

**ORIGINAL**

**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. )

**PUBLIC RECORD**

Docket No. 9298

**WARNER COMMUNICATIONS INC.'S MOTION FOR  
IN CAMERA TREATMENT OF CERTAIN  
CONFIDENTIAL DOCUMENTS DESIGNATED AS TRIAL EXHIBITS**

Non-party Warner Communications Inc. ("Warner") moves, under Federal Trade Commission ("FTC") Rule of Practice 3.45(b), 16 C.F.R. §3.45(b), for an order directing *in camera* treatment of certain confidential documents designated as proposed trial exhibits ("Proposed Trial Exhibits") by Complaint Counsel. Warner oversees a collection of entities known as Warner Music Group ("WMG"). Such documents, copies of which accompany the non-public version of this motion as Confidential Exhibits A – BB include information revealing: (i) WMG's present and future business plans; (ii) WMG's confidential contractual relations with artists and other third parties; and (iii) WMG's marketing strategies for certain artists, retail discounts and pricing policies. Warner submits that good cause exists for *in camera*

treatment of the following confidential Warner documents for the time period specified, as public disclosure of such documents would cause "serious competitive injury."

The Proposed Trial Exhibits for which Warner seeks *in camera* treatment are listed below:<sup>1</sup>

<b>Confidential Exhibit</b>	<b>Document</b>	<b>Length of time <i>In Camera</i> Treatment Requested</b>
<b><u>GROUP A</u></b>		
A.	3TEN00000130	10 Years
B.	3TEN00000230	10 Years
C.	3TEN00010795-3TEN00010797	10 Years
D.	3TEN00000225	10 Years
E.	3TEN00010184-3TEN00010185	10 Years
F.	3TEN00010181-3TEN00010183	10 Years
G.	3TEN00002142-3TEN00002147	10 Years
H.	3TEN00010151	10 Years
I.	3TEN00007301	10 Years
BB.	Portions of Anthony O'Brien's Deposition Transcript <sup>2</sup> ¶¶ 84:25-86:12	10 Years
<b><u>GROUP B</u></b>		
J.	3TEN00000209-3TEN00000216	Permanent
K.	3TEN00002308-3TEN00002323 <sup>3</sup>	Permanent
L.	3TEN00002392-3TEN00002403	Permanent
M.	3TEN00002405-3TEN00002412	Permanent
N.	3TEN00003601-3TEN00003602	Permanent
O.	3TEN00002438-3TEN00002449 <sup>4</sup>	Permanent

<sup>1</sup> At the present time, the admissibility of Warner's confidential documents designated by Complaint Counsel as Proposed Trial Exhibits has yet to be ruled upon. Thus, Warner has identified the documents for which *in camera* treatment is being sought by reference to each document's original bates number as previously submitted by Warner during the pre-complaint investigatory phase of this matter.

<sup>2</sup> Transcript of Anthony J. O'Brien (and related exhibits) ("O'Brien Dep."), dated December 6, 2001.

<sup>3</sup> *In camera* treatment sought for pages 3TEN00002308-3TEN00002320 only.

<sup>4</sup> *In camera* treatment sought for pages 3TEN00002438-3TEN00002443 only.

<b>Confidential Exhibit</b>	<b>Document</b>	<b>Length of time <i>In Camera</i> Treatment Requested</b>
P.	3TEN00003298-3TEN00003299	Permanent
Q.	3TEN00017990-3TEN00017996	Permanent
R.	3TEN00000173-3TEN00000186	Permanent
S.	3TEN00000187-3TEN00000199	Permanent
T.	3TEN00000074-3TEN00000091	Permanent
U.	3TEN00006987-3TEN00006997	Permanent
V.	3TEN00003755-3TEN00003765	Permanent
W.	3TEN00005522-3TEN00005531	Permanent
X.	3TEN00000640-3TEN00000651	Permanent
Y.	3TEN00000052-3TEN00000062	Permanent
Z.	3TEN00004303-3TEN00004320	Permanent
BB.	Portions of O'Brien Dep. ¶¶ 29:13-34:21	Permanent
<b><u>GROUP C</u></b>		
AA.	3TEN00003977-3TEN00003978	10 Years
BB.	Portions of O'Brien Dep. ¶¶ 49:1-6; 60:22-61:3; 90:23-92:6; 106:14-107:15	Permanent

In further support of this motion, Warner submits the attached memorandum of law. Neither Complaint Counsel nor Respondents' counsel in this proceeding object to this request for *in camera* treatment of the above-identified Proposed Trial Exhibits.<sup>5</sup> A proposed order is attached for the Court's convenience. Warner respectfully requests that the Court grant this Motion for *In Camera* Treatment of Certain Confidential Documents Designated as Trial Exhibits to avoid serious competitive harm.

Respectfully submitted,



George S. Cary

Tanya N. Dunne\*

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Counsel for Non-party

Warner Communications Inc.

\* Admitted in New York only. Working under the supervision of principals in the Washington office.

Dated: February 28, 2002

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<sup>5</sup> The FTC has requested, and Warner does not object, that witnesses be able to discuss the contracts in Group B in "general terms;" provided, however, that the identified contracts, and drafts thereof, be kept under seal.

**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

**PROPOSED ORDER GRANTING WARNER COMMUNICATIONS INC.'S  
MOTION FOR *IN CAMERA* TREATMENT OF CERTAIN  
CONFIDENTIAL DOCUMENTS DESIGNATED AS TRIAL EXHIBITS**

Upon the motion of non-party Warner Communications Inc., and for good cause shown, **IT IS HEREBY ORDERED** that the following confidential documents designated as Proposed Trial Exhibits (and portions of O'Brien's Dep.) be placed *in camera*:

<b>Document</b>	<b>Length of <i>In Camera</i> Treatment</b>
3TEN00000130	10 Years
3TEN00000230	10 Years
3TEN00010795-3TEN00010797	10 Years
3TEN00000225	10 Years
3TEN00010184-3TEN00010185	10 Years
3TEN00010181-3TEN00010183	10 Years
3TEN00002142-3TEN00002147	10 Years

<b>Document</b>	<b>Length of <i>In Camera</i> Treatment</b>
3TEN00010151	10 Years
3TEN00007301	10 Years
3TEN00000209-3TEN00000216	Permanent
3TEN00002308-3TEN00002323 <sup>1</sup>	Permanent
3TEN00002392-3TEN00002403	Permanent
3TEN00002405-3TEN00002412	Permanent
3TEN00003601-3TEN00003602	Permanent
3TEN00002438-3TEN00002449 <sup>2</sup>	Permanent
3TEN00003298-3TEN00003299	Permanent
3TEN00017990-3TEN00017996	Permanent
3TEN00000173-3TEN00000186	Permanent
3TEN00000187-3TEN00000199	Permanent
3TEN00000074-3TEN00000091	Permanent
3TEN00006987-3TEN00006997	Permanent
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3TEN00005522-3TEN00005531	Permanent
3TEN00000640-3TEN00000651	Permanent
3TEN00000052-3TEN00000062	Permanent
3TEN00004303-3TEN00004320	Permanent
3TEN00003977-3TEN00003978	10 Years
Portions of O'Brien Dep.:	
¶¶ 84:25-86:12	10 Years
¶¶ 29:13-34:21; 49:1-6; 60:22-61:3; 90:23-92:6; 106:14-107:15	Permanent

IT IS FURTHER ORDERED that, in addition to the protection specified in Federal Trade Commission Rule of Practice §3.45, the confidential materials designated herein

<sup>1</sup> *In camera* treatment granted for pages 3TEN00002308-3TEN00002320 only.

<sup>2</sup> *In camera* treatment granted for pages 3TEN00002438-3TEN00002443 only.

shall not be disclosed to any employee of Respondents, except as provided for in the Modified Protective Order entered previously in this proceeding.

\_\_\_\_\_  
James P. Timony  
Chief Administrative Law Judge

Dated: \_\_\_\_\_, 2002

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

_____	)	
In the Matter of	)	
	)	
POLYGRAM HOLDING, INC.,	)	
a corporation,	)	
	)	
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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, Tanya N. Dunne, hereby certify that on March 6, 2002, I caused a true and correct copy of **WARNER COMMUNICATIONS INC.'S MOTION FOR *IN CAMERA* TREATMENT OF DOCUMENTS DESIGNATED AS TRIAL EXHIBITS (PUBLIC RECORD)** to be served upon the following persons by hand delivery or by facsimile:

Hon. James P. Timony  
Chief Administrative Law Judge  
Federal Trade Commission  
Room H-112  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580  
*Richard Dagen*  
Geoffrey M. Green  
John Roberti  
Cary Zuk  
Melissa Westman-Cherry  
Bureau of Competition  
Federal Trade Commission  
601 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

Bradley S. Phillips  
Glenn D. Pomerantz  
Stephen E. Morrissey  
Munger, Tolles & Olson LLP  
355 South Grand Ave., Suite 3500  
Los Angeles, CA 90071

  
\_\_\_\_\_  
Tanya N. Dunne\*

\*Admitted in NY only. Working under the supervision of the principals of the Washington office.



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

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

**MEMORANDUM OF LAW IN SUPPORT OF  
WARNER COMMUNICATIONS INC.'S MOTION FOR *IN CAMERA*  
TREATMENT OF CERTAIN DOCUMENTS DESIGNATED AS TRIAL EXHIBITS**

Non-party Warner Communications Inc. ("Warner") respectfully submits this memorandum of law in support of its motion for an order directing *in camera* treatment of a small number of competitively sensitive confidential documents out of the hundreds of confidential Warner documents that have been designated by Complaint Counsel as Proposed Trial Exhibits. Warner oversees a collection of entities known as Warner Music Group ("WMG"). The confidential Warner documents for which *in camera* treatment is sought<sup>1</sup> fall into three general categories:

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<sup>1</sup> Warner also seeks to redact certain portions of Anthony J. O'Brien's Deposition (and related exhibits) ("O'Brien Dep."), dated December 6, 2001, from the public record.

