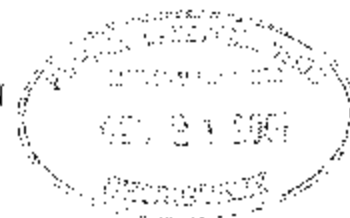


UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )

POLYGRAM HOLDING, INC., )  
a corporation, )

DECCA MUSIC GROUP LIMITED, )  
a corporation, )

UMG RECORDINGS, INC., )  
a corporation, )

and )

UNIVERSAL MUSIC & VIDEO )  
DISTRIBUTION CORP., )  
a corporation. )  
\_\_\_\_\_

Docket No. 9298

**COMPLAINT COUNSEL'S MOTION TO COMPEL  
RESPONDENTS TO PRODUCE DOCUMENTS**

Pursuant to the Federal Trade Commission's Rules of Practice §3.38, complaint counsel hereby moves for an order compelling respondents to produce documents responsive to complaint counsel's First Request for Documents and Things Issued to Respondents, Specification Number 19. The bases for this motion are set forth in the accompanying Memorandum in Support of Complaint Counsel's Motion to Compel Respondents to Produce Documents and the attachments thereto, and in the accompanying Declaration of John Roberti.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Melissa Westman-Cherry".

Geoffrey M. Green

John Roberti

Melissa Westman-Cherry

Complaint Counsel

Dated: December 21, 2001

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of )

POLYGRAM HOLDING, INC., )  
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DECCA MUSIC GROUP LIMITED, )  
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UMG RECORDINGS, INC., )  
a corporation, )

and )

UNIVERSAL MUSIC & VIDEO )  
DISTRIBUTION CORP., )  
a corporation. )  
\_\_\_\_\_)

Docket No. 9298

To: The Honorable James P. Timony  
Chief Administrative Law Judge

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION  
TO COMPEL RESPONDENTS TO PRODUCE DOCUMENTS**

Complaint counsel respectfully requests that this Court compel respondents to produce documents responsive to one request for documents. As set forth below, this discovery request is narrowly focused, and the requested material is relevant.

Specification Number 19 of Complaint Counsel's First Request for Documents (relevant portions of which are Attachment 1 to this Memorandum), as modified in negotiations between the parties, requests the following:

All market studies, consumer research, forecasts and surveys that discuss:  
(a) supply and demand conditions for audio products or video products;  
(b) the relationship, if any, between the advertising/promotion of audio products and prices or sales levels; and/or (c) the relationship, if any, between the advertising/promotion of video products and prices or sales levels.

It is important to note that complaint counsel has not requested all documents relating to, e.g., supply and demand conditions – but only a narrowly defined subset.

Basic market studies and consumer research are probably relevant in any civil antitrust action. They are particularly relevant here. The Commission's complaint in this case alleges that respondents entered into an agreement with Warner Music Group not to discount or advertise certain audio and video products featuring the Three Tenors (the "moratorium agreement"). Complaint counsel contends that, in view of the anticompetitive nature of the restraints alleged here, this Court should apply the truncated or "quick-look" antitrust analysis employed in, *inter alia*, *California Dental Association v. FTC*, 526 U.S. 756 (1999); *NCAA v. Board of Regents*, 468 U.S. 85 (1984); and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

The reports of respondents' experts are lengthy and winding, but the gist is this: Respondents claim that truncated analysis is not appropriate here because price discounting and advertising are not significant competitive factors in the recorded music industry.<sup>1</sup> Further, respondents' expert reports suggest that the potential for free riding and consumer confusion

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<sup>1</sup> See, e.g., Expert Report of Janusz A. Ordover ¶ 62 (charging that complaint counsel's analysis of pricing restraints fails to "examine the particular dynamics of the recorded music industry")

attendant to promotion of the 1998 Three Tenors album is in various ill-defined ways different from the potential for free riding and consumer confusion associated with promotions for other audio products.<sup>2</sup>

In other words, in an effort to justify that which is almost never justifiable (price fixing), respondents argue that the recorded music industry is like no other industry, and that Three Tenors albums are like no other albums. The market studies, consumer research, surveys and forecasts requested by complaint counsel are likely to contain information relevant to -- and we suspect refuting -- the claims advanced by respondents' experts.

Accordingly, complaint counsel respectfully requests that respondents be ordered to produce documents responsive to Request No. 19 of Complaint Counsel's First Request for Production of Documents and Things Issued to Respondents.

