

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COPY

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



**RESPONDENTS' RESPONSE TO COMPLAINT COUNSEL'S MOTION IN LIMINE
REGARDING THE TESTIMONY OF RICHARD CONSTANT**

Complaint Counsel's in limine motion reflects a misunderstanding of Respondents' position. Respondents do not intend to offer an advice of counsel defense or to have Mr. Constant, or any other witness, testify on matters about which they were properly instructed not to testify during their depositions. Nonetheless, Respondents wish to avoid an unnecessary dispute. Respondents will not call Mr. Constant to testify "on the subject of PolyGram's decision whether to implement any restriction on pricing and discounting of the 1990 and 1994 Three Tenors albums as part of its joint venture with Warner Music Group" ("the Decision"). See Proposed Order In Limine.¹ Respondents will not do so for the following reasons:

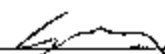
1. Mr. Constant's testimony on the Decision is not necessary to resolve the

¹ Respondents reserve the right to call Mr. Constant to testify on other relevant subject matters.

threshold issue in this case -- assuming the proposed moratorium agreement had been implemented, would it properly be analyzed under the full rule of reason, as Respondents believe, or under "quick look" (or "truncated") rule of reason, as Complaint Counsel urge? As explained in the pending motion for summary decision, Respondents believe that application of California Dental Ass'n v. FTC, 526 U.S. 756 (1998), to the undisputed facts here requires a full rule of reason analysis.

2. Respondents intended to offer Mr. Constant's testimony as part of its showing that PolyGram never entered an agreement with Warner to implement the proposed "moratorium." Paul Saintilan, a PolyGram employee in its classical music division, sent a memorandum describing the proposed moratorium to a number of PolyGram senior executives for their review. One of those executives was Mr. Constant. That review led PolyGram to decide not to agree to or implement the proposed moratorium. Mr. Saintilan then communicated PolyGram's decision to Warner and to PolyGram's operating companies. Respondents will prove these facts through documents and the testimony of a number of witnesses, but not through Mr. Constant's testimony about the Decision.

Respectfully Submitted,


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Dated: February 1, 2002

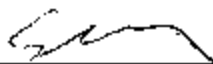
CERTIFICATE OF SERVICE

I, Stephen Morrissey, hereby certify that on February 1, 2002, I caused a copy of the **RESPONDENT'S RESPONSE TO COMPLAINT COUNSEL'S MOTION IN LIMINE REGARDING THE TESTIMONY OF RICHARD CONSTANT** to be served upon the following persons:

Geoffrey M. Green/John Roberti
Cary Zuk/Richard Dagen
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6th & Pennsylvania Ave., N.W.
Washington, D.C. 20580
Complaint Counsel
(By Facsimile and Federal Express)

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
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Donald S. Clark, Secretary
Federal Trade Commission
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STEPHEN MORRISSEY