UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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

RESPONDENTS' PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW, AND PROPOSED ORDER

Respondents PolyGram Holding, Inc., Decca Music Group Limited, UMG Recordings, Inc. and Universal Music & Video Distribution Corp. (collectively "PolyGram" or "Respondents") hereby respectfully submit these proposed findings of fact and conclusions of law, as well as a proposed order for the initial decision in this matter:

I. Introduction

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.

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.

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.

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.

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.

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.

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

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.

II. Proposed Findings Of Fact

A. PolyGram and Warner

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.

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.

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.

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.

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

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.

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.

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.

B. The Three Tenors Joint Venture

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.

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

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 11; JX 100, 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.

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.

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.

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.

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.

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).

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.

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.*

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.*

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).

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).

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"), JX11.

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; JX 11.

34. Under the Rights Agreement, RPL agreed to create and produce master recordings of a Three Tenors concert in Paris on July 10, 1998, to create and produce the 1998 Album, and to license the worldwide rights to those recordings to Warner. *See* JX 11 (Rights Agreement ¶¶ 1, 4.)

35. Additionally, the Rights Agreement authorized the subsequent release of box set and greatest hits albums that would include recordings from the 1990, 1994 and 1990 Three Tenors Albums. *Id.* ¶ 15.

36. In exchange, Warner agreed to pay RPL an $18 million advance on royalties, and to provide RPL with a 25% royalty on sales of the 1998 Album and the subsequent box-set and greatest hits albums. *Id.* ¶¶ 9-10.

37. The Rights Agreement contemplated that Warner would be permitted to sub-license the "ROW" (*i.e.*, rest of the world) rights to a third-party, such as PolyGram. *Id.* ¶¶ 1, 24.

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 101, 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.").

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.

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).

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. (Under the Rights Agreement, the "rights" were defined to include not only the rights to the 1998 recordings, but also the right to use the 1990 and 1994 recordings in connection with the box-set and greatest hits albums. JX 11, Rights Agreement ¶ 15.)

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 100, 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 101, 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.

C. PolyGram's and Warner's Decision To Adopt Restrictions On The Marketing And Promotion Of 3T1 and 3T2 As Part Of Their Marketing Plans For 3T3.

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.")

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 101, 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 101, O'Brien 12/6/01 Depo. Tr. at 105:19-106:3; JX 94, Saintilan Depo. Tr. at 81:24-82:3.

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").

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").

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).

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

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.

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.

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.")

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").

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.

D. The Business Rationale For The Moratorium.

65. PolyGram and Warner both believed that the moratorium was an important part of their marketing plans for 3T3. JX 101, 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.").

1. The Moratorium Was Part Of A Marketing Strategy Designed To Increase The Aggregate Output Of Three Tenors Products.

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 101, 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).

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. JX101, 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).

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 101, 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.

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");

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").

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.")

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).

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)

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).

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).

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).

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.*

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 (All Data); RX 713 (U.S. Sales Data).

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.

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.

2. The Moratorium Was Designed To Prevent The Operating Companies From Free Riding And Opportunistic Behavior.

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 101, O'Brien 12/6/01 Depo. Tr. at 105:19-106:3.

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.

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.

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.

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.

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.

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.

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 101, 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.

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.

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.

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.

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).

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.

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 101, O'Brien 12/6/01 Depo. Tr. at 111:5-112:5; JX 100, 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.

3. The Moratorium Was Narrowly Tailored To The Specific Interests Of The Three Tenors Joint Venture.

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").

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.

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 100, 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.

E. The Potential Effects Of The Moratorium.

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.

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.

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").

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 101, O'Brien 12/6/01 Depo. Tr. at 111:5-112:5; JX 100, 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.

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 101, 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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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 311 and 312 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.

F. Complaint Counsel's Proposed Alternatives To The Moratorium.

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.

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.

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.

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.

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.

G. PolyGram's Decision To Abandon The Moratorium And The Likelihood Of Recurrence.

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 (AlF Data).

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 100, O'Brien 1/5/01 Depo. Tr. at 97:24-98:4.

II. Proposed Conclusions Of Law.

A. The Moratorium Was Not Illegal *Per Se*.

150. The moratorium was not illegal *per se*. *Per se* condemnation is reserved exclusively for the types of naked agreements between competitors with which economists and the courts have substantial experience and, based on that experience, can conclude with confidence both that they are likely to cause substantial harm to competition and that they have no procompetitive potential. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (finding horizontal price-fixing agreement per se illegal).

151. In considering alleged restraints adopted in the context of joint ventures and other forms of legitimate collaborations among competitors, courts consistently have refused to apply the *per se* label. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 100-13 (applying "quick look" version of rule of reason to restraints adopted as part of college football joint venture); *Chicago Prof'l Sports Ltd. P'ship v. National Basketball Ass'n*, 961 F.2d 667, 673 (7th Cir. 1992) (holding that "the Rule of Reason supplies the framework for antitrust analysis" of restraints adopted in the context of joint ventures); *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (concluding that agreement not to compete adopted as part of joint venture was lawful under rule of reason); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 343-406 (S.D.N.Y. 2001) (holding that restrictions on competition adopted as part of Visa joint venture were illegal under full rule of reason).

