ORIGINAL

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	**Docket No. 2012-6 CRB CD 2004-2009 (Phase II)**
Distribution of the 2004-2009 Cable Royalty Funds	)	

In the Matter of	)	**Docket No. 2012-7 CRB SD 1999-2009 (Phase II)**
Distribution of the 1999-2009 Satellite Royalty Funds	)	

SETTLING DEVOTIONAL CLAIMANTS' OPPOSITION TO INDEPENDENT PRODUCERS GROUP'S MOTION TO STRIKE REPLIES IN SUPPORT OF MOTIONS FOR SANCTIONS

The Settling Devotional Claimants ("SDC") hereby oppose Independent Producers Group's ("IPG") Motion to Strike Reply Briefs Filed by the SDC and MPAA in Response to IPG's Opposition to Motion for Sanctions.

As IPG notes in its Motion to Strike, the Judges' Order on IPG Motion for Leave to File Amended Direct Statement, January 10, 2017, permitted the SDC and MPAA to file a motion for sanctions against IPG on or before March 10, 2017, and allowed IPG 30 days to file an opposition. The Judges' Order does not address replies at all, either to prohibit replies or to set a deadline for their filing. In the absence of an order addressing a reply, procedures are governed by 37 CFR § 350.4(f), which provides that "replies to oppositions shall be filed within four business days of the filing of the opposition." *See* 37 CFR § 350.1 ("This subchapter governs procedures generally applicable to proceedings before the Copyright Royalty Judges in making determinations and adjustments pursuant to the Copyright Act, 17 U.S.C. 801(b)"); 37 CFR §

350.6 ("[T]he provisions of this subchapter may be suspended or waived, in whole or in part, upon a showing of good cause, to the extent allowable by law"). The SDC filed their reply within the time period specified in 37 CFR § 350.4(f), so the reply was authorized by the Judges' rules. MPAA also filed its reply within the time limit, so its reply was also authorized by the Judges' rules.

IPG further asserts that the SDC have used their opportunity to file a reply to submit "new accusations" about IPG, IPG's counsel, and Dr. Cowan's "ultimate" report. IPG does not identify what "accusations" it believes are new. Each and every section in the SDC's reply specifically responds to factual contentions or legal arguments raised in IPG's opposition, and identifies the particular portions of IPG's opposition to which the SDC were replying.

IPG asserts that the SDC "purposely confuse IPG's reference to changes in Dr. Cowan's written report versus the data underlying such report ...." The SDC do not have a clue what IPG is referring to. The only paragraph in the SDC's reply that specifically addresses any reference by IPG to changes in Dr. Cowan's written report says this:

> IPG asserts that Dr. Cowan's "amended report differed from his initial report in only a handful of ways, predominantly the substitution of table percentages and the correction of typographical errors ...." IPG Opposition at 21. Actually, as has been discussed extensively in multiple pleadings, the most predominant change in Dr. Cowan's report aside from the substitution of table percentages was the substitution of a log-level regression specification in place of a level-level regression specification.

Maybe IPG is implying that Dr. Cowan's substitution of a log-level regression specification in place of a level-level regression specification appeared only in the underlying data, and not in Dr. Cowan's amended report. If so, IPG is wrong. The formulas contained in the text of Dr. Cowan's amended report show an unexplained change from a level-level regression specification to a log-level regression specification. This change, which necessitated the SDC to utilize and

expert and incur expenses for analysis of Dr. Cowan's modified report, was one of the bases of the SDC's motion to strike IPG's initial Amended Direct Statement, even before the SDC had been provided with any underlying data and code files. *See* SDC's Reply in Support of Their Motion for Entry of a Distribution Order and Motion to Strike Amended Direct Statement of IPG, Sep. 9, 2016, at 3-4 (showing the changes in Dr. Cowan's formulas and explaining their importance). These changes are not mere corrections of "typographical errors" as IPG insists on claiming, but were material modifications based on a new methodology.

IPG asserts that the SDC's use of the language, "[w]ith all due respect, IPG does not have the slightest clue what effort was required to conduct discovery related to the seriatim filings," constituted "inflammatory rhetoric." In context, the SDC do not believe their rhetoric was inflammatory. The SDC were responding to IPG's largely foundationless assertion that conducting the additional discovery required by IPG's multiple rounds of corrected filings required only a "modicum of effort." IPG's argument demonstrated a lack of awareness as to the extent of the SDC's discovery efforts. This lack of awareness is embodied in the colloquial expression, "does not have a clue." *See, e.g., DEK Energy Co. v. FERC*, 248 F.3d 1192, 1196 (D.C. Cir. 2001) ("[W]e *have no clue* whether DEK's interest in the Northern California market is any more jeopardized by gas that has reached Stanfield, Oregon ... than by gas held by SoCal in Southern California and viewed by it as surplus") (emphasis added). Just because an expression is colloquial or rhetorical does not mean that it is "inflammatory."

