

ATTORNEY GENERAL OF THE STATE OF NEW YORK
INTERNET BUREAU

IN THE MATTER OF

InfoBeat LLC,
Respondent.

ASSURANCE OF DISCONTINUANCE

Pursuant to the provisions of Executive Law Section 63 subdivision 12 and the General Business Law ("G.B.L.") Article 22-A, ELIOT SPITZER, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of InfoBeat LLC. As a result of such inquiry, the Attorney General determines:

FINDINGS

1. InfoBeat LLC ("InfoBeat") is a limited liability company established under the laws of the State of Delaware on March 29, 1999 and having its principal place of business at 550 Madison Avenue, New York, New York 10022, and is a wholly owned subsidiary of Sony Music, a Group of Sony Music Entertainment Inc. ("Sony Music").

2. Pursuant to an Asset Purchase Agreement dated December 15, 1998, Sony Music purchased from InfoBeat, Inc., a Delaware corporation

currently known as Exactis, Inc. ("Exactis"), as of January 1, 1999, certain assets of Exactis which constituted an Internet-based customized news and information e-mail delivery business operating under the name "InfoBeat" (the "InfoBeat Business") (the "Acquisition").

3. Since January 1, 1999, InfoBeat has been conducting the InfoBeat Business in the State of New York, pursuant to which it distributes Internet e-mail based newsletters to subscribers and sells electronic advertisements in such newsletters to advertisers.

4. InfoBeat estimates that approximately five percent of its approximately two and one-half million subscribers reside in New York.

5. According to its Web page:

InfoBeat offers both a variety of free consumer e-mail services and a suite of online marketing and technology solutions for the enterprise InfoBeat's e-newsletters include personalized coverage of News, Sports, Finance, Weather, Reminders, Entertainment, Classifieds and seasonal Snow reports, all sent via e-mail. Subscribers personalize the services by choosing only the information they want to receive. These advertising-supported services can be delivered in text or in a graphically-rich HTML format. See Exhibit A.

6. The costs of InfoBeat's e-mail service are paid for through the sale of advertisements that appear in the e-mail messages that subscribers receive from InfoBeat. According to InfoBeat's Web page, "[i]n order to provide a

service that is FREE to the end-user, our revenues must come from sponsorship relationships.”

7. InfoBeat selects which advertisements appear on each user's screen while he or she is using the service based on certain demographic information that the subscriber provides while registering for the service.

8. The required demographic information consists of the subscriber's e-mail address, gender, date of birth, and zip code. A new subscriber is also asked to volunteer certain optional demographic information, including his or her name, address, marital status, education, occupation, and income.

9. InfoBeat's Web site contains a "Statement of Integrity," which explains that InfoBeat uses the demographic information it collects to select appropriate advertisements for its subscribers.

10. As of October 5, 1999, the Statement of Integrity further explicitly stated the following:

Our subscribers are our most important asset and, as such, we would like to set forth the following policies that we will strictly adhere to: We will NEVER release, sell or give a subscriber's name or e-mail address to any other party or organization, without the subscriber's explicit permission To enable InfoBeat to attract sponsors, we request demographic information from our subscribers that helps us match appropriate advertisements with our subscribers. However, the demographic information will ONLY be distributed to the sponsors in aggregate form. We will NEVER release a subscriber's individual name, phone number, street address or

e-mail address to anyone, without that subscriber's explicit permission.

http://www.infobeat.com/static/cgi/static_merc.cgi?page=integrity.html (visited on October 5, 1999) (emphasis in original).

11. As of October 5, 1999, the Web site also contained a document called the "Terms of Service," which contains InfoBeat's further assurances that the company will not turn over a subscriber's name, address, or e-mail address to a third party, except as required by law. The relevant portion of the Terms of Service read as follows:

Provider agrees to NEVER release, sell or give a subscriber's name or e-mail address to any other party or organization. Provider further agrees to only send messages to subscribers that contain requested information, new subscription announcements, confirmation of profile changes, product development surveys or announcements of new or enhanced services. Provider may, from time to time, request demographic information from our subscribers. Though Provider reserves the right to use and distribute aggregate demographic information collected by its system, Provider will NEVER release the names of subscribers to any 3rd party except as the result of a court order or other applicable law.

http://www.infobeat.com/main/cgi/main_merc.cgi?action=terms& (visited on October 5, 1999) (emphasis in original).

12. The Attorney General believes that many consumers are reluctant to reveal personal information without assurances of confidentiality of the type InfoBeat placed on its Web site.

