Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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

COMMENTS OF WORLDWIDE SUBSIDY GROUP, LLC TO PROPOSED RULE REGARDING VIOLATION OF STANDARDS OF CONDUCT

Worldwide Subsidy Group, LLC, dba Independent Producers Group ("WSG"), hereby submits its comments in response to the Proposed Rule of the Copyright Royalty Board ("CRB") set forth at 82 Fed. Reg. 18601 (April 20, 2017). In response thereto, WSG opposes the Proposed Rulefor the reasons set forth herein.

INTRODUCTION

A. The Judges do not have the authority to exclude certain classes of persons from the distribution proceedings.

A major problem with the Proposed Rule is the vantage point from which it comes, wherein the opening language announces that it is a "privilege" to appear before the Copyright Royalty Board ("CRB"). The rights prosecuted before the CRB are pursuant to federal statute. The right to prosecute retransmission royalty

rights is therefore an entitlement, not a "privilege", and it is the CRB's obligation under appointment to administer the collection and distribution of royalties.

By extension, it is not a "privilege" to be a "representative, agent, attorney, or witness in a proceeding before the Copyright Royalty Board". If an agent has been contractually assigned the exclusive right to collect such royalties, then regardless of whether the Judges consider them to be standing in the shoes of the claimant, or an assignee of the claimant's rights, they are entitled to participate in the proceedings. If a representative, agent or witness is a percipient witness to matters to be considered by the CRB, altogether denying such persons an opportunity to participate in the proceedings in prosecution of a claimant's claim is no different than denying a party access to the courts. Finally, if an attorney or expert witness has been selected by any claimant, claimant's representative, or claimant's agent to prosecute a claim in the proceedings, it is beyond the authority of the CRB to disregard the decision as to the selected attorney or expert witness and preclude their participation. It is, of course, always within the Judges' discretion to evaluate the testimony and actions of such persons, but to altogether prohibit their participation in the proceedings by determining in advance that they are not worthy of being involved is far beyond the authority of the CRB, and finds no authority in either the statutes affording the Judges their authority, or the U.S. Constitution.

In fact, CRB regulations require that non-natural entities be represented by legal counsel, and the only prerequisite is that at the time of representation the attorney is a member of the bar, in one or more states, in good standing. See 37 C.F.R. 350.2. Further, the CRB has expressly disregarded testimony regarding competing methodologies unless presented by an expert witness,[1] and the CRB has required percipient witnesses in order to substantiate claimant claims via live or written testimony (if they expect to have challenged claims maintained). Any invasion into a participant's selection of legal counsel or restriction of witnesses (percipient or expert) is simply a denial of due process, particularly where such a narrow area of expertise is required. Nowhere do the federal statutes authorize the CRB to restrict the collection and distribution of royalties to only those persons deemed worthy by the CRB, or to restrict the submission of evidence such that it may be authored or submitted only by persons deemed worthy by the CRB.

[1] See *Final Determination of Distributions; Distribution of 2000, 2001, 2002, and 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984, 65000 (Oct. 30, 2013). Notwithstanding, no regulation requires presentation by an expert witness, and in CRT and CARP proceedings, methodologies were often presented by non-expert witnesses. Notably, because of the narrow area of expertise required, WSG has had great difficulty locating individuals capable of providing expert witness testimony on matters that the CRB has deemed critical to its consideration. ["Dismayingly, none of the parties proffered admissible testimony (written or oral) of a witness with knowledge of CSO programming."; Id. at 64992, fn. 28.] Such fact was aptly demonstrated in the 1999-2009 satellite and 2004-2009 cable proceedings when it was discovered that both WSG and the Settling Devotional Claimants had engaged the same individual, Mr. Gerald McKenna.

B. The Proposed Rule is overbroad, ambiguous, and provides no standards for the "notice and opportunity for hearing" that is referenced.

The Proposed Rule is overbroad in that it sanctions a party even for utilizing the services of any person of the "prohibited classes" of persons identified at Section 350.9(b)(1). See Section 350.9(b)(2). Literally, the Proposed Rule would sanction any entity that ever hired an individual convicted of a felony or misdemeanor if they assisted, *in any manner*, with the entity's presentation to the CRB. That is, even if the hired individual was never scheduled to appear before the CRB and give testimony, even if the hiring entity had reviewed and endorsed the work product of the hired individual, then the Proposed Rule states that the hiring entity could be altogether excluded from the proceedings.

Even though the ostensible purpose of the Proposed Rule is to "carry out [the Judges'] responsibilities under the Copyright Act" and "preserve the integrity of the Copyright Royalty Board proceedings", the Proposed Rule goes dramatically further, failing at all to tie the CRB proceedings to the presentation of evidence from certain "prohibited classes", or the hiring of persons from certain "prohibited classes", except in the most tenuous of ways. It is comparable to denying any entity or their representative access to the courts because they have hired an individual that the CRB has deemed unworthy, or choosing to disregard

contractual agreements if one of the contracting entities had hired an individual that the CRB has deemed unworthy. The overbreadth of the Proposed Rule is further demonstrated by its sanction of: (i) parties shown to be ambiguously "incompetent or disreputable", with no explanation as to what standards are utilized to deem a party "incompetent or disreputable"; (ii) parties that "knowingly or recklessly provides false or written testimony" without affording any due process for such determinations; and (iii) "Any person who has violated *any* Copyright Royalty Board rules or regulations." See Section 350.9(b)(3)-(5) (emphasis added). Obviously, if a party has violated the CRB regulations by exceeding page limits for briefing, or failed to place the required footer on their pleading, the Proposed Rule unreasonably allows for the unencumbered sanction of that person or entity, or their legal counsel, at the whim of the CRB.

