

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

**ORDER IN LIMINE REGARDING THE TESTIMONY OF RICHARD CONSTANT**

Complaint counsel has moved, Pursuant to Commission Rule of Practice 3.43(b), for an order limiting the testimony of Richard Constant to the subject of PolyGram's business structure in 1998, and precluding Respondents from introducing evidence, through the testimony of Richard Constant, about PolyGram's decision whether to implement restrictions on pricing and discounting of the 1990 and 1994 Three Tenors albums. Having considered the submissions of the parties, and for good cause shown, **IT IS HEREBY ORDERED** that the trial testimony of Richard Constant shall be limited to the subject of PolyGram's business structure in 1998.

Evidence in the form of testimony from Richard Constant 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 is inadmissible under Rule 3.43(b) of the Commission's Rules of Practice, and Respondents shall not present such testimony at trial.

ORDERED:

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James P. Timony  
Chief Administrative Law Judge

Date: February \_\_, 2002

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and	)	
	)	
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DISTRIBUTION CORP.,	)	
a corporation.	)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION  
IN LIMINE REGARDING THE TESTIMONY OF RICHARD CONSTANT**

Pursuant to Rule 3.43(b) of the Commission's Rules of Practice, 15 C.F.R. §3.43(b), complaint counsel respectfully requests that the Court enter the attached proposed Order in Limine Regarding the Testimony of Richard Constant.

The Complaint in this matter alleges an agreement between competitors PolyGram and Warner to fix prices and forgo advertising (the "moratorium agreement"). PolyGram denies the existence of the moratorium agreement, and further claims that if such agreement was adopted, it was not implemented.

Richard Constant, an in-house lawyer for PolyGram, has been identified by Respondents as a prospective trial witness to testify concerning PolyGram's implementation of the Three Tenors moratorium agreement. And yet, when questioned on this subject at his deposition, Mr. Constant repeatedly invoked the attorney-client privilege, and declined to provide any meaningful responses. As he has declined to address the Three Tenors moratorium agreement during discovery, Mr. Constant must likewise be barred from addressing this subject at trial.

### **BACKGROUND**

On January 18, 2002, Respondents filed their proposed witness list in this matter. Second on the list of prospective witnesses, Respondents identified Richard Constant, together with the following description of proposed testimony: "Mr. Constant will testify [1] concerning PolyGram's business structure in 1998 and [2] concerning PolyGram's decision not 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." Respondents Polygram Holding, Inc, Decca Music Group, Ltd., UMG Recordings, Inc. and Universal Music & Video Distribution Corp.'s Proposed Witness List, Designations of Deposition Testimony, and Exhibit List of January 18, 2002 at p.3.

On November 28, 2001, complaint counsel took Mr. Constant's deposition. Mr. Constant responded satisfactorily to questions about [1] PolyGram's business structure in 1998. However, when asked about [2] PolyGram's consideration of whether to implement the moratorium agreement, Mr. Constant (and his lawyer) repeatedly invoked the attorney-client privilege. As a result, complaint counsel was substantially precluded from learning whatever it is that Mr. Constant may know about the subject.

Mr. Constant stated only that he was consulted by PolyGram personnel with regard to the agreement with Warner to restrict price competition.<sup>1</sup> However, Mr. Constant declined to disclose who at PolyGram decided whether the company would implement the moratorium agreement,<sup>2</sup> why certain PolyGram personnel wanted to implement the moratorium agreement,<sup>3</sup> the substance of several communications within PolyGram surrounding the decision whether to implement the moratorium agreement,<sup>4</sup> whether Mr. Constant concluded that implementation of the moratorium agreement was illegal,<sup>5</sup> what instructions Mr. Constant gave to PolyGram personnel on the subject of the moratorium agreement,<sup>6</sup> and whether the actions of PolyGram personnel with regard to implementation of the moratorium agreement were or were not related in any way to their communications with Mr. Constant.<sup>7</sup>

Given that Mr. Constant's personal knowledge regarding PolyGram's decision whether to implement the moratorium agreement consists entirely of (assertedly) privileged communications, what can Mr. Constant offer this Court at trial? First, Mr. Constant's trial

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<sup>1</sup> Transcript of Deposition of Richard Constant ("Constant Tr.") (Nov. 28, 2001) at 31. Attached hereto as Exhibit A.

<sup>2</sup> Constant Tr. at 60-61, 63.

<sup>3</sup> Constant Tr. at 58-60.

<sup>4</sup> Constant Tr. at 31-32.

<sup>5</sup> Constant Tr. at 53-54.

<sup>6</sup> Constant Tr. at 36.

<sup>7</sup> Constant Tr. at 48-49.

testimony may consist of information that was withheld during discovery.<sup>8</sup> Second, Respondents may argue that the mere fact of a lawyer's involvement in the decision-making process supports the claim that the moratorium agreement was not implemented.<sup>9</sup> As discussed below, both of these strategies would be improper.

Complaint counsel disputes Respondents' claim that non-compliance with a price-fixing agreement is a valid defense.<sup>10</sup> Mr. Constant's testimony regarding implementation of the moratorium is for this reason irrelevant and should be precluded. However, we do not press this argument for purposes of the present motion. Even assuming that implementation of the moratorium agreement is a relevant issue, Mr. Constant should not be permitted to address this matter at trial.

#### ARGUMENT

A motion in limine may be made before trial to exclude anticipated inadmissible or prejudicial evidence before the evidence is actually offered. *Dura Lube Corp.*, FTC Dkt. No. 9292, 1999 FTC LEXIS 252, \*2 (Oct. 22, 1999) (Order Granting in Part and Denying in Part

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<sup>8</sup> That this may be Respondents' intention is suggested by Respondents' Response to Complaint Counsel's Interrogatory No. 2, which offered a vague and incomplete description of Mr. Constant's now "privileged" communication with PolyGram manager Paul Saintilan.

<sup>9</sup> This explanation was advanced by counsel for Respondents during the deposition of Mr. Constant. Constant Tr. at 38 ("I think what we [counsel for Respondents] would expect the evidence to show is that the business people within PolyGram sought legal advice, received legal advice and then certain actions followed. We would not intend to offer the substance of that advice.").

<sup>10</sup> See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n. 59 (1940) (Section 1 condemns anticompetitive restraints "whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.").

Complaint Counsel's Motion in Limine); *see also Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984); *Kansas v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979).

Mr. Constant should not be permitted to withhold testimony during discovery and later spring his testimony on complaint counsel and the Court during trial (Point I, *infra*). In addition, Mr. Constant should not be permitted to testify that he provided legal advice relevant to an issue in this case without fully disclosing the substance of the relevant communications (Point II, *infra*).

**I      Mr. Constant Cannot Testify at Trial about  
Matters that He Refused to Address at His Deposition**

It is well established that a party cannot, based on an assertion of privilege, refuse to give testimony about a subject during a deposition and then testify about that same subject at trial. *International Telephone and Telegraph Corporation v. United Telephone Co. of Florida*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) ("Fundamental fairness and justice requires that if the defendant intends to waive the privilege at trial by the introduction of evidence within that privilege, then the defendant will be required to allow discovery with regard to matters material to that testimony."); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("Since the same rules of privilege govern the scope of discovery as generally govern the admissibility of evidence at trial, a party may obtain pretrial discovery of materials allegedly subject to the attorney-client privilege . . . where the protection of the privilege will be waived at the trial."); *Fox v. California Sierra Financial Services*, 120 F.R.D. 520, 530 (N.D. Cal. 1988) ("Defendants cannot conceal such information from discovery and expect to spring it upon plaintiffs in the midst of trial for the sake of obtaining a tactical advantage in litigation . . . . If

the holder intends to consent to the waiver of the attorney-client privilege at trial, such intention must be disclosed during the discovery stage and any information as to which the privilege will be waived must be made available to the opposing party through discovery so as not to afford the one party an unfair advantage at trial.”); 6 Moore's Federal Practice § 26.49[5] (Matthew Bender 3d ed.). *See also Nick Istock, Inc. v. Research-Cottrell, Inc.*, 74 F.R.D. 150, 151 (W.D. Pa. 1977).

During his deposition, Mr. Constant declined to respond to relevant questions concerning Respondents' claim that PolyGram decided not to implement the moratorium agreement. Plainly, Mr. Constant should be barred from giving testimony at trial on matters that he refused on privilege grounds to discuss during his deposition.

**II Because Mr. Constant Declined to Disclose the Content of His Communications, any Testimony that He Provided Legal Advice is Irrelevant and Prejudicial**

Respondents contend that they received advice from counsel and thereafter decided not to implement the price-fixing agreement with Warner. If Respondents are placing their reliance on legal advice in issue, then there is a waiver of the attorney-client privilege; if Respondents are not (implicitly or explicitly) asserting their reliance on the advice of counsel, then the fact of the consultation is irrelevant – and should be excluded.<sup>11</sup> Respondents cannot simultaneously claim that they received legal advice from Mr. Constant, that this advice is relevant to the issues in this case, and that the substance of this advice is protected from disclosure.

A party may not use the attorney-client privilege as both a “shield” and a “sword,” selectively disclosing portions of communications for self-serving purposes. *United States v.*

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<sup>11</sup> *See* Commission Rule of Practice § 3.43(b) (“Relevant, material, and reliable evidence shall be admitted. Irrelevant immaterial, and unreliable evidence shall be excluded.”).



*Bilzerian*, 926 F. 2d 1285, 1292 (2<sup>nd</sup> Cir. 1991). When a litigant places into issue its executive's reliance on an attorney's advice, the opposing party must be permitted full discovery concerning the underlying communications:

The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice – whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.

*Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3<sup>rd</sup> Cir. 1995).

At deposition, Respondents asserted that Mr. Constant's relevant communications with PolyGram employees were privileged in their entirety. Standing alone, the contention that PolyGram personnel consulted with Attorney Constant is therefore entirely irrelevant. *Recycling Solutions, Inc. v. Dist. of Columbia*, 175 F.R.D. 407, 409 n.3 (D.D.C. 1997) (if defendants did not intend to raise a reliance-upon-counsel defense, then "reference to their consultation with [counsel] would be superfluous"). Consultation with an attorney does not in itself show good faith, a willingness to reverse course, or a propensity to comply with the law. Perhaps PolyGram's executives were advised by counsel to fabricate a paper record merely purporting to show that the company was not complying with the moratorium agreement. Invoking the attorney-client privilege, Mr. Constant declined to confirm or deny that this was the company's scheme.<sup>12</sup>

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<sup>12</sup> Constant Tr. at 40-41. Another possibility is that PolyGram's decision whether to implement the moratorium agreement was entirely unrelated to the consultation with Mr. Constant. Indeed, Mr. Constant declined to disclose whether or not the actions of PolyGram managers following the attorney-client communication were related to that communication. Constant Tr. at 48-49.

