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Plaintiff Arbitron Inc. (“Arbitron” or “Plaintiff”) submits this memorandum of law in support of its motion for a temporary restraining order and preliminary injunction to compel Defendant Spanish Broadcasting System, Inc. (“SBS” or “Defendant”) to perform its obligations under a June 2007 agreement with Arbitron entitled “Encoding Agreement for Spanish Broadcasting System, Inc.” (the “Encoding Agreement”). Affidavits of Carol Hanley (“Hanley Aff.”), Arbitron’s Senior Vice President/Chief Sales Officer and Beth Webb (“Webb Aff.”), its Vice President of Research Methods and Quality, are submitted herewith.

## **I. PRELIMINARY STATEMENT**

Arbitron is the nation’s leader in radio audience measurement. Arbitron compiles radio listening information and statistics for approximately 300 markets throughout the United States. Its customers are mainly radio broadcasters, advertisers, and advertising agencies. SBS is a broadcasting group that operates twenty Latino-oriented radio stations in major markets in the United States, including New York, Los Angeles, Miami, Chicago, San Francisco, and Puerto Rico, and is an Arbitron subscriber.

Beginning in 2007, Arbitron introduced a new electronic audience measurement system known as the Personal Portable Meter or PPM. The PPM is a handheld device about the size of a cell phone that electronically and automatically detects hidden inaudible codes embedded in radio broadcasts by Arbitron’s equipment placed at the transmitter of the radio station. The inaudible codes identify the station being heard by the PPM panelist. Arbitron’s entire PPM system, and its ability to provide detailed, timely audience measurement information to the thousands of radio stations, advertisers and advertising agencies that rely on it, depends in large part on broadcasters agreeing to encode their radio broadcasts with these inaudible signals.

In June 2007, Arbitron and SBS entered into an Encoding Agreement pursuant to which SBS promised to encode its stations’ broadcasts with the inaudible PPM signal. Hanley Aff.

Exh. 1. Arbitron provided encoding equipment to SBS and assisted SBS's personnel in installing the equipment. The Encoding Agreement requires SBS to continuously encode its broadcasts through the expiration of SBS's latest to expire Radio Station License Agreement to Receive and Use Arbitron PPM™ Data and Estimates with Arbitron (the "PPM License Agreement") (Hanley Aff., Exh. 2). The Encoding Agreement does not permit SBS to terminate or cancel for any reason. The SBS PPM License Agreement – and thus, SBS's commitment to encode its broadcasts with the PPM code – continues through December 2012.

On February 3, 2010, without providing any notice to Arbitron, SBS shut off the encoders at its stations in Chicago, New York, Los Angeles, Miami, and San Francisco. On February 4, 2010, Arbitron's personnel determined that SBS's radio stations were no longer being encoded. SBS engineers confirmed via email that the corporate office of SBS had ordered that the encoding equipment be turned off.<sup>1</sup> Arbitron has notified SBS that it is in breach of the Encoding Agreement. Not only was SBS's act in flagrant breach of the express and unambiguous terms of its contract with Arbitron, but it threatens the integrity of the entire audience measurement system in the major markets across the nation.

SBS's decision to stop encoding appears to be its latest tactic in a fee dispute with Arbitron. SBS has seen several of its stations fare worse in the ratings under the electronic PPM system than under Arbitron's previous audience measurement system which relied on survey participants, based on memory, to fill out paper diaries to document their radio listening. SBS is upset that this reduction in ratings may cause a reduction in its advertising revenues. In June

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<sup>1</sup> As noted, under the Encoding Agreement, SBS does not have the right to stop encoding unilaterally as it has done. In addition, the Encoding Agreement requires SBS to provide Arbitron with 24 hours notice that the encoders at any of SBS's broadcast facilities are malfunctioning or will be taken offline for any reason. SBS's failure to notify Arbitron that it had decided to turn off the encoders is thus yet another breach of the Encoding Agreement by SBS.

2009, SBS informed Arbitron that it was dissatisfied with the PPM Reports because it believed that the methodology that Arbitron uses to conduct its PPM service is flawed. SBS stopped paying its license fees and demanded a credit against the entire amount of the overdue license fees and vastly reduced license fees going forward. Nonetheless, SBS wanted to continue to receive and have the right to use the “flawed” estimates. Arbitron informed SBS that under the PPM License Agreement, SBS was not entitled to challenge Arbitron’s survey methodology nor was it entitled to a credit against its license fees based on any supposed flaw in the methodology. *See Hanley Aff., Exh. 4.*

In July 2009, SBS stopped paying the license fees it owes under its contracts with Arbitron and now owes more than \$2.5 million in unpaid license fees. Thereafter, Arbitron suspended the PPM reports as it is expressly entitled to do under the PPM License Agreement. Now, in an act apparently aimed at forcing Arbitron to agree to relieve it of its obligation to pay the full amount of the license fees owed and/or to force Arbitron to deliver its PPM reports to SBS without payment, SBS has pulled the plug on the encoders. SBS’s refusal to continue to encode takes the matter out of the realm of a simple fee dispute between SBS and Arbitron as it endangers the integrity of the ratings system, threatens Arbitron’s ability to provide detailed and timely information to its other subscribers, and will cause immeasurable and irreparable harm to Arbitron’s business and reputation. For SBS to resume encoding – as it had been doing from June 2007 until last week – would require SBS to do nothing more than turn the encoders back on at each of its stations. This would cost SBS nothing and would cause it no harm whatsoever.