**Group A:** Documents revealing WMG's present and future business plans and strategies for the upcoming 3 Tenors Greatest Hits ("Greatest Hits") album release;

**Group B:** Documents revealing WMG's contractual relations with artists and other third parties; and

**Group C:** Documents revealing WMG's 3 Tenors operating costs, retail and marketing strategies for certain artists.

As discussed in more detail below and in the attached Declaration by Paul Robinson (Senior Vice President and Deputy General Counsel for Warner Music Group Inc. ("WMG Inc.")), these documents (hereinafter referred to as the "Confidential Documents") collectively reveal: confidential proprietary information concerning WMG's current and future business plans with respect to its upcoming 3 Tenors Greatest Hits album; WMG's highly competitively sensitive contractual relations, terms and conditions with the 3 Tenors and joint venture partners and confidential negotiations surrounding such contracts; and strategic marketing and retail discounting/pricing plans and operating cost data used by WMG to distinguish itself from its competition.

The finding and signing of artists (and the terms and conditions of such relationships) is the cornerstone to success in the record business and secrecy is important in maintaining a competitive edge. Giving WMG's competitors access to such highly sensitive information—which they would not otherwise have—would put WMG at a serious and irreversible competitive disadvantage.

Warner provided a copy of the following Confidential Documents in response to a subpoena served by the Federal Trade Commission ("FTC") in the pre-complaint investigatory

phase of this matter, which Warner has since settled with the FTC.<sup>2</sup> Due to the competitively sensitive information which they contain, Warner received “Confidential Discovery Material” treatment for the Confidential Documents (and other confidential Warner documents not listed as Proposed Trial Exhibits) pursuant to the Modified Protective Order entered in this proceeding.<sup>2</sup> The confidential basis upon which Warner provided these documents should be maintained.

Although Warner and WMG would prefer for sound business reasons that many other confidential and sensitive business documents identified as potential trial exhibits by Complaint Counsel not be placed on the public record, in appreciation of the FTC’s policy of favoring public disclosure in adjudicatory proceedings Warner has been selective in seeking *in camera* treatment for only the most sensitive documents.

## **I. DESCRIPTION OF CONFIDENTIAL WARNER DOCUMENTS**

### **A. Documents revealing WMG’s present and future business plans related to the upcoming 3 Tenors Greatest Hits album release.**

The following Confidential Documents contain information that is highly material to the competitive success of a product yet to be released in the market i.e., the 3 Tenors Greatest Hits. Although some of the Confidential Documents may be a couple of years old, they are related to repertoire, pricing and marketing plans that remain highly relevant and competitively sensitive today, this information would not otherwise be available outside WMG or the joint venture. See Declaration of Paul Robinson, dated February 28, 2002, ¶ 6 (“Robinson Decl.”)

Proposed Trial Exhibit 3TEN00000130, attached as Confidential Exhibit A, is an internal memorandum discussing, among other competitively sensitive information, the proposed repertoire, pricing points, advances and royalties payable, suggested release dates and other

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<sup>2</sup> See Warner Communications Inc., File No. 001-0231 (2001) (Consent Order), available at <http://www.ftc.gov/os/2001/07/warnerdo.htm>.

contractual terms of the Greatest Hits release. This information reveals the proposed confidential business strategy and marketing plans relating to product yet to hit the market.

Proposed Trial Exhibit 3TEN00000230, attached as Confidential Exhibit B, is a communication between the joint venture partners reflecting confidential business strategy with respect to the proposed release of the Greatest Hits album, including information regarding competitors' products and the effect that they may or may not have on the future release.

Proposed Trial Exhibit 3TEN00010795-3TEN00010797, attached as Confidential Exhibit C, is a communication between the joint venture partners reflecting the confidential business strategy with respect to the proposed repertoire of the future Greatest Hits album.

Proposed Trial Exhibit 3TEN00000225, attached as Confidential Exhibit D, is a communication between the joint venture partners reflecting the confidential business strategy and marketing plans for the upcoming album release, including information regarding a competitor's product and the effect that it may or may not have on the future release.

Proposed Trial Exhibit 3TEN00010184-3TEN00010185, attached as Confidential Exhibit E, is an internal communication (with attached correspondence between the joint venture partners) reflecting confidential business and marketing strategy with respect to the proposed repertoire, related costs and other promotional aspects surrounding the release of the future Greatest Hits album.

Proposed Trial Exhibit 3TEN00010181-3TEN00010183, attached as Confidential Exhibit F, is a communication between the joint venture partners reflecting confidential business strategy with respect to suggested repertoire, sales estimates in the United States and abroad, and potential release dates for the future Greatest Hits album.

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<sup>3</sup> See Polygram Holding Inc., Docket No. 9298, (Nov. 5, 2001) F.T.C. (Modified Protective Order Governing Discovery Material).

Proposed Trial Exhibit 3TEN00002142-3TEN00002147, attached as Confidential Exhibit G, is a communication between the joint venture partners reflecting proposed repertoire and accompanying liner notes for the future Greatest Hits album.

Proposed Trial Exhibit 3TEN00010151, attached as Confidential Exhibit H, is a communication between the joint venture partners reflecting business and marketing strategy for the forthcoming Greatest Hits album, including information regarding a competitor's product and the effect that it may or may not have on the future release.

Proposed Trial Exhibit 3TEN00007301, attached as Confidential Exhibit I, is an internal memorandum reflecting confidential business and marketing strategy with respect to proposed repertoire, distribution, royalties payable and other contractual terms related to the future Greatest Hits album.

Portions of O'Brien's Dep., ¶¶ 84:25-86:12, attached as Confidential Exhibit BB, relate to WMG's plans for the proposed release of the Greatest Hits album.

**B. Documents revealing WMG's contractual relations with artists and other third parties.**

The following Confidential Documents contain information that is highly material to WMG's current and future contractual relations with artists or other third parties. These documents are competitively sensitive and would not otherwise be available to anyone other than the contracting parties. See Robinson Decl. ¶ 7. In addition to the inordinate amount of time, effort and money expended by WMG in securing such contracts, the information contained in the Confidential Documents below reveals WMG's strategy in negotiating and contracting with artists and others, and makes known confidential contractual provisions used by WMG in current and future contracts with artists and other potential contracting parties. Robinson Decl. ¶ 7.

Proposed Trial Exhibit 3TEN00000209-3TEN00000216, attached as Confidential Exhibit J, is a communication (and attached agreement) reflecting confidential contractual terms and conditions relating to the signing of the 3 Tenors for the 1998 concert. The information contained in this document reflects WMG's strategy in negotiating and contracting with artists, and reveals confidential contractual provisions used by WMG in current and future contracts with other artists.

Pages 3TEN00002308-3TEN00002320 of Proposed Trial Exhibit 3TEN00002308-3TEN00002323, attached as Confidential Exhibit K, consist of a letter with an attached marked-up copy of the draft Three Tenors/1998 Concert/License Agreement ("Joint Venture Agreement") between joint venture partners reflecting proposed confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert, and in-house counsel's legal advice on the draft.<sup>4</sup>

Proposed Trial Exhibit 3TEN00002392-3TEN00002403, attached as Confidential Exhibit L, is a letter (with an attached marked-up copy of the draft Joint Venture Agreement) between joint venture partners reflecting proposed confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert, and Polygram's in-house counsel's legal advice on the draft.

Proposed Trial Exhibit 3TEN00002405-3TEN00002412, attached as Confidential Exhibit M, is a marked-up copy of the draft Joint Venture Agreement between joint venture partners reflecting comments on the proposed confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert.

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<sup>4</sup> It should be noted that Warner does not seek *in camera* treatment for the actual Joint Venture Agreement itself, but rather just the drafts and negotiations surrounding those drafts. Such documents reveal Warner's negotiating strategies and should not be disclosed.

Proposed Trial Exhibit 3TEN00003601-3TEN00003602, attached as Confidential Exhibit N, is an internal memorandum reflecting confidential discussions of the contractual terms, proposed retail price points and strategy surrounding the proposed 3 Tenors box set and Greatest Hits albums to be included in the Joint Venture Agreement.

Pages 3TEN00002438-3TEN00002443 of Proposed Trial Exhibit 3TEN00002438-3TEN00002449, attached as Confidential Exhibit O, consist of a letter with an attached marked-up copy of draft Joint Venture Agreement between joint venture partners reflecting proposed confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert, and in-house counsel's legal advice on the draft.

Proposed Trial Exhibit 3TEN00003298-3TEN00003299, attached as Confidential Exhibit P, is an internal memorandum reflecting in-house counsel's legal advice on the negotiations surrounding the signing of the 3 Tenors for the 1998 concert and the proposed Joint Venture Agreement.

Proposed Trial Exhibit 3TEN00017990-3TEN00017996, attached as Confidential Exhibit Q, is a letter (with an attached copy of the draft Joint Venture Agreement) between joint venture partners reflecting proposed confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert.

Proposed Trial Exhibit 3TEN00000173-3TEN00000186, attached as Confidential Exhibit R, is an agreement reflecting confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert and associated television program rights.

Proposed Trial Exhibit 3TEN00000187-3TEN00000199, attached as Confidential Exhibit S, is an agreement reflecting confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert and associated videogram licensing rights.

Proposed Trial Exhibit 3TEN00000074-3TEN00000091, attached as Confidential Exhibit T, is an agreement reflecting confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert and associated recording licensing rights.

Proposed Trial Exhibit 3TEN00006987-3TEN00006997, attached as Confidential Exhibit U, is an internal memorandum reflecting proposed confidential contractual terms and conditions surrounding the signing of the 3 Tenors for the 1998 concert.

The following Confidential Documents, although older than those listed above, contain information reflecting confidential terms that served as a model for, and were the basis of negotiations for the later agreements (recording licensing rights, television programming and videogram licensing rights) relating to the Joint Venture's exploitation of the 3 Tenors 1998 concert including the forthcoming 3 Tenors Box Set and Greatest Hits albums.

Proposed Trial Exhibit 3TEN00003755-3TEN00003765, attached as Confidential Exhibit V, is an agreement reflecting confidential contractual terms and conditions relating to the signing of the 3 Tenors for the 1994 concert.

Proposed Trial Exhibit 3TEN00005522-3TEN00005542, attached as Confidential Exhibit W, is a letter amending an agreement (also attached) reflecting confidential contractual terms and conditions relating to the signing of the 3 Tenors for the 1994 concert and associated television programming rights.

