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Before the
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Washington, D.C.

In the Matter of Distribution of 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds	)	Docket No. 2012-6 CRB CD 2004-2009 (Phase II)
In the Matter of Distribution of 1999-2009 Satellite Royalty Funds	)	Docket No. 2012-7 CRB SD 1999-2009 (Phase II)

INDEPENDENT PRODUCERS GROUP'S REPLY IN SUPPORT OF MOTION TO STRIKE REPLY BRIEFS FILED BY THE SETTLING DEVOTIONAL CLAIMANTS AND THE MOTION PICTURE ASSOCIATION OF AMERICA IN RESPONSE TO INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO MOTIONS FOR SANCTIONS

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its *Reply Brief In Support of Motion to Strike Reply Brief filed by the Settling Devotional Claimants and Motion Picture Association of America In Response to IPG's Opposition to Motions for Sanctions*.[1]

[1] IPG's reply brief responds to an opposition brief filed by the Settling Devotional Claimants ("SDC"). No opposition brief was filed by the Motion Picture Association of America ("MPAA").

UNDERSIZED DOCUMENTS

Mr. Boydston
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Under typical circumstances, the straightforward nature of IPG's motion would not require submission of a reply brief. Notwithstanding, so many of the assertions set forth in the Settling Devotional Claimants' opposition brief ring hollow or untrue that IPG is obligated to briefly address such inaccuracies.

1. <u>The SDC submitted new accusations in its reply brief</u>.

The SDC assert that they are unaware of any new accusations being made in its reply brief. Nothwithstanding, for the first time ever, the SDC allege that Dr. Cowan's amended report was "for the purpose of reaching a desired result at IPG's request, rather than to correct any errors." Literally no evidence exists to support the SDC's accusation, and such accusation was never previously levied.

Such accusation is made in more than a few instances,[2] and directly contradicts all prior declarations of IPG, its counsel, and Dr. Cowan, whom have repeatedly stated that IPG was alerted to a concern only because certain program supplier figures appeared more beneficial to IPG than expected, and IPG requested Dr. Cowan to *investigate* the matter, not to revise his report. Nevertheless, the SDC blithely maintain that "[e]ach and every section in the SDC's reply specifically responds to factual contentions or legal arguments raised in IPG's

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[2] "Dr. Cowan then quickly prepared a revised report based on a new methodology after being informed of IPG's desired results . . . ." SDC reply at p. 6.

opposition, and identifies the particular portions of IPG's opposition to which the SDC were replying." In fact, IPG has never previously addressed a contention that IPG directed Dr. Cowan to prepare a revised report in order to accomplish certain "desired results", because such contention has never previously been alleged. Consequently, the SDC's contention that it was merely responding to IPG's argument on the issue is as false as the statement itself.

At no time did IPG or its counsel communicate to Dr. Cowan a "desired result", nor has any evidence ever suggested such was the case.

2. The SDC fail to follow the dictate of their own cited authority.

Although the SDC cite to 37 C.F.R. §350.1, they ignore the plain text of that regulation. Such regulation states that the CRB's regulations relating to the submission of pleadings applies *generally*, but can be modified. See 37 C.F.R. §350.1 (emphasis added) ("This subchapter governs procedures *generally* applicable to proceedings before the Copyright Royalty Judges . . . ."). Parties are not entitled to file reply briefs as a matter of right, and certainly not entitled when the Judges have proscribed a different process to follow, with specific response dates that expressly mention moving and opposition briefs, but not reply briefs.[3]

[3] The instances in which the Judges have directed a filings process varying from the standard process of submission of a moving brief, opposition brief, then reply brief, are innumerable and common. The SDC's only response is that the Judges did not mention the filing of a reply brief, and therefore did not prohibit its filing.

3. **<u>The SDC purposely confuse its efforts to compare Dr. Cowan's original and amended written reports, with the efforts to compare the underlying data thereof</u>**.

While continuing to feign ignorance of the distinction in its opposition brief, IPG noted that the SDC's reply brief repeatedly exaggerated the efforts required to compare IPG's original and amended direct statements, and purposely confused that effort with the effort to compare the data underlying such reports. As IPG made clear in its opposition to the SDC's and MPAA's respective *Motion for Sanctions*, only a modicum of effort was required to compare the original and amended *written* reports of Dr. Cowan. No "expert" was required to be engaged on an expedited basis, or at all -- merely a proofreader.

The text of Dr. Cowan's 13-page, double-spaced, amended report differed from his initial report in only a handful of ways, all of which were detailed to the SDC and MPAA in September 2016 and are cited in IPG's opposition to the motions for sanctions. See fn. 11. For its part, not only does the SDC reply brief continue to perpetuate the falsity of extraordinary last-minute effort, it simply fails to acknowledge that the only difference that resulted to the SDC discovery requests was to add the phrase "and the Amended Cowan Report" in any instance where the SDC request made any reference to "the Cowan Report".

