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

RESPONDENTS' TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Pursuant to the Court's scheduling order, Respondents PolyGram Holding, Inc., Decca Music Group Limited, UMG Recordings, Inc. and Universal Music & Video Distribution Corp. (collectively, "PolyGram" or "Respondents") respectfully submit this trial brief.

I. INTRODUCTION

This case involves what Complaint Counsel concede was a legitimate and procompetitive joint venture between PolyGram and Warner Music Group ("Warner") for the creation of new Three Tenors products, including the August 1998 album of a Paris concert in July 1998 (3T3) and as-yet unreleased Greatest Hits and Box-Set albums of recordings from all three Three Tenors albums. As part of that joint venture, PolyGram and Warner discussed the need to market the two prior Three Tenors albums – PolyGram's 1990 album (3T1) and Warner's 1994 album (3T2) – in ways that would not interfere with the cooperation and trust necessary to the potential success of the new album and would instead maximize the success of the entire Three Tenors product line. The parties planned to encourage their respective operating companies to aggressively promote and discount 3T1 and 3T2 during the June-July period surrounding the Paris concert, but to impose a "moratorium" on those discounting and promotional activities during a ten-week period surrounding the release of the new album. Ultimately, however, this proposed moratorium was not implemented. In late July 1998 – after many of its operating companies had completed their 3T1 promotional campaigns, but before the moratorium was to take effect – PolyGram informed Warner that it would not agree to the proposed moratorium and instructed its operating companies that they should promote and discount 3T1 as they saw fit during the would-be moratorium period. On these facts, Respondents should prevail in this case for three separate reasons.

First, as detailed in the moving papers submitted in support of Respondents' motion for summary decision, the only issue that the Court need resolve in this case is a narrow one: whether, as urged by Complaint Counsel, the proposed moratorium can be evaluated without *any*

analysis of its actual effect (if any) on competition? As a matter of law, the proposed moratorium is subject to analysis under the rule of reason. Any antitrust violation under the rule of reason requires a threshold showing that the challenged practice had an actual anticompetitive effect and, where there the challenged practice also has plausible procompetitive benefits, proof that the *net* effect on competition was anticompetitive. *See, e.g., California Dental Assn. v. Federal Trade Comm'n*, 526 U.S. 756 (1999); *Continental Airlines, Inc.v. United Airlines, Inc.*, 277 F.3d 499, 509-10 (4th Cir. 2002). Complaint Counsel have offered no evidence that the proposed moratorium had any actual anticompetitive effect, and Respondents have identified procompetitive justifications for the proposed moratorium that are both theoretically and factually plausible. Accordingly, Complaint Counsel's case fails as a matter of law.

Second, even if, as Complaint Counsel contends, there were some triable issue regarding the "validity" of Respondents' procompetitive justifications, Respondents would prevail because their procompetitive justifications for the proposed moratorium are, at the very least, valid. If this case proceeds to trial, Respondents will show that the proposed moratorium was a reasonably necessary part of the marketing plans for 3T3, and that PolyGram and Warner both contemporaneously viewed it as a reasonably necessary measure to prevent their respective operating companies from "free riding," to avoid consumer and trade confusion that might have reduced sales of all Three Tenors products, and to ensure that their operating companies were singly focused on the new album. Respondents' experts, Professors Janusz Ordover and Yoram ("Jerry") Wind, will opine that these procompetitive justifications are sound as a matter of both economics and marketing strategy. While Complaint Counsel will dispute the degree to which the proposed moratorium would have had any procompetitive effect, there will be no evidence that the proposed moratorium had any actual anticompetitive effect. Indeed, the evidence will be that the proposed moratorium was irrelevant in the United States because 3T1 and 3T2 would not have been promoted or discounted in the United States during the relevant ten-week period regardless of whether there was any

moratorium. The only permissible conclusions thus will be that the proposed moratorium was either procompetitive or had no competitive effect at all; accordingly, there will be no basis for concluding that the proposed moratorium was unlawful. *See, e.g., California Dental*, 526 U.S. at 771-81.

