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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

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COMPLAINT

Case No. CV 00-10781R (LGB) (AJWx)

EDWARD MICHAEL OBRIEN

and SAVIORG CORPORATION,

Plaintiffs,

v.

TIME WARNER, INC., WARNER MUSIC GROUP,

WARNER-ELECTRA-ATLANTIC CORPORATION,

WARNER BROS. RECORDS, INC., ATLANTIC RECORDING CORP.,

ELEKTRA ENTERTAINMENT GROUP, INC., RHINO ENTERTAINMENT

COMPANY, WAL-MART STORES, INC., K-MART CORPORATION,

BORDERS BOOKS, and MORNING GLORY MUSIC,

Defendants.

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## I. CASE SYNOPSIS

1. Plaintiff, Edward Michael O'Brien and SAVIORG Corporation ["PLAINTIFF"] bring this antitrust action against Defendants, Time Warner, Inc. ["TW"], Warner-Elektra-Atlantic Corporation ["WEA"], Warner Music Group ["WMG"], Warner Bros. Records, Inc. ["WBR"], Atlantic Recording Corp. ["ARC"], Elektra Entertainment Group, Inc. ["EEG"], and Rhino Entertainment Company ["REC"], Walmart Stores, Inc. ["WMS"], and K-Mart Corporation ["KMC"], Morning Glory Music, Inc. ["MGM"], and Border's Books, Inc. ["BBS"] under the laws of the United States of America (Title 15, United States Codes, Sections 1, 2, 14, and 15) and of the State of California (Business & Professions Codes, Sections 16720, et seq. and 17200, et seq.) to recover damages incurred by the Plaintiff caused by illegal *tying* and *price-fixing* by defendants acting as (1) distributor(s) of prerecorded music (including compact discs ["CDs"], cassettes and albums), (2) prerecorded music ["PRM"] wholesalers, and (3) PRM retailers.

2. TW directly, indirectly and/or through other corporations, subsidiaries, divisions, agents or devices adopted, maintained enforced and threatened to enforce certain policies, plans and directives which made the receipt of (1) Continuing Distribution["CDP"] of PRM, (2) Cooperative Advertising ["CO"] and/or Promotional Funds ["PF"] tendered by TW and subsidiaries to associated retailers contingent upon the actual or suggested retail price at which PRM products were advertised, promoted, offered for sale or sold by traditional retailers ["TR"] or discount retailers ["DR"], including the Defendants.

WEA, WMG, WBR, ARC, EEG, REC, WMS, KMC, MGM and BBS conspired with, and fully agreed to implement and maintain, TW's Minimum Advertised Pricing ["MAP"] policies, plans, directives and actions.

Note: When WEA is read henceforth herein WEA includes all named defendants not retailers of PRM. Although certain Defendants other than TW and WEA did not always act in conspiracy over time of cause of action, for purposes of clarity and brevity herein, comprehensive conspiracy is averred.

3. TW, in conspiracy and in contractual agreement with other named Defendants to monopolize and/or attempt to monopolize and, thereby, to preclude competition in PRM markets (wholesale and retail) and to maximize retail prices for PRM, used (1) TW/WEA and contracts with TRs and DRs for CDP, and (2) CO and PF benefits tied to CDP contracts to compel TR's and DR's advertisement/sale of PRM at retail prices specified in Defendants' MAP directives.

4. TW and subsidiaries' monopolistic policies compelling fixed PRM prices coupled with ties of two separate values (CO and PF) to a third value (CDP), as alleged above, constituted illegal price-fixing (15 U.S.C., sec. 1), monopolization and/or attempted monopolization (15 U.S.C., sec. 2) and illegal tying (15 U.S.C., sec. 14).

5. When TW/WEA distributed its' monopolized, tied and price-fixed PRM products to TRs and DRs, TW/WEA did not immediately increase wholesale prices to TRs and DRs. Rather, the initial, primary targets for Defendants' illegal actions were retail consumers in PRM markets.

Following MAP revision and promulgation in 1996, initial antitrust injury was only to retail consumers overcharged by Defendants for PRM. Initially, wholesalers and retailers were not overcharged by TW/WEA. Wholesale prices remained the same. The first overcharge issuing from revised MAP policies, targeted and executed by the TW/WEA-TR/DR conspiracy (collusion), directly and exclusively impacted only consumers.

Defendants had not "passed on any monopoly overcharge to its' own customers, the wholesale purchasers..." [*IN RE BRAND NAME PRESCRIPTION DRUGS*, 123 F.3d 604-606 (7th Cir. 1997)]

6. Although consumers were , technically, indirect purchasers of PRM they were directly injured (financially) by Defendants' conspiratorial actions and the doctrine established by the United States Supreme Court in *Hanover Shoe* and *Illinois Brick* precluding antitrust standing for "indirect purchasers" does not apply to this case where retail customers were first to be overcharged. [*Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)]

7. It can be argued, tangentially, that Defendants' actions also injured recording artists and independent producers of PRM who contracted to receive from Defendants certain percentages of PRM sales revenues as compensation, when Defendants' anticompetitive prices curtailed maximum wholesale/retail sales (revenues) of PRM in order to aggrandize Defendants on a relatively long term basis.

8. PLAINTIFF purchased PRM products directly from TRs and DRs for corporate as well as personal use from January 1996 to the present. Therefore, as directly purchasing consumers of Defendants' products during the relevant time period, PLAINTIFF has antitrust standing to assert claims and obtain Court's relief for corporate and personal damages (trebled) and statute specified exemplary damages (federal/state) because Defendants' anticompetitive acts directly injured PLAINTIFF, other consumers, and commerce itself in PRM markets in a manner which federal and state antitrust laws were designed to prevent.

