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Before the
COPYRIGHT ROYALTY JUDGES
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)
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INDEPENDENT PRODUCERS GROUP'S OPPOSITION TO THE SETTLING DEVOTIONAL CLAIMANTS' MOTION FOR SANCTIONS AND THE MOTION PICTURE ASSOCIATION OF AMERICA'S MOTION FOR SANCTIONS

Worldwide Subsidy Group LLC (a Texas limited liability company) dba Independent Producers Group ("IPG") hereby submits its "Opposition to Settling Devotional Claimants' Motion for Sanctions and the Motion Picture Association of America's Motion for Sanctions".

On January 10, 2017, the Judges issued their *Order on IPG Motion for Leave to File Amended Written Direct Statement*. Therein, the Judges granted IPG's motion to file an Amended Written Direct Statement, chastised IPG and its counsel for the proposed submission, and permitted the SDC and MPAA to file:

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> "individual motions or a joint motion with authoritative legal analysis addressing the Judges' authority, if any, to impose financial or other sanctions in this circumstance in which a party has disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification."

Order at 7.

By their motions, the Settling Devotional Claimants (the "SDC") and Motion Picture Association of America ("MPAA") seek sanctions against IPG and its counsel for filing a Written Direct Statement which included an expert witness report containing errors that, consequently, required amendment vis-à-vis an Amended Written Direct Statement.

FACTS

In order to address the authority of the Judges to issue financial or other sanctions, and the application of such authority (if existent) it is necessary for the Judges to appreciate the context by which IPG submitted its Direct Statement ("WDS") and Amended Written Direct Statement ("AWDS").

On August 2, 2016, subject to IPG's objection, the Judges granted a motion jointly brought by the MPAA and SDC to continue the filing deadline for the remanded proceedings from August 8, 2016 until August 22, 2016. IPG objected, for among other reasons, because IPG had incurred premium expenses in order to have its expert witness complete his expert report by the original date required.

See the Declaration of Brian D. Boydston ("Decl. of Boydston"), paragraph 1, and the Declaration of Raul Galaz ("Decl. of Galaz"), paragraph 1.

Nevertheless, after communicating the contents of such continuance to IPG's expert witness, Dr. Charles Cowan, Dr. Cowan advised IPG that he believed that he now had sufficient data in order to construct an analysis that, for the first time in any distribution proceeding, attempted to implement the Shapley Valuation analysis expressly sought by the Judges. See 2008-1 CRB CD 98-99 (Phase II), *Final Distribution of Distributions of 1999 Cable Royalty Funds* at p. 14 et seq. (Jan. 14, 2015). With the ambition of providing the Judges with precisely the type of analysis that other experts had argued was impossible to construct for these proceedings (e.g., SDC expert, Erkan Erdem), IPG agreed to have Dr. Cowan pursue such endeavor. Decl. of Boydston, para. 2; Decl. of Galaz, para. 2.

Throughout the dates for which a filing continuance had been provided, IPG's counsel received repeated assurances from Dr. Cowan that the results of the Shapley Valuation would soon be forthcoming. Notwithstanding, and not unpredictably when dealing with a sample of millions of broadcasts, each with scores of associated data, requiring segregation by types of programming and other factors, the analysis took longer than expected. Ultimately, IPG's counsel received Dr. Cowan's report and associated figures approximately one hour prior to the filing deadline. See Decl. of Boydston, para. 3.

IPG's counsel immediately set upon to review Dr. Cowan's report, but only for typographical or obvious grammatical errors.[1] IPG counsel did not venture to address either the logic of Dr. Cowan's methodology, nor the accuracy of his calculations, nor would have supposed the capability of challenging *any* aspect thereof without the assistance of another expert. Such was specifically the purpose and purview of Dr. Cowan's engagement as an expert witness. Not only would it have been beyond any expertise of IPG's counsel to question or challenge Dr. Cowan's stated methodology or calculations, IPG counsel would have had no means of verifying Dr. Cowan's calculations for the simple reason that the software utilized by Dr. Cowan is a variety typically only utilized by professionals of Dr. Cowan's expertise, is not a software generally utilized in the legal profession, and is certainly not a software with which IPG's counsel (or any IPG representative) was familiar, *then or now*.[2] See Decl. of Boydston, paras.. 4, 5, and 6.

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[1] IPG's counsel previously asserted at footnote 5 of *IPG's Motion for Leave to File Amended Direct Statement* that he had not reviewed or considered Dr. Cowan's report prior to its submission to expressly avoid any allegation that IPG had "straitjacketed" its witness. A clearer statement is that IPG's counsel reviewed such report, but only for non-substantive purposes.

[2] In the Judges' *Order on IPG Motion for Leave to File Amended Direct Statement* (Jan. 10, 2017), the Judges assert that:

> "IPG counsel failed to give even cursory attention to the expert report. Had he done so, counsel could not have helped but discover *clear error in the*

In fact, the only hint that some of Dr. Cowan's calculations might be amiss was when IPG noticed that *certain* program supplier calculations appeared disproportionately beneficial to IPG. IPG raised this with IPG's counsel who then promptly inquired with Dr. Cowan regarding such program supplier figures, to which Dr. Cowan indicated that he would review such matter and get back to IPG counsel. Decl. of Boydston, para. 7; Decl. of Galaz, para. 3.

Following more than a week of review, Dr. Cowan reported that he discovered errors in all his ultimate calculations, some slight, but insisted that there was no change in his methodology. IPG solicited and received a revised report that appeared to contain minor typographical revisions from the initial report, but substantially different numeric results, and promptly filed the revised report as part of an Amended Direct Statement on August 31, 2016. Decl. of Boydston, para. 8; Decl. of Galaz, para. 4. As of such date, no discovery had been propounded in

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> *results of the expert's calculations*. After he filed the report, he contacted the expert and set in motion an effort to make amends."

Order at p. 4 (emphasis added).

