SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK by ELIOT SPITZER, Attorney General of the State of New York, Plaintiffs, -against- ENTERCOM COMMUNICATIONS CORP., ENTERCOM RADIO, LLC, ENTERCOM NEW YORK, INC., ENTERCOM BUFFALO, LLC, ENTERCOM BUFFALO LICENSE, LLC, ENTERCOM ROCHESTER, LLC, and ENTERCOM ROCHESTER LICENSE, LLC, Defendants.	**COMPLAINT** Index No.:

1. Plaintiffs, the People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York ("Attorney General"), complaining of the above-named Defendants (collectively "Entercom"), allege upon information and belief that:

PRELIMINARY STATEMENT

2. The broadcast media are, in the words of the United States Supreme Court, a "valuable and limited public resource." For the music industry, radio stations serve as vehicles for record labels to expose listeners to their music, as stations play – or "spin" – their songs. The resulting competition for radio airplay has created what is effectively a black market for the illegal sale of "spins," in which radio stations accept payments or non-cash consideration from record labels, or their independent promoter representatives, in exchange for airplay without their

listeners' knowledge.

3. In the 1950s, record labels obtained spins by making bribes to local disc jockeys. Today, this practice has evolved into a corporate pay-for-play business strategy, developed and managed at the highest levels of radio broadcasting companies and major record labels. The primary loser is the music listener, the consumer who is unaware of the deception and manipulation that corrupts radio station programming, and ultimately, record sales.

4. Entercom Communications Corp., the nation's fifth largest radio conglomerate, has been an active participant in this deception of its listeners. Entercom stations have traded airplay for revenue, with the knowledge and encouragement of Entercom's corporate leadership, in two ways. Some stations – such as WKSE in Buffalo – have solicited benefits such as promotional items, payment of invoices and computers directly from labels in return for playing their songs. Other stations – such as WBEE in Rochester and at one time, WTSS in Buffalo – have also received funds from an "independent promoter," which come directly from payments received by the promoter from labels in exchange for securing "adds" of new music. The result, in both cases, has been the same: the sale of Entercom's valuable air time to the highest bidder, without disclosure to its listeners.

5. In addition to the pay-for-play schemes carried out at the local level, Entercom has instituted corporate programs, supported and directed by its most senior management, that have amounted to little more than the direct sale of airplay on Entercom stations for the purpose of manipulating the music charts. Under its "CD Preview" program, Entercom has made its airtime available in exchange for cash payments, for the explicit purpose of deceiving record monitoring services concerning the chosen records' popularity and airplay, and thereby falsely propelling

records up the music charts. More recently, Entercom has developed another corporate program – "CD Challenge" – which similarly serves as a vehicle for selling "detections" by the charting services. Entercom has not provided monitoring services with the information necessary to exclude these false "spins" from airplay calculations. To the contrary, it has threatened employees with discipline if they disclose the information necessary to compile an accurate chart based on genuine popularity.

6. Through these acts, Entercom has placed its airtime up for sale, and has concealed from listeners and reporting services the detrimental impact of its deceptive practices.

PARTIES

7. This action is brought by the Plaintiff Attorney General on behalf of the People of New York State based upon his authority under Article 22 of the General Business Law ("GBL") §§ 349(b)and 350-d, and Executive Law §63(12), and as *parens patriae*.

8. Defendant Entercom Communications Corp. is a Pennsylvania Corporation with its principal place of business in Bala Cynwyd, Pennsylvania. Entercom Communications Corp. sets corporate policy for and directs the activities of those stations run by its direct and indirect subsidiaries. David Field, Pat Paxton, and Entercom's Vice President of Label Relations are employed by, serve as agents of, and operate on behalf of, Entercom Communications Corp. Field also serves as the Chief Executive Officer of all the Defendants set forth below. Entercom Communications Corp. created and directs the CD Preview and CD Challenge programs.

9. Defendant Entercom Radio, LLC is a wholly-owned subsidiary of Entercom Communications Corp. It employs regional managers who supervise and direct the activities of

radio stations that fall within their purview.

10. Defendant Entercom New York, Inc. is a subsidiary of Defendant Entercom Radio, LLC, and participates in the operation of Entercom's New York stations.

11. Defendants Entercom Buffalo License, LLC and Entercom Buffalo, LLC are Delaware corporations headquartered in Buffalo, New York, and are subsidiaries, directly or indirectly, of Entercom Radio, LLC. They own and operate the Buffalo radio stations whose conduct is set forth in this complaint, including WKSE. Entercom Buffalo License, LLC owns the license for these stations. Entercom Buffalo, LLC is the direct employer, and pays the salaries of, employees of these stations and their local management. The employees of the Entercom Buffalo stations described in this complaint, including David Universal and his supervisor, Lawrence Robb, serve as agents of, and operate on behalf of, Entercom Buffalo License, LLC and Entercom Buffalo, LLC.

