UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
POLYGRAM HOLDING, INC., a corporation,	)	
	)	
DECCA MUSIC GROUP LIMITED, a corporation,	)	
	)	Docket No. 9298
UMG RECORDINGS, INC., a corporation,	)	
	)	
and	)	
	)	
UNIVERSAL MUSIC & VIDEO DISTRIBUTION CORP., a corporation.	)	
	)	

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

COMPLAINT COUNSEL'S MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

Respondents have been provided with each and every non-privileged, responsive document that complaint counsel has reviewed or relied upon in connection with this case. Respondents do not dispute this. Because a long line of authority limits discovery by Respondents to the factual documents that complaint counsel has reviewed or relied upon in preparing the case at hand, Respondents' efforts to obtain additional documents must fail.

Notwithstanding this precedent, Respondents seek to rummage through myriad unrelated cases and files in search of documents that address a range of legal issues: interpretations of the

Collaboration Guidelines, truncated antitrust analysis, joint venture analysis, and free riding. Respondents demand every communication that any employee of the Commission has had with anyone outside of the Commission on any of these topics. What is clear from the very language of the discovery requests is that they are not designed to find facts; they are an improper effort to enlist complaint counsel to do Respondents' legal research.

Respondents' request for legal background materials can produce little, if any, information of value. The Court's decision in this case will be based foremost on the decisions of the federal courts, the Commission, and Administrative Law Judges – all of which are readily available to Respondents. Other potentially persuasive authority, including articles, papers, and speeches, are available in libraries, on the Commission's website, and in the Commission's public records room. These items can as easily be collected by Respondents as by complaint counsel. Those non-public items that would arguably be responsive to Respondents' discovery request (*e.g.*, depositions and expert reports in other litigated cases) would have no precedential value and therefore no relevance. In addition, searching for these miscellaneous documents would place a substantial burden on complaint counsel. Despite Respondents' cavalier assertions to the contrary, it is, in fact, an immense burden for complaint counsel to contact all persons employed by the Commission to direct them to search their offices and archived files for any documents reflecting any communication they have ever had with anyone outside the Commission on the broad topics Respondents identify.

What is equally clear is that this unprecedented expansion of the rights of the Respondents to delve into Commission files on unrelated cases and projects would change the very nature of Part III Commission discovery. If Respondents are correct that they are entitled to this broad discovery (and they have cited no case that supports this request), then in every case going forward, every

lawyer, economist, paralegal, investigator, administrative law judge and Commissioner would be required to open every file on every case so that the respondent can obtain all documents containing passing reference to each legal issue in the litigated matter. This is not, and should not, be the state of the law. Accordingly, Respondents' motion should be denied.

I. Discovery is Limited To Non-Privileged Documents Reviewed or Relied Upon By Complaint Counsel

It is well-established that the scope of discovery upon the FTC is limited to the documents reviewed or relied upon by complaint counsel in bringing the complaint. This is the standard that Judge Chappell has adhered to in two recent decisions. *In re Hoechst Marion Roussel, Inc.*, 2000 FTC LEXIS 134, *14 (August 18, 2000); *In re Schering-Plough*, Order on American Home Products Corporation's and Schering Plough Corporation's Motions to Compel and on Non-Parties ANDRX Pharmaceutical Inc.'s and Aventis Pharmaceutical Inc.'s Motion for Protective Order at 5 (Sept. 7, 2001), FTC Docket No. 9297, available at www.ftc.gov (attached hereto as Exhibit "A"). In *Hoechst*, Judge Chappell held that documents from files other than those maintained in connection with the litigation at issue need be produced in very limited circumstances. In particular, Judge Chappell held that documents other than those produced by parties in connection with the litigation at issue must be produced:

> . . . *only if* complaint counsel intends to rely on or refer to any such [documents] in prosecuting its case *or if* any such agreements have been reviewed or relied upon by a testifying expert for Complaint Counsel; and any document relied upon, reviewed, consulted, or examined by a testifying expert in connection with forming an opinion on the subject on which he or she is expected to testify, regardless of the source of the document or whether a document was originally generated in another investigation or litigation.

