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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Proceedings of the	)	Docket No. 17-CRB-0013 RM
Copyright Royalty Board;	)	
Violation of Standards of Conduct	)	
	)	

REPLY OF WORLDWIDE SUBSIDY GROUP, LLC TO COMMENTS OF THE ALLOCATION PHASE PARTIES TO PROPOSED RULE REGARDING VIOLATION OF STANDARDS OF CONDUCT

Worldwide Subsidy Group, LLC, dba Independent Producers Group ("WSG"), hereby submits its *Reply to Comments of the Allocation Phase Parties to Proposed Rule Regarding Violation of Standards of Conduct*, pursuant to the *Federal Register* notice of the Copyright Royalty Board ("CRB") set forth at 82 Fed. Reg. 28800 (June 26, 2017).

For the extensive reasons set forth in *Comments of Worldwide Subsidy Group, LLC to Proposed Rule Regarding Violation of Standards of Conduct*, filed on May 22, 2017, no need exists for promulgation of the Proposed Rule, and multiple aspects thereof are at odds with the law. Nonetheless, WSG submits this *Reply to Comments of the Allocation Phase Parties to Proposed Rule Regarding*

Violation of Standards of Conduct under the presumption that the Proposed Rule, or various incarnations thereof, are allowable as a matter of law.

A. The Allocation Phase Parties' Comments Fail to Address the Legality of the Proposed Rule, Fail to Address the Substance of Cited Authority, and Suggest Expanded Applications without Rationale or Explanation.

As is immediately apparent, the Allocation Phase Parties altogether fail to address the issue as to whether the Proposed Rule is allowed as a matter of law. Rather, the Allocation Phase Parties merely presume the validity of the Proposed Rule, then offer commentary as to how they would "tweek" it. In large part, the Allocation Phase Parties argue for the already broad Proposed Rule to be further broadened.

37 C.F.R. § 350.9(b)(1): The Allocation Phase Parties suggested amendment to 37 C.F.R. § 350.9(b)(1) allows the CRB the discretion to suspend an attorney from appearing before the CRB based on a suspension broadly instituted "by an agency or tribunal". No parameters as to the nature of the "agency or tribunal" are set. Such modification makes no distinction as to whether the suspension by any agency or tribunal has any relation to the attorney's practice before the CRB, or even whether the agency or tribunal is federal, state, or community based, much less whether such suspension provided sufficient due

process for the attorney prior to imposition of the order. Literally, the breadth of the Allocation Phase Parties' suggested amendment would allow the CRB to consider suspending an attorney whose local school board or homeowner's association refused to allow such attorney to appear before it. With the exception of specific non-court entities explicitly authorized by law to oversee the licensing of attorneys, non-legal agencies and tribunals are not entitled to issue legal sanctions that extend to all aspects of an attorney's practice. Nonetheless, that is what the Allocation Phase Parties suggest – overbroadening the significance of *any* decision of *any* agency or tribunal, whether such agency/tribunal was authorized or not, whether due process was afforded or not, in order to subject an attorney to possible disqualification by the CRB.

As regards the provision within Section 350.9(b)(1) that pertains to any person "convicted of a felony or a misdemeanor involving moral turpitude", the Allocation Phase Parties cite to Federal Rule of Evidence 609 in order to support their contention that any person convicted of a crime may be suspended or debarred from appearing before the CRB. The Allocation Phase Parties ask the CRB to expand the potential application of suspension or debarment to persons convicted of crimes involving a "dishonest act or false statement", ostensibly in

order to make the Proposed Rule "consistent with Federal Rule of Evidence 609(a)(2)".

In fact, FRE 609 *only* allows the admission of evidence relating to a crime for the purpose of "attacking a witness's character for truthfulness". Further, for crimes for which a sentence greater than one year were imposed, FRE 609(a)(1)(A) remains tempered by FRE 403, which excludes admission of evidence of a conviction if the "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury . . .". For crimes in which less than a one year sentence was imposed, FRE 609 allows the admission of such evidence *only* for a crime involving a "dishonest act or false statement". Finally, admission of such evidence is allowed ten years after release of the individual from incarceration *only* if "its probative value, supported by specific facts and circumstances, *substantially* outweighs its prejudicial effect."