12. Defendants Entercom Rochester License, LLC and Entercom Rochester, LLC are Delaware corporations headquartered in Rochester, New York, and are subsidiaries, directly or indirectly, of Entercom Radio, LLC. They own and operate the Rochester radio stations whose conduct is set forth in this complaint, including WBEE. Entercom Rochester License, LLC owns the license for these stations. Entercom Rochester, LLC is the direct employer, and pays the salaries of, employees of these stations and their local management. The employees of the Entercom Rochester stations described in this complaint, including all employees of WBEE, serve as agents of, and operate on behalf of, Entercom Rochester License, LLC and Entercom Rochester, LLC.

13. Defendants act functionally as a single company, and are referred to herein

collectively as "Entercom."

14. In its Buffalo radio station "cluster," Entercom operates seven radio stations. Those stations' call letters are WBEN-AM, WGR-AM, WKSE-FM, WTSS-FM, WLKK-FM, WWKB-AM and WWWS-AM .

15. In its Rochester radio station "cluster," Entercom operates four radio stations. Those stations' call letters are WBEE-FM, WBZA-FM, WFKL-FM, and WROC-AM.

JURISDICTION

16. Plaintiffs bring this action pursuant to Executive Law §63(12), GBL §349(b) and § 350-d and as *parens patriae* to, *inter alia*, enjoin Entercom from engaging in deceptive, fraudulent and illegal practices in the selection of recorded music for airplay on their radio stations.

FIVE-DAY NOTICE

17. Pursuant to GBL § 349(c), on February 6, 2006, Plaintiffs served a five-day notice of this action on Defendants.

FACTUAL ALLEGATIONS

I. Payola: The Legal Framework

18. The term "payola" refers to the recorded music industry practice of exchanging money or other valuable consideration for increased exposure or promotion of a particular piece of music. Payola, or "pay-for-play," has existed in one form or another since the industry's inception.

19. Payola has long been condemned as a deceptive practice that conceals the sale of the public airwaves. In 1959, the Federal Trade Commission brought numerous actions against record labels for payola, characterizing the practice as "inherently deceptive." In findings that remain valid today, the FTC stated that payola is used:

> to mislead the public into believing that the records "exposed" were the independent and unbiased selections of the disk jockeys based either on each record's merit or public popularity. The deception of the public has the capacity and tendency to cause the public to purchase the "exposed" records which they otherwise might not have purchased and, also, to enhance the popularity of the "exposed" records in various popularity polls, which in turn has the capacity and tendency to substantially increase the sales of the "exposed" records. (*In the Matter of Chess Record Corp, et al.*, 59 F.T.C. 361 (1961))

A 1959 report issued by the United States Attorney General, after an extensive investigation, also recognized payola as a "Deceptive Practice in Broadcasting Media."

20. New York State law proscribes deceptive practices like payola and those others set forth in this Complaint. *First*, Article 22-A and § 349 of the New York General Business Law ("GBL"), modeled after the Federal Trade Commission Act, empower the Attorney General to seek injunctive relief when any person or entity has engaged in deceptive acts or practices in the conduct of any business. Section 350-d empowers the Attorney General to seek civil penalties in the amount of $500 for each violation of GBL Article 22-A.

21. *Second*, Executive Law § 63(12) empowers the Attorney General to seek injunctive relief, restitution and damages when any person or business entity has engaged in or otherwise demonstrated repeated or persistent fraudulent or illegal acts in the transaction of business. The prohibited acts of fraud are defined broadly to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, [or] false promise . . . ."

22. Federal law also specifically prohibits undisclosed sale of airplay. The relevant statute requires radio stations to exercise due diligence to ensure that stations make sponsorship announcements whenever airtime is exchanged for consideration. 47 U.S.C. § 317. Following the 1959 investigations, a provision was added that requires any employee of a radio station who accepts or agrees to accept money, services or other valuable consideration, or any person who pays or agrees to pay such radio station employee money, services or other consideration in exchange for the broadcast of any programming matter to disclose this payment to the station. 47 U.S.C. § 508. The reason for this requirement is to ensure that the station makes the requisite disclosure of such payments to the public, or refrains from accepting payment in the first place. According to the Federal Communications Commission, these "payola" statutes are intended "clearly to prevent deception on the part of the public growing out of concealment of the fact that the broadcast of particular program material was induced by consideration received by the licensee." Public Notice 85460, 40 F.C.C. 69 (March 16, 1960).

II. The Workings of Modern Radio

23. The radio industry has undergone significant changes since the initial payola scandal broke in the 1950's. Station ownership has consolidated in the hands of a small number of conglomerates, a process that has accelerated since the Telecommunications Act of 1996, which substantially increased the number of stations that can be owned by a single entity. Entercom itself has been the product of this consolidation. Since it first became a public company in 1999, the number of Entercom stations has more than doubled, to a present total of 103 stations nationwide.