152. An alleged restraint need not be "essential" or "necessary" to the formation or operation of a collaboration to be plausibly procompetitive. *NCAA*, 469 U.S. at 100-13 (holding restraint that plainly was not "essential" or "necessary" to NCAA was subject to rule of reason);

Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1, 21 (holding restraint that led to "substantial lowering of costs" and "potential benefits" was subject to rule of reason even though alternative arrangements were possible); FTC & DOJ Antitrust Guidelines for Collaborations Among Competitors ("Guidelines") (April 2000) at 8-9 ("An agreement may be 'reasonably necessary' [and therefore exempt from *per se* condemnation] without being essential.").

153. The moratorium was discussed exclusively in the context of the joint venture between PolyGram and Warner, and was part of the parties' marketing plans for the joint venture product, and thus is subject to the rule of reason, not the *per se* rule. *Chicago Professional Sports*, 961 F.2d at 673 ("[i]f the NBA is a joint venture, then the Rule of Reason supplies the framework for antitrust analysis . . . *NCAA* leaves no room for debate."); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (holding that a restrain that is ancillary to a joint venture in the sense that it is "related to the efficiency sought to be achieved" is "exempt from the per se rule"); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) ("A restraint is ancillary [and therefore subject to the Rule of Reason] when it may contribute to the success of a cooperative venture that promises greater productivity and output.").

154. The fact that the moratorium would have affected products that were not distributed as part of the joint venture does not support the conclusion that the moratorium was illegal *per se*, because courts have evaluated ancillary restraints under the rule of reason even where those restraints applied to products that were not created or marketed by the joint venture. *Polk Bros.*, 776 F.2d at 187 (concluding that restraint affecting marketing of appliances and home furnishings that were not distributed as part of building joint venture were subject to rule of reason); *United States v. Visa U.S.A., Inc.*, 163 F.Supp.2d 322 (S.D.N.Y. 2001) (applying rule of reason to agreements among the members of the Visa and MasterCard joint ventures that no member would compete with the joint venture by offering non-venture American Express or

Discover cards); Guidelines Ex. 10, at 34 (stating that restraint on non-venture software products may be subject to analysis under the rule of reason).

155. The moratorium also is not subject to *per se* analysis simply because it was adopted shortly after the formation of the joint venture; courts have routinely analyzed restraints adopted after the formation of joint ventures without any consideration of that fact. *NCAA*, 468 U.S. at 101 (applying rule of reason in analyzing restraint adopted well after formation of joint venture"); *Polk Bros.*, 776 F.2d at 187-88 (same); *Rothery Storage*, 792 F.2d at 212, 229-30 (concluding that restraint adopted after the formation of the joint venture was a legitimate means to address risk that parties would free ride on services provided by joint venture); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970-72 (10th Cir. 1994) (holding that by-law adopted approximately forty years after formation of Visa joint venture was reasonably necessary to prevent free riding and protect investment in the venture); *United States v. Visa*, 163 F. Supp.23d at 343-406 (concluding that same by-law was subject to rule of reason analysis).

156. The conclusion that the moratorium is not illegal *per se* also is supported by the lack of judicial experience with similar restraints. *See, e.g., California Dental*, 526 U.S. 756, 771-81 (holding that courts must "look[ ] to the circumstances, details, and logic" surrounding any alleged restraint before making any finding that it is in violation of the antitrust laws); *Broadcast Music, Inc. v. Columbia Broadcasting Systems*, 441 U.S. 1, 7-8 (*per se* rule is limited to practices that are "so plainly anticompetitive" and so "lack[ing] . . . any redeeming virtue" that they can be "conclusively presumed" to violate the antitrust laws); *Arizona v. Maricopa Cty. Medical Soc.*, 457 U.S. 332, 344 (1982) (application of the *per se* rule is appropriate only after "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it").

B. Complaint Counsel Failed To Establish That The Moratorium Is Unlawful Under The Rule Of Reason.

157. Under the rule of reason, a restraint cannot be found unlawful absent some showing that the restraint had some actual anticompetitive effect. *California Dental*, 526 U.S. at 771-81.

158. Under the rule of reason, the identification of a relevant market is required unless the actual anticompetitive effects of the restraint are obvious. *California Dental*, 526 U.S. at 771-81; *Chicago Prof'l Sports Limited P'Ship v. National Basketball Assn.*, 961 F.2d 667 (7th Cir. 1992) (concluding that "quick look" was applicable to restrictions on telecasts of Chicago Bulls games in Chicago); *NCAA*, 468 U.S. 85 (concluding that "quick look" was applicable to telecasts of Oklahoma Sooners football games in Oklahoma); *Toys 'R Us, Inc. v. FTC*, 221 F.3d 928 (concluding that, if restraints were not illegal per se, "quick look" could be applicable to boycott by "dominant" toy retailer).

