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Division of Law
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FILED

JUL 23 2013

Division of Consumer Affairs

By: Jah-Juin Ho
Deputy Attorney General
[REDACTED]

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS

_____	:	
In the Matter of	:	Administrative Action
	:	
PULSEPOINT, INC.,	:	<u>CONSENT ORDER</u>
	:	
Respondent.	:	
_____	:	

WHEREAS this matter having been opened by the New Jersey Division of Consumer Affairs, Office of Consumer Protection ("Division"), as an investigation to ascertain whether violations of the of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("CFA"), have been or are being committed by PulsePoint, Inc. ("PulsePoint" or "Respondent") in its advertisement of merchandise to consumers in the State of New Jersey;

IT IS on this 23rd day of July, 2013 ORDERED and AGREED as follows:

ADMISSIONS OF FACT

1. PulsePoint is a digital media company which engages in consumer analytics and ad-serving across display, social, mobile, video and email. PulsePoint was formed in September 2011, through a combination of the business of legacy ContextWeb, Inc. ("legacy ContextWeb") and legacy Datran Media Corp. ("legacy Datran Media"). Among other lines of business,

PulsePoint operates an advertising exchange in which it enters into agreements with website publishers to sell advertising space on their websites, while also contracting with advertisers to place their advertisements on the publishers' websites.

2. Between June 2009 and February 2012, legacy ContextWeb and, later, PulsePoint employed a JavaScript code to place cookies on the Safari internet browsers of consumers whose privacy settings were configured to only accept cookies from "sites I visit- Block cookies from third parties and advertisers" and "site you navigate to- For example, not from advertisers on those sites."

3. Legacy ContextWeb represented through their privacy policies in effect prior to August 2011 that consumers could "generally" configure their web browsers to "reject all cookies." In fact, however, legacy ContextWeb and PulsePoint placed cookies on consumers' Safari Browsers whose privacy settings were set to only accept cookies from "sites I visit" or "navigate to" and to "block cookies from third parties and advertisers." ("Covered Conduct").

4. A "cookie" is a file or package of data that is placed on a user's browser for uniquely identifying a user's browser or computer, debugging, frequency capping, or other technical purpose.

5. The privacy settings for the Safari Browser allow users to select between "always" accepting cookies, "never" accepting cookies, or accepting cookies only from "sites I visit- block cookies from third parties and advertisers." By default, Safari Browsers were set to accept only cookies from "sites I visit" and to "block cookies from third parties and advertisers" ("Safari Default Settings").

6. Legacy Contextweb's privacy policy in effect prior to August 2011 stated that:

You can generally configure your browser to accept all cookies, reject all cookies, or notify you when a cookie is set. (Each browser is different, so check the 'Help' menu of your browser to learn how to change your cookie preferences).

7. Legacy Contextweb's privacy policy did not accurately describe the functionality of the Safari Browser to the public. Notwithstanding its privacy policy, legacy ContextWeb placed cookies on the computers of the users of Safari Browsers whose Safari Default Settings were set to accept cookies from "sites I visit" and to "block cookies from third party advertisers".

8. Legacy ContextWeb and PulsePoint served cookies by deploying a Javascript code in the advertisements which they placed on websites that were visited by consumers. That code included a mechanism which replicated a submission of a form that made the Safari Browser act as if the user had clicked on the advertisement when in fact the user had not. Once legacy ContextWeb and PulsePoint sent this form submission from the advertisement, the Safari Browser allowed legacy ContextWeb and PulsePoint to place their cookies on the browsers of users whose privacy settings were set to accept cookies only from "sites I visit" and "block cookies from third parties and advertisers." This occurred without the legacy ContextWeb or PulsePoint disclosing to consumers that they were deploying such a mechanism.

9. One of the cookies placed by legacy ContextWeb, and later PulsePoint, was a "pbrtb ev" network synchronization. This cookie was used by legacy ContextWeb and PulsePoint to allow third party advertisement buyers to identify their cookies on legacy ContextWeb's network. If the third party advertisement buyer had also placed a cookie on the user's Safari Browser, the third party advertisement buyer was able to synchronize the consumers' cookies.

10. PulsePoint continued this practice after the merger between legacy ContextWeb and legacy Datran. PulsePoint ceased this practice after independent researchers Jonathan Mayer and Ashkan Soltani identified and confirmed, and the Wall Street Journal reported, in a February

17, 2012 article, that a number of companies, including Google, Inc., Vibrant Media, Inc., WPP PLC's Media Innovation, and Gannett Co.'s PointRoll, Inc., had engaged in similar practices.

