Before the
COPYRIGHT ROYALTY JUDGES
Washington, DC

In the Matter of **Distribution of the 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds**	**Docket No. 2012-6 CRB CD 2004-2009 (Phase II)**
In the Matter of **Distribution of the 1999-2009 Satellite Royalty Funds**	**Docket No. 2012-7 CRB SD 1999-2009 (Phase II)**

SETTLING DEVOTIONAL CLAIMANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Settling Devotional Claimants ("SDC") hereby submit their Proposed Findings of Fact and Conclusions of Law with respect to the hearing held before the Copyright Royalty Judges on April 13-17, 2015.

The Judges called the hearing to determine the appropriate Phase II distribution of the 2004-2009 cable and 1999-2009 satellite royalty funds attributable to the devotional and program suppliers categories. These royalty funds are to be distributed among the SDC claimants and the Independent Producers Group ("IPG") claimants in the devotional category, and the IPG claimants and the MPAA-Represented Program Suppliers' ("MPAA") claimants in the Program Suppliers category.[1] The Judges identified the valid claimants in their March 13, 2015,

[1] The Judges already determined the Phase II allocation of 1999 satellite royalty funds attributable to the program suppliers category and distributed those funds. *See* 78 Fed. Reg. 50114, 50115 (Aug. 16, 2013) (citing Order,

"Memorandum Opinion and Ruling on Validity and Categorization of Claims," Docket Nos. 2012-6 CRB CD 2004-2009 and 2012-7 CRB SD 1999-2009 (March 13, 2015) ("Claims Ruling").

FINDINGS OF FACT

I. VALID DEVOTIONAL CLAIMANTS

1. The SDC are comprised of the following claimants in this proceeding, all in the Devotional category:

- Amazing Facts, Inc.
- American Religious Town Hall, Inc.
- Billy Graham Evangelistic Association
- Catholic Communications Corporation
- Christian Television Network, Inc.
- The Christian Broadcasting Network, Inc.
- Coral Ridge Ministries Media, Inc.
- Cottonwood Christian Center
- Crenshaw Christian Center
- Crystal Cathedral Ministries, Inc.
- Evangelical Lutheran Church in America
- Faith for Today, Inc.
- Family Worship Center Church, Inc. (d.b.a Jimmy Swaggart Ministries)
- International Fellowship of Christians & Jews, Inc. (cable only)
- In Touch Ministries, Inc.
- It is Written
- John Hagee Ministries, Inc. (a.k.a. Global Evangelism Television)
- Joyce Meyer Ministries, Inc. (f.k.a Life in the Word, Inc.)
- Kerry Shook Ministries (a.k.a. Fellowship of the Woodlands)
- Lakewood Church (a.k.a. Joel Osteen Ministries)
- Liberty Broadcasting Network, Inc.
- Messianic Vision, Inc.
- New Psalmist Baptist Church
- Oral Roberts Evangelistic Association, Inc.
- RBC Ministries
- Reginald B. Cherry Ministries
- Rhema Bible Church (a.k.a. Kenneth Hagin Ministries)

Docket No. 2008-5 CRB SD 1999-2000 (June 19, 2013)). Therefore, only the SDC and IPG sought a 1999 satellite royalty award in this proceeding.

- Ron Phillips Ministries
- Speak the Word Church International
- St. Ann's Media
- The Potter's House of Dallas, Inc. (d.b.a. T.D. Jakes Ministries)
- Word of God Fellowship, Inc. (d.b.a Daystar Television Network)
- Zola Levitt Ministries

See SDC638 and SDC639 at Appendix B.

2. IPG initially asserted claims on behalf of eighteen claimants in the devotional category, of which the following were deemed to have valid, compensable claims after the Claims Ruling:

- Billy Graham Evangelistic Association (satellite only 2001-2003)
- IWV Media Group, Inc. (no claims for 1999-2001)
- Jack Van Impe Ministries International (no claims for 1999, 2000 and 2008 satellite)
- Life Outreach International (no claim for 2008 satellite)
- Salem Baptist Church of Chicago, Inc. (no claims for 1999-2000, 2003).

See IPG124; Claims Ruling at Exhibit A-2; Order on IPG Motions for Modification (April 9, 2015).

II. <u>RELEVANT FACTORS FOR ALLOCATION OF CABLE ROYALTY FUNDS</u>

3. The preeminent consideration in the allocation of funds in the devotional category is the relative market value of the SDC's distantly retransmitted programming as a whole and the relative market value of IPG represented claimants' distantly retransmitted programming as a whole. *See Distribution of 2000-03 Cable Royalty Funds*, 78 Fed. Reg. 64984, 64986 (Oct. 30, 2013) (citing *Program Suppliers v. Librarian of Congress*, 409 F.3d 395, 401 (D.C. Cir. 2005)); *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. 13423, 13428 (Mar. 13, 2015). Because the SDC and IPG have internal formulas for allocating awarded royalties among their respective individual claimants, the Judges need not assign a value to each individual claimant.

4. "Market value" is identical to "fair market value," traditionally defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13428 (quoting *U.S. v. Cartwright*, 411 U.S. 546, 551 (1973)); *see also* Ex. 638, Amended Testimony of John S. Sanders, at 2 (applying substantially similar definition). The "willing sellers" in the context of a hypothetical market for distantly retransmitted television programming are the copyright owners of the programs, and the "willing buyers" are the cable and satellite system operators who may wish to retransmit those programs to their own subscribers. *Id.* The term "relative" market value denotes that the value of one group of retransmitted programs is "to be determined in relation to the value of all other programs within the bounds of the respective Phase I category definitions," and thus can be expressed as a percentage of total market value, rather than as a dollar amount. *Id.* In this Phase II proceeding, the task is to set forth the shares for programs in a homogenous category (Devotional) based on the compensable content claimed by the SDC and IPG. *See* Tr. Vol 2, 44:9-17; 83:15-19 [Sanders].

5. The valuation methodology presented by the SDC is based on viewership as determined by local ratings reported by Nielsen in its Reports on Devotional Programming, scaled by the number of distant subscribers receiving each program. This approach is supported by the testimonies of: (1) John Sanders, an experienced and well-qualified expert in the field of valuation of media assets, including television programming; (2) Dr. Erkan Erdem, an experienced economist and statistician; and (3) Toby Berlin, the former Vice President of Program Acquisition at DIRECTV and a respected consultant in cable and satellite programming matters. Dr. Erdem was qualified by the Judges as an expert in economics, statistics and data

analytics. Tr. Vol 1, 140:19-141:5. Mr. Sanders was qualified by the Judges as an expert in the field of valuation of media assets, including television programs. Tr. Vol 1, 234: 13-21. Ms. Berlin was qualified by the Judges as an expert in the field of satellite and cable television programming. Tr. Vol 2, 75:19-76:11.

6. The methodology described by Dr. Erdem starts with local viewing ratings as summarized in the Nielsen Reports on Devotional Programs for the month of February in each year from 1999 through 2003, and for each of the four sweep months in each year from 2004 through 2009. *See* SDC635 at 3. Dr. Erdem then scales those ratings by the number of distant subscribers receiving those programs to determine the relative marketplace value of IPG versus SDC programs. *See* SDC635 at 17-20.

7. The SDC methodology is similar to the methodology that the Judges used in the 1999 cable proceeding, (*see* Distribution of 1998-99 Cable Royalty Funds, 80 Fed. Reg. at 13442-43), but with two important improvements. In this proceeding, the SDC's methodology utilizes one Nielsen Report on Devotional Programs for calendar years 1999-2003 and four Nielsen Reports on Devotional Programs for every year from 2004-2009, for a total of 29 reports in all. SDC635 at 3. Additionally, the SDC's methodology is scaled based on subscribership so as to account for the fact that some programs are retransmitted to many more subscribers than other programs. *See* SDC635 at 14-15.

8. IPG's methodology was presented by Dr. Laura Robinson, an economist with no demonstrated experience or skill in the valuation of television programs, who was found by the Judges to have "tried hard to obscure" a fact in a prior proceeding in order to benefit IPG. Distribution of 1998-99 Cable Royalty Funds, 80 Fed. Reg. at 13441-42. IPG's methodology relies on substantially the same four metrics that the Judges rejected as valuation measures in

that prior proceeding: (1) the number of hours of claimed broadcasts on the air in IPG's sample stations; (2) the time of day of those broadcasts by quarter hours; (3) the fees paid by cable system operators to retransmit the stations carrying those broadcasts; and (4) the number of distant subscribers to those stations. *See* IPG288 at 5; Tr. Vol. 3, 61:7-11 [Robinson]. *See Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. 13423, 13441-42 (Mar. 13, 2015).

9. Indeed, Dr. Robinson utilizes substantially the same metrics as those that were offered by Mr. Galaz and rejected by the Judges in 2000-2003 cable royalty proceedings, in which Mr. Galaz held himself out as IPG's putative valuation expert. *See Distribution of 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 65001. Dr. Robinson's decision to use substantially the same metrics and data raises serious questions about her independent judgment, just as the Judges found in the 1999 case. *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. at 37-38.

