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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARBITRON INC., :
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 : 08 Civ. 8497 (OLG)
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 Plaintiff, :
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 v. :
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 ANDREW M. CUOMO, in his Official : COMPLAINT
 Capacity as Attorney General for the State of :
 New York, :
 :
 Defendant. :
 :
 -----X

Plaintiff Arbitron Inc. ("Arbitron"), by its attorneys, Dickstein Shapiro LLP, as and for its
Complaint, hereby alleges as follows:

THE NATURE OF THIS ACTION

1. Arbitron brings this action pursuant to 42 U.S.C. § 1983 for a declaratory judgment under 28 U.S.C. § 2201 and for injunctive relief to protect its rights of free speech under the First and Fourteenth Amendments to the U.S. Constitution and under Article 1 of the New York State Constitution. As is more fully stated below, the Defendant has threatened to commence litigation against Arbitron regarding purported false and misleading statements he claims Arbitron has made about Arbitron's services. These threats have created an apprehension

and reasonable belief that the Defendant will seek to enjoin and restrain the publication of Arbitron's radio audience estimates in the New York Metro radio market in violation of Arbitron's constitutional rights.

THE PARTIES

2. Arbitron is a publicly held corporation organized and existing under the laws of the State of Delaware, with a place of business located at 142 West 57th Street, New York, New York.

3. Arbitron is in the business of publishing its opinions regarding radio audience estimates and station rankings in various markets throughout the United States. Arbitron's subscribers consist principally of radio broadcasters, advertisers, and advertising agencies.

4. Defendant Andrew M. Cuomo is named herein in his official capacity as Attorney General for the State of New York (the "AG" or "Attorney General"). Defendant maintains executive offices at The Capitol, Albany, New York, and at 120 Broadway, New York, New York, the office that has been involved principally in the events and occurrences giving rise to this action.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 as Arbitron asserts claims arising under the U.S. Constitution and 42 U.S.C. § 1983. This Court also has jurisdiction pursuant to 42 U.S.C. § 1343(a)(3) as Arbitron seeks to redress the deprivation of its civil rights by the New York State Attorney General acting under color of state law. Arbitron also asserts claims under New York State law over which this Court has supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) in that Defendant resides and is subject to personal jurisdiction in this District and a substantial portion of the events or omissions giving rise to the claims asserted herein occurred in this District. Arbitron's executive offices are located within this District, all process issued by the AG has come from its office in this District, and all other acts complained of herein have taken place within this District.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

The Diary and PPM Methods of Collecting Listener Information

7. For more than 40 years, Arbitron has collected information regarding radio audiences in various markets throughout the United States. Arbitron obtains this information by mailing paper diaries to selected survey participants in a given market. The participants are each asked to keep a written record of any radio broadcasts they hear over a one-week period, and then mail the diary back to Arbitron. The participants are selected at random so as to be representative of the local market population based on criteria such as age, sex, race, ethnicity, and whether English or Spanish is the dominant language spoken.

8. Arbitron collects the completed diaries over a three- or six-month period and analyzes the information using its proprietary methodologies and processes to determine audience estimates for radio stations. The estimates are organized by, among other things, time period and demographics such as age, sex, race, ethnicity, geography, and whether English or Spanish is the dominant language spoken. Arbitron publishes reports setting forth its opinions as to the size of radio audiences and station rankings on a quarterly basis (or twice per year in some markets). These audience estimates are in known in the industry as Arbitron Radio Market

Reports (“Arbitron Reports”). Each Arbitron Report is a copyrighted, original work, and is registered as such.

9. The Arbitron Reports are published to subscribers, comprised primarily of radio broadcasters, advertising agencies and advertisers, which enter into subscription agreements with Arbitron to use the estimates contained in the Arbitron Reports in connection with their businesses. The ratings opinions published by Arbitron are often used as a tool by these subscribers to make decisions regarding the buying and selling of advertising time. For example, an advertising agency or advertiser may use the Arbitron Reports to help determine where to place a product advertisement targeted at adults 25-54 years of age in the New York market between the hours of 6:00 a.m. and 10:00 a.m. This information may also be used to determine a reasonable rate for the advertisement considering the station’s ranking for that demographic at that particular time and the likely number of people who will be exposed to the advertisement on that station during a particular quarter hour time slot. The Arbitron Reports are also used by radio stations to aid them in making programming decisions for their stations. However, radio advertisers and advertising agencies are not compelled or caused to take any action or to refrain from taking any action as a result of having received Arbitron’s audience estimates. These businesses also consider other information in order to reach their own conclusions regarding programming decisions, whether and how to spend their advertising budgets, the targets of their advertising, and the media by which those targets may best be reached.