Consequently, when the SDC continue to disclaim in its most recent pleading any understanding as to the distinction between what it was required to do prior to its submission of discovery requests to IPG (i.e., addition of the phrase "and the Amended Cowan Report" to its requests), with what it voluntarily elected to do under the normal timeframes applicable to discovery (a comparison of the electronic data underlying those reports), such assertion is evidently purposely misleading.

4. **The SDC's rationalization of its inflammatory language is preposterous.**

Seeking to make more benign the gratuitous insult lobbed at IPG, the SDC cite to a ruling by an opinion in which the court describes itself as "not having a clue". Apparently, SDC counsel are unaware of the fact that persons are allowed to make self-deprecating or even insulting assertions about themselves, but to make the same comment about another is insulting. Regardless, one need only consider the language in the excerpt cited by the SDC with the SDC's statement in its reply brief in order to appreciate the difference between the two statements. One is intended to be received as an insult, the other is not. It is not difficult.

Indeed, within the last few days the Judges have issued a proposed regulation that purportedly seeks to maintain "the integrity" of these proceedings. Comments such as those liberally thrown around by the SDC have no place in a court of law, have no place in these proceedings, and have transformed these

proceedings into something less than they previously were. Courts regularly chastise parties for making gratuitous insults. The Judges should do the same here.

5. **The SDC continue to falsely maintain significance to Mr. MacLean's declaration**.

The SDC reply brief falsely suggested to the Judges that Mr. MacLean's declaration was admitted into evidence in a prior proceeding with no qualification, and the SDC ostensibly submitted the declaration in its reply brief in order to address the issue of whether SDC counsel knew or did not know that data underlying the SDC-submitted methodology did not exist at the time of the SDC's submission of its direct statement in the 1998-1999 cable proceedings (Phase II). As is now clear, neither assertion is accurate.[4]

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[4] Remarkably, Mr. MacLean's declaration does not even address the issue it purports to address, i.e., whether SDC counsel knew when they submitted their proposed methodology in the 1998-1999 Phase II proceedings that data underlying the purported results of such methodology did not exist. Rather, Mr. MacLean's declaration addresses the sequence of events relating to the issue of what representations were made to IPG in conversations, and via produced documents, as to the source of the sample of stations that were part of the SDC-submitted (MPAA-created) study. Nowhere does Mr. MacLean's declaration address whether or not at the time that the SDC submitted its declaration the underlying data did not exist, could not therefore be attested to as the basis of the SDC-proposed results (by Mr. Sanders or SDC counsel), and had to be reconstructed by Dr. Erkam Erdem. Mr. MacLean's declaration is therefore irrelevant.

The fact is that such attempted reconstruction occurred only *after* IPG was misled to believe that such data existed, after IPG was required to file a motion to compel production, and after IPG moved for dismissal of the SDC study when no responsive underlying electronic data was ultimately produced. Such facts are well

A cursory review reveals that Mr. MacLean's declaration makes several statements of fact regarding several matters for which he has no personal knowledge, e.g., the MPAA's engagement of computer programmer Alan Whitt more than twelve years prior, the data produced by Mr. Whitt at such time, the actions and impressions of John Sanders, etc. Contrary to the excuse provided by the SDC in its opposition brief, several of such assertions of "fact" are made without any attribution to the testimony of Mr. Whitt, Mr. Sanders, or any other persons. See, e.g., MacLean declaration at paras. 3 ("To do this . . . ."), 5, 6, 9, 10, 24 ("The relationship between . . . ."), 25, 26. Moreover, IPG and its counsel take issue with Mr. MacLean's recollection of the substance of certain conversations with IPG and its personnel. (See paras. 29-33).

For these and other reasons, Mr. MacLean's declaration was admitted in the prior proceeding for only a limited purpose, i.e., to show the sequence of events relating to the production of records and data underlying *one aspect* of the SDC's methodology.[5] It was *not* admitted to establish the truth of the matters contained

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chronicled in the Judges' *Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014).

[5] The issue at hand was whether or not the SDC had misrepresented that the television station data appearing in its submitted study was the same as the television station data selected by MPAA employee Marsha Kessler in the MPAA's Phase I study. In response to IPG discovery requests seeking documents underlying the stations selected and appearing in the SDC-submitted study, the

therein, and certainly not for the purpose of engaging in a debate at the hearing as to the accuracy of Mr. MacLean's hearsay statements. IPG objected because of the obvious issues with Mr. MacLean's submission of his own declaration to IPG "two minutes" before he moved for its introduction into evidence. See transcript text appearing at fn. 1 to IPG *Motion to Strike*.

Nevertheless, in the SDC's reply brief, not only did Mr. MacLean fail to clarify such limited admission, but now doubles down that:

> "Every statement in the declaration is based on counsel's personal knowledge, including counsel's personal knowledge as to what other witnesses testified."

SDC Opp. at p. 4.

The problem with the foregoing statement is that it simply is not true. There are several statements contained in Mr. MacLean's declaration that counsel could not logically have personal knowledge about (see prior paragraph cites), are not reflected in testimony anywhere, nor does Mr. MacLean's declaration assert that such (hearsay) statements represent the testimony of others. On the contrary, Mr.