10. IPG has presented nothing new in this proceeding that would warrant a departure from the 1999 cable determination. The SDC's methodology, on the other hand, is substantially better than the methodology adopted by the Judges in the 1999 cable proceeding, and is therefore a reasonably reliable method for determining the allocation of the 2004-2009 cable and 1999-2009 satellite royalty shares.

III. <u>IPG'S METHODOLOGY</u>

11. IPG's methodology as described by Dr. Robinson takes the share of hours in a sample of claimed distantly retransmitted broadcasts, and then multiplies that share by the following factors, which Dr. Robinson seems to suggest are measures of the average relative value of programming per hour based on: (a) the time of day of the broadcasts (measured based

on two different sets of data for satellite), (b) the number of distant subscribers to the CSOs and SSOs that distantly retransmitted the broadcasts, and (c) for cable only, the fees paid by CSOs distantly retransmitting the broadcasts, as apportioned by the Cable Data Corporation ("CDC"). IPG 288, Supplemental Report at 17-19; IPG288A, Supplemental Report at 18; Tr. Vol 3, 67:11-72:12 [Robinson].

12. As previously determined in 1999, there are several material defects in IPG's methodology. First, it is based entirely on data provided by, and in some cases compiled by, Raul Galaz of IPG, a disgraced former lawyer and convicted felon who served time in prison for defrauding the Copyright Office in royalty distribution proceedings like this one (*see* SDC642 at 229:22-230:8), and who has been found in this very proceeding to have testified falsely (*see* Claims Ruling at 7-8). *See* Tr. Vol 5, 113:1-114:4 [Robinson] (acknowledging that she relied on IPG to provide her with data); Tr. Vol 2, 269:11-270:1 [Galaz] (admitting that he chose to create his own summaries of satellite statements of accounts for Dr. Robinson's use). Incredibly, Dr. Robinson testified that she was not aware of Mr. Galaz's criminal record (*see* Tr. Vol 5, 59:19-60:1 [Robinson]. However, the veracity of that testimony is called into question by Dr. Robinson's assertion in both her written and oral testimony that she read and considered the Judges' decision in at least the 2000-03 cable royalty proceeding, which discusses Mr. Galaz's criminal history extensively. *See* Tr. Vol 5, 93:2-96:6 [Robinson] (claims to have considered Judges' opinion from 2000-03 cable case, after first falsely claiming to have considered Judges' opinion from 1999 cable case when preparing her written testimony in this case); *Distribution of 2000-03 Cable Royalty Funds*, 78 Fed. Reg. at 65000 ("Mr. Galaz was previously convicted and incarcerated for fraud in the context of copyright royalty proceedings .... In connection with that fraud, Mr. Galaz admittedly lied in a cable distribution proceeding").

13. In the 1999 cable proceeding, the Judges found that Dr. Robinson was "straitjacketed" by the limited data received from Mr. Galaz, noting particularly Mr. Galaz's lack of expertise in any relevant field and his history of fraud. *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13440-41. She was no less straitjacketed in this proceeding and, indeed, relied on substantially the same data, even including data compiled by Mr. Galaz personally. *See* Tr. Vol 2, 269:1-274:17 [Galaz].

14. So utterly reliant on Mr. Galaz was Dr. Robinson that she barely even knew what she was working with. In her written testimony, she testified that her time-of-day metric was based on "information from the Nielsen media research on daily television viewing by distant viewers in 2000 through 2004 for selected stations by time of day in quarter hour increments," information that was "produced to IPG in the 2000 to 2003 Cable Royalty Distribution Proceedings Phase II." IPG288, Robinson Amended Direct Statement, at 14 and n. 9. In other words, it was the same HHVH data from MPAA that Dr. Robinson has criticized on various grounds when offered by any other party. *See, e.g.,* IPG289 at 32-36; IPG290. But on the stand, she forgot, if she ever knew, where her own data came from, and incorrectly insisted that it was other data from Nielsen covering a longer period, from 2000 to 2009. Tr. Vol 5, 61:3-63:10 [Robinson]; Tr. Vol 5, 74:20-75:14 [Robinson]; 130:17-131:12 [Robinson]. Only after being confronted with her written testimony on cross-examination did she admit that she relied on HHVH data produced by MPAA in the 2000-2003 cable proceedings, perhaps because she had not previously realized what her data was or where it came from. Tr. Vol 5, 133:7-135:22 [Robinson].

15. Second, Dr. Robinson did not properly apply her cable valuation methodology to her weighted stratified random sample of stations because she failed to apply sampling weights

by strata. *See* SDC640, Erdem Rebuttal Testimony, at 6-8; *see also* Tr. Vol. 1, 46:7-48:14 [Gray] (discussing necessity of applying sampling weight by strata, describing it as a matter he would hope would be learned in "Statistics 101"). Dr. Robinson admitted that she failed to apply sampling weights by strata to her stratified random sample, which was weighted heavily in favor of strata based upon larger stations that are attributed more fee generation. Tr. Vol 5, 119:6-120:21 [Robinson]; *see also* IPG288, Table 2. When asked to explain why she did not use a sampling weight by strata, Dr. Robinson admitted that she was focused on "other issues" and would have incorporated a sampling weight if she "were to do [the analysis] over again." Tr. Vol 5, 120:22-123:6 [Robinson]. Because her sample was weighted by fee generation, which was also one of her scaling factors for valuation, she acknowledged that the failure to apply sampling weights reduces the reliability of both her fee generation and subscribership metrics. Tr. Vol 5, 123:8-125:14 [Robinson]. In fact, it renders all of her metrics and calculations unreliable, because it renders her station sample unrepresentative. *See* SDC640, Erdem Rebuttal Testimony, at 6-8.

16. Dr. Robinson's station sample for her satellite analysis was selected entirely by Mr. Galaz. Tr. Vol 2, 272:3-274:3 [Galaz]. Although Dr. Robinson claimed it to be a "census," it is nothing of the sort. It consists of only the top stations by number of subscribers, and omits hundreds of other retransmitted stations (many of which would be received by the same subscribers receiving the stations in her sample). Tr. Vol 5, 117:20-119:15 [Robinson]. This demonstrates the disingenuity in her claim that her "analysis is really essentially based on the entire population rather than on a random sample." Tr. Vol 3, 67:16-68:2 [Robinson]. Simply stated, she is looking at the wrong "population." The relevant "population" for purposes of the representativeness of her station sample is the population of stations, of which she is missing

most, rather than the population of subscribers. Tr. Vol 5, 117:20-119:15 [Robinson]. Her satellite sample is, if anything, even less representative than her sample for cable.

17. Third, although the express premise of IPG's methodology is to eschew viewership as a basis for valuation (*see* IPG250, at 2-6; IPG250A, at 2-6), both of IPG's expert witnesses testified that viewership is important to valuation, at least when comparing similar programs in the same niche. *See* Tr. Vol 3, 165:1-14 [Egan] (as between two similar programs that satisfy the same niche, "if you had ratings that would tell you that, you would look at that for sure"); 184:4-186:1 [Egan] (ratings would be "more important" when comparing programs within a niche); Tr. Vol 4, 265:11-266:6 [Robinson] (would have used viewership data if she had received it earlier); Tr. Vol 5, 113:1-8 [Robinson] (would have used viewership data for particular programs if she had her "druthers"); Tr. Vol 5, 98:1-13 [Robinson] ("Even though the hypothetical negotiation here is between the CSO and the copyright holder, the underlying economics of the advertising is going to matter, and that's why viewership matters"). As both witness testimony and the Judges' prior decisions establish, programs in the devotional category can be thought of as a relatively homogeneous niche. *See* SDC633, Berlin Testimony, at 7 (religious viewers are an "important niche"); SDC638, Sanders Amended Testimony, at 6 ("The programs claimed within the category of devotional programming are directed predominantly to a Christian audience, and can therefore be thought of as homogeneous in terms of the subscriber base to which they are likely to appeal"); Tr. Vol 2, 83:5-19 [Berlin] ("For the religious programming, I treated it pretty homogeneous, and I relied on the ratings information to tell me what was most popular in those DMAs or out of market DMAs"); *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13437 ("[T]he programs within the Devotional Claimants category on the surface appear to be more homogeneous *inter se* than they are in comparison

with programs in either the Sports Programming or the Program Suppliers' claimant categories"). Therefore, "[t]his relative homogeneity suggests that a rational CSO would not be as concerned with whether different programs would attract different audience segments (compared with more heterogeneous programming) and therefore the CSO would rely to a greater extent on absolute viewership levels." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13437.

18. Finally, the Judges already ruled in the 1999 cable proceeding that none of the four factors as utilized by IPG is an appropriate measure of the relative market value of IPG vs. SDC programs.

19. *Broadcast Hours*: The Judges have already rejected IPG's starting point of number of broadcast hours:

> Dr. Robinson acknowledged that the number of hours of broadcasts is not actually a measure of value; rather it is a measure of volume. [Citation omitted]. Volume fails to capture the key measure of whether anyone is actually viewing the retransmitted program.

Distribution of 1998-99 Cable Royalty Funds, 80 Fed. Reg. at 13441-42.

