Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	Docket No. 14-CRB-0010-CD 2010-2013
2010-2013	)	
Cable Royalty Funds	)	

MULTIGROUP CLAIMANTS' OPPOSITION TO "ALLOCATION PHASE PARTIES' MOTION TO DISMISS MULTIGROUP CLAIMANTS", AND MOTION FOR SANCTIONS AGAINST ALLOCATION PHASE PARTIES

Multigroup Claimants hereby submits its *"Oppositon to Allocation Phase Parties' Motion to Dismiss Multigroup Claimants"*, and simultaneously submits it *"Motion for Sanctions Against Allocation Phase Parties"*.

Multigroup Claimants ("MC") is a party in the above-captioned proceeding. In this proceeding, the Judges have consistently clarified that while claims categorization, claims validation, allocation, and distribution issues will be considered separately, they remain indistinguishable as part of a single, consolidated proceeding. See *Notice of Participants, Notice of Consolidation, and Order for Preliminary Action to Address Categories of Claims*, at p. 2 (Sept. 9, 2015); *Notice of Participant Groups, Commencement of Voluntary Negotiation Period (Allocation), and*

Scheduling Order, at fn. 4 and p. 3 (Nov. 25, 2015); *Order Regarding Discovery*, at fn. 1, p. 3 (citing 80 Fed. Reg. 108), fn. 7 (July 21, 2016). Consistent therewith, the orders established the procedural schedule for claims categorization, claims validation, allocation, and distribution issues, again all as part of a single, consolidated proceeding.

Further consistent with the foregoing orders, when the parties were ordered to exchange evidence and documents relating to claims validation issues, parties were ordered to produce such information even to parties with whom there was no adversarial position, and "whether or not they believe the other parties have a specific interest in the claims controversies they present." *Order for Further Proceedings*, at p. 2 (March 14, 2016). MC has already been extensively involved with regard to the exchange of discovery in connection with claims-related issues in this proceeding, and has propounded and responded to several discovery-related motions. In compliance with the relevant orders MC produced and served voluminous proprietary documents on parties, including the "Allocation Phase Parties", regardless of whether they maintained claims adversarial to MC.[1]

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[1] Parties receiving MC documentation irrespective of there being no adversarial issues with MC included, *inter alia*, the Public Television Claimants, the Canadian Claimants Group, Broadcast Music, Inc. (BMI), American Society of Composers, Authors, Publishers (ASCAP), SESAC and National Public Radio.

As the Judges' orders demonstrated, parties to these proceedings are not "party" to segregable claim categorization, claim validation, allocation or distribution issues. If such were the case, then no basis would logically exist to serve voluminous, proprietary documents on parties with whom no adversarial position exists for one or more of such topics. For this rather obvious reason, each and every one of the "Allocation Phase Parties" served MC with the "Written Direct Statements re Allocation Methodologies (WDS-A)", as was required pursuant to the *Order for Further Proceedings*, at p. 2 (March 14, 2016), and the *Order Regarding Discovery* (July 21, 2016).

Despite the foregoing, the "Allocation Phase Parties" apparently thereafter agreed amongst themselves to deny MC access to the documents and data to be exchanged in connection with discovery associated with the Written Direct Statements regarding Allocation. In fact, while such parties evidently communicated with each other prior to collectively deciding not to afford MC the same nature of documents that MC produced in the claims validation aspect of this proceeding, no notice was given to MC regarding this conspiratorial denial of access to discovery.

Specifically, while discovery regarding allocation issues is scheduled to conclude on February 22, 2017, and production to occur no later than such date, on January 23, 2017, MC became aware that parties submitting WDS-A filings had already agreed (to MC's exclusion) to exchange documents weeks prior. The only suggestion previously provided as to this position was on January 3, 2017, when counsel for the Settling Devotional Claimants ("SDC") sent an email making such contention, and informing MC that if MC did not "withdraw as a party to the Allocation Phase", the SDC would "prepare and file our own motion asking the Judges to dismiss [MC] as a party in the Allocation Phase of the case." See **Exhibit A**. MC immediately responded, stating:

> "[A]s the Judges' prior orders make clear, the allocation and distribution phases are all considered aspects of the same proceeding. That is, an entity is either a party to the proceeding or not, and is not considered a "party" to only certain aspects of the proceeding. This is why all parties were compelled to share discovery and documents relating to distribution in certain programming categories even with those parties not participating in the distribution of royalties in such category."

Id.

