

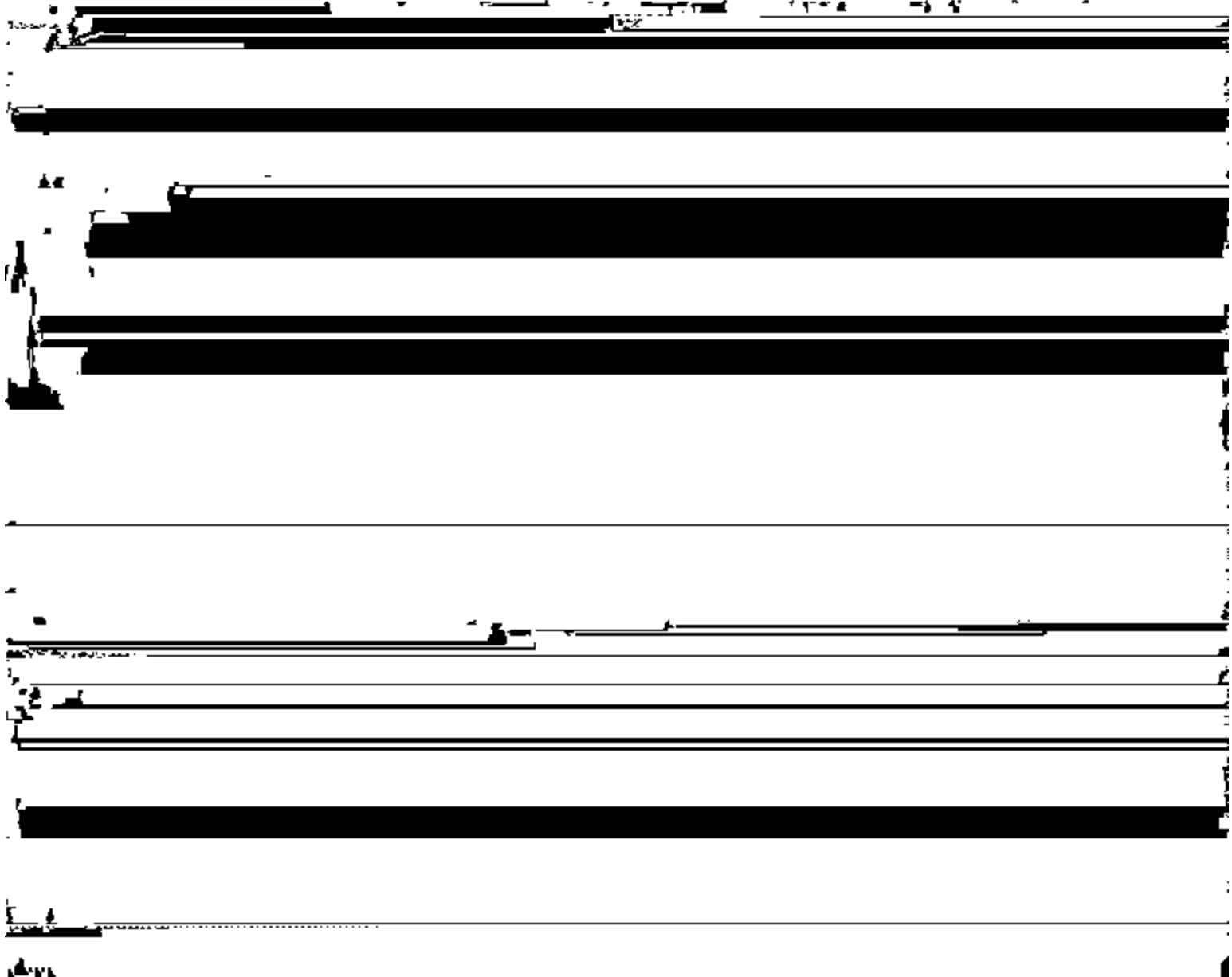


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## INTRODUCTION

Initially, Respondents argued that the Three Tenors moratorium agreement never existed.<sup>1</sup>