10. Some estimates from the Arbitron Reports are also provided to both mainstream media outlets and trade publications and are often published in the press, and are thus regularly disseminated publicly. Indeed, members of the public have shown a great interest in knowing how their favorite radio stations rank in the Arbitron Reports. Aware of this fact, top-ranked

radio stations in markets across the country frequently announce when they are “Arbitron-rated #1” in their respective markets. The results of Arbitron’s radio audience surveys are thus a matter of public interest and concern.

11. Although paper diary surveys have been the accepted currency for radio ratings for decades in the United States, the industry has long expressed concerns and levied criticisms regarding the fairness and reliability of the survey results. According to these critics, the paper diary survey is too subjective and depends too heavily on the memory of the participants. In response to these concerns, more than 15 years ago, Arbitron began to develop a new type of electronic ratings meter – the PPM. To date, Arbitron has invested more than \$150 million dollars in the development and testing of the PPM both in the United States and internationally.

12. The PPM is a small electronic device worn by panelists, who like diary participants, are selected at random so as to be representative of the local population in the surveyed market. The PPM panelists may remain in the panel for up to a two-year period. The PPM electronically and automatically picks up a hidden inaudible code embedded in a radio broadcast, which code identifies the station being heard by the panelist. In addition, the PPM contains a very sensitive motion detection device that allows the PPM to determine if it is being worn or carried in compliance with the survey requirements (as opposed to just sitting on a table, for example). The PPM can also determine whether it is inside or outside of the panelist’s home.

13. At the end of each day, each panelist places its PPM in a docking station. The information collected by the PPM is then transmitted to Arbitron for its expert statistical review and analysis resulting in the formulation and ultimate publication of Arbitron’s PPM audience estimates. Unlike the reports based on information obtained using paper diaries, which are

published quarterly (or semi-annually in some markets), the PPM audience estimates and rankings are generally published monthly.

Arbitron's Efforts to Gain Acceptance in the Market Prior to the Launch of PPM

14. Prior to launching PPM commercially in the United States, Arbitron conducted more than 75 separate studies and field tests of the PPM in the United States and in more than 15 other countries. These tests were overseen by Arbitron's world-renowned research and technology unit. To date, the results of these tests have led Canada, Belgium, Norway, Denmark, Iceland and Kazakhstan, to select the PPM for commercial ratings or marketing information. Arbitron's PPM encoding technology has been used for TV ratings in Singapore since 2001 and has been deployed in a commercial ratings service overseas since 2003.

15. Before the PPM was launched as a commercial service in the United States, Arbitron worked with the Media Rating Council, Inc. ("MRC"), the radio, broadcast television and cable television industries, as well as with advertising agencies and advertisers to demonstrate the unique value of PPM as a new electronic ratings tool. The MRC is a broadcasting industry association formed in the 1960's and made up of broadcasters, advertisers, advertising agencies and other media industry representatives. The MRC accredits audience ratings methodologies. Ratings services which desire MRC accreditation voluntarily submit their methodologies to the MRC, on a confidential basis, for its evaluation.

16. The MRC has a Voluntary Code of Conduct that requires a ratings service voluntarily seeking accreditation in a particular market to undergo an independent audit of its service in that market by a CPA firm selected by the MRC. The results of that audit are published only to members of the MRC. According to the MRC, the steps of audit, MRC committee review of the audit prior to commercialization – referred to by the MRC as

“illumination” – and disclosure of impact data are required to satisfy the minimum standards of the Voluntary Code of Conduct. The MRC Voluntary Code of Conduct does not *require* MRC accreditation before commercialization and, indeed it has never been the practice of Arbitron and other rating services over the past 40 years to obtain MRC accreditation before commercializing a rating service using a new technology.

17. Arbitron began to commercialize the PPM in early 2007. Arbitron chose to commercialize the PPM in the Top 50 markets in the United States because it is in the largest markets where implementing the PPM is commercially feasible and cost-effective.

18. The MRC accredited the PPM methodology in Houston in or about January 2007. Although Arbitron was not required by law or by the MRC’s own voluntary code of conduct to obtain MRC accreditation prior to that commercialization, Arbitron sought and obtained MRC accreditation of the PPM methodology for the Houston market prior to commercialization. This accreditation process took nearly two years.