With all due respect to the Judges, the Judges grossly overstate the facts. There was no "clear error", much less error that could have been verified absent IPG's engagement of a *different* expert witness to confirm the computations of Dr. Cowan from electronic data that IPG counsel does not even have the ability to analyze. See discussion, *infra*. Decl. of Boydston; Decl. of Galaz.

these proceeding, much less been subject to production. Nonetheless, when both the SDC and MPAA propounded discovery, with minor revisions to their document requests both parties included requests for documents associated with the content of both IPG's WDS and AWDS. IPG timely produced all data in its possession and the possession of Dr. Cowan relating to *both* filings.[3] Decl. of Boydston, para. 9; Decl. of Galaz, para. 5.

Following IPG's production, the SDC inquired why certain of the devotional programming calculations appearing in Dr. Cowan's amended expert report did not comport with the electronic data produced. IPG immediately submitted such query to Dr. Cowan, who determined that two of the tables included in his amended report had apparently been taken from some interim version of his report, in error. Such fact was immediately communicated to the SDC.[4] Decl. of Boydston, para. 10; Decl. of Galaz, para. 6.

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[3] While IPG appreciates that *some* amount of time would be required to compare IPG's WDS and AWDS, to suggest that it would require more than an insignificant expenditure of time to compare the almost identical wording appearing in Dr. Cowan's report and amended report, both of which were only 13 pages in length, double-spaced, would be an exaggeration.

[4] The SDC purposely attempt to distort this dialogue by asserting that IPG waited two months to file its revised numbers with the Judges, suggesting that such information was withheld from the SDC. In fact, the discrepancy between the figures in two devotional programming tables was *discovered by the SDC* and presented to IPG within one week of IPG's discovery production, was immediately acknowledged by IPG in correspondence (see **Exhibit F** to *IPG Motion for Leave*

A. NO EXPLANATION IS PROVIDED AS TO HOW IPG OR ITS COUNSEL "DISREGARDED (OR NEGLIGENTLY OR PURPOSELY MISINTERPRETED) THE JUDGES' PROCEDURAL RULES" WHEN IPG FILED ITS AMENDED DIRECT STATEMENT.

The MPAA and SDC submit that IPG's AWDS was required to be filed *because* IPG's counsel "did not review or consider Dr. Cowan's [initial] report prior to its submission", suggesting that counsel's substantive review would have necessarily revealed the substantive errors contained in either Dr. Cowan's written report or the underlying electronic data. See, e.g., MPAA motion at p. 3. No evidence exists to support such assertion, which remains the predicate leap of faith upon which both the MPAA and SDC motions necessarily rely.[5]

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to File Amended Written Direct Statement), and involved *zero* revisions to Dr. Cowan's expert report or the electronic data already in the SDC's possession. That is, almost immediately following IPG's production of its electronic data, the SDC discovered, and IPG confirmed, that the percentage figures appearing in two of Dr. Cowan's tables should be the figures appearing in the electronic data.

Quite simply, as IPG explained, two of the tables inserted into Dr. Cowan's amended report had erringly been taken from some interim iteration of figures. IPG considered it unnecessary and premature to file a revised set of claimed percentages with the CRB until such time as the Judges ruled on the pending motions to strike filed by the SDC and the MPAA, and address whether *any* amended direct statement would be allowed. Moreover, such revision to the claimed percentages clearly fell within the ambit of 37 C.F.R. §351.4(b)(3), which need not be based on "new" information obtained during discovery and is allowed to be submitted "at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law." 37 C.F.R. §351.4(b)(3).

[5] If Dr. Cowan had informed IPG or its counsel that there were no errors in his initial calculations, then absent IPG engaging a separate expert to test such statement, IPG would have no basis to challenge such contention. To be clear,

Nor was IPG counsel ever informed by Dr. Cowan that a methodological change was the basis for his revised calculations submitted as part of IPG's AWDS, a position flatly contested by Dr. Cowan in declarations previously submitted to the Judges.[6] As such, literally no evidence suggests that IPG or its counsel "disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification" when IPG filed its AWDS. Rather, believing that IPG's AWDS maintained the identical methodology, and that it was merely calculation errors that required a revision of IPG's WDS, IPG

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other than the revised percentage figures, the only revision to Dr. Cowan's initial written report were either typographical in nature or a revision to a stated calculation that was represented to IPG as being non-substantive, and which would appear to a non-expert as being no more than a typographical revision.

Revisions to the *electronic data* that is the basis for Dr. Cowan's revised calculations remains accessible *only* in a computer software program typically utilized by professionals of Dr. Cowan's expertise, is not a software generally utilized in the legal profession, and is not a software with which IPG's counsel (or any IPG representative) was familiar, then or now.

[6] As is unanimously reflected in IPG's pleadings as part of *IPG's Motion for Leave to File Amended Written Direct Statement*, including the declarations of Dr. Cowan and Brian Boydston, at no time was IPG or IPG counsel informed that a methodological change to Dr. Cowan's calculations was involved. In fact, Dr. Cowan maintained in his sworn declaration that his revision from linear scaling to logarithmic scaling and other revisions did not involve a "methodological" change, a position that was ultimately rejected by the Judges in their *Order on IPG Motion for Leave to File Amended Direct Statement* (Jan. 10, 2017). See Order at pp. 3-4.

submitted the AWDS solely as though it was revision of claims pursuant to 37 C.F.R. §351.4(b)(3).[7] Decl. of Boydston, para. 11; Decl. of Galaz, para. 7.

As such, the MPAA and SDC do not actually seek sanctions against IPG and its counsel for "disregard" of amended direct statement filing requirements, as was the only purpose allowed for the filing of their motions, but rather for the mere fact that substantive errors existed with the initial report of Dr. Cowan that had to be remedied by IPG's AWDS. Case law is clear, however, that IPG cannot be sanctioned for substantive errors made by its expert witness, Dr. Cowan. *See* Coffey v. Healthtrust, Inc., 1 F3d 1101, 1104 (10th Cir. 1993) ("the court must allow parties and their attorneys to rely on their experts without fear of punishment for any errors in judgment made by the expert").

The gravamen of the sanctions motions is that the IPG and its counsel should be sanctioned because IPG's counsel did not discover the substantive error in Dr.