Respondents apparently will ask the Court to infer from the fact of attorney consultation that PolyGram was advised to abandon the moratorium, and therefore acted accordingly. The Court is left to infer (on what basis?) the contents of a conversation only because Respondents are asserting a privilege. This is not only speculative (see above), but legally improper. Respondents are by inference raising an advice of counsel defense, but denying complaint counsel and the Court the opportunity to examine the underlying facts (“whether counsel gave a well-informed opinion and whether that advice was heeded by the client.”<sup>13</sup>). In order to foreclose this strategem, courts refuse to recognize any distinction between a defendant’s asserting the “act” of legal consultation, and asserting reliance on legal advice. Both claims effectively waive the attorney-client privilege. *Recycling Solutions, Inc. v. Dist. of Columbia*, 175 F.R.D. 407, 409 n.3 (D.D.C. 1997); *ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765, 767 (D. Del. 1994).

In *ML-Lee Acquisition*, the Lee Defendants were charged with acting in reckless disregard of the requirements of the securities laws. Defendants responded with the assertion that they had acted after consulting counsel, but denied that they were relying on the substance of the advice they received from counsel. On this basis, Defendants refused to produce relevant attorney-client communications. The court viewed this distinction as irrelevant:

The Lee Defendants respond by first denying that they have raised a reliance on the advice of counsel defense. The Lee Defendants assert that they have raised the “act” of consulting counsel to rebut Plaintiffs’ allegations of acting in reckless disregard of the requirements of the 1940 Act, as opposed to relying upon any substantive advice received from counsel. The Court is unpersuaded by the Lee Defendants’ distinction. Even if the Lee Defendants intend only to rely on the act

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<sup>13</sup> *Glenmede Trust*, 56 F.3d at 486.

of seeking advice from counsel to show they behaved in good faith, Plaintiffs are entitled to test the validity and sincerity of that action.

*ML-Lee Acquisition*, 859 F. Supp. at 767. The court further concluded that, in light of the claim that the Lee Defendants sought advice from counsel, plaintiffs were entitled to a fair and adequate opportunity to test that claim and offer rebuttal. The privilege had been waived:

[P]laintiffs are entitled to know, for example, whether the Lee Defendants disclosed all material facts to counsel, whether counsel gave an otherwise well-informed opinion, did the Lee defendants follow the advice from counsel.

*ML-Lee Acquisition*, 859 F. Supp. at 767.

As discussed in Point I, *supra*, it is too late in the day for Respondents to waive the attorney-client privilege with regard to communications with Mr. Constant. Considerations of fairness and relevance require that Mr. Constant be precluded from testifying as to these communications, and even from asserting that such communications occurred.<sup>14</sup>

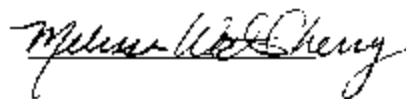
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<sup>14</sup> Alternatively, if the Court decides to permit this testimony then Respondents should be ordered to produce immediately those written communications with Mr. Constant that are being withheld from complaint counsel under a claim of attorney-client privilege.

## CONCLUSION

For the reasons stated above, complaint counsel respectfully requests that the Court issued an Order in Limine limiting Mr. Constant's trial testimony to the one subject that he addressed at deposition: PolyGram's business structure in 1998. Mr. Constant should not be permitted to testify regarding PolyGram's decision whether or not to implement any restriction on pricing and discounting of the 1990 and 1994 Three Tenors albums during 1998. A proposed Order is attached hereto.

Respectfully submitted,



Geoffrey M. Green  
John Roberti  
Melissa Westman-Cherry

Counsel Supporting the Complaint

Bureau of Competition  
Federal Trade Commission  
Washington, D.C.

Dated: January 25, 2002

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**In The Matter Of:**

*POLYGRAM HOLDING, INC., ET AL.*  
*MATTER NO. DO9298*

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*RICHARD CONSTANT*  
*November 28, 2001*

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*For The Record, Inc.*  
*Court Reporting and Litigation Support*  
*603 Post Office Road*  
*Suite 309*  
*Waldorf, MD USA 20602*  
*(301) 870-8025 FAX: (301) 870-8333*

*Original File 11128CON.ASC, 103 Pages*  
*Min-U-Script® File ID: 4142717145*

**Word Index included with this Min-U-Script®**

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(4)

(5) EXHIBITS FOR ID DESCRIPTION

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(7) stamp UMG 006322 and

(8) UMG 006324

(9) No. 2 71 Document bearing Bates

(10) stamp UMG 004189 through

(11) UMG 004192

(12)

(13) QUESTIONS NOT ANSWERED:

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- (11) APPEARANCES:
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- (31)
- (32)
- (33)
- (34)
- (35)

(1) FEDERAL TRADE COMMISSION

(2)

(3) In the Matter of: )

(4) POLYGRAM HOLDING, INC., )

(5) a corporation, )

(6) BECCA MUSIC GROUP LIMITED, )

(7) a corporation, )

(8) UMG RECORDINGS, INC., )

(9) a corporation, ) Docket No. 9268

(10) and )

(11) UNIVERSAL MUSIC & VIDEO )

(12) DISTRIBUTION CORP. )

(13) a corporation, )

(14)

(15)

(16)

(17) Wednesday, November 28, 2001

(18) 10877 Wilshire Boulevard

(19) Suite 700

(20) Los Angeles, California

(21)

(22) The above-entitled matter came on for

(23) deposition pursuant to notice of 9:35 a.m.

(24)

(25)

(1) PROCEEDINGS

(2)

(3) RICHARD CONSTANT, having been first

(4) placed under oath by the Certified Shorthand Reporter

(5) of the State of California, was examined and testified

(6) as follows:

(7)

(8) EXAMINATION

(9) BY MR. GREEN:

(10) Q: Please state your name.

(11) A: Richard Constant.

(12) Q: Mr. Constant, my name is Geoffrey Greene.

(13) I'm a lawyer from the Federal Trade Commission.

(14) I will be asking you a series of questions

(15) this morning. If at any point you don't understand

(16) the question, indicate that you don't understand it

(17) and I will rephrase it.

(18) If at any point you don't hear the question,

(19) ask me to repeat it. Is that clear?

(20) A: Yes.

(21) Q: Are you employed, Mr. Constant?

(22) A: Yes.

(23) Q: By what firm are you employed?

(24) A: Universal Music International Limited.

(25) Q: Is Universal Music International Limited a

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1 Q: Right.  
2 A: I beg your pardon. Not the people that  
3 reported directly to me, no.  
4 Q: Did anybody who to you indirectly have  
5 responsibility for U.S. operations?  
6 A: Yes, because I was the general counsel of  
7 PolyGram N.V. and, therefore, my responsibilities were  
8 global rather than as they are now, all outside of  
9 North America.  
10 Q: So who among the people that reported to you  
11 indirectly had responsibility for U.S. operations?  
12 A: They would be the legal and business affairs  
13 staff in United States.  
14 Q: Did Eric Kronfeld report to you —  
15 A: No.  
16 Q: — indirectly?  
17 Did Rand Hoffman?  
18 A: Yeah. He had a dotted line to me, yes.  
19 Q: Mr. Hoffman did —  
20 A: Yeah.  
21 Q: — but not Mr. Kronfeld?  
22 A: Mr. Kronfeld was chief operating officer of  
23 PolyGram N.V. in the United States.  
24 Q: Okay, and who else in the United States had  
25 reported to you directly or indirectly?

1 A: It was merely a dotted line, so on day-to-day  
2 matters he reported, I believe in to Eric Kronfeld.  
3 Q: What does a dotted line signify?  
4 A: It means that you have a functional — a  
5 functional, as opposed to an operational. I don't  
6 know whether that makes it any clearer. If there were  
7 sort of matters of legal policy, matters like that,  
8 then I would — I would probably speak to Rand, but in  
9 matters of the deals he was involved in, he would  
10 reported in to, as I believe it was Eric Kronfeld.  
11 Q: And Lisa Rothblum, as she also a dotted  
12 line —  
13 A: Yes.  
14 Q: — report to you?  
15 Yes?  
16 A: Yes.  
17 Q: Do you know the name Jim Harrold,  
18 I-a-r-r-o-l-d?  
19 A: I know a Tim Harrold, but I don't know Jim  
20 Harrold.  
21 Q: Is there a Tim Harrold —  
22 A: Tim Harrold.  
23 Q: — with PolyGram.  
24 What was his position?  
25 A: He was head of Classics, but not in 1998. I

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1 A: You mean names of individuals?  
2 Q: Right.  
3 MR. POMERANTZ: I think it's indirectly. He  
4 has said no one reported directly to him.  
5 BY MR. GREEN:  
6 Q: I will restate it.  
7 Who in the United States reported to you  
8 indirectly during 1998?  
9 A: There were a lot of lawyers.  
10 Q: Who were the most senior people?  
11 A: Lisa Rothblum, Milt Olin, O-l-i-n, Andrew  
12 Lewis, and I could sort of carry on with a lot of  
13 names because there must have been around 25 —  
14 Q: Okay, let me —  
15 A: — in the U.S.  
16 Q: — stop you there for now.  
17 What was Mr. Hoffman's position during 1998,  
18 if you recall?  
19 A: I don't recall his title, but he was based in  
20 the PolyGram U.S. head office in New York doing  
21 general legal and business affairs matters, business  
22 affairs matters I should say, relating to PolyGram's  
23 U.S. operations.  
24 Q: And what was the reporting line from  
25 Mr. Hoffman to you?