19. Because the PPM is a new type of ratings measurement tool which is more objective in nature than the paper diary and does not rely on the memory and recall of the participant, the audience estimates obtained from the PPM panelists using the PPM are not the same as the results previously obtained using the paper diaries. Across the board in Houston and in other markets, Average Quarter Hour (“AQH”) ratings are lower for most if not all stations, although some stations experience greater decreases in their ratings than do other stations.

20. Arbitron believes this drop in ratings is due primarily to participants’ “rounding up” in the diary. Diary participants are instructed to record the actual start and stop times of their radio listening, but many participants round up the start and/or stop times to the top or bottom of the hour. In addition, many participants record continuous unbroken listening when in fact

actual time spent listening may have been significantly less because the panelist may have, for example, left the vicinity of the radio to run an errand or attend a meeting. Rounding up is common in a memory-based survey of radio audiences such as the diary system. The PPM does not suffer from these limitations.

21. Over the one and a half years that the PPM has been commercially deployed in Houston and elsewhere, broadcasters and advertising agencies alike have learned how to better utilize PPM audience estimates to increase their listening audience and ranking. For example, in Houston, two urban-formatted radio stations (KBXX-FM and KMJQ-FM) that are owned by Radio One, the largest majority African-American-owned radio station group in the United States, were perennial ratings leaders according to the diary-based survey. In the Winter 2007 Arbitron Report, which was the last diary report released in Houston, KBXX-FM and KMJQ-FM ranked first and third, respectively, in the market for AQH Persons, aged 12 and over, between the hours of 6AM and Midnight, Monday through Sunday, which is also known as the “total week” day part. When the Houston market was converted to the PPM-based ratings currency in 2007, these two stations experienced initial declines in their market rankings, falling to sixth and eighth, respectively. By June 2008, after those stations had implemented several well-publicized changes in their programming and promotion practices – *but not changes to their basic formats* – the ranking for these two stations climbed back to first and second in the market.

22. In another instance, the diary-based reports for the Winter, Spring, Summer, and Fall of 2006, and for the Winter of 2007 (which was the last diary-based report for Houston) showed that radio station KLOL in Houston was the third-highest-ranked Spanish-language station in that market. According to a recent article in *Radio & Records* magazine, however, KLOL was the top-ranked Spanish-language station among listeners 12 years of age and older in

six of the last 10 PPM monthly reports. Thus, KLOL's market ranking among Spanish-language stations improved under the PPM-based reporting. General market stations have also experienced similar changes after the transition to PPM-based estimates, which Arbitron believes to be superior to diary-based estimates.

23. Arbitron commercialized its PPM radio ratings service in Philadelphia in or about April 2007. Arbitron produced pre-currency impact data, submitted to the MRC audit of the Philadelphia PPM methodology, and the results of the audit were shared with the MRC committee, but to date, the MRC has denied accreditation in that market. In many respects, Arbitron's sampling methodology for the Philadelphia PPM service is similar to the previous diary-based methodology in that market. There are also many aspects of the Philadelphia PPM methodology that are identical to the accredited Houston PPM methodology. Nonetheless, Arbitron continues to work with the MRC and its customers to make quantifiable improvements to a range of sample quality metrics so as to obtain accreditation of the Philadelphia PPM methodology, even though MRC accreditation is not required for commercialization. While Arbitron seeks accreditation, PPM continues as the currency ratings service for the Philadelphia market.

24. In anticipation of commercializing the PPM in New York, Arbitron submitted its New York PPM methodology – which is essentially the same as the Philadelphia methodology – to the MRC for accreditation. Pursuant to the MRC's rules, Arbitron has produced pre-currency impact data, provided documentation of the New York PPM methodology to Ernst & Young for an independent audit, and the results were provided to the MRC's PPM Audit Committee. To date, the MRC has denied Arbitron's request for accreditation in New York. Arbitron continues to work with the MRC and its customers to make quantifiable improvements in a range of

sample quality metrics in New York so as to obtain accreditation in New York even though MRC accreditation is not required for commercialization.