24. Radio stations also no longer rely on disc jockeys to choose recorded music for broadcast. Rather, programming personnel have responsibility for formulating "play lists," strict and detailed schedules setting forth every song the radio station will play each week. As they update the play lists from one week to the next, programmers generally remove a limited number of songs and add new songs to fill the vacated slots. The newly added songs are referred to in the industry as "adds." Even when a record has been added, record labels continuously seek to increase the number of "spins" the record receives.

25. Radio stations employ a variety of formats, depending on the targeted demographic of the station. Only those formats that play a significant amount of new music make regular adds. In New York, three Entercom stations fit this description: WKSE-FM in Buffalo (which plays Top 40), WTSS-FM in Buffalo (Hot Adult Contemporary) and WBEE-FM in Rochester (Country Music).

26. Entercom radio stations directly solicit and receive a wide variety of valuable consideration in exchange for adds and spins. Some stations have also enlisted the services of so-called independent promoters, or "indies." Independent promoters are middlemen who act as conduits for delivery of the labels' "promotional support" to the stations, and help perpetuate the fiction that this support is not actually being delivered by the labels in exchange for airplay.

27. Independent promoters receive compensation from labels in exchange for each "add" they obtain. A portion of this money is then paid to the radio station. Entercom stations are fully aware that independent promoters obtain funds from record labels for procuring adds. Ostensibly, the payment to the station compensates it for providing the promoter with early "notice" of the add; in practice however, the payment constitutes prohibited compensation for the

station's decision to add the song to its playlist.

28. The indies – including those that worked with Entercom stations in New York – also offer "billbacks," payments tied to airplay of specific songs that directly defray station expenses. By means of billbacks, Entercom stations have engaged in the unadorned sale of airplay, via the independent promoter intermediary. Two Entercom stations in New York, WTSS and WBEE, used independent promoters at various times, and the indies provided budgets for the stations' use. These funds were, in turn, derived from payments made by record labels on the basis of whether the promoters' stations added certain songs.

29. Once a radio station has finished its playlist for the upcoming week, the station reports its adds to other music industry participants, including the two charting companies, Billboard and Radio & Records. These companies compile charts for various music formats that purport – and which the public understands – to reflect the popularity of individual songs based on radio airplay, as monitored by two other entities, BDS (the New-York based service used by Billboard) and Mediabase (the service used by Radio & Records). The charting services monitor stations electronically, searching for the "fingerprint" of each song – a portion that will register as a "spin" in their systems.

30. Billboard calls its charts "a reliable guidepost for anyone seeking to discover the globe's hottest musical acts," and its rankings can have a profound influence on the decisions made by radio stations in giving songs further airplay, in the record selections made by large retailers, and in purchases made by the public. As a result, the ability to manipulate chart position has, like airplay itself, become a valuable commodity for which record labels are willing to pay, and which Entercom has put up for sale.

III. Entercom Stations' Pay-for-Play Practices

31. Entercom stations routinely obtain cash or in-kind promotional support directly from record labels, or from independent promoters on behalf of the labels. Indeed, Entercom's senior staff have encouraged its stations to maximize revenue from these sources.

32. In October 2001, Entercom Vice President of Programming Pat Paxton sent a memorandum to Entercom stations, listing the amount that each station "seems to be worth" – i.e., the amount of revenue Paxton believed each station should get from labels. Paxton's targets ranged up to $125,000 per year, per station. [Exhibit A - ETM 043692-93].[1]

33. Paxton indicated that stations could meet these goals by soliciting money directly from labels or through an independent promoter. In either case, the monetary intake had to be the same: "[s]tations that choose not to work with an indie still go through the same budget consideration, and they will be expected to get this much 'value' directly from the labels." Paxton further stated that he would "set a target of potential Indie money for each appropriate station as a benchmark for comparison to any alternative" label funding. This benchmark was to be taken into account when setting up station budgets for the following year.

34. In short, stations were expected to use whatever vehicle would – in the words of one station manager – "get the most bang for our buck." [Exhibit A - ETM 043641]. Senior management demanded that stations dealing directly with labels get the same value they would receive from an independent promoter. Those stations that could not obtain the expected revenue – either from record companies directly or through their conduits, the independent

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[1]Bracketed citations refer to documents attached as exhibits hereto.

promoters – would suffer a concomitant reduction in their budgets.

35. While Paxton also paid lip service to the need to avoid using airplay to obtain these funds, in reality the stations had nothing to sell other than airplay to meet the required revenue goals. And so, whether directly or through independent promoters, Entercom stations gave "adds" and "spins" in exchange for items of value, without disclosure and in clear contravention of law.