9. TW/WEA's illegal tying can be synopsisized thusly,

a) TW/WEA offered three (3) separate products: (a) National/Regional Advertising Access (Product A), (b) Retail Promotional Benefits (Product B), and (c) PRM (Product C).

b) TW/WEA's new MAP policies (promulgated in 1996 and following) stated effectively, if TRs and DRs wanted to continue to acquire Products A and B they had to purchase Product C restricted by MAP policies which effectively price-fixed all PRM distributed by TW/WEA.

10. Five "major distributors" distribute and sell over 85% of all PRM in the United States. WEA, wholly owned by TW, is one of the five major distributors of PRM. Sony Music Entertainment, Inc., Universal Music and Video Distribution, Inc., EMI Music Distribution, and Bertelsmann Music Group, Inc. are the other major distributors.

Because PLAINTIFF can prove distributors' oligopoly agreed and acted monolithically to create, promulgate and integrate MAP policies (1996-2000) it is alleged that Defendants' conduct constituted illegal *monopolization* where oligopoly acted progressively and unilaterally to monopolize and/or attempt to monopolize relevant markets via price-fixing and illegal tying, as proscribed under Title 15, sec. 1, 2 and 14.

Defendants agreed to, and did, fix prices and this fact alone is evidence of monopoly power.

"The presence of price discrimination in the economic sense is evidence of the presence of monopoly power--the power to raise price above cost without losing so many sales as to make the price rise unsustainable...Since monopoly power can be created by collusion among competing sellers, the existence of industry-wide price discrimination is some evidence of collusion." [Ibid., p.603]

Defendants had sufficient monopoly power to control retail prices in relevant interstate markets and thereby increase collective regional and national monopolies in those markets. The purpose of Defendants' monopolistic policies and agreements was to arbitrarily raise and maintain all PRM retail prices and so reduce and/or eliminate retail price competition from discount retailers which had threatened the artificially high and stable profit margins enjoyed, long term, by TW/WEA and its' TRs.

11. Defendants began to threaten and eventually preclude competition in relevant markets when numerous DRs (including also Target, Inc., Circuit City, Inc., and Best Buy, Inc.) found that they could legally and profitably undercut prevailing retail prices charged for PRM products by TRs. Customers in great numbers went to DRs who rapidly gained PRM market share at the expense of TRs.

12. TRs reacted by pressuring TW/WEA (and the other major distributors of PRM) to impose new MAP standards which would more effectively establish retail price levels for PRM, thereby reducing and/or eliminating retail price competition. Responding to that pressure, and desirous of eliminating retail competition for PRM which threatened its' own high profit margins, TW/WEA, agreed to impose stronger MAP policies. TRs immediately acknowledged TW/WEA's new MAP, and sought to strengthen the policies by, among other things, sending letters to TW, WEA and WMG thanking the corporations for implementing the new MAP policies.

13. TR's demand for TW/WEA's MAP policies backfired, however, when TW/WEA discovered that, due to a preclusion of competition (monopolization) phenomena inherent in MAP implementation, it became increasingly possible for TW/WEA to arbitrarily raise wholesale prices.

14. MAP policies applied so broadly and punished TRs and DRs violations so severely that they effectively precluded DRs from selling PRM below prices set by TW/WEA (and eventually set by all other PRM distributors). Since discounted sales are "bread & butter" for DRs, they protested vigorously but the severe financial penalties which TW/WEA imposed on non-complying TRs and DRs created absolute solidarity of

compliance, and made resistance to MAP too dangerous, costly and/or otherwise prohibitive for even the largest DRs, like WMS and KMC.

15. Primary effects of Defendants' anticompetitive agreements and actions have been twofold. First, retail PRM prices, which had been dropping in 1994-1996, were stabilized and raised industry-wide. Second, the PRM distributor oligopoly, in which TW/WEA was prominent, was able to maintain relatively high wholesale prices and margins for PRM products. As a result of both effects, (1) consumers have paid higher prices for PRM than they would have absent illegal conduct, (2) competitors of TRs and DRs have been precluded from competition, and (3) recording artists and other producers of PRM have been financially injured by curtailment of compensation.

## I. JURISDICTION, VENUE AND LIMITS

16. This complaint, which alleges violations of Section 1 and 2 of the Sherman Act, (15 U.S.C., sec. 1, 2) and Section 3 of the Clayton Act, (15 U.S.C., Section 14), is filed under, and jurisdiction is conferred upon, this Court by Section 4c of the Clayton Act, (15 U.S.C., sec. 15). For injuries sustained as a result of the violations alleged herein, under 15 U.S.C., sec. 1, 2 and 14, PLAINTIFF seeks to recover treble damages and federal/state exemplary damages, costs and expenses of suit and reasonable attorneys' fees.

17. This complaint also includes allegations of California antitrust and unfair competition law violations, and seeks relief including damages for commercial and personal injuries sustained in California. State law claims are so related to federal law claims raised in this complaint that they form part of the same case or controversy under Article III of the United States Constitution. Therefore, district court has supplemental jurisdiction over these state claims.

18. Because this civil action arises under the laws of the United States of America, this Court has jurisdiction over this matter pursuant to Title 15 U.S.C., section 15 and Title 28 U.S.C., section 1331.

