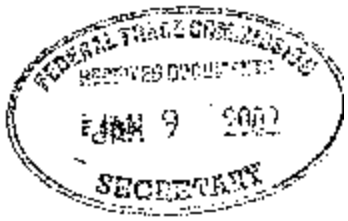
COPY

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.	FILE/DOCKET NO. 488016/0010231/DO9298

RESPONDENTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF

Respondents PolyGram Holding, Inc. ("PolyGram Holding"), Decca Music Group Limited ("Decca"), UMG Recordings, Inc. ("UMG"), and Universal Music & Video Distribution Corp. ("UMVD") (collectively "Universal" or "Respondents") respectfully submit this motion to compel production of documents based on complaint counsel's refusal to search for and produce documents requested in Respondents' First Request for Production of Documents.

I. Factual and Procedural Background Relevant to the Motion

A. Complaint Counsel's Allegations and Respondents' Defenses.

This matter arises from a joint venture between Decca Music Group Limited (and its affiliates within PolyGram Classics, hereinafter "PolyGram") and Atlantic Records (and its affiliates within Warner Music Group, hereinafter "Warner") for the production of a 1998 Three Tenors World Cup concert in Paris, creation and distribution of a 1998 Three Tenors album, which would include recordings that concert , and future release of other Three Tenors products. *See* Complaint ¶ 11. As part of the joint venture, PolyGram contributed the exclusive recording services of Luciano Pavarotti, and Warner contributed the exclusive recording services of Jose Carreras. Without a collaboration between Warner and Polygram, the 1998 Three Tenors concert and album could not have been created. Under the joint venture agreement, PolyGram was responsible for distribution of the 1998 Three Tenors album outside the United States, and Warner was responsible for distribution of the album within the United States. The parties contemplated that, as part of the joint venture, they would jointly produce and distribute "box set" and/or "greatest hits" albums that would include both recordings from the 1998 Three Tenors album and recordings from the 1990 Three Tenors album released and distributed by Polygram and the 1994 Three Tenors album released and distributed by Warner. The parties agreed to share equally the costs of and profits derived from the joint venture.

Complaint counsel do not dispute that the Three Tenors joint venture was a pro-competitive collaboration. Rather, Complaint Counsel challenge an agreement that was allegedly formed between the joint venture partners regarding a "moratorium" on aggressive discounting and promotion of the 1990 and 1994 Three Tenors albums during the time period surrounding the release of the 1998 Three Tenors album. *Id.* ¶¶ 13-15. Although the precise

scope and nature of the proposed moratorium are disputed, the alleged agreement would have precluded PolyGram and Warner from aggressively discounting or promoting the 1990 and 1994 Three Tenors albums during a ten-week period surrounding the release of the 1998 Three Tenors album in August 1998.

Respondents contend that the proposed moratorium did not violate Section 5 of the FTC Act, 15 U.S.C. § 45, for three principal reasons. First, and most fundamentally, although not directly relevant to this motion, Respondents contend that the proposed moratorium was never finally agreed to or implemented. Before the moratorium was to be implemented, PolyGram obtained legal advice on issues relating to the moratorium, and PolyGram then elected not to proceed with the moratorium and informed Warner of its decision. The fact that the moratorium was not finally agreed to or implemented is demonstrated both by correspondence between the parties and witness testimony and by evidence that, during the time period that the proposed moratorium was to have been in effect, PolyGram's operating companies aggressively advertised and discounted the 1990 Three Tenors album in a number of territories. Respondents therefore believe that this evidence shows both that there was no violation of Section 5 and that Complaint Counsel cannot satisfy their burden of showing that the challenged practice is ongoing or likely to recur. *See TRW, Inc. v. Federal Trade Commission*, 647 F.2d 942, 954 (9th Cir. 1981) (holding that prospective relief may be granted only where Commission shows a "cognizable danger" of recurrent violation).