Proposed Trial Exhibits 3TEN00000640-3TEN00000651; 3TEN00000052-3TEN00000062; and 3TEN00004303-3TEN00004320, attached as Confidential Exhibits X, Y, and Z respectively, are agreements reflecting confidential contractual terms and conditions relating to the signing of the 3 Tenors for the 1994 concert and associated recording and videogram licensing rights.



Portions of O'Brien's Dep., ¶ 29:13-34:21, attached as Confidential Exhibit BB, reflect the confidential contractual provisions, and reveal the parties' negotiating strategies surrounding such provisions.

C. **Documents revealing WMG's 3 Tenors operating costs, retail and marketing strategies for certain artists.**

Proposed Trial Exhibit 3TEN00003977-3TEN00003978, attached as Confidential Exhibit AA, is an internal document reflecting a recent summary of the 3 Tenors operating statement, including confidential business and marketing information relating to total sales, costs, and royalties. The information contained in this document is highly material to present and future sales of all 3 Tenors products, including the yet-to-be-released Greatest Hits album and Box Set, and thus extremely sensitive; such information would not otherwise be available outside WMG. See Robinson Decl. ¶ 8.

Portions of O'Brien's Dep.: ¶¶ 49:1-6; 60:22-61:3; 90:23-92:6; 106:14-107:15, attached as Confidential Exhibit BB, reveal WMG's confidential marketing strategies and company policies with respect to pricing of albums and retail discounts. The information contained in these portions of O'Brien's Dep. is highly material and competitively sensitive as it gives competitors an inside look at how WMG assesses its marketing strategies for, and makes business judgments related to, various artists. Such information would not otherwise be available outside WMG. See Robinson Decl. ¶ 8.

For reasons outlined below, Warner respectfully requests that the documents described above be granted *in camera* treatment for the time periods specified.

## II. ARGUMENT

### A. Standard For Granting *In Camera* Treatment

The Confidential Documents contain non-public information as defined under Section 4.10(a)(2) of the Federal Trade Commission Rules of Practice (“FTC Rule”), 16 C.F.R. §4.10(a)(2), and therefore warrant *in camera* treatment pursuant to FTC Rule §3.45(b).

The FTC recognizes in affording *in camera* treatment the importance of avoiding disclosure of competitively sensitive information which would cause serious competitive harm. See FTC Rule §3.45(b).

The party seeking *in camera* treatment must demonstrate that “the information concerned is sufficiently secret and sufficiently material to [its] business that disclosure would result in serious competitive injury.” Volkswagen of America, Inc., 1984 FTC LEXIS 53, at \*5 (June 19, 1984); General Foods Corp., 1980 FTC LEXIS 99, at \*10 (Mar. 10, 1988).

In considering the secrecy and materiality of such documents, the following factors should be weighed: “(1) the extent to which the information is known outside of [the party’s] business; (2) the extent to which it is known by employees and others involved in [the party’s] business; (3) the extent of measures taken by [the party] to guard the secrecy of the information; (4) the value of the information to [the party] and to its competitors; (5) the amount of effort or money expended by [the party] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.” Bristol-Myers Co., 1977 FTC LEXIS 25, at \*5 (Nov. 11, 1977).

The duration of *in camera* treatment is determined by distinguishing documents related to “trade secrets” as opposed to “ordinary business records,” with greater protection

afforded to trade secrets. H.P. Hood & Sons, Inc., 1961 FTC LEXIS 368, at \*11-13 (March 14, 1961). Trade secrets include secret formulas or processes; the disclosure of which “will almost invariably result in injury.” Id. at \*12. Whereas the “revelation of a business record may in many instances produce no more than embarrassment.” Id.

Although there is a presumption that *in camera* treatment will not be provided to information that is three or more years old,<sup>5</sup> the presumption can be rebutted if the information sought to be protected “possess a uniqueness that has extended their competitive sensitivity in excess of the three year period normally considered adequate for confidential business data to lose most of its competitive utility.” E.I. DuPont de Nemours & Co., Docket No. 9108 (F.T.C. December 21, 2000); Kaiser Aluminum & Chemical Corp., 1977 FTC LEXIS 1 at \*5 (Dec. 30, 1977) (citing Graber Mfg. Co. v. Dixon, 223 F. Supp. 1020, 1022 (D.D.C. 1963) (recognizing that four year old documents would provide competitors with a “potent weapon in diverting customers” and thus were entitled to *in camera* treatment).

Furthermore, this Court has recognized that requests for *in camera* treatment from third party competitors “should be received as favorably as possible.” Kaiser Aluminum, 1977 FTC LEXIS 1, at \*11-12. “The request of a third-party by-stander is deserving of special solitude ....” Id. at \*12 (citing Crown Cork, [1967 FTC LEXIS 128, at \*6-7] (dicta)). Warner is a “third-party by-stander” in this action; their competitors should not benefit through forced disclosure of its competitively sensitive confidential information.

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<sup>5</sup> See General Foods, 1980 FTC LEXIS 99, at \*5; Crown Cork & Seal Co., 1967 FTC LEXIS 128, at \*2 (June 26, 1967); see also Volkswagen, 1984 FTC LEXIS 53, at \*7 (noting that permanent *in camera* treatment is rarely granted).

As described more fully below, an order for *in camera* treatment for the three categories of confidential Warner documents is not only warranted in this case, but also necessary to ensure WMG does not suffer needless serious competitive injury.

**1. Disclosure Of Confidential Documents Revealing WMG's Business Strategies For The Future 3 Tenors "Greatest Hits" Release Will Cause Serious Competitive Injury.**

Warner's confidential documents relating to the future release of the 3 Tenors Greatest Hits album are "sufficiently secret" and "sufficiently material" as to warrant *in camera* treatment. Such documents are effectively WMG's current and prospective confidential business and marketing plans, the disclosure of which would cause WMG serious competitive harm.

WMG's future business plans are rarely, if ever, disclosed outside of WMG. Typically only those WMG employees actually involved in a particular release are privy to such information. Robinson Decl. ¶ 6. In this case, however, because the Greatest Hits album is part of a joint venture agreement with Polygram, certain employees within Polygram are aware of, and actively participate in the planning, marketing, and development of the future Greatest Hits release. Robinson Decl. ¶ 4. Information related to WMG's future business plans generally are not available to competitors, nor do competitors have any way to replicate the information. Robinson Decl. ¶¶ 10, 11.

The extraordinary amount of time, effort and money that each company invests in planning, developing and releasing a new record would be thwarted if a competitor had access to this information because competitors could "adjust and alter [their] sales plans to frustrate and defeat [WMG's] sales success; ... if competitors had information as to promotional plans contemplated by [WMG], they could copy the best features of those plans in advance or offset

them by running promotions of their own in the same areas.” United States v United Fruit Co., 410 F.2d 553, 557 n11 (5<sup>th</sup> Cir. 1969); see Kaiser Aluminum, 1977 FTC LEXIS 1 at \*5-6.

Should this information be publicly available, competitors would have access to the proposed repertoire, proposed pricing, proposed release dates, advances and royalties payable and other confidential terms related to the upcoming Greatest Hits album. Robinson Decl. ¶ 6. Disclosure of such vitally sensitive information would place WMG at a significant competitive disadvantage in the marketplace and would allow its competitors to use WMG’s confidential information to develop their own future strategic plans for competitive releases. For example, they could use this information in scheduling their own competitive releases. See Robinson Decl. ¶ 6.

This Court has recognized that “the likely loss of business advantages is a good example of a ‘clearly defined, serious injury’ that mandates *in camera* treatment under Rule 3.45.” Intel Corp., FTC Docket No. 9288 (Feb. 23, 1999) (J. Timony) (Order re *In Camera* Treatment of Evidence at Trial); see also Int’l Ass’n of Conference Interpreters, 1996 FTC LEXIS 298, at \*4 (June 26, 1996). Allowing public disclosure through this proceeding most certainly would lose any “business advantage” WMG has over its competitors with respect to the Greatest Hits release.

Furthermore, the documents relate to recent (i.e., less than 3 years old) confidential business decisions as well as strategies for the future. For these reasons, Warner respectfully requests *in camera* treatment for the above documents for a period not less than ten years (as the actual release date has not yet been determined); or in the alternative, a minimum of three years beginning from the release date of the Greatest Hits album in the US.

2. **Disclosure of WMG's Confidential Contractual Relations with Artists and Other Third Parties Will Provide Competitors with WMG's Secret to Success in the Recording Industry Causing Serious and Substantial Competitive Injury.**

This category of documents reveal WMG's secret contractual relations, including internal negotiations and in-house legal advice regarding proposed terms and conditions for signing artists (including discussion on retail pricing for albums yet released) and for establishing a joint venture relationship that, if publicly disclosed, would cause WMG serious and substantial competitive injury.

WMG maintains a strict policy that limits the disclosure of contract terms to those individuals directly involved in the negotiations, planning, and implementing of contracts. Robinson Decl. ¶ 7. Generally, artists are aware of the terms of only their own contracts and rely on the confidentiality WMG assures. Robinson Decl. ¶ 7. Even employees within WMG who are not directly involved with a particular artist are denied access to the artist's contractual terms. WMG does not reveal specifics about its contracts with artists or other third parties outside of those involved in negotiating, planning and implementing such contracts. Robinson Decl. ¶ 7.

The finding and signing of artists is the key to success in the record business. Robinson Decl. ¶ 5. Such contracts are held in the strictest confidence within WMG, and as with the business plans, the specific details surrounding the release of an upcoming album are among the most important and most confidential information within the company, access to which is carefully guarded.<sup>6</sup> Robinson Decl. ¶ 7. Only WMG's employees with a "need to know" are privy to such intimate details of the contracts. Robinson Decl. ¶ 7.

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<sup>6</sup> While release dates are made public, they are usually made public approximately only six weeks before the actual release. Robinson Decl. ¶6 n.1.

