

**Before the  
COPYRIGHT ROYALTY BOARD  
LIBRARY OF CONGRESS  
Washington, D.C.**

**In the Matter of:**

**Digital Performance Right in Sound  
Recordings and Ephemeral Recordings**

**Docket No. 2009-1  
CRB Webcasting III**

**LIVE365, INC.'S REPLY IN SUPPORT OF  
MOTION FOR ISSUANCE OF SUBPOENAS TO NONPARTY WITNESSES**

Live365, Inc. (“Live365”) hereby replies to the Oppositions to the Motion for Issuance of Subpoenas to Nonparty Witnesses that were filed by SoundExchange, Inc. (“SoundExchange”) and the three parties to whom the proposed subpoenas would be directed. As set forth in detail below, the oppositions are fundamentally mistaken in their assertions that the statutes governing this proceeding do not contemplate the third party discovery requested by Live365 and fellow movant RealNetworks, Inc. (“RealNetworks”). The requested discovery is not only contemplated by statute, it is also vital for the CRJs to develop a full record in this proceeding as to the proper royalties that a willing buyer and willing seller would (and could) agree to in the webcasting marketplace. This is not a fishing expedition into the business secrets of these organizations, but instead an attempt to put before the CRJs evidence as to the true economic state of the webcasting industry to demonstrate the devastating effect that the royalties proposed by SoundExchange would have if they were adopted.

When it created the Copyright Royalty Board, Congress provided the CRJs with subpoena power and expressly articulated its purpose for providing such power: “to give the decisionmakers a means to create a more complete record upon which to make their decisions.”

H.R. Rep. No. 108-408, at 33 (2004) (attached as Exhibit 1 to RealNetworks' Reply brief), *reprinted in* 2004 U.S.C.C.A.N. 2332. Congress also observed that previous rate-setting tribunals were denied the benefit of considering some of the "most probative evidence" in determining appropriate rates since discovery was unduly limited to documents underlying a party's direct case. *See id.* As the legislative history of 17 U.S.C. § 803(b)(6)(C) explains:

Historically, the process has allowed parties to circumscribe the type and amount of evidence considered by limiting discovery to documents underlying a party's direct case and by limiting the decisionmakers' authority to request additional evidence. Consequently, decisionmakers have set rates or made distributions in some instances without the benefit of the most probative evidence or access to witnesses that, for example, were better to explain to the intricacies of a study or explain the rationale for specific provisions in a negotiated agreement. The Committee believes that the grant of subpoena power to the CRJs will alleviate this problem by allowing the CRJs to subpoena additional witnesses and evidence when it is apparent the record is incomplete.

*Id.*

In this proceeding, where only two commercial webcasters are representing the industry as a whole, the record before the Board as to the industry-wide impact of the proposed SoundExchange royalties will be incomplete if the requested discovery is not granted. Comprehensive information will not be available regarding the basic financial operations of companies that SoundExchange's expert witness has identified as "succeed[ing] in the market." Pelcovits WDT at 10. It is expected that this information will provide compelling evidence of an industry that *lacks* short and long-term viability under the rates proposed by SoundExchange – in stark contrast to SoundExchange's description of "a robust and evolving market for webcasting." *Id.* at 11. Plainly, this information should provide valuable, probative evidence that would assist the CRJs in setting a rate for the entire industry. Without the information, SoundExchange's claims about these companies will not be able to be effectively refuted with the best and most

probative evidence available – information from the companies themselves. Yet, as demonstrated in its Opposition, SoundExchange seeks to do exactly what Congress sought to avoid: unfairly limiting discovery such that a rate determination will be made without access to highly probative evidence on issues SoundExchange itself put into evidence. Such efforts should not be countenanced.