In re Hoechst Marion Roussel, Inc., 2000 FTC LEXIS 134, *14-15 (August 18, 2000), *citing Dura*

Lube Corp., 2000 FTC LEXIS 1, * 18-19 (Dec. 15, 1999)(emphasis in original). *See also In re Schering-Plough,* Order on American Home Products Corporation's and Schering Plough Corporation's Motions to Compel and on Non-Parties ANDRX Pharmaceutical Inc.'s and Aventis Pharmaceutical Inc.'s Motion for Protective Order at 5 (Sept. 7, 2001) (limiting production to documents reviewed or relied on by complaint counsel or provided to testifying expert).

Judge Chappell's decisions are consistent with a long line of precedent. In *Sperry and Hutchinson Company v. F.T.C.*, 256 F. Supp. 136, 144 (S.D.N.Y. 1966), the Court explained:

> [To] hold, as Sperry urges, that a respondent is . . . entitled to a complete disclosure of the Commission's files would be to fashion a new rule in administrative proceedings of very wide implications would not be in the public interest. No authority has been cited to me which approves such a rule and I know of none.

As has been reiterated regularly since *Sperry*, there is no right to search beyond the documents considered by complaint counsel in bringing the case. *In Re Abbott Laboratories*, 1992 FTC Lexis 296, *7-8 (Dec. 15, 1992) (striking an instruction in a subpoena "to the extent it purports to require a search of the entire Commission for responsive documents; only files in the custody or control of complaint counsel need be searched."); *In Re Kroger Company*, 1977 FTC Lexis 55, *4 (Oct. 27, 1977) ("The Commission's prior proceedings, including formal proceedings, investigations, compliance proceedings and proposed rulemaking proceedings, are beyond the scope of legitimate discovery in the instant proceeding.").

Respondents counter with a case that involves the standard for the review of agency rule-making (not adjudication); yet, even the standard enunciated in that case entitles the Respondents to nothing more than what they have already received. *Exxon Corp. v. Dep't of Energy,* 91 F.R.D. 26, 36 (N.D. Tex. 1981) holds that only the documents considered by the relevant decision-makers

should be subject to discovery. In this matter, the only "relevant decision-makers" will be from the offices of Administrative Law Judges and the offices of the Commissioners. Depositions and expert reports from other cases will not be a part of the administrative record.

Respondents cite *Exxon* for the proposition that it is entitled to "staff statements." The section quoted by Respondents relates to an argument concerning the contemporaneous construction of an agency regulation, not, as here, a potential appeal of an administrative adjudication. Moreover, the *Exxon* court denied the request for staff statements because such discovery request was unduly burdensome. *Id.* at 42. There is no dispute that complaint counsel has provided all the documents responsive to these requests that have been reviewed by or relied upon by complaint counsel. Accordingly, under *Exxon*, Respondents are entitled to no more than what they have already received.

II. The Discovery Requests at Issue Are An Improper Attempt to Compel Complaint Counsel to Conduct Legal Research for Respondents

As is clear from the very language of the requests, Respondents are not seeking facts through this motion to compel. The requests are for "papers, economic analyses, expert reports and transcripts of testimony" related to "the appropriate legal or economic standard" to be applied in this case.[1] Respondents cite no case in which discovery requests for such materials have been upheld, and the precedent is to the contrary.