A. Direct Pay-for-Play: The Case of WKSE

36. WKSE, Kiss 98.5 FM, is a Top 40 Entercom station that operates in the Buffalo market. It opted to pursue the revenue targets established by Entercom senior staff by soliciting cash and in-kind promotional support directly from record labels.

37. From December 1999 until January 2005, David Universal ("Universal") served as Program Director of WKSE. During his tenure as Program Director, Universal modified the WKSE playlist on a weekly basis by removing certain songs from rotation, adjusting the rotation levels of songs already on the playlist and adding new songs. As part of this process, Universal engaged in weekly, direct negotiations with record label promotion representatives in which he offered slots on the WKSE playlist in return for cash, promotional support, artist appearances and performances, trips and other benefits for WKSE and, on occasion, himself.

38. These negotiations often involved explicit discussions of specific dollar amounts to be paid by the labels for airplay commitments. For example, in a July 15, 2003 e-mail exchange, Universal asked a Columbia Records promotion representative: "Do you need help on Jessica [Simpson] this week? 1250? If you don't need help, I certainly don't need to play it. . . . thought I'd reach out to one of my new boys." [Exhibit B - Sony 113402-03]. The Columbia

promoter replied: "Sorry I didn't see the 1250. That is fine with me. Can I put it on the Board?" In a similar negotiation, Universal made the following offer to an Epic promotion representative with respect to a song by the band B2K: "I'll give you the B2K early – and a Guaranteed spot in rotation next week for 1500." [Exhibit B - Sony 00099425-26].

39. Often, during these weekly negotiations, Universal and record label personnel agreed in principle to a specific dollar amount in return for adding a new song to the WKSE playlist or increasing airplay of a song already on the playlist. Universal later decided how to "spend" the agreed-to sum, either by requesting payment from the record label or by asking for in-kind consideration such as concert tickets, airfare, or promotional items. Although Universal specifically agreed to give airplay in exchange for such consideration, he did not make on-air disclosure, or otherwise reveal to listeners that he or the station had received any benefit for airplay.

40. Additionally, Universal provided airplay in exchange for record labels' agreement that their artists perform at WKSE concerts for free or at reduced rates. Often, the artists made available by their labels for performances were different from the ones for whom the airplay was offered. These performances were significant revenue generators for WKSE, and at times Universal received a bonus from the station based on this revenue. WKSE did not disclose that airplay was given in exchange for concert performances.

41. The cash and in-kind promotional support generated by Universal for WKSE was substantial. According to records maintained by Universal, he negotiated in excess of $93,000 from record labels for adds to the WKSE playlist in 2004 alone, a figure that does not take into account the value of artist performances that Universal negotiated. Of the $93,000, WKSE

received $26,771.46 in direct monetary payments from record labels. [Exhibit C]. The remaining revenue was transferred in-kind through the record labels' provision, either directly or through a third party vendor, of airfare, hotel stays and other promotional items to WKSE.

42. Universal's illegal transactions were clearly disclosed to his supervisors. Universal maintained a log delineating the precise items he received in return for adds, which he showed from time to time to the station's General Manager. [Exhibit C]. In October 2002, Entercom formalized this process when it promulgated a policy requiring that "any [Entercom] station desiring to utilize promotional support available from record labels or independent promoters must first have the use of such support authorized in writing . . . and approved in writing by the general manager." At WKSE, many of the resulting "Support Authorization" forms made clear on their face that the promotional items were provided to the station in return for adds or spins. [Exhibit D]. Nonetheless, they prompted no inquiry from the supervisory personnel who reviewed them, and no form was ever rejected for non-compliance with Entercom policy.

43. At the time of their submission, these logs and forms made clear that Universal received numerous items having no connection at all with the promotion of the listed songs, but simply constituting financial consideration for WKSE's addition of those songs to its playlist. Universal's lists documented items that the station had received in exchange for specific adds: computers, funding of a ratings study, staff trips, specific sums of money, funds for Entercom promotional teams, and payment of invoices. At times, the list would indicate that an add was part of a "deal" to obtain an artist for a concert sponsored by the station. [Exhibit C].

44. Many of the items received by Universal had no connection to the song or artist

being played, and the labels gave such consideration solely to obtain an add. Nonetheless, Universal's supervisors never inquired about their propriety, never sought to determine whether the requisite sponsorship identification had been made, and never rejected any proposed exchange. No one ever reviewed the forms for legal compliance.

B. WBEE: Institutionalizing the Role of Label "Support" in Setting a Playlist

45. The selection of airplay based on receipt of promotional and other benefits was not a phenomenon unique to WKSE. At WBEE – Entercom's Country Music station in Rochester – staff solicited promotional consideration from record labels and independent promoters, and then used the fact of such consideration in its determination of the records to be played by the station. These practices took place with the full approval, and support, of senior station management.

