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

ORDER DENYING MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

On July 30, 2001, the Commission issued a complaint charging Polygram Holding, Inc. ("Polygram"), Decca Music Group Limited, UMG Recordings, Inc., and Universal Music & Video

[redacted]

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Reply Memorandum. Respondents' motion to file a reply brief is GRANTED. Further [redacted]

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evidence about the material issues of fact, summary judgment is inappropriate." *International*

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Once the moving party has properly supported its motion for summary judgment, the

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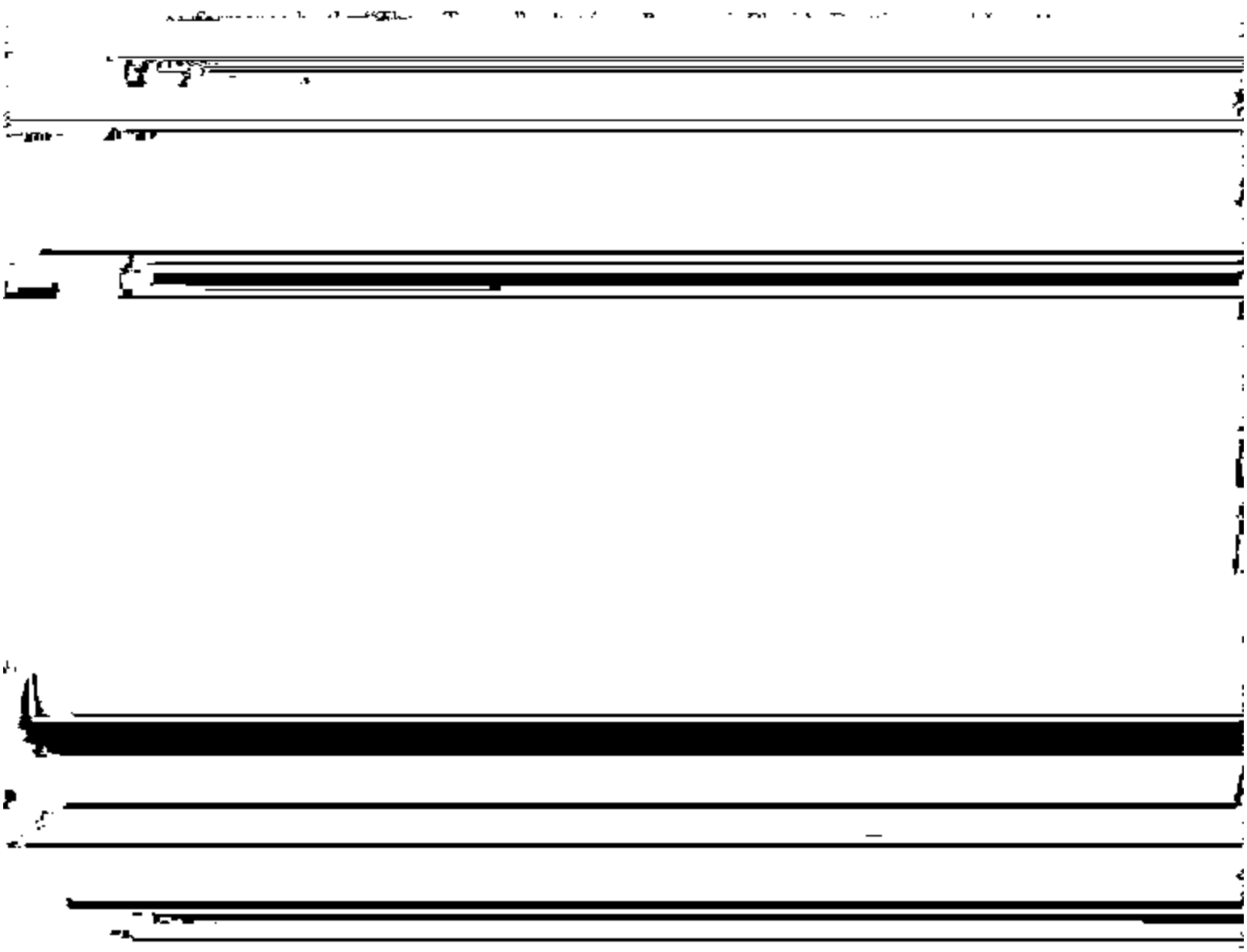

audio, video, and home television rights to the 1998 concert ("the 3T3 Rights"). Warner licensed PolyGram the 3T3 Rights outside the U.S. Warner kept the United States.

