**CONFIDENTIAL**

**AMERICAN ARBITRATION ASSOCIATION**

| | |
|---|---|
| **SHANE MCANALLY, et al.,**<br><br>**Claimants,**<br>**v.**<br><br>**AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,**<br><br>**Respondent.** | Case No.: 01-18-0000-5736 |

# ASCAP'S PRE-HEARING MEMORANDUM

RICHARD H. REIMER
JACKSON WAGENER
ASCAP
1900 Broadway
New York, NY 10023

*Attorneys for Respondent American Society of Composers, Authors and Publishers*

# Table of Contents

## PRELIMINARY STATEMENT

Shane McAnally and his publishing companies ("Claimants") profited handsomely from their relationship with Respondent American Society of Composers, Authors and Publishers ("ASCAP") for almost two decades. With the increasing commercial success of McAnally's musical compositions, these works qualified for, and received, substantial bonus payments – what ASCAP terms "premiums" -- as part of Claimants' ASCAP royalty distributions. When ASCAP paid Claimants premiums equal to as much as 50% of their total royalties, Claimants did not challenge the source of funding or the method of computing the premiums.

Having made a calculated decision to resign from ASCAP and license the right of performance in their works through a direct business competitor, only after they resigned did Claimants challenge ASCAP's rules that resulted in the phasing out of the premiums. While claiming to have been treated in an "unfair" or "unjust" manner, Claimants fail to address the only real issue in this appeal: Were Claimants paid royalties in a manner consistent with ASCAP's distribution rules? The ASCAP Board of Review analyzed every one of Claimants' arguments. In its decision, the Board of Review concluded that Claimants were paid royalties as prescribed by ASCAP's distribution rules as applied not only to Claimants, but also to other members who resigned at the same time as Claimants, as well.

ASCAP is the only U.S. performing rights licensing organization that both operates on a nonprofit basis and is owned and governed by its members. Every member signs the same uniform membership agreement, by the terms of which the members grant ASCAP certain rights and agree to be bound by ASCAP's Articles of Association and other governing documents. The members elect a Board of Directors comprised of twelve composers and lyricists, and twelve

representatives of music publishers. The Articles of Association empower the Board of Directors to promulgate rules and regulations governing, among other things, (i) the manner in which the license fees ASCAP collects from its licensees are paid to the members as royalties attributable to performances of the members' music; and (ii) the application of these rules and regulations when members opt to resign from ASCAP membership. These are the rules and regulations at issue in this proceeding.

Claimants were members of ASCAP from 1998 -- near the start of Mr. McAnally's songwriting career -- until 2015, when he had attained his current status as one of the most successful songwriters and independent music publisher/record producers in Nashville. While at ASCAP, Claimants earned millions of dollars in ASCAP royalties. Significant portions of those royalties resulted from application of the ASCAP rules providing for premiums. In the highly competitive music licensing marketplace, premiums are designed to compensate members whose works achieve high levels of performances and, as a result, increase the value of the ASCAP repertory to ASCAP's licensees.

Sometime in 2013, Mr. McAnally received what seemed to be an overwhelmingly attractive offer from the latest entrant into the performing rights licensing marketplace, Global Music Rights ("GMR"). In the simplest of terms, if Mr. McAnally would resign from ASCAP, remove his works from the ASCAP repertory and give GMR the right to license performances of his works, GMR would pay him an amount that, although never disclosed, would nevertheless be so substantial as to be "life-changing."

At a meeting on December 16, 2013, after ASCAP had learned of Claimants' discussions with GMR, ASCAP's then co-head of Nashville Membership, Michael Martin, asked to be advised if Mr. McAnally was seriously contemplating leaving ASCAP for GMR so that ASCAP

would have the opportunity to make a counter-offer in an attempt to keep Claimants at ASCAP. The next day, ASCAP received resignation notices from Mr. McAnally's publishing companies.

ASCAP's request for the opportunity to make a counter-offer was, in essence, met with silence. In March 2014, Mr. McAnally and Michael Baum, Mr. McAnally's business manager and the president of Mr. McAnally's publishing companies, invited ASCAP's Martin and LeAnn Phelan -- ASCAP's other co-head of Nashville membership at the time -- to a breakfast meeting. Messrs. McAnally and Baum requested the meeting so that they could tell Mr. Martin and Ms. Phelan that, after more than 15 years of membership, they were leaving ASCAP for GMR and were taking their works with them. It was the proverbial "done deal."

As Mr. Baum candidly testified, *at no time prior to their resignation from ASCAP* did Claimants either: (i) review ASCAP's governing documents; or (ii) speak with any representatives of ASCAP regarding ASCAP's survey and distribution rules and policies applicable to the calculation of royalties for resigning members. Had they done so, they would have learned that ASCAP has specific rules distinguishing between the manner in which royalties are calculated for members who resign and leave their works with ASCAP, and those who, like Mr. McAnally, choose to remove their works from ASCAP upon resignation. These rules, and others implicated when members resign -- specifically, the rules regarding "Licenses-In-Effect" and "Continuing-Members-In-Interest" -- have existed since 1960; originally were embodied in a court order; and since 2001 have been published in a document now entitled "ASCAP's Survey and Distribution System: Rules & Policies" (the "S&D Rules").

Following Claimants' resignations, ASCAP applied its resigned member rules in calculating Claimants' royalty distributions. Specifically, ASCAP phased out Claimants' royalties derived from revenues received from licensees in "unsurveyed" media, as specified in

Rule 3.3.2(ii) of the S&D Rules. Because as much as 50% of Claimants' ASCAP royalties were based on premiums funded by revenues attributable to unsurveyed media licensees, Claimants experienced a substantial reduction in their royalties. Thus, as they previously had disproportionately benefitted from the premiums, so were they conversely affected by the phase-out, as compared to other resigning ASCAP members who resigned during the same time period.

ASCAP's Articles of Association provide a remedy for members who believe ASCAP has improperly calculated their royalties. Article XIV establishes the ASCAP Board of Review, comprised of writer and publisher members elected by the ASCAP membership and empowered to hear and determine claims brought against ASCAP by members who are aggrieved by ASCAP's application of its survey and distribution rules and regulations. In 2016, Claimants initiated their Protest before the Board of Review, claiming initially that ASCAP's distribution rules, and in particular, its phase-out of premiums to Claimants, were improper, and had resulted in unfair and/or discriminatory treatment of Claimants. Following discovery, significant prehearing briefing, and a day-long hearing before seven members of the Board of Review functioning as a jury of Claimants' peers, the Board of Review issued a 27-page written decision.

The Board of Review carefully considered and rejected each of Claimants' arguments in support of their claims. In its decision, the Board of Review concluded that (i) ASCAP's distribution rules, as duly promulgated by its Board of Directors, permitted ASCAP to phase out premiums paid to members who resign and remove their works from the ASCAP repertory; and (ii) in all respects, Claimants have been treated in a manner consistent with ASCAP's survey and distribution rules and policies, applied to Claimants and other resigned members, alike.

As permitted by ASCAP's Articles of Association, Claimants have exercised their right to appeal the decision of the Board of Review to the Panel. For the reasons set forth below, ASCAP respectfully urges that the Panel should affirm the Board of Review's decision.

## STATEMENT OF THE ISSUES

The issues presented by Claimants' appeal are:

I. Whether this Panel, tasked with affirming, modifying, or reversing the decision of the Board of Review, may entertain claims that ASCAP's rules unfairly discriminate against resigning members, and/or are unlawful, unreasonable, or improper; or are such claims beyond the scope of the Board of Review's -- and this Panel's -- jurisdiction.

II. Whether ASCAP's distribution rules, which specifically distinguish between how distributions are to be calculated for resigned members who choose to remove their works from the ASCAP repertory, as opposed to current members, nevertheless require ASCAP to calculate and pay distributions to resigned members and current members in an identical manner.

III. Whether the Board of Review correctly determined that ASCAP's distribution rules permit ASCAP to phase out the payment of the Audio Feature Premium ("AFP") to resigned members of ASCAP who remove their works from the ASCAP repertory.

