23-0935-cv(L),
23-1004-cv(XAP)

United States Court of Appeals

for the

Second Circuit

BROADCAST MUSIC, INC.,

Petitioner-Appellee-Cross-Appellant,

– v. –

NORTH AMERICAN CONCERT PROMOTERS ASSOCIATION, as licensing representative of Live Nation entities including, AC Entertainment, Avalon, and Delsener; AEG; Elevated; and Another Planet Entertainment, together with the additional promoters listed on Exhibit A hereto,

Respondent-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PETITIONER-APPELLEE-CROSS-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner-Appellee-Cross-Appellant Broadcast Music, Inc. ("BMI") hereby certifies that it has no parent corporation. TEGNA Inc. and Gray Television, Inc., through indirect, wholly-owned subsidiaries, are the public companies that each own 10% or more of BMI's stock.

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PRELIMINARY STATEMENT

BMI is one of four performing rights organizations (each a "PRO") that licenses the songs performed at concerts. PROs facilitate the licensing of musical compositions. Each domestic PRO—BMI, the American Society of Composers and Publishers ("ASCAP"), SESAC, and Global Music Rights ("GMR")—offers a blanket license for its entire repertoire to music users. Without PROs, music users would have to negotiate licenses individually with music publishers (or directly with songwriters), each of which would have the power under copyright law to refuse to license.

BMI licenses approximately 45% of the songs performed at live concerts in the United States. To mitigate the potential market power that results from collectively licensing such a large share of musical copyrights, BMI operates pursuant to a consent decree with the U.S. Government (the "Consent Decree"). The Consent Decree grants an automatic license to users who request one—eliminating BMI's right to walk away from a negotiation. It also establishes the Southern District of New York as the rate court to resolve disputes over appropriate rates (the "Rate Court"). The Consent Decree requires the Rate Court to review BMI's quoted rate for reasonableness. If it determines that the rate quoted is reasonable, its inquiry ends. If it determines it is not, the Consent Decree requires the Rate Court to set a reasonable rate "based upon all the evidence." Since 1994, the Hon. Louis L.

Stanton has overseen the Consent Decree and presided over BMI rate disputes, including the one below.

For almost twenty years, concert promoters, through the North American Concert Promoters Association ("NACPA"), paid BMI just fifteen cents for every $100 in ticket sales at the largest concerts. That bargain-basement price was negotiated in the mid-1990s when the concert industry successfully argued to BMI that it was in financial distress and ninety percent of concerts were staged at a loss. Back then, NACPA convinced BMI that BMI's proposed rate of 1% of revenue would put promoters out of business and secured rates of 0.30% of revenue for concerts with under 10,000 seats and 0.15% of revenue for concerts at or above 10,000 seats. These rates persisted despite the live concert industry transforming into one of almost extravagant wealth. More recently, both SESAC and GMR, smaller PROs that lack BMI's large market share and are not constrained by consent decrees, have been able to negotiate much higher live concert rates than BMI has been paid.

NACPA, an industry association whose entire purpose is to keep PRO rates as low as possible, represents the largest and most powerful concert promoters in the country, including Live Nation and AEG. Through horizontal consolidation of concert promoters and vertical integration of concert-related industries, Live Nation and AEG today dominate the industry and control virtually every aspect of live

concerts in this country, including booking talent, operating venues, and selling tickets. Live Nation and AEG are immensely profitable and together account for almost 90% of the license fees paid by NACPA.

The Consent Decree charges the Rate Court with setting a reasonable rate, *i.e.*, the rate a willing buyer would pay a willing seller in a hypothetical competitive market, based upon "all the evidence." In this matter, Judge Stanton presided over a five-week trial in which he heard testimony from twelve fact witnesses and two economic experts, including Professor Catherine Tucker, a chaired professor at MIT with expertise in pricing, and admitted more than 300 exhibits into evidence. Based on "all the evidence," Judge Stanton concluded that the rate BMI quoted for the period January 1, 2014 through June 30, 2018 (the "Retroactive Period") was reasonable, and set a rate of 0.5% for the period July 1, 2018 through December 31, 2022 (the "Current Period"). The 0.5% rate fell between the 0.8% rate proposed by BMI and the 0.23% rate NACPA argued for at trial.

Judge Stanton detailed his reasoning in a balanced 37-page opinion (the "Opinion") replete with citations to the trial record (many of which NACPA ignores in its brief (the "Brief")). NACPA's Brief characterizes the entire benchmarking analysis and rate-setting process as a legal exercise subject to *de novo* review. This Court, however, has repeatedly made clear that rate setting is a largely factual task

reviewed for clear error. NACPA does not even attempt to meet the "clear error" standard.

Consistent with this Court's precedent, the Rate Court conducted a benchmarking analysis to aid in determining the reasonable rate. BMI proposed as benchmarks sixteen market agreements, falling into three categories: (1) domestic licenses from PROs governed by a consent decree (*i.e.*, BMI and ASCAP licenses with NACPA or concert promoters), (2) domestic licenses from PROs not governed by a consent decree (*i.e.*, SESAC and GMR licenses with NACPA or concert promoters), and (3) international PRO licenses. Consistent with its goal of perpetuating the decades-old BMI and ASCAP rates, NACPA pressed the Rate Court to consider only two agreements, the 2006 BMI/NACPA license and the 2018 ASCAP/NACPA license.

The Rate Court evaluated the proposed benchmarks using the four-factor framework described by this Court in *United States v. Broadcast Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005) ("*Music Choice IV*"). The Rate Court adopted the twelve domestic agreements as benchmarks, agreeing with BMI that SESAC and GMR licenses, and licenses with the thousands of non-NACPA promoters were proper benchmarks, and agreeing with NACPA that the 2006 BMI/NACPA license was a proper benchmark. The Rate Court rejected as benchmarks the five international licenses proffered by BMI.

The Rate Court was similarly balanced in considering an expansion of the revenue base. BMI proposed expanding the revenue base beyond the face value of the tickets sold to encompass the additional value that music generates for concert promoters, including: (a) VIP and box suite revenue attributable to concerts and paid to the promoter, or the artist or venue with which the promoter has a contract; (b) ticket service and other fees received by the promoter; and (c) advertising and sponsorship revenue. The Rate Court concluded that VIP and box suite revenue, as well as ticketing fees, should be included in the revenue base, but agreed with NACPA that sponsorship and advertising revenues should not.

The Rate Court also adjusted the benchmark agreement rates to translate them into a comparable rate for a BMI license and adjusted those rates downward (in NACPA's favor) to account for the expanded revenue base to which the rate would be applied. The Rate Court found the range of reasonable rates for a BMI license to be 0.21%-0.54%. The Rate Court selected a rate at the higher end of the range—0.5%. This selection was fully supported by the Rate Court's factual determinations and was not clearly erroneous.

First, the evidence showed that the historical rates should be increased to reflect the "significant market changes" since the initial BMI/NACPA license rates were negotiated in the 1990s.

Second, the evidence established that SESAC and GMR have been able to negotiate higher rates than BMI has been paid. Extensive evidence—from both fact and expert witnesses—established that the SESAC and GMR licenses were sufficiently comparable to a BMI license and did not reflect supracompetitive prices. Professor Tucker testified that the SESAC and GMR benchmarks—which are at the higher end of the benchmark range—better approximated a hypothetical free market negotiation than the lower BMI and ASCAP benchmarks, which were negotiated under the constraints of consent decrees and in the "shadow" of consent-decree-required rate courts.

In contrast, the 2018 ASCAP/NACPA License rate—which NACPA suggests should have dominated Judge Stanton's analysis—largely perpetuated the historical rates agreed to in 1998, which ASCAP essentially mirrored in the early 2000s. The record established that ASCAP entered into its 2018 license without information about certain higher market rates. Moreover, ASCAP viewed the new rate as a temporary stopgap: ASCAP negotiated for the right to terminate the license early, to benefit from BMI's rate litigation without bearing the cost of its own rate court litigation. Indeed, when the 2018 license expired shortly before the proceeding below went to trial, ASCAP did not renew the license, but instead waited to negotiate a new rate until after the resolution of BMI's trial with NACPA.

Finally, the selection of the rate was supported by evidence that BMI charges its many music users percentage-of-revenue rates across a spectrum, with users paying higher rates when music is essential to the product or service they offer. The evidence, which was incorporated into the Opinion, showed concert promoters were paying rates between those paid by cable sports networks (0.1375%) and talk radio stations (0.31%), rather than the much higher rates paid by other music-intensive users—for example, digital music services (rates ranging from 2.5% to 4.6%), radio stations (1.78%), and virtual live concert streaming services (2.5%). The Rate Court's conclusion, that "[i]ncreasing the rate of a license for live concerts better reflects the fair market value placed on licenses in music intensive industries," was amply supported by the record.

Dissatisfied with the factual determinations of the Rate Court, NACPA attempts to cast them as legal errors subject to *de novo* review.

First, NACPA argues it was legally impermissible to include licenses with parties not subject to consent decrees as benchmarks. There is no legal rule that the Rate Court cannot consider licenses negotiated with a licensor that is not governed by a consent decree. The opposite is true: in both *Broadcast Music, Inc. v. DMX*, 683 F.3d 32, 45 (2d Cir. 2012) ("*DMX*") and *Broadcast Music, Inc. v. Pandora Media, Inc.*, 140 F. Supp. 3d 267, 290–91 (S.D.N.Y. 2015) ("*Pandora*"), licenses with music publishers (which are also not subject to consent decrees) were adopted

as benchmarks. The license must therefore be evaluated based on the evidence. Here, the evidence, including testimony from Professor Tucker, showed that the SESAC and GMR licenses were better benchmarks than the ASCAP and BMI licenses. To support its position, NACPA relies on findings from other rate cases, with other parties, and on other records, that declined to adopt SESAC licenses as a benchmark. Those factual determinations, however, were not binding on the Rate Court here.

Next, NACPA attacks the Rate Court's expansion of the revenue base as legal error, suggesting that the Rate Court misapplied this Court's holding in *United States v. Broadcast Music, Inc.*, 316 F.3d 189 (2d Cir. 2003) ("*Music Choice II*"), by adopting as a *per se* rule that the retail cost is the proper reflection of fair market value. The Rate Court did no such thing. The Rate Court expressly considered and addressed NACPA's arguments that portions of the retail cost should be excluded from the revenue base. In fact, the Rate Court excluded VIP, box suite and ticketing fee revenues received by third parties, explaining that this limitation mitigated NACPA's concern about the difficulty of reporting revenue received by a third party.

Although framed as legal argument, NACPA's Brief is a thinly-disguised attack on the Rate Court's factual determinations. NACPA never acknowledges the factual character of its argument because it does not want to contend with the "clear error" standard that applies to the Rate Court's findings. As demonstrated below,

the Rate Court's rate determinations were amply supported by the record and should be affirmed.

In a subsequent order, the Rate Court granted BMI's request for post-judgment interest but rejected its request for pre-judgment interest. The Rate Court reasoned that pre-judgment interest was precluded by the terms of the Consent Decree. This holding was legally flawed. The Consent Decree—which is limited to its terms and must be construed narrowly—does not address, and therefore does not control, the availability of pre-judgment interest. The Rate Court erred in not applying the factors articulated by this Court in *Wickham Contracting Co., v. Local Union No. 3, International Brotherhood of Electrical Workers*, 955 F.2d 831, 833-34 (2d Cir. 1992) ("*Wickham*"), which support an award of pre-judgment interest.

STATEMENT OF JURISDICTION

The Rate Court had jurisdiction under 28 U.S.C. § 1331. The Rate Court entered a final judgment as to the issues on appeal on March 28, 2023 and May 22, 2023, respectively. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Rate Court erred in setting a royalty rate of 0.5% for the Current Period based on all the trial evidence.