19. Venue is proper in this district under 28 U.S.C., sec. 1391 because defendants transact business and are found within this district. Defendants' anticompetitive practices complained of herein have resulted in loss or damage to plaintiff's public charity, business and person, and to the general welfare and economic status of large numbers of consumers and companies in the United States and worldwide.

20. This action is within time limits.

Cause of action in this case is subject to tolling provisions authorized under Title 15, U.S.C., Section 16 relating to Federal Trade Commission ["FTC"] action *In The Matter of Time Warner, Inc.*, File No. 971-0070.

## II. DEFINITIONS

21. "Discount Retailer" [DR] means an entity that sells prerecorded music products to consumers through stores that do not specialize in prerecorded music products. DRs include, but are not limited to, mass merchandisers and electronics superstores such as Best Buy, Circuit City, K-Mart and Wal-Mart.
22. "Label" means an entity that is in the business of producing prerecorded music, including contracting with artists and producers and promoting prerecorded music products.
23. "Distributor" means an entity that distributes prerecorded music products on behalf of a music company or label. "Defendant distributor" means Time Warner, Inc., Warner Music Group, Inc. and/or Warner-Elektra-Atlantic Corporation.
24. "Traditional retailer" [TR] means an entity that specializes in selling primarily prerecorded music products to consumers.
25. The "relevant time period" is the period beginning January 1993 to the present.

## III. PARTIES

26. On August 8, 2000, Attorneys General of thirty (30) States of the United States of America, under the leadership of Eliot Spitzer, Attorney General of New York, in sovereign capacity as *parens patriae* on behalf of natural persons for whom the States are entitled to act, and as *parens patriae* on behalf of each States' citizens, economy and general welfare, filed an action in federal court very similar to this case. PLAINTIFF has found it necessary to file and prosecute a separate action because California, PLAINTIFF'S State of Incorporation, business location, primary residence and State of citizenship, was not included among States' aforesaid action(s) *parens patriae* on behalf of private and public plaintiffs.
27. Edward Michael O'Brien is the founding president and chairman of SAVIORG CORPORATION, a California public charity [509 (a)2], established in 1990 at 3460 Constellation Road, Lompoc, California 93436. SAVIORG and Mr. O'Brien receive mail at principal place of business, P.O. Box 91003, Santa Barbara, CA 93190.
28. TIME WARNER, INC. is a corporation organized and existing under the laws of the State of Delaware with its' principal place of business at 75 Rockefeller Plaza, New York, New York. TW owns subsidiaries that distribute PRM under names WARNER-ELEKTRA-ATLANTIC CORPORATION, WARNER MUSIC GROUP, INC., WARNER BROS. RECORDS, INC., ATLANTIC RECORDING CORPORATION and RHINO ENTERTAINMENT COMPANY.

WARNER-ELEKTRA-ATLANTIC CORPORATION is a corporation organized and existing under the laws of the State of New York with its principal place of business at 111 North Hollywood Way, Burbank, California.

WARNER MUSIC GROUP, INC. is organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York.

WARNER BROS. RECORDS, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York.

ATLANTIC RECORDING CORPORATION is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 75 Rockefeller Plaza, New York, New York.

RHINO ENTERTAINMENT COMPANY is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 10635 Santa Monica Blvd., Los Angeles, California.

29. ELEKTRA ENTERTAINMENT GROUP, INC. is a corporation organized and existing under the laws of the State of Florida with its principal place of business at 1413 Ryan Lane, Royal Palm Beach, Florida.

30. WAL-MART STORES, INC. is a corporation that makes retail sales of PRM on an interstate basis, and is organized and existing under the laws of the State of Delaware with principal place of business at 702 S.W. Eighth St., Bentonville, AR 72716.

31. KMART CORPORATION is a corporation that makes retail sales of PRM on an interstate basis, and is organized and existing under the laws of the State of Michigan with principal place of business at 3100 West Big Beaver Road, Troy, Michigan 48084.

32. BORDER'S BOOKS, INC. is a corporation that makes retail sales of PRM on an intrastate basis, and is organized and existing under the laws of the State of California with principal place of business at 7000 Marketplace Avenue, Goleta, CA 93117.

33. MORNING GLORY MUSIC, INC. is a company that makes retail sales of PRM on an intrastate basis, and is organized and existing under the laws of the State of California with principal place of business at 1014 State Street, Santa Barbara, CA 93190.

#### IV. CO-CONSPIRATORS

34. Various firms, corporations and other persons, known and unknown, not named as defendants herein, including without limitation unnamed retailers, wholesalers, labels, one-stops and rack jobbers, have participated as co-conspirators with the Defendants in the violations alleged in this complaint and have performed acts in furtherance thereof.

#### V. TRADE AND COMMERCE

35. There are two relevant markets in this matter. First, the production, distribution and wholesale of PRM. Second, retail sales of PRM. The geographic realm of the wholesale/retail markets is the United States of America.

PRM wholesale markets are characterized by high entry barriers that effectively preclude entry into competition by new distributors.

WEA sells PRM to numerous retailers including independent retailers, large national chains, mass merchandisers, regional chains and consumer electronics stores. WEA also sells PRM to certain sub-distributors who in turn supply retailers not serviced directly by WEA.

36. During the relevant period, defendant distributor, TW/WEA, sold PRM, including compact disks ["CDs"], to retailers located throughout the United States. These products were transported across state lines, were shipped in interstate commerce, and were sold in various States of the USA by numerous retailers.

