

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Division of Law
Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112
Attorney for Plaintiffs

By: James R. Michael
Deputy Attorney General
Tel.: (609)984-3105

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO.:

ANNE MILGRAM, Attorney General of
the State of New Jersey, DAVID
SZUCHMAN, Director of the New
Jersey Division of Consumer
Affairs, J. FRANK VESPA-PAPALEO,
Director of New Jersey Division
on Civil Rights,

Plaintiffs,

v.

ARBITRON, INC.,

Defendant.

Civil Action

COMPLAINT

Plaintiffs Anne Milgram, Attorney General of the State of New Jersey ("Attorney General"), with offices located at the Hughes Justice Complex, 25 Market Street, Trenton, New Jersey 08625, David Szuchman, Director of the New Jersey Division of Consumer Affairs ("DCA Director"), with offices located at 124 Halsey Street, Seventh Floor, Newark, New Jersey 07102, and J. Frank Vespa-Papaleo, Director of the New Jersey Division on Civil Rights ("DCR

Director"), with offices located at 140 East Front Street, Sixth Floor, Trenton, New Jersey 08625, by way of Complaint allege as follows:

PRELIMINARY STATEMENT

Defendant Arbitron, Inc. (Arbitron) is the sole source of audience measurement data, otherwise known as "ratings", for the radio industry. Broadcasters and advertisers use this data to set the rates to be paid for radio advertising. Until Monday, October 6, 2008, Arbitron had always issued its ratings using a methodology for data collection and sampling that was accredited by the Media Rating Council (MRC), a non-profit organization formed at the behest of Congress to ensure the reliability of media audience measurement. On October 6, 2008, Arbitron released data to the New York City and Middlesex-Somerset-Union radio markets that was based on new methodology that was denied accreditation by the MRC because it was insufficiently reliable. Arbitron produced these ratings despite methodological flaws that undercount radio listeners in certain racial and ethnic groups. The new ratings undercount the radio-listening habits of Blacks and Hispanics, among other demographic groups. Because radio stations' existence is premised on advertiser sales, and advertisers rely heavily on Arbitron's ratings in deciding where to place advertisements, the new, unreliable ratings severely harm both those radio stations serving minorities and minority listeners themselves.

In bringing to market unreliable ratings that disproportionately affect racial and ethnic minorities, Arbitron violated four distinct provisions of New Jersey law: 1) it has removed an accredited ratings product and replaced it with ratings product based on a flawed, non-accredited methodology that undercounts minority listenership, which constitutes an unconscionable commercial practice in violation of the Consumer Fraud Act (CFA); 2) it has made deceptive and misleading statements regarding its new service and its failure to receive accreditation by the MRC in violation of the CFA; 3) it has advertized a ratings product which is based on a flawed, non-accredited methodology without designating limitations in the quality of the product in violation of the Advertising Regulations promulgated under the CFA; and 4) it has offered to broadcasters and advertisers as the sole ratings product to use to buy and sell advertising for radio a product derived from a methodology that disparately impacts radio stations serving racial and ethnic minorities in violation of the New Jersey Law Against Discrimination. This action seeks injunctive, compensatory, and all other appropriate relief to cure the harms caused by Arbitron's illegal conduct.

ALLEGATIONS

1. The Attorney General is charged with the responsibility of enforcing the Consumer Fraud Act ("CFA"), N.J.S.A. 56:8-1 et

seq., and the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq. The DCA Director is charged with the responsibility of administering the CFA and its attendant regulations on behalf of the Attorney General. The DCR Director is charged with the responsibility of administering the LAD and its attendant regulations on behalf of the Attorney General.

2. Defendant Arbitron, Inc. ("Arbitron") is a company incorporated under the laws of the State of Delaware, with its headquarters located at 142 West 57th Street in New York, New York. Arbitron is in the business of conducting audience measurement services for radio stations, including radio stations in New Jersey. Arbitron sells data collected through Arbitron's proprietary audience measurement services to broadcasters and advertisers in New Jersey.

3. In conducting its audience measurement services, Arbitron recruits a sample panel that is intended to be a representative sample of individuals in the market being measured, taking into account demographics such as age, race and ethnicity. Arbitron then records data concerning the radio stations that individuals on the sample panel are listening to, and converts this data into "ratings" and market share for radio stations in that market.

