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October 19, 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.

Dear Mr. Clark,

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

1. Warner Communications Inc.'s Motion to Modify the Protective Order Governing Discovery Material and to Stay Disclosure Pending Resolution of this Motion,
2. Order,
3. Declaration of George S. Cary,
4. Certificate of Service, and
5. Draft Protective Order Governing Discovery Material.

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

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,)	
)	Docket No. 9298
UMG RECORDINGS, INC.,)	
a corporation,)	
)	
and)	
)	
UNIVERSAL MUSIC & VIDEO)	
DISTRIBUTION CORP.,)	
a corporation.)	
)	

**WARNER COMMUNICATIONS INC.'S MOTION TO MODIFY THE
PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL AND TO STAY
DISCLOSURE PENDING RESOLUTION OF THIS MOTION**

Warner Communications Inc. (“Warner”) moves under Federal Trade Commission’s (“FTC”) Rule of Practice 4.10(g), 16 C.F.R. § 4.10(g) to modify the Protective Order Governing Discovery Material (“Protective Order”) filed in this matter on Tuesday, October 16, 2001 and to stay disclosure of such discovery material pending resolution of this motion so as to provide Warner with the “opportunity to seek an appropriate protective order” in order to avoid irreparable commercial harm.

During the pre-complaint investigatory phase of this matter, Warner produced a substantial number of commercially sensitive documents to the FTC pursuant to assurances of confidentiality. These documents contain information about sensitive aspects of Warner’s internal competitive decision making processes. There are documents reflecting Warner

executives' business judgments, analyses of pricing levels for albums and the associated effect on demand, advertising strategies, and factors Warner executives take into account when making investment decisions. As happens inevitably in a production to the government of this type, many documents contain not only information on the subject matter at issue in this litigation, but also commercially sensitive information about multiple facets of Warner's business unrelated to this litigation. These include documents relating to pricing and marketing decisions, budget forecasts and expenditures, and market analyses for entire divisions of Warner and even communications between Warner distribution and its record-store customers.

The FTC has informed Warner that it will produce those documents to Respondents pursuant to a protective order that could allow Warner's confidential business documents to be made available to employees of its major competitor; to retained experts and even to adversaries of Warner in other litigation. Should Respondents be allowed to use such information outside of the present litigation, they could have the upper hand in competitive situations and lawsuits against Warner. Warner therefore seeks to modify certain provisions of the proposed Protective Order in order to ensure that Warner's confidential materials are not needlessly disclosed, while allowing Respondents sufficient access to the documents so as to defend themselves in this proceeding. The modifications Warner seeks are not unusual and analogous protections are contained in other protective orders issued by the Commission.

The specific provisions of the Protective Order Warner seeks to modify are: (i) the definition of "Protected Discovery Material" in paragraph 16 of the Definitions and the associated operative provision in paragraphs 5 & 8 of the Protective Order; (ii) the use of Confidential Discovery Material in proceedings other than this matter outlined in paragraph 8; and (iii) the limited notice provisions pertaining to experts in paragraph 8(a).

1. Definition of “Protected Discovery Material”

Under paragraph 15 in the Definitions section of the Protective Order, designated “Confidential Discovery Material,” disclosure of non-public commercial information that would cause “substantial commercial harm” or “personal embarrassment” to Warner is prohibited except to the parties enumerated in paragraphs 4 and 6 of the Protective Order. Warner does not take issue with this definition. Warner does, however, have grave concerns regarding the next paragraph in the Definitions section, paragraph 16, which creates a subcategory of Confidential Discovery Material known as “Protected Discovery Material.” This provision allows Respondents, upon showing no “substantial commercial harm” to Warner, complete discretion to disclose those Warner confidential documents to any employee of “Respondents or any direct or indirect subsidiary of the ultimate parent of any Respondent” (collectively “Universal”). This provision is fundamentally flawed for two reasons: (i) it allows for disclosure of Confidential Discovery Material that would cause “personal embarrassment” to Warner or to its officers or employees; and (ii) it allows for widespread disclosure of Warner’s commercially sensitive documents to all Universal employees without any showing by Respondent that such disclosure is needed for its defense of this matter.

There is no reasonable justification or useful purpose to be served in allowing Universal to publish Warner confidential information secured through compulsory process or in lieu of compulsory process to its employees in this way merely because such disclosure may not cause “substantial commercial harm”. The FTC has recognized this possibility in its Rule of Practice § 3.31(d), 16 C.F.R. § 3.31(d) by providing the Administrative Law Judge (“ALJ”) with the power to “deny discovery ... to protect a party or other person from annoyance, embarrassment, [or] oppression ...”. This Court has acknowledged also the potential danger to a non-party

