UNITED STATES OF AMERICA

[redacted]

In the Matter of

POLYGRAM HOLDING, INC.,
a corporation,

DECCA MUSIC GROUP LIMITED,
a corporation,

UMG RECORDINGS, INC.,
a corporation,

and

[redacted]

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

I. INTRODUCTION

This case involves what Complaint Counsel concede was a legitimate and procompetitive joint venture between PolyGram and Warner Music Group ("Warner") for the creation of new Three Tenors products, including the August 1998 album of a Paris concert in July 1998 (3T3) and as-yet unreleased Greatest Hits and Box-Set albums of recordings from all three

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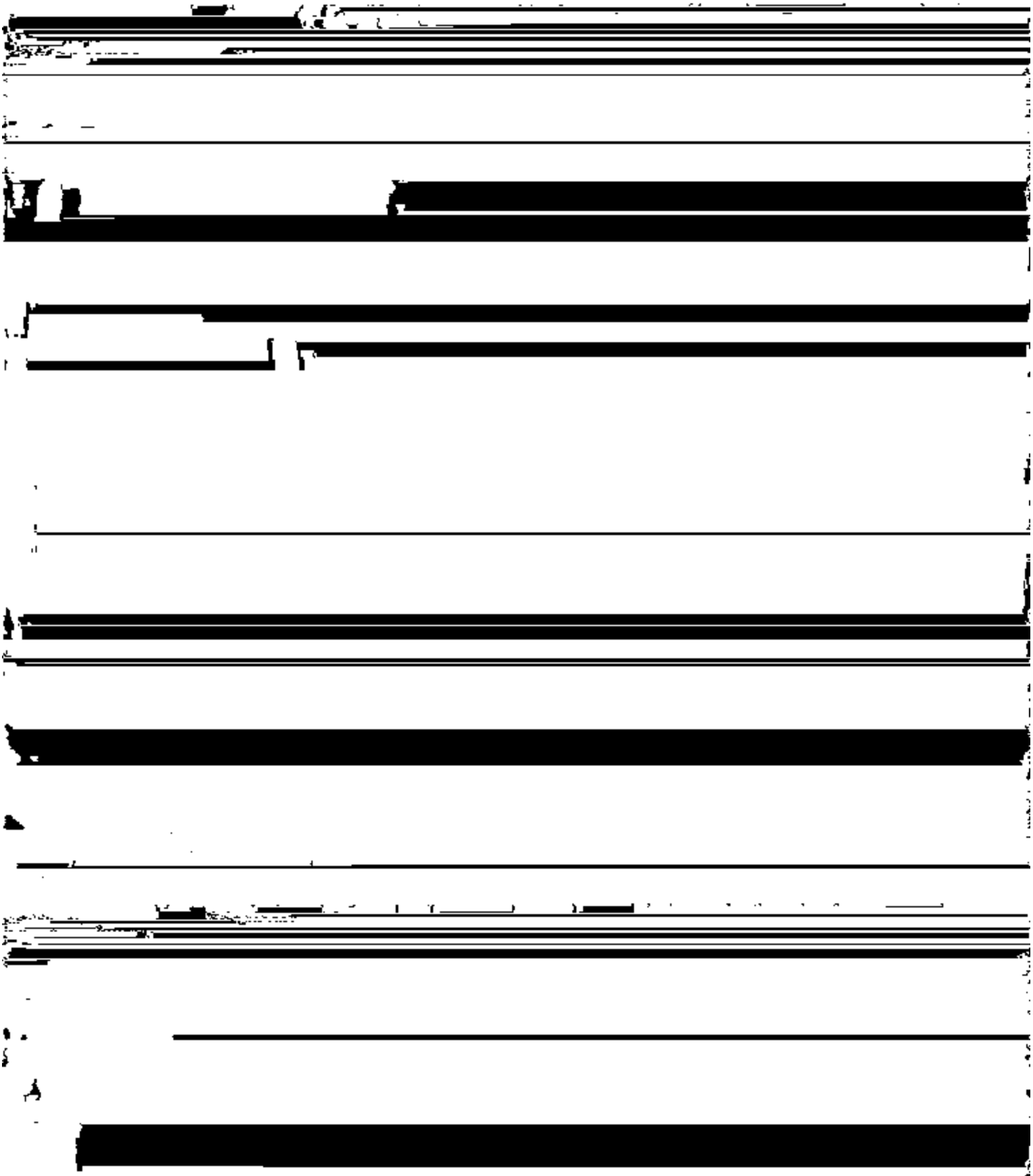
market the two prior Three Tenors albums – PolyGram's 1990 album (3T1) and Warner's 1994



moratorium. The only permissible conclusions thus will be that the proposed moratorium was either

that the proposed moratorium was unlawful. *See, e.g., California Dental*, 526 U.S. at 771-81.