Unless SBS is compelled to resume encoding its broadcasts with the PPM signal immediately as it is required to do under the Encoding Agreement, Arbitron will suffer permanent and irreparable harm. SBS’s refusal to encode destroys Arbitron’s ability to gather listening data regarding those stations and deliver it to Arbitron’s subscribers who have

contracted to receive Arbitron Data and Reports in part, in reliance on the promise that other broadcasters in the market have contracted to encode their radio broadcasts and will continue to do so for the entire term of their agreements. Arbitron's advertising agency subscribers need to know which stations in each market have committed to encode their broadcasts and expect to receive this information for the entire term of the encoding agreements. Many of these agencies focus on minority-format stations, and so SBS's absence from the ratings would be a particularly harsh blow to them.

Money damages are inadequate to compensate Arbitron for the harm from SBS's decision to stop encoding. Arbitron's reputation for delivering ratings as promised is being severely undermined by SBS's refusal to honor the Encoding Agreement. If broadcasters such as SBS are permitted to stop encoding at any time and for any reason, all of the other stations, advertisers and advertising agencies in those markets will no longer be able to rely on Arbitron's promise to provide audience estimates for the stations in that market. Those licensees will not be as willing to license the ratings or will demand a lower price. In sum, while the loss in value to the Arbitron Data and Reports in the markets where SBS is no longer encoding (New York, Chicago, Miami, Los Angeles and San Francisco) is surely significant, it is not easily quantifiable. Arbitron cannot even begin to put a price on the harm SBS is doing to Arbitron's credibility in the marketplace. Only an order requiring SBS to resume encoding as required by the Encoding Agreement – which would require nothing more of SBS than a flip of the switch on the encoders – can remedy the harm suffered by Arbitron and its licensees by SBS's conduct.

## **II. STATEMENT OF FACTS**

### **A. Arbitron's Radio Ratings Business**

Arbitron is in the business of publishing data and reports concerning audience measurement of radio listening in nearly 300 markets throughout the United States. *See*

Affidavit of Carol Hanley (“Hanley Aff.”) at ¶ 3. Arbitron collects radio audience listening data from which it then produces estimates and reports (“Arbitron Data and Reports”). *See id.*

Arbitron’s customers are subscribers to the Arbitron Data and Reports consisting principally of radio broadcasters, advertisers, and advertising agencies. *See id.*

For more than 40 years, Arbitron has collected information regarding radio audiences in various markets throughout the United States. *See id.* at ¶ 4. Arbitron has traditionally obtained this information by mailing paper diaries to selected survey participants in a given market. *See id.* The participants are each asked to keep a written record in quarter-hour increments of any radio broadcasts they hear over a one-week period, and then mail the diary back to Arbitron. *See id.* 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 primary language spoken. *See id.* Arbitron collects the completed diaries over a three-month period and analyzes the information using its proprietary methodologies and processes to determine audience estimates for radio stations. *See id.* 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. *See id.* Under the diary service, 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). *See id.*

Paper diary surveys have been the accepted currency for radio ratings for decades and they will continue to be used for the foreseeable future in markets outside of the top 48 metros. *See id.* at ¶ 5. With the explosion of audio and video entertainment choices that have resulted from wireless high-speed mobile internet access, satellite radio, and HD TV & Radio, the industry needed a ratings technology that did not rely on people to recall every media outlet they were exposed to throughout the week. *See id.* Competitive media such as Television and

Internet provide their advertisers with immediate data on the audiences they reach and radio needed to provide similar reports or risk losing their share of ad revenue. *See id.* In summary, advertisers and the radio industry required more detailed, timely and actionable ratings service that only electronic measurement can provide. *See id.* In response to these and other concerns, in 2007, Arbitron launched a new type of electronic ratings meter – the Portable People Meter, or PPM – which had been in development at Arbitron since approximately 1992. *See id.* 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. *See id.*

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. *See id.* at ¶ 6. The PPM panelists may remain in the panel for up to a two-year period. *See id.* The PPM electronically and automatically picks up hidden inaudible codes embedded in radio broadcasts at the transmitter of the radio station, which code identifies the station being heard by the panelist. *See id.* 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). *See id.* The PPM can also determine whether it is inside or outside of the panelist's home. *See id.*

At the end of each day, each participating panelist is instructed to place its PPM in a docking station. *See id.* at ¶ 7. 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 the Arbitron Data and Reports. *See id.* 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, and weekly data is also made available to subscribers. *See id.*

The Arbitron Data and Reports are published to subscribers, comprised primarily of radio broadcasters, advertising agencies and advertisers, which enter into license agreements with Arbitron to use the estimates contained in the Arbitron Reports in connection with their businesses. *See id.* at ¶ 8. 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. *See id.* It is very important to the subscribers to Arbitron's PPM Services, and thus to the overall value of Arbitron's business, that Arbitron be able to tell subscribers and prospective subscribers which stations have agreed to encode the PPM signal. *See id.* For example, an advertising agency or advertiser may use the Arbitron Data and Reports to help determine where to place a product advertisement targeted at Spanish-speaking adults 25-54 years of age in the New York market between the hours of 6:00 a.m. and 10:00 a.m. *See id.* This information may also be used to determine a reasonable rate for the advertisement considering the station's rating 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 typical 15-minute period. *See id.* The Arbitron Data and Reports are also used by radio stations to aid them in making programming decisions for their stations. *See id.*

For the PPM system to work, radio stations must be willing to embed the inaudible code in their broadcasts so that the PPM can detect the broadcast. *See id.* at ¶ 9. For this reason, Arbitron licenses its encoding equipment to FCC-licensed radio broadcasters in a measured market free of charge and assists broadcasters in installing and maintaining the equipment at their broadcast sites. *See id.* Once installed, the encoder automatically places a unique code into the radio broadcast without requiring the broadcaster to do anything other than make sure that the equipment is turned on and has not malfunctioned. *See id.* Encoding allows a broadcaster's station to be eligible to be included in the Arbitron PPM reports regardless of whether the station

is also a subscriber. *See id.* In fact, Arbitron has clients which encode their broadcasts even though they do not subscribe to the PPM service. *See id.*