competitor in granting a protective order denying respondent's employees access to a competitor's confidential information: "[d]isclosure to [R]espondent's employees of confidential documents obtained from respondents competitors would undoubtedly cause needless competitive harm ..." In re BASF Wyandotte Corp., 1979 FTC LEXIS 599, at *2 (order granting protective order). See also Vikase Corp., v. W.R. Grace & Co., 2993 Dist. LEXIS 619, at *14 (N.D. Ill. Jan. 23, 1992)("The Court ... cannot underestimate the resourcefulness of plaintiff's employees when handed sensitive information of a competitor ... '[W]here confidential material is disclosed to an employee of a competitor, the risk of the competitor's obtaining an unfair business advantage may be substantially increased.'" (quoting Akzo N.V. v. U.S. International Trade Commission, 808 F.2d 1471, 1483 (Fed. Cir. 1986)); In re Toys "R" Us, Inc., 1997 FTC LEXIS 336, at **11-13 (order re respondent seeing in camera evidence)(Judge Timony applied the US International Trade Commission's position in Akzo to FTC proceedings, albeit for *in camera* motions, by balancing the interests of the parties and denying access to competitors employees absent a showing of necessity).

There is no basis to allow any Universal employee, who may or may not have a need to know such information for purposes of this litigation, to have access to Confidential Discovery Material of its competitor just because disclosure could not be shown to cause "substantial commercial harm." The FTC Rules recognize that avoiding embarrassment, annoyance or oppression are equally legitimate objections. Respondents have made no showing that there is a compelling reason to dispense with such protections in this case. Warner, therefore, respectfully requests that the Protective Order be modified as follows:

(i) paragraph 16 of the Definitions to be modified to add the phrase "or personal embarrassment" after the phrase "would not cause substantial commercial harm" so as to read:

16. “Protected Discovery Material” means Confidential Discovery Material the disclosure of which to Respondents and its affiliates would not cause substantial commercial harm or personal embarrassment to the disclosing party.

(ii) paragraph 5(b) to be modified to add the following two sentences:

“Disclosure of Protected Discovery Material made under subparagraph 5(b) above shall only be made to persons on a demonstrated need to know basis and shall be used by such persons only for the purpose of this proceeding and not for any business, competitive or other purpose whatsoever; in addition, the Parties shall follow the procedure set forth in paragraph 8(b) & (d) below for Disclosure to New Persons except notice by disclosing Party to Producing Party need only consist of the name and title/position of the person at Universal to whom such material is to be disclosed and a brief statement of the reasons why this person has a need to know Protected Discovery Material.”¹

(iii) paragraph 8(b) to be modified to replace “5” with “5(a)” in the first sentence.

2. The Use Of Warner’s Confidential Discovery Material In Other Proceedings

Warner respectfully objects to the Respondents’ ability under paragraph 1 of the Protective Order to “use or disclose any Discovery Material, or information derived therefrom, for any other proceeding” without Warner’s permission. It is completely inconsistent with the assurances of confidentiality given to Warner in consideration for producing these documents to allow Respondent (with or without the permission of the ALJ) to use these documents for any purpose other than in defending this suit. Had Warner had any inkling that its documents could be used by anyone other than the government for any purpose unrelated to the specific investigation in which they were requested, Warner would have litigated the question before producing the documents. Certainly Warner understood that its documents could be used in this proceeding. But to change the rules of the game to allow for their use by Respondents in unrelated actions at this point is a serious infringement of Warner’s rights and the assurances of

¹ See, e.g., In re Intel Corp., Docket No. 9288, F.T.C., (July 20, 1998)(protective order governing discovery material), available at <http://www.ftc.gov/os/adjpro/d9288/index.htm> (protective order provides for authorized disclosure of confidential information to any person only on a “need to know” basis and provides for procedural protections).

confidentiality afforded Warner at the outset. Confidential documents secured by the Government under compulsion for law enforcement purposes and disclosed to Respondents only in order to defend the allegations in the complaint, should not be made available for Respondents' benefit in wholly unrelated activities, including other law suits.

Furthermore, there is no requirement that Warner be given notice of an application to the ALJ so that Warner can appear and be heard on the issue before its documents are used in such other proceeding.

Discovery Material, or information derived therefrom, should be used by Respondents' solely for purposes of this matter, and under no circumstances should Respondent be entitled to use such information in any other proceeding. Warner respectfully requests the following portion of paragraph 1 of the Protective Order be deleted:

“Notwithstanding the foregoing, with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided, however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event”.

3. Limited Notice Provisions Regarding Experts

Pursuant to subparagraph 8(a) of the Protective Order, Respondents need only provide Warner with notice of its intent to disclose Confidential Discovery Material to a narrow class of experts; i.e. an expert who (i) is employed in; (ii) regularly consults to; or (iii) may otherwise have a financial or pecuniary interest in the music or home video industry other than his employment as an expert in this matter. Arguably this would allow Respondents to provide Confidential Discovery Material to all other experts without any notice to the Producing Party. The Protective Order recognizes that experts may have conflicting interests that, in all fairness,

should be disclosed before a third party's confidential information is made available to them. The provision, however, ignores that these same principles apply in the case of experts other than those identified. For example, experts other than those that "regularly" consult to the music or home video industry may have an opportunity to misuse confidential information received in the course of their work on this case. Just one example might be economic experts who do not "regularly" consult to the music industry, but who may consult for a particular plaintiff, or have consulted against Warner, in another case. Similarly, this provision does not take into account experts who were "previously" employed in the industry.