25. In November 2007, Arbitron announced to the industry its intention to commercialize the PPM service in the New York market and seven other large U.S. markets (including Chicago, Los Angeles, San Francisco, San Jose and Riverside-San Bernardino) with the release of the September 2008 PPM survey report in early October 2008. Arbitron began to publish pre-currency PPM estimates for the New York market in the Fall of 2007 and continued to publish these estimates monthly through the August 2008 PPM ratings. (“Pre-currency” ratings may be used for internal programming purposes, but not for buying and selling of advertising). These pre-currency estimates, like those in Houston and Philadelphia, showed an across-the-board drop in audience estimates for New York stations. A decline in PPM ratings (compared to ratings obtained using the diary system) is evident not only for minority-owned stations but for many general market stations as well. For example, 89% of the audience of WABC, a station in New York City that has an all-talk format, is made up of persons who are neither African-American nor Hispanic. The July 2008 PPM ratings for adults aged 25 to 54 for WABC are only 40% of those reported by the diary. This represents a 60% reduction in that station’s largely Caucasian audience.

26. Arbitron intended to commercialize PPM in New York on December 31, 2007, but postponed the commercial rollout until the release of the September 2008 PPM survey report in response, in part, to feedback it received from some of its customers, the MRC, and other constituencies that led the company to conclude that the radio industry would be better served by a delay in commercialization.

27. In June 2008, Arbitron told the industry that the Spring 2008 diary for New York would be the last diary-based ratings in New York. The Spring 2008 diary was published in July 2008, and no further diary ratings for the New York market have been created or published.

28. Over the past eleven months, Arbitron has had extensive meetings with minority-owned broadcasters in an effort to satisfy them that the results of Arbitron's PPM surveys are valid and reliable. Despite these efforts, there is a small group of minority-owned broadcasters that has continued to be critical of the PPM methodology and samples, largely unsupported by verified facts, documentation or empirical evidence. This same group of broadcasters speculates that a decline in the ratings for their stations will cause them financial harm despite compelling evidence that stations that make use of the PPM data can improve their performance and ratings results. To Arbitron's knowledge, in the nearly two years since the PPM has launched in Houston and Philadelphia, no minority owned station has gone out of business or suffered significant financial harm as a result of the PPM ratings. In fact, revenue trend data for the radio markets in Houston and Philadelphia for 2006 and 2007, the year the PPM was commercialized in both markets, shows that minority-format radio stations have performed almost identically to the local markets as a whole. In fact, the minority-format radio stations in Philadelphia actually outperformed the local radio market when Arbitron implemented the PPM.

29. Arbitron has published PPM audience estimates in the New York Metro radio market each month since October 2007. On October 6, 2008 Arbitron published its PPM audience estimates for the New York Metro radio market, and in seven (7) other large markets in the United States, for September 2008, and also announced to its subscribers and to the industry that effective October 6, 2008, the PPM audience estimates are now currency – which means that subscribers can now, under their subscription agreements with Arbitron, buy and sell advertising

for radio using the PPM audience estimates for July, August and September 2008. Prior to October 6, 2008, subscribers were only permitted to use the PPM audience estimates for internal programming purposes or for comparison purposes with the estimates from Arbitron's diary service.

30. The New York radio market covers the five boroughs of New York City; Nassau, Suffolk, Putnam, Rockland and Westchester Counties in New York; Middlesex, Somerset, Essex, Monmouth, Morris, Bergen, Hudson, Passaic and Union Counties in New Jersey and; Fairfield County in Connecticut. The New York market includes two smaller markets for which separate Arbitron Reports are also available: Middlesex-Somerset-Union (New Jersey) and Nassau-Suffolk (New York). The other markets commercialized for the first time on October 6, 2008, include Chicago, Los Angeles, San Francisco, San Jose and San Bernardino-Riverside.

31. To the best of Arbitron's knowledge, the broadcasters and advertisers in the markets where PPM has become currency have already prepared for the transition to using the PPM audience estimates and have or will adjust their programming to take best advantage of PPM.

32. The estimates released in the New York PPM ratings for September 2008 show how successfully certain radio stations, including minority-owned radio stations, have adjusted to the PPM. For example, the Steve Harvey Morning Show on WBLS, which is broadcast by Inner City Broadcasting, a minority-owned company, is now the number-one-rated morning program in New York among persons 25-54, the key buying demographic for advertisers.

33. There are similar success stories in other markets around the country. For example, WOJO in Chicago, which is a Spanish-formatted station owned by Univision, is now the number-one rated station for weekday mornings among persons aged 18-34 in the Chicago

PPM ratings for September. Similarly, KYLL in Riverside, California, which is a Spanish Adult Hits station, is now the number-one rated station for Monday-Sunday, 6AM-Midnight, among persons aged 25-54 in the Riverside-San Bernardino PPM ratings for September. Likewise, KMEL in San Francisco, which is an Urban-formatted station, is now the number-one rated station for Monday-Sunday, 6AM-Midnight, among persons aged 18-34 and 18-49 in the San Francisco PPM ratings for September.