11. PulsePoint represents that its current directors and officers were unaware of the Covered Conduct until February 2012.

12. Between June 2009 and February 2012, PulsePoint's highest estimates indicate that 215 million advertisement impressions were served to New Jersey Safari Browser users.

13. PulsePoint and the Division have entered into this Consent Order to resolve the Division's investigation into the Covered Conduct without the need for further action.

EFFECTIVE DATE

14. This Consent Order is effective on the date that it is entered by the Division ("Effective Date").

DEFINITIONS

As used in this Consent Order, the following words or terms shall have the following meanings, which meanings shall apply wherever the words and terms appear in this Consent Order:

15. "Attorney General" shall refer to the Attorney General of the State of New Jersey and the Office of the Attorney General of the State of New Jersey.

16. "Clearly and Conspicuously" shall mean a statement that, regardless of the medium in which it is made, is presented in such type, size, color, contrast, duration, location and audibility, compared to the other information with which it is presented, that it is readily apparent and understandable and in language and terms used in accordance with their common or ordinary usage and meaning. If such statement modifies, explains or clarifies other information with which it is presented, it must be presented in proximity to the information it modifies, explains or clarifies and in a manner that is readily apparent and understandable.

17. “Consumer Information” shall mean information Respondent collects from or about a person, including but not limited to: (a) first and last name; (b) home or other physical address, including street name and city; (c) email address or other online contact information, such as a user identifier or screen name; (d) persistent identifier (e.g. IP address or UDID); (e) telephone number; (f) contact lists or address books; (g) geographic/physical location; and (h) demographic information (e.g. race, gender, age, etc.).

18. “Consumer Linked Information” shall mean information Respondent collects from or about a person, including but not limited to: (a) first and last name; (b) home or other physical address, including street name and city; (c) email address or other online contact information, such as a user identifier or screen name; (d) persistent identifier (e.g. IP address or UDID); (e) telephone number; (f) contact lists or address books; (g) geographic/physical location; (h) demographic information (e.g. race, gender, age, etc.); or (i) any other information about a person that is combined with subsections (a) through (h) above.

19. “Person[s],” “Consumer,” or “User” shall mean “Person” as defined in N.J.S.A. 56:8-1(d).

20. “Represent” shall mean to state or imply through claims, statements, questions, conduct, graphics, symbols, lettering, formats, devices, language, documents, messages or any other manner or means by which meaning might be conveyed. This definition applies to other forms of the word “Represent” including, without limitation, “Representation” and “Misrepresent.”

21. “State” shall refer to the State of New Jersey.

BUSINESS PRACTICES

22. Respondent shall not engage in any unfair or deceptive acts or practices in the conduct of its business in the State and shall comply with all applicable State and/or Federal laws,

rules and regulations as now constituted or as may hereafter be amended including, but not limited to, the CFA.

23. Respondent shall not, without a consumer's affirmative consent, override, alter, or otherwise change the privacy settings of that consumer's web browser. Except that, nothing herein shall prevent Respondent from taking any of the foregoing actions for the purpose of detecting fraud or addressing security issues.

24. Respondent shall not misrepresent a material fact regarding: (1) the purposes for which it collects and uses Consumer Linked Information; or (2) the extent to which consumers may exercise control over the collection, use, or disclosure of their Consumer Linked Information.

25. Within 30 days of the Effective Date, Respondent shall maintain systems for two years configured to instruct Safari Browsers to expire any cookie placed by Respondent through the Effective Date if those systems encounter such a cookie.

26. No later than 30 days from the Effective Date, Respondent shall provide a page or pages within its website to provide consumers with information about the types of Consumer Information it collects and the manner such Consumer Information is used ("Consumer Information Page"). A link to the Consumer Information Page shall be clearly and conspicuously posted on the homepage of Respondent's website(s). The contents of the Consumer Information Page shall include:

- a. a detailed list of the standard types of Consumer Information Respondent collects from consumers from both online and offline sources;
- b. a detailed description of how each type of Consumer Information listed in subsection (a) is maintained and used and whether such Consumer Information is transferred to third parties;
- c. a detailed description of what cookies are and how Respondent uses information derived from cookies;

- d. information about how consumers can manage Respondent's cookies; and
- e. information about how consumers can restrict, limit, opt-out or otherwise control the Consumer Information collected by Respondent about them.

27. Within 30 days of the Effective Date, Respondent shall implement a privacy program ("Privacy Program"), that contains comprehensive privacy controls and procedures and that is designed to protect the privacy and confidentiality of Consumer Information. Respondent shall maintain the Privacy Program for a period of at least five years.