The roll-out of the PPM service in the top 48 markets in the United States began in 2007 with the Philadelphia and Houston markets, continued in 2008 with New York, Los Angeles, Chicago, San Francisco and several other markets, and will be completed by the end of 2010. *See id.* at ¶ 10. In preparation for this roll-out, Arbitron began to enter into agreements with top-48-market broadcasters to encode their broadcasts and to license the Arbitron Data and Reports generated from PPM data. *See id.* Although some broadcasters chose not to encode their broadcasts or license PPM data, radio broadcasters accounting for the vast majority of radio listening in the top 48 markets have contracted to encode and subscribe. *See id.*

**B. SBS's Licenses the Arbitron Data and Reports and Agreed to Encode its Broadcasts**

SBS is a major Hispanic-controlled radio broadcaster that operates twenty Hispanic-format radio stations in major markets in the United States, including New York, Los Angeles, Miami, Chicago, San Francisco, and Puerto Rico. *See id.* at ¶ 11. SBS's radio stations include WSKQ-FM and WPAT-FM (New York); KXOL-FM and KLAX-FM (Los Angeles); WRMA-FM, WXDJ-FM and WCMQ-FM (Miami); WLEY-FM (Chicago); KRZZ-FM (San Francisco); and WZET-FM, WZMT-FM, WZNT-FM, WODA-FM, WIOB-FM, WIOA-FM, WMEG-FM, WIOC-FM, WEGM-FM, WRXD-FM, and WNOD-FM (Puerto Rico) (collectively, the "SBS Stations"). *See id.*

SBS has been a subscriber to Arbitron Data and Reports for many years, first for the diary survey, and now for the PPM survey. *See id.* at ¶ 12. In June 2007, with the roll-out of the PPM underway, Arbitron and SBS entered into the Encoding Agreement pursuant to which SBS promised to encode the radio broadcasts of the SBS Stations. *See id.* Pursuant to the Encoding Agreement, Arbitron provided encoding equipment to SBS free of charge and assisted SBS's

personnel in installing the equipment at its broadcasting sites. *See id.* SBS was not charged a license fee for the equipment or the right to encode its broadcasts. Rather, SBS benefits from encoding because it permits the PPM to detect audience levels for the SBS Stations, and, therefore, allows Arbitron to include the SBS Stations in the Arbitron Data and Reports. *See id.*

The Encoding Agreement requires SBS to continuously encode its broadcasts through the expiration of the latest to expire Radio Station License Agreement to Receive and Use Arbitron PPM™ Data and Estimates with Arbitron. *See id.* at ¶ 13. The Encoding Agreement does not permit SBS to terminate or cancel for any reason. *See id.* If the encoding equipment fails to operate properly, SBS is required to notify Arbitron of that failure within twenty-four (24) hours and provide Arbitron with reasonable assistance and access to its premises to repair the equipment. *See id.*

As of September 18, 2007, Arbitron and SBS entered into a “Radio Station License Agreement to Receive and Use Arbitron PPM™ Data and Estimates” (the “PPM License Agreement”) whereby Arbitron agreed to provide Arbitron Data and Reports generated using PPM data to SBS. *See id.* at ¶ 14. At the same time, Arbitron and SBS also entered into “Radio Station License Agreement to Receive and Use Scarborough Reports” (the “Scarborough Agreement”) to provide additional data and reports. *See id.* Pursuant to these agreements, Arbitron granted to SBS a limited license to use the Arbitron Data and Reports in exchange for license fees to be paid in periodic installments as specifically provided in the agreements. *See id.*

Since the PPM License Agreement expires following the delivery of the December 2012 Arbitron Data and Reports, the earliest expiration date of the Encoding Agreement is December 2012. *See id.* at ¶ 15.

**C. SBS Stops Paying the License Fees for its PPM License Agreement and the Scarborough Agreement**

In approximately June 2009, SBS informed Arbitron that it was dissatisfied with the Arbitron Data and Reports because it believed that the methodology that Arbitron uses to conduct its PPM service is flawed. *See id.* at ¶ 16. By July 2009, SBS had stopped paying its license fees under the PPM License Agreement and Scarborough License Agreement and demanded a credit against the entire amount of the overdue license fees and vastly reduced license fees going forward. *See id.* SBS wanted to continue to receive and have the right to use the “flawed” estimates, but no longer wanted to pay an appropriate rate for the right to do so. *See id.*

Arbitron rejected SBS’s position and, among other things, informed SBS that under the section 9 of the PPM License Agreement, SBS was not entitled to challenge Arbitron methodology for producing the Arbitron Data and Reports or to obtain a credit against its license fees based on any supposed flaw in the methodology. *See id.* at ¶ 17. In pertinent part, section 9, entitled “Methodology,” states:

**ARBITRON MAKES NO WARRANTIES, EXPRESS OR IMPLIED  
... CONCERNING THE SERVICES PROVIDED HEREUNDER,  
INCLUDING BUT NOT LIMITED TO:**

**(A) THE DATA GATHERED OR OBTAINED BY ARBITRON  
FROM ANY SOURCE;**

**(B) THE PRESENT OR FUTURE METHODOLOGY EMPLOYED  
BY ARBITRON IN PRODUCING ARBITRON DATA AND/OR  
REPORT(S) AND/OR SERVICES; OR**

**(C) THE ARBITRON DATA AND/OR REPORT(S) AND/OR  
SERVICES LICENSED HEREUNDER.**

**ALL ARBITRON DATA AND/OR REPORT(S) REPRESENT  
ONLY THE OPINION OF ARBITRON. RELIANCE THEREON  
AND USE THEREOF BY STATION IS AT STATION’S OWN  
RISK.**