34. Thus, it appears that in markets around the country where PPM has now been commercialized, stations aimed at minority and urban listeners are adjusting their programming to the new PPM service and are performing well. That does not mean that some minority owned broadcasters have not seen a reduction in ratings and rankings, as have many general market stations. In Arbitron's view, such reduced ratings fairly reflect the radio audiences for those stations at the present time.

Arbitron's Ratings Represent Its Opinions Regarding Radio Audiences in New York

35. The Arbitron PPM agreements with subscribers expressly state that the information, reports and services published by Arbitron under the agreement "represent only the opinion of Arbitron." The subscription agreements also provide that in no event shall Arbitron or any third party provider "be subject to injunctive relief with respect to the publication of any data or report and/or service" provided under the agreement. In addition, in its literature regarding the PPM methodology, which accompanies the ratings information sent to subscribers, Arbitron expressly states that the PPM reports set forth Arbitron's *opinions* as to radio audience levels and station rankings and related information.

36. Arbitron does not publish or market its Arbitron Reports containing PPM audience estimates to consumers in the State of New York or elsewhere. The published PPM audience estimates do not propose any commercial transaction between Arbitron and the subscriber. Arbitron does not try to sell anything by the publication nor does it ask the subscriber to buy anything from Arbitron.

The Campaign to Stop Arbitron's PPM

37. Upon information and belief, there is a small number of politically well-connected minority station owners and broadcasters who are displeased at the prospect that under the PPM system, their station's ratings and rankings may decline from those previously reported by Arbitron under the diary system. However, any such decline in ratings and rankings, in Arbitron's opinion as reflected by the PPM audience estimates, represents the likely listening audience for these stations and is in many respects driven by the programming decisions made by these stations.

38. Upon information and belief, these broadcasters are attempting to use political influence in an effort to stop the further commercialization of PPM in New York and across the country, claiming that its launch will have an adverse impact on minority-owned broadcasters. On September 2, 2008, members of this group who formed an association known as the PPM Coalition filed an Emergency Petition For Section 403 Inquiry asking the Federal Communications Commission to conduct an investigation of the PPM ratings services. On September 24, 2008 Arbitron responded to the Petition pointing out, among other things, that the FCC lacks jurisdiction over a ratings service like Arbitron because it is neither a licensed broadcaster or otherwise within the regulatory authority or jurisdiction of the FCC.

39. The above-described group of minority-owned broadcasters also appealed to the New York City Council for intervention and assistance. As a result, on September 25, 2008, the City Council passed a resolution urging the FCC to conduct the investigation.

The Attorney General Joins the Fight Against the PPM

40. On or about September 9, 2008, the AG advised Arbitron that his office was commencing an investigation against Arbitron concerning commercialization of the PPM. Upon information and belief, the AG investigation arises out of complaints made to the AG by minority-owned broadcasters or other individuals acting on their behalf. The AG investigation began less than one month before the October 8, 2008 announced date for publication of the September 2008 PPM audience estimates, as well as the date on which the PPM audience estimates were to become currency, despite the fact that it has been well-known since November 2007 that Arbitron would publish and commercialize these PPM audience estimates in early October 2008. The AG's representatives have informed Arbitron that unless Arbitron voluntarily agrees to delay commercial publication of its PPM audience estimates until the MRC accredits the PPM methodology for the New York market, the AG will commence a lawsuit. This is the demand even though the MRC itself does not require accreditation before commercialization under its own Voluntary Code of Conduct and even though it has not been the practice over the past forty (40) years for a ratings service to obtain accreditation before commercialization in a market.

41. At the same time, the AG served a broad subpoena *duces tecum* on Arbitron concerning its PPM methodology and publication. A true and correct copy of a letter from the AG that accompanied the subpoena and a copy of the subpoena are annexed hereto as Exhibits 1

and 2, respectively, and made a part hereof. The subpoena and letter provide that the AG began the investigation “. . . to determine whether Arbitron repeatedly violated or is about to violate the New York State General Business Law (N.Y. Gen. Bus. Law §§ 349 and 350), and to determine whether a proceeding or action should be instituted against Arbitron pursuant to New York State Executive Law § 63(12).”

42. N.Y. Gen. Bus. Law § 349 and § 350 are tort-based consumer protection statutes prohibiting deceptive trade practices and misrepresentations.