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[7] The Judges' *Order on IPG Motion for Leave to File Amended Direct Statement* (Jan. 10, 2017) states "IPG admits that its submission is tantamount to a *revision* of its claims", then suggests that there is some legal consequence because "a revision is not an inconsequential amendment".

IPG has never suggested that a *revision* to a claim is an inconsequential amendment, only that a mere *revision* of claims (without a change in methodology) invokes the provisions of 37 C.F.R. §351.4(b)(3) rather than the provisions of 37 C.F.R. §351.4(c). Even accepting for the sake of argument that a *revision* of claims is always "consequential" or always "significant" still does not affect the applicability of either 37 C.F.R. §351.4(b)(3) or 37 C.F.R. §351.4(c), as the concept of significance is not addressed in either regulation.

Cowan's initial report prior to filing it with the WDS. For the reasons set forth above, IPG and its counsel had neither the capability nor obligation to determine Dr. Cowan's error, and even to this day IPG cannot be said to have "discovered" the error in Dr. Cowan's calculations. In fact, it required more than a week before Dr. Cowan and his team, acknowledged experts in statistics and economics, discerned the basis for the miscalculation that IPG and its counsel could, at best, only intuit.[8] Moreover, and fatal to any contention that IPG or its counsel should have discovered the errors in Dr. Cowan's initial report and underlying electronic data, the MPAA and SDC simultaneously contend that for *them* to discover such errors and the revisions to Dr. Cowan's written report and underlying electronic data, it was *necessary* for the MPAA and SDC to engage the services of their expert witnesses. The MPAA and SDC cannot have it both ways; they cannot assert that IPG or its counsel would have immediately recognized errors in IPG's WDS and then claim that in order to discern the errors they were required to engage expert witnesses.

Under these circumstances, no sanction should issue because IPG and its

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[8] In fact, IPG only suspected possible error with *certain* program supplier figures and, while uncharacteristically low, did not consider any devotional figures to be outside the range of plausibility under the methodology that IPG was only first witnessing. Only after seeing the recalculations that appear in the Amended Direct Statement did IPG become aware that the devotional figures were also subject to a miscalculation. Decl. of Boydston, para. 15; Decl. of Galaz, para. 9.

counsel were reasonably relying on Dr. Cowan's expertise in presenting his report to the Judges with the WDS.

B. IT IS NOT THE ROLE OF LEGAL COUNSEL TO IDENTIFY SUBSTANTIVE ERRORS IN THE EXPERT OPINIONS OR CALCULATIONS OF COUNSEL'S OWN EXPERT WITNESS, NOR CAN A PARTY OR ITS COUNSEL BE SANCTIONED FOR ERRORS MADE BY THEIR EXPERT WITNESS. NO AUTHORITY EXISTS FOR THE JUDGES TO IMPOSE THE FINANCIAL OR OTHER SANCTIONS SOUGHT BY THE SDC AND MPAA.

In its moving papers, the MPAA and SDC acknowledge that the Judges are not specifically authorized by statute or regulation to impose sanctions on parties or counsel before it. Rather, the parties argue that the CRB is generally authorized to police the parties and counsel appearing before it to provide for the orderly conduct of its proceedings. Given that such authority is only even generally defined, there is little, if any, specific legal authority to define what exactly the CRB is authorized to do in terms of issuing sanctions, or under what circumstances they are appropriate. Notwithstanding, what is clear is that a party and its counsel are not the guarantor of the accuracy of an engaged expert witness' testimony, opinion, or calculations.[9] Nor should a party be sanctioned for good faith errors made by their expert witness.

[9] IPG's counsel previously noted his conscious effort to expressly avoid any allegation that IPG had "straitjacketed" its witness, an allegation *twice* asserted by the Judges against IPG. In response, the Judges' order of October 7, 2016 asserted

In fact, the MPAA appropriately draws on legal authority surrounding F.R.C.P. 11, but then conspicuously fails to address on point legal authority addressing the issuance of sanctions for the acts of an expert witness. In Coffey v. Healthtrust, Inc., 1 F3d 1101, 1104 (10th Cir. 1993), the Tenth Circuit was presented with a situation like this one, in which a party sought Rule 11 sanctions against the other party and its counsel based upon inconsistencies concerning an expert witness report. Specifically, in Coffey, an anti-trust case, the 10th Circuit overturned Rule 11 sanctions imposed on the attorney for the plaintiff for filing an economic study by an expert witness, and held as follows:

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that IPG misapprehended the Judges' concerns regarding "straitjacketing", claiming that it related to their concerns about Raul Galaz, "an individual with no relevant training or experience in economics or econometrics, a financial stake in the outcome, and a prior history of fraud." Order at fn. 5. As previously noted, and with all due respect to the Judges, the prior ruling on the matter was not so limiting as to include reference only to Mr. Galaz, wherein the Judges stated:

> "In any event, the Judges recognize that even a party that does not have such a checkered history has an inherent self-interest in selecting the types of data for use by its expert that is inconsistent with the independence of the expert in identifying his or her own categories of data."

Docket No. 2008-1 CRB CD 98-99 (Phase II), *Final Determination of Distributions of Cable Royalty Funds (Phase II)* at p. 38. Based on such language, IPG and its counsel believed that the selection of data for preparation of an expert report according to the direction of *any* person without "relevant training or experience in economics or econometrics", *including* legal counsel, should be equally discouraged. Decl. of Boydston, para. 12; Decl. of Galaz, para. 8.

> "In a case such as this, where the attorney does not have the necessary knowledge, involvement of the specialized knowledge of an expert is necessary. The attorney relies on the expert to explain to the judge or jury what is not within his or her realm of knowledge. There would seem to be no problem for the attorney to rely on the expert's opinion as the basis of his client's position. As long as reliance is reasonable under the circumstances, the court must allow parties and their attorneys to rely on their experts without fear of punishment for any errors in judgment made by the expert."

Coffey, at 1104. [emphasis added]

Two other cases similarly adopt the holding of Coffey. See Dubois v. U.S. Dep't of Agric., 270 F.3d 77 (1st Cir. 2001), and City of Aurora v. Simpson (in re Water Rights of Park County Sportsmen's Ranch), 105 P.3d 595 (Colo. 2005).