In negotiating the terms of the 1998 Three Tenors project, PolyGram and Warner

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discussed the scope of any covenant not to compete, and agreed in concept that, for five years, neither would release a new Three Tenors album (except as part of the collaboration). Warner stated that the non-compete should not apply to the earlier Three Tenors albums. The final

[redacted]

offer was accepted, agreeing to a ten-week moratorium on all discounting and promotion of the prior 3T albums.[1]

The central, genuine issue of material fact on this motion is whether the moratorium was agreed to as part of the joint venture agreement, and was essential and necessary to it, or whether it was a separate agreement. Respondents argue that the moratorium agreement was part of the license agreement, dated December 19, 1997, which provided that the parties were required to

[redacted]

Where the restraint is deemed to be anticompetitive, the next step is to consider any

[redacted]

A. The Standard for Analyzing the Challenged Restraints

Certain categories of restraints almost always tend to raise price or reduce output; the

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in anticompetitive effects, market definition is not a necessary element of the analysis.[13] Here,

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anticompetitive.[14]

B. Plausible Efficiency Argument

Respondents assert that if the party defending a restraint identifies an economically

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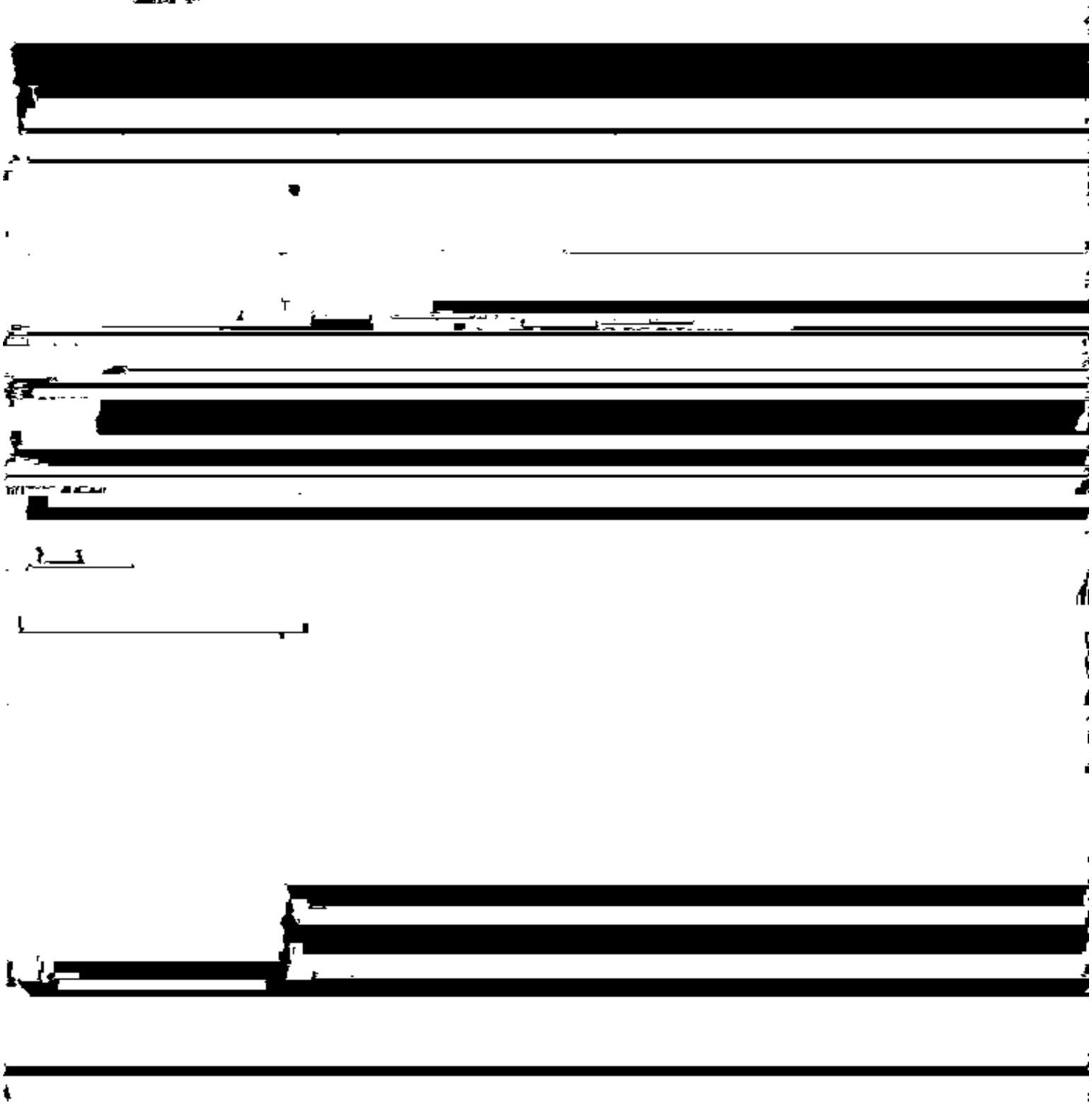
justifications without an examination of market definition, market power, or actual anticompetitive effects. If the Three Tenors moratorium price restrictions and advertising bans



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parties from coordinating the price and advertising for these non-venture products.[18] Although

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outside of the United States, and may have later exacted a promise that PolyGram would not