Now the moratorium has been admitted. Respondents argued with Warner a horizontal

competitor, to fix prices and to forgo advertising for certain audio and video products.<sup>2</sup> Initially, Respondents averred that the moratorium was necessary for the formation of the PolyGram/Warner collaboration.<sup>3</sup> Now Respondents have, by stipulation, abandoned this defense.<sup>4</sup> Initially, Respondents claimed that the moratorium was necessary for the efficient operation of the joint venture.<sup>5</sup> Yet, Respondents have effectively forfeited this contention by offering no supporting evidence.<sup>6</sup>

already ruled that “plausibility” alone is not a sufficient defense, and that the Court’s conclusion is founded on extensive Supreme Court and lower court precedent. Order Denying Motion For Summary Decision at 8-11 and cases cited therein (Feb. 26, 2002) (“Summary Decision Order”).

The moratorium agreement should be presumed to be anticompetitive – on the basis of

legal precedent, economic analysis, and circumstantial evidence. The burden of proof therefore shifts to

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

1970 CV 111

1 [REDACTED]

[REDACTED]

to proving that the moratorium was necessary for the effective marketing of 3T3. Yet this is the sum total of Respondents' supporting evidence.

Respondents' second efficiency argument is that the moratorium remedies a free-riding problem: perhaps, absent the moratorium, consumers brought to the store by advertising for 3T3 would instead purchase 3T1 or 3T2. It is a "fact of life" that a consumer is not obligated to

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

are not available. A decision to require full rule of reason review on the basis of the superficial

and unsupported arguments asserted by the Defendants would be tantamount to allowing

Respondents state that they "are aware of no rule of reason case in which a restraint was

held unlawful on the burden of proof shifted to the defendant." *Id.* at 11.

either of an actual anticompetitive effect or of market power." Respondents' Post-Trial Brief at

17. *Id.* There are some prominent cases that have been cited to support this claim.

[REDACTED]

[REDACTED]

[REDACTED]

*of Registration in Optometry*, 110 F.T.C. 549, 604 (1988) ("*Mass. Board*").

Respondents have chosen to ignore these cases. Respondents' effort to find in other decisions a repudiation of abbreviated analysis is not persuasive. In *CDA*, the Supreme Court explicitly endorsed the use of the abbreviated rule of reason in cases where "an observer with even a rudimentary understanding of economics could conclude that the arrangement in question

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

link between the unavailability of x-rays and an increase in the price of dental treatment:

desired by consumers for the purpose of determining whether a particular



"two among thousands of compact discs" as "comparably obvious" is "absurd." *Id.* This is

