Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of 2014-2017	)	Docket No. 16-CRB-0009-CD
Cable Royalty Funds	)	(2014-2017)
	)	
In the Matter of	)	
	)	
Distribution of 2014-2017	)	Docket No. 16-CRB-0010-SD
Satellite Royalty Funds	)	(2014-2017)
	)	

MULTIGROUP CLAIMANTS' REPLY IN SUPPORT OF MOTION FOR DISALLOWANCE OF CLAIMS BY SETTLING DEVOTIONAL CLAIMANTS

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ARGUMENT

A. The SDC provide a conflicting explanation for its failure to provide an executed copy of its satellite joint collaboration agreement, and *still* fail to provide any evidence as to when the cable and satellite joint collaboration agreements were entered into.

1. The SDC's remarkable explanation for failing to produce an executed joint collaboration agreement.

After reviewing the SDC's opposition brief in conjunction with the SDC's discovery responses, one hardly knows what to believe.

The SDC submitted their discovery responses on the letterhead of Pillsbury, Winthrop, et al., and asserted that an executed version of the SDC's joint collaboration agreement for the satellite proceedings could not be produced because of Covid concerns,[1] but then in its opposition brief asserted that it *actually* could not be produced because one (of the five) legal counsel appearing on the signature blocks for SDC legal counsel was wintering in Florida, and that the only fully-executed copy of the agreement was in the offices of Lutzker & Lutzker LLP. Decl. of A. Lutzker at paras. 4-6. According to Mr. Lutzker, even an electronic version of the documents, signed in counterparts or otherwise, could not be recovered from past emails until he returned from Florida long after the close of discovery, and in any event such email restoration did not

[1] See **Exhibit C** to Multigroup Claimants' moving brief, at 3:

> "Signature pages for the agreement relating to satellite proceedings are temporarily unavailable in counsel's office as a result of remote working conditions during the covid-19 pandemic, but will be produced once counsel is able to return to the office and retrieve copies."

occur until after Multigroup Claimants filed its motion to disallow claims in May 2022. This latest explanation seemingly ignores that:

(i) there were *seven* individual legal counsel who have signature blocks appearing on the *unexecuted* joint collaboration document, any one of which would likely have had a fully-executed copy of the document, *if it existed*, and that such document would likely have been accessible through any one of their email records, without any prerequisite need to restore the 2018 emails of Lutzker & Lutzker LLP;

(ii) there are two law firms identified as counsel of record to the SDC, both of which would likely have had a fully-executed copy of the agreement, *if it existed*; and

(iii) the law firm Lutzker & Lutzker LLP comprises two (of the five) SDC counsel of record, and no explanation is provided why the other attorney with such law firm – Benjamin Sternberg -- was unable to go into the offices of Lutzker & Lutzker LLP and retrieve the physical copy even if his colleague was in Florida.

Moreover, to Multigroup Claimants' knowledge, there has never been a "one of our attorneys-of-record is wintering in Florida" exception to discovery obligations. On that basis alone, the executed version of the SDC joint collaboration agreement for satellite proceedings cannot and should not be considered, as the SDC failed to produce such document in discovery, and no valid reason was provided as to why the SDC could not secure the document during the discovery period.

Indeed, perhaps one of the least acceptable explanations fathomable was provided by the SDC. Even if such a remarkably poor excuse had not been given, the fact remains that in the immediately prior distribution proceeding, the Judges made clear in a series of rulings that the Judges ***will not consider*** documents not produced in discovery, even if they were inadvertently not produced. *Ruling and Order Regarding Objections to Cable*

and Satellite Claims at 15, 27 (twice), 30, 32, 33 (thrice) (Oct. 23, 2017), Consolidated Proceeding nos. 14-CRB- 0010-CD (2010-2013), 14-CRB-0011-SD (2010-2013). Here, the SDC do not even suggest that it overlooked production, just that they did not consider it part of their discovery obligation to produce such documentation within the timeframe set by the Judges' *Scheduling Order*[2] and, consequently, made no effort to obtain and produce such documentation.

2. The SDC's continuing failure to produce evidence that it *timely* received authorization to include several of its represented claimants in its petition to participate.

Literally nothing in the Argument section of Multigroup Claimants' moving brief need be re-stated, as the SDC *still* fail to provide *any* evidence as to *when* the SDC's cable and satellite joint collaboration agreements were entered into. Although claiming that such evidence is readily available, and has been internally reviewed, the SDC avoid producing a single item of documentation to demonstrate when the joint collaboration agreements were actually executed.