Limiting notice only to some specific groups of experts deprives Warner of important protections. Providing the identity of an expert "is necessary to assure no commercial harm" to the Producing Party; it does not prevent the disclosing party "from consulting with an expert" nor does it "inhibit" the disclosing party from "choosing his experts." In re Neubauer, 173 B.R. 505, 508 (D. Md. 1994). See also Biovail Corp. Int'l v. Hoechst Aktiengesellschaft, 1999 U.S. Dist. LEXIS 21621, at **20-21 (D. N.J. Nov. 12, 1999)(noting that where a party seeks a protective order due to the exchange of highly confidential information, "the desirability, if not necessity, of obtaining the identity of an opponents' consultants rests primarily on the need to ensure the confidentiality of the information.").

A primary purpose of the Protective Order is to limit unauthorized or inadvertent disclosure of confidential commercial information produced by third parties to the parties in this litigation. It cannot be left to Respondents' own judgment whether a particular expert has such conflicts of interest. Simply providing the required information to producing third parties with respect to all rather than just some experts helps ensure that confidential information is not abused, while imposing no undue burden on Respondents' defense.

Accordingly, Warner respectfully requests the following portion of subparagraph 8(a) of the Protective Order be deleted:

“and who is employed in, regularly consults to, or may otherwise have a financial or pecuniary interest in the music or home video industry beyond his employment as an expert in this Matter,”

so as to read in part:

8a) Disclosure to Experts

If any Party desires to disclose Confidential Discovery Material to any expert who may testify, who is not an FTC employee,⁴² ~~and who is employed in, regularly consults to, or may otherwise have a financial or pecuniary interest in the music or home video industry beyond his employment as an expert in this Matter,~~ the disclosing Party shall notify the Producing Party of its desire to disclose such material.

Conclusion

The Protective Order entered into this case was not a product of any agreement reached between the Parties and Warner. This motion provides the only means by which Warner, pursuant to FTC Rule of Practice 4.10(g), 16 C.F.R. § 4.10(g), can “seek an appropriate protective order” before its confidential information is disclosed. Therefore, pending resolution of this motion, Warner respectfully requests that the Court stay disclosure by the FTC. The protections sought in this motion are commonplace and vindicate Warner’s legitimate interests in its confidential information while not unduly hindering Respondent. Warner respectfully requests that the Court grant this Motion to Modify the Protective Order Governing Discovery Material to avoid unwarranted disclosure of Warner’s confidential commercial information.

Respectfully submitted,

George S. Cary,
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1801
Tel: (202) 974-1500
Fax: (202) 974-1999
Email: gcary@cgsh.com

Counsel for Warner Communications Inc.

October 19, 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.)	
_____)	

CERTIFICATE OF SERVICE

I, George S. Cary, hereby certify that on October 19, 2001, I caused a true and correct copy of *Warner Communications Inc.'s Motion to Modify the Protective Order Governing Discovery Material and to Stay Disclosure Pending Resolution of this motion* to be served upon the following persons by hand delivery or first-class mail:

Hon. James P. Timony
Administrative Law Judge
Federal Trade Commission
Room H-112
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Donald S. Clark, Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Geoffrey M. Green
Bureau of Competition
Federal Trade Commission
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Richard B. Dagen
Assistant Director, Bureau of Competition
Federal Trade Commission
Room 3037
601 Pennsylvania Ave., N.W.
Washington, D.C. 20580

M. Sean Royall
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-378
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Joseph J. Simons
Director, Bureau of Competition
Federal Trade Commission
Room H-372
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Michael E. Antalics
Deputy Director, Bureau of Competition
Federal Trade Commission
Room H-376
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

George S. Cary

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a corporation.)	
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ORDER

Upon the motion of Warner Communications Inc., and for good cause shown, **IT IS HEREBY ORDERED** that the Protective Order entered in this matter on October 16, 2001 is modified as follows:

1. paragraph 16 of the Definitions shall be modified to add the phrase “or personal embarrassment” after the phrase “would not cause substantial commercial harm”;
2. paragraph 5(b) of the Protective Order shall be modified to add the following two sentences:

“Disclosure of Protected Discovery Material made under subparagraph 5(b) above shall only be made to persons on a demonstrated need to know basis and shall be used by such persons only for the purpose of this proceeding and not for any business, competitive or other purpose whatsoever; in addition, the Parties shall follow the procedure set forth in paragraph 8(b) & (d) below for Disclosure to New Persons except notice by disclosing Party to Producing Party need only

consist of the name and title/position of the person at Universal to whom such material is to be disclosed and a brief statement of the reasons why this person has a need to know Protected Discovery Material.”;

3. paragraph 8(b) shall be modified to replace “5” with “5(a)” in the first sentence;
4. the following words shall be deleted from paragraph 1 of the Protective Order:

“Notwithstanding the foregoing, with notice to the Producing Party, a Party may apply to the Administrative Law Judge for approval of the use or disclosure of any Discovery Material, or information derived therefrom, for any other proceeding. Provided, however, that in the event that the Party seeking to use Discovery Material in any other proceeding is granted leave to do so by the Administrative Law Judge, it will be required to take appropriate steps to preserve the confidentiality of such material. Additionally, in such event”;

5. the following words shall be deleted from paragraph 8(a) of the Protective Order:

“and who is employed in, regularly consults to, or may otherwise have a financial or pecuniary interest in the music or home video industry beyond his employment as an expert in this Matter”.