20. In this case, at least, Dr. Robinson has structured her factors to allow them to be multiplied, thereby permitting a multiplication of her "volume" factor by what she refers to as her valuation factors. However, she identifies no reason why hours of broadcast is a relevant measure of volume. The number of broadcast hours is only a measure of time on the air. Because different stations are retransmitted to different numbers of subscribers, the number of broadcast hours is not a measure of volume of programming actually distributed to distant subscribers.

21. Applying principles of Shapley valuation, Dr. Erdem explains why a longer program, or a program that is broadcast more frequently, cannot be assumed to deliver more value than regular program that is shorter or less frequent:

> A methodology based on volume (of hours of transmitted programming) is not a reliable one because viewers and CSOs/SOs may value a 30-minute program more than they value a 90-minute program. ... Analogously, there could be and are situations where one hit show airs once a week on Sunday and has a very large viewership, while there may be another program that is telecast five days a week (Monday-Friday) with many broadcast hours but very small viewership. ...
>
> Indeed, a longer program might be worth less than a shorter program with similar viewership because of the opportunity cost associated with timeslots that could have been used for other programs appealing to different sets of viewers. For example, Shapley valuation ... would suggest that a cable system operator would likely prefer two half-hour programs that each appeal to 100 unique viewers (200 viewers total) over a single one-hour program that appeals to 100 viewers.

SDC640, Erdem Rebuttal Testimony, at 9.

22. Mr. Sanders, who has decades of experience valuing media assets, including television programs, agrees with Dr. Erdem's conclusion:

> The starting point of using hours of programming implies proportionality between the length of the program or the number of episodes and its relative value. This is clearly not the case.

SDC641, Sanders Rebuttal Testimony, at 7.

23. Notably, IPG's own expert witnesses agree as well. Dr. Robinson testified that she has no reason to believe that a one-hour program attracts twice as many subscribers to subscribe as a half-hour program attracts:

> Q Any reason to think that a one-hour program attracts twice as many subscribers [to subscribe] as a half-hour program ... [t]o the degree of a one-hour programming attracting twice as many as a half-hour programming?

A I would not, I have no, I have no reason to believe that.

Tr. Vol 5, 79:9-80:6 [Robinson]. But that is precisely how her methodology works. By multiplying her valuation factors by the number of broadcast hours of each program, twice as many minutes equates to twice as much value in her methodology. Tr. Vol 5, 81:10-16 [Robinson].

24. Similarly, IPG's rebuttal expert, Michael Egan, testified that daily programs are not necessarily more valuable than weekly programs:

> Q Would you say daily programs are more valuable than weekly programs?
> ...
>
> A NFL games, you know, my New York Jets are playing New England Patriots once a week, is less important therefore than I Love Lucy, which is on Monday through Friday? No, no it's not. So I can't answer that question.
>
> Q Well, didn't you just answer by saying no it's not?
>
> A ... I don't know if it's more important or not. I don't think that the fact how many times it's on a week is going to determine that.

Tr. 196:16-197:11 [Egan].

25. In short, every single expert who testified with regard to the devotional category either implicitly or explicitly rejected the notion that hours of broadcast is a relevant factor in calculating relative market value.

26. *Time of Day*: The Judges also have already rejected Dr. Robinson's time-of-day factor:

> Dr. Robinson's time-of-day measure does not measure the value of the individual programs that are retransmitted. [As used, IPG's measure] give[s] equal value to the Super Bowl and any program broadcast at the same time.

Distribution of 1998-99 Cable Royalty Funds, 80 Fed. Reg. at 13441-42.

27. Dr. Robinson offers no reason why her time-of-day factor is any more compelling in this proceeding than it was in the 1999 cable case. It is essentially identical, and must be

rejected for the reasons set forth in the 1999 Distribution Determination and by Dr. Erdem and Mr. Sanders in their written rebuttal testimonies. *See* SDC640, Erdem Rebuttal Testimony, at 10-12; SDC641, Sanders Rebuttal Testimony, at 8-9.

28. *Fees Generated*: The Judges also have already rejected Dr. Robinson's measure of fees generated:

> The use of a fee-based attempt at valuation is particularly problematic, however, for a niche area such as devotional programming, which constitutes only a small fraction of total station broadcasting.

Distribution of 1998-99 Cable Royalty Funds, 80 Fed. Reg. at 13441-42.

29. The amount of fees IPG suggests are generated by station retransmission by cable systems or satellite carriers is not a statistic compiled by the Copyright Office or dictated by the Cable or Satellite Statements of Account. Royalties are paid on a sliding scale and it is "not possible to determine precisely at what royalty rate the cable system paid for … for any … distant signal," *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063, 57071 (Sept. 17, 2010). Further, IPG has presented no evidence to suggest that a fee generation methodology establishes the relative value of a signal or category of programming. Just as in the 1999 cable proceeding, there is no basis to believe that the amount of fees allocated to a station has any bearing on the relative value in the hypothetical market for a specific program carried by the retransmitted station.

30. It bears noting that in the 1999 case, Dr. Robinson initially analyzed her fees generated metric using her "matching game" approach, in which she artificially divided hours of program based on "fee generation categories" that she devised herself, and then attempted to "match" hours of SDC programming with hours of IPG programming in equal or higher categories. The approach proved to be hopelessly flawed in several respects, not least of which

was the fact that the highest "fee generation category" in her matching game was a $400,000+ category with no upper limit, thereby obscuring the fact that a fee generation measure would have overwhelmingly benefited the SDC in 1999, when the SDC had the only compensable devotional program on WGNA, the satellite feed of superstation WGN, with $53 million in fee generation. *See* SDC643 at 281:14-284:11 [Robinson]. Unlike in 1999, Dr. Robinson chose not to use her "matching game" methodology in this proceeding, where both the SDC and IPG have compensable programs on WGNA.

31. Dr. Robinson denies that she chose a different fee generation measure in this proceeding than in the 1999 cable proceeding because of the effect of WGNA. Tr. Vol 5, 91:22-93:20 [Robinson]. But she failed to provide any other plausible explanation.

32. At first, she claimed that she was not able to calculate an aggregate number in the 1999 cable case - until it was pointed out to her that she actually *did* calculate an aggregate number in that case when the Judges requested her to do so. Tr. Vol 5, 92:13-93:13 [Robinson]; *see also* SDC643 at 308:15-309:20, 397:13-402:18, and 1032:5-1033:22 [Robinson].

33. Then, when that explanation failed, she answered in response to a question from Judge Feder that the Judges' decision from the 1999 cable case "informed my thinking about the issue here," and that she "considered it." Tr. Vol 5, 94:9-95:14 [Robinson]. But that explanation turned out to be hopelessly inept – and untrue – because the Judges' initial decision in the 1999 cable case was not issued until December 10, 2014, five months after Dr. Robinson had already submitted her Amended Direct Testimony in this case on July 7, 2014. *See* Tr. Vol 5, 140:16-141:1. She was smart enough not to try to claim that she had considered the SDC's rebuttal statement in the 1999 cable case when she changed her methodology (Tr. Vol 5, 97:1-10

[Robinson]), because that rebuttal statement was submitted on August 12, 2014, only after she had already submitted her Amended Direct Testimony in this case.

34. Finally, as noted above, Dr. Robinson herself acknowledged that her fees-generated measure is "less compelling" as a result of her failure to apply sampling weights by strata to her stratified random sample, particularly given that her strata were weighted by fees generated, the very thing she is trying to measure in the population of stations. *See* Tr. Vol 5, 123:17-19 [Robinson].

35. *Subscribers*: The Judges also have already rejected Dr. Robinson's valuation factor based on subscribership levels:

> Dr. Robinson's final metric measures the average number of distant subscribers per cable system retransmitting IPG programming versus SDC programming. (Citation omitted). This metric measures average subscribers *per cable system*, without taking into account the number of cable systems retransmitting a station. Therefore, this metric is of no assistance in measuring the total number of distant subscribers even *receiving* a program, let alone the number of distant subscribers who watch the program.

Distribution of 1998-99 Cable Royalty Funds, 80 Fed. Reg. at 13441-42.

36. In this proceeding, Dr. Robinson modified the subscribership metric she used in the 1999 proceeding by replacing "average subscribership per cable system" (a preposterous measure that she only could have chosen in the 1999 cable proceeding in order to obscure the effect of WGNA) with "aggregate subscribership." *See* IPG288 at 11-12; IPG288A at 11-12. Regardless, Dr. Robinson's use of subscribership as a measure of value, as opposed to volume, has all of the same pitfalls as use of fees generated. Indeed, because fees generated are closely related to the number of subscribers, there is little distinction between these two factors. Tr. Vol 5, 91:10-21 [Robinson]. It is therefore also a "less compelling" factor as a result of Dr. Robinson's failure to apply sampling weights by strata. *See* Tr. Vol 5, 123:8-125:14 [Robinson].

More fundamentally, as with fees generated, there is no basis to believe that the amount of fees allocated to a station has any bearing on the relative value of any particular program on the station. *See* SDC640 at 13.

37. Indeed, Dr. Robinson admitted that, by design, her subscribership methodology assumes that every program on a station is of equal value (*see* Tr. Vol 5, 89:15-20 [Robinson]), an assumption that IPG's rebuttal expert Mr. Egan expressly rejected. Tr. Vol 3, 204:5-205:5 [Egan].