WMG vigorously competes with other record companies for such contracts. Robinson Decl. ¶ 5. Artists' contracts are effectively the equivalent of a "trade secret." CL Hood, 1961 FTC LEXIS 368, at \*13-14; see In re General Foods, 1980 FTC LEXIS 99, at \*2. It is the "secret formula" by which WMG secures the artist's commitment. Robinson Decl. ¶ 7. The value of this information to competitors is obvious. Should a competitor be privy to the intimate details behind the signing of a particular artist, such competitor could use the very same information to "steal" that artist (or a similar artist) away from WMG by using WMG's contracts as a baseline and thereby placing themselves in a better negotiating position. Robinson Decl. ¶ 7. This secret information cannot be replicated by a competitor because such information is never released to anyone outside of WMG and the negotiating parties.<sup>7</sup> Robinson Decl. ¶ 7. Competitors would effectively be free riding on the enormous amount of time and money expended by WMG in securing these contracts, ensuring "serious competitive injury" to WMG. See Robinson Decl. ¶¶ 11, 12.

Furthermore, artists' contracts by their very nature may only come up for re-negotiations once every few years depending upon the artist and genre.<sup>8</sup> See Robinson Decl. ¶ 7. Unlike sales data or pricing information for commodities that may become "stale" after a year or two, the information contained in these contracts serves as a starting point for future negotiations at the time of contract renewals many years later. See Robinson Decl. ¶ 7. In that sense, the contracts for the 1998 concert are like current business plans -- they will remain current until the re-negotiation and renewal of the artists' next contract. Thus, the contracts for

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<sup>7</sup> The only way this information may be acquired by one of WMG's competitors is if an artist shows a competitor a copy of the contract directly, and artists are likely to make these disclosures only selectively, if at all, to enhance their own bargaining position. Robinson Decl. ¶ 7.

<sup>8</sup> For example, the contracts for a 3 Tenors performance on the eve of a World Cup Final, by their very nature, would only come up for re-negotiations approximately every four years.

the 1994 album are current and competitively sensitive because many of the provisions were used as a starting point for the 1998 album negotiations, which in turn are relevant to current and future negotiations.

For the reasons listed above, Warner respectfully requests that *in camera* treatment be granted for the above contracts (and drafts thereof) permanently; or in the alternative, for a period of no less than twelve years.<sup>9</sup>

3. **Disclosure Of Confidential Documents Revealing WMG's Costs, Retail And Marketing Strategies For Certain Artists Will Cause Substantial Competitive Harm.**

WMG's confidential business information relating to the sales of all WMG's 3 Tenors products, and confidential marketing strategies surrounding numerous artists' recordings, and retail discounting and pricing policies are "sufficiently secret" and "sufficiently material" as to warrant *in camera* treatment. Such documents provide competitors with an "inside" look at strategic marketing observations/analyses and related business judgments made based upon those observations.

WMG would not reveal its cumulative total operating figures for its 3 Tenors product line to the public. Robinson Decl. ¶ 8. This information is highly material to current and future sales of its 3 Tenors products (as well as to potential future sales of the Greatest Hits and Box Set) and would be very valuable if ever placed in the hands of its competitors. Robinson Decl. ¶ 8. They therefore reveal to competitors insights into WMG's business and marketing decisions. Robinson Decl. ¶ 8. This information is neither accessible to the public

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<sup>9</sup> Three consecutive contracts with an artist or group, such as the 3 Tenors, for a special event whose contract re-negotiations take place every 3-4 years (thereby totaling a period of nine to twelve years) should be viewed as the equivalent to three consecutive years of historical sales data, historical business plans and the like.



nor could it be replicated by a competitor without forced disclosure through this proceeding.  
Robinson Decl. ¶ 11.

For reasons listed above, Warner respectfully requests *in camera* treatment for the above Confidential Documents (or portions thereof) for a period no less than ten years, with the exception of certain portions of O'Brien Dep. ¶¶ 49:1-6; 60:22-61:3; 90:23-92:6; 106:14-107:15, for which Warner requests permanent *in camera* treatment.

In addition to the above, the information contained within these documents relating to other artists is totally irrelevant to this proceeding and, as such, should be redacted from the public record.

### III. CONCLUSION

For the reasons stated above, Warner respectfully requests that the Court issue an order granting *in camera* treatment to the above Proposed Trial Exhibits (and selected portions of O'Brien Dep.) for the periods specified to avoid needless public disclosure of WMG's most confidential commercial information.

Respectfully submitted,



George S. Cary  
Tanya N. Dunne\*  
Cleary, Gottlieb, Steen & Hamilton  
2000 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006-1801  
Tel: (202) 974-1500  
Fax: (202) 974-1999

Counsel for Non-party  
Warner Communications Inc.

\* Admitted in New York only. Working under the supervision of principals in the Washington office.

February 28, 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.	)	

**DECLARATION OF PAUL ROBINSON**

PAUL ROBINSON, hereby declares as follows:

1. I am Senior Vice President & Deputy General Counsel for Warner Music Group Inc. ("WMG Inc."), a subsidiary of Warner Communications Inc. ("Warner"). Warner oversees a collection of entities known as Warner Music Group ("WMG"). I am responsible for, among other things, providing legal advice to WMG and WMG Inc.
  
2. I submit this declaration in support of Warner's Motion for *In Camera* Treatment of Certain Confidential Documents Designated as Proposed Trial Exhibits.
  
3. WMG is involved, *inter alia*, in the business of finding and signing recording artists, and in planning, developing and marketing audio and visual recordings of such artists.

4. I am aware that Warner Music Benelux B.V. was involved in a joint venture with Polygram with respect to the planning, marketing and development of the 1998 album of the 3 Tenors in Paris. I am also aware that the joint venture extends to the planning, marketing and development of the future 3 Tenors Greatest Hits ("Greatest Hits") album and 3 Tenors box set.

5. WMG competes vigorously with other record companies to secure recording contracts and subsequently provide artists' recordings in various formats for sale to the consumer. WMG endeavors to distinguish itself from its competitors by, *inter alia*, offering customized business and marketing strategies in order to attract more and better recording artists, as artists are the key to success in the recording business.

6. The following Proposed Trial Exhibits reveal detailed information regarding WMG's confidential business and marketing strategies related to the future release of the Greatest Hits album. For example, the information contained in these documents relate to: proposed release dates;<sup>1</sup> proposed repertoire;<sup>2</sup> proposed pricing;<sup>3</sup> advances and royalties payable and other confidential terms<sup>4</sup> and overall competitively sensitive business and marketing strategies related to the Greatest Hits release (including discussion of competitors' products).<sup>5</sup> This information is highly material to the future Greatest Hits release. This information is extremely confidential and is not disseminated even within WMG except on a "need to know"

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<sup>1</sup> While release dates are made public, they usually are made public only approximately six weeks before actual release. Proposed Trial Ex. 3TEN00000130; 3TEN00000230; 3TEN00000225; 3TEN00010181-3TEN00010183; 3TEN00010151.

<sup>2</sup> Proposed Trial Ex. 3TEN00000130; 3TEN00010795-3TEN00010797; 3TEN00010184-3TEN00010185; 3TEN00010181-3TEN00010183; 3TEN00002142-3TEN00002147; 3TEN00007301.

<sup>3</sup> Proposed Trial Ex. 3TEN00000130.

<sup>4</sup> Proposed Trial Ex. 3TEN00000130; 3TEN00007301.

<sup>5</sup> Proposed Trial Ex. 3TEN00000225; 3TEN00010184-3TEN00010185; 3TEN00010181-3TEN00010183; 3TEN00010151; 3TEN00007301.

basis. Public disclosure of this confidential information contained in these documents would cause serious and substantial competitive injury to WMG by revealing to WMG's competitors the business, pricing and marketing plans for a future album release. Revealing to WMG's competitors such secret information provides its competitors with insights into WMG's policies, practices and methods for doing business.

3TEN00000130  
3TEN00000230  
3TEN00010795-3TEN00010797  
3TEN00000225  
3TEN00010184-3TEN00010185  
3TEN00010181-3TEN00010183  
3TEN00002142-3TEN00002147  
3TEN00010151  
3TEN00007301

7. The following Proposed Trial Exhibits reveal WMG's confidential negotiations and contractual relations with artists (or their representatives) and other third parties. The Proposed Trial Exhibits contain detailed information regarding negotiations for artists' recording contracts;<sup>6</sup> confidential contractual negotiations (including legal advice);<sup>7</sup> confidential discussions surrounding the contractual terms for the yet-to-be-released Greatest Hits album (including pricing information).<sup>8</sup> Such confidential negotiations are material in preserving the

<sup>6</sup> Proposed Trial Ex. 3TEN00000209-3TEN00000216; 3TEN00000173-3TEN00000186; 3TEN00000187-3TEN00000199; 3TEN00000074-3TEN00000091; 3TEN00006987-3TEN00006997; 3TEN00003755-3TEN00003765; 3TEN00005522-3TEN00005542; 3TEN00000640-3TEN00000651; 3TEN00000052-3TEN00000062; 3TEN00004303-3TEN00004320.

<sup>7</sup> Proposed Trial Ex. pages 3TEN00002308-3TEN00002020 of 3TEN00002308-3TEN00002323; 3TEN00002392-3TEN00002403; 3TEN00002405-3TEN00002412; pages 3TEN00002438-3TEN00002443 of 3TEN00002438-3TEN00002449; 3TEN00003298-3TEN00003299; 3TEN00017990-3TEN00017996.

<sup>8</sup> Proposed Trial Ex. 3TEN00003601-3TEN00003602.

relationship between WMG and artists for future releases. Artists rely on the confidentiality WMG assures. The only way this information may be acquired by one of WMG 's competitors is if an artist shows a competitor a copy of the contract directly, and artists are likely to make these disclosures only selectively, if at all, to enhance their own bargaining position. WMG has expended an substantial amount of time, effort and money to secure such contracts, as artists' contracts by their very nature may only come up for re-negotiations once every few years depending upon the popularity of the artist and genre of music. Public disclosure of such contracts, and the confidential negotiations surrounding such contracts, would cause WMG serious competitive injury by providing WMG 's competitors with essentially WMG 's "secret formula" by which WMG secures an artist's commitment to the company. Competitors could use this inside information to place themselves in a better negotiating position with an artist to the detriment of WMG. Such information is held in the strictest confidence within WMG and is not disseminated to anyone other than the contracting parties or those within WMG on a "need-to-know" basis.