1 think he had already retired then.  
2 Q: Head of PolyGram Classics?  
3 A: Yeah.  
4 Q: Mr. Constant, do you expect to be a witness  
5 in this litigation?  
6 A: I don't know.  
7 Q: Have you been told that you will be a  
8 witness?  
9 MR. POMERANTZ: Objection. Instruction not  
10 to answer on grounds of privilege.  
11 BY MR. GREEN:  
12 Q: Have you discussed with anyone other than  
13 your attorneys whether you are going to be a witness  
14 in this —  
15 A: No.  
16 Q: — in this trial?  
17 Has anyone told you that you have been listed  
18 on a witness list submitted by Universal in connection  
19 with this matter?  
20 A: Only in connection with this particular  
21 deposition that I'm doing now.  
22 Q: Not in the context of a subsequent trial —  
23 A: No.  
24 Q: — as I understand it? Okay.  
25 Are you familiar with PolyGram's business



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1 A: It may have been.  
2 Q: And are you familiar with an entity called  
3 PolyGram Group Distribution?  
4 A: Yes.  
5 Q: Okay. And PolyGram Records, Inc. did not  
6 sell albums directly to consumers in 1998; is that  
7 right?  
8 A: I believe that to be the case.  
9 Q: So is there a transfer of rights from  
10 PolyGram Records, Inc. to PolyGram Group Distribution?  
11 MR. POMERANTZ: Let me just — you know, I  
12 think Richard has said he's not sure who gets what  
13 rights. And you have now sort of created this  
14 scenario in which you are accepting as fact something  
15 that he said he doesn't know is fact, which is that  
16 PolyGram Records, Inc. is the licensee within this  
17 PolyGram system. So I just don't want this to keep  
18 building on itself without recognizing that there was  
19 some speculation in his prior answer.  
20 MR. GREEN: Okay, I understand that.  
21 MR. POMERANTZ: If you know the answer to the  
22 question, you can answer.  
23 THE WITNESS: I don't recall whether there  
24 was — there would not have been a — I doubt if there  
25 was a written agreement between PolyGram Records,

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1 Inc., if indeed that was the licensee, and PolyGram  
2 Group Distribution, Inc.  
3 BY MR. GREEN:  
4 Q: Okay. And the PolyGram operating company in  
5 the United States that licensed the rights to the 1990  
6 Three Tenors album paid a licensing fee to PolyGram  
7 International Music; is that right?  
8 A: Yes.  
9 Q: And was that licensing fee referred to in the  
10 company as an all-in-fee?  
11 A: That is correct.  
12 Q: Today is Decca Music Company Limited a  
13 subsidiary of Vivendi Universal S.A.?  
14 A: Did you say Decca Music Company Limited?  
15 Q: Yes.  
16 A: Is Decca Record Company limited? Yes, it is.  
17 Q: Today Decca Record Company Limited is a  
18 subsidiary of Vivendi Universal S.A.; is that correct?  
19 A: Yes.  
20 Q: And I'm going to shift to a different entity  
21 now, PolyGram Holding, Inc. You are familiar with  
22 that entity?  
23 A: Yes.  
24 Q: In 1998, was PolyGram Holding, Inc. a  
25 subsidiary of PolyGram N.V.?

1 A: Yes.  
2 Q: What was the business of PolyGram Holding,  
3 Inc.?  
4 A: It was the — I will start again.  
5 As I recall, it was the ultimate parent of  
6 PolyGram's operations in the United States.  
7 Q: Apart from owning these PolyGram operations,  
8 were there business activities engaged in by PolyGram  
9 Holding during 1998?  
10 A: I'm sorry. Could you restate the question?  
11 Q: Sure.  
12 Do you know what other business activities  
13 were engaged in by PolyGram Holding during 1998?  
14 A: I don't recall whether it was merely a  
15 holding operation or whether it had business  
16 activities.  
17 Q: Do you know how PolyGram Holding derived  
18 revenues during 1998?  
19 A: Apart from dividends from its subsidiary  
20 companies, I don't know.  
21 Q: In 1998, was PolyGram Records, Inc. a  
22 subsidiary of PolyGram Holding, Inc.?  
23 A: I believe so.  
24 Q: What was the business of PolyGram Records,  
25 Inc. during 1998?

1 A: It was the acquisition and marketing of  
2 repertoire in the United States.  
3 Q: How did PolyGram Records, Inc. derive  
4 revenues?  
5 A: I don't recall. I have to say I don't recall  
6 how it would have derived revenues.  
7 Q: During 1998, was PolyGram Classics and Jazz a  
8 division of PolyGram Records, Inc.?  
9 A: I believe so.  
10 Q: Do you know what the business of PolyGram  
11 Classics and Jazz was?  
12 A: It was the acquisition and marketing of  
13 classical and jazz repertoire in the United States.  
14 Q: Do you know how PolyGram Classics and Jazz  
15 derived revenues during 1998?  
16 A: Again, I don't recall.  
17 Q: During 1998, was PolyGram Group Distribution  
18 a subsidiary of PolyGram Holding, Inc.?  
19 A: I believe so.  
20 Q: What was the business of PolyGram Group  
21 Distribution, Inc.?  
22 A: The — start again.  
23 I know it was responsible for the physical  
24 distribution of PolyGram repertoire in the United  
25 States. It might have also been the entity under

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(1) A: PolyGram N.V.'s senior management.  
(2) Q: Could an operating company change a recording  
(3) from top to mid price without the approval of the  
(4) senior management?

(5) MR. POMERANTZ: Objection. Lack of  
(6) foundation. Incomplete hypothetical.

(7) THE WITNESS: It could do that, but it would  
(8) more often than not need the approval of the  
(9) repertoire owner, as I explained.

(10) BY MR. GREEN:

(11) Q: The requirement that you referred to of  
(12) seeking approval from the repertoire owner, is that a  
(13) policy within PolyGram?

(14) A: It was a rule in the all-in-fee agreement.

(15) Q: Was the all-in-fee agreement an agreement  
(16) between different PolyGram entities?

(17) A: Yes.

(18) Q: What entities?

(19) A: Between the -- each of the repertoire owners,  
(20) that is, the companies that acquired repertoire within  
(21) the PolyGram group, and PolyGram International Music  
(22) B.V. on the one hand, and then between PolyGram  
(23) International Music B.V. and each of the PolyGram  
(24) operating companies that exploited that repertoire in  
(25) its own country.

(1) go ahead and answer it. If you can't answer it  
(2) without basing it entirely on privileged  
(3) communications, then just tell Mr. Green that.

(4) THE WITNESS: No, there was no agreement.

(5) BY MR. GREEN:

(6) Q: During 19 -- do you know -- withdrawn.  
(7) Do you know Paul Saintilan?

(8) A: Yes.

(9) Q: And during 1998, Mr. Saintilan was an  
(10) employee of Decca; is that right?

(11) A: I believe so.

(12) Q: During 1998, did Paul Saintilan propose to  
(13) Warner that PolyGram and Warner restrict the

(14) discounting of the 1990 and 1994 Three Tenors albums

(15) MR. POMERANTZ: Objection. Lack of  
(16) foundation.

(17) And again, if you have some basis other than  
(18) privileged communications to answer that question, if  
(19) you have knowledge of that, you can answer it.

(20) Otherwise, simply tell Mr. Green that you don't have a  
(21) basis to answer that is not privileged.

(22) THE WITNESS: Can you restate the question?

(23) MR. GREEN: Could we read it back, please?

(24) (Record read as follows:

(25) "Question: During 1998, did Paul

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(1) So the repertoire owner usually exploited the  
(2) repertoire in its own country. So say, for example,  
(3) PolyGram France acquired repertoire, exploited that  
(4) repertoire in France, it licensed that repertoire to  
(5) PolyGram International Music B.V. for territories  
(6) outside France, and then PolyGram International Music  
(7) B.V. in turn licensed that repertoire to PolyGram  
(8) companies around the world, for example, PolyGram  
(9) Germany or PolyGram United States or Brazil or  
(10) wherever.

(11) Q: Was the all-in-fee agreement amended or  
(12) modified periodically?

(13) A: It was reviewed every year and changes were  
(14) put in every year.

(15) Q: So a new all-in-fee agreement was issued or  
(16) ratified --

(17) A: Every year.

(18) Q: I want to shift now to asking you about the  
(19) Three Tenors.

(20) During 1998, was there an agreement between  
(21) Warner and PolyGram that restricted the discounting of  
(22) the 1990 and 1994 Three Tenors albums?

(23) MR. POMERANTZ: To the extent that you can  
(24) answer that without -- on a basis other than  
(25) privileged communications that you have had, you can

(1) Saintilan propose to Warner that  
(2) PolyGram and Warner restrict the  
(3) discounting of the 1990 and 1994  
(4) Three Tenors albums?")

(5) THE WITNESS: I don't recall.

(6) BY MR. GREEN:

(7) Q: During 1998, did Paul Saintilan discuss with  
(8) Warner the subject of restricting discounting of the  
(9) 1990 and 1994 Three Tenors albums?

(10) MR. POMERANTZ: Same instructions as the  
(11) prior question.

(12) THE WITNESS: I believe so.

(13) BY MR. GREEN:

(14) Q: How did you learn of those discussions?

(15) A: I heard of them, but I don't recall how I  
(16) heard about them.

(17) Q: When did you learn of these discussions?

(18) A: It was in the first half of July --

(19) correction.

(20) I believe it was in the first half of July of  
(21) 1998.

(22) Q: What is your understanding of the nature of  
(23) the discussions that Mr. Saintilan was having with  
(24) Warner?

(25) MR. POMERANTZ: Again, if that -- if your

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1 words proposed moratorium, I think that is important  
2 to the issues raised in this case, and I just want the  
3 record to be clear that when you say moratorium and he  
4 says proposed moratorium, the two of you were talking  
5 about perhaps different things, perhaps the same  
6 things.

7 Q: Okay. Fair enough.

8 What is your understanding of the proposed  
9 moratorium in connection with the Three Tenors in  
10 1998?

11 MR. POMERANTZ: To the extent that you have  
12 an understanding that is not based on privileged  
13 communications, you can answer that.

14 THE WITNESS: Moratorium is a halt on, in  
15 this case, discounting.

16 BY MR. GREEN:

17 Q: Okay. And are we referring here to  
18 discounting of the 1990 and 1994 Three Tenors albums?

19 MR. POMERANTZ: Was that his understanding?

20 BY MR. GREEN:

21 Q: Was that your understanding of the proposed  
22 moratorium?

23 A: Yes.

24 Q: Okay. And since there is some possible  
25 confusion over the use of the term moratorium and

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1 proposed moratorium, I'm going to have to go back.

2 Did you have any non-privileged  
3 communications with Paul Saintilan on the subject of  
4 the proposed moratorium prior to contacting Mr. Kon?

5 A: No.

6 Q: And did you have any non-privileged  
7 communications with Mr. Rand Hoffman on the subject of  
8 the proposed moratorium prior to contacting Mr. Kon?