Moreover, the Proposed Rule merely gives lip service to a "notice and an opportunity for hearing" prior to "suspension and debarment". Literally no language is provided by the Proposed Rule to suggest that the "notice and opportunity for hearing" is for any purpose other than to confirm the basis of the sanction, e.g., violation of "*any* Copyright Royalty Board rules or regulations". By all appearances, the Proposed Rule suggests that such hearing is merely pro forma, a *fait accompli* that suspension or debarment will occur if the individual or entity is found to fall within one of the "prohibited classes", or to have engaged someone

within one of the "prohibited classes". It is of no consolation that reinstatement can occur only "for good cause shown", as the Proposed Rule presumes that all persons falling in the "prohibited classes" identified at Section 350.9(b)(1)-(5) are to be considered unworthy of appearance before the CRB and can be precluded even as percipient witnesses. Such "guilty until proven innocent" rule, while simple for the Judges to administer, contradicts the basic principles of the American legal system.

C. The Proposed Rule does not appear to be for the purpose of maintaining the integrity of the CRB proceedings, but for the singular purpose of punitively excluding WSG and its longstanding witness, Raul Galaz, from the distribution proceedings.

The CRB proceedings are largely conducted vis-à-vis written submissions and, despite the submission of thousands of pleadings and documents, scores of submitted declarations, and weeks of oral testimony and proceedings under oath, there has been little issue with the professionality of parties giving concern to the ostensible issue of "integrity of proceedings" claimed by the Judges.[2] In fact, the Judges cite only two instances of concern.

[2] This is not to say that there are not frequent allegations of "fraud", "unprofessionality", and the like. As the Judges are aware, one party to the distribution proceedings in particular, the SDC and its legal counsel, regularly accuse WSG of such unsubstantiated assertions. Most recently, the SDC accused WSG counsel of falsely representing electronic service of a document, despite

Rather, based on the following facts, the Proposed Rule appears to be directed at WSG and its longstanding witness, Raul Galaz, for the purpose of excluding WSG from these proceedings:

(i) Mr. Galaz is predominately referenced in the Proposed Rule;
(ii) the Judges attempted to solicit a Proposed Rule in March 2015 in response to the Judges' allegation of perjury by Mr. Galaz;
(iii) the allegation of perjury was predicated on a subsequently disproven CRB "policy";
(iv) Mr. Galaz was never provided a hearing to address the purported "policy" upon which the CRB relied as its predicate for alleging perjury; and
(v) that the Judges have now initiated the Proposed Rule despite no suggestion of the need therefore since March 2015, nor any events since March 2015 that would suggest problems with the "integrity" of the proceedings.

D. The Proposed Rule attempts to implement post-facto a remedy previously sought by the U.S. Copyright Office that was expressly rejected by a federal court judge.

In fact, the Proposed Rule seeks to formulate criteria that appears designed to apply specifically to WSG and Mr. Galaz, and therefor implement a sanction against WSG and Mr. Galaz that was expressly rejected by U.S. District Court

---

WSG's counsel producing the email attaching such communication. WSG religiously responds to such accusations, has frequently asked the Judges to chastise or sanction the SDC for such unprofessional, exaggerated allegations, yet no measure has ever been taken by the Judges to discourage such unprofessional behavior. If the Judges' purpose is to "maintain the integrity of the proceedings", far more obvious actions could be taken before the Judges' attempt to simply banish certain parties from the proceedings altogether.

Judge Henry Kennedy in 2002 and, again, in 2005. As referenced in the Federal Register notice soliciting comment on the Proposed Rule, in the 1997 cable proceedings (held during 2000), Raul Galaz provided false testimony when he denied under oath that he had committed a crime in connection with (unrelated) 1994-1996 cable claims. Mr. Galaz later admitted to the underlying crime, pled guilty to a felony count of mail fraud, and was convicted thereof.

In connection with Mr. Galaz's sentencing, the U.S. Copyright Office submitted a letter to U.S. District Judge Henry Kennedy requesting (i) that Raul Galaz "or any entity in which he has an interest" be forever banned from filing retransmission royalty claims or otherwise participating in any proceedings before the U.S. Copyright Office, whether for existing or future claims, and (ii) that the Judge deem all agreements between any royalty claimant and the company founded by Raul Galaz (Worldwide Subsidy Group, LLC; "WSG") as subject to rescission. Effectively, the Copyright Office sought to scuttle WSG entirely for the unrelated prior criminal activity of one of its principals.

Notably, Mr. Galaz's criminal act did not involve WSG, predominately preceded the formation of WSG, and Mr. Galaz was not even the majority owner of WSG. Despite these facts, such was the request of the Register of Copyrights

on the advice of various legal counsel within the Copyright Office.[3] Clearly recognizing the arbitrary and overreaching nature of the Copyright Office, Judge Kennedy strongly rebuked the request of the Register of Copyrights, noted that he did not even have the authority to issue such a determination, and (contrary to the request of the Copyright Office) *affirmatively* held that Raul Galaz could continue to participate in the retransmission royalty proceedings subject only to the caveat that he would submit no claims on behalf of any party without first obtaining written authorization from such claimant.[4] [5] Mr. Galaz was sentenced to 18

[3] Following WSG's inquiry, former CRB Judge William Roberts, Jr., acknowledged his and other persons' review of the request to Judge Kennedy, prior to its submission.