**I. THE CRJs ARE AUTHORIZED TO ISSUE THE REQUESTED SUBPOENAS**

Live365 joins in the arguments set forth by RealNetworks in its Reply brief regarding the CRJs' authority to issue subpoenas and, therefore, incorporates those arguments herein. Indeed, if the CRJs' subpoena power were limited solely to the CRB parties or to the witnesses who already have submitted written statements in this proceeding – as SoundExchange asserts under its narrow interpretation – then this would effectively render meaningless (or, at least, duplicative) the other provisions that *already* permit the same discovery directed to the CRB parties and their witnesses who submitted written statements. Under the existing discovery provisions of the statute, a subpoena is not needed to compel deposition testimony or documents from parties and their witnesses. *See, e.g.*, 17 U.S.C. § 803(b)(6)(C)(v)-(vii) (allowing parties to obtain documents and deposition testimony from other CRB participants); 37 C.F.R. § 351.5(b)(1)-(2) (same). Thus, Congress must have had something else in mind when it conferred the subpoena power on the CRJs, i.e., the ability to compel the attendance of third parties. The statutory construction urged by SoundExchange simply does not make sense.

**II. THE PROPOSED SUBPOENAS ARE NOT CONTRARY TO THE WEBCASTER SETTLEMENT ACTS**

SoundExchange and some of the proposed subpoenaed entities assert that the subpoenas are contrary to the agreements entered into Webcaster Settlement Acts (“WSA”) and to Congressional intent underlying the WSA. *See* SoundExchange’s Opposition at 8-9; Pandora’s

Opposition at 4; Slacker’s Opposition at 1-2. However, the WSA agreements *expressly* contemplate (and permit) webcasters who are signatories to those settlement agreements to provide documents and/or testimony in this proceeding (i.e., Webcasting III) in response to a subpoena upon certain conditions.<sup>1</sup> *See, e.g.*, Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293, 9301-02 (March 3, 2009). It, therefore, does not (and cannot) violate Congressional intent for the CRJs to issue subpoenas to the settling entities given the explicit provision in the WSA agreements that permit them upon an order. *See id.*

Moreover, contrary to the suggestions made in some of the Opposition briefs, Live365 does not seek “an improper end-run” (SoundExchange Opp’n at 9) around the requirements of the WSA agreements restricting the use of certain of such agreements in subsequent proceedings. The WSA prohibits the admission of evidence about WSA agreements, such as the “rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein.” 17 U.S.C. § 114(f)(5)(c). If this had been Live365’s true intent, subpoenas would not be necessary. The submission of evidence of the “rate structure, fees, terms, conditions, or notice and recordkeeping requirements” of the WSA agreements is evident on the face of those agreements, which are publicly available. Instead, what is being sought is information directly relevant to SoundExchange’s claims of success of certain large webcasters in the marketplace, so that Live365 can demonstrate that these same webcasters could not be financially viable under the rates and terms proposed by SoundExchange in this proceeding. The requested information is not sought to demonstrate that the rates or terms of the WSA settlements should be precedential

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<sup>1</sup> Those conditions require that the subpoena must be made: (1) “without any action by a Broadcaster to encourage or suggest such a subpoena or petition,” and (2) pursuant to an “order[] to testify or provide documents in such proceeding.” Notification of Agreements Under the Webcaster Settlement Act of 2008, 74 Fed. Reg. 9293, 9301-02 (March 3, 2009).

here, but instead merely to show that webcasters deemed to be “successful” by SoundExchange would not be successful under its proposed royalty scheme.

Consistent with the legislative history of Section 803(b)(6)(C)(ix), the subpoenas are requested “to give the [CRJs] ... a more complete record upon which to make their decisions” regarding the economic factors facing the webcasting industry. *See* H.R. Rep. No. 108-408 at 33. If the CRJs attempted to make an industry-wide determination without the information sought here, the record would lack the completeness to properly assess the webcasting marketplace and to determine what rates a willing buyer and willing seller would agree to in that marketplace.