Notably, neither the SDC nor any other of the "Allocation Phase Parties" notified MC that it was refusing to produce evidence and documents in support of their respective Written Direct Statements, nor filed a motion

related thereto. Not until MC confronted the JSC, whom erringly made a supplemental production to MC on January 23, 2017, did MC confirm that an initial production had already occurred, and that a prior agreement was in place for the "Allocation Phase Parties" to exchange discovery. The instant motion followed on January 25, 2017.

ARGUMENT

A. ALL PRECEDENT CITED BY THE "ALLOCATION PHASE PARTIES" IS DERIVED FROM PROCEEDINGS WITH A SEGREGATED PHASE I AND PHASE II PROCEEDING, AND IS THEREFORE INAPPLICABLE AND IRRELEVANT.

Each and every basis upon which the "Allocation Phase Parties" seek to rationalize their bad faith denial of production to MC are proceedings in which a separate Phase I and Phase II proceeding existed. As such, the cited precedent is simply inapplicable and irrelevant. Unlike the prior proceedings from which precedent is cited, the Judges expressly consolidated what had previously been segregated as "allocation" and "distribution" phases. Nowhere, within any order relating to *this* proceeding, is there a basis for a party to be a "party" only with regard to certain issues being addressed by the Judges at the time, and the obvious fact that there is only one approved service list in this proceeding corroborates such fact.

B. THE JUDGES' ORDERS MAKE CLEAR THAT MULTIGROUP CLAIMANTS REMAINS A PARTY ENTITLED TO PARTICIPATE IN THE ALLOCATION PORTION OF THIS PROCEEDING.

Moreover, MC was under no obligation to submit a written direct statement addressing allocation issues, but having elected not do so (because other parties had announced their intent to do so for categories affecting MC), such fact did not forfeit MC's entitlement to receive and address the evidence and documents on which the "Allocation Phase Parties" rely for their allocation arguments. In fact, that the Judges did not intend for there to be distinct service lists, etc., for different aspects of this single proceeding is already made clear by the Judges' Order of July 21, 2016. Therein, the Judges stated:

> "When the Judges initiated the instant proceeding, they required interested parties to file Petitions to Participate in a single proceeding, without regard to whether the party claimed or represented entities claiming a direct interest in either "Phase I" or "Phase II". See 80 Fed. Reg. 108 (Jun. 5, 2015). By identifying all potential participants, the Judges intended to accelerate the identification of both allocation and distribution issues and to expedite the distribution of royalties to copyright owner claimants."

See *Order Regarding Discovery* , p. 4 (July 21, 2016).

In fact, contrary to the assertion of the "Allocation Phase Parties", in the context of the Judges' order consolidating allocation and distribution

issues into a single proceeding, the failure of a party to file a written direct statement regarding allocation issues should not necessarily preclude participation or commentary by such party when relevant. This identical concept was addressed in the Judges' orders as relates to claim validation issues, wherein the Judges held:

> "Claims validity and categorization issues must be resolved expeditiously. For this preliminary step, any party in interest *may* participate, only participants asserting controversies relating to the identity, validity, or categorization of a claim need participate actively, however."

See *Order for Further Proceedings*, at p. 2 (March 14, 2016) (emphasis in original). As such, the concept is quite clear – even a party *not* asserting a controversy in their particular distribution category, i.e., ***a party that will not be submitting a written direct statement regarding distribution issues***, was ***still*** entitled to participate fully in the claims validity aspect of this proceeding. No language exists in any of the Judges' orders to suggest that a different result would apply to the allocation issues appearing in this case, nor could a different result logically apply in light of the foregoing.

C. THE "ALLOCATION PHASE PARTIES" PREVIOUSLY EXPRESSED THEIR UNDERSTANDING OF THE JUDGES' ORDERS, AND AGREED THERETO.

Ironically, no misreading of the Judges' prior orders previously existed, the identical issue as appears herein has already been addressed by

the "Allocation Phase Parties" – and the outcome agreed upon. Specifically, after objection by the NAB, on July 29, 2016, certain of the "Allocation Phase Parties" expressly articulated their understanding regarding the Judges' prior orders, ultimately agreeing that *all* parties to the proceeding are to receive *all* documents, irrespective of whether they stand in an adversarial capacity.[2] On such grounds alone, the movants are estopped from now asserting a contrary position, and their newfound position is revealed to be bad faith disregard of the Judges' prior orders. That the "Allocation Phase Parties" covertly conspired to deny MC access to evidence and discovery comparable to evidence and discovery previously produced by MC in these proceedings, rather than openly addressing the issue with MC, warrants substantial sanction.