## STANDARD OF REVIEW

Pursuant to ASCAP's Articles of Association, the Panel's role is simply to affirm, reverse or modify the Board of Review's decision. JX 5 (Articles of Association), Art. XIV, § 4. In essence, the Articles of Association "suggest that the Panel is to act as an appellate body." *In re Karmen*, 708 F. Supp. 95, 97 (1989). In *Karmen*, Judge Conner held that the process

contemplated in ASCAP's Articles of Association conveys a right to a "limited trial *de novo*." *Id.* The Panel previously has determined that it will not allow the introduction of new evidence at the hearing. *See* Panel's Rulings on Offer of New Evidence, dated May 3, 2018. Therefore, the Panel's task is to reevaluate the Board of Review's findings of fact, while "giving some deference on issues involving credibility," (*id.* at 97-98) and determine whether, on the entire record on appeal, the Board of Review correctly determined that ASCAP properly applied its rules in calculating Claimants' royalty distributions. As to that ultimate point, Claimants retain the "burden of proof." *See* Decision issued by the Board of Review in this matter on December 22, 2017 (the "Decision of the Board of Review"), at p. 3, citing Board of Review Rules of Procedure, Rule 2.6 ("The Protesting Member shall have the burden of proof of showing that the distribution to him, her or it was improper.").

## STATEMENT OF JURISDICTION

Before discussing the substantive issues raised by Claimants' appeal, there is a threshold jurisdictional matter that must be addressed. Since filing their Complaint with the Board of Review, Claimants repeatedly have argued -- and continue to argue -- that ASCAP's rules unfairly discriminate against resigning members, and/or are unlawful, unjust, or otherwise improper, as applied to resigning members, generally, and as to Claimants, specifically.[1] As the Board of Review properly recognized, it lacks the jurisdictional authority to entertain such claims. *See* Decision of the Board of Review, at pp. 2-3.

The Parties have stipulated that the Board of Review has a limited jurisdictional mandate. *See* Joint Stipulations at p. 4, Stipulated Applicable Rule #1. As per Rule 1.1 of the Board of

[1] *See, e.g.*, the entirety of Section A of the Argument Section of Claimants' Pre-Hearing Memorandum.

Review's Rules of Procedure, "the jurisdiction of the Board of Review is limited only to complaints from any member who believes the Society has not made proper distribution of royalties to him, her or it in accordance with the rules and regulations adopted by the Board of Directors governing the distribution of royalties." *Id.* And, Rule 1.2 of the Board of Review's Rules of Procedures provides as follows:

> The Board of Review does not have jurisdiction over any claims other than those set forth in Rule 1.1. The Board of Review will not entertain claims such as, but not limited to, the following: (1) that the rules and regulations adopted by the Board of Directors governing distribution of royalties are unreasonable, improper or unlawful; or (2) that notice of changes in the rules and regulations adopted by the Board of Directors governing distribution of royalties was improper, insufficient, or unlawful.

*Id.* Thus, the Board of Review may neither substitute its views as to the propriety of any of ASCAP's distribution rules for the views of ASCAP's Board of Directors, nor question the procedures employed by ASCAP to advise its members of changes in those rules.

The Panel has jurisdiction over this matter pursuant to Article XIV of ASCAP's Articles of Association, following Claimants appeal to the Panel of the Board of Review's decision in this matter. Pursuant to Section 4 of Article XIV, the Panel may affirm, reverse or modify the decision of the Board of Review; by definition, then, it may not consider claims not properly before the Board of Review. As such, any claim that the resigned member rules as applied to Claimants -- or any other resigned member, for that matter -- are discriminatory, unreasonable, improper or unlawful; or, similarly, "unfair, inequitable or unjust," is not a matter that may be considered by this Panel.[2] Nor may the Panel find that Claimants were not given proper notice of changes in those rules.

---

[2] Before ASCAP's Consent Decree was last modified in 2001, the Articles of Association afforded an appellate Panel, in reviewing a decision of the Board of Review, the power to "void such rule or regulation on grounds of its discriminatory or arbitrary character." *In re Karmen*, 32 F.3d 727, 732 (2d Cir. 1994). The Panel's authority to void a distribution rule has since been

## STATEMENT OF THE CASE

Claimants submitted their Complaint to the ASCAP Board of Review on March 23, 2016 ("Complaint"). ASCAP filed a timely Answer to the protest on May 9, 2016 ("Answer"). Subsequently, the parties engaged in substantial discovery; ASCAP produced more than 2,500 pages of documents, and allowed Claimants' counsel, Mr. Turner, to conduct an informal telephonic interview of ASCAP's Chief Economist, Dr. Peter Boyle for several hours over a two-day period. In advance of the Board of Review Hearing, Claimants and ASCAP also filed pre-hearing briefs and letters.

On July 12, 2017, a day-long hearing was held before a quorum of seven members of ASCAP's Board of Review, an independent body elected by ASCAP's members pursuant to ASCAP's Articles of Association. At the hearing, the Board of Review heard live testimony from five witnesses: claimant Shane McAnally, Michael McAnally Baum, the President of Mr. McAnally's publishing and management companies; Brian Roberts, ASCAP's COO; Dr. Peter Boyle, ASCAP's SVP and Chief Economist; and Michael Martin, ASCAP's Vice President of Nashville Membership. In addition to the witnesses' testimony, the Board of Review also considered the Complaint and Answer; the parties' prehearing statements and certain additional correspondence submitted by the parties; some 65 Joint Exhibits; the parties' Confidential Joint Stipulations; and each side's Demonstratives. The Board of Review also permitted Claimants and ASCAP to make opening statements and closing arguments.

Following extensive deliberations, the Board of Review issued a detailed 27-page decision on December 22, 2017. In its decision, the Board of Review (i) concluded that

---

removed; it may now only affirm, reverse, or modify the decision of the Board of Review. JX 5, Art. XIV.

ASCAP royalty distributions to Claimants had been calculated properly and in accordance with rules and regulations duly adopted by the ASCAP Board of Directors. The Board of Review also considered and rejected all of Claimants' arguments to the contrary, concluding that (i) ASCAP's distribution rules, as duly promulgated by its Board of Directors, permitted ASCAP to phase out payments of premiums to members who resign from ASCAP and remove their works from the ASCAP repertory; (ii) the applicable distribution rules and policies are either published or are disclosed to members who, unlike Claimants, inquire as to how the specific rules and policies are applied to calculate royalties of resigned members; (iii) there was no basis for Claimants' assertion that they were "targeted" by a "new interpretation" of the applicable rules and (iv) an arbitration proceeding involving BMI and several of its affiliates who resigned from BMI more than 30 years ago and left their works with BMI has no relevance to this proceeding.

Although Claimants repeatedly imply that the Board of Review process is somehow biased against protesting members (*see, e.g.*, Claimants' Pre-Hearing Memorandum at p. 2, suggesting that the Board of Review is upholding ASCAP's allegedly "nefarious" behavior), there is absolutely no basis for this supposition. Comprised of six songwriter members and six music publisher members, ASCAP's Board of Review functions as a quintessential jury of peers of any protesting member. The members of the Board of Review are tasked with interpreting rules that are binding not only upon the resigning member but also upon all other members of ASCAP, including, by definition, the members of the Board of Review. Thus, on behalf of the membership that elects them, and on their own behalf, the Board of Review's true motivation is not to rubber-stamp the implementation of S&D Rules as undertaken by ASCAP's management; rather, their motivation is to make sure that ASCAP correctly applies its

distribution rules to all members. It is in this sense that the Board of Review's decision should be read as concluding that Claimants were, indeed, treated fairly.

Having carefully considered all of the evidence, Claimants' allegations were rejected by the Board of Review in their entirety. For the reasons set forth in further detail below, the Panel should affirm the decision of the Board of Review.