[4] In fact, Raul Galaz has not filed a claim with the Copyright Office since at least July 2000.

[5] Moreover, on a second occasion Judge Kennedy rebuked an attempt for the government to exclude Mr. Galaz from participating in the retransmission royalty proceedings. In 2005, and while still subject to supervised release, Mr. Galaz's probation officer forbid him from engaging in such business. Mr. Galaz filed a motion with the sentencing court, informing it of the refusal of the probation officer to allow my participation in such business, and sought an order allowing my further participation. The order was opposed by the United States (on behalf of the Copyright Office) and the MPAA. Notwithstanding, on January 27, 2006, Judge Henry Kennedy issued an order reading as follows:

> **ORDERED** that this court's judgment must be interpreted and implemented in accordance with the plain meaning of the words employed to express it; and it is further

months in a federal prison, and three years of supervised release. After the maximum reduction allowed for good behavior, Mr. Galaz satisfied his sentence. Upon release, he was provided a rarely issued letter of recommendation from the warden of the prison.

What appears clear is that the CRB, who is appointed by the Librarian of Congress and in various respects remains beholden to the Copyright Office, is now attempting to enact regulations that would *de facto* accomplish the punishment sought by the Copyright Office in 2002 and denied by a court of competent jurisdiction.

E. Since his actions in 2000, Raul Galaz has substantially participated in distribution proceedings more than any other witness. The singular criticism by the CRB was based on a predicate fact that was disproven but for which the CRB has refused to acknowledge any error.

Since Mr. Galaz's testimony in 2000, and the conclusion of his sentence, Raul Galaz has appeared and testified on countless occasions before the CRB, likely more than any other witness before the CRB or its predecessor. He has

---

> **ORDERED** that Mr. Galaz is able to engage in the profession of television royalty collection during his period of supervised release, subject only to the restriction imposed by this court that he "file no further claims with the United States Copyright Office unless he presents written authorization from the company verifying his representation."

appeared as a witness on behalf of WSG in proceedings relating to 1998-1999 cable, 2000-2003 cable, consolidated 2004-2009 cable and 1999-2009 satellite proceedings (the "Consolidated Proceedings"), and the 2010-2013 cable/satellite proceedings. He has testified orally and through written testimony about a wealth of matters, including as a percipient witness to scores of contracts between WSG and represented claimants, data and evidence supporting particular variations of cable and satellite methodologies, and as a witness critiquing multiple other methodologies.

In the Consolidated Proceedings, an issue arose with respect to the content of WSG's 2008 satellite claim, one of seventeen claims being prosecuted by WSG. Specifically, the claim appearing in the "official records" attached an exhibit listing the identity and contact information of WSG's represented claimants. The exhibit was headed "Exhibit A to WSG (TX) Claim for Cable/Satellite Royalties". Save one distinction, the exhibit to WSG's 2008 *satellite* claim appearing in the CRB's "official records" was identical in all respects to the exhibit attached to WSG's 2008 *cable* claim, including the header of the document which, as noted, indicated that it was an exhibit to *both* WSG's 2008 cable and satellite claims.

The sole distinction between the attachments to WSG's 2008 *satellite* and *cable* claims was that, whereas WSG's cable claim contained ten pages,

enumerated 1-10, the "official" version of WSG's 2008 satellite claim was missing certain of those pages, i.e., pages 4, 5, 9, and 10, did not appear therein.

At a hearing on the claims challenges made by the MPAA and SDC, Mr. Galaz testified that WSG's internal copy of its 2008 satellite claim included all ten pages of the exhibit. Specifically, Mr. Galaz testified (and produced) a photocopy of the entire contents from WSG's files of WSG's submission of 2008 cable and satellite claims, which included a cover letter to the Copyright Royalty Board detailing the contents of the package, i.e., WSG's 2008 cable and satellite claims. As reflected thereby, the exhibit to WSG's 2008 satellite claim was complete, and included all ten pages.

Mr. Galaz also explained that it had in its possession a version of the 2008 satellite claim that was missing the same pages as appearing in the official records, i.e., missing pages 4, 5, 9, and 10. Mr. Galaz explained that such incomplete version had been secured from the Copyright Royalty Board on one of several instances in which Mr. Galaz had traveled to Washington, D.C., during which he had hand-photocopied the claims of WSG and numerous other claimants from the files of the CRB. Mr. Galaz explained that he had personally scanned in the version from the "official records", stored it electronically on his computer, and simply had not noticed its discrepancy from the version actually filed by WSG. Mr. Galaz further explained that in response to discovery requests, he had erringly

produced the incomplete version of WSG's 2008 satellite claim rather than the version that was sent to the CRB.

Mr. Galaz's testimony was unremarkable. Not a single question about his testimony was asked by any adverse party, nor the Judges. Notwithstanding, on March 13, 2015, the Judges issued their *Memorandum Opinion and Ruling on Validity of Claims*, accusing Mr. Galaz of lying about such matter. According to the Judges, the version of WSG's 2008 satellite claim that was produced in discovery could not *under any circumstances* have been obtained from the CRB because the CRB's "ordinary course of official business" upon receipt of annual claims is to ascribe a "hand written sequential number". Because the version produced by WSG was not hand numbered, the Judges opined that it could not have come from the CRB. According to the Judges, Mr. Galaz had therefore lied about the source of the document that was produced in discovery, and surmised that it must have been taken directly from the files of WSG.