38. Failure to Consider Factors Together: Finally, even assuming - counterfactually - that Dr. Robinson's factors had some validity, the way she combines them is not true to her own approach. In calculating her "Range of IPG Royalty Share," she multiplies the number of hours of IPG programming, as a percent of the total hours of claimed devotional programming, by her time-of-day calculation supposedly showing the average relative value of an hour of IPG programming as compared to an hour of SDC programming. *See, e.g.,* IPG 260. So, for example, for 2004 cable, she calculates that IPG had 22.86% of total claimed hours in the devotional category in her station sample, and that the average IPG hour of broadcasting was broadcast at a time that was 86.45% as valuable as an hour of SDC broadcasting.

39. Dr. Robinson's methodology, if believed, would suggest that the average hour of IPG programming in 2004 is in a time slot that is only 85.45% as valuable as the time slot of an average hour of SDC programming *and is also* retransmitted to only 55.77% as many distant subscribers as the average hour of SDC programming. *See* IPG260. (Or, in a related measure, the average hour of IPG programming in 2004 was retransmitted on stations generating only 56.49% as much in fees as the stations on which the average hour of SDC programming was retransmitted). *See id.* So Dr. Robinson's methodology would suggest that the average hour of

IPG programming is less valuable than the average hour of SDC programming *both* because it is on at less valuable times of day, *and also*, separately, because it is on less valuable stations (as measured by either fee generation or by subscribership). *See id.*

40. At the very least, a more reasonable formula would multiply IPG's share of broadcast hours, times the time-of-day value, times either the fees paid value or the distant subscribership value. Recalculated on that basis, Dr. Robinson's methodology would have yielded significantly lower values for IPG in cable across the board (*see id.*), and in satellite for every year except for 2001-2003 (*see* IPG276).

41. It was Dr. Robinson herself who suggested that this calculation could be done:

> ... [Y]ou can look at them in isolation, you can look at them together; in this case as opposed to the prior case, you could actually multiply them across. So I've done just one at a time, where I've multiplied the volume by time of day, but you could multiply by time of day, by fees paid.

Tr. Vol 4, 261:13-262:8 [Robinson]. Conspicuously, Dr. Robinson failed to explain why she did not perform the calculation in this way. Tr. Vol 5, 107:1-111:21 [Robinson]. Dr. Robinson correctly noted during oral testimony that it would not be proper to multiply correlated values (for example, fees generated and distant subscribership value). *Id.* But there is no correlation between how widely retransmitted the station is and the time of day of the programs on the station, because every station has the same 24 hours of programming to fill, regardless of how widely retransmitted it may be. *Id.*

42. In sum, IPG's methodology is once again utterly useless in determining the relative market value of the SDC and IPG programming in this proceeding. It should be accorded no consideration by the Judges in allocating devotional shares.

IV. SDC METHODOLOGY

43. The SDC's allocation methodology presented by expert witnesses Dr. Erdem and John Sanders is substantially similar to the methodology that was devised by the Judges in the 1999 proceeding. Dr. Erdem started with Nielsen reports of audience viewing of devotional programs from each year 1999 through 2003, and four Nielsen reports from each year 2004 through 2009 - "the universe of Nielsen data that ... [was] available" for the time period at issue in this proceeding. Tr. Vol 1, 253:10-19 [Sanders]. (Mr. Sanders also testified that he sought more data from Nielsen, but that Nielsen responded that other meaningful data could not be recovered. Tr. Vol. 2 254:14-255:13 [Sanders].) Dr. Erdem merged the Nielsen data with Cable Data Corporation Statements of account by year and channel, and then merged the combined data with Nielsen ratings data by year and program title. *See* SDC635 at 3, 16-19; SDC636 at 3, 16-19. He then multiplied ratings, his valuation factor, by distant subscribership, his volume factor, to calculate relative market value - a volume-times-value calculation perfectly typical of any valuation or appraisal exercise. *Id.*

44. At the start of this case, both SDC and IPG claimed compensable programming on WGNA, the satellite feed of superstation WGN. In his initial calculation, Dr. Erdem applied a discount to programming on WGNA, recognizing, as MPAA's expert witness Dr. Gray separately recognized, that WGNA is an outlier requiring special treatment. *See* SDC635 at 19-20; SDC636 at 20; MPAA367 at 20-21.

45. After certain IPG programs were disallowed by the Judges' Claims Ruling, IPG no longer claimed any regularly broadcast compensable program on WGNA, leaving the SDC with the only compensable regularly scheduled programming in the devotional category on WGNA. *See* SDC640 at 27-29; Tr. Vol 1, 225:21-227:18 [Erdem]. Because Dr. Erdem only had

ratings for regularly scheduled programming, he decided to exclude WGNA from his calculation. This was done not to disclaim entitlement to royalties for programs on WGN, but in recognition that WGN is an outlier and to avoid special treatment of WGNA-retransmitted programs that might provide an anomalous benefit for the SDC. *Id.* Nevertheless, by eliminating the SDC programming on the most highly retransmitted signal in his calculations, Dr. Erdem's allocations understate the SDC's entitlement in the affected years. *Id.*

46. Using the steps above, Dr. Erdem determined the allocation of royalties for the SDC and IPG for each year in this proceeding should be as follows:

Royalty Allocation for SDC and IPG Claimants

	Cable		Satellite	
Year	**IPG**	**SDC**	**IPG**	**SDC**
1999	-	-	6.1%	93.9%
2000	-	-	2.8%	97.2%
2001	-	-	1.2%	98.8%
2002	-	-	1.5%	98.5%
2003	-	-	2.8%	97.2%
2004	11.2%	88.8%	1.8%	98.2%
2005	10.8%	89.2%	1.7%	98.3%
2006	12.4%	87.6%	6.7%	93.3%
2007	7.4%	92.6%	3.4%	96.6%
2008	9.9%	90.1%	0.0%	100.0%
2009	10.4%	89.6%	2.1%	97.9%

See SDC640 at 25-28 (adjusted in 2004 satellite only to account for an apparent error in CDC data (Tr. Vol 1, 145:4-146:14 [Erdem])).

47. SDC expert witness John Sanders confirmed the validity of the SDC's ratings-based methodology. Based on his experience valuing hundreds of programs and working for cable and satellite system operators, he testified that, within categories of homogeneous programming, operators choose to carry programs that viewers are most interested in watching, and the most commonly accepted source of ratings data is the Nielsen reports. Tr. Vol 1, 247:9-249:12 [Sanders]; SDC638 at 6. Mr. Sanders also testified that Dr. Erdem's valuation approach,

which can be summarized as multiplying the volume of households viewing the programs at issue on a distant signal basis by the value of the programs as measured by subscriber interest, is consistent with the value times volume approach that is typically used in programming valuations. Tr. Vol 1, 250:17-252:1 [Sanders].

48. SDC witness Toby Berlin further confirmed the validity of a ratings-based methodology. As an executive at DIRECTV and a consultant in cable and satellite programming matters for many years, Ms. Berlin testified that cable and satellite system operators consistently rely on ratings, as measured by Nielsen, to determine which programs to offer to subscribers, including programs designed to target niche demographics such as religious programs. *See* SDC 633 at 3; Tr. Vol 2, 78:4-81:16 [Berlin]. In fact, Ms. Berlin confirmed that cable operators "viewed ratings as principal measure of value within a defined genre of programming." SDC 633 at 7.

Criticisms of the SDC methodology

49. In their written rebuttal and oral testimonies, Dr. Robinson and Raul Galaz identified four alleged criticisms of the SDC methodology: (1) the CDC satellite subscribership data used by Dr. Erdem has errors, (2) the SDC methodology relies on local rather than distant ratings data, (3) the Nielsen Reports on Devotional Programming do not include all programs claimed in the devotional category, and (4) Dr. Erdem's relative market value metric relies on relative viewership of claimed broadcasts without accounting for differences among viewers or the impact of viewership on subscribership. However, as to each criticism, the evidence presented demonstrates either that the criticism is invalid or that any effect of a potential flaw most likely favors IPG, and not the SDC. (Indeed, Dr. Erdem has gone out of his way, to the SDC's detriment, to ensure that the methodology favors IPG in each doubtful circumstance. The

Judges should incentivize this practice by crediting it to the integrity of the expert witness offering it, rather than by dis-incentivizing it by further penalizing the party that offers the best available methodology.)

a. <u>Errors in CDC Subscribership data</u>

50. Dr. Robinson identified a single error in the CDC satellite data used by Dr. Erdem. IPG290 at 25-26. Dr. Erdem corrected that error and searched for others like it, and then adjusted his proposed allocations accordingly, resulting in a 0.5% increase to IPG's share in 2004 satellite only. Tr. Vol 1, 145:4-146:14 [Erdem].

51. On the stand, Mr. Galaz testified that he reviewed the CDC data of distant satellite subscribers relied on by Dr. Erdem and found other discrepancies between it and his own calculations of the number of distant satellite subscribers based on his review of statements of account for the years 1999 to 2009. Tr. Vol 2, 183:14-201:12 [Galaz]. As a specific example, Mr. Galaz pointed out an error by CDC in which subscribers were incorrectly attributed to the station WDLI, which he said predominantly carries religious programming. Mr. Galaz claimed that WDLI had twice as many SDC programs as IPG programs, implying that this particular error would tend to favor SDC. Tr. Vol 2, 191:15-196:9 [Galaz].