Second, the proposed moratorium, even if it had been implemented, could only properly be evaluated under the full rule of reason, but Complaint Counsel has elected not to pursue a full rule of reason case (having, among other things, declined to define a relevant market or allege market power or effect in such a market). The proposed moratorium could only

be evaluated under the full rule of reason because it was a novel arrangement that was developed in the context of and reasonably related to the pro-competitive joint venture and was designed to manage a promotional opportunity (aggressive promotion of the 1990 and 1994 albums to capitalize on the 1998 concert and album) that *would not have existed but for that joint venture*, and because any anti-competitive effect of the proposed moratorium is far from obvious. Horizontal restraints adopted in the context of joint ventures must be analyzed under the full rule of reason so long as the parties to the restraint are able to identify a plausible efficiency justification for the restraint and it is not obvious that the effect of the restraint, in the context of the joint venture, is on balance anti-competitive.. *See California Dental Assn. v. Federal Trade Commission*, 526 U.S. 756 (1999); *United States v. Visa U.S.A., Inc., et al.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001). As the Commission's Collaboration Guidelines explain, if the "participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered per se illegal." *See Guidelines for Collaborations Among Competitors* ("Collaboration Guidelines") § 3.2, at 8. Because Complaint Counsel have not even alleged that the proposed moratorium had a substantial effect on competition in any relevant market and have elected not to pursue a full rule of reason case, a conclusion that the proposed moratorium is subject to analysis under the full rule of reason necessarily would result in a decision in favor of Respondents. *California Dental Assn. v. Federal Trade Commission*, 224 F.3d 942 (9th Cir. 2000).

Third, Respondents submit that the proposed moratorium was reasonable. The proposed moratorium was designed to prevent PolyGram's and Warner's respective operating

companies from free riding on the promotional opportunity created by the Three Tenors' Paris concert and release of the 1998 Three Tenors album – an opportunity that existed only because of very substantial expenditures made as part of the joint venture – in a way that would undermine the potential success of the joint venture. Because Polygram and Warner each owned 100% of one of the prior Three Tenors albums, their operating companies could have had an incentive to promote and discount the 1990 or 1994 album at the expense of the new 1998 joint venture album (from which each would derive only 50% of the profit). The proposed moratorium sought to manage this promotional opportunity for Three Tenors products by allowing those territories that were interested in aggressively discounting the prior albums prior to and immediately around the time of the concert to do so, but only so long as the promotional campaigns in those territories were completed before August when the new album was to be released.[1] The parties hoped that the proposed moratorium would increase sales of all Three Tenors products, first by allowing aggressive promotion and discounting of the prior albums during the months preceding the release of the new album, and then by guarding against the consumer confusion that could occur if retailers were simultaneously promoting the new album and the prior albums.

The relevant case law and provisions of the Collaboration Guidelines both strongly suggest that restrictions such as the proposed moratorium adopted in the context of a joint venture do not run afoul of the antitrust laws. *See Polk Bros. Inc., v. Forest City Enterprises, Inc.*, 776 F.2d 185, 187-90 (7th Cir. 1985) (noting that agreement whereby partners in joint venture to create shopping complex agreed not to compete against each other's

[1] Although the parties discussed a "worldwide" moratorium – and although several witnesses have indicated that the moratorium was to apply in the United States – there is no evidence that PolyGram's or Warner's United States operating companies were interested in aggressively promoting or discounting the 1990 or 1994 albums in the United States during 1998, or that PolyGram has ever sold the 1990 Three Tenors album at heavily discounted prices in the United States.

respective product lines promoted the efficiency of the joint venture by enabling each retailer to prevent the other from free riding on promotional and marketing efforts made in the context of the joint venture.); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 213 (D.C. Cir. 1986) ("The free ride can become a serious problem for a partnership or joint venture because the party that provides capital or services without receiving compensation has a strong incentive to provide less, thus rendering common enterprise less effective."); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970-72 (10th Cir. 1994) (holding that by-law excluding issuers of rival credit cards from membership in credit card joint venture was reasonably necessary to prevent free riding and protect investment in the venture even though it was adopted approximately forty years after the formation of the venture); *See* Collaboration Guidelines § 3.36(b), at 24 & Ex. 10 (recognizing that joint venture partners may legitimately adopt horizontal restraints designed to prevent "free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies").

