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 **PUBLIC VERSION**

To: The Honorable James P. Timony
Administrative Law Judge

COMPLAINT COUNSEL'S REPLY TO RESPONDENTS' PROPOSED FINDINGS OF FACT

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Dated: May 22, 2002

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Complaint Counsel respectfully submit their reply to Respondents' Proposed Findings of Fact. For the convenience of the court, we have reprinted each of the Respondents' proposed findings, followed by Complaint Counsel's reply. A separate reply brief accompanies these reply findings.

INTRODUCTION

Respondents' proposed findings of fact should not be adopted by the Administrative Law Judge. Many of those findings are unsupported by the evidence, contrary to more reliable evidence, incomplete, misleading, or otherwise unreliable. On the following pages, we have reproduced each of Respondents' proposed findings of fact. Complaint Counsel's response ("CPRF") follows each finding or group of findings responded to. While we have attempted to address the most important issues posed by the proposed findings, we have not responded to every point made by respondent. Accordingly, the failure to address a particular proposed finding or part thereof does not signify endorsement of the finding, and should not be taken as agreement that the proposed finding be adopted.

The following citation forms are used in these reply findings.

CPRF	Complaint Counsel's Proposed Reply Finding of Facts
CPF	Complaint Counsel's Proposed Finding of Facts
RPF	Respondents' Proposed Finding of Facts
CC Brief	Complaint Counsel's Memorandum of Law in Support of Complaint Counsel's Proposed Findings of Fact, Conclusions of Law and Order
CC Reply Brief	Complaint Counsel's Memorandum of Law in Response to Respondents' Proposed Findings of Fact and Conclusions of Law
Complaint	Complaint of the Federal Trade Commission, Dkt No. 9298, issued July 31, 2001
Answer	Answer of Respondents, filed August 23, 2001
JX	Joint Exhibit (JX1 - JX109)
CX	Complaint Counsel Exhibit (CX201 - CX623)
RX	Respondents' Exhibit (RX701 - RX731)

PHC Tr.	Pre-hearing Conference Transcript, dated March 4, 2002
Stip. ¶ _	The Parties' First Set of Stipulations filed February 20, 2002

The testimony of the witnesses may be found as follows:

Professor Catherine Moore	Volume 1 (March 5, 2002)	7:25 - 272:14
Rand Hoffman (Public)	Volume 2 (March 6, 2002)	278:16 - 373:5
Rand Hoffman (In Camera)	*Volume 2 (March 6, 2002)*	*373:6 - 381:19*
Anthony O'Brien	Volume 3 (March 7, 2002)	389:9 - 558:3
Dr. Stephen Stockum	Volume 4 (March 8, 2002)	563:9 - 840:1

References to trial transcript are made using witness name, page and lines:

Moore 139:11-19.

Trial transcript references that carry over to a later page are referenced in the following fashion:

Moore 101:14-103:4.

Multiple references to the same witness and volume are made as follows:

Moore 73:1-8, 75:27-6:12.

References to exhibits include prefix, number and page if applicable:

CX383 at UMG003284.

References to investigational hearing or deposition transcripts that have been included in the trial record as exhibits include witness name and the designation "I.H." or "Dep.", exhibit number, and transcript page and lines:

Caparro Dep. (CX609) 71:8-21.

Effort has been made to note *in camera* portions of the record by inserting "(*in camera*)" after the relevant exhibit.

Hoffman 373:12-24 (*in camera*); CX583; CX232 (*in camera*).

Respondents' Proposed Finding No. 1

The Commission issued its complaint in this matter on July 31, 2001, charging Respondents PolyGram Holding, Inc., Decca Music Group Limited, UMG Recordings, Inc. and Universal Music & Video Distribution Corp. (collectively "PolyGram" or "Respondents") with unfair methods of competition in violations of Section 5 of the Federal Trade Commission ("FTC") Act, as amended, 15 U.S.C. § 45.

Complaint Counsel's Response to Proposed Finding No.1

This proposed finding is largely duplicative of information in CPF ¶¶ 1-2.

Respondents' Proposed Finding No. 2

The complaint specifically alleges that PolyGram violated the FTC Act by agreeing to a "moratorium" on the pricing and discounting of two older Three Tenors during the period surroundings its release of a new Three Tenors album as part of a joint venture with certain Warner Music Group entities that are not party to this action.

Complaint Counsel's Response to Proposed Finding No. 2

This proposed finding is largely duplicative of information in CPF ¶¶ 1-2.

Respondents' Proposed Finding No. 3

Complaint Counsel claim that the "moratorium" is either illegal *per se* or may be found unlawful without any consideration of the relevant market or any actual net competitive effects. *See* Complaint Counsel's Trial Brief. Respondents contend that the moratorium is subject to analysis under any version of the rule of reason, which requires at least some analysis of any net competitive effects that the moratorium may have had in some relevant market, and that Complaint Counsel's case must fail because they have chosen to forego any such analysis. *See* Respondents' Trial Brief.

Complaint Counsel's Response to Proposed Finding No. 3

This proposed finding is inaccurate because it misstates Complaint Counsel's position, and because Respondents' position misstates the applicable law. The moratorium agreement between PolyGram and Warner is an agreement made between competing record companies to

ban discounting and advertising of older Three Tenors products. CC Brief 24-35. Because the agreement is presumptively anticompetitive, the burden shifts to Respondents to demonstrate a plausible and valid efficiency justification. CC Brief 24; Summary Decision Order at 7. If Respondents fail to prove an efficiency justification that is both plausible and valid, the agreement is unlawful. CC Brief 35-41.

Respondents' position is the same as they offered in their failed motion for summary decision; namely, Respondents assert that if the party defending a suspect restraint identifies an economically plausible pro-competitive justification, then the challenged agreement must be reviewed under the fullest rule of reason. Respondents' Post-Trial Brief 35. This argument was considered and rejected by this Court on Summary Decision: "If the efficiency argument [advanced by Respondents] is determined to be plausible it must be valid, and may be rejected where it is speculative or unproven, where there is a less restrictive alternative, where the argument sweeps too broadly, or where the restraint is not an effective remedy for the competitive problem that it purports to address." Order Denying Motion for Summary Decision at 7-8 (Feb. 26, 2002) (citations omitted).

Respondents' Proposed Finding No. 4

The hearing in this matter began on March 5, 2002. Complaint Counsel called four live witnesses during their case-in-chief: Catherine Moore, a Professor at New York University and an expert in the marketing of recorded music; Rand Hoffman, the PolyGram executive who negotiated the joint venture agreement; Anthony O'Brien, the Atlantic Records Chief Financial Officer; and Dr. Stephen Stockum, an economist.

Complaint Counsel's Response to Proposed Finding No. 4

This proposed finding is largely duplicative of information in CPF ¶¶ 4-5.

Respondents' Proposed Finding No. 5

Additionally, during Complaint Counsel's case-in-chief, the parties stipulated to the admission of substantial portions of the deposition transcripts of a number of witnesses, including current or former PolyGram employees Eric Kronfeld, Kevin Gore, Jonathan Lieberman, Christopher Roberts, Paul Saintilan, Stephen Greene, Stephen Kon, Richard Constant, Bert Cloeckaert, James Caparro, Gerald Kopecky, Melchor Hidalgo, Eric Fuller, and Dickon Stainer, as well as the deposition transcripts of the four live witnesses.

Complaint Counsel's Response to Proposed Finding No. 5

This proposed finding is largely duplicative of information in CPF ¶ 6.

Respondents' Proposed Finding No. 6

The parties also stipulated to the admission of the expert reports and deposition transcripts of two PolyGram experts: Janusz Ordover, a Professor of Economics at New York University; and Yoram ("Jerry") Wind, a Professor of Marketing at the Wharton School of Business at the University of Pennsylvania.

Complaint Counsel's Response to Proposed Finding No. 6

This proposed finding is largely duplicative of information in CPF ¶¶ 4-5. When Complaint Counsel stipulated to the admission of these expert reports and deposition transcripts, it was with the understanding– based on Respondents' representations throughout the case -- that they would call their expert witnesses to testify at trial, so that they would be subject to cross examination and credibility determinations by the Court. Despite listing these witnesses on their witness list, Respondents rested without calling any witnesses. CPF ¶ 6.

Respondents' Proposed Finding No. 7

Finally, the parties stipulated to the admission of numerous documents, including all of the documents on the parties' Stipulated List of Exhibits.

Complaint Counsel's Response to Proposed Finding No. 7

With respect to the admission of the expert reports and deposition transcripts, see CPRF ¶ 6. Otherwise, Complaint Counsel has no specific response.

Respondents' Proposed Finding No. 8

Respondents rested following Complaint Counsel's case-in-chief contending that, based on the record evidence, the moratorium was not illegal *per se* and could not be found unlawful absent a showing that it had an actual, net anticompetitive effect in a relevant market under the requirements of the rule of reason.

Complaint Counsel's Response to Proposed Finding No. 8

Respondents' contentions are contrary to the applicable law and the law of the case. Respondents have identified at most a "plausible" justification, if even that, and thus cannot prevail in this case as a matter of law. *See* CPRF ¶ 3.

Respondents' Proposed Finding No. 9

In 1998, PolyGram Music Group included the Respondent entities Decca, PolyGram Records, PolyGram Distribution, and PolyGram Holding. PolyGram Music Group was engaged in the business of producing, marketing, and distributing recorded music and videos in the United States and worldwide. Stip No. 19.

Complaint Counsel's Response to Proposed Finding No. 9

This proposed finding is largely duplicative of information in CPF ¶¶ 9-19.

Respondents' Proposed Finding No. 10

In December 1998, PolyGram N.V., a Netherlands Corporation and then the parent of the companies included in PolyGram Music Group, was acquired by The Seagram Company Ltd. ("Seagram"), a Canadian corporation. The music businesses of PolyGram N.V. (*i.e.*, PolyGram Music Group) were then combined with the music businesses of Seagram to form Universal Music Group ("Universal"). Two years later, Seagram Company Ltd. merged with Vivendi S.A. and Canal Plus S.A. to form Vivendi Universal S.A. Stip. No. 24.

Complaint Counsel's Response to Proposed Finding No. 10

This proposed finding is largely duplicative of information in CPF ¶ 21.

Respondents' Proposed Finding No. 11

In 1998, Decca Music Group Limited ("Decca") was a PolyGram label that specialized in classical music and was part of a business division called PolyGram Classics & Jazz that included other PolyGram labels. Stip. Nos. 7, 74, 79, 95-97.

Complaint Counsel's Response to Proposed Finding No. 11

This proposed finding is largely duplicative of information in CPF ¶¶ 17-18.

Respondents' Proposed Finding No. 12

Warner Music Group ("Warner") is a group of firms -- affiliated with Warner Communications, Inc. -- engaged in the business of producing, marketing, and distributing recorded music and videos in the United States and worldwide. Among the firms composing the Warner Music Group are Atlantic Recording Corp. ("Atlantic") and Warner Music International ("WMI"). Stip. No. 26.

Complaint Counsel's Response to Proposed Finding No. 12

This proposed finding is largely duplicative of information in CPF ¶ 24.

Respondents' Proposed Finding No. 13

Atlantic Records is a record label that does business in the United States. Stip. No. 81.

Complaint Counsel's Response to Proposed Finding No. 13

This proposed finding is largely duplicative of information in CPF ¶ 25.

Respondents' Proposed Finding No. 14

WMI is a division of Warner Communications responsible for managing and coordinating the music operations of Warner's operating companies outside of the United States. Stip. No. 27.

Complaint Counsel's Response to Proposed Finding No. 14

This proposed finding is largely duplicative of information in CPF ¶ 26.

Respondents' Proposed Finding No. 15

Both PolyGram and Warner distribute their products through a network of operating companies, or "opcos"- subsidiaries responsible for sales within a particular country. Stip. No. 154.

Complaint Counsel's Response to Proposed Finding No.15

This proposed finding is largely duplicative of information in CPF ¶ 27.

Respondents' Proposed Finding No. 16

PolyGram's United States operating company responsible for distributing records in the United States in 1998 was PolyGram Group Distribution, Inc., the predecessor to Universal Music & Video Distribution Corp. Stip. Nos. 76, 80, 82, 135.

Complaint Counsel's Response to Proposed Finding No. 16

This proposed finding is misleading because it leaves out relevant information. In the United States, marketing and distribution functions are divided between separate PolyGram subsidiaries. PolyGram Classics and Jazz, the predecessor to Universal Classics, was responsible for, *inter alia*, marketing classical albums in the United States. CPF ¶ 18. As this proposed finding accurately states, PolyGram Group Distribution, Inc was a "distribution company" in the business of distributing and selling audio and video products in the United States, and was the sales and distribution organization responsible for servicing all of the PolyGram labels and joint ventures. CPF ¶ 19.

Respondents' Proposed Finding No. 17

This case involves a joint venture between PolyGram and Warner for the creation and distribution of new Three Tenors products throughout the world. JX 22 (November 20, 1997 Memorandum from Rand Hoffman to Approvers described general terms of joint venture deal); Trial Tr. (Hoffman) at 333:15-336:17; Trial Tr. (O'Brien) at 497:5-449:18; Trial Tr. (Moore) at 140:20-141:3.

Complaint Counsel's Response to Proposed Finding No. 17

This proposed finding is inaccurate. This case involves an agreement between competitors PolyGram and Warner to ban advertising and discounting of separately owned Three Tenors products in order to increase the profits of a new Three Tenors release being distributed as part of a collaboration between PolyGram and Warner. CPF ¶¶ 41-55.

. PolyGram and Warner were responsible for marketing and distributing 3T3.

Respondents' Proposed Finding No. 18

The Three Tenors is a musical collaboration consisting of renowned opera singers Jose Carreras, Placido Domingo, and Luciano Pavarotti. Stip. No. 7.

Complaint Counsel's Response to Proposed Finding No. 18

This proposed finding is largely duplicative of information in CPF ¶ 7.

Respondents' Proposed Finding Nos. 19-21

19. At all relevant times, Mr. Pavarotti was subject to an exclusive recording contract with PolyGram, Mr. Carreras was subject to an exclusive recording contract with Warner, and Mr. Domingo was not subject to any exclusive recording contract. Stip. Nos. 123-25.

20. At all relevant times, an individual named Tibor Rudas, through an entity called the Rudas Organization ("Rudas"), exclusively managed the Three Tenors and produced and promoted their concerts. JX 22; ; JX 101, O'Brien 1/5/01 Depo. Tr. at 19:13-18 ("Mr.

Rudas is the producer and either the individual or through his corporate entities who owns the rights to the Three Tenors in Concert, as well as the concert that occurs each [*sic*] year for the World Cup.")

21. Because of the exclusive rights held by PolyGram, Warner and Rudas, the recording of any Three Tenors album necessarily required collaboration among PolyGram, Warner, Rudas and the Three Tenors themselves. Stip. Nos. 123-125.

Complaint Counsel's Response to Proposed Finding Nos. 19-21

These proposed findings are inaccurate because they leave out relevant information and misstate the relationship among the parties.

First, although in 1998 Carreras was subject to an exclusive recording contract with Warner, that contract was set to expire prior to the Three Tenors concert in Paris during 1998. CX356 at 3TEN00002248 ("We are probably covered for Domingo . . . . Teldec's [Warner's] contract with Carreras expires in April of 1998"); Stip. ¶ 124. Thus, at the time that the 3T3 project was negotiated (late 1997), Carreras was free to participate without the consent of Warner. Moreover, the exclusivity arrangements between artists and labels are frequently waived in circumstances such as those under which the 1998 Three Tenors concert in Paris occurred. Stip. ¶¶ 108-109; CX515; CX516; Moore 39:13-40:9.

Second, there is no evidence that Rudas held "exclusive rights" to manage the Three Tenors at any time. Although Rudas managed and produced the 1994 and 1998 Three Tenors concerts, Rudas was not involved with the 1990 Three Tenors concert. The 1990 Three Tenors concert was organized by artist agent Mario Dradi and by a firm named Top Film. Stip. ¶ 88. PolyGram acquired rights to the 1990 Three Tenors performance from Quinn Holdings Ltd., a successor firm to Top Film. Stip. ¶ 89.