4. Arbitron sells its ratings information to broadcasters and advertisers. It produces many products concerning audience measurement for radio, but only certain products are designated as

"currency" products. Currency products are those that broadcasters and advertisers may rely upon to set the rates that advertisers pay to broadcasters for advertising on radio stations. Through its contracts with broadcasters and advertisers, Arbitron designates which of its products may be used as currency products. Generally speaking, the higher a station's Arbitron rating, the higher the rate it may charge for advertising on the station. Arbitron maintains a virtual monopoly in the field of radio audience measurement, and Arbitron's ratings are the only available source of "currency" ratings used in major markets for the purpose of setting radio advertising rates.

Media Rating Council

5. The Media Rating Council (MRC) is a non-profit entity that was formed at the behest of Congress in the early 1960's with the mission of securing for the media industry and related users audience measurement services that are valid, reliable and effective. The MRC is made up of users of ratings information, including leading broadcasters and advertisers. Media measurement services, such as Arbitron, are not permitted to be members of the MRC.

6. MRC has established, and updates, its Minimum Standards for Media Rating Research ("Minimum Standards"), which set forth the requirements to be met for audience measurement services to attain "accreditation" of the service by MRC. MRC relies on

audits, conducted by independent CPA firms, of the actions of ratings services to assess a measurement service's adherence to the Minimum Standards and to make its accreditation decisions. At all relevant times, MRC has relied upon the accounting firm of Ernst & Young to conduct the audits described above for the MRC.

7. Arbitron has traditionally conducted its radio data collection through the use of "paper diaries." Under this system, paper diaries are distributed to a sample panel and each panelist completes a weekly diary of radio stations listened to and mails it to Arbitron, which then computes the ratings. The MRC has issued accreditation for Arbitron's paper diary system.

8. For more than a decade, Arbitron has been conducting research to replace the paper diary system, which relies on recall and self-reporting by panelists, with a more passive electronic system of measurement. It has been testing an electronic device called the Portable People Meter (PPM), which is able to pick up and record encoded transmissions in radio frequencies in the vicinity of the device, and transmit that data back to Arbitron. Because of the passive nature of the recording system, which does not rely on manual input from the panel member, the PPM technology has the potential to be significantly more reliable than the paper diary system in tracking the radio stations that a panel member is actually listening to.

9. Arbitron first used the PPM system in the Houston market,

as part of a joint venture with Nielsen, the company that is the primary source of audience measurement for television. In Houston, Arbitron utilized an in-person, address-based system of panel recruitment. Under this in-person, address-based system, potential panelists are selected based on their address, with representatives of Arbitron knocking on their doors in order to recruit them to agree to participate as panelists. Following an audit by Ernst and Young, the MRC accredited the Houston PPM system, which is now used as a currency product in place of the paper diaries in Houston.

10. After implementation of the PPM in Houston, Nielsen decided not to use the PPM as its primary measurement tool, and dropped out of the PPM joint venture with Arbitron. Arbitron next introduced the PPM in the Philadelphia market, which includes Burlington, Camden and Gloucester counties in New Jersey. However, Arbitron did not use the accredited in-person, address-based system of panel recruitment deployed in Houston in the Philadelphia market. In order to cut costs, Arbitron changed its methodology to instead utilize a telephone-based system of recruitment, which primarily relies on reaching out to potential panelists who have landline telephones.

11. Arbitron also began testing the PPM system in other markets, including New York City, which includes the "embedded" market of Middlesex, Somerset, and Union Counties in New Jersey

("Middlesex-Somerset-Union"), as well as the New Jersey counties of Essex, Bergen, Passaic, Hudson, Morris, Hunterdon and Monmouth. As an "embedded" market, the measurement data from the Middlesex-Somerset-Union area is included in the New York market data and also used to produce an additional ratings product covering only the Middlesex-Somerset-Union area. In the New York market, as in Philadelphia, Arbitron did not use the methodology employed for panel recruitment that was accredited by the MRC for the Houston market, instead relying on a telephone-based recruitment system that largely selects panelists with landline telephones.