In response, WSG personnel immediately traveled to Washington, D.C., and requested to see all claims files in order to evaluate the Judges' assertion regarding the CRB's "ordinary course of official business", and to compare WSG claim copies in WSG's possession with those appearing in the "official records". WSG discovered a staggering number of discrepancies demonstrating that the CRB did

not abide by the "ordinary course of official business" that the Judges relied on to accuse Mr. Galaz. Following its review, WSG was able to demonstrate

- CRB personnel sometimes inscribe a "hand-written sequential number" on claims;
- CRB personnel sometimes utilize a bate-stamp number on claims;
- In a given filing process for a particular calendar year, CRB personnel sometimes vacillate between inscribing a "hand-written sequential number" and utilizing a bate-stamp number on claims;
- CRB personnel sometimes fail to *either* inscribe a "hand-written sequential number" or to utilize a bate-stamp number on claims.
- CRB personnel sometimes add a "hand-written sequential number" and other notations on claims *after* such claims are available for photocopying by the public at the Copyright Office.
- CRB personnel maintain multiple versions of the identical claim;
- the CRB make the "official records" of claims available to the public at a site different from its location, without any supervision or attempt to assure that such records are returned in the same state as were provided, nor confirm that such claim files are not harmed, whether by inadvertence (e.g., photocopying issues) or intentionally.

WSG immediately filed a *Motion for Modification of the March 13, 2015 Order*, which attached as exhibits numerous examples of filed claims demonstrating the foregoing conclusions. Even through the pleading process, the documents continued to reveal more and more issues, clearly demonstrating that the Judges' sole predicate for concluding that Mr. Galaz had testified untruthfully was entirely inaccurate.

Nevertheless, the Judges' response to WSG's motion was to dismiss WSG's arguments after misstating the CRB's own demonstrated practices. For example, the Judges stated: "Admittedly, the sequential numbers were handwritten in some

years for some claims and number-stamped in other years", ignoring that the practice vacillated *even for a given claim filing for a particular calendar year*.[6] That is, the asserted "practice" was not even maintained for the same royalty pool filings, and was not maintained even for the 2008 satellite or cable filings.

Further, despite the CRB's assertion that only one "official" version of any claim exists, in response to WSG demonstrating that WSG was able to produce *numerous* iterations of the same claim that *all* had different markings showing that they had *all* been obtained from the CRB, the CRB argued that it would only consider the 2008 satellite claims. That is, the CRB would not consider 2008 cable claims, or any pre- or post- claims filed with the CRB in order to assess whether the "official practice" was being followed. Such response disingenuously backpedaled from the fact that the Judges' predicate for accusing Mr. Galaz of lying was that there was an "ordinary course of official business" for the CRB that applied for *all* claims received by the CRB. In further disregard of the lack of any "ordinary course of official business", the Judges ignored WSG's revelation of the

[6] In fact, the 2008 satellite claims on file with the CRB were generally bate-stamped, but suspiciously only claim nos. 176, 193 (WSG's), 194, and 220-237 (the last claims filed), contained a hand-written claim number. Not only is it suspicious because of the limited number of deviations from bate-stamping for these particular claims, but because it suggests that the "official" version of WSG claim no. 193 was a substitute of a bate-stamped version, demonstrating the existence of some interim iteration such as what Mr. Galaz believed he had photocopied.

number of instances in which the CRB had altogether misplaced filed claims, for years. Proximate to the Judges' assertion that Mr. Galaz had lied, several parties had demonstrated that they had timely filed claims with the CRB that had been altogether lost by the CRB, begging the obvious question as to how the CRB could not acknowledge that it was possible for the CRB to lose *parts* of a claim filing when it was already demonstrated that they had lost *entire* claims.

Finally, the Judges argued that WSG's exhibits related to claims received by the Copyright Office before the advent of the CRB, suggesting that the Judges' assertion as to its "ordinary course of official business" would not apply to the WSG claim exhibits. In fact, *each and every one* of the exhibits attached to WSG's motion for reconsideration had been filed with the CRB, as opposed to any predecessor of the CRB, a fact prominently apparent by the designation "CRB" on the CRB-proscribed forms that were attached as exhibits.

In sum, the Judges disregarded the significance of multiple exhibits attached to WSG's motion that demonstrated the failure of the CRB to maintain any "ordinary course of official business". The Judges also ignored (without comment) WSG's revelation that the CRB had failed to maintain the chain-of-title of the very records at issue, creating the very real possibility that between 2009 and 2014, the publicly accessible claims of WSG had been separated. The Judges also disregarded (without comment) WSG's production of multiple iterations of the

same WSG claim, all reflecting that they had been secured by WSG from the CRB, none of which contained either a handwritten or bate-stamped number.

Despite the wealth of evidence corroborating Mr. Galaz's explanation as to why he had in his possession an incomplete copy of WSG's 2008 satellite claim, the Judges refused to withdraw their findings, arguing that it was within their authority to review Mr. Galaz's credibility in light of records of official notice. Regardless of the due process issues with the Judges' act of relying exclusively on arguments and evidence that were not presented to WSG, the CRB argument disregards that the entire predicate for any challenge to Mr. Galaz's testimony was a demonstrably false statement by the CRB as to its ostensible practices. Literally no evidence supported the CRB's contention that it faithfully followed an "official" practice, and all evidence demonstrated that no such practice had been consistently followed.