9 A: Insofar as I did have any discussions with  
10 Mr. Hoffman, which as I said I can't precisely recall,  
11 but there would have been none that would not have  
12 been privileged.

13 Q: And did you have any other communications --  
14 withdrawn.

15 Did you have any communications with any  
16 other PolyGram employees on the subject of the  
17 proposed moratorium prior to contacting Mr. Kon?

18 A: I would have discussed it with one of my  
19 direct reports in my department.

20 Q: Do you recall who that was?

21 A: It was Patrick Bradley.

22 Q: Is Patrick Bradley an attorney?

23 A: Yes.

24 Q: Based in London?

25 A: Yes.

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1 Q: Okay. Did you take any actions -- withdrawn.

2 What was your next actions with regard to the  
3 proposed moratorium after contacting Mr. Kon?

4 A: I discussed the matter with Mr. Kon.

5 Q: Okay. And did you have any non-privileged  
6 communications with Mr. Kon on the subject of the  
7 proposed moratorium?

8 A: No.

9 Q: Okay. When were your communications with  
10 Mr. Kon?

11 A: These would have been from around the middle  
12 of July 1998.

13 Q: You described Mr. Kon as having expertise in  
14 the area of competition law; is that right?

15 A: Yes.

16 Q: Is Mr. Kon's expertise in the area of British  
17 competition law, do you know?

18 A: Primarily European Union competition law.

19 Q: And do you know whether Mr. Kon has the  
20 expertise in the area of U.S. competition law?

21 A: He has knowledge of competition law in other  
22 jurisdictions.

23 Q: Did you seek -- withdrawn.

24 Did you consult with anyone apart from  
25 Mr. Kon outside of PolyGram on the subject of the

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1 proposed moratorium?

2 A: No.

3 Q: Did you consult with any U.S. attorneys on  
4 the subject of the proposed moratorium?

5 A: No.

6 Q: Okay. What did Mr. Kon tell you on the  
7 subject of the proposed moratorium?

8 MR. POMERANTZ: I will instruct him not to  
9 answer on the grounds of privilege.

10 You don't have to answer that question.

11 BY MR. GREEN:

12 Q: Did you take any actions following your  
13 communications with Mr. Kon?

14 A: Yes. I gave instructions to Paul Saintilan.

15 Q: When did you give instructions to Mr. Paul  
16 Saintilan?

17 A: It would be in the second half of July 1998.

18 Q: What were your instructions to Mr. Saintilan?

19 MR. POMERANTZ: I'm going to instruct him not  
20 to answer on the grounds of privilege.

21 MR. GREEN: Your interrogatory responses  
22 discuss the instructions that were given.

23 MR. POMERANTZ: Do you have the interrogatory  
24 responses?

25 MR. GREEN: Why don't we go off the record.

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(1) to create a paper record purporting to show that  
(2) PolyGram was not going to comply with the proposed  
(3) moratorium agreement?

(4) **MR. POMERANTZ:** Same instruction for the same  
(5) reasons.

(6) **BY MR. GREEN:**

(7) **Q:** Did you have more than one conversation with  
(8) Mr. Saintilan following your consultation with  
(9) Mr. Kon?

(10) **A:** I probably did, but I don't recall precisely.

(11) **Q:** And were all your communications with  
(12) Mr. Saintilan on the subject of the proposed  
(13) moratorium agreement privileged communications?

(14) **A:** Yes.

(15) **Q:** Separate from your communications —

(16) **THE WITNESS:** Can I interrupt and ask a  
(17) question of my counsel?

(18) **MR. POMERANTZ:** Sure. Do you want to step  
(19) outside?

(20) **THE WITNESS:** Yes, just one minute.

(21) (The witness and his counsel exit the  
(22) room and then return.)

(23) **BY MR. GREEN:**

(24) **Q:** Separate from the communications you had with  
(25) Mr. Kon and Mr. Saintilan, did you have any other —

(1) **BY MR. GREEN:**

(2) **Q:** Why don't we take one step at a time. During  
(3) 1998, did you see any documents on the subject of the  
(4) proposed moratorium agreement?

(5) **A:** Yes, I did.

(6) **Q:** What documents?

(7) **A:** I can't recall exactly which documents.

(8) **Q:** Do you recall receiving any e-mails on the  
(9) subject of the proposed moratorium agreement?

(10) **A:** I received documents when — from Paul  
(11) Saintilan.

(12) **Q:** Do you recall the substance of those  
(13) documents? Withdrawn.

(14) Do you recall the content of those documents?

(15) **A:** They were internal PolyGram communications.

(16) **Q:** Do you recall the content of any of these  
(17) communications?

(18) **MR. POMERANTZ:** I'm sorry, I missed it. Is  
(19) this internal communications to you or between other  
(20) PolyGram people?

(21) **THE WITNESS:** Between — they were between  
(22) other PolyGram people.

(23) **MR. POMERANTZ:** So they are not privileged  
(24) communications?

(25) **THE WITNESS:** No.

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(1) withdrawn.

(2) Separate from the conversations that you had  
(3) with Mr. Saintilan and Mr. Kon, did you take any other  
(4) actions with regard to the proposed moratorium  
(5) agreement?

(6) **A:** I don't recall of my other actions that I  
(7) took.

(8) **Q:** You testified earlier that there was no  
(9) agreement between Warner and PolyGram not to restrict  
(10) sales of the older Three Tenors albums. Do you recall  
(11) that?

(12) **A:** Yes.

(13) **Q:** And what is the basis for your understanding  
(14) that there was no such agreement?

(15) **MR. POMERANTZ:** And again you can testify as  
(16) to any basis that is not privileged, information you  
(17) learned outside of a privileged communication.

(18) **THE WITNESS:** I never saw any such agreement  
(19) and, as I can recollect, the correspondence on the  
(20) subject did not amount to an agreement.

(21) **BY MR. GREEN:**

(22) **Q:** What correspondence have you seen on the  
(23) subject of the proposed moratorium agreement?

(24) **MR. POMERANTZ:** In other words, had he seen  
(25) it in 1998 at the time he was involved?

(1) **MR. POMERANTZ:** Okay.

(2) **BY MR. GREEN:**

(3) **Q:** Do you recall the contents of any of the  
(4) communications that you saw on the subject of the  
(5) proposed moratorium agreement?

(6) **A:** Only that they concerned a proposed  
(7) moratorium.

(8) **MR. POMERANTZ:** Can we go off the record for  
(9) one second.

(10) **MR. GREEN:** Yes.

(11) (Discussion held off the record.)

(12) **BY MR. GREEN:**

(13) **Q:** After 1998, did you review any documents on  
(14) the subject of the proposed moratorium agreement?

(15) **A:** Yes.

(16) **Q:** When did you review documents on the subject  
(17) of the moratorium agreement — proposed moratorium  
(18) agreement?

(19) **A:** When I heard about the FTC investigation at  
(20) the end of last year, beginning of this year.

(21) **Q:** Did you review any documents in preparation  
(22) for the deposition today?

(23) **A:** Yes, I did.

(24) **Q:** Okay. And did these documents refresh your  
(25) recollection as to the events of July 1998?

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[1] Q: Okay. What communications are you referring  
[2] to?

[3] A: I believe there was a communication, the gist  
[4] of which was informing PolyGram companies that there  
[5] was no moratorium.

[6] Q: Okay. And was there some relationship  
[7] between your communication with Mr. Saintilan and the  
[8] memo that you just referred to?

[9] MR. POMERANTZ: Unless you agree that  
[10] allowing him to answer is not a waiver, I will  
[11] instruct him not to answer.

[12] Will you agree it's not a waiver?

[13] MR. GREEN: No, I won't.

[14] MR. POMERANTZ: Then I will instruct him not  
[15] to answer.

[16] BY MR. GREEN:

[17] Q: Did you receive, during 1998, a copy of the  
[18] memorandum that Mr. Saintilan sent to the PolyGram  
[19] operating companies?

[20] A: Yes.

[21] Q: Okay. When did you receive that memo?

[22] A: I don't recall. It was sometime in the  
[23] second half of July 1998.

[24] Q: From whom did you receive that memo?

[25] A: I don't recall.

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[1] Q: Did you review Mr. Saintilan's memorandum  
[2] prior to the time that it was sent to the operating  
[3] companies?

[4] MR. POMERANTZ: You can answer that.

[5] THE WITNESS: Yes.

[6] BY MR. GREEN:

[7] Q: Did you receive a draft of Mr. Saintilan's  
[8] memorandum, or did you receive the document in its  
[9] final form?

[10] A: I don't recall, but I believe I would have  
[11] received a draft.

[12] Q: Did you propose any changes in  
[13] Mr. Saintilan's memorandum?

[14] MR. POMERANTZ: Instruction not to answer on  
[15] grounds of privilege.

[16] BY MR. GREEN:

[17] Q: Was the document that you received from  
[18] Mr. Saintilan different from the version that was sent  
[19] to the PolyGram operating companies?

[20] MR. POMERANTZ: Same instruction.

[21] BY MR. GREEN:

[22] Q: Following your conversation with Mr. Kon --  
[23] withdrawn.

[24] How many conversations did you have with  
[25] Mr. Kon on the subject of the moratorium agreement?

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[1] A: Proposed moratorium agreement?

[2] Q: Sorry. I will ask it again.

[3] How many conversations with Mr. Kon on the  
[4] subject of the proposed moratorium agreement?

[5] A: I don't recall, but it would have been more  
[6] than one.

[7] Q: Following any of your conversations with  
[8] Mr. Kon, did you have communications with any of the  
[9] PolyGram employees separate from lawyers, other than  
[10] Mr. Saintilan?

[11] A: I may have, but I don't recall.

[12] Q: Do you recall discussing the proposed  
[13] moratorium agreement with Chris Roberts?

[14] MR. POMERANTZ: At any time.

[15] THE WITNESS: I don't recall.

[16] BY MR. GREEN:

[17] Q: Do you recall discussing the moratorium  
[18] agreement at any time with Mr. Cloeckaert?

[19] A: I don't recall.

[20] Q: Did any representative of PolyGram  
[21] communicate with Warner on the subject of the propo-  
[22] moratorium agreement during July of 1998?

[23] MR. POMERANTZ: Objection. Lack of  
[24] foundation.