### **III. THE ABSENCE OF THE REQUESTED DISCOVERY WOULD SUBSTANTIALLY IMPAIR THE JUST RESOLUTION OF THIS PROCEEDING**

In this proceeding, SoundExchange has argued for a sizeable increase (165% over the next five years) in the current royalties paid by Internet radio companies, while RealNetworks and Live365 have contended that the royalties already in place are too high for statutory webcasters to operate competitive business operations. At this point, Live365 must rely on the financial information about its own operations, some industry data, and the limited additional information available publicly about the financial operations of webcasting companies to demonstrate the economic realities of webcasters. As webcasting companies are, in the vast majority of cases, either privately-held entities or comprise such a small part of a public company that their financial results are not broken out separately, there is relatively little public financial information available to demonstrate the likely devastating impact of the rates proposed by SoundExchange on webcasting companies.

In connection with its direct case, SoundExchange has anticipated the parties’ arguments by proffering reports of webcasters “succeed[ing] in the market,” pre-staging the argument that

will undoubtedly follow in this case that, if Live365's operations cannot support these royalties, it is merely as a result of their "failed business plan" - an argument advanced by SoundExchange in prior proceedings. Without the requested third party discovery, Live365 will be substantially hampered from demonstrating that other purportedly successful companies would also fail under the weighty rates proposed by SoundExchange in this proceeding. In sum, Live365 submits that without basic financial information of companies that SoundExchange's expert witness has identified as evidence of "robust market" (Pelcovits WDT at 11) and that, by false implication, could afford the substantial increases in the statutory rates proposed by SoundExchange, "the resolution of the proceeding would be substantially impaired by the absence of such testimony or production of documents." 17 U.S.C. § 803(b)(6)(C)(ix); *see also* 37 C.F.R. § 351.5(c).

**IV. LIVE365 SUPPORTS APPLICATION OF THE PROTECTIVE ORDER TO THE INFORMATION PROVIDED IN RESPONSE TO THE SUBPOENAS TO PROTECT SENSITIVE BUSINESS INFORMATION**

The companies that are the subjects of the proposed subpoenas have expressed concern about producing sensitive business information to competitors in this litigation. Live365, however, has no interest in any "corporate espionage" or anything of the sort. Undersigned counsel to Live365 are fully aware of their obligations under the Protective Order in this proceeding to protect sensitive business information, and are perfectly willing to work with the third parties to address any concerns in that regard which they might have. Moreover, to address any ambiguity which may be deemed to exist in the current Protective Order, Live365 fully supports any reasonable amendment to that Order that would more explicitly govern the third

parties' business information for all purposes, such that *only* outside counsel will ever have access to this information.<sup>2</sup>

**V. THE PROPOSED SUBPOENAS ARE NOT OVERBROAD NOR UNDULY BURDENSOME, AND THE PROBATIVE VALUE SUBSTANTIALLY OUTWEIGHS ANY BURDEN**

The subjects of the proposed subpoenas object to the proposed subpoenas on overbreadth and undue burden grounds. Though Live365 respectfully disagrees with these contentions, Live365 is fully willing to confer with these entities to address these concerns and to minimize any undue burdens, should the proposed subpoenas issue.

Moreover, the probative value of the information (particularly the limited financial statements) sought in these subpoenas substantially outweighs any burden that may be imposed. It is expected that the financial statements sought by the subpoenas will provide substantial evidence that the largest willing buyers in the webcasting industry would not be economically viable under SoundExchange's proposed rates.<sup>3</sup> This is especially significant since Dr. Pelcovits recently acknowledged that he did *not* consider the impact of his (or SoundExchange's) proposed rates from the perspective of the "willing buyer" – i.e., a statutory webcaster – in his analysis.

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<sup>2</sup> CBS Interactive asserts that "Outside counsel only" protection is not adequate since, according to CBS Interactive, outside counsel may still "rely on Protected Material to advise their clients." Opposition of CBS Interactive, at 7. However, the same provision in the Protective Order cited by CBS Interactive also makes clear that "in rendering such advice, counsel shall *not* disclose any other party's Restricted Information other than in a manner provided for in this Protective Order." See Protective Order at 4 (¶4) (emphasis added). The Protective Order, therefore, addresses CBS Interactive's concern. To the extent the protections provided by the Protective Order are still deemed insufficient, Live365 is not opposed to entry of a revised or new Protective Order to the information gained through the proposed subpoenas.