Specifically, the only "evidence" presented in order to address *when* the joint collaboration agreements were entered into is the declaration of Arnold Lutzker. Faced with Multigroup Claimants' challenge that no evidence was produced in discovery as to when the various members of the SDC actually entered into the joint collaboration agreements (which only first authorized the law firms of Pillsbury, Winthrop, et al. and

[2] *Order for Further Proceedings and Scheduling Case Events* (Jan. 10, 2022) (the "*Scheduling Order*").

Lutzker and Lutzker LLP to make filings on their behalf), literally zero documentation is provided corroborating the date of execution.

Rather, counsel to the SDC simply reassures the Judges that the joint collaboration agreements were executed several months prior to the SDC's filing of its petition to participate in these proceedings, and that his review of email correspondence establishes such fact. SDC br., Decl. of A. Lutzker at para. 3. In light of the obvious fact that such form of "evidence" is vastly inferior and less reliable than the actual email correspondence that Mr. Lutzker says exists, ***is readily available***, and has been reviewed by him, Mr. Lutzker's declaration cannot even be considered. The "best evidence rule" memorialized by Federal Rule of Evidence 1002 mandates this result.

Plainly put, the Best Evidence Rule states that instead of introducing other pieces of evidence to assert the contents of a writing, a recording, or a photograph, the Best Evidence Rule requires the introduction of the original evidence (i.e. the writing, the recording, the photograph, etc.) when it is, as here, readily available. As described by the Municipal Court of Appeals for the District of Columbia:

> "The best evidence rule is usually invoked only where the contents of a writing are to be proved. Where such writing is not produced, parol evidence is inadmissible to prove its contents unless its absence is satisfactorily explained."

Anderson v. District of Columbia, 48 A.2d 710, 712 (1946). See also, *United States v. Bennett*, 363 F.3d 947 (9th Cir. 2004), *Hartzell v. United States*, 72 F.2d 569 (8th Cir. 1934), and *Shreve v. United States*, 103 F.2d 796 (9th Cir. 1939).

In these circumstances, application of the Best Evidence Rule makes common sense and, in this instance, Mr. Lutzker's conspicuous failure to produce any

corroborating email correspondence sets off alarm bells. No reasonable rationalization exists for the SDC's failure to produce the corroborating emails, which other than accurately establishing when the joint collaboration agreements were, in fact, executed, would provide no substantive information beyond what has already been produced in discovery.

B. The SDC fundamentally misunderstand the nature of their joint collaboration agreements and, consequently, misunderstand the requirements for their various members[3] to be represented in this proceeding. There is no "attorney-client" relationship on which the SDC members may rely.

1. The SDC dispute applicability of the *Scheduling Order* provision that requires the production of documents establishing the authority to represent its various members.

Perhaps to just confuse, perhaps to just dissemble, the SDC contend that Multigroup Claimants "has not challenged the claims filed by the SDC claimants" and that Multigroup Claimants "concedes that the claims . . . are valid" (SDC br. at 5-7), yet by its motion this is *precisely* the challenge made by Multigroup Claimants.

Per the SDC, the only means by which MGC can challenge the participation of any SDC member in this proceeding is to challenge the July claim filed by that member. This is not accurate. The SDC seemingly fail to appreciate that if a *petition to participate* (as opposed to a July claim filing) were to identify a claimant when that claimant has not *timely* granted authorization to the filer to include the claimant on such filing, the filing

[3] Although the SDC continue to maintain that they are not a unified, singular entity, but are rather separate entities working in concert with singular legal representation, in more than a half-dozen instances in their opposition brief alone, they refer to the "members of the SDC" or "SDC members", suggesting membership in a singular organization.

cannot be remedied by an after-the-fact grant of authorization. For the filer to have included the claimant on the petition to participate without the claimant's authorization violates the certification of the filer that they have the "authority and consent of" each of the named claimants, and effectively gives rise to a "placeholder" claim. Not only does the existence of a placeholder claim give cause to dismiss the claims of the claimant that had not timely authorized representation, but given the severity of the misrepresentation, could give cause to dismiss the entirety of the petition to participate as a sanction for such conduct.

As has been frequently set forth in distribution proceedings, a copyright owner making claim in this proceeding must ***both*** (i) be identified in a July claim, and (ii) appear on a participant's petition to participate.[4] Failure to do either of those things invalidates the claim. Recognizing this fact, it follows that any claimant's appearance on a petition to participate without having provided the filer their *express authorization* to be included thereon is no different than having not appeared thereon. Disallowance of the claimant's claim would be appropriate.