43. In response to the subpoena, Arbitron has had discussions with the AG’s office during which Arbitron has maintained that its radio audience estimates are non-commercial speech protected from prior restraint by the First Amendment, but the investigation and threats of litigation continue.

44. By letter dated October 2, 2008, the Attorney General notified Arbitron that he intends to commence litigation against Arbitron pursuant to New York Executive Law § 63(12), N.Y. Gen. Bus. Law §§ 349, 350 and 352 and Section 40-c of the New York Civil Rights Law. A copy of the Attorney General’s notification letter is annexed hereto as Exhibit 3 and by this reference made a part hereof. This letter was made public on October 3, causing tremendous uncertainty in the marketplace regarding whether the radio and advertising industries would be without contemporaneous radio ratings indefinitely, thereby depriving the industry of any timely basis for pricing and placing advertising on the radio. The Fall season is a critical time in the industry for the planning of advertising budgets and for the placement of advertising programs. While the AG’s letter stated that “Arbitron is hereby afforded the opportunity to show, within five business days after receipt of this notice, why such proceeding should not be instituted” which would have placed any lawsuit *after* the originally scheduled October 8 date for

publication and commercialization, Arbitron believed it was necessary to eliminate this confusion and uncertainty by publishing on October 6, rather than October 8, 2008.

45. Nevertheless, the threat of litigation hangs over Arbitron and the entire radio industry. Uncertainty still exists as to whether the AG will attempt to stop Arbitron from publishing the New York PPM ratings for October, which are scheduled to be published on November 5, or otherwise attempt to interfere with Arbitron's publication of the PPM audience estimates in New York.

46. On September 12, 2008 the New Jersey Attorney General commenced an investigation into Arbitron's commercialization of the PPM, although to date the New Jersey Attorney General has offered no legal grounds of inquiry or other statutory basis for her investigation. To date, no member of the PPM Coalition or other subscriber or media industry related company has brought a civil lawsuit to enjoin the publication of the PPM.

47. Any restraint on Arbitron's publication of its PPM audience estimates would have an extreme adverse impact on the radio broadcast industry and advertising industries as a whole, because the New York radio market would be completely without a contemporaneous ratings service for the indefinite future.

48. Despite the chilling effect of the AG's unconstitutional assertions of authority over Arbitron's publishing activities as detailed herein, Arbitron continues to publish audience estimates derived from the PPM in the New York market and in the other new PPM markets across the country.

49. Arbitron believes that the AG has no reasonable expectation of success on any of the purported claims the AG has informed Arbitron it intends to pursue. Rather, Arbitron

believes that the AG intends, at least in part, to harass and burden Arbitron for reasons unrelated to the merits.

FIRST CLAIM FOR RELIEF
**(Violation of First and Fourteenth Amendments
to U.S. Constitution, 42 U.S.C. § 1983)**

50. Arbitron repeats and realleges paragraphs 1 through 49 above as if fully set forth herein.

51. In conducting its PPM surveys and in publishing its opinions, Arbitron is engaged in classic, non-commercial free speech, protected by the First and Fourteenth Amendments to the U.S. Constitution. Arbitron's PPM audience estimates published to its subscribers do not propose or constitute any commercial activity or transaction. The Arbitron audience estimates also express information of public interest and concern. As non-commercial speech, Arbitron's acts are not subject to prior restraint by the AG under statutes such as N.Y.Gen.Bus.Law §§ 349, 350 and 352, nor under Section 40-c of the New York Civil Rights Law.

52. The AG has notified Arbitron that it intends to bring an action against Arbitron seeking an injunction. Based on the AG's October 2, 2008 letter and other communications with the AG, Arbitron believes that the filing of that action is imminent. A justiciable controversy exists between the parties in that Arbitron maintains that the AG's actions are unconstitutional.

53. Any restraint on Arbitron's publication of its PPM audience estimates, including prohibiting Arbitron from publishing its PPM ratings in the New York market on November 5, 2008 or thereafter, would constitute an unlawful prior restraint of Arbitron's right to publish under the First and Fourteenth Amendments to the United States Constitution, would cause Arbitron to suffer irreparable harm to its ability to conduct business, and would cause Arbitron

and its shareholders to suffer severe economic injury. Monetary relief would be an inadequate remedy for the negative impact such action would have.