52. All Mr. Galaz's testimony showed is that his computations differ from CDC's. Both CDC and Mr. Galaz admitted to errors. At best (for IPG) there was conflicting evidence as to whose is more reliable, Tr. Vol 4, 7:8-65:8; however, CDC is the only independent company providing such data as a service. *See* Distribution of 2000-2003 Cable Funds, 78 Fed. Reg. at 64993 n. 36. By contrast, Mr. Galaz, on whom Dr. Robinson relied exclusively for the statistics on satellite retransmissions that she used as the basis for her testimony (Tr. Vol. 2, 269:1-273:3 [Galaz]), is not an unbiased source.

53. As to the specific example of WDLI, Dr. Erdem testified that he investigated whether the removal of WDLI would have any effect on the SDC allocation determination. He determined that the error had no impact whatsoever, because there was no rated and claimed devotional programming on WDLI in the Nielsen reports for the years at issue in this proceeding. Tr. Vol 5, 141:19-143:20 [Erdem]. He triple and quadruple-checked that finding. *Id.*

b. <u>Reliance on local rather than distant ratings data</u>

54. For the purpose of satisfying himself of the common-sense presumption that there is a positive and significant correlation between local and distant viewing in the devotional category, Dr. Erdem performed a single linear regression for 1999, the only year for which he had distant viewing HHVH data from MPAA - drawn from MPAA's "Kessler sample" of stations. *See* SDC635 at 14-15; SDC636 at 14-16. He found a correlation coefficient of 0.9 - suggesting that 90% of any variation in distant viewing, after adjusting for subscribership, is correlated with a corresponding variation in local viewing. *Id.*

55. This is a strong correlation, but hardly a surprising one. Popularity in "distant" markets is driven by many of the same factors that drives popularity in local markets. In the context of "distant" retransmission, the word "distant" may be something of a misnomer, because many of the distant retransmissions are to neighboring markets - for example, from a city to a nearby suburb or town, where demographics and local interests might not differ much from the originating market. Tr. Vol 2, 20:20-21:6 [Sanders].

56. Dr. Robinson criticizes Dr. Erdem's conclusion that local ratings can be used as a surrogate for distant viewing, but Dr. Erdem's use of local ratings is fully consistent with the use of local ratings by real-world professionals in the television industry. Ms. Berlin, former Vice President of Program Acquisition at DIRECTV, testified that she regularly relied on ratings from

the originating market when ratings for the distant market were not available, and she was never steered wrong:

> Q Now were there circumstances in which you were looking at acquisition of a distant station, when viewership information in your particular market was not available ...
>
> A There were.
>
> Q What would you look at in those situations, where you don't have Nielsen information for the particular market in which you are retransmitting?
>
> A I would look at the DMA where the station resided.
>
> Q And did you find as a general matter that the information that you would get from that DMA would be transportable to making business judgments in the DMA where you're retransmitting.
>
> A Yes, exactly.
>
> Q Have you ever had a circumstance where you were surprised unpleasantly about the -- or pleasantly, relating to the transportability of the information you were relying on from an originating DMA to the DMA where you were retransmitting?
>
> A No. I found the Nielsen very valuable, and I was never surprised in my decisionmaking.

Tr. Vol 2, 81:8-82:20 [Berlin]. Of course, this is consistent with the Judges' finding in the 1999 cable case that the local ratings in that case were "very relevant " in the determination of relative market value. *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg at 13442-43. There is no reason to believe that a buyer or seller in a hypothetical market would give less weight to Nielsen information than actual buyers and sellers in the real market.

57. Dr. Robinson incorrectly implied that Dr. Erdem assumed that "the relationship between local ratings and distant ratings would be exactly the same" in the ten years after 1999, the only year in which when Dr. Erdem had distant viewing HHVH information. Tr. Vol 4,

176:11-15 [Robinson]. But Dr. Erdem made no such assumption. He performed a regression to HHVH using 1999 data, but he did not apply a regression coefficient in calculating relative value. Tr. Vol 5, 146:16-149:20. He only presumed that the correlation between local and distant viewing remained positive and significant. *Id.* Further, Dr. Erdem reviewed the written testimony and underlying discovery documents of Dr. Gray, MPAA's expert witness, to confirm this correlation. Tr. Vol I, 179:19-22 [Erdem]. Dr. Gray also established through his regression analysis that the correlation between local and distant viewing remained positive and significant in every year for which he had distant HHVH data. Tr. Vol 5, 220:16-221:8 [Gray]. Indeed, Dr. Gray's own regression analysis could not have been performed otherwise, as it was based on a regression between measures of local and distant viewing.

58. Aside from confirming that there was a positive and significant correlation between local and distant viewing, there was no need for Dr. Erdem to apply the regression coefficient from his single linear regression. Because a regression coefficient is merely a scaling factor, it would have scaled all SDC and IPG programming in equal proportions. The exact value of the regression coefficient is therefore irrelevant to the relative market value, expressed as a percentage, so long as it is positive:

> Because let's say distant viewing equals [the regression] coefficient times [] a local reading.
>
> If I use that coefficient to predict the distant viewing for other years for every SDC and IPG show I would be scaling up or down every number I have as local rating for every show by the same amount.
>
> And when I used that eventual[ly] to calculate a [relative] share, those coefficients will cancel out. I will end up with the same percentage.

Tr. Vol 5, 149:9-20 [Erdem].

59. Dr. Erdem's explanation can be expressed mathematically as follows:

$$Relative\ value_t^{IPG} = \frac{\beta \times Viewer_t^{IPG}}{\beta \times Viewer_t^{IPG} + \beta \times Viewer_t^{SDC}}$$

is mathematically equivalent to:

$$Relative\ value_t^{IPG} = \frac{\beta \times Viewer_t^{IPG}}{\beta(Viewer_t^{IPG} + Viewer_t^{SDC})}$$

which is mathematically equivalent to:

$$Relative\ value_t^{IPG} = \frac{Viewer_t^{IPG}}{Viewer_t^{IPG} + Viewer_t^{SDC}}$$

Therefore, β is irrelevant in calculating $Relative\ value_t^{IPG}$.

Where: $Relative\ value_t^{IPG}$ is the relative market value of IPG's programming in year t.

$Viewer_t^k$ is calculated as described in SDC640 at 26-27, where $k = SDC, IPG$.

β is the regression coefficient.

c. <u>Reliance on Nielsen Reports that Did Not Contain All Claimed Programs</u>

60. As for IPG's argument that the Nielsen data does not include all programs in this proceeding, the SDC's data covered everything of substance. With the Judges' exclusion of all Envoy programs in the Devotional category pursuant to the Claims Ruling, only three of IPG's programs do not appear in the SDC's Nielsen data – Billy Graham, Salem Baptist Church, and a program by Primary Focus. Tr. 174:7-176:20 [Erdem]. Because these three programs were not broadcast on a daily or weekly basis, but as specials a few times a year, they have little to no bearing on the relative market value of SDC versus IPG programs. Mr. Sanders testified that, in his experience, these types of sporadic programs would not drive subscriber decisions. Tr. Vol 1, 256:16-257:19 [Sanders].

61. Moreover, there is no evidence that any of these three IPG-claimed programs would have substantially improved IPG's relative value if they had appeared in the Nielsen reports.

a. Billy Graham is claimed by IPG in 2001-2003 satellite only, but is claimed by SDC in cable and satellite for 2004-2008. Therefore, Billy Graham's failure to meet Nielsen's reporting standards for the Reports on Devotional Programming can be expected to have harmed the SDC considerably more than IPG. Tr. Vol 1, 174:4-175:2 [Erdem].

b. In IPG's own station sample, Salem Baptist Church comprises only 0.02% of all broadcasts claimed in the devotional category retransmitted on satellite, and only 0.1% on cable. Tr. Vol 1, 175:6-176:1 [Erdem]. Similarly, the program Primary Focus does not appear in IPG's satellite sample at all, and comprises less than 1% of all broadcasts claimed in the devotional category retransmitted on cable. Tr. Vol 1, 176:6-176:15 [Erdem].

62. Dr. Robinson disingenuously points to Dr. Erdem's conclusion that IPG should receive an allocation of 0% in 2008 satellite as evidence that the omission of certain programs from the Nielsen Reports on Devotional Programming harmed IPG. Tr. Vol 4, 177:8-178:6 [Robinson] ("[H]is result is zero percent share for IPG, which is a direct result of the fact that he doesn't have any IPG programs in [2008] in his data"). She failed to realize that her own analysis *also* found a 0% allocation for IPG in 2008 satellite. Tr. Vol 5, 51:20-54:3 [Robinson]. The reason: *all* of IPG's programs in the devotional category in 2008 satellite were disqualified for one reason or another (except for Salem Baptist Church, a non-regularly scheduled program

which appears not to have been retransmitted during that year). The 0% allocation for that year had nothing to do with a lack of data.