*See id.*, Exhibit 2 at § 9. In its letter to SBS of June 8, 2009, Arbitron reminded SBS that it had previously waived any right to challenge the PPM methodology or obtain a credit based on a supposed flaw in the methodology. *See id.* at ¶ 17. Nevertheless, SBS has continued to refuse to pay its license fees for either PPM or diary-based data and continued to allege methodological flaws in the PPM survey. *See id.* Through January 19, 2010, SBS owes Arbitron over \$2.3 million in unpaid license fees for Arbitron Data and Reports based on PPM data, and over \$250,000 for Arbitron Data and Reports generated by the diary survey (which service is not even the subject of this dispute). *See id.*

In response to SBS's failure to pay license fees since July 2009, Arbitron suspended delivery of the Arbitron Data and Reports under section 5(b) of the PPM License Agreement. *See id.* at ¶ 18. According to that provision, Arbitron is permitted to suspend delivery of the Arbitron Data and Reports "without terminating, breaching or committing a default under [the] Agreement or any such other agreements." *See id.*, Ex. 2 at § 5(b). Arbitron has not terminated the license agreements, but rather, under the agreements, has elected to suspend delivery until such time that SBS is current in its payment obligation. *See id.* at ¶ 18. The PPM License Agreement and Scarborough Agreement continue to be in full effect. *See id.* Arbitron remains willing to begin delivery of the Arbitron Data and Reports once SBS becomes current in its payments under those agreements. *See id.*

#### **D. SBS's Breach of the Encoding Agreement**

On Thursday, February 4, 2010, Arbitron's personnel determined that the following SBS radio station broadcasts were no longer being encoded: WLEY-FM (Chicago); KXOL-FM and KLAX-FM (Los Angeles); WRMA-FM, WXDJ-FM and WCMQ-FM (Miami); WSKQ-FM and WPAT-FM (New York); and KRZZ-FM (San Francisco). *See id.* at ¶ 19. SBS's engineering personnel in its New York, Los Angeles and Chicago broadcast facilities confirmed via email

that the corporate office of SBS had ordered that the encoding equipment be turned off. *See id.* Arbitron did not receive twenty-four (24) hours' notice that the encoders at any of SBS's broadcast facilities were malfunctioning or would be taken offline for any reason as required by the Encoding Agreement. *See id.*

The Encoding Agreement remains in full force and effect because it is coterminous with the PPM License Agreement, which has not been terminated by Arbitron and which does not expire until after the delivery of the December 2012 Arbitron Data and Reports. *See id.* at ¶ 20. While Arbitron has notified SBS that it has failed to pay its license fees the PPM License Agreement and Scarborough Agreement, Arbitron has repeatedly given SBS the opportunity to become current in its payments so that it may again receive the Arbitron Data and Reports. *See id.*

**E. Arbitron Will Suffer Immediate Irreparable Harm that Cannot Be Quantified with Reasonable Certainty**

Arbitron will suffer irreparable harm from SBS's refusal to encode its radio broadcasts, and this harm can only be avoided by an order requiring SBS to encode its radio broadcasts for the entire term of the Encoding Agreement. *See id.* at ¶ 21.

SBS's refusal to encode its radio broadcasts destroys Arbitron's ability to gather listening data regarding those stations and deliver it to Arbitron's subscribers who have contracted to receive Arbitron Data and Reports. *See id.* at ¶ 22. Arbitron's subscribers license the PPM ratings on the premise that the broadcasters who have agreed to encode their radio broadcasts will continue to do so throughout the entire term of their agreements. *See id.* Arbitron specifically informs advertising agencies of the particular stations in each market for which Arbitron will be providing listening data, and those agencies expect to receive this information throughout the life of the active encoding agreements broadcasters have entered into with Arbitron. *See id.* Many of these agencies focus on minority-format stations, and so SBS's

absence from the ratings would be a particularly harsh blow to their business. *See id.* Similarly, all minority and general market subscribing broadcasters in SBS's markets will also suffer because they will now be unable to determine how their stations rank in comparison to SBS's stations. *See id.* Arbitron's inability to provide estimates as to the audiences of SBS's radio stations decreases the overall value of the Arbitron Data and Reports to subscribers because the Arbitron Data and Reports now provide a less complete and thorough portrayal of radio listening in the markets where SBS is no longer encoding. *See id.*

Arbitron's credibility in the marketplace for delivering ratings as promised is also harmed by SBS's refusal to honor the Encoding Agreement. *See id.* at ¶ 23. If radio stations and advertising agencies cannot rely on Arbitron's promise that it will be able to provide audience estimates for certain radio stations for the promised time period, those licensees will not be as willing to license the ratings or will demand a lower price for the ratings in light of the real possibility that radio broadcasters like SBS can stop encoding at any time and for any reason. *See id.* Furthermore, advertisers and agencies may not have the confidence in their radio buy if they do not believe they will continue to be able to evaluate the stations in the ratings report on an ongoing basis. *See id.* The marketplace must have confidence in Arbitron's ability to deliver ratings as promised if Arbitron is going to continue to be successful. *See id.* If stations which have contracted to encode for a set term are free to simply unplug their encoders, as SBS has done, Arbitron's entire PPM business is at risk. *See id.*