54. The acts and threatened acts of the AG complained of above were taken under color of state law, and are calculated to intentionally and recklessly deprive Arbitron of its rights, privileges and immunities secured by the Constitution and laws of the United States. Specifically, the AG's threats have created a reasonable apprehension that he will seek to deprive Arbitron of its rights under the First and Fourteenth Amendments to the Constitution of the United States. The AG's threatened acts, unless enjoined, will cause irreparable harm to Arbitron.

55. By reason of the foregoing, pursuant to 42 U.S.C. § 1983, Arbitron is entitled to judgment pursuant to 28 U.S.C. § 2201, *et seq.*, declaring that its publication of its PPM audience estimates are non-commercial speech, protected by the First and Fourteenth Amendments to the United States Constitution, and not subject to prior restraint by the AG under N.Y. Gen. Bus. Law §§ 349, 350, and 352 nor under Section 40-c of the New York Civil Rights Law.

56. The AG's threatened acts, unless enjoined, will cause Arbitron and the radio and advertising industry in New York considerable and irreparable harm for which monetary damages would be inadequate, and Arbitron has no adequate remedy at law.

57. By reason of the foregoing, pursuant to 42 U.S.C. § 1983, Arbitron is entitled to a preliminary and permanent injunction enjoining the AG from violating Arbitron's rights by seeking to enjoin Arbitron from publishing its New York PPM survey results.

58. By reason of the foregoing, pursuant to 42 U.S.C. § 1988, Arbitron is entitled to an award of its reasonable attorneys' fees and costs incurred in bringing this action.

SECOND CLAIM FOR RELIEF
(Violation of First and Fourteenth
Amendments to U.S. Constitution)

59. Arbitron repeats and realleges paragraphs 1 through 58 above as if fully set forth herein.

60. In conducting its PPM surveys and in publishing its opinions, Arbitron is engaged in classic, non-commercial free speech, protected by the First and Fourteenth Amendments to the U.S. Constitution. Arbitron's PPM audience estimates published to its subscribers do not propose or constitute any commercial activity or transaction. The Arbitron audience estimates also express information of public interest and concern. As non-commercial speech, Arbitron's acts are not subject to prior restraint by the AG under statutes such as N.Y. Gen. Bus. Law §§ 349, 350 and 352, nor under Section 40-c of the New York Civil Rights Law.

61. The AG has notified Arbitron that it intends to bring an action against Arbitron seeking an injunction. Based on the AG's October 2, 2008 letter and other communications with the AG, Arbitron believes that the filing of that action is imminent. A justiciable controversy exists between the parties in that Arbitron maintains that the AG's actions are unconstitutional.

62. Any restraint on Arbitron's publication of its PPM audience estimates, including prohibiting Arbitron from publishing its PPM ratings in the New York market on November 5, 2008 or thereafter, would constitute an unlawful prior restraint of Arbitron's right to publish under the First and Fourteenth Amendments to the United States Constitution, would cause Arbitron to suffer irreparable harm to its ability to conduct business, and would cause Arbitron and its shareholders to suffer severe economic injury. Monetary relief would be an inadequate remedy for the negative impact such action would have.

63. The acts and threatened acts of the AG complained of above were taken under color of state law, and are calculated to intentionally and recklessly deprive Arbitron of its rights, privileges and immunities secured by the Constitution and laws of the United States. Specifically, the AG's threats have created a reasonable apprehension that he will seek to deprive Arbitron of its rights under the First and Fourteenth Amendments to the Constitution of the United States. The AG's threatened acts, unless enjoined, will cause irreparable harm to Arbitron.

64. By reason of the foregoing, Arbitron is entitled to judgment pursuant to 28 U.S.C. § 2201, *et seq.*, declaring that its publication of its PPM audience estimates are non-commercial speech, protected by the First and Fourteenth Amendments to the United States Constitution, and not subject to prior restraint by the AG under N.Y. Gen. Bus. Law §§ 349, 350, and 352 nor under Section 40-c of the Civil Rights Law.

65. The AG's threatened acts, unless enjoined, will cause Arbitron and the radio and advertising industry in New York considerable and irreparable harm for which monetary damages would be inadequate, and Arbitron has no adequate remedy at law.

66. By reason of the foregoing, Arbitron is entitled to a preliminary and permanent injunction enjoining the AG from violating Arbitron's rights by seeking to enjoin Arbitron from publishing its New York PPM survey results.