[25] Also, to the extent you know about it in a

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[1] non-privileged way, you can testify to it. To the  
[2] extent you only know about it from a privileged  
[3] communication, you should not answer to that extent.

[4] THE WITNESS: Can I -- I need to ask you a  
[5] question. Am I allowed to at this stage?

[6] MR. GREEN: Sure.

[7] MR. POMERANTZ: Let's step outside.  
[8] (The witness and his counsel exit the  
[9] room and then return.)

[10] MR. POMERANTZ: The only basis that  
[11] Mr. Constant has to answer the pending question is a  
[12] privileged communication and, therefore, I'm going to  
[13] instruct him not to answer.

[14] BY MR. GREEN:

[15] Q: Did Mr. Kon communicate with Warner on the  
[16] subject of the proposed moratorium?

[17] MR. POMERANTZ: Again I'm going to instruct  
[18] him on the grounds of privilege.

[19] Will you agree that allowing him to answer  
[20] that question is not a waiver of any privilege?

[21] MR. GREEN: No.

[22] MR. POMERANTZ: Okay. Then I will instruct  
[23] him not to answer.

[24] MR. GREEN: Okay. Is it your position that  
[25] if Kon described to Constant a communication that Kon

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[1] but just whether you recall.

[2] **THE WITNESS:** Yes.

[3] **BY MR. GREEN:**

[4] **Q:** And please relate the substance of that  
[5] communication.

[6] **MR. POMERANTZ:** I will instruct him not to  
[7] answer on the grounds of privilege.

[8] **MR. GREEN:** This is attorney-client  
[9] privilege; is that right?

[10] **MR. POMERANTZ:** Yes.

[11] **BY MR. GREEN:**

[12] **Q:** Okay. These conversations with Mr. Saintilan  
[13] were about a year ago; is that right?

[14] **A:** It was after the start of the FTC  
[15] investigation, so I'm afraid I don't recall exactly  
[16] when it was.

[17] **Q:** And were you Mr. Saintilan's attorney in the  
[18] context of these communications?

[19] **A:** No.

[20] **Q:** Okay. So what was the substance of these  
[21] communications?

[22] **MR. POMERANTZ:** I'm instructing him not to  
[23] answer. If you want to take it to the judge, go  
[24] ahead. You know we are representing Mr. Saintilan in  
[25] this case. You know we represented him at the

[1] employees wanted to implement moratorium agreeme  
[2] with Warner?

[3] **MR. POMERANTZ:** That is just a yes or no or I  
[4] don't recall.

[5] **THE WITNESS:** Yes.

[6] **BY MR. GREEN:**

[7] **Q:** What was the reason?

[8] **MR. POMERANTZ:** Okay. Again, I instruct you  
[9] not to answer to the extent that that is based on  
[10] privileged communications.

[11] I'm not aware of any non-privileged  
[12] communications that would form the basis for that  
[13] answer, but if you are aware of any, you can testify  
[14] to that extent.

[15] **THE WITNESS:** I'm not aware of any.

[16] **BY MR. GREEN:**

[17] **Q:** You are not aware of any non-privileged  
[18] communications on this subject?

[19] **A:** What I'm aware is we previously discussed of  
[20] the internal correspondence, and that was the extent  
[21] of my knowledge on the subject.

[22] **Q:** Okay. And I'm — my question here is whether  
[23] you have an understanding as to what PolyGram intend  
[24] or hoped to achieve with the moratorium agreement?

[25] **MR. POMERANTZ:** Objection. Lack of

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[1] deposition and flew him all the way over here so you  
[2] didn't have to travel to Australia. If you want to  
[3] take the issue to the judge, go ahead. We're claiming  
[4] privilege.

[5] **BY MR. GREEN:**

[6] **Q:** During 1998, were there PolyGram employees  
[7] who wished to implement a moratorium agreement with  
[8] Warner in connection with the sale of the 1990 and  
[9] 1994 Three Tenors albums?

[10] **A:** Were there PolyGram —

[11] **MR. POMERANTZ:** Again, I think this question  
[12] has already been asked, and to the extent he's able to  
[13] answer it, he has answered it.

[14] Do you think this is a different question  
[15] than you have asked before?

[16] **MR. GREEN:** Yes.

[17] **MR. POMERANTZ:** Okay. I don't hear it as  
[18] different. So maybe you could explain. Because we  
[19] have tried to fairly allow him to answer questions,  
[20] and now you are going back to something that I know  
[21] you have done before.

[22] **MR. GREEN:** Okay, well, I will ask a  
[23] different question.

[24] **BY MR. GREEN:**

[25] **Q:** Do you know why PolyGram — certain PolyGram

[1] foundation. It also assumes facts not in evidence  
[2] that PolyGram had intent that you described.

[3] But in any event, I think Mr. Constant  
[4] already answered that question. To the extent — but  
[5] you can answer it again, as long as you don't disclose  
[6] any privileged communication.

[7] **THE WITNESS:** I would like to ask my attorney  
[8] on the question of privilege.

[9] **MR. GREEN:** Sure.

[10] (The witness and his counsel exit the  
[11] room and then return.)

[12] **MR. GREEN:**

[13] (Record read as follows;

[14] "Question: My question here is  
[15] whether you have an understanding as  
[16] to what PolyGram intended or hoped to  
[17] achieve with the moratorium  
[18] agreement?")

[19] **MR. POMERANTZ:** Based on my discussions with  
[20] Mr. Constant, I believe the entirety of his knowledge  
[21] that would be relevant to that question is based on  
[22] privileged communications, and so I will instruct him  
[23] not to answer.

[24] **BY MR. GREEN:**

[25] **Q:** Mr. Constant, who at PolyGram decided that

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1 room and then return.)  
2 (Record read as follows:  
3 "Question: And what is your  
4 understanding as to whether Warner  
5 conformed its conduct to the proposed  
6 moratorium agreement?")  
7 **THE WITNESS:** My only recollection on that  
8 issue is a letter that came, I believe from Warner to  
9 PolyGram, the gist of which was that they weren't going  
10 to recommend the proposed moratorium.  
11 **BY MR. GREEN:**  
12 **Q:** Is the letter that you have in mind a letter  
13 authored by Tony O'Brien?  
14 **A:** I believe it was Tony O'Brien.  
15 **Q:** And do you recall when you saw that letter?  
16 **A:** I imagine I would have seen it shortly after it  
17 was received by PolyGram.  
18 **Q:** Was the letter addressed to you?  
19 **A:** No, I don't think it was.  
20 **Q:** Do you recall how you received the letter?  
21 **A:** No, I don't.  
22 **Q:** What was the effect upon PolyGram of the  
23 decision not to implement the proposed moratorium  
24 agreement?  
25 **MR. POMERANTZ:** Objection. Lack of foundation.

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1 Calls for speculation. Also, to the extent it calls for  
2 any privileged communications, I would instruct you not  
3 to answer to that extent.  
4 **THE WITNESS:** I don't know.  
5 **BY MR. GREEN:**  
6 **Q:** Do you know whether the 1998 Three Tenors  
7 project was considered a success at PolyGram?  
8 **A:** From recollection, no, it was not.  
9 **Q:** Was it considered a failure?  
10 **A:** I suppose yes, in a word.  
11 **Q:** Do you know whether the failure of the 1998  
12 Three Tenors project was related to the company's  
13 decision not to implement the proposed moratorium  
14 agreement?  
15 **MR. POMERANTZ:** Objection. Lack of foundation.  
16 Calls for speculation.  
17 **MR. GREEN:** Excuse me?  
18 **THE WITNESS:** That means I don't answer?  
19 **MR. POMERANTZ:** No, you can answer it if you —  
20 **THE WITNESS:** No.  
21 **BY MR. GREEN:**  
22 **Q:** Do you know?  
23 **A:** I don't know.  
24 **Q:** Do you know whether the company, during 1998,  
25 considered implementing the moratorium agreement in some

1 jurisdictions but not others?  
2 **MR. POMERANTZ:** To the extent you have any  
3 knowledge based on privileged communications, you a  
4 instructed not to answer that. To the extent you have  
5 any knowledge that's not based on privileged  
6 communications, you can answer it.  
7 **THE WITNESS:** Can you restate the question?  
8 I'm sorry, repeat the question.  
9 **MR. GREEN:** Can you read it back, please.  
10 (Record read as follows:  
11 "Question: Do you know whether  
12 the company, during 1998, considered  
13 implementing the moratorium agreement  
14 in some jurisdictions but not  
15 others?")  
16 **THE WITNESS:** Well, proposed moratorium, I  
17 don't recall.  
18 **BY MR. GREEN:**  
19 **Q:** Have you had any conversations on the subject  
20 of a Three Tenors greatest hits recording?  
21 **A:** No.  
22 **Q:** Have you had any communications on the  
23 subject of a release of a Three Tenors box set?  
24 **A:** No.  
25 **Q:** Were you involved in the acquisition of

1 rights to the 1990 Three Tenors album?  
2 **A:** No.  
3 **Q:** Were you involved in any way with the 1990  
4 Three Tenors album?  
5 **MR. POMERANTZ:** Objection. Vague and  
6 ambiguous as to what you mean by "involved in any  
7 way."  
8 **BY MR. GREEN:**  
9 **Q:** Did you have any role with regard to the 1990  
10 Three Tenors album?  
11 **A:** Not in connection with the acquisition of the  
12 rights in 1990. Thereafter only — it would have been  
13 only on an incidental basis and in connection with, as  
14 far as was relevant to the 1994 album.  
15 **Q:** Are you familiar with a company named Top  
16 Film?  
17 **A:** Top Film. Top Film.  
18 **Q:** In connection with the 1990 album?  
19 **A:** It vaguely rings a bell.  
20 **Q:** Do you know who the principals are in that  
21 firm?  
22 **A:** No, I don't recall.  
23 **Q:** Do you recall the firm Quinn Holdings  
24 Limited?  
25 **A:** No.

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1 Q: Okay, Do you recall why you authored this  
2 letter?

3 MR. POMERANTZ: If you are going to go into  
4 it in some substance, why don't you let him read it  
5 for a few minutes.

6 Can we just go off the record for a few  
7 minutes while he reads it?

8 MR. GREEN: Sure.

9 (Recess taken from 11:43 a.m. to  
10 11:47 a.m.)

11 MR. GREEN: Could you read back the last  
12 question, please?

13 (Record read as follows:

14 "Question: Okay, Do you recall  
15 why you authored this letter?")

