Public Version
FTC Docket No. 9298

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.	Docket No. 9298

COMPLAINT COUNSEL'S MEMORANDUM OF LAW
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Pursuant to Rule 3.24 of the Commission's Rules of Practice, 16 C.F.R. §3.24, Complaint Counsel respectfully submits this memorandum of law in opposition to the motion for summary judgment filed by the Respondents in this case, PolyGram Holding, Inc., Decca Music Group Ltd, UMG Recordings, Inc., and Universal Music and Video Distribution Corp. (collectively referred to as "Respondents" or "PolyGram").

TABLE OF AUTHORITIES

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MISCELLANEOUS

I. INTRODUCTION

This case involves a collaboration between two music companies, PolyGram and Warner Music Group ("Warner"), to produce and distribute audio and video recordings of a 1998 live performance by the world renowned "Three Tenors"– Luciano Pavarotti, Placido Domingo, and Jose Carreras. The focus of the case is not, however, the joint venture itself. Rather, the litigation focuses on conduct by the joint venture participants falling outside the scope of their venture. That is, the case concerns a side agreement by PolyGram and Warner to ban price reductions and advertising on their own pre-existing Three Tenors ("3T") releases – *i.e.*, PolyGram's recording of the original 3T concert released in 1990, and Warner's recording of a follow-up 3T concert released in 1994 – which were not created by the joint venture.

There is no dispute that the agreed upon "moratorium" on discounting and promotion of non-venture 3T products was reached after the parties entered into their joint venture.[1] Nor is there any suggestion that instituting such a moratorium was in any way essential in order to enable PolyGram and Warner to proceed with a new, jointly released product. Nevertheless, PolyGram argues that it and Warner had valid justifications for agreeing to forgo price and advertising competition on their pre-existing 3T releases - the principal justification being that this side agreement would enable the parties to "maximize the value" of both their joint and independent Three Tenors product lines. Resp. Mot. at 1. In other words, the agreement allowed them to make more money.

Not surprisingly, the validity of Respondents' proffered efficiency justifications is

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[1] For convenience, we will refer to PolyGram and Warner collectively as "the parties," meaning the parties to the joint venture and to the challenged side agreement. As the Court knows, however, Warner is not a party to this litigation, having previously entered a consent agreement resulting in settlement of the Commission's claims.

disputed by Complaint Counsel. In light of the clear factual controversy, how could PolyGram possibly believe that it is entitled to summary decision?[2] The answer, apparently, is that PolyGram is content to rely upon creative legal arguments that defy common sense, and that run directly counter to well-established case law governing the analysis of horizontal restraints.

Respondents' basic argument boils down to this: putting aside whether their proffered efficiency justifications are in fact valid, so long as these justifications at least have an air of "plausibility," then the Commission's Complaint must be dismissed. In other words, Respondents claim that, as they read the law, whenever there is at least some "plausible" justification for a horizontal restraint, the court reviewing the restraint is compelled to undertake the most searching form of the rule of reason analysis possible, exploring all potentially relevant issues, including market definition, market power, and the existence of anticompetitive effects. Because Complaint Counsel "have disclaimed any reliance on full rule of reason analysis," Resp. Mot. at 1, the argument goes, it follows that if Respondents' proffered efficiency justifications were plausible – which they erroneously claim to be undisputed – then judgment in their favor must be entered.

Both of the premises upon which this argument is built are demonstrably false.

First, it is not correct, as Respondents assert, that Complaint Counsel or their expert

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[2] To obtain summary judgment, Respondents must show that "there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." Commission Rule of Practice 3.24(a)(2), 16 C.F.R. § 3.24 (a)(2). Complaint Counsel, as the non-moving party, "is entitled to have the evidence viewed in the light most favorable to them and to have all factual inferences made in their favor. Where there is conflicting evidence about the material issues of fact, summary judgment is inappropriate." *International Assoc. Conf. Int.* 1995 FTC LEXIS 375, *1 (Nov. 29, 1995). Summary dismissal of an antitrust claim is precluded where, as here, there is a genuine dispute as to the material facts underlying the alleged efficiency defense. *E.g., Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 483-86 (1992).

witness have conceded the "plausibility" of PolyGram's proffered efficiency justifications. To the contrary, Complaint Counsel will explain below, and is prepared to demonstrate at trial, that the various justifications PolyGram has offered in defense of the challenged moratorium are each, on their face, either pretextual, inapposite, legally insufficient, or otherwise implausible. Hence, even as to the issue of plausibility, a fact dispute exists which precludes summary judgment.

Second, the central legal argument upon which Respondents' motion is predicated is a gross distortion of the applicable law. Their argument, in essence, is that courts, in analyzing a challenged horizontal restraint, are forbidden from applying anything short of full-blown rule of reason review (a plenary market examination), provided the defendant can articulate some arguably plausible justification for the conduct. However, the very Supreme Court decision on which Respondents purport to rely – *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) ("*CDA*") – holds the opposite. As the Court explained in *CDA*, its prior horizontal restraints decisions (referring in part to *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) ("*BMI*"), and *NCAA v. Board of Regents*, 468 U.S. 85 (1984) ("*NCAA*"), discussed below) "formed the basis for what has come to be called abbreviated or 'quick-look' analysis under the rule of reason." CDA, 526 U.S. at 770. In other words, these decisions helped to establish the now settled proposition that courts, in evaluating horizontal restraints, are not limited to the two traditional, and polar opposite, modes of analysis: *per se* condemnation and full-blown rule of reason review. Rather, in cases (like this one) involving restraints that raise "obvious" concerns of potential anticompetitive effects, courts may next focus on the merits of the proffered efficiency

justifications.[3] Upon determining that the proffered justifications are either implausible on their face or invalid in view of the relevant facts, the court is then free to condemn the restraint as unlawful without conducting "the fullest market analysis." *Id.* at 779. Thus, assuming *arguendo* that Respondents' efficiency justification were plausible, this would not compel an examination of market definition and market power, nor would it be grounds for summary judgment.

Either of these two flaws in Respondents' argument – one factual and the other legal – would provide ample grounds for denial of Respondents' motion. Yet the motion rests in part on another flawed argument. According to Respondents, even absent a plausible efficiency justification, whenever an alleged restraint is "related to" or "adopted in the context of" a joint venture, Resp. Mot. at 12, 14, the restraint cannot be condemned as *per se* unlawful, but rather must be subjected to the fullest rule of reason review. This argument, again, grossly distorts the applicable law. As was resolved by the Supreme Court roughly twenty years ago in *BMI* and *NCAA* – horizontal restraints will not escape *per se* condemnation solely because they arise in the general context of a joint venture. Rather, to be entitled to more lenient treatment under the rule of reason, the particular type and form of restraint in question must have been "necessary" or "essential" to enable the efficiency-enhancing integration that renders the joint venture procompetitive.[4] In contrast to *BMI* and *NCAA*, here Respondents make no attempt to argue that

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[3] As discussed below, although Respondents contend that the challenged restraints are not obviously anticompetitive, this argument at best raises a factual dispute, making summary judgment inappropriate.

[4] *See BMI*, 441 U.S. at 23 (declining to apply *per se* analysis to ancillary price restraint where "the agreement on price [was] necessary to market the product at all") (emphasis added); *NCAA*, 468 U.S. at 101 (noting that the "critical" fact warranting more in-depth rule of reason review, as opposed to *per se* condemnation, of the challenged restraint was that the "case involve[d] an industry in which horizontal restraints are essential if the product is to be available

the challenged moratorium was reasonably necessary to formation of the parties' joint venture, nor could they credibly make such a claim. Indeed, the most Respondents have argued is that the moratorium "was an important part of their marketing plans for the new album." Resp. Mot. at 13. As a matter of law, this argument falls considerably short of the standard plainly articulated by *BMI* and *NCAA*. Moreover, even the claim that the challenged moratorium was somehow "important" to the success of the parties' joint venture raises serious factual disputes, which in themselves would prevent summary judgment.

For these and other reasons explained below, Complaint Counsel respectfully urges the Court to deny Respondents' motion.

II. FACTUAL BACKGROUND

PolyGram and Warner are vertically integrated producers and distributors of recorded music. CCS ¶ 1.[5] Competition in this industry takes place at many levels, but for present purposes the most important arena of competition is this: PolyGram and Warner, in direct competition with one another, each distribute audio and video products featuring the Three Tenors.

A. PolyGram and Warner Acquire Competing Three Tenors Products

In the summer of 1990, on the eve of the final match of the World Cup soccer tournament, three of the world's most famous opera stars – Carreras, Domingo, and Pavarotti –

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at all") (emphasis added). *See also Antitrust Guidelines for Collaborations Among Competitors* ¶ 3.2 (April 2000) (an otherwise *per se* restraint "that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits" is subject to more thorough rule of reason review).

[5] CCS ¶ ___ is a reference to Complaint Counsel's Separate and Concise Statement of Material Facts as to Which There Is a Genuine Issue for Trial, which is being filed herewith.

performed together at the Baths of Caracella in Rome. CCS ¶ 4. PolyGram acquired from the concert promoter the right to distribute recordings of the Rome concert. CCS ¶ 4. This 1990 release (hereinafter "3T1") soon became the best selling classical recording of all time. CCS ¶ 5.

In 1994, the trio – now widely known as the Three Tenors – planned a second World Cup performance in Los Angeles. CCS ¶ 6. Concert promoter Tibor Rudas offered to license to PolyGram the rights to the concert. CCS ¶ 7.

PolyGram did not sit back and permit the release of Warner's new album to eclipse its own top-selling Three Tenors recording. Rather, in response to the release of 3T2, PolyGram promoted the message that 3T1 was the "original" Three Tenors recording – "unique and unrepeatable." CCS ¶ 11. In several territories, PolyGram marketed 3T1 at a "mid price" level, several dollars below the price of Warner's 3T2. CCS ¶ 12. In turn, Warner designed a marketing strategy to counter PolyGram's competitive challenge. CCS ¶ 13. From 1994 until the time of the challenged moratorium, PolyGram and Warner were at war with one another, forced to "fight head on for every inch of advantage." CCS ¶ 16. Naturally, consumers benefitted from this unrestrained rivalry. CCS ¶¶ 12, 15. PolyGram and Warner had little reason to complain as well. Their respective Three Tenors albums were both among the best-selling classical recordings in the United States in 1994, 1995, 1996, and 1997. CCS ¶ 17.

B. PolyGram and Warner Agree to Collaborate on the 1998 Three Tenors Project

As in 1994, Pavarotti was under exclusive contract with PolyGram. CCS ¶ 20. In the spring of 1997, the Chairman of Atlantic Recording Corp. (a Warner subsidiary based in the U.S.) met with his counterpart at PolyGram "to ask that PolyGram allow Luciano Pavarotti to record the project for [Warner]." CCS ¶ 21. PolyGram responded with an offer of its own: Warner and PolyGram should share financial and operational responsibility, profits, and losses for the 1998 Three Tenors project. CCS ¶ 22.

The collaboration agreed upon by the parties took the following form: In return for an $18 million advance and other consideration, Rudas licensed to Warner worldwide audio, video, and home television rights to the 1998 concert ("the 3T3 Rights"). Warner then sub-licensed to PolyGram the right to exploit the 3T3 Rights in all territories outside the U.S. Warner was responsible for distributing the new album and video in the United States, and PolyGram was responsible for distribution elsewhere in the world. The parties also agreed:

- that Warner and PolyGram would each receive 50 percent of the net profits and losses derived from the exploitation of the Rights (as well as from the production of a Greatest Hits album and/or a Box Set incorporating the 1990, '94, and '98 concerts);

- that PolyGram would reimburse Warner for 50 percent of the $18 million advance paid to Rudas; and

- that other expenses incurred by either party in the exploitation of the Rights (*e.g.*, manufacture, distribution, and marketing) would be deducted from revenues for purposes of calculating net profits (in effect, such expenses were shared by Warner and PolyGram on a 50/50 basis). CCS ¶¶ 23-24.

In negotiating the terms of the 1998 Three Tenors project, PolyGram and Warner evaluated and discussed the appropriate scope of any covenant not to compete. Several iterations of this contract provision were drafted and exchanged.

The final Concert/License Agreement, dated December 19, 1997, provides that PolyGram and Warner shall each be free separately to exploit its older Three Tenors recordings. CCS ¶ 27.

C. **The Moratorium Agreement**

Various marketing strategies were considered to create a unique identity for the 1998 album. CCS ¶¶ 35-36. Rudas had assured the music companies that the album recorded in Paris would consist of selections not appearing on the earlier Three Tenors albums. The music companies decided that the all new repertoire would be a key selling point. PolyGram and Warner were also in agreement that the packaging for 3T3 "must be as different as possible from the two previous releases." CCS ¶ 36.

Despite this planning, concerns about the marketability of 3T3 persisted. At a meeting of PolyGram and Warner representatives held in New York in March 1998, the moratorium was born: PolyGram and Warner agreed not discount or advertise their older Three Tenors products in the weeks surrounding the release of the new product. CCS ¶ 37. The agreement was

motivated by a recognition that competition from the older Three Tenors products would reduce the profitability of the new Three Tenors release. CCS ¶¶ 44, 48, 51, 54.

In April 1998, PolyGram instructed its distribution companies around the world (operating companies or "opcos")[6] that, pursuant to an agreement with Warner, aggressive marketing campaigns in support of 3T1 would have to terminate by the end of July. CCS ¶ 38. Paul Saintilan (PolyGram) notified Warner of PolyGram's actions. CCS ¶ 40.

D. PolyGram and Warner Learn that the Repertoire for the 1998 Concert May Be Disappointing

In mid-June 1998, Tibor Rudas informed PolyGram and Warner of the intended repertoire for the upcoming Three Tenors concert. CCS ¶ 45. Both music companies were alarmed to learn that, contrary to earlier promises, the repertoire would include several compositions that appeared on 3T1 and/or 3T2. CCS ¶¶ 46-47. This development threatened to jeopardize the success of the '98 album.

On several occasions from mid-June through to the date of the live performance in July, PolyGram and Warner expressed to Rudas their dissatisfaction with the intended repertoire. CCS ¶ 49.

E. PolyGram and Warner Reaffirm the Moratorium Agreement

On June 25, 1998, Tony O'Brien (Warner) and Paul Saintilan (PolyGram) discussed their

[6] Both PolyGram and Warner distribute their products through a network of affiliated operating companies responsible for sales within a particular country or region. CCS ¶ 2.

mutual desire to "re-enforce the moratorium." CCS ¶ 53. On July 2 and July 10, 1998, Saintilan (PolyGram) provided O'Brien (Warner) with letters formalizing the terms of the moratorium, and seeking Warner's assent. CCS ¶¶ 54-55. Soon thereafter, O'Brien (Warner) notified Saintilan (PolyGram) that the offer was accepted. CCS ¶¶ 58-59.

For purposes of this motion, PolyGram concedes "that the parties adopted the ten-week moratorium on all discounting and promotion of the prior [3T] albums." Resp. Mot. at 10.

III. SUMMARY OF APPLICABLE LAW

The legal framework for analyzing the competitive effects of horizontal agreements is now well established. The court's first step is to examine the nature of the challenged restraint and the theoretical basis for the anticompetitive effects alleged. If the potential anticompetitive impact of the challenged agreement is judged to be "obvious" or "clear," then the restraint is a candidate for some form of abbreviated review (either *per se* or truncated rule of reason). *See CDA*, 526 U.S. at 79; *NCAA*, 468 U.S. at 109. On the other hand, if the restraint has no clear anticompetitive potential, then a more extended consideration of its market implications is required; this may but does not necessarily entail a "plenary market examination," including an analysis of market definition and market power. *CDA*, 526 U.S. at 779.

Where the restraint is deemed to be presumptively anticompetitive, the next step is to consider any efficiency justifications advanced by the defendant. If the procompetitive justification is not plausible as applied to the case at hand (or if there is no efficiency defense), then the restraint should be judged *per se* unlawful. An efficiency argument may be deemed implausible on its face where, for example, it is pretextual, inapposite to the factual circumstances presented, or premised upon the claim that competition is unworkable or

undesirable.[7]

On the other hand, if the efficiency argument is determined to be plausible (legally and economically), the court must next consider whether it is valid in the context of the relevant facts. Note that the "validity" inquiry may require detailed consideration of facts, but only those facts which bear directly upon the merits of the justification. In this sense, validity analysis is fundamentally different from the fullest rule of reason inquiry in that issues of market definition, market power, and anticompetitive effects are not relevant. The scope of the validity inquiry depends upon the circumstances of the case. An efficiency justification may be rejected as insufficient or invalid where, *inter alia*, it is speculative or unproven,[8] where there is a less restrictive alternative,[9] where the argument sweeps too broadly,[10] or where the restraint is not an effective remedy for the competitive problem that it purports to address.[11] Where, as here, we are dealing with a restraint that is said to be ancillary to a collaboration, the defendant must show that the restraint is "necessary" in order to achieve the procompetitive benefits of the collaboration. *NCAA*, 468 U.S. at 97-8; *BMI*, 441 U.S. at 21-3.