In the present circumstance, Multigroup Claimants submits to the Judges that in response to discovery, the SDC provided no evidence of a *timely* grant of authorization by several of its represented claimants. That is, no shred of paper produced by the SDC has demonstrated that the various members of the SDC granted timely authorization to

[4] 17 U.S.C. §§ 111(d)(3) and (4)(A); 17 U.S.C. §§ 119(b)(4) and (b)(5)(A); 37 C.F.R. §§ 351.1(b)(3) and 360.2. See also, *Memorandum Opinion and Ruling on Validity and Categorization of Claims* at 5 (Mar. 13, 2015), Dkt. Nos. 2012-6 CRB CD 2004-09 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II) (the "*Memorandum Opinion*").

the law firms of Pillsbury, Winthrop, et al. and Lutzker & Lutzker LLP to represent their claims in this proceeding prior to the SDC's submission of its petitions to participate (cable and satellite) on March 8, 2019. Without granting such authorization, those claimant's claims are invalidated. Moreover, given the severity of the misrepresentation, disallowance of the entirety of the petitions to participate may be in order.

2. No "attorney-client" relationship exists between a majority of the SDC members and the Pillsbury/Lutzker law firms.

Notwithstanding, the SDC maintain that Multigroup Claimants misunderstands the nature of the relationship between the SDC "members" and the law firms Pillsbury, Winthrop, et al. and Lutzker & Lutzker LLP. According to the SDC, the SDC "members" have an attorney-client relationship with such law firms, are entitled to engage legal counsel as they choose, and that Multigroup Claimants' challenge is effectively an assault on the attorney-client relationship.[5] The SDC seeks to distinguish its members by noting that, unlike Multigroup Claimants, the SDC members file their own July claims. Of course, this trait is no different than *all* of the claimants represented

[5] Seeking to rely on the language as precedent, the SDC cite the Judges' description of the SDC in the *Consolidated Proceedings*. SDC br. at 2-3, citing *Memorandum Opinion* at 6. Notably, however, the language from the *Memorandum Opinion* is dicta, and was taken from the SDC's unchallenged *self-description* in that proceeding. The self-description by the SDC that is set forth in the *Memorandum Opinion* was not raised as an issue in the *Consolidated Proceedings*, nor did the SDC produce a joint collaboration agreement in those proceedings comparable to the joint collaboration agreements produced in discovery in this proceeding. If a comparable joint collaboration agreement had been produced thereat, an issue would have been raised, as the language appearing in the joint collaboration agreements produced in this proceeding contradict the SDC's assertion of an attorney-client relationship between *all* the SDC members and the counsel of record, and would therefore contradict the Judges' description of the SDC found in the *Memorandum Opinion*.

by the MPA, and Multigroup Claimants and its predecessors have previously represented entities that had independently filed their own July claims, making the intended distinction incorrect and illusory.

In fact, there is no "attorney-client" relationship, and the joint collaboration agreements make this clear. See **Exhibit A** and **Exhibit B** to MGC moving brief, at para. 2.5.1(f). On their face, the joint collaboration agreements are not engagement agreements between counsel and client. Rather, the joint collaboration agreements are agreements *between various claimants* addressing how they may best exploit their retransmission royalty claims. As part of many unrelated covenants, the joint collaboration agreements address the engagement of legal counsel to pursue the collective claims of the signatories, *but concedes any continuing authority by the signatory as to how best to prosecute the signatories' claims*. See infra. This is manifestly different than an attorney engagement agreement pursuant to which the attorney works at the direction of the client, and according to the client's ultimate decisions.

Conspicuously absent in the SDC opposition brief is any substantive response to the provision found within the joint collaboration agreements that *expressly* establishes that *no attorney-client relationship is created* as a result of the joint collaboration agreements. Rather, the SDC generally ignore such provision, and seek to dismiss it by claiming that Multigroup Claimants has "misread" the provision by failing to address its predicate phrase.[6] SDC br. at 9. According to the SDC, the predicate phrase "except as

[6] As set forth in Multigroup Claimants moving brief, the joint collaboration agreements contain the following language:

provided in Section 2.3.2" sufficiently qualifies the meaning of the provision, and reaffirms the existence of a typical attorney-client relationship.

Not true. Review of Section 2.3.2 of the joint collaboration agreements merely reaffirms that legal counsel shall be designated, but goes on to state:

> "Such Lead Counsel shall have the authority to determine, and be responsible for, *the overall case strategy, design, and execution* of the Phase I Proceedings as to the Parties . . . ."