12. In 2007, Arbitron submitted the modified methodology for its Philadelphia and New York PPM service to the MRC for accreditation. Following an audit, and meetings with Arbitron to address the findings of the audit, MRC voted to deny accreditation to the Philadelphia and New York PPM systems. This decision was communicated by MRC to Arbitron on February 14, 2008. The decision to deny accreditation was based on numerous shortcomings in the PPM systems cited in the audit findings, many of which focused on the manner in which Arbitron is recruiting and retaining individuals on its sample panels, particularly individuals who fit into younger age demographics and racial and ethnic minority groups.

13. Upon information and belief, the methodology and data used by Arbitron in the Philadelphia and New York markets is flawed in the following ways:

a. Arbitron is getting a very low positive response rate from potential panelists it approaches to be part of its sample panels. The higher the response rate for panelist participation, the more reliable the estimates derived from that sample panel of that market's listening habits. While Arbitron maintains a response rate of about 30% with its paper diary system, its initially submissions to MRC on response rate for the New York PPM system were as low as 11%;

b. Even after a sample panel is selected, a significantly lower number of panelists from certain demographic groups, such as younger people and racial and ethnic minorities, are "in-tab," meaning that data from these panelists are ultimately used to calculate the ratings data. These lower in-tab rates compound existing reliability issues related to the low initial response rate. Since Arbitron is not getting usable data from the PPM system from large segments of the panels in these demographic groups, it then "weights" the data it does obtain from the smaller sample of responders to compute its ratings. This excessive weighting of data for some groups undermines the validity of the overall data;

c. Arbitron under-samples households that do not use a landline-based telephone. Arbitron relies on certain hard caps for recruitment of such cell-phone-only households that do not comport with the actual proportion of individuals who use only cell phones,

particularly with respect to younger demographics and racial and ethnic minorities;

d. Arbitron is not correctly collecting data concerning language use (such as whether a household is primarily an English-speaking or Spanish-speaking household), and not collecting data concerning country of origin for panelists; and

e. Arbitron is not collecting zip code data concerning its sample panel, or otherwise assuring that it has obtained sufficient geographical diversity in its sample panel for the market being measured.

14. Despite the failure to obtain MRC accreditation of its PPM system in Philadelphia, Arbitron unilaterally decided to discontinue the accredited paper diary system and, since March 2007, has only produced ratings in Philadelphia based on the non-accredited PPM system. Broadcasters and advertisers are now forced to use the PPM ratings in negotiating rates for advertising.

15. Arbitron continued to test the PPM system in eight more markets, including New York, Middlesex-Somerset-Union, Chicago and Los Angeles, using methodology similar to the methodology used in Philadelphia that was denied accreditation by the MRC. When the non-accredited PPM system for measurement was used for non-currency data in these markets for the month of June 2008, 16 out of 17 stations serving African American and Hispanic communities that had previously been top-ten stations in their market saw significant

drops in their PPM ratings as compared to the ratings in the previous paper diary ratings report. This drop was seen in these stations while the PPM ratings for general market stations (those not targeting specific racial or ethnic groups) in these markets did not see similar effects on their ratings from the previous paper diary ratings report.

16. MRC conducted another audit this year of Arbitron's PPM system for Philadelphia and New York. Based on these audits, MRC has still declined to issue accreditation to these systems. The MRC has cited several continuing deficiencies in the PPM system, particularly with respect to appropriate levels concerning recruitment and retention of panel members. MRC has noted, as it did with the prior year's audit, deficiencies that would adversely affect minority participation on sample panels for PPM.

17. Despite these noted deficiencies in the PPM system over the past two years, Arbitron has failed to make sufficient modifications to its methodology in order to obtain accreditation by the MRC.

18. Notwithstanding the failure to obtain MRC accreditation of its PPM methodology in New York, Arbitron decided to discontinue the accredited paper diary system and, on October 6, 2008, released "currency" ratings data based on the PPM system for New York and Middlesex-Somerset-Union, as well as six other markets. Arbitron also advised its customers that they should consider the prior PPM

data released during the summer to be "currency" data. As in Philadelphia, broadcasters and advertisers were now forced to rely solely on the PPM ratings in negotiating rates for advertising. In the PPM ratings released by Arbitron on October 8, radio stations serving racial and ethnic minorities in the New York and Philadelphia markets saw significantly greater drops in their ratings as compared to their prior diary-based ratings than did general market stations.