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



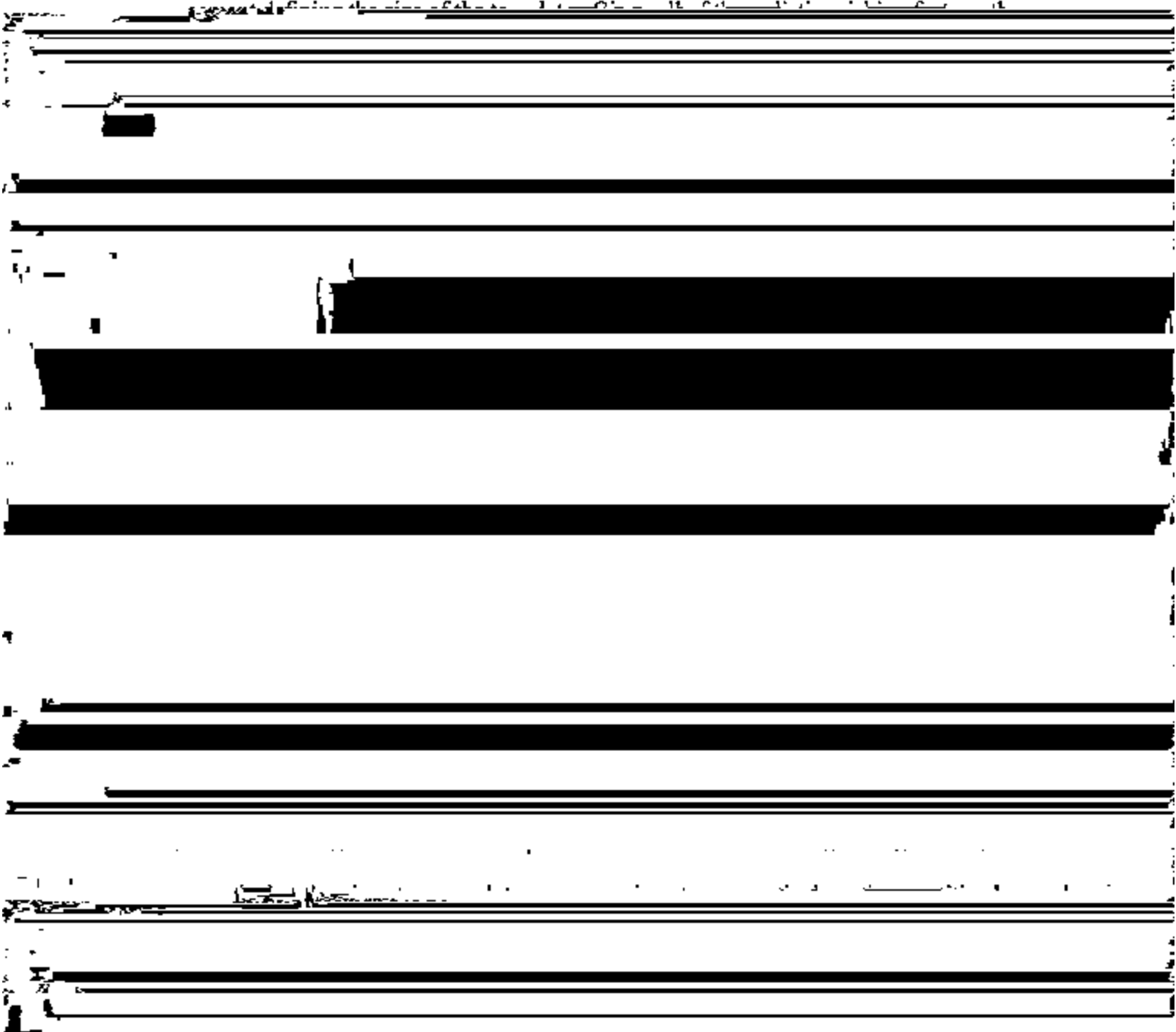
relevant question is whether the restraints employed by PolyGram and Warner – an agreement not to discount and an agreement not to advertise – fall within a category of restraints that is likely to be anticompetitive absent an efficiency justification. Plainly, the answer to this question is yes; these are considered to be among the most serious and pernicious restraints that

\_\_\_\_\_

Respondents' contention that courts lack experience with restraints similar to those

\_\_\_\_\_

277 F.3d 499 (4th Cir. 2002), upon which Respondents rely. The Court of Appeals determined that an agreement among airlines defining the size of the template placed adjacent to x-ray machines at airport luggage checkpoints did not have obviously anticompetitive effects. Courts have no prior antitrust experience with such agreements; there is no economic literature that addresses such agreements; the relationship between the templates and the price of air transportation is not obvious; and it was essential that the airlines collectively reach some



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] conspiracy that the members might have been officers and/or with the ability

[REDACTED]

[REDACTED]

[REDACTED]

51. See *In re SKF Indus. Inc.* 94 F.T.C. 6, 103 (“Some efficiencies may of course result from

almost any market allocation scheme.”) This is not what the Supreme Court intended when it

relaxed the rule of *per se* liability in *NCAA* and *BMI*.

[REDACTED]

Contrary to Respondents' argument, *CDA* does not support the proposition that a plausible efficiency benefit is a sufficient defense. The *CDA* Court instructed that where likely anticompetitive effects are obvious, the burden then shifts to the defendants "to show empirical

As described below, Defendants have not advanced sufficient evidence to validate their

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3

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[Redacted]

[Redacted]

As detailed in Complaint Counsel's Post-Trial Memorandum, there is no evidence of actual or likely consumer confusion in selecting among the various Three Tenors recordings.