In *U.S. v. Schichman*, 2001 U.S. Dist. Lexis 3199, *10-11 (E.D.N.Y. 2001), the defendants requested from the Internal Revenue Service all "policy statements" related to the legal issue of who is a responsible person for purposes of assessing penalties. The District Court refused to compel the

[1] Respondents' Motion to Compel Production of Documents and Incorporated Memorandum of Law In Support Thereof, Exhibits "A" and "C."

requested discovery: "The undersigned agrees that the broad request for 'all subsequent policy statements' is burdensome and asks the government to do the defendant's research."[2]

Similarly, in *National Advanced Systems v. U.S.*, 795 F. Supp. 1208, 1210 (U.S. Ct. of Int'l Trade 1992), the court refused to compel discovery where the plaintiffs were "asking the government to supply them with information provided in judicial rulings and findings, textbooks, treatises, dictionaries and the like." The court explained that the private party was "entitled to complete factual background of this case in order to adequately prepare for trial, but it cannot expect the government to perform its research." *Id.*

Respondents state that the documents sought by this motion may be used to cross-examine the Commission's experts. This does not alter the fact that the materials sought relate to the legal issues in this case, and not to any factual issues. Moreover, complaint counsel's experts will be testifying on economic and industry-related issues, not legal arguments. To the extent that Respondents seek to question complaint counsel's economic and industry experts about legal issues, such questioning is objectionable and should be prevented.

None of the cases cited by Respondents permit the broad discovery they seek in this case. Indeed, all of the cases they cite stand for the unremarkable proposition that a respondent in litigation against the Government is entitled to learn the facts that the Government intends to rely upon in presenting its case. It is undisputed that all factual materials have already been supplied to the Respondents, rendering these holdings completely inapplicable to Respondents' Motion for documents prepared in other, unrelated cases.

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[2] The Court did require the Government to produce to the Court for *in camera* inspection the factual documents related to the specific case under review. *Schichman*, 2001 U.S. Dist. Lexis 3199, *11-12. In this case, complaint counsel has already provided to Respondents the documents related to this specific case.

Respondents' reliance upon *U.S. v. Capitol Service, Inc.*, 89 F.R.D. 578 (E.D. Wisc. 1981), is misplaced. The defendant made a specific showing that the Government's prior sanctioning of certain motion picture split agreements was factually relevant to its defense because the Department of Justice had been regulating this practice under two consent decrees. *Id.* at 581. The court allowed discovery into the Department of Justice's actions with regard to the split agreements in the market identified in the complaint. *Id.* at 582. However, the Court declined to require the production of information concerning split agreements in other markets. The discovery denied by the court in *Capitol Service* is in fact more narrowly tailored than the discovery sought by Respondents in this case. The *Capitol Service* defendants sought discovery regarding the facts of a specific case. The Respondents in this case seek opinions of Commission staff on any case or project that anyone has worked on since January 1, 1990. Contrary to Respondents' contention in their brief, nowhere does the *Capitol Service* court expand discovery to include "staff statements" concerning the split agreements.

Likewise, *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26 (N.D. Tex. 1981) stands for nothing more than the proposition that an agency must make available to a respondent the entire administrative record related to an adverse decision against the respondent. As the *Exxon* court emphasized: "Discovery to complete the record is not to be broad-ranging. Its primary function is to offer assurance that the administrative record is complete in areas where completeness is suspect." *Id.* at 34. The *Exxon* court never sanctioned (1) delving into the files of agency staff matters unrelated to the challenged action; or (2) the search of files other than those of "the relevant decision-makers." *Id.* at 36.

III. The Discovery Sought by Respondents is Tangential, At Best, to the Issues At Hand

Respondents do not contend that the documents they seek are relevant factually or could be introduced into evidence in this case. Instead, they spin conjecture about documents that, if they exist, may help to bolster Respondents' legal arguments. However, it is clear that, other than the documents that are publicly available, and therefore equally available to Respondents and complaint counsel, the documents sought will provide no real assistance to them.

First, the articles, guidelines, directives, and manuals that Respondents seek are available in published reporters, treatises, law journals, and via on-line services. To the extent that the relevant decision-makers themselves have expressed an opinion that could be considered persuasive, the vast majority of these are publicly available. For example, articles written by various Commissioners and Bureau Directors are available on Lexis/Nexis, and speeches given by Commissioners and Bureau Directors at the Commission since 1995 are publicly available at http://www.ftc.gov/speeches/speech1.