Only if the proffered efficiency justification is both plausible and valid must the court determine whether there is proof of an actual anticompetitive effect (or employ its surrogate,

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[7] *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 463 (1986); *NCAA*, 468 U.S. at 116-7); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) ("*NSPE*").

[8] *IFD*, 476 U.S. at 463 (1986); *Chicago Pro. Sports*, 961 F.2d at 674-76.

[9] *NCAA*, 468 U.S. at 114; *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 351-52; *NSPE*, 435 U.S. at 696; *Chicago Pro. Sports*, 961 F.2d at 674-76; *Mass. Board*, 110 F.T.C. at 607-08.

[10] *IFD*, 476 U.S. at 463; *Catalano*, 446 U.S. at 649-50; *NSPE*, 435 U.S. at 696; *Mass. Board*, 110 F.T.C. at 607-08.

[11] *NCAA*, 468 at 116, 119; *Law v. NCAA*, 134 F.3d at 1022-24.

market definition and market power). *CDA*, 526 U.S. at 780; *BMI*, 441 U.S. at 24.

IV. ARGUMENT

A. The Challenged Restraints Are Presumptively Anticompetitive

Abbreviated antitrust analysis begins with the recognition that certain categories of restraints almost always tend to raise price or reduce output; the presumptively anticompetitive effects of such agreements are "intuitively obvious."[12] Although Respondents contend here that the agreed upon ban on price and advertising competition should not be regarded as presumptively anticompetitive, that argument is plainly meritless.

The agreement between PolyGram and Warner not to discount 3T1 and 3T2 is a form of price fixing,[13] and hence subject to abbreviated review as a matter of law.[14] The agreement between PolyGram and Warner to forgo all advertising – including truthful and non-deceptive, and price-related advertising – is also presumptively anticompetitive. Such agreements have often been treated as *per se* violations by the courts.[15] In *CDA*, the Supreme Court expressed a somewhat more permissive view toward limited advertising restraints in a professional services market. Nevertheless, the Court indicated that a complete ban on truthful, non-deceptive

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[12] *CDA*, 526 U.S. at 781; *NCAA*, 468 U.S. at 110.

[13] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) ("an agreement to eliminate discounts . . . falls squarely within the traditional *per se* rule against price fixing").

[14] *NCAA*, 468 U.S. at 100 (1984) ("Horizontal price fixing [is] perhaps the paradigm of an unreasonable restraint of trade."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927).

[15] *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688, 691 (7th Cir. 1961); *Federal Prescription Service, Inc. v. American Pharm. Ass'n*, 484 F.Supp. 1195, 1207 (D.D.C. 1980), *aff'd in part and rev'd in part*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982); *United States v. House of Seagram, Inc.*, 1965 Trade Cas. (CCH) ¶ 71,517 at 81,275 (S.D. Fla. 1965); *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988) ("*Mass. Board*").

advertising – especially in an ordinary commercial market[16] – should continue to be viewed harshly.[17]

Respondents contend that, before the restraints at issue here can be deemed presumptively anticompetitive or judged unlawful, Complaint Counsel is obligated to allege and prove a relevant market. This argument is wrong as a matter of law. When addressing a horizontal agreement that is inherently likely to result in anticompetitive effects, market definition is not a necessary element of the analysis.[18] This proposition was clearly established by the Supreme Court in *NCAA*. In that case, the universities claimed that price and output restrictions on football telecasts were necessary to maintain a competitive balance among amateur athletic teams. This "plausible" defense was rejected, without proof of market power, because factual inquiry identified less restrictive means of equalizing the competitive strength of collegiate football programs. In the context of this otherwise legitimate joint venture, the Court endorsed the principle that underpins all abbreviated antitrust analysis: "As a matter of law, the absence of proof of market power does

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[16] *CDA* 526 U.S. at 773 n. 10 ("'It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas.'") (*quoting Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n. 17 (1975)). *See also* T. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17*, 8 S. Ct. Econ. Rev. 265, 269 (2000) (hereinafter "Muris") ("[C]oncerns over the differences between professional advertising and that by 'merely' commercial enterprises are crucial to understanding the Court's *CDA* decision."); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 2023.1 at 619 (2000 Supp.) ("[*CDA*] distinguished a class of differentiated markets having unusually large information costs from the more general run of markets . . . . [I]t would be a serious error to apply the rule of this decision in simpler or more ordinary markets where such [market failure] claims are not so readily justified.").

[17] *CDA*, 526 U.S. at 773 ("the restrictions at issue here are very far from a total ban on price or discount advertising").

[18] "[T]he application of abbreviated analysis focuses on the restraint itself rather than the market in which the restraint occurred." Muris, *supra* note 17 at 307. *See also Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998) ("[w]here a practice has obvious anticompetitive effects – as does price-fixing – there is no need to prove that the defendant possesses market power."), *cert. denied*, 525 U.S. 822 (1998).

not justify a naked restriction on price or output." *NCAA* 468 U.S. at 109 (emphasis added).[19]

In any event, to the extent that any factual inquiry is required to determine whether the restraints are presumptively anticompetitive, there is a dispute as to the material facts.[20] Thus, summary judgment for Respondents is precluded.

B. A Plausible Efficiency Argument is Not Sufficient to Require Plenary Market Examination of Presumptively Anticompetitive Restraints

Respondents assert that if the party defending a restraint identifies an economically plausible procompetitive justification, then the challenged agreement must be reviewed under the fullest rule of reason. This is simply a misstatement of the applicable law. Indeed, in numerous horizontal restraints cases in which plausible efficiency justifications have been advanced, courts have nevertheless condemned the restraint as unlawful, without a full market analysis. *See, e.g.*, footnotes 8-11, *supra*.

The *CDA* decision does not support Respondents' thesis. In *CDA*, the Supreme Court considered restrictions on certain non-verifiable advertising claims adopted by an association of dentists. The association claimed that the restrictions were designed to avoid false and deceptive claims in a market characterized by "striking disparities between the information available to the

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[19] A restraint is "naked" if its purpose or likely effect is to increase price or reduce output in the short run. Where a plausible efficiency justification is shown to be invalid, the suspect restraint is properly classified as "naked" and hence unlawful. *See* H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* at 197 (2d ed. 1999) ("Indeed, many restrictions are 'naked' even though contained in elaborate joint ventures that were not being challenged and were almost certainly socially beneficial. For example, while the NCAA is a socially beneficial athletic venture involving colleges and universities, both its rule limiting televised football games and the rule fixing maximum coaches salaries were properly characterized by the courts as 'naked' restraints on price or output.").

[20] *See* Expert Report of Dr. Stephen Stockum ¶ 11 (opining that in absence of efficiency justification, price and advertising restraints adopted by PolyGram are likely to have anticompetitive effects). In reaching these conclusions, Dr. Stockum relies upon economic theory and empirical research. *See* CCS ¶ 63 and articles cited therein.

professional and the patient." *CDA,* 526 U.S. at 772. The Court explicitly endorsed the use of the abbreviated rule of reason where the plaintiff has established that the restraint is anticompetitive on its face (*id.* at 769-70), but concluded that the Court of Appeals had not adequately evaluated whether the challenged restraint did more than prohibit deceptive advertising. Contrary to Respondents' representation, in *CDA* the Court did not remand for a plenary rule of reason review. Instead, the Court of Appeals was instructed to conduct a more detailed consideration of whether the advertising restraints were properly deemed to be presumptively anticompetitive. If the restraints were, upon further consideration, deemed to be presumptively anticompetitive, the Supreme Court instructed that the defendant then would have the burden of showing "empirical evidence of procompetitive effects" in the context of a "quick look" analysis. *Id.* at 775 n.12.[21] In other words, the case could be resolved based on an abbreviated analysis of the proffered efficiency justifications without an examination of market definition, market power, or actual anticompetitive effects.

CDA thus reaffirms the analytical structure applied in *BMI* and *NCAA* and outlined above. Since the Three Tenors moratorium falls within the "general rule" that price restrictions and advertising bans are *prima facie* anticompetitive, the burden shifts to the Respondents to advance a plausible and valid efficiency justification. *Id.* at 771.

C. Presumptively Anticompetitive Restraints Adopted "In the Context of" a Legitimate Joint Venture Are Subject to Abbreviated Review

Respondents contend that the moratorium was "discussed exclusively in the context of a legitimate joint venture," Resp. Mot. at 13, and that this somehow triggers a plenary market

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[21] *CDA,* 526 U.S. at 779-81 ("Saying here that the Court of Appeals's conclusion at least required a more extended examination of the factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis . . . . What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.").

examination. The same could be said of virtually any alleged ancillary restraint, yet the courts have held that the standard for evaluating the validity of an ancillary restraint is whether it is "necessary" to achieve a legitimate procompetitive purpose. *BMI*, 441 U.S. at 20-21.[22] Respondents' argument is therefore a *non sequitur*.

Respondents further suggest that restraints on competition between participants to a joint venture can never be judged unlawful, because "parties to a joint venture are not obligated to compete directly with their venture." Resp. Mot. at 2. This too is plainly incorrect. Numerous antitrust cases have condemned anticompetitive agreements between a venture and a parent firm, or (more relevant here) an anticompetitive agreement between co-venturers – even where the restraint is adopted "in the context" of the venture.[23] The rationale was explained by Judge Posner: "It does not follow that because two firms have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition."[24]

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[22] *Accord Maricopa*, 457 U.S. at 352-53 (maximum fee schedule established by physicians found unlawful where it was unnecessary; schedule set by insurers was a workable alternative); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986) (restraints adopted by joint venture were upheld given that they were "reasonably necessary to the business it is authorized to conduct"), *cert. denied*, 479 U.S. 1033 (1987); *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594-95 (7th Cir. 1984) (market division agreement among truck leasing companies judged illegal as it was not necessary to the venture).

[23] *E.g.*, *NCAA*, 468 U.S. 85; *Law v. NCAA*, 134 F.3d 1010; *Chicago Pro. Sports*, 961 F.2d 667; *General Leaseways*, 744 F.2d 588; *Yamaha Motor Corp. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001).

[24] *General Leaseways*, 744 F.2d at 594.

D. The Challenged Restraints Are Outside – and Not Ancillary to – the Collaboration Between PolyGram and Warner

The doctrine of ancillary restraints affords parties to a joint venture an opportunity to demonstrate that an inherently suspect restraint is efficient by virtue of being necessary to facilitate procompetitive integration. Conversely, "The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding *per se* condemnation." Collaboration Guidelines at § 3.2.

An obvious corollary to the forgoing is that the scope of the integration of assets defines the scope of potentially permissible restraints; restraints that are outside of the integration are not permitted. Hence, considering that PolyGram and Warner decided it was unnecessary to bring their catalog Three Tenors albums, 3T1 and 3T2, into the venture in order to create 3T3, that choice precludes the parties from coordinating the price and advertising for these non-venture products.

Palmer v. BRG of Georgia, Inc., 498 U.S. 46, 49-50 (1990), illustrates this principle most clearly. HBJ, a nationwide provider of bar review classes, licensed a competitor to use HBJ's trade name and teaching materials in the State of Georgia only, and agreed not to compete with the licensee in Georgia. In return, the licensor (HBJ) received a license fee and a commitment that the licensee would not compete with the licensor anywhere in the U.S. (outside of Georgia). In other words, the parties combined their assets in Georgia only, yet they simultaneously agreed not to compete anywhere in the United States. Not surprisingly, even though the latter restraint was agreed to in connection with the formation of the venture, because it restricted competition outside the scope of the venture, it was judged *per se* illegal.[25]

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[25] *See also Visa U.S.A.*, 163 F. Supp. 2d 322 at 405-06 (agreement prohibiting members of Visa and MasterCard networks from offering a third competing product – American Express or Discover card – judged illegal); *General Motors Corp.*, 103 F.T.C. 374 (1984) (consent

The holding of *BRG* controls this case. Warner licensed its competitor PolyGram to distribute 3T3 outside of the United States, and (later) exacted a promise that PolyGram would not compete with Warner inside of the United States. PolyGram's rights to 3T1 pre-date the arrangement and were not part of the integration; PolyGram's U.S. marketing operation was not used efficiently for the betterment of the collaboration; and PolyGram's U.S. distribution assets were completely uninvolved in the collaboration. Thus, as in *BRG*, the challenged moratorium, which restricted price and advertising competition on non-venture products far exceeds the scope of the parties' integration and should be condemned as a matter of law.[26]

E. Respondents' Efficiency Arguments in Support of the Moratorium Are Not Sufficient to Require A Plenary Market Examination

Because this case involves presumptively anticompetitive restraints, Respondents have the burden of coming forward with a valid efficiency justification. As in *BMI*, then, the threshold question for Respondents is: Why was the moratorium necessary; how did it benefit consumers? No clear or convincing answer can be found in Respondents' Memorandum. What is clear is that the moratorium was not necessary to the formation of the PolyGram/Warner collaboration; was

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agreement) (manufacturing joint venture between General Motors and Toyota approved by the Commission, subject to the conditions aimed at reducing the likelihood of collusion between the manufacturers with regard to non-venture products), *vacated on other grounds*, 5 Trade Reg. Rep. (CCH) ¶ 23,491 (Oct. 23, 1993); *Brunswick Corp.*, 94 F.T.C. 1174, 1275-77 (1979) (agreement restricting venturer's sale of pre-existing, non-venture product judged *per se* illegal), *aff'd as modified sub nom. Yamaha Motor Co. v. FTC*, 657 F.2d 971, 984 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).

[26] Note that none of the cases relied on by Respondents in which suspect restraints were upheld involved restraints on products outside of the joint venture. *See BMI*, 441 U.S. 1, 24 (restraint solely concerned pricing of blanket license that was product of the joint venture; participants were free to separately license and price their individual works); *Rothery*, 792 F.2d 210, 214 (restrictions concerned venturers' use of joint venture assets); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (restraint applicable to sales from jointly constructed facility; venturers remained free to increase output from separately operated facilities).

not necessary for the production of the Paris concert; was not necessary for the creation of 3T3; and was not necessary to assure the distribution of 3T3 in the United States. These commitments were in place well before discussions of the moratorium even commenced, and as a matter of law cannot justify the challenged restraints.[27]

Respondents advance four arguments in support of the agreement not to compete. All are rather trivial considerations relating to the marketing (not production) of 3T3. One strong indication of their unimportance is that PolyGram and Warner were willing to enter into the 3T3 collaboration without first agreeing to the moratorium. As detailed below, none of Respondents' contentions constitutes a plausible, much less valid, efficiency defense. In any event, each argument raises factual issues which preclude summary judgment.

1. Respondents' Profit Maximization Argument Should Be Rejected

Respondents' assertion that the moratorium would assist PolyGram and Warner "to recoup" their investment is not a procompetitive (*i.e.*, pro-consumer) justification for the moratorium. "'We do it because it's more profitable' is not a defense under the Sherman Act."[28] It is likewise not a defense under the FTC Act.[29]

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[27] *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (allocation of territories was not ancillary to agreement to dissolve law partnership where restraint was adopted after the termination of the partnership); *Polk Bros.*, 776 F.2d at 189 ("A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted."); *see also* H. Hovenkamp, XIII *Antitrust Law* at 138 ¶ 2131c2 (1999).

[28] *Chicago Pro. Sports Ltd. Partnership v. NBA*, 754 F. Supp. 1336, 1359 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992). *See also Law v. NCAA*, 134 F.3d at 1023; *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991).

[29] *See FTC v. Superior Court Trial Lawyers Assoc.*, 493 U.S. 411, 422 (1990). Note that there is no evidence the moratorium was necessary to assure the venture's financial viability, and Respondents advance no such claim. Indeed, according to the analysis of Respondents' economic expert, the moratorium made only a trivial contribution to the financial success of the PolyGram/Warner collaboration. Ordover Report ¶ 35.