SBS's conduct threatens a major portion of Arbitron's entire business, as Arbitron's PPM service in the markets where SBS operates generates approximately 12% of Arbitron's total revenues. *See id.* at ¶ 24. Arbitron realized approximately \$48,000,000 in revenues from licensing the Arbitron Data and Reports based on the PPM service in New York, Los Angeles, Chicago, Miami and San Francisco, excluding SBS, in 2009, and this figure is expected to grow

to \$55,000,000 in 2010. *See id.* Thus, Arbitron's ability to deliver the promised ratings in these markets underlies a major portion of Arbitron's entire business and is now being called into doubt by SBS's refusal to perform under the Encoding Agreement. *See id.*

The fact that some broadcasters have not agreed to encode their stations does not affect the value of the Arbitron Data and Reports or Arbitron's credibility from the perspective of Arbitron's current licensee because Arbitron has not promised data from non-encoding broadcasters to its other licensees. *See id.* at ¶ 25. By contrast, Arbitron's licensees do expect to receive SBS's ratings, and the sudden and unexplained loss of that information could seriously impair Arbitron's ratings business. *See id.*

Money damages are inadequate to compensate Arbitron for SBS's breach of the Encoding Agreement. *See id.* at ¶ 26. The loss in value to the Arbitron Data and Reports in the markets where SBS is no longer encoding (New York, Chicago, Miami, Los Angeles and San Francisco) is not quantifiable with reasonable certainty, and Arbitron cannot put a price on its credibility in the marketplace. *See id.* An award of money damages would not satisfy Arbitron's need to obtain listening data regarding SBS's radio stations – only the data itself will eliminate the harm to Arbitron and its licensees. *See id.* Arbitron has no other means of obtaining PPM listening data as to SBS's radio stations except through the encoding of those broadcasts, and so an order requiring SBS to abide by the terms of the Encoding Agreement is the only way to address the harm suffered by Arbitron and its licensees by SBS's conduct. *See id.*

To restart encoding, SBS can simply turn on its encoders with the flip of a switch. *See id.* at ¶ 27. Although some listening data has been lost since SBS stopped encoding, if SBS were to be ordered to immediately restart encoding, sufficient listening data from its radio stations could still be included in the February 2010 Arbitron Data and Reports as well as several weekly reports to be issued so as to preserve the value to the subscribers of the reports in the affected

markets. *See id.* By contrast, if SBS were not ordered to begin encoding immediately, the value of the ratings reported in the February 2010 reports, if any, would be degraded as the amount of listening data reflected by the ratings decreases with each passing day, causing immediate harm to Arbitron and its subscribers. *See id.* As such, Arbitron and its customers stand to benefit significantly from an order requiring SBS to begin encoding immediately, whereas SBS would suffer no hardship at all. *See id.*

### III. ARGUMENT

#### A. Applicable Legal Standard.

Pursuant to CPLR § 6301, a movant is entitled to a preliminary injunction where it establishes the following: (i) a likelihood of success on the merits; (ii) danger of irreparable injury in the absence of an injunction; and (iii) a balancing of the equities tipping in the moving party's favor. *Aetna Ins. Company v. Capasso*, 75 N.Y.2d 860, 862, 552 N.Y.S.2d 918, 919, 552 N.E.2d 166, 167 (1990); *Four Times Square Assocs., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5, 764 N.Y.S.2d 1, 2 (1st Dep't 2003). Moreover, where a mandatory injunction is sought, "the court must weigh the conflicting considerations of benefit to the [party seeking the injunction] and harm to the [party subject to the injunction] which would follow the granting of such a drastic remedy." *Nat Holding Corp. v. Banks*, 22 A.D.3d 471, 474, 802 N.Y.S.2d 214, 216-217 (2d Dep't 2005).

"A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR § 6301. *See also* CPLR § 6313(a). Thus, where a movant seeks a temporary restraining order, in addition to meeting the test required for a preliminary injunction, the movant should demonstrate that the impending

harm, loss, or damage is immediate. *See 2207 Pavilion Assocs., LLC v. Plato Foufas & Co.*, 18 Misc.3d 1110(A), 856 N.Y.S.2d 27 (Sup. Ct. N.Y. County 2007).

**B. Arbitron is Likely to Succeed on the Merits of Its Claim that It Is Entitled to Specific Performance of the SBS Encoding Agreement.**

To obtain a preliminary injunction, a plaintiff must demonstrate that it is likely to succeed on the merits of its underlying claims. A *prima facie* showing of success on the merits is sufficient. *See Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 552, 457 N.Y.S.2d 27, 29 (1st Dep't 1982). The plaintiff need not establish that it is certain to succeed on the merits. *Props for Today, Inc. v. Kaplan*, 163 A.D.2d 177, 178, 558 N.Y.S.2d 38, 39 (1st Dep't 1990). "Where denial of injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced." *Ma v. Lien*, 198 A.D.2d 186, 187, 604 N.Y.S.2d 84, 85 (1st Dep't 1993) (citing *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 145, 561 N.Y.S.2d 566 (1st Dep't 1990)). "It is well settled that a likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence is inconclusive." *Four Times Square Assocs.*, 306 A.D.2d at 5, 764 N.Y.S.2d at 2.

Arbitron can readily demonstrate a likelihood of success on the merits of its claim for specific performance. The elements of a cause of action for specific performance of a contract are that (1) the plaintiff has performed all previous obligations and stands ready, willing, and able to perform its remaining obligations; (2) the defendant is able to perform its obligations under the contract; and (3) the plaintiff has no adequate remedy at law. *Piga v. Rubin*, 300 A.D.2d 68, 69, 751 N.Y.S.2d 195, 196 (1st Dep't 2002). Specific performance is appropriate where "the amount of damages is difficult to ascertain, based on the unique nature of the subject matter of the contract or agreement or the lack of an established market value." *JMG Custom Homes, Inc. v. Ryan*, 45 A.D.3d 1278, 1281, 844 N.Y.S.2d 817, 819-820 (4th Dep't 2007); *see*

*also Netherby Ltd. v. Jones Apparel Group, Inc.*, No. 04 Civ. 7028, 2007 WL 1041648, at \*19 (S.D.N.Y. Apr. 5, 2007) (internal citations and quotations omitted) (“Legal remedies may be found inadequate where any calculation of damages would be speculative, or where the contract involves goods that are unique in kind, quality or personal association. Doubts concerning the adequacy of money damages should be resolved in favor of granting specific performance.”).