In Dubois, a ski resort, with part of its operations located in a national forest, applied for a permit from the U.S. Forest Service to expand its operations and draw additional water from a pond in the national forest. Dubois, 270 F.2d at 79. Plaintiff filed suit alleging that the Forest Service violated the National Environmental Protection Act by approving the permit without first exploring reasonable alternatives to using the pond, which pond provided water to a nearby town. Id. The trial court granted summary judgment in favor of the Forest Service, but the 1st Circuit court reversed the judgment and, instead, ordered that summary judgment be entered in favor of plaintiff. Id.

Following remand, plaintiff, as the prevailing party in the suit, filed a motion for attorney's fees, arguing that the Forest Service's litigation position was

vexatious in that the Forest Service stated that an alternative to using the pond, to wit building storage ponds, was a "practical impossibility," while at the same time, it had authorized the construction of such storage ponds at a different national forest nearby. Id. at 79-80. The attorney's fee motion was denied by the trial court. Id.

On appeal, the Dubois court agreed that, while a federal district court, ". . . may [as an exception to the "American Rule" that each side bear its own attorney's fees] award attorney's fees to a prevailing party when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,'" the court's power, "'. . . should be used sparingly and reserved for egregious circumstances,'" and, ". . . with great circumspection and restraint, employed only in compelling situations." Id. (emphasis added)(citations omitted). "Vexatious" conduct was characterized as that which is, "'. . . frivolous, unreasonable, or without foundation. . .'" Id.

While plaintiff's motion for attorney's fees in Dubois was not made pursuant to Federal Rule of Civil Procedure 11, in affirming the denial of the motion, the Dubois court viewed it through a Rule 11 lens because plaintiff argued that the trial court had failed, ". . . to consider whether the litigators for the Forest Service conducted a reasonable inquiry into the facts . . .", and that, ". . . the government attorneys have a responsibility to investigate their client's claims of 'practical impossibility' and inquire of each Forest Service unit as to whether snowmaking

ponds were in place . . . nearby." Id. at 82. In rejecting these arguments and affirming the denial of the motion for attorney's fees, the Dubois court stated that, ". . . [a] signer's obligation personally to comply with the requirements of Rule 11 clearly does not preclude the signer from any reliance on information from other persons." Id. Specifically, and citing Coffey, the 1st Circuit court reasoned:

> ". . .[G]overnment counsel in the instant case reasonably relied on the technical expertise of the Forest Service to craft its litigation position. The Forest Service is a recognized expert on environmental issues, and government counsel . . . had no reason to question the accuracy of their client's claims. In addition, the subject matter of the Forest Service's statement was highly technical."

Id. at 83 (citing Coffey, 1 F.3d at 1104). The Dubois court viewed "the technical nature of [an] expert's research" as a factor in determining whether an attorney's reliance thereupon is reasonable. Id.

Here, as in Dubois, the MPAA's and SDC's motion for sanctions is not brought pursuant to Rule 11, but should likewise be viewed through a Rule 11 lens because they allege that IPG's counsel should have substantively reviewed and considered Dr. Cowan's initial report prior to filing it as part of the WDS, and affirmatively discovered the substantive errors that both parties simultaneously contend required the assistance of the MPAA's and SDC's expert witnesses. There can be no dispute that the calculation of royalty pool shares in this matter is, like the water issues in Dubois and the health care market analysis in Coffey, highly

technical. Because of the technical nature of Dr. Cowan's calculations, and the fact that counsel for IPG had no basis on which to challenge the substantive accuracy of such calculations, counsel for IPG acted reasonably in relying upon and filing Dr. Cowan's report with the WDS. Decl. of Boydston, paras. 5-6. A substantive inquiry or investigation by IPG and its counsel into Dr. Cowan's calculations prior to their filing was not required. Id. at 82.

Similarly, in City of Aurora, opposers successfully contested a water rights application, which application was based upon a groundwater model prepared by applicants' experts. Id. at 602, 618-19. The matter was tried by a District Court for Water Division 1 ("water court") rather than by a civil court, hence the unusual nomenclature for the parties. Id. at 602. At the conclusion of trial, the water court found that applicants knew, or should have known, that their groundwater model was indefensible, but proffered such evidence anyway. Id. On this basis, opposers' motion for attorney's fees was granted. Id. at 617-18.

Notwithstanding, the Colorado Supreme Court reversed the award of attorney's fees, analogizing the grant of attorney's fees pursuant to state statute to sanctions granted pursuant to Rule 11, thus:

> "Coffey is not directly applicable here because it involves Rule 11, whereas this case involves [Colorado statute]. However, the analysis in Coffey is indirectly applicable to an award of attorney fees under [Colorado statute] because both Rule 11 and [the Colorado statute]

> have similar purposes; both impose sanctions against a party or its attorney for pursuing groundless or frivolous claims."

Id. at 618-20. The Colorado statute in question authorizes recovery of attorney's fees where a party brings or defends an action that is substantially frivolous, groundless, or vexatious. Id. at 618.

Citing Coffey, the City of Aurora court stated that, ". . .a court must allow parties and their attorneys to rely on their experts without fear of punishment for errors in judgment made by the expert." Id. at 619 (emphasis added). Echoing the Dubois "technical nature" factor discussed supra:

> "Given the highly technical and complex nature of hydrology, as well as the groundwater expertise of [applicants'] experts, [applicant's] reliance on its experts was reasonable. Consequently, [applicant] was entitled to rely on its experts without fear of an award of attorney fees for errors in judgment made by its experts."

Id. at 620.

The Coffey, Dubois, and City of Aurora decisions demonstrate that the weight of legal authority is clearly against the issuance of sanctions sought herein by the MPAA and SDC. As those cases, IPG's counsel was reasonably relying on Dr. Cowan, as IPG's expert witness, to accurately calculate royalty pool shares. Decl. of Boydston, paras. 5-6. At no time has IPG's counsel had the expertise to challenge the opinions and testimony of Dr. Cowan, nor had the ability to "double-check" the figures presented by Dr. Cowan. Decl. of Boydston, para. 4. As must

be acknowledged by the SDC and MPAA, Dr. Cowan's calculations are presented in computer software that is not generally utilized by the consuming public, not generally utilized by professionals in the legal profession, nor a software for which IPG or IPG's counsel even has any passing familiarity. As such, neither IPG nor its counsel should be sanctioned for relying upon Dr. Cowan to accurately make his calculations.