law, these facts also would preclude the issuance of the prospective relief sought by Complaint

[redacted]

The Concert/License Agreement specifically required PolyGram and Warner to

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relating to the joint venture. *Id.* Additionally, the revenue sharing provision of the Concert/License [redacted]

[redacted]

the prior albums rather than the new albums, and that promotion of the prior albums rather than the new album might lead to lower sales of *all* Three Tenors products.

Although the parties always were in agreement on the basic principle that the prior albums should not be promoted in ways that would interfere with the potential success of the new

[redacted]

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

> The key point to observe is that the "original" album should not [redacted]

such an agreement was necessary to ensure that "unrestricted price competition on the 1990 and 1994

sought additional legal advice concerning European competition laws from Stephen Kon, a

[redacted]

PolyGram ultimately determined that it would not proceed with the moratorium.

[redacted]

following the release of 3T2. See August 2, 1999 E-mail from Paul Saintilan to Malcolm Hildalgo

(JX 79) (approving discounts of 1990 Album); AIF Data (RX 709).

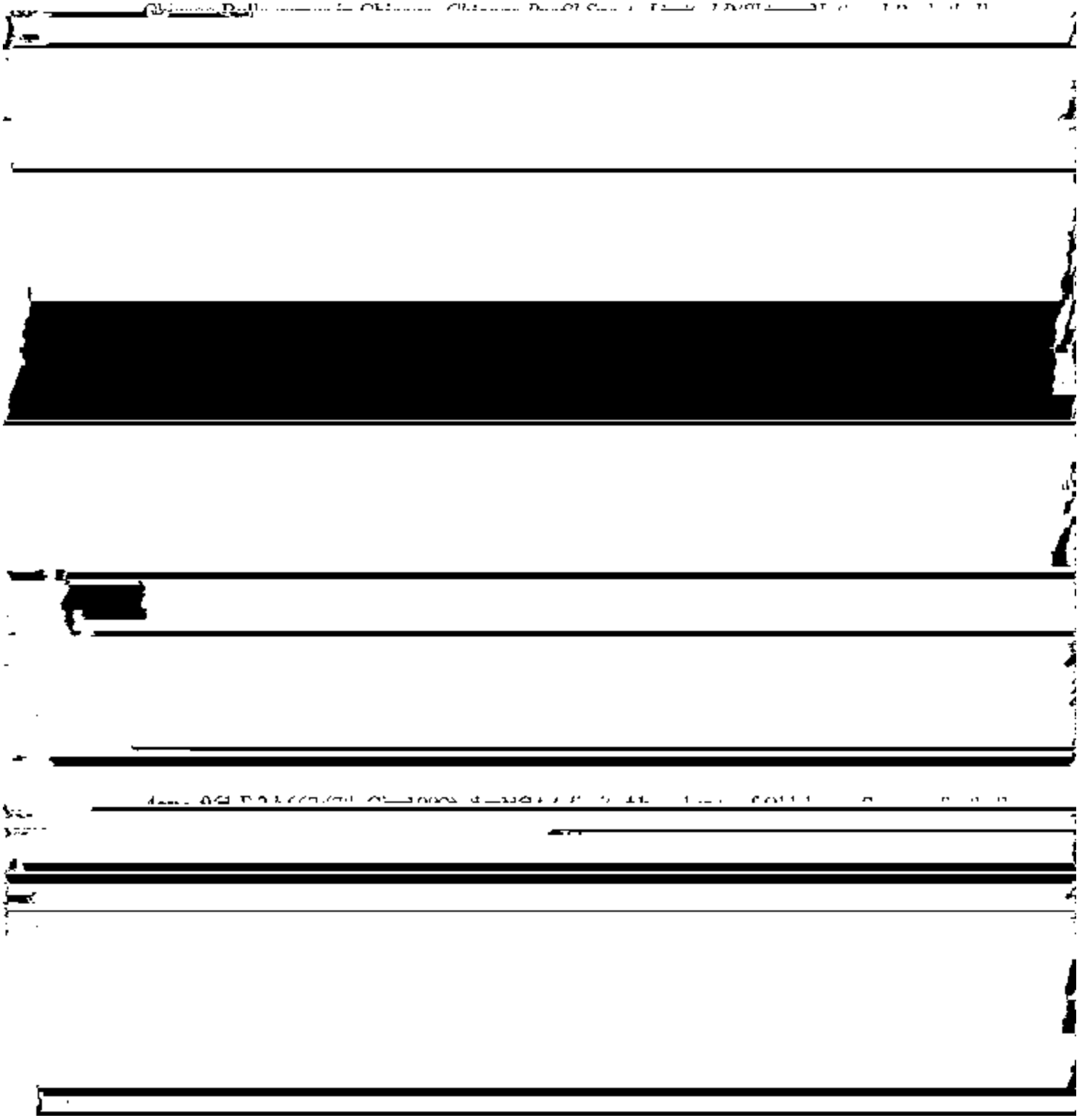
1. The Proposed Moratorium Is Not Illegal *Per Se*