Any responsive documents not found in these public sources will have little, if any, value. What a Commission staff attorney may have said in an unpublished paper, or what an expert retained by the Commission may have opined in an unrelated matter involving different parties will have little, if any, bearing in this case. This would not be precedent, and whatever minor persuasive force these documents may have would be outweighed by the cumbersome and time-consuming process of understanding the context in which these statements arose.

IV. Given the Marginal Relevance, Respondents' Request is Unduly Burdensome

While the documents sought by Respondents are marginally relevant at best, the burden of complying with Respondents' requests would be enormous. Complaint counsel would be obligated to contact hundreds of lawyers, economists, and other employees of the Commission and ensure the search of their files. Complaint counsel would also have to retrieve from archives and search the files of each and every closed investigation and litigation from the past twelve years to determine if there were any statements made to any parties in those cases about any one of the broad topics advanced by Respondents.[3] There would also be an arduous process to determine which of the documents may be subject to the deliberative process or other privileges, and which documents would be shielded from disclosure by applicable law. In addition, expert reports and transcripts of testimony may contain information designated as Confidential pursuant to a Protective Order (such as the Protective Order in this case), and complaint counsel would have to provide notice to these parties and give them an opportunity to object.

Respondents offer no suggestions as to how to limit this search, relying instead on the uninformed conjecture that such a search is not burdensome. The *Exxon* case, which the Respondents rely upon, is contrary to Respondents' position. The *Exxon* court recognized that "there is a point of diminishing relevance where the likelihood of aid in the interpretive task no longer justifies discovery." Exxon Corp., 91 F.R.D. at 42. Accordingly, the court refused to order discovery of the "administrative record" of each contemporaneous interpretation of the regulation at issue, and required that defendants identify specific persons or conversations thought to be relevant. *Id.*

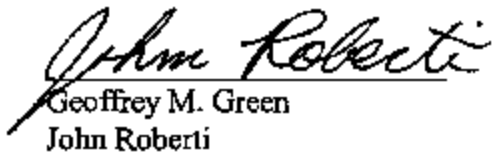
[3] Such a task would entail a search of hundreds, if not thousands, of case, personal, and investigative files. This is exacerbated by the vague and overbroad nature of the requests. Requests for "papers" and "economic analyses" are so broad as to encompass virtually every document imaginable.

In this case, the excessive burden is exacerbated by Respondents' delay in bringing this motion. Discovery in this matter closed on December 21, 2001. Despite the fact that complaint counsel made its position clear to respondents on November 13, 2001[4], Respondents' Motion to Compel was filed on January 8, 2002, more than two weeks after the close of discovery. If this motion is granted, complaint counsel will be chasing down boxes and boxes of documents and combing through them for passing references to "free riding" and "opportunistic behavior," all within the final three weeks before trial.

Conclusion

For all of the reasons stated herein, Respondents' motion to compel should be denied.

Respectfully Submitted



Geoffrey M. Green
John Roberti
Melissa Westman-Cherry

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C.

Dated: February 1, 2002

[4] Respondents' Motion to Compel Production of Documents and Incorporated Memorandum of Law In Support Thereof, Exhibit "B."

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ORDER DENYING RESPONDENTS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS

For the reasons set forth in Complaint Counsel's Memorandum in Opposition to Respondents' Motion to Compel Production of Documents, and for good cause shown, Respondents' Motion to Compel Production of Documents **IS DENIED**

ORDERED:

James P. Timony
Chief Administrative Law Judge

Date:_____

CERTIFICATE OF SERVICE

I, Melissa Westman-Cherry, hereby certify that on February 1, 2002 I caused a copy of Complaint Counsel's Memorandum of Law in Opposition to Respondents' Motion to Compel Production of Documents to be served upon the person listed below by hand:

The Honorable James P. Timony
Chief Administrative Law Judge
The Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

I, Melissa Westman-Cherry, hereby certify that on February 1, 2002 I caused a copy of Complaint Counsel's Memorandum of Law in Opposition to Respondents' Motion to Compel Production of Documents to be served upon the person listed below by facsimile and U.S. Mail:

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

Melissa Westman-Cherry