## STATEMENT OF FACTS

### A. ASCAP's Survey And Distribution Rules

#### 1. Background

In 1959, ASCAP and the U.S. Department of Justice agreed upon significant changes to the then-existing ASCAP distribution system. Those changes were embodied in an order entered on January 7, 1960 by the U.S. District Court for the Southern District of New York and attachments to that order (the "1960 Order"). JX 2. The 1960 Order was effectively superseded when the ASCAP Consent Decree was last amended in 2001. Shortly thereafter, however, ASCAP's Board of Directors adopted, virtually in their entirety, the distribution rules that had been set out in the 1960 Order, as those rules had been amended from time to time. Today, ASCAP's distribution rules are set forth in "ASCAP's Survey and Distribution System: Rules & Policies" (the "S&D Rules"). JX 14; *see* Transcript of Board of Review Proceedings held on July 12, 2017 ("Hearing Tr.") at 269:12-270:11.

ASCAP's Board of Directors is responsible for promulgating the rules regarding ASCAP's survey and distributions policies and practices in a fair and equitable manner. Hearing Tr. at 200:5-13 (Roberts); JX 5 (Articles of Association), Art. V § 2 (the "enumerated powers" of the Board of Directors includes, among other powers, the power to "fix the rate, time and manner of payment of royalties for the performances of all works registered with the Society; . . ." and

the power to "distribute among the members the royalties collected in proportionate shares provided for in the scheme of allotment of royalties prescribed in these articles."). For that reason, although rule changes or modifications may be suggested or recommended by ASCAP's Management, the Board of Directors' Survey and Distribution Committee, or even individual members, ASCAP's S&D Rules are modified or newly implemented only upon adoption of a resolution of the Board of Directors. Hearing Tr. 198:5-13.

Unlike its competitors, ASCAP makes its distribution rules, as set forth in the S&D Rules -- along with its other "governing documents" -- available to the membership and, indeed, the general public. Hearing Tr. at 199:18-200:4 (Roberts). Because the rules are complex, however, it is not possible -- nor does ASCAP endeavor -- to set forth every nuance of the manner in which those rules are implemented in practice. Hearing Tr. at 200:18-201:5 (Roberts). Furthermore, because ASCAP exists in a highly competitive market place, ASCAP does not publicly disclose elements of its survey and distribution rules and policies that it views as highly confidential and/or proprietary, including, for example, the sources of funding for "premiums" (bonus payments) for highly performed works on terrestrial and satellite radio, online streaming platforms, and television. Hearing Tr. at 201:17-202:09; *see, generally*, JX 14 (S&D Rules), Rule 2.8 ("Audio Feature Premium") and Rule 2.9 ("Television Premium").[3] Most importantly, however, ASCAP makes such information available to its members, when asked. *See, e.g.*, Hearing Tr. 211:08-212:12 (Roberts); Hearing Tr. 344:07-344:10 (Boyle); Hearing Tr. 350:25-351:06 (Boyle); 351:13-351:15 (Boyle); 360:05-360:12 (Boyle).

[3] Indeed, it is because of the highly competitive environment in which ASCAP and its members conduct business that ASCAP refrains from disclosing the specific source of funds for any elements of its domestic distributions. Similarly, although detailed information about the ASCAP Plus Awards and the ASCAP OnStage program is available on the ASCAP website, the source of funding for those programs is not publicly disclosed.

2. "Follow-the-Dollar" and Surveyed vs. Unsurveyed Media

A core principle underlying ASCAP's distribution rules is "follow-the-dollar" -- that is, "royalty distributions made to members for performances in each licensed medium should reflect the license fees paid by or attributable to users in that medium." JX 14, Rule 1.2. In other words, and as relevant to this matter, license fees collected by ASCAP from terrestrial radio licensees are paid to those members whose works are performed in that medium. Hearing Tr. at 195:13-196:07 (Roberts).

At the most basic level, there are two distinct types of media that are subject to ASCAP's distribution rules: surveyed media, which accounts for [redacted] of ASCAP's domestic revenues; and unsurveyed media, which accounts for [redacted] Hearing Tr. at 196:08-197:13 (Roberts). Where possible, ASCAP aims to obtain performance data for any given medium of performance via census or sample surveys. Hearing Tr. at 270:12-270:24 (Boyle).

Surveyed media are all media for which performance data are included in ASCAP's scientific survey of performances, including, but not limited to: terrestrial radio, satellite radio, network and local television, cable television networks, background/foreground music services, on-line streaming services and many concerts. *See, e.g.*, Hearing Tr. 193:20-195:10 (Roberts). Unsurveyed media, by contrast, refers to media for which performance data are not available, and includes, for example, bars, nightclubs, restaurants, retail stores, and most other nonbroadcast, or "general" licensees. Hearing Tr. 196:23-197:07 (Roberts).

With respect to revenues obtained from licensees in unsurveyed media, the overarching question is: how to distribute those revenues when there is no reliable scientific data regarding actual performances? ASCAP's practice is to use certain performances in surveyed media as

"proxies" for performances by unsurveyed media licensees. Hearing Tr. at 196:23-197:7 (Roberts); Hearing Tr. at 27015-24 (Boyle); JX 14 at Rule 1.5. For decades, ASCAP has relied on performances in terrestrial radio as a proxy for unsurveyed media performances; more recently, it has expanded the proxies for unsurveyed media to include performances on satellite radio and online streaming sources. And, ASCAP has consistently used revenues obtained from unsurveyed media licensees to fund premiums. During the entire period of their membership in ASCAP, Claimants never questioned or challenged this policy for calculating and funding their premiums.

3. Premiums

In addition to "base" royalty distributions, ASCAP's Board of Directors also has from time to time granted ASCAP the authority, "in the exercise of its business judgment," to pay "premiums" in a survey quarter for works achieving high levels of feature performances in certain identified media. *See, e.g.*, JX 14, Rule 2.8 (describing ASCAP's "Audio Feature Premium"). Premiums represent an important "competitive tool" in ASCAP's arsenal. Hearing Tr. 209:08-209:20 (Roberts). One of the primary purposes of ASCAP's premiums is to incentivize members to join -- or remain with -- ASCAP, and thereby maintain and increase the value of ASCAP's repertory. JX 20 (ASCAP's Management's Presentation to Survey & Distribution Committee, Feb. 2015) at ASCAP039 (describing the benefits to ASCAP of implementing its Audio Feature Premium).

Beginning in 1994, in response to increased competition with its primary competitor, Broadcast Music, Inc. ("BMI"), ASCAP created a "Radio Feature Premium" (the "RFP"). *See* Corrected JX 27, at ASCAP0070-0071 (Marilyn Bergman Letter to Members of the Society, dated April 25, 1994); Hearing Tr. 282:13-282:17 (Boyle); Hearing Tr. 284:15-285:02 (Boyle).

The RFP allowed ASCAP to increase payments to works that achieved a high number of radio performances. Corrected JX 27, at ASCAP0070-71.

ASCAP's RFP remained in place until February 2015 when ASCAP's Board of Directors accepted and approved the institution of the Audio Feature Premium ("AFP"). Joint Stipulations, Uncontested Fact No. 12.[4] ASCAP's AFP is described in Rule 2.8 of the S&D Rules, which states, in relevant part:

> In the exercise of its business judgment, ASCAP may make additional payments in a survey quarter for works achieving high levels of Feature Performances in ASCAP's terrestrial radio, satellite radio and music streaming service surveys, respectively, as such levels shall be determined by ASCAP; provided, however, that such additional payments shall be based primarily on the number of Feature Performance credits or plays received by the works for performances in each survey quarter.

The AFP was an expansion of the RFP to include payments for works achieving high levels of performance not only in ASCAP's terrestrial radio survey, but also in its satellite radio and music streaming service surveys. *See* JX 20 (ASCAP's Management's Presentation to Survey & Distribution Committee, Feb. 2015); JX 21 (Report of Survey & Distribution Committee, Feb. 5, 2105; JX 22 (Minutes of Board of Directors Meeting, Feb. 5, 2015); Hearing Tr. 306:23-307:19 (Boyle). As with the adoption of the RFP in 1994, ASCAP's expansion of the RFP into the AFP was substantially driven by competitive pressures in the PRO industry. Hearing Tr. 209:08-209:20 (Roberts).