To the extent that Respondents argue that "collaboration" in this case includes obtaining a release of one of the Three Tenors, there was "collaboration" between Warner and PolyGram in 1990, when Warner released Carreras to perform on 3T1. Stip. ¶¶ 92-93. There was also "collaboration" in 1994 because PolyGram released Pavarotti to perform on 3T2. Stip. ¶¶ 108-110. Further, there was a "collaboration" in 2000, as PolyGram released Pavarotti to perform on the Three Tenors Christmas album, which was put out by Sony Classics. CPF ¶¶ 229-230. There was no moratorium agreement involving PolyGram or Warner in 1990, 1994, or 2000.

Respondents' Proposed Finding No. 22

Prior to 1998, the Three Tenors had recorded two albums: *The Three Tenors*, a 1990 album distributed by PolyGram (hereinafter "3T1" or the "1990 Album"); and *Three Tenors in Concert 1994*, a 1994 album distributed by Warner (hereinafter "3T2" or the "1994 Album"). Stip. No. 85.

Complaint Counsel's Response to Proposed Finding No. 22

This proposed finding is largely duplicative of information in CPF ¶ 8.

Respondents' Proposed Finding No. 23

3T1 and 3T2 each contained songs recorded at live concerts performed by the Three Tenors during the soccer World Cups in Rome, Italy and Los Angeles, California. Stip. Nos. 83-85.

Complaint Counsel's Response to Proposed Finding No. 23

This proposed finding is largely duplicative of information in CPF ¶¶ 32-33, 35.

Respondents' Proposed Finding No. 24

3T1 and 3T2 both were very successful: 3T1 is the best-selling classical album of all time, and 3T2 achieved "platinum" sales on ship out in the United States. Stip. Nos. 100, 116.

Complaint Counsel's Response to Proposed Finding No. 24

This proposed finding is largely duplicative of information in CPF ¶¶ 34, 255.

Respondents' Proposed Finding No. 25

Following the success of 3T1 and 3T2, PolyGram, Warner, Rudas and the Three Tenors all were interested in producing a third album ("3T3" or the "1998 Album") based on a concert performance that was to be held in front of the Eiffel Tower in Paris, France during the 1998 World Cup. Stip. Nos. 122, 126, 127; JX 21; JX 22.

Complaint Counsel's Response to Proposed Finding No. 25

This proposed finding is misleading because it leaves out relevant information. In 1996 and 1997, Warner and PolyGram both were anxious to distribute 3T3 independently, without any prospect of a moratorium on competition with the other with respect to earlier Three Tenors albums. CPF ¶¶ 57, 59; CX317; CX321 at 3TEN00004277; ; CX323 at UMG000487-488; CX324 at UMG004669; CX327 at UMG004679; O'Brien 550:20-551:20.

Respondents' Proposed Finding No. 26

PolyGram and Warner discussed the idea of creating 3T3 as part of a joint venture under which they would both share equally in the risks and potential benefits of 3T3 was discussed at least as early as April 1997. *See* JX 20 (E-mail from Rand Hoffman to Pat Clancy, April 14, 1997); JX 21 (Memorandum to Eric Kronfeld from Rand Hoffman, April 14, 1997).

Complaint Counsel's Response to Proposed Finding No. 26

There appears to be a typographical error in this proposed finding, which makes this proposed finding confusing. Complaint Counsel avers that, as early as April 1997, PolyGram and Warner discussed a collaboration to distribute 3T3. *See* CPF ¶¶ 60-61.

Respondents' Proposed Finding No. 27

By November 1997, PolyGram and Warner had committed themselves to the Three Tenors project, and were in the process of finalizing the contracts establishing their joint venture. A November 20, 1997 memorandum from Rand Hoffman, the PolyGram Senior Vice President of Business Affairs responsible for negotiating the terms of the joint venture, to the "Approvers" (Chris Roberts, Alain Levy and Roger Ames, the senior PolyGram executives whose approval was necessary for the venture to proceed) described a proposed "joint venture deal with Warner Music for a Three Tenors project to be recorded in Paris two nights before the 1998 World Cup Final." *See* JX 22 (November 20, 1997 Memorandum from Rand Hoffman to Approvers); Trial Tr. (Hoffman) at 333:15-340:23.

Complaint Counsel's Response to Proposed Finding No. 27

Complaint Counsel has no specific response. The key terms of the collaboration are set forth in CPF ¶¶ 65-68.

Respondents' Proposed Finding No. 28

The "Approvers" memorandum noted that, in addition to 3T3, the joint venture also contemplated new Three Tenors products that would include recordings from 3T1 and 3T2, including "(i) a box set consisting of all three 3 Tenors albums and (ii) a single-disc greatest hits album." *Id.*

Complaint Counsel's Response to Proposed Finding No. 28

Complaint Counsel has no specific response. The key terms of the collaboration are set forth in CPF ¶¶ 65-68.

Respondents' Proposed Finding No. 29

The "Approvers" memorandum stressed the substantial financial commitment that PolyGram would be making to the Three Tenors joint venture. The total advance to the Three Tenors for the audio, video, and broadcast versions of the Paris concert would be $18 million—an amount which exceeds the advances paid to most successful pop superstars. The Three Tenors also would be entitled to a 25% royalty on any additional sales after recoupment of the advance. *Id.* In addition to these substantial payments to the artists, PolyGram also was undertaking to split all of the costs associated with the production and distribution of the new Three Tenors products evenly with Warner. *Id.*

Complaint Counsel's Response to Proposed Finding No. 29

Complaint Counsel has no specific response. The key terms of the collaboration are set forth in CPF ¶¶ 65-68.

Respondents' Proposed Finding No. 30

Because of the unprecedented financial investment that PolyGram would be making in the Three Tenors project, the "Approvers" memorandum was supported by a detailed financial analysis of the transaction. *See* JX 23 (October 28, 1997 Memorandum from Pat Clancy to Jan Cook, Geoff Lawlan, Alain Rebillard & Rand Hoffman); CX 23, Roberts 11/01/01 Depo. Tr. at 167:1-168:10 (noting that Three Tenors joint venture was the "largest album deal" that Christopher Roberts had ever approved as President of PolyGram Classics & Jazz).

Complaint Counsel's Response to Proposed Finding No. 30

This proposed finding is misleading and not supported by the cited evidence.

Respondents' Proposed Finding No. 31

In evaluating the transaction-- and in projecting that the Three Tenors project could be profitable-- PolyGram emphasized the fact that the venture contemplated a "greatest hits" album. *Id.* Indeed, according to PolyGram's analysis, approximately one-third of PolyGram's anticipated profits would be derived from the greatest hits album. *See* JX 23 (October 28, 1997 Memorandum from Pat Clancy to Jan Cook, Geoff Lawlan, Alain Rebillard & Rand Hoffman).

Complaint Counsel's Response to Proposed Finding No. 31

Complaint Counsel has no specific response.

Respondents' Proposed Finding No. 32

Following the approval of the joint venture by the relevant PolyGram executives, the plans for the joint venture were memorialized in two agreements: (1) the "The Three

Tenors/1998 Concert/License Agreement" (the "Concert/License Agreement") between PolyGram and Warner, JX 10; and (2) the "Master Recording License Agreement" between Warner and Resorts Production Ltd. ("RPL"), an entity affiliated with Rudas (the "Rights Agreement"), .

Complaint Counsel's Response to Proposed Finding No. 32

This proposed finding is largely duplicative of information in CPF ¶¶ 64-65.

Respondents' Proposed Finding No. 33

The Concert/License Agreement was executed on or about February 5, 1998, and the Rights Agreement was executed on or about February 25, 1998. JX 10; .

Complaint Counsel's Response to Proposed Finding No. 33

This proposed finding is misleading and inaccurate. The Concert/License Agreement is dated December 19, 1997. JX10-N, JX10-X. The Master Recording License Agreement is dated October 14, 1997. . Although they cite to no particular page, Respondents apparently rely upon transmittal letters containing different dates; however, these letters indicate only the date these documents were transmitted, not the dates that they were signed. PolyGram submitted the Concert/License Agreement to the relevant executives for signature on December 18, 1997. CX368. PolyGram had formally signed and returned the Concert/License Agreement to Warner by January 26, 1998, and approved in writing the Rights Agreement by January 30, 1998. CX369; CX370; CX371.

Respondents' Proposed Finding No. 34

Complaint Counsel's Response to Proposed Finding No. 34

This proposed finding is largely duplicative of the information in CPF ¶ 63.

Respondents' Proposed Finding No. 35

Complaint Counsel's Response to Proposed Finding No. 35

There appears to be a typographical error in this proposed finding.

Respondents' Proposed Finding No. 36

Complaint Counsel's Response to Proposed Finding No. 36

This proposed finding is largely duplicative of the information in CPF ¶ 63.

Respondents' Proposed Finding No. 37

Complaint Counsel's Response to Proposed Finding No. 37

This proposed finding is largely duplicative of the information in CPF ¶ 63.

Respondents' Proposed Finding No. 38

The Concert/License Agreement set forth the general terms of the joint venture between PolyGram and Warner for the creation of products relating to the 1998 Three Tenors concert, under which Atlantic would distribute the joint venture products in the United States, and PolyGram would distribute the joint venture products outside the United States. JX 10; Trial Tr. (Hoffman) at 342:1-13 ("All the specifics of marketing still had to be agreed. [The Concert/License Agreement] lays out the general – how the relationship works, how the financial interaction works. The record had to be made. Repertoire had to be discussed and approved. All the marketing elements had to be discussed."); JX 100, O'Brien Depo. 12/6/01 Tr. at 99:25-102:3 ("It's very much a work in progress . . . . [W]hen this agreement was entered into the concert hadn't even taken place, and as you well know, we don't put the – you know, the entire concert program onto a CD, so there are repertoire issues, there are marketing issues and there were many decisions that have – that had to be made between the time of signing this agreement and releasing the album.").

Complaint Counsel's Response to Proposed Finding No. 38

This proposed finding is misleading and inaccurate. The Concert/License Agreement embodies the actual terms of the collaboration between PolyGram and Warner for the distribution of products related to the 1998 Three Tenors concert. JX10-N, JX10-V. *See* CPRF ¶¶ 41-50. Respondents have stipulated that the moratorium agreement was not necessary to the formation of the collaboration between Warner and PolyGram. CPF ¶ 295. Thus, the outstanding decisions to which Respondents refer all relate to the marketing, sales and distribution of 3T3. Complaint Counsel does not dispute that PolyGram and Warner would have to collaborate on the decisions regarding the marketing, sales and distribution of 3T3; however, Warner and PolyGram had explicitly carved out the "exploitation" of 3T1 and 3T2 from the collaboration. CPF ¶ 66-68. Therefore, while there may have been decisions to be made about how to market 3T3, it had already been decided that the marketing of 3T1 and 3T2 was not part of the collaboration.

Respondents' Proposed Finding No. 39

Pursuant to the Concert/License Agreement, PolyGram acquired the "ROW" rights to the 1998 Album, as contemplated by Paragraph 24 of the Rights Agreement, and agreed to reimburse Warner for one-half of the $18 million advance paid RPL under the Rights Agreement. *See* JX 10 ¶¶ 2, 6.

Complaint Counsel's Response to Proposed Finding No. 39

This proposed finding is largely duplicative of the information in CPF ¶¶ 64-65.

Respondents' Proposed Finding No. 40

Additionally, the Concert/License Agreement recognized that Messrs. Carreras and Pavarotti were party to exclusive recording contracts with labels affiliated with Warner and PolyGram, respectively, and accordingly required Warner and PolyGram to waive those exclusive contracts so that the artists could participate in the venture. *Id.* JX 10 ¶¶ 3(b), (c).

Complaint Counsel's Response to Proposed Finding No. 40

This proposed finding is misleading because it leaves out relevant information. Although in 1998 Carreras was subject to an exclusive recording contract with Warner, Carreras' exclusive Warner contract was set to expire prior to the Three Tenors concert in Paris during 1998. CPRF ¶¶ 19-21. Warner would be required to waive exclusivity only if the arrangement with Carreras was extended.

Respondents' Proposed Finding Nos. 41-50

41. 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.

42. The same provision of the contract also required PolyGram and Warner to "consult and coordinate" with one another regarding "all marketing and promotion activities in connection with the exploitation of the rights." *Id.* ¶ 4.

43. The provision of the Concert/License Agreement requiring PolyGram and Warner to "consult and coordinate" with one another contemplated that PolyGram and Warner would work together in developing the marketing plans for 3T3 and that each would have access to the other's confidential plans relating to the marketing and promotion of 3T3. Trial Tr. (O'Brien) at 499-500 (Mr. O'Brien understood "that Warner would be discussing its marketing plans for 3T3 in the United States with PolyGram" and that "PolyGram would be discussing its marketing plan for 3T3 outside the United States with Warner").

44. The revenue sharing provision of the Concert/License Agreement provided that each party would be entitled to a fifty-percent royalty on any net profits (and an obligation to pay a royalty at the same rate for any net losses) derived from sales of any products made pursuant to the venture, and thus gave each party a substantial interest in the other's sales of Three Tenors products made as part of the venture. JX 10 ¶ 5.

45. Finally, 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.

46. This "holdback" provision made it clear that the parties could continue to sell the 1990 and 1994 Albums during the term of the joint venture; however, as noted above, the agreement contemplated that the recordings embodied on those prior albums would be included in the box set and greatest hits albums that were to be released during the life of the venture, and generally required the parties to "consult and coordinate" their marketing and promotional activities with respect to Three Tenors products during the life of the joint venture. *Id.* ¶¶ 4, 5; Trial Tr. (Hoffman) at 354:9-15 ("This sentence had nothing to do with that. That was a whole different aspect of the agreement by cooperating on marketing in connection with the venture products. This was just a simple clarification that the previous sentence wasn't meant in any way to require PolyGram or Warners to stop selling 3T1 or 3T2."); Trial Tr. (O'Brien) at 514:17-515:1 ("[T]he purpose of this paragraph was to protect the joint venture against any future compilations and at the same time indicating we could continue to exploit the '94 album and the '90 album, and at the time of drafting this particular agreement we anticipated no restrictions with respect to that exploitation. I honestly don't believe that we contemplated exploiting those albums, you know, at the cost of the '98 concert."); JX 101, O'Brien 1/5/01 Depo. Tr. at 54:19-23 ("It simply means that we can each continue to sell and market our respective albums, but we can't create new product or we can't reconfigure those albums and create new product outside the joint venture.")

47. Mr. Hoffman and Anthony O'Brien, the CFO of Atlantic Records who negotiated the Concert/License Agreement on behalf of Warner, each testified that the Agreement was not intended to allow either party to market its prior album in any way that might have undermined the success of the joint venture. Trial Tr. (Hoffman) at 354:9-15; Trial Tr. (O'Brien) at 514:17-515:1; JX 100, O'Brien 12/6/01 Depo. Tr. at 102:7-103:11 ("Q: At the time you entered into the joint venture agreement, did you believe that PolyGram would compete against the 1998 album by aggressively discounting the 1990 album. A: No, not at all. Q: Would you have entered into the agreement if you believed that they would? A: No, I wouldn't.")

48. The Concert/License Agreement did not specify, and was not intended to specify, all of the material terms of the joint venture. For instance, the parties recognized that, after the joint venture was formed, they would need to reach further agreements regarding the repertoire to be included on 3T3; all of the necessary marketing and promotional plans for 3T3; the release dates for the album; and all of the other necessary elements for the release of the album. Trial Tr. (Hoffman) at 342:1-13 ("All the specifics of marketing still had to be agreed. [The Concert/License Agreement] lays out the general – how the relationship works, how the financial interaction works. The record had to be made. Repertoire had to be discussed and approved. All the marketing elements had to be discussed."); JX 100, O'Brien Depo. 12/6/01 Tr. at 99:25-102:3 ("It's very much a work in progress . . . . [W]hen this agreement was entered into the concert hadn't even taken place, and as you well know, we don't put the – you know, the entire concert program onto a CD, so there are repertoire issues, there are marketing issues and there were many decisions that have – that had to be made between the time of signing this agreement and releasing the album.").