B. **The Requested Discovery.**

The requested discovery that is the subject of this motion is related to the second and third reasons that Respondents believe there is no violation in this case. On October 24, 2001, Respondents served Complaint Counsel with their First Request for Production of Documents.[2] The Requests sought the production of, *inter alia*, various categories of documents in the possession, custody or control of the Bureau of Competition relating to the drafting and analysis of the Guidelines; positions taken by the Commission or Commission staff regarding whether challenged agreements or practices were or were not reasonably related and/or reasonably necessary to a joint venture; and positions taken by the Commission or Commission

[2] A copy of Respondents' First Set of Requests for Production is attached hereto as Exhibit A.

staff on issues of free riding and opportunistic behavior. Complaint Counsel blanketly refused to search for documents in response to the Requests. *See* Complaint Counsel's Responses and Objections to Respondents First Request for Production of Documents (Ex. B). Respondents' subsequently narrowed their requests to include only the following categories of documents:

> All papers, economic analyses, pleadings, expert reports, and transcripts of testimony (deposition or otherwise) prepared by the FTC or any expert acting on its behalf on or after January 1, 1990, that have been disclosed to any person outside the FTC and that relate to any of the following:
>
> 1. The *Guidelines for Collaborations Among Competitors* issued by the FTC and the Antitrust Division of the Department of Justice (and excluding such documents that have not been disclosed to any person outside either the FTC or the Department of Justice).
>
> 2. Whether an agreement or restraint is reasonably related to and/or reasonably necessary to formation or efficient operation of a joint venture.
>
> 3. Whether an agreement or restraint is reasonably necessary to prevent free riding on the activities of a joint venture.
>
> 4. The appropriate legal or economic standard for evaluating whether a restraint agreed to by the parties to a joint venture violates the antitrust laws, including Section 5 of the FTC Act, or is anticompetitive.
>
> 5. The circumstances under which application of a "quick look" or "truncated" rule of reason analysis is appropriate.

See December 13, 2001 Letter from Bradley S. Phillips to John Roberti (Ex. C).

Despite Respondents' willingness to narrow their requests, Complaint Counsel continues to refuse to conduct any search or to produce any documents in response to the Requests. In response to Mr. Phillips' December 13 letter, Complaint Counsel stated that they "continue to believe that the document requests are unduly burdensome and not likely to lead to admissible evidence." *See* December 17, 2001 Letter from John Roberti to Bradley S. Phillips (Ex. D). During a subsequent meet and confer session regarding this dispute, Complaint Counsel continued to assert their objections to the Requests.

II. Argument

A. Respondents' Document Requests are Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

The requested discovery should not be controversial. It is well-established that judicial review of any Commission decision in this matter must be based on the full administrative record before the agency. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971); *see also Federal Trade Comm'n v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986) (noting that judicial review provisions of 45 U.S.C. § 45(c) are "essentially identical" to the "substantial evidence" standard used in judicial review of agency fact finding under the Administrative Procedures Act). As now-Fifth Circuit Judge Higginbotham has explained, the full administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Exxon Corp. v. Department of Energy*, 91 F.R.D. 26, 32-33 (N.D. Tex. 1981) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951). To enable review on a full administrative record, courts generally have allowed discovery of documents relating to how an agency decision was made. *Id.* (allowing discovery of agency staff "'statements, internal memoranda, manuals, directives and the like'" and "agency applications of the regulations which reflect a particular interpretation") (quoting *Petrolane, Inc. v. DOE*, 79 F.R.D. 115 (C.D. Cal. 1978)); *United States v. Capitol Service, Inc.*, 89 F.R.D. 578 (E.D. Wisc. 1981) (allowing discovery of Antitrust Division staff statements regarding "split agreements" between motion picture distributors and theater chains).