C. ANY "PREJUDICE" ASSERTED BY THE MPAA AND SDC ARE EXPENSES THAT WERE NOMINAL, WERE UNNECESSARILY INCURRED BY THEIR OWN MAKING, OR WERE EXPENSES THAT WOULD HAVE BEEN INCURRED REGARDLESS OF WHETHER DR. COWAN HAD REVISED HIS REPORT AND CALCULATIONS.

1. Nominal effort was required to review and prepare discovery on IPG's Amended Written Direct Statement.

In their Order of January 10, 2017, the Judges address the prejudice suffered by the MPAA and SDC as a result of IPG filing an AWDS. IPG had previously noted that the filing of its proposed AWDS came prior to the respective parties' submission of discovery requests, resulting in no delay in the MPAA's or SDC's receipt of documentation underlying *both* IPG's WDS and AWDS. In response, the Judges noted that IPG's argument confused the concept of whether the discovery requests were able to timely address IPG's AWDS with the ability of MPAA and SDC counsel to "apply muscle" to a last minute task, i.e., prejudice.

Indeed, IPG did not disregard or confuse the level of effort for the MPAA and SDC to modify their respective discovery requests, and addressed this very matter in IPG's *Motion for Leave to File Amended Written Direct Statement* (see pp. 7-9). In fact, in order to demonstrate the modicum of effort that was exerted, IPG attached the discovery requests of both the MPAA and SDC, and directed the Judges to those provisions relating to IPG's AWDS. See **Exhibits C** and **D** to *IPG Motion for Leave to File Amended Written Direct Statement*). As reflected therein, the opening paragraph of the MPAA requests expressly refers to IPG's AWDS, and the inclusion of a mere seven (7) additional requests uniquely directed at the AWDS, adding to the seventy-six (76) requests already drafted. Those additional requests reflect that four simply address, on a table-by-table basis, the four revised percentage allocation tables appearing in Dr. Cowan's amended report; two address documents reflecting the differences between the initial and revised report; with a final request generally requesting all documents underlying the amended report. Id. Decl. of Boydston, para. 13. The SDC discovery requests were even more rudimentary in their modification, and simply added the phrase "and the Amended Cowan Report" where there was any reference to "the Cowan Report". Id. Decl. of Boydston, para. 14. Clearly, whatever "muscle" might have been referenced by the Judges was not herculean, and such was the very point of IPG's argument, i.e., so little effort was required in order to revise the MPAA and SDC

discovery requests that whatever "prejudice" existed was nominal, if not non-existent.

Notwithstanding the foregoing, the MPAA and SDC parade before the Judges every conceivable unrelated issue regarding IPG's ostensible violations of process since 2006, each of which has already been extensively addressed (and in some cases, is already the subject of sanction), for the purpose of characterizing IPG as "unrepentant".[10] Then, for example, with the presentation of no corroborating evidence, the MPAA contends that it expended:

> "*significant* resources to quickly review, attempt to identify the changes made in the IPG ADS, and formulate appropriate discovery requests on the eve of the deadline for serving such requests."

MPAA motion at p. 9 (emphasis added).

Indeed, these exaggerations of "significant" effort, i.e., "prejudice", are simply unbelievable. Far more effort was expended by the MPAA and the SDC in

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[10] For due measure, the MPAA attributes the issue of IPG's filing of its AWDS with the Judges' decision to delay the final proceeding from March 2017 until February 2018. As the Judges are aware, the Judges' order regarding such matter made no such attribution for the 11-month continuance, nor would resolution of whether IPG's AWDS would be allowed necessitate any significant delay.

The MPAA also contend that IPG should be sanctioned because the MPAA and SDC-represented claimants have been waiting for the final distribution of royalties for 8-18 years. Conspicuously omitted from such throwaway argument is that, unlike IPG, the MPAA and SDC-represented claimants have received substantial percentage advances of their royalties.

the preparation of their motions than the effort expended to compare wording appearing in Dr. Cowan's initial report and amended report, both of which were a mere 13 pages in length, double-spaced.

2. Any efforts expended to compare the underlying data to IPG's WDS and AWDS were unnecessary and performed at the voluntary election of the MPAA and SDC, or would have been performed regardless of whether Dr. Cowan's amended report was his initial or amended report.

At the time IPG filed its AWDS, discovery in the remand proceeding had not even commenced. The MPAA and SDC only had in its possession IPG's WDS, which attached Dr. Cowan's initial report. The text of Dr. Cowan's 13-page, double-spaced, amended report differed from his initial report in only a handful of ways, predominately the substitution of table percentages and the correction of typographical errors (e.g., reference to "IDC" instead of "IPG").[11] The status of the proceedings is poignantly significant because the MPAA and SDC did not yet have in their possession, nor were yet entitled to receive, the underlying data that stood as the basis for the revisions that resulted in Dr. Cowan's amended report. Decl. of Boydston, para. 16.

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[11] For a detailed listing of all textual differences between IPG's WDS and AWDS, see *IPG Motion for Leave to File Amended Written Direct Statement*, at pp. 2-4 (Sept. 12, 2016), *IPG Opposition to MPAA Motion to Strike IPG Amended Direct Statement*, at pp. 2-3 (Sept. 12, 2016), and *IPG Opposition to SDC Motion to Strike IPG Amended Direct Statement*, at pp. 6-8 (Sept. 12, 2016).

No different than the existence of a complaint and an amended complaint in civil proceedings, once an amended complaint is filed it becomes the operative pleading. While a party is certainly entitled to address any of the allegations contained within the initial complaint, it is not obligated to do so. No differently, the MPAA and SDC had no *obligation* to address any of the textual differences between Dr. Cowan's initial report and amended report. Any decision to do so would be at its own voluntary election.