19. Because the non-accredited PPM system being used in New York, Philadelphia, and Middlesex-Somerset-Union has deficiencies that adversely affect stations serving racial and ethnic minorities, these stations face significantly reduced advertising revenue. Such reduced revenues could force these stations out of business, or force stations to change format, reducing the number of stations serving these communities. Advertising agencies have already begun contacting stations serving racial and ethnic minorities to question their lower ratings under PPM, and in order to achieve rate reductions because of the lower ratings.

20. MRC maintains a Voluntary Code of Conduct ("MRC Code") with respect to both its members, and audience measurement services seeking accreditation. The Code of Conduct provides that the MRC and its members believe that the MRC process should be applied to all "currency" audience measurement products (that is, products used by broadcasters and advertisers to buy and sell advertising).

The MRC Code provides that participating measurement services, such as Arbitron, "shall use best efforts to obtain MRC accreditation of all 'currency' audience measurement products." The MRC Code further provides that a participating audience measurement service seeking to replace an accredited currency product with a new currency product use "best efforts to obtain accreditation of the new product prior to its commercialization." The MRC Code also states that "strong consideration should be given to discontinuing the existing accredited currency product only when the replacement currency product has successfully achieved accreditation."

21. Arbitron's actions in discontinuing the accredited paper diary system in the Philadelphia, New York and Middlesex-Somerset-Union markets prior to gaining accreditation of the PPM system in these markets run counter to the MRC Code.

22. Arbitron maintains a website in which it advertises its products to its customers and the public. With respect to PPM, Arbitron states on its website that it "recognizes the importance of accreditation from the Media Rating Council for any service." The website advises that the PPM Houston service has been accredited since early 2007, and that the accreditation process is ongoing for its other PPM markets. Arbitron does not state that MRC denied accreditation of the Philadelphia and New York PPM service, or that it employs a different methodology in Houston than in other markets in which it is introducing PPM, or that this

different methodology has produced lower levels of response rate and in-tab compliance.

23. Arbitron has issued several press releases in connection with PPM service. It has stated in these press releases that it abides by the MRC Code of Conduct. Arbitron has made these statements despite the fact that it has discontinued its accredited paper diary system in the Philadelphia, New York and Middlesex-Somerset-Union markets prior to gaining accreditation of the PPM service in these markets, contrary to the MRC Code.

24. On February 28, 2008, Arbitron filed its annual report with the Securities and Exchange Commission (Form 10-K), and has made this report available to investors through its website. The Form 10-K reports that the Houston PPM service was accredited by the MRC, but does not indicate that Arbitron decided to change that methodology when it expanded PPM to other markets. Arbitron also makes representations in its Form 10-K about the reliability and planned commercialization of PPM, despite the fact that it has failed to gain accreditation for PPM in any market other than Houston, and despite the existence of methodological flaws that affect critical measures of reliability, such as response rate and in-tab compliance.

25. Arbitron has tied the amount of bonus pay its executives will receive to meeting the anticipated schedule for the roll-out of PPM, regardless of whether PPM is accredited by the MRC.

Arbitron filed a proxy statement on April 3, 2008 which revealed that 40% performance-based non-equity compensation for its executives is tied to meeting the schedule for the roll-out of PPM.

COUNT I

**VIOLATION OF THE CFA BY DEFENDANT
(UNCONSCIONABLE COMMERCIAL PRACTICES)**

26. Plaintiffs repeat and reallege the allegations contained in Paragraphs 1 through 25 above as if more fully set forth herein.

27. The CFA, N.J.S.A. 56:8-2, prohibits:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing [] concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise....

28. The CFA defines "merchandise" as including "any objects, wares, goods, commodities, services or anything offered, directly or indirectly to the public for sale." N.J.S.A. 56:8-1(c).

29. In the operation of their business, and particularly in the marketing of their PPM radio measurement services, Arbitron has engaged in the use of unconscionable commercial practices, misrepresentations and/or the knowing concealment, suppression or omission of material facts.