ORDERED:

Date: _____

James P. Timony
Chief Administrative Law Judge

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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a corporation.)	
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DECLARATION OF GEORGE S. CARY

GEORGE S. CARY, hereby declares as follows:

1. I am a partner at Cleary, Gottlieb, Steen & Hamilton located at 2000 Pennsylvania Ave., NW, Washington, DC, 20006. I represent Warner Communications Inc. (“Warner”).
2. I submit this declaration to demonstrate that I have conferred with Respondents’ counsel and FTC Counsel in an effort to resolve by agreement the issues raised by this motion and have been unable to reach such an agreement.
3. Prior to receiving official notification from the Federal Trade Commission (“FTC”) of its intent to disclose confidential Warner documents produced to the FTC during the precomplaint stage of this matter, I participated in numerous phone calls with Geoffrey Green, trial attorney with the Bureau of Competition at the FTC, to express Warner’s concerns regarding certain provisions of the Respondents draft protective order. Warner made its views know to Mr. Green, including its views on the matters discussed in Warner’s Motion To Modify The Protective Order. Mr. Green indicated that the FTC had no objection to accommodating Warner’s requests. I also expressed similar concerns with Glenn Pomerantz, counsel to Respondents, during the course of the Parties negotiations over the protective order.

4. Immediately upon notification from the FTC on Friday, October 12, 2001 of its intent to disclose confidential Warner documents, I left a voicemail for Mr. Pomerantz, to discuss the outstanding issues. On Tuesday, October 16, 2001, I left similar voicemails for Mr. Pomerantz. The following evening, Wednesday October 17, 2001, I received a call from Mr. Pomerantz and we discussed each of the issues raised by this motion. Mr. Pomerantz indicated that he could not resolve the issues with consultation with his client.

5. On Thursday, at approximately 6 p.m., I called Mr. Pomerantz again, not having heard from him. He indicated that Respondents, having reached agreement with the FTC staff, was not prepared to agree with Warner either to modify the protective order or to enter into a separate agreement with Warner providing it with greater protection.

6. After a good faith effort to resolve by agreement the issues raised by this motion, no agreement was reached.

7. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 19, 2001

George S. Cary

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DRAFT PROTECTIVE ORDER GOVERNING DISCOVERY MATERIAL

For the purpose of protecting the interests of the parties and third parties in the above captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

IT IS HEREBY ORDERED THAT this Protective Order Governing Confidential Material ("Protective Order") shall govern the handling of all Discovery Material, as hereafter defined.

DEFINITIONS

1. "Matter" means the matter captioned *In the Matter of PolyGram Holding, Inc., Decca Music Group Limited, UMG Recordings, Inc., and Universal Music & Video Distribution Corp.*, Docket Number 9298, pending before the Federal Trade Commission, and all subsequent

appellate or other review proceedings related thereto.

2. "Commission" or "FTC" means the Federal Trade Commission, or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this Matter.

3. "PolyGram Holding" means PolyGram Holding, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at New York, New York.

4. "Decca Music" means Decca Music Group Limited, a corporation organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at London, England.

5. "UMG" means UMG Recordings, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Santa Monica, California.

6. "UMVD" means Universal Music & Video Distribution Corp., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Universal City, California.

7. "Party" means either the FTC, PolyGram Holding, Decca Music, UMG, or UMVD.

8. "Respondents" means PolyGram Holding, Decca Music, UMG, and UMVD.

9. "Outside Counsel" means any law firm that is counsel of record for a Respondent in this Matter; its associated attorneys; persons regularly employed by such law firms (including legal assistants, clerical staff, and information management personnel); and temporary personnel retained by

such law firm to perform legal or clerical duties, or to provide logistical litigation support with regard to this Matter; provided that any attorney associated with Outside Counsel shall not be a director, officer or employee of Respondents. The term Outside Counsel does not include persons retained as consultants or experts for the purposes of this Matter.

10. "Producing Party" means a Party or Third Party that produced or intends to produce Confidential Discovery Material to any of the Parties. For purposes of Confidential Discovery Material of a Third Party that either is in the possession, custody or control of the FTC or has been produced by the FTC in this Matter, the Producing Party shall mean the Third Party that originally provided the Confidential Discovery Material to the FTC. The Producing Party shall also mean the FTC for purposes of any document or material prepared by, or on behalf of the FTC.

11. "Third Party" means any natural person, partnership, corporation, association, or other legal entity not named as a party to this Matter, and their employees, directors, officers, attorneys and agents.

12. "Expert/Consultant" means experts or other persons who are retained to assist complaint counsel or Respondents' counsel in preparation for trial or to give testimony at trial.