49. In negotiating the Concert/License Agreement, Mr. O'Brien and Mr. Hoffman left the specifics of the marketing plan to the relevant PolyGram and Atlantic marketing personnel. Trial Tr. (O'Brien) at 499:19-500:5 ("I really left it up to our marketing people to have those conversations."); Trial Tr. (Hoffman) at 342:1-13 ("All the specifics of marketing still had to be agreed.")

50 As Mr. O'Brien explained at trial, he believed that PolyGram and Warner would develop the specifics of their marketing plan in a commercially reasonable manner, because they were "partners" in their joint venture for new Three Tenors products. Mr. O'Brien further explained that the "need and desire to work together" was "inherent in this agreement, inherent in this joint venture agreement." Trial Tr. (O'Brien) at 499-500.

Complaint Counsel's Response to Proposed Finding Nos. 41-50

These proposed findings are misleading, incomplete and inaccurate. Notably, however, Respondents admit that all of the "material terms" of the Concert/License Agreement that needed to be negotiated post-execution (*i.e.*, repertoire, release date) relate to 3T3, not 3T1 and 3T2.

The written agreement between PolyGram and Warner provided that Warner had the right to market and distribute 3T3 in the United States. Warner developed the strategy for the marketing of 3T3 in the United States, and PolyGram had no right to review or approve these plans. Warner granted PolyGram the right to market and distribute 3T3 everywhere except in the United States. PolyGram developed the strategy for the marketing of 3T3 outside the United

States, and Warner had no right to review or approve these plans. JX10-P ("The foregoing shall not be construed to confer upon Warner any approval rights regarding PolyGram's marketing or promotion in the PolyGram Territory of any phonograph records, audiovisual devices or television programs derived, in whole or in part, from the Concert, nor to confer upon PolyGram any approval rights regarding Warner's marketing or promotion in the Warner Territory of any phonograph records, audiovisual devices or television programs derived, in whole or in part, from the Concert.").

The Rights Agreement did contemplate that PolyGram and Warner would consult on broad marketing issues with respect to 3T3, the Greatest Hits record and the Boxed Set. JX10-P ("Notwithstanding anything to the contrary contained herein, each of Warner and PolyGram shall consult and coordinate with the other party hereto, in good faith and on an ongoing basis, in respect of all marketing and promotion activities in connection with the exploitation of the Rights . . .").

However, the parties explicitly excluded 3T1 and 3T2 from the venture and from the scope of the non-compete obligation, as set forth in Paragraph 9 of the final, executed Concert/License Agreement: "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 (as defined in the Rights Agreements)." JX10-U-V. Thus, to the extent that plans had to be made, they were plans related to 3T3, and not 3T1 or 3T2.

The scope of the Rights contemplated in the Rights Agreement includes only the songs derived from the 1998 Paris concert, and the right to combine those songs with other, prior releases to create a Greatest Hits record and Boxed Set. JX10-N ("Upon its execution of the Rights Agreements, Warner shall acquire from RPL certain worldwide phonographic record and

home video rights and certain television exploitation rights (collectively, the 'Rights') in respect of the [1998] Concert and master recordings derived therefrom (including, without limitation, certain rights to couple the master recordings derived from the [1998] Concert with other, existing master recordings embodying the performances of the Artists))." "Exploitation" encompasses selling, advertising, marketing, and promoting an album. O'Brien 422:6-11. Thus, PolyGram and Warner agreed to "consult and coordinate" only with respect to the advertising, marketing, and promotion of 3T3, and two products which have not yet been produced: the Boxed Set and the Greatest Hits record.

The final contract between Warner and the Rudas Organization provides that the Rudas Organization shall control the selection of songs for the Paris concert.

; JX22 at UMG001342 ("RPL [Rudas] will consider our input [regarding repertoire], but in the event of a disagreement RPL's decision is final."). Therefore, the Rudas Organization and the Tenors selected the songs to be included on the 1998 Album.

Respondents now make much over potential sharing of "confidential plans," but that was neither required by the Concert/License Agreement nor explicitly discussed by the parties prior to the trial in this matter. What constitutes "confidential plans" is vague and ambiguous.

Regardless, no employee of WMI (the Warner entity that had responsibility for promoting 3T2 in Europe) and no employee of PolyGram Classics in the United States (the PolyGram entity that had responsibility for promoting 3T1 in the United States but no responsibility for 3T3) attended marketing meetings related to 3T3. JX5 at UMG001523; CX382 at 3TEN00007983. No copy of the PolyGram marketing plan for 3T3 appeared in Warner's or Atlantic's files, and

no copy of Atlantic's U.S. marketing plan for 3T3 appeared in PolyGram's files. *See* CX393 at UMG000539 (Decca marketing plan sent to Rudas organization, but not to anyone at Warner or Atlantic). Kevin Gore, then Senior Vice President and General Manager of PolyGram Classics and Jazz in the United States, was never consulted by Warner about marketing 3T3 in the United States. Gore Dep. (JX87) 59:8-10, 60:2-10 (Gore's opinion on 3T3 was solely "from an outsider's perspective").

Respondents' Proposed Finding Nos. 51-53

51. As Bert Cloeckaert, PolyGram's Vice President for Continental Europe, testified, in developing their marketing plans for a new albums by any artist, record companies generally consider how to promote and market catalog albums by the same artist during the period surrounding the release of the new album. JX 97, Cloeckaert Depo. Tr. at 68-70, 97:15-102:14. Complaint Counsel's marketing expert, Professor Moore, also testified that record companies consider catalog product in developing their marketing plans. Trial Tr. (Moore) at 153:12-17.

52. As Mr. Cloeckaert testified, the success of any new album during its initial release period is critical in the music industry: "Then the new album comes and you have to concentrate yourself on the new album, because the new album is so vital to the rest of what you're doing and to what you can do afterwards. I mean, if you – if you don't make success of the new album, you won't have a successful back catalog neither." JX 97, Cloeckaert Depo. Tr. at 100:14-20.

53. It also is generally understood in the music industry that the period surrounding the release of a new album (the "release period") is critical to the success of the album. Trial Tr. (Hoffman) at 359:12-360:17 ("[T]he catalog is more valuable if the new record is a success, and to make a new record a success, the key is the launch period. You want the new record to sell as much as possible when it first comes out."); JX 94, Saintilan Depo. Tr. at 81:23-82:3; JX 89, Stainer Depo. Tr. at 57:14-58:22, 64:9-65:14, 75:22-76:14. Respondents' marketing expert, Professor Wind, also confirmed that this view is generally accepted as a sound marketing strategy. JX 91, Wind Depo. Tr. at 9:23 – 10:10 ("[T]he success of the launch of the new product, especially in a very crowded market, really depends on focus, on the single dedicated focus of the specific product. And any distraction that will prevent this focus of all involved, which means the manufacturers, the retailers, everybody involved in the launch, is absolutely critical that we have this single focus here.")

Complaint Counsel's Response to Proposed Finding Nos. 51-53

These proposed findings are misleading because they leave out relevant information. Respondents spin hypotheticals assuming a single firm owned all three Three Tenors albums. However, since one firm did not own all three albums, how a single firm might have marketed these products is not relevant to the analysis in this case. CC Brief 64-68.

In any event, as Professor Moore testified, there is no "generally understood" way to market catalog items around the release of a new item by the same artist. When one record company owns both the new release and the catalog item, "the practice is that sometimes the catalog releases are advertised with the new release, not always, but it's quite common to see that, the catalog titles will be advertised with the new release." Moore 68:15-69:1. In fact, a record company might choose to advertise a catalog item even if it were to take sales away from the new release. Moore 160:17-163:3. Professor Moore explained that "when a label has releases that have been successful in the past, it would make sense for them to advertise or promote them together." Moore 138:24-139:10.

Professor Moore acknowledged that in preparing a marketing plan for a new album, a record company will "take into account" the existence of catalogue albums by the same artist. Moore 153:12-17. But a firm might take a competing product "into account" without seeking to suppress all discounting and advertising for that product. Thus, as Dr. Moore explained, the moratorium was not necessary for the effective marketing of 3T3. Moore 119:19-124:7, 138:24-139:19.

Professor Moore's conclusions are echoed by Cloeckaert, who testified: "It's an open debate of how do you promote your back catalog related to new release, and there are as many

views as there are labels and people as there are labels." Cloeckaert Dep. (JX97) 97:23-98:7. When asked if, as Respondents insist in this case, the re-promotion of a catalog item during the initial release period of a new release would harm the new release, Cloeckaert replied, "I don't know. Again, there are as many theories as there are people in the record industry." Cloeckaert Dep. (JX97) 101:2-8.

To the extent that Respondents cite the testimony of O'Brien to support their points about how best to market 3T3, as Respondents argued during their objections at trial, O'Brien does not have marketing expertise. O'Brien 449:10-13, 479:17-24. In addition, O'Brien testified that the reason he entered into the moratorium was that he was concerned that 3T3 might lose sales to 3T1 and 3T2, and that competition among Three Tenors products might adversely affect the profitability of the 3T3 project. CPF ¶¶ 301-308; CPRF ¶ 65.

Respondents' Proposed Finding Nos. 54-55

54. The PolyGram and Atlantic employees involved in the joint venture recognized that aggressively marketing and promoting 3T1 and 3T2 during the 3T3 release period could make it less likely that 3T3 would be successful, and thereby could lead to fewer sales of *all* Three Tenors products. JX 89, Stainer Tr. at 57:14-58:22, 64:0-65:14, 75:22-76:19; JX94, Saintilan Depo. Tr. at 43:5-8, 80:25-82:3, 220:16-22; JX97, Cloeckaert Depo. Tr. at 71:15-22, 97:15-102:14; JX 100, O'Brien 12/6/01 Depo. Tr. at 105:19-106:3.

55. The relevant PolyGram and Atlantic employees also believed that the potential negative effect on long-term sales of all Three Tenors products from promoting and discounting 3T1 and 3T2 during the 3T3 release period outweighed any positive effect on sales of 3T1 and 3T2 that might have been achieved by promoting and discounting those products during the 3T3 release period, because there was limited long-term potential for additional sales of the eight and four year old catalog products. JX 89, Stainer Depo. Tr. at 57:14-58:23, 64:9-65:15, 75:22-76:14; JX97, Cloeckaert Depo. Tr. at 71:15-22, 97:15-102:14; JX 100, O'Brien 12/6/01 Depo. Tr. at 105:19-106:3; JX 94, Saintilan Depo. Tr. at 81:24-82:3.

Complaint Counsel's Response to Proposed Finding Nos. 54-55

These proposed findings are misleading, incomplete and not supported by the evidence. None of the evidence to which Respondents cite supports a finding that PolyGram and Warner employees were concerned that aggressive discounting and promotion of 3T1 and 3T2 would lead to fewer overall sales of all Three Tenors products, or would harm the long-term success of the brand. At most, these citations support the proposition that these employees were afraid that aggressive discounting and promotion of the older albums would divert sales from 3T3 to 3T1 and 3T2.

The purpose of the Three Tenors moratorium was to shield 3T3 from competition. The parties were concerned that 3T3 might lose sales to 3T1 and 3T2, and that competition among Three Tenors products might adversely affect the profitability of the 3T3 project. CPF ¶¶ 301-308; CPRF ¶ 65.

Moreover, it is a generally accepted economic axiom that higher prices and less advertising will lead to less output, absent an efficiency. Here there is no efficiency justification for the moratorium. *See* CPF ¶¶ 309-370. Thus, the effect of the moratorium– a ban on discounting and advertising– will likely be less, not more, output. *See* Stockum 581:19-582:6 ("My fundamental conclusions are that the restrictions contained in the moratorium agreement have a clear anticompetitive potential, that they fall within the category of restraints that can be very clearly concluded to be likely to be anticompetitive, and that is the restriction on discounting, which is tantamount to price-fixing, and a broad-based ban on advertising, which has a clear anticompetitive potential. So I ultimately concluded the moratorium agreement is likely to be anticompetitive.").

With regard to Respondents' "beliefs" about the need for the moratorium, these beliefs alone are insufficient as a matter of law to establish an efficiency defense. CC Brief 41-42.

Respondents' Proposed Finding No. 56

Because of the importance of the 3T3 release period and the relative insignificance of any potential benefits from promoting and marketing 3T1 and 3T2, PolyGram and Warner would not have entered into the joint venture if either party believed that the other would aggressively promote and discount 3T1 and 3T2 during the 3T3 release period. Trial Tr. (O'Brien) at 501:18-502:13 ("Q: If during the course of the negotiations PolyGram had come to you and said to you that they planned on promoting 3T1 during launch window for 3T3, what would you have done? . . . A: "I would not have continued with the deal").

Complaint Counsel's Response to Proposed Finding No. 56

This proposed finding is inaccurate and not supported by the evidence. The only testimony cited is from Anthony O'Brien of Warner. However, O'Brien also testified that it was Val Azzoli and Ahmet Ertegun, and not O'Brien, who would have the final say on whether Warner would enter into a collaboration with PolyGram without a moratorium. O'Brien 412:19-413:5. Chris Roberts, the President of PolyGram Classics and Jazz during 1998, and one of the executives who approved the collaboration with Warner, testified that he did not remember whether he thought Warner was going to discount and advertise 3T2 upon the release of 3T3, and did not know whether the moratorium was necessary for the formation of the collaboration. Roberts Dep. (JX92) 50:10-51:21.

Indeed, Respondents have stipulated that the moratorium was not necessary to the formation of the Three Tenors collaboration. PHC Tr. 83:4-84:1. PolyGram and Warner were contractually committed to the 3T3 project well before entering into the moratorium agreement. PolyGram and Warner were committed to the formation of the PolyGram/Warner collaboration,

the production of the Paris concert, the creation of 3T3, and the distribution of 3T3 in the United States well before discussions of the moratorium even commenced. Thus, the moratorium cannot be necessary for any of these elements of the 3T3 project. CPF ¶ 296.

Respondents' Proposed Finding No. 57

At the first joint meeting the relevant PolyGram and Atlantic marketing personnel regarding the marketing plans for the joint venture, which was held on January 28, 1998 (one week before the Concert/License Agreement was executed), the parties recognized the need to develop a strategy regarding the marketing and promotion of the prior albums during the period surrounding the release of 3T3. CX 383 ("PolyGram and Atlantic need to agree a strategy on promotion of 3T1 and 3T2: One option is to impose an ad moratorium until November 15"); Saintilan Depo. Tr. at 41:10-25 (noting that the moratorium was first discussed at a "joint venture meeting" in "late January").

Complaint Counsel's Response to Proposed Finding No. 57

This proposed finding is inaccurate and misleading. PolyGram executed the Concert/License Agreement on January 26, 1998, three days before the referenced first marketing meeting (which was held on January 29, 1998, not January 28, 1998). CX383; CPRF ¶ 33. At the meeting, Chris Roberts (PolyGram Classics) raised with the group his "general concern" over how older Three Tenors products would be marketed upon the release of 3T3. At the meeting in question, there were "no concrete discussions" regarding the proposed advertising moratorium and PolyGram and Warner did not reach any agreement regarding the concern raised by Chris Roberts. CPF ¶¶ 95-97. Indeed, at an internal PolyGram meeting on February 9, 1998, Saintilan's notes indicate that he reported that there were "no restrictions on 1990/1994 products." CX386 at UMG004596.

Respondents' Proposed Finding No. 58

At an internal PolyGram meeting held on February 18, 1998, someone suggested the possibility "that the first album could be price discounted from July 13 to mid August" (*i.e.*, during the month *before* the release of the 1998 Album), and PolyGram concluded that further investigation was required before concluding whether to allow the operating companies to

discount 3T1 prior to the release of 3T3. JX 27 (Minutes of February 18, 1998 Meeting at UMG000035).

Complaint Counsel's Response to Proposed Finding No. 58

This proposed finding is misleading and not supported by the evidence. The notes cited by Respondents simply read: "There was a suggestion that the first album could be price discounted from July 13 to mid-August. *Action: [Paul Saintilan] to investigate.*" JX27 at UMG000035 (emphasis in original). This language is ambiguous and could mean, *inter alia*, that Saintilan would investigate whether discounting by PolyGram should extend beyond mid-August.

Respondents' Proposed Finding No. 59

PolyGram and Atlantic again met to discuss their marketing plans for 3T3 on March 10, 1998. JX 5 (March 10 Meeting Notes).