16 THE WITNESS: Because of complaints that had  
17 been received by Placido Domingo's representatives  
18 regarding the 1990 Three Tenors album.

19 BY MR. GREEN:

20 Q: Were there instances where contracts with  
21 Mr. Domingo were adjusted retroactively to provide for  
22 additional payments to Mr. Domingo?

23 A: Other than as stated here, I don't recall.

24 Q: Do you know why the payments referenced here  
25 were made?

1 A: Adjusting.

2 Q: Retroactively adjusting?

3 A: Yeah, I don't know.

4 Q: Is it unusual for a music label to adjust  
5 retroactively its agreements with an artist so as to  
6 provide additional monies to that artist?

7 MR. POMERANTZ: Objection. Lack of  
8 foundation. Incomplete hypothetical. Calls for  
9 speculation. Also asks for expert testimony.

10 THE WITNESS: After all that —

11 MR. POMERANTZ: I will try to think of some  
12 more, if I can.

13 THE WITNESS: I'm embarrassed to respond, but  
14 no, it's not unusual.

15 BY MR. GREEN:

16 Q: What's the reason then? Or what in general  
17 are the circumstances under which a label would make  
18 such payments to an artist?

19 MR. POMERANTZ: Same objections.

20 THE WITNESS: Usually artist relations.

21 BY MR. GREEN:

22 Q: What does that mean?

23 A: To maintain the good relationship between the  
24 company and the artist.

25 Q: If you would turn to page — the second page

1 of this letter, it's 4190. There is a paragraph that  
2 begins "You seem ." Do you see that?

3 A: Uh-huh.

4 Q: There it a statement in the letter that  
5 unprecedented amounts of both time and money were  
6 contributed to the 1990 Three Tenors album. Do you  
7 see that?

8 A: Yes.

9 Q: What was unusual or unprecedented about the  
10 marketing effort for the 1990 Three Tenors album?

11 A: I don't recall precisely, but I believe it  
12 was because there was more marketing effort given to  
13 the album than is normal for a classical release.

14 Q: What was the nature of the marketing effort  
15 that was given for the 1990 album?

16 MR. POMERANTZ: Objection. Vague and  
17 ambiguous. Lack of foundation.

18 THE WITNESS: It would have been the  
19 normal — it would have included the normal marketin  
20 activities undertaken by a record company for a — for  
21 the release of a record. It may have included  
22 television advertising. It would have included other  
23 forms of advertising.

24 BY MR. GREEN:

25 Q: If you would turn to the next page, 4191.

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1 Let me direct your attention to the top of the page,  
2 the first paragraph there. It says that approximately  
3 120 recordings are released by Decca each year. Do  
4 you see that?

5 A: Uh-huh.

6 Q: Do you know the number of releases by Decca  
7 each year during the late 1990s?

8 A: No, I don't.

9 Q: Do you know if it was more or less than 120?

10 A: I would imagine it would be less.

11 Q: Did the company get smaller through the '90s?

12 A: The Decca Record Company?

13 Q: Right.

14 A: I don't know what you mean by smaller.

15 Q: Did their amount of business activity  
16 decline?

17 A: I don't know.

18 Q: But your understanding is that the number of  
19 releases per year declined in the late 1990s as  
20 compared to 1992; is that right?

21 A: I believe that to be the case.

22 Q: Do you know whether all of Decca's releases  
23 are marketed in the United States?

24 A: I would think it unlikely.

25 Q: Do you know what percentage of its releases



1) outlined.

2) **BY MR. GREEN:**

3) **Q:** Okay. Who negotiated the key terms?

4) **A:** Mr. Kronfeld may have been involved in that.

5) **Q:** And do you know who was involved from The  
6) Rudas Organization?

7) **A:** He may have had conversations with Mr. Rudas,  
8) but I don't know.

9) **Q:** Were you based in London during 1993?

10) **A:** I was.

11) **Q:** Were your negotiations held in London?

12) **A:** Yes.

13) **Q:** What happened with regard to these  
14) negotiations in 1993?

15) **A:** We had one or more meetings with Mr. Clay and  
16) were in quite detailed discussions, and from what I  
17) recall, fairly shortly after the last meeting we had  
18) with him, we heard that they had signed an agreement  
19) with Warners for the album that subsequently became  
20) the 1994 album.

21) **Q:** Was there an issue that PolyGram and The  
22) Rudas Organization were having difficulty reaching  
23) agreement upon?

24) **A:** I recall that the issue that seemed to be the  
25) biggest problem at the time was the question of

1) television advertising of the album and to what extent  
2) that would result in a reduction in the royalty  
3) payable, on the basis that if you advertise on  
4) television, that is obviously expensive and,  
5) therefore, it is quite common to secure a reduction in  
6) the royalty that you pay to the licensor or artist in  
7) question.

8) **Q:** PolyGram wanted a television break?

9) **A:** Right, yeah.

10) **Q:** And The Rudas Organization did not want to  
11) provide for a television break; is that right?

12) **A:** As I recall.

13) **Q:** Was The Rudas Organization simultaneously  
14) negotiating with Warner and PolyGram?

15) **A:** It seems likely, yes. Just having in mind  
16) the timing of what happened.

17) **Q:** During 1993 when you were negotiating with  
18) The Rudas Organization, were you aware that The Rudas  
19) Organization was also negotiating with Warner?

20) **A:** I don't recall being aware they were actually  
21) in negotiations. I could say that we would have  
22) surmised they were a possible alternative licensee.

23) **Q:** Do you know whether during 1993 The Rudas  
24) Organization was negotiating with any music companies  
25) other than PolyGram and Warner?

1) **A:** I have no knowledge of that.

2) **Q:** During 1994, was Mr. Pavarotti under  
3) exclusive contract to Decca?

4) **A:** I believe he was.

5) **Q:** Did PolyGram release Pavarotti to Warner for  
6) the 1994 Three Tenors album?

7) **A:** Yes.

8) **Q:** Were you involved in negotiating that  
9) release?

10) **A:** I was involved in discussions about the  
11) release, but not in negotiating the release.

12) **Q:** How did you learn that The Rudas Organization  
13) had signed a contract with Warner in connection with  
14) the 1994 Three Tenors album?

15) **A:** I don't recall.

16) **Q:** Did PolyGram consider refusing to release  
17) Pavarotti to Warner for that project?

18) **A:** Yes.

19) **Q:** Okay. Why did PolyGram release Pavarotti to  
20) Warners for the 1994 Three Tenors project?

21) **MR. POMERANTZ:** You can answer that question  
22) to the extent it doesn't require privileged  
23) communications.

24) **THE WITNESS:** Can you repeat the question,  
25) please.

1) (Record read as follows:

2) "Question: Okay. Why did  
3) PolyGram release Pavarotti to Warners  
4) for the 1994 Three Tenors project?")

5) **THE WITNESS:** I believe it was for artist  
6) relation reasons.

7) **BY MR. GREEN:**

8) **Q:** And what does that mean?

9) **A:** Same thing as when you last asked me. It's  
10) for the —

11) **MR. POMERANTZ:** Objection. Asked and  
12) answered.

13) **THE WITNESS:** It was to maintain good  
14) relations with the artist, I believe.

15) **BY MR. GREEN:**

16) **Q:** In order to maintain good relations with  
17) Mr. Pavarotti; is that right?

18) **A:** Yes.

19) **Q:** During 19 — withdrawn.

20) In connection with the 1994 Three Tenors  
21) project, did PolyGram want a studio recording of the  
22) Tenors?

23) **A:** As opposed to the live recording?

24) **Q:** Yes.

10 THE WITNESS: No.

11 BY MR. GREEN:

12 Q: Separate from the Three Tenors project, are  
13 you aware of any agreements that PolyGram has entered  
14 into with competing music companies that restrict  
15 PolyGram's ability to discount its recordings?

16 MR. POMERANTZ: Same instruction, as well as  
17 now asked and answered.

18 THE WITNESS: No.

19 BY MR. GREEN:

20 Q: Are you aware of any agreements that  
21 Universal Music Group has entered into with competing  
22 music companies that restrict Universal's ability to  
23 discount its recordings?

24 MR. POMERANTZ: Same instructions.

25 THE WITNESS: Could I have a word, please?

26 MR. POMERANTZ: Sure.

27 (The witness and his counsel exit the  
28 room and then return.)

29 THE WITNESS: Would you repeat the question,  
30 please?

31 (Record read as follows:

32 "Question: Are you aware of any  
33 agreements that Universal Music Group  
34 has entered into with competing music

10 or Warner.

11 Q: What time period was this joint venture  
12 entered into?

13 A: I believe it was last year.

14 Q: 2000?

15 A: Uh-huh.

16 Q: Is Cher an artist signed to Universal  
17 currently?

18 A: I believe signed — with Warner or Sony, Sony  
19 currently, but used to be signed to a Universal  
20 company, hence the reason for the .

21 Q: Universal has some catalog albums issued by  
22 Cher, is that right?

23 A: I believe to be the case.

24 Q: Is the album that is the subject of this  
25 joint venture entitled Cher's Greatest Hits?

26 A: Something like that.

27 Q: What company is distributing Cher's Greatest  
28 Hits?

29 A: I believe it was Universal.

30 Q: Is it Universal distributing the recording  
31 world wide?

32 A: I don't know, but it was in a significant  
33 number of countries.

34 Q: And what is the nature of the price agreement

10 companies that restrict Universal's  
11 ability to discount its recordings?"

12 THE WITNESS: The only example I can think of  
13 is where we joint ventured an album on, I think it was  
14 Cher Greatest Hits, which involves the putting  
15 together of sound recordings, some of which are owned  
16 by another company, some which were owned by  
17 Universal. And one company, either Universal or  
18 Was Cher Warner —

19 THE REPORTER: I'm sorry, what did you say?

20 THE WITNESS: I think it was — I'm sorry,  
21 could I go off the record for a moment?

22 MR. POMERANTZ: Just —

23 THE WITNESS: Okay. One company is  
24 responsible for actually marketing and selling the  
25 album and there is agreements relating to the price of  
26 each such album should be sold.

27 BY MR. GREEN:

28 Q: This Cher, C-h-e-r?

29 A: Yeah.

30 Q: And Universal has entered into a joint  
31 venture agreement with another music company?

32 A: Uh-huh.

33 Q: What company is that?

34 A: I was trying to remember whether it was Sony

10 that you recall?

11 A: Only that the — I can only recall the  
12 agreement dealt with the pricing at which the album  
13 should be sold.