46. Immediately after Entercom's purchase of WBEE from Sinclair Broadcast Group in 1998, Entercom cut the station's promotion budget with the expectation that the station would recover the funds from record labels. As a result, the Station's senior staff demanded that WBEE programmers solicit record labels for monies in order to achieve a $40,000 budget for radio promotions. When one programmer refused to solicit labels for promotional dollars, the station's Operations Manager directly approached the label representatives for support.

47. Every promotional item from record labels or independent promoters had to be approved by the Operations Manager. WBEE's promotions staff were instructed to log every form of promotional benefit received from the record labels on a computerized spreadsheet detailing the amount of consideration received, the record label providing the benefit, as well as the song supported by that benefit. This spreadsheet resided on a shared database accessible by

the station's senior staff, who were thereby made well aware of the benefits provided the station by various record labels.

48. WBEE explicitly factored such gifts in its song selection decisions. The Operations Manager often discussed these gifts with labels, and agreed with labels on adding spins for particular records. He instructed other employees to take the consideration available from labels into account in their decision-making, and to select songs that would result in substantial promotional support.

49. The results of this policy are apparent in an explicit, and undisclosed, purchase of airplay that took place in April 2003. At that time, WBEE's Program Director asked Country Music label Universal South to pay for a $2500 laptop computer for the station. [Exhibit E - UMGEM 064460]. In exchange, WBEE agreed to add songs by two Universal South artists: Joe Nichols and McHayes. After WBEE added their singles, the Northeast Promotion Representative for Universal South sent him the following email:

> All looks well for Joe this Monday. Thank you again for being a part of this single so early! And for McHayes.
>
> Have you received your computer yet? [Exhibit E - UMGEM 064462].

Subsequently, the Promotion Representative recorded the exchange in an internal email: "WBEE $2500 Joe and McHayes For laptop for studio." [Exhibit E - UMGEM 053007]. WBEE made no on-air disclosure that it had received any consideration for this airplay.

50. Senior station management learned of this arrangement but declined to make any disclosure or return the computer. To the contrary, they assisted in covering up the gift. At the request of Universal South, WBEE sent a letter to the label falsely confirming that the computer

had been received as part of a "promotion" – although, in fact, the station had simply retained the computer for its own use. [Exhibit E - ETM 056992]. No one was disciplined for the gift, or the subsequent falsehood.

51. WBEE also exchanged airplay for concerts and station visits by artists. For example, in one March 2004 email, WBEE's Music Director announced the agreement by country artist Blake Shelton to visit the station. The Music Director added, for reasons that would clearly be understood by the station's staff: "We have to add his song today . . . ." The station did so, without disclosing the quid pro quo nature of this arrangement.

52. In addition to such direct consideration, various independent promoters channeled money from record labels to WBEE. For example, in 2003 and 2004, WBEE contracted with Jeff Solima of Hit Squad Promotion, the source of an annual promotional budget of between $30,000 and $35,000 for the station. Solima was paid by record labels, depending on the records that were added by the stations he represented.

53. The annual budget that WBEE received from Solima and his predecessors was determined by the extent to which Solima believed the station would add the songs he suggested. WBEE's senior staff were fully aware of the financial stake the station had in delivering those adds to Solima, and WBEE's Operations Manager discussed with Solima the latter's song preferences – i.e., those songs for which Solima would be compensated by record labels. The Operations Manager then pushed for selection of those songs at staff meetings, precisely because they were recommended by the independent promoter.

54. In these ways, WBEE sold its airplay for benefits from labels, without informing its listeners of the real basis for the airplay decisions.

C. Corporate Support for Pay-for Play

55. Entercom station managers and even more senior personnel had ample evidence of their stations' pay-for-play conduct, but took no steps to follow up on this information. For example, Vice President and Buffalo General Manager Lawrence Robb openly addressed senior Entercom officials of David Universal's practices as early as June 2000. In an e-mail to Regional Vice President Weezie Taylor, Robb wrote:

> As of this date I choose not to work with an 'indie." My program director Dave Universal is vehemently opposed to working with an indie.....Dave generates $90,000+ in record company *(sic)* annually for WKSE. *I receive a weekly update of adds and dollars from Dave....*Forcing Dave to work with an indie at this time is the wrong move. (Emphasis added)

[Exhibit F - ETM 036572]. No Entercom official made any further inquiry in response to this statement.

56. Entercom's policy of requiring general manager approval of all promotional support ostensibly served as a means to ensure Entercom's compliance with the payola statutes. However, Vice President of Programming Paxton, specifically told general managers that the only reason for them to review the forms was to insure that program directors "aren't making bad deals," thereby eviscerating the very check Entercom supposedly had instituted to ensure that its program directors did not accept consideration for adding records and made appropriate disclosure if they did. Other stations, such as WBEE, were able simply to ignore the policy without any consequence.