Since implementing the RFP in 1994, ASCAP has funded premiums from revenues obtained from unsurveyed media licensees. Corrected JX 27, at ASCAP0071; Joint Stipulations, at Uncontested Fact 4. It is not the case, however, that ASCAP has always used 100% of such

[4] The AFP was first implemented in connection with distributions in June and July of 2015, for publisher and writer members, respectively. Joint Stipulations, Uncontested Fact No. 13.

revenue to fund its premiums. Rather, the portion of revenue from unsurveyed media that was allocated towards funding the RFP changed over time. *Id.* For example, in 1994, when the RFP was first adopted, the revenues from unsurveyed media were allocated to three sources, with one portion used to fund the RFP; a second portion distributed on the basis of all feature performances on radio; and a third portion distributed on the basis of all performances on television. Hearing Tr. 285:17-286:06.

Since February 2015, with the adoption of the AFP, 100% of the revenue from unsurveyed media licensees has been used to fund the AFP. *See, e.g.*, Hearing Tr. 307:20-308:4 (Boyle); Hearing Tr. 251:05-251:06 (Roberts); *see also*, Hearing Tr. 347:16-348:07 (Boyle). Furthermore, although a work's *eligibility* to receive AFP payments is determined, in part, based on the work achieving a certain number of credits in terrestrial radio, *ASCAP has at all times separately calculated credits for its premiums* (*i.e.*, in calculating AFP distributions, ASCAP does not simply carry over credits from radio).[5] *See, generally*, Hearing Tr. at 314:09-318:16. That is because premiums come from an entirely separate budget: revenue attributable to unsurveyed general licensees; [redacted]

4. Rules Regarding Distributions to Resigned Members

For nearly six decades, ASCAP's distribution rules have drawn a distinction between distributions for resigned members and distributions for "current" members. Hearing Tr. 273:12-274:15 (Boyle); JX 2 (1960 Order) at ASCAP0026-28 (for resigning publisher members),

[5] This was also the case when the RFP was in place. *See, e.g.*, JX 54 K (Royalty Statement from Shane McAnally's July 2014 Domestic writer distribution) at 92 of 124 (in the section of royalty statement relating to radio, radio feature premium credits are separately listed).

ASCAP0044-26 (for resigning writer members). That distinction continues to exist in ASCAP's S&D Rules. *See* JX 14, Rule 3.3 (setting forth distribution rules for resigning members).

In addition to drawing a distinction between current members and resigned members, ASCAP's distribution rules also draw a distinction between resigned members who leave their works with ASCAP, and resigned members who choose to remove their works from the ASCAP repertory.[6] Hearing Tr. 275:04-13. Thus, when a member decides to resign from ASCAP, that member faces a decision regarding whether to remove his or her works -- or share of works -- from the ASCAP repertory. Hearing Tr. at 202:18-203:06 (Roberts).[7]

Members who choose to leave their works with ASCAP are paid on the same basis as current members. Hearing Tr. 357:4-11 (Boyle) ("If the resigning members leave works . . . [w]e pay the base rates, we pay the premiums, we pay everything. There is no difference in distributions to resign[ed] member[s] for works they've left in the repertoire."). As one would reasonably expect, ASCAP royalty payments to resigned members who remove their works from the ASCAP repertory decrease over time and, eventually, cease, altogether. That is because, once removed, ASCAP may no longer license those works prospectively.

ASCAP's resigned member rules are divided into two subsections. Rule 3.3.1(i) deals with royalty distributions to resigned members for works with respect to which ASCAP continues to license a share of the work by virtue of the fact that another ASCAP member continues to claim an interest in the work. The rule effectively provides that the resigning

[6] A resigning member's choice to remove works from the ASCAP repertory is not "all or nothing." The member may choose to leave some works while removing others.

[7] [redacted]

member will continue to be paid royalties based on the performance credits earned for such works as long as the works are not licensed through any other performing rights organization. *See* JX 14, Rule 3.3.1(i). Because McAnally, moved his repertory to GMR upon his resignation from ASCAP (*see* Additional Joint Stipulation No. 2), Rule 3.3.1(i) simply has no applicability to this matter. Hearing Tr. at 331:22-334:06 (Boyle).

Rule 3.3.2 codifies the concept that a resigning member's right to remove works from the ASCAP repertory is subject to "Licenses-In-Effect."[8] The basic premise of Licenses-In-Effect is that a resigning members' right to remove works is "subject to the rights or obligations existing between ASCAP and its licensees under any . . . written final agreement entered into by ASCAP and any Music User" that remains in effect -- *i.e.*, licenses still within their term -- as of the effective date of the member's resignation. JX 16 (Compendium), § 1.11.3. For such "Licenses-in-Effect" ASCAP will continue to license performances of the works written during ASCAP membership pursuant to the terms of those licenses, until they expire; and the resigning member "shall continue to receive distributions from ASCAP on the basis of performances made under such Licenses-In-Effect." JX 16 (Compendium), § 1.11.5; JX 14 (S&D Rules), Rule 3.3.2.

The impact of the Licenses-In-Effect rule on resigning members who remove their works from the ASCAP repertory, like Claimants, is threefold: First, as set forth above, final licenses continue in effect until they expire on their own terms, and the resigning member's right to receive a distribution of fees for those licenses remains unchanged. JX 14, Rule 3.3.2. Once the license

[8] ASCAP's current rules regarding Licenses-In-Effect trace their origins back nearly 70 years to the 1950 version of the Consent Decree entered in *U.S. v. ASCAP* (the "Amended Final Judgment"). JX1, Section IV(G) ("the right of any member to withdraw . . . shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses").

term of a "final license" expires, however, the resigned member immediately stops receiving ASCAP royalties attributable to performances by that licensee. Second, resigned members do not receive royalties attributable to performances attributable to music users that are licensed on an "interim" rather than final basis. Hearing Tr. 297:22-298:04 (Boyle).

Lastly, as provided in Rule 3.3.2(ii) of the S&D Rules, royalties attributable to performances in unsurveyed media (determined by "proxy," and based on the allocation of license fees from unsurveyed media as part of ASCAP's distribution system) are "phased out" over four quarters. This phase-out is meant to account for the fact that the great majority of ASCAP's thousands of licenses for bars, restaurants, nightclubs, retail stores and most other general licensees are for one-year terms that expire on different dates during the calendar year with the majority of such licenses expiring during the first calendar quarter. It therefore makes sense to implement the reduction in revenue from unsurveyed media licensees gradually over four quarters, rather than immediately upon resignation. Hearing Tr. 205:21-207:7 (Roberts); Hearing Tr. 276:22-278:14 (Boyle).

The rationale for the Licenses-In-Effect rule is straightforward: When licensees obtain a final ASCAP license, the licensees pay fees for the right to perform any of the works in the ASCAP repertory at the time the license is executed, for the duration of the term of each applicable ASCAP license. Thus, the Licenses-In-Effect rule -- by ensuring that licensees may continue to use the repertory that they paid for -- is designed to protect the value of the final license from the perspective of the licensee. Hearing Tr. 203:07-203:20 (Roberts). It also avoids the need to renegotiate final licenses every time a work is removed from the ASCAP repertory. Hearing Tr. 358:22-359:08 (Boyle). Concomitantly, the resigning members are entitled to continue to be paid by ASCAP for performances of their works under Licenses-In-Effect. Thus,

the concept is simply a matter of fairness and efficiency for both licensees and resigning members.