13. "Document" means the complete original or a true, correct and complete copy and any non-identical copies of any written or graphic matter, no matter how produced, recorded, stored or reproduced, and includes all drafts and all copies of every such writing, record or graphic that contain any commentary, notes, or marking whatsoever not appearing on the original.

“Document” includes, but is not limited to, every writing, letter, envelope, telegram, e-mail, meeting minute, memorandum, statement, affidavit, declaration, book, record, survey, map, study,

handwritten note, working paper, chart, index, tabulation, graph, drawing, chart, photograph, tape, phono record, compact disc, video tape, data sheet, data processing card, printout, microfilm, index, computer readable media or other electronically stored data, appointment book, diary, diary entry, calendar, organizer, desk pad, telephone message slip, note of interview or communication, or any other data compilation from which information can be obtained.

14. "Discovery Material" includes without limitation deposition testimony, deposition exhibits, interrogatory responses, admissions, affidavits, declarations, documents produced pursuant to compulsory process or voluntarily in lieu thereof, and any other documents or information produced or given to one Party by another Party or by a Third Party in connection with discovery in this Matter.

15. "Confidential Discovery Material" means all Discovery Material that is designated by a Producing Party as confidential and that is covered by Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. § 46(f), and Commission Rule of Practice § 4.10(a)(2), 16 C.F.R. § 4.10(a)(2); or Section 26(c)(7) of the Federal Rules of Civil Procedure and precedents thereunder. Confidential Discovery Material shall include non-public commercial information, the disclosure of which to Respondents or Third Parties would cause substantial commercial harm or personal embarrassment to the disclosing party. The following is a non-exhaustive list of examples of information that likely will qualify for treatment as Confidential Discovery Material: strategic plans (involving pricing, marketing, research and development, product roadmaps, corporate alliances, or mergers and acquisitions) that have not been fully implemented or revealed to the public; trade secrets; customer-specific evaluations or data (e.g., prices, volumes, or

revenues); personnel files and evaluations; information subject to confidentiality or non-disclosure agreements; proprietary technical or engineering information; proprietary financial data or projections; and proprietary consumer, customer or market research or analyses applicable to current or future market conditions, the disclosure of which could reveal Confidential Discovery Material.

16. "Protected Discovery Material" means Confidential Discovery Material the disclosure of which to Respondents and its affiliates would not cause substantial commercial harm or personal embarrassment to the disclosing party.

TERMS AND CONDITIONS OF PROTECTIVE ORDER

1. Discovery Material, or information derived therefrom, shall be used solely by the Parties for purposes of this Matter, and shall not be used for any other purpose, including without limitation any business or commercial purpose. The Commission may only use or disclose Discovery Material as provided by (1) its Rules of Practice, Sections 6(f) and 21 of the Federal Trade Commission Act and any cases so construing them; and (2) any other legal obligation imposed upon the Commission. The Parties, in conducting discovery from Third Parties, shall attach to such discovery requests a copy of this Protective Order and a cover letter that will apprise such Third Parties of their rights hereunder.

2. Discovery Material may be designated as Confidential Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation "CONFIDENTIAL - FTC Docket No. 9298" (or other similar notation containing a reference to this Matter) to the first page of a document containing such Confidential

Discovery Material, or by Parties or Producing Parties instructing the court reporter to denote each page of a transcript containing such Confidential Discovery Material as "Confidential." Such designations shall be made within fourteen (14) days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the designations that the document constitutes or contains "Confidential Discovery Material."

Discovery Material may be designated as Protected Discovery Material by Producing Parties by placing on or affixing, in such manner as will not interfere with the legibility thereof, the notation "PROTECTED - FTC Docket No. 9298" (or other similar notation containing a reference to this Matter) to the first page of a document containing such Protected Discovery Material, or by Parties or Producing Parties instructing the court reporter to denote each page of a transcript containing such Protected Discovery Material as "Protected." Such designations shall be made within fourteen (14) days from the initial production or deposition and constitute a good-faith representation by counsel for the Party or Third Party making the designations that the document constitutes or contains "Protected Discovery Material."

3. All documents heretofore obtained by compulsory process or voluntarily from any Party or Third Party, regardless of whether designated confidential by the Party or Third Party, and transcripts of any investigational hearings, interviews and depositions, that were obtained during the precomplaint stage of this Matter shall be treated as Confidential Discovery Material. Material previously produced by Respondents or a Third Party, and designated as "Confidential," regardless of whether such materials have been marked in accordance with paragraph 2 above, shall be treated as Confidential Discovery Material.

4. Confidential Discovery Material (with the exception of Protected Discovery Material) shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to:

(a) complaint counsel and the Commission, as permitted by the Commission's Rules of Practice;

(b) Outside Counsel;

(c) Experts/Consultants;

(d) the Administrative Law Judge and personnel assisting him;

(e) court reporters and deposition transcript reporters;

(f) judges and other court personnel of any court having jurisdiction over any appeal proceedings involving this Matter;

(g) any author or recipient of the Confidential Discovery Material (as indicated, for example, on the face of the document, record or material), and any individual who was in the direct chain of supervision of any author or recipient at the time the Confidential Discovery Material was created or received; and

(h) such other person(s) authorized in writing by the Producing Party.