Complaint Counsel's Response to Proposed Finding No. 59

This proposed finding is largely duplicative of information in CPF ¶¶ 99-100.

Respondents' Proposed Finding No. 60

The parties discussed the possibility of marketing and promoting 3T1 and 3T2 during the 3T3 release period at the March 10, 1998 meeting. *Id.* at 5.

Complaint Counsel's Response to Proposed Finding No. 60

This proposed finding is largely duplicative of information in CPF ¶ 101.

Respondents' Proposed Finding No. 61

The March 10, 1998 meeting notes state:

> **3T1 AND 3T2 CAMPAIGNS**
>
> Agreement reached that on initial POS [point of sale] materials, neither company will feature the earlier albums. However, space

> will be allowed in free standing display units and counter stands, for the later inclusion of back catalogue. Agreement that a big push on catalogue shouldn't take place before November 15.

Id. at 5.

Complaint Counsel's Response to Proposed Finding No. 61

This proposed finding is largely duplicative of information in CPF ¶¶ 101-103.

Respondents' Proposed Finding No. 62

PolyGram and Warner subsequently referred to the agreement reached at this March 10, 1998 meeting as a "moratorium" on promotion and discounting of 3T1 and 3T2 that would be implemented during the 3T3 release period. JX3; JX4; Saintilan Depo. Tr. at 45:5-46:16 ("I believe unilaterally, that we would want to implement such a moratorium, such a window, irrespective of whether Warner was involved or not involved. Ant I was in our interest as a company to create this window. It was only further down the line when we had a clear view as to how – I believe the process was one of iteration. The process was one of going backwards and forwards and taking on different advice and changing the position depending on this advice. So it was an evolutionary thing throughout the discussion on the moratorium. But it was only further down the line that we then told Warner that this is the sort of structure we intended to adopt and the sort of position we intended to take because we believe it would be in the best interest of the album.")

Complaint Counsel's Response to Proposed Finding No. 62

Complaint Counsel has no specific response. For a detailed description of the terms of the moratorium agreement, see CPF ¶¶ 49-55.

Respondents' Proposed Finding No. 63

After the moratorium agreement was reached at this March 10, 1998 meeting, the parties later modified the agreement to apply during a ten-week period running from August 1, 1998 through October 15, 1998. JX 3 (July 13, 1998 E-mail from Paul Saintilan to Chris Roberts, Rand Hoffman, *et al.*) (discussing Warner's agreement to "observe the moratorium from August 1 through to October 15"); JX4 (Draft Memorandum from Paul Saintilan to PolyGram operating companies discussing moratorium from "August 1 to October 15, 1998").

Complaint Counsel's Response to Proposed Finding No. 63

Complaint Counsel has no specific response. For a detailed description of the terms of the moratorium agreement, see CPF ¶¶ 49-55.

Respondents' Proposed Finding No. 64

PolyGram and Warner agreed that, during the moratorium period, "prices should be 'normal' and not subject to any special discounts or promotions." JX 3.

Complaint Counsel's Response to Proposed Finding No. 64

Complaint Counsel has no specific response. For a detailed description of the terms of the moratorium agreement, see CPF ¶¶ 49-55.

Respondents' Proposed Finding No. 65

PolyGram and Warner both believed that the moratorium was an important part of their marketing plans for 3T3. JX 100, O'Brien 12/06/01 Depo. Tr. at 101:20-102:3 (Warner considered it "important for the parties to discuss and resolve how to promote the catalog products during the period surrounding the release of the 1998 album as part of the joint venture"); JX 94, Saintilan Depo. Tr. at 221:8-25 (describing how moratorium was "an important part" of the marketing plan for the 1998 album "[b]ecause we wanted to ensure a simple, uncluttered selling proposition in retail; we wanted to ensure that there wasn't any consumer confusion around the aggressive promotion of an earlier album; we wanted to ensure that the spotlight fell for a specific new release.").

Complaint Counsel's Response to Proposed Finding No. 65

This proposed finding is misleading because it leaves out relevant information and is not supported by the evidence. The purpose of the Three Tenors moratorium was to shield 3T3 from competition. CPF ¶¶ 301-308. The parties were concerned that 3T3 might lose sales to 3T1 and 3T2, and that competition among Three Tenors products might adversely affect the profitability of the 3T3 project. Anthony O'Brien, the Warner executive responsible for the moratorium agreement, testified at trial that the purpose of the moratorium was to protect the company's profits by impeding consumers from discovering and selecting a lower priced alternative to 3T3:

> Q: And during 1998 you were concerned that 3T3 would lose sales to 3T1 and 3T2; is that right?
>
> A: That's correct.
>
> . . .

Q: Were you concerned, Mr. O'Brien, that consumers would be unable to distinguish among the three different Three Tenors albums.

A: My concern was not that they would not be able to distinguish between them. My concern was that there would be some level of confusion perhaps, but then you know, if presented, you know, with a clear choice, if you have those three pieces displayed together, even though our promotion for 3T3 may have driven them into the store in the first instance and they may – they may look at the price of the product, they may look at the repertoire of the product, and they may determine that, frankly, 3T2 at a lower price is similar enough to what they went in for the first place for.

Q: Your concern was that consumers might pick them up and compare them and then decide that 3T2 was their preference rather than 3T3?

A: My concern was twofold. One, that certainly given the similarity of the – the visual similarity of the product there could be some confusion, coupled with the fact that they may start comparing the repertoire along with the price and make a determination that, you know, the '94 concert is just fine for a few dollars less.

O'Brien 485:21-487:13.

Rand Hoffman, PolyGram's representative in the United States, also testified that the function of the moratorium was to deter consumers from purchasing 3T1 and 3T2, with the expectation that such consumers would by default select 3T3. Hoffman I.H. (JX102) 43:10-23. This strategy, Hoffman expected, would protect the venturers' investment in the new Three Tenors album. Hoffman I.H. (JX102) 47:4-14 ("The feeling was that both we and Warners 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 Warners together had related product that conceivably consumers might buy instead.").

Paul Saintilan, the PolyGram manager responsible for negotiating the moratorium agreement, testified at deposition that the purpose of the moratorium was to protect the company's profits by impeding consumers from discovering and selecting a lower priced alternative to 3T3. Saintilan Dep. (JX94) 90:9-15. This is what Saintilan wrote in the contemporaneous documents. JX9-A ("We [PolyGram] 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.").

With regard to Respondents' "beliefs," these beliefs alone are insufficient as a matter of law to establish an efficiency defense. CC Brief 41-42.

Respondents' Proposed Finding No. 66

PolyGram and Warner thought it was critical to focus on 3T3 during the initial release period, and that the best way to maximize the potential long-term success of the Three Tenors brand was to create a clear "window" for the new album during the release period. Trial Tr. (O'Brien) at 538, 541; *see* JX94, Saintilan Depo. Tr. at 78-98, 217-23, 226-27; JX 100, O'Brien Depo. Tr. at 46:13-49:15; JX97, Cloeckaert Depo. Tr. at 68-71, 75-76, 98-102; JX89, Stainer Depo. Tr. at 64-65, 53-58; JX 7 (Memorandum from Val Azzoli to Ramon Lopez; explaining that WMI's plan to discount 3T2 outside the United States during the moratorium period "could have a serious negative impact on PolyGram's marketing of the new Three Tenors album," and that "[t]he key here is focusing consumer's attention on the new album starting now in

anticipation of the initial release and continuing through the Christmas season"); JX 28 (Three Tenors in Paris Marketing Plan).

Complaint Counsel's Response to Proposed Finding No. 66

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 54-55.

Respondents' Proposed Finding No. 67

The relevant PolyGram and Warner business people testified that a single firm owning all Three Tenors albums would have adopted a strategy like the moratorium in managing the Three Tenors brand. JX 100, O'Brien 12/6/01 Depo. Tr. at 105 ("Certainly if Atlantic records was simply conducting business by itself, as I previously testified, and if we were releasing that '98 album, we would not have positioned the '94 album alongside it."); JX 97, Cloeckaert Depo. Tr. at 68-71, 75-76, 98-102 (stating that strategy like moratorium is "preferred strategy" for marketing catalog products in conjunction with a new release and that the strategy "makes commercial sense" for the Three Tenors products); JX 95, Greene Depo. Tr. at 171:12-172:3, 191:17-192:21 (Decca Business Manager stating that strategy whereby PolyGram decided to "focus on the new album when it comes out and to stop promoting the first [album] makes perfect sense with or without this agreement" with Atlantic).

Complaint Counsel's Response to Proposed Finding No. 67

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 51-53.

Respondents' Proposed Finding Nos. 68-69

68. The relevant business personnel were concerned that promoting and discounting the prior albums during the period surrounding the release of the new album could have jeopardized the potential success of the new album by sending a confusing message to consumers and the trade and diverting the operating companies' focus away from the new album, which was of far greater commercial significance to both PolyGram and Warner in 1998. JX 97, Cloeckaert Depo. Tr. at 68-71, 75-76, 98-102 (discounting the prior albums during the initial release period would not have "made commercial sense"; "you have to concentrate yourself on the new album because the new album is so vital to the rest of what you are doing and to what you can do afterwards"); JX 100, O'Brien Depo. Tr. at 99:2-17 ("aggressively promoting or discounting the prior albums during the initial release period for the new album" "absolutely" would have "undermined the success of the joint venture"); JX94, Saintilan Depo. Tr. at 43:5-8, 78-84, 205:7-206:20, 220:16-22 (aggressive discounting and promotion of the prior albums during the initial release period could have "sabotaged the new release"); JX89, Stainer Depo. Tr. at 57:14-58:22, 64:9-65:14, 75:22-76:14 (aggressive promotion and discounting of prior albums during the initial release period "would damage the Three Tenors brand").

69. As Mr. Saintilan testified, PolyGram was concerned that potential consumers of 3T3 were particularly susceptible to potential confusion among the various Three Tenors products, and that this confusion could lead to lower sales of all Three Tenors products. JX94, Saintilan Depo. Tr. at 79:21-81:22, 205:7-206:20 (concern was that "instead of actually consummating the purchase, which I'm trying to get as a marketing person, that they walk out of here saying it's too hard"). Complaint Counsel's expert economist, Dr. Stockum, testified that he had "no factual basis to disagree with [Mr. Saintilan], he certainly knows his business better than I know his business --." Trial Tr. at 726:1-10. As Complaint Counsel's marketing expert, Professor Moore, testified that, if all three albums were displayed together in record stores as a result of promotional activities relating to the prior albums during the period surrounding the release of the new album, it was possible that some consumers would be confused by the three albums and not buy any Three Tenors album at all. *Id.* at 176:20-177:2.

Complaint Counsel's Response to Proposed Finding Nos. 68-69

These proposed findings are misleading and not supported by the evidence. The purpose of the Three Tenors moratorium was to shield 3T3 from competition. CPF ¶¶ 301-308. The parties were concerned that 3T3 might lose sales to 3T1 and 3T2, and that competition among Three Tenors products might adversely affect the profitability of the 3T3 project. CPF ¶¶ 301-308; CPRF ¶ 65.

There is no support for the proposition that there was any confusing message sent to the trade (*i.e.* , retailers) or the operating companies within the record companies. In the United States, Warner treated 3T3 as a high-priority record, and the marketing campaign for 3T3 in the United States was well-funded. CPF ¶¶ 190-195. Witnesses representing both Warner and PolyGram testified that 3T3 would have been appropriately promoted without the moratorium, and indeed that the moratorium had no significant effect on the resources devoted to advertising and promoting 3T3. "I think that 3T3 would have been appropriately marketed and promoted in the United States without regard for the moratorium with PolyGram." O'Brien 490:19-22. *See also* CPF ¶¶ 323-326. Thus, it was clear to the trade that 3T3 was a high priority.

Likewise, PolyGram executives were not concerned that PolyGram operating companies would not use their best efforts to promote 3T3 at the time of the launch, regardless of whether

they were allowed to discount 3T1 or Warner discounted 3T2. Greene Dep. (JX95) 89:23-90:10, 189:19-190:1 (testifying that he was not concerned that "the 1990 album would take attention or effort away from the 1998 album"). Thus, the message to the operating companies was not confusing.

As to confusion among consumers, the evidence simply does not bear this out as a problem. The "concern" about confusion was not based upon research, data, or observation. According to Saintilan, "It was simply a concern." CPF ¶¶ 347-350. Significantly, there is no evidence that consumers were actually confused in selecting among the various Three Tenors albums. CPF ¶¶ 350. There was no confusion between 3T1 and 3T2 prior to the release of 3T3. CPF ¶ 352.

Any potential confusion could have been avoided without resort to a moratorium. For example, PolyGram designed the cover art for 3T3 and was free to design packaging for 3T3 that was distinct from, and would not be confused with, the older Three Tenors products. CPF ¶ 351. PolyGram and Warner could have used standard marketing techniques to distinguish 3T3 from 3T1 and 3T2, as they did in 1994. CPF ¶ 353. Likewise, 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. CPF ¶ 354.

In addition, record retailers have the incentive and ability to display their products in a manner that does not confuse consumers. PolyGram and Warner could have remedied any consumer confusion by requesting that retailers display 3T3 separately from 3T1 and 3T2 (*e.g.*, not in the same end of aisle display). CPF ¶¶ 356-359.

Professor Moore testified that, although it was "possible" that consumers could be confused among 3T1, 3T2 and 3T3, she saw no evidence in the documents she reviewed of any

actual confusion. Moreover, she suggested that if there were concerns about consumers being confused because of similar packaging and repertoire, that there were standard marketing techniques that could be used to make these products more distinctive, as Warner did in 1994. Moore 262:19-264:7.

Respondents' Proposed Finding No. 70

At the same time, PolyGram believed that it was important to exploit the promotional opportunity created by the Paris concert by discounting and promoting 3T1 in June and July 1998, prior to the release of 3T3. CX 413 (April 29, 1998 memorandum to PolyGram operating companies encouraging them to "aggressively promote the '3 Tenors 1' album and video . . . around the time of the 3 tenors concert");

Complaint Counsel's Response to Proposed Finding No. 70

This proposed finding is largely duplicative of information in CPF ¶¶ 111-116.

Respondents' Proposed Finding No. 71

The opportunity to promote the prior albums in June and July 1998 existed only because of the Paris concert and the new album created by the joint venture. JX94, Saintilan Tr. at 220:23-221:5 ("Only within the context of this new album coming out did we have this opportunity to promote the old album."); Trial Tr. (O'Brien) at 538:6-12 (noting that moratorium was designed to ensure that the operating companies did not "try to take advantage of PolyGram's and Warner's massive publicity campaign" for 3T3").

Complaint Counsel's Response to Proposed Finding No. 71

This proposed finding is misleading. 3T1 has been continuously marketed by PolyGram from its release in 1990 through to the present day, and 3T2 has been continuously marketed by Warner from its release in 1994 through to the present day. 3T1 remained one of the top five selling classical albums each year from 1991 through 1996, and was a top ten seller in 1997. 3T2 was in the top five from 1994 through 1996, and finished as the 12th best-selling classical album in 1997. CX583; CX584; CX585; CX586; CX587; CX588; CX589; CX590.

In addition, the Three Tenors Paris concert would have gone forward with or without the collaboration between Warner and PolyGram, perhaps with 3T3 being distributed by PolyGram or Warner separately, or by another major record company. CPF ¶¶ 320-321.

Respondents' Proposed Finding No. 72

The moratorium was designed to balance the interest in discounting and promoting the prior albums during the period surrounding the Paris concert with the paramount interest in focusing on the new album once it was released in order to maximize the chance that it would be successful. JX 94, Saintilan Tr. at 91:10-21; Trial Tr. (O'Brien) at 538:6-540:22; JX 95, Greene Depo. Tr. at 192:14-21 ("We wanted people to concentrate, because we had a considerable investment in the new album and we wanted to make it a success . . . . [I]t was really sort of setting and time limit and saying to people, look, just – just, you know, do your best with the old album once there is an opportunity but the main focus is the new album.")

Complaint Counsel's Response to Proposed Finding No. 72

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶ 65.