Notwithstanding, as the MPAA discovery reveals, the MPAA expressly sought all documents reflecting differences between IPG's WDS and AWDS and, by incorporation, the differences between Dr. Cowan's initial and amended reports. See **Exhibit D** to *IPG Motion for Leave to File Amended Written Direct Statement* (MPAA discovery requests), Request No. 83. IPG did not object to the request, and produced all responsive documents, including all underlying data relating thereto, on September 12, 2016. Moreover, because responsive documents were produced to the MPAA in this proceeding, IPG also produced such documents to the SDC. Regardless, because the MPAA and SDC complained in their respective motions to strike IPG's AWDS that IPG had failed to detail the textual differences between IPG's WDS and AWDS, IPG also identified such differences in IPG's

opposition thereto, also filed on September 12, 2016.[12] Moreover, if either the MPAA or SDC had believed that IPG had not satisfactorily produced such documents, either could have issued follow-up requests, which neither party did.[13] Decl. of Boydston, para., 17.

In sum, the MPAA and SDC received a description of the few and obvious textual differences between IPG's WDS and AWDS on September 12, 2016 rather than August 31, 2016, and all the supporting underlying data on the exact date to which such parties were entitled such information, September 12, 2016.

Regardless of the foregoing, the MPAA and SDC contend that they were prejudiced because they were *required* to engage expert witnesses to review the underlying data supporting IPG's WDS and AWDS, and detail the differences thereto. In fact, neither party was required to do so, but rather *voluntarily elected* to do so, in hope of finding whatever information could be useful in the rebuttal portion of these proceedings. When IPG filed its AWDS, it became the equivalent

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[12] Notably, prior to bringing motions in civil practice, the moving party is required to attest their attempt to acquire information or a result without assistance of the court. Neither the MPAA or SDC attempted to do so, demonstrating that each was less concerned with being directed to the textual differences between IPG's WDS and AWDS (which were few and obvious) than complaining to the Judges.

[13] The SDC filed a motion to compel production, however addressing a separate issue. See discussion, *infra*.

of IPG's operative direct statement. If, by contrast, IPG had produced the underlying data to IPG's WDS initially, and then later produced the underlying data to IPG's AWDS, one could at least conceive of the possibility that the MPAA and SDC had superfluously had their expert witnesses review one set of underlying data unnecessarily. However, when the underlying data to IPG's AWDS is delivered at the exact same time as the underlying data to IPG's WDS, causing no delay in the proceedings, the cries of the MPAA and SDC that they were *required* to review the differences between the underlying data supporting IPG's WDS and AWDS ring false. No prejudice resulted.

In fact, had IPG filed Dr. Cowan's amended report as part of IPG's WDS on August 22, 2016 (rather than August 31, 2016), IPG *still* would have submitted the underlying data to both IPG's WDS and AWDS, to which the MPAA and SDC would *still* have been required to have their expert witnesses review such materials. The dictate of the CRB regulations is clear on this matter:

> "*Introduction of studies and analyses.* If studies or analyses are offered in evidence . . . [t]he facts and judgments upon which conclusions are based shall be stated clearly, ***together with any alternative courses of action considered.*** Summarized descriptions of input data, tabulations of input data and the input data themselves shall be retained."

37 C.F.R. §351.10(e).

To IPG's consternation this provision has been openly disregarded by the MPAA and SDC, in this and prior proceedings, despite the clarity by which it establishes prerequisites for the introduction of a study.[14] Nevertheless, it demonstrates that the decision of the MPAA and SDC to engage an expert witness to review the coding differences appearing in underlying electronic data supporting IPG's WDS and AWDS were entirely voluntary, i.e., not an analysis required, but an analysis elected. No prejudice resulted.

3. The SDC's preparation of its "Notice of Consent" was voluntary, exemplified little effort, and was legally prohibited.

On August 26, 2016, i.e., four days after IPG filed its WDS, the SDC filed its *Notice of Consent to 1999-2009 Satellite Shares Proposed by Independent Producers Group and Motion for Entry of Distribution Order*, arguing to the

[14] In the 2000-2003 cable proceedings (Phase II), the MPAA's witness, Dr. Jeffrey Gray, remarkably testified that if there were ever exhibited a conflicting claim between an MPAA and IPG program, he awarded it to the MPAA. In his testimony, Dr. Gray affirmed that he had no personal knowledge regarding entitlement to any of the thousands of programs for which there was a conflicting claim, but made such election on the instruction of MPAA counsel. Revelation of this significant fact did not appear in any aspect of Dr. Gray's report, and was only discernible after review of the coding commands in his underlying data. For the reasons cited earlier, i.e., the Judges admonition that expert studies should not be "straitjacketed" by "an individual with no relevant training or experience in economics or econometrics" (e.g., MPAA counsel), a sanction of MPAA and Dr. Gray's report would have appeared imminent. No sanction was levied, nor was the Dr. Gray's study excluded from evidence, nor was Dr. Gray directed to remove such coding command in order to provide updated results.

Judges that they should order adoption of only *certain* of the figures appearing in IPG's WDS. The SDC complain that its effort in preparing such motion "prejudiced" the SDC.

As detailed in IPG's *Opposition to Settling Devotional Claimants' Motion for Entry of Distribution Order* (Sept. 2, 2016), such motion stood on legal quicksand. It was for this rather obvious reason that, rather than propose to IPG that IPG just agree to figures to which neither party disagreed (an obvious and rational choice for IPG), the SDC rushed to move the Judges to issue a ruling that was openly contradictory of a prior ruling of the District of Columbia Court of Appeals, a ruling that was specifically advocated to the Court of Appeals *by the SDC*.