5. Protected Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to anyone except to:

(a) those persons identified in paragraphs 4(a) through 4(h); and

(b) officers, directors, and employees of Respondents or any direct or indirect subsidiary of the ultimate parent of any Respondent.

Disclosure of Protected Discovery Material made under subparagraph 5(b) above shall only be

made to persons on a demonstrated need to know basis and shall be used by such persons only for the purpose of this proceeding and not for any business, competitive or other purpose whatsoever; in addition, the Parties shall follow the procedure set forth in paragraph 8(b) & (d) below for Disclosure to New Persons except notice by disclosing Party to Producing Party need only consist of the name and title/position of the person at Universal to whom such material is to be disclosed and a brief statement of the reasons why this person has a need to know Protected Discovery Material.

6. In addition to the above-designated persons, one in-house counsel for Respondents who is not involved in competitive decision making may be provided with access to Confidential Discovery Material on the condition that this in-house counsel signs a declaration in the form attached hereto as Exhibit "A," which is incorporated herein by reference. The designated in-house counsel for Respondents is Harvey Geller.

7. Confidential Discovery Material shall not, directly or indirectly, be disclosed or otherwise provided to an Expert/Consultant unless such Expert/Consultant agrees in writing:

(a) to maintain such Confidential Discovery Material in separate locked rooms or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;

(b) to return such Confidential Discovery Material to complaint counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of the Expert/Consultant's assignment or retention or the conclusion of this Matter;

(c) not to disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and

(d) to use such Confidential Discovery Material and the information contained

therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

8. This paragraph governs the procedures for the following specified disclosures and challenges to designations of confidentiality.

(a) Disclosure to Experts

If any Party desires to disclose Confidential Discovery Material to any expert who may testify, who is not an FTC employee, the disclosing Party shall notify the Producing Party of its desire to disclose such material. Such notice shall identify the specific expert who may testify to whom the Confidential Discovery Material is to be disclosed. Such identification shall include, but not be limited to, the full name and professional address and/or affiliation of the proposed expert who may testify, and a current curriculum vitae of such expert identifying all other present and prior employers and/or firms in the music or home video industry for which or on behalf of which the identified expert has been employed or done consulting work in the preceding four (4) years. The Producing Party may object to the disclosure of the Confidential Discovery Material within five (5) business days of receiving notice of an intent to disclose the Confidential Discovery Material to the identified expert by providing the disclosing Party with a written statement of the reasons for the objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Confidential Discovery Material to the identified expert, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified expert. If at the end of five (5) business days of negotiating the

parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 8(c) of this Protective Order. If the Producing Party does not object to the disclosure of Confidential Discovery Material to the identified expert within five (5) business days, the disclosing Party may disclose the Confidential Discovery Material to the identified expert.

(b) Disclosure to New Persons

If any Party desires to disclose a Producing Party's Confidential Discovery Material to any person other than those referred to in paragraphs 4, 5(a) and 6 of this Protective Order ("New Person"), the disclosing Party shall inform the Producing Party of its desire to disclose such material. Such notice shall identify those materials sought to be disclosed with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials), and the specific New Person (by name and business affiliation) to whom such material is to be disclosed. The Producing Party may object to the disclosure of the Confidential Discovery Material within five (5) business days of receiving notice of an intent to disclose the Confidential Discovery Material to the New Person by providing the disclosing Party with a written statement of the reasons for the objection. If the Producing Party timely objects, the disclosing Party shall not disclose the Confidential Discovery Material to the New Person, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party lodging an objection and the disclosing Party shall meet and confer in good faith in an attempt to determine the terms of disclosure to the identified New Person. If at the end of five (5) business days of negotiating the parties have not resolved their differences or if counsel determine in good

faith that negotiations have failed, the disclosing Party may make written application to the Administrative Law Judge as provided by paragraph 8(d) of this Protective Order. If the Producing Party does not object to the disclosure of the Confidential Discovery Material to the New Person within five (5) business days, the disclosing Party may disclose the Confidential Discovery Material to the identified New Person.

(c) Challenges to Confidentiality Designations

If any Party seeks to challenge a Producing Party's designation of material as Confidential Discovery Material or any other restriction contained within this Protective Order, the challenging Party shall notify the Producing Party and all Parties of the challenge to such designation. Such notice shall identify with specificity (i.e., by document control numbers, deposition transcript page and line reference, or other means sufficient to locate easily such materials) the designation being challenged. The Producing Party may preserve its designation within five (5) business days of receiving notice of the confidentiality challenge by providing the challenging Party and all Parties to this action with a written statement of the reasons for the designation. If the Producing Party timely preserves its rights, the Parties shall continue to treat the challenged material as Confidential Discovery Material, absent a written agreement with the Producing Party or order of the Administrative Law Judge. The Producing Party preserving its rights and the challenging Party shall meet and confer in good faith in an attempt to negotiate changes to any challenged designation. If at the end of five (5) business days of negotiating the parties have not resolved their differences or if counsel determine in good faith that negotiations have failed, the challenging Party may make written application to the Administrative Law Judge as provided by paragraph 8(d) of this Protective Order.