57. Entercom's corporate management has been made aware of other instances in which it appeared that radio station programmers may be illegally accepting consideration for airplay. In July 2004, an employee at an Entercom station sent Paxton and Entercom CEO

David Field an e-mail that complained, in part, "I want to work at another entercom station, not [this one]. [The Program Director] is takeing [*sic*] record company money and makes me help him. he will fire me to [*sic*] if I do tell you this." The complainant forwarded an email that appeared to reflect the Program Director's knowledge of the exchange of airplay for $1200. Paxton referred the matter to a local supervisor, and took no steps to follow up on this report, or to ensure that the manager was complying with the law. [Exhibit G - ETM 043816-18]. Paxton never learned, or sought to learn, whether the supervisor investigated the matter.

58. In the wake of the New York Attorney General's investigation, Entercom adopted a single reform of its practices: it ended its relationships with most independent promoters effective December 31, 2004. Yet, by then, most Entercom stations had already recognized that they could get far more value working directly with record companies. [Exhibit F - ETM 040335]. Entercom made no effort to alter stations' direct pay-for-play practices. To the contrary, in the months since the Entercom stations ended their relationships with indies, stations have simply sought out other ways, in the words of one Entercom market manager, "to replace the indie money we had in the past." [Exhibit G - ETM 043930]. According to Vice President and Buffalo General Manager Lawrence Robb, since the revelations about David Universal's conduct and the Attorney General's investigation, Entercom has failed to undertake any reforms. Rather, he said, it has been "business as usual."

IV. Entercom's Corporate Programs: Selling Manipulation of the Music Charts

A. CD Preview: The Sale of "Detections"

59. In addition to the more traditional pay-for-play programs, Entercom corporate management has developed formal channels by which record labels may purchase "spins" of

their songs on Entercom stations. Its first such initiative was "CD Preview." Through this program, Entercom encourages record labels to buy spins – even if they are not part of Entercom stations' regular playlists – and generally runs them in the overnight hours when listenership is at its lowest. Entercom sells the program explicitly as a means by which participants can increase the amount of airplay detected by services used by the Billboard and Radio & Records charts. [Exhibit H.1 - Sony 00120765]. By means of CD Preview, a song can move up the charts as a result of these paid-for, middle-of-the-night spins.

60. CD Preview was created in October 2001 by Entercom's senior corporate management, including Paxton and CEO David Field. [Exhibit H.1 - ETM 044026-27]. The program allows labels to purchase a slot of seven spins "in addition to any regularly scheduled spins" on all of Entercom's stations in the relevant format. Entercom has sometimes allowed labels to purchase double or triple the normal complement for a particular period. [Exhibit H.1 - ETM 043717].

61. Entercom stations must complete their play of the purchased music before Sunday night at 10pm – when the charts' monitoring of airplay ends for the week. The cost of these spins has ranged from $1000 to $3500. Entercom's CEO sets high revenue targets for the program, which he expects his employees to meet by selling airplay. Annually, the program generates over $2 million in revenue for Entercom, much of it from stations in New York State.

62. CD Preview consists of nothing more than a brief identification of the record label paying for the spin, followed by the purchased song. The song includes an electronic "fingerprint" detected by the monitoring services that count spins. Paxton has acknowledged that record companies "buy the program to better their chart position," and that the program "is

dependent on BDS spins." Entercom makes clear to potential buyers that by participating in the program, they are getting a means to manipulate the charts. In marketing materials, Entercom lists its pricing by the number of "BDS detections" that a participating station will receive. For example, the Entercom employee charged with selling the program pledged in an email to Country Music stations that four Entercom stations would "run[] the program once in the overnight earning the record 28 detections for the week." In one case, "Don't Tell Me" by Avril Lavigne aired 109 times in one week on Entercom's WQZQ in Nashville. Over one-third of these spins were paid for by Arista Records, Lavigne's label.

63. Entercom has boasted to stations about the impact of such paid-for spins on the music charts. One employee told a representative of Capitol Records who had purchased airplay for artist Liz Phair that "[t]he program sure has come in handy. I love coming in and seeing that bullet on the chart for Liz."

64. The purchased songs often have little to do with the music format of the station on which they are played. When one record employee told Paxton that "many of the CD Previews are songs we would never play normally," Paxton said there was little he could do about this, and urged the employee to try to "bury" the songs that did not fit.

65. CD Preview has come to alter Entercom's late night airplay to such an extent that station personnel have begun to complain. For example, the WBEE Program Director sent an e-mail to his supervisor in June 2004 asserting:

> [t]he cd preview load for this weekend is crazy!! Apparently, they ended up being added to regular stopsets thru out the weekend....3 out of 5 of the preview songs are ALREADY in heavy rotation, so I'm assuming people are hearing the same songs every hour or two. Are the few dollars earned with the CD previews worth killing our TSL [time spent listening] on the weekends?