2. Whether the Rate Court erred in determining that BMI's proposed rates for the Retroactive Period were reasonable based on all the trial evidence.

3. Whether the Rate Court erred in defining the revenue base for the Current Period to better align with the retail cost to attend a concert.

4. Whether the Rate Court committed legal error by failing to consider the *Wickham* factors and instead denying BMI pre-judgment interest based on an incorrect determination that the Consent Decree is controlling on the issue and does not allow for it.

STATEMENT OF THE CASE

A. The Parties

1. BMI

BMI represents approximately 1.3 million affiliates—songwriters, composers, and music publishers. BMI's repertoire includes approximately twenty-two million musical works. (SA1:10-19.) BMI licenses the public performance rights in these works to a broad range of music users, including radio and television broadcasters, digital streaming services, and concert promoters. (SA2:10-14, SA3:16-24.) BMI distributes the license fees it collects (minus certain deductions) as royalties to its affiliates.

BMI is one of four domestic PROs. (A54-55 ¶¶ 18-24.) Each of the four domestic PROs—BMI, ASCAP, SESAC and GMR—offers a blanket license for its respective repertoire. A blanket license provides unlimited access to a PRO's repertoire during the license term. Blanket licenses are extremely valuable: they reduce transaction costs associated with tracking and procuring performing rights, grant users instantaneous access to new works, and protect users against copyright infringement claims. (SA5:8-24.)

Each of BMI and ASCAP licenses approximately 45% of the songs performed at live concerts in the United States. (SPA3; SA638.) SESAC and GMR have smaller market shares of 3.6% and 4.5%, respectively. (SPA3.)

2. NACPA

NACPA is an industry association that represents the country's largest concert promoters in negotiations with PROs. (A53 ¶¶ 10-11.) NACPA is dominated by Live Nation and AEG, which collectively own or control 29 of NACPA's 46 members and account for almost 90% of NACPA's fees. (A72:8-16.) NACPA's few remaining members are smaller promoters. NACPA's principal goal is to minimize PRO license fees for its members. (SA130:2-11, SA155:23-156:3.)

Although BMI offers other forms of license, concert promoters uniformly secure blanket licenses. (SA7:20-8:23.) Promoters contractually agree, in advance of any concert, to secure rights that will allow artists to perform whatever songs the artist may choose. The promoter does so without any knowledge of what those songs will be, effectively requiring promoters to obtain blanket licenses from all four PROs. (SA123:2-20, SA124:7-10, SA73:22-74:2; A53 ¶ 12.) To obtain the same rights in the absence of PROs, promoters would have to negotiate directly with the copyright holders, typically music publishers. (SA168:3-169:3; A174:14-18.) As AEG's Assistant General Counsel explained, this would be "untenable" because "[AEG] would need to verify the copyright holder for every composition performed

. . . and then go out and license, secure a license from each copyright holder, . . . as a company, we don't have the experience or capacity to do that." (A111:2-9.) In fact, PRO licenses have always been so convenient, and priced so low, that concert promoters have never made any effort to directly license musical rights. (A110:24-111:25; 571:3-11; 995:24-996:23.)

B. The BMI Consent Decree

BMI has never been found to have engaged in anti-competitive behavior. This Court has explained, however, that "because of [the] unique conditions recognized as *potentially* anti-competitive, BMI's business operations, like those of [ASCAP], are regulated by a court-approved consent decree." *United States v. Broad. Music, Inc.*, 316 F.3d 189 (2d Cir. 2003) (citing *United States v. Broad. Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *as amended by* 1996-1 Trade Cas. ¶ 71,378 (S.D.N.Y. 1994)) (emphasis added); *see also* Second Amended Final Judgment, *United States v. Am. Soc'y of Composers, Authors and Publishers*, 1940-43 Trade Cas. (CCH) (S.D.N.Y. 1941). BMI has never been found (or alleged) to have violated the Consent Decree.

To mitigate any potential undue market power from the aggregation of copyrights by BMI and ASCAP, their respective consent decrees provide music users with an automatic license upon request. Unlike typical copyright holders, who can legally refuse to license musical works unless the user agrees to the holder's

price demand, BMI and ASCAP must provide a license to any user that requests one. BMI and ASCAP have no right to say "no." (SA6:5-12, SA39:6-17, SA168:13-169:3.) Their only recourse, if they cannot reach agreement on a rate, is to petition their respective rate court to both set a reasonable rate and compel the user to pay. (SA6:13-7:2.)

The Rate Court is tasked with setting a rate that reflects what a willing buyer and a willing seller would agree to in a hypothetical arm's length negotiation. *See Am. Soc'y of Composers, Authors & Publishers v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990) ("*Showtime II*"). This requires balancing the potential increase in market power from BMI's aggregation of copyrights with the potential decrease in market power from the elimination of BMI's ability to rely on the statutory monopoly right to refuse to transact. (SPA1, SPA30; SA168:13-169:3.) As NACPA's economic expert Professor Adam Jaffe conceded, the reasonable rate set by the Rate Court should not be lower than the aggregate price that all individual copyright holders (including music publishers) could negotiate in the absence of PROs. (SA232:3-6.)

C. The Rate Quote

On December 9, 2020, BMI provided NACPA with the rate quote at issue (the "Rate Quote").[1] For the Retroactive Period, BMI proposed (a) a fee schedule for concerts ranging from 0.15% to 0.80% of the face value of tickets sold depending on the venue's seating capacity, and (b) rates of 0.3% for festivals with capacity at or above 10,000 and 0.4% for festivals with capacity of up to 9,999. (SA499-500; SA623.) Thousands of concert and festival promoters not associated with NACPA paid BMI these rates on a final basis in the Retroactive Period.

For the Current Period, BMI proposed a single rate for all concerts and festivals of 0.80%. For the Current Period, BMI proposed that the rate be applied to an expanded revenue base that would include the full cost to a consumer of attending a concert, including: (1) the face value of the ticket; (2) revenues received by the promoter from any tickets sold in the first instance directly onto the secondary market; (3) VIP package and box suite revenues attributable to live concerts and paid to the promoter or a venue or artist with which the promoter has a contractual relationship; (4) any ticket service, handling or other fees above the face value of the ticket paid by the consumer if received by the promoter; and (5) revenues from advertising and sponsorship attributable to the live concert. (SA499-500.)

[1] The Rate Quote provided a revised rate quote for the Current Period and referred back to a rate quote from 2017 for the Retroactive Period.

D. The Benchmarks

With this Court's approval, rate courts have historically set rates by reference to "benchmarks," which are "agreements reached after arms' length negotiation between other similar parties in the industry." *DMX*, 683 F.3d 32 at 45. Here, the Rate Court evaluated nineteen benchmarks proposed by the parties using the four-factor framework established by this Court: "[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, and [3] the similarity of the economic circumstances affecting the earlier negotiators and the current litigants, . . . as well as [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." *Music Choice IV*, 426 F.3d 91 at 95 (citing *Showtime II*, 912 F.2d at 569).

The proposed benchmark agreements fall into three categories: (1) domestic licenses with PROs governed by a consent decree, including the most recent final BMI/NACPA license (the "2006 BMI/NACPA License"), the most recent ASCAP/NACPA license (the "2018 ASCAP/NACPA License"), and BMI and ASCAP licenses with independent promoters (the "Non-NACPA Licenses"); (2) domestic licenses with PROs not governed by consent decrees (*i.e.*, SESAC and GMR licenses with NACPA or concert promoters); and (3) agreements with

international PROs for live concerts outside of the United States. (SA616-619.) Based on an extensive factual record, the Rate Court adopted the domestic agreements as benchmarks, but declined to adopt the international licenses.

1. Domestic Licenses with PROs Under Consent Decrees

a. The 2006 BMI/NACPA License

The 2006 BMI/NACPA License was NACPA's primary benchmark. BMI presented evidence that economic circumstances had drastically changed since the rates in that license were negotiated in the 1990s. The Rate Court included the 2006 BMI/NACPA License as a benchmark, but found, based on the evidence, that it set the "floor" for an acceptable rate. (SPA27-28.)

i. History of License Negotiations

BMI and NACPA commenced negotiations for a license in 1994, when BMI sought a rate of 1%. (SA28:19-29:17, SA266-267.) Over many years of negotiations, NACPA cried poverty, claimed that promoters could not afford a 1% rate, and argued that a 1% rate would destroy the live concert industry. NACPA told BMI:

- "[p]romoters put on 90 percent of their shows at a loss in order to get the 10 percent of the shows that make money" (SA262);
- "the current economic environment and the climate in the touring industry has brought additional pressures to bear on promoters" (SA261);
- the "ramifications of BMI's 1 percent of gross scheme will be profound and the results catastrophic" (SA270);

- promoters "simply cannot afford to underwrite an increase of this magnitude" (SA271); and
- BMI's proposal would "jeopardize [promoters'] financial stability" and efforts to reverse a continuing decline in profitability (SA272).

NACPA prevailed, and BMI lowered its proposed rate significantly. (SA331.) The parties ultimately agreed to a license effective January 1, 1998 with a tiered rate of (a) 0.3% of ticket sales for concerts up to 9,999 seats, and (b) 0.15% of ticket sales for concerts with 10,000 seats or more (the "1998 BMI/NACPA License"). The 1998 BMI/NACPA License ran until 2004 and was later extended through 2005.

Negotiation of the 2006 BMI/NACPA License was limited to the treatment of music festivals. (SA125:6-126:2; SPA7.) Live concert rates were not discussed and the concert rates from the 1998 BMI/NACPA License remained unchanged. (SA125:6-17, SA125:24-126:2; SPA7.) The 2006 BMI/NACPA License was set to expire on December 31, 2009, but the parties allowed it to automatically renew annually through 2013, when BMI terminated the license. (A78:16-25.) Thereafter, NACPA was licensed on an interim basis, subject to retroactive fee adjustment once a final rate was negotiated or set by the Rate Court. BMI initiated this proceeding in 2018.

ii. The Live Concert Industry Changes Radically

Trial testimony established that the live concert industry has fundamentally changed since the 1998 BMI/NACPA License was negotiated. The industry is no

longer dominated by small promoters operating on slim margins. Through mergers and acquisitions, Live Nation and AEG have consolidated the industry, becoming global conglomerates that own and manage complementary concert-related businesses, including venues and ticketing services, which collect service fees on tickets sold. (SPA5-6; SA116:3-117:12.) With their increased size and scope, Live Nation and AEG generate revenue at a breadth and scale unimaginable when the 1998 BMI/NACPA License was negotiated.[2] (SA15:21-16:20, SA57:13-25, SA60:14-18, SA97:25-98:12, SA99:1-100:1, SA116:3-117:12.)

As NACPA's expert admitted, the cries of poverty from concert promoters in the mid-1990s would be quickly recognized as crocodile tears in the Current Period. (SA239:6-240:12.) By 2019, Live Nation, was touting itself as the "largest live entertainment company in the world." (SA496.) It went into COVID strong and emerged from the total shutdown even stronger. (SA50:13-52:7.) By early 2022, every key metric was at an all-time high—Live Nation was promoting more concerts, selling more tickets, and making more profit than ever before. (SA51:7-15.) At the same time, Live Nation's CEO reportedly received $30 million in cash and stock annually, plus a $6 million signing bonus. (SA507.) AEG's CEO's

[2] One example: in 1998, ticket servicing fees were a cost shared equally by promoters and consumers. (SA263.) Today, ticketing fees are paid entirely by the consumer and are pure revenue shared by the promoter, ticketing company, and venue. (SA63:18-64:12, SA65:24-67:21, SA96:14-19, SA97:25-98:5, SA99:1-6, SA503.)

compensation similarly increased, reflecting AEG's strong performance and profitability. (SA113:4-114:2.)