If the Producing Party does not preserve its rights within five (5) business days, the challenging Party may alter the designation as contained in the notice. The challenging Party shall notify the Producing Party and the other Parties to this action of any changes in confidentiality designations.

Regardless of confidential designation, copies of published magazine or newspaper articles, and excerpts from published books and public documents filed with the Securities and Exchange Commission may be used by any Party without reference to the procedures of this subparagraph.

(d) Resolution of Disclosure or Confidentiality Disputes

If negotiations under subparagraphs 8(a)-(c) of this Protective Order have failed to resolve the issues, a Party seeking to disclose Confidential Discovery Material or challenging a confidentiality designation or any other restriction contained within this Protective Order may make written application to the Administrative Law Judge for relief. Such application shall be served on the Producing Party and the other Parties to this action, and be accompanied by a certification that the meet and confer obligations of this paragraph have been met, but that good faith negotiations have failed to resolve outstanding issues. The Producing Party and any other Parties shall have five (5) business days to respond to the application, which time may be extended by the Administrative Law Judge. While an application is pending, the Parties shall maintain the pre-application status of the Confidential Discovery Material. Nothing in this Protective Order shall create a presumption or alter the burden of persuading the Administrative Law Judge of the propriety of a requested disclosure or change in designation.

9. Confidential Discovery Material shall not be disclosed to any person described in

subparagraphs 4(b) and 4(c), paragraph 5, and paragraph 6 of this Protective Order until such person has executed and transmitted to Respondent's counsel or complaint counsel, as the case may be, a declaration or declarations, as applicable, in the form attached hereto as Exhibit "A," which is incorporated herein by reference. Respondents' counsel and complaint counsel shall maintain a file of all such declarations for the duration of the litigation. Confidential Discovery Material shall not be copied or reproduced for use in this Matter except to the extent such copying or reproduction is reasonably necessary to the conduct of this Matter, and all such copies or reproductions shall be subject to the terms of this Protective Order. If the duplication process by which copies or reproductions of Confidential Discovery Material are made does not preserve the confidentiality designations that appear on the original documents, all such copies or reproductions shall be stamped "CONFIDENTIAL - FTC Docket No. 9298."

10. The Parties shall not be obligated to challenge the propriety of any designation or treatment of information as Confidential and the failure to do so promptly shall not preclude any subsequent objection to such designation or treatment, or any motion seeking permission to disclose such material to persons not referred to in paragraphs 4, 5 and 6 above. If Confidential Discovery Material is produced without the legend attached, such document shall be treated as Confidential from the time the Producing Party advises complaint counsel and Respondents' counsel in writing that such material should be so designated and provides all the Parties with an appropriately labeled replacement. The Parties shall return promptly or destroy the unmarked documents.

11. If the FTC: (a) receives a discovery request that may require the disclosure by it of a Third Party's Confidential Discovery Material; or (b) intends to or is required to disclose, voluntarily

or involuntarily, a Third Party's Confidential Discovery Material (whether or not such disclosure is in response to a discovery request), the FTC promptly shall notify the Third Party of either receipt of such request or its intention to disclose such material. Such notification shall be in writing and sent for receipt by the Third Party at least five (5) business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Third Party of its rights hereunder.

12. If any Party receives a discovery request in another proceeding that may require the disclosure of a Producing Party's Confidential Discovery Material, the subpoena recipient promptly shall notify the Producing Party of receipt of such request. Such notification shall be in writing and sent for receipt by the Producing Party at least five (5) business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the Producing Party of its rights hereunder. The Producing Party shall be solely responsible for asserting any objection to the requested production. Nothing herein shall be construed as requiring the subpoena recipient or anyone else covered by this Order to challenge or appeal any such order requiring production of Confidential Discovery Material, or to subject itself to any penalties for noncompliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission.

13. This Order governs the disclosure of information during the course of discovery and does not constitute an *in camera* order as provided in Section 3.45 of the Commission's Rules of Practice ("Rule"), 16 C.F.R. § 3.45.

14. Nothing in this Protective Order shall be construed to conflict with the provisions of Sections 6, 10, and 21 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 50, 57b-2, or with

Rules 3.22, 3.45 or 4.11 (b)-(e), 16 C.F.R. §§ 3.22, 3.45 and 4.11 (b)-(e).¹ Any Party or Producing Party may move at any time for *in camera* treatment of any Confidential Discovery Material or any portion of the proceedings in this Matter to the extent necessary for proper disposition of the Matter.

15. At the conclusion of this Matter, Respondents' counsel shall return to the Producing Party, or destroy, all originals and copies of documents and all notes, memoranda, or other papers containing Confidential Discovery Material that has not been made part of the public record in this Matter. Complaint counsel shall dispose of all documents in accordance with Rule 4.12, 16 C.F.R. § 4.12.