[redacted]

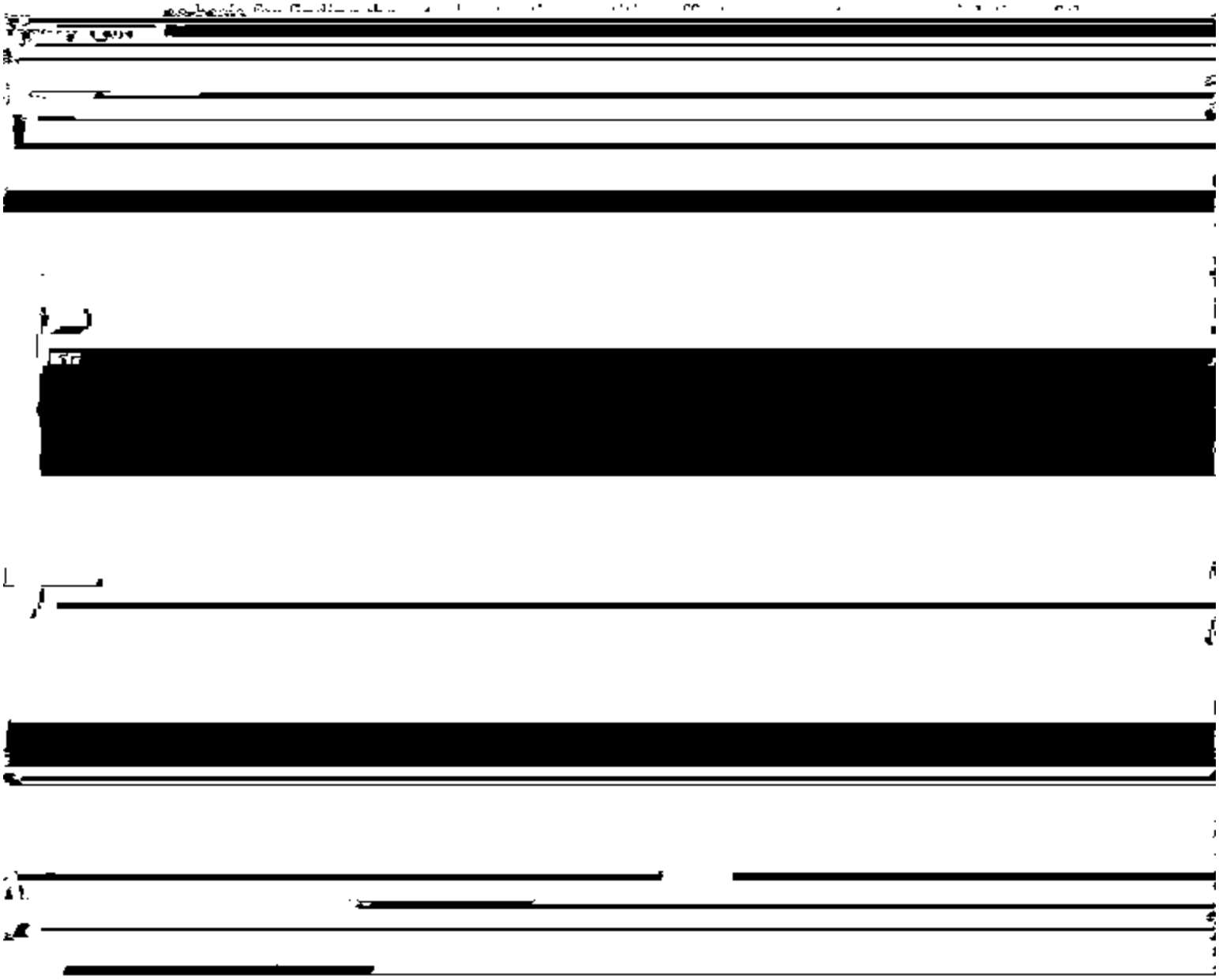
Per se condemnation is reserved exclusively for the types of naked agreements between competitors with which economists and the courts have substantial experience and, based on that experience, can conclude with confidence both that they are likely to cause substantial harm to competition and that they have no procompetitive potential. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (finding horizontal price-fixing