63. Ironically, Dr. Robinson's own analysis concludes that IPG should also receive a 0% allocation in 2000 satellite, whereas Dr. Erdem's analysis awards IPG an allocation of 2.8%. *Compare* IPG276 with SDC640 at 28. This shows that Dr. Erdem's data set included IPG programming that was missing from Dr. Robinson's own station sample (which she incorrectly refers to as a census). Tr. Vol 5, 55:19-56:20 [Robinson] ("I agree with you"). Dr. Erdem's data is more complete than IPG's data. For that matter, because Dr. Erdem's data covers every commercial station in every DMA, it is far more complete than any set of data presented by any other party. *See* Tr. Vol 1, 249:3-250:16 [Sanders]; Tr. Vol 1, 58:8-62:15 [Gray].

64. Due to the eligibility requirements for reporting devotional viewing results in the ROPD, the Nielsen reports omitted vastly more programs claimed by the SDC, amounting to approximately two-thirds of the broadcasts of unrated programs that appear in IPG's station sample in both cable and satellite, even prior to the disqualification of many of IPG's unrated programs. SDC635, Erdem Amended Testimony (Cable), at 20-24; SDC636, Erdem Amended Testimony (Satellite), at 20-25. Dr. Erdem's calculations were made prior to the disqualification of certain IPG-claimed programs, including unrated programs; therefore, they understate the extent to which the SDC's unrated but compensable programs exceed IPG's unrated but compensable programs in volume. Any methodology that attempted to assign value to unrated programs would therefore be expected overwhelmingly to benefit the SDC. Tr. Vol 1, 173:6-14 [Erdem]; SDC638 at 11 ("because there are more unrated SDC programs than IPG, it is appropriate to view Dr. Erdem's results as the low end of the zone of reasonableness for the SDC and the high end of the zone for IPG").

65. At bottom, however, it would have been a futile exercise to attempt to assign a value to programs in the absence of information about viewership. Tr. Vol 1, 259:16-261:15 [Sanders]. As Mr. Sanders said, that would be a good way for a real-life buyer or seller to go out of business quickly. *Id.* As the Judges previously have found, "there is certainly no basis to allow for compensation of a program in the absence of *any* evidence of viewership." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13441 (emphasis in original). With regard to the unrated programs in this case, including those claimed by the SDC and those very few claimed by IPG, that is precisely the situation we have here.

66. Dr. Robinson also criticized Dr. Erdem's decision to exclude WGNA. Her criticism is ironic, given her own history of obscuring positive effects of WGNA toward SDC in her own fee-based and subscriber-based methodologies. But because IPG had no rated, compensable devotional programming on WGNA, Dr. Erdem's decision to exclude WGNA from his analysis only benefited IPG. SDC640, at 27-28. Indeed, avoiding unfair detriment to IPG was the express reason for excluding it. *Id.*

d. <u>Dr. Robinson's Flawed Hypotheticals</u>

67. Dr. Robinson also criticizes Dr. Erdem for not attempting to link his viewership analysis to an analysis of subscribership. IPG290 at 18-20. To illustrate the alleged flaw, Dr. Robinson uses a hypothetical of two copyright claimants each claiming royalties for a single title of equal length (Title 1 and Title 2), with only one station broadcasting both of the titles. *Id.* One CSO retransmits the station, and there are 100 distant subscribers, all of which watch both titles. 90 of the subscribers prefer Title 1 to Title 2 and would not pay to subscribe if the station broadcast only Title 2. The remaining 10 subscribers prefer Title 2 to Title 1 and would not pay to subscribe if the station broadcast only Title 1. Dr. Robinson then infers that under Dr.

Erdem's methodology, the relative market value of each of the programs would be 50% and 50%, which Dr. Robinson says is incorrect. *Id.* (For whatever it is worth, Dr. Robinson's own methodology would have reached precisely the same result, given the hypothetical figures).

68. But, as Dr. Erdem demonstrated, the hypothetical is based on an absurd premise - that *all* subscribers watch *all* programming on *all* stations, which is the only way that one could suppose that subscriber viewing behavior has no correlation to preference. *See* Tr. Vol 1, 155:19-159:8 [Erdem]. It is not possible for a subscriber to watch all programs available at a time. It may be that subscribers will sometimes watch programs that they do not value, simply for lack of anything better to do. But economic theory suggests that subscribers will watch the programs that they value enough to drive their decision to subscribe. *Id.* Otherwise, the subscription is wasted. There is necessarily some correlation between what subscribers watch and what they value.

69. As Dr. Erdem further demonstrated, if Dr. Robinson's hypothetical is altered to assume *any* correlation between subscriber behavior and subscriber preferences, a methodology based on viewership yields a more accurate result than a methodology based solely on the number of distant subscribers. *See* Tr. Vol 1, 163:11-167:6 [Erdem]. Moreover, when dealing with relatively homogeneous programming, if the correlation between subscriber behavior and subscriber preferences is anything less than 100%, the viewership based methodology tends to overvalue, and not undervalue, programs with lower ratings. *Id.* IPG's claimed programs have lower ratings on average than SDC's claimed programs. *Id.* Therefore, Dr. Erdem's viewership methodology over-values IPG's programs, if subscriber behavior is not perfectly correlated with subscriber preferences. *Id.* ("Q: So if anything, your methodology undervalues the SDC's programs? A: That's correct"). This effect is directly related to Shapley valuation, which

predicts, among programs with relatively uniform amounts of overlapping viewers, that any overlap in viewership inures to the benefit of the lower-rated program, and not the higher-rated programs. *Id.*; SDC644 at 1083:7-10 [Erdem].

70. Dr. Robinson presents a second, even more poorly constructed hypothetical in which she argues that Dr. Erdem's methodology "estimates significantly different distant viewership shares ... for the parties even when actual distant viewership shares are equal." IPG290 at 22-23, referencing IPG226 (replaced by IPG226A).[2] But the hypothetical she presents shows no such thing, because the inputs are incorrectly calculated.

71. The hypothetical is constructed in a somewhat convoluted way, but it essentially proposes that, assuming a known number of distant viewers, a multiplication of "Ratings" (which Dr. Robinson calculates as the known number of distant viewers divided by the total number of distant subscribers to all cable systems) times "Total Distant Subscribers" (which Dr. Robinson calculates as the total number of subscribers to cable systems that retransmit the particular program) results in a number that does not match the known number of distant viewers. *Id.*

72. Even an amateur could see the slight-of-hand involved, and Dr. Erdem had no difficulty in exposing it. *See* Tr. Vol 1, 169:10-172:18 [Erdem]. Dr. Robinson incorrectly calculates the "Actual IPG Rating" and "Actual SDC Rating" involved in her hypothetical by dividing the known number of distant viewers of each program by the total number of distant subscribers to all cable systems in the hypothetical, *including those that did not carry the programs*. *Id.* If she had correctly calculated the "Actual IPG Rating" and "Actual SDC Rating" by dividing the known number of distant viewers by the number of subscribers to the cable

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[2] IPG submitted IPG226A to correct an arithmetic error in IPG226. But the error corrected is not the error that Dr. Erdem addressed in his testimony, and has little bearing on the fundamental problems with the hypothetical.

systems carrying the stations that broadcast those programs - which is somewhat more analogous to how local ratings are calculated, using the number of television households within the DMA of the broadcast signal - she would have found that multiplying "Ratings" times "Total Distant Subscribers" would yield exactly the correct result. *Id.*

CONCLUSIONS OF LAW

I. Legal Standard

73. Section 111(d)(4) of the Copyright Act does not prescribe specific factors that the Judges must apply to determine how to distribute royalties. However, the Judges and their predecessors have held that relative marketplace value must guide the allocation of royalties among participants. *See Distribution of 2004 and 2005 Cable Royalty Funds*, Docket No. 2007-3 CRB CD 2004-2005, 75 Fed. Reg. 57063, 57065 (Sept. 17, 2010); *Program Suppliers v. Librarian of Congress,* 409 F.3d 395, 401 (D.C. Cir. 2005). They have also found that, in Phase II proceedings, "actual measured viewing is significant to determining relative marketplace value." *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64986.

II. IPG's Methodology is Unreliable and Unsupported by Precedent

74. IPG has brought nothing new to this proceeding. Its methodology relies on the essentially the same four factors that the Judges have previously rejected: (1) number of hours of broadcasts on the air; (2) time of day of the broadcasts by quarter hours; (3) the fees paid by cable system operators to retransmit the stations carrying the claimed broadcasts; and (4) the number of distant subscribers: *See* IPG288 at 5; Tr. Vol. 3, 61:7-11 [Robinson]; Tr. Vol 2, 289:2-16 [Galaz] (IPG's "value metrics" are "essentially the same" as in prior Phase II proceedings). Indeed, the Judges need look no further than the most recent distribution

determination for the 1999 cable royalties for their own explanations as to why each of IPG's metrics is useless.