2. Respondents' Consumer Confusion Argument Should Be Rejected

Respondents argue that the moratorium on discounting and promotion of older Three Tenors products "helped eliminate the risk that some consumers would confuse the various Three Tenors albums and not purchase the new album that they intended to buy." Resp. Mot. at 13-14. The claim apparently is that competition is enhanced if 3T1 and 3T2 are high priced and hidden away from vulnerable and undiscerning consumers. Analogous challenges to consumer sovereignty were dismissed by the Supreme Court in both *IFD* and *NSPE*, with the observation that the argument amounts to "nothing less than a frontal assault on the basic policy of the Sherman Act."[30]

There is no evidence in the summary judgment record that consumers were in fact confused in selecting among the various Three Tenors albums – only that PolyGram was "concerned." CCS ¶ 88. Why would it be confusing for consumers to choose among 3T1, 3T2, and 3T3? Would it be more difficult for consumers to select a Three Tenors album than, say, a Frank Sinatra album,[31] or a long distance carrier, or a detergent, or a computer, or an automobile? Respondents offer no answer to these questions. As far as their argument is concerned, however, the antitrust laws provide the definitive answer: Confusing competition is preferred to the clarity offered by monopolization and collusion.[32]

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[30] *IFD*, 476 U.S. at 463 (rejecting claim that providing X rays to insurance companies will necessarily lead then to make unwise and dangerous choices); *NSPE*, 435 U.S. at 694 (rejecting claim that competitive bidding will necessarily lead to inferior engineering work).

[31] The on-line music seller Amazon.com lists over a hundred Frank Sinatra albums, offered by several different music companies. CCS ¶ 101.

[32] *See, e.g., United States v. Western Electric Co.*, 583 F. Supp. 1257, 1260 (D.D.C. 1984) ("There is no doubt that some find confusion in the mushrooming of [telephone] service and equipment options that have become available in the wake of [the AT&T] divestiture; others may regard such proliferation as healthy in that they give the consumer greater choice at potentially lower prices. In any event, that policy dispute, too, is resolved by the antitrust laws and the

Respondents assert that if catalog Three Tenors albums had been aggressively discounted, then music retailers may have positioned these products prominently in their stores, resulting in a "cluttered selling proposition" (Respondents' disparaging term for consumer choice). Resp. Mot. at 20. And yet one architect of the moratorium, Paul Saintilan, acknowledged that music retailers have the incentive and ability to display their products in a manner that would not confuse their customers. CCS ¶ 92. Further, if as Respondents contend a primary source of confusion is that the cover art for 3T3 resembles the cover art for 3T2 and 3T1, then a less restrictive remedy was to make the packaging for 3T3 more distinct. CCS ¶ 90.[33] A seller is not permitted to make its product appear unique by suppressing competing products.[34]

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decree.").

[33] Assuming *arguendo* some potential for confusion, uniform prices and less advertising likely aggravate the problem. Absent the moratorium, significant discounting of 3T1 and 3T2 could have helped to differentiate these products from the new Three Tenors release. CCS ¶ 98. Advertising campaigns on behalf of 3T1 and 3T2 could have emphasized the distinctive features of these albums (as was done in 1994). CCS ¶¶ 11, 13, 91. In other words, the competitive activity squelched by the moratorium should dispel rather than foster consumer confusion. *Cf. Law v. NCAA*, 134 F.3d at 1024 (defendant must show that restraint would be an effective method of achieving the asserted efficiency).

[34] The fact that PolyGram executives feared that the 1998 Three Tenors album would be insufficiently appealing (in the eyes of consumers) to meet sales expectations cannot justify an effort by PolyGram and Warner to insulate this product from competition. Such a strategy will necessarily injure rather than enhance consumer welfare. This was the Supreme Court's holding in *NCAA*, 468 U.S. at 116-17 (footnote omitted):

> The NCAA's argument that its television plan [restricting the number of college football games televised] is necessary to protect live attendance is . . . [based] on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. The television plan protects ticket sales by limiting output – just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act.

3. The Moratorium Was Not Necessary to Achieve a Commercially Sound Marketing Strategy

Respondents next assert that the moratorium "reflected a commercially sound marketing strategy," similar to the strategy that would be adopted if a single firm owned all three Three Tenors albums in 1998. Resp. Mot. at 14, 17. The contention is that where products are close competitors, it is more profitable for the sellers to find distinct, non-overlapping markets than to "fight head on for every inch of advantage" (as PolyGram and Warner did in 1994). CCS ¶¶ 11-13, 16.[35] This defense is deficient as a matter of law, and in any event relies upon disputed facts.

First, it is not clear that if a single firm controlled 3T1, 3T2, and 3T3, it would choose to hide 3T1 and 3T2, as opposed to positioning these products to capture additional sales. CCS ¶ 106. In any event, the analogy to single firm conduct is unpersuasive. A single firm may be permitted to pursue a market segmentation strategy; but when competitors agree to seek out separate customer groups (that is, to allocate markets), it is manifestly anticompetitive. *See Palmer v. BRG,* 498 U.S. 46.

Further, there is evidence that a sound and effective marketing strategy for the 1998 Three Tenors album could have been developed that did not depend upon reduced competition from the catalog Three Tenors products. CCS ¶ 105. Thus, the moratorium was not necessary.[36]

Respondents' reliance on Example 10 of the Commission's *Collaboration Guidelines* is misplaced. Example 10 posits a venture between two producers of computer software, where

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[35] Insofar as Respondents have advanced an efficiency argument for price fixing that can plausibly be asserted with regard to all closely competing products, regardless of whether encompassed within a joint venture, it must be rejected as incompatible with the antitrust laws. *See NSPE*, 435 U.S. at 695; *Catalano,* 446 U.S. at 649-50); *Law v. NCAA*, 134 F.3d at 1022-23.

[36] CCS ¶ 105. *Cf. NCAA,* 468 U.S. at 114 (efficiency justification rejected on the basis of factual finding that "NCAA football could be marketed just as effectively without the television plan").

restraints on competition are justified by a history of "failed" marketing initiatives involving other firms. Here, the industry history is quite the opposite: in 1994, Warner successfully launched 3T2 without restricting PolyGram's marketing activity in support of 3T1. CCS ¶¶ 18, 81.

4. Respondents' Free Riding Defense Should Be Rejected

Finally, the free riding defense advanced by Respondents does not satisfy the requirements identified in the case law.[37] At a minimum, summary judgment is inappropriate because the defense raises factual questions that must be addressed at trial.[38]

The competitive concern is that if free riding "is widespread the valued service or product [being free ridden upon] may disappear."[39]

Indeed, no witness testified that the motivation for the moratorium was a concern that Warner would devote insufficient resources to promoting 3T3. CCS ¶ 110. It follows that the price-fixing agreement, even if it prevented 3T1 and 3T2 from benefitting from the promotion of 3T3,

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[37] In *Toys "R" Us*, the Commission surveyed the relevant Sherman Act case law and identified three requirements for the successful invocation of the free-riding defense. Respondents must show that: (i) absent the challenged restraint, free riding was likely to have the effect of eliminating some valued service from the marketplace; (ii) there was no reasonable means by which the competitor that benefitted from the valued service (the alleged free rider) could have compensated the firm that was providing such service; and (iii) there were no less restrictive alternatives. *Toys "R" Us, Inc.*, 126 F.T.C. 415, 600-07 (1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000).

[38] Respondents repeatedly suggest that Complaint Counsel's expert has conceded the plausibility of proffered efficiency justifications. To the contrary, Dr. Stockum's testimony merely acknowledged that it is "plausible" in the abstract that advertising for 3T3 may lead some consumers to purchase 3T1 or 3T2. As detailed in his expert report, however, this alone is insufficient to establish a meritorious free rider defense.

[39] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* at 202 § 5.2b1 (2d ed. 1999).

provided no benefit to consumers.[40]

Moreover, free riding on a rival's advertising is a familiar problem among producers of commodities with a well-established solution – joint advertising arrangements.[41] There was a reasonable means by which PolyGram and Warner could have shared the costs of advertising and promoting 3T3 in the United States. Such cost sharing was not just a theoretical alternative here, but the actual state of affairs; that is, PolyGram and Warner agreed to share the 3T3 advertising costs incurred during the moratorium period. CCS ¶ 113.[42] In these circumstances, no valid free riding argument can be made. As one court stated, "When payment is possible, free-riding is not a problem because the 'ride' is not free." *Chicago Pro. Sports*, 961 F.2d at 675.[43]

Finally, there were substantially less restrictive alternatives for addressing the free riding concern. According to PolyGram's expert witness, the danger that advertising for 3T3 may have benefitted the older Three Tenors albums arose principally because 3T3 was not sufficiently different from 3T1 and 3T2. Ordover Rep. ¶¶ 16, 31. The obvious remedy for this problem would have been for PolyGram to have made 3T3 more distinct – for example, by developing a more distinct repertoire, adding a guest performer, designing a distinct packaging, or launching an

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[40] *See Toys "R" Us, Inc.*, 126 F.T.C. 415, 600-07 (1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000). (free-rider defense rejected where there was no evidence that the club stores' failure to provide particular services "had, or was likely to have, the effect of driving those services from the market"), *aff'd*, 221 F.3d 928, 938 (7th Cir. 2000).

[41] H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* at 203 § 5.2b3 (2d ed. 1999) (where firms that benefit from advertising pay a proportionate share of the costs of advertising, free rider concerns are ameliorated).

[42] Respondents assert that PolyGram could not have compensated Warner for advertising expenditures in the United States; this factual contention is incoherent and disputed.

[43] *See also* H. Hovenkamp, XIII *Antitrust Law* at 334 ¶ 2223b (1999) ("[F]ree rider defenses should be rejected when the firm that controls the input is able to sell, rather than give away, the good or service that is subject to the free ride.").

advertising campaign that would foster a unique identity.[44] These unilateral strategies, and not price fixing, should continue to be the preferred tools of marketing.

For all of these reasons, Respondents' free riding defense should be rejected.

V. CONCLUSION

As set forth herein, Complaint Counsel urges the Court to deny Respondents' motion for summary decision.

Respectfully submitted,

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

Dated: February 14, 2002

[44] *See* Rebuttal Expert Report of Catherine Moore ¶¶ 5-11.

Public Version
FTC Docket No. 9298

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.	Docket No. 9298

COMPLAINT COUNSEL'S SEPARATE AND CONCISE STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE FOR TRIAL

Pursuant to Rule 3.24(a)(2) of the Commission's Rules of Practice, 16 C.F.R. §3.24(a)(2), complaint counsel hereby submits a separate and concise statement of those material facts as to which there exists a genuine issue for trial. Part I of this submission sets forth those of material facts (with citations to the record) that demonstrate that there is a genuine issue for trial. Part II of this submission responds to each of the assertions as to which Respondents contend that there is no material dispute.

PART I: STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE FOR TRIAL

Description of the Parties

1. PolyGram and Warner are each vertically integrated producers and distributors of recorded music. Complaint ¶¶6-7 (SJX 149)[1]; Answer ¶¶6-7(SJX 150).

2. Both PolyGram and Warner distribute their products through a network of operating companies, or "opcos" -- subsidiaries responsible for sales within a particular country. The activities of Warner's operating companies outside of the United States are managed by an entity named Warner Music International. Rebuttal Expert Report of Catherine Moore ¶7 (SJX 167).

PolyGram and Warner Acquire Competing Three Tenors Products

3. The Three Tenors is a musical collaboration consisting of renowned opera singers Jose Carreras, Placido Domingo, and Luciano Pavarotti. Beginning in 1990, Carreras, Domingo, and Pavarotti have come together every four years at the site of the World Cup soccer finals for a combination live concert and recording session. Complaint ¶9 (SJX 149); Answer ¶9 (SJX 150).

4. The Three Tenors first performed together at the Baths of Caracella in Rome, on the eve of the 1990 World Cup final match. PolyGram acquired from the concert promoter the right to distribute audio and video recordings of the Rome performance. Letter Constant to Franzen, (March 27, 1992) (UMG004189-4192 at 190) (SJX 12).

5. The 1990 Three Tenors album and video (hereinafter "3T1") became the best selling classical releases of all time. Memo Bledsoe to Distribution (July 11, 1994) (3TEN00005574-97 at 577) (SJX 29); Memo Rigby to Distribution List (June 9, 1994) (3TEN00004763-67 at 765) (SJX 24).

6. In 1994, the Three Tenors planned a second World Cup performance in Los Angeles. Press Release (April 8, 1994) (3TEN00017695-696 at 695) (SJX 18).

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[1] The exhibits supporting each contention of fact are compiled in the Appendix to Complaint Counsel's Separate and Concise Statement Of Material Facts as to Which There Is a Genuine Issue for Trial, and will be cited as ("SJX __").

7. Concert promoter Tibor Rudas offered to license to PolyGram the rights to the concert. Letter Maclaren to Kronfeld (Sept. 29, 1993) (UMG004779-004788 at 781) (SJX 13).

8.

9.

10.

Warner and Polygram Compete Aggressively As Warner Releases a New Album

11. PolyGram did not permit the release of Warner's new album to eclipse its own top-selling Three Tenors recording. In response to the release of 3T2, PolyGram promoted the message that 3T1 was the "original" Three Tenors recording "unique and unrepeatable." Memo Rigby to Distribution (June 9, 1994) (3TEN00004763-767 at 766) (SJX 24); Memo Cottignies to Dulitzky *et al.* (May 10, 1994) (UMG000523-528 at 524) (SJX 22).

12. In several territories, PolyGram marketed 3T1 at a "mid price" level, several dollars below the price of Warner's 3T2. Memo Caradine to Sandau (April 28, 1998) (3TEN00011058) (SJX 106); Marketing Information (June 20, 1994) (3TEN00011249-255 at 254) (SJX 27); E-Mail Pitman to Still (May 23, 1997) (3TEN00011131) (SJX 61); E-Mail Lewis to Cloeckaert (April 24, 1998) (UMG003950) (SJX 105A) ("aggressive price based campaign" in 1994); Memo Rigby to Distribution (June 9, 1994) (3TEN00004763-67 at 4766) (SJX 24).

13. Warner designed a marketing strategy to counter the competitive challenge mounted by PolyGram. Memo Laister and Turner to Tagarro (May 5, 1994) (3TEN00011259-70 at 59, 60) (SJX 20) ("In terms of positioning, we will be looking to establish this concert as 'the' event of the summer, highlighting the differences between this and the first collaboration at the same time emphasizing the fact that it is both the first reunion event featuring all four artists and the first time that all of them have performed together in the United States."); Marketing Information (June 20, 1994) (3TEN00011249-255 at 254) (SJX 27); Memo Pitman to Andry *et al.* (Aug.1, 1994) (3TEN00011106-11125 at 11108) (SJX 30); Memo Caradine to Murphy (June 10, 1994) (3TEN00004761) (SJX 26).

14. Warner believed that the added "hype" generated by PolyGram's parallel marketing campaign for 3T1 would "probably overall benefit us." Marketing Information Memo (June 20, 1994) (3TEN00011249-255 at 255) (SJX 27).

15. During 1996 and 1997, the Three Tenors participated in a World Tour, performing concerts in, *inter alia,* Tokyo, London, New York, Johannesburg, and Melbourne. Polygram and Warner continued to advertise and market their respective Three Tenors products in a vigorous competition for sales. Marketing Information (June 13, 1995) (3TEN00011211-212 at 211) (SJX 37); Marketing Information (April 2, 1996) (3TEN00005902-907 at 902) (SJX 45); Memo Andry to Caradine (July 3, 1995) (3TEN00005163-171 at 165) (SJX 38); Memo Germaise to Baruch (March 12, 1996) (3TEN00010826-0827) (SJX 44); Marketing Information (June 24, 1996) (3TEN00004983-986) (SJX 48).

16. At the time of the 1996 tour, PolyGram assured concert promoter Tibor Rudas that the rivalry between Warner and PolyGram would be beneficial for the Three Tenors:

> Warner and we [PolyGram] will fight head on for every inch of advantage we could possibly gain over each other in exploiting the 3T tour with our respective product. Fair enough, competition is good for the business . . . . be assured the competition will be lively and the whole project will greatly benefit from it.

Memo Kommerell to Rudas (Feb. 1, 1996) (3TEN00005089) (SJX 42).

17. The Three Tenors albums, 3T1 and 3T2, were both among the best-selling classical recordings in the United States in calendar years 1994, 1995, 1996, and 1997. *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 24, 1994) (SJX 36); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 23, 1995) (SJX 41); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 28, 1996) (SJX 58); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 27, 1997) (SJX 80).

18.

PolyGram and Warner Agree to Collaborate on the 1998 Three Tenors Project

19.