Here, the requested materials are likely to be relevant to the ultimate issue whether there has been any violation of Section 5 in this case. Positions taken by the

Commission or Commission staff in other, arguably similar circumstances, are relevant to, among other things, expert witnesses' consideration of Complaint Counsel's and their expert's contention that the moratorium may be condemned under a "truncated" version of the rule of reason, and to the Court's consideration of that issue. If, for instance, the Commission or Commission staff have conceded that full rule of reason analysis applies to other alleged horizontal restraints adopted in the context of joint ventures, that would undermine Complaint Counsel's and their expert's position that the proposed moratorium can be evaluated without a full rule of reason analysis. Similarly, recognition by the Commission or Commission staff that concerns regarding free riding or opportunistic behavior were legitimate in the context of other joint ventures would suggest that such concerns are, at a minimum, plausible justifications for the alleged restraint at issue here. One example of this appears in the Collaboration Guidelines themselves, where the Commission expressly recognizes that joint venture partners may legitimately adopt horizontal restraints designed to prevent "free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies." Collaboration Guidelines § 3.36(b), at 24 & Ex. 10. Respondents should be entitled to discovery of similar statements by the Commission or Commission staff, regardless of whether those statements were made in briefs, expert reports, speeches, or papers presented at conferences. As the court noted in *Exxon*, it should "'strain[s] the Court's imagination to assume the administrative decision-makers reached their conclusion without reference to a variety of internal memoranda, guidelines, directives, and manuals, and without considering how arguments similar to [Respondents'] were evaluated in prior decisions by the agency.'" 91 F.R.D. at 34 n. 11.

The requested discovery also is relevant to the degree of deference to which any Commission decision in this matter would be entitled on appeal. Courts are bound to defer to the Commission's reasonable interpretations of Section 5. *See American Financial Services, Inc. v. Federal Trade Comm'n*, 767 F.2d 957, 968 (D.C. Cir. 1985) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Courts also have pointed to agency practice in considering whether a challenged restraint is subject to *per se* analysis. In *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979), for instance, the Court considered the government's longstanding supervision of the industry (and implicit approval of the policy) in refusing to invalidate the "blanket license" as illegal *per se*. In *Capitol Service*, the court pointed to *BMI* in allowing discovery from the Antitrust Division regarding its staff's statements regarding agreements similar to the "split" agreement challenged in that case. 89 F.R.D. at 581. Recognizing the obvious unfairness in affording deference to agency decision-making while denying discovery regarding the agency's decision-making process to allow a full record for judicial review, courts have permitted discovery that is materially indistinguishable from that sought here. *Id.* (holding that materials regarding "prior positions" of Antitrust Division regarding "split" agreements were discoverable); *Exxon*, 91 F.R.D. at 40 (allowing discovery because "weight to be given an agency's interpretation of its own regulations 'depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the other factors which give the power to persuade, if lacking the power to control'") (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Respondents have narrowly tailored their requests to the core issues of this case. They should be permitted to review the requested documents to determine whether Complaint

Counsel's and their expert's positions in this case are consistent with the positions the Commission and Commission staff have previously taken.

B. **Complaint Counsel has Not Identified any Legitimate Basis for Refusing to Search for and Produce the Requested Documents.**

Complaint Counsel's boilerplate objections to Respondents' discovery requests are insufficient to justify their refusal to conduct any search or produce any documents in response to the Requests. Despite Complaint Counsel's protestations of "undue burden," Complaint Counsel plainly could comply with the Requests with minimal burden by simply asking other attorneys in the Bureau of Competition whether they have any responsive documents. The pleadings, expert reports, and transcripts sought by the Requests surely are maintained in the files of the Bureau of Competition and surely are readily accessible to Complaint Counsel. Complaint Counsel's assertion of "undue burden" is baseless.