<sup>3</sup> As recently reported over the past week, Pandora now accounts for 44% of all Internet radio listening hours, according to Ando Domestic Ranker. Yet Dr. Pelcovits readily admits he did not do anything to consider the impact of his rates on Pandora. See Pelcovits Depo Tr. at 241:13 – 242:11.

*See Pelcovits Depo Tr. (12/14/09) at 200:18 – 202:2.* Dr. Pelcovits also acknowledged, with respect to financial data that could be obtained from Pandora, that he “would obviously want to gather as much data as [he] could and interpret that data, present it to the Judges” if he were to do a financial analysis. *Id.* at 242:1-11. The proposed subpoenas offer the best – and only – means to present such data to the CRJs so that the Judges can determine what the hypothetical willing buyer and willing seller would agree to in the marketplace. If detailed information about these webcasters – implied by SoundExchange to be examples of successes in the marketplace – were to be circumscribed from the record such that the CRJs could not determine if they would be economically viable under the rates proposed by SoundExchange, then the CRJs could not insure that the rates that they adopt are indeed suitable for the industry as a whole.

If these subpoenas are not issued, the CRJs will effectively allow SoundExchange to decide what evidence is allowed into this case to support its royalty proposal, as its reliance on information about these companies cannot be challenged by real facts and evidence about these companies’ actual operations. By extending lower royalties to certain companies allowing them to operate successfully, and then effectively blocking evidence about what would have happened to those companies had the royalties now proposed by SoundExchange been applied to their operations, SoundExchange will effectively be able to dictate which webcasting companies live and which ones do not. This gaming of the system cannot be allowed. Issuance of the proposed subpoenas is, therefore, appropriate.

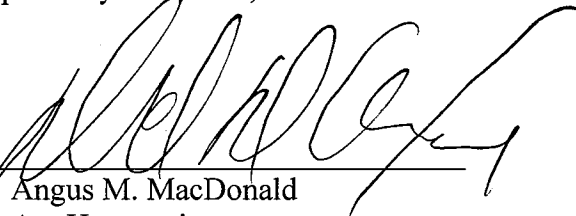


**VI. CONCLUSION**

For the foregoing reasons and for the reasons set forth in the motion and joinder, Live365 respectfully requests that the CRJs issue the proposed subpoenas.