\* \* \* \* \*

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<sup>2</sup> See, e.g., Expert Report of Yoram (Jerry) Wind ¶ 5(d) ("Some consumers who come to the store, because of the promotion of the 1998 album and intending to buy that album, may be attracted by the cheaper 1990 and 1994 albums and buy them instead.").

For the foregoing reasons, complaint counsel respectfully requests that this Court grant the Motion to Compel Respondents to Produce Documents.

Respectfully submitted,



Geoffrey M. Green

John Roberti

Melissa Westman-Cherry

Complaint Counsel

Dated: December 21, 2001

**UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

POLYGRAM HOLDING, INC.,  
a corporation,

DECCA MUSIC GROUP LIMITED,  
a corporation,

UMG RECORDINGS, INC.,  
a corporation,

and

UNIVERSAL MUSIC & VIDEO  
DISTRIBUTION CORP.,  
a corporation.

Docket No. 9298

**COMPLAINT COUNSEL'S FIRST REQUEST FOR PRODUCTION OF  
DOCUMENTS AND THINGS ISSUED TO RESPONDENTS**

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37, complaint counsel hereby requests that Respondents Polygram Holding, Inc., Decca Music Group, UMG Recordings, Inc. and Universal Music & Video Distribution Corp. (collectively, "Respondents" ) produce all documents and other things responsive to the following requests, within their possession, custody, or control, within twenty days in accordance with the Definitions and Instructions set forth below.

**DEFINITIONS**

1. The term "you," "your" and "Company" as used in this document request means Respondents, their domestic and foreign parents (including Vivendi Universal S.A., PolyGram NV, and Polygram International Ltd.), predecessors, divisions, and wholly or

gross sales net of misorders, discounts, allowances, and excise taxes.

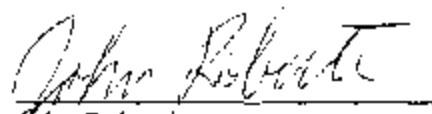
13. For each Three Tenors Product sold by the Company, documents sufficient to show, by country and by month, the Company's total unit sales. Unit sales refers to total gross sales less misorders.
14. For each Three Tenors Product sold by the Company, documents sufficient to show, by country and by month, the dollar amount spent by the Company advertising or promoting such product.
15. For each Three Tenors Product sold by Warner, documents sufficient to show, by country and by month, for the period from January 1, 1998 to date, the dollar amount spent by Warner advertising or promoting such product.
16. For each Three Tenors Product sold by the Company, documents sufficient to show, by country and by month: (i) the dollar value of discounts granted by the Company to customers, and (ii) the dollar value of allowances granted by the Company to customers.
17. All organization charts and the most recent telephone and other personnel directories for Respondents and for each corporation, subsidiary or division or other entity within the Company involved in any activity relating to the sale, marketing, or distribution of any Three Tenors Product.
18. All documents that discuss the marketing, advertising, discounting, pricing, promotion or re-release of a Catalogue Product contemporaneous with the release of a new product featuring the same artist.
19. All documents that discuss competition in the sale of audio products or video products, including, but not limited to, market studies, consumer research, forecasts and surveys, and all other documents that discuss: (a) supply and demand conditions for audio products or video products; (b) the relationship, if any, between the advertising/promotion of audio products and prices or sales levels; and/or (c) the relationship, if any, between the advertising/promotion of video products and prices or sales levels.
20. All documents that discuss the marketing, advertising, discounting, pricing, promotion or re-release by a person other than the Company of a Catalogue Product contemporaneous with the release by the Company of a new Product featuring the same artist.
21. All documents that discuss the Company's strategy or plans for the pricing, advertising, marketing, distribution, sale or release by the Company of a new Product featuring an artist whose prior Products are distributed by another company.
22. All documents that discuss the Company's strategy or plans for the pricing, advertising,



**CERTIFICATE OF SERVICE**

I, John Roberti, hereby certify that on September 12, 2001, I caused a copy of Complaint Counsel's First Request for Production of Documents and Things Issued to Respondents to be served upon the following persons by facsimile and by U. S. Mail:

Glenn D. Pomerantz  
Bradley S. Phillips  
Stephen E. Marrissey  
Munger Tolles & Olson LLP  
355 South Grand Avenue  
35<sup>th</sup> Floor  
Los Angeles, Ca 90071