13. Until October 1999, contrary to the advertised claims contained on its Web page, InfoBeat disclosed to certain third party advertisers the e-mail addresses of those subscribers who receive the html version of InfoBeat's newsletters, and who hyperlinked from certain banner advertisements embedded in the newsletters to such advertisers' Web sites. Moreover, InfoBeat included certain subscriber demographic information in the meta-tag portion of its html newsletters, which subscribers might have inadvertently disclosed when forwarding the message to others.

14. The Attorney General finds that by virtue of the material errors or omissions in the descriptions of its information practices, InfoBeat has violated G.B.L. Sections 349 and 350, which prohibit deceptive business practices and false advertising. InfoBeat has thus also violated Executive Law Section 63 subdivision 12, which prohibits repeated fraudulent and/or illegal business activities.

15. **IT NOW APPEARS** that InfoBeat is willing to enter into this Assurance of Discontinuance without admitting to the Attorney General's findings or to any violation of law and that the Attorney General is willing to accept this Assurance of Discontinuance pursuant to Executive Law Section 63 subdivision 15 in lieu of commencing a statutory proceeding.

STATEMENT OF RESPONDENT

16. InfoBeat believes that it is, and at all times has been, in compliance with New York law. InfoBeat has cooperated fully with the Attorney General throughout this investigation. Although InfoBeat does not believe that the investigation has disclosed any inappropriate business practices, InfoBeat is entering into this Assurance so that this matter may be resolved amicably, without further cost or inconvenience. InfoBeat asserts that it has diligently and expeditiously investigated and corrected the problems identified by the Attorney General.

17. By letter dated October 7, 1999, the Attorney General informed InfoBeat of "some concerns about certain advertising and business practices of" InfoBeat. (Because of an incorrect address, this letter did not reach InfoBeat or Sony Music until October 12.) On October 14, 1999 in a conversation between Ann Sweeney, Vice President, New Technology and Business Development Counsel for Sony Music, and Eric A. Wenger, Assistant Attorney General, InfoBeat first learned of a possible violation of its data collection policies which had been discovered by the Attorney General's office: that when a subscriber clicked on any such data in an html-format link in an InfoBeat e-mail to one or more advertisers, such subscriber's e-mail address might be included in the uniform resource locator (URL) address at such advertiser's Web site.

18. Immediately upon learning of the possible problem described by Eric Wenger on October 14, 1999, InfoBeat commenced an in-depth review of its data control practices, including an internal examination and fact-checking with Exactis and InfoBeat's advertisers. This investigation, which lasted approximately three weeks, uncovered a software flaw in the programming code for two of InfoBeat's advertisers, ProFlowers and TotalE. This flaw, which was the result of a programming code which was unique to these two advertisers, and which had been designed and implemented prior to Sony Music's acquisition of the InfoBeat Business, operated in such a way that if a subscriber clicked on an html-format advertisement link for either such advertiser, such subscriber's e-mail address would be included as part of a long string URL address at the advertiser's Web site (but only if the subscriber accessed such site via such html links). During the course of its investigation InfoBeat received assurances from both ProFlowers and TotalE that each advertiser was unaware of the access to the subscriber's e-mail address, and that neither had made any use of any such data. Such investigation also revealed that InfoBeat included certain subscriber demographic information in the meta-tag portion of its html newsletters, which subscribers might have inadvertently disclosed when forwarding the message to others.

19. During the course of its investigation, InfoBeat corrected each of the problems identified in paragraph 18 hereof. At the conclusion of its internal investigation, on November 5, 1999, InfoBeat sent an e-mail notice to each of its subscribers; such notice identified the problems, explained how the problems had been corrected; and directed subscribers to a special web page (<http://www.infobeat.com/QandA.html>) addressing the issue in greater detail. Finally, the notice invited subscribers to e-mail any questions concerning the matter to privacy@infobeat.com. Less than one month after its knowledge of the problems described in paragraph 18 hereof, InfoBeat had fully investigated those problems, corrected those problems, and provided subscribers with full disclosure with respect to them.

AGREEMENT

I.

20. **IT IS HEREBY AGREED** by and between the parties that this Assurance of Discontinuance ("Assurance") shall be binding on, and apply to, InfoBeat, LLC, its officers, directors, servants, agents, employees, assignees, and any individual, subsidiary, division, affiliate or other entity through which InfoBeat may now or hereafter act, as well as any successors in interest (hereinafter "InfoBeat").

II.

21. **IT IS FURTHER UNDERSTOOD AND AGREED** that InfoBeat shall refrain and desist from any of the acts and practices alleged by the State to be in violation of its laws, including, but not limited to representing directly or by implication that InfoBeat does not share with advertisers and/or third parties the personal data it collects from its subscribers, unless that is the case.