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[2] See **Exhibit B**: According to the SDC,

> "We do not believe that any party should withhold documents in this proceeding from other parties. The Judges previously ruled in the context of the 2000-2003 case that even though SDC and MPAA were not disputing the same funds, because it was a consolidated proceeding, we were each entitled to all discovery in the proceeding. There may be evidentiary rulings applicable to one category that implicate another, and no party should be at a discovery deficit when dealing with such matter. We are happy to participate in a meet and confer, but our positon is quite clear."

CONCLUSION

The "Allocation Phase Parties" literally rewrite the Judges' orders to fit their desired outcome, disregarding the straightforward dictate of prior orders, and the logical implications of prior orders, and disregarding the agreement previously reached by such parties when the subject was addressed in the context of the claims validation portion of this proceeding.

For the reasons set forth herein, Multigroup Claimants requests that the Judges deny the instant motion, direct the "Allocation Phase Parties" to immediately produce all evidence and documents otherwise produced in this proceeding, and for an appropriate sanction be levied against such parties for their evident disregard of prior Judges' orders.

Dated: February 1, 2017

_____/s/_____

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Attorneys for Multigroup Claimants

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2017, a copy of the foregoing was sent by email and overnight mail to the parties listed immediately below.

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

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EXHIBIT A

Re: 2010-2013 Allocation Phase

From **Brian D. Boydston, Esq.** brianb@ix.netcom.com hide details

To **Arnie Lutzker** arnie@lutzker.com

Cc **MacLean,Matthew J.** matthew.maclean@pillsburylaw.com, **Harrington,Clifford M.** clifford.harrington@pillsburylaw.com

Arnie, please clarify what you are trying to accomplish. IPG is not participating in the allocation phase (formerly known as Phase I). Notwithstandi prior orders make clear, the allocation and distribution phases are all considered aspects of the same proceeding. That is, an entity is either a part not, and is not considered a "party" to only certain aspects of the proceeding. This is why all parties were compelled to share discovery and docur distribution in certain programming categories even with those parties not participating in the distribution of royalties in such category.

Brian

----Original Message----
From: Arnie Lutzker
Sent: Jan 3, 2017 9:59 AM
To: "Brian D. Boydston, Esq."
Cc: "MacLean, Matthew J." , "Harrington, Clifford M."
Subject: 2010-2013 Allocation Phase

Brian – Regarding the 2010-2013 proceeding, we see that Multigroup Claimants did not file any written direct statemer Allocation Phase of the case. As I'm sure you know, under the Judges' rules, the filing of a written direct statements is all party participants. With that rule in mind, we believe that Multigroup has forfeited its party status for this phase of th should not continue as a participant in this part of the litigation. Therefore, we ask that you advise us that you agree tc a party in the Allocation Phase no later than on our call tomorrow evening, and then promptly file a motion to withdraw. not inclined to do this, we advise you that we will prepare and file our own motion asking the Judges to dismiss Multigr party in the Allocation Phase of the case.
Arnie

Arnold P. Lutzker
Lutzker & Lutzker LLP

EXHIBIT B

From: Arnie Lutzker [mailto:arnie@lutzker.com]
Sent: Friday, July 29, 2016 2:55 PM
To: Stewart, John; Brian D. Boydston, Esq.; Plovnick,Lucy; Mace, Ann; Harrington,Clifford M. (clifford.harrington@pillsburylaw.com); MacLean,Matthew J. (matthew.maclean@pillsburylaw.com); Lynch,Victoria N. (victoria.lynch@pillsburylaw.com); Garrett,Robert (Robert.Garrett@APORTER.COM); Laane,M. Sean (Sean.Laane@APORTER.COM); Kientzle,Michael (Michael.Kientzle@aporter.com); Edward S. (Ted) Hammerman,Esq (ted@copyrightroyalties.com); Ervin, David
Subject: RE: 2010-13 Cable and Satellite, Distribution Phase Discovery Production

John - the SDC has already indicated that we have agreed with this position and also that we have already produced the SDC documents to all parties. We do not believe that any party should withhold documents in this proceeding from other parties. The Judges previously ruled in the context of the 2000-2003 case that even though SDC and MPAA were not disputing the same funds, because it was a consolidated proceeding, we were each entitled to all discovery in the proceeding. There may be evidentiary rulings applicable to one category that implicate another, and no party should be at a discovery deficit when dealing with such matter. We are happy to participate in a meet and confer, but our positon is quite clear.

Arnie