Third, the proposed moratorium was never implemented. In late July – before the August 1, 1998 date the moratorium was to take effect - PolyGram informed Warner that it was not going to implement the proposed moratorium. After learning that PolyGram would not be implementing the proposed moratorium, Warner informed PolyGram that it, too, would not be implementing the moratorium – although its contract with Tibor Rudas, the manager of the Three Tenors, prevented it from discounting 3T2 during the relevant time period. In a memorandum distributed on July 30, 1998, PolyGram informed all of its operating companies that their pricing and promotional activities with respect to 3T1 were *not* limited by any moratorium agreement. After receiving that memorandum, several PolyGram operating companies actually discounted 3T1 during the would-be moratorium period – something that would not have occurred had the moratorium in fact been implemented.

Consequently, the proposed moratorium cannot have constituted any violation of the antitrust laws. The fact that the parties never ultimately agreed on the terms of the proposed moratorium will preclude any finding that there was any agreement to restrain trade. Likewise, because the moratorium was not implemented, there is no evidence that the moratorium had any effect on competition anywhere, let alone in the United States. Under the rule of reason, this lack of any actual anticompetitive effect in the United States market is dispositive. *See, e.g., California Dental*, 526 U.S. at 771-81. Moreover, the unique combination of factors that gave rise to the need for the moratorium, coupled with PolyGram's ultimate decision to abandon the moratorium before it was implemented – particularly when considered along with the fact that the relevant PolyGram entities have been through two mergers since the relevant time period – forecloses any finding that there is a substantially likelihood that the challenged conduct will recur. Under the relevant case

law, these facts also would preclude the issuance of the prospective relief sought by Complaint Counsel. *See TRW, Inc. v. FTC*, 647 F.2d 942, 954-55 (9th Cir. 1981) (holding that, to obtain prospective relief, complaint counsel must prove that "'there exists some cognizable danger of recurrent violation'") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

II. FACTUAL ISSUES TO BE ADDRESSED AT TRIAL

A. The Three Tenors Joint Venture.

Complaint Counsel do not dispute the existence and procompetitive nature of the Three Tenors joint venture. *See* Complaint Counsel's Status Report and Statement of the Case. In this joint venture, PolyGram and Warner collaborated in the creation of a July 1998 Three Tenors concert in Paris and the Three Tenors album of that concert that was released in August 1998. Prior to the joint venture, the Three Tenors had recorded two albums: 3T1, distributed by PolyGram; and 3T2, distributed by Warner. The 1998 Album (3T3), like 3T1 and 3T2, was recorded at a concert event held in conjunction with the final match of the World Cup soccer tournament and televised throughout much of the world. As part of the joint venture, PolyGram and Warner also planned to release a Greatest Hits album and/or a "box set" containing recordings from all three Three Tenors albums.

The general terms of the Three Tenors 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") (JX010).[1] Pursuant to the Concert/License Agreement, Warner obtained the right to distribute the joint venture products in the United States, and PolyGram acquired the rights to distribute those products outside the United States and agreed to reimburse Warner for one-half of an $18 million advance. *See* Concert/License Agreement ¶¶ 2, 6.

[1] All documents cited herein will be included on the parties' joint exhibit list.

The Concert/License Agreement specifically required PolyGram and Warner to "consult and coordinate" with one another regarding "all marketing and promotion activities" relating to the joint venture. *Id.* Additionally, the revenue sharing provision of the Concert/License Agreement gave each party a substantial interest in the other's sales of Three Tenors products made as part of the venture, by providing 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).

The Concert/License Agreement plainly did *not* specify all of the material terms of the joint venture. Thus, the agreement did not set forth the repertoire that was to be performed at the concert and included in the album; describe the marketing plans for products releases as part of the joint venture; establish the promotional budget for those products; set the release date for the 1998 album; or address the manner in which the prior Three Tenors should be promoted in conjunction with the Paris concert and the release of the new album. At trial, the relevant witnesses – including Anthony O'Brien, the executive who negotiated the Concert/License Agreement on Warner's behalf, and Rand Hoffman, the executive who negotiated the agreement on PolyGram's behalf – will testify that they viewed Warner and PolyGram as "full partners" in the joint venture, and proceeded with a "general understanding" that neither party would do anything that might undermine the potential success of the joint venture. Rather, each party expected the other to work together in developing the plans for 3T3 in a manner consistent with sound marketing practices in the recording industry.