The activities of each of the defendants, including receiving, distributing, and selling prerecorded music products, were in the regular, continuous and substantial flow of interstate commerce and have had, and do have, a substantial effect upon interstate and intrastate commerce.

#### VI. PRODUCT AND GEOGRAPHIC MARKETS

37. The product markets in this case are wholesale and retail sales of prerecorded music, including markets and submarkets for CDs, cassettes, and albums. Such products are highly valued by consumers, and have no close substitutes.

38. The geographic markets in this case are the United States, for sales of PRM at wholesale, and national, local and regional markets and submarkets throughout the United States, for sales of PRM at retail.

## VII. PRERECORDED MUSIC INDUSTRY

39. Each year, consumers pay billions of dollars at retail for PRM products, the vast majority of which are CDs. According to an industry trade association estimate, in 1999 the total U.S. market for PRM was estimated at \$14.6 billion.

40. After a multiplicity of mergers in the late 1980s and early 1990s, the PRM industry was dominated by six (6) major holding companies, BMG, EMI, SONY, UNIVERSAL, TIME WARNER, and POLYGRAM. This group was reduced to five (5) when UNIVERSAL's parent company acquired POLYGRAM in July 1998. Generally, these holding companies are both vertically and horizontally integrated, comprising both labels and distribution companies. Recording artists ["RA"] enter into contracts with labels, for a certain number of releases during the contract term. The label is responsible, working jointly with RA, for "content development" and for the actual manufacturing of PRM media. Each label also plays a role, with its' affiliated distribution company(s), in marketing the finished product. Distribution companies are responsible for wholesale contracting and distribution of PRM to retailers of new releases and catalogue ordered releases.

41. There is a group of relatively small "independent" music distributors, but high barriers to entry shield TW/WEA and other major distributors both from expansion by independents and from entry of new independents into wholesale markets for PRM. Barriers to entry arise from certain monopoly powers (group monopolization) including advantages that accrue to owners of extensive catalogs and "back catalogs" of successful recordings and the enormous financial, logistical and networking resources available to major corporations as they dominate existent and would-be competitors seeking to acquire and maintain control of essential assets including portfolios of successful artists and their works.

42. For cited and other reasons, wholesale markets for PRM is dominated by major players having few other viable competitors. Major distributors' market shares tend to remain relatively stable over time and "majors" view each other as their only effective competitors.

43. TW/WEA and its' labels promote their products directly and pay retailers to promote them. Generally, promotional efforts are either media advertisements, or some form of in-store promotion. In-store promotions often involve eye-catching placement of a particular product, for example at an end-cap (the end of a merchandise aisle) or at the cash register. Promotional funding that TW/WEA and/or labels provide to TRs and fully compliant DRs are very substantial, running to many millions of dollars annually. Moreover, promotional payments often exceed the cost to the retailer of providing promotional services.

## VIII. THREAT OF COMPETITION

44. Entry into the retail PRM market by DRs (often paying the same wholesale prices as TRs but able to sell in bulk at lower prices) in the early 1990s introduced new and stronger competition into retail markets, and so threatened wholesale markets for

prerecorded music. Dangers inherent in the new competition quickly became apparent to TRs. New entrants, including discount "superstore" retailers like Wal-Mart and K-Mart, aggressively offered highly competitive prices to consumers. According to the deposition of one TR, the average price of a CD went from \$15 to \$10 in a short period of time.

45. DRs' sales grew dramatically, and price competition among music retailers spread rapidly. Although TRs were forced to drop their prices to some extent, they nevertheless lost significant market share to DRs such as Best Buy Inc., Circuit City Inc., Target Inc., Wal-Mart Inc., and K-Mart Inc.

46. It was not only TRs who felt threatened. TW/WEA and other major distributors recognized that retail price competition was beginning to put pressure on wholesale margins as well, and this fact affected TW/WEA's ability to rationalize wholesale price maintenance and/or increases.

47. TW/WEA first instituted MAP policies in the early 1990s. According to the terms of the (1996-2000) policies, retailers could not obtain reimbursement for advertising expenditures for PRM advertised below prices listed on the MAP schedules. However, MAP policies did not immediately push back the rising tide of price competition. As reported in the March 22, 1997 issue of *Billboard*, "When the price war began, the six majors each implemented their own MAP policies, but those early efforts were considered ineffective."

When oligopoly leader, TW/WEA, demanded MAP compliance, MAP proved highly effective curtailing competition and its corresponding effect on prices.

## IX. SCHEME TO STOP COMPETITION

48. TW/WEA and many other distributors, labels and retailers belong to the National Association of Recording Merchandisers ("NARM"), an industry trade association. Representatives of the distributors, labels and retailers regularly attended meetings of NARM. Distributors' officers and chief executives have served on the board of directors and various committees and groups of NARM, as have the retailers.

49. NARM provided a forum for private discussion between retailers, labels and distributors regarding MAP policies and MAP pricing levels.

50. In 1995, with price competition intensifying, and with traditional retailers in deepening financial difficulties, retailers began sending strong messages to TW/WEA and other major distributors that decisive steps were necessary. In February 1995, Jack Eugster, the CEO of Musicland, Inc., a large TR, delivered the keynote address at the NARM convention.

51. Eugster, who was also NARM's President, spoke to an audience of industry executives, including ranking representatives of TW/WEA and its' labels and retailers. He decried the devaluation of CDs, and called for a return to a "sane" marketplace.