28. The Privacy Program shall include:

- a. the designation of an employee or employees responsible for such program;
- b. an independent privacy assessment report ("Privacy Assessment Report"); and
- c. the designation and implementation of reasonable privacy controls and procedures in accordance with prevailing industry standards to assess the risks identified in the Privacy Assessment Report, and regular testing or monitoring of the effectiveness of those privacy controls and procedures.

29. Respondent's Privacy Assessment Report shall be prepared by an independent third-party professional in accordance with prevailing industry standards. A person qualified to prepare such Privacy Assessment Report shall have a minimum of three years of experience in the field of privacy and data protection. All persons preparing a Privacy Assessment Report shall be approved by the New Jersey Office of the Attorney General, Division of Law at its sole discretion. The reporting period shall cover: (1) the first 180 days after the Effective Date; and (2) every two year period thereafter for five years after the Effective Date. The Privacy Assessment Report shall:

- a. Set forth the privacy controls that Respondent has implemented and maintained during the reporting period;
- b. explain how such privacy controls are appropriate to adequately protect the Consumer Information collected by Respondent;

- c. identify and require Respondent to implement methods to promote “just in time” privacy disclosures;
 - d. identify the standard types of Consumer Information collected by Respondent and measure the impact of such Consumer Information on consumer privacy;
 - e. identify the monthly rate of consumers electing to opt-out of Respondent’s collection of Consumer Information, as a percentage of Respondent’s active cookies, and determine reasonable methods of improving visibility, function, and transparency of the opt-out process in accordance with industry standards and practices;
 - f. identify reasonably foreseeable, material risk, both internal and external, that could result in PulsePoint’s unauthorized collection, use, or disclosure of Consumer Information; and
 - g. certify that the privacy controls are operating with sufficient effectiveness to protect the privacy of Consumer Information in accordance with industry standards and practices and that the controls have so operated throughout the reporting period.
30. Within 30 days of the Effective Date, Respondent shall:
- a. deliver this Consent Order to Respondent’s executive management;
 - b. deliver this Consent Order to employees of Respondent having supervisory responsibilities for implementation of the Privacy Program; and
 - c. deliver this Consent Order to Respondent’s attorneys whose responsibilities include providing advice about the privacy of Consumer Information.

31. Respondent shall cooperate with any further requests made by the Office of the Attorney General and the Division, with respect to any practices, documents, or information relating to itself or any third party concerning the Covered Conduct or pursuant to the Attorney General’s authority under N.J.S.A. 56:8-3 (Investigation by attorney general; powers and duties). Respondent shall produce all such documents or information within thirty (30) days of receiving such request.

SETTLEMENT PAYMENT

32. The Parties have agreed to a settlement of the Covered Conduct in the amount of One Million Dollars (\$1,000,000.00) (“Settlement Payment”).

33. The Settlement Payment consists of a civil penalty of Five Hundred Sixty-Six Thousand One Hundred Ninety-Six and 96/100 Dollars (\$566,196.96) pursuant to N.J.S.A. 56:8-13; Thirty-Two Thousand Forty-Eight Dollars (\$32,048.00), as reimbursement of the Division’s attorneys’ fees; One Thousand Seven Hundred Fifty-Five and 04/100 Dollars (\$1,755.04), as reimbursement of the Division’s investigative costs, pursuant to N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19; One Hundred Fifty Thousand Dollars (\$150,000.00) to be used at the sole discretion of the Attorney General for the promotion of consumer privacy programs, including the purchase of investigative tools and the retention of technologists, consultants, and experts, or for other investigatory or enforcement efforts related to consumer fraud (collectively, “State Compensation”); and Two Hundred Fifty Thousand Dollars (\$250,000.00) of in-kind advertising services to be used by the Division for the purpose of fulfilling its statutory mission of protecting the public from fraudulent, unfair, and deceptive practice and misrepresentations in the sale and advertisements of goods and services and for other public interest purposes (“In-Kind Services”).

34. From the State Compensation, Respondent shall pay as follows:

- a. Two Hundred Fifty Thousand Dollars (\$250,000.00) shall be paid on or before the Effective Date;
- b. The remaining Five Hundred Thousand Dollars (\$500,000.00) shall be paid in 20 equal installments of Twenty-Five Thousand Dollars (\$25,000.00) each quarter. Respondent shall pay installments on the first of each quarter to ensure that the Division is paid in a timely, regular, and prioritized manner. For purposes of this subsection, each quarter shall start on January 1, April 1, July 1, and December 1 of every year.
- c. PulsePoint may accelerate the schedule of its quarterly payments to the Division on an immediate basis.