30. Arbitron has engaged in unconscionable commercial practices including, but not limited to, the following:

- a. Using its radio-ratings monopoly to discontinue an accredited measurement product, and forcing broadcasters and advertisers to use ratings data derived from a PPM system that is not accredited and possesses significant methodological flaws;
- b. Selling, as the only currency product in the radio market, ratings developed using a non-accredited methodology that substantially disadvantages stations serving racial and ethnic minorities;
- c. Trumpeting accreditation of the Houston PPM service in promoting the PPM system in other markets, when Arbitron is not using the accredited methodology from the Houston market in other markets;
- d. Tying compensation for executives to the roll-out of the PPM product into new markets without regard to whether the product is sufficiently reliable to gain MRC accreditation; and
- e. Commercializing the PPM system that has failed to gain accreditation without addressing flaws in the system.

31. Each unconscionable commercial practice by Defendant constitutes a separate violation under the CFA, N.J.S.A. 56:8-2.

COUNT II

**VIOLATION OF THE CFA BY DEFENDANT
(DECEPTION, MISREPRESENTATIONS
AND KNOWING OMISSIONS OF MATERIAL FACT)**

32. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 31 above as if more fully set forth herein.

33. In the operation of its business, Arbitron has undertaken deception, made misrepresentations and knowing omissions of material fact, including, but not limited to:

- a. Creating the impression that the PPM methodology is accredited by focusing attention on the accreditation of the Houston PPM service in promoting the PPM system in other markets, when Arbitron is not using the accredited methodology from the Houston market in other markets;
- b. Misrepresenting to consumers that it abides by the MRC Code, when it has unilaterally withdrawn an accredited currency product from the market prior to gaining accreditation of the replacement product contrary to the MRC Code;
- c. Making statements regarding the reliability of the PPM service despite the existence of significant methodological flaws that have prevented the PPM system from gaining accreditation.

34. Each false promise, misrepresentation and/or knowing

omission of material fact by Defendant constitutes a separate violation under CFA, N.J.S.A. 56:8-2.

COUNT III

**VIOLATION OF THE ADVERTISING REGULATIONS
BY DEFENDANTS**

35. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 34 above as if more fully set forth herein.

36. The Advertising Regulations, N.J.A.C. 13:45A-9.1 et seq., promulgated pursuant to the CFA, among other things, govern general advertising practices.

37. Specifically, the Advertising Regulations provide, in pertinent part:

(a) Without limiting the application of N.J.S.A. 56:8-1 et seq., the following practices shall be unlawful with respect to all advertisements:

.

2. The failure of an advertiser to specifically designate within an advertisement which merchandise items possess special or limiting factors relating to price, quality, condition or availability.

[N.J.A.C. 13:45A-9.2(a)(2).]

38. On its website and in its promotional materials, Defendant violated the Advertising Regulations by making representations as to the reliability of the PPM system when it is aware of, and not disclosing, significant flaws in the methodology that have prevented the system from gaining MRC accreditation.

39. Each violation of the Advertising Regulations by

Defendants constitutes a per se violation of the CFA, N.J.S.A.
56:8-2.

COUNT IV

VIOLATION OF LAW AGAINST DISCRIMINATION

40. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 39 above as if more fully set forth herein.

41. The New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq., makes it unlawful for a person to discriminate in the provision of goods and services to any other person on the basis of, among other things, race, color, national origin, or nationality. N.J.S.A. 10:5-12.

42. The LAD also prohibits any person from interfering with any right protected by the LAD. N.J.S.A. 10:5-12d.

43. Arbitron provides the sole currency product for radio stations to sell advertising in New York, Philadelphia and Middlesex-Somerset-Union.

44. The PPM methodology utilized by Arbitron in New York, Philadelphia and Middlesex-Somerset-Union systematically undercounts the listening habits of younger age demographics and racial and ethnic minorities.

45. The flawed PPM methodology and the systematic undercounting of younger age demographics and racial and ethnic minorities causes these populations to receive an inferior service from Arbitron than other non-minority populations.