14 Q: And the agreement that you have in mind  
15 relates to the price at which the Cher's Greatest Hits  
16 album is sold; is that right?

17 A: Uh-huh.

18 Q: You have to say — is that yes?

19 A: Yes. Sorry.

20 Q: And did you negotiate this agreement?

21 A: No.

22 Q: Who negotiated the agreement?

23 A: Employees of Universal Music International.

24 Q: Does the agreement between Universal and this  
25 other music company restrict Universal's ability to  
26 set a price for the Cher albums in Universal's  
27 catalog?

28 A: No.

29 Q: Does the agreement restrict the ability of  
30 this competing music company to independently  
31 determine the selling price for the Cher albums in  
32 this other music company's catalog?

33 A: No.

34 Q: Was there any discussion of restricting

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[1] A: From the time — sorry. Start again.  
[2] From very shortly after I first joined  
[3] PolyGram.  
[4] Q: Through to today?  
[5] A: Artists and licensors, yus.  
[6] Q: When did you join PolyGram?  
[7] A: In 1980.  
[8] Q: What year did you become general counsel?  
[9] A: In 1990.  
[10] Q: Are you aware of any artists that are  
[11] currently under contract to record exclusively for  
[12] Universal who formerly released albums with other  
[13] music companies?  
[14] A: Yes.  
[15] Q: What artists are you aware of?  
[16] A: Could I go off the — I need to go off the  
[17] record, because I need time to think about this. I'm  
[18] sorry. It happens all the time in the music business,  
[19] so I need to sort of think.  
[20] MR. GREEN: Okay. Well, I'm near the end, so  
[21] I'm going to take a minute. If you can think about it  
[22] for a minute.  
[23] MR. POMERANTZ: Okay.  
[24] MR. GREEN: Is that satisfactory to you?  
[25] MR. POMERANTZ: Yeah, that's fine.

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[1] (Recess taken from 12:29 p.m. to  
[2] 12:36 p.m.)  
[3] THE WITNESS: Elton John and the Rolling  
[4] Stones.  
[5] BY MR. GREEN:  
[6] Q: Is Elton John currently signed to Universal?  
[7] A: Yes.  
[8] Q: How long has Elton John been signed to  
[9] Universal?  
[10] A: He was formerly signed to PolyGram or a  
[11] PolyGram company, and prior to that, was signed to  
[12] Dick James Music, U.K.  
[13] Q: Currently Elton John is signed to Universal;  
[14] is that right?  
[15] A: Yes. Yes, that's correct. I was trying to  
[16] recall which Universal company he was signed to.  
[17] Q: And do you know when Elton John was signed to  
[18] Dick James Music?  
[19] A: It was in the 1970s.  
[20] Q: Is Dick James an independent label?  
[21] A: It was.  
[22] Q: And today?  
[23] A: It was bought by PolyGram.  
[24] Q: Currently are there any Elton John albums  
[25] that are distributed by companies outside of

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[1] Universal?  
[2] A: I don't believe so.  
[3] Q: When was Dick James purchased by PolyGram?  
[4] A: 1986.  
[5] Q: Are the Rolling Stones currently signed to  
[6] Universal?  
[7] A: No. They were signed to Decca.  
[8] Q: During what period?  
[9] A: In the 1960s and '70s.  
[10] Q: Does Decca currently have Rolling Stones  
[11] albums in its catalog?  
[12] A: Yes.  
[13] Q: Do you know who the Rolling Stones are  
[14] currently signed with?  
[15] A: I think it's Warner. I'm sorry. I should  
[16] know this, but they are not the group they were. It's  
[17] Warner EMI.  
[18] Q: Decca has non-classical recordings in its  
[19] catalog; is that right?  
[20] A: Prior to its acquisition by PolyGram in 1980  
[21] it was a company that did both classical and pop  
[22] music.  
[23] Q: Do you know of any other artists that are  
[24] currently signed to Universal that have catalog albums  
[25] with other companies?

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[1] A: I don't immediately recall. I would have to  
[2] think about it.  
[3] Q: Have you ever been involved in negotiating  
[4] co-op advertising programs with retailers?  
[5] A: No.  
[6] MR. GREEN: I have no more questions or no  
[7] more new questions at this time.  
[8] A number of questions have not been answered  
[9] because of instructions from Counsel not to answer  
[10] those questions on the basis of privilege or  
[11] otherwise. We intend to review the transcript. If we  
[12] reach a conclusion that any of these privilege claims  
[13] may be invalid or inconsistent with positions taken in  
[14] other forums or if we determine that subjects that  
[15] have been foreclosed to us here will be areas of  
[16] testimony at trial, then we reserve the right to  
[17] re call this witness.  
[18] Do you have any questions or anything you  
[19] would like to put on the record?  
[20] MR. POMERANTZ: I have no questions for the  
[21] witness.  
[22] MR. GREEN: Okay. Then we are adjourned.  
[23] THE REPORTER: Do you want to read and sign?  
[24] MR. POMERANTZ: Yes.  
[25] (End time: 12:40 p.m.)

**Lawyer's Notes**

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## CERTIFICATE OF SERVICE

I, Melissa Westman-Cherry, hereby certify that on January 25, 2002, I caused a copy of Memorandum in Support of Complaint Counsel's Motion In Limine Regarding the Testimony of Richard Constant 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 January 25, 2002, I caused a copy of Memorandum in Support of complaint counsel's Motion In Limine Regarding the Testimony of Richard Constant to be served upon the persons listed below by facsimile and by U. S. Mail:

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*Counsel for Respondents*

  
Melissa Westman-Cherry

**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

**ORDER IN LIMINE REGARDING THE TESTIMONY OF RICHARD CONSTANT**

Complaint counsel has moved, Pursuant to Commission Rule of Practice 3.43(b), for an order limiting the testimony of Richard Constant to the subject of PolyGram's business structure in 1998, and precluding Respondents from introducing evidence, through the testimony of Richard Constant, about PolyGram's decision whether to implement restrictions on pricing and discounting of the 1990 and 1994 Three Tenors albums. Having considered the submissions of the parties, and for good cause shown, **IT IS HEREBY ORDERED** that the trial testimony of Richard Constant shall be limited to the subject of PolyGram's business structure in 1998.

Evidence in the form of testimony from Richard Constant 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 is inadmissible under Rule 3.43(b) of the Commission's Rules of Practice, and Respondents shall not present such testimony at trial.

ORDERED:

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James P. Timony  
Chief Administrative Law Judge

Date: February \_\_, 2002

**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.	)	
_____	)	

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL’S MOTION  
IN LIMINE REGARDING THE TESTIMONY OF RICHARD CONSTANT**

Pursuant to Rule 3.43(h) of the Commission’s Rules of Practice, 15 C.F.R. §3.43(b), complaint counsel respectfully requests that the Court enter the attached proposed Order in Limine Regarding the Testimony of Richard Constant.

The Complaint in this matter alleges an agreement between competitors PolyGram and Warner to fix prices and forgo advertising (the “moratorium agreement”). PolyGram denies the existence of the moratorium agreement, and further claims that if such agreement was adopted, it was not implemented.

Richard Constant, an in-house lawyer for PolyGram, has been identified by Respondents as a prospective trial witness to testify concerning PolyGram's implementation of the Three Tenors moratorium agreement. And yet, when questioned on this subject at his deposition, Mr. Constant repeatedly invoked the attorney-client privilege, and declined to provide any meaningful responses. As he has declined to address the Three Tenors moratorium agreement during discovery, Mr. Constant must likewise be barred from addressing this subject at trial.

### **BACKGROUND**

On January 18, 2002, Respondents filed their proposed witness list in this matter. Second on the list of prospective witnesses, Respondents identified Richard Constant, together with the following description of proposed testimony: "Mr. Constant will testify [1] concerning PolyGram's business structure in 1998 and [2] concerning PolyGram's decision not 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." Respondents Polygram Holding, Inc, Decca Music Group, Ltd., UMG Recordings, Inc. and Universal Music & Video Distribution Corp.'s Proposed Witness List, Designations of Deposition Testimony, and Exhibit List of January 18, 2002 at p.3.

On November 28, 2001, complaint counsel took Mr. Constant's deposition. Mr. Constant responded satisfactorily to questions about [1] PolyGram's business structure in 1998. However, when asked about [2] PolyGram's consideration of whether to implement the moratorium agreement, Mr. Constant (and his lawyer) repeatedly invoked the attorney-client privilege. As a result, complaint counsel was substantially precluded from learning whatever it is that Mr. Constant may know about the subject.

Mr. Constant stated only that he was consulted by PolyGram personnel with regard to the agreement with Warner to restrict price competition.<sup>1</sup> However, Mr. Constant declined to disclose who at PolyGram decided whether the company would implement the moratorium agreement,<sup>2</sup> why certain PolyGram personnel wanted to implement the moratorium agreement,<sup>3</sup> the substance of several communications within PolyGram surrounding the decision whether to implement the moratorium agreement,<sup>4</sup> whether Mr. Constant concluded that implementation of the moratorium agreement was illegal,<sup>5</sup> what instructions Mr. Constant gave to PolyGram personnel on the subject of the moratorium agreement,<sup>6</sup> and whether the actions of PolyGram personnel with regard to implementation of the moratorium agreement were or were not related in any way to their communications with Mr. Constant.<sup>7</sup>

Given that Mr. Constant's personal knowledge regarding PolyGram's decision whether to implement the moratorium agreement consists entirely of (assertedly) privileged communications, what can Mr. Constant offer this Court at trial? First, Mr. Constant's trial

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<sup>1</sup> Transcript of Deposition of Richard Constant ("Constant Tr.") (Nov. 28, 2001) at 31. Attached hereto as Exhibit A.

<sup>2</sup> Constant Tr. at 60-61, 63.

<sup>3</sup> Constant Tr. at 58-60.

<sup>4</sup> Constant Tr. at 31-32.

<sup>5</sup> Constant Tr. at 53-54.

<sup>6</sup> Constant Tr. at 36.

<sup>7</sup> Constant Tr. at 48-49.

testimony may consist of information that was withheld during discovery.<sup>8</sup> Second, Respondents may argue that the mere fact of a lawyer's involvement in the decision-making process supports the claim that the moratorium agreement was not implemented.<sup>9</sup> As discussed below, both of these strategies would be improper.