16. The provisions of this Protective Order, insofar as they restrict the communication and use of Confidential Discovery Material shall, without written permission of the Producing Party or further order of the Administrative Law Judge hearing this Matter, continue to be binding after the conclusion of this Matter.

17. This Protective Order shall not apply to the disclosure by a Producing Party or its Counsel of such Producing Party's Confidential Discovery Material to such Producing Party's employees, agents, former employees, board members, directors, and officers.

¹ The right of the Administrative Law Judge, the Commission, and reviewing courts to disclose information afforded *in camera* treatment or Confidential Discovery Material, to the extent necessary for proper disposition of the proceeding, is specifically reserved pursuant to Rule 3.45, 16 C.F.R. § 3.45.

18. The production or disclosure of any Discovery Material made after entry of this Protective Order which a Producing Party claims was inadvertent and should not have been produced or disclosed because of a privilege will not be deemed a waiver of any privilege to which the Producing Party would have been entitled had the privileged Discovery Material not inadvertently been produced or disclosed. In the event of such claimed inadvertent production or disclosure, the following procedures shall be followed:

(a) The Producing Party may request the return of any such Discovery Material within twenty (20) days of discovering that it was inadvertently produced or disclosed (or inadvertently produced or disclosed without redacting the privileged content). A request for the return of any Discovery Material shall identify the specific Discovery Material and the basis for asserting that the specific Discovery Material (or portions thereof) is subject to the attorney-client privilege or the work product doctrine and the date of discovery that there had been an inadvertent production or disclosure.

(b) If a Producing Party requests the return, pursuant to this paragraph, of any such Discovery Material from another Party, the Party to whom the request is made shall return immediately to the Producing Party all copies of the Discovery Material within its possession, custody, or control — including all copies in the possession of experts, consultants, or others to whom the Discovery Material was provided — unless the Party asked to return the Discovery Material in good faith reasonably believes that the Discovery Material is not privileged. Such good faith belief shall be based on either (i) a facial review of the discovery material or (ii) the inadequacy of any explanations provided by the Producing Party, and shall not be based on an argument that

production or disclosure of the Discovery Material waived any privilege. In the event that only portions of the Discovery Material contain privileged subject matter, the Producing Party shall substitute a redacted version of the Discovery Material at the time of making the request for the return of the requested Discovery Material;

(c) Should the Party contesting the request to return the Discovery Material pursuant to this paragraph decline to return the Discovery Material, the Producing Party seeing the return of the Discovery Material may thereafter move for an order compelling the return of the Discovery Material. In any such motion, the Producing Party shall have the burden of showing that the Discovery Material is privileged and that the production was inadvertent.

19. Nothing in this Protective Order shall be construed to limit, restrict, or otherwise affect the ability of the parties to seek to modify this Protective Order by application to the Administrative Law Judge for good cause shown.

20. Entry of the foregoing Protective Order is without prejudice to the right of the Parties or Third Parties to apply for further protective orders or for modification of any provision of this Protective Order.

ORDERED:

James P. Timony
Administrative Law Judge

Dated: _____

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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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.)	
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**DECLARATION CONCERNING PROTECTIVE ORDER
GOVERNING DISCOVERY MATERIAL**

I, [NAME], hereby declare and certify the following to be true:

1. [Statement of employment]

2. I have read the "Protective Order Governing Discovery Material" ("Protective Order") issued by Administrative Law Judge James P. Timony on _____, in connection with the above captioned matter. I understand the restrictions on my use of any Confidential Discovery Material (as this term is used in the Protective Order) in this action and I agree to abide by the Protective Order.

3. I understand that the restrictions on my use of such Confidential Discovery Material include:

- a. that I will use such Confidential Discovery Material only for the purpose of preparing for this proceeding, and hearing(s) and any appeal of this proceeding and for no other purpose;
- b. that I will not disclose such Confidential Discovery Material to anyone, except as permitted by the Protective Order; and
- c. that upon the termination of my participation in this proceeding I will promptly return all Confidential Discovery Material, and all notes, memoranda, or other papers containing Confidential Discovery Material, to complaint counsel or respondent's counsel, as appropriate.

4. I understand that if I am receiving Confidential Discovery Material as an Expert/Consultant, as that term is defined in this Protective Order, the restrictions on my use of Confidential Discovery Material also include the duty and obligation:

- a. to maintain such Confidential Discovery Material in separate locked room(s) or locked cabinet(s) when such Confidential Discovery Material is not being reviewed;
- b. to return such Confidential Discovery Material to complaint counsel or Respondent's Outside Counsel, as appropriate, upon the conclusion of my assignment or retention; and
- c. to use such Confidential Discovery Material and the information contained therein solely for the purpose of rendering consulting services to a Party to this Matter, including providing testimony in judicial or administrative proceedings arising out of this Matter.

5. I am fully aware that, pursuant to Section 3.42(h) of the Commission's Rules of Practice, 16 C.F.R. § 3.42(h), my failure to comply with the terms of the Protective Order may constitute contempt of the Commission and may subject me to sanctions imposed by the Commission.

Full Name [Typed or Printed]

Date: _____

Signature