At any rate, the SDC's argument on this point was not "redundant, immaterial, impertinent, or scandalous," and is therefore not a basis for a motion to strike. *See, e.g.,* Fed. R. Civ. P. 12(f); *Badger v. Greater Clark County Schools*, No. 4:03-cv-00101-SEB-WGH, 2005 U.S. Dist. LEXIS 4277, *15 n. 11 (S.D. Ind. Feb. 15, 2005) (declining to strike mere "rhetorical

embellishments"). The Judges unfortunately have had occasion to caution all parties in this case to tone down their rhetoric. *See, e.g.,* Order on IPG Motions Relating to MPAA Testimony and Exhibits, July 20, 2015, at 6 (noting that "[f]amiliarity may have bred some contempt"). This particular example, however, falls far short of any reasonable mark.

Finally, IPG argues that "the SDC attempts to defend its own errant behavior with a 14-page declaration of counsel whereupon such counsel purports to attest from personal knowledge multiple events with which he evidently had no personal knowledge." The "errant behavior" to which IPG refers is IPG's attempt to rehash discovery disputes over the distant HHVH data relied upon by the SDC in the 1999 cable proceeding, which IPG characterized in its Opposition as "far more egregious instances of abuse" (speaking of inflammatory language ...). The Judges decided those disputes in the SDC's favor long ago, and the D.C. Circuit affirmed.

In response to IPG's argument, the SDC submitted the Declaration of Matthew MacLean ("MacLean Declaration") from the 1999 cable case because it contains the most comprehensive summary of the history of those discovery disputes. Every statement in the declaration is based on counsel's personal knowledge, including counsel's personal knowledge as to what other witnesses testified. Practically every statement in the MacLean Declaration that recounts what another witness testified cites specifically to the written or oral testimony of that witness.

IPG notes that the MacLean Declaration was admitted for the limited purpose of establishing the sequence and timing of events relating to the discovery disputes, and not for the truth of the content of the documents to which those disputes related. Of course, it is counsel's personal knowledge of the events relating to the discovery disputes, and not the underlying truth of the testimony of others, that is relevant when responding to IPG's counsel's false statement that "attorneys representing the SDC submitted a direct statement advocating an allocation of

royalties for which such attorneys had firsthand knowledge that supporting evidence did not exist at the time of filing ...." Declaration of Brian Boydston at ¶ 19 ("Boydston Declaration"). The MacLean Declaration stands in stark contrast to the Boydston Declaration submitted with IPG's Opposition, which provides only a cursory and inaccurate account of the history of the discovery disputes in the 1999 cable case, without any reference to supporting evidence.

Conclusion

For the foregoing reasons, IPG's motion to strike Motion to Strike Reply Briefs Filed by the SDC and MPAA in Response to IPG's Opposition to Motion for Sanctions should be denied.

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Respectfully submitted,

Clifford M. Harrington (D.C. Bar No. 218107)
clifford.harrington@pillsburylaw.com
Matthew J. MacLean (D.C. Bar No. 479257)
matthew.maclean@pillsburylaw.com
Michael A. Warley (D.C. Bar No. 1028686)
michael.warley@pillsburylaw.com
Jessica T. Nyman (D.C. Bar No. 1030613)
jessica.nyman@pillsburylaw.com
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 17th Street NW
Washington, D.C. 20036
Tel: (202) 663-8000
Fax: (202) 663-8007

Counsel for Settling Devotional Claimants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically and by overnight mail on April 26, 2017, to the following:

INDEPENDENT PRODUCERS GROUP
Brian D. Boydston
Pick & Boydston, LLP
10786 Le Conte Avenue
Los Angeles, CA 90024
brian@ix.netcom.com

PROGRAM SUPPLIERS
Gregory O. Olaniran
Lucy Holmes Plovnick
Mitchell Silberberg & Knupp LLP
1818 N Street, NW
8th Floor
Washington, DC 20036
goo@msk.com
lhp@msk.com

Matthew J. MacLean