52. In advocating joint action between TW/WEA and other distributors, labels and retailers in the form of strengthened MAP programs, Eugster said:

"This discussion brings us then to retailer, distributor and music company partnerships. More than ever, these partnerships need to be tightened. Our industry health is going to depend on proactive programs that are targeted to prevent the devaluation of CD's. As record companies, be wary of marketers who use your products as skills, come-ons and loss-leaders for other merchandise...

For years, wholesalers in many industries have found that minimum advertised price programs to qualify co-op dollars have been especially effective in supporting the value of perceptions of their merchandise. Most music companies and movie studios have MAP programs. These programs accomplish their goals best when the MAP price is sufficiently above wholesale cost as to not de-value the product in the consumer's mind. Also, effective MAP programs consider in-store pricing as well as advertised prices and condition co-op support for the entire ad on MAP compliance."

53. Following the NARM convention of 1995, TRs, including defendant TOWER RECORDS ["TRC"], continued to press TW/WEA to strengthen its MAP programs by implementing the provisions which Eugster had proposed. For example, in April 1995, a representative of TRC, met with an executive of EMD to urge EMD to increase MAP without raising wholesale prices.

54. Gradually, and under persistent pressure, TW/WEA with the approval and/or support of its' affiliated labels and retailers agreed to implement and enforce stronger MAP policies.

55. In a series of announcements to their retail customers in 1995 and 1996, TW/WEA transformed its' MAP programs into blunt and effective instruments for putting an end to price competition, along precise lines that Eugster enunciated. In three (3) key respects, policies adopted by TW/WEA and the other major PRM distributors were found to be substantially similar.

56. First, the ban on communicating discounted prices to consumers was not confined to "advertised" prices in print and electronic media. Rather, it extended to all in-store displays and signs, with the sole exception of a small price sticker on the CD itself. In effect, TW/WEA's MAP policies, for implementation by all of its' retailers (TRs and DRs), prohibited virtually all commercially practicable means of communicating discounted prices to consumers.

57. Second, a single violation by a retailer could have far-reaching economic consequences, such as the loss of all promotional funds available from TW/WEA for a period of from sixty (60) to ninety (90) days from the date of the violation. Moreover, a violation at a single store could jeopardize promotional funds and advertising benefits for an entire chain.

## X. INJURY TO COMPETITION AND CONSUMERS

58. Third, TW/WEA's MAP policies broadly applied to any advertisement or promotion undertaken by a retailer with respect to TW/WEA's and its' labels's PRM products, whether or not any advertising funds provided by the distributor and/or label were used to pay for the advertisement or promotion. In other words, sanctions were triggered under the policies even by advertisements or promotions funded entirely by the retailers themselves, if those advertisements or promotions featured prices below those dictated by TW/WEA and/or its' labels.

59. By January 1, 1996, defendant TW/WEA had implemented a stronger MAP policy that included all of the provisions outlined in paragraphs 54-56 above. The other major distributors of PRM followed TW/WEA's leadership as follows.

60. By July 1, 1996, Universal Music Group had implemented a stronger MAP policy that included all of the provisions outlined in paragraphs 54-58 above.

61. By July 27, 1996, Capitol Records, Inc. had implemented a stronger MAP policy that included all of the provisions outlined in paragraphs 54-58 above.

62. By August 5, 1996, Sony Entertainment had implemented a stronger MAP policy that included all of the provisions outlined in paragraphs 54-58 above.

63. By January 2, 1997, Bertelsmann Music Group had implemented a stronger MAP policy that included similar provisions.

64. Pressure from TRs played a key role not only in the initial adoption of these stricter MAP provisions, but in ensuring that each of the major distributors of PRM products adopted substantially equivalent policies, so that they applied uniformly and market-wide. Distributors who lagged behind in implementing any of noted three provisions were pushed and prodded by TW/WEA until each of them had adopted the tough, new MAP stance toward PRM retailers, both TRs and DRs.

65. After each wave of tighter MAP policies, many TRs contacted TW/WEA to thank the corporation, and applaud its' efforts in stabilizing, increasing and maintaining prices in relevant PRM markets.

66. Having reached illegal agreements, TW/WEA and its' TRs proceeded to enforce them. TRs, including TRC, aggressively policed the MAP agreements by informing TW/WEA of violations, and TW/WEA cooperated by consistently imposing sanctions on offending TRs and DRs. Ultimately, the financial pain that the conspirators inflicted on DRs through MAP enforcement efforts resulted in the unwilling agreement by most DRs to adhere to TW/WEA's pricing "guidelines".

67. Agreements reached and enforced by TW/WEA with the support and/or approval of labels, TRs and complying DRs were in commercial reality and practical effect illegal agreements and actions to fix resale prices, for at least three (3) reasons.

68. First, because retailers have, under enforced MAP policies, strong incentive not to sell below their advertised prices, distributors' fix of advertised price levels effectively fixes retailers' price levels.

69. Second, broadening MAP policies to cover virtually all price communications from retailers to consumers, whether in-store or in the media, and even covering advertising projects funded solely at retailers expense, essentially ended retailers' ability to sell PRM products at discounted prices.

70. Third, the fact that a single violation of the TW/WEA's MAP policies could entail the loss of all advertising funds that a given retailer would otherwise have enjoyed during a ninety or sixty day period meant that the cost to retailers of violating policy was prohibitive. TW/WEA and its' labels have been providing \$X. million dollars in advertising and promotional funds to retailers, annually, since 1996.