159. The alleged anticompetitive effects of the moratorium – which affected the marketing and promotion of two older classical cd's for a ten-week period – are not obvious because Complaint Counsel offered no evidence that the moratorium actually increased prices or reduced output in the United States, whereas Respondents offered evidence that the moratorium would have had no adverse effect on price or output in the United States and in fact would have increased the aggregate output of Three Tenors products. *Compare Chicago Prof'l Sports*, 961 F.2d 667 (concluding that restraint that actually restricted telecasts of Chicago Bulls games in Chicago could be found unlawful without identification of relevant market); *NCAA*, 468 U.S. 85 (concluding that restriction on telecasts of Oklahoma Sooners football games in Oklahoma could be found unlawful without identification of relevant market).

160. Complaint Counsel's failure to identify the relevant market or offer any evidence of any actual anticompetitive effect requires a decision in Respondents' favor. *California Dental*, 526 U.S. at 771-81.

161. Under the rule of reason, the identification of a plausible procompetitive justification for a challenged restraint necessitates consideration of the actual, net competitive effects of the restraint in the relevant market. *California Dental*, 526 U.S. at 771-81.

162. Respondents identified a plausible procompetitive justification for the moratorium by offering evidence that the moratorium was part of a marketing strategy for 3T3 that was designed to maximize the long-term output of Three Tenors products rather than a mechanism to restrict the price or output of 3T1 and 3T2.

163. Respondents identified another plausible procompetitive justification for the moratorium by offering evidence that the moratorium was designed to prevent the PolyGram and Warner operating companies from engaging in opportunistic behavior and "free riding" on the confidential marketing plans of the venture partners and the promotional opportunity created by the Paris concert and the release of 3T3. *See* Collaboration Guidelines § 3.36(b), at 24 ("free riding or other opportunistic conduct that could reduce significantly the ability of the collaboration to achieve cognizable efficiencies"); *Polk Bros.*, 776 F.2d at 190 ("[C]ontrol of free riding is a legitimate objective of a system of distribution" because it "make[ ] it easier for people to cooperate productively in the first place"); *Rothery Storage*, 792 F.2d at 213 ("The free ride can become a serious problem for a partnership or joint venture because the party that provides capital or services without receiving compensation has a strong incentive to provide less, thus rendering common enterprise less effective."); *Chicago Prof'l Sports*, 961 F.2d at 673 (stating that free riding is "an accepted justification for cooperation").

164. Respondents' procompetitive justifications for the moratorium are valid in that they are consistent with the witness testimony regarding the purposes for the moratorium and thus are not pretextual.

165. Because Complaint Counsel have offered no evidence that the moratorium had any actual, net anticompetitive effect, there is no need to consider Complaint Counsel's alleged "less restrictive alternatives" to the moratorium.

166. Even if there were any need to consider Complaint Counsel's alleged "less restrictive alternatives" to the moratorium, Complaint Counsel's failure to offer any evidence regarding the actual, net competitive effects, if any, of the moratorium as compared to the actual, net competitive effects, if any, of the suggested alternatives precludes the conclusion that any of those alternatives actually would have been both less restrictive of competition than the moratorium and effective in addressing the inefficiencies addressed by the moratorium.

167. Because Complaint Counsel have offered no evidence that the moratorium had any actual, net anticompetitive effect, and Respondents' procompetitive justifications are plausible and valid, there is no basis for concluding that the moratorium was unlawful under the rule of reason. *California Dental Ass'n*, 526 U.S. at 780.

C. Complaint Counsel Have Failed To Demonstrate Any Likelihood Of Recurrence.

168. To obtain prospective relief such as that sought here, Complaint Counsel must show that "'there exists some cognizable danger of recurrent violation.'" *TRW, Inc. v. FTC*, 647 F.2d 942, 954-55 (9th Cir. 1981) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)).

169. It is undisputed that the moratorium is not ongoing; by its terms, it would have ended in October 1998.

170. Conduct similar to the moratorium is unlikely to recur because PolyGram ultimately instructed its operating companies not to implement the moratorium.

171. Additionally, Complaint Counsel has provided no evidence that PolyGram – let alone the current corporate parents of the relevant record labels and operating companies at UMG Recordings, Inc. and Vivendi Universal, S.A. – has ever contemplated any agreement similar to the Moratorium.

172. Finally, the PolyGram/Warner joint venture was unique in a number of respects, Respondents' justifications for the Moratorium are specific to the joint venture, and any similar agreement adopted in any other context would need to be considered in light of all the facts and circumstances surrounding that agreement.

173. Accordingly, Complaint Counsel has not met its burden of demonstrating the jurisdictional requirement that the Moratorium is ongoing or likely to recur.

III. Proposed Order

174. For the reasons set forth in these findings of fact and conclusions of law, Complaint Counsel failed to establish any violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and thus shall take nothing by their complaint.

Respectfully Submitted,

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Dated: April 26, 2002

CERTIFICATE OF SERVICE

I, Stephen Morrissey, hereby certify that on April 26, 2002, I caused a copy of the **RESPONDENTS' PROPOSED FINDINGS OF FACT, PROPOSED CONCLUSIONS OF LAW AND PROPOSED ORDER** to be served upon the following persons by Federal Express:

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