5. Rules Regarding the Implementation of the Phase-Out

ASCAP's distribution rules regarding resigned members have remained substantially unchanged since 1960. *See* JX 2 (1960 Order), ASCAP0027-28 *compare* JX 14 (S&D Rules), Rule 3.3.2(ii). As a result, for more than 50 years, when members resign from ASCAP and choose to remove their works from the ASCAP repertory, their right to receive a share of revenues from unsurveyed media licensees has been "phased out" over the course of four quarters. *Id.* Since 1994, when ASCAP first adopted the RFP, that phase-out has included the phasing out of premiums. Hearing Tr. 287:10-289:21 (Boyle); 290:05-291:02 (Boyle); 294:08-296:04 (Boyle).

The methodology for achieving the phase-out of royalties from unsurveyed media has, however, changed over time. Prior to 2009, ASCAP calculated resigned member payments via a complex three step process that involved the division of credits into separate surveyed and unsurveyed credit values. JX17 (June 2002 Management Presentation to the Board of Directors' Survey & Distribution Committee), at ASCAP0368. In 2002, ASCAP's management recognized that this three-step process had become outdated because, by that time, ASCAP had started separately calculating credits attributable to unsurveyed media. *See* JX 17 at ASCAP0369. As a result, ASCAP's management proposed -- and the Board of Directors promulgated -- a new rule allowing ASCAP to calculate resigned member payments using the credits as actually calculated. *See, generally*, Joint Stipulations, at Uncontested Fact Number 6; Hearing Tr. 288:05-291:12; JX

17; JX 18 (June 12, 2002, Report of the Survey & Distribution Committee); JX 19 (June 13, 2002, Board of Directors' Meeting Minutes).[9]

**B. The Facts As To Claimants' Resignations From ASCAP**

Claimant Shane McAnally is a highly accomplished, producer, songwriter, music publisher, and performing artist. *See* Complaint ¶ 2; Answer to ¶ 2. He became an ASCAP writer member in the 1990s, and his publishing companies subsequently became ASCAP publisher members, as well. *Id.* Michael McAnally Baum handles all of Mr. McAnally's business affairs, and is also the president of his various publishing companies. Hearing Tr. 103:25-104:07 (Baum). At the Board of Review Hearing, McAnally testified that he had not reviewed his ASCAP statements in nearly a decade. Hearing Tr. 57:23-58:08 (McAnally).

Beginning in mid-2013, Mr. McAnally and Mr. Baum discussed leaving ASCAP for another performing rights organization, Global Music Rights ("GMR"), and entered into negotiations with principals of GMR regarding such a move. Hearing Tr. 83:22-85:22 (McAnally); Hearing Tr. 147:16-148:13 (Baum). On December 16, 2013, Mr. Baum met with Michael Martin -- who was at that time ASCAP's co-head, and is now head, of ASCAP Nashville membership -- at ASCAP's Nashville office to discuss GMR's interest in making an offer for McAnally to join the roster of GMR. Additional Joint Stipulation No. 1. During that meeting, Mr. Martin asked that ASCAP be allowed the opportunity to make a counter-offer

[9] Pursuant to the newly adopted rule, the phase out of revenues from unsurveyed media licensees was to be accomplished through taking a resigned member's "credits attributable to unsurveyed general licensing money," and phasing out those credits over four quarters. JX 17, at ASCAP0370; JX 18; JX 19. By definition, this included the phase out of credits for the RFP -- and subsequently the AFP. *See, e.g.*, Hearing Tr. 314:09-318:16 (explaining how credits for premiums are separately calculated and funded by Unsurveyed Media Revenues); Hearing Tr. 341:13-341:17 (Boyle) ("The fact that the unsurveyed money is allocated in a certain way and generates credits guides how those performances are phased out and how resigned members are paid.").

before Claimants finalized their move to GMR. The very next day, on December 17, 2013, resignations from ASCAP were submitted for Mr. McAnally's publishing companies Crazy Water Music and Smack Ink. *See* Joint Stipulations, at Uncontested Fact 7.

On March 12, 2014, three months after submitting resignations for Crazy Water Music and Smack Ink, Messrs. Baum and McAnally had breakfast with ASCAP's then co-heads of Nashville Membership, Michael Martin and LeAnn Phelan (the "Breakfast Meeting"). *See* Additional Joint Stipulations No. 2. The purpose of the Breakfast Meeting was so that Messrs. Baum and McAnally could inform Mr. Martin and Ms. Phelan about Claimants' impending decision to resign from ASCAP and move their repertoire of music to GMR. *See* Additional Joint Stipulations No. 2. Although McAnally had not yet signed a contract with GMR, as of the Breakfast Meeting, he had made a firm decision to leave ASCAP and take his catalog of works with him to GMR. *See* Additional Joint Stipulations No. 2; *see also* Hearing Tr. 171:20-172:21.

According to Mr. McAnally, during the Breakfast Meeting, Mr. Martin offered to match GMR's offered financial terms, although Mr. McAnally did not disclose the terms of his GMR deal to Mr. Martin. Hearing r. 87:22-88:11, 91:25-92:05 (McAnally); Hearing Tr. 173:25-184:04 (Baum). In fact, at no point prior to, during, or even after the March 12, 2014 meeting did either Mr. Baum or Mr. McAnally disclose to Mr. Martin, Ms. Phelan -- or anyone else at ASCAP for that matter -- the specific terms of his deal with GMR. *See, e.g.*, Hearing Tr. 173:25-174:04 (Baum); 174:18-22 (Baum) (noting that discussions regarding the deal with GMR were kept "[v]ery, very vague"). Notably, even during the course of this very proceeding, Claimants have refused to disclose the terms of their deal with GMR. *See, e.g.*, Hearing Tr. 85:24-86:18. While Claimants have consistently refused to disclose any aspect of the financial terms of the

deal, Mr. Baum did concede that the deal was "financially attractive." Hearing Tr. 171:20-172:21 (Baum).[10]

In the quarters leading up to Claimants' resignation, premiums -- totaling hundreds of thousands of dollars, cumulatively -- frequently accounted for more than half of the revenues earned by Mr. McAnally. *See* Hearing Tr. 114:18-115:12 (Baum); Hearing Tr. 142:21-143:5 (Baum). Notwithstanding that fact, Mr. Baum -- who, as Mr. McAnally's business manager, was the individual that Claimants relied upon to review and analyze their royalty statements (*see, e.g.*, Hearing Tr. 57:23-58:08 (McAnally); Hearing Tr. 104:08-104:12 (Baum) -- testified that he could not recall ever asking ASCAP to explain how the premiums were funded, because he thought he "understood it a little better." Hearing Tr. 145:08-15; *see also* Hearing Tr. 164:02-17 (Baum); 174:23-177:17 (Baum). Nor could Mr. Baum specifically recall having read ASCAP's Articles of Association, Compendium, or S&D Rules at any point prior to McAnally's resignation. *See, e.g.*, Hearing Tr. 150:05-151:18 (Baum). Instead, Mr. Baum testified that, in order to understand ASCAP's rules regarding collection and distribution, he relied on his own financial analyses, and his background in mortgage financing. Hearing Tr. 104:13-108:18 (Baum); *see also* 187:14-188:16 (Baum).

### C. The Facts Regarding Claimants' Post-Resignation Distributions

Claimants' musical compositions that were written before the applicable effective resignation dates were subject to the terms and conditions of ASCAP's agreement with the Radio Music License Committee, ("RMLC") as a "License-In-Effect" through December 31, 2016. *See, e.g.*, Joint Stipulations, at Uncontested Fact No. 17; JX 63, at § 1 (ASCAP 2010 RMLC

[10] Mr. Martin testified that during the breakfast meeting, "[w]ell, part of what we talked about, [Mr. McAnally] goes listen, I love working with you guys, you've done nothing wrong, we've had great success together, but [he] felt like this was a life-changing opportunity for him creatively." Hearing Tr. 376:12-376:16 (Martin)

Radio Station License Agreement). Through December 31, 2016, Claimants' works in ASCAP's repertory were publicly performed by radio stations and ASCAP collected license fees pursuant to the ASCAP 2010 RMLC Radio Station License Agreement for the broadcast of public performances of those songs. *See* Uncontested Facts 18-19.