46. The flawed PPM methodology and the systematic undercounting of younger age demographics and racial and ethnic minorities represents a departure from Minimum Standards and lowers the ratings of radio stations serving racial and ethnic minorities. Lower ratings cause the radio stations to face losses in advertising revenue. Reduced revenues could force these stations out of business, or force stations to change format, reducing the number of stations serving these communities. Advertising agencies have already begun contacting stations serving racial and ethnic minorities to question their lower ratings under PPM, and in order to achieve rate reductions because of the lower ratings.

47. Arbitron is aware of, and has declined to implement, alternate methodologies to collect ratings information that would accurately and fairly count younger age demographics and racial and ethnic minorities in New York, Philadelphia and Middlesex-Somerset-Union.

48. Defendants have violated the LAD by offering to broadcasters and advertisers, as the sole currency product for radio stations to sell advertising, a ratings system that disparately harms radio stations serving racial and ethnic minorities.

PRAYER FOR RELIEF

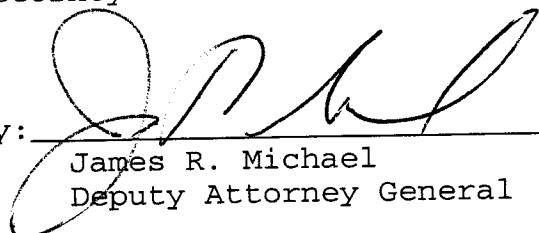
WHEREFORE, based upon the foregoing allegations, Plaintiffs respectfully request that the Court enter judgment against Defendant:

- (a) Finding that the acts and omissions of Defendant constitute multiple instances of unlawful practices in violation of the CFA, N.J.S.A. 56:8-1 et seq., and the regulations promulgated thereunder, specifically the Advertising Regulations, N.J.A.C. 13:45A-9.1 et seq.;
- (b) Finding that the acts and omission of Defendant constitute violations of the Law Against Discrimination, specifically N.J.S.A. 10:5-12;
- (c) Enjoining Defendant and its owners, officers, directors, shareholders, founders, managers, agents, servants, employees, representatives, independent contractors and all other persons or entities directly under their control, from engaging in, continuing to engage in, or doing any acts or practices in violation of the CFA, N.J.S.A. 56:8-1 et seq., and the regulations promulgated thereunder, specifically the Advertising Regulations, N.J.A.C. 13:45A-9.1 et seq., including, but not limited to, releasing PPM ratings data that is not accredited by the MRC as the sole currency ratings in the New York, Philadelphia or Middlesex-Somerset-Union markets;
- (d) Assessing the maximum statutory civil penalties against Defendants, jointly and severally, for each and every violation of the CFA, in accordance with N.J.S.A. 56:8-13;
- (e) Directing the assessment of costs and fees, including attorneys' fees, against Defendants, jointly and severally, for the use of the State of New Jersey, as authorized by the CFA, N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19; and by the Law Against Discrimination, N.J.S.A. 10:5-27, and

(f) Granting such other relief as the interests of justice may require.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: _____


James R. Michael
Deputy Attorney General

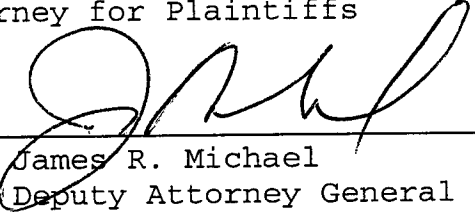
Dated: *October 10*, 2008

DESIGNATION OF TRIAL COUNSEL

Pursuant to R.4:25-4, James R. Michael, Deputy Attorney General, is hereby designated as trial counsel on behalf of Plaintiffs.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: _____


James R. Michael
Deputy Attorney General


Dated: October 10, 2005

RULE 4:5-1 CERTIFICATION

I certify, to the best of my information and belief, that the matter in controversy in this action is not the subject of any other action between the parties. I further certify that the matter in controversy in this action is not the subject of a pending arbitration proceeding, nor is any other action or arbitration proceeding contemplated, although I am aware of another action pending in Federal court in the Southern District of New York between Defendant Arbitron and the Attorney General of New York involving much of the same subject matter as this complaint. I certify that there is no other party who should be joined in this action.

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Plaintiffs

By: _____


James R. Michael
Deputy Attorney General

Dated: October 10, 2008