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ADMITTED IN NEW YORK AND BRUSSELS

ADMITTED ONLY TO A BAR OTHER THAN THAT OF
THE DISTRICT OF COLUMBIA, WORKING UNDER THE
SUPERVISION OF A PRINCIPAL OF THE WASHINGTON F

November 2, 2001

BY HAND

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20006



Re: FTC v. Polygram Holding, Inc., et. al., Docket No. 9298

Dear Mr. Clark,

On behalf of our client, Warner Communications, Inc., we submit the following documents:

1. Warner Communications Inc.'s Request for Leave to File a Reply Brief;
2. Order Granting Leave to File Reply in Support of Warner Communications Inc.'s Motion to Modify the Protective Order Governing Discovery Material and to Rebut New Assertions Set Forth by Respondents in their Response to Warner's Motion to Modify the Protective Order Governing Discovery Material;
3. Warner Communications Inc.'s Reply Memorandum in Support of Warner Communications Inc.'s Motion to Modify the Protective Order Governing Discovery Material and to Rebut New Assertions Set Forth by Respondents in their Response to Warner's Motion to Modify the Protective Order Governing Discovery Material; and
4. Certificate of Service.

Donald S. Clark, Secretary, p. 2

Please acknowledge receipt of this letter and its enclosures by date-stamping the enclosed copy of this letter and returning it to our waiting messenger.

Should you have any questions, please do not hesitate to contact me at (202) 974-1920.

Very truly yours,

George S. Cary / TD

George S. Cary

Enclosures

**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



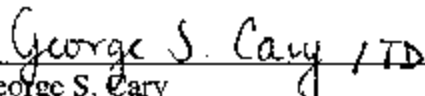
**WARNER COMMUNICATIONS INC.'S REQUEST
FOR LEAVE TO FILE A REPLY BRIEF**

Pursuant to Rule 3.22(c) of the Federal Trade Commission Rules of Practice for Adjudicatory Proceedings, 16 C.F.R. § 3.22(c) (2001), Warner Communications Inc. ("Warner") respectfully requests leave to file the attached Reply Memorandum in support of its Motion to Modify the Protective Order Governing Discovery Material and to rebut new assertions set forth by Respondents in their Response to Warner's Motion to Modify the Protective Order Governing Discovery Material. Respondents' do not oppose Warner's Motion to Modify the Protective Order. However, Respondents seek an order requiring Warner "not to over-designate." Through this approach, Respondents de facto seek to change the terms of the protective order so as to shift the burden and expense of reviewing documents to Warner, a third party. Warner respectfully requests that the unopposed protective order¹ be entered and that Respondents procedurally and substantively inappropriate "response" be denied.

¹ Warner's proposed protective order as modified by the FTC without objection.

Warner respectfully submits that the attached Reply Memorandum rebuts Respondents' new assertions and will further assist Your Honor in considering Warner's Motion to Modify the Protective Order.

Respectfully submitted,


George S. Cary

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Counsel for Warner Communications Inc.

Dated: November 2, 2001

**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.)	
_____)	

**ORDER GRANTING LEAVE TO FILE REPLY IN SUPPORT OF WARNER
COMMUNICATIONS INC.'S MOTION TO MODIFY THE PROTECTIVE ORDER
GOVERNING DISCOVERY MATERIAL AND TO REBUT NEW ASSERTIONS SET
FORTH BY RESPONDENTS IN THEIR RESPONSE TO WARNER'S MOTION TO
MODIFY THE PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

IT IS HEREBY ORDERED that Warner Communications Inc.'s motion for leave to file Reply Memorandum in Support of its Motion to Modify the Protective Order Governing Discovery Material and to Rebut New Assertions Set Forth by Respondents in their Response to Warner's Motion to Modify the Protective Order Governing Discovery Material is GRANTED.

James P. Timony
Chief Administrative Law Judge

Dated: November ____, 2001

**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.)	
_____)	

**WARNER COMMUNICATIONS INC.'S REPLY MEMORANDUM
IN SUPPORT OF WARNER COMMUNICATIONS INC.'S MOTION TO MODIFY THE
PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL AND TO REBUT
NEW ASSERTIONS SET FORTH BY RESPONDENTS IN THEIR RESPONSE TO
WARNER'S MOTION TO MODIFY THE
PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL**

Warner Communications Inc. ("Warner") respectfully submits this reply in support of its Motion to Modify the Protective Order Governing Discovery Material ("Warner's Motion") and to rebut new assertions set forth by Respondents in their Response to Warner's Motion.