Respectfully submitted,

By



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**RELEVANT PAGES OF  
MICHAEL D. PELCOVITS DEPOSITION TESTIMONY**

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<p style="text-align: right;">10</p> <p>1 through or -- or -- at various points between the  2 time I filed my testimony and showing up here  3 today.  4 Q. All right. I think, for the next  5 question, it'll help if I mark a couple of  6 exhibits. So I'm going to hand you a copy of what  7 I will ask the court reporter to mark as  8 Exhibit Pelcovits 1.  9 (Pelcovits Deposition Exhibit No. 1  10 was marked for identification and attached to the  11 original transcript.)  12 BY MR. GRANNIS:  13 Q. Dr. Pelcovits, do you recognize  14 Exhibit Pelcovits 1 as a copy of the testimony  15 that you filed with the CRB on or about  16 September 29th of 2009?  17 A. I do.  18 Q. Okay. Now, I'm going to hand you the  19 exhibit that I'll ask the reporter to mark as  20 Pelcovits 2.  21 (Pelcovits Deposition Exhibit No. 2  22 was marked for identification and attached to the</p>	<p style="text-align: right;">12</p> <p>1 that was corrected as a result of testimony that  2 you read from another party in this proceeding?  3 A. No.  4 Q. Is there anything you've read more  5 recently in the testimony of witnesses -- other  6 witnesses in this proceeding that makes you want  7 to make further correction to your written  8 testimony?  9 A. No.  10 Q. Okay. Have you spoken with anyone  11 other than counsel in preparation for today's  12 deposition?  13 A. I have spoken with colleagues at my  14 firm.  15 Q. And is that MiCRA?  16 A. Yes.  17 Q. What does MiCRA stand for?  18 A. Microeconomic Consulting &amp; Research  19 Associates.  20 Q. Are those colleagues who helped  21 prepare your testimony?  22 A. Yes.</p>
<p style="text-align: right;">11</p> <p>1 original transcript.)  2 BY MR. GRANNIS:  3 Q. And do you recognize  4 Exhibit Pelcovits 2 as a copy of the corrected  5 testimony that was served on all the other parties  6 to this proceeding on December -- on or about  7 December 7th, 2009?  8 A. Yes.  9 Q. Has Exhibit Pelcovits 2 been filed  10 with the CRB yet?  11 A. I don't know the answer to that.  12 Q. Okay. You told me a minute ago that  13 you had reviewed the testimony of several  14 witnesses from Live365 and Real Networks and that  15 you reviewed that testimony after you submitted  16 Pelcovits 1 to the CRB; is that correct?  17 A. Yes.  18 Q. Okay. Did you review that testimony  19 before or after you prepared Exhibit Pelcovits 2?  20 A. I reviewed those testimonies, I think,  21 both before and after.  22 Q. Is there anything in -- in Pelcovits 2</p>	<p style="text-align: right;">13</p> <p>1 Q. Okay. I will ask you about people who  2 helped with your testimony.  3 Is there anyone you spoke to in  4 preparation for the deposition who did not help  5 prepare your testimony?  6 A. No one other than counsel, as you just  7 asked about earlier.  8 Q. Great. Thank you.  9 Are you familiar with the  10 Webcaster Settlement Act?  11 A. Yes.  12 Q. And you refer to it in your written  13 testimony in the proceeding, don't you?  14 A. I do.  15 Q. Okay. Do you understand that it  16 restricts the quantity of evidence that the  17 Copyright Royalty Board can consider?  18 MR. HANDZO: Objection; calls for a  19 legal conclusion.  20 THE WITNESS: I guess I'm not sure I  21 understand your question in terms of what it means  22 by "quantity."</p>

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<p style="text-align: right;">198</p> <p>1 Q. And what did that review indicate? 2 A. That's a different question. 3 What do I remember right here today? 4 I don't remember the exact trends. I 5 remember seeing some graphs, and I can't -- I 6 recall that it was certainly not showing increases 7 or significant increases. It was either -- and it 8 depends on the period. It's either flat, going 9 down in some periods, up in other periods. 10 But it was not a -- a significant 11 upward trend. 12 Q. Let's just say over the last year, do 13 you recall whether that trend was flat or falling? 14 A. I certainly don't recall the change 15 over one year, no. 16 Q. Okay. Did you look at trends 17 regarding the amount of advertising revenue 18 generated per hour of streaming in the webcasting 19 industry? 20 A. I do not recall. 21 Q. Do you have any basis to disagree with 22 the statement that advertising revenue per hour of</p>	<p style="text-align: right;">200</p> <p>1 significant change one way or the other. 2 Q. Okay. Now, in updating your knowledge 3 of the webcasting industry, you met with or talked 4 with executives from the four major record labels, 5 correct? 6 A. I'd say my -- that was part of the 7 process. 8 Q. Right. 9 It wasn't everything you did to update 10 your knowledge of the webcasting industry, but in 11 connection with your updating your knowledge, you 12 spoke with executives from the four major record 13 labels, right? 14 A. That was part of the source -- sources 15 for learning about the industry, but certainly not 16 the major reason or the major focus of the 17 discussions with the record executives. 18 Q. Okay. Did you talk to any executives 19 from webcasting services? 20 A. No. 21 Q. Okay. Did you attempt to determine 22 the impact of your proposed rates on statutory</p>
<p style="text-align: right;">199</p> <p>1 streaming is the -- the trend is generally 2 downward over the past few years? 3 A. I guess I would need a little more 4 specificity to that statement. 5 Q. What sort of specificity are you 6 looking for? 7 A. As to what is included in the category 8 of webcasters and what was happening as far as 9 demographics or total amounts of ads sold. 10 So I can't disagree or agree. 11 Q. Did you review any information about 12 subscription rates falling, going up, being flat 13 over the past few years? 14 A. Subscription to what? 15 Q. Oh, sorry. Subscription rates in the 16 webcasting industry, generally. 17 A. Are you talking about subscription 18 paid by consumers to listen to the music? 19 Q. Yes. 20 A. I have the rates in my testimony here, 21 and I did collect rates in my prior testimony. I 22 don't believe that on average, there's been a</p>	<p style="text-align: right;">201</p> <p>1 webcasting services? 2 A. Not directly, although I observed from 3 the fact that NAB voluntarily agreed to the rates 4 that are part of the agreement under the 5 Webcaster Settlement Act. 6 It's certainly reasonable to conclude 7 from that that they believe those rates will allow 8 them to successfully perform and provide service 9 in the webcasting. 10 Q. Now, did NAB and -- let's lump in 11 Sirius XM as well -- represents a little bit more 12 than 50 percent of the statutory webcasting 13 industry if you look at it by performance per 14 recording, correct? 15 A. Yes. 16 Q. Did you try to ascertain the impact of 17 your proposed rate -- your proposed range of rates 18 on those services that do not fall within the NAB 19 or Sirius XM agreements? 20 A. No. There's certainly a lot of the 21 statutory webcasting business provided by the pure 22 play webcasters. And their agreement is</p>