Much of the economic growth occurred after the 2007-2008 financial crisis. (SA52:4-7.) As late as 2009, Live Nation's CEO testified before Congress that the live concert business was "bleeding," and ominously predicted the "death of the American music industry" if structural changes (specifically, Live Nation's acquisition of Ticketmaster) were not allowed. (SA559, SA561.) Live Nation's explicit strategy was to yield higher margins through consolidation of its ticketing and venue businesses with its traditional promoter business. (SA60:9-18, SA65:24-67:10.) Live Nation's strategy has been successful. (SA55:20-56:6.) AEG similarly has found success with vertical integration, including investing in its own ticketing service company, AXS, to compete with Ticketmaster. (A104:3-14.)

iii. BMI Revisits Its Live Concert Licenses in Light of the Industry's Transformation

In 2012, BMI's Senior Vice President of Licensing, Michael Steinberg, assumed responsibility for the NACPA license. (SA12:11-17; A69:18-20, A73:23-A74:1, A78:16-A79:25.) Steinberg observed that seismic changes in concert promoter economics rendered the rates paid to BMI "appallingly low." (SA12:18-13:18, SA22:7-11.)

The parties' economic experts disputed the relevance of such evidence. BMI's expert, Professor Tucker, opined that the rates needed to be reset to reflect

the changed circumstances because the evidence showed BMI discounted the original rates to account for the dire economic circumstances. (SA183:16-184:20.) As a result, BMI songwriters did not receive a reasonable share of industry growth, despite the rate being set as a percentage of revenue. (*Id.*)

In contrast, NACPA's expert, Professor Jaffe, testified that even though the promoters themselves had viewed their profitability as relevant in setting a rate back in 1990s, the improvement in their economic position should be ignored by the Rate Court in setting a reasonable rate. Professor Jaffe testified that economic growth did not warrant an adjustment to the license because the percentage-of-revenue-rate structure automatically resulted in increased PRO revenues as industry revenues rose.[3] (A331:8-332:5.)

The Rate Court engaged directly with Professor Jaffe on this issue:

> COURT: . . . . **wouldn't the fact that the older agreement was made under conditions of grinding poverty and the present situation is one of almost extravagant wealth justify a readjustment in the rate?**
>
> PROF. JAFFE: Well, with all respect, your Honor, I don't think so because I think that the sector is doing much better. We have seen that and BMI has shared in that. Their royalties have doubled. . . .

[3] Professor Jaffe went even further, suggesting that the percentage-of-revenue rates should ***decrease*** because the value of the non-music components of concerts (*e.g.* lights, pyrotechnics, and dancers) has increased since the 1990s, making music less important to the overall concert experience. (A333:7-335:16.) Professor Tucker explained that this argument ignored that songs at a concert are complementary—they increase the value of the secondary elements, which serve to amplify the music. (SA197:5-200:21, SA201:11-204:14; A268:11-19.)

> COURT: And of course that's been very good because it was good for everybody. The rising tide raises all boats. **But the fact that the circumstances of poverty or wealth have themselves changed, doesn't that justify a comparative reexamination of the rate formed under conditions of poverty**.
>
> PROF. JAFFE: Well, I don't think so because the whole purpose of the percentage of revenue royalty is to adjust for those conditions as we go. . . .
>
> COURT: That's a restatement that the rising tide has risen all boats. That view would cast every agreement in lifetime terms.

(SA247:23-249:8 (emphases added).)

The Rate Court accepted the 2006 BMI/NACPA License as a benchmark over BMI's objection but, based on its finding that there had "been significant market changes since the rate was first set in 1998," held that it set the floor for a BMI/NACPA license for the Current Period. (SPA27-28.)

b. The 2018 ASCAP/NACPA License

The Rate Court next considered the 2018 ASCAP/NACPA License. BMI did not object to the 2018 ASCAP/NACPA License being a benchmark, but presented evidence that the license should receive limited weight in the Rate Court's analysis.

ASCAP first licensed NACPA in 2001 (the "2001 ASCAP/NACPA License"). Like the 1998 BMI/NACPA License, the 2001 ASCAP/NACPA License included a tiered rate structure based on venue size, with the largest concerts paying

the lowest rate. BMI and ASCAP earned roughly equivalent fees under their respective licenses. (SA157:3-6.)

Like the 1998 BMI/NACPA License rates, the 2001 ASCAP/NACPA License rates remained unchanged for 15 years. (SA135:2-8.) Professor Tucker opined that this stagnation was to be expected for rates subject to a rate court. (A230:8-17.) As Professor Tucker explained, the existence of a rate court causes rates to be "sticky" because the cost and uncertainty of litigation make parties reluctant to challenge rates until they become entirely unreasonable. (A229:23-230:17; SA207:16-22.) Both Professors Jaffe and Tucker agreed that rate courts also introduce an element of "circularity" into negotiations, because parties negotiate around the rate they believe the rate court will set, and the rate courts typically set rates based on previously-negotiated benchmark agreements. (A229:23-231:5; SA235:4-236:8.) The presence of the rate court thus makes it difficult to reset a rate that was initially set too low.

In 2016, ASCAP and NACPA commenced negotiations for a new license. (SA135:2-8.) ASCAP sought a substantial rate increase, but ultimately agreed to only a slight increase over its prior rates. (SA158:19-159:10, SA160:11-161:5.) The 2018 ASCAP/NACPA License provided for a unitary rate of 0.23% for the period January 1, 2018 through December 31, 2019, and a rate of 0.275% for the period January 1, 2020 through December 31, 2021. (SA405-406.) At the time, ASCAP

was unaware that GMR had recently negotiated significantly higher rates in its licenses with the largest concert promoters. (SA139:19-141:3; SA424.)

However, it was known that BMI was likely to commence a rate proceeding against NACPA. (SA136:19-22.) Accordingly, ASCAP negotiated for an early termination right. (SA210:16-23, SA241:5-22.) By securing this right, ASCAP positioned itself to benefit if BMI was successful in litigation, without incurring the substantial costs that BMI would incur. (SA136:19-138:12, SA443.)

When ASCAP's early termination right became exercisable in 2020, COVID had all but shut down live concerts, and delayed the BMI rate case. (SA104:22-105:2, SA241:5-22.) ASCAP did not exercise its termination right. The next year, however, with the BMI rate case approaching trial, ASCAP elected not to renew the terms of the 2018 ASCAP/NACPA License, instead entering into an interim license, subject to retroactive rate adjustment. This allowed ASCAP to benefit from any favorable BMI Rate Court result. (SA104:22-105:2, SA241:5-22.)

The Rate Court adopted the 2018 ASCAP/NACPA License as one of its benchmarks but recognized, consistent with Professor Tucker's testimony, that the license was "negotiated in the shadow of the rate court." (SPA28.)

c. The Non NACPA-Licenses

The Rate Court next considered the thousands of licenses between BMI or ASCAP, on the one hand, and concert promoters that are not members of NACPA,

on the other. Over 2,000 non-NACPA promoters are licensed by BMI, and actively stage concerts in the United States. (SA33:11-22.) These promoters operate principally in smaller venues where the majority of concerts in the United States are staged. (A77:13-21; SA173:10-174:13.) NACPA membership is only available to the largest promoters. (SPA4 n.3.) Despite size differences between some NACPA promoters and non-NACPA promoters, they compete to promote shows at smaller venues. (SA72:13-17.)

From the time of the first NACPA license in 1998, BMI believed that non-NACPA and NACPA promoters should pay the same rates as each other, which was the practice until 2008. (SA31:8-14; A79:7-13.) In 2008, BMI negotiated new licenses with thousands of non-NACPA promoters (the "2009 BMI/Non-NACPA License").[4] (SA10:6-10; A76:13-A77:13.) The 2009 BMI/Non-NACPA License retained a tiered rate structure, but increased concert rates at smaller venues. When BMI increased non-NACPA rates in 2009, some eligible non-NACPA promoters joined NACPA to take advantage of the lower NACPA rates. (SA115:5-9.)

[4] In 2013, BMI canceled the 2006 BMI/NACPA License and sought to realign the NACPA and non-NACPA rates. Thereafter, BMI determined that the non-NACPA license rates were still too low. (SA17:20-18:1.) BMI canceled the 2009 BMI/Non-NACPA License effective July 1, 2018, offering non-NACPA promoters interim licenses with terms expressly adjustable based on the outcome of this proceeding. (SA23:2-7; A60 ¶ 60.)

Based on the evidence, the Rate Court adopted the non-NACPA licenses as benchmarks, concluding that they "arose in a market that reflects the same degree of competition, and economic circumstances" as a BMI/NACPA license and "cover the same rights." (SPA28.)

2. Domestic Licenses with PROs Not Governed by Consent Decrees

a. SESAC and GMR Licenses with NACPA and NACPA Member-Promoters

The Rate Court next evaluated licenses between NACPA and SESAC and between GMR and individual NACPA members (including Live Nation and AEG). NACPA argued that these licenses should be rejected as benchmarks because: (i) SESAC and GMR are not subject to consent decrees, (ii) promoters were not incentivized to negotiate with SESAC or GMR, and (iii) SESAC and GMR market shares are unknown. The Rate Court rejected each argument and adopted the SESAC and GMR licenses as benchmarks.

i. Licenses with SESAC and GMR Can Be Proper Benchmarks Even Though SESAC and GMR Are Not Subject to Consent Decrees

Unlike BMI and ASCAP, neither SESAC nor GMR is governed by a consent decree. Professor Tucker opined that this difference makes the SESAC and GMR agreements superior benchmarks because, since SESAC and GMR can walk away from a negotiation like a typical copyright holder, their agreements better reflect the hypothetical free market negotiation the Rate Court is trying to emulate in rate-

setting proceedings. (A229:11-231:18; SA177:24-180:11.) In the absence of PROs, concert promoters would be forced to negotiate directly with music publishers, none of which are subject to consent decrees. (SPA30-31, SA168:3-169:3, SA179:14-180:23.) Large music publishers have market shares of 20%, significantly larger than the market shares of SESAC (3.6%) or GMR (4.5%). (SA233:6-234:8, SA638.) The Rate Court noted that SESAC's and GMR's "market sizes are more comparable to those of the large music publishers that music users would have to negotiate with directly in the absence of PROs." (SPA31.) The Rate Court thus concluded that SESAC's and GMR's market shares were not so large as to make their agreements *per se* improper benchmarks. (*Id.*) The Rate Court also evaluated the evidence and concluded that neither SESAC nor GMR had used any additional leverage from the aggregation of copyrights to extract supracompetitive prices. (SPA31-33.)

NACPA argued that the SESAC and GMR licenses were insufficiently competitive to be benchmarks because, despite their small size, their repertories were "must-haves," such that SESAC and GMR could compel promoters to take their licenses at any price. (Br. 39-40.) The Rate Court considered and expressly rejected this argument, finding that rather than being compelled, promoters "elected to buy a blanket license for their own business goals and convenience[.]" (SPA32.) Supporting its conclusion, the Rate Court observed that promoters opted to not ask for song lists before a show. (*Id.*) Moreover, promoters admitted that they had not

considered whether taking a SESAC or GMR license was avoidable because doing so would be administratively burdensome.[5] (*See supra* 11-12.)

ii. Promoters Were Incentivized to, and Did, Actively Negotiate with SESAC and GMR

As an additional reason to reject the SESAC and GMR benchmarks, NACPA argued that their smaller market shares eliminate promoters' incentive to negotiate reasonable rates because the actual dollars at issue are insignificant. The record established otherwise. Since 2003, SESAC and NACPA have reached agreement on numerous licenses only after extensive negotiations. (SA131:18-25.) NACPA itself described those licenses as "heavily negotiated" and touted its ability to negotiate SESAC down from its initial demands. (SA46:18-47:1, SA130:2-5, A209:1-11.)