Applying these standards, Arbitron is clearly entitled to specific performance. There can be no real dispute that Arbitron has performed its duties under the Encoding Agreement. Arbitron has provided the requisite encoding equipment and remains willing and able to continue abide by the Encoding Agreement. SBS can easily resume performance under the Encoding Agreement by simply turning on the encoders at its broadcasting facilities. The damage that Arbitron will suffer to its goodwill and the harm to the relationships with its other licensees caused by SBS’s refusal to continue to encode cannot be compensated by money damages.

SBS’s refusal to encode prevents Arbitron from gathering listening data for the SBS and keeps Arbitron from providing information about those stations to its other subscribers who have contracted to receive Arbitron Data and Reports. Those subscribers pay a license fee for the PPM ratings with the understanding that the broadcasters who have agreed to encode their radio broadcasts will continue to do so throughout the entire term of their agreements. This decreases the overall value of the Arbitron Data and Reports to those subscribers because the Arbitron Data and Reports would provide a less complete and thorough portrayal of radio listening in the market.

Arbitron’s goodwill in the market would be severely diminished if SBS were not ordered to honor the Encoding Agreement. If radio stations and advertising agencies cannot rely on Arbitron’s promise that it will be able to provide audience estimates for radio stations in a given market that have agreed to encode and be included in its ratings for the full period those

agreements are in force, licensees will not be as willing to license the ratings or will demand a lower price. Advertisers and agencies would have less confidence in their radio buys if they do not believe they will continue to be able to evaluate the stations in the ratings report on an ongoing basis. The marketplace must have confidence in Arbitron's ability to deliver ratings as promise. If stations which have contracted to encode for a set term are free to simply unplug their encoders, as SBS has done, Arbitron's entire PPM business is at risk. Money damages at the conclusion of this case would be inadequate to redress the harm caused by SBS. The reduction in value of Arbitron's Data and Reports, along with the damage to its reputation can only be remedied through an order requiring SBS to continue performance under the Encoding Agreement, i.e., to turn on the encoders.

Arbitron can also easily demonstrate that it is likely to succeed on its claim for breach of contract. To establish a breach of contract, a plaintiff must prove that (1) a contract exists between the parties; (2) the plaintiff performed under the contract; (3) the defendant failed to perform; and (4) the plaintiff suffered damages because of the breach. *See Wallace v. Merrill Lynch Capital Servs. Inc.*, No. 602604/2005, 2005 WL 3487809, at \*4 (Sup. Ct. N.Y. County Dec. 14, 2005), *aff'd*, 29 A.D. 3d 382 (1st Dep't 2006).

SBS cannot dispute that (1) the Encoding Agreement exists; (2) Arbitron performed under the Encoding Agreement by providing the encoding equipment; (3) SBS turned off its encoders without having any right do so under the Encoding Agreement; and (4) Arbitron is damaged by its inability to gather listening data for SBS's radio stations and include that data in the Arbitron Data and Reports.

SBS may argue that it did not breach the Encoding Agreement because Arbitron had already terminated the Encoding Agreement by virtue of its alleged repudiation of the PPM License Agreement(which is coterminous with the Encoding Agreement) when it suspended

delivery of the Arbitron Data and Reports. *See* Hanley Aff., Ex. 1 at § 1. This argument disregards the clear language of the PPM License Agreement. Arbitron's suspension of delivery of the Arbitron Data and Reports to SBS under section 5(b) of the PPM License Agreement cannot constitute a termination or repudiation of the PPM License Agreement. The PPM License Agreement expressly contemplates that in the event of a default by SBS, Arbitron may suspend delivery of the Arbitron Data and Reports "without terminating, breaching or committing a default under [the] Agreement or any such other agreements." *See* Hanley Aff., Exhibit 2, § 5(b). Since Arbitron was justified in invoking this provision as a result of SBS's refusal to pay over \$2 million in license fees under the PPM License Agreement, the exercise of its contractual power cannot be deemed a repudiation or termination of the PPM License Agreement or its coterminous Encoding Agreement.

SBS's complaints that the PPM methodology used to formulate the Arbitron Data and Reports is flawed or defective do not support a defense that Arbitron breached the PPM License Agreement, thereby terminating the Encoding Agreement. In the PPM License Agreement, SBS specifically agreed that Arbitron made no warranties, express or implied, concerning the PPM methodology, the data produced by Arbitron, and the Arbitron Data and Reports. *See* Hanley Aff., Exhibit 2 at § 9. SBS cannot now declare a breach of the PPM License Agreement based on warranties already disclaimed by Arbitron in the parties' contract. *See Against Gravity Apparel, Inc. v. Quarterdeck Corp.*, 267 A.D.2d 44, 44-45, 699 N.Y.S.2d 368, 369 (1st Dep't 1999). SBS also expressly agreed that the Arbitron Data and Reports are Arbitron's opinions as to radio listening and that SBS may use them only at their own risk. *See* Hanley Aff., Exhibit 2 at § 9. Therefore, even if the PPM methodology were flawed, which it is not, SBS would have no right to declare the PPM License Agreement, and, therefore, the Encoding Agreement, terminated based on Arbitron's alleged breach of warranties which were disclaimed.