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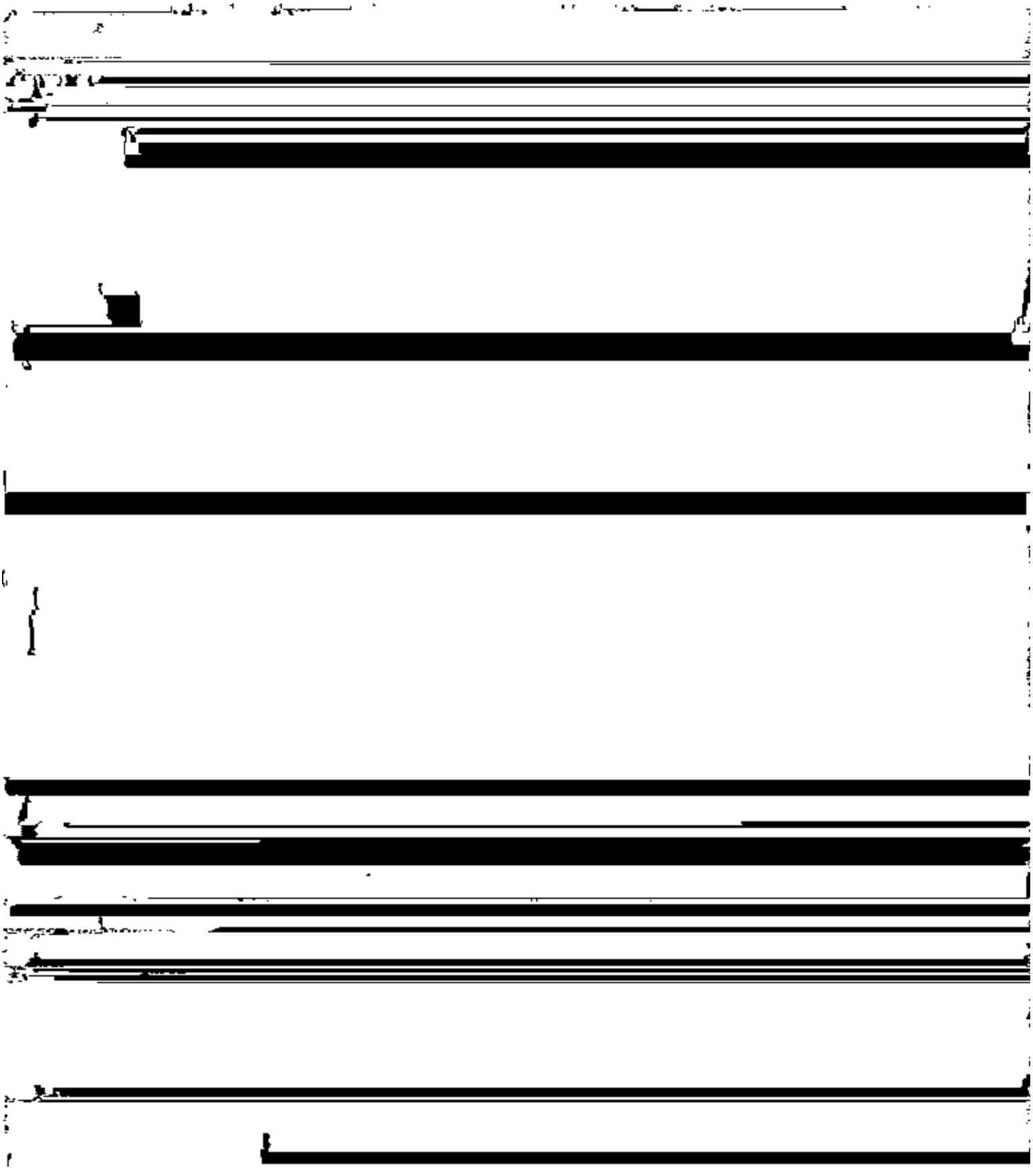
would have the burden of coming forward with a valid efficiency justification. Respondents



evidence in the summary judgment record that consumers were in fact confused in selecting

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Respondents assert that if earlier Three Tenors albums had been discounted, then music retailers may have positioned these products prominently in their stores, resulting in a "cluttered selling proposition." There is a fact dispute as to whether music retailers display their products

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4. Free riding

Respondents' free riding defense raises factual questions that must be addressed at trial.[25]

[redacted]

arrangement.[26] PolyGram and Warner apparently agreed to share the 3T3 advertising costs incurred during the moratorium period and "when payment is possible, free-riding is not a problem because the 'ride' is not free." *Chicago Pro. Sports*, 961 F.2d at 675.

Finally, there appear to be less restrictive alternatives for the free riding concern. According to PolyGram's expert witness, the danger that advertising for 3T3 may have benefitted the older Three Tenors albums arose principally because 3T3 was not sufficiently different from 3T1 and 3T2. PolyGram could have made 3T3 more distinct through a more distinct repertoire or by other means.

The motion for summary decision is DENIED. Counsel shall confer and file by February 28, 2002, any additional stipulated material facts as to which there is no dispute.

[redacted]