71. As a result of Defendants' actions alleged, retail and wholesale prices for PRM, from 1996 to the present, have progressively increased. Such increases were/are exactly what TW/WEA, its' labels and TRs intended to achieve by implementing formal agreements to fix price levels.

72. From inception in 1983 through 1996, average CD prices decreased substantially and nationwide. Then something occurred in 1996 that is not rationalized by fair business practice.

"Clearly there are many costs associated with producing a CD, and despite these costs the price of recorded music to consumers has fallen dramatically since CDs were first introduced in 1983. Between 1983 and 1996, the average price of a CD fell by more than 40%. Over this same period of time, consumer prices (measured by the Consumer Price Index, or CPI) rose nearly 60%." [RECORD CO'S SUE OVER CD PRICES, Larry Neumeister, Associated Press Article (<http://dailynews.yahoo.com>), August 8, 2000]

73. "...the average retail price of a CD in 1996 [was] \$12.75."[Ibid.]

74. Average retail prices for PRM CDs, throughout the USA and internationally are difficult to compile.

75. Average retail price for PRM CDs sold in the county of Santa Barbara, California by the four (4) leading retail stores, surveyed personally by PLAINTIFF in August, 2000, was \$15.52. Average retail prices per company surveyed are listed below:

- a. Wal-Mart Stores : \$14.50
- b. K-Mart Corp. : \$14.45
- c. Border's, Inc. : \$17.50 non-sale CDs [\$12.99 on-sale CDs]
- d. Morning Glory Music, Inc. : \$15.68 non-sale CDs

e. County average : \$15.53

76. The Federal Trade Commission (FTC) publicly announced on Wednesday, May 10, 2000, "The FTC estimates that the policies have forced U.S. consumers to pay as much as \$480. million more than they should have for CDs and other music over the last two-and-a-half years." [FTC forces CD price reform, CNNfn, <http://cnnfn.cnn.com>, May 10, 2000: 4:22 p.m. ET]

77. "The record companies policies were 'designed to get prices up', FTC Chairman Robert Pitofsky said at a press conference in Washington. 'There was no plausible business justification for this other than to get prices up,' he said. [Ibid.]

The elasticity of demand for PRM is low because the need for PRM is high. PLAINTIFF has lived and worked in many regions of the United States, and has consistently found concurrence with his own sentiments that listening to PRM is not so much a diversionary pleasure as it is an essential way-of-life (psychological health) for many, if not most, teenage and adult Americans. Inability to purchase PRM can, and has, caused emotional distress...for millions of persons worldwide. PLAINTIFF is one such person.

78. There appears to be no reasonable, legitimate business rationale for TW/WEA's MAP provisions; their sole purpose has been to eliminate competition and, thereby, stabilize and/or increase retail price levels.

79. Since 1996 and TW/WEA's commencement of noted MAP policies in cooperation with TR and DR Defendants, retail and wholesale prices have risen well in excess of the average annual rate of inflation and the CPI. Prices increased because major DRs buckled under extreme pressure from TW/WEA, its' lables and TRs, and DRs raised retail prices in conformity with MAP dictates. Once in the retail price fold, DRs were then made sufficiently receptive to anticompetitive directives re wholesale price increases by TW/WEA.

80. The causal connection between strengthened MAP policies and increasing prices was apparent to industry observers at the time of their establishment. By June 8, 1996, *Billboard* reported that "...since these [MAP] policies have come into play, sanity appears to be returning to hit pricing." Not wishing to ascribe the adjective "insane" to market conditions re discount retailer competition (1994-1996), PLAINTIFF would, in this case, object to *Billboard's* improper use of the word "sanity" because it does not refer to fair business practice, but rather to excess profitability.

81. A co-defendant with TW/WEA in States' *parens patriae* case reported in one of its' securities filings:

"During 1996, many of the major music vendors began to enforce programs such as the Minimum Advertised Pricing Program...the enforcement of the MAP program has been successful in stabilizing prices in the industry. Non-traditional retailers have...maintained less aggressive pricing policies." [Trans World Entertainment Corp., form 10-K, filed on March 31, 1998]

82. As stated above, once retail prices were brought under control, TW/WEA was able to increase wholesale prices, and did so leading to higher retail prices for consumers. Retail and wholesale price increases occurred despite the fact that, as records of the music companies reveal, per-CD unit costs decreased sharply during the 1990s. As a result of higher retail prices during the relevant period, consumers in all relevant markets have suffered economic injury. As a result of higher wholesale prices, retail "competitors" and PRM artist/producers have suffered economic injury.

## XI. FIRST COUNT AND BASIS FOR CLAIMS

( *Per se* violation of Section 1 of the Sherman Act )

83. PLAINTIFF repeats and realleges each and every allegation contained in paragraphs 1-82 with the same force and effect as if here set forth again in full.

84. Beginning in or about February 1995, and continuing thereafter to the present, Defendants and co-conspirators engaged in unlawful contracts, combinations, and/or conspiracies in restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act. These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

85. Said combinations and conspiracies consisted of continuing agreements, understandings, and/or concert of action between Defendants and their co-conspirators, the substantial terms of which were to fix, raise, maintain and/or stabilize the retail prices at which Defendants' prerecorded music products were advertised and sold to the consuming public. Such combinations or conspiracies are *per se* violations of Section 1 of the Sherman Act. These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

86. For the purpose of forming, effectuating, and furthering combinations alleged, Defendants and their co-conspirators did those things which they combined, agreed, and conspired to do as set forth in paragraphs 1-82 above.