Arbitron will thus be able to establish that SBS breached the valid and enforceable Encoding Agreement by turning off the encoders, thereby causing harm to Arbitron that can be fully redressed only through injunctive relief.

**C. Arbitron Will Suffer Irreparable Harm if SBS Is Not Compelled to Encode its Radio Broadcasts.**

Arbitron's PPM business will be irreparably harmed if this Court does not issue a temporary restraining order and preliminary injunction requiring SBS to encode its broadcasts. "Irreparable injury is found where an award for monetary damages is not adequate compensation." *Witham v. VFinance Investments, Inc.*, 17 Misc. 3d 1136(A), 851 N.Y.S.2d 75 (Sup. Ct. N.Y. County Nov. 21, 2007) (citing *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 544-545, 708 N.Y.S.2d 26, 28 (2000)). Irreparable injury can arise when the impact on a plaintiff's business of the defendant's wrong activities is difficult to quantify, *see Kings Mall, LLC v. Wenk*, 42 A.D.3d 623, 625, 839 N.Y.S.2d 313, 316 (3rd Dep't 2007), particularly where the defendant's actions cause a loss of goodwill in the business. *Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 859, 768 N.Y.S.2d 504, 507 (3rd Dep't 2003).

As discussed above, money damages are inadequate to redress the harm that Arbitron's goodwill, contractual relationships, and PPM business will suffer if SBS is not ordered to resume encoding. Arbitron has numerous contracts for 2010 expected to be worth approximately \$55,000,000 with subscribers who expect to be receive data regarding SBS's radio stations in New York, Los Angeles, Chicago, Miami and San Francisco. If Arbitron is unable to deliver those ratings as promised, the value of these contracts, as well as Arbitron's goodwill arising from its ability to provide radio ratings as promised, will be diminished to an extent that is not quantifiable in terms of money. Subscribers will be hesitant to enter into long-term PPM agreements with Arbitron if they do not have confidence in Arbitron's ability to make sure that

the stations in the market will encode. Advertisers and agencies will not have confidence in their radio buys if they do not believe they will be able to evaluate the stations in the ratings report on an ongoing basis. Agencies that specialize in minority-formatted radio stations will be most affected because SBS is a large minority-oriented broadcaster. These factors will ultimately affect the value of the Arbitron Data and Reports in a manner that is neither compensable nor quantifiable in money damages. For these reasons, injunctive relief is required.

The balance of the equities strongly favors the issuance of a temporary restraining order and preliminary injunction. To prevail as to this requirement, the plaintiff must demonstrate that “the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through the imposition of an injunction.” *Destiny USA Hldgs., LLC v. Citigroup Global Markets Realty Corp.*, 2009 Slip Op. 08263, 889 N.Y.S.2d 793, 802 (4th Dep’t 2009).

While Arbitron would suffer irreparable harm, as detailed above, if a temporary restraining order and preliminary injunction were not issued, SBS will suffer no harm whatsoever if ordered to resume encoding its radio broadcasts. For SBS to perform under the Encoding Agreement, it would merely have to flip the switch on each of its encoders – a process that requires little time or effort and would not result in any injury to SBS. Indeed, SBS had been encoding its broadcasts for two and a half years; if the encoding itself resulted in any injury to it, SBS would have ceased to encode long ago. In light of the immediate and irreparable injury Arbitron will suffer if SBS is not ordered to encode, and the minimal effort that would be required of SBS, the balance of the equities favors the immediate issuance of an injunction.

**D. Arbitron Will Suffer Immediate Irreparable Harm if A Temporary Restraining Order Is Not Issued.**

Arbitron will suffer immediate irreparable harm if a temporary restraining order is not issued because the value of SBS’s ratings reported in the February 2010 reports, if any, would be

degraded as the amount of listening data reflected by the ratings decreases with each passing day, causing immediate harm to Arbitron and its subscribers. If a temporary restraining order is entered, sufficient listening data from SBS's radio stations can still be included in the February 2010 Arbitron Data and Reports as well as several weekly reports to be issued. The temporary restraining order would thereby to preserve the status quo, *i.e.* the value to the subscribers of the reports in the affected markets.

**E. Arbitron's PPM Methodology Has Been Accredited By the MRC in Two Markets and Approved for Use by Three Attorneys General.**

SBS's flagrant breach of the Encoding Agreement is its latest tactic in a months-long campaign to avoid paying license fees under the PPM License Agreement and Scarborough Agreement. Beginning in June 2009, SBS has asserted that based on vague and unsubstantiated criticisms of the PPM methodology, Arbitron should continue to provide the Arbitron Data and Reports, but should give SBS a credit against overdue license fees and vastly reduced license fees going forward. As already detailed above, SBS has no right to challenge the PPM methodology or to obtain a credit against its license fees, but it nevertheless has withheld \$2.5 million in fees. When Arbitron suspended delivery of the Arbitron Data and Reports, thereby cutting off SBS's supply of free data, SBS responded by turning off its encoders solely as a means to put further pressure on Arbitron or to force Arbitron to deliver the reports to SBS without payment.

Even if SBS had the contractual right to challenge the PPM methodology, which it does not, its criticisms ignore that the PPM methodology, known as the "Radio First" methodology, in use in all of the markets where SBS operates has been accredited by the Media Rating Counsel in two markets, and has been approved for use pursuant to settlement agreements with three Attorneys General following two lawsuits and an independent investigation.