B. <u>The Parties' Discussion Of The Proposed Moratorium As Part Of Their Marketing Plans For The New Album.</u>

The issue of how promotion of the prior Three Tenors albums would affect the joint venture's success was discussed from the outset as part of the joint venture. At an internal PolyGram meeting held shortly after the joint venture agreement was executed, it was suggested "that the first album could be price discounted from July 13 to mid August" (*i.e.*, during the month prior to the release of the 1998 Album). *See* Minutes of February 18, 1998 Meeting (JX 27)). The parties were

concerned that the promotional opportunity surrounding the Paris concert might be used to promote the prior albums rather than the new albums, and that promotion of the prior albums rather than the new album might lead to lower sales of *all* Three Tenors products.

Although the parties always were in agreement on the basic principle that the prior albums should not be promoted in ways that would interfere with the potential success of the new album, the precise way to advance that principle was in a constant state of flux and was never ultimately agreed to. The first joint meeting to discuss the marketing plans for the new album was held on March 10, 1998. One of the items discussed at that meeting was the relationship between the parties' promotion of the prior Three Tenors album and their promotion of the new album. The minutes of that meeting indicate that both parties agreed that the prior albums should not be promoted during the critical release period for the new album in a way that could undermine the success of the new album. *See* Minutes of March 10, 1998 Meeting at 5 (JX 005) (stating that parties had reached agreement that point of sale materials for new album would not "feature the earlier albums" and that "a big push on catalogue shouldn't take place before November 15").

During the months leading up to the concert, the issue of how to promote the prior Three Tenors albums in a way that would not interfere with the release of the new album was the subject of ongoing discussions. In April 1998, representatives from several of the PolyGram operating companies responsible for distributing PolyGram products in their respective territories sought approval to aggressively promote and discount the 1990 concert during the two months prior to the release of the new album.

In late April, PolyGram informed its operating companies that they were encouraged to "aggressively promote the '3 Tenors 1' album and video . . . around the time of the 3 tenors concert." *See* April 29, 1998 Memorandum from Stephen Greene and Paul Saintilan to European Classical MDs/European Label Managers (CS 413). The memorandum also stressed that

discounting should not occur during the initial period following the release of the new album. The memorandum discussed the proposed moratorium as follows:

> The key point to observe is that the "original" album should not interfere with the launch of the new album (August 10) and all price discounting activity should be discontinued from July 24 to allow a cooling off period. Further to this, we also have an agreement with Atlantic Records that no advertising or point of sale material originated for the launch of the new album will feature packshots of the previous albums. This will help ensure that when purchasers walk into retail on the day of release they face a simple, uncluttered selling proposition . . . . This agreement (which includes price discounting) will be enforced from July 24 until the Christmas campaigns hit the shops, when the original album will undoubtedly be promoted as a priority release (as it always has been).

Id. The April 29, 1998 memorandum further explained that "this new policy strikes a balance between maximizing an opportunity on the 'original album' and yet protecting our considerable investment in the new album." *Id.*

The PolyGram operating companies in various countries subsequently sought and obtained permission to aggressively discount 3T1 through July 1998 to take advantage of the promotional opportunity surrounding the concert. PolyGram's actual pricing data during this time period also shows that PolyGram was aggressively discounting 3T1 in numerous markets, including Germany, France, and the United Kingdom, during this period. *See* 1998 AIF Data (RX 709). At trial, PolyGram's witnesses, including Kevin Gore, the executive responsible for PolyGram's United States operating company, will explain that PolyGram has never used price discounting to promote the 1990 album in the United States, and that PolyGram's United States operating company did not seek approval to discount the 1990 album during this time period.[2]