3TEN00000209-3TEN00000216  
3TEN00002308-3TEN00002323  
3TEN00002392-3TEN00002403  
3TEN00002405-3TEN00002412  
3TEN00003601-3TEN00003602  
3TEN00002438-3TEN00002449  
3TEN00003298-3TEN00003299  
3TEN00017990-3TEN00017996  
3TEN00000173-3TEN00000186  
3TEN00000187-3TEN00000199  
3TEN00000074-3TEN00000091  
3TEN00006987-3TEN00006997  
3TEN00003755-3TEN00003765

3TEN00005522-3TEN00005531

3TEN00000640-3TEN00000651

3TEN00000052-3TEN00000062

3TEN00004303-3TEN00004320

8. The following Proposed Trial Exhibits reveal information relating to WMG's confidential marketing strategies for certain artists (including but not limited to the 3 Tenors), and retail discounting and pricing policies. The information contained in Proposed Trial Exhibit:

3TEN00003977-3TEN00003978

reveals total sales, costs and royalty data for all of WMG's 3 Tenors products. In addition, Proposed Trial Exhibits reflect confidential retail and marketing strategies and pricing policies which is material and would provide competitors with an "inside" look at how WMG markets a particular release and the business judgments related to such releases. Furthermore, this information is not disseminated outside of WMG and its disclosure would cause serious and substantial competitive harm to WMG.

3TEN00017819-3TEN00017820

(page 3TEN00017820 only)

3TEN00017825-3TEN00017830

3TEN00017841-3TEN00017843

3TEN00017821-3TEN00017822

3TEN00017850-3TEN00017853

3TEN00003977-3TEN00003978

3TEN00017819-3TEN00017820

3TEN00017825-3TEN00017830

3TEN00017841-3TEN00017843

3TEN00017821-3TEN00017822

3TEN00017850-3TEN00017853

9. I understand that Warner produced a copy of the Proposed Trial Exhibits in response to a subpoena served by the FTC in the pre-complaint investigatory phase of this matter. The documents produced by Warner are considered "Confidential Discovery Material" pursuant to a protective order entered in this matter. As Warner has entered into a consent decree, it is not a party to this proceeding. I further understand that Complaint Counsel want to use such documents in this proceeding against Polygram.

10. All of the aforementioned Proposed Trial Exhibits contain competitively sensitive information that if publicly disclosed would provide competitors with intimate details regarding WMG's business and marketing strategies that would place WMG at a serious competitive disadvantage.

11. WMG has invested a great deal of time and money into planning, marketing and developing its business and marketing strategies. Such significant competitive information could not be replicated by competitors without access to Warner's documents via this proceeding.



12. In sum, it is my belief that public disclosure of any or all of the above Proposed Trail Exhibits will result in serious and substantial competitive injury through loss of confidential business and marketing information integral to the success of any recording company.

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

Dated: February 28, 2002

  
Paul Robinson

**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. )  
\_\_\_\_\_ )

**PUBLIC RECORD**

Docket No. 9298

**EXHIBITS IN SUPPORT OF WARNER COMMUNICATIONS INC.'S MOTION FOR  
IN CAMERA TREATMENT  
OF CERTAIN CONFIDENTIAL DOCUMENTS DESIGNATED AS TRIAL EXHIBITS**

Non-party Warner Communications Inc. ("Warner") submits the following redacted Confidential Exhibits K, O, and BB<sup>1</sup>, in support of its Motion For *In Camera* Treatment of Certain Confidential Documents Designated as Trial Exhibits (Public Record version).

<sup>1</sup> Confidential Exhibits A to J, L to N, P to AA are confidential in their entirety and are thus not included in the public record version of the Exhibits in Support Of Warner Communications Inc.'s Motion For *In Camera* Treatment Of Certain Confidential Documents Designated As Trial Exhibits.



Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

Confidential Exhibit K

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**



Warner Communications Inc  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**



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 \*\* TX REPORT \*\*  
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Warner Communications Inc.  
 Confidential Discovery Material  
 Subject to Protective Order  
 FTC Docket No. 9298

## TRANSMISSION OK

TX/RX NO 0420  
 CONNECTION TEL 3338296  
 SUBADDRESS  
 CONNECTION ID  
 ST. TIME 12/18 14:42  
 USAGE T 26'24  
 PGS. 13  
 RESULT OK



from: Margo Scott  
 subject: The Three Tenors  
 date: December 18, 1997  
 pages: 14, including this cover page  
 message:

ADDRESSEE	FAX NUMBER
Rand Hoffman	333-8158
Jonathan Lieberman	333-8296
Tony O'Brien	autodial
Phil Wild	autodial

\*\*\*\*\*  
 \*\* TX REPORT \*\*  
 \*\*\*\*\*

Warner Communications Inc.  
 Confidential Discovery Material  
 Subject to Protective Order  
 FTC Docket No. 9298

TRANSMISSION OK

TX/RX NO 0421  
 CONNECTION TEL 3331012  
 SUBADDRESS  
 CONNECTION ID  
 ST. TIME 12/18 15:08  
 USAGE T 05'40  
 PGS. 14  
 RESULT OK



## Facsimile TRANSMITTAL

from: Margo Scott  
 subject: The Three Terrors  
 date: January 15, 1997  
 pages: 14, including this cover page  
 message:

ADDRESSEE	FAX NUMBER
Rand Hoffman	333-8158
Jonathan Lieberman	333-8296
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwam	autodial
Phil Wild	autodial

\*\*\*\*\*  
TX REPORT  
\*\*\*\*\*

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298

TRANSMISSION OK

TX/RX NO 1978  
CONNECTION TEL 2733601  
SUBADDRESS  
CONNECTION ID P ROBINSON  
ST. TIME 12/18 14:04  
USAGE T 06'01  
PGS. 14  
RESULT OK

 **Facsimile**  
TRANSMITTAL

from: Margo Scott  
subject: The Three Tenors  
date: December 18, 1997  
pages: 14, including this cover page  
message: Paul/ Sam - if you see anything that needs correction, please let me know today (since PolyGram will be signing this deal in France tomorrow morning). Thanks. ✎

ADDRESSEE	FAX NUMBER
Paul Robinson	autodial
Samantha Schwam	autodial



Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

Confidential Exhibit O

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**



Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298  
In Camera Treatment Requested

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

\*\*\*\*\*  
TELEPHONE REPORT  
\*\*\*\*\*

Warner Communications In  
Confidential Discovery Mat  
Subject to Protective Order  
FTC Docket No. 9295

TRANSMISSION OF

TX/RX NO 1372 3335296  
CONNECTION TEL.  
SUBADDRESS  
CONNECTION ID  
ST. TIME 12-05-15:05  
USAGE T 04:23  
PCS 5  
RESULT OK

*Jonathan*



**Facsimile**  
TRANSMITTAL

from: Margo Scott  
subject: The Three Tenors/ PolyGram Split Profits Arrangement  
date: December 8, 1997  
pages: 7, including this cover page  
message:

ADDRESSEE	FAX NUMBER
Jonathan Lieberman	333-8296
Rand Hoffman	333-8158
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwarz	autodial
Phil Wild	autodial

*Called to confirm  
(Got all pages)*

\*\*\*\*\*  
TX REPORT  
\*\*\*\*\*

Warner Communications inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298

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CONNECTION TEL 3335156  
SUBADDRESS  
CONNECTION ID  
ST. TIME 12-08 17:46  
USAGE T 09'48  
PGS. 7  
RESULT OK

*Rand*



**Facsimile**  
TRANSMITTAL

from: Margo Scott  
subject: The Three Tenors/ PolyGram Split Profits Arrangement  
date: December 8, 1997  
pages: 7, including this cover page  
message:

ADDRESSEE	FAX NUMBER
Jonathan Lieberman	353-8296
Rand Hoffman	353-8158
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwam	autodial
Phil Wild	autodial

\*\*\*\*\*  
 \*\*\* TX REPORT \*\*\*  
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Warner Communications Inc.  
 Confidential Discovery Material  
 Subject to Protective Order  
 EIC Docket No. 9296

## TRANSMISSION OK

TX/RX NO 1876  
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 SUBADDRESS  
 CONNECTION ID T O'BRIEN  
 ST-TIME 12/08 15:20  
 USAGE T CB 46  
 PGS. 7  
 RESULT OK



# Facsimile

TRANSMITTAL

from: Margo Scott  
 subject: The Three Tenors/ PolyGram Split Profits Arrangement  
 date: December 8, 1997  
 pages: 7, including this cover page  
 message:

ADDRESSEE	FAX NUMBER
Jonathan Lieberman	333-8296
Rand Hoffman	333-8158
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwam	autodial
Phil Wild	autodial

SCOTT-LICHTMAN

FOR 212 400 9870

\*\*\*\*\*  
TX REPORT  
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Warner Communications Inc.  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9296

TRANSMISSION OK

TX/RX NO	1375	2753601
CONNECTION TEL		
SUBADDRESS		
CONNECTION ID	P ROBINSON	
ST. TIME	12:08 16:34	
USAGE T	03'16	
PCS	7	
RESULT	OK	



# Facsimile TRANSMITTAL

from: Margo Scott  
 subject: The Three Tenors/ PolyGram Split Profits Arrangement  
 date: December 8, 1997  
 pages: 7, including this cover page  
 message:

ADDRESSEE	FAX NUMBER
Jonathan Lieberman	333-8296
Rand Hoffman	333-8158
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwarz	autodial
Phil Wild	autodial

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TI REPORT  
\*\*\*\*\*

Warner Communications Inc  
Confidential Discovery Material  
Subject to Protective Order  
FTC Docket No. 9298

TRANSMISSION OK

TI/RI NO 1676  
CONNECTION TEL 4055440  
SUBADDRESS  
CONNECTION ID JOY-SAM  
ST. TIME 12/08 15:35  
USAGE T 04'18  
PCS 7  
RESULT OK

 **Facsimile**  
TRANSMITTAL

from: Margo Scott  
subject: The Three Tenors/PolyGram Split Profits Arrangement  
date: December 8, 1997  
pages: 7, including this cover page  
message:

ADDRESSEE	FAX NUMBER
Jonathan Lieberman	333-8296
Rand Hoffman	333-8158
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwarz	autodial
Phil Wild	autodial

12/08/97 MON 15:46 FAX 212 405 5520

SCOTT-LICETMAN

\*\*\*\*\*  
TX REPORT  
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Warner Communications  
Confidential Discovery M  
Subject to Protective Ord  
FTC Docket No. 9298

TRANSMISSION OK

TX/RX NO	1677	
CONNECTION TEL		4055537
SUBADDRESS		
CONNECTION ID	P WILD	
START TIME	12/08 15:43	
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RESULT	OK	

 **Facsimile**  
TRANSMITTAL

from: Margo Scott  
 subject: The Three Tenors/ PolyGram Split Profits Arrangement  
 date: December 8, 1997  
 pages: 7, including this cover page  
 message:

ADDRESSEE	FAX NUMBER
Jonathan Lieberman	333-8296
Rand Hoffman	333-8158
Tony O'Brien	autodial
Paul Robinson	autodial
Samantha Schwam	autodial
Phil Wild	autodial



CONFIDENTIAL

**Confidential Exhibit BB**

1) to similarities in their repertoire among the albums?