Complaint Counsel's Post-Trial Memorandum at 60-61; see also CBE #0340-250-26 (4-1-17)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



¶ 144.<sup>27</sup> Given this less restrictive alternative, PolyGram and Warner are not permitted to act in

*America v. F.T.C.*, 312 U.S. 668 (1941).

Most implausible of all is the claim that concerted action was required in order to ensure that Warner's operating company in the United States would "focus" appropriate resources upon

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**III. The Moratorium Agreement Was Not Necessary to Avoid Free Riding**

Respondents have established a case of the essential elements of a claim of free riding.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

diverted sales would go to Warner (3T2) and only half to competitor PolyGram (3T1), and given that in 1998 PolyGram was compensating Warner for the advertising expenditures. CPRF ¶ 91.<sup>12</sup>

Respondents answer by citing the following testimony: The volume of 3T3 sales during the moratorium period will influence the venturers' judgment as to how much advertising should be funded following the moratorium period; if 3T3 is very successful during August, September,

October 1998, then the album will require to be promoted extensively. This testimony has

absolutely nothing to do with free riding consumers out of the moratorium agreement. The

there was an effect, was it meaningful or substantial? Defendants offer no evidence that

hence have not met their burden to demonstrate that the free-riding problem was significant.<sup>33</sup>

Assuming, contrary to the evidence, that there was a significant free-riding problem here,

the court would then need to consider whether there were any less restrictive alternatives that

line product stocking, and extensive inventories . . . . [T]hus these services were not susceptible to free riding.”).

These cases reject a free-riding defense when compensation is possible, and Respondents’ attempts to distinguish these precedents are not persuasive. Respondents point out that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

allocation of costs at any time. [REDACTED] CPF ¶¶ 335-349; CPRF ¶ 141-142. Finally, so long as advertising for 3T3 is continued, the allocation of costs is of no antitrust concern. *TRU*, 126 F.T.C. at 602.

**IV. The Moratorium Was Not Necessary for the  
Release of Future Three Tenors Albums**

Dependants argue that the moratorium was justified because it causes that [REDACTED]

lead to increased total output. CPRF ¶¶ 139-142. On this issue, Dr. Stockum is undoubtedly correct.<sup>35</sup>

Tenors albums some years hence should depend upon a moratorium agreement in effect four years ago. To the extent that the moratorium leads to higher market prices and greater profits (without a legitimate efficiency), this may make it more attractive for PolyGram and Warner to introduce new products. But this is simply a by-product of cartelization, and not a valid efficiency defense. See *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980);



**V. The Moratorium Was Not Necessary to Protect Confidential Information**

Respondents claim that the moratorium helped assure that neither PolyGram nor Warner would free ride on the “confidential marketing plans developed by the joint venture partners for the new album.” Respondents’ Post-Trial Brief at 45-46. This argument is pretextual and entirely without merit.

No witness, and no document, suggests that the moratorium was intended to protect against the misuse of confidential marketing plans. This is the attorneys’ post hoc rationalization for the moratorium agreement, and is therefore not a valid defense. *See* Complaint Counsel’s Post-Trial Memorandum at 44.

There is no evidence that PolyGram and Warner exchanged confidential marketing

information relative to 2T2, CDPE # 41, 50, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

...insisting the other's marketing contribution ...

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

how").

[REDACTED]

[REDACTED]

595.

The analogy between the present case and *Palmer v. BRG*, 498 U.S. 46 (1990), is

The Court should issue an order enjoining Respondents from again agreeing with a competitor to fix prices or restrict advertising. Respondents contend that a cease and desist order

is this case inappropriate because the respondents have not been found liable for any violation of the antitrust laws.

similar to the 3T3 project – in which Respondents have both an incentive and an opportunity to fix prices and restrict advertising for competing products. CPF ¶¶ 371-374. An order will deter Respondents from agreeing in the future to a moratorium on competitive activity.

PolyGram and its horizontal competitor, Warner, agreed to fix prices and ban advertising for certain audio and video products featuring the Three Tenors. Because the moratorium

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]