

COP

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



In the Matter of  
**POLYGRAM HOLDING, INC.,**  
a corporation  
**DECCA MUSIC GROUP LIMITED,**  
a Corporation,  
**UMG RECORDINGS, INC.,**  
a corporation,  
and  
**UNIVERSAL MUSIC & VIDEO  
DISTRIBUTION CORP.,**  
a corporation.

FILE/DOCKET NO.  
488016/0010231/DO9298

**RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S  
MOTION TO COMPEL RESPONDENTS TO PRODUCE DOCUMENTS**

Respondents PolyGram Holding, Inc. ("PolyGram Holding"), Decca Music Group Limited ("Decca"), UMG Recordings, Inc. ("UMG"), and Universal Music & Video Distribution Corp. ("UMVD") (collectively "Universal" or "Respondents") respectfully submit this memorandum in opposition to complaint counsel's motion to compel Respondents to produce documents.

Complaint Counsel's motion is directed to Specification 19 of Complaint Counsel's First Request for Production of Documents. Although this action is based solely on conduct that allegedly occurred in the context of a joint venture for Three Tenors products, and

although Complaint Counsel contend that the "moratorium" they allege may be found unlawful under some form of abbreviated antitrust analysis under which no analysis of anticompetitive effects is required, Complaint Counsel are seeking the production of *all* market studies, consumer research, forecasts and surveys regarding "supply and demand condictions for audio products or video products," "the relationship, if any, between the advertising/promotion of audio products and prices or sales levels," and/or "the relationship, if any, between the advertising/promotion of video products and prices or sales levels." See Complaint Counsel's Mem. at 2.

Specification 19 is unduly burdensome and is not reasonably calculated to lead to the discovery of admissible evidence. Respondents have searched the files of the employees in Universal's classical music group for documents responsive to Specification 19, and have produced the small number of documents they were able to locate that were responsive to that request. Additionally, Respondents have informed Complaint Counsel that they do not have a company-wide consumer or market research group, and that there is no central repository of documents responsive to this request. Any further search for documents responsive to this request would entail a pointless and far-reaching fishing expedition through the files of numerous persons working in Universal's many rap, hip hop, alternative, popular, and country music labels in search of documents having nothing to do with the Three Tenors joint venture (or any joint venture at all). Completely ignoring the obvious fact that different people listed to different music, Complaint Counsel has not offered any reason why any consumer research regarding rap or country recordings, for instance, would be of any conceivable relevance to this action.

Complaint Counsel's contention that the requested materials somehow became relevant to this action as a result of the opinions included in Respondents' expert reports reflects a fundamental misunderstanding of both the law applicable to the narrow case Complaint Counsel have chosen to pursue and the opinions of Respondents' expert witnesses. Complaint Counsel are not pursuing a rule of reason case, but rather contend that the alleged "moratorium" on certain promotional activities relating to the 1990 and 1994 Three Tenors albums during the period surrounding the release of the 1998 album as part of a joint venture between PolyGram and Warner can be found unlawful under the abbreviated, "quick look," mode of analysis set forth in, *inter alia*, *California Dental Assn. v. FTC*, 526 U.S. 756 (1999). To establish liability, Complaint Counsel will need to establish (1) that the alleged moratorium had an "obvious" anticompetitive effect in some relevant market and (2) that the procompetitive justifications for the alleged moratorium offered by Respondents are not even "plausible." *Id.* at 771-81. Complaint Counsel's failure to establish either of these elements would require that the alleged moratorium be analyzed under the rule of reason and, because Complaint Counsel have chosen to forego a rule of reason case, a decision in Respondents' favor.

Accordingly, far from opining that "price discounting and advertising are not significant competitive factors in the recorded music industry," that the "recorded music industry is like no other industry," or that "Three Tenors albums are like no other albums," *see* Complaint Counsel's Mem. at 2-3, Respondents' experts have opined that the alleged moratorium did not result in any "obvious" anticompetitive effect, and that the procompetitive justifications identified by Respondents are at least "plausibly" valid. In developing their opinions, Respondents' experts did not rely on consumer research regarding rap or country music, but rather focused on Complaint Counsel's narrow allegations and the available documentary

evidence and witness testimony regarding the Three Tenors joint venture and the alleged moratorium. Thus, contrary to Complaint Counsel's contention, it is exceedingly unlikely that the market studies, consumer research, surveys and forecasts regarding other musical genres would be of any relevance here.

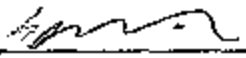
ii. Conclusion

For all of the foregoing reasons, Complaint Counsel's motion to compel should be denied.

Dated: January 10, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen E. Morrissey, hereby certify that on January 10, 2002, I caused a copy of the attached **RESPONDENTS' MEMORANDUM IN OPPOSITION TO COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONDENTS TO PRODUCE DOCUMENTS** to be served upon the following persons by facsimile and Federal Express:

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