20. Warner was interested in acquiring distribution rights to the 1998 concert. However, as in 1994, Pavarotti was under exclusive contract with PolyGram. Memo Kommerell to Roberts (July 29, 1996) (UMG004206) (SJX 51).

21. In the spring of 1997, Ahmet Ertegun, the Chairman of Atlantic Recording Corp. (a Warner subsidiary based in the United States) met with his counterpart at PolyGram, Alain Levy, "to ask that PolyGram allow Luciano Pavarotti to record the project for us (in exchange for allowing Jose Carreras to participate in a Three Tenors greatest hits and/or Christmas album for PolyGram)." Memo O'Brien to Daly (Dec. 15, 1997) (3TEN00007334-335 at 334) (SJX 77).

22. PolyGram's counter-offer was that Warner and PolyGram should "be partners for the 1998 concert project and all derivative product." Memo Memo O'Brien to Daly (Dec. 15, 1997) (3TEN00007334-335 at 334) (SJX 77); Memo from Hoffman to Approvers (November 20, 1997) (UMG001342-356 at 342) (SJX 72); Memo Clancy to Cook et. al. (August 28, 1997) (UMG001635-1640 at 635) (SJX 65).

23.

PolyGram and Warner Negotiate the Terms of the Collaboration

24. By contract dated December 19, 1997, Warner and PolyGram agreed to collaborate on the distribution of products derived from the 1998 Three Tenors World Cup concert. The Three Tenors/1998 Concert/License Agreement (Dec. 19, 1997) (3TEN0000475-484)(SJX 79). Among the important provisions of this contract are the following:

a. Warner secured from Tibor Rudas the "3T3 Rights"; (*Id.* at 475)

b. Warner licensed to its affiliate, Atlantic, the right to exploit the 3T3 Rights within the United States. (*Id.*)

c. Warner licensed to PolyGram the right to exploit the 3T3 Rights outside of the United States. (*Id.* at 476).

d. Warner and PolyGram agreed to "consult and coordinate" with respect to marketing and promotion activities in connection with the exploitation of the 3T3 Rights. Warner and PolyGram were separately responsible for developing and implementing marketing plans for their respective territories. Neither party had the right to approve or disapprove the other's marketing plans. (*Id.* at 477).

e. Warner and PolyGram were each entitled to 50 percent of the net profits and net losses derived from the worldwide exploitation of the 3T3 Rights (as well as from the production of a Greatest Hits album and/or a Box Set incorporating the 1990, 1994, and 1998 Three Tenors albums). (*Id.* at 480, 482).

f. PolyGram agreed to reimburse Warner for 50 percent of the $18 million advance paid to Rudas.(*Id.* at 480, 482).

g. Other expenses incurred by either Warner or PolyGram in the exploitation of the 3T3 Rights (*e.g.*, manufacture, advertising, marketing, and distribution) were to be deducted from revenues for purposes of calculating net profits (losses). (*Id.* at 480, 481).

25.

26.

27. The parties' non-compete obligation is contained in Paragraph 9 of the final, executed agreement:

> Holdback on Future "Three Tenors" Products: Neither Warner nor PolyGram (nor any of their respective parents or affiliates) shall release any phonograph record or audiovisual device embodying the joint performances of all of the Artists (whether pre-existing or newly recorded), anywhere in the world, until June 1, 2002, unless such release is pursuant to this agreement. ***Nothing in this paragraph 9 shall be construed to prohibit (a) Warner from continuing to exploit the 1994 Album or (b) PolyGram from continuing to exploit the 1990 Album (as defined in the Rights Agreements).***

The Three Tenors/1998 Concert/License Agreement (Dec. 19, 1997) (3TEN0000475-484 at 482-83) (SJX 79) (emphasis added).

28. A more contentious issue negotiated among Warner, Polygram and Rudas was control over the repertoire. Warner and PolyGram recognized that the success of the new Three Tenors album was tied to the repertoire. The music companies wanted to be sure that the repertoire on the 1998 recordings would be "compelling," "topical," and "distinctive," and did not repeat selections from the earlier Three Tenors recordings. Roberts Tr. 12-16 (SJX 162); *See also*

Memo Roberts to Ertegun (April 17, 1997) (UMG004183-184 at 183) (SJX 60) ("Objective: No repeat repertoire other than Nessun Dorma."); E-Mail Marnier to Saintilan (Aug. 22, 1997) (UMG003337) (SJX 64); E-Mail Gratton to Saintilan (March 11, 1998) (UMG003416) (SJX 93).

29.

30. Tibor Rudas insisted that he and the artists should control the choice of songs. E-Mail Hoffman to Roberts et al. (June 6, 1997) (UMG001694) (SJX 62).

31. In 1997, Phil Wild was Executive Vice President for Atlantic and a member of Warner's negotiating team. In a memo to senior management, Wild identified the repertoire issue as one of the most significant business risks presented by the Three Tenors transaction:

> [In the current draft, we do not] have contractual approval over the repertoire . . . . As a practical matter [Co-Chairman of Atlantic, Ahmet Ertegun] feels comfortable with his relationship with Tibor [Rudas], the Tenors and [conductor] James Levine and that we will be able to work out the repertoire on a mutual basis. PolyGram, however, is still insisting that Warner should obtain from [Rudas] a contractual approval right. Even with such a contractual right, it is unlikely we could force the Tenors to sing that which they do not want to sing. ***Therefore, there is always the risk that when all is said and done, we could end up with an album comprised of repertoire which has little commercial appeal.***

Memo Wild to Azzoli *et al.* (Nov. 7, 1997) (3TEN00002270-273 at 272) (SJX 70) (emphasis added).

32. Ultimately, PolyGram agreed to forgo the right to approve the repertoire for the 1998 concert. Memo Scott to Gold (Dec. 16, 1997) (3TEN00002246-54 at 2249) (SJX 78).

33.

After the Contracts are Executed, Polygram and Warner Agree Upon a Moratorium on the Discounting and Advertising of Their Older Three Tenors Albums

34.

35. PolyGram executives wished to differentiate the 1998 concert by adding a guest performer, perhaps the pop star Madonna. However, this suggestion was rejected by the Tenors. (Roberts Tr. 25-26) (SJX 162).

36. In January 1998, representatives of PolyGram and Warner met to discuss the logistics of the release of the 1998 Three Tenors audio and video products. Various marketing strategies were considered to create a unique identity for the 1998 album. Concert promoter Tibor Rudas had assured the music companies that the album to be recorded in Paris would consist of a totally new repertoire, not appearing on the earlier Three Tenors albums. Polyram and Warner decided that the all new repertoire would be a key selling point. The firms were also in agreement that the packaging for 3T3 "must be as different as possible from the two previous releases." Saintilan Notes (January 29, 1998) (UMG003282-289 at 284) (SJX 83); Meeting Minutes (March 6, 1998) (UMG003147-149 at 148) (SJX 87) (Rudas stated that Tenors would be "performing an entirely new program.").

37. Concerns about the marketability of 3T3 persisted. At a follow-up meeting held in New York in March 1998, PolyGram and Warner agreed that – in order to shield the 1998 Three Tenors recordings from competition – the music companies would not undertake a "big push" for their older Three Tenors albums in the weeks surrounding the release of the new product. More specifically, the firms agreed not discount or advertise 3T1 and 3T2 during this period. Saintilan Notes (March 10, 1998 Meeting) (UMG004122-4128 at 126-127) (SJX 91); March 10, 1998 Meeting Notes (3TEN0008004-11 at 009) (SJX 90).

Polygram Directs its Operating Companies To Comply With the Moratorium

38. In March 1998, several of Polygram's operating companies requested permission to discount and promote 3T1. In a series of memos, PolyGram instructed its operating companies (i) that in view of the upcoming World Cup tournament, they could reduce the price of 3T1 and advertise its availability; but (ii) pursuant to an agreement with Warner, aggressive marketing campaigns in support of 3T1 would have to terminate by the end of July:

> To keep in line with an agreement laid down with Atlantic and [PolyGram executive] Chris Roberts, we should not encourage any promotion on the original [Three Tenors] album from the day of release of the new album (probably in-store August 10) for a period of around 6 weeks.

E-Mail Saintilan to Greene (April 8, 1998) (UMG000080) (SJX 99);

> We have agreed with Warners to discourage any promotion on the first [Three Tenors] album from the day of release of the new album . . . for a period of around 6 weeks. So all promotion on the first album should have stopped by then.

E-Mail Greene to Cloeckaert (April 9, 1998) (UMG002997) (SJX 100);

> PolyGram has made an undertaking to Atlantic Records that no advertising or point of sale material originated for the launch of the new album will feature packshots of the 1990 album. This is based on Atlantic's reciprocating by omitting the 1994 album in their initial POS [point of sale]/ads, and telling their OpCos to back off promoting the 1994 album worldwide until a sufficient window has been observed.

Memo Saintilan to Baruch (April 17, 1998) (UMG001485-1495 at 1487) (SJX 102);

> Following further discussions with Warners regarding the joint marketing of the 1998 "3 Tenors" album, it is now felt that we should avoid any aggressive price campaigns of the 1st "3 Tenors" album. This means that we will be unable to give consent to Germany and France for their campaigns and that we shall discourage any further requests from the opcos . . . .
>
> We do hope that you will appreciate that this decision is partly beyond our control and arises from a complex set of ongoing negotiations between PolyGram, Warners and the Rudas Organisation.

Memo Greene to Cloeckaert et al. (April 20, 1998) (UMG003074) (SJX 103).

39. PolyGram was concerned that Warner may cheat on the moratorium agreement. Chris Roberts, President of PolyGram Classics & Jazz, instructed project manager Paul Saintilan to "ensure" that Warner would comply with the moratorium agreement. E-Mail Saintilan to Clancy (April 21, 1998) (UMG001504) (SJX 105).

40. Paul Saintilan (PolyGram) notified Warner of PolyGram's instructions to its operating companies regarding the marketing of 3T1, and requested confirmation that Warner was also taking steps to assure compliance with the moratorium. Initially, Warner did not respond to PolyGram's letter. Memo Creed to O'Brien & Scott (April 29, 1998) (3TEN00010551-553 at 551) (SJX 107); Memo Saintilan to Creed (April 29, 1998) (UMG002661-662) (SJX 108).

Warner Music International Launches
a Discount Campaign For the 1994 Three Tenors Album

41. The division of responsibility for 3T3 between PolyGram and Warner along territorial lines had one unintended consequence. The Warner business unit responsible for non-U.S. operations, Warner Music International ("WMI"), had no direct responsibility for the 1998 Three Tenors album, and became isolated from the planning process for the release of this product – including discussions concerning the moratorium. Thus, on May 15, 1998, WMI issued a bulletin to its operating companies worldwide announcing the launch of a discount campaign for 3T2, effective from May 17, 1998 until December 31, 1998. Memo O'Rourke to Distribution (May 15, 1998) (3TEN00011075) (SJX 115).

42. WMI forecast that dropping the wholesale price of the 3T2 from $13.40 per unit to $8.50 per unit, combined with an aggressive marketing campaign, would increase sales by 170 percent. Memo Caradine to Rudas (April 7, 1998) (3TEN00009930-934 at 930) (SJX 98).

43. A copy of WMI's bulletin was obtained by PolyGram in June 1998, leaving PolyGram uncertain as to whether Warner intended to comply with its commitments under the moratorium agreement. E-Mail Greene to Van der Hayden (June 16, 1998) (UMG000166-167 at 167) (SJX 123).

44. On June 11, 1998, PolyGram sent a letter to Warner complaining that in Denmark, and perhaps elsewhere in Europe, Warner was offering the 1994 Three Tenors album at a "very low price." This action, PolyGram charged, contravened the understanding between PolyGram and Warner. PolyGram asked that Warner take steps to eliminate this discounting:

> This [low price] violates the general understanding PolyGram and Atlantic reached about not promoting or selling the 1990 and 1994 albums in a manner that would negatively effect sales of the 1998 album. I understand the difficulty of communicating a consistent policy on a worldwide basis, but I must ask that you contact whomever is necessary in the Warner International organization so that this practice and others like it stop immediately.

Letter Hoffman to Scott (June 11, 1998) (3TEN00000326) (SJX 119).

Warner and PolyGram Learn that the Repertoire
For the 1998 Concert May Be Disappointing

45. In mid-June 1998, concert promoter Tibor Rudas informed PolyGram and Warner of the intended repertoire for the upcoming Three Tenors concert. E-Mail Scott to Creed (June 18, 1998) (3TEN00010262) (SJX 124).

46. PolyGram and Warner learned that the intended repertoire for the 1998 Three Tenors concert would overlap substantially with the repertoire of the earlier Three Tenors

concerts: "4 out of the 5 songs Pavarotti is considering singing were performed in either 1990 or 1994. In addition, 7 of the 8 scheduled encores were performed in either 1990 or 1994." Memo Scott to O'Brien (June 26, 1998) (3TEN00000019) (SJX 130); Letter O'Brien to Rudas (June 30, 1998) (UMG002663-664 at 663) (SJX 131).

47. PolyGram and Warner were alarmed to learn that the intended repertoire for the 1998 Three Tenors concert was "not substantially new." Memo Scott to O'Brien (June 26, 1998) (3TEN00000019) (SJX 130); Letter O'Brien to Rudas (June 30, 1998) (UMG002663-664 at 663) (SJX 131).

48.

49. On several occasions from mid-June through to the concert, PolyGram and Warner expressed to Tibor Rudas their dissatisfaction with the intended repertoire. Memo Scott to O'Brien (June 26, 1998) (3TEN00000019) (SJX 130); Letter O'Brien to Rudas (June 30, 1998) (UMG002663-664 at 663) (SJX 131). Rudas agreed to raise these repertoire concerns with the Tenors. E-Mail Scott to Creed (June 18, 1998) (3TEN00010262) (SJX 124).

Warner and PolyGram Re-Affirm the Moratorium

50. In June 1998, executives at Warner's Atlantic Recording Corp. understood that its affiliate WMI was using a mid-price campaign to sell the 1994 Three Tenors recordings, and hence that the moratorium agreement was in jeopardy of falling apart. Memo Moorhead to Scott (June 23, 1998) (3TEN00001498-1503 at 1499) (SJX 125).

51. On June 24, 1998, Atlantic forwarded a memo to Ramon Lopez, the CEO of WMI. Atlantic warned WMI that its price cut on 3T2 could lead PolyGram to discount its Three Tenors album:

> WMI's campaign could have a serious negative impact on PolyGram's marketing of the new Three Tenors album . . . . PolyGram is planning on a

> moratorium on marketing their 1990 album . . . . [W]hen PolyGram learns of WMI's plans, PolyGram will be forced to market aggressively their 1990 album as well. When all is said and done, the real loser could be the Warner Music Group and its $9 million investment in the new album.

Memo Azzoli to Lopez (June 24, 1998) (3TEN00001492) (SJX 127).

52. The CEO of WMI, Ramon Lopez, responded on July 1, 1998, insisting that PolyGram had initiated the price reduction:

> I am somewhat baffled by your assertion that PolyGram is planning a moratorium on the marketing of their 1990 album. You should be aware that PolyGram has been marketing and pricing very aggressively their 1990 album for approximately a month and a half already – well ahead of us – and in some markets they are actually giving the dealers incentives not to buy in our album . . . .
>
> Far from the Warner Music Group shooting itself in the foot by us marketing our album, we will be doing precisely that if we allow PolyGram to have a free run in marketing theirs with us doing nothing with ours.

Memo Lopez to Azzoli (July 1, 1998) (3TEN0001456) (SJX 133).

53. On June 25, 1998, Anthony O'Brien (Atlantic) and Paul Saintilan (PolyGram) discussed by telephone the moratorium. O'Brien advised Saintilan that he was "extremely keen to re-enforce the moratorium on promotion of the 1990 and 1994 albums from August 1 to November 15." Letter Saintilan to O'Brien (July 2, 1998) (3TEN000012-014 at 12) (SJX 136); E-Mail Saintilan to Roberts (July 10, 1998) (UMG000203) (SJX 139).