## XII. SECOND COUNT AND BASIS FOR CLAIMS

( Rule of Reason violation of Section 1 of the Sherman Act )

87. PLAINTIFF repeats and realleges each and every allegation contained in paragraphs 1-72 with the same force and effect as if here set forth again in full.

88. Beginning in or about February 1995, and continuing thereafter to the present, Defendants and their co-conspirators engaged in unlawful contracts, combinations, and/or conspiracies in restraint of interstate trade and commerce, in violation of Section 1 of the

Sherman Act. These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

89. Said combinations and conspiracies consisted of continuing agreements, understandings, and/or concert of action between Defendants and their co-conspirators, the substantial terms of which were to fix, raise, maintain and/or stabilize the retail prices at which Defendants' prerecorded music products were advertised and sold to the consuming public. Such combinations or conspiracies are an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

90. For the purpose of forming, effectuating, and furthering combinations alleged, Defendants and their co-conspirators did those things which they combined, agreed, and conspired to do as set forth in paragraphs 1-82 above.

### XIII. THIRD COUNT AND BASIS FOR CLAIMS

( *Per se* violation of Section 2 of the Sherman Act )

91. Beginning in or about February 1995, and continuing thereafter to the present, Defendants and their co-conspirators unlawfully combined and conspired to monopolize and/or attempt to monopolize, and did, in fact, monopolize and/or attempt to monopolize a significant part of the trade and commerce of the United States of America including relevant markets in the State of California.

92. Said combinations and conspiracies consisted of continuing agreements, understandings, and/or concert of action between Defendants and their co-conspirators, the substantial terms of which were to monopolize and/or attempt to monopolize certain interstate markets for prerecorded music. Such combinations or conspiracies were an unreasonable restraint of trade and commerce in violation of Section 2 of the Sherman Act. These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

93. For the purpose of forming, effectuating, and furthering combinations alleged, Defendants and their co-conspirators did those things which they combined, agreed, and conspired to do as set forth in paragraphs 1-82 above.

### XIV. FOURTH COUNT AND BASIS FOR CLAIMS

( *Per se* violation of Section 14 of the Sherman Act )

94. Beginning in or about February 1995, and continuing thereafter to the present, Defendants and their co-conspirators unlawfully engaged in commerce, in the course of such commerce, fixed retail prices for contracted resellers such as to substantially lessen

competition or tend to create a monopoly in markets for prerecorded music. These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

95. For the purpose of forming, effectuating, and furthering combinations alleged, Defendants and their co-conspirators did those things which they combined, agreed, and conspired to do as set forth in paragraphs 1-82 above.

#### XV. FIFTH COUNT AND BASIS FOR CLAIMS

( *Per se* violation of Section 3 of the Clayton Act )

96. Beginning in or about February 1995, and continuing thereafter to the present, Defendants and their co-conspirators unlawfully engaged in commerce, in the course of such commerce, agreed, understood and made contracts between seller(s) and buyer(s) that conditioned buyers' purchase of one product upon the purchase of a second product from seller(s). These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

97. For the purpose of forming, effectuating, and furthering combinations alleged, Defendants and their co-conspirators did those things which they combined, agreed, and conspired to do as set forth in paragraphs 1-82 above.

#### XVI. SIXTH COUNT AND BASIS FOR CLAIMS

98. PLAINTIFF repeats and realleges each and every allegation contained in paragraphs 1-82 with the same force and effect as if here set forth again in full.

99. The aforementioned conspiracy(s) by Defendants and their co-conspirators were and are in violation of three (3) California Statutes: Business & Professions Codes, Sections 16720, et seq., "Combinations in Restraint of Trade" and Sections 17200, et seq., "Unfair Trade Practices". These actions injured PLAINTIFF, other consumers, and markets where purchases were made.

#### XVII. CONCLUSION

100. Each of the aforesaid unlawful acts, contracts, combinations and conspiracies by each of the Defendants and their co-conspirators had the following effects, among others:

101. The retail purchase prices for prerecorded music products sold throughout the United States, inclusive of California, were fixed, raised, maintained and/or stabilized at artificial, noncompetitive levels;

102. Wholesale prices for prerecorded music products sold throughout the United States, inclusive of California, were raised, maintained and/or stabilized at artificial, noncompetitive levels;

103. Price competition among retailers for the sale of prerecorded music products was restrained; and

105. PLAINTIFF and many other purchasers of prerecorded music products were denied the benefits of free and open competition among retailers and among wholesalers of those products, and, as a result, paid more for such products than they would have in a competitive market. Overcharge for PRM also restricted consumers ability to make purchases, and thereby, caused additional harm.

106. As a result of each of the illegal contracts, combinations, and conspiracies alleged above, natural and non-human persons residing in California have sustained injury to their property.

107. Natural and non-human persons residing within California are threatened with further imminent and irreparable injury to their property unless Defendants are restrained from continuing their illegal conduct. To this end, district court's award of personal and exemplary damages is appropriate and desirable.

## XVIII. DISCUSSION ON REMEDIES

108. PLAINTIFF sustained business and personal antitrust injury reasonably estimated at \$75,000. PLAINTIFF is able to prove financial injury under a cognizable legal/economic theory, and via expert witnesses, statistical analysis, and/or other detailed, documented evidence.