[5] NACPA suggests the Rate Court's analysis on this point is flawed because SESAC and GMR members cannot directly license their works. (Br. 43-44.) There was, however, ample evidence that promoters did not attempt to, or even consider whether they could, directly license any works because doing so would be so administratively burdensome. (A110:24-111:25; SA74:3-11, SA127:24-128:12.) The evidence also showed that promoters did not "dare" tell artists what songs to perform (or not perform), eliminating their ability to avoid taking a SESAC or GMR license. (SA118:18-119:18, SA128:13-20; A111:16-21.) Moreover, there was no evidence that SESAC prohibits direct licensing. NACPA's reliance on a preliminary finding from another proceeding regarding SESAC's practices from a decade ago (Br. 44), is improper.

GMR negotiated directly with each of Live Nation and AEG (and other NACPA members), rather than with NACPA.[6] (*See, e.g.*, SA42:5-8, SA48:9-11, SA448-454, SA457-465; A121:19-A122:2.) Live Nation and AEG had active negotiations with GMR, including dozens of phone calls and multiple exchanges of draft agreements. (SPA32; A121:19-A122:2, A123:8-20, SA103:14-104:11, SA130:2-5.) Even smaller promoters, like Nederlander Concerts ("Nederlander"), negotiated actively with GMR. (SA253:3-9.)

AEG negotiated a license that was "in the best interest of" the company (SA103:14-25), and Live Nation's President of US Concerts testified that he thought the GMR deal was "fair in the context of all of the collective PROs" (A122:8-13).

Promoters were incentivized to take negotiations seriously because they fully expected that their licenses with GMR and SESAC would be benchmarks in future dealings with BMI and ASCAP. Live Nation discussed internally that a higher GMR rate would drive up the rates for BMI and ASCAP. (SPA33 n.7 (citing SA444-445; SA142:10-21).) Similarly, NACPA's former Executive Director testified that if GMR secured a high rate, "other PROs would look to emulate that." (SA154:3-14, SA444-445.)

[6] GMR had initial discussions with NACPA but did not want to pay the administrative fee NACPA was demanding. (SA48:9-49:8; SA481.)

In sum, the evidence fully supported the Rate Court's conclusion that SESAC and GMR did not demand or extract supracompetitive prices.

iii. Licensees Had Adequate Information About SESAC and GMR Market Shares

NACPA also argues that SESAC and GMR licenses are not appropriate benchmarks because their market shares are volatile and hard to measure. According to NACPA, that volatility should result in the complete rejection of the SESAC and GMR licenses as benchmarks.

The evidence, however, established that NACPA and its members were well aware of SESAC's and GMR's relative market shares. NACPA commissioned a market share study that detailed SESAC's market share for use in its negotiations with SESAC.[7] (SA439-442.) AEG commissioned a similar study for use in its negotiations with GMR to "quantify the degree to which those compositions are affiliated with [GMR]." (SA467, SA483-484.) Smaller NACPA promoters

[7] The most recent SESAC/NACPA license was negotiated in 2020, during the virtually complete shutdown of live concerts caused by COVID. These unique circumstances allowed NACPA to secure a decrease in fees from SESAC. (SA133:17-134:19.) Even with this reduction, SESAC was still paid more, on a share-adjusted basis, than was BMI. (SA621.)

calculated GMR's market share independently using information received from GMR. (SA253:10-254:12.)

NACPA and its member-promoters considered the market share information in their negotiations and understood that they were paying SESAC and GMR more on a per-point-of-market-share basis than BMI or ASCAP were being paid. (SA131:11-17 (SESAC), SA40:16-41:14 (GMR), SA455 (GMR).)

b. SESAC Licenses with non-NACPA Promoters

SESAC, like BMI and ASCAP (*see supra* 23-25), has licenses with non-NACPA promoters. The Rate Court also adopted the rate for these licenses as a benchmark. (SPA29.)

3. The International PRO Rates

BMI proposed rates charged by international PROs in five English-speaking countries—Canada, the United Kingdom, Australia, New Zealand, and Ireland—as additional benchmarks. (A229:4-10; SA189:14-190:1; *see also* SA616-619.) Most of these rates exceeded BMI's proposed 0.8% rate, and all of them exceeded the 0.5% rate set by the Rate Court. (SPA19-20, 33.) BMI presented evidence that Live Nation and AEG promote concerts globally under a single contract, and that the largest and most successful tours are global tours with the same artists performing the same songs in all countries. The evidence also showed that AEG-promoted

concerts in Canada are almost always negotiated as part of a larger U.S. tour. (SA37:7-38:5.)

The Rate Court rejected the international rates as benchmarks, finding that BMI did not show that it was sufficiently similar to the international PROs. (SPA20-21.) The Rate Court also found that BMI had not demonstrated that the regulatory and business environments in the foreign countries were comparable. (*Id.*)

E. The Revenue Base

In addition to setting a rate, the Rate Court was also called upon to determine the revenue base to which the rate would be applied. Historically, the revenue base for concert promoter PRO licenses included only the face value of the tickets sold. To account for changes in the concert industry, BMI proposed an expanded revenue base that captures additional revenues attributable to the concert, including certain VIP and box suite revenues, ticketing and other fees, and sponsorship and advertising revenues. (*See supra* 14.) NACPA objected to any change to the historical revenue base.

The Rate Court considered each proposed new revenue category:

1. VIP Package and Box Suite Revenue

VIP packages are bundled offerings designed to increase the price of attending a concert for a consumer. (SA81:13-15, SA109:18-25.) VIP packages often consist of the best tickets in the venue sold at "an enormous price," bundled with some add-

ons like an autographed picture or a cassette. (SA68:11-24, SA82:10-83:5, SA120:17-22.) Sales of these packages significantly boost revenue. For example, Live Nation's CEO told investors that in amphitheaters, premium ticket sales could turn what would be a $10 million loss into a $30 million profit. (SA550.) Like VIP packages, box suites also give fans access to some of the best seats in the venue, and the cost of the suite is the price of admission to the concert. (SA78:8-17.)

NACPA advised its members in 2016 that if admission to the concert is bundled in a VIP package, all the revenues from the VIP package should be reported. (SA418-419.) Some NACPA members, including Live Nation and AEG, already paid BMI on some VIP revenues, but only when they chose to do so. (SPA23 (citing SA69:6-8, SA84:20-24).) For example, Live Nation reported VIP revenues where the performing artist had successfully negotiated for them to be included in the artist's portion of proceeds. (SA69:21-71:13.)

The Rate Court held that the revenue base should include VIP package and box suite revenue received either by the promoter, or by venues and artists with which the promoter has a contractual relationship. (SPA22-23.) NACPA argued that concert promoters would be unable to determine the amount of VIP and box suite revenues. The Rate Court rejected that argument, finding that the limitation on reportable VIP and box suite revenues (to those received by the promoter or one in

contractual privity with the promoter) alleviates the practical concerns, "even if it does not produce perfectly efficient administration."[8] (SPA24-25.)

2. Ticketing Service, Handling, and Other Fees

Ticket fees are part of the price to attend a concert. "There is virtually no way to opt out of paying the fees." (SPA24 (citing SA87:20-89:16, SA614).) Ticketmaster, which is owned by Live Nation, "requires ticket buyers to pay service fees on virtually all tickets, which amount to an average of 20% of the face value of the ticket." (SPA5 (citing A145:12-24, A148:12-23).) AEG's ticketing arm, AXS, "charges service fees comparable to Ticketmaster." (*Id.* (citing SA79:13-19, SA86:10-89:16, SA91:15-19).)

AEG's CEO conceded that the price of admission is comprised of both the ticket's face value and the fees charged to purchase the ticket.[9] (SPA24 (citing SA85:3-7).) In recent years, service fees have increased proportionally more than ticket face values. (SA92:20-93:3.) As a result, the rate of increase for promoter

[8] Professor Tucker opined that promoters could include revenue reporting obligations in their contracts alleviating the practical difficulty. (SA167:2-16, SA190:25-191:9, SA192:3-193:10.)

[9] AEG's CEO admitted that service fees are part of the cost to attend a concert, but argued they should not be in the revenue base because artists are not paid on those fees. This argument is nonsensical. Songwriters are not involved in artist negotiations and artists receive an average of 80-90% of the ticket price (after the promoter has deducted show costs), as compared to BMI songwriters' historical 0.21%, or the current 0.5% of ticket value, which is itself charged to artists as one of the show costs. (A132:11-21; SA208:19-22, SA277-289.)

revenues has exceeded the rate of increase of fees paid by promoters to BMI. (SA95:8-11, SA96:14-19.)

Live Nation and AEG control the ticketing process for many concerts. If ticketing fees are not included in the revenue base, Live Nation and AEG (and other promoters with a ticketing arm) can manipulate how revenues are allocated between the face value of a ticket and the service fee. For example, AEG's CEO explained that AEG had increased the cost of attendance at its largest festival, Coachella, by adding a service fee rather than by changing the face ticket price. (SA94:1-25.) Under the old revenue base, the service fee would increase the cost to the consumer and the revenue to the promoter, but not the fees paid to BMI. Rather than perpetuate this revenue shell game, the Rate Court concluded that ticketing fees received by the promoter should be included in the revenue base. (SPA24.)

3. Advertising and Sponsorship Revenues

BMI sought to include in the revenue base advertising and sponsorship revenues received by concert promoters that were related to a musical attraction. On this issue, the Rate Court agreed with NACPA, reasoning that revenues from advertising and sponsorships reflect the value of a captive audience and not the cost of admission. (SPA13-14.) The Rate Court thus declined to include advertising and

sponsorship revenue, finding that it would "unreasonably inflate[]" the fees that concert promoters pay. (SPA15.)

F. Determining the Reasonable Rate

The Rate Court set a rate of 0.5%, rejecting both BMI's proposed 0.8% rate and the 0.21% rate for which NACPA had advocated based on the 2006 BMI/NACPA License.

The Rate Court adjusted the headline rates in the benchmark agreements to account for differences in the revenue base between the benchmarks and the proposed BMI/NACPA license for the Current Period. To do so, the Rate Court considered two sets of adjustments that Professor Tucker made to each benchmark. The primary adjustments accounted for differences in how the rates were structured in each license (*e.g.*, tiered versus unitary), variations in the value of the rights covered by each license (*i.e.*, market share), and incremental VIP or box suite revenue not previously reported. (SPA15-16 (citing A232:2-4, A232:16-233:18, A234:1-13; SA623).) The secondary adjustments accounted for the further expansion of the revenue base. (*See* SPA17; A240:9-241:6.) Together, Professor Tucker's adjustments accounted for an 18.3% expansion of the revenue base. (A241:7-9.) Although Professor Tucker testified that the secondary adjustments were not necessary, the Rate Court applied them (in NACPA's favor), lowering the benchmark rates proportionally to the expansion of the revenue base. (SPA17-19.)

So adjusted, the benchmarks accepted by the Rate Court implied rates for a BMI license of 0.21%, 0.23%, 0.34%, 0.36%, 0.37%, 0.51%, and 0.54%. (*Id.* at 18-19, 33.)

The rates at the low end of the range were derived from the 2006 BMI/NACPA License, which the Rate Court determined was a floor that had to be adjusted upward to account for the subsequent economic success of the industry, and the 2018 ASCAP/NACPA License, which largely mirrored the 2006 BMI/NACPA License rate. The rates at the higher end of the range were derived from the SESAC and GMR licenses, which Professor Tucker testified were superior benchmarks because they were not affected by the "shadow" of the rate court and the resulting circularity that impacts the negotiation of historical BMI and ASCAP rates prior to the commencement of a rate court proceeding. (A229:11-231:18; SA181:8-20.)