75. *Broadcast Hours* – The first factor in IPG's methodology, the number of hours or length of the retransmitted broadcasts, was rejected by the Judges in the 1999 Distribution Proceeding on the grounds that it is "not actually a measure of value [but a] measure of volume," and "[v]olume fails to capture the key measure of whether anyone is actually viewing the retransmitted program." Distribution of 1998 -99 Cable Royalty Funds, 80 Fed. Reg. at 13441. The Judges further held that "'volume' *i.e.*, number of hours of air time, does not even reflect how many subscribers have access to the programs." *Id.*

76. The Copyright Royalty Tribunal ("CRT") and the Judges and their predecessors have on multiple occasions rejected time-based formulas, as they distort marketplace analysis and ignore market considerations. *Id.* at 65001; *see also 1983 Cable Royalty Distribution Proceeding*, Docket No. CRT 84-1 83CD, 51 Fed. Reg. 12792, 12813 (Apr. 15, 1986); *see also Distribution of the 1979 Cable Royalty Funds*, Docket No. CRT 80-4, 45 Fed. Reg. 9879, 9897 (Mar. 8, 1982). In the 2000-2003 Distribution Proceeding, the Judges rejected IPG's "time period weight factor" on numerous grounds, including the fact that it "ascribed equal value to MPAA-claimed programs and IPG-claimed programs that aired on the same station and for the same duration, despite substantially different levels of viewership." *See Distribution of 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 65001.

77. Here, IPG's number of broadcast hours measure fails for the same reason. The number of minutes that a program airs does not indicate the value of the program to a cable or satellite system operator or subscriber – or even how many subscribers were actually receiving the program. *See* SDC640 at 8-9; Tr. Vol 3, 195:16-20 [Erdem]; Tr. Vol 5, 79:9-80:6

[Robinson]. For example, this measure does not account for the fact that a cable or satellite system operator may value a 30-minute devotional program more than a 90-minute devotional program, because the 30 minute program attracts more viewers, and therefore has more opportunity to attract subscribers to subscribe to the system. SDC640 at 8-9. For these reasons, IPG's time-based methodology does not inform the Judges as to the value of devotional programming. *Id.*

78. Time of day of broadcasts by quarter hours – The second factor in IPG's methodology, which compares the time of day viewership of IPG versus SDC programs using aggregated Nielsen viewership data, was rejected in the 1999 proceeding because it "does not measure the value of the individual programs that are retransmitted, thereby "absurdly … giv[ing] equal value to the Super Bowl and any program broadcast at the same time." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. 13423, 13441 (Mar. 13, 2015). The Judges held that "the proper measure of value for such individual programs, when considering ratings, would hold the time of day constant, and then consider relative ratings within the fixed time periods."

79. Here, IPG did not endeavor to improve the issues with the time of day factor in any material way. It still ascribes equal relative value to SDC-claimed programs and IPG-claimed programs that air at the same time for the same duration, even if they have substantially different levels of viewership. SDC640 at 11; Tr. Vol 5, 103:12-21 [Robinson]. It does not take into account program popularity, number of subscribers viewing the program, or the nature of the program. It also gives less credit to devotional programs at the times when they are most likely to be viewed. For example, the time of day factor fails to account for the fact that television stations often air religious shows in the otherwise weak Sunday morning dayparts, because most

Christians worship on Sunday mornings and are therefore most likely to watch at that time. SDC641; *see also* Tr. Vol. 5, 105:16-106:15 [Robinson]. Accordingly, the time of day measure is not a reliable measure of relative marketplace value.

80. *Subscribers* – As for IPG's third factor, which measures the number of distant subscribers receiving stations in IPG's station sample on which IPG and SDC programs are retransmitted, the Copyright Arbitration Royalty Panel ("CARP") expressly rejected an allocation method based on the number of distant subscribers to signals in the 1998-1999 Distribution Proceeding. *Distribution of 1998 and 1999 Cable Royalty Funds*, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3616 (Jan. 26, 2004). There, PBS presented a study that attempted to show a relationship between the relative number of distant subscriber instances to PBS signals and the relative marketplace value of the programming carried on those signals. The CARP rejected this theory, stating:

> ... [S]ubscriber instances ... attempt to equate relative programming *volume* with relative programming *value*. ... We view [the] subscriber instances theory as relatively unuseful because it is based on a measure of time, not value.

Id.

81. Similarly, in the 2000-2003 Distribution Proceeding, the Board rejected IPG's implementation of its subscriber-based factor on the grounds that a CSO attracts subscribers "only to the extent that the programs it offered were demanded by customers who intended to view the programs." *See Distribution of 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64999.

82. In this proceeding, IPG's use of its subscriber factor suffers from similar flaws. Ms. Berlin testified that devotional programming is a niche factor for cable and satellite operators seeking to attract niche subscribers. *See* Tr. Vol 2, 78:18-79:21 [Berlin]; SDC633 at 7.

Because subscribers of devotional programming constitute only a small portion of a cable or satellite operator's subscriber base, and programs are offered to subscribers in bundles of channels, the number of distant subscribers to the cable or satellite system says nothing about the value that should be allocated to a particular program. See SDC641 at 10; SDC640 at 13.

83. <u>Fee Generation</u> – IPG's final factor, the fees paid by cable system operators to retransmit the stations carrying the SDC and IPG broadcasts, was rejected in the 1999 Cable Proceeding because it is "particularly problematic … for a niche area such as devotional programming, which constitutes only a small fraction of total station broadcasting." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13441. The fee generation numbers are virtually useless in the devotional context.

84. The CRT repeatedly rejected fee generation as a methodology for valuation. *See Distribution of the 1978 Cable Royalty Funds*, Docket No. CRT 79-1, 45 Fed. Reg. 63026, 63036 (Sept. 23, 1980) ("[b]ecause we find that cable systems pay under compulsory license is not a clear or true reflection of the direct marketplace value of the work, additional considerations … were used by the Tribunal to determine the marketplace value…"); *See also Distribution of the 1980 Cable Royalty Funds*, Docket No. CRT 80-1, 48 Fed. Reg. 9552, 9569 (Mar. 7, 1983) (Fee generation was "based upon a methodology which the Tribunal has repeatedly indicated fails to lend itself to an application of the Tribunal's criteria"). In those few proceedings where fee generation has been adopted, the claimants have met the standard of showing that is the best methodology because, for example, the signals at issue are retransmitted by cable systems as discrete, intact distant signals containing a single kind of programming. In such cases, the amount of fees paid may approximate the value that the cable system operator places on that particular station's programming. *See, e.g., Distribution of 1998 and 1999 Cable*

Royalty Funds, Docket No. 2001-8 CARP CD 98-99, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004) (fee generation adopted in PBS category because PBS signals are retransmitted as discrete signals containing only PBS programming).

85. IPG's fee generation analysis is not anchored to any evidence of cable system or satellite carrier interest in programming. The use of this metric is unjustified in this proceeding. IPG has failed to demonstrate that it is the best method, or even a plausible method, for determining devotional programming shares. No evidence suggests that any signal in IPG's study contains predominantly devotional programming. Because cable and satellite system operators pay a pre-determined rate to carry a bundle of programs, IPG has failed to demonstrate how much in fees a cable or satellite operator paid for its devotional program. *See* SDC641 at 10; SDC640 at 12. Simply put, IPG cannot justify the use of fee generation in this proceeding.

III. SDC's Methodology is Reliable and Supported by Precedent

86. The SDC's methodology relies on program viewership data to determine relative market value of devotional programing. It is supported by SDC witnesses John Sanders, an expert in the field of valuation of assets, Erkan Erdem, an expert in economics, econometrics, and statistics, and Toby Berlin, an experienced executive at DIRECTV and consultant to cable and satellite companies. The SDC's methodology is the appropriate approach for allocating devotional shares in this proceeding. Moreover, by scaling local ratings to distant subscribership, the SDC has substantially improved upon the viewership methodology that the Judges adopted in the 1999 Cable Proceeding.

87. The Judges and their predecessors have frequently used viewership as a measure of relative marketplace value in allocating shares of cable royalties, particularly with respect to Phase II allocations. *1986 Cable Royalty Distribution Proceeding, Notice of final determination,*

in Docket No. CRT 88–2–86CD, 54 FR 16148, 16153 (Apr. 21, 1989); *see also Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64986. Indeed, the Judges have concluded that "viewership is the initial and predominant heuristic that a hypothetical CSO would consider in determining whether to acquire a bundle of programs for distant retransmission…" 78 Fed. Reg. at 64996.

88. In the 1999 Cable Determination, the Judges found that use of "viewership as an indicium of program value is reasonable, appropriate, and consistent with recent precedent in distribution proceedings" for determining the relative market value of programs in the devotional category when there is insufficient evidence available to conduct the optimal analysis using "Shapley-approximate values." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13442. In contrast, the Judges rejected IPG's methodology as "seriously deficient and far less probative than the SDC methodology." *Id.* at 13433 n. 34.

89. As established by the SDC's expert testimonies, the Nielsen viewing data used by the SDC in this proceeding is even more reliable than the single Nielsen Report of Devotional Programming that the Judges relied upon in the 1999 cable proceeding. Instead of using only a single report, Dr. Erdem had one report for each year from 1999 through 2003, and four reports for each year from 2004 through 2009, for a total of 29 reports, collectively covering every royalty year in this proceeding. SDC636 at 2-3; 15; Tr. Vol 1, 177:16-179:5 [Erdem]. As the Judges found in the 1999 Cable Determination, they are "confident that, generally, Nielsen-derived viewership data presents a useful measurement of actual viewership," in part because of Mr. Sanders' testimony that "those in the television industry consider viewership data, as compiled to Nielsen, to be the best and most comprehensive measure of viewership." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13433.