Respondents' Proposed Finding No. 73

The moratorium specifically allowed the PolyGram and Warner operating companies to aggressively discount and promote 3T1 and 3T2 during the periods before and after the critical release period for 3T3. Thus, after receiving requests from several European operating companies for permission to discount 3T1 from June through July 1998, Paul Saintilan and Stephen Greene, the PolyGram employees principally responsible for the Three Tenors project, stated that the operating companies were free to discount 3T1 "around the time of the concert" (which would be a few weeks prior to the release of the new album) if they believed that such discounting would "overall make money for the group." *See* JX 40 (April 8, 1998 e-mail correspondence between Paul Saintilan and Stephen Greene); CX 404 (April 9, 1998 e-mail from Stephen Greene to Bert Cloeckaert).

Complaint Counsel's Response to Proposed Finding No. 73

This proposed finding is largely duplicative of information in CPF ¶¶ 111-116.

Respondents' Proposed Finding No. 74

After learning that the proposal to discount the first album prior to the release of the new album had been approved, Bert Cloeckaert, PolyGram's Vice President responsible for managing PolyGram's European operating companies, informed the operating companies that 3T1 could be discounted to a "high mid price level" for sales "between 15th of June till the end of July . . . ." *See* JX 41A-C (April 10, 1998 Memorandum from Bert Cloeckaert to Classical MD's/Classical Marketing Managers)

Complaint Counsel's Response to Proposed Finding No. 74

This proposed finding is largely duplicative of information in CPF ¶¶ 111-116.

Respondents' Proposed Finding No. 75

In late April, following further internal debate regarding whether discounting of 3T1 should be permitted in June and July, PolyGram again informed its operating companies that they were authorized to "aggressively promote the '3 Tenors 1' album and video . . . around the time of the 3 tenors concert." CX 413 (April 29, 1998 Memorandum from Stephen Greene and Paul Saintilan to European Classical MDs/European Label Managers).

Complaint Counsel's Response to Proposed Finding No. 75

This proposed finding is largely duplicative of information in CPF ¶¶ 111-116.

Respondents' Proposed Finding No. 76

The April 29, 1998 memorandum stressed the reasons why discounting should not be permitted to occur during the initial period following the release of the new album:

> 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). . . . [T]his new policy strikes a balance between maximizing an opportunity on the 'original album' and yet protecting our considerable investment in the new album."

Id.; JX 9 (July 2, 1998 Letter from Paul Saintilan to Anthony O'Brien).

Complaint Counsel's Response to Proposed Finding No. 76

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶ 65.

Respondents' Proposed Finding No. 77

A number of PolyGram operating companies ultimately sought and obtained permission to discount 3T1 through July 1998. *See* JX 95, Greene Depo. Tr. at 207:6-213:14; JX 47 (April 30, 1998 E-mail from Stephen Greene to Dave Tweed) (discussing discounts on U.K. sales of first album beginning July 6, 1998); RX 704 (May 6, 1998 E-mail from Kjeld Stefanson to Stephen Greene (discussing Danish plans for discussing the first album in June and July).

Complaint Counsel's Response to Proposed Finding No. 77

This proposed finding is largely duplicative of information in CPF ¶¶ 111-116.

Respondents' Proposed Finding Nos. 78-79

78. PolyGram's actual pricing data during this time period also shows that PolyGram discounted 3T1 in numerous markets during June and July 1998, including Argentina, Belgium, Germany, France, the United Kingdom, Hong Kong, Ireland, Italy, Japan, the Netherlands, Austria, Portugal and Sweden. *See* RX 709 (1998 AIF Data); JX 95, Greene Depo. Tr. at 207:6-213:14.

79. In France, although there do not to appear to have been any discount sales of the 1990 Album during the moratorium period, more than 80% of the sales of the 1990 Album for the *entire year* were made in June at a 59% discount price. RX 709. In several other countries, including Hong Kong, Spain, Japan, Sweden, and Switzerland, all or nearly all of the unit sales during the time period that the Moratorium was to have been in effect were made at discount prices. *Id.*

Complaint Counsel's Response to Proposed Finding Nos. 78-79

These proposed findings are misleading because they leave out relevant information. PolyGram's "actual pricing data" fails to show moneys rebated to retailers through cooperative advertising. RX709. This omission is significant because providing cooperative advertising funds to retailers has the effect of reducing the wholesale price. CPF ¶ 250.

Respondents claim that some units of 3T1 were sold by PolyGram at a discounted price outside of the United States during the moratorium period. This is not evidence of non-compliance with the moratorium agreement. First, one, and only one, PolyGram operating company (Spain) sought and received permission from Decca and PolyGram (Bert Cloeckaert) to offer 3T1 at a significant discount during the moratorium period. RX725; Greene Dep. (JX95)

146:6-148:9, 149:1-24. This authorization was limited to allowing customers that purchased 3T3 to place a single order for 3T1 at a discounted price. Stip. ¶¶ 146-147. This single order represented the "highest quantity" of discounted product sold during the moratorium period. Cloeckaert Dep. (JX98) 155:17-156:5.

Second, in negotiating the moratorium agreement, Warner and PolyGram recognized that outside of the United States, some discounting during the moratorium period would be unavoidable. JX74 at UMG000203 ("may be some spillage and late compliance"). For example, each company would need to honor commitments made to retailers. PolyGram and Warner agreed to be "completely transparent about these problems, tabling where issues exist and advising why compliance is difficult and when it would take effect." JX1-B. *See also* JX2; JX3; CX452; CX454; CX455; CX456.

Third, Respondents' characterization of the behavior of their foreign operating companies is misleading. For example, the price in Japan, while purportedly a discounted price, was the same price that had been offered since 1997 (*i.e.* , the price of 3T3 was not raised or lowered at any time). RX709 at UMG003016. In the other countries where there was a discounted price offered during the moratorium– Hong Kong, Sweden and Switzerland– it was done without authorization from PolyGram central management. Greene Dep. (JX95) 146:6-149:24.

Respondents' Proposed Finding No. 80

PolyGram's United States operating company – which has never aggressively discounted 3T1 – did not seek to aggressively promote or discount 3T1 during this time period. JX 87, Gore Depo. Tr. at 36:23-39:3 (President of PolyGram Classics U.S. testifying that reducing price level in the United States would not have been justified by any increase in sales and that he was not aware of any time PolyGram had reduced its price level for 3T1 in the United States); Greene Depo. Tr. at 204:16-205:7 (Business Manager for Decca Classics Catalog Develop testifying that he could not recall any occasion where U.S. op co sought permission to discount 3T1 and that there was no evidence in the date of any discounting of 3T1 in the U.S.); CX 608, Fuller Depo. Tr. at 76:20-77:22 (CFO of PolyGram Classics U.S. testifying that he was not aware of any

situations where PolyGram temporarily reduced price level for 3T1 or any other album in the U.S.); RX 709 (AIF Data); RX 713 (U.S. Sales Data).

Complaint Counsel's Response to Proposed Finding No. 80

This proposed finding is incomplete, misleading and not supported by the evidence. First, Respondents concede, and Complaint Counsel agrees, that PolyGram did not promote or discount 3T1 in the United States during the moratorium period. In other words, PolyGram complied with the moratorium agreement in the United States.

In the spring of 1998, Paul Saintilan told Kevin Gore, Senior Vice President and General Manager of PolyGram Classics and Jazz in the United States, about the Three Tenors moratorium. Gore assured Saintilan that PolyGram Classics "would seek to comply." Saintilan Dep. (JX94) 49:16-50:24. Saintilan understood that Gore intended to communicate with PGD regarding the moratorium, and to ensure that PGD complied with its terms as well. Saintilan Dep. (JX94) 50:19-51:15. That this exchange occurred demonstrates that PolyGram executives were genuinely concerned that, absent the moratorium agreement, the U.S. companies would discount 3T1 in the period following the release of 3T3. CPF ¶ 110.

It is true that, in the United States, PolyGram has always classified 3T1 within the "top" price tier. However, this does not mean that PolyGram has not offered 3T1 at a discounted price through price discounts to retailers or by means of cooperative advertising rebates. *See* CPF ¶¶ 249-253.

During the moratorium period, by withholding cooperative advertising funds from U.S. retailers, PolyGram was, in essence, withholding discounts. In the United States, it is common to cause the price of an album to be reduced by means of cooperative advertising. CPF ¶¶ 250-252. Indeed, in September 1994, PolyGram returned to retailers through 3T1 cooperative advertising programs approximately nine percent of the money 3T1 generated. CPF ¶ 252. Moreover,

cooperative advertising funds create an incentive for retailers to place the advertised product on sale in order to move a higher volume of product. CPF ¶ 253; Moore 67:3-16.

In addition, there are ways to offer a discount to retailers without changing the wholesale list price. Gore testified that he believed that 3T1 was, in fact, discounted during 1998. Gore Dep. (JX87) 22:25-23:13.

Given the promotional history of PolyGram Classics in the United States, it is likely that, but for the moratorium, PolyGram would have promoted 3T1 and taken actions that would have caused 3T1 to be offered at a discounted price at retail in the United States. In September 1994 – the first full month after the release of 3T2 – PolyGram spent $57,178.00 on cooperative advertising for 3T1 in the United States. JX103 at UMG0[illegible]407. In August and September 1998– the moratorium period– PolyGram spent $437.50 on cooperative advertising in the United States. RX728. Gore testified that 3T1 was, indeed, promoted in the United States during 1998 (although, as Respondents concede, not during the moratorium period). Gore Dep. (JX87) 20:11-21:10, 39:4-16.

Respondents' Proposed Finding No. 81

This strategy was consistent with PolyGram's general practices, because PolyGram often employs a marketing strategy of creating a release window under which promotional activities relating to catalog releases by an artist are discontinued during the period surrounding a new release by the artist. JX 97, Cloeckaert Depo. Tr. at 66-71, 75-76 98-102. Mr. Cloeckaert testified that this was the most commercially reasonable strategy for 3T3 and the catalog albums in 1998. Complaint Counsel's marketing expert, Professor Moore, testified that record companies consider an artist's catalog albums in developing the marketing plans for a new album by that artist, Trial Tr. at 153:12-154:11, and that Mr. Cloeckaert's strategy for promoting Three Tenors products in Summer 1998 by promoting the prior albums in June and July, and then focusing on the new album when it came out, "makes sense." Trial Tr. at 165:10-175:17.

Complaint Counsel's Response to Proposed Finding No. 81

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 51-53.

Respondents' Proposed Finding No. 82

Professor Moore testified that this strategy of discontinuing promotional activities during a period surrounding the release of a new album by an artist is a reasonable marketing strategy for a new album. Trial Tr. at 158:5-163:4.

Complaint Counsel's Response to Proposed Finding No. 82

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 51-53.

Respondents' Proposed Finding No. 83

PolyGram and Warner also were concerned that, absent a clear message regarding their marketing strategy with respect to the catalog products, their respective operating companies throughout the world – and particularly their European operating companies – would take advantage of the promotional opportunity surrounding the Paris concert and the release of 3T3 in ways that would undermine the initial success of 3T3 and the long-term success of the Three Tenors brand. CX 413 ("The key point to observe is that the 'original' album should not interfere with the launch of the new album."); JX 94, Saintilan Depo. Tr. at 43:5-8, 78-84, 205:7-206:2-, 220:16-22; JX 100, O'Brien 12/6/01 Depo. Tr. at 105:19-106:3.

Complaint Counsel's Response to Proposed Finding No. 83

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 54-55.

Respondents' Proposed Finding No. 84

As Dr. Stockum testified, "free riding can create inefficiency in the market." Trial Tr. at 694:24-695:6; Trial Tr. at 713:20-716:1; Stockum Depo. at 56:13-15.

Complaint Counsel's Response to Proposed Finding No. 84

This proposed finding is misleading because it leaves out relevant information and misstates the evidence. Dr. Stockum testified that, whereas free riding might create inefficiency in the market, if the magnitude of free riding is small, it might not create market distortions. Stockum 716:16-717:13. Dr. Stockum testified that, in this case, the evidence indicated that the magnitude of potential free riding was not significant. Stockum 626:9-638:21, 734:9-25. Dr.

Stockum also testified that there was no contemporaneous evidence of concerns that advertising expenditures for 3T3 would be affected due to lost sales to 3T1 or 3T2, and that he would have expected to see such documentation in the files if the spillover effect were significant. Stockum 626:9-628:6, 721:24-723:1. In other words, Dr. Stockum testified that the free-riding "defense" was not valid.

Respondents' Proposed Finding No. 85

As Dr. Stockum testified, there is one type of free riding, or spillover, in which one party uses the expenditures of another party to sell more of its products without paying for those expenditures. Dr. Stockum testified that this type of free riding could be referred to as a "positive spillover." Trial Tr. at 719:15-20.

Complaint Counsel's Response to Proposed Finding No. 85

Complaint Counsel has no specific response.

Respondents' Proposed Finding No. 86

As Dr. Stockum testified, there is a second type of free riding, or spillover, in which a party takes advantage of the marketing expenditures of another party in a manner that takes sales away from the party that made the expenditures. Dr. Stockum testified that this type of free riding could be referred to as a "negative spillover." Trial Tr. at 720:7:13. Dr. Stockum testified that it was his understanding that, in adopting the moratorium, PolyGram and Warner were concerned about the "negative spillover" that could occur from discounting and promoting 3T1 and 3T2 during the period surrounding the launch of 3T3. *Id.* at 720:14-721:5.

Complaint Counsel's Response to Proposed Finding No. 86

This proposed finding is misleading because it leaves out relevant information. PolyGram and Warner were concerned that 3T3 might lose sales to 3T1 and 3T2 and, as a result, be less profitable. *See* CPRF ¶ 65.

Respondents' Proposed Finding Nos. 87-88

87. As Dr. Stockum testified, "obtaining confidential marketing information in the context of [a] joint venture" might "enhance the ability or opportunity for the joint venture partners to compete with the joint venture," and that this "would make the threat of free-riding activity to the detriment of the joint venture greater than in a situation where the free rider doesn't have that

confidential information" because the "information could facilitate his ability to compete against the joint venture product." Trial Tr. at 756:2-13.

88. As Dr. Stockum testified, a provision that ensures the partners in a joint venture "will not use the confidential competitive information of the venture to compete with the venture" "certainly makes economic sense in some circumstances," and that "[i]t may well be reasonably necessary to the venture to make sure that the partners of the venture don't use the venture's information to compete with the venture." Trial Tr. at 752:17-753:2.

Complaint Counsel's Response to Proposed Finding Nos. 87-88

These proposed findings are misleading and not supported by the evidence. *See* CPRF ¶¶ 41-50.

Respondents' Proposed Finding Nos. 89-90

89. Dr. Stockum testified he was unaware of any factors other than the Paris concert and the release of 3T3 that "would have changed PolyGram's incentives with respect to advertising, promotion or pricing of Three Tenors 1" in 1998, and that the same was true with respect to Atlantic's incentives to advertise, promote and price 3T2 in 1998. Absent the Paris concert and the release of 3T3, Dr. Stockum could "point to no particular factors" that would have led PolyGram or Atlantic to do anything differently with respect to 3T1 and 3T2 in 1998 than they had done in 1997. Trial Tr. at 667:16-668:5. Professor Moore likewise was unable to identify anything other than the Paris concert and the release of 3T3 that would have affected the parties incentives to promote the prior albums. Trial Tr. at 150:21-151:5.

90. As Dr. Stockum testified that, with the Paris concert and the release of 3T3, absent the moratorium, "one might expect to see behavior by PolyGram and Warner, promotional behavior, advertising behavior and discounting behavior, that would not have occurred if the joint venture had not been formed." Trial Tr. at 673:4-13.

Complaint Counsel's Response to Proposed Finding Nos. 89-90

These proposed findings are misleading and not supported by the evidence. *See* CPRF ¶ 71.

Respondents' Proposed Finding No. 91

As Complaint Counsel's marketing expert, Professor Moore, testified that, if 3T2 were promoted during the moratorium period, it was "quite reasonable" to believe that some consumers would come to record stores "because they saw the marketing that the joint venture paid for" and that they would purchase 3T2 instead of the joint venture product if the prior products were being promoted in the store. Trial Tr. at 145:5-147:11. Under this scenario, PolyGram and Warner each would have paid half of the relevant advertising for 3T3, but the

100% of the benefit from that advertising would have been obtained by the party selling 3T2. *Id.* at 146:20-25. The same would hold true with respect to any sales of 3T1. *Id.* at 147:7-11.