Based on all the evidence, the Rate Court determined that a rate of 0.5% was reasonable. (SPA33.) In doing so, the Rate Court noted that music-intensive users pay a relatively higher percentage of revenue for music licensing. (SPA33-34 ("Licenses in music intensive industries . . . have higher rates [for music licensing] because music is at the heart of the product being offered by the businesses.").) The Rate Court cited testimony from BMI's Senior Vice President, Licensing (who has extensive knowledge about rates paid by a wide variety of music users) that the rates paid by NACPA promoters were well below rates paid by other music-intensive

users—*e.g.*, digital music services (ranging from 2.5% to 4.6%), radio stations (1.78%), and virtual live concert streaming services (2.5%). (SPA34 (citing SA13:5-13); *see also* SA13:2-14:4, SA20:22-21:3.) NACPA's rates were actually similar to, and in some cases ***lower*** than, those paid to BMI by music users with non-music-intensive products, such as sports television networks (0.1375%) and talk radio stations (0.31%). (SA13:2-14:17.) In contrast to talk radio or televised sporting events, the Rate Court found "it is indisputable that music is essential to a live concert." (SPA34.)

STANDARD OF REVIEW

A. Rate Setting

To determine a reasonable rate, a rate court must identify the fair market value of the license, or the rate that a willing buyer and a willing seller would agree to in a hypothetical arm's-length negotiation. *See Showtime II*, 912 F.2d 563 at 569. The Consent Decree anticipated that this determination would be a highly factual one, requiring that determination of a reasonable fee be based on "all of the evidence." Consent Decree Art. XIV(A).

Findings of fact about benchmark agreements are reviewed for clear error. *See Pandora Media v. Am. Soc'y of Composers, Authors & Publishers*, 785 F.3d 73, 78 (2d Cir. 2015). Specifically, (i) the "evaluation of [] facts surrounding the formation of the benchmarks," (ii) the "adjustment of the benchmark[s] to best

approximate the fair market value," and (iii) the assessment of "the credibility of witnesses and other evidence at trial," are reviewed for clear error. *Music Choice IV*, 426 F.3d 91 at 96. Similarly, determinations about "whether [benchmarks] were formed in a freely competitive market" are factual and are reviewed for clear error. *DMX*, 683 F.3d at 45. This Court departs from the "clearly erroneous" standard of review only where the lower court relied on impermissible factors, failed to consider legally relevant factors, applied incorrect legal standards, or misapplied the correct legal standards. *See Showtime II*, 912 F.2d at 569–71; *see also Music Choice II, 316 F.3d at 194-95.*

A rate court must write an opinion that informs the appellate court of the bases for its decision, but a rate court "need only explain how it reached a particular rate sufficiently to permit [appellate] review of the rate for reasonableness . . . ." *Music Choice IV*, 426 F.3d at 99. A rate court need not identify every single finding that underlies its opinion. This Court must only determine whether the decision includes "sufficiently detailed findings to inform the appellate court of the basis of the decision and to permit intelligent appellate review." *Krieger v. Gold Bond Bldg. Prod.*, 863 F.2d 1091, 1097 (2d Cir. 1988) (internal citations omitted). This Court may consider record evidence not directly cited by a rate court and any alternative basis for affirmance. *See* Fed. R. App. P. 10(a); *see also Dollinger v. N.Y. State Ins. Fund*, 726 F. App'x 828 (2d Cir. 2018) ("record on appeal comprises among other

things the original papers and exhibits filed in the district court"); *US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 57 n.5 (2d Cir. 2019) (same).

B. Pre-Judgment Interest

The Court reviews a rate court's award or denial of pre-judgment interest for abuse of discretion. *See Com. Union Assur. Co. v. Milken*, 17 F.3d 608, 613 (2d Cir. 1994). An exercise of discretion that rests on an error of law is necessarily an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also Herman v. Davis Acoustical Corp.*, 196 F.3d 354, 356 (2d Cir. 1999) (reversing denial of fee request motion predicated on misinterpretation of statute).

ARGUMENT

I. The Determination of a Reasonable Rate and Related Factual Determinations Are Entitled to Deference

This Court has repeatedly emphasized the fact-intensive nature of the determination of a reasonable rate. *See Music Choice IV*, 426 F.3d at 96 (evaluation of benchmark formation, adjustment of benchmarks, and credibility determinations are all factual determinations). That this value is hypothetical does not change the factual nature of the inquiry or the standard of review. *See Showtime II*, 912 F.2d at 569 ("Fact-finders frequently are obliged to determine as a matter-of-fact hypothetical values pertinent to damages calculations.").

NACPA ignores the standard of review in rate court cases (*see supra* 37-39), and instead sweepingly and incorrectly asserts that a rate court's "selection of

appropriate benchmarks and the weight it allocates to the selected benchmarks" are reviewed *de novo*. (Br. 30.) NACPA takes out of context a single sentence from this Court's decision in *RealNetworks* that states that "determinations . . . that particular benchmarks are comparable and particular factors are relevant are questions of law reviewed *de novo*." (Br. 24 (citing *United States v. Am. Soc'y of Composers, Authors & Publishers* (*In re RealNetworks, Inc.*), 627 F.3d 64, 76 (2d Cir. 2010) ("*RealNetworks*")).) As the very next sentence (omitted by NACPA) makes plain, however, "findings as to each factor under consideration or those underlying a proposed benchmark agreement, as well as findings with respect to fair market value, are reviewed for clear error." *RealNetworks*, 627 F.3d at 76.

NACPA places entirely too much weight on that single out-of-context sentence from *RealNetworks*. (Br. 24.) *RealNetworks*' mention of the *de novo* standard is followed by a citation to this Court's earlier decision in *Showtime II*. *See RealNetworks*, 627 F.3d at 76 (citing *Showtime II*, 912 F.2d at 569). There, this Court explained that the determination of whether a proffered license is "comparable," and thus an appropriate benchmark based on the application of the facts, is "a legal determination analogous to an evidentiary ruling that would have occurred if the [license rate] had been offered at a jury trial." *See Showtime II*, 912 F.2d at 569-71. Courts have significant latitude in making such determinations. As this Court noted in *Showtime II*, the rate court's determinations regarding "[t]he

factors bearing on the comparability of the . . . [benchmark] place it well within the degree of latitude enjoyed by a trial judge in ruling on the admissibility of such evidence." *Id.*

NACPA repeatedly asserts that the Rate Court "erred" without specifying whether the supposed errors are factual or legal. Much of NACPA's arguments are directed toward factual determinations, yet NACPA never suggests that it can meet a "clear error" standard. Instead, NACPA tries to ignore the distinction and characterizes all of its arguments as legal arguments subject to *de novo* review, without explaining why any of the supposed errors are legal, as opposed to factual. NACPA does not identify the legal errors in the Opinion because there are none. NACPA cannot dispute that Judge Stanton applied the correct four-factor legal framework articulated in *Music Choice IV*, which NACPA itself proposes for evaluating benchmarks. (*Compare* SPA11 *with* Br. 29-30.)

NACPA's arguments on appeal are attacks on the Rate Court's factual determinations (1) adopting SESAC and GMR licenses as benchmarks (Br. 25, 36-37), (2) ordering an expansion of the revenue base to include the full retail cost of attending a concert (Br. 52-53), and (3) setting a rate at the high end of the benchmark range that does not mirror the ASCAP/NACPA (and historical BMI/NACPA) rate (Br. 26, 33, 46). None of these determinations raise legal issues that would justify reversal.

Each of these determinations was based on consideration of a well-developed factual record that included extensive fact and expert evidence at trial. None of the Rate Court's determinations was erroneous, much less clearly erroneous. The Rate Court's 37-page Opinion includes extensive citation to the record and thoughtfully lays out its reasoning and the factual basis supporting its conclusions. The Opinion explains the Rate Court's view of the proffered benchmarks, their implications for the range of reasonable rates, and the rationale for selecting a rate at the higher end of the range of benchmarks, all in a manner more than sufficient "to permit [this Court's] review of the rate for reasonableness[.]" *Music Choice IV*, 426 F.3d at 99. The Opinion addresses virtually every contested factual and economic issue pressed by the parties at trial. As such, the Opinion rebuts on its face NACPA's repeated refrain that the decision should be reversed as a matter of law because the Rate Court failed to adequately explain its reasoning (Br. 26-27, 35, 43, 46, 49, 52). A decision is reversable on this ground only when it is so devoid of reasoning that this Court cannot intelligently review it on appeal. *See Krieger*, 863 F.2d at 1097. That is plainly not the case here.

II. The Rate Set for the Current Period Is Supported by the Record and Was Not Based on Clear Error

The Rate Court determined that twelve of the proffered benchmarks were comparable agreements negotiated between similar parties, for similar rights, and under similar economic circumstances. (SPA11, 27-28, 33; *supra* 15-16.) Based on

a detailed analysis of those benchmarks, the Rate Court determined that a license rate of 0.5% of the expanded revenue base for the Current Period was reasonable.

The Rate Court applied the four-factor *Music Choice IV* framework to the nineteen proffered agreements to determine whether each was a proper benchmark. (*See, e.g.*, SPA11, 19-21, 27-28, 29-33.) In a detailed discussion, the Rate Court evaluated the facts relevant to each factor—the comparability of the parties, rights, and economic circumstances, as well as the presence of an adequate degree of competition—and concluded that each of the domestic agreements was a proper benchmark. (SPA25-32.) The Rate Court agreed with NACPA and rejected the international rates proposed by BMI (which would have supported a higher rate than 0.5%) because it found that BMI had not demonstrated that the licensors or markets were sufficiently comparable. (SPA19-21.)

NACPA challenges the Rate Court's adoption as benchmarks of licenses where either (1) BMI or ASCAP is not the licensor or (2) NACPA is not the licensee. This would—conveniently for NACPA—exclude all licenses other than the 2006 BMI/NACPA License and the 2018 ASCAP/NACPA License, which are at the lowest end of the range. As became clear in Professor Jaffe's testimony, under NACPA's logic, once a BMI or ASCAP rate is negotiated, no other PRO benchmarks would be available to BMI to establish that the initial rate should be revised upward. (*See* SA229:3-21, SA237:4-13, SA238:17-20.)

NACPA's arguments ignore the evidentiary record, which amply supported the Rate Court's decision to adopt the additional benchmark agreements.

A. The Rate Court Did Not Err in Adopting the SESAC and GMR Licenses as Benchmarks

NACPA argues for the exclusion of the SESAC and GMR agreements as benchmarks because (1) SESAC and GMR are not subject to consent decrees (Br. 39-40), (2) SESAC and GMR are too small (Br. 37-38), and (3) the "individual promoter" licensees are not comparable to NACPA and are influenced in their negotiations by idiosyncratic factors (Br. 37, 41, 43). The Rate Court properly rejected those arguments based on the factual record.

1. The Absence of a Consent Decree Does Not Invalidate a Benchmark

Whether a benchmark satisfies the "competitive market" prong of the four-factor framework is a factual determination entitled to deference, and no less so when the Rate Court bases its decision on the evaluation of competing opinions from expert economists. *See Showtime II*, 912 F.2d at 569 ("[T]he competitiveness of a market and the market power of a seller may be ascertained with the aid of expert opinions, whose persuasive force is itself a factual matter within the purview of the fact-finder.").

Here, the Rate Court heard competing expert testimony on the question and agreed with BMI. Professor Tucker opined that the GMR and SESAC licenses are better indicators of value than ASCAP or BMI licenses, because they preserve the

legal monopoly power granted to BMI's affiliates by the Copyright Act (and eliminated by the Consent Decree) that rate-setting is intended to incorporate and are not distorted by the rate court.[10] (A219:11-A221:18; SA191:8-182:20.) Professor Tucker also explained that SESAC's and GMR's market shares did not give them outsized market power because they are smaller than individual music publishers that promoters would face in negotiations in the absence of PROs.[11] (SPA31; SA244:8-10; *see also* A176:14-18 (AEG's CEO conceding that, without PROs, concert promoters would be negotiating directly with publishers and songwriters).)

