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2008-2

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Copyright Royalty Board

Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of)
)
Phase II Distribution of the 2000,)
2001, 2002, and 2003 Cable)
Royalty Funds)
)

Docket No. 2008-2
CRB CD 2000-2003 (Phase II)

SETTLING DEVOTIONAL CLAIMANTS' REPLY IN SUPPORT OF MOTION TO STRIKE IPG'S WRITTEN DIRECT STATEMENT

The Settling Devotional Claimants ("SDC") hereby reply in support of their motion to strike IPG's Written Direct Statement.

IPG begins by asserting that "the SDC purposely mischaracterize IPG's presented methodology as the *same* methodology previously rejected by the Judges in this proceeding." IPG Opposition at 1-2 (emphasis in original). Actually, the SDC characterized IPG's methodology using IPG's own expert's description, "The methodology employed is exactly that previously described by the Judges in their review of previous many IPG calculations, however modified to remove the Time Period Weight Factor that was employed" SDC Motion at 4 (quoting Expert Report of Dr. Charles Cowan at ¶ 31). The SDC then went on to explain why IPG's removal of the "Time Period Weight Factor" does not overcome the law of the case doctrine as it applies to the Judges' prior ruling relating to the IPG methodology.

IPG's gratuitous remark, "That the SDC's motion did not direct the Judges to these revisions, and characterized IPG's two methodologies as identical reflects a purposeful misleading of the Judges," is therefore based on a false premise. The SDC directed the Judges to IPG's alleged "revisions," and discussed them at length.

IPG seeks to rehabilitate its methodology by arguing that it engaged its expert witness, Dr. Charles Cowan, "to review, verify, and critique IPG's methodology." IPG Opposition at 3.

That's quite a stretch. There is no evidence either in Dr. Cowan's report or in any declaration that Dr. Cowan has done anything to "verify" or "critique" Mr. Galaz's methodology. To the contrary, Dr. Cowan says he "was asked to consider the computations that IPG has performed in the past and *provide the results of these computations for this case.*" Cowan Report at ¶ 30 (emphasis added). By mechanically applying the computation and including the results in his report, Dr. Cowan was simply doing as he was told, with no endorsement.

The closest that IPG can point to as an endorsement is Dr. Cowan's statement that "As a viable alternative, I present in this report a set of estimates that relies on a calculation that the Judges have previously accepted." IPG Opposition at 4 n. 4 (quoting Cowan Report at ¶ 8). Dr. Cowan's use of the phrase "viable alternative" is not in reference to any analysis or opinion of his own, but rather refers apparently to his mistaken belief that the Judges "have previously accepted" components of the IPG methodology other than the "Time Period Weight Factor." This mistaken belief as to what the Judges "have previously accepted" is not within Dr. Cowan's expertise or his competence as a witness. The Judges can take official notice that they did not accept any component of Mr. Galaz's methodology (except in the limited sense that they accepted the methodology into evidence, only to reject it on the merits). Without some analysis or opinion applying Dr. Cowan's own independent expertise, the IPG methodology remains exclusively the work product of Raul Galaz.

IPG admits (as it must) to including its excluded claimants Jack Van Impe and Salem Baptist Church inappropriately in its written direct statement and underlying methodology. Although IPG characterizes this improper inclusion of excluded claimants as a "miscalculation" affecting its results only in 2001, it fails to address the fact that the only reason its calculations in 2002 and 2003 were not also affected is because IPG's non-random sample selection did not

happen to include any relevant broadcasts for those claimants in those years. IPG asks why a simple “adjustment of calculations” would not be sufficient to address its failure to abide by the Judges’ claims ruling, “as typically occurs” IPG Opposition at 7. The answer is that “adjustments” in IPG’s methodologies to bring IPG into compliance with the Judges’ rulings have become all too “typical.” This apple has been bitten down to its core. Indeed, absent a review of IPG’s written direct statement by the SDC’s expert and the instant motion, there is no reason to believe IPG would have voluntarily identified and withdrawn the barred claims. Certainly, IPG had more than sufficient time to make the adjustments, if it had carefully reviewed the Judges’ rulings and its own filing.

Remarkably, IPG now expresses an intent to move for reconsideration of the Judges’ exclusion of Jack Van Impe and Salem Baptist Church, a ruling that IPG did not appeal and is now law of the case. Because IPG did not appeal the Judges’ ruling, it has waived its right to challenge that ruling, and the Judges are bound by law of the case. Moreover, even if the Judges’ claims ruling were not law of the case, IPG already moved for reconsideration of the Judges’ exclusion of Jack Van Impe and Salem Baptist Church in this proceeding, and the Judges denied that motion for reconsideration. *See* IPG’s Motion for Reconsideration of Order Following Preliminary Hearing on SDC’s Motion to Strike Portions of IPG’s Claims, Apr. 5, 2013; Order Denying IPG Motion to Reconsider Preliminary Hearing Order Relating to Claims Challenged by SDC, May 14, 2013. It is far too late for reconsideration.

Finally, IPG argues that Dr. Cowan’s discussion of a hypothetical methodology that he never applied should not be stricken because Dr. Cowan was required by 37 CFR § 351.10(e) to include discussion of alternative methodologies considered (even if, as appears to be the case here, the methodology was considered only to the extent that the expert determined it could not

even be attempted). The Judges need not decide whether the discussion was required or not, because it is immaterial to the SDC's motion to strike. Required or not, Dr. Cowan's testimony was not sufficient to meet the requirements for a written direct statement, because it is not applied to facts and does not present a result, other than the result of Raul Galaz's methodology, minus the "Time Period Weight Factor," that the Judges have already rejected on the merits. Expert testimony is inadmissible if it is not relevant and helpful, or if it usurps the role of the trier of fact. *See United States v. Libby*, 461 F. Supp. 2d 3, 6-7 (D.C. Cir. 2006). Dr. Cowan's testimony regarding a methodology he does not apply is neither relevant nor helpful, and his testimony relating to his mistaken belief that the Judges have "accepted" Mr. Galaz's methodology other than the "Time Period Weight Factor" usurps the role of the trier of fact.

CONCLUSION

For the foregoing reasons, the SDC's Motion to Strike IPG's Written Direct Statement should be granted.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

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