90. Although IPG criticizes the SDC's methodology for its use of local Nielsen data to determine the value of distantly retransmitted programs, this is precisely what the Judges did in the 1999 cable proceeding, despite having been presented distant viewing data. The Judges' allocation of royalties in the devotional category in that case was based solely on local ratings, finding that "the viewership data for the SDC and IPG programs in the local market ... served as an 'analogous' market by which to estimate the distribution of royalties in th[e] proceeding..." *Id.* at 13442.

91. Additionally, in the 2000-2003 Distribution Proceeding, the Board endorsed MPAA expert Dr. Gray's decision to use Nielsen local ratings data and CDC distant subscriber data in his analysis to determine the relationship between local viewing and distant viewing, finding that the use of local viewing data strengthened the results and mitigated perceived problems with the Nielsen distant viewing data. *Distribution of the 2000-2003 Cable Royalty Funds*, 78 Fed. Reg. at 64996. Although Dr. Gray's approach in the 2000-2003 cable case involved a more sophisticated multiple regression than Dr. Erdem has applied here, there are several advantages to the SDC's approach that were not present in Dr. Gray's:

- Dr. Gray's methodology relies on ratings data and distant HHVH data from samples of television stations, including the so-called "Kessler sample" which the Judges have sharply criticized; whereas Dr. Erdem's Nielsen data covers essentially every commercial television station in every DMA. *See* Tr. Vol 1, 58:8-62:15 [Gray].
- Dr. Gray's use of samples might be more justifiable in the Program Suppliers category, where the sheer number of programs involved reduces the standard error; whereas any error in the sample would be expected to be greater when applied to

comparatively fewer programs in the devotional category. *See* Tr. Vol 1, 56:18-58:2 [Gray] ("Well said").

- Dr. Gray's methodology relies on viewership on a quarter-hour basis, thereby effectively assigning more value to longer or more frequently broadcast programs; whereas Dr. Erdem and Mr. Sanders have effectively demonstrated, based on Shapley theory, that the length or frequency of broadcast of regular programs is not expected to be a driver of value to a cable or satellite operator (who, for example, would be more interested in two half-hour programs capable of attracting 100 unique subscribers each over a one-hour program capable of attracting 100 subscribers). SDC640, Erdem Rebuttal Testimony, at 9; SDC641, Sanders Rebuttal Testimony, at 7.

92. IPG also criticized the SDC methodology because the Nielsen data did not include every single IPG program at issue in the proceeding. But the SDC presented evidence that the substantial majority of unrated programs were SDC programs, and not IPG programs, and that only three of IPG's programs did not appear in the Nielsen data. One of those, Billy Graham, was claimed by IPG only in 2001 through 2003 satellite, and was claimed by the SDC in 2004 through 2008 cable and satellite. The other two, Salem Baptist Church and Primary Focus, are not regularly scheduled programs, and constituted a negligible fraction of the total devotional programming claimed in this case. Tr. 174:4-176:20 [Erdem]; Tr. Vol 1, 256:16-257:19 [Sanders]. At any rate, as the Judges have previously held, "there is certainly no basis to allow for compensation of a program in the absence of *any* evidence of viewership." *1998-1999 Cable Royalty Distribution*, 80 Fed. Reg. at 13441 (emphasis in original). IPG has presented no evidence that its three unrated programs had any viewership - or other indicia of value - at all.

93. As to IPG's other criticisms, IPG produced no evidence showing that any alleged error in the CDC data impacted the SDC's allocation determination, and precedent from the 1999 case has already established that it is a "common sense idea" that viewership and subscribership are linked, because "subscribers would not continue to subscribe if they did not watch the offered programming." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13433.

94. The SDC's measure of viewership is the best available means of assessing the relative market value of the devotional programming in this proceeding, and considerably better than the basis on which the Judges allocated royalties in their 1999 cable decision. It allows the Judges to make a rational, non-arbitrary allocation of the devotional royalty fund based on substantial evidence in the record. 5 U.S.C. § 706; *Nat'l Assoc. of Broadcasters v. Copyright Royalty Tribunal*, 146 F.3d 907, 923 (D.C. Cir. 1992). Mr. Sanders' and Dr. Erdem's analyses set forth a methodology of sufficient precision for a reliable result. This is all that is required to enable the Judges to allocate shares within a zone of reasonableness in the devotional category.

95. Indeed, any negative adjustment to the SDC's proposed allocations would be arbitrary and not substantiated in the record. Although the Judges have in the past resorted to discounting valuation methodologies based on perceived shortcomings, this practice comes with an important caveat: the opposing claimants must demonstrate a likelihood that they were harmed by the alleged deficiencies:

> [V]iewing measurements are not perfect and the Judges must be prepared to make appropriate adjustments when claimants are able to demonstrate that their programs have not been measured or are significantly undermeasured.

Distribution of 2000-2003 Cable Royalty Funds, 78 Fed. Reg at 64986 (citing authorities) (emphasis added). IPG has made no such showing, nor did it even attempt to do so. Any adjustment to the allocations to the SDC's detriment would be more likely to exacerbate any flaw in the methodology than to correct it. The Judges should not "let[] the perfect be the enemy of the good." *Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13432.

96. In the 1999 proceeding, the Judges rejected the allocations suggested by the SDC based on distant viewing data, preferring instead to rely on a local ratings methodology that had not been proposed by any party as a basis for allocations. *See id.* at 13442-43. The Judges did not and would not have made this decision simply to try to find a mid-point between the parties' competing proposals, nor would it be proper to discount a reliable methodology simply because it was proposed by a party. "King Solomon was not subject to the Administrative Procedure Act; the Royalty Judges are." *Settling Devotional Claimants v. Copyright Royalty Board*, Opinion, No. 13-1276, at 2 (D.C. Cir. Aug. 14, 2015).[3]

97. Rather than splitting the baby, the Judges relied on local viewing data in the 1999 case because they found it to be the most reliable evidence of value. *See Distribution of 1998-99 Cable Royalty Funds*, 80 Fed. Reg. at 13442-43 ("Importantly, that approach does not suffer from the uncertainty created by the selection and use of the Kessler Sample of stations, nor any of the other serious potential or actual deficiencies in the application of the SDC Methodology ..."). It is also the most reliable evidence of value in this case.

98. A reasoned justification to discount an award, or to determine any award, "requires more than an absence of contrary evidence; it requires substantial evidence to support a decision." *Settling Devotional Claimants*, Opinion, No. 13-1276, at 26 (quoting *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 571 F.3d 69, 87 (D.C. Cir. 2009)). There is no substantial evidence that would support a conclusion that the results of the SDC's

[3] As claimants in the *devotional* category of programming, the SDC feel it is their duty to point out respectfully that even wise King Solomon did not *actually* split the baby. 1 Kings 3:16-28.

methodology overstate the relative market value of the SDC's programming. To the contrary, the substantial evidence suggests that the SDC's methodology would be expected to overstate IPG's relative market value. *See* SDC640, at 27-28 (SDC's exclusion of WGNA favors IPG); Tr. Vol 1, 173:1-176:15 [Erdem] (omission of certain programs from Nielsen Reports on Devotional Programming is more likely to favor IPG); SDC638, Sanders Amended Direct Statement, at 11 (same); Tr. Vol 5, 55:19-56:20 [Robinson] (SDC's more complete data includes information favorable to IPG that is missing from IPG's own station sample); Tr. Vol 1, 163:11-167:6 [Erdem] (Shapley valuation predicts that ratings-based analysis will undervalue higher rated programs within a category of programming geared toward an overlapping audience); SDC644 at 1083:7-10 [Erdem] (same).

99. Because the SDC's methodology appropriately relies on viewership data with the required amount of precision, because it improves upon the very methodology adopted by the Judges in the 1999 cable proceeding, and because there is no evidence that it overstates the SDC's relative marketplace value, it is an appropriate measure of the relative marketplace value of devotional programming in this proceeding. Because its conclusions likely overstate the value of IPG's programming, it represents the lower end of the zone of reasonableness for an allocation to the SDC. *See* SDC638, Sanders Amended Direct Statement, at 11.

IV. Conclusion

The Judges should award royalty funds in the devotional category for 2004 – 2009 cable and 1999 – 2009 satellite as follows:

Cable

Year	IPG	SDC
2004	11.2%	88.8%
2005	10.8%	89.2%
2006	12.4%	87.6%
2007	7.4%	92.6%
2008	9.9%	90.1%
2009	10.4%	89.6%

Satellite

Year	IPG	SDC
1999	6.1%	93.9%
2000	2.8%	97.2%
2001	1.2%	98.8%
2002	1.5%	98.5%
2003	2.8%	97.2%
2004	1.8%	98.2%
2005	1.7%	98.3%
2006	6.7%	93.3%
2007	3.4%	96.6%
2008	0.0%	100.0%
2009	2.1%	97.9%

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Victoria N. Lynch, hereby certify that a copy of the foregoing "SETTLING DEVOTIONAL CLAIMANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW" was sent electronically and via Federal Express, overnight delivery, this 17th day of August, 2015 to the following:

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