In this regard, it is notable that the materials sought here are different from the materials that were the subject of the recent denials of motions to compel in *In re Schering-Plough Corp., et al.*, FTC Docket No. 9297, 2001 WL 1478386 (Aug. 2, 2001), and *In re Hoechst Marion Roussel, et al.*,, 2000 FTC Lexis 134 (Aug. 18, 2001). In those cases, the respondents sought discovery of the confidential information of *third parties* maintained in the files of Commission staff in connection with other cases and investigations. The motions to compel were denied because searching voluminous third-party materials for relevant documents would have been unduly burdensome, and because complaint counsel represented that they would not rely upon any of the third party materials in connection with those cases. Here, by contrast, Respondents seek discovery of positions taken by *the Commission or Commission staff* regarding the core issues in this case, to allow an assessment whether Complaint Counsel's and

their expert's positions in this case are consistent with prior positions taken by the Commission. *Schering-Plough* and *Hoechst* provide no insight into whether the materials sought here are discoverable.[3]

III. **Conclusion**

For all of the foregoing reasons, Respondents' motion to compel should be granted, and Complaint Counsel should be ordered to produce the requested materials.

Dated: January 8, 2002

Respectfully submitted,

BRADLEY S. PHILLIPS
GLENN D. POMERANTZ
STEPHEN E. MORRISSEY
MUNGER, TOLLES & OLSON LLP
355 S. Grand Ave., 35th Floor
Los Angeles, CA 90071
(213) 683-9593

By: _____
Stephen E. Morrissey

Attorneys for Respondents

[3] Complaint Counsel's reliance on the "deliberative process privilege" is meritless in light of Respondents' having limited their requests to documents that have been disclosed to persons outside the FTC.

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

RESPONDENTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS ISSUED TO COMPLAINANT

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. § 3.37, respondents hereby request that Complainant Federal Trade Commission 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.

1. All transcripts and notes of all investigative hearings, depositions and witness interviews conducted as part of the pre-complaint investigation in this matter.

2. All documents obtained from any person or entity other than Respondents as part of the pre-complaint investigation in this matter.

3. All papers, economic analyses, speeches and presentations, or drafts thereof relating to the *Guidelines for Collaborations Among Competitors* jointly issued by the Federal Trade Commission and the Antitrust Division of the Department of Justice, including all drafts of the *Guidelines*.

4. All papers, economic analyses, speeches and presentations, or drafts thereof prepared by Commission staff or any third party relating to joint ventures or other forms of collaborations among competitors.

5. All pleadings, briefs expert reports, deposition transcripts and transcripts of testimony in which the FTC or any expert testifying on its behalf have discussed whether a challenged agreement or practice was reasonably related and/or reasonably necessary to a joint venture.

6. All papers, economic analyses, speeches and presentations, or drafts thereof prepared by Commission staff or any third party explaining, discussing, referring to or relating to free riding.

7. All pleadings, briefs, expert reports, deposition transcripts and transcripts of testimony in which the FTC or any expert testifying on its behalf in any judicial or administrative proceeding explaining, discussing, referring to or relating to free riding.

8. All papers, economic analyses, speeches and presentations, or drafts thereof prepared by Commission staff or any third party explaining, discussing, referring to or relating to methods by which joint venture partners may seek to prevent opportunistic behavior by members of their venture.

9. All pleadings, briefs, expert reports, deposition transcripts and transcripts of testimony in which the FTC or any expert testifying on its behalf in any judicial or administrative proceeding explaining, discussing, referring to or relating to methods by which joint venture partners may seek to prevent opportunistic behavior by joint venture partners.

Dated: October 21, 2001

Respectfully submitted,

BRADLEY S. PHILLIPS
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By: _____
Stephen E. Morrissey

Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Stephen E. Morrissey, hereby certify that on October 25 2001, I caused a copy of the attached **RESPONDENTS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS ISSUED TO COMPLAINANT** to be served upon the following persons by facsimile and Federal Express:

Geoffrey M. Green
John Roberti
Cary Zuk
Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Washington , D.C. 20580

STEPHEN E. MORRISSEY

6-PPM

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

John Roberti
Attorney

Direct Dial
(202) 326-3775

November 13, 2001

BY FACSIMILE AND U.S. MAIL
Stephen E. Morrissey, Esq.
Munger Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071

Re: Polygram Holding, et. al.