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[10] *See United States v. Am. Soc'y of Composers, Authors & Publishers* (*In re Showtime/The Movie Channel, Inc.*), No. 13-95, 1989 WL 222654, at *22 (S.D.N.Y. Oct. 12, 1989) ("*Showtime I*") ("general goal" in rate-setting is to eliminate improper monopoly power from aggregation while still providing "a return for [] labors that is generally commensurate with the value that a competitive market would place on both the musical fruits of those efforts and the benefits offered by the blanket license"), *aff'd sub nom. Showtime II*, 912 F.2d 563 (2d Cir. 1990).

[11] Professor Jaffe opined that the lack of a consent decree allows SESAC and GMR to extract supracompetitive rates by virtue of its aggregating individual copyright making them improper benchmarks for rate setting. (A359:10-23.) With no evidence of supracompetitive pricing in these negotiations, Professor Jaffe attempted to bolster his testimony with evidence (not in the record) that he had purportedly seen in connection with an unrelated antitrust litigation from a decade ago involving SESAC and television broadcasters (cited again by NACPA in its Brief). The Rate Court was within its discretion to credit Professor Tucker's testimony over Professor Jaffe's and ignore Professor Jaffe's characterization of supposed evidence from another proceeding.

This Court has previously held that agreements with major music publishers—which are not governed by consent decrees—can be valid benchmarks. *See DMX*, 683 F.3d at 48-49. In *Pandora*, the BMI Rate Court followed this Court's precedent and again adopted as benchmarks licenses negotiated directly with music publishers. *See Pandora*, 140 F. Supp. 3d 267 at 290–91. Relying on such benchmark agreements is consistent with the Rate Court's charge to set a rate based on a hypothetical competitive market—not a market governed by consent decrees. The Rate Court properly held that agreements with GMR and SESAC (which have less market power than large publishers) arose from sufficiently competitive markets to be adopted as benchmarks. There was nothing clearly erroneous about the Rate Court's decision to credit Professor Tucker on this issue.

2. SESAC's and GMR's Size Do Not Disqualify Their Licenses as Benchmarks

NACPA advances three market-share-based arguments for rejecting the SESAC and GMR licenses. First, NACPA argues that the market shares of SESAC and GMR are not discernable based on public information, suggesting that promoters did not know the size of the repertoires they were licensing. (Br. 37-38.) The evidence showed otherwise. First, promoters could—and did—analyze SESAC's and GMR's market share in negotiating their licenses. (*See supra* 29-30.) NACPA and its promoters even understood they were paying SESAC and GMR more on a per-share basis than they had been paying to BMI and ASCAP. (*See id.*)

Second, NACPA argues that SESAC's and GMR's small sizes make their market shares volatile, and the calculated implied rates unreliable. (Br. 38-39.) Professor Tucker controlled for this fluctuation in SESAC and GMR market shares by using five-years' worth of market share data and by conducting a market share sensitivity analysis. (SA170:19-175:23.)

Third, NACPA argues that concert promoters lacked incentive to invest in serious negotiation of the SESAC and GMR licenses because of the small dollar amounts at issue. The evidence established, however, that NACPA and individual promoters were aggressive in negotiating their SESAC and GMR licenses because, among other reasons, they understood that any license would impact rates paid to BMI and ASCAP. (*See supra* 27-29.) The Rate Court properly rejected NACPA's assertion that the SESAC and GMR licenses were not thoroughly negotiated, finding that "[n]o evidence at trial supports [it]." (SPA33 n.7.)

Unable to develop record evidence to support the aforementioned arguments about the SESAC and GMR licenses, NACPA instead cites to factual findings from different proceedings based on different trial records covering different negotiations and different time periods.[12] For example, NACPA cites findings by ASCAP's rate

[12] The lack of evidence supporting NACPA's argument on this point was so glaring that *amici* attempt to bolster the record by recounting their purported experiences negotiating with SESAC and GMR and by similarly citing record evidence from other cases. (*See* Amicus Br. 15-27.) While the Court may consider *record* evidence

court from almost a decade ago that uncertainty about SESAC's market share made it difficult to use a SESAC license as a benchmark (Br. 38), and that different licensees lacked incentive to negotiate aggressively with SESAC because the total dollar amounts at issue in those negotiations were small (Br. 38-39). The cases that NACPA cites make clear, however, that NACPA is citing factual, not legal, determinations. *See In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 361–62 (S.D.N.Y. 2014) (finding "insufficient data about the SESAC repertoire . . . to make the adjustments required to support" ASCAP's proposed rate); *In re Application of MobiTV, Inc.*, 712 F. Supp. 2d 206, 254 (S.D.N.Y. 2010) ("*MobiTV*") (dismissing in dicta a SESAC settlement agreement as benchmark where fee was insubstantial relative to the litigation risk).[13]

Such factual findings from another case cannot displace the Rate Court's factual determinations in this case. *See, e.g.*, *DiBella v. Hopkins*, 403 F.3d 102, 118

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not cited by the rate court, *see Dollinger*, 726 F. App'x at 830, amicus briefs are not a place for the injection of evidence into a trial record. *See, e.g.*, *Int'l Bus. Machines Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975) ("federal appellate courts will not consider rulings or evidence which are not part of trial record" "absent extraordinary circumstances"). Moreover, none of the *amici* is a participant in the live concert marketplace, and none purports to speak to negotiations in that market.

[13] NACPA's citation to the magistrate's opinion appended to *Showtime II* (Br. 39) is inapposite. There, negotiators offered "credible" testimony that they did not seek a "reasonable" rate in agreeing to licenses. *Showtime II*, 912 F.2d at 585–86. The Rate Court found on the trial record here that the opposite was true. (*See supra* 27-29.)

(2d Cir. 2005) (factual conclusions from another case cannot be introduced on appeal before the Second Circuit). In any event, none of the decisions on which NACPA relies involved negotiations with concert promoters, much less the negotiations that were at issue in this case.

In another effort to muddy the record, NACPA cites on appeal to ***allegations*** by television and radio broadcasters against SESAC and GMR in various antitrust cases. (Br. 40.) Unsubstantiated allegations are not evidence. Moreover, NACPA grossly misrepresents the facts of those cases, omitting that the settlement of the two-sided GMR antitrust litigation with the Radio Music License Committee resulted in a substantial increase (not decrease) in fees. *See* Inside Radio, *Decision Time on Pending Deal with GMR, Which Shakes Up How Radio Rates Are Calculated* (Jan. 31, 2022), *available at* https://bit.ly/Jan22IR; Inside Radio, *Enough Broadcasters Say "Yes" to GMR Deal; Agreement Will End Long-Running Legal Fight* (Feb. 7, 2022), *available at* https://bit.ly/Feb22IR.

3. The GMR Licenses Were Not Influenced by Idiosyncratic Circumstances

NACPA argues that the GMR licenses should be excluded as benchmarks because the "individual promoter" licensees were not sufficiently comparable to NACPA. (Br. 40-47.) The Rate Court did not err in concluding otherwise. NACPA's Brief ignores that two of the "individual promoters" at issue—AEG and

Live Nation—dominate NACPA and account for 90% of its licensing fees. (SPA4-5; A70:5-72:16.)

NACPA relies on *Music Choice II* to argue that the GMR licenses should be rejected because they were shaped by "idiosyncratic circumstances." (Br. 41 (citing *Music Choice II*, 316 F.3d at 192).) *Music Choice II* does not suggest, however, that agreements with individual licensees are *always* idiosyncratic, or should be rejected out of hand. This Court cautioned only that there may be factual issues to consider. Here, the Rate Court considered and rejected each of the factual issues raised by NACPA.

First, NACPA argues that "some individual promoters had a relationship with GMR's founder, Irving Azoff, that influenced their willingness to pay higher rates under an individual GMR license." (Br. 41.) The evidence at trial showed otherwise. When asked if he agreed to pay GMR a higher rate to curry favor with Azoff, AEG's CEO responded indignantly that "Mr. Azoff has not sold AEG Presents an artist in over half a dozen years, so I wouldn't say we were on the best of terms. So currying favor by paying somebody more money wasn't going to help me." (SA104:1-11.)

Likewise, Bob Roux, Live Nation's President of US Concerts, rejected the notion that Live Nation overpaid GMR to curry favor with Azoff. Roux testified that Live Nation "actively negotiated [its] license with GMR," and that "when [he]

looked at the whole picture, [he] thought it was a fair deal." (SA506; A121:19-122:15, A124:3-9.)

Second, NACPA suggests that individual promoters agreed to higher fees because GMR threatened to bring infringement claims for past unlicensed performances. (Br. 41.) NACPA relies on an email from Azoff stating that he would "rather sue" AEG than negotiate a license. (Br. 41; SA446.) However, Roux (who knows Azoff) testified that he understood Azoff's reference to litigation as sarcastic. (A122:16-A123:7.) NACPA presented no evidence that GMR ever sued any concert promoter for infringement.

NACPA also relies on testimony from Nederlander's representative that his organization licensed with GMR because GMR threatened suit. (Br. 40.) The record established, however, that GMR demanded and accepted only $873, the amount that would have been payable under the negotiated go-forward rate of the agreed license, for a full release of all purported infringement claims against Nederlander. (SA254:4-257:2.)

NACPA's argument also ignores that even if a concert promoter had paid a premium to cover copyright infringement claims on its initial license (prior to which it was unlicensed), infringement claims would not have been an issue in subsequent negotiations. The GMR licenses renewed annually, but none of the promoters sought a lower license rate, as would have been expected if the initial license fee had

been inflated to address potential copyright infringement claims for unlicensed periods. (SA110:14-111:4; A400:24-401:20.) Instead, the licenses renewed every year until GMR terminated them in 2022. (A124:22-125:18, A770:2-8, A396:15-16; SA110:12-112:12, SA458, SA471.)

B. The Rate Court Did Not Err in Adopting as Benchmarks Licenses with Promoters that Are Not NACPA Members

NACPA also attacks the Rate Court's consideration of each of BMI's, ASCAP's, and SESAC's licenses with non-NACPA promoters as benchmarks. There are some 2,000 concert promoters not associated with NACPA that have agreed to licenses with BMI. (SA33:11-22.) For over a decade, BMI had licensed NACPA and non-NACPA promoters at the same rates. (SA11:12-19; A76:11-22, A77:10-21.) Although NACPA and the non-NACPA promoters differ in the scope of their business, they directly compete at small venues. (SPA28; SA72:13-17, SA251:25-252:7.) Some NACPA members consider themselves more like non-NACPA promoters than other NACPA members like Live Nation or AEG. (SA251:25-252:7.) Based on this evidence, the Rate Court had sufficient basis to conclude that the non-NACPA licenses with BMI, ASCAP and SESAC covered the same rights and economic circumstances and reflected the same degree of competition as a BMI/NACPA license, and that the thousands of non-NACPA licenses were sufficiently comparable for the agreements to be benchmarks. This finding is consistent with the ASCAP rate court's reasoning in *DMX*, which was

quoted approvingly by this Court, that "collective decisions of [hundreds of publishers and administrators] to execute direct licenses [were] comparable to the decision [a PRO] makes in entering a license." *DMX*, 683 F.3d at 48 (quoting *In re DMX*, 756 F. Supp. 2d 516, 550 (S.D.N.Y. 2010)).