54. On July 2, 1998, Paul Saintilan (PolyGram) forwarded a letter to Anthony O'Brien (Atlantic) formally offering to observe a moratorium on competition. The letter specifies the terms of such arrangement, and seeks Warner's assent:

> **re: THREE TENORS 1990 & 1994 MORATORIUM**
>
> I would like to confirm in writing [PolyGram's] position on the above, which was stated in our telephone conversation of June 25. We believe that without any firm agreement between our two companies, there will be unrestricted price competition on the 1990 and 1994 albums and videos, which will damage sales of the new release. Thus to protect our massive investment, we believe in the principle of a worldwide moratorium on discounting and promoting the previous albums and videos to create a window for the new release.
>
> The widest window that we believe is enforceable at the moment is from August 1

through to Thursday October 15. During this time we would not price discount the 1990 album/video below normal full price, nor would we incorporate the 1990 formats in any advertising or point of sale materials for the new release . . . . This is all clearly dependent upon Warners fully reciprocating, and providing the undertakings in such a way that we have complete confidence that they will be enforced.

Letter Saintilan to O'Brien (July 2, 1998) (3TEN0000012-014 at 012) (SJX 136).

55. On July 10, 1998, Paul Saintilan (PolyGram) forwarded a follow-up letter to Anthony O'Brien (Atlantic) providing additional details regarding the implementation of the moratorium agreement and again seeking Warner's assent:

re: THREE TENORS MORATORIUM ON 1990 & 1994 ALBUMS

As discussed, we fully support a moratorium on the above albums which we strongly believe would be to our mutual benefit. The dates we are prepared to commit to are from August 1 to November 15 (subject to the qualifications in italics below).

The moratorium would constitute the following:

1. Advertising and promotion

The original 1990 album would not be advertised or promoted during this period. We have already omitted the 1990 album from all advertising and point of sale materials centrally originated for the new album.

2. Pricing

The original 1990 album would be sold at the top classical price point that it has historically traded at in each market . . . .

As discussed before, PolyGram operating companies have already been advised of the above moratorium, however we have informally allowed it to collapse at a local level to allow a response to Warners pricing. When we have a clear undertaking from Warners that the above agreement will be adhered to, we will re-enforce things from our side . . . .

So in summary, once a price agreement has been made, and we have clear evidence that Warners will enforce the moratorium, then we will re-enforce the moratorium on our side.

Letter Saintilan to O'Brien (July 10, 1998) (UMG000204-205) (SJX 138).

56. The PolyGram letters triggered a series of internal discussions at Warner. Ultimately, WMI acceded to the request of the Atlantic executives to comply with the moratorium between August 1, 1998 and October 15, 1998. Memo Azzoli to Lopez (July 2, 1998) (3TEN 0008230-8232 at 8231) (SJX 137); E-Mail Saintilan to Roberts (July 13, 1998) (UMG000206) (SJX 141); O'Brien Notes (July 13, 1998) (3TEN00011275) (SJX 142).

57. On July 13, 1998, WMI distributed a memorandum to its operating companies instructing that the company's Three Tenors mid-price campaign must end on July 31. "No further discounting or new marketing activities which are not already in place may occur between August 1st and October 15th." Memo O'Rourke to Three Tenors Distribution List (July 13, 1998) (3TEN00017714) (SJX 143).

58. Anthony O'Brien (Atlantic) telephoned Paul Saintilan (PolyGram) to report that WMI was now on board: the moratorium on discounting and promoting the older Three Tenors recordings would be honored throughout Warner, in the United States and internationally. E-Mail Saintilan to Roberts (July 13, 1998) (UMG000206) (SJX 141).

59. O'Brien further informed Saintilan that WMI had issued a directive instructing all Warner managers to observe the moratorium. E-Mail Saintilan to Roberts (July 13, 1998) (UMG000206) (SJX 141); O'Brien Notes (July 13, 1998) (3TEN00011275) (SJX 142). Saintilan was satisfied that the directive "complied perfectly" with his agreement with Warner. E-Mail Saintilan to Roberts (July 14, 1998) (UMG000207-209 at 207 (SJX 144).

60. On or about July 14, 1998, Paul Saintilan (PolyGram) distributed a memorandum to PolyGram operating companies worldwide "re-enforcing" the company's intention to comply with the agreement not to compete with Warner:

> Ramon Lopez, the Chairman and CEO of Warner Music International issued a directive on July 13, that there should be no price discounting, advertising or promotion on the 1994 Warners Three Tenors album from August 1 until October 15. The only exceptions to this will be where legal obligations to retailers exist (such as four weeks notice of a price increase).
>
> We now seek to re-enforce the moratorium on PolyGram's side, from August 1 to October 15, on a worldwide, not simply European basis. The moratorium prohibits price discounting, advertising and promotion of the 1990 album and video during this period . . . .
>
> Should you find any evidence of Warners failing to comply with this agreement after August 1, please contact me providing as much detail as possible.

E-Mail Saintilan to Roberts (July 14, 1998) (UMG000207-09 at 207-08) (SJX 144); Saintilan Tr. 171 (SJX 163).

Respondents' Agreement Not to Discount
Three Tenors Products is Presumptively Anticompetitive

61. Economic analysis and empirical research demonstrate that a horizontal agreement setting minimum prices has significant anticompetitive potential. Expert Report of Dr. Stephen Stockum ¶¶ 6-7 (SJX 168).

62. Price discounting is an important marketing tool in the recorded music industry, and is generally viewed by the industry as capable of leading to increased sales for audio products. Caparro Tr. 33, 43-44 (SJX 151) (in the United States, several times a year, PolyGram discounted its catalog albums by 5 to 7 percent (sometimes higher) in order "to encourage customers to buy more heavily."); Caparro Tr. 49-50 (SJX 151) (discounting by PolyGram did in fact lead to higher sales volumes); *see also* Kopecky Tr. 12 (SJX 158) (discounts offered to encourage retailers "to stock up"); Cloeckaert Tr. 25-26 (SJX 152) (purpose of temporary price reductions is "obviously" to garner additional sales); Stainer at 9-10 (SJX 164) (PolyGram runs mid price campaigns "because there can be short-term benefits in terms of sales by reducing the price of a full price item to mid price"); Greene Tr. 58 (SJX 155); Saintilan Tr. 70 (SJX 163) (customary in the United Kingdom for PolyGram to drop price of certain CDs to a mid price level for a short period of time; purpose is to generate a "short term major sales increase").

Respondents' Agreement to Forgo Advertising
For Three Tenors Products is Presumptively Anticompetitive

63. Economic analysis and empirical research demonstrate that a horizontal agreement to forgo advertising has significant anticompetitive potential. Expert Report of Dr. Stephen Stockum ¶¶ 8-10 (SJX 168); Ordover Tr. 47 (SJX 161).

64. Advertising is an important marketing tool in the recorded music industry, and is generally viewed by the industry as capable of leading to increased sales for audio products. Hidalgo Tr. 20-21 (SJX 156) (PolyGram's advertising for 3T1 during 1990 led to higher sales).

65. Music companies spend huge amounts of money advertising audio products in the United States, with the expectation and understanding that such investments lead to increased sales levels. Caparro Tr. 57-58 (SJX 151) (PolyGram spent about 5 percent of revenues on advertising); Kopecky Tr. 50 (SJX 158); Gore Tr. 90 (SJX 154).

66. When music companies discount their recorded music products, advertising makes the discounts more effective. If PolyGram were "running a mid line campaign, not only would there be a discount offer, we would look to promote and advertise and merchandise that product to the consumer as well." Caparro Tr. 55-56 (SJX 151); *see also* Cloeckaert Tr. 23, 52-53 (SJX 152); Saintilan Tr. 71 (SJX 163) (generally when price of CD dropped from full to mid price level, pricing action is accompanied by an advertising campaign in order to make sure that the public is aware of the availability of the discounted product).

e. Letter Cream to Andry (July 7, 1994) (3TEN00005402-403 at 402) (SJX 28) (in Canada "Polygram are spending considerable money on television advertising to promote the album . . . The album is sold at the regular PolyGram full price, with a 10% deal.") (emphasis in original);

70.

71.

72. During the first half of 1998, PolyGram authorized its operating companies to sell 3T1 at a mid price, provided that the discount was supported by an appropriate advertising campaign. Memo Cloeckaert to Classical MDs (April 10, 1998) (UMG003075) (SJX 101); Memo Cloeckaert to Classical MDs (April 21, 1998) (UMG000478-481 at 479-481) (SJX 104); Memo Greene to European Classical MDs (April 29, 1998) (UMG003058-061 at 058) (SJX 110).

73. In 1998, PolyGram's operating companies forecast substantial additional sales of 3T1 if they were permitted to discount and advertise. E-Mail Marnier to Greene (March 6, 1998) (UMG000054) (SJX 86) (sales of 30,000 to 50,000 units in France during a three-month campaign if discounting were allowed; 10,000-15,000 units if discounting were prohibited); Cloeckaert Tr. 57-58 (SJX 152) (PolyGram France forecast that by reducing price of 3T1 from top to mid price level, could increase sales by eight or ten times); Decca Campaign Overview (UMG003453-455 at 453) (SJX 5) (if 30,000 English pounds were spent, then there would be 40,000 additional units sold in the United Kingdom); Stainer Tr. 38 (SJX 164) (in United Kingdom, PolyGram ran a campaign advertising 3T1 as "Three Tenors For Two Fivers"); Cloeckaert Tr. 81 (SJX 152) (during 1998, PolyGram temporarily decreased price of 3T1 in Europe with purpose and effect of increasing sales).

74. During the first half of 1998, PolyGram estimated that it would sell 200,000 units of a record by Pavarotti released in the United States if it advertised the album on television, and 100,000 units if there were no television advertising. E-Mail Barbero (March 24, 1998) (UMG000337) (SJX 97).

The Challenged Restraints are Outside – and Not Reasonably Related to –

67. Between July 1994 (release of 3T2) and August 1998 (moratorium), a number of aggressive and successful marketing campaigns were run separately by Warner and Polygram to increase sales of their respective Three Tenors products. Hidalgo Tr. 46 (SJX 156) (Warner's campaign for 3T2 during 1994 was "most impressive campaign that I have seen in my days").

68. Price discounting was a key component of the marketing campaigns for 3T1 (PolyGram) and 3T2 (Warner).

a. Hidalgo Tr. 44-45, 48 (SJX 156) (during 1994, PolyGram Spain discounted 3T1 significantly, leading to much higher sales than previous year);

b. Stainer Tr. 38, 70-71 (SJX 164) (in United Kingdom during 1994, PolyGram offered 3T1 for "Under a Tenner"(a ten pound note); the decrease in price led to a significant increase in sales);

c. Memo Day to Caradine, (June 10, 1994) (3TEN0004762-767 at 765, 766) (SJX 25) (in Australia, Polygram offered "massive price reductions" on 3T1);

d. E-Mail Pitman to Still (May 23, 1997) (3TEN00011131) (SJX 61) (Polygram has moved 3T1 from top price to mid-price and "will probably go even lower to try to counter any initiatives that we take");

e. Marketing Information (June 24, 1996) (3TEN0004983-986 at 983) (SJX 48) (PolyGram offered 3T1 at mid price in many markets).

69. Advertising was also an important component of these marketing campaigns for Three Tenors products.

a. Hidalgo Tr. 20-21 (SJX 156) (PolyGram's advertising for 3T1 during 1990 led to higher sales);

b. Stainer Tr. 10-11 (SJX 164) (during 1994, Warner advertised 3T2 in posters, press, and television "to inform or communicate to people the availability of the album and to communicate the benefits of the album")

c. Stainer Tr. 17-18 (SJX 164) (to avoid diversion of sales to 3T1 during 1996, Warner tried to make sure that its marketing was better than competitor – better trade positioning, better advertising, remind consumers that this was the more recent concert).

d. Memo Germaise to Baruch (March 12, 1996) (3TEN00010826-827 at 826) (SJX 44) (Warner launched a major television campaign when the Tenors performed in New York in July 1996).

the Collaboration Between Polygram and Warner

75. PolyGram's rights to 3T1 pre-date the PolyGram/Warner collaboration and were not part of the integration. The Three Tenors/1998 Concert/License Agreement (Dec. 19, 1997) (3TEN0000475-484 at 482-483) (SJX 79).

76. Warner's rights to 3T2 pre-date the PolyGram/Warner collaboration and were not part of the integration. *Id.*

77. PolyGram and Warner decided not to bring their catalog Three Tenors albums, 3T1 and 3T2, into the venture. The Concert/License Agreement specifically provides that PolyGram and Warner retain the unconstrained right to exploit the older Three Tenors recordings. *Id.*

78. PolyGram's U.S. marketing operation was not involved in the 3T3 collaboration. Gore Tr. 59 (SJX 154) (no one from Warner consulted with the President of Polygram Classics in the United States about marketing the 1998 album).

79. PolyGram's U.S. distribution assets were uninvolved in the distribution of 3T3. Caparro Tr. 24-25 (SJX 151).

The Moratorium Was Not Necessary to the Formation and Implementation of the Collaboration

80. The Three Tenors moratorium was not necessary to the formation of the PolyGram/Warner collaboration; was not necessary for the production of the Paris concert; was not necessary for the creation of 3T3; and was not necessary to assure the distribution of 3T3 in the United States. PolyGram and Warner had already committed to the 3T3 project well before entering into the moratorium agreement. *Compare* The Three Tenors/1998 Concert/License Agreement (Dec. 19, 1997) (3TEN0000475-484) (SJX 79) *with* Saintilan.Notes (March 10, 1998) (UMG004122-4128 at 4126-4127) (SJX 91) (moratorium first agreed to in March 1998); March 10 Meeting Notes (3TEN0008004-011 at 8009) (SJX 90) (same).

81.

82.

83. In 1996 and 1997, PolyGram was anxious to distribute 3T3 independently, with no prospect of a moratorium with Warner. Hindocha to Clancy (Sept. 5, 1996) (UMG000486-492 at 87-88) (SJX 53); Kommerell to Roberts (Sept. 17, 1996) (UMG004669-674 at 669) (SJX 54); Memo Roberts to Ames (Nov.12, 1996) (UMG004679-687 at 679) (SJX 57).

84.

85. Other music companies also were interested in distributing 3T3, with no prospect of a moratorium with PolyGram and Warner. Memo Caradine to Lopez (July 25, 1996) (3TEN00004282) (SJX 50) (noting "MCA's interest in the 1998 project").

The Moratorium Was Not Necessary for the Parties' to Recover their Investment

86. Respondents estimate that the moratorium made only a small contribution to the financial success of the PolyGram/Warner collaboration. Ordover Report ¶ 35 (SJX 170); Stainer Tr. 46, 50-51 (SJX 164) (possible discounting of 3T2 by Warner had no affect on sales projections in United Kingdom); Saintilan Tr. 105-06 (SJX 163) (anticipated diversion of sales to 3T1 and 3T2, absent a moratorium, was "not a lot"; no effort at quantification at PolyGram).

87. Disappointing sales of 3T3 are probably attributable to the "tiring of the concept more than anything else." Clocckaert Tr. 73-74 (SJX 152); *see also* Stainer Tr. 74 (SJX 164) ("the repertoire had nothing significantly new, the act itself came across on television as slightly formulaic"); Hidalgo Tr. 60-61, 91 (SJX 156) ("they are not adding anything which is exciting . . . As a matter of fact, I am sure that if I play the record . . . different records for some people, they wouldn't be able to distinguish which is which . . ."); Saintilan Tr. 35-36 (SJX 163) (failure to achieve sales expectations was "probably due to the fact that it was a formula being repeated for the third time").

The Moratorium Was Not Necessary to Avoid Consumer Confusion

88. There is no evidence of consumer confusion relating to any of The Three Tenors products. Stainer Tr. 42-43 (SJX 164) (in United Kingdom, PolyGram was not concerned about confusion "because this [3T3] was the new album, and this was the album that the record trade would focus on a new album. If you walked into a major supermarket, this was the one that would have been racked out in the chart racks."); Stainer Tr. 17-20 (SJX 164); Hidalgo Tr. 84-84 (SJX 156) (PolyGram executive explained that assertion about consumer confusion is "speculation"); Saintilan Tr. 20, 81-82 (SJX 163) (PolyGram did no consumer research regarding Three Tenors project; "It [confusion] was simply a concern."; cannot quantify potential lost sales); Green Tr. 193,195 (SJX 155) (Respondents' designated Rule 3.33(c) witness on efficiencies testified that claim of consumer confusion "was speculation," and that he could not say what sort of confusion may arise).

89. PolyGram and Warner were free to design packaging for the 1998 Three Tenors products that was distinct from, and would not be confused with, the older Three Tenors products. Saintilan Notes (March 10, 1998) (UMG004122-128 at 122-123) (SJX 91);

90. As early as January 1998, PolyGram recognized the desirability of designing packaging for the 1998 Three Tenors products that was "as different as possible from the two previous releases." Saintilan Notes (Jan. 29, 1998) (UMG003282-289 at 284) (SJX 83); Minutes (Feb. 9, 1998) (UMG000371-373 at 372) (SJX 85).