35. The State Compensation shall be made by bank check, attorney trust account check, or other guaranteed funds made payable to the "New Jersey Division of Consumer Affairs" and forwarded to the undersigned:

Case Management Tracking
Division of Consumer Affairs
P.O. Box 45024
Newark, New Jersey 07101

36. PulsePoint will notify the Division if PulsePoint receives any proceeds from applicable insurance policies for coverage relating to settlement of the Division's investigation of the Covered Conduct, with the purpose of applying such proceeds to any outstanding balance of the Settlement Payment.

37. Upon making the State Compensation, Respondent shall immediately be fully divested of any interest in, or ownership of, the monies paid. All interest in the monies, and any subsequent interest or income derived therefrom, shall inure entirely to the benefit of the Division pursuant to the terms herein.

38. Within 30 days of the Effective Date Respondent shall create a New Jersey fund to distribute the In-Kind Services ("New Jersey Fund"). The distribution of In-Kind Services from the New Jersey Fund shall be used by the Division for the purpose of benefitting New Jersey consumers. Within 14 days of the Effective Date, Respondent shall meet with the Division to formalize a plan for use of the In-Kind Services. Respondent shall use its best efforts and will work in good faith to finalize the plan for use of the In-Kind Services within 45 days of the Effective Date.

FORBEARANCE ON EXECUTION AND DEFAULT

39. In the event that Respondent fails to make any of the payments referenced in Section 34 within 15 days of their due date, all unpaid amounts due and payable under this

Consent Order shall immediately be accelerated and due and payable without the need for notice and presentment, with interest calculated in accordance with R. 4:42-11 from the date of default, and with the Division's cost of collection. In any notice provided by this Section, the Division shall provide Respondent with a 15 day period within which to cure any default. In addition to the relief provided for in this Section, this default shall also entitle the Division to make an application to the Court for an order directing compliance and any other relief in aid of litigant's rights including an award of attorneys' fees.

40. Respondent agrees to pay all reasonable attorneys' fees and costs including, but not limited to, Court costs, associated with any successful collection efforts by the Division pursuant to this Consent Order.

GENERAL PROVISIONS

41. This Consent Order is entered into by the Parties as their own free and voluntary act and with full knowledge and understanding of the obligations and duties imposed by this Consent Order.

42. This Consent Order shall be governed by, and construed and enforced in accordance with, the laws of the State.

43. The Parties have negotiated, jointly drafted and fully reviewed the terms of this Consent Order and the rule that uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this Consent Order.

44. This Consent Order contains the entire agreement among the Parties. Except as otherwise provided herein, this Consent Order shall be modified only by a written instrument signed by or on behalf of the Parties.

45. Except as otherwise explicitly provided in this Consent Order, nothing herein shall be construed to limit the authority of the Attorney General to protect the interests of the State or the people of the State.

46. If any portion of this Consent Order is held invalid or unenforceable by operation of law, the remaining terms of this Consent Order shall not be affected.

47. This Consent Order shall be binding upon Respondent as well as its officers, directors, subsidiaries, successors and assigns, and any Person through which it may now or hereafter act, as well as any Persons who have authority to control or who, in fact, control and direct its business.

48. This Consent Order shall be binding upon the Parties and their successors in interest. In no event shall assignment of any right, power or authority under this Consent Order avoid compliance with this Consent Order.

49. Unless otherwise prohibited by law, any signatures by the Parties required for filing of this Consent Order may be executed in counterparts, each of which shall be deemed an original, but all of which shall together be one and the same Consent Order.

50. The Parties represent and warrant that their signatories to this Consent Order have authority to act for and bind the respective Parties.

RELEASE

51. In consideration of the payments, undertakings, mutual promises and obligations provided for in this Consent Order and conditioned on Respondent making the Settlement Payment, the Division hereby agree: (1) to release Respondent from any and all civil claims or Consumer related administrative claims, to the extent permitted by State law, which the Division could have brought prior to the Effective Date against Respondent for violations of the CFA

arising out of the Covered Conduct (“Released Claims”); and (2) to conclude the Division’s investigation of the Covered Conduct.

52. Notwithstanding any term of this Consent Order, the following do not comprise Released Claims: (a) private rights of action; (b) actions to enforce this Consent Order; and (c) any claims against Respondent by any other agency or subdivision of the State.