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<p style="text-align: right;">202</p> <p>1 different, but certainly, it tells you something 2 about that part of the market. 3 Q. And what is that -- that that tells 4 you? 5 A. Well, I think it tells you that they 6 can certainly -- or certainly expect to operate 7 profitably at the rates that they agreed to, 8 which, again, are hard to know exactly what those 9 are, because they're going to be a function of a 10 greater of schedule. 11 But the totality of what's out there 12 in the market; namely, NAB and the parties to NAB, 13 including CBS that provides and feeds other 14 services, that all of those rates in total can -- 15 can allow the industry, at least in the industry's 16 view, the webcasting industry's view, to continue 17 in business and do -- do quite well. 18 Q. Now, with respect to the pure play 19 agreement, can you determine the effective per 20 play rate for those services that fall under that 21 agreement? 22 A. No.</p>	<p style="text-align: right;">204</p> <p>1 to draw anything from that agreement, you would 2 have to look at it in terms of meaning over a long 3 period of time over the length the agreement 4 applies. 5 So in that case, you would have to 6 consider and judge that pure play parties believed 7 that they could be in business at those rates. 8 Q. You've concluded that the webcasting 9 industry continues to grow, correct? 10 A. Yes. 11 Q. How do you define growth? 12 A. I define growth as an increase in 13 total number of performances or you might call 14 plays, number of individual plays to individual 15 listeners. 16 Q. Does the increase in performances 17 translate to increase in profitability? 18 A. Not necessarily. 19 Q. In your opinion, does growth represent 20 economic viability? 21 A. I think it's part of the picture. It 22 certainly indicates that firms are continuing to</p>
<p style="text-align: right;">203</p> <p>1 Q. Why not? 2 A. Because you don't know what the 3 greater of formula will yield. If they become -- 4 you can tell the minimum, just per play rate 5 stated in the greater of formula, but you can't 6 tell what the likely rate will be because you 7 don't know what their advertising and other 8 revenue will be. 9 You also don't know how much of the 10 services they provide will be paying the same rate 11 as NAB under various provisions of the agreement. 12 Q. Well, I guess what I was trying to get 13 at is not going forward, but for the past fees 14 that were paid under the pure play agreement. 15 Are you able to ascertain the 16 effective per play rates? 17 A. I've -- I don't -- my understanding is 18 that's a recent -- a relatively recent agreement. 19 So I don't know how much past data there is. I 20 certainly have not seen anything along those 21 lines. 22 I think -- I think, if you're trying</p>	<p style="text-align: right;">205</p> <p>1 sell and encourage sales at whatever their current 2 margins are. 3 I would say, conversely, you would not 4 expect an industry that is not able or cannot -- 5 cannot expect to be profitable under its current 6 academic situation. You don't expect that type of 7 industry to try to increase sales and, you know, 8 double sales over a couple-year period. 9 Q. Are webcasters entitled to a 10 reasonable profit? 11 A. They're entitled to whatever the 12 market provides for them. 13 Q. Does the market currently provide for 14 webcasting to receive -- statutory webcasting to 15 receive -- to generate a profit? 16 A. Well, obviously, the NAB believes that 17 it does. And SoundExchange believes that it does. 18 So that, in my mind, is evidence that 19 there are many firms that are capable of providing 20 webcast services that believe they can profitably 21 offer services over the next six years. 22 Q. Do you have an opinion as to what a</p>