THIRD CLAIM FOR RELIEF
(Violation of Art. I of N.Y. State Constitution)

67. Arbitron repeats and realleges paragraphs 1 through 66 above as if fully set forth herein.

68. In conducting its PPM surveys and in publishing its opinions, Arbitron is engaged in classic, non-commercial free speech, protected by Article I of the New York State

Constitution. Arbitron's PPM audience estimates published to its subscribers do not propose or constitute any commercial activity or transaction. As non-commercial speech, Arbitron's acts are not subject to prior restraint by the AG under N.Y. Gen. Bus. Law §§ 349, 350 and 352 nor under Section 40-c of the New York Civil Rights Law.

69. The AG has notified Arbitron that it intends to bring an action against Arbitron seeking an injunction. Based on the AG's October 2, 2008 letter and other communications with the AG, Arbitron believes that the filing of that action is imminent. A justiciable controversy exists between the parties in that Arbitron maintains that the AG's actions are unconstitutional.

70. Any restraint on Arbitron's publication of its PPM audience estimates, including prohibiting Arbitron from publishing its PPM ratings in the New York market on November 5, 2008 or thereafter, would constitute an unlawful prior restraint of Arbitron's rights to publish under Article I of the New York State Constitution, would cause Arbitron to suffer irreparable harm to its ability to conduct business, and would cause Arbitron and its shareholders to suffer severe economic injury. Monetary relief would be an inadequate remedy for the negative impact such action would have.

71. The acts and threatened acts of the AG complained of above were taken under color of state law, and are calculated to intentionally and recklessly deprive Arbitron of its rights, privileges and immunities secured by the New York State Constitution. Specifically, the AG's threats have created a reasonable apprehension that he will seek to deprive Arbitron of its rights under Article I of the New York State Constitution. The AG's threatened litigation, unless enjoined, will cause irreparable harm to Arbitron.

72. By reason of the foregoing, Arbitron is entitled to judgment pursuant to 28 U.S.C. § 2201, *et seq.*, declaring that its publication of its PPM audience estimates are non-commercial

speech, protected by Article I of the New York State Constitution, and not subject to prior restraint by the AG under N.Y. Gen. Bus. Law §§ 349, 350, and 352 nor under Section 40-c of the New York Civil Rights Law.

73. The AG's threatened acts, unless enjoined, will cause Arbitron and the radio and advertising industry in New York considerable and irreparable harm for which monetary damages would be inadequate, and Arbitron has no adequate remedy at law.

74. By reason of the foregoing, Arbitron is entitled to a preliminary and permanent injunction enjoining the AG from violating Arbitron's rights by seeking to enjoin Arbitron from publishing its New York PPM survey results.

WHEREFORE, Arbitron respectfully requests judgment as follows:

- (a) On its First Claim for Relief, pursuant to 42 U.S.C. § 1983,
 - (1) declaring that Arbitron's publication of its PPM audience estimates is non-commercial speech under the First and Fourteenth Amendments to the United States Constitution, and as such, is not subject to prior restraint by the AG;
 - (2) preliminarily and permanently enjoining the AG from taking any action or steps to restrain or enjoin Arbitron from publishing its New York PPM audience estimates; and
 - (3) awarding Arbitron the costs and disbursements of this action, including reasonable attorneys' fees pursuant to 42 U.S.C. § 1988;
- (b) On its Second Claim for Relief,
 - (1) declaring that Arbitron's publication of its PPM audience estimates is non-commercial speech under the First and Fourteenth Amendments to the

United States Constitution, and as such, is not subject to prior restraint by the AG;

- (2) preliminarily and permanently enjoining the AG from taking any action or steps to restrain or enjoin Arbitron from publishing its New York PPM audience estimates; and
- (3) awarding Arbitron the costs and disbursements of this action, including reasonable attorneys' fees to the extent permitted by law;

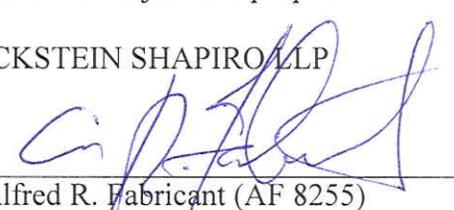
(c) On its Third Claim for Relief,

- (1) declaring that Arbitron's publication of its PPM audience estimates is non-commercial speech under Article I of the New York State Constitution, and as such, is not subject to prior restraint by the AG;
- (2) preliminarily and permanently enjoining the AG from taking any action or steps to restrain or enjoin Arbitron from publishing its New York PPM audience estimates; and
- (3) awarding Arbitron the costs and disbursements of this action, including reasonable attorneys' fees to the extent permitted by law, and

(c) For such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 6, 2008

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