C. The Parties' Efforts To Finalize A Proposed Moratorium Agreement.

After the parties experienced some confusion regarding the scope of the proposed moratorium, Mr. Saintilan proposed that the parties enter into a "firm agreement," and suggested that

such an agreement was necessary to ensure that "unrestricted price competition on the 1990 and 1994 albums and videos" would not "damage sales of the new release" and to protect the "massive joint investment" in the 1998 Album. *See* July 2, 1998 Letter from Paul Saintilan to Anthony O'Brien (JX 9). Mr. Saintilan proposed that this "moratorium" would preclude all price discounting and advertising of the 1990 and 1994 albums and videos between August 1, 1998 and October 15, 1998. *Id.* In a letter dated July 10, 1998, Mr. Saintilan reiterated this proposal (albeit with the inclusion of November 15 as the end date for the proposed moratorium). *See* July 10, 1998 Letter from Paul Saintilan to Anthony O'Brien (JX 1).

In response, Warner suggested different terms for the moratorium. Warner said that it was not interested in a formal agreement, but that it was willing to "observe the moratorium between August 1 through to October 15." *See* July 13, 1998 E-mail from Paul Saintilan to Chris Roberts, Rand Hoffman, *et al.* (JX3). Warner proposed that, during the term of the proposed moratorium, "prices should be 'normal' and not subject to any special discounts or promotions." *Id.* Thus, under Warner's July 13, 1998 proposal, the moratorium was to provide for a two and one-half month ban on "special" discounts and promotions during the period immediately following the release of the 1998 Album.

D. <u>PolyGram's Decision Not To Implement The Moratorium.</u>

Shortly after the July 13, 1998 communication with Warner, Mr. Saintilan sought review and approval of Warner's latest moratorium proposal from PolyGram's senior management before it was finalized and implemented. *See* July 14, 1998 E-mail from Paul Saintilan to Chris Roberts, Pat Clancy, *et al.* (JX4). The executives who reviewed the proposal included PolyGram's in-house counsel in the United Kingdom, Richard Constant, who in turn

[2] There also will be no evidence that Warner has ever discounted 3T2 in the United States, or that Warner had any plans to discount 3T2 during the would-be moratorium period.

sought additional legal advice concerning European competition laws from Stephen Kon, a London antitrust lawyer.

PolyGram ultimately determined that it would not proceed with the moratorium. Accordingly, on July 30, 1998, Mr. Saintilan sent a memorandum to PolyGram's operating companies, informing them that there was "no agreement with Atlantic Records in relation to the pricing and marketing of the previous Three Tenors albums" and that they had "discretion to act as they best s[aw] fit" in pricing and promoting 3T1. *See* July 30, 1998 Memorandum from Paul Saintilan to Distribution List (JX 76). Thus, as of the date the moratorium was to have taken effect, PolyGram had instructed its operating companies that their pricing and promotion of 3T1 were not limited by any agreement, and informed them that they were free to use their "discretion" in pricing 3T1 in the months following the release of the 1998 Album.

PolyGram also told Warner that it was not going to finalize or implement the moratorium. In a telephone conversation in late July, Mr. Saintilan informed Mr. O'Brien of PolyGram's decision not to implement the moratorium. Also, Mr. Kon discussed PolyGram's decision not to implement the proposed moratorium with attorneys for Warner, including Paul Robinson and Stuart Rabinowitz. On or about July 27, 1998, Mr. Kon reviewed a draft letter from Mr. O'Brien to Mr. Saintilan, which stated that Warner was not going to agree to the proposed moratorium. *See* July 27, 1998 facsimile from Mr. Robinson to Mr. Kon (RX 705). The final version of this draft letter was sent to Mr. Saintilan, without any material changes, on or about August 10, 1998. *See* August 10, 1998 letter from Anthony O'Brien to Paul Saintilan (JX081). Based on his communications with Warner representatives, it was Mr. Kon's understanding that Warner was not implementing the moratorium.