The foregoing facts are critical because, absent the incident in 2000 which Mr. Galaz acknowledged and for which he has long since been punished, the only alleged deviation of Mr. Galaz from the expected norms of propriety in the retransmission royalty proceedings is the ruling discussed above which was based entirely on a demonstrably inaccurate predicate – the "ordinary course of official business" ostensibly followed by the CRB. In light of the practices revealed to exist with the CRB's intake of claims, the CRB's actual misplacement of claims,

and the CRB's failure to maintain the chain-of-title, there is substantial evidence to support a conclusion that the CRB erred in concluding that any evidence existed to dispute Mr. Galaz's testimony. In fact, given the evidence of the CRB's *actual* recordkeeping practices, Mr. Galaz's explanation of the source of a particular iteration of WSG's 2008 satellite claim appears far more likely and compelling than the Judges' conclusion that Mr. Galaz was untruthful.

LEGAL AUTHORITIES and APPLICATION

The legal issue presented is whether the Proposed Rule, i.e., an amendment to 37 CFR Part 350 to be codified at 37 C.F.R. pt. 350 (the "Proposed Rule"), is unconstitutional as drafted.

A. Administrative Rules Are Subject to the Same Constitutional Scrutiny as Statutes.

In *Rodriguez v. U.S. Parole Comm'n*, 594 F.2d 170, 173-174 (7th Cir. 1979), it was held that:

> "'Legislative' rules adopted by the [United States Parole Commission] pursuant to statutory power have the force and effect of law. . .This rule must be viewed as tantamount to a statute for purposes of determining whether its application to [appellant] runs afoul of [a clause of the U.S. Constitution]."

Accordingly, the Proposed Rule is subject to the same constitutional scrutiny as a federal statute.

B. The Proposed Rule Violates the Equal Protection Clause of the U.S. Constitution.

Section 1 of the 14th Amendment (the "Equal Protection Clause") holds that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, § 1. The 14th Amendment expressly applies to state actions; however, the rights protected by the Amendment's Equal Protection Clause also apply to federal action through the 5th Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954) ("[D]iscrimination may be so unjustifiable as to be violative of due process. . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government [than upon the states]").

A trio of cases involving disqualification due to felony convictions are instructive. In *Miller v. Carter*, 547 F.2d 1314, 1315 (7th Cir. 1977), plaintiff was a convicted felon who was denied a license to drive a taxicab pursuant to a municipal code ordinance barring the issuance of licenses to individuals convicted of certain felonies. *Id.* As to other felonies and crimes of moral turpitude, individuals were ineligible for a period of eight years following conviction. *Id.*

The *Miller* court held that the ordinance, "regardless of the importance of the public safety considerations underlying the statute of the relevance of prior convictions to fitness," was violative of the Equal Protection Clause in that it led to *irrational* results. *Id.* at 1316. Specifically, under the ordinance, plaintiff, whose conviction was 11 years-old when he was denied a license, was barred from being licensed, but someone who was already licensed and was subsequently convicted of the same crime might be permitted to retain his license. *Id.* Additionally, an individual who concealed his conviction and was issued a license might be permitted to retain it. *Id.* "Such distinctions among those members of the class of ex-offenders are *irrational*. . .[I]nsofar as [the ordinances] discriminate irrationally among the classes of ex-offenders, they violate the equal protection clause of the Fourteenth Amendment." *Id.* (emphasis added).

Similarly, in *Smith v. Fussenich*, 440 F. Supp. 1077, 1078 (D.Conn. 1977), plaintiff was denied a security guard license under a state statute because all applicants who had been convicted of a felony, or any crime involving moral turpitude, were disqualified. Plaintiff alleged that the statute in question violated the Equal Protection Clause. *Id.*

The *Smith* court found that, "the right to hold specific employment is a vital and constitutionally protected one," and proceeded to analyze the subject statute using the "rational basis" test. *Id.* at 1079. The relevant inquiry under this test is

"whether the challenged state action rationally furthers a legitimate state purpose or interest." *Id.* (emphasis added).

While the *Smith* court agreed that "the State may and should prohibit individuals of bad character from employment as private detectives and security guards. . .the validity of the goal of the statute is not under challenge in this lawsuit." *Id.* at 1080. "Rather, we are asked to determine whether the method used to achieve this goal is constitutionally defensible. We hold that it is not." *Id.*

The *Smith* court explained:

> "The critical defect in the blanket exclusionary rule here is its *overbreadth*. The statute is simply not constitutionally tailored to promote the State's interest in eliminating corruption in certain designated occupations. *The legislation fails to recognize the obvious differences in the fitness and character of those persons with felony records*. . . . Moreover, the statute's across-the-board disqualification fails to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation. We believe it is fair to assume that many qualified ex-felons are being deprived of employment due to the broad sweep of the statute."

Id.

It is important to note that the *Smith* court considered the Supreme Court's *DeVeau* decision cited *infra* and distinguished it:

> "In reaching our conclusion that the statute violates equal protection, we have not overlooked the [decision] of the Supreme Court in *DeVeau*. . . In *DeVeau*, the Supreme Court upheld the absolute disqualification of felons from office in waterfront labor

> organizations. However, in that case state and federal legislatures had uncovered 'a notoriously serious situation [which needed] drastic reform' and had found 'impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation'. . . In the instant case, the [state has] presented no evidence that prior to the passage of the statute the Connecticut legislature conducted an investigation which revealed that criminality was a serious problem in the regulated occupations or that felons as a class would undoubtedly corrupt these otherwise pure businesses."