2) A: Yes.

3) Q: When you say "that that could occur," did you  
4) mean that the 1998 album could lose sales to the earlier  
5) Three Tenors' album?

6) MR. MORRISSEY: Vague.

7) A: Yes.

8) MR. GREEN: Mark this, please, as Warner

9) Exhibit-2.

10) (Document bearing Bates stamp 3TEN00004154

11) through 3TEN00004163 was marked as Warner

12) Exhibit-2 for identification: 12-6-01, P.W.)

**[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]**

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17 MR. MORRISSEY: Vague.

18 A: Yes.

19 Q: What was the nature of those communications

20 A: I don't recall — I don't recall the precise  
21 time frame, but we had conversations which lead to  
22 understanding that we would create a window for a  
23 launch for the '98 concert that would be a clear an  
24 uncluttered launch.25 Q: Do you recall whether the first communication  
26 with PolyGram regarding this window occurred prior  
27 after the execution of Exhibit-2?

28 A: I believe they occurred before then.

29 Q: And what do you recall as being the time frame  
30 of those discussions?31 A: I just indicated I don't recall that — the time  
32 frame, the precise time frame.33 Q: Do you recall that you appeared for an  
34 investigational hearing in January of 2001?

35 A: Yes, I do.

36 Q: And you recall that I asked you a series of  
37 questions and you answered those questions?

38 A: Yes.

39 Q: And you were under oath at that time?

40 A: Yes.

41 Q: And you answered those questions truthfully to

[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]

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42 the best of your ability; is that right?

43 A: That's correct.

44 Q: Did you review that transcript in preparation  
45 for today's deposition?46 A: I briefly reviewed it for a short period of time  
47 today, but I have not fully reviewed it, no.48 Q: Let me ask you to take a look at page 56, line  
49 19 and the lines that follow.50 Do you recall that you were asked the following  
51 question and gave the following answer —

52 MR. CARY: Hold on. Page 56, line what?

53 MR. GREEN: Starting at line 19.

54 Q: You were asked, "Prior to the time that you  
55 executed this contract, the time that you were  
56 negotiating Exhibit-2, were there specific discussions  
57 regarding the exploitation of the earlier album?"

58 Answer: "With PolyGram?"

59 Question: "Right."

60 Answer: "I don't believe so."

61 Do you see that?

62 A: Yes.

63 Q: Do you have a different recollection today?

64 A: Today I don't recall specifically when I first  
65 had a conversation with PolyGram concerning the  
66 moratorium.67 Q: Prior to the time that this contract, Exhibit-2,  
68 was executed, did you have any communications with  
69 PolyGram representatives about the exploitation of the  
70 1994 Three Tenors' album?

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TREATMENT REQUESTED]

171 Our album had never been sold at a mid or budget price  
172 in the U.S. I'm not so familiar with what occurred  
173 outside of the U.S. My area of responsibility is the  
174 U.S. I could only tell you that I had conversations  
175 with Warner Music International urging them for the same  
176 period of time not to promote, position their '94 album  
177 in the rest of the world. Whether in fact they had done  
178 that before and there was still product in the stores at  
179 a lesser price. I don't know.

180 Q: If I may clarify the terms of the understanding  
181 that you reached with Mr. Sainilan, was part of the  
182 agreement that PolyGram would sell the 1994 Three  
183 Tenors' album in the United States only at full price?

184 MR. MORRISSEY: Vague, lacks foundation.

185 A: No, they didn't have the '94 album.

186 Q: I'm sorry, was part of your agreement with  
187 Mr. Sainilan that PolyGram would sell the 1990 Three  
188 Tenors' album in the United States during this window  
189 period only at full price?

190 MR. MORRISSEY: Vague, lacks foundation.

191 A: It was my understanding that they would be  
192 selling it for their normal full price. I don't recall  
193 what that amount was, and that they would not be  
194 actively promoting that album during the period of this  
195 moratorium.

196 Q: Was it your understanding that these  
197 restrictions would apply to PolyGram Group Distribution  
198 in the United States?

199 A: Well, yes, because it would be my understanding  
200 that PolyGram Distribution would take instructions from  
201 the label in terms of whether it positioned product,  
202 whether it discontinued product or positioned product.

203 Q: Did the agreement that you reached with  
204 Mr. Sainilan apply to the Three Tenors' videos as well  
205 as the Three Tenors' audio?

206 MR. MORRISSEY: Vague, lacks foundation.

207 A: I believe so.

208 Q: Who approved the moratorium agreement on behalf  
209 of Warner?

210 A: I did.

211 Q: And who agreed on behalf of PolyGram?

212 MR. MORRISSEY: Vague, lacks foundation.

213 A: I don't know.

214 Q: Did you discuss the Three Tenors Moratorium with

215 anyone at PolyGram other than Paul Sainilan?

216 A: I don't recall.

217 Q: Did you have dealings with Chris Roberts in  
218 connection with the Three Tenors' 1998 project?

219 A: I had limited dealings with Chris Roberts.

220 Q: Do you recall ever discussing the Three Tenors  
221 Moratorium with Chris Roberts?

222 A: I don't recall.

223 Q: Do you recall ever discussing the Three Tenors  
224 Moratorium with Roger Lewis?

225 A: I don't recall.

226 Q: Did Mr. Sainilan ever tell you that Chris  
227 Roberts was aware of the moratorium?

228 A: I don't recall.

229 Q: Did Mr. Sainilan ever tell you that Roger Lewis  
230 was aware of the moratorium?

231 A: Again, I don't recall.

232 Q: Do you recall discussing the moratorium with  
233 Rand Hoffman?

234 A: I don't recall.

235 Q: Apart from Mr. Sainilan, do you know of anyone  
236 else at PolyGram who was aware of your discussions  
237 regard to the Three Tenors Moratorium?

238 A: No, I don't.

239 Q: What did you understand the purpose to be of

240 Mr. Sainilan's letter dated July 2, 1998?

241 MR. MORRISSEY: Vague, lacks foundation.

242 A: Short explanation here, it's a relatively simple  
243 task for Atlantic Records to make a determination that  
244 it will not promote the — its 1994 album alongside its  
245 1998 release. Something that can be discussed among  
246 very few people. When one is organizing a worldwide  
247 release, there are many territories involved and many  
248 more people involved in that process, and so from Paul  
249 Sainilan's point of view, he would have had to notify  
250 many more people, which makes it, from a logistical  
251 point of view, more complicated matter, and I believe  
252 that he needed to be comfortable that we understood  
253 this moratorium meant so that — so that he could  
254 implement this moratorium outside of the U.S.

255 Q: Did you forward the July 2 letter to Val Azzoli?

256 A: I forwarded a number of things to Val Azzoli. I  
257 don't specifically recall.

258 Q: If you would turn to the previous page marked  
259 10121, have you seen this memo before?

260 A: Yes.

261 Q: Did you have a role in drafting this memo?

262 A: I don't believe I did.

263 Q: When did you see this memo?

264 A: I don't recall specifically when I saw it. I

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(1) Q: Were you in Paris for the Three Tenors' concert  
 (2) on July 10, 1998?  
 (3) A: I was.  
 (4) Q: Do you recall any communications with  
 (5) Mr. Saintilan between July 2 and July 10, 1998, July 2  
 (6) being the date of the earlier letter?  
 (7) A: I don't recall.  
 (8) Q: What did you understand to be the purpose of the  
 (9) July 10 letter?  
 (10) A: Let me read it.  
 (11) Q: Sure.  
 (12) MR. MORRISSEY: Vague, calls for  
 (13) speculation.  
 (14) A: Okay, and your question again?  
 (15) Q: What did you understand to be the purpose of the  
 (16) July 10 letter from Mr. Saintilan?  
 (17) A: My understanding of this letter is that he  
 (18) was — that he was clarifying the steps that he was  
 (19) taking for his part in terms of honoring this agreement  
 (20) and pointing out a couple of areas where there may  
 (21) indeed be a little slippage, so he was alerting me to a  
 (22) couple potential problem areas, but also clarifying the  
 (23) agreement and what he was doing.  
 (24) Q: Areas of slippage, does that refer to  
 (25) territories where there may be some discounting of the

(1) Q: And Mr. Saintilan writes, quote, The original  
 (2) 1990 album would be sold at the top classical price  
 (3) point that it has historically traded at in each market  
 (4) closed quote.  
 (5) Did this represent a change in the terms of your  
 (6) understanding with Mr. Saintilan or was this just a  
 (7) memorialization?  
 (8) A: It was a clarification.  
 (9) Q: Was it your understanding that the same  
 (10) obligation would apply with regard to the 1994 Three  
 (11) Tenors' album?  
 (12) A: Yes.  
 (13) Q: During 1998, what was the top classical price  
 (14) point in the U.S. for the 1994 Three Tenors' album, if  
 (15) you recall?  
 (16) A: In the U.S., clearly quite different to the  
 (17) pricing structure in Europe. We only have a few price  
 (18) points, and we typically do not move albums between  
 (19) those price points. We start off at our full price,  
 (20) which in this case was 19.98. We could then drop the  
 (21) price down to a mid price, which is currently 11.98,  
 (22) then to a budget price of maybe 7.98.  
 (23) We have done none of those things. We do not  
 (24) believe this product is price sensitive, so we have no  
 (25) plans to reduce the album from a full price to a mid

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(1) older Three Tenors' album during the window period?  
 (2) A: Yes. Given the lateness of the agreement, yes.  
 (3) Again, I should point out that as I've said on a couple  
 (4) of prior occasions, I am not an expert in matters  
 (5) pertaining to the selling of records outside of the  
 (6) U.S., and I'm not sure what particular problems Paul and  
 (7) others had to deal with, even in order to effect this  
 (8) type of agreement.  
 (9) Q: Looking at page 10117, the first page of this  
 (10) memorandum, do you see the heading "advertising and  
 (11) promotion"?  
 (12) A: Yes.  
 (13) Q: The first sentence underneath that reads, quote,  
 (14) The original 1990 album would not be advertised or  
 (15) promoted during this period, closed quote.  
 (16) Was this a change in the agreement that you had  
 (17) with Mr. Saintilan or was this a —  
 (18) A: No, I don't believe so. I think it was just a  
 (19) restatement of that agreement.  
 (20) Q: Was it your understanding that the same  
 (21) obligation would apply with regard to the 1994 album?  
 (22) A: Yes.  
 (23) Q: Do you see the heading "pricing," number two,  
 (24) "pricing" below that?  
 (25) A: Yes.