91. PolyGram and Warner were free to design a marketing campaign that would create a unique identity for 3T3 in the minds of consumers, thus eliminating the potential for confusion. Rebuttal Expert Report of Catherine Moore ¶ 2 (SJX 167) ("I conclude that it was not necessary for Polygram and Warner to agree not to discount or advertise the 1990 and 1994 Three Tenors albums in order to achieve an effective launch for the 1998 Three Tenors album. A sound and effective marketing strategy for the 1998 album could have been developed that did not depend upon reduced competition from the catalog Three Tenors products during the launch period").

92. Music retailers have the incentive and ability to display their Three Tenors products in a manner that will not confuse their customers. Saintilan Tr. 83-84 (SJX 163).

93. PolyGram encouraged retailers to display products in a manner that was not confusing to consumers. Generally, the confusing display of albums was not a problem for PolyGram. Caparro Tr. 70-71 (SJX 151).

94. The cover art for 3T1 features a group portrait of the Tenors and conductor Zubin Mehta. *Compact Disc: "Carreras, Domingo, Pavarotti, Mehta: The Three Tenors in Concert"* (1990) (SJX 1).

95. The cover art for 3T2 features Dodger Stadium at night. Floating above the stadium are pictures (head shots) of the Tenors and conductor Zubin Mehta. *Compact Disc: "Tibor Rudas Presents Carreras, Domingo, Pavarotti with Mehta: The 3 Tenors in Concert 1994."* (SJX 2).

96. The cover art for Warner's World Tour edition of the 1994 Three Tenors album features a group portrait of the Tenors and conductor Zubin Mehta. Cover of Special Edition World Tour CD (May 2, 1996) (3TEN00005034) (SJX 3).

97. The cover art for 3T3 features the Eiffel Tower at night. Floating above the Eiffel Tower are pictures (head shots) of the Tenors and conductor James Levine. *Compact Disc: "Tibor Rudas Presents Carreras, Domingo, Pavarotti with Levine: The 3 Tenors Paris 1998."* (SJX 4).

98. Significant discounting of 3T1 and 3T2 could have helped to differentiate these products from the new Three Tenors release. Saintilan Tr. 91-92 (SJX 163) (discounting need not lead to confusion if products are displayed appropriately at retail).

99. Advertising campaigns on behalf of 3T1 and 3T2, emphasizing the distinctive features of these older albums, could have helped to differentiate these products from the new

Three Tenors release. Marketing Information (June 20, 1994) (3TEN00011249-255 at 254) (SJX 27); Memo Pitman to Andry *et al.* (Aug.1, 1994) (3TEN00011106-11125 at 11108) (SJX 30); Saintilan Tr. 91 (SJX 163) (confusion concern relates to retail display of product).

100. In 1994 with the release of 3T2, and thereafter, PolyGram and Warner used the ordinary tools of marketing to create unique identities for their respective products and succeeded in avoiding consumer confusion. Stainer Tr. 12-13; 19-20 (SJX 164) (Warner was not concerned about confusion during 1994; packaging is different; cover art is different; titles are different; images are different); Hidalgo Tr. 18-19; 22-24 (SJX 156) ("[I]t was very clear for Warner's [in 1994] that they had to distinguish very clearly from the 1990 in order not to confuse people, and I remember that the campaign they did was rather specific on that, so according to the publicity they did, it was particularly impossible for the customers to confuse.").

101. Choosing among the three albums featuring the Three Tenors can hardly be more confusing for consumers than, for example, choosing a Frank Sinatra album. The on-line music seller Amazon.com lists over a hundred Frank Sinatra albums, offered by several different music companies. Amazon.Com Music Search Results (Frank Sinatra) (Feb. 7, 2002) (SJX 171).

The Moratorium Was Not Necessary to Achieve a Commercially Sound Marketing Strategy

102. It is not uncommon for a recording artist to switch labels, with the result that the company releasing the artist's new album may be required to compete with the company distributing the artist's older (or catalog) albums. Caparro Tr. 76 (SJX 151) ("artists jump labels, contracts expire"); Constant Tr. 97 (SJX 153) ("It happens all the time in the music business . . .).

103. There are many examples of artists switching labels. Caparro Tr. 74 (SJX 151) (Elton John, Willie Nelson); Kopecky Tr. 59 (SJX 158) (Sarah Brightman); Gore Tr. 63, 68-69 (SJX 154) (Miles Davis, George Benson, Sarah Brightman, Peter White, Keith Jarrett); Cloeckaert Tr. 124-25 (SJX 152) (Rolling Stones, Janet Jackson); Roberts Tr. 91-92 (SJX 162) (Domingo, Carreras, and Pavarotti recording individually).

104. In the classical music sector, many artist contracts are short in duration and refer only to specific recordings. As a consequence, the company releasing the artist's new album may be different from the company distributing the artist's older (or catalog) albums. Seagram Company Ltd. Form 10-K (June 30, 2000) (pp. 3-5) (SJX 172).

105. A sound and effective marketing strategy for the 1998 Three Tenors album could have been developed that did not depend upon reduced competition from the catalog Three Tenors products. Rebuttal Expert Report of Catherine Moore ¶ 2 (SJX 167). *Cf.* Caparro Tr. 78-80 (SJX 151) (marketing effort for new Willie Nelson album focused on that album, not competitor's catalog albums); Caparro Tr. 80 (SJX 151) ("consumer interest is first on what's new and fresh and today"); Kopecky Tr. 59 (SJX 158) (not concerned that catalog may cannibalize artist's new release; "a new release just out performs a catalog title, that's just the nature of the business").

106. When issuing a new album, a music company may at the same time promote older albums in its catalog by the same artist to achieve "wind sales." Gore Tr. 96 (SJX 154). In recent years, Island Defjam, a label owned by Universal Music Group, has issued two albums by pop star Jimmy Buffet. Buffet's older, catalog albums are owned by MCA, a sister label also owned by Universal Music Group. In connection with the release of the new Buffet albums, Island Defjam did not coordinate with MCA the marketing of the older Buffet albums. Caparro Tr. 75-76 (SJX 151).

Respondents' Free Riding Defense is Insufficient

107. That advertising for one product may benefit another company's product is a "ubiquitous" phenomenon. This generally does not lead firms to cease advertising. Rebuttal Expert Report of Stephen Stockum ¶ 16 (SJX 169); see also Wind Tr. 125-127 (SJX 165).

108.

109. PolyGram's advertising expenditures in support of 3T3 outside of the United States were also unaffected by the moratorium. Saintilan Tr. 88-89, 139, 194-95, 201-02 (SJX 163).

110. No witness testified that the moratorium was necessary to prevent free riding. Indeed, none of witnesses designated by Polygram, under Commission Rule of Practice §3.33(c), to address efficiency defenses identified free riding as a relevant concern. *See* Roberts Tr. 4, 56 (SJX 162).

111. Christopher Roberts, the President of PolyGram Classics & Jazz and one of these Rule 3.33(c) efficiency witnesses, testified that he did not know whether discounting and promotion of older Three Tenors products during the moratorium period would have any effects on advertising, sales, marketing strategy or marketing expenditures. Roberts Tr. 50-56 (SJX 162).

112. A common method of addressing a free rider problem associated with advertising is to ensure that all those who benefit from such advertising contribute toward the funding for the advertising. Rebuttal Expert Report of Stephen Stockum ¶ 25 (SJX 169).

113. Warner and PolyGram did in fact agree to share the cost of advertising and promoting the 1998 Three Tenors album in the United States, on a 50:50 basis. The Three Tenors/1998 Concert/License Agreement (Dec. 19, 1997) (3TEN0000475-484 at 478-479) (SJX 79). The consumer harm that is purportedly caused by free-riding – reduced incentives to advertise – is remedied. Rebuttal Expert Report of Stephen Stockum ¶ 25 (SJX 169).

114.

PART II: RESPONSE TO RESPONDENTS' STATEMENT OF MATERIAL FACTS AS TO WHICH RESPONDENTS CLAIM THERE IS NO GENUINE DISPUTE

Complaint counsel hereby responds to each of the statements in Respondents' Statement of Material Facts as to Which Respondents Contend There is No Genuine Issue. Respondents' statements are re-printed herein in italics.

1. The conduct alleged in this case arose in the context of a pro-competitive joint venture between PolyGram and Warner Music Group ("Warner") for the distribution of new Three Tenors products, including the 1998 album of a Three Tenors concert in Paris in July 1998. See Complaint Counsel's Status Report and Statement of the Case, In re PolyGram Holding, Inc., et al., No. 9298 (FTC), filed Nov. 27, 2001.

Response to 1:

Disputed in part. Complaint counsel does not dispute that the agreements between competitors PolyGram and Warner to fix minimum prices and to forgo advertising, as alleged in the Commission's Complaint, were contemporaneous with a collaboration between Polygram and Warner. However, complaint counsel contends that the challenged agreements applied to products that were outside the collaboration. Complaint counsel further contends that the challenged restraints were not reasonably necessary to the formation or efficient operation of the collaboration. See Complaint Counsel's Separate and Concise Statement of Material Facts as to Which There Is a Genuine Issue for Trial (Part I) ("CCS") ¶¶75-114, *supra*; Response to Respondents' Statement of Material Facts As to Which Respondents Claim There Is No Genuine Dispute ¶¶ 10-12, *infra*.

In addition, complaint counsel objects to Respondents' Statement 1 because it contains no factual citation in support of the contentions. In particular, there is no factual support for the

contention that the collaboration between Polygram and Warner was a "pro-competitive joint venture."

2. Two Three Tenors albums were released prior to the joint venture: PolyGram's 1990 Three Tenors album and Warner's 1994 Three Tenors album.

Response to 2:

Not disputed.

3. The general terms of the joint venture between PolyGram and Warner for the creation of products relating to the 1998 Three Tenors concert are set forth in a document called the "Three Tenors/1998 Concert/License Agreement" (the "Concert/License Agreement").

Response to 3:

Disputed in part. Complaint counsel does not dispute that Warner and Polygram entered into the Concert License/Agreement. However, complaint counsel disputes the claim that this written contract sets forth only the "general terms" of the parties' collaboration. The Concert/License Agreement "constitute[d] the understanding between [Warner] and [Polgram] with respect to the recording and exploitation of the performances" of the Three Tenors at a concert in Paris, France in July, 1998. The Three Tenors/1998 Concert/License Agreement (Dec. 19, 1997) (3TEN00000475-484 at 475) (SJX 79).

4. Under the Concert/License Agreement, PolyGram obtained the right to distribute the products of the Three Tenors joint venture outside the United States, and Warner obtained the right to distribute those products within the United States.

Response to 4:

Disputed in part.

Per

the terms of the Concert/License Agreement, Warner sub-licensed to PolyGram the right to exploit the 3T3 Rights in all territories outside of the Unite States. *See* The Three Tenors/1998 Concert/License Agreement ¶2(b) (Dec. 19, 1997) (3TEN00000475-484 at 476) (SJX 79). Warner retained, for the United States, the audio, video and television rights that it obtained from RPL. *See* The Three Tenors/1998 Concert/License Agreement ¶ 2(a) (Dec. 19, 1997) (3TEN00000475-484 at 475) (SJX 79).

Complaint counsel also objects to Respondents' Statement 4 because it is a statement that is unsupported by any citation to the record.

5. Under the Concert/License Agreement, PolyGram and Warner agreed to cooperate in creative issues relating to the venture, such as the selection of the songs to be included on the 1998 Album. Id. ¶ 4. The contract specifically required PolyGram and Warner to "consult and coordinate" with one another regarding "all marketing and promotion activities" relating to the joint venture. Id.

Response to 5:

Disputed. Both sentences of this contention are disputed. PolyGram and Warner did not have control over the selection of songs to be included on the 1998 Three Tenors album. Warner, with the knowledge and express acquiescence of Polygram, ceded to concert promoter Tibor Rudas the right to determine the repertoire for the album. E-Mail Hoffman to Roberts *et al.* (June 6, 1997) (UMG001694) (SJX 62). The final contract between Warner and Tibor Rudas provided that Rudas "shall determine the musical compositions to be embodied on the Artist Masters." Rudas shall "consider in good faith" Warner's suggestions as to repertoire, and shall pass such suggestions on to the Tenors.

Complaint counsel disputes the second sentence of this Statement because it is misleading and incomplete. The Concert/License Agreement provides that Warner and PolyGram are separately responsible for developing and implementing marketing plans for their respective territories, and that neither party had the right to approve or disapprove the other's marketing plans. The Three Tenors/1998 Concert/License Agreement ¶4 (Dec. 19, 1997), (3TEN00000475-484 at 477) (SJX 79). The consultation regarding marketing and promotion activities was limited to those activities undertaken "*in connection with the exploitation of the [3T3] Rights . . .*" *See Id.* at ¶4 (emphasis added). The "Rights" were defined to include only the audio, video and

television rights associated with the live concert in Paris, France in July, 1998. See *Id.* at Introductory Paragraph and ¶1. The term "Rights" does not include the 1990 and 1994 Three Tenors albums. In a separate provision of the contract, the parties explicitly agree that PolyGram and Warner would be permitted to "continuing to exploit" their older, catalog Three Tenors albums. *See Id.* at ¶9.

For the essential terms of the collaboration between Warner and Polygram, see CCS ¶¶23-24, *supra*.

6. The revenue sharing provisions of the Concert/License Agreement provided that each party would be entitled to a fifty-percent royalty on any net profits derived from sales of any products made pursuant to the venture. Id. ¶ 5(a).

Response to 6:

Disputed as confusing and unclear. Warner and Polygram agreed that they would share equally all costs, profits, and losses "derived from the exploitation of the [3T3] Rights," including any "Recompilation" album such as a Greatest Hits album or Box Set. *See* The Three Tenors/1998 Concert/License Agreement ¶ 5(a) (Dec. 19, 1997) (3TEN00000475-484 at 478) (SJX 79).

7. The Concert/License Agreement required that the parties use the joint venture as the exclusive vehicle for the release of new Three Tenors products until June 1, 2002. Id. ¶ 9.

Disputed as confusing and unclear. The Concert/License Agreement prohibited PolyGram and Warner from separately releasing any product embodying a joint performance of the Three Tenors until June 1, 2002. New Three Tenors albums could be jointly distributed

pursuant to the terms of the Concert/License Agreement. *See* The Three Tenors/1998 Concert/License Agreement ¶9 (Dec. 19, 1997) (3TEN00000475-484 at 482) (SJX 79).

8. *The Concert/License Agreement allowed the parties to continue distributing the 1990 and 1994 Albums. Id.*

Disputed as misleading and incomplete. The Concert/License Agreement explicitly stated that, despite the restriction on the separate release of new Three Tenors products, "Nothing contained in this paragraph 9 shall be construed to prohibit (a) Warner from continuing to exploit the 1994 Album or (b) Polygram from continuing to exploit the 1990 Album." The Three Tenors/1998 Concert/License Agreement ¶ 9 (Dec. 19, 1997) (3TEN00000475-484 at 482-83) (SJX 79). That is, the Concert/License Agreement contemplated not only the continued distribution of the 1990 and 1994 Three Tenors albums, but that such distribution should continue without restraint.

9. *In developing their marketing plans for the 1998 Three Tenors album, PolyGram and Warner discussed restrictions on discounting and promotion of the 1990 and 1994 Albums during the period surrounding the release of the 1998 Album. For purposes of this motion, PolyGram assumes that these restrictions – which were referred to as the "moratorium" – were agreed to and implemented.*

Disputed in part as misleading and incomplete. Complaint counsel does not dispute that restrictions on the discounting and advertising of catalog Three Tenors albums were agreed to and implemented by PolyGram and Warner.

Complaint counsel also objects to Respondents' Statement 9 on the ground that it contains no citation to the record.

10.

Response to 10:

Disputed. The 1990 Three Tenors album has been continuously marketed by PolyGram from its release in 1990 through to the present day. The 1994 Three Tenors album has been continuously marketed by Warner from its release in 1994 through to the present day. The 1990 album remained one of the top 5 selling classical albums each year from 1991 through 1996, and was a top 10 seller in 1997. The 1994 album was in the top 5 from 1994 through 1996, and finished as the 12th best-selling classical album in 1997. *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 21, 1991) (SJX 146); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 26, 1992) (SJX 147); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 25, 1993) (SJX 148); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 24, 1994) (SJX 36); *The Year in Music, Top Classical Albums,* Billboard Magazine (Dec. 23, 1995) (SJX 41); *The Year in Music, Top Classical Albums,*

Billboard Magazine (Dec. 28, 1996) (SJX 58); *The Year in Music, Top Classical Albums*, Billboard Magazine (Dec. 27, 1997) (SJX 80).