Dear Steve:

We write to respond to Respondents' First Request for Production of Documents and Things Issued to Complainant. As you know, we have already produced all documents identified in our initial disclosures, which cover most, if not all, of the documents responsive to specifications 1 and 2. However, we have a number of objections to these requests, as set forth below.

We object to all specifications because they are vague, overly broad, ambiguous, unduly burdensome, provide no parameters as to the materials to be searched and provide no limitation as to time period. Further, complaint counsel specifically objects to each request to the extent that it calls for the production of materials protected by the deliberative process, law enforcement investigatory files, settlement, attorney-client and attorney work product privileges.

Specification 1

Notwithstanding the general objections noted above, we will produce or have already produced all non-privileged, non-duplicative materials called for by Specification 1– namely, the two investigational hearing transcripts prepared as part of the pre-complaint investigation in this matter. However, specifically excluded from production of documents pursuant to Specification 1 are notes of all hearings, depositions and witness interviews in preparation for this litigation as they are protected by the attorney-client and attorney work product privileges.

Specification 2

Notwithstanding the general objections noted above, we will produce or have already produced all non-privileged, non-duplicative materials obtained from any person other than

Respondent, namely the documents and data produced by Warner Music Group during the investigational phase of this matter.

Specifications 3 Through 9

We have carefully considered Specifications 3 through 9, and have determined that, in addition to above-referenced objections, documents responsive to these requests lack relevance to this case, and are not likely to lead to admissible evidence. Respondents seek to require complaint counsel to comb through the many thousands of investigations, litigations, analyses, speeches and presentations, internal and external, whether made by Commission staff or anyone else, since the creation of the Federal Trade Commission in 1914 in which the broad concepts of joint ventures, "free riding," and "opportunistic behavior" may have been raised. As a result, all of these specifications are overly broad, vague and unduly burdensome.

Specifications 3, 4, 6 and 8: "All papers, economic analysis, speeches and presentations or drafts thereof" related to joint ventures, "free riding," and "opportunistic behavior"

As described above, these requests are so overly broad, unduly burdensome and vague as to render them incapable of a response.

Complaint counsel specifically objects to specifications 3, 4, 6 and 8 because these requests are not calculated to lead to admissible evidence at all. Rather, these requests seek to have complaint counsel research legislative history, precedent and persuasive authority regarding the legal issues in this case, and are therefore not appropriate discovery requests.

To the extent that these requests seek public information, such as "speeches and presentations," complaint counsel objects to specifications 3, 4, 6 and 8 because this information is available in the public record or from some source other than complaint counsel, and the Respondents are equally capable of obtaining these documents through their own efforts.

To the extent that these requests seek non-public information, such as "papers, economic analyses and . . . drafts," complaint counsel objects to specifications 3, 4, 6 and 8 because this information is subject to attorney-client, attorney work product and deliberative process privileges.

Complaint counsel also objects to specifications 4, 6 and 8 to the extent that they seek documents "prepared by . . . any third party" because such request would require complaint counsel to produce documents outside complaint counsel's possession, custody or control.

Specifications 5, 7, and 8: "All pleadings, briefs, expert reports, deposition transcripts and transcripts of testimony . . . explaining, discussing, referring to or relating to" joint ventures, "free riding," and "opportunistic behavior"

As described above, these requests are so overly broad, unduly burdensome and vague as to render them incapable of a response.

Complaint counsel specifically objects to specifications 5, 7, and 9 because these requests

seek documents from unrelated cases without even a hint of relevance. Indeed, these cases will involve different parties, different facts and different legal analyses. Whatever information might be discovered would be neither admissible as evidence nor even useful as persuasive authority.

To the extent that these requests seek non-public information, complaint counsel objects to specification 5, 7, and 9 to the extent these requests seek documents that incorporate non-public information provided by third parties because disclosure of such documents, without appropriate notice to third parties, may violate the Federal Trade Commission Act or a protective order (similar to the one entered in this case).