Id. at 1080-1081.

In *Kindem v. Alameda*, 502 F. Supp. 1108, 1110 (N.D. Cal. 1980), plaintiff was convicted of a felony drug offense. A decade later, he was fired from his job as a janitor for the City of Alameda, California pursuant to a section of the City Charter which provided that: "No person who shall have been convicted of a felony. . . shall ever hold any office or position of employment in the service of the City." *Id.*

In applying the rational basis test required by the Equal Protection Clause:

> "Despite this low threshold, the court finds enforcement of the challenged City Charter section violated plaintiff's rights to equal protection of the laws. The court is unconvinced that the across-the-board ban on hiring ex-felons is reasonably related to any stated goal. The City unquestionably has a legitimate interest in hiring qualified, competent and trustworthy employees, and in employing persons who will inspire the public's confidence. But it has not been demonstrated that the sole fact of a single prior felony renders an individual unfit for public employment, regardless of the type of crime committed or the type of job sought."

Id. at 1112 (emphasis added). Accordingly, in striking down the offending section, the court held: "The permanent and automatic disability which the City Charter makes out of a felony conviction, without any attempt to fit the classification to the legitimate governmental interests implicated in the municipal employment decisions amounts to a violation of the Equal Protection Clause." *Id.* at 1113.

The Proposed Rule suffers from the same fatal flaws as the statutes successfully challenged in *Miller*, *Smith*, and *Kindem*, in that the Proposed Rule seeks to bar "any person who has been convicted of a felony" without regard to whether there exists a close nexus between the felony and the proceedings sought to be regulated, without regard to the "obvious differences in the fitness and character of those persons with felony records", the age of the conviction, the rehabilitation of the person with the felony record, etc.[7] No "notoriously serious situation" in need of "drastic reform" exists, as existed in *DeVeau*, as would warrant an across-the-board prohibition of persons convicted of a felony.

[7] Under the Proposed Rule, absurd results would follow like the banning from CRB proceedings of a person convicted of training a bear to wrestle, a felony under Section 13A-12-5 of the Alabama Code; a person convicted of using live livestock as a lure in dog race training, a felony under Texas Penal Code 42.09; a person who flies an airplane without a license, a felony under 49 U.S. Code 46317; or a person who destroys a mailbox, a felony under 18 U.S. Code 1705, among a plethora of other felony offense which also have no relevance as to whether someone should be disqualified from participating in CRB proceedings.

As regard its application to Raul Galaz, the Proposed Rule seeks to exclude him from future proceedings despite the age of his conviction (fifteen years) based on acts taken over seventeen years ago, and despite an overwhelming number of uneventful instances in which Mr. Galaz has appeared or testified before the CRB, and participated in CRB proceedings, without incident. Moreover, the Proposed Rule seeks to circumvent the prior rulings of U.S. District Court Judge Henry Kennedy, by post-facto enacting a regulation that is clearly directed toward Mr. Galaz, and no one else.

Additionally, the Proposed Rule's ban on "any attorney who has been suspended or disbarred by a court of the United States or of any State," lacks a close nexus between the suspension or disbarment and the proceedings sought to be regulated here. In California, for example, an attorney is suspended for the non-payment of annual membership fees pursuant to Rule 2.33 of the Rules of the California Bar. Barring such an attorney from participating in CRB proceedings would not only clearly fail the "rational basis" test, but would be nonsensical.

Accordingly, the Proposed Rule, on its face, fails the "rational basis" test and, therefore, violates the Equal Protection Clause.

C. The Proposed Rule Violates Substantive Due Process.

Substantive Due Process protects individuals from arbitrary or irrational action on the part of the federal government. U.S. CONST. Amend. V.

The *Kindem* court held that, in addition to the City Charter being unconstitutional under the Equal Protection Clause, the very same lack of a close nexus between the felony involved and the particular job sought also constituted a violation of plaintiff's Substantive Due Process rights:

> "As discussed above during consideration of plaintiff's equal protection claim, the classification which resulted in his termination is legally irrational, as it is not sufficiently keyed to any legitimate state interests. The impairment of plaintiff's liberty interest pursuant to such a policy violated his substantive due process rights."

Kindem, 502 F. Supp. at 1113-1114; see also *Smith*, 440 F. Supp. at 1081 (statute held invalid under Equal Protection Clause may also be impermissible on Due Process grounds as well).

On the same grounds that the Proposed Rule violates the Equal Protection Clause of the U.S. Constitution, it violates Substantive Due Process.

D. The Proposed Rule is Unconstitutional as a Bill of Attainder.

Article I, Section 9 of the U.S. Constitution expressly forbids Bills of Attainder. U.S. CONST. Art. I, § 9. The U.S. Supreme Court has defined Bill of Attainder as "a law that legislatively determines guilt and inflicts punishment upon

an identifiable individual without provision of the protections of a judicial trial." *Selective Service System v. Minn. Pub. Interest Research,* 468 U.S. 841, 846-847 (1984). An illustration of a Bill of Attainder may be found in *U.S. v. Lovett,* 328 U.S. 303 (1946) where the Supreme Court invalidated a federal statute that barred particular individuals from government employment by naming them as subversives. See also, *U.S. v. Brown,* 381 U.S. 437 (1965)(section of statute criminalizing former communist serving on a union's executive board invalid).