[Exhibit H.1 - ETM 030079]. To which his supervisor replied, "These are not optional. They come from corporate, and generate millions of dollars for Entercom." [Exhibit H.1 - ETM 030079]. Another station reported that both listeners and advertisers had complained about these paid-for spins.

66. Entercom has not notified the charting services as to which spins are merely paid-for advertisements. To the contrary, Entercom has sought to conceal this information. In one instance, station employees registered their protest by identifying to Mediabase, the company that accumulates data for the Radio & Records chart, those spins that were the result of CD Preview, thereby causing Mediabase to drop those spins from its chart. After a phone call from Paxton, Mediabase reinstated the paid-for spins on its charts. Paxton threatened that, should he find out that Entercom employees made any similar disclosure in the future, "what happens next won't be pleasant." [Exhibit H.1 - ETM 043739]. No Entercom employee has since disclosed the songs played on the program to the charting services. Recently, when BDS has received such disclosure – as it has from certain labels as a result of their agreements with the New York Attorney General's Office – it has excluded the paid-for songs from its calculations.

67. Entercom corporate officials have also made clear that the sale of paid-for detections generates substantial income for the company, and that stations thus are required to fill their air time with the purchased songs. In March 2003, Paxton sent an email to station managers to caution them that the CD Preview program "IS NOT OPTIONAL" and that "[i]f need be, we'll begin charging specific markets for the revenue lost because of their mistakes" in not playing the paid-for songs. In another email, Paxton declared that there would be "no exceptions" to station participation. He indicated that any employees who declined to play the

sold spins would be terminated.

68. In sum, through CD Preview, Entercom has created a scheme by which it sells record labels the use of its airwaves for the purpose of deceiving the public and inflating songs' chart positions.

B. CD Challenge: Selling Detections Through "Competitions"

69. In March 2004, Entercom developed yet another means of selling detections, this time in the guise of a song "competition," known as "CD Challenge." Any label that pays to participate in the program has two of its songs played twice a day on Friday, Saturday and Sunday, on the six Entercom Top 40 stations or the four Entercom Country Music stations. Listeners are given a number to call to vote for their choice between the two songs. By participating in this program, labels receive 36 spins on the Entercom Top 40 stations or 24 spins on Entercom's Country Music stations, over a three-day period. In the Country Music format, participation in the CD Challenge Program has been sold exclusively to one label, RCA, for $10,000 per month. Like CD Preview, the broadcast includes a brief identification of the sponsoring label, and the two songs.

70. As in the case of CD Preview, Entercom has sold CD Challenge as a means for labels to buy the right to manipulate the music charts. Paxton has indicated that stations can air the promotion in the overnight hours – an unlikely time to gather useful listener feedback about the songs at issue. In an exchange with Paxton in March 2004, the independent promoter who helped develop the program even proposed "extracting the BDS 'fingerprint' and playing only 1 minute of each contender," so that record companies would get what they desired – a detection by the charting services – while taking up less air time. He cautioned, however, that one

"downside" to this idea was that it "could also attract BDS's attention." [Exhibit H.2 - ETM 043744].

71. Entercom employees are well aware that the primary goal of the program is to create yet another vehicle for the sale of detections. The employee tasked with selling the program to labels told Paxton that "the spins are the most important part" of the promotion. [Exhibit H.2 - ETM 042635]. Labels rarely request CD Challenge as a means to get information. Rather, they generally purchase the program only when the CD Preview slots are filled and they need "detections."

72. Entercom has made little effort to promote the program as a means for record labels to gather useful data on their songs. Labels often buy a CD Challenge for only one song, and Entercom simply picks another randomly, without any basis for believing that comparative information about feedback for the two songs would be of any interest to the purchaser.

73. In sum, both CD Challenge and CD Preview are schemes to deceive the monitoring services, and ultimately the listening public, about the true popularity of the records they track. Through these programs, Entercom has helped generate misleading chart information, to the detriment of consumers.

C. Total Access: Planning the Sale of Airplay in the Guise of "Access"

74. On the heels of the success of "CD Preview" as a generator of revenue, senior Entercom management sought to create yet another vehicle for selling airplay. In 2003, Paxton proposed the "Total Access" program, formulated in conjunction with participating record labels. Although the planned program was formally shelved in the past year – subsequent to the initiation of the Attorney General's investigation – the discussions surrounding the idea

demonstrate Entercom senior management's tolerance and support of the sale of airplay.

75. As initially characterized by Paxton in a proposed letter to program directors, Total Access called upon Entercom stations to sell record companies the opportunity to hold a conference call with all of Entercom's program directors in the relevant format to pitch a song that the label would identify by "objective evidence" as a potential blockbuster. In exchange for this access, the labels would be required to enter into a marketing plan with Entercom involving a commitment to purchase twenty advertising spots per station in the relevant format at an average price of $100 per spot.