Complaint Counsel's Response to Proposed Finding No. 91

This proposed finding is misleading and misstates the evidence. As PolyGram and Warner both owned a catalogue Three Tenors item, both companies benefitted from the potential spillover effect. PolyGram benefitted from incremental sales of 3T1; Warner benefitted from incremental sales of 3T2. This is in contrast to the situation in 1994, where Warner marketed 3T2 aggressively and successfully without any restrictions on 3T1. CPF 233-242, 255-256. In 1994, all of the spillover to older Three Tenors products went to PolyGram, which, unlike in 1998, contributed nothing to the marketing and advertising of the new Three Tenors product.

That advertising for one product might benefit another company's product is a ubiquitous phenomenon. CPF ¶¶ 312-314. Within the recorded music industry, the diversion of sales identified by Respondents is commonplace: Advertising intended to benefit one album often leads to sales of competing albums (perhaps an older album by the same artist on a different label, perhaps an album by an entirely different artist). CPF ¶ 315. For example, a strong, popular album creates spillover effects that are beneficial to the entire recorded music industry. For this reason, both labels and retailers often blame slow overall store traffic on the absence of heavily-advertised major new releases during a particular fiscal quarter. CPF ¶ 316.

Respondents' Proposed Finding No. 92

The parties recognized that the Paris concert and the release of the new album created an important opportunity for promoting Three Tenors products that existed only because the joint venture existed, and wanted to ensure that their substantial expenditures that created this opportunity were directed towards sales of the new album rather than the prior albums. *See* JX 100, O'Brien 12/6/01 Depo. Tr. at 98-107; JX 94, Saintilan Depo. Tr. at 220-21; JX 89, Stainer Depo. Tr. at 76-80.

Complaint Counsel's Response to Proposed Finding No. 92

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 71, 101.

Respondents' Proposed Finding No. 93

This concern was particularly acute with respect to WMI – the Warner entity responsible for distribution and marketing outside the United States – because WMI marketed and distributed 3T2 but had no financial interest in 3T3. Trial Tr. (O'Brien) at 502-512, 527-38.

Complaint Counsel's Response to Proposed Finding No. 93

This proposed finding is misleading and confusing because it is unclear what "concern" was particularly acute. The "concerns" that led to the moratorium agreement are described in CPF ¶¶ 302-308 and CPRF ¶ 65.

Respondents' Proposed Finding Nos. 94-96

94. While Mr. O'Brien and Mr. Hoffman were negotiating the Concert/License Agreement, Ramon Lopez – the Chairman of WMI – sought to condition Atlantic's use of 3T2 as part of the greatest hits and box set albums, which were to be produced as part of the joint venture, on allowing WMI to significantly discount 3T2 during the period surrounding the release of 3T3. CX 566; Trial Tr. (O'Brien) at 502-512.

95. Mr. O'Brien believed that the condition sought by Mr. Lopez would "blow the deal"; accordingly, he wrote to Bob Daly, the most senior executive of Warner Music Group, to explain that the condition sought by Mr. Lopez was unreasonable. CX 566; Trial Tr. (O'Brien) at 509:20 –512:1.

96. Mr. O'Brien entered into the Concert/License Agreement believing the issue had been resolved and "very confident that [Atlantic and PolyGram] would be able to use the [3T2] repertoire without the conditions that would seriously undermine the launch and viability of [3]T3." Trial Tr. (O'Brien) at 511:15-512:1.

Complaint Counsel's Response to Proposed Finding Nos. 94-96

There appears to be a typographical error in the citations in these proposed findings. Complaint Counsel assumes that the intended citation was to CX366, not CX566. In any event, these proposed findings are misleading because they leave out relevant information. The relevant

documents indicate that WMI's insistence that Rudas reduce the royalty on 3T2 could "blow this deal" from Rudas', not PolyGram's, perspective. In late 1997, WMI was insisting that Rudas contribute to the advertising campaign for 3T2 between May and December 1998 by reducing the royalty payments on 3T2. CX366 at 3TEN00007338. O'Brien was concerned that insisting that Rudas pay for this would cause Rudas not to agree to work with Warner on 3T3.

Rudas was not concerned about the price discounting by Warner where the discount came from Warner's net profits– indeed, Rudas encouraged discounting and advertising during the moratorium period, so long as there was no reduction in royalties. RX701 (Rudas representative writes "we agree that a sales incentive program should be implemented for the 1994 album in connection with the upcoming release of the 1998 album," urging WMI to promote 3T2 at retail and encouraging "sale pricing" but not agreeing to reduce the royalties on 3T2). This should not be surprising, given that Rudas would earn the same royalty but on a likely larger volume of sales if 3T2 were advertised and discounted.

Respondents' Proposed Finding No. 97

However, even after the Concert/License Agreement was entered into, WMI developed plans to discount 3T2 in Europe from May 17, 1998 through December 31, 1998, a period that included the proposed moratorium period. Trial Tr. (O'Brien) at 527:20-538:12.

Complaint Counsel's Response to Proposed Finding No. 97

This finding is largely duplicative of information in CPF ¶¶ 123-128.

Respondents' Proposed Finding No. 98

Atlantic explained to Mr. Lopez that WMI's proposed European discounting campaign, under which WMI would be seeking to "take advantage of [Atlantic's] and PolyGram's massive publicity campaign to sell [its] catalog album," "could have a serious impact on PolyGram's marketing of the new Three Tenors album," JX 7 (Memorandum from Val Azzoli to Ramon Lopez).

Complaint Counsel's Response to Proposed Finding No. 98

This proposed finding is misleading because it leaves out relevant information. In response to Val Azzoli's memo, Ramon Lopez stated that WMI's plan to discount was in direct response to PolyGram's discount campaign that was already in effect. JX8 at 3TEN00001456 ("You should be aware that PolyGram has been marketing and pricing very aggressively their 1990 album for approximately a month and a half already . . .") He further pointed out that marketing catalogue albums during the release of a new release or related event was a "traditional practice of [the music] industry." *Id.*

Respondents' Proposed Finding Nos. 99-100

99 Mr. O'Brien testified that WMI's proposed European discounting campaign "could have had a seriously negative effect on our – on the launch of our '98 [album]," Trial Tr. at 536:21-537:10, and thus was not in the overall best interests of Warner Music Group.

100. Because of the moratorium, Mr. O'Brien ultimately was able to persuade WMI not to conduct its European discounting campaign during the moratorium period. Trial Tr. at 527:26-538:12.

Complaint Counsel's Response to Proposed Finding Nos. 99-100

These proposed findings are misleading because they leave out relevant information. Warner was concerned that discounting of 3T2 by Warner would lead PolyGram to discount 3T1. CX366. This, in turn, would result in potential lost sales of 3T3, and decreased profits for 3T3. *See* CPRF ¶ 65.

Respondents' Proposed Finding No. 101

Absent the moratorium, PolyGram and Warner may have spent less money promoting 3T3, particularly if aggressive promotion and discounting of 3T1 and 3T2 during the release period led to lower sales of 3T3. JX 100, O'Brien 12/6/01 Depo. Tr. at 111:5-112:5; JX 101, O'Brien 1/5/01 Depo. Tr. at 58:24-59:12. Dr. Stockum testified that Atlantic might have spent less money advertising and promoting 3T3 if "people were buying 3T1 and 3T2 instead." Trial Tr. at 729:11-25; *id.* at 730:17-731:3. Complaint Counsel's marketing expert, Professor Moore, testified that PolyGram and Atlantic were likely to alter their promotional spending on 3T3

depending on how it performed during the initial period following its release. Trial Tr. at 197-99.

Complaint Counsel's Response to Proposed Finding No. 101

This proposed finding is inaccurate and not supported by the evidence. Advertising expenditures were not affected by the moratorium. At trial, O'Brien testified: "I think that 3T3 would have been appropriately marketed and promoted in the United States without regard for the moratorium with PolyGram." O'Brien 490:19-22. *See also* CPF ¶¶ 323-325.

Dr. Stockum testified that, if the spillover had a significant effect on sales of 3T3, it is possible that Atlantic would have increased its advertising expenditures on 3T3. Stockum 729:11-20. *See also* Stainer Dep. (JX89) 75:9-21 (PolyGram's U.K. operating company increased its expenditures on advertising after realizing that 3T3's sales were disappointing notwithstanding the moratorium agreement). Likewise, Dr. Ordover acknowledged in his deposition that discounting and promotion of 3T1 by PolyGram might actually increase (rather than decrease) Warner's incentive to promote 3T3. Stated differently, the moratorium might actually decrease Warner's incentive to advertise 3T3. Ordover Dep. (JX90) 115:16-116:13, 118:8-119:1. Significantly, however, both Dr. Stockum and Dr. Ordover evaluated the evidence in this case and found no support for the proposition that the spillover effect would be significant. Stockum 643:7-643:25; CPF ¶¶ 327-332. *See also* CPRF ¶ 108.

Respondents' Proposed Finding No. 102

PolyGram and Warner limited the moratorium to apply only to two older catalog cd's (3T1 and 3T2) during a ten-week period surrounding the release of 3T3. Trial Tr. (O'Brien) at 516:13-517:13; JX 94, Saintilan Depo. Tr. at 48:2-11 (testifying that the moratorium was intended to run from "just prior to the release of the album through just prior to the Christmas period" and that it entailed an agreement "[t]hat we wouldn't seek to create confusion and undermine the success of the new album be aggressively advertising price discounting of the prior albums").

Complaint Counsel's Response to Proposed Finding No. 102

This proposed finding is incomplete and therefore misleading. The terms of the moratorium agreement are set forth in CPF ¶¶ 49-55.

Respondents' Proposed Finding No. 103

The moratorium was designed to address PolyGram's and Warner's specific concerns regarding the need to ensure a successful launch of 3T3 and to prevent free riding and opportunistic behavior during the release period, while ensuring that there would be no restrictions on aggressive competition between 3T1 and 3T2 outside the moratorium period. JX 9; CX 413; Trial Tr. (O'Brien) at 538:6-540:22.

Complaint Counsel's Response to Proposed Finding No. 103

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 54-55, 65.

Respondents' Proposed Finding No. 104

The relevant PolyGram and Warner witnesses testified that the Three Tenors joint venture was unique in a number of respects, that the moratorium was necessary because of the unique features of the joint venture, and that they were unaware of any other situation in which a restraint like the moratorium had been considered or adopted. Trial Tr. (Hoffman) at 358-365; JX 101, O'Brien 1/5/01 Depo. Tr. at 97:24-98:4. Complaint Counsel's marketing expert, Professor Moore, was unable to identify any other similarly structured joint venture between two record companies. Trial Tr. at 188:15-191:1, 258:8-259:15.

Complaint Counsel's Response to Proposed Finding No. 104

This proposed finding is misleading and not supported by the evidence. The purpose of the Three Tenors moratorium was to shield 3T3 from competition because the parties were concerned that 3T3 might lose sales to 3T1 and 3T2 and that competition among Three Tenors products might adversely affect the profitability of the 3T3 project. CPF ¶¶ 302-308. It was not the structure of the joint venture that caused concern about lost sales, but rather the fact that 3T3 was not sufficiently differentiated from 3T2 or 3T1. As Anthony O'Brien testified:

> [T]he problem that we had was that The Three Tenors [are] perhaps three of the laziest performers we have ever seen performing this type of music, and what we were hoping for, when we were making the '98 concert, was to have new and exciting repertoire. . . And they're not particularly given to sort of learning new arias, and so Nessun dorma! would come back again, or maybe Carreras would sing one of the Pavarotti songs or vice versa. And so although the album was different . . . it wasn't, perhaps, quite as new and exciting as we had hoped it to be.

O'Brien I.H. (JX101) 74:2-16.

O'Brien explained this further at trial:

> During that negotiation and during our negotiation, that is, Atlantic's negotiation with Rudas, we were trying very hard to get commitments from Rudas and from the tenors that we would have new and exciting repertoire. We knew that the Three Tenors, who have slightly lazy work habits, work ethics, would not give us an album that would be entirely new. We didn't know how much of it would be overlap, but we knew that it was an event concert, we knew there would be some overlapping repertoire, and that led to our concern, coupled of course with the, you know, visual similarity that I described earlier.

O'Brien 543:7-545:22.

Respondents' Proposed Finding No. 105

As Dr. Stockum testified that, as a matter of economics, in considering the potential competitive effects of the moratorium, "we are not just concerned about the ten weeks" during which the moratorium would have been in place. Trial Tr. at 732:1-16.

Complaint Counsel's Response to Proposed Finding No. 105

This proposed finding is misleading because it leaves out relevant information. Dr. Stockum was asked to assume that, because of free riding, Atlantic spent substantially less on advertising during a period of time after the moratorium period. However, this assumption is not supported by the evidence: there is no evidence of a significant free-riding problem in this case. CPF ¶¶ 309-346.

Respondents' Proposed Finding No. 106

The contemporaneous documentation shows that PolyGram and Warner employees believed the moratorium could have increased the aggregate output of Three Tenors products by maximizing the chance that 3T3 would be successful, thereby leading to increased sales of all Three Tenors products in the long-term. JX 7; CX 413; RX 701.

Complaint Counsel's Response to Proposed Finding No. 106

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 54-55.

Respondents' Proposed Finding No. 107

The contemporaneous documentation shows that PolyGram and Warner employees believed that the parties were concerned that aggressive discounting of the prior albums during the period surrounding the release of the new album could have jeopardized the entire joint venture, thereby making it less likely that the parties would release 3T3 or the greatest hits or box set albums. CX 366 (Memorandum from O'Brien to Daly stating that WMI's plans to discount 3T2 could "blow the deal").

Complaint Counsel's Response to Proposed Finding No. 107

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 54-55, 56, 94-95.

Respondents' Proposed Finding No. 108

As Mr. O'Brien testified, by increasing the likelihood that 3T3 would be successful, the moratorium could have led to higher promotional and marketing expenditures on 3T3 than would have occurred absent the moratorium. JX 100, O'Brien 12/6/01 Depo. Tr. at 111:5-112:5; JX 101, O'Brien 1/5/01 Depo. Tr. at 58:24-59:12. Complaint Counsel's marketing expert, Professor Moore, also testified that PolyGram and Warner were likely to adjust their marketing expenditures for 3T3 based on how it performed in the marketplace. Trial Tr. at 197:2-200:14.

Complaint Counsel's Response to Proposed Finding No. 108

This proposed finding is misleading, not supported by the evidence and misconstrues the testimony of O'Brien and Professor Moore. Neither witness suggests that advertising expenditures for 3T3 are related to the moratorium agreement. In fact, O'Brien testified that 3T3 would have been aggressively advertised and marketed by Warner following its release (August to October 1998) – with or without the moratorium agreement. CPF ¶ 323; *see also* CPRF ¶ 101.

Advertising expenditures during the post-moratorium period would depend upon the company's expectations as to whether that investment would or would not produce a sufficient return (*i.e.*, generate incremental sales). Moore 158:18-159:17, 199:2-23. In other words, when the marketing executives project the future sales of an album for purposes of determining advertising expenditures, they consider the market conditions during the period when the advertising will run (as opposed to a prior period when market conditions may have been different). To the extent that the price and advertising restraints affected sales of 3T3 during August through October 1998, that artificial sales boost would expire when the moratorium expired on October 15. As the moratorium does not affect sales of 3T3 during the post-moratorium period, there is no reason to expect that the moratorium would affect advertising expenditures during the post-moratorium period.

Respondents' Proposed Finding No. 109

PolyGram and Warner employees believed that any increase in sales associated with discounting and promotion of 3T1 and/or 3T2 during the moratorium likely would have been outweighed by the decreased sales of 3T3 associated with such discounting and promotional activities, and that the moratorium thus was likely to increase the aggregate output of Three Tenors products. JX 7; JX 100, O'Brien 12/6/01 Depo. Tr. at 99:2-17; JX 94, Saintilan Depo. Tr. at 43:5-8, 78-84, 205:7-206-20, 220:16-22; JX 89, Stainer Depo. Tr. at 57:14-58:22, 64:9-65:14, 75:22-76:14.