Federal Remedy Specifications:

109. Federal antitrust statutes specify penalties and/or remedies for proven breach(s) of Title 15, United States Codes, sections 1, 2, and 14. Many state antitrust statutes specify compensatory, exemplary and other forms of remedy for personal and business injuries sustained via breach of Title 15, U.S.C., sec. 1, et seq., and State Code violations (antitrust). California specifies penalties and/or remedies, included below, which are appropriate for this action.

Federal Penalties/Remedies :

110. a) Sec. 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or

by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 1]

111. Sec. 2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." [15 U.S.C., sec. 2]

112. Sec. 14: Statute is silent on specific remedy, but that does not imply that none exists. In case precedent and/or via the discretion of District Court and by long history of jury awards, parameters have been constructed which allow civil penalties, predicated on violation of this statute (including compensatory and exemplary damages), to be specified and demanded in acceptable monetary amounts.

113. Sec. 15: "...and person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." [15 U.S.C., sec. 15]

#### Declaration of Penalties/Remedies:

114. On its face it appears in this private antitrust case that the appropriate penalty/remedy for proven breach of sec.1, 2, and 14 is:

a) For convictions on Sections 1 and 2: Each Defendant must pay two-million dollars (trebled) to Plaintiff.

b) For conviction on Section 14: Each Defendant must pay (1) federal (civil) monetary penalties and damages as determined in the wisdom of the Court, and (2) state (civil) monetary penalties and damages as specified under State of California criteria at Section 2.(b)3 recorded below.

#### State Remedy Specifications Re California Law:

115. a) Section 16750: "Any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without respect to the amount in controversy, and to recover three times the damages sustained by him or her actual damages pursuant to Section 16761, and preliminary or permanent injunctive relief when and under the same conditions and principles as injunctive relief is granted by courts generally under the laws of this state and the rules governing these proceedings, and shall be awarded a reasonable attorneys' fee together with the costs of the suit.

116. This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." (emphasis added) [Cal. Codes: Business and Professions: Sec. 16750 (a)]

117. Section 16755: "Any violation of this chapter is a conspiracy against trade, and any person who engages in any such conspiracy or takes part therein, or aids or advises in its commission, or who as principal, manager, director, agent, servant or employee, or in any other capacity, knowingly carries out any of the stipulations, purposes, prices, rates, or furnishes any information to assist in carrying out such purposes, or orders thereunder or in pursuance thereof, is punishable, as follows:

118. (1) If the violator is a corporation, by a fine of not more than one million dollars (\$1,000,000) or the applicable amount under paragraph (3), whichever is greater.

119. (2) If the violator is an individual, by imprisonment in a state prison for one, two, or three years, by imprisonment for not more than one year in a county jail, by a fine of not more than the greater of two hundred fifty thousand dollars (\$250,000), a fine or the applicable amount under paragraph (3), or by both a fine and imprisonment.

120. (3) If any person derives pecuniary gain from a violation of this chapter, or the violation results in pecuniary loss to a person other than the violator, the violator may be fined not more than an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross gain multiplied by two or an amount equal to the amount of the gross loss multiplied by two, whichever is applicable."

121. Discussion: In this case, appropriate State penalty/remedy for proven breach(s) of Sections 16720, et seq. and Section 17200, et seq. are:

122. a) For convictions on Section 16000, et seq. and Section 17000 et seq.: Each Defendant must pay two-million dollars (trebled), or the gain (pecuniary) that each of the Defendants derived from proven breach(s) of antitrust laws over the time of the cause of action, if the gain is proven greater than \$6.00 million.

## XIX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for this Court to

a. Adjudge and decree that each of the Defendants has engaged in an unlawful contract, combination and/or conspiracy in violation of Section 1 of the Sherman Act, 15 U.S.C., section 1; and thereby caused antitrust injury to PLAINTIFF, other consumers, and markets where purchases were made.

b. Adjudge and decree that each of the Defendants has engaged in an unlawful contract, combination and/or conspiracy in violation of Section 2 of the Sherman Act, 15 U.S.C.,

section 2; and thereby caused antitrust injury to PLAINTIFF, other consumers, and markets where purchases were made.

c. Adjudge and decree that TW/WEA has engaged in unlawful tying of products in violation of Section 3 of the Clayton Act, 15 U.S.C., section 14; and thereby caused antitrust injury to PLAINTIFF, other consumers, and markets where purchases were made.

d. Adjudge and decree that each Defendant has violated certain sections of California Business & Professions Codes, Sections 16720, et seq., "Combinations in Restraint of Trade" and Sections 17200, et seq., "Unfair Trade Practices", and thereby caused antitrust injury to PLAINTIFF, other consumers, and markets where purchases were made.

e. Enter judgment in favor of the PLAINTIFF and against each of the Defendants, for \$300,000. or threefold the damages determined to have been sustained by PLAINTIFF as a result of each of the Defendants' violations of the above-referenced federal and state antitrust laws;

f. Enter judgment in favor of PLAINTIFF and against each Defendant for the maximum civil penalty allowed under the above-referenced federal and state antitrust laws;

g. Enter judgment in favor of PLAINTIFF and against each Defendant for statute (punitive) damages of twice the pecuniary gain derived from alleged illegal activities during the time period relevant to cause of action. Amount of statute damages specified no less than \$1,000,000,000. for companies having average net income of at least \$2,000,000,000. over time of cause of action.

h. Award PLAINTIFF the costs and expenses of suit, including reasonable attorneys' fees;

i. Grant such other and further relief as the Court may deem just and proper.

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EXECUTED this day, February 13, 2001

By \_\_\_\_\_

Edward Michael O'Brien

*Pro se*