See **Exhibits A, B** to moving brief, at para. 2.3.2 (emphasis added). In fact, the provision affirms that no attorney-client relationship exists, by having the signatory members yield their authority to control the "overall case strategy, design, and execution" of the proceedings.

Given the language appearing in the joint collaboration agreements, the SDC fail to address how on Earth it can possibly reconcile its position that the Pillsbury/Lutzker law firms are legal counsel to all of the individual claimants identified in the SDC's petition to participate, when by agreement of all those claimants and those law firms, ***no attorney-client relationship exists***. Rather, the SDC simply continue to parrot that an attorney-client relationship exists because Pillsbury and Lutzker are law firms, and have been charged with prosecuting the rights created by the signatory claimant's claims.

> (f) No Creation of Client Relationship Through Sharing Information. **Each Party understands** and acknowledges that except as provided in Section 2.3.2: (1) the Party is represented only by the Party's own Law Firm in this matter, and (2) while the Law Firms for the other Parties have a duty to preserve the confidences disclosed to them pursuant to this Agreement, **the sharing of such confidences shall not be deemed to create an attorney client relationship between any Law Firm and anyone other than the Party represented by that Law Firm**."

Exhibits A, B to moving brief, at para. 2.5.1(f) (emphasis added).

However, no attorney-client relationship exists any more than exists between the MPA's legal counsel and the thousands of MPA-represented claimants.

Indeed, although the SDC assert that the relationship between the signatory claimants and the Pillsbury/Lutzker law firms is one of attorney-client, it is actually more akin to the engagement of the MPA by its claimants. No differently, the underlying claimant agrees to the engagement of legal counsel to prosecute the July claims that were filed by the claimant, yet seemingly has no authority to control prosecution of their claim after the engagement has occurred. By contrast, in a true attorney-client relationship, the client would, of course, be able to direct the attorney as to the actions to take, and in this context the most basic of authorizations would relate to what methodology to propose and whether to settle those claims. However, as Exhibits A and B to MGC's moving brief reflect, throughout the collaboration agreements there are restrictions on all the authorizations that a client would normally retain over their legal counsel and, as noted, the signatories ultimately concede any authority over the "overall case strategy, design, and execution" of their claims.[7] This is the substantive reality of the joint collaboration agreements, and defines the relationship between the signatories to such agreements, on the one hand, and the Pillsbury/Lutzker law firms, on the other.

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[7] The SDC redacted the entirety of the paragraph relating to the "Decision to Settle", citing a non-existent "attorney-client privilege" as the basis for the redaction (See **Exhibits A, B** to moving brief at para. 2.3.4). Notwithstanding, given that the law dictates the boundaries of a normal attorney-client relationship, the existence of a provision that qualifies the authorization provided by law by its nature demonstrates that something other than an attorney-client relationship exists.

For the foregoing reason, it is not satisfactory for the SDC to hide behind the fact that their joint collaboration agreement addresses the engagement of counsel to prosecute the signatories' claims. That fact alone does not establish an "attorney-client" relationship between the respective claimants and the Pillsbury/Lutzker law firms, and if it were not already clear that an agreement amongst third parties to engage counsel for a defined purpose fails to dispositively establish an "attorney-client relationship", any question about the issue is resolved by the very words set forth at paragraph 2.5.1(f) of the joint collaboration agreements, an admission of the SDC members that rejects the possibility that an attorney-client relationship exists.

3. The *Scheduling Order* requirement applies equally to the SDC, and the SDC has failed to produce any documentation as to *when* authority was provided to prosecute the claims of its various members.

The consequence of the foregoing is that the dictate of the Scheduling Order – that participants identify the basis for their authority to represent each claimant – is as relevant for the SDC as it is for all other participants, and the SDC is not immune from its application (as the SDC has maintained). No different than any other participant, the SDC (as a participant in these proceedings) was required to establish *how* and *when* authority was obtained in order to include the various SDC members on its petition to participate. This fact makes immediately relevant *when* the joint collaboration agreements were executed and, ipso facto, *when* the Pillsbury and Lutzker law firms first had the authority to prosecute the claims of the signatories.

Despite the SDC's opportunity and obligation to establish the foregoing in its discovery responses, and despite its opportunity to do the same in response to Multigroup

Claimants' motion, it failed to produce a single document corroborating this event, and only presented the inferior declaration of its legal counsel that is unacceptable according to the Best Evidence Rule. After having two clear opportunities to establish this date, the SDC has provided no reliable evidence, suggesting that it has no reliable evidence to offer, and cannot demonstrate that the various SDC "members" granted the Pillsbury and Lutzker law firms authority prior to the filing of the petition to participate.