The fact that the moratorium was not implemented is confirmed by evidence that several PolyGram operating companies in fact discounted 3T1 in the weeks immediately

following the release of 3T3. *See* August 3, 1998 E-mail from Paul Saintilan to Melchor Hidalgo (JX 79) (approving discounts of 1990 Album); AIF Data (RX 709).

III. LEGAL ISSUES TO BE RESOLVED AT TRIAL

There are several reasons that the proposed moratorium did not constitute an antitrust violation. First, as a matter of law, Complaint Counsel's failure to offer any evidence that the proposed moratorium had any actual anticompetitive effect, coupled with PolyGram's identification of procompetitive justifications, must result in a decision in PolyGram's favor. *California Dental Ass'n v. FTC*, 526 U.S. 756, 771-81 (1998); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509-10 (4th Cir. 2002). Second, even if there were some triable issue regarding PolyGram's procompetitive justifications, the evidence will show that those justifications are both legally and factually sound. Complaint Counsel will be offering no evidence that the proposed moratorium had any actual anticompetitive effect, so the only permissible conclusions from the evidence will be that the proposed moratorium would have been procompetitive or had no effect at all – either of which would result in a decision in PolyGram's favor. Third, PolyGram's decision not to implement the moratorium precludes any decision in Complaint Counsel's favor, both because it shows there was neither an agreement to restrain trade nor any actual anticompetitive effect, and because it forecloses the finding of some "cognizable danger" that the challenged conduct will recur that would be necessary to justify the prospective relief sought by Complaint Counsel.

A. The Proposed Moratorium Cannot Be Analyzed Under The "Quick Look" Version Of The Rule Of Reason Urged By Complaint Counsel.

As detailed in PolyGram's moving papers in support of its motion for summary decision, the central legal issue is straightforward and should be resolved in PolyGram's favor as a matter of law. The proposed moratorium – an agreement between the parties to a joint venture for the creation of new Three Tenors products to restrict the pricing and promotion of two older Three Tenors albums during a ten-week period surrounding the release of a new Three Tenors album – clearly is subject to analysis under the rule of reason, not any *per se* rule.

1. The Proposed Moratorium Is Not Illegal *Per Se*.

Per se condemnation is reserved exclusively for the types of naked agreements between competitors with which economists and the courts have substantial experience and, based on that experience, can conclude with confidence both that they are likely to cause substantial harm to competition and that they have no procompetitive potential. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (finding horizontal price-fixing agreement per se illegal). By contrast, in considering alleged restraints adopted in the context of joint ventures and other forms of legitimate collaborations among competitors, courts consistently have refused to apply the *per se* label. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 100-13 (applying "quick look" version of rule of reason to restraints adopted as part of college football joint venture); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992) (holding that "the Rule of Reason supplies the framework for antitrust analysis" of restraints adopted in the context of joint ventures); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (concluding that agreement not to compete adopted as part of joint venture was lawful under rule of reason); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 343-406 (S.D.N.Y. 2001) (holding that restrictions on competition adopted as part of Visa joint venture were illegal under full rule of reason). PolyGram is not aware of any case in which an alleged restraint adopted in the context of a joint venture was held to be illegal *per se* without any analysis of its net competitive effects.

2. Complaint Counsel's Claim Fails As A Matter of Law Under The Rule Of Reason.

To establish that the proposed moratorium violates the antitrust laws under the rule of reason, Complaint Counsel must show (1) that it had some actual anticompetitive effect and (2) if the procompetitive justifications offered by PolyGram are at least plausible, that the actual *net* effect was anticompetitive. *California Dental*, 526 U.S. at 771-81; *Continental Airlines*, 277 F.3d at 514-17. Complaint Counsel have failed on both counts.