53. This Consent Order is entered into by the Parties for settlement purposes only. Neither the fact of, nor any provision contained in this Consent Order shall be construed as: (a) an approval, sanction or authorization by the Division or any other governmental unit of the State of any act or practice of Respondent; or (b) an admission by Respondent that any of its acts or practices described in or prohibited by this Consent Order are unfair or deceptive or violate the CFA. Neither the existence of, nor the terms of this Consent Order shall be deemed to constitute evidence or precedent of any kind except in: (a) an action or proceeding by one of the Parties to enforce, rescind or otherwise implement any or all of the terms herein; or (b) an action or proceeding involving a Released Claim to support a defense of res judicata, collateral estoppel, release or other theory of claim preclusion, issue preclusion or similar defense.

PENALTIES FOR FAILURE TO COMPLY

54. The Attorney General (or designated representative) shall have authority to enforce the injunctive provisions of this Consent Order or to seek sanctions for violations hereof or both.

55. The Parties agree that any future violations of the injunctive provisions of this Consent Order and the CFA shall constitute a second or succeeding violation under N.J.S.A. 56:8-13 and that Respondent may be liable for enhanced civil penalties, as provided therein.

COMPLIANCE WITH ALL LAWS

56. Except as provided in this Consent Order, no provision herein shall be construed as:

- a. Relieving Respondent of its obligation to comply with all State and Federal laws, regulations or rules, as now constituted or as may hereafter be amended, or as granting permission to engage in any acts or practices prohibited by any such laws, regulations or rules; or
- b. Limiting or expanding any right the Division may otherwise have to obtain information, documents or testimony from Respondent pursuant to any State or Federal law, regulation or rule, as now constituted or as may hereafter be amended, or limiting or expanding any right Respondents may otherwise have pursuant to any State or Federal law, regulation or rule, to oppose any process employed by the Division to obtain such information, documents or testimony.

NOTICES UNDER THIS CONSENT ORDER

57. Except as otherwise provided herein, any notices or other documents required to be sent to the Division or the Respondent pursuant to this Consent Order shall be sent by United States mail, Certified Mail Return Receipt Requested, or other nationally recognized courier service that provides for tracking services and identification of the Person signing for the documents. The notices and/or documents shall be sent to the following addresses:

For the Division:

Jah-Juin Ho, Deputy Attorney General
Office of the Attorney General
Division of Law
124 Halsey Street, 5th Floor
Newark, New Jersey 07101

For the Respondent:

Joe Cyr, Partner
Hogan Lovells US, LLP
875 Third Avenue
New York, New York 10022

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: _____

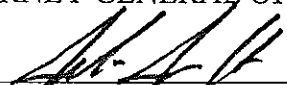

Eric T. Kanefsky, Director
Division of Consumer Affairs

**THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS
CONSENT ORDER ON THE DATES BESIDE THEIR RESPECTIVE SIGNATURES.**

FOR THE DIVISION:

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY

By: _____


Jah-Juin Ho
Deputy Attorney General

Dated: July 23, 2013

Glenn Graham
Deputy Attorney General

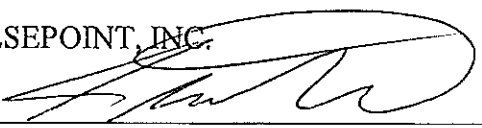
Edward Mullins
Deputy Attorney General

Brian McDonough
Assistant Attorney General

FOR THE RESPONDENT:

PULSEPOINT, INC.

By: _____


Steven Vine
General Counsel

Dated: July 17, 2013

HOGAN LOVELLS, LLP

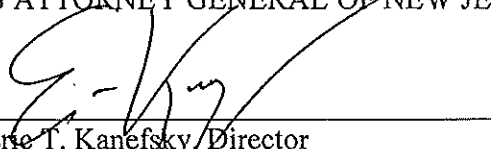
ATTORNEYS FOR THE RESPONDENT

By: _____

Joe Cyr
Partner

Dated: _____, 2013

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: 
Eric T. Kanefsky, Director
Division of Consumer Affairs

THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS
CONSENT ORDER ON THE DATES BESIDE THEIR RESPECTIVE SIGNATURES.

FOR THE DIVISION:

JEFFREY S. CHIESA
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Jah-Juin Ho
Deputy Attorney General

Dated: _____, 2013

Glenn Graham
Deputy Attorney General

Edward Mullins
Deputy Attorney General

Brian McDonough
Assistant Attorney General

FOR THE RESPONDENT:

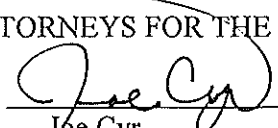
PULSEPOINT, INC.

By: _____
Steven Vine
General Counsel

Dated: _____, 2013

HOGAN LOVELLS, LLP

ATTORNEYS FOR THE RESPONDENT

By: 
Joe Cyr
Partner

Dated: July 17, 2013