As is immediately evident FRE 609 does not address the wholesale exclusion of a witness's testimony, or ban the witness from appearing before any court of law, agency or tribunal, or ban any entity hiring such an individual – all of which are now entailed by the Proposed Rule. As such, if the Allocation Phase Parties' intent was to bring the Proposed Rule in sync with FRE 609, as they have represented, then their proposed revision would only address the admission of

evidence of such criminal conviction. FRE 609 therefore stands as a poor basis on which to rely for a Proposed Rule that goes far beyond what is considered an appropriate censure for an individual previously convicted of a crime.

Conveniently, the Allocation Phase Parties omit any reference to FRE 601 appearing proximate to FRE 609, which dictates (both from its current incarnation and clarification within the Notes of Advisory Committee on Rules), that conviction of a crime does *not* disqualify a person's testimony. A discussion as to how the Proposed Rule conflicts with FRE 601 and FRE 609 already appears in the *Comments of Worldwide Subsidy Group, LLC to Proposed Rule Regarding Violation of Standards of Conduct,* filed on May 22, 2017 in response to the *Federal Register* notice soliciting comments, and may be viewed there.

To WSG's awareness, the CRB and its predecessors have not faced a notable concern with attorneys appearing before it, despite decades of existence. Such obvious fact begs the question why the CRB at this juncture feels compelled to issue regulations addressing such matter under the pretext that some need for guidance to the parties exists. Clearly, there is no need for such provision, much less a broadening thereof as suggested by the Allocation Phase Parties, in order to "maintain the integrity" of the CRB proceedings.

37 C.F.R. § 350.9(b)(3): The Allocation Phase Parties suggest a revision to Section 350.9(b)(3) to add the phrase "or guilty of gross misconduct". The basis of such suggestion is a cite to 35 U.S.C. § 32, provisions governing conduct of persons appearing before the U.S. Patent and Trademark Office ("PTO").[1] Again, it is important to draw comparison to the authority cited by the Allocation Phase Parties, as the full text of such provisions bear relevance to the provisions contained in the Proposed Rule, and provisions evidently missing from the Proposed Rule. Reviewing 35 U.S.C. § 32 in its entirety reflects the following text:

> "A proceeding under this section shall be commenced not later than the earlier of either the date that is *10 years* after the date on which the misconduct forming the basis for the proceeding occurred, or *1 year* after the date on which the misconduct forming the basis for the proceeding is made known to an officer or employee of the Office as prescribed in the regulations established under section 2(b)(2)(D)."

35 U.S.C. §32 (emphasis added).

As such, and unlike the Proposed Rule, the provision by which the Allocation Phase Parties make comparison has an identified statute of limitations

[1] By all appearances, the PTO provisions appear to be for the purpose of protecting one-off applicants (current and future) who are making submissions to the Patent & Trademark Office, in order to insure that they are adequately represented. By contrast, the Proposed Rule appears to be of a different ilk, an intended punitive measure affecting claimants that have historically had decades-long relationships with their representatives and whom make claim in the distribution proceedings year after year.

that proscribes the timeframe by which the Director of the Patent & Trademark Office may take action – no more than *one year* after the Director's awareness of the actionable conduct, and no more than ten years after such conduct. Moreover, such provision additionally provides immediate review of any action taken by the Director by the U.S. District Court for the Eastern District of Virginia, i.e., due process through a forum of appeal. Further, unlike the Proposed Rule, the provisions cited by the Allocation Phase Parties were set forth in a statute enacted by Congress, extensively vetted, and not the mere product of agency-enacted regulation.

Again, the appearance of such provisions even within the legal authority with which the Allocation Phase Parties draw comparison makes clear that certain obvious principles are not represented in the text of the Proposed Rule, e.g., basic principles such as a timeframe by which any challenge to the participant's status may be brought.