[redacted]

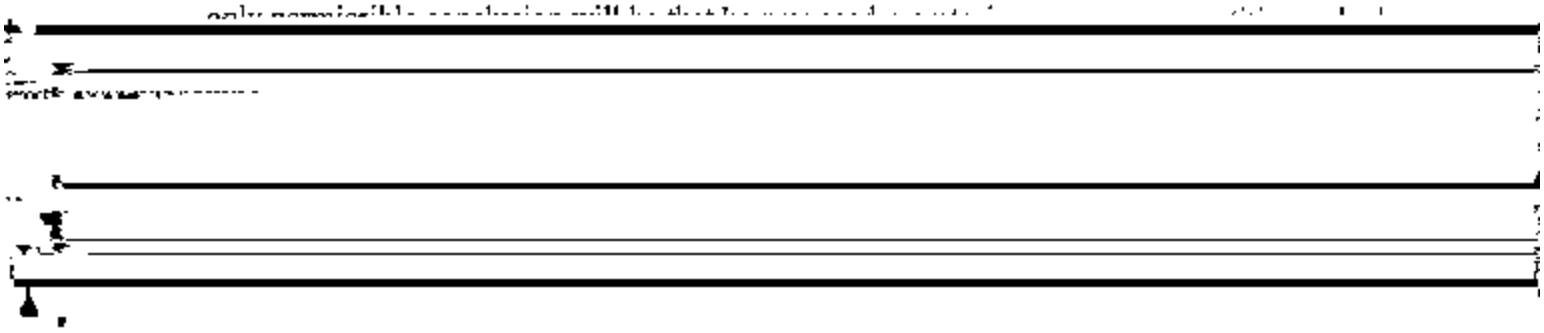
First, Complaint Counsel have not shown that the proposed moratorium had any actual anticompetitive effect. There is no presumption of anticompetitive effects in any rule of reason case, and Complaint Counsel are not providing any evidence that would support a finding that actual anticompetitive effects are "obvious" – as when the NBA restricted telecasts of



Counsel's expert economist has conceded that he is not aware of any actual competition that the proposed moratorium would have prevented. Stockum Depo. at 136. Accordingly, there will be



antitrust laws under the rule of reason, *see, e.g., California Dental*, 526 U.S. at 771-81, and the



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

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

The relief sought be Complaint Counsel in this case is exclusively *prospective* – an order requiring PolyGram to "cease and desist" certain categories of conduct, and to provide periodic reports regarding various joint venture-related activities. *See* Complaint at 6 (Notice of Contemplated Relief). However, to obtain prospective relief, Complaint Counsel must show that

[redacted]

"'there exists some cogniza[redacted]ble danger of recurrent violation.'" *TRW, Inc. v. FTC*, 647 F.2d 942.

[redacted]

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Counsel for Respondents

Dated: February 19, 2002

CERTIFICATE OF SERVICE

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

Geoffrey M. Green/John Roberti/Cary Zuk/ Hon. James P. Timony