To the extent that these requests seek public information, such as "pleadings, briefs . . . and transcripts of testimony," complaint counsel objects to specification 5, 7, and 9 because these documents are available in the public record or from some source other than complaint counsel, and the Respondents are equally capable of obtaining these documents through their own efforts.

Scope of Search

With respect to Specifications 1 and 2, we have searched the files of all Commission staff who have documents relating to this litigation.

Please feel free to call me if you have any questions about this response.

Very truly yours,

John Roberti

cc: Geoffrey M. Green, Esq.

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December 13, 2001

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Via Facsimile

John Roberti
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: *Polygram Holdings, et al., Docket No. 9298*

Dear John:

We are writing with respect to the Commission's response to Respondents' First Request for Production of Documents. We believe that the Commission's blanket refusal to produce documents in response to requests 3 through 9 is unwarranted and unreasonable. We are prepared to limit our requests to the following:

> All papers, economic analyses, pleadings, expert reports, and transcripts of testimony (deposition or otherwise) prepared by the FTC or any expert acting on its behalf on or after January 1, 1990, that have been disclosed to any person outside the FTC and that relate to any of the following:
>
> 1. The *Guidelines for Collaborations Among Competitors* issued by the FTC and the Antitrust Division of the Department of Justice (and excluding such documents that have not been disclosed to any person outside either the FTC or the Department of Justice).
>
> 2. Whether an agreement or restraint is reasonably related to and/or reasonably necessary to formation or efficient operation of a joint venture.
>
> 3. Whether an agreement or restraint is reasonably necessary to prevent free riding on the activities of a joint venture.

4. The appropriate legal or economic standard for evaluating whether a restraint agreed to by the parties to a joint venture violates the antitrust laws, including Section 5 of the FTC Act, or is anticompetitive.

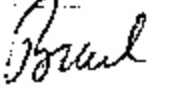
5. The circumstances under which application of a "quick look" or "truncated" rule of reason analysis is appropriate.

These documents are all relevant to this action and/or calculated to lead to the discovery of admissible evidence, and they are not subject to any privilege, including the deliberative process privilege. To the extent any of the documents would not themselves be admissible, they could be relied upon by experts and/or used in cross-examination of experts. In addition, to the extent you intend to rely in any respect on the *Guidelines*, we are entitled to discover what the FTC or its experts have said about interpretation and application of those *Guidelines*.

With respect to your objections based upon burden and the supposed "equal availability" of such documents to Respondents, we believe it should not be particularly burdensome for complaint counsel to circulate a request for documents meeting this description within the FTC, and that the feasibility of such a procedure makes the documents, including those that may be "in the public record," far more readily available to complaint counsel than to Respondents. Of course, we are not asking that you produce documents outside the FTC's possession, custody or control.

Please advise us as quickly as possible whether you will produce the documents specified above. Thank you.

Sincerely,



Bradley S. Phillips

BSP:ncm

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
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John Roberti
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December 17, 2001

BY FACSIMILE
Bradley S. Phillips, Esq.
Munger Tolles & Olson LLP
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Re: Polygram Holding, et. al.

Dear Brad:

We are reviewing your letter of December 13, 2001. For the reasons stated in our le of November 7, 2001, we continue to believe that the document requests are unduly burden and not likely to lead to admissible information. Notwithstanding that, we are available to t and confer concerning these issues on Wednesday, December 19, 2001. Please contact me that we can schedule a convenient time for a conference call.

In the meantime, please let me know if you have any case law or other authority supporting the types of requests made by Respondents, so that we can discuss all of the issu Wednesday.

Very truly yours,

John Roberti

cc: Stephen E. Morrissey, Esq.

CERTIFICATE OF SERVICE

I, Stephen E. Morrissey, hereby certify that on **January 4, 2002**, I caused a copy of the attached **RESPONDENTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF** to be served upon the following persons by facsimile and Federal Express:

Geoffrey M. Green
John Roberti
Cary Zuk
Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Washington , D.C. 20580

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington , D.C. 20580

Hon. James P. Timony
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington , D.C. 20580

STEPHEN E. MORRISSEY