With respect to performances on the thousands of terrestrial radio stations represented by the RMLC and bound by the terms of the ASCAP 2010 RMLC Radio Station Agreement, Mr. McAnally received payment in full, on equal footing with his ASCAP co-writers, for the "Base Credits" (*i.e.*, the credits for terrestrial radio performances on RMLC stations, funded by revenues collected under the terms of the ASCAP 2010 RMLC Radio Station License Agreement). *See, generally*, Hearing Tr. 298:16-303:21 (Boyle); Hearing Tr. 354:15-356:17.

Mr. McAnally's right to receive premiums (*i.e.*, payments based on the credits for the AFP, funded by revenues from unsurveyed media licensees) was phased out over the course of four quarters following his resignation. Joint Stipulations, Uncontested Fact No. 22. *See, generally*, Hearing Tr. 298:16-303:21 (Boyle); Hearing Tr. 354:15-356:17.

Following his resignation, McAnally's distributions and royalty statements were delayed, in some cases by nine months, throughout 2015. Joint Stipulations, Uncontested Fact No. 21. ASCAP's delay in providing Claimants with their statements during 2015 was caused by the need to reconcile ASCAP's records concerning the works that were being removed from the ASCAP Repertory and because ASCAP's Chief Economist had to calculate and create the resigned member statements manually for McAnally and other former members who resigned and removed their works during that time frame. *See, e.g.*, 216:18-218:10 (Roberts); 321:20-322:20 (Boyle). Manual calculations were necessary at the time because, as of early 2015, ASCAP's computer system was not programmed to calculate royalties for those members who

elected to remove their works. *See* Hearing Tr. 292:04-293:07 (Boyle); Hearing Tr. 218:05-10 (Roberts). At significant expense, ASCAP has since updated its computer systems so that calculation of royalties for resigned members is now fully automated. *See* Hearing Tr. 218:10-218:19 (Roberts).

## ARGUMENT

### I. Distributions For Resigned Members Who Remove Their Works From The ASCAP Repertory Are Calculated On A Different Basis Than For Current Members

Claimants assert that, as a matter of "fairness," royalties paid to resigning members should be the same as those paid to current members of ASCAP. This assertion ignores the applicable ASCAP rules. As set forth in detail in Section I.D., above, Rule 3.3 of ASCAP's S&D Rules specifically delineate how distributions are to be calculated for resigned members. Pursuant to Rule 3.3. members, such as Claimants, who remove their works from the ASCAP Repertory upon resignation and license those works through another performing rights organization, simply are not paid on the same basis as current members. Rather, for such resigned members, the right to receive ASCAP royalties diminishes over time, as follows:

- The right of resigned members who remove their works from the ASCAP repertory to receive royalties from various "Licenses-In-Effect" continues until the license expires, on a license-by-license basis.
- The right of resigned members who remove their works from the ASCAP repertory to receive royalties from music users licensed on an interim basis terminates immediately upon resignation.
- The right of resigned members who remove their works from the ASCAP repertory to receive royalties attributable to unsurveyed media sources is phased out over four quarters.

Notwithstanding all of the foregoing, Claimants insist that ASCAP's rules nevertheless require ASCAP to make distributions to resigned members and current members on the exact same basis.[11] In support of that proposition, Claimants principally point to Rules 3.1.3 and 3.31 of ASCAP's S&D Rules. However, Rule 3.1.3 has no bearing on ASCAP's resigned member rules; it relates instead to a member's election of the manner in which their distributions are to be calculated. *See* JX 14, at Rule 3.1.3; *see also* JX 14 at Rule 3.1.2; *see also* Decision of the Board of Review at pp. 18-19.

While Rule 3.3.1 does set forth a "resigned member" rule, the provisions of Rule 3.3.1 are applicable only where "no other performing rights licensing organization has any such right." JX 14, Rule 3.3.1. Here, of course, Claimants elected to remove their works from the ASCAP repertory and license them through GMR. *See* Additional Joint Stipulation No. 2; *see also* Hearing Tr. 333:17-334:6 (Boyle); Hearing Tr. 224:05-224:12 (Roberts); Hearing Tr. 242:18-242:22; Decision of the Board of Review at pp. 17-18.

Indeed, if it were the case that either Rule 3.1.3 or Rule 3.3.1 required ASCAP to pay resigned members and current members on precisely the same basis, such an interpretation would render meaningless the provisions of Rule 3.3.2. It is a fundamental principle of contract law that an agreement should not be interpreted in any manner that would "render any term, phrase, or provision meaningless or superfluous." *See, e.g.*, *Ward v. TheLadders.com, Inc.*, 3 F. Supp.3d 151, 162 (S.D.N.Y. 2014) (internal quotation omitted); *see also* Decision of the Board

[11] To be clear, ASCAP agrees that resigned members who leave their works with ASCAP upon resignation are entitled to be paid on the same basis as current members. And that is how ASCAP pays those resigned members. Hearing Tr. 309:22-311:23 (Boyle); Hearing Tr. 359:20-360:04 (Boyle).

of Review at p. 19 ("McAnally's interpretation would be in direct conflict with Section 3.3.2's specific provisions for resigned members who elect to remove their works.")

Fundamentally, there is nothing at all "unfair" in paying resigned members who choose to remove their works from ASCAP differently from those who resign but leave their works.

## II. ASCAP's Distribution Rules Permit ASCAP To Phase Out AFP Payments To Resigned Members Who Remove Their Works From The ASCAP Repertory

Rule 3.3.2(ii) of ASCAP's S&D Rules provides for a four-quarter phase-out of distributions of revenue from unsurveyed media to resigning members who remove their works from the ASCAP repertory. JX 14, Rule 3.3.2; *see also* Decision of the Board of Review at pp. 15. Since 1994, when ASCAP first implemented the RFP, as a precursor to the AFP, ASCAP has used revenues from unsurveyed media to fund its premiums. As a result, since 1994, premiums have been subject to a phase-out for resigning members who remove their works from the ASCAP repertory.

In 2002, ASCAP's Board of Directors promulgated a rule permitting ASCAP to phase out a resigning member's right to receive Unsurveyed Media Revenues by phasing out "credits attributable to unsurveyed general licensing money." JX17, at ASCAP0370; JX 18; JX 19; *see also*, Decision of the Board of Review at pp. 15-16. That rule, however, was not implemented until 2009 when ASCAP's upgraded computer system went live. *See* Hearing Tr. 291:13-292:21 (Boyle). By definition, because the premiums reflected credits that were funded through "unsurveyed general licensing money," the Board of Director's 2002 resolution unambiguously permitted the phase-out of premium credits. *See, e.g.*, Hearing Tr. 314:09-318:16; Hearing Tr. 341:13-341:17 (Boyle) ("The fact that the unsurveyed money is allocated in a certain way and generates credits guides how those performances are phase out and how resigned members are paid."); *see also*, Decision of the Board of Review at pp. 15-16.

Claimants admits that ASCAP's Survey & Distribution Rules allow for the phase-out of revenues derived from unsurveyed media licensees payable to resigned members who remove their works from the ASCAP repertory. *See* Claimants' Pre-Hearing Memorandum at pp. 6, 16. Notwithstanding this admission, Claimants continue to assert that they are entitled to receive AFP payments even though the AFP is funded by revenues from unsurveyed media. In order to reconcile this obvious contradiction, Claimants mischaracterize the interplay between the payment of royalties for performances on commercial radio and the payment of the AFP. *See, e.g.*, Claimant's Pre-Hearing Memorandum at p. 6. It simply is not accurate to suggest that the AFP constitutes payment for surveyed performances on radio, for the reasons set forth below.

Pursuant to the "follow-the-dollar" principle, revenues from ASCAP's commercial radio station licensees are aggregated and paid out to those members whose works are performed on commercial radio stations. Because ASCAP's license agreement with the RMLC -- on behalf of the majority of the commercial radio industry -- was a "License-In-Effect" at the time Claimants' resigned from ASCAP, ASCAP continued to pay Claimants the full value of all credits generated by performances on commercial radio stations licensed pursuant to the agreement until it terminated on December 31, 2016. *See, generally*, Hearing Tr. 298:16-303:21 (Boyle); Hearing Tr. 354:15-356:17.