As is now known, the incorrect calculations appearing in Dr. Cowan's initial report undervalued IPG's distribution share in the devotional category. Presuming for the sake of argument that the SDC did not suspect that Dr. Cowan's devotional figures were amiss,[15] seeing that such calculations were actually less than those under the SDC's own methodology, the SDC filed its *Notice of Consent*, in which

[15] It is evidently suspicious why the SDC sought an order compelling distribution according to certain percentages rather than merely approaching IPG and asking for distribution according to such percentages (or the SDC-applied percentages that were within a "zone of reasonableness"). Absent IPG desiring to engage in unnecessary litigation for the purpose of obtaining no more than it was already desirous, a clearly unreasonable act, IPG would have accepted.

the SDC agreed to accept IPG's methodology and ask that a distribution order be entered by the Judges consistent with IPG's errant calculations. The, SDC notably did not ask for the Judges to render distribution according to the higher numbers advocated by the SDC in the 1999-2009 satellite pools, or to render distribution according to the same methodology applied to the 2004-2009 cable pools, but rather cherry-picked which pools for which it wanted to accept IPG's figures. Logically, for the SDC to ask the Judges to distribute royalties according to a particular methodology, it could not place a caveat that such methodology only apply to certain royalty pools and not others, and could not request distribution of royalties less than it has itself advocated (any more than IPG could reasonably request distribution according to the SDC's higher figures for IPG).

As was immediately apparent to IPG, the SDC sought to have the Judges issue a ruling that was evidently inconsistent with the ruling of the District of Columbia Court of Appeals in its ruling on the SDC's appeal of the Judge's distribution order of the 2000-2003 Cable Royalty proceeding for Devotional Programming. *Settling Devotional Claimants v. Copyright Royalty Board*, et al., U.S.C.A. Case No. 13-1276 (D.C. Cir. 2015)(Aug. 14, 2015). Specifically, the Court of Appeals held that the Judge's distribution orders must be based upon a specific adopted methodology, and cannot simply adopt the figures of parties even if the methodological results of the parties come to the identical conclusion.

Clearly, grabbing at distribution figures simply because they fall within a permitted range of each other was inconsistent with the Court of Appeals ruling that had been initiated by the SDC.

Moreover, if there were a choice between IPG's errant undervalued calculations and the SDC's calculations (which accorded IPG higher distributions than IPG's errant calculations), the higher calculations should have been utilized rather than the lower calculations. After all, the SDC was advocating its methodology as the superior one and the one that best achieves justice. As such, it would be inconsistent (perhaps disingenuous) for the SDC to advocate its distribution numbers, but then ask the Judges to issue an order based on another methodology. Further, if the SDC advocated distribution according to a particular methodology, it must concede the calculations to all pools against which such methodology has been applied.

For these rather evident reasons, the SDC Notice of Consent would have failed, regardless of whether IPG had filed its AWDS or not. No prejudice resulted.

4. The SDC's preparation of its "Motion to Compel" was voluntary, exemplified inaccurate legal argument, and was entirely unnecessary.

On October 17, 2016, the SDC filed its *Motion to Compel IPG to Produce Documents*, arguing to the Judges that "extraordinary unique circumstances" exist

to overcome the privilege from production that exists between IPG and its engaged experts and personnel. The gist of the SDC motion was that IPG had failed to produce the underlying data for two tables appearing in the amended direct statement initially filed by IPG, i.e., the amended direct statement that the Judges' Order of October 7, 2016 struck from the record. The SDC complain that its effort in preparing such motion "prejudiced" the SDC.

From the outset, the means by which the two tables appeared in such document had been thoroughly explained to the SDC, including the fact that Dr. Cowan surmised that the two tables had come from some intermediate iteration of his calculations, that he no longer had whatever iteration of electronic data that may have generated the two tables, and that whatever electronic data may have existed had never been provided to either IPG or its counsel. See generally, *Opposition to Settling Devotional Claimants' Motion to Compel Independent Producers Group to Produce Documents*. Nevertheless, and undeterred from casting gratuitous aspersions on IPG personnel, IPG counsel, and Dr. Cowan, the SDC filed its motion to compel production. However, the SDC's requests were not narrowly tailored to address communications regarding Dr. Cowan's reports and calculations, but broadly sought any and all communications between IPG, Dr. Cowan, and IPG's former expert witness, Laura Robinson and her consulting firm, regardless of their content. Decl. of Boydston, para. 18.

Appropriately, the SDC motion was substantially denied by the Judges' *Order Granting in Part and Denying in Part SDC's Motion to Compel IPG to Produce Documents* (Jan. 3, 2017), but ordered the production of documents already requested by the SDC for which IPG had already explained no such electronic data existed, i.e., the overwritten data.[16] Still undeterred, the SDC again accuse IPG personnel, IPG counsel, and Dr. Cowan of lying, and complain that but for IPG filing its AWDS, the SDC's motion to compel would have been obviated.

As has been borne out, the SDC motion was entirely unnecessary, a voluntary venture of the SDC seeking documents far beyond the SDC's entitlement, and unrelated to the ostensible desire to obtain information as to the two tables in issue. No documents were ordered produced that IPG had not already agreed to produce (but indicated did not exist), so how the SDC attempt to saddle IPG with responsibility for the SDC endeavor to file an unnecessary motion remains unexplained. No prejudice resulted.

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[16] The SDC go so far of accusing IPG counsel of failing to instruct Dr. Cowan to keep all iterations of his analysis, without qualification. As Dr. Cowan had explained in his previously submitted declaration when IPG submitted its *Motion for Leave to File Amended Written Direct Statement*, whatever iteration was the source of the two misplaced tables was simply part of the process of construction. To analogize, in the course of drafting correspondence or a pleading, many revisions are made creating an endless number of iterations. The SDC nonetheless aver that all iterations during all stages must be maintained, without qualification, meaning by analogy to correspondence or a pleading that there must be a separate saved version of such documents created after *every* paragraph, *every* sentence, and *every* letter that is typed.

D. THE JUDGES HAVE REFUSED TO IMPOSE SANCTIONS DESPITE FAR MORE EGREGIOUS INSTANCES OF ABUSE.

In this instance, the Judges solicited the SDC and MPAA to submit motions seeking the imposition of "financial or other sanctions". To IPG's knowledge, no comparable solicitation has ever occurred by Judges in prior proceedings, despite the existence of far more egregious abuse. Most recently, and before this identical panel of Judges, in the 1998-1999 cable proceedings (devotional), 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 the filing (and was later "reconstructed"), and further submitted "expert" testimony endorsing the results of a study on the pretext that such non-existent evidence had been considered and validated by the expert witness prior to such endorsement. Such abuse was verified only after IPG was required to file a motion to compel production of documents, which was granted, and no supporting electronic data was produced. IPG consequently filed a motion to strike those portions of the SDC direct statement relying on the non-existent evidence. See generally, *Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014). See Decl. of Boydston, para. 19.