37 C.F.R. § 350.9(c): Providing literally no explanation for its suggested amendment, the Allocation Phase Parties suggest that the first opportunity for a debarred individual or entity to apply for reinstatement must be twelve months, i.e., a "cooling off" period. First, it is not clear what is being "cooled off" for the evident reason that the Proposed Rule provides no restrictions as to when the

sanction may be forthcoming. That is, in its current incarnation, the Proposed Rule can (and appears intended to) sanction a party for acts taken *decades* prior, and without recognition of any other sanction or penalty to which the party has already been subject. Such fact highlights the arbitrariness of the Allocation Phase Parties suggestion of a "cooling off" period. Further, and to again add to the randomness of the suggestion, the Allocation Phase Parties suggest that such "cooling off" period run from the date of any denial of a motion for reconsideration. Obviously, such amendment would serve no purpose other than to artificially extend the proposed (and unexplained) "cooling off" period, discouraging the filing of any motion for reconsideration. This disincentive would exist despite the fact that legitimate bases may exist for such motion for reconsideration, and further extending the "cooling off" period based on the Judges' responsiveness to the motion rather than based on the actionable conduct on which the sanction was based.

B. The Allocation Phase Parties present no comment on the "Term of Suspension or Debarment".

Although the comments filed by the Allocation Phase Parties assert that they address the "Term of Suspension or Debarment", they do not. To be clear, WSG's comments did not either, for the reason that WSG opines that the Proposed Rule is contrary to law, and altogether unenforceable. Commentary on the

application or reasonableness of any particular aspect of an otherwise illegitimate regulation is therefore moot. By contrast, the entirety of the Allocation Phase Parties' comments presumes the legality of the Proposed Rule, and then opines the obvious, that the severity of sanction, i.e., whether debarment should be temporary or permanent, should be based on the severity of the conduct at issue.

Ironically, the Allocation Phase Parties' comments continue to demonstrate why the Proposed Rule is unnecessary. According the Judges' Federal Register notice, the purpose of the Proposed Rule is to "provide consistent guidance":

> "Preliminarily, the Judges believe the proposed rule is necessary to allow them to carry out their responsibilities under the Copyright Act and is consistent with the Judges' goal to *provide consistent guidance* to people and entities regarding the Judges' expectations of conduct in Copyright Royalty Board proceedings and other dealings with the Copyright Royalty Board."

82 Fed. Reg. 18601, at 18602 (Apr. 20, 2017)(emphasis added).

Notwithstanding, no "guidance" is provided other than to say that the Judges "may" deny a party the ability to appear before the Judges if the Judges determine at some point that the party is incompetent, etc. The only bright line criteria that "may" result in debarment is a prior criminal conviction, prior professional license revocation, or an attorney's sanction by a court. Consequently, no true guidance is provided by the Judges other than to communicate to the public that the Judges

seek to sanction *post facto* the only individual who regularly has participated in distribution proceedings and been convicted of a crime, and the only company to have engaged that individual.

No party has challenged the Judges' ability to levy appropriate sanctions. As the comments of the Allocation Phase Parties reveals, however, any sanction can only be evaluated specifically and in the context in which it appears. What is truly at issue is the appropriateness of setting certain criteria by which a party may be sanctioned or will be likely sanctioned, the enforcement of which runs contrary to multiple aspects of law. See *Comments of Worldwide Subsidy Group, LLC to Proposed Rule Regarding Violation of Standards of Conduct*, filed on May 22, 2017.

C. The Allocation Phase Parties Comments on the "Treatment of Claimants Where a Party Representative is Suspended or Debarred" allows for Abuse of the Proposed Rule to Achieve Malicious Ulterior Motives.

As the Judges are aware, the Settling Devotional Claimants ("SDC"), one of the Allocation Phase Parties, have regularly sought the debarment of WSG in multiple proceedings, pursuant to multiple pleadings. The SDC have alleged misconduct of all sorts against WSG, ranging from misconduct by WSG's personnel, principals, expert witnesses, and legal counsel. Matters of little

significance have been regularly alleged to be "fraudulent" or the product of malfeasance, and while debarment of WSG's personnel, principals, expert witnesses, and legal counsel, has never been ordered, such fact has never dissuaded the SDC from continuing its meritless accusations seeking extraordinary sanctions. An extraordinary amount of time and effort has been devoted by WSG and the Judges to addressing the SDC's meritless accusations.

Despite never imposing debarment of WSG's personnel, principals, expert witnesses, or legal counsel, the Judges have never chastised the SDC for its exaggerated description of events, or the extraordinary sanctions sought. The Proposed Rule, unfortunately, encourages the continued strategy of the SDC.