First, Complaint Counsel have not shown that the proposed moratorium had any actual anticompetitive effect. There is no presumption of anticompetitive effects in any rule of reason case, and Complaint Counsel are not providing any evidence that would support a finding that actual anticompetitive effects are "obvious" – as when the NBA restricted telecasts of Chicago Bulls games in Chicago, *Chicago Prof'l Sports Limited P'Ship v. National Basketball Assn.*, 961 F.2d 667 (7th Cir. 1992), the NCAA limited broadcasts of Oklahoma Sooners football games in Oklahoma, *NCAA v. Board of Regents*, 468 U.S. 85 (1985), or the "dominant" toy retailer coordinated a group boycott of rival retailers by the leading toy manufacturers, *Toys 'R Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000). Rather, the proposed moratorium would have affected two among thousands of compact discs for a brief ten-week period as part of a marketing plan that *encouraged* the aggressive promotion and discounting of those same compact discs during the two months preceding the moratorium period. Because Complaint Counsel are offering no actual evidence of any anticompetitive effect, their claim must fail.

Second, even if Complaint Counsel had offered evidence of an actual anticompetitive effect (or alternately were entitled to the unprecedented "presumption of anticompetitive effect" they attempt to invoke), Complaint Counsel's claim would still fail because there are economically plausible efficiency justifications for the moratorium. *California Dental*, 526 U.S. at 771-81. Complaint Counsel offer a number of arguments as to why they believe Respondents' efficiency justifications (deterrence of opportunistic behavior and free-riding by the venturers, and development of a coherent marketing plan for the venture) are not plausible. But most of Complaint Counsel's arguments have been rejected by courts as a matter of law. *See, e.g., Polk Bros. Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985). And, in any event, their arguments go to the balancing of procompetitive and anticompetitive effects required by the rule of reason, not to the plausibility of Respondents' justifications. The balancing inquiry required to determine whether a challenged practice has any net anticompetitive effect here must result in a determination that the proposed moratorium was procompetitive -- or had no effect at all -- because Complaint Counsel has offered nothing to place on its side of the scale.

B. PolyGram's Procompetitive Justifications For The Proposed Moratorium Are Factually And Legally Sound.

A trial regarding PolyGram's procompetitive justifications for the proposed moratorium would only confirm that those justifications are both factually and legally sound, and that the proposed moratorium did not have any net anticompetitive effect. PolyGram expects that the Warner and PolyGram witnesses who are scheduled to testify at trial all will confirm that the moratorium was viewed as a necessary part of the marketing plans for 3T3. As Mr. Hoffman and Mr. O'Brien will testify, Warner and PolyGram viewed themselves as "full partners" in the joint venture from the outset, and expected their respective marketing personnel to develop the plans for 3T3 in a manner that was consistent with sound marketing practices in the recording industry. The existence of 3T1 and 3T2 was a factor in those plans – a factor that would have been considered by a single firm owning all three albums, and that was reasonably considered by the joint venture. The proposed moratorium was designed to address an acute risk that certain European operating companies would free ride on the promotional opportunity created by the Paris concert in ways that would undermine the potential success of 3T3 and weaken the Three Tenors brand, and was consistently discussed as part of the marketing plans for 3T3.

PolyGram's experts – Professors Janusz Ordover and Yoram ("Jerry") Wind – will testify that the proposed moratorium was plausibly procompetitive as a matter of economics and an important part of a sound marketing strategy for 3T3. Complaint Counsel's expert economist, Dr. Stephen Stockum, has conceded that the efficiency justifications for the proposed moratorium are plausible, *see* Stockum Depo. at 517:15-21, and Complaint Counsel apparently does not dispute that a single firm owning all three albums might well have adopted a similar marketing strategy for 3T3. *See* Complaint Counsel's Mem. in Opp. to Respondents' Motion for Summary Decision at 22. Complaint Counsel is offering no evidence that the proposed moratorium had any actual anticompetitive effect in any relevant market. Indeed, Complaint

Counsel's expert economist has conceded that he is not aware of any actual competition that the proposed moratorium would have prevented. Stockum Depo. at 136. Accordingly, there will be no basis for finding the actual *net* anticompetitive effect necessary to prove a violation of the antitrust laws under the rule of reason, *see, e.g., California Dental*, 526 U.S. at 771-81, and the only permissible conclusion will be that he proposed moratorium was procompetitive or had no effect at all.