NACPA makes much of the fact that the Rate Court's decision did not specifically address the SESAC/non-NACPA licenses. NACPA's hyperbole peaks when it suggests that the entire rate determination is tainted because the SESAC/non-NACPA licenses are at the benchmark rate "closest" to the rate selected by the Rate Court.[14] (Br. 42-43.)

NACPA's argument is without basis. The Rate Court found, in connection with its discussion of other licenses, (1) the comparability of SESAC to BMI, (2) the comparability of non-NACPA promoters to NACPA promoters, (3) the similar scope of the rights licensed, and (4) the relevant economic circumstances. Professor Tucker proposed the SESAC/non-NACPA license as a benchmark, and the Rate Court, having considered all the factors in the context of the other proposed benchmarks, adopted these licenses as benchmarks as well. The Rate Court was not

[14] Nothing in the Opinion suggests that the 0.5% rate was tied to the SESAC/non-NACPA licenses, which, as adjusted, implied a different rate (0.51%) for BMI. To the contrary, the Rate Court explained that it chose a rate toward the high end of the range, not one tethered to a particular agreement. Excluding the SESAC/non-NACPA licenses would not affect the high end of the range or change the Rate Court's finding that 0.5% was a "reasonable" rate.

required to engage in the talismanic repetition (for the SESAC/non-NACPA licenses) of findings it had made for other licenses involving SESAC or involving non-NACPA licensees. Notably, NACPA did not cross-examine any witness, even Professor Tucker, about the SESAC/non-NACPA licenses, and NACPA never made arguments that were specific to those licenses. It is hardly surprising that the Rate Court did not devote separate discussion to licenses that were subject to the same arguments that had been rejected in the context of other benchmark licenses.

III. The Rate Court Did Not Err in Setting a Revenue Base that Differed from the Benchmark Agreements

The economic value of a license is determined by the percentage-of-revenue rate and the scope of the revenues to which the rate is applied, the latter of which is referred to as the revenue base. NACPA argues that it was error for the Rate Court to set a revenue base that differed from the revenue base in the benchmark agreements. (Br. 54.) NACPA itself acknowledges, however, that the Rate Court's overall charge in setting the revenue base is only to "ensure that the overall amount a licensee is charged is reasonable." (*Id.*)

Here, the Rate Court established a new revenue base that appropriately includes revenues linked to the use of BMI's music, and adjusted the benchmark rates downward to reflect this expanded revenue base to "ensure that the final amounts generated by the [benchmark] license are not overly inflated but remain a true reflection of the fees the parties [to the benchmark agreements] negotiated for."

(SPA17-19, 33 (citing A238:21-241:16, A242:2-12; SA615-648).) Specifically, the Rate Court used Professor Tucker's secondary adjustments to lower the benchmark rates to account for the full expansion of the revenue base. (SPA17-19.) NACPA's expert did not dispute Professor Tucker's method for adjusting the benchmarks or offer an alternative approach; nor does NACPA in its Brief. No rate court has ever rejected the determination of a revenue base when the corresponding rate was adequately adjusted to account for the economic impact of any expansion or retraction.[15]

In determining a reasonable revenue base for the license, the Rate Court accepted this Court's directive that, "absent some valid reason for using a different measure, what retail customers pay to receive the product or service in question . . . [is] an excellent indicator of its fair market value." (SPA13 (quoting *Music Choice II*, 316 F.3d at 195).) Contrary to NACPA's argument, the Rate Court recognized that, in some instances, as this Court has stated, "there may be reason to approximate fair market value on the basis of something other than the prices paid by customers," *Music Choice II*, 316 F.3d at 195, and specifically considered whether such factors were present here (SPA13, 23-25). *See also Music Choice IV*, 426 F.3d at 97 (the

[15] NACPA is also wrong to suggest that the revenue base in the benchmarks demonstrate that face-value ticket revenue is the only reasonable revenue base (Br. 54); the GMR/AEG License provides that service charges are to be included in the revenue base if they are included in any other PRO license. (SA102:21-25.)

rate court may "find fair market value on any basis adequately supported by the record"). Ironically, the Rate Court's focus on what "retail customers pay" worked to NACPA's advantage in connection with the Rate Court's consideration and rejection of BMI's request that the revenue base include sponsorship and advertising revenue received by promoters in connection with live concerts. (SPA13-15.)

NACPA appears to suggest that the Rate Court cannot use retail cost if there are any "valid reasons" for using a different measure. (Br. 53.) That argument stands *Music Choice II* on its head. Nothing in *Music Choice IV* or *MobiTV*, also cited by NACPA, supports such a conclusion. Those cases provide only that retail revenues are not *always* the best measure of fair market value.

Here, the Rate Court had discretion to establish a revenue base on the basis of the cost to consumers to attend a concert. In addition to the logic of that rule (as explained by the Court in *Music Choice II*), the use of that measure here had a number of other advantages, including: (1) preventing manipulation of the revenue base by concert promoters (reallocating costs from the face value to service fees, both within the control and discretion of Live Nation and AEG, each of which own ticketing arms) and (2) removing inconsistencies in reporting by concert promoters (*e.g.*, by requiring all NACPA concert promoters to report revenues from VIP ticket sales, a practice that was being inconsistently applied by promoters under the prior license's revenue base).

A. The Evidence Demonstrated that Each of the Revenue Streams Was Part of the Price to Attend the Concert

NACPA argues that revenues from box suites and VIP packages are for goods and services distinct from the musical compositions and should be excluded from the revenue base because they are not part of the cost to attend a concert. (Br. 57-58.) The Rate Court rejected this argument at trial and found that both categories of revenue reflected the price a "customer is willing to pay [] to hear the music." (SPA23.) As Live Nation's representative explained, VIP packages are "a way of dramatically increasing the price of the ticket and the price of admissions." (SA26:24-27:25.)

Defining the revenue base to explicitly include VIP revenues is also necessary to ensure consistency in payment among promoters and across concerts. Even though NACPA had previously instructed its members in 2016 that such VIP revenues should be included in the revenue base (SA418-419), concert promoters took inconsistent positions on the inclusion of such revenues. (*See supra* 32.) For example, Live Nation's practice of reporting VIP revenues only where a performing artist is paid on them makes no sense: payment to BMI should not change depending on whether an artist has agreed to capture or forgo payments on such revenues.

Likewise, the Rate Court's inclusion of box suite revenues "attributable to live concerts" in the revenue base was fully supported by the record. (SPA22.) NACPA's claims that some box suite revenues are attributable to other non-music

events such as sporting events hosted by the venue misrepresents the Rate Court's Opinion. (Br. 58.) However, only box suite revenues "attributable to live concerts" are included in the revenue base. (SPA22.) The trial evidence established that the cost of the box suite is the price of admission for those enjoying the performance from the box. (SA78:8-17.) Contrary to some NACPA witness testimony, the evidence also showed that box suites can be sold for individual concerts. (A201:18-203:14.) The Rate Court thus properly included box suite revenue attributable to music attractions in the revenue base for calculation of BMI royalties.

NACPA does not even attempt to argue on appeal that service fees are not part of the price consumers must pay to attend a concert. Instead, not supported by anything in the record, NACPA challenges for the first time on appeal BMI's *enforcement* of the Judgment. That issue is not properly before the Court.[16] *See*

[16] NACPA contends that since entry of the Judgment, BMI has demanded that concert promoters report ticketing fees beyond those directed by the Rate Court, specifically fees from promoted concerts collected by the promoter's affiliated ticketing arms but not formally transferred to the balance sheet of the promoter arm. (Br. 58-59.) Regardless, BMI's enforcement and collection efforts are consistent with the Judgment and the trial record on this issue. Live Nation and AEG are concert promoters that own ticket servicing businesses (SPA5), and the service fees they collect for concerts they promote are "received by the promoter." Live Nation reports its promoter, venue, and ticketing segment financials on a consolidated basis and operates its business to maximize profitability of the overall company, not a particular segment. (SA45:12-25.) AEG's promoters, venue, and ticketing revenue all flow to the same parent. (SA79:15-80:16.) Allowing promoters to shield the service fees collected by their affiliated ticketing segments would perpetuate the current incentive (and practice at AEG) to shift revenues away from face value and toward service fees. (*See supra* 33-34.)

Siemens Energy, Inc. v. Petroleos de Venezuela, S.A., 82 F.4th 144, 160 (2d Cir. 2023) (declining to consider issue raised for the first time on appeal where post-Judgment motion was not first brought before the trial court).

B. The Rate Court Considered and Accounted for NACPA's Arguments that an Expanded Revenue Base Is "Commercially Impracticable"

NACPA also argues that the revenue base is unreasonable because it would be impracticable for promoters to report revenues that they do not collect. (Br. 55-57.) NACPA ignores, however, that the Rate Court's revenue base already accounts for this: It is limited to revenues received directly by the promoter or, in some cases, a venue or artist with which the promoter has a contractual relationship. (*See supra* 32-33.) Professor Tucker explained that limiting revenue in this way results in a narrower revenue base (in NACPA's favor) than would be ideal from an economic perspective, as it does not include the full cost of attending a concert. Professor Tucker explained, however, that these limitations were included in the proposed license to address the same practical considerations that NACPA raised at trial, and raises again on appeal. (SA167:2-16.) The Rate Court agreed with Professor Tucker, holding that limiting the revenues to "***those received by the promoters or a contractually related third-party*** helps to alleviate [NACPA's] concerns, even if it does not produce perfectly efficient administration." (SPA24-25 (emphasis added).)

IV. The Selection of a Rate at the High End of the Range of Reasonable Rates Was Supported by the Record

Having selected a group of benchmarks that resulted in rates between 0.21% and 0.54%, the Rate Court acted within its discretion in selecting 0.5% as the reasonable rate. *See Music Choice IV*, 426 F.3d at 99 (noting that the rate court can select a rate with reference and adjustment to any benchmarks it deems reasonable); *Showtime I*, 1989 WL 222654, at *4 (to determine a reasonable rate, a rate court must "define a rate or range of rates that approximates the rates that would be set in a competitive market").

Contrary to NACPA's arguments, there is no legal requirement that the Rate Court adopt a rate that is tethered to a particular benchmark rate or to adopt an algorithmic weighting of the benchmarks.[17] Benchmarking is simply a tool to assist courts in determining the fair market value of the license, *i.e.*, the range of prices that a willing buyer and a willing seller would agree to in an arm's-length

[17] Since BMI and ASCAP together have approximately 90% market share, NACPA's suggestion that the Rate Court should have calculated a rate by weighting the benchmarks based on each PRO's share of live concert performances (Br. 48), is just a reframing of its argument that the rate should be set by reference to prior BMI and ASCAP rates.

Additionally, NACPA's citation to this Court's critique of a "rough estimation" in *RealNetworks* is misplaced. (Br. 49.) That estimation referred to a metric adopted by the rate court for determining the amount of website advertising revenue attributable to streaming music, it had nothing to do with the weighting of benchmarks. *See RealNetworks*, 627 F.3d at 77–78.

transaction. (SPA10-11 (citing *DMX*, 683 F.3d at 45; *Music Choice II*, 316 F.3d at 194).) The Consent Decree gives the Rate Court latitude to select a "reasonable" rate based on "all of the evidence." Here, there was ample evidence in the record (much of which NACPA ignores entirely in its Brief) to support the Rate Court's selection of the 0.5% rate as "reasonable."

First, the Rate Court properly considered the history of the BMI/NACPA negotiations in determining that the 2006 BMI/NACPA License set a floor for a "reasonable rate." That evidence, which NACPA never addresses, established that the old BMI rate had been negotiated and agreed to in an entirely different economic environment. (*See supra* 16-17.) The Rate Court permissibly considered the change in economic circumstances in determining to view the old BMI rates as a "floor."