C. Multigroup Claimants had no obligation to submit a motion to compel the SDC's production of documents corroborating *when* the joint collaboration agreements were executed, nor would it have mattered.

The SDC challenge that Multigroup Claimants "has no standing" to raise the issues raised by its motion because Multigroup Claimants did not first seek to address the issues via a motion to compel. SDC br. at 10. Obviously, certain practical considerations beg the question as to what difference it would have made, because not only does the SDC currently challenge any obligation of it to produce documents corroborating *when* the joint collaboration agreements were executed, but given the opportunity to produce this innocuous documentation in response to Multigroup Claimants' motion, it *still* refused.

The Judges have previously ruled that there is no obligation of an aggrieved party to bring a motion to compel production before seeking a different remedy for a party's failure to produce documents. In its affirmation of the discovery sanction levied against Independent Producers Group, the Judges stated the following:

> "Based on previous rulings, the parties to this proceeding are fully aware of the Judges' position regarding full discovery. [fn. 4]. The Judges favor expedient resolution of distribution proceedings, but not at the cost

> of factual deficits or errors. No party should have to file a motion to compel discovery. The onus of discovery is on the producing party to be forthcoming. IPG's reliance on this procedural formality is unavailing."
>
> [footnote 4: "Congress purposefully limited discovery in distribution proceedings. Limits on discovery have proved, however, to be a double-edged sword whose backswing results in parties not fully prepared for presentation of evidence at a hearing and surprise or trial-by-ambush practices.]

Order on IPG Motions for Modification at 4 (Apr. 9, 2015), in the *Consolidated Proceeding*.

Multigroup Claimants acknowledges that there are innumerable circumstances in which a good faith dispute exists as to whether certain categories of documents are responsive to a document request, or relevant, or subject to a privilege. Such is not the case here, as Multigroup Claimants expressly requested documents substantiating the SDC counsel's timely authorization to represent the SDC members, the SDC objected that it was not obligated to respond to such a discovery request, and continues to avoid production of documents that would dispositively address the matter – all in the face of an order by the Judges that it takes "a dim view of any party's reluctance to make the disclosures." *Scheduling Order* at 3. No different result would have followed from Multigroup Claimants' submission of a motion to compel.

CONCLUSION

Multigroup Claimants initially moved for the Judges to dismiss all cable and satellite claims asserted by the Settling Devotional Claimants that were not expressly identified as clients of the law firms Pillsbury, Winthrop, et al. and Lutzker and Lutzker LLP. Multigroup Claimants conservatively sought this remedy based on the presumption

that the longstanding clients of the Pillsbury/Lutzker law firms had provided timely authorization to include those claimants in any petitions to participate that were filed.

Notwithstanding, in light of the absolute dearth of documentation provided by the SDC in order to establish the timely grant of authorization of all other claimants, first in discovery but now, shockingly, in the face of this motion, the validity of the *entirety* of the SDC claims set forth in the petitions to participate are brought into question. Multigroup Claimants' presumption in favor of the existing Pillsbury and Lutzker clients may have been misplaced, and on such grounds Multigroup Claimants avers that it would not be inappropriate for the Judges to consider the dismissal of the entirety of SDC claimants and claims that were purported to be represented by the SDC's petitions to participate, both cable and satellite.

Respectfully submitted,

Dated: June 17, 2022

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2022, a copy of the foregoing was provided to each of the parties on the attached service list via the Copyright Royalty Judges' eCRB electronic filing system.

_____/s/_____
Brian D. Boydston, Esq.

Proof of Delivery

I hereby certify that on Friday, June 17, 2022, I provided a true and correct copy of the Multigroup Claimants' Reply In Support Of Motion For Disallowance Of Claims By Settling Devotional Claimants to the following:

Global Music Rights, LLC, represented by Scott A Zebrak, served via E-Service at scott@oandzlaw.com

Joint Sports Claimants, represented by Michael E Kientzle, served via E-Service at michael.kientzle@arnoldporter.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman, served via E-Service at ted@copyrightroyalties.com

Devotional Claimants, represented by Matthew J MacLean, served via E-Service at matthew.maclean@pillsburylaw.com

SESAC Performing Rights, LLC, represented by Timothy L Warnock, served via E-Service at twarnock@loeb.com

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Signed: /s/ Brian D Boydston