Complaint counsel disputes Respondents' claim that non-compliance with a price-fixing agreement is a valid defense.<sup>10</sup> Mr. Constant's testimony regarding implementation of the moratorium is for this reason irrelevant and should be precluded. However, we do not press this argument for purposes of the present motion. Even assuming that implementation of the moratorium agreement is a relevant issue, Mr. Constant should not be permitted to address this matter at trial.

### ARGUMENT

A motion in limine may be made before trial to exclude anticipated inadmissible or prejudicial evidence before the evidence is actually offered. *Dura Lube Corp.*, FTC Dkt. No. 9292, 1999 FTC LEXIS 252, \*2 (Oct. 22, 1999) (Order Granting in Part and Denying in Part

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<sup>8</sup> That this may be Respondents' intention is suggested by Respondents' Response to Complaint Counsel's Interrogatory No. 2, which offered a vague and incomplete description of Mr. Constant's now "privileged" communication with PolyGram manager Paul Saintilan.

<sup>9</sup> This explanation was advanced by counsel for Respondents during the deposition of Mr. Constant. Constant Tr. at 38 ("I think what we [counsel for Respondents] would expect the evidence to show is that the business people within PolyGram sought legal advice, received legal advice and then certain actions followed. We would not intend to offer the substance of that advice.").

<sup>10</sup> See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n. 59 (1940) (Section 1 condemns anticompetitive restraints "whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.").

Complaint Counsel's Motion in Limine); *see also Luce v. United States*, 469 U.S. 38, 40 n. 2 (1984); *Kansas v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979).

Mr. Constant should not be permitted to withhold testimony during discovery and later spring his testimony on complaint counsel and the Court during trial (Point I, *infra*). In addition, Mr. Constant should not be permitted to testify that he provided legal advice relevant to an issue in this case without fully disclosing the substance of the relevant communications (Point II, *infra*).

**I      Mr. Constant Cannot Testify at Trial about Matters that He Refused to Address at His Deposition**

It is well established that a party cannot, based on an assertion of privilege, refuse to give testimony about a subject during a deposition and then testify about that same subject at trial. *International Telephone and Telegraph Corporation v. United Telephone Co. of Florida*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) ("Fundamental fairness and justice requires that if the defendant intends to waive the privilege at trial by the introduction of evidence within that privilege, then the defendant will be required to allow discovery with regard to matters material to that testimony."); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("Since the same rules of privilege govern the scope of discovery as generally govern the admissibility of evidence at trial, a party may obtain pretrial discovery of materials allegedly subject to the attorney-client privilege . . . where the protection of the privilege will be waived at the trial."); *Fox v. California Sierra Financial Services*, 120 F.R.D. 520, 530 (N.D. Cal. 1988) ("Defendants cannot conceal such information from discovery and expect to spring it upon plaintiffs in the midst of trial for the sake of obtaining a tactical advantage in litigation . . . . If



the holder intends to consent to the waiver of the attorney-client privilege at trial, such intention must be disclosed during the discovery stage and any information as to which the privilege will be waived must be made available to the opposing party through discovery so as not to afford the one party an unfair advantage at trial.”); 6 Moore’s Federal Practice § 26.49[5] (Matthew Bender 3d ed.). *See also Nick Istock, Inc. v. Research-Cottrell, Inc.*, 74 F.R.D. 150, 151 (W.D. Pa. 1977).

During his deposition, Mr. Constant declined to respond to relevant questions concerning Respondents’ claim that PolyGram decided not to implement the moratorium agreement. Plainly, Mr. Constant should be barred from giving testimony at trial on matters that he refused on privilege grounds to discuss during his deposition.

**II Because Mr. Constant Declined to Disclose the Content of His Communications, any Testimony that He Provided Legal Advice is Irrelevant and Prejudicial**

Respondents contend that they received advice from counsel and thereafter decided not to implement the price-fixing agreement with Warner. If Respondents are placing their reliance on legal advice in issue, then there is a waiver of the attorney-client privilege; if Respondents are not (implicitly or explicitly) asserting their reliance on the advice of counsel, then the fact of the consultation is irrelevant -- and should be excluded.<sup>11</sup> Respondents cannot simultaneously claim that they received legal advice from Mr. Constant, that this advice is relevant to the issues in this case, and that the substance of this advice is protected from disclosure.

A party may not use the attorney-client privilege as both a “shield” and a “sword,” selectively disclosing portions of communications for self-serving purposes. *United States v.*

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<sup>11</sup> *See* Commission Rule of Practice § 3.43(b) (“Relevant, material, and reliable evidence shall be admitted. Irrelevant immaterial, and unreliable evidence shall be excluded.”).

*Bilzerian*, 926 F. 2d 1285, 1292 (2<sup>nd</sup> Cir. 1991). When a litigant places into issue its executive's reliance on an attorney's advice, the opposing party must be permitted full discovery concerning the underlying communications:

The party opposing the defense of reliance on advice of counsel must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice -- whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion and whether that advice was heeded by the client.

*Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 486 (3<sup>rd</sup> Cir. 1995).

At deposition, Respondents asserted that Mr. Constant's relevant communications with PolyGram employees were privileged in their entirety. Standing alone, the contention that PolyGram personnel consulted with Attorney Constant is therefore entirely irrelevant. *Recycling Solutions, Inc. v. Dist. of Columbia*, 175 F.R.D. 407, 409 n.3 (D.D.C. 1997) (if defendants did not intend to raise a reliance-upon-counsel defense, then "reference to their consultation with [counsel] would be superfluous"). Consultation with an attorney does not in itself show good faith, a willingness to reverse course, or a propensity to comply with the law. Perhaps PolyGram's executives were advised by counsel to fabricate a paper record merely purporting to show that the company was not complying with the moratorium agreement. Invoking the attorney-client privilege, Mr. Constant declined to confirm or deny that this was the company's scheme.<sup>12</sup>

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<sup>12</sup> Constant Tr. at 40-41. Another possibility is that PolyGram's decision whether to implement the moratorium agreement was entirely unrelated to the consultation with Mr. Constant. Indeed, Mr. Constant declined to disclose whether or not the actions of PolyGram managers following the attorney-client communication were related to that communication. Constant Tr. at 48-49.

Respondents apparently will ask the Court to infer from the fact of attorney consultation that PolyGram was advised to abandon the moratorium, and therefore acted accordingly. The Court is left to infer (on what basis?) the contents of a conversation only because Respondents are asserting a privilege. This is not only speculative (see above), but legally improper. Respondents are by inference raising an advice of counsel defense, but denying complaint counsel and the Court the opportunity to examine the underlying facts (“whether counsel gave a well-informed opinion and whether that advice was heeded by the client.”<sup>13</sup>). In order to foreclose this strategem, courts refuse to recognize any distinction between a defendant’s asserting the “act” of legal consultation, and asserting reliance on legal advice. Both claims effectively waive the attorney-client privilege. *Recycling Solutions, Inc. v. Dist. of Columbia*, 175 F.R.D. 407, 409 n.3 (D.D.C. 1997); *ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765, 767 (D. Del. 1994).

In *ML-Lee Acquisition*, the Lee Defendants were charged with acting in reckless disregard of the requirements of the securities laws. Defendants responded with the assertion that they had acted after consulting counsel, but denied that they were relying on the substance of the advice they received from counsel. On this basis, Defendants refused to produce relevant attorney-client communications. The court viewed this distinction as irrelevant:

The Lee Defendants respond by first denying that they have raised a reliance on the advice of counsel defense. The Lee Defendants assert that they have raised the “act” of consulting counsel to rebut Plaintiffs’ allegations of acting in reckless disregard of the requirements of the 1940 Act, as opposed to relying upon any substantive advice received from counsel. The Court is unpersuaded by the Lee Defendants’ distinction. Even if the Lee Defendants intend only to rely on the act

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<sup>13</sup> *Glenmede Trust*, 56 F.3d at 486.

of seeking advice from counsel to show they behaved in good faith, Plaintiffs are entitled to test the validity and sincerity of that action.

*ML-Lee Acquisition*, 859 F. Supp. at 767. The court further concluded that, in light of the claim that the Lee Defendants sought advice from counsel, plaintiffs were entitled to a fair and adequate opportunity to test that claim and offer rebuttal. The privilege had been waived:

[P]laintiffs are entitled to know, for example, whether the Lee Defendants disclosed all material facts to counsel, whether counsel gave an otherwise well-informed opinion, did the Lee defendants follow the advice from counsel.

*ML-Lee Acquisition*, 859 F. Supp. at 767.

As discussed in Point I, *supra*, it is too late in the day for Respondents to waive the attorney-client privilege with regard to communications with Mr. Constant. Considerations of fairness and relevance require that Mr. Constant be precluded from testifying as to these communications, and even from asserting that such communications occurred.<sup>14</sup>

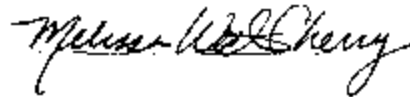
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<sup>14</sup> Alternatively, if the Court decides to permit this testimony then Respondents should be ordered to produce immediately those written communications with Mr. Constant that are being withheld from complaint counsel under a claim of attorney-client privilege.

**CONCLUSION**

For the reasons stated above, complaint counsel respectfully requests that the Court issued an Order in Limine limiting Mr. Constant's trial testimony to the one subject that he addressed at deposition: PolyGram's business structure in 1998. Mr. Constant should not be permitted to testify regarding PolyGram's decision whether or not to implement any restriction on pricing and discounting of the 1990 and 1994 Three Tenors albums during 1998. A proposed Order is attached hereto.

Respectfully submitted,



Geoffrey M. Green  
John Roberti  
Melissa Westman-Cherry

Counsel Supporting the Complaint

Bureau of Competition  
Federal Trade Commission  
Washington, D.C.

Dated: January 25, 2002

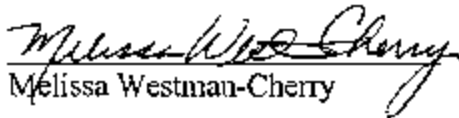
**CERTIFICATE OF SERVICE**

I, Melissa Westman-Cherry, hereby certify that on January 25, 2002, I caused a copy of Memorandum in Support of Complaint Counsel's Motion In Limine Regarding the Testimony of Richard Constant 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 January 25, 2002, I caused a copy of Memorandum in Support of complaint counsel's Motion In Limine Regarding the Testimony of Richard Constant to be served upon the persons listed below by facsimile and by U. S. Mail:

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