(1) price. The pricing differences that we've been talking  
 (2) about up until now have been in the area of — we  
 (3) describe it as pricing and positioning with retail.  
 (4) It's more of a promotional thing where we pay retail  
 (5) position and we provide a discount on product that  
 (6) retail takes in, and the discount is generally fulfilled  
 (7) by way of free goods that will enable individual  
 (8) retailers to sell this album, not 19.98 but 18.98,  
 (9) because the discounts — we're not changing the price  
 (10) point of the album. I think it's important to make that  
 (11) point.  
 (12) Q: The prices that you referred to in response to  
 (13) the earlier question, are those suggested retail prices  
 (14) A: The 19.98; yes, they are.  
 (15) Q: During 1998, do you know what the wholesale  
 (16) price was for the top classical price point?  
 (17) A: Not offhand.  
 (18) Q: Can you approximate that?  
 (19) A: If you want a very rough approximation, the  
 (20) wholesale price is probably in the \$12 range, very rough  
 (21) approximation.

[REDACTED: IN CAMERA  
 TREATMENT REQUESTED]

[REDACTED: IN CAMERA  
TREATMENT REQUESTED]

117 Q: If you turn to the earlier page, 10116, take a  
118 minute and review this note.

119 A: Okay.

120 Q: With reference to the page that's stamped 10116,  
121 is this a note that you wrote?

122 A: Yes.

123 Q: Who is Karen?

124 A: Karen was my assistant.

125 Q: Did you forward Mr. Sautilan's July 10  
126 memorandum to Mr. Azzoli?

127 A: Yes.

128 Q: What did you want Mr. Azzoli to do in response  
129 to this memorandum, if anything?

130 A: I wanted him to forward it to Ramon Lopez so  
131 that he could understand what exactly PolyGram were  
132 intending on doing, so that he could hopefully instruct  
133 his affiliates to do likewise.

134 MR. GREEN: Warner Exhibit-6, please.

135 (Document bearing Bates stamp 3TEN00011275  
136 was marked as Warner Exhibit-6 for  
137 identification; 12-6-01, P.W.)

138 Q: Warner Exhibit-6 is a one-page handwritten

139 note. At the top it says AOB 7/13. It's Bates stamped  
140 3TEN00011275. Take a moment, please, and review this  
141 exhibit.

142 A: Okay.

143 Q: Is this a note that you wrote on July 13, 1998?

144 A: Yes.

145 Q: On July 13, 1998, did you have a conversation  
146 with Mr. Lopez and Mr. Azzoli regarding the Three Tenors  
147 Moratorium?

148 MR. MORRISSEY: Vague, lacks foundation.

149 A: I dated this note July the 13th. I don't recall  
150 when I had a conversation with Ramon Lopez and —

151 Q: In early July of 1998, did you have a  
152 conversation with Ramon Lopez and Val Azzoli regarding  
153 the Three Tenors Moratorium?

154 A: Yes.

155 Q: Describe, please, that conversation.

156 A: The conversation with Ramon was along the lines  
157 of the memo that I had received from Paul Sautilan  
158 dated 10th of July 1998 outlining the steps that  
159 PolyGram would take with respect to this moratorium.  
160 Ramon Lopez agreed to comply with this. He mentioned a  
161 couple of problem areas. It's clearly stated in my note  
162 here which I then communicated to Val and to PolyGram.  
163 Q: With whom at PolyGram did you communicate?

164 A: To the best of my recollection, it would have  
165 been Paul Sautilan.

166 Q: Did you have a conversation with Paul Sautilan  
167 on or about July 13, 1998?

168 A: Yes. To the best of my recollection, it was  
169 Paul Sautilan, and it would have been in that time  
170 period.

171 Q: What do you recall regarding the substance of  
172 that conversation?

173 A: That Ramon had agreed to comply with the  
174 moratorium as we had discussed outside of the U.S., that  
175 there were a couple of areas that required four weeks  
176 written notice, we might anticipate some problems  
177 there. It was just a report of the agreement and the  
178 conversation that I had with Ramon.

179 Q: Do you recall anything that Mr. Sautilan said  
180 during that conversation?

181 A: No, and I'm not sure whether it was with Paul or  
182 with an intermediary, but, in any event, this was  
183 regarded as good news.

184 MR. GREEN: Warner Exhibit-7, please.

185 (Document bearing Bates stamp 3TEN00001428  
186 through 3TEN00001431 was marked as Warner  
187 Exhibit-7 for identification; 12-6-01, P.W.)

188 Q: Warner Exhibit-7 is a letter attached to some

189 fax transmittal sheets. All together it's four pages.  
190 First page is Bates stamped 3TEN00001428, last page is  
191 Bates stamped 3TEN00001431. First page is a letter from  
192 Tony O'Brien to Paul Sautilan dated August 10, 1998.

193 Do you recognize this letter, Mr. O'Brien?

194 A: I recognize the letter, yes.

195 Q: Who drafted this letter?

196 A: This was drafted by an attorney in our corporate  
197 department.

198 Q: Do you recall who?

199 A: Best of my recollection it was — it was drafted  
200 in collaboration with an outside law firm, and I believe  
201 the attorney at the Music Group was Paul Robinson.

202 Q: Did Mr. Robinson ask you to sign this letter?

203 MR. CARY: Hold on a second. We're going  
204 to confer for a second.

205 (Conference between Mr. O'Brien and  
206 Mr. Cary.)

207 MR. CARY: Can you repeat the question,  
208 please?

209 Q: Did Mr. Robinson ask you to sign this letter?

210 A: Yes.

211 Q: Did Mr. Robinson direct you to forward this  
212 letter to Paul Sautilan?

213 A: Yes.

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17 Q: Did Sony release a Three Tenors' album in  
18 calendar year 2000?  
19 A: I believe they released a Christmas album.  
20 Q: Was that during calendar year 2000?  
21 A: I believe so.  
22 Q: Were there any discussions between Sony and  
23 Warner on the marketing of Warner's Three Tenors' album  
24 at the time of the Sony release?  
25 A: Not to my knowledge.  
26 Q: Did Sony's release of a Three Tenors' album have  
27 an effect on Warner's sales of its Three Tenors' albums?  
28 A: It would be impossible for me to tell.  
29 Q: Separate from the Three Tenors' transaction, are  
30 you aware of any other instance where Atlantic agreed  
31 with another music company to restrict discounting of an  
32 audio product?  
33 A: Absolutely not.  
34 Q: At the time of the release of the 1998 Three  
35 Tenors' album, did Warner provide U.S. retailers with  
36 point of sale materials?  
37 A: Yes.  
38 Q: Do you know what type of point of sale materials  
39 were provided?  
40 A: I remember one standee which was a picture of  
41 the Eiffel Tower with pictures of the Three Tenors on

42 Q: Do you recall whether Atlantic considered  
43 lowering the price of the 1998 Three Tenors' album  
44 in order to diminish the loss of sales to older Three  
45 Tenors' albums?  
46 A: I'm sorry, could you repeat that?  
47 Q: Did Atlantic consider lowering the price of the  
48 1998 Three Tenors' album in order to diminish the k  
49 of sales to the older Three Tenors' albums?  
50 A: No, Atlantic didn't have the right to simply  
51 lower the price of that album, and we don't consider  
52 product to be price sensitive.  
53 Q: What do you mean when you say that you don't  
54 consider the 1998 Three Tenors' album to be price  
55 sensitive?  
56 A: We didn't believe — I mean, we're still — we  
57 are still selling the 1998 album at 19.98. We have not  
58 requested from the producer, Tibor, the right to reduce  
59 the price to a mid price. Frankly, we don't believe we  
60 would sell significantly more albums if we were to  
61 reduce the price to a mid price.  
62 Q: Did you think that you would lose sales to the  
63 older Three Tenors' albums during this window period  
64 the older Three Tenors' albums were priced significant  
65 below 19.98?  
66 MR. MORRISSEY: Vague.

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67 if.  
68 Q: And did this standee, this standee held Three  
69 Tenors' CDs; is that right?  
70 A: Yes, I believe so.  
71 Q: Did Atlantic direct retailers that the 1994  
72 Three Tenors' album was not to be placed in these Eiffel  
73 Tower standees?  
74 A: I was not involved in the specific marketing  
75 campaigns, and so I was not party to any conversations  
76 with retailers as to what they should or shouldn't do.  
77 Q: Do you know whether Atlantic could have arranged  
78 with retailers that only the 1998 Three Tenors' album  
79 would be placed in these Eiffel Tower standees?  
80 A: I don't know for a fact, but I believe they  
81 could.  
82 Q: Separate from the moratorium agreement that  
83 we've been discussing, in 1998, were any other  
84 alternatives considered by Atlantic for minimizing the  
85 loss of sales to older Three Tenors' albums at the time  
86 that the '98 album was released?  
87 Let me ask the question again. In 1998, were  
88 any alternatives to the moratorium agreement considered  
89 in order to diminish cannibalization?  
90 MR. MORRISSEY: Vague, compound.  
91 A: It wasn't even necessary to consider that.