WSG is not the only party to recognize this tactic and its potential abuse. In the *Comments of the Music Community Participants*, filed May 22, 2017, such commentors stated the following:

> "Commenting Parties have concerns about participants trying to use the proposed standards of conduct, if adopted, to gain a tactical advantage over their litigation adversaries by suggesting their suspension or debarment. Due to the nature of proceedings before the Judges, the same participants, and frequently the same counsel, litigate against each other recurrently. Presenting the opportunity to have a perennial adversary or the adversary's counsel knocked out of future proceedings may tempt participants to pursue suspension or debarment proceedings against their adversaries in cases involving good-faith differences of opinion that are to be expected in hotly-contested proceedings, or in cases involving inadvertent errors of the kind that sometimes occur when complicated analyses are prepared under time pressure. While the Judges presumably

> would not impose harsh discipline in such cases, the possibility for tactical use of the proposed rules suggests that caution is warranted."

Comments of the Music Community Participants at p. 6.

Regardless of whether the Proposed Rule is adopted or not, the Judges will predictably continue to receive motion after motion seeking debarment if the Judges do not issue a counter-sanction for a party filing meritless motions seeking extraordinary sanctions such as debarment, needlessly wasting the resources of the Judges and the parties. To that end, while WSG recognizes that the Proposed Rule remains contrary to the law, to the extent that the Judges were to adopt *any* form of the Proposed Rule, it should include a countervailing sanction for parties frivolously seeking debarment.

At minimum, in order to discourage the abuse of the Proposed Rule to obtain a tactical advantage, i.e., the issue raised by the Music Community Participants above, WSG suggests a variation on the treatment of claimants represented by a debarred representative. The Allocation Phase Parties deviously suggest that such claimants be offered the opportunity to just "go it alone", *knowing* that there are but only a handful of claimants in the entirety of distribution proceedings for which individual participation could be economically feasible. Moreover, no claimant will have the time, knowledge, or monies necessary to inject themselves into distribution proceedings, or the ability to align themselves with other remaining

claimants. *Consequently, no claimant will choose to "go it alone"*. Knowing this fact, the Allocation Phase Parties' suggestion that a remaining claimant can go it alone is the equivalent of suggesting that such party just forfeit their claim.

One alternative, however, is to allow such remaining claimants to elect to receive their royalties according to whatever methodology is ultimately adopted by the CRB for such category, and require the calculations thereon to be performed by the entity that advocated such methodology. In such scenario, while any participant may still have an improper motive for seeking debarment of a competing representative, i.e., the avoidance of a representative with a competing methodology, such debarment cannot reasonably be the basis for the dismissal of a claim if the claimant agrees to accept application of the adopted methodology to their claimed programs. As a basis of comparison, in the 2000-2003 cable proceedings (Phase II), the Settling Devotional Claimants were found to have untimely submitted a proposed methodology, attempting to submit it as part of their rebuttal of the methodology proposed by Independent Producers Group. The consequence was not to dismiss the claims of the SDC or its represented claimants, but merely dismiss consideration of the SDC-proposed methodology.

D. Commentary on the Incidents referred to in the initial *Federal Register* notice have already been provided by multiple parties.

In the most recent *Federal Register* notice seeking reply comments, the Judges query:

> "[W]hether, on balance, the remedies currently available to the Judges for addressing ethical lapses of participants and counsel are adequate or preferable to the remedial rule the Judges proposed. In particular, the Judges seek detailed comments regarding the incidents to which the Judges referred in the notice proposing the provision (or others that commenters are aware of to which the Judges did not refer) and how remedies currently available were used to address those incidents and whether or not the extant remedies (*e.g.*, discovery sanctions or loss of the presumption of validity regarding claims) adequately addressed those incidents or whether gaps in the current remedial framework might lead to future incidents that could compromise public confidence in the CRB ratemaking and royalty distribution system."

As the initial Federal Register notice acknowledges, "In the *few* instances in which the Judges determined that a witness's testimony was not truthful . . ." 82 Fed. Reg. 18601 (April 20, 2017). The question is therefore begged as to what issue prompted the immediate need for the Proposed Rule when, after decades of proceedings, only a "few" instances of alleged misconduct can even be cited.