Second, the Rate Court had ample evidence, including testimony from Professor Tucker, to conclude that the SESAC and GMR benchmarks (which were at or toward the high end of the benchmark range) were superior to the BMI and ASCAP benchmarks (which were at or toward the low end of the benchmark range). Unconstrained by consent decrees and mandatory licensing, SESAC and GMR preserve the legal monopoly power granted to a work's owner by the Copyright Act. (SPA30; *supra* 44-45.) At the same time, their smaller size and negotiation behavior demonstrated that they did not exercise undue market power as a result of their aggregation of copyrights. (SPA31-33; *supra* 26.) As the Rate Court noted, the

GMR and SESAC negotiations were directly comparable to negotiations between promoters and large music publishers in a hypothetical competitive market without PROs. (SPA30-31.) The parties' competing experts devoted considerable trial testimony to this question. The Rate Court's decision to agree with Professor Tucker's opinion over Professor Jaffe's on this critical question was entirely proper and in no way clearly erroneous.

Third, the Rate Court was not (as NACPA claims) required to set a rate consistent with the 2018 ASCAP/NACPA License rate. NACPA places significant emphasis (Br. 33) on the Rate Court's statement that ASCAP is BMI's "closest comparator" as if that requires the Rate Court to adopt that rate as the only "reasonable" rate. The evidence established that the 2018 ASCAP/NACPA rate (0.23%) largely continued the old rates from the 1990s that had been agreed under different economic circumstances. (*See supra* 16-19, 22-23.) Thus, the 2018 ASCAP/NACPA License rate was almost identical to the implied rate from the 2006 BMI/NACPA License (0.21%) that the Rate Court found did not reflect the significant market changes that had occurred since the old concert promoter rates had been set in the 1990s. (SPA27-28.) Just as the Rate Court found that the 2006 BMI/NACPA License should serve as a "floor" in its analysis, it follows that the ASCAP rate—that was influenced by the BMI rate—would serve a similar function.

Selecting a rate significantly above the ASCAP benchmark rate was consistent with these factual findings.

NACPA's argument that the Rate Court was not permitted to divert from the ASCAP rate also ignores significant trial evidence that supported an upward departure from that rate. This evidence included that ASCAP (1) entered into the license without complete information about higher GMR rates, (2) negotiated for an early termination right to preserve flexibility based on the result of BMI's Rate Court proceeding, and (3) did not enter a new final license and instead opted for an interim license as the trial below approached. (*See supra* 22-23.) The Rate Court was permitted to consider all this evidence in determining the appropriate weight to place on the ASCAP license. There was nothing improper about its decision to choose a rate at the high end of the range that was more consistent with the superior GMR and SESAC benchmarks.

Finally, in choosing the 0.5% rate, the Rate Court also considered evidence regarding rates paid to BMI by other music users. NACPA ignores that the Rate Court cited to Steinberg's testimony that BMI generally charges higher percentage-of-revenue rates to music users with products where music is essential, and that the rates paid by NACPA were entirely inconsistent with BMI's other market rates. (SPA34 (citing SA13:5-13); *see also supra* 36-37).) As Steinberg testified, NACPA's rates were similar to, and at times lower than, those paid to BMI by

licensees in non-music-intensive industries, such as talk radio and cable sports. (SA14:9-17.) Professor Tucker explained that looking at rates paid by other users is helpful as a "sanity check," to see if the rate is generally in the right range. (SA194:19-197:4.) Professor Tucker opined that an analysis of the other market rates demonstrated the unreasonableness of the rates in the 2006 BMI/NACPA License and the 2018 ASCAP/NACPA License because the BMI and ASCAP rates were near or below the rates BMI charged to users making ancillary use of music. (*Id.*) It was not clearly erroneous for the Court to find that a concert promoter would pay more for access to music than a talk radio station.

At trial, NACPA attempted to undercut this notion by arguing that concerts derive their value principally from non-musical elements such as pyrotechnics, dancing, or even the quality of seats in a venue. (A333:7-334:8.) The Rate Court rejected this view: "Even though non-musical elements might be critical to the concert goer's experience, the fact that the show simply could not go on without the music forces the only conclusion that it is a music intensive industry." (SPA34.)

NACPA also offered testimony from Professor Jaffe, who disputed the relevance of comparing percentage-of-revenue rates across different users, and proffered instead an analysis showing that BMI receives significantly more (in pennies) from NACPA per-song-per-listener than it does from broadcast radio stations and digital streaming services (like Pandora or Spotify). (SA226:3-25.) As

Professor Tucker explained at trial, Professor Jaffe's penny-rate analysis misses the mark. Consumers pay far more per song to attend a concert than to listen to the radio or subscribe to a digital streaming service.[18] A consumer's willingness to pay is affected by the mode of consumption, not the relative contributory value of the music. It is hardly surprising then that BMI would receive a higher penny rate for use of its compositions at a concert than on the internet or the radio, but Professor Jaffe's penny-rate analysis ignores those differences. On cross-examination, Professor Jaffe conceded that he would expect penny rates to be much lower for a Spotify subscription than for a concert. (SA231:2-22.) Music licenses have traditionally been negotiated on a percentage-of-revenue basis for just that reason.

Accordingly, the Rate Court appropriately considered other music user rates in choosing a 0.5% rate at the high end of the benchmark range.

V. The Court Properly Found BMI's Rate Proposal for the Retroactive Period Was Reasonable

The Rate Court's decision to adopt the proposed rates for the Retroactive Period was supported by the record and was not clearly erroneous. If the Rate Court determines that the rate quoted by BMI is "reasonable," the quote is adopted and the inquiry ends. Consent Decree Art. XIV(A). Professor Jaffe calculated the implied

[18] Professor Tucker further explained this is in part the result of the complementary nature of music at concerts: when songs are combined with other elements such as the performer and staging of a concert, each element becomes more valuable. (SA197:24-199:15.)

unitary rate BMI's rate quote for the Retroactive Period to be 0.28%.[19] This is nearly equivalent to the license rate of 0.275% for the 2020-2021 period in the 2018 ASCAP/NACPA License that NACPA advanced as a benchmark, and only slightly above the 0.23% rate NACPA advocated for based on the prior ASCAP/NACPA license. (SA405-406; SA242:22-25, SA245:2-246:4.)

For over a decade, BMI licensed NACPA and non-NACPA promoters at the same rates. (SA31:9-14; *supra* 24.) BMI's rate quote for the Retroactive Period returns that alignment. The rates quoted by BMI and adopted by the Rate Court mirror the rates paid by the thousands of non-NACPA promoters—many of which compete directly with NACPA promoters—on a final basis during the Retroactive Period. (SPA28, 36; SA617.) This was not clear error.

VI. The Rate Court's Pre-Judgment Interest Determination Was Erroneous

The Rate Court made three related errors of law in denying BMI's request for an award of pre-judgment interest. (SPA39 (the "Interest Opinion").) First, the Rate Court failed to consider the four factors this Court articulated for determining whether to award pre-judgment interest. Second, the Rate Court incorrectly held that the Consent Decree prohibits an award of pre-judgment interest. Third, the Rate

[19] Professor Jaffe calculated this rate by weighting the non-NACPA concert and festival rates by the NACPA concert and festival revenue. (A371:13-A372:12, 1638:18-1639:4.)

Court misapprehended the purpose of pre-judgment interest, incorrectly characterizing it as a potential "embellishment[]" or form of "overcompensat[ion]," rather than what it actually is: compensation that makes "a person wrongfully deprived of his money . . . whole for the loss." *Waterside Ocean Nav. Co., v. Int'l Nav. Ltd*., 737 F.2d 150, 154 (2d Cir. 1984) (noting presumption in favor of awarding pre-judgment interest).

A. The Rate Court Failed to Consider the *Wickham* Factors

This Court has identified four factors relevant to determining whether to make a discretionary award of pre-judgment interest: "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *See Wickham*, 955 F.2d 831 at 833-34. The *Wickham* factors support an award of pre-judgment interest.

First, BMI and its songwriters have been deprived of the reasonable value of the public performance license for almost a decade and deserve full compensation. Second, during this prolonged period of underpayment, NACPA members inequitably retained for their own use and benefit monies that were reasonably due to BMI and its affiliates. The fourth prong[20] also supports an award, because the

[20] The third prong is not directly relevant, as there is no applicable statute.

Consent Decree—which establishes a mandatory licensing process whereunder BMI can go years without full payment—should be read to allow the Rate Court, at the end of the process, to award the full value of the performances to BMI's affiliates, including accounting for any delay. Otherwise, parties will be incentivized to vigorously contest interim rates knowing they will not be liable for the lost value if the dispute drags on without resolution.

The Rate Court's disregard of *Wickham* is not cured by its summary statement that its "determination of the final fee amount was designed to be the entire embodiment of what constitutes a reasonable fee[.]" (SPA45.) The Rate Court set constant rates for the periods at issue, with no finding to suggest that, for instance, payment for a performance in 2019 should be less in real dollars than payment for a performance in 2022. The Court should remand with instruction to the Rate Court to evaluate the *Wickham* factors.

B. The Consent Decree Does Not Bar an Award of Pre-Judgment Interest

In ignoring *Wickham*, the Rate Court instead found that the Consent Decree controls the award of pre-judgment interest because it "calls for a simple substitution of the interim rate by the new rate, not a new rate plus interest[.]" (SPA43-44.) The Consent Decree, however, says nothing about interest, and it was legal error to read such a prohibition into its terms. *See United States v. Broad. Music, Inc.,* 720 F. App'x 14, 16 (2d Cir. 2017) ("[C]ourts must abide by the express terms of a consent

decree and may not impose additional requirements or supplementary obligations on the parties even to fulfill the purposes of the decree more effectively.") (citing *Perez v. Danbury Hosp.*, 347 F.3d 419, 424 (2d Cir. 2003)).

The Rate Court's interpretation of the Consent Decree is also contrary to ASCAP rate court determinations awarding pre-judgment interest in substantially identical proceedings pursuant to a consent decree that is similarly silent about the award of pre-judgment interest. *See United States v. Am. Soc'y of Composers, Authors & Publishers* (*In re Capital Cities/ABC, Inc.*), 831 F. Supp. 137, 166-67 n.27 (S.D.N.Y. 1993) (awarding pre-judgment interest and noting that the court had awarded pre-judgment interest in a prior ASCAP rate proceeding). Those prior rulings reasonably informed the parties' expectations in other rate court proceedings like this one. There is no reason why pre-judgment interest should be permitted under the ASCAP consent decree, but not under the BMI Consent Decree.

C. The Rate Court Misapprehended the Purpose of Pre-Judgment Interest

In addition to failing to analyze the *Wickham* factors, the Rate Court also incorrectly characterized pre-judgment interest as an "embellishment[]" that would "overcompensate BMI at NACPA's expense." (SPA45.) This is wrong: pre-judgment interest is compensation for the loss of use of funds to which one was entitled. *See Waterside Ocean*, 737 F.2d at 154 ("[I]t is almost unnecessary to

reiterate that only if such interest is awarded will a person wrongfully deprived of his money be made whole for the loss.").

Since 2014, NACPA paid rates lower than what the Rate Court determined to be reasonable. As a result, NACPA members retained the benefit of the funds while BMI affiliates bore the effects of inflation and lost opportunity cost. Pre-judgment interest is necessary to reverse these effects here and in the future. *See Gierlinger v. Gleason*, 160 F.3d 858, 874 (2d Cir. 1998) (pre-judgment interest is an element of complete compensation that discourages the non-prevailing party from delaying to benefit from an interest-free loan).

CONCLUSION

For the foregoing reasons, the Opinion should be affirmed. The Interest Opinion should be vacated and remanded for further proceedings.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(G)

I, Scott A. Edelman, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this brief contains 16,346 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word Office 365 in 14-point Times New Roman Font.

Dated: January 3, 2024

/s/ Scott A. Edelman
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