Although credits from ASCAP's terrestrial radio survey, together with credits from ASCAP's satellite radio survey, and online music survey, determine a work's "eligibility" for AFP payments, ASCAP separately generates credits for the AFP. And, of course, unlike the terrestrial radio credits that are funded by revenues from radio stations (*i.e.*, a surveyed medium), AFP credits are funded by revenues from unsurveyed media. Thus, Claimants' suggestion that AFP credits are categorically equivalent to terrestrial radio credits is simply inaccurate.

In fact, funding the AFP using revenues obtained from unsurveyed media licensees is both a rational and appropriate manner in which to distribute such revenues by "proxy." Because performances in terrestrial radio, satellite radio, and music streaming services are considered the relevant proxies for unsurveyed media performances, it is entirely consistent to use revenues obtained from unsurveyed media to fund premiums that reward high levels of performances on terrestrial radio, satellite radio, and music streaming services. *See, e.g.*, Hearing Tr. at 342:14-343:14 (Boyle); Correct JX 27, at ASCAP0071 ("In part to fund the RFP . . . the Society is modifying the proxy used for distributing unsurveyed general licensing revenues.").

## III. ASCAP Did Not Originate The AFP Phase-Out To Punish Claimants

ASCAP's rules permit it to phase out AFP payments. In an attempt to undermine this fact, Claimants repeatedly proffer "evidence" out of context to support their assertion that ASCAP contrived the AFP phase-out to punish Claimants for their decision to remove their works from ASCAP and license them through GMR. The most egregious of these statements are addressed below.

### A. The Phase-Out of Premiums Does Not Violate ASCAP's Consent Decree

Claimants argue that the current version of ASCAP's Consent Decree (AFJ2) requires ASCAP "to pay all of its members, current or resigned, the same royalties" for the same performances. *See, e.g.*, Claimants' Pre-Hearing Statement at p. 1; *see also id.* at p. 2 (asserting that the phase-out of premiums constitutes a "slick attempt to circumvent the Consent Decree); *id.* at p. 10 ("The entire point of the Consent Decree is to ensure that ASCAP does not unilaterally discriminate or unjustly pay its members.")

Simply put, the Consent Decree has no bearing on ASCAP's survey and distribution practices.[12] Although Section XI(B) of the Consent Decree includes certain survey and distribution rules, those rules are not in effect because Section XI(C) provides that "each provision of Section XI(B) . . . shall only be effective upon entry of an order in United States v. Broadcast Music, Inc. . . . that contains a substantially identical provision." JX 4 § XI(C). To date, no such order has been entered against BMI and, as a result, the ASCAP Consent Decree simply has no bearing on -- or relevance to -- this matter.

**B. ASCAP Did Not Shift Its Funding For Premiums When It Implemented The AFP**

Contrary to Claimant's assertions, ASCAP did not shift the source of its funding when it implemented the AFP in 2015. *See, e.g.*, Claimants' Pre-Hearing Statement at pp. 12-13. Nor did its decision to allocate the revenues from unsurveyed media to fund the AFP constitute an attempt to "use the funding source as a means of taking away the AFP from resigned members." *Id.* at p. 13.

Since the implementation of the RFP in 1994, ASCAP has funded that premium from revenues obtained from unsurveyed media. As a result, since 1994, ASCAP's rules have authorized the phase-out of premiums.[13] Furthermore, pursuant to a rule change adopted by the

---

[12] Contrary to Claimants' assertions (*see, e.g.*, Claimants' Pre-Hearing Statement pp. 3-4, 10-11), ASCAP's Membership Agreement and Articles of Association also have no direct relevance to the manner in which royalties are distributed to resigning members who elect to remove their works from ASCAP.

[13] Claimants inaccurately suggest that Dr. Boyle "could not recall a single instance when ASCAP imposed the radio premium reduction to a resigned member." *See, e.g.*, Claimants' Pre-Hearing Statement at p. 13 (*citing* Hearing Tr. at 324:16-325:02). In the cited testimony, Dr. Boyle actually testified that he could not specifically recall how many times he had to create a manual statement by which ASCAP calculated a reduction in the radio premium for a resigned member. He went on to clarify that, although he could recall some of the specific names of the individuals for whom he created statements manually, he could not recall whether or not those specific individuals had radio feature premium credits. *Id.* at 325:02-325:04. Earlier, Dr. Boyle

Board of Directors in 2002, and implemented in 2009,[14] ASCAP has been specifically authorized to accomplish the four-quarter phase out of royalties derived from unsurveyed media by phasing out "credits attributable to unsurveyed general licensing money." JX 17 at ASCAP0370; *see also* Decision of the Board of Review at pp. 15-16.

As noted above, the source of funding for the AFP is not publicly available. That does not, however, suggest that ASCAP was "secretly shifting around the funding source of the premiums," or devising "secret interpretations of its rules." Claimants' Pre-Hearing Statement at p. 19. As ASCAP's witnesses explained, the sources of funding are not publicly disclosed because they are highly proprietary. Nevertheless, had Claimants merely asked ASCAP how premiums are funded, that information would have been readily disclosed to them, as it would be to any member.

Mr. Roberts testified that during his time as CFO of Warner Music Group, when he wanted to understand the underlying elements of his company's ASCAP distribution statements, including "where things are actually funded from," he would "ask very specific questions [to ASCAP employees] and get specific answers." Hearing Tr. 211:19-212:12 (Roberts). Similarly, ASCAP's Chief Economist, Peter Boyle testified that he has had many conversations, both face-to-face and via telephone, with members regarding not just the intricacies of the distribution rules, generally, but specifically regarding the impact of resignation on a member's right to receive royalties, including "what happens to the unsurveyed money or what happens to those