Argument

The proposed protective order ("Protective Order") entered in this matter on Tuesday, October 16, 2001, was the product of an agreement between the Federal Trade

Commission ("FTC") and Respondents; Warner was not privy to this version of the protective order before it was entered. Contrary to Respondents' assertion, after reviewing an earlier version of the proposed protective order, Warner expressed its confidentiality concerns numerous times to Glenn Pomerantz for the Respondents and Geoffrey Green for the FTC. The sole reason Warner was forced to seek modification of the Protective Order in this Court was the fact that Warner's legitimate concerns regarding unjustifiable disclosure of its confidential commercial information were simply not addressed by the aforementioned Protective Order. Neither the FTC nor Respondents oppose Warner's Motion suggesting that Warner's concerns are well founded. Warner's modifications to the Protective Order should therefore be accepted.

This should be the end of the issue. However, Respondents now seek from this Court an instruction to require Warner to re-assess its confidentiality designations already provided for in the Protective Order. In essence, Respondents have filed a counter motion without following the Commission's procedural rules. FTC Rule of Practice 3.22(c).

The Protective Order entered by the Parties in this case states unequivocally that:

All documents heretofore obtained by compulsory process or voluntarily from any Party or Third Party, regardless of whether designated by the Party or Third Party ... that were obtained during the precomplaint stage of this Matter shall be treated as Confidential Discovery Material. Materials previously produced by Respondents or a Third Party, and designated as "Confidential" ... shall be treated as Confidential Discovery Material.²

Based upon this provision, Warner sent the Parties a letter on October 19, 2001, confirming that its commercially sensitive information produced to the FTC during the pre-complaint stage of this matter will, in fact, be treated as such i.e. as "Confidential Discovery Material." Should Respondents' wish to disclose Warner's confidential documents to certain of its identified

² Protective Order ¶3 (as modified).

employees³, the protective order clearly provides for Respondents' to challenge such confidentiality designations and to move documents to the less protected category. Protective Order ¶8(c). Thus, there was no "purposeful over-designation" of documents by Warner in this matter. Warner, as a third party, simply followed the terms of the Protective Order. Furthermore, at no time did Warner "indicate its unwillingness to reconsider" the confidentiality designations provided for by the Protective Order to Respondents or anyone else; Respondents did not ever respond to Warner's October 19, 2001 letter.

The protections sought in Warner's Motion are not unusual and maintain Warner's legitimate interests in its confidential information while not unduly hindering Respondent. If Respondents' want to show Warner's documents to its identified employees, then they simply need to request that those documents be re-designated to the lower level of protection. In essence, Respondents are seeking to shift the burden and expense of reviewing the documents from the Parties (who need to review all the documents anyway) to non-parties, such as Warner.

The Protective Order quite appropriately puts the burden of review on the Parties for two reasons: (i) a non-party has no reason to know which particular confidential documents a Party may wish to show to its employees in preparation for trial; and (ii) it is more efficient and less burdensome to require Parties to review such documents than to require non-parties to re-review all its confidential documents previously submitted to the government. These efficiencies are not only appropriate and consistent with past practices of the Commission, but also have

³ Disclosure to Respondents' employees would be subject to the protections outlined in paragraph 5 of Warner's proposed protective order submitted with its Motion, if approved by this Court.

already been taken into account by the procedural mechanisms built in to the Protective Order as modified without objection.

There is no reason to believe that the mechanism agreed to by the FTC and Respondents and ordered by this Court for re-designating documents to a lower category of confidentiality will result in the “likelihood of additional motion practice.” Respondents need only review Warner’s documents at the outset (as they must in any event), and ask Warner under ¶8(c) of the Protective Order to re-designate those documents that they wish to show with employees as “Protected Discovery Material.” Warner will consider the request in good faith and will comply with the Protective Order. There is no reason to believe that this will force the parties to return to this Court for a determination. Such procedure provides Respondents with access to the documents and third parties with protection from unwarranted disclosure of confidential business information, and should not burden the Court.

Conclusion

Aware of the time pressures on the Parties' and their need for access to its confidential documents, Warner narrowly tailored its request to modify the protective order. Respondents, although readily agreeing to Warner's modifications, now seek from this Court an instruction to require Warner to re-assess the protection it needs in contradiction of the protective order they do not oppose. In doing so, Respondents shift the burden and expense of review onto Warner, a non-party, and circumvents the Commission's procedural rules. For the foregoing reasons, Warner respectfully requests that this Court grant Warner's Motion to Modify the Protective Order Governing Discovery Material and deny Respondent's adhoc request to alter specific provisions of the Protective Order.

Respectfully submitted,

George S. Cary /TD

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Counsel for Warner Communications Inc.

November 2, 2001.

CERTIFICATE OF SERVICE

I, George S. Cary, hereby certify that on November 2, 2001, I caused a true and correct copy of *Warner Communications Inc.'s Motion for Leave to File a Reply Memorandum in support of its Motion to Modify the Protective Order Governing Discovery Material ("Warner's Motion") and to Rebut New Assertions Set Forth by Respondents in their Response to Warner's Motion*, and the *Reply Memorandum* in support thereof, to be served upon the following persons by hand delivery or facsimile and Federal Express:

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