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<p style="text-align: right;">238</p> <p>1 and nonstatutory. I've used their service and 2 recall it being differentiated from a pure webcast 3 model. 4 Q. Do you know why CBS interactive 5 acquired Last.fm? 6 A. I don't recall whether any reason was 7 given in the reports that I reviewed. 8 Q. Do you know what CBS values Last.fm 9 currently? 10 A. I don't know. 11 Q. Have you reviewed any recent 12 marketplace acquisitions within the webcasting 13 market such as the -- the imeem acquisition -- let 14 me -- let me ask it a different way. 15 Are you familiar with -- or have you 16 heard of the reports of imeem being purchased by 17 MySpace Music? 18 A. I have heard of that. I've not 19 reviewed any reports or documentation showing 20 that. 21 Q. Do you have any understanding as to 22 what imeem was purchased for?</p>	<p style="text-align: right;">240</p> <p>1 enter and grow in the market in a relatively short 2 period of time. And that's the reason that I 3 presented the discussion of Slacker in my 4 testimony. 5 Q. Did you review any financial 6 statements for Slacker -- from Slacker? 7 A. No. 8 Q. Did you speak with anybody at Slacker 9 in connection with your testimony? 10 A. No. 11 Q. Do you know whether Slacker is 12 profitable? 13 A. I don't know. 14 Q. Do you know what percentage of revenue 15 the sound recording -- sound recording performance 16 royalty fees make up for -- from Slacker's 17 business? 18 A. You mean of Slacker's revenues, what 19 percentage of revenues? 20 Q. Yes. 21 A. I don't know. 22 Q. All right. Let's quickly turn to</p>
<p style="text-align: right;">239</p> <p>1 A. I don't know what the acquirer said in 2 public statements on this and, even beyond that, 3 what it might not have said that might have been 4 responsible for the purchase. 5 Q. You do not know? 6 A. I do not know. 7 Q. Do you have any understanding as to 8 how many millions of dollars of investments were 9 made in imeem? 10 A. No. 11 Q. Okay. Do you know what factors led to 12 the -- the purchase of imeem by -- by 13 MySpace Music? 14 A. No. 15 Q. Now, you specifically identify 16 Slacker Radio as another webcaster that has grown 17 quickly, correct? 18 A. Yes. 19 Q. In your opinion, does Slacker 20 represent a success in the market? 21 A. I regard -- let me strike that. 22 It is an example of a firm that could</p>	<p style="text-align: right;">241</p> <p>1 Pandora now. 2 I think you referred to Pandora on 3 Pages 12 and perhaps elsewhere, but I guess I'm 4 specifically focused on Page 12. 5 Now, you assert that Pandora is -- is 6 a popular service, correct? 7 A. Well, it certainly is a popular 8 service. I don't know if I would -- use the words 9 it is a popular service in my testimony. 10 Q. Okay. But you referred to its 11 popularity? 12 A. Yes. 13 Q. Okay. Do you know whether Pandora's 14 popularity over the past few years has translated 15 to profitability over the past few years? 16 A. I don't know. 17 Q. Did you review any financial 18 statements from Pandora? 19 A. No. 20 Q. Did you speak with anybody at Pandora 21 in connection with your testimony? 22 A. No.</p>