11.

Response to 11:

Disputed. The principal motivation for the moratorium agreement was to prevent the older Three Tenors album from competing with the 1998 Three Tenors album. Thus, in a written confirmation of the terms of the moratorium agreement, PolyGram's representative explained:

> "We believe that without any firm agreement between our two companies, there will be unrestricted price competition on the 1990 and 1994 albums and videos, which will damage sales of the new release. Thus to protect our massive investment, we believe in the principle of a worldwide moratorium on discounting and promoting the previous albums and videos to create a window for the new release."

(Letter Saintilan to O'Brien (July 2, 1998) (3TEN0000012-014 at 012) (SJX 136).

Another contemporaneous document explained that "there is concern at a senior level in PolyGram and [Warner] . . . that aggressive promotion of the earlier [Three Tenors] albums may

have a partially substitutional effect on sales of the new album." A Note on the Original Three Tenors Album (UMG SK 0005) (SJX 7).

Rand Hoffman, at the time of the moratorium the head of business affairs for Polygram Holding, Inc., explained the moratorium as follows: "The feeling was that both we [PolyGram] and Warner were investing a lot of money so that the 1998 album could exist. And it was necessary to protect that investment when we had – we and Warner together had related product that conceivably consumers might buy instead." Hoffman (Jan. 31, 2001) Tr. 47 (SJX 157).

No witness testified that the moratorium was "necessary" to "prevent the parties' operating companies from free riding." Indeed, none of witnesses designated by Polygram, under Commission Rule of Practice §3.33(c), to address efficiency defenses identified free riding as a relevant concern. *See, e.g.*, Roberts Tr. 4, 56 (SJX 162). Christopher Roberts, the President of Universal Classics and Jazz and one of these Rule 3.33(c) efficiency witnesses, testified that he did not know if there would have been any effects on advertising, sales, marketing strategy or marketing expenditures if there had been discounting or promotion of older Three Tenors products during the moratorium period. Roberts Tr. 50-56 (SJX 162). Former Polygram employee Paul Saintilan specifically testified that the marketing budget for the 1998 Three Tenors album had been set in January, prior to the moratorium agreement, and that it would be unaffected by whether the earlier albums were discounted or promoted at the time of the release. Saintilan Tr. 88-89 (SJX 163).

Complaint counsel also disputes the contention that the moratorium was necessary to remedy "consumer confusion." First, no evidence of actual consumer confusion has been presented by the Respondents. Stainer Tr. 42-43 (SJX 164) (Executive not concerned at all that consumers would be confused about which Three Tenors album was the new album that they had seen advertised); Hidalgo Tr. 84-85 (SJX 156) (Executive claimed that assertion about consumer confusion is "speculation" and that he did not do anything to try to avoid confusion among the albums). Respondents simply propose that consumer confusion may occur. Green Tr.193-195 (SJX 155) (Respondents' designated Rule 3.33(c) witness on efficiencies testified that claim of consumer confusion "was speculation," and that he could not say what sort of confusion may arise). Second, Mr. Saintilan, the principal fact witness that proposed consumer confusion as a justification for the moratorium, conceded that the agreement to fix prices was not necessary in order to avoid consumer confusion. Saintilan Tr. 92 (SJX 163). Third, Mr. Saintilan testified that retailers have a motivation to avoid consumer confusion, and in fact take steps to avoid this confusion. Saintilan Tr. 82-83 (SJX 163); *see also* Rebuttal Expert Report of Dr. Stephen Stockum ¶ 30 (SJX 169). Fourth, Polygram and Warner could have dispelled any potential confusion by making the 1998 Three Tenors album more distinct from the earlier releases. Possible strategies included arranging for a more distinct repertoire, including a guest performer at the concert, and designing a more distinct packaging. Rebuttal Expert Report of Catherine Moore ¶¶2, 5-12 (SJX 167); Roberts Tr. 25-26 (SJX 162).

For a further discussion of these issues, see CCS ¶¶ 88-101, *supra*.

Complaint counsel dispute the contention that the moratorium was necessary to protect the "Three Tenors brand." First, no witness testified that the purpose of the moratorium was to

protect the "brand." Second, the term "brand" can only refer to products controlled by a single firm. Wind Tr. 77-79 (SJX 165). Accordingly, similarities notwithstanding, 3T1, 3T2, and 3T3 are not a single brand. Third, Respondents and its witnesses have offered no coherent explanation of why discounting and promotional activity surrounding the release of 3T3 injure the alleged brand. Fourth, a sound marketing strategy could have been developed that did not injure the alleged brand and that was less restrictive of competition than the moratorium. Rebuttal Expert Report of Catherine Moore ¶¶2,5-12 (SJX 167).

12. PolyGram's expert witnesses – Professors Janusz Ordover of New York University (an economist) and Yoram Wind of the Wharton School at the University of Pennsylvania (a marketing expert) – have opined that the proposed moratorium was reasonable in the context of the Three Tenors joint venture and that its competitive effects, if any, are uncertain without a full rule of reason inquiry. See Expert Report of Janusz Ordover at 3, 12-20; Expert Report of Yoram Wind at 16-19.

Response to 12:

Disputed. Complaint counsel disputes the conclusions advanced by PolyGram's expert witnesses.

The moratorium is unreasonably anticompetitive because, *inter alia*: (1) it placed restraints on products outside of the collaboration; (2) it was not reasonably necessary to the formation or efficient operation of the joint venture; (3) the efficiency justifications proposed by Respondents are pretextual; and (4) the alleged market failures identified by Respondents could have been remedied through less restrictive means. *See* CCS ¶¶ 75-114, *supra*, and Complaint Counsel's Memorandum of Law in Opposition to Respondents' Motion for Summary Judgment Section IV.

Complaint counsel also objects to Respondents' Statement 12 on the ground that it is an assertion of law, not fact, and as such is not appropriate for inclusion in a statement of uncontested material facts.

13. As a matter of law, an alleged restraint adopted in the context of a joint venture is subject to rule of reason analysis if (a) its anticompetitive effect in a relevant market is not obvious, or (b) there is a plausible procompetitive justification for the restraint. See California Dental Ass'n v. FTC, 526 U.S. 756, 771-81 (1998).

Response to 13:

Disputed. Complaint counsel objects to Respondents' Statement 13 on the ground that it is an assertion of law, not fact, and as such is not appropriate for inclusion in a statement of uncontested material facts. Notwithstanding this objection, complaint counsel avers that Respondents misstate the holding of *California Dental Ass'n v. FTC*. See Complaint Counsel's Memorandum of Law in Opposition to Summary Judgment Section IV(B).

14. As a matter of law, the anticompetitive effects of the proposed moratorium are not obvious.

Response to 14:

Disputed. Complaint counsel objects to Respondents' Statement 14 on the ground that it is an assertion of law, not fact, and as such is not appropriate for inclusion in a statement of uncontested material facts. Notwithstanding this objection, complaint counsel avers that the anticompetitive effects of an agreement to fix minimum prices and to forgo advertising are intuitively obvious. The conclusion that such agreements are likely to have anticompetitive effects is supported by the case law, economic theory, and empirical research. *See* Complaint

Counsel's Memorandum of Law in Opposition to Summary Judgment at IVA-D; Expert Report of Dr. Stephen Stockum ¶¶ 6-10 (SJX 168).

15. As a matter of fact, Complaint Counsel has not alleged that the proposed moratorium had an anticompetitive effect in any relevant market, and their economist has not conducted any analysis of the competitive effects, if any, of the proposed moratorium. See Stockum Depo. Tr. at 42:22-43:16.

Response to 15:

Disputed as misleading. Complaint counsel alleges that the effect of the moratorium "was to restrain competition unreasonably, to increase prices, and to injure consumers." Complaint ¶16 (SJX 149). Complaint counsel contends that the competitive effects of the moratorium can and should be judged on the basis of a *per se* or abbreviated rule of reason analysis. Complaint counsel is not required to allege the boundaries of the relevant market, or offer a "full rule" of reason analysis of the anticompetitive effects of the price-fixing agreement and advertising ban that constitute the moratorium.

16. As a matter of law, PolyGram's pro-competitive justifications for the proposed moratorium are plausible.

Response to 16:

Disputed. Complaint counsel objects to Respondents' Statement 16 on the ground that it is an assertion of law, not fact, and as such is not appropriate for inclusion in a statement of uncontested material facts. Notwithstanding this objection, complaint counsel avers that Respondents misstate the applicable law. *See* Complaint Counsel's Memorandum of Law in Opposition to Summary Judgment Sections III and IV.

17. As a matter of fact, Complaint Counsel's own economist has conceded that PolyGram's procompetitive justifications for the proposed moratorium are "at least plausible."

Response to 17:

Disputed. Dr. Stockum has done nothing more than state that it is "plausible" that, because advertising may generate consumer traffic, some consumers drawn to record stores by advertising for one product may purchase a competing product instead. However, he opines that this "spillover effect" does not harm consumers. "Free riding (in the sense of one firm benefiting from the expeditures of a rival) appears to be ubiquitous in the recorded music industry– as it is in many other contexts . . . Clearly, more than the mere potential for free riding must be necessary in order to justify restrictions that have clear and serious anticompetitive potential. . . . It is common for advertising and other promotional activity to benefit a competitor different from (and in addition to) the firm that funded the advertising. Despite this spillover effect, American consumers are inundated with advertising." Rebuttal Expert Report of Dr. Stephen Stockum ¶¶16-17 (SJX 169).

Respondents have provided no citation to the Record to support their contention; however, the only place in his deposition where Dr. Stockum uses the word "plausible" is where, consistent with the opinion cited above, he explains that "the types of spillovers" that Respondents use to justify their price-fixing agreement "are common" in the recorded music industry. Stockum Tr. 154 (SJX 164A). As Dr. Stockum explains, the fact that there is "some plausible spillover effect, does not in and of itself justify what would otherwise be an anticompetitive agreement." *Id.*

As is clear from Dr. Stockum's testimony, Dr. Stockum (and complaint counsel) deny that this observation is a procompetitive justification for the moratorium. There is no evidence that,

absent the moratorium, the potential "spillover" from advertising identified by Respondents would lead to consumer harm; further, to the extent that consumer harm is threatened, there are remedies significantly less restrictive than price fixing and a ban on advertising. Rebuttal Expert Report of Dr. Stephen Stockum ¶¶17-32 (SJX 169).

Complaint counsel also objects to Respondents' Statement 17 because it contains no citation to the record. Finally, complaint counsel object to Respondents' Statement 17 as misleading because the terms "plausible efficiency" and "procompetitive justification" are legal conclusions, defined by the case law. The economic meaning of such terms may be different.

18. As a matter of law, the proposed moratorium is subject to analysis under the full rule of reason and cannot be evaluated under the abbreviated forms of antitrust analysis urged by Complaint Counsel.

Response to 18:

Disputed. Complaint counsel objects to Respondents' Statement 18 on the ground that it is an assertion of law, not fact, and as such is not appropriate for inclusion in a statement of uncontested material facts. Notwithstanding this objection, complaint counsel avers that Respondents misstate the applicable law. See Complaint Counsel's Memorandum of Law in Opposition to Summary Judgment Sections III and IV.

19. Complaint Counsel have elected to forego any challenge to the proposed moratorium under the full rule of reason.

Response to 19:

Not disputed, provided that the term "full rule of reason" is understood to refer to that mode of antitrust analysis that involves, *inter alia*, formal definition of the boundaries of the relevant market coupled with an assessment of Respondents' market power. As a matter of law, these issues need not and should not be part of the Court's competitive analysis of the Three Tenors moratorium. See Complaint Counsel's Memorandum of Law in Opposition to Summary Judgment Sections III and IV.

Respectfully Submitted,

John Roberti /sara

Geoffrey M. Green
John Roberti
Melissa Westman-Cherry
Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

Dated: February 14, 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, UMG RECORDINGS, INC., a corporation, and UNIVERSAL MUSIC & VIDEO DISTRIBUTION CORP., a corporation	Docket No. 9298

DECLARATION OF JOHN ROBERTI IN OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DECISION

1. I am an attorney employed by the Federal Trade Commission. I am admitted to practice law in the State of New York, and am one of the complaint counsel in the above-captioned litigation.

2. Pursuant to Pursuant to Rule 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I submit this declaration solely to bring before the Court documents and sworn testimony relevant to Complaint Counsel's Opposition to Respondents' Motion for Summary Decision.

3. The materials submitted to the Court in the Appendix to Complaint Counsel's Separate and Concise Statement Of Material Facts as to Which There Is a Genuine Issue for Trial are true and correct copies of the following:

Exhibit Number	Date	Document Description
SJX 001	1990	Compact Disc: "Carreras, Domingo, Pavarotti, Mehta: The Three Tenors in Concert"
SJX 002	1994	Compact Disc: "Tibor Rudas Presents Carreras, Domingo, Pavarotti with Mehta: The 3 Tenors in Concert 1994"
SJX 003	May 02, 1996	Cover of Special Edition World Tour CD
SJX 004	1998	Compact Disc: "Tibor Rudas Presents Carreras, Domingo, Pavarotti with Levine: The 3 Tenors Paris 1998"
SJX 005	Undated	Decca Campaign Overviews: 3T3 & Pav & Friends: UK
SJX 006	Undated	Decca Campaign Overviews: The Three Tenors (Original)
SJX 007	Undated	A note on the Original Three Tenors Album
SJX 008	Undated	Three Tenors 3 Investment Pre-Calculation: Summary of Contribution at Various Sales Levels
SJX 009	Undated	All-Time 3 Tenors Classical Operating Statement Summary: February 1998 All-Time to Date
SJX 010	Undated	Contract between Pavarotti, Carreras, Domingo, and Top Film
SJX 011	Oct. 23, 1989	Fax from Kommerell to Harrold re. Pavarotti, Domingo, Carreras in One and the Same Concert
SJX 012	Mar. 27, 1992	Letter from Constant to Franzen
SJX 013	Sep. 29, 1993	Draft Contract between Resort Productions Ltd. and Decca
SJX 014	Oct. 10, 1993	Letter Contract: Television Program Agreement Amendment
SJX 015	Oct. 10, 1993	Contract: Videogram Licensing Agreement
SJX 016	Oct. 10, 1993	Contract: Master Recording Licensing Agreement
SJX 017	Jan 07, 1994	Letter from Kronfeld to Breslin
SJX 018	Apr. 08, 1994	Press Release re. Warner Music Group Companies Acquire Worldwide Rights for New Three Tenors Television Broadcast, Album, and Video
SJX 019	Apr. 19, 1994	Letter from Lopez to Tagarro
SJX 020	May 05, 1994	Letter from Laister and Turner to Tagarro
SJX 021	May 09, 1994	Contract between Decca, Warner, and Resorts Production Ltd.
SJX 022	May 10, 1994	Memo from de Cottinges to Distribution
SJX 023	May 17, 1994	Memo from Rollefson to Distribution
SJX 024	June 09, 1994	Fax from Rigby to Distribution
SJX 025	June 10, 1994	Fax from Day to Caradine, Mansbridge, Pitman, and Laister with attachments
SJX 026	June 10, 1994	Memo from Caradine to Murphy
SJX 027	June 20, 1994	e-Mail from Pitman to Distribution
SJX 028	July 07, 1994	Letter from Cream to Andry
SJX 029	July 11, 1994	Memo from Bledsoe to Distribution
SJX 030	Aug. 01, 1994	Memo from Pitman to Distribution attaching Marketing Plan
SJX 031	Aug. 07, 1994	Fax from Andry to Caradine re. Three Tenors - Polygram
SJX 032	Aug. 26, 1994	Marketing Information for Three Tenors
SJX 033	Sep. 09, 1994	Atlantic PDR Report
SJX 034	Sep. 09, 1994	Atlantic PDR Report