**1. Arbitron's Radio First Methodology In Use in SBS's Markets Has Been Accredited by the MRC in Two Markets.**

SBS cannot argue that the PPM methodology used in New York, Los Angeles, Chicago, Miami and San Francisco is flawed because the Radio First methodology has been accredited in two other markets by a non-profit organization known as the Media Rating Council ("MRC"). Ratings services such as Arbitron and Nielsen Media Research typically submit their services for accreditation to the MRC. *See* Declaration of Beth Webb ("Webb Decl.") at ¶ 4. The ratings services seek accreditation for each of the markets in which the service operates. *See id.*

The MRC has a voluntary code of conduct which the ratings services seeking accreditation must comply with as part of the accreditation process. *See id.* at ¶ 5. The Voluntary Code of Conduct ("VCOC") provides, among other things, that participation in the MRC's accreditation and auditing process is voluntary and that none of the MRC's various substantive and procedural rules preclude any measurement service from offering products that are not accredited by the MRC. *See id.* As long as the measurement service that has voluntarily sought accreditation discloses impact data and completes an MRC audit and MRC committee review prior to commercialization of the currency product, it has complied with the VCOC. *See id.* Arbitron has, in all cases, complied with the VCOC. *See id.*

Historically, it has been typical for the accreditation process for a new type of ratings service to take several years or more to obtain MRC accreditation in numerous markets. *See id.* at ¶ 6. For example, Nielsen launched an electronic ratings service in 2004 and has yet to receive accreditation from the MRC in all markets that it services. *See id.* Arbitron first commercialized its PPM Service in 2007 in the Houston and Philadelphia markets. *See id.* The MRC granted accreditation for Houston but has still not granted accreditation for the Philadelphia market. *See id.*

In 2008, Arbitron commercialized its PPM Service in twelve (12) additional markets, including New York, Los Angeles, Chicago, Riverside-San Bernardino, Atlanta, and Washington, D.C. *See id.* at ¶ 7. The MRC granted accreditation to the Riverside-San Bernardino market (the “Radio First” methodology), and in 2009, the MRC granted accreditation for the PPM Service in the Minneapolis-St. Paul market. *See id.* The remaining PPM markets have not yet been accredited, but Arbitron continues to seek accreditation. *See id.* at ¶¶ 7-8.

The Radio First methodology that Arbitron employs for the New York, Los Angeles, Chicago, Miami and San Francisco markets where SBS operates is essentially the same as the methodology which the MRC has accredited for the Riverside-San Bernardino and Minneapolis-St. Paul markets. *See id.* at ¶ 8. As such, SBS has no basis to argue that the PPM methodology in SBS’s markets is not valid and reliable.

## **2. The PPM Methodology Has Been Tested in Prior Litigation.**

The Radio First methodology has also been investigated by three Attorneys General, two of which initiated litigation and ultimately agreed to the entry of Consent Judgments that permitted Arbitron to continue using the methodology.

The change from the Arbitron diary service to the electronic PPM Service predictably resulted in changes in ratings produced under the different methods. *See Webb Decl.* at ¶ 9. The paper diary service requires listeners in the survey to recall what stations they listened to and for what length of time for one week. *See id.* The PPM meter automatically detects what stations the panelist is exposed to throughout the day and also determines the length of time that each station is heard. *See id.* Across the board, the switch to the PPM from diary has established that the total number of persons listening to the radio (the “cume”) is greater under PPM while the average time spent listening to a particular station (“average quarter hour” listening) is less. *See id.* As a result, most stations have seen their ratings decline under PPM. *See id.*

Several minority-owned or controlled broadcasters, including SBS, have criticized PPM claiming that its methodology somehow undercounts minority listening and therefore causes a disproportionate reduction in ratings to minority-formatted stations. *See id.* at ¶ 10. In fact, many non-minority-formatted stations such as talk radio and jazz have also seen a significant reduction in ratings under the PPM. *See id.* Nonetheless, the objecting minority broadcasters have been vocal and aggressive in seeking out a political solution to the issue. *See id.* They have filed a petition with the FCC and have participated in the Congressional hearings by the House Committee on Oversight and Government Reform. *See id.*

In the fall of 2008, the Attorneys General of the States of New York and New Jersey commenced an investigation into the minority broadcasters' claim that PPM undercounts minority listeners. *See id.* at ¶ 11. In October 2008, litigation was commenced in both New York and New Jersey. *See id.* Both actions were settled by entry of a Consent Judgment with no admission of any wrongdoing or flaws in the methodology of the PPM. *See id.*, Exs. 1, 2. The Consent Judgments continue to permit Arbitron to use the Radio First methodology in the PPM Service with certain commitments by Arbitron to achieve certain specific minimum results ("metrics"). *See id.* Arbitron also settled any disputes with the Maryland Attorney General on very similar terms. *See id.*, Ex. 3. Arbitron is in compliance with its commitments to the Attorneys General. *See id.*

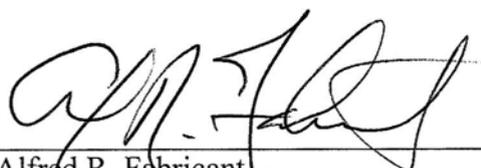
The settlements with the Attorneys General from New York, New Jersey and Maryland, which are directed to the radio markets in New York, New Jersey, Philadelphia, Washington, D.C. and Baltimore, cover essentially the same Radio First methodology which Arbitron uses in the PPM Service today in each of the markets covered by the SBS contracts: New York, Los Angeles, Chicago, San Francisco and Miami. *See id.* at ¶ 12. SBS cannot reasonably argue that the PPM methodology is somehow flawed when these Attorney Generals have already obtained

extensive discovery into the methodology from Arbitron, consulted with experts in the field of survey methodology, and concluded that Arbitron may continue to use the methodology in all affected markets.

#### IV. CONCLUSION

For the foregoing reasons, Arbitron is entitled to the entry of a temporary restraining order and preliminary injunction requiring SBS to immediately resume encoding its radio broadcasts pursuant to the Encoding Agreement.

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