As the submitted comments reflect, WSG, the Music Community Participants, and Raul Galaz, have already addressed the incidents cited in the *Federal Register* notice proposing the provision. Very different views exist as to the facts therein, and whether the sanctions that were forthcoming were warranted.

The Music Community Participants refer to the cited *Phonorecords I* matter, stating:

> "While the testimony at issue there had inaccuracies, and so did not rise to the level to which participants in proceedings should aspire, there is no reason to believe that fraud was intended. Instead, as commonly happens, the inaccuracies were revealed in the ordinary course of discovery and cross examination, and the Judges declined to credit the testimony."

Comments of Music Community Participants, at p. 6.

WSG and Raul Galaz cite to the sanction levied against WSG after the Judges opined that Raul Galaz had falsely testified regarding the contents of a WSG file. Raul Galaz adamantly maintains his truthfulness, and such parties have cited to the Judges' refusal to withdraw the sanction even after WSG was able to establish that the predicate for the Judges' sanction – an ostensible policy of the CRB to immediately number every claim received in July – was demonstrably inaccurate for the years in question and for all other years.[2] Of particular note was

[2] WSG further challenged the CRB's chain-of-title problem, i.e., that the CRB made *original* copies of claims available for photocopying to the public without supervision, which frequently resulted in the displacement of claims from such file. In fact, as recently as March 2015, WSG was informed by the CRB that the only copy of WSG's 2007 satellite claim was a version stamped "copy", and that the original was not in its possession. As but another example, in its most recent visit to the Copyright Office, WSG informed the CRB staff of claims missing from its files. Ironically, one of the missing claims included a claim filed by the Canadian Broadcasting Corporation, who has submitted commentary as a claimant

the fact that the CRB had acknowledged its altogether loss or misplacement of entire claims (both of WSG and multiple third parties), yet in the cited instance refused to acknowledge that it might have been responsible for the loss of only certain of the pages from WSG's 2008 satellite claim. Despite these rather compelling facts, the Judges nonetheless dismissed WSG-represented claimants appearing on the missing four pages, and as sanction for Raul Galaz's allegedly false testimony that WSG's 2008 satellite claim contained the identical ten page exhibit that was attached to WSG's 2008 cable claim that arrived at the CRB in the same envelope, and not a six page exhibit numbered pages 1, 2, 3, 6, 7, and 8, the Judges denied all 250+ WSG-represented claimants the "presumption of validity" for seventeen (17) separate royalty pools.

The existing authority of the CRB to issue sanctions has not been an impediment to the Judges issuing draconian penalties. The participating claimants and their counsel, who can all be considered veterans of these proceedings, are well aware of this panel's inclination. Consequently, what "consistent guidance" is necessary for the benefit of participants remains unexplained and unclear. A different question might be posed if the Judges' intended for the Proposed Rule to

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represented by one of the Allocation Phase Parties who supports the Proposed Rule, the Canadian Claimants Group.

provide the exhaustive options for sanction, however such does not appear to be the intent of the Proposed Rule.

CONCLUSION

For the reasons set forth herein, and the extensive reasons set forth in the comments in response to the CRB's initial *Federal Register* notice, the Proposed Rule is not needed, and its adoption would create a heavy handed mechanism not supported by the law.

Respectfully submitted,

July 26, 2017

_____/s/_____

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Certificate of Service

I hereby certify that on Thursday, July 27, 2017 I provided a true and correct copy of the Comment - Reply on Comments of the Allocation Phase Parties to the following:

Canadian Claimants Group, represented by Lawrence K Satterfield served via Electronic Service at lksatterfield@satterfield-pllc.com

Joint Sports Claimants, represented by Robert A Garrett served via Electronic Service at robert.garrett@apks.com

Music Community Participants, represented by Steven R. Englund served via Electronic Service at senglund@jenner.com

Public Broadcasting Service, represented by Ronald G. Dove Jr. served via Electronic Service at rdove@cov.com

Worldwide Subsidy Group, LLC, dba Independent Producers Group, represented by Brian D Boydston served via Electronic Service at brianb@ix.netcom.com

Program Suppliers, represented by Gregory O Olaniran served via Electronic Service at goo@msk.com

Commercial Television Claimants, represented by John Stewart served via Electronic Service at jstewart@crowell.com

Settling Devotional Claimants, represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Signed: /s/ Brian D Boydston