92 A: I've tried to make it clear that I'm by no  
93 means, you know, an expert in marketing or — nor do  
94 I supervise the specific activities of the people who  
95 market these records. I look at a much — at a global  
96 picture here, and so I'm not really qualified to say  
97 what would happen in terms of the '98 release if the  
98 albums were — if the other two albums, the '90 and '91  
99 were priced somewhat lower.  
100 My concern, that I expressed on a number of  
101 occasions, is that I didn't want — I didn't want to  
102 advertise, I didn't want to position, I didn't want to  
103 confuse the consumer into possibly buying a '90 or '91  
104 album when I'm trying to sell a '98 album, and so that  
105 pretty much the answer I could give you.  
106 Q: Do you recall any consideration of having a  
107 guest performer at the 1998 Three Tenors' concert?  
108 A: I think that — I think in the early stages  
109 there may have been some discussion about that, but  
110 discussion would have been very much at the Ahmet  
111 Ertegun and Tibor Rudas level. It does ring a bell, but  
112 I don't recall any names. It may have been discussed.  
113 Q: Did Atlantic want a guest performer to be  
114 included at the 1998 Three Tenors' concert?  
115 A: I don't recall.

[REDACTED: IN CAMERA  
TREATMENT REQUESTED]

[REDACTED: IN CAMERA  
TREATMENT REQUESTED]

113 Q: Did you take any actions upon receiving this  
114 or memo?

115 A: I don't recall. I don't recall what, if any,  
116 action I took.

117 Q: Do you recall any conversations regarding the  
118 moratorium agreement in connection with this memorandum?

119 A: I don't -- I don't recall whether I had any  
120 conversations or whether I decided simply to let things  
121 take their natural course.

122 MR. GREEN: Warner Exhibit-10, please.

123 (Document bearing Bates stamp 3TEN00010028  
124 was marked as Warner Exhibit-10 for  
125 identification; 12-6-01, P.W.)

126 Q: What do you have in mind when you say "let  
127 things take their natural course"?

128 A: Well, we, I believe, complied fully with the  
129 moratorium. Ramon Lopez, I believe, complied with the  
130 moratorium, as far as Warner International Music was  
131 concerned. The '98 release was a worldwide  
132 disappointment, and I could see no reason for extending  
133 the moratorium at this point in time, and so for Warner  
134 Music International to begin again or to consider  
135 selling the '94 concert at a mid price, not only after  
136 October 15th, not only was the agreement that we had  
137 made, but I didn't see any negative fallout from that

138 plan, and I don't think it was necessary for me to  
139 communicate this to anybody, and by "natural course" I  
140 mean let it happen.

141 Q: Warner Exhibit-10 is a memorandum from Tibor  
142 Rudas to Tony O'Brien dated October 28, 1998 Bates  
143 stamped 3TEN00010028. Take a moment, please, to review  
144 this.

145 A: Okay.

146 Q: Is this a memo that you received from Tibor  
147 Rudas on or about October 28, 1998?

148 A: Yes.

149 Q: What is "Luciano's Caruso on radio"?

150 A: Tibor Rudas, I must tell you, is particularly  
151 naive to the way in which the record business works both  
152 here and overseas, and he actually believed that we  
153 could get Luciano's aria Caruso on the radio all over  
154 the country, so we would go and promote, you know, PLJ  
155 and classic rock or classics classics and whatever, and  
156 sales of Three Tenors. Clearly it was not a  
157 possibility, but the thrust of this was can we get this  
158 on the radio, which, as you know, the radio is the  
159 strongest promotional tool that we have for a typical  
160 record, if it was a classical record or a Three Tenors  
161 record.

162 Q: I'm going to guess that you didn't take any

163 MR. GREEN: Mark this as Warner 9, please.  
164 (Document bearing Bates stamp 3TEN00010426  
165 was marked as Warner Exhibit-9 for  
166 identification; 12-6-01, P.W.)

167 Q: Warner Exhibit-9 is a memorandum from Ramon  
168 Lopez to Val Azzoli dated October 2, 1998, Bates stamped  
169 3TEN00010426.

170 Have you seen this document before, Mr. O'Brien?

171 A: I'm looking for the reference. I don't see it,  
172 but we're looking at the same thing, right? Okay. Yes.

173 Q: Did you receive this memo during October of  
174 1998?

175 A: I believe so.



10) action in response to --

11) A: You're absolutely correct. The matter is  
12) crazy.

13) MR. GREEN: Warner Exhibit-11, please.

14) (Document bearing Bates stamp 3TEN00010551

15) through 3TEN00010553 was marked as Warner

16) Exhibit-11 for identification; 12-6-01, P.W.)

17) Q: Warner Exhibit-11 is a three-page document. The

18) first page is a memo from Pat Creed to Tony O'Brien and

19) Margo Scott dated April 29, 1998 Bates stamped

20) 3TEN00010551, the last page 10553.

21) Let me ask you to turn to the second page Bates

22) stamped 10552. This is a memorandum from Paul Saintilan

23) to Pat Creed dated April 29, 1998. Have you seen this

24) memo before?

25) A: Yes.

26) Q: At the top of page 10552, is this your

27) handwriting?

28) A: 10552, yes, it is.

29) Q: Are these your notes from a conversation?

30) A: I don't know whether they're my notes from a

31) conversation or simply my notes.

32) Q: Do you recall any communications you had

33) regarding this memorandum from Paul Saintilan?

34) A: No, I don't.

[REDACTED: IN CAMERA  
TREATMENT REQUESTED]

1) Q: Do you recall discussing this memorandum with  
2) anyone at Atlantic?

3) A: I don't recall any specific conversation.

4) Q: If you turn to the first page, do you see under  
5) heading one, it reads, quote. Attached please find a copy  
6) of the message sent by Decca to their affiliates around  
7) the world. They are still looking for some sort of  
8) assurance from us that the same is being done through  
9) Warner Music International, closed quote.

10) Do you see that?

11) A: Yes.

12) Q: Do you recall any discussion of providing  
13) assurances of compliance to PolyGram, I'm referring to  
14) discussions that may have taken place on or about April  
15) 29, 1998?

16) A: Again, I don't remember that far back the  
17) specific conversations that we had, but I do recall in  
18) this deposition discussing certain exhibits which  
19) indicate that indeed conversations and communications  
20) had taken place with Ramon Lopez and he had agreed to  
21) the moratorium and I had communicated that to Paul  
22) Saintilan, and that completes the circle.

[REDACTED: IN CAMERA  
TREATMENT REQUESTED]

7) MR. CARY: Can we take a short break?

8) MR. GREEN: Sure.

9) (A recess was taken.)

10) MR. GREEN: Warner Exhibit-12, please.

11) (Document bearing Bates stamp 3TEN00008183  
12) was marked as Warner Exhibit-12 for  
13) identification; 12-6-01, P.W.)

14) Q: Warner Exhibit-12 is a letter from Rand Hoffman  
15) to Margo Scott dated June 11, 1998.

16) Mr. O'Brien, did you receive a copy of this  
17) letter on or about June 11, 1998?

18) A: Yes.

19) Q: Is any of the handwriting in the upper right  
20) your handwriting?

21) A: I don't believe so.

22) Q: Did you understand Rand Hoffman to be  
23) complaining that Warner was not complying with the  
24) moratorium agreement?

25) MR. MORRISSEY: Vague, calls for

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117 A: Absolutely not.

118 Q: Was one of the reasons you wouldn't want the new  
119 album positioned near the prior albums during the  
120 initial release period that you wanted people who  
121 already owned the prior albums to purchase the new  
122 album?

123 A: Yes.

124 Q: Did your discussions of the proposed moratorium  
125 all take place in the context of developing your  
126 marketing plans for the new album?

127 A: No.

128 Q: Why wasn't it that those discussions took place  
129 in those context?

130 A: First of all, I'm not sure — I'm not trying to  
131 be uncooperative here, but, I mean, from an overall  
132 position, I approved the concept of the moratorium. I  
133 was not involved in the development of the detailed  
134 marketing plan, and it made a lot of sense to me to have  
135 this form of moratorium. Certainly if Atlantic records  
136 was simply conducting business by itself, as I  
137 previously testified, and if we were releasing that '98  
138 album, we would not have positioned the '94 album  
139 alongside it. As simple as that. We would have waited  
140 until much later when the holiday season and the holiday  
141 buy-in the started, and so — and so it seemed logical

[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]

142 Q: Specifically, with respect to PolyGram, did you  
143 have an understanding as to whether PolyGram used  
144 temporary reductions to mid price in the United States?

145 A: I don't know what PolyGram did, but I would  
146 doubt that they would do it, for the reasons that I just  
147 described.

148 Q: Do you know if PolyGram ever temporarily reduc  
149 the 1990 Three Tenors' album in the United States to r  
150 price?

151 A: I don't know.

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152 for the marketing plan with PolyGram as our partner to  
153 comply with that concept, to be in accordance with that  
154 concept.

155 Q: Did you believe the moratorium would apply  
156 aggressive discounting and promotion?

157 A: Yes.

158 Q: What do you understand aggressive to mean?

159 A: Well, aggressive would mean that if you are  
160 paying retail to take in product and offering details to  
161 retail — you know, whether those details are in the  
162 five or up to 10 percent, that's what I consider  
163 aggressive in the U.S., I don't know what is considered  
164 aggressive for outside of this country.

[REDACTED: *IN CAMERA*  
TREATMENT REQUESTED]

165 Q: Do you know if PolyGram has ever sold the 1990  
166 Three Tenors' album at mid price in the United States?

167 A: I don't know.

168 Q: Would it surprise you if they hadn't sold the  
169 1990 Three Tenors' album at mid price in the United  
170 States?

171 A: Would it surprise me if they had not?

172 Q: Right.

173 A: No, but I'm not familiar with the — I'm not  
174 familiar with the sales pattern of the 1990 concert. We  
175 will move product from full price to mid price or from  
176 mid price to budget price based upon the performance  
177 the sales performance of that product and what we exp  
178 the change in price — what effect we would expect t  
179 change in price to have on the sales performance of th  
180 product.

181 Q: If I could focus you for a second on the time  
182 period prior to any discussion with Mr. Saintilan or  
183 anyone else regarding a moratorium. Can you focus on  
184 that time period for a second?

185 A: Yes.

186 Q: During that time period, prior to any discussion  
187 of the moratorium, did you have any reason to believe  
188 that PolyGram would discount the 1990 album to mid pr  
189 in the United States during the initial release period