Despite the Judges' scheduling of a separate proceeding to address whether a study could be relied upon without the production of all the data responsible for producing the result, and IPG's incurrence of extraordinary expenses to appear and

to have IPG's expert witness appear at such special proceeding in Washington, D.C. to testify regarding such matter, no sanctions were issued, or much less solicited by the Judges.[17] See Decl. of Boydston, para. 20.

By contrast to the foregoing scenario, whereby the SDC obfuscated its lack of intermediate data that was *required* by regulation to have been maintained by the SDC, IPG and its counsel have openly and genuinely described in detail the circumstances surrounding IPG's Direct Statement and Amended Direct Statement. While unfortunate, the errors that resulted in the content of those filings were not the product of a "circumstance in which a party has disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification." Rather, the errors were simply the product of errors by IPG's expert witness under rushed circumstances, with no malice, no intent to

[17] In the 1998-1999 cable proceedings (devotional), the SDC asserted the results of a study that was not presented by its designer (who remains *unknown*), but was endorsed by the SDC expert (Mr. John Sanders) a decade after its making, without any opportunity for revision or manipulation, and only after the study results (not the complete analysis) were taken from an inoperable hard drive found in the basement of a computer programmer previously employed by the MPAA. As to Mr. Sanders' credibility, his endorsement of the SDC viewer study arrived with the SDC written direct statement on December 2, 2013, in the absence of any of the intermediate data demonstrating the processes and merger of underlying datasets to generate the SDC's ostensible results, and several months prior to Dr. Erdem's ostensible replication of such intermediate data on March 28, 2014. See generally, *Order Denying IPG Motion to Strike Portions of SDC Written Direct Statement* (May 2, 2014).

deceive, and certainly not as part of any "dilatory practice" by IPG.[18] Such are not the circumstances under which sanctions should be levied. See Decl. of Boydston, para. 21.

CONCLUSION

The declarations submitted in this proceeding by IPG personnel, IPG counsel, and Dr. Cowan, universally confirm that IPG and its counsel reasonably relied on the representations of Dr. Cowan, acted diligently when IPG merely suspected (but could not confirm) that errors existed with *certain* presented figures in Dr. Cowan's initial report, had no means of discerning the accuracy of Dr. Cowan's calculations, and that Dr. Cowan adamantly maintained and communicated to IPG counsel (and the Judges) that his report corrections were not methodological in nature. If not methodological in nature, and merely a *revision* of

[18] The Judges' order of January 10, 2017 asserts that the Judges accept that MPAA and the SDC have been prejudiced by IPG's "dilatory practices", which term suggests IPG's intentional delay. Notwithstanding, the Judges' order does not address what possible benefit IPG could have received by engaging in a "dilatory practice". The answer, most obviously, is that IPG had nothing to gain, by delaying the submission of the most accurate version of its direct statement, and could only be prejudiced thereby because IPG was then required to submit additional responsive documents in discovery and, as is occurring here and elsewhere, explain the basis for the revision. As such, no intended "dilatory practice" can reasonably be said to exist.

claim pursuant to 37 C.F.R. §351.4(b)(3) as IPG understood, then IPG's actions would be deemed entirely appropriate.

Regardless of whether the Judges agree with Dr. Cowan's contention regarding whether his revisions were methodological or not, it is unrefuted that such contention was communicated to IPG and its counsel, and such persons had no reason (or even ability) to challenge Dr. Cowan's contention. Absent any shred of evidence that IPG or its counsel believed (or should have believed) that the corrections were methodological, no basis exists to characterize IPG's actions as either inappropriate or "unrepentant", and no basis exists to impose any sanction, of any sort.

Moreover, no basis exists to impose the draconian sanctions sought by the parties. After acknowledging that the Judges' January 10, 2017 order already let stand IPG's AWDS, the MPAA and SDC attempt to revisit the issue by asserting that the Judges have yet to consider striking the AWDS *as a sanction* (even though the Judges made specific findings already, and invited the briefing). In addition, and regardless of the fact that the Judges already allowed the AWDS to stand, the MPAA and SDC nonetheless advocate an even more draconian sanction, dismissing IPG from the entirety of these proceedings. The SDC further advocate imposition of an "adverse inference rule" against Dr. Cowan's amended report, a proposed sanction based on allegations for which there have not been any findings,

and which were not even part of the Judges' solicitation for sanctions for when a party "has disregarded (or negligently or purposely misinterpreted) the Judges' procedural rules without explanation or plausible justification." In fact, the SDC's own authority limits imposition of an "adverse inference rule" to those circumstances in which "a party has relevant evidence within his control which he fails to produce. . . .", a scenario not even present here,[19]

IPG agrees with the moving parties that "enough is enough", but considers such statement from a different vantage point – when straightforward acts with straightforward explanations become distortedly characterized as acts of malfeasance, replete with the vitriol appearing in national politics, "enough *is* enough".[20]

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[19] Although far from clear, the SDC's request for an "adverse inference rule" appears to be based on the theory that Dr. Cowan should have retained all iterations of his electronic data, without regard to whether they became part of his analysis, separately saved at every step of consideration, and regardless how fleeting.

[20] See, e.g., **Exhibit F** to *IPG Motion for Leave to File Amended Written Direct Statement* (SDC counsel Mathew MacLean: states that he refuses to take Dr. Cowan at his word; accuses IPG counsel Brian Boydston of lying about his understanding of a matter; and falsely asserts that IPG has refused multiple requests to produce a category of documents, even though the same email dialogue reflects IPG's lack of any objection to such production). See also, SDC motion at pp. 5-6, challenging the credibility of IPG personnel, IPG counsel, and Dr. Cowan, and alleging a "serious concern regarding IPG and its counsel because Dr. Cowan overwrote iterations of his calculations that were non-final and not being relied on.

For the reasons set forth above, the MPAA and the SDC motions must be denied in their entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2017, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

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