A Bill of Attainder "consists of three elements: (1) specification of the affected persons; (2) punishment; and (3) lack of a judicial trial." *Dehainaut v. Pena,* 32 F.3d 1066, 1070 (7th Cir. 1994). There is a "three-prong test for determining whether a particular enactment inflicts punishment: (1) does it fall within the historical meaning of legislative punishment? (2) when viewed in terms of the type and severity of burdens imposed, can it reasonably be said to further nonpunitive legislative purposes? and (3) does the legislative. . .record evince an intent to punish." *Id.* at 1071 (emphasis added).

In affirming a New York statute which disqualified convicted felons from serving in any office in a waterfront labor organization, the Supreme Court in *DeVeau v. Braisted,* 363 U.S. 144, 160 (1960) observed: "[T]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past

activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession."

In the instant case, the Proposed Rule identifies Raul Galaz as an individual to which the regulation applies, and no judicial trial is afforded. As regards whether the Proposed Rule constitutes "legislative punishment", it has been devised to go after a single individual, Raul Galaz, and affect a single participant in the distribution proceedings, WSG. Even the CRB's description as to its motivation predominately cites to Mr. Galaz, making clear its intended effect. No allusions exist to the contrary, and the Proposed Rule quite transparently seeks to enact a regulation to accomplish the punishment that was rejected fifteen years ago by U.S. District Court Judge Henry Kennedy, and rejected again twelve years ago. No "notoriously serious situation" in need of "drastic reform" exists as would possibly warrant the exclusion of all persons with felony convictions. Squarely, the Proposed Rule seeks to punish Mr. Galaz for acts that he performed years ago, furthers no nonpunitive legislative purpose, and the record of the CRB "evinces an intent to punish".

E. EEOC Guidelines Provide Non-Binding Guidance Regarding Consideration of Conviction Records.

In its April 25, 2012 Enforcement Guideline, the U.S. Equal Opportunity Commission ("EEOC") admonishes employers that, if there exists a disparate impact on members of a certain race, national origin, or other protected class when criminal convictions are used as a basis for exclusion from employment, such exclusion may constitute a violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000, et seq.

Although an exclusion on the basis of a criminal conviction may appear protected-class neutral on its face, it may still violate Title VII:

> "Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans, even though African Americans only comprised approximately 14% of the general population. In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. Moreover, African Americans and Hispanics were more likely than whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for whites. . .1 out of every 17 white men. . .is expected to prison at some point during his lifetime. . .This rate climbs to 1 in 6. . .for Hispanic men. For African American men, the rate of expected incarceration rises to 1 in 3. . .*National data, such as cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin*. . .The issue is whether the policy or practice deprives a disproportionate number of Title VII-protected individuals from employment opportunities.

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDELINE NO.915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012) ¶ A.2. (emphasis added).

After disparate impact is established, "Title VII shifts the burdens of production and persuasion to the employer to 'demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . .[T]he employer's burden [is] to show that the policy or practice is one that 'bear[s] a demonstrable relationship to successful performance of the jobs for which it was used' and 'measures the person for the job and not the person in the abstract.'" Id. ¶ V.B.1.

The Enforcement Guideline cites *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975) for three factors relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity: (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and/or completion of the sentence, and (3) the nature of the job held or sought. The Guidelines also cites *El v. SE Pa. Transportation Auth.*, 479 F.3d 232 (3rd Cir. 2007) for the *El* case's conclusion that Title VII requires employers to justify criminal record exclusions by demonstrating that they

"accurately distinguish between applicants [who] pose an unacceptable level of risk and those [who] do not."

The Proposed Rule, though facially protected-class neutral casts such a wide net, in denying the participation of "any person who has been convicted of a felony or a misdemeanor involving moral turpitude" from CRB proceedings, members of protected classes will be necessarily suffer disparate impact. Section 350.9(b)(2) of the Proposed Rule makes clear that employers in the business of royalty distribution may be permanently barred from proceedings if they hire "in any capacity" anyone convicted of a felony or a misdemeanor involving moral turpitude.

In order to satisfy its burden on proof that such impact does not violate Title VII, the CRB must prove that the Proposed Rule's disqualification of anyone convicted of such crimes has to do with that person's qualifications for the work involved in the proceedings and is also consistent with business necessity. As set forth in the analysis of the Proposed Rule supra, the Proposed Rule fails to adequately examine whether such a nexus exists and, therefore, constitutes a violation of Title VII.

F. The Proposed Rule's Prohibition of Convicted Persons as Witnesses Violates Federal Rules of Evidence 601 and 609.

Federal Rule of Evidence 601 states that "Every person is competent to be a witness unless these rules provide otherwise." Notably, the Notes of Advisory Committee on Rules expressly states that the Rule abolished the exclusion of testimony of those convicted of crime (they were considered incompetent to testify under common law).

Similarly, Federal Rule of Evidence 609 limits the means by which a prior criminal conviction can be used to impeach the testimony of a witness. Notably, such conviction can only be used for ten years after a conviction or incarceration and only if "its probative value, supported by specific facts and circumstances, *substantially* outweighs its prejudicial effect." Fed. Rule of Evid. 609(b).

As such, the prohibition set forth in the Proposed Rule that altogether prohibits the participation of any person convicted of a crime of moral turpitude quite clearly runs afoul of the Federal Rules of Evidence. Not only does Rule 601 affirmatively state that every person is competent to be a witness, a prior rule prohibiting testimony by convicted persons was expressly stricken. The Proposed Rule would, effectively, seek to reinstitute the stricken rule of evidence. Consistent therewith, Rule 609 addresses the significance of a criminal conviction,

and the limits on which such information can even be admitted into evidence. By contrast to such defined limits, the Proposed Rule simply excludes all testimony by certain convicted felons, again effectively deeming them incompetent as witnesses.

