

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of)
)
Distribution of 2000, 2001, 2002) Docket No. 2008-2 CRB CD
And 2003 Cable Royalty Funds) 2000-2003 (Phase II) (Remand)
_____)

**INDEPENDENT PRODUCERS GROUP'S MOTION FOR
ADMONITION AND SANCTIONS AGAINST
THE SETTLING DEVOTIONAL CLAIMANTS**

Worldwide Subsidy Group LLC (a Texas limited liability company) dba
Independent Producers Group ("IPG") hereby submits its *Motion for Admonition
and Sanctions Against the Settling Devotional Claimants*.

INTRODUCTION

**A. THE FILING OF IPG'S AMENDED WRITTEN DIRECT
STATEMENT IN THE 1999-2009 SATELLITE/2004-2009 CABLE
PROCEEDINGS, AND THE OBJECTIONS THERETO.**

On January 10, 2017, the Judges issued their *Order on IPG Motion for
Leave to File Amended Written Direct Statement* in the consolidated 1999-2009
satellite and 2004-2009 cable proceedings. Such order addressed whether the
Judges would allow IPG to file its Amended Written Direct Statement ("AWDS"),
but additionally addressed the respective motions of the Settling Devotional
Claimants ("SDC") and Motion Picture Association of America ("MPAA") to

strike IPG's AWDS in the consolidated proceedings for the distribution of 1999-2009 satellite royalties and 2004-2009 cable royalties.¹ Therein, the Judges addressed IPG's submission of its AWDS, with particular attention to the following statement in IPG's pleadings:

“IPG’s counsel admits he ‘did not review or consider Dr. Cowan’s report prior to its submission....’ 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 results of the expert’s calculations. After he filed the report, he contacted the expert and set in motion an effort to make amends.

Counsel’s failure to review the report caused consternation on the part of the other parties, resulted in the aforementioned barrage of filings, occupied the limited resources of the Judges and their staff and delayed the current proceeding and other pending business with which both Judges and staff are fully occupied.”

Id. at 4.

IPG noted that IPG’s recognition of its expert witness’ error was not independently determinable by IPG or its counsel, and could only have been confirmed by the expert witness or another individual with statistical expertise. Moreover, IPG argued that no prejudice had befallen either SDC or the MPAA, for the obvious reason that IPG’s AWDS was filed prior to the commencement of discovery, and that both the SDC and MPAA were able to incorporate requests for

¹ Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and Docket No. 2012-7 CRB SD 1999-2009 (Phase II), *Order on IPG Motion for Leave to File Amended Written Direct Statement* (January 10, 2017).

documents underlying both the initial WDS and the AWDS into its initial discovery requests. Ergo, whatever “prejudice” could have occurred prior to IPG’s submission of documents underlying both the initial WDS and the AWDS could, logically, *only* be limited to the effort to draft and submit a single additional document request for “documents underlying the AWDS”. *Id.* at 5-6.

The Judges nonetheless found that the SDC and MPAA had both experienced “prejudice”, and stated:

“The fact that the AWDS surfaced (barely) before the commencement of discovery is not an achievement to be honored.”

Id. at 5.

The Judges determined the prejudice to be “attributable primarily to the inattention of counsel”, and characterized IPG’s discovery of the error in its expert witness’ calculations to be a “dilatory practice” (*Id.* at 6), even though such AWDS was filed immediately after IPG’s expert witness confirmed that there were errors in his calculations.

B. THE POTENTIAL SANCTION AGAINST IPG.

Although the Judges allowed the AWDS to stand, the Judges ruled that if any additional discovery were required as a result of the AWDS, the SDC and MPAA would have an opportunity to issue such discovery, and IPG would be required to respond within fifteen days. In fact, no “additional” discovery was

propounded by the SDC or MPAA because, as IPG had noted, the SDC and MPAA had *already* issued discovery relating to the AWDS as part of its initial submission of document requests. That is, no “additional” discovery was required, and IPG had already produced documents underlying both the initial WDS and the AWDS.

The Judges further invited the SDC and MPAA to file motions 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.

On March 10, 2017, both the SDC and the MPAA filed such motions. In opposition, IPG noted that the declarations submitted in the proceeding by IPG personnel, IPG counsel, and its expert witness (Dr. Cowan), universally confirmed 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. IPG further noted that the

Judges had not sanctioned the SDC, much less invited briefing on sanctions, for far more egregious conduct by SDC counsel.²

As noted, absent any shred of evidence that IPG or its counsel believed (or should have believed) that the corrections were methodological, no basis existed to characterize IPG's actions as either inappropriate or "unrepentant", and no basis existed to impose any sanction, of any sort. The SDC and MPAA nonetheless advocated an even more draconian sanction than that for which briefing was solicited by the Judges, seeking to dismiss IPG from the entirety of the consolidated proceedings, or imposing an "adverse inference rule" against the amended report of IPG's expert witness, Dr. Cowan.

² 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).

C. THE SDC'S SUBMISSION OF A REVISED WRITTEN REBUTTAL STATEMENT BASED ON AN OBVIOUS ERROR BY MR. JOHN SANDERS.

The Judges have yet to issue an order addressing the motions of the SDC and MPAA, filed March 10, 2017, in the consolidated proceeding. It is therefore ironic that in this proceeding, the SDC discovered after filing their written rebuttal statement that the expert witness that they engaged to critique the written direct statement of IPG (Mr. John Sanders) had engaged in a rather obvious error. Specifically, on January 16, 2017, *after* the commencement of discovery related to written rebuttal statements, the SDC filed its *Errata to Written Rebuttal Statement*.