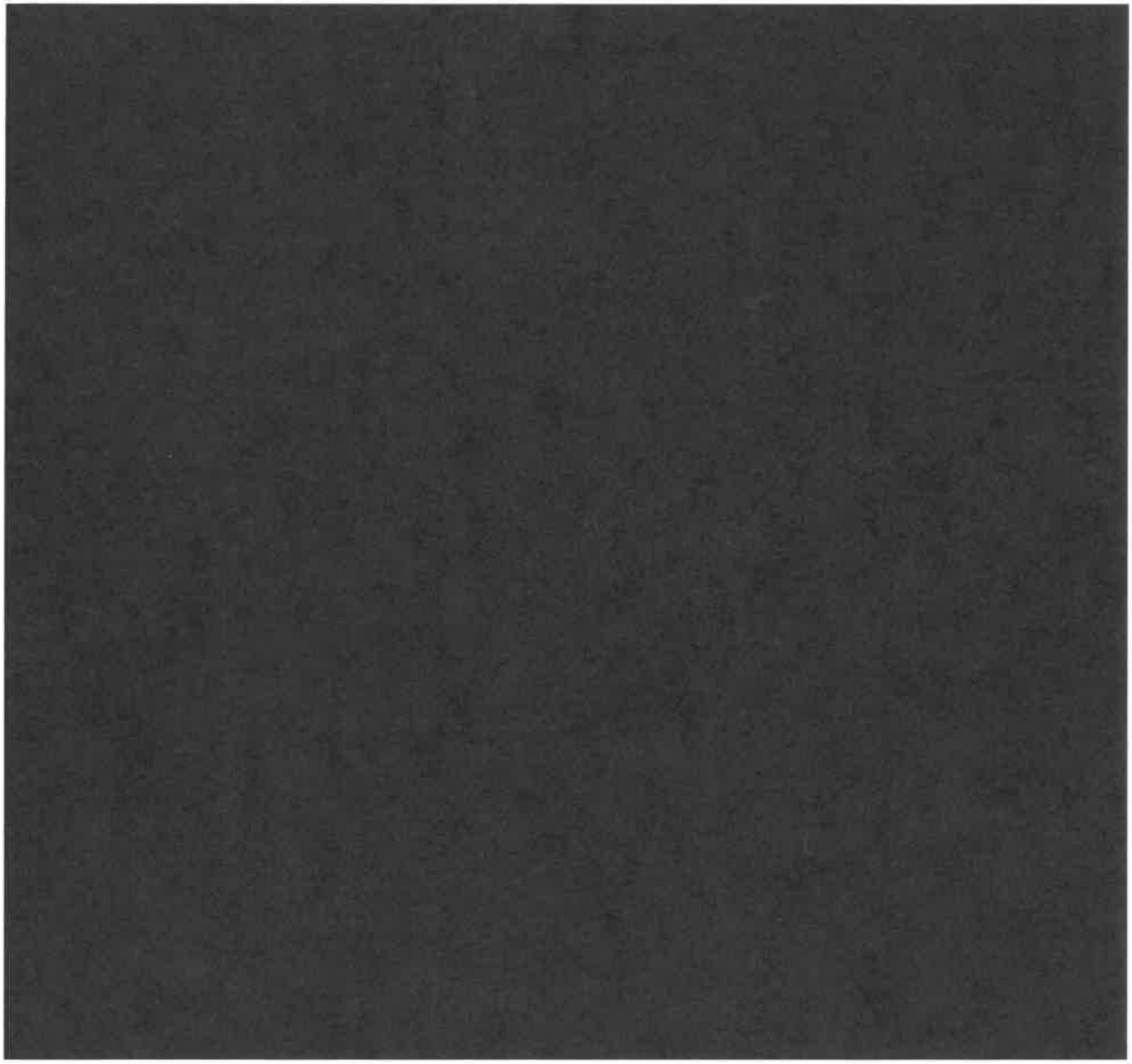
---

had, indeed, named some of the resigned members for whom he had created royalty statements manually. Hearing Tr. 294:19-296:04 (Boyle)

[14] Claimants assertion that ASCAP failed to produce documentation supporting the rule change that was approved in 2002 and implemented in 2009 is simply wrong. That rule change was presented to -- and approved by -- the Board of Directors. *See* JX 17; JX 18; JX 19.

credits when you resign." Hearing Tr. 344:07-344:10 (Boyle); *see* Hearing Tr. 350:25-351:06 (Boyle); 351:13-351:15 (Boyle); 360:05-360:12 (Boyle) (testifying to having had thousands of conversations with ASCAP staff concerning members' questions about distributions, where "some were clearly in advance of resignation while they were contemplating their resignation.")

For whatever reason, *Claimants simply never made the effort to find out the financial impact of McAnally's resignation before accepting GMR's "life-changing" deal.*



### D. ASCAP Is Not Responsible For Claimants' Failure To Conduct Their Own Due Diligence

In 2013. Claimants were planning to move a very valuable collection of musical works from an established music rights organization to a deep-pocketed newcomer, GMR. Mr. Baum has admitted he did no due diligence as to the financial implications of leaving ASCAP or how its rules might impact on Claimants. Now, Claimants suggest that ASCAP's co-heads of Nashville Membership -- rather than Claimants' own business manager and able legal counsel -- bore the ultimate responsibility for researching and explaining to Claimants how their decision to leave ASCAP for GMR might impact their bottom-line financials. Of course, the reality is that, as Mr. Baum conceded, it was reasonable for ASCAP to assume that Claimants' representatives had "done their due diligence," in order to understand ASCAP's rules and ask questions, if necessary. Hearing Tr. 179:25-180:08 (Baum). That is because, unlike ASCAP's Michael Martin, Claimants' Business Manager, Mr. Baum actually *knew* the terms of Mr. McAnally's deal with GMR, and regularly reviewed Claimants' royalty statements. Mr. Baum, unlike Mr. McAnally, was therefore aware that Claimants earned as much as 50% of their revenues from premiums.

Moreover, Mr. Martin testified that, as the co-head of Membership, he was not an expert in the nuances of ASCAP's distribution rules. Hearing Tr. 386:10-387:09 (Martin); Hearing Tr. 392:11-393:02 (Martin). Rather, had Claimants asked Mr. Martin about the funding of premiums, ASCAP's rules relating to resigned member resignations, or the impact on Claimants of their decision to resign from ASCAP and remove their works, he would have referred Claimants to the individuals at ASCAP who possessed the requisite expertise. *Id.* Of course, as Claimants concede, Claimants never asked those crucial questions of Mr. Martin, or anyone else

at ASCAP. And, as detailed above, Claimants made no effort to review ASCAP's S&D Rules or other governing documents at the time they were considering the GMR offer.

### E. There Is No Basis For The Assumption That The "Proper" Phase-Out Of Revenues From Unsurveyed Media Should Result In An Overall Reduction [redacted]

There is no dispute that unsurveyed media revenues account for [redacted] of ASCAP's overall domestic revenues. Nor is it disputed that other members who resigned and removed their works from ASCAP during the same time frame as Claimants received proportionally smaller reductions in their overall distributions -- and, in many cases, significantly smaller -- than did the Claimants. This is not, however, indicative of the fact either that the phase out of the AFP was either improper, unfair, or discriminatory, as Claimants suggest, or that the [redacted] should be applicable to Claimants.

The reason for the proportionally greater reduction in Claimants' distributions was directly tied to the fact that Claimants earned a proportionally greater share of their royalties from premiums. In fact, Claimants admit that, at times premiums accounted for as much as 50% of their overall distributions. Thus, as premiums were phased out, Claimants would necessarily receive less total royalties because they benefited disproportionately when premiums were earned. There is nothing "unfair" in a rule that is applied uniformly to all resigning ASCAP members.

## IV. The *Immel v. BMI* Matter ("*Immel* Arbitration") Is Irrelevant To This Dispute

Lastly, Claimants continue to argue that a 30-year-old matter involving BMI and certain of its former affiliates is somehow relevant to the issue of whether ASCAP properly applied its resigned member rules in phasing out premiums to Claimants. *See* Claimant's Pre-Hearing Memorandum at p. 2. As an initial matter, determinations regarding the proper interpretation of

BMI's survey and distribution rules should have no bearing whatsoever on the proper interpretation and/or application of ASCAP's Survey & Distribution Rules; BMI and ASCAP do not operate under the same set of rules.

The issue presented in the *Immel* Arbitration differs from the issue presented here, in one very crucial respect: Unlike Claimants -- who elected to remove their works from the ASCAP repertory -- the writers involved in the *Immel* Arbitration had left their works in the BMI repertory at the time of their resignations from BMI. Notwithstanding that BMI had the rights to license the public performances of those works, and notwithstanding that *no other PRO had any rights to license those works*, BMI determined that it would cease all bonus payments for performances of the resigned affiliates' works. It was for this reason that both the arbitrators and the Department of Justice ruled against BMI and concluded that it had violated its rules and its consent decree requiring equal treatment for all BMI works.

As noted previously, royalty payments to resigned members who leave their works in ASCAP's repertory are not subject to any phase-out. In other words, *had Claimants decided to leave their works at ASCAP – or even just the works that had generated premiums -- they would have been paid on the same basis as current members of ASCAP.* Thus, even if the arbitrators' decision in the *Immel* Arbitration somehow created binding precedent relevant to this matter -- and, of course, it does not -- ASCAP's application of its distribution rules does not conflict with the outcome of the BMI matter. *See, e.g.*, Hearing Tr. 309:22-311:23 (Boyle); Hearing Tr. 359:20-360:04 (Boyle).

## CONCLUSION

The Panel should affirm the Board of Review's decision in all respects.

Dated: August 17, 2018

Respectfully submitted,

RICHARD H. REIMER
JACKSON WAGENER
ASCAP
1900 Broadway
New York, NY 10023
(212)621-6261

*Attorneys for Respondent American Society of Composers, Authors and Publishers*