III.

22. **IT IS FURTHER UNDERSTOOD AND AGREED** that, within ten (10) business days of the execution of this Assurance, InfoBeat shall ensure that the “Statement of Integrity” and “Terms of Service” sections of its Web site include a materially complete and accurate summary of its policies regarding the disclosure of any personal data that it may collect from its subscribers, along with a clear and conspicuous "hypertext link" or "jump-point" to the Attorney General’s Web site (“<http://www.oag.state.ny.us/internet/internet.html>”), which shall be maintained for one year. The Attorney General may change the address of the hypertext link upon seven (7) days prior written notice to InfoBeat.

23. **IT IS FURTHER UNDERSTOOD AND AGREED** that, within twenty (20) business days of the execution of this Assurance, InfoBeat shall distribute to all then current members an e-mail message containing a materially complete and accurate summary of its policies regarding the disclosure of any

personal data that it may collect from its members, along with a clear and conspicuous "hypertext link" or "jump-point" to the corresponding section of its "Terms of Service" Web page.

24. **IT IS FURTHER UNDERSTOOD AND AGREED** that, within thirty (30) days of the execution of this Assurance, InfoBeat shall as part of its online sign-up process provide prospective members with a materially complete and accurate summary of its policies regarding the disclosure of any personal data that it may collect from its members, along with a clear and conspicuous "hypertext link" or "jump-point" to the corresponding section of its "Terms of Service" Web page prior to the time that his/her subscriber registration data is transmitted to InfoBeat. With respect to those subscribers who enroll in the InfoBeat service via a sign-up sheet included on the Web page of a party other than InfoBeat in connection with so-called subscriber acquisition agreements, InfoBeat shall, within sixty (60) days of the execution of this assurance, institute the following procedure: InfoBeat shall (i) include in a confirming e-mail to each such subscriber, within five (5) days after subscription, a materially complete and accurate summary of its policies regarding the disclosure of any personal data that it may collect from its members, along with a clear and conspicuous "hypertext link" or "jump-point" to the corresponding section of its "Terms of Service" web page; (ii) offer such subscriber the opportunity, in such confirming

e-mail, the option to cancel his or her subscription, and (iii) in the event of any such cancellation, purge any personally-identifiable information received from the canceling subscriber.

IV.

25. **IT IS FURTHER UNDERSTOOD AND AGREED** that InfoBeat, by certified checks, shall pay the sum of Seventy Five Thousand (75,000) Dollars to the New York State Department of Law as and for costs of investigation upon the execution of this Assurance.

V.

26. **IT IS FURTHER UNDERSTOOD AND AGREED** that within three months of the execution of this Assurance, InfoBeat shall retain the services of an independent third party auditor who will review InfoBeat's information practices to ascertain whether InfoBeat is accurately representing such practices to the public.

27. **IT IS FURTHER UNDERSTOOD AND AGREED** that within six months of the execution of this Assurance, InfoBeat shall file with the Attorney General an affidavit, completed by an officer of InfoBeat knowledgeable of InfoBeat's business practices, describing InfoBeat's compliance with all the terms of this Assurance with copies of all relevant documentation, including the auditor's report referred to in Paragraph 26, annexed thereto.

VI.

28. **IT IS FURTHER UNDERSTOOD AND AGREED** that nothing contained in this Assurance of Discontinuance shall be construed to limit or affect the rights of any other persons or entities who are not parties to this agreement with respect to any of the matters contained herein.

29. **IT IS FURTHER UNDERSTOOD AND AGREED** that the acceptance of this Assurance of Discontinuance by the Attorney General of the State of New York shall not be deemed or construed as an approval by the Attorney General of any of InfoBeat's activities or practices, past or present, and InfoBeat will not make any representations to the contrary.

30. **IT IS FURTHER UNDERSTOOD AND AGREED** that the aforementioned payment shall in no way foreclose and/or prohibit the Attorney General from taking further action against respondent for non-compliance with this Assurance.

31. **IT IS FURTHER UNDERSTOOD AND AGREED** by InfoBeat that, in the event of any violation of this Assurance of Discontinuance, the Attorney General may commence an action or proceeding, under Executive Law Section 63 subdivision 12, in which evidence of a violation of this Assurance of Discontinuance shall constitute *prima facie* evidence of a violation of the applicable law. InfoBeat and its officers and directors expressly acknowledge that

they have knowledge of the statutes referred to in this Assurance of Discontinuance and the acts or practices alleged to be in violation of those statutes.

WHEREFORE, the following signatures are affixed hereto this ___ day of January, 2000.

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