Coyly, Mathew MacLean, counsel to the SDC, stated the following in the notice of errata:

“Mr. Sanders testified that IPG’s results in 2001 “improperly include the disqualified programs claimed by IPG claimants Salem Baptist Church and Jack Van Impe. . . . After reviewing the testimony of IPG’s witness Raul Galaz, counsel for the SDC realized that IPG had submitted a Notice of Revised Claim to 2001 Cable Royalties (Devotional) on May 10, 2017, and that counsel had inadvertently overlooked the submission of that revision, which did not appear on the electronic CRB filing docket at the time that counsel was reviewing the draft Written Rebuttal Statement. Counsel for the SDC have notified Mr. Sanders of their error.”

Mr. MacLean’s statement is significant for several reasons. First, unlike IPG’s discovery of the error in its expert testimony, the SDC’s error was revealed only *after* the commencement of discovery. Second, although it is Mr. Sanders’

testimony that reflects the error, Mr. Sanders has not issued amended testimony and explained why such error was made. Instead, Mr. MacLean notes the error and provides the explanation in a document that purports to modify the contents of a witness' sworn declaration. For obvious evidentiary reasons, a statement by Mr. MacLean as to what Mr. Sanders did or did not know, and the reasons therefor, is not acceptable and should be stricken.

Most significantly, however, is the comparison of culpability between the actions of IPG's counsel, and the SDC counsel. It is a fact that IPG's expert error could not have been confirmed by IPG or its counsel unless another expert witness was engaged to review the work of the first expert witness. By contrast, the SDC expert's error was obvious and determinable, even by SDC counsel.

ARGUMENT

A. SDC COUNSEL SHOULD BE ADMONISHED FOR THEIR FAILURE TO IDENTIFY OBVIOUS ERROR IN THE EXPERT WITNESS REPORT THAT WAS SUBMITTED. OTHER SANCTIONS SHOULD BE LEVIED ON THE SDC THAT ARE NO LESS ONEROUS THAN SANCTIONS LEVIED ON IPG, IF ANY.

The error in Mr. Sanders' testimony demonstrates that SDC counsel:

“[F]ailed to give even cursory attention to the expert report. Had [they] done so, counsel could not have helped but discover clear error . . .”

Mr. Sanders' allegation that IPG had inappropriately maintained claims for Salem Baptist Church and Jack Van Impe Ministries was clear error. If SDC

counsel had given even “cursory attention” to the matter, the SDC would have informed Mr. Sanders of the error of his statement *prior* to the SDC filing a written rebuttal statement. Moreover, IPG has been prejudiced in no less of a way than the SDC previously complained, as IPG was required to engage its legal counsel to address the veracity of Mr. Sanders’ neglectful statement, was required to engage its legal counsel to confirm the previous filing of IPG’s revised claim in May 2017, and was required to draft discovery to address such matter.

In this situation, the proverb, “what is good for the goose, is good for the gander” appears poignantly relevant. The *identical* arguments as were set forth by the SDC in the consolidated 1999-2009 satellite/2004-2009 cable proceeding would warrant, according to the SDC, that one or more of the following remedies be levied against the SDC:

- (i) admonition of SDC counsel;
- (ii) striking of the SDC’s *Written Rebuttal Statement* and *Errata to Written Rebuttal Statement*;
- (iii) submission of amended testimony of Mr. John Sanders, if allowed;
- (iv) ample opportunity for IPG to engage in further discovery addressing the change in Mr. Sanders’ testimony (when that occurs), if amended testimony is allowed;
- (v) imposition of an “adverse inference rule” against any subsequent amended report of SDC witness Mr. John Sanders, if amended testimony is allowed; and

(vi) dismissal of the SDC from these proceedings.

IPG believes that such a ruling (*other than the admonition of SDC counsel*) would be draconian. These remedies are, nonetheless, the *identical* remedies proposed by the SDC for the acts of IPG counsel, even though the acts of IPG counsel were far less culpable. As noted, it was beyond the capability of IPG counsel to personally engage in an expert statistical witness analysis necessary to verify or invalidate the testimony of Dr. Cowan, whereas it was well within the capability of SDC counsel to confirm that Mr. Sanders' statements criticizing IPG were inaccurate and unwarranted.

CONCLUSION

On the foregoing grounds, IPG moves that the Judges admonish SDC counsel in no less harsh a manner than IPG's counsel was admonished in the Judges' *Order on IPG Motion for Leave to File Amended Written Direct Statement* (January 10, 2017), Docket No. 2012-6 CRB CD 2004-2009 (Phase II) and Docket No. 2012-7 CRB SD 1999-2009 (Phase II).

Second, IPG moves that the Judges render a ruling on SDC's written rebuttal statement that is no less onerous against IPG than any sanctions levied against IPG (if any) in the consolidated 1999-2009 satellite and 2004-2009 cable proceedings.

DATED: January 24, 2018

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 2018, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

_____/s/_____
Brian D. Boydston

SETTLING DEVOTIONAL CLAIMANTS:

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Certificate of Service

I hereby certify that on Wednesday, January 24, 2018 I provided a true and correct copy of the INDEPENDENT PRODUCERS GROUP'S MOTION FOR ADMONITION AND SANCTIONS AGAINST THE SETTLING DEVOTIONAL CLAIMANTS to the following:

Settling Devotional Claimants (SDC), represented by Matthew J MacLean served via Electronic Service at matthew.maclea@pillsburylaw.com

Signed: /s/ Brian D Boydston