  
\_\_\_\_\_  
John Roberti

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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In the Matter of )  
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POLYGRAM HOLDING, INC., )  
a corporation, )  
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DECCA MUSIC GROUP LIMITED, )  
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UMG RECORDINGS, INC., )  
a corporation, )  
 )  
and )  
 )  
UNIVERSAL MUSIC & VIDEO )  
DISTRIBUTION CORP., )  
a corporation. )  
\_\_\_\_\_

Docket No. 9298

**ORDER**

Upon the motion of complaint counsel, and for good cause shown, **IT IS HEREBY ORDERED** that, on or before January 2, 2002, the respondents shall produce to complaint counsel all of the following documents within their possession, custody or control:

All market studies, consumer research, forecasts and surveys that discuss: (a) supply and demand conditions for audio products or video products; (b) the relationship, if any, between the advertising/promotion of audio products and prices or sales levels; and/or (c) the relationship, if any, between the advertising/promotion of video products and prices or sales levels.

ORDERED:

\_\_\_\_\_  
James P. Timony  
Chief Administrative Law Judge

Date: \_\_\_\_\_

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

POLYGRAM HOLDING, Inc.  
a corporation,

DECCA MUSIC GROUP LIMITED,  
a corporation,

UMG RECORDINGS, INC.,  
a corporation,

and

UNIVERSAL MUSIC & VIDEO  
DISTRIBUTION CORP.,  
a corporation

Docket No. 9298

**DECLARATION OF JOHN ROBERTI**

1. I am an attorney employed by the Federal Trade Commission, and complaint counsel in the above-captioned matter.
2. I submit this declaration to affirm that complaint counsel has attempted in good faith to resolve the dispute that is the subject of Complaint Counsel's Motion to Compel Respondents to Produce Documents. Complaint counsel and respondents have not been able to come to an agreement.
3. On or about September 12, 2001, complaint counsel served its First Request for Production of Documents and Things Issued to Respondents. On or about October 12, 2001 respondents provided objections and responses, including a refusal to produce documents responsive to Specification 19.

4. On or about October 22, 2001, I contacted Steven Morrissey of Munger, Folles and Olson, counsel for respondents, in an effort to resolve this dispute.

5. Following this conversation, I agreed to limit Specification 19 to:

All market studies, consumer research, forecasts and surveys that discuss: (a) supply and demand conditions for audio products or video products; (b) the relationship, if any, between the advertising/promotion of audio products and prices or sales levels; and/or (c) the relationship, if any, between the advertising/promotion of video products and prices or sales levels.

On November 6, 2001, I wrote a letter to Mr. Morrissey confirming this position.

6. On or about November 14, 2001, Mr. Morrissey and I again conferred about Specification 19. As a result of that conversation, complaint counsel agreed to delay filing any motion to compel until after receipt of respondents' expert reports. We informed the Court of this potential dispute in Complaint Counsel's Status Report and Statement of the Case, dated November 27, 2001, at p. 6.

7. Respondents' expert reports were received on December 7, 2001. On or about December 12, 2001, I spoke to Mr. Morrissey in a final effort to resolve this dispute, and suggested that he propose a limited scope of search to ease any purported burden. On or about December 14, 2001, Mr. Morrissey wrote to reject this offer, and reassert respondents' objection to producing documents responsive to this request.

8. On December 20 and December 21, 2001, Mr. Morrissey and I spoke in person in a final effort to resolve this dispute, but were unable to come to an agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: December 21, 2001

  
John Roberti

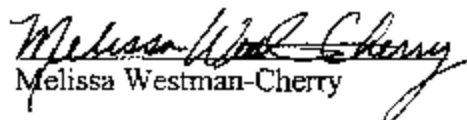
## CERTIFICATE OF SERVICE

I, Melissa Westman-Cherry, hereby certify that on December 21, 2001, I caused a copy of the following documents to be served upon the persons listed below by facsimile and by U. S. Mail:

- (1) Complaint Counsel's Motion to Compel Respondents to Produce Documents;
- (2) Complaint Counsel's Memorandum in Support of the Motion to Compel Respondents to Produce Documents;
- (3) Proposed Order; and
- (4) Declaration of John Roberti.

Glenn D. Pomerantz  
Bradley S. Phillips  
Stephen E. Morrissey  
Munger Tolles & Olson LLP  
355 South Grand Avenue  
35<sup>th</sup> Floor  
Los Angeles, Ca 90071  
Fax: (213) 687-3702  
*Counsel for Respondents*

James P. Timony  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Room 112  
Washington, DC 20580

  
Melissa Westman-Cherry