C. PolyGram's Decision Not To Implement The Moratorium Mandates A Decision In PolyGram's Favor.

As described above, the trial evidence will show beyond any serious dispute that neither PolyGram nor Warner actually implemented the moratorium. That fact alone must result in a decision in PolyGram's favor because it (1) demonstrates that the moratorium did not violate the antitrust laws and (2) precludes the finding of some "cognizable danger" that the conduct is likely to recur that would be necessary to support the prospective relief sought by Complaint Counsel.

1. The Decision Not To Implement The Moratorium Proves That There Was No Antitrust Violation.

PolyGram's decision not to accept the version of the moratorium proposed by Warner on July 13, 1998 shows that there was no agreement, and that Complaint Counsel thus have not satisfied the fundamental requirement of proving that PolyGram and Warner actually agreed to restrain trade. *NCAA*, 468 U.S. at 98. Moreover, because this is a rule of reason case, Complaint Counsel can prevail only if they show that the challenged conduct had an actual net anticompetitive effect. *California Dental*, 526 U.S. at 771-81. While Complaint Counsel are offering no evidence of any actual anticompetitive effect, and while PolyGram is offering extensive evidence that the proposed moratorium actually would have been procompetitive, the simplest explanation of why there was no effect here is that the moratorium was not, in fact, implemented. There will be no evidence that the pricing and promotional practices of *any* PolyGram or Warner operating company – let alone the United States operating companies, whose conduct would not have changed even if the moratorium had been implemented – were affected by the moratorium. At the same time, there will be substantial evidence that

PolyGram's operating companies were given discretion to price and promote 3T1 as they saw fit during the would-be moratorium period.

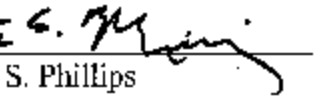
2. The Decision Not To Implement The Moratorium Forecloses The Prospective Relief Sought By Complaint Counsel.

The relief sought be Complaint Counsel in this case is exclusively *prospective* – an order requiring PolyGram to "cease and desist" certain categories of conduct, and to provide periodic reports regarding various joint venture-related activities. *See* Complaint at 6 (Notice of Contemplated Relief). However, to obtain prospective relief, Complaint Counsel must show that "'there exists some cognizable danger of recurrent violation.'" *TRW, Inc. v. FTC*, 647 F.2d 942, 954-55 (9th Cir. 1981) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). There will be no basis for such a finding here. First, it is unclear when, if ever, a similar set of facts might converge and lead to a situation where another measure like the moratorium might be considered. The evidence will show that various elements of the Three Tenors joint venture – the agreement to split costs and benefits on a 50/50 basis, the existence of prior albums by the same artist distributed by both companies, the potential for free riding created by a specific event, *etc.* – were unique and unprecedented. Moreover, the moratorium was not actually implemented, and there will be no evidence that any similar agreement has ever been entered into in the recording industry. Complaint Counsel's contention that there is some danger of recurrence here is, as in *TRW*, purely speculative and is not sufficient to support the relief they seek here.

IV. CONCLUSION

For all of the foregoing reasons, Complaint Counsel's claims are both factually and legally insufficient to establish any violation of the antitrust laws.

Respectfully Submitted,



Bradley S. Phillips
Glenn D. Pomerantz
Stephen E. Morrissey / MorrisseySE@mto.com
Munger, Tolles & Olson LLP
355 S. Grand Ave., 35th Floor

Los Angeles, CA 90071
(213) 683-9100 (Telephone)
(213) 687-3702 (Facsimile)

Counsel for Respondents

Dated: February 19, 2002

CERTIFICATE OF SERVICE

I, Stephen Morrissey, hereby certify that on February 20, 2002, I caused a copy of the **RESPONDENTS' TRIAL BRIEF** to be served upon the following persons by Federal Express:

Geoffrey M. Green/John Roberti/Cary Zuk/
Richard Dagen
Federal Trade Commission
6th & Pennsylvania Ave., N.W.
Washington , D.C. 20580
Complaint Counsel

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

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

STEPHEN MORRISSEY