G. The Proposed Rule Seeks to Disqualify Legal Counsel In Advance or Subject to Unidentified, Ambiguous Criteria, a "Drastic Measure" that is "Strongly Disfavored".

As noted, the current regulations merely require that the attorney appearing in CRB proceedings is a member of the bar, in one or more states, in good standing. See 37 C.F.R. 350.2. The Proposed Rule effectively seeks to disqualify legal counsel in advance based on criteria that, according to the CRB, deems such legal counsel unworthy of appearing before the CRB.

"[D]isqualification . . . is a drastic measure which courts should hesitate to impose except when absolutely necessary." *Freeman v. Chi. Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982). Generally speaking, the disqualification of counsel has been viewed disfavorably. See *Richardson-Merrell v. Koller*, 472 U.S. 424, 441 (1985) (Brennan, J., concurring) ("the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation"), *N. Am. Foreign Trading Corp. v. Zale Corp.*, 83 F.R.D. 293, 297 (S.D.N.Y. 1979) (finding the disqualification motion to be a vexatious ploy), *Rogers v. Pittston Co.*, 800 F. Supp. 350, 353 (W.D. Va. 1992), *Solow v. W.R.*

Grace & Co., 83 N.Y.2d 303, 632 N.E.2d 437, 440 (1994), *Penn Mut. Life Ins. v. Cleveland Mall Assocs.*, 841 F. Supp. 815, 819 (E.D. Tenn. 1993), *Ferranti Int'l PLC v. Clark*, 767 F. Supp. 670, 672 (E.D. Pa. 1991), *Responsible Citizens v. Super. Court*, 16 Cal. App. 4th 1717, 1725 (1993) and *Weil, Freiburg & Thomas v. Sara Lee*, 577 N.E.2d 1344, 1354 (1991).

Because disqualification motions are "strongly disfavored," "strict judicial scrutiny" generally applies. *See Oracle Am. Inc. v. Innovative Tech. Distribs., LLC*, 2011 U.S. Dist. LEXIS 78786, at *10–*11 (N.D. Cal. July 20, 2011). In addition, Courts recognize the substantial hardship and monetary and other costs replacing counsel entails. *See, Gregori v. Bank of Am.*, 207 Cal App. 3d 291, 300 (Ct. App. 1989). In *Lee v. Gadasa Corp.*, 714 So. 2d 610, 613 (Fla. App. 1998) a Florida court of appeal expressed reluctance to sanction the use of a disciplinary rule for the purpose of "depriving the opponent of [counsel] who is intimately familiar with the litigation, and forcing it [to] spend additional funds for new counsel or to concede defeat".

These concerns apply equally to the Proposed Rule, which would create the possibility of separating a party from counsel of its choice. Clearly, the Proposed Rule again extends its reach too far, seeking to prohibit the participation of counsel that the CRB finds unworthy of appearing before the Judges or, more generally, that the CRB simply finds "incompetent or disreputable". Apparently, the CRB

criteria was intended to be broad and subjective, affording the CRB the greatest possible discretion as to what type of actions would warrant a finding of counsel being "incompetent or disreputable". For several obvious reasons, including the additional costs thrust upon a party whose counsel has been disqualified, disqualification is strongly disfavored, even if the CRB considers such counsel to be "incompetent or disreputable". In royalty distribution proceedings, where command of the subject matter is particularly complex and unique, disqualification of legal counsel would subject any party to extraordinary legal fees in the re-education of new legal counsel, specifically the substantial hardship sought to be avoided.

CONCLUSION

For the reasons set forth herein, the Proposed Rule, in any incarnation, cannot be adopted. Although the Judges requested commentary on variations from any party that believes that the Proposed Rule is not necessary or appropriate, the provisions run afoul of the law and would, in part, amount to a circumnavigation around the ruling of U.S. District Judge Henry Kennedy. The broad brush by which the Proposed Rule seeks to exclude certain "prohibited classes" of persons from any participation in the proceedings, even as witnesses, violates the most basic tenets of the U.S. Constitution, and attempts to reinstate policies soundly rejected by legal experts and authorities. Further, the CRB's attempt to penalize

any entity that relies on the work of a person in one of the prohibited classes, even if that person is neither appearing or testifying in the proceedings, strongly suggest that the intention of the Proposed Rule is nothing more than an attempt to penalize a party for the employees, consultants, experts and attorneys that they select.

Particularly disturbing, however is the evident fact that the Proposed Rule is directed at one individual and one company in order to punish them for a decades old act that Judge Kennedy already ruled in 2002 (and again in 2005) should not be punished in the manner that the CRB seeks by the Proposed Rule. Given only two examples in which the Proposed Rule might have been "needed" over the last thirteen years, the notion that the Proposed Rule is "necessary" to maintain the integrity of the proceedings, appears highly doubtful.

# # #

In short, the Proposed Rule is not needed, and its adoption would create a heavy handed mechanism not supported by the law.

Respectfully submitted,

May 22, 2017

_____/s/_____

Brian D. Boydston, Esq.
PICK & BOYDSTON, LLP
10786 Le Conte Ave.
Los Angeles, California 90024
Telephone: (213)624-1996
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Worldwide Subsidy Group, LLC