Exhibit Number	Date	Document Description
SJX 035	Sep. 15, 1994	Atlantic PDR Report
SJX 036	Dec. 24, 1994	The Year in Music, Billboard Magazine, Top Classical Albums, December 24, 1994
SJX 037	June 13, 1995	Memo re. Marketing Information for 1994 3 Tenors Concert
SJX 038	July 03, 1995	Fax from Andry to Caradine and Mansbridge with attachments re. The Three Tenors World Concert Tour
SJX 039	Oct. 16, 1995	Memo re. Marketing Information for 1994 3 Tenors Concert
SJX 040	Nov. 11, 1995	e-Mail from Focke to Pitman re. 3 Tenors World Tour 1996/7
SJX 041	Dec. 23, 1995	The Year in Music, Billboard Magazine, Top Classical Albums, December 23, 1995
SJX 042	Feb. 01, 1996	Fax from Kommerell to Rudas
SJX 043	Feb. 25, 1996	Memo re. Marketing Information for 1994 3 Tenors Concert
SJX 044	Mar. 12, 1996	Memo from Germaise to Baruch re. The 3 Tenors -- July 1996
SJX 045	Apr. 02, 1996	Memo re. Marketing Information for 1994 3 Tenors Concert
SJX 046	Apr. 12, 1996	Memo re. Marketing Information for 1994 3 Tenors Concert
SJX 047	RESERVED	
SJX 048	June 24, 1996	Memo re. Marketing Information for 1994 3 Tenors Concert
SJX 049	July 10, 1996	Letter from Kommerell to Roberts re Pavarotti/Rudas Update
SJX 050	July 25, 1996	Memo from Caradine to Lopez
SJX 051	July 29, 1996	Fax from Kommerell to Roberts
SJX 052	Aug. 01, 1996	Memo from Cooper to Daly, Gold, Semel with attachment re. The 3 Tenors Breakeven Analysis
SJX 053	Sep. 05, 1996	Memo from Kommerell to Clancy re. 3 Tenors 3
SJX 054	Sep. 17, 1996	Fax from Kommerell to Roberts with attachment
SJX 055	Sep. 27, 1996	Memo from Caradine to O'Brien with attachment
SJX 056	Oct. 07, 1996	Fax Memo from Kommerell to Roberts re. 3 Tenors 98, Paris
SJX 057	Nov. 12, 1996	Fax from Roberts to Ames with attachment
SJX 058	Dec. 28, 1996	The Year in Music, Billboard Magazine, Top Classical Albums, December 28, 1996
SJX 059	Apr. 14, 1997	Memo from Hoffman to Kronfeld re. The Three Tenors -- Volume 3/Status
SJX 060	Apr. 17, 1997	Memo from Roberts to Ertegun re. Three Tenors Three
SJX 061	May 23, 1997	e-Mail from Pitman to Still
SJX 062	June 06, 1997	e-Mail from Hoffman to Roberts and Clancy
SJX 063	Aug. 07, 1997	Memo from Scott to O'Brien and Wild
SJX 064	Aug. 22, 1997	e-Mail from Marnier to Saintilan
SJX 065	Aug. 28, 1997	Memo from Clancy to Cook, Lawlan, and Hoffman re. Three Tenors 3
SJX 066	Oct. 14, 1997	Contract: Videogram Licensing Agreement
SJX 067	Oct. 14, 1997	Contract: Television Program Agreement
SJX 068	Oct. 14, 1997	Contract: Master Recording Licensing Agreement
SJX 069	Oct. 22, 1997	Memo from Wild to Ertegun, Azzoli, O'Brien
SJX 070	Nov. 07, 1997	Memo from Wild to Azzoli, Ertegun, and O'Brien

Exhibit Number	SJX Date	Document Description
SJX 071	Nov. 19, 1997	Fax from Lieberman to Scott enclosing Draft Agreement between Polygram SA and Warner Music Netherlands B.V.
SJX 072	Nov. 20, 1997	Memo from Hoffman to Approvers re. The Three Tenors/Volume 3 (Revised)
SJX 073	Dec. 02, 1997	Memo from Scott to O'Brien and Wild re. The Three Tenors/Record Agreement
SJX 074	Dec. 08, 1997	Fax from Scott to Lieberman enclosing Draft of Split Profits Arrangement
SJX 075	Dec. 14, 1997	Memo from O'Brien to Daly
SJX 076	Dec. 15, 1997	Draft of Polygram Split Profits Arrangement
SJX 077	Dec. 15, 1997	Memo from O'Brien to Daly
SJX 078	Dec. 16, 1997	Fax from Scott to Gold, O'Brien, Robinson, Wild, and Wistow
SJX 079	Dec. 19, 1997	Letter Contract: Concert/License Agreement
SJX 080	Dec. 27, 1997	The Year in Music, Billboard Magazine, Top Classical Albums, December 27, 1997
SJX 081	Jan 27, 1998	Memo from O'Rourke to Distribution re. The Three Tenors 1998 Concert
SJX 082	Jan 28, 1998	Memo from Creed to Anderson, Bates, Davis, Gidion, Scott, Silver, and Slight re. The Three Tenors Logistics Meeting with attachments
SJX 083	Jan 29, 1998	Atlantic Meeting Notes
SJX 084	Jan 30, 1998	Letter from Hoffman to Scott
SJX 085	Feb. 09, 1998	3 Tenors Meeting Minutes
SJX 086	Mar. 06, 1998	e-Mail from Marnier to Greene re. 3 Tenors 1
SJX 087	Mar. 10, 1998	March 6, 1998 Meeting Minutes
SJX 088	Mar. 09, 1998	e-Mail from Greene to Cavell re. 3 Tenors 1
SJX 089	Mar. 09, 1998	e-Mail from Saintilan to Greene
SJX 090	Mar. 10, 1998	3T3 Proposed Agenda
SJX 091	Mar. 13, 1998	March 10, 1998 3T3 Meeting Notes
SJX 092	Mar. 11, 1998	e-Mail from Greene to Strooker re. 3 Tenors 1
SJX 093	Mar. 11, 1998	e-Mail from Gratton to Saintilan re. TTT - P&F5
SJX 094	Mar. 15, 1998	e-Mail from Stainer to Saintilan
SJX 095	Mar. 18, 1998	The Three Tenors Concert 1998 (3T3) PVP General Update and Action List
SJX 096	Mar. 23, 1998	Memo from O'Rourke to Lopez re. The Three Tenors Royalty Break with attachment
SJX 097	Mar. 24, 1998	Email from Barbero re: Pavarotti and Friends
SJX 098	Apr. 07, 1998	Memo from Caradine to Rudas re. 1994 Three Tenors Recording with attachments
SJX 099	Apr. 08, 1998	e-Mail from Saintilan to Greene re. 3T1 Discounting
SJX 100	Apr. 09, 1998	e-Mail from Greene to Cloeckaert re. Three Tenors Pricing
SJX 101	Apr. 10, 1998	Memo from Cloeckaert to Classical MD's/Classical Marketing Managers re. Pricing 1st Three Tenors Album

Exhibit Number	Date	Document Description
SJX 102	Apr. 17, 1998	Fax Memo from Saintilan to Baruch re. Three Tenors in Paris-Marketing Plan
SJX 103	Apr. 20, 1998	E-Mail from Greene to Cloeckaert re. Pricing 1st Three Tenors Album
SJX 104	Apr. 21, 1998	e-Mail from Cloeckaert to Classical MDs / Classical Marketing Managers
SJX 105	Apr. 21, 1998	e-Mail from Saintilan to Clancy re. Three Tenors TV Advertising
SJX 105A	Apr. 24, 1998	e-Mail from Lewis to Roberts and Cloeckaert
SJX 106	Apr. 28, 1998	Fax Memo from Caradine to Sandau re. The Three Tenors- 1994 Album Pricing
SJX 107	Apr. 29, 1998	Memo from Creed to O'Brien and Scott with attachment
SJX 108	Apr. 29, 1998	Fax Memo from Saintilan to Creed
SJX 109	Apr. 29, 1998	e-Mail from Caradine to O'Rourke
SJX 110	Apr. 29, 1998	e-Mail from Greene and Saintilan to European Classical MDs and European Label Mangers re. 3 Tenors 1 Promotion and Pricing
SJX 111	Apr. 30, 1998	e-Mail from Tweed to Greene re. 3 Tenors 1 Promotion & Pricing
SJX 112	Apr. 30, 1998	e-Mail from Tweed to Harveye and Haywood re. 3 Tenors 1 Promotion and Pricing
SJX 113	May 11, 1998	Fax from Still to Rudas re. The Three Tenors Mid-price for 1994 Album
SJX 114	May 13, 1998	Fax from Still to Caradine re. The Three Tenors Mid-price for 1994 Album with attachments
SJX 115	May 15, 1998	Memo from O'Rourke to Distribution re. Royalty Break
SJX 116	May 15, 1998	Fax from Still to Clay
SJX 117	May 19, 1998	e-Mail from Fischer to Greene re. Three Tenors One Campaign
SJX 118	May 27, 1998	DC5 Classics Marketing Priority: Spain
SJX 119	June 11, 1998	Fax from Hoffman to Scott
SJX 120	June 11, 1998	Fax from Hoffman to Scott
SJX 121	June 15, 1998	e-Mail from Lewis to Cavell, Greene, and Saintilan
SJX 122	June 15, 1998	e-Mail from Stefansen to Greene re. 3 Tenors 1
SJX 123	June 16, 1998	e-Mail from Greene to Heyden re. Pavarotti
SJX 124	June 18, 1998	e-Mail from Scott to Creed and O'Brien re. Tibor Meeting
SJX 125	June 23, 1998	Letter from Moorhead to Scott with attachments
SJX 126	June 24, 1998	e-Mail from Greene to Saintilan re. '90 Three Tenors Special Price Campaign
SJX 127	June 24, 1998	Fax Letter from Azzoli to Lopez
SJX 128	June 25, 1998	Fax from Maclaren to Still re. The Three Tenors: 1994
SJX 129	June 25, 1998	e-Mail from Greene to Law re. '90 Three Tenors Special Price Campaign
SJX 130	June 26, 1998	Memo from Scott to O'Brien
SJX 131	June 30, 1998	Letter from O'Brien to Rudas
SJX 132	June 30, 1998	Fax from Maclaren to O'Brien re. The Three Tenors: 1994
SJX 133	July 01, 1998	Memo from Lopez to Azzoli

Exhibit Number	Date	Document/Description
SJX 134	July 02, 1998	Memo from Still to Lopez re. 3 Tenors Mid-price
SJX 135	July 02, 1998	Fax from Scott to Mansbridge
SJX 136	July 02, 1998	Fax from Saintilan to O'Brien
SJX 137	July 02, 1998	Memo from Azzoli to Lopez
SJX 138	July 10, 1998	Memo from Saintilan to O'Brien
SJX 139	July 10, 1998	e-Mail from Saintilan to Roberts, Clancy, Kleinman, Lewis, Cavell, Greene, et. al. re. Three Tenors Moratorium
SJX 140	July 13, 1998	Memo from Saintilan to Distribution re: Three Tenors Moratorium
SJX 141	July 13, 1998	e-Mail from Saintilan to Roberts, Hoffman, Clancy, Lewis, Darbyshire, Cloeckaert, et. al. re. Three Tenors Moratorium
SJX 142	July 13, 1998	Handwritten Note from O'Brien
SJX 143	July 13, 1998	Memo from O'Rourke to Distribution re. Three Tenors Mid Price Campaign
SJX 144	July 14, 1998	e-Mail from Saintilan to Roberts, Clancy, Kleinman, Darbyshire, Hoffman, Cloeckaert, et. al. re. Three Tenors Moratorium
SJX 145	RESERVED	
SJX 146	Dec. 21, 1991	The Year in Music, Billboard Magazine, Top Classical Albums, December 21, 1991
SJX 147	Dec. 26, 1992	The Year in Music, Billboard Magazine, Top Classical Albums, December 26, 1992
SJX 148	Dec. 25, 1993	The Year in Music, Billboard Magazine, Top Classical Albums, December 25, 1993
SJX 149	July 31, 2001	Complaint
SJX 150		Answer of Respondents
SJX 151	Dec. 17, 2001	Excerpts from the Deposition Transcript of James Caparro
SJX 152	Nov. 28, 2001 & Nov. 29, 2001	Excerpts from the Deposition Transcript of Bert Cloeckaert, Volumes 1 & 2
SJX 153	Nov. 28, 2001	Excerpts from the Deposition Transcript of Richard Constant
SJX 154	Oct. 30, 2001	Excerpts from the Deposition Transcript of Kevin Gore
SJX 155	Nov. 19, 2001	Excerpts from the Deposition Transcript of Stephen Greene
SJX 156	Dec. 20, 2001	Excerpts from the Deposition Transcript of Melchor Hidalgo
SJX 157	Jan 31, 2001	Excerpts from the Investigational Hearing Transcript of Rand Hoffman dated January 31, 2001
SJX 158	Dec. 18, 2001	Excerpts from the Deposition Transcript of Gerald Kopecky
SJX 159	Jan 05, 2001	Excerpts from the Investigational Hearing Transcript of Anthony O'Brien, dated January 5, 2001
SJX 160	Dec. 06, 2001	Excerpts from the Deposition Transcript of Anthony O'Brien
SJX 161	Jan 07, 2002	Excerpts from the Deposition Transcript of Janusz Ordover
SJX 162	Oct. 31, 2001 & Nov. 01, 2001	Excerpts from the Deposition Transcript of Christopher Roberts, Volumes 1 & 2
SJX 163	Nov. 06, 2001	Excerpts from the Deposition Transcript of Paul Saintilan
SJX 164	Dec. 21, 2001	Excerpts from the Deposition Transcript of Dickon Stainer
SJX 164A	Jan 08, 2002	Excerpts from the Deposition Transcript of Stephen Stockum

JPX Number	Date	Document Description
SJX 165	Jan 10, 2002	Excerpts from the Deposition Transcript of Yoram Wind
SJX 166	Undated	Expert Report of Catherine Moore
SJX 167	Undated	Rebuttal Expert Report of Catherine Moore
SJX 168	Undated	Expert Report of Stephen Stockum
SJX 169	Undated	Rebuttal Expert Report of Stephen Stockum
SJX 170	Undated	Expert Report of Janusz Ordover
SJX 171	Feb. 07, 2002	Printout of Frank Sinatra Albums from Amazon.Com
SJX 172	June 30, 2000	Excerpts from The Seagram Company Ltd. 10-K/A filing for fiscal year ended June 30, 2000
SJX 173	1972	Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. LAW & ECON. 337 (1972)
SJX 174	1976	John F. Cady, An Estimate of the Price Effects of Restrictions on Drug Price Advertising, 14 ECON. INQUIRY 493 (1976)
SJX 175	1981	Amihai Glazer, Advertising, Information and Prices- A Case Study, 92 ECON. INQUIRY 661 (1981)
SJX 176	1980	James M. Henderson and Richard E. Quandt, MICROECONOMIC THEORY: A MATHEMATICAL APPROACH 136 (3d ed. 1980).
SJX 177	1984	John E. Kwoka, Jr., Advertising and the Price and Quality of Optometric Services, 74 AM. ECON. REV. 211 (1984)
SJX 178	2000	Robert H. Lande and Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals and Rules*, 2000 WIS. L. REV. 941, 991-2 (2000
SJX 179	1991	James A. Langenfeld and John R. Morris, Analyzing Agreements Among Competitors: What Does the Future Hold?, 36 ANTITRUST BULLETIN 651 (1991)
SJX 180	1993	James A. Langenfeld & Louis Silvia, *The Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L.J. 653, 673 (1993)
SJX 181	1996	James H. Love and Frank H. Stephen, Advertising, Price and Quality, in Self-regulating Professions: A Survey, 3 INT'L J. ECON. BUS. 227 (1996)
SJX 182	1979	Edwin Mansfield, MICROECONOMICS, THEORY AND APPLICATIONS 103, 105 (3rd ed. 1979).
SJX 183	1999	Jeffrey Milyo and Joel Waldfogel, The Effect of Price Advertising on Prices: Evidence in the Wake of 44 Liquormart, 89 AM. ECON. REV. 1081 (1999)

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

John Roberti

Dated: February 14, 2002

CERTIFICATE OF SERVICE

I, John Roberti, hereby certify that on February 14, 2002, I caused a copy of of the following documents:

(1) Complaint Counsel's Memorandum of Law in Opposition to Respondents' Motion for Summary Decision (Public Version);

(2) Complaint Counsel's Separate and Concise Statement Of Material Facts as to Which There Is a Genuine Issue for Trial (Parts I and II) (Public Version);

(3) Appendix to Complaint Counsel's Separate and Concise Statement Of Material Facts as to Which There Is a Genuine Issue for Trial (Volumes I, II and III) (Public Version); and

(4) Declaration of John Roberti In Opposition to Respondents' Motion for Summary Decision (Public Version).

to be served upon the persons listed below:

The Honorable James P. Timony
Chief Administrative Law Judge
The Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580 (served by hand)

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John Roberti