Complaint Counsel's Response to Proposed Finding No. 109

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 54-55.

Respondents' Proposed Finding No. 110

Despite the contemporaneous documentation regarding the parties reasons for adopting the moratorium, Complaint Counsel's expert economist, Dr. Stockum, testified that it was his understanding that "[t]he contemporaneous documents are pretty much silent on that issue" of whether the parties were trying to balance an effort to "capitalize on the positive spillover effect" around the time of the concert by promoting and discounting 3T1 and 3T2 against an effort to create "a window of time when Three Tenors 3 sales could be maximized without having a negative spillover effect." Trial Tr. at 721:24-722:13.

Complaint Counsel's Response to Proposed Finding No. 110

This proposed finding is misleading because it misstates the evidence and leaves out relevant information. The "contemporaneous documents" do not support Respondents' contentions. CPRF ¶¶ 54-55. Dr. Stockum testified that he had not "seen anything to confirm" Respondents' hypotheses about the reasons for the creation of the moratorium. Stockum 626:9-628:6, 721:24-722:13. Dr. Stockum further testified that he would have expected to see such documentation in the files if the spillover effect were significant. Stockum 722:14-723:1. *See also* CPF ¶¶317-332.

Respondents' Proposed Finding No. 111

PolyGram and Warner employees testified that they did not believe the moratorium would have any effect on the price of 3T1 or 3T2 in the United States, because those products

never have been sold at mid-price in the United States and continued to be sold with the normal range of discounts and allowances in the United States during the moratorium period. Complaint Counsel's marketing expert, Professor Moore, testified that temporary price reductions to mid-price are not used to promote records in the United States. Trial Tr. at 186:17-22, 188:6-14.

Complaint Counsel's Response to Proposed Finding No. 111

This proposed finding is irrelevant, misleading and not supported by the evidence. If what Respondents assert were true, there would be no need for an agreement with Warner. Moreover, this proposed finding fails to consider the fact that the price of 3T3 may have decreased if there were competition from 3T1 and 3T2.

Respondents' contention is not supported by the evidence. Respondents provide no citations for their assertions about the purported testimony of PolyGram and Warner employees with regard to the effect of the moratorium on, or the pricing history of, 3T1 and 3T2. However, it is clear that PolyGram has reduced the price of 3T1 in the United States substantially by means of cooperative advertising rebates, including on a temporary basis. CPF ¶¶ 250-254; CPRF ¶ 80. Absent the moratorium, additional discounting of 3T1 and/or 3T2 may have taken place, perhaps bringing the price to a mid-level.

Respondents' Proposed Finding Nos. 112-113

112. PolyGram's marketing expert, Professor Jerry Wind of the Wharton School, opined that the moratorium represented a reasonable commercially sound marketing strategy for developing the Three Tenors brand and maximizing the potential for the long-term success of Three Tenors products. RX 717, Wind Report at 16-17; JX 91, Wind Depo. Tr. at 9:7-10:10, 16:3-23:12, 26:7-27:8, 36:22-37:13, 49:2-50:24, 60:15-63:22.

113. Professor Wind also opined that, because retailers were free to adjust their purchasing patterns in light of the moratorium's limited duration, this strategy was unlikely to have any adverse effect on consumers. RX 717 Wind Report at 20.

Complaint Counsel's Response to Proposed Finding Nos.112-113

These proposed findings are irrelevant and not supported by the evidence. CPRF ¶¶ 51-53. Dr. Wind admits that he did not review the evidence in this case to determine if the moratorium was actually necessary, as opposed to merely theoretically or "plausibly" necessary. CPF ¶ 366.

Dr. Wind has not evaluated marketing conditions surrounding the release of 3T3 in the United States during 1998. Dr. Wind reviewed no deposition testimony of any individual responsible for marketing 3T3 in the United States, and indeed no deposition testimony of any Warner employee. CPF ¶ 366. In addition, Dr. Wind has not studied the recorded music industry, has not worked in the recorded music industry, and has not consulted to the recorded music industry. Wind Dep. (JX91) 5:16-24.

Accordingly, Dr. Wind's testimony should be given little weight.

Respondents' Proposed Finding No. 114

PolyGram's expert economist, Professor Janusz Ordover of New York University, opined that the moratorium may well have been pro-competitive in that it prevented "free riding" and thus increased may have increased the aggregate output of Three Tenors products. RX 716, Ordover Report at 3, 12-20; JX 90, Ordover Depo. Tr. at 52:11-77:7.

Complaint Counsel's Response to Proposed Finding No. 114

This proposed finding is not supported by the evidence. Respondents have failed to demonstrate a plausible and valid free-rider problem. CPF ¶¶ 309-346. In addition, Dr. Ordover's report should be given little weight in this case. CC Brief 47-50; CPF ¶¶ 330-334.

Respondents' Proposed Finding Nos. 115-116

115. Dr. Stockum testified that he had not seen any documents indicating that the purpose of the moratorium was to restrict competition between 3T1 and 3T2. Trial Tr. at 837:19-838:8 ("I have not seen a document specific to that issue of restrict – that the concern was to restrict competition between 3T1 and 3T2.")

116. Dr. Stockum testified that he had not seen any documents indicating that the "purpose of the moratorium was to make sure that the price of 3T3 was not affected by 3T1 or 3T2." Trial Tr. at 838:9-14.

Complaint Counsel's Response to Proposed Finding Nos. 115-116

These proposed findings are misleading because they leave out relevant information. The purpose of the moratorium was to ensure that sales of 3T3 were not lost to 3T1 and 3T2. CPRF ¶ 65.

Respondents' Proposed Finding No. 117

Dr. Stephen Stockum, complaint counsel's expert economist, testified that Respondents' procompetitive justifications for the moratorium are "plausible." Stockum Depo. Tr. at 517:15-21; Trial Tr. at 643:7-644:16.

Complaint Counsel's Response to Proposed Finding No. 117

This proposed finding is misleading and misstates the evidence. Dr. Stockum has testified that it is plausible that some consumers would see the advertisements for 3T3 but buy 3T1 and 3T2 instead. However, Dr. Stockum never testified that this phenomenon alone constituted a plausible procompetitive justification for the moratorium. CPRF ¶ 110.

During trial, Respondents asked Dr. Stockum how he testified at deposition, but were careful not to show Dr. Stockum or the court his actual deposition testimony and interrupted several times so as not to let Dr. Stockum explain his answer. Stockum 642:17-644:17 ("That was– I seem to recall that that was my answer to that. If you'd like, we could turn to my deposition and see exactly what I said. Q: I think your recollection is sufficient."). There appears to be a typographical error in Respondents' citation to Dr. Stockum's testimony, as there is no page 517 of Dr. Stockum's deposition. Regardless, Dr. Stockum actually testified that it was plausible that some spillover might occur from 3T3 to 3T2 and 3T1, but that this did not rise

to the magnitude to demonstrate a problem. Stockum 643:7-643:25. Dr. Stockum's deposition testimony is as follows:

> Q. You refer -- later in that paragraph you ask what I take to be a rhetorical question, "Would a price-fixing agreement applicable to all classical albums therefore be justified?" Did you mean to suggest by that rhetorical question that there was no significant distinction in your view between a -- the moratorium agreement here with respect to Three Tenors 1 and Three Tenors 2 and a comparable agreement between PolyGram and Warner with respect to all classical albums, no significant differences for purposes of analyzing the competitive effect of those two?
>
> A. No, the point I'm making there is just that the mere fact that there -- of spillover, or as you said, I think you termed earlier some plausible spillover effect, does not in and of itself justify what would otherwise be an anti-competitive agreement. There needs to be something beyond having a bit of a story there. That's all I'm getting at.
>
> Q. But the more of a story you have, the more likely it is to justify it, correct, and you have much more of a story to tell if you're talking about the two closest substitutes for the new joint venture product rather than talking about all classical albums, right?
>
> A. Well, one bit of terminology that's sometimes used is that one need not have a mere plausible efficiency story, but you need to

have evidence to validate it. It's -- those are terms that are used sometimes. And so, you know, having the mere story is one thing, but if you can't show at least -- you know, maybe not prove the magnitude but show the existence and substantiality of it through some degree of factual or empirical endeavor, then one should dismiss that story.

Stockum Dep. (JX85) 154:8-155:16.

Respondents' Proposed Finding No. 118

As Dr. Stockum testified, there would be "some economic plausibility" to PolyGram's procompetitive justifications if "the parties were attempting to capitalize on the positive spillover effect from the joint venture in an earlier period before the launch of the product and then trying to create a window to prevent a negative spillover effect during the launch of the product." Trial Tr. at 723:2-15.

Complaint Counsel's Response to Proposed Finding No. 118

This proposed finding is inaccurate and not supported by the evidence. CPRF ¶ 65.

Respondents' Proposed Finding Nos. 119-122

119. As Dr. Stockum testified, it is "possible," "under certain circumstances," that "[c]ertain agreements that would be anticompetitive if they were naked may be procompetitive if they're entered into in connection with a joint venture." Trial Tr. at 646:3-8; Trial Tr. at 691:23-694:8.

120. As Dr. Stockum also testified, there is no evidence of any actual competition in the United States that would have occurred but for the moratorium, but that did not occur because of the moratorium. JX 85, Stockum Depo. Tr. at 136; Trial Tr. at 678:24-670:11.

121. Dr. Stockum testified that he did not know "whether or to what extent the total advertising or promotion expenditures on Three Tenors 1 or Three Tenors 2 during the period from June 1 through October of 1998 was less than it would have been absent the moratorium agreement." Trial Tr. at 678:24-679:5.

122. Dr. Stockum testified that he was not "aware of any evidence that in the United States PolyGram would have discounted Three Tenors 1 differently in 1998 if there had been no moratorium agreement in the United States." Trial Tr. at 679:6-11.

Complaint Counsel's Response to Proposed Finding Nos. 119-122

These proposed findings are misleading and not supported by the evidence. Whether Dr. Stockum was aware of certain evidence does not mean that this evidence does not exist. In particular, it is likely that had there been no moratorium, PolyGram and Warner would have provided retailers cooperative advertising funds for 3T1 and 3T2 around the time of the launch of 3T3, just as PolyGram did in 1994. CPF ¶ 252. But for the moratorium, the parties would have made unilateral decisions on pricing and advertising. Kevin Gore, Senior Vice President and General Manager of PolyGram Classics and Jazz during 1998 and currently President of Universal Classics, testified in his deposition that if he had found out that Warner was discounting 3T2 during the moratorium period, PolyGram's pricing and discounting decisions for 3T1 could have been affected. Gore Dep. (JX87) 111:15-22, 113:4-11.

These proposed findings also fail to consider that the price of 3T3 may have been decreased if it faced competition from 3T1 and 3T2.

Dr. Stockum's "fundamental conclusions" are that the moratorium agreement has "a clear anticompetitive potential" and falls "within the category of restraints that can be very clearly concluded to be likely to be anticompetitive." Stockum 581:19-582:6.

Respondents' Proposed Finding No. 123

As Dr. Stockum testified, to do a "complete and comprehensive analysis of the Three Tenors moratorium" of the moratorium's actual competitive effect, if any, one would need to take into account "many additional factors," including: "market definition, market share, analysis of actual advertising practices and discounting practices, to name a few." Trial Tr. at 647:10-649:17; JX 85, Stockum Depo. Tr. at 135:24-136:16.

Complaint Counsel's Response to Proposed Finding No. 123

This proposed finding is irrelevant. Complaint Counsel need not do a full rule of reason analysis in order to establish that the effect of the moratorium was likely to be anticompetitive. CC Brief at 27-41.

Respondents' Proposed Finding No. 124

As Dr. Stockum testified, the moratorium was "far less restrictive" than the hypothetical restraint described in Example 10 of the FTC & DOJ Antitrust Guidelines for Collaborations Among Competitors ("Guidelines") (April 2000), which the Guidelines stated may be subject to analysis under the rule of reason. JX 85, Stockum Depo. Tr. at 146:3-7; Trial Tr. at 699:9-704:1.

Complaint Counsel's Response to Proposed Finding No. 124

This proposed finding is misleading and misstates the rationale of the Guideline's analysis of Example 10. *See* CC Brief at 66-67.

Respondents' Proposed Finding No. 125

Dr. Stockum testified that he is not aware of any prior academic or judicial analysis of a restraint like the proposed moratorium. JX 85, Stockum Depo. Tr. at 193-94.

Complaint Counsel's Response to Proposed Finding No. 125

This proposed finding is misleading and not supported by the evidence. Dr. Stockum cited a number of articles in his report and testified that he had studied a number of analyses of advertising bans, including short-term advertising bans. JX104 (Stockum Expert Report); Stockum 592:20-600:10.

Respondents' Proposed Finding Nos. 126-131

126. As Dr. Stockum testified, "you wouldn't expect to find an effect on the price" of a large group of products generally from a restriction on advertising of two products within that group of products, and that "price is a pretty good proxy for effect on output." As Dr. Stockum further testified, he did not do any analysis of the actual effects of the moratorium's restriction on advertising 3T1 and 3T2 in the United States. Trial Tr. at 653:22-655:6; *id.* at 661:16-665:4.

127. As Dr. Stockum testified, because rules that discourage joint venture partners from forming joint ventures in the first place and from investing more resources in joint ventures can

have anticompetitive effects, and a restraint thus could be procompetitive even though it was adopted after the formation of the joint venture and thus was not essential to the formation of the joint venture. Trial Tr. at 684:4-688:25; Trial Tr. at 704:16-706:4; Stockum Depo. Tr. at 142-43. RX 717, Ordover Report at 9-10.

128. As Dr. Stockum testified when asked whether a restraint could "facilitate the activity of the venture even if it's not essential to the operation of the venture," that "[u]nder some circumstances," a restraint "might not be essential to the creation, it might not be essential to the operation, but it might increase the efficiency of the operation." Trial Tr. at 689:1-8; *id.* at 710:23-711:1.

129. As Dr. Stockum testified, a restraint adopted in the context of a joint venture could be procompetitive even if it "did not relate directly to the new product being created by the joint venture." Trial Tr. at 693:13-694:23.

130. As Dr. Stockum testified, in a worldwide joint ventures, there can be inefficiencies associated for developing different policies for different countries. Trial Tr. at 779:16-783:19.

131. Complaint Counsel have not alleged the moratorium had any actual anticompetitive effect in any relevant market, and Dr. Stockum testified that he did not conduct any of the analyses necessary to evaluate the actual, net competitive effects, if any, of the moratorium. Stockum Depo. Tr. at 42:22-43:16; Trial Tr. at 649:25-652:18.

Respondents' Proposed Finding Nos. 126-131

These findings are misleading, irrelevant and not supported by the evidence. Complaint Counsel has alleged that the moratorium was likely to have anticompetitive effects, and Dr. Stockum analyzed the likely effects and concluded the moratorium agreement is likely to be anticompetitive. Stockum 581:19-582:6, 639:10-641:7; JX104 (Stockum Expert Report).

Respondents' Proposed Finding Nos. 132-137

132. Professor Moore, Complaint Counsel's marketing expert, identified several alternatives to the moratorium, which included: (1) encouraging the Three Tenors to perform different songs, and more English and French-language songs, for 3T3; (2) having a "guest artist" perform songs along with the Three Tenors at the Paris concert; (3) using different packaging for the 3T3 compact disc; (4) placing various additional stickers on the cover of 3T3; and (5) producing a larger booklet for 3T3. Trial Tr. at 108:20-140:3.

133. Professor Moore has never been involved in creating a joint venture, negotiating a joint venture agreement, operating a joint venture, or participating in a joint venture. Trial Tr. at 141:4-12.

134. Professor Moore has not been involved in developing the marketing plans for a new release since 1995. Trial Tr. at 210:24-211-25.

135. Professor Moore never has been involved in developing the marketing plans for a release as significant as 3T3. Trial Tr. at 212:1-12.