SDC had produced written testimony of Marsha Kessler relating to an MPAA study submitted in Phase I of the proceedings. By all appearances, the SDC simply presumed that the station data was the same, which was disproven when IPG's expert witness discovered little overlap between the stations selected in the MPAA's Phase I study and the stations appearing in the SDC's Phase II study. Mr. MacLean's declaration addressed the sequence of correspondence and conversations between IPG and SDC personnel (including expert witnesses) relating to that narrow subject.

MacLean sets forth such statements as facts of his own personal knowledge, and now rationalizes (inaccurately) that if statements are not of his own personal knowledge, they nevertheless appear in the sworn testimony of others.

As such, Mr. MacLean misrepresented both the significance of his declaration to the issue at hand (i.e., whether SDC counsel submitted a direct statement with full knowledge that underlying supporting data did not exist at the time of submission), and misrepresented a ruling of the Judges as to the scope of the declaration's admission in a prior proceeding. Such acts appear evidently inconsistent with the Judges desire to maintain the integrity of these proceedings.

6. **The MPAA have now submitted a *second* notice of errata to its direct statement in the 2010-2013 proceedings, and the SDC have submitted a first notice of errata to its direct statement in the 2010-2013 proceedings, all in hypocrisy of their criticism of IPG.**

Although the MPAA did not file an opposition brief to IPG's motion to strike, it is ironic that the MPAA has now filed yet another notice of errata to its direct statement in the 2010-2013 proceedings.

As noted in IPG's moving brief, despite condemning IPG for not immediately recognizing errors in the calculations of its expert's report, the MPAA revealed on April 3, 2017 that it had failed to detect significant errors in the report of its expert witness. Since the advent of this pleading cycle, the MPAA has now revealed a *second* instance of significant errors appearing in the report of a different expert witness. That is, the MPAA has now ***twice*** revealed that it has

determined errors in the reports of two expert witnesses. The MPAA's notices of errata were submitted on April 3, 2017 and April 25, 2017, i.e., *four weeks* and *seven weeks*, respectively, following the MPAA's submission of its amended direct statement.

Similarly, in the last few days the SDC also revealed errors in the report of Dr. Erdem Erkem in the 2010-2013 proceedings, and filed a notice of errata. According to such notice of errata, the SDC filed an amended direct statement on March 9, 2017, and was informed about the error by the Canadian Claimants Group *on April 4, 2017*. Although the due diligence needed to confirm or deny the particular error appears extraordinarily basic (inclusion or exclusion of five programs in the SDC repertoire from CRTC logs; see Exh. B to SDC notice of errata), the SDC waited until *April 28, 2017* in order to report this error. No explanation is provided as to why the SDC waited 3 ½ weeks to report this error rather than report it immediately, however IPG can only presume that such delay was a purposeful attempt to avoid revelation of such error during the pleading cycle for IPG's motion to strike.

A stark contrast exists between IPG's recognition of errors in the work of its expert witness, and the MPAA/SDC recognition of errors with three expert witnesses. IPG's direction for Dr. Cowan to investigate figures with which IPG found concern occurred *immediately*, and without any prejudice to adverse parties

(other than the nominal effort to compare Dr. Cowan's original and amended 13-page, double-spaced, reports). By contrast, the MPAA's expert errors were revealed *four weeks* and *seven weeks*, respectively, following the MPAA's submission of its amended direct statement, while the SDC's expert error was revealed *seven weeks* following the SDC's submission of its amended direct statement. As noted, rather than promptly reporting its error, the SDC inexplicably withheld such information for 3 ½ weeks.

Moreover, while the MPAA provided a redline showing the changes between Dr. Gray's and Mr. Horowitz's reports and corrected reports, no explanation as to the reason for such changes was provided other than that Dr. Gray "discovered a calculation error" and that the *Joint Sports Claimants* (not the MPAA) discovered discrepancies between Mr. Horowitz's report and underlying documents produced in connection therewith. Nor has the MPAA provided a description of the significance of changes made in the data *underlying* the corrected report. Nor did the MPAA seek leave to file the corrected reports, even though both of the MPAA's redline versions reflect the substitution of *substantive* figures. For its part, the SDC's error was also initially detected by a different entity, the Canadian Claimants Group.

The question is obviously begged how the MPAA and SDC can reasonably criticize IPG for its failure to detect an error its expert report when the MPAA and

SDC altogether failed to detect certain of their own errors until informed by third parties, verified such errors several weeks after the submission of such reports and after the conclusion of discovery related thereto, and in the case of the SDC, purposely withheld such information for 3 ½ weeks. **Literally, the MPAA and SDC have engaged in errors of greater consequence and scope than IPG, yet still maintain that IPG should be sanctioned, an extraordinarily hypocritical position.**

CONCLUSION

For the reasons set forth above, the MPAA and the SDC reply briefs should be stricken and not considered by the Judges.

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May, 2017, a copy of the foregoing was sent by electronic mail and next day mail to the parties listed on the attached Service List.

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