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<p style="text-align: right;">242</p> <p>1 Q. If Pandora provided evidence in this 2 proceeding that it could not be economically 3 viable to continue its service under 4 SoundExchange's proposed royalty rates for 2011 to 5 2015, would that impact your analysis? 6 A. In and of itself, no. If I were 7 disposed to do a financial analysis as part of my 8 testimony, I would obviously want to gather as 9 much data as I could and interpret that data, 10 present it to the Judges. But I would not change 11 my opinion based on one company's financials. 12 Q. What about if Slacker and Last.fm 13 provided similar evidence of its inability to be 14 economically viable? Would that impact your 15 analysis? 16 A. You said Last.fm and Slacker? 17 Q. Correct. 18 A. I believe Last.fm is under the CBS/NAB 19 deal. So I guess they could present analysis that 20 said they shouldn't have signed the deal -- 21 Q. Okay. 22 A. -- which would be interesting.</p>	<p style="text-align: right;">244</p> <p>1 MR. HANDZO: Not a party who is on 2 your side. 3 MR. GRANNIS: What's on my side mean? 4 MR. HANDZO: You guys are the -- are 5 paying the royalties here. If I asked cross, you 6 could follow up, but, no, not in that courtroom. 7 MR. MACDONALD: What's the limit we 8 agreed in terms of the deposition in terms of 9 length? 10 MR. HANDZO: It doesn't have anything 11 to do with length. He's done, you're done, I'm 12 done. We're all done. Sorry guys. 13 MR. GRANNIS: Is this really worth 14 arguing about later? 15 MR. HANDZO: What's that? I'm not 16 going to let this go on endlessly. 17 MR. GRANNIS: I'm not either. 18 MR. HANDZO: Look, if you were in the 19 courtroom, I promise you, having tried a number of 20 cases in front of these Judges, you would not get 21 to do a cross based on his -- a recross based on 22 his. There's no way they would allow it.</p>
<p style="text-align: right;">243</p> <p>1 Q. Let's talk about Slacker, then. 2 A. Again, my answer is we have evidence 3 from actual deals, which I would value a lot more 4 than individual company's presentation of its 5 financial business case. 6 And I would add that in any of these 7 circumstances, it would not be useful to review 8 basic business documents. You would need to do a 9 very comprehensive financial analysis, which the 10 Copyright Royalty Judges did not seem to favor in 11 the prior two proceedings I was involved in. 12 MR. MACDONALD: Well, I don't have any 13 further questions. 14 MR. HANDZO: I don't. So that means 15 we're done. 16 MR. GRANNIS: I'm sorry. I got to 17 follow up on a couple of -- 18 MR. HANDZO: No. We're done. I don't 19 think you get to follow up on questions that are 20 asked by people on your side of the beat. 21 MR. GRANNIS: I don't get a cross from 22 another party?</p>	<p style="text-align: right;">245</p> <p>1 You can try when we're in the 2 courtroom, but good luck to you. 3 MR. MACDONALD: Just for the record, I 4 want to object to the departure of Mr. Pelcovits 5 before the questioning has been completed. 6 MR. HANDZO: That's fine. You can 7 object. 8 THE COURT REPORTER: Are you doing the 9 same delivery as with the hearings, five days and 10 a rough ASCII also? 11 MR. HANDZO: Yes. 12 THE COURT REPORTER: And is the 13 delivery the same for both of you, and rough 14 ASCII's as well? 15 MR. GRANNIS: Yes. 16 MR. MACDONALD: Yes, that's fine. 17 (Whereupon, at 5:20 p.m., the 18 deposition of MICHAEL DEAN PELCOVITS 19 was concluded.) 20 21 * * * * * 22</p>

**CERTIFICATE OF SERVICE**

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that copies of the foregoing “**Live365, Inc.’s Reply in Support of Motion for Issuance of Subpoenas to Nonparty Witnesses**” were sent via electronic email and via first-class, postage prepaid, United States mail, this 23<sup>rd</sup> day of December, 2009 to the following:

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