136. Professor Moore did not evaluate whether any of her suggested alternatives would have had any effect on sales of Three Tenors products, or of whether any of them would have been as effective as the moratorium in addressing the concerns that gave rise to the moratorium, analyze whether her alternatives were practicable, or attempt to quantify how many consumers would have changed their purchasing decisions if her alternatives had been adopted. Trial Tr. at 225:9-226:6, 239:16-240:2, 241:7-242:11, 246:9-247:21, 271:20-272:1.

137. As Professor Moore testified, there is no reason to believe that the relevant PolyGram and Warner executives were not making decisions regarding the repertoire, packaging, and promotional materials for 3T3 based on what they believed "would be best for the success of 3T3." Trial Tr. at 207:9-13.

Complaint Counsel's Response to Proposed Finding Nos. 132-137

These proposed findings are misleading because they leave out relevant information and misstate Professor Moore's testimony. Professor Moore's proposals are based on the statements of Warner and PolyGram executives, who explained that the reason that the concern about lost sales to catalog items was particularly significant for 3T3 was because 3T3 was not sufficiently differentiated from 3T2 or 3T1. As Anthony O'Brien testified:

> [T]he problem that we had was that The Three Tenors [are] perhaps three of the laziest performers we have ever seen performing this type of music, and what we were hoping for, when we were making the '98 concert, was to have new and exciting repertoire. . . . And they're not particularly given to sort of learning new arias, and so Nessun dorma! would come back again, or maybe Carreras would sing one of the Pavarotti songs or vice versa. And so although the album was different . . . it wasn't, perhaps, quite as new and exciting as we had hoped it to be.

O'Brien I.H. (JX101) 74:2-16.

O'Brien explained this further at trial:

> During that negotiation and during our negotiation, that is, Atlantic's negotiation with Rudas, we were trying very hard to get commitments from Rudas and from the tenors that we would have new and exciting repertoire. We knew that the Three Tenors, who have slightly lazy work habits, work ethics, would not give us an album that would be entirely new. We didn't know how much of it would be overlap, but we knew that it was an event concert, we knew there would be some overlapping repertoire, and that led to our concern, coupled of course with the, you know, visual similarity that I described earlier.

O'Brien 543:7-545:22.

O'Brien explained that, had 3T3 been more distinctive in terms of repertoire and visual impact, he would have been less concerned about 3T3 losing sales to 3T1 or 3T2. O'Brien 544:25-545:21.

Thus, responding to these statements, Professor Moore offered suggestions about how to provide 3T3 with a more distinctive identity. She concluded that the moratorium was not necessary for an effective launch of 3T3, because, through the standard tools of marketing, 3T3 could have been given its own distinct identity. Moore 119:19-124:7. These standard tools of marketing were used by PolyGram and Warner to promote their respective products when 3T1 and 3T2 competed from 1994-1997. CPF ¶¶ 236-254.

Respondents' Proposed Finding No. 138

As Professor Wind testified in discussing Professor Moore's alternatives, "her approach, by trying to show the 72 ways in which you can differentiated doesn't make any sense. You want still to maintain – overall, the long-term objective is long-term profitability of the entire profit line, not just of the 1998 product. And when you look at this from a dynamic point of view of maximizing profitability of the entire product line, then the moratorium was really a critical component because it was limited only to the launch period and allowed maximum opportunity to promote the entire line following the launch once you establish the benchmark of the launch and to promote the hell out of Three Tenors 1 and Three Tenors 2 prior to the launch. I think really they came up with the as . . . elegant an optimum strategy from a marketing and business point of view as one can . . . ." JX 91, Wind Depo. Tr. at 197:1-19.

Complaint Counsel's Response to Proposed Finding No. 138

This proposed finding is irrelevant and misleading. Dr. Wind's testimony should be given little weight. CPF ¶¶ 365-370; CPRF ¶¶ 112-113.

Respondents' Proposed Finding Nos. 139-142

139. Dr. Stockum suggested several alternatives to the moratorium, which included: (1) a licensing scheme whereby PolyGram and Warner would compensate one another for increased sales of 3T1 and 3T2 resulting from their operating companies' free riding activities, Trial Tr. at 734:9-756:22; (2) a series of vertical agreements with retailers throughout the country whereby the retailers would agree not to discount or promote 3T1 or 3T2 during the moratorium period, Trial Tr. at 756:23-778:17; and (3) establishing a "firewalls" between employees responsible for 3T3 and employees responsible for 3T1 and 3T2 so that confidential information regarding the marketing plans for 3T3 would not be used to promote the prior albums, Trial Tr. at 797:13-798:15.

140. As Dr. Stockum testified, the experience of the relevant PolyGram and Warner witnesses in the music industry should "bear a lot of weight" in assessing his suggested alternatives. Trial Tr. at 762:17-23.

141. As Dr. Stockum testified, his licensing proposal would not address any asymmetrical negative effect on 3T3 caused by discounting and promotion of 3T1 and 3T2 during the moratorium period. Trial Tr. at 826:19-829:11 ("Q: So if the problem being addressed is harm to the overall success of Three Tenors 3 and the overall success of the Three Tenors 3 brand as a result of the launch of Three Tenors 3, your proposal does not necessarily address the problem; correct? A: . . . Under this limited scenario of asymmetric effect here where there's something going on in the long term that doesn't flow back into 3T1 and 3T2 pockets, there is a potential for economic losses to occur and for there to be harm from that phenomenon, yes, under that hypothetical. Q: And the economic losses and harm that are not addressed by your payment proposal; correct? A: Again, there's some increment of harm that would not be addressed by my particular proposal."); *id.* at 829:25-830:6 ("I mean, I've already confirmed your point. I mean,

it's conceivable that some consumers will get confused and not make the purchase. It's also – and that's one possibility that would happen to some consumers and perhaps to a very limited number of consumers. Q: Perhaps to more than a limited number; correct? A: Perhaps").

142. As Dr. Stockum testified that, regardless of how the licensing fees were established under his licensing proposal, the PolyGram and Warner operating companies would continue to have an incentive to free ride on the promotional opportunity created by the Paris concert and the release of 3T3. Trial Tr. at 741:25-742:15; 746:23-748:25.

Complaint Counsel's Response to Proposed Finding Nos. 139-142

These proposed findings are misleading and not supported by the evidence. Respondents' contentions regarding free riding are meaningless because, as a matter of law, if payment is possible, then the ride is not free. By sharing the expenses, PolyGram and Warner have the incentive to compete against each other with older albums, while appropriately promoting the new album. CC Brief 56-60. As Dr. Stockum testified, any "free riding" would be completely internalized if expenses were shared, and thus there are no distortions of incentives. Stockum 714:20-715:8, 718:11-21, 749:20-750:16.

Moreover, Respondents have not established a free-riding problem because they have failed to establish that the magnitude of the free riding was such that it would affect spending on advertising or otherwise alter the marketing of 3T3. Stockum 624:9-22, 730:1-16, 739:20-741:19.

Respondents misstate Dr. Stockum's testimony with respect to "asymmetrical negative effect." Dr. Stockum was asked to assume that discounting and advertising of 3T1 and 3T2 following the release of 3T3 results - over the long term - in lower total sales of all Three Tenors products. Stockum 826:2-6, 826:19-24. Respondents' have now re-packaged this colloquy so as to suggest that Dr. Stockum pronounced this assumption about long-term effects to be valid. In truth, Dr. Stockum opined that the moratorium was likely to be anticompetitive. Stockum

581:19-582:6, 639:10-641:7; JX104 (Stockum Expert Report). On this issue, Dr. Stockum is undoubtedly correct. CPRF ¶¶ 54-55.

If the proportional benefit to each party of the advertising is equivalent to the proportional cost of advertising borne by each party, then there is no distortion of incentives. For example, if Warner pays 50 percent of the cost of advertising 3T3, and receives 50 percent of the benefit (*e.g.*, because sales of 3T1 are comparable to sales of 3T2), that is an efficient arrangement. Stockum 819:19-820:13; Ordover Dep. (JX90) 114:17-115:15.

If the forecasted benefit to PolyGram and Warner from advertising 3T3 (taking into account all profits from the sale of 3T1, 3T2, and 3T3) were not equal, then the parties could have altered the cost-sharing mechanism accordingly. Stockum 820:18-821:17.

If PolyGram and Warner were unable to make a reasonably reliable forecast regarding the relative benefits from advertising 3T3, then each party's contribution to the advertising of 3T3 could have been determined by the parties after the launch of 3T3, similar to the arrangement discussed in the *Chicago Professional Sports* case. Stockum 741:25-743:3, 822:7-823:17. The citation of the case Dr. Stockum discusses is *Chicago Prof'l. Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667 (7th Cir. 1992) *cert. denied*, 506 U.S. 954 (1992).

Respondents' Proposed Finding Nos. 143-144

143. As Dr. Stockum testified, the likely "contractual equilibrium" under his proposal for vertical arrangements with retailers would be a situation whereby the retailers would agree not to discount or advertise 3T1 or 3T2 during the moratorium period. Trial Tr. at 831:17-832:1; Stockum Depo. Tr. at 104:12-19, 101:9-102:10. As Dr. Stockum also testified, under the actual moratorium, retailers were not prohibited from promoting 3T1 and 3T2 during the moratorium period, or purchasing 3T1 and 3T2 at discounted prices in June and July and then reselling those products at discounted prices during the moratorium period. Trial Tr. at 774:16-775:6. When asked about whether this suggested alternative was practicable, Professor Moore testified that the question was "hard to answer." JX 84, Moore Depo. Tr. at 120:16-22.

144. As Professor Wind testified, Dr. Stockum's proposal for a series of vertical arrangements would be "unwieldy" and a "nightmare to implement," and there is no basis for concluding it

would have been as effective as the moratorium in addressing the parties' concerns. JX 90, Wind Depo. Tr. at 88:10-89:12.

Complaint Counsel's Response to Proposed Finding Nos. 143-144

These proposed findings are incomplete and misleading. Economists generally agree that vertical arrangements have a much lower potential to be anticompetitive that do horizontal agreements. Stockum 795:14-796:12.

Dr. Stockum's proposal is practicable. Dr. Wind testified that it is common for a manufacturer to agree with a retailer to compensate the retailer in return for the retailer's promotion of the manufacturer's product and a commitment not to promote competing products during the promotional period negotiated by the manufacturer. Dr. Wind explained that this type of agreement may be found "in any category when you have major players competing with each other." Wind Dep. (JX91) 81:20-87:16.

In some territories during 1994, Warner negotiated "exclusive chain deals and prevented competitors from getting retail space." CX249 at 3TEN00011253. Warner's competitors attempted similar tactics. CX259 at 3TEN00011110 ("an early sell-in campaign will help us to saturate all potential distribution chains to block competitors who are already trying to tie up retailers' budgets and display space"). Record companies in the United States have been able to achieve exclusive rights to given space at retail establishments. Kopecky Dep. (CX610) 36:24-37:9, 64:1-9; Caparro Dep. (CX609) 66:4-24; Moore 52:7-12, 261:23-262:18.

As part of its 1998 campaign, Atlantic made cooperative arrangements with a large number of major retailers. CX482; CX483. In the United States, a total of ten retail chains control 48 percent of the recorded music industry retail sales. CX538 at UMG006539.

To the extent that Dr. Wind criticizes Dr. Stockum, Dr. Wind's testimony should be given little weight, because he did not testify at trial and his review of the evidence in this case was cursory at best. CPF ¶¶ 365-369.

Respondents' Proposed Finding No. 145

As Dr. Stockum testified, his "firewall" proposal would be "a lot less effective" insofar as the same PolyGram and Warner employees were responsible for marketing 3T3 and their respective prior Three Tenors album, and that he had not considered whether this was the case. Trial Tr. at 833:10-834:7.

Complaint Counsel's Response to Proposed Finding No. 145

This proposed finding is misleading and not supported by the evidence. *See* CPRF ¶¶ 41-50.

Respondents' Proposed Finding Nos. 146-148

146. Before the moratorium was implemented, PolyGram decided to abandon the moratorium, and informed its operating companies that:

> With immediate effect Decca has concluded that it is appropriate to adopt a flexible position that allows operating companies the chance to make their own commercial decisions on the optimum pricing of the 1990 album. We would emphasize, however, that in deciding on how to market and price the 1990 album, operating companies should take full account of PolyGram's massive investment in the 1998 album and the need to maximize returns on this investment.
>
> Contrary to any previous suggestion, there has been no agreement with Atlantic Records in relation to the pricing and marketing of the previous Three Tenors albums. Clearly it is in our interests to protect the 1998 album, but if other commercial considerations so dictate, you have the discretion to act as you best see fit.

See JX 76 (July 30, 1998 Memorandum from Paul Saintilan to Distribution List).

147. In an exchange of correspondence between PolyGram and Warner attorneys in late July, Warner indicated that also was not implementing the moratorium, but that it would not be discounting 3T2 during the period surrounding the release of the new album because Mr. Rudas (who had a contractual right to approve any discounting campaign) had not approved WMI's request to discount 3T2 during that time period. RX 705 (July 27, 1998 facsimile from Mr.

Robinson to Mr. Kon); *see also* JX 81 (August 10, 1998 letter from Anthony O'Brien to Paul Saintilan).

148. Consistent with Mr. Saintilan's July 30, 1998 memorandum, several PolyGram's operating companies discounted 3T1 in the weeks immediately following the release of the 1998 Album. *See* JX 79 (August 3, 1998 E-mail from Paul Saintilan to Melchor Hidalgo); Greene Tr. at 207:16-213:14, 223:8-225:19; RX 710 (AIF Data).

Complaint Counsel's Response to Proposed Finding Nos. 146-148

These proposed findings are misleading, incomplete and not supported by the evidence. Respondents' argument that they abandoned the moratorium is not supported by the evidence. CPF ¶¶ 168-186. In particular, Saintilan's July 30, 1998 memorandum was likely understood by managers at the PolyGram operating companies as a pretense. CPF ¶¶ 174-175. Furthermore, after sending the correspondence their lawyers urged them to send, Saintilan and O'Brien agreed to disregard these letters and go forward with the moratorium. CPF ¶¶ 178-186. Minor discounting in Europe is not evidence of non-compliance with the moratorium. CPRF ¶¶ 78-79; CPF ¶ 211.

Respondents' Proposed Finding No. 149

Complaint Counsel have not alleged or provided any evidence that Respondents have entered into, or have considered entering into, any agreement similar to the moratorium, either in the context of another joint venture or otherwise. The relevant witnesses testified that the Three Tenors joint venture was unique in the music industry several critical respects (*e.g.*, the agreement to share costs and benefits 50/50 on a worldwide basis, the existence of catalog owned by both companies), that the justifications for the moratorium were specific to the Three Tenors joint venture, and that they were unaware of any other situation in which any similar agreement has been considered or implemented. Trial Tr. (Hoffman) at 358-365; JX 101, O'Brien 1/5/01 Depo. Tr. at 97:24-98:4.

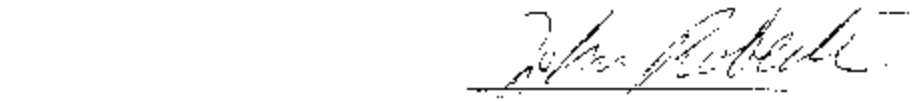
Complaint Counsel's Response to Proposed Finding No. 149

This proposed finding is misleading and not supported by the evidence. There is a significant risk that Respondents unlawful behavior will recur. That advertising for one product might benefit another company's product is a ubiquitous phenomenon. CPF ¶¶ 312-316. In addition, it is not unusual for an artist to release material on more than one label. CPF ¶ 371. It

is also common that an artist will be released from an exclusive contract for a particular project. CPF ¶¶ 372-373. Under Respondents' logic, anytime a record company with a new release fears competition from a company with the same artists' catalog items, the two competitors would be justified in agreeing to ban discounting and advertising of the older albums so that the new record can enjoy a "successful" release and contribute to the success of the "brand."

Moreover, joint ventures are common in the recorded music industry. For example, Universal Music Group and Sony Music Entertainment formed a joint venture to distribute music over the Internet. Universal, Sony, and other music companies will provide their music to the venture, known as "pressplay" on a non-exclusive basis. Accordingly, the music products marketed by the joint venture might also be marketed through traditional retail outlets. This creates an incentive and opportunity for future moratorium agreements. CPF ¶ 374.

Respectfully submitted,



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