76. Paxton initially asserted that the program would not guarantee that the chosen song would be added; rather, in a May 15, 2003 email to CEO David Field, Paxton stated:

> Entercom PD's [program directors] will seriously consider adding the song to their playlist. It won't be a corporate dictate, however they will be encouraged to pay close attention to what is being said on the call since this is a song that has developed some reason to believe it may be more successful than others.

[Exhibit H.3 - ETM 043728]. That same day, however, Paxton prepared a memorandum describing the program to record labels. Here, he asserted that "the chances of an add will be *much greater* than if you had gone through the typical promotion process." In far more direct language, Paxton proposed telling the labels:

> [Total Access] is designed to help you accelerate the process of getting a hit played on the radio. In other words, you can "supercharge" the process, which as you know, can lead to hundreds of thousands, if not millions of incremental dollars.

[Exhibit H.3 - ETM 043735, ETM 043756].

77. Throughout the formulation of the program, Entercom executives discussed ways to reward those stations that gave the record airplay. In one proposal, Paxton told Field that "as

part of the compensation [record labels] pay us, [they] could give us 3 shows to be distributed as we see fit. Might be a good way for us to support stations that play the record." [Exhibit H.3 - ETM 043733]. Entercom corporate officials thus designed a system of getting stations to add the paid-for songs to their playlists.

78. The notion that labels had to justify their participation through "objective" evidence also went by the wayside. Rather, Paxton later stated that more "subjective" evidence such as focus groups would be acceptable – essentially opening up the program to any participant. Indeed, Entercom's Director of Label Relations suggested dispensing with all pretense, and simply charging labels for the promised phone calls.

79. Entercom's window-dressing about "access" notwithstanding, "Total Access" was envisioned as yet another means by which record labels would buy "adds" in exchange for payments to Entercom radio stations. Because representatives of record labels talk to program directors on a daily basis, there is little apparent value to them in securing a fifteen minute conference call. Entercom's vision that the chance of airplay would be "much greater," and that the record would be "supercharged", made clear the purpose of the program. Similarly, internal discussions about incentivizing airplay for participating songs reveal that Total Access was not a vehicle for selling access that already existed. It was simply to be a logical continuation of Entercom's sale of airplay.

FIRST CAUSE OF ACTION
(Persistent Fraud and Illegality)

80. The acts and practices alleged herein constitute conduct proscribed by § 63(12) of the Executive Law. Defendants have engaged in repeated and persistent fraudulent acts in the conduct of their businesses by, among other things:

- Repeatedly and persistently, on at least two or more occasions, providing airplay in exchange for items of value, and failing to disclose or actively concealing such exchanges from listeners;
- Repeatedly and persistently, on at least two or more occasions, failing to exercise due diligence in ensuring that when airplay was provided for consideration, that fact was disclosed to listeners; and
- Repeatedly and persistently, on at least two or more occasions, participating in a scheme to deceive charting agencies and consumers by selling "detections" of songs for the explicit purpose of improving chart position, and concealing such deception.

These actions and practices constitute fraudulent conduct, as that term is defined in Exec. Law § 63(12).

SECOND CAUSE OF ACTION
(Deceptive Business Practices)

81. By engaging in the acts and practices described above, Defendants have violated Article 22-A of the General Business Law in that Defendants engaged in deceptive acts and practices prohibited by § 349 of the General Business Law.

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

A. Enjoining and restraining Defendants and their affiliates, assignees, subsidiaries, successors and transferees, and their officers, directors, partners, agents and employees, and all other persons acting or claiming to act on their behalf or in concert with them, from engaging in any conduct and from adopting or following any practice, plan, program, scheme, artifice or device similar to, or having a purpose and effect similar to, the conduct complained of above.

B. Directing that Defendants, pursuant to Article 22-A of the General Business Law, § 63(12) of the Executive Law, and the common law of the State of New York, to disgorge all profits obtained, directly or indirectly by the fraudulent, deceptive and illegal acts complained of herein;

C. Directing that Defendants pay penalties pursuant to section 350-d of the General Business Law;

D. Directing that Defendants pay Plaintiff's costs;

E. Awarding to Plaintiffs damages, restitution and/or disgorgement of illegal obtained revenues to the extent authorized by law;

F. Directing such other equitable relief as may be necessary to redress Defendants' violations of New York law; and

G. Granting such other and further relief, as may be just and proper.

New York, New York
March 7, 2006

STATE OF NEW YORK

ELIOT SPITZER
Attorney General

By: Terryl Brown Clemons
TERRYL BROWN CLEMONS
Assistant Deputy Attorney General
Public Advocacy Division
120 Broadway
New York, New York 10271
(212) 416-6155

SHAHLA ALI
DAVID A. WEINSTEIN
Assistant Attorneys Generals
Of Counsel