

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
ELF PAINTING AND WALLPAPERING
Apparent Liability for Forfeiture
File No. EB-03-TC-004
NAL/Acct. No. 200432170003
FRN: 0012251880

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: November 30, 2004

Released: December 1, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability For Forfeiture ("NAL")¹, we find that Elf Painting and Wallpapering ("Elf")² apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended ("Act"), and the Commission's rules and orders by delivering unsolicited advertisements to the telephone facsimile machines of at least five consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that Elf is apparently liable for a forfeiture in the amount of \$22,500.

1 See 47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act" See also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who is not a common carrier so long as such person (A) is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of residence; and (C) subsequently engages in conduct of the type described in the citation).

2 According to our research, Elf is headquartered at 10309 Cherry View Court, Oakton, Virginia, 22124-2530; an alternate address is provided at 1835 Monroe Street, N.W., Washington, DC 20010-1014. The owner is Ed Faust. Elf Painting and Wallpapering claims in its advertising to specialize in re-coating large scale residential properties and commercial and industrial facilities. Elf Painting and Wallpapering is not registered as a small business in the State of Virginia or the District of Columbia, nor is it listed as a corporation in the State of Virginia or District of Columbia.

3 See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3); see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8779, ¶ 54 (1995) (TCPA Report and Order) (stating that Section 227 of the Act prohibits the use of telephone facsimile machines to send unsolicited advertisements).

II. BACKGROUND

2. On February 4, 2003, in response to a consumer complaint alleging that Elf had faxed an unsolicited advertisement, the Commission staff issued a citation⁴ to Elf, pursuant to section 503(b)(5) of the Act.⁵ The staff cited Elf for allegedly using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements to a telephone facsimile machine, in violation of section 227 of the Act and the Commission's rules and orders. According to the complaints, the unsolicited advertisement offered painting and wallpapering services.⁶ The citation, which the staff served by certified mail, return receipt requested, informed Elf that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation, and included a copy of the consumer complaint that formed the basis of the citation. The citation informed Elf that within 21 days of the date of the citation, it could either request a personal interview at the nearest Commission office, or could provide a written statement responding to the citation. The Commission received a signed return receipt evidencing that Elf had received the citation on February 8, 2003. Elf did not respond to the citation.

3. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission has received additional consumer complaints indicating that Elf continued to engage in such conduct after receiving the citation.⁷ We base our action here on this information from consumers alleging that Elf sent unsolicited advertisements to telephone facsimile machines after the date of the citation.⁸

III. DISCUSSION

A. Violations of the Commission's Rules Restricting Unsolicited Facsimile Advertisements

4. Section 227(b)(1)(C) of the Act makes it "unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."⁹ The term "unsolicited advertisement" is defined in the Act and the

⁴ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-03-TC-004, issued to Elf on February 4, 2003.

⁵ See 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to non-common carriers for violations of the Act or of the Commission's rules and orders).

⁶ See consumer complaint requesting Commission action from Bonnie Algera, IC No. 00-W27340, received February 7, 2000, which was attached to the citation (stating that she received an unsolicited advertisement via facsimile from Elf on December 12, 1999, without her permission, after which she called Elf to request removal from their list; on February 7, 2000, she received another unsolicited advertisement via facsimile from Elf without her permission at 2:43 A.M.)

⁷ See the following consumer complaints requesting Commission action: (1) David T. Prescott, via email, Director, Communications and Crisis Management Center, Office of Homeland Security, Enforcement Bureau, Federal Communications Commission (April 14, 2004) (received unsolicited facsimile on April 14, 2004); (2) Robert D. Baldwin, via letter, Director of Learning Resources, Allegany College of Maryland (May 24, 2004) (received unsolicited facsimile on May 24, 2004); (3) Dennis C. Brown, via letter (April 1, 2004) (received unsolicited facsimile March 14, 2004); (4) Eric M. Uslander, via letter (May 3, 2004) (received unsolicited facsimile May 3, 2004); (5) Robert Chapman, IC 04-W8312285 (April 29, 2004) (received unsolicited facsimile April 29, 2004).

⁸ We note that evidence of additional instances of unlawful conduct by Elf may form the basis of subsequent enforcement action.

⁹ 47 U.S.C. § 227(b)(1)(B).

Commission's rules as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." Under Commission rules and orders currently in effect, the Commission views an established business relationship between a fax sender and recipient as constituting prior express invitation or permission to send a facsimile advertisement.¹⁰

5. This NAL is based on evidence that five consumers received unsolicited fax advertisements from Elf after the Bureau's citation. Each of those facsimile transmissions describes the same commercial service: "For High Quality Interior/Exterior Painting Service For Your Home Contact Elf Painting and Wallpapering Today and Start Saving on Your Next Interior Project!" with a local number to call for "special savings." We find that these facsimiles fall within the definition of an unsolicited advertisement.¹¹ According to their declarations, none of the consumers had an established business relationship with Elf, and the consumers did not give Elf permission to send the facsimile transmissions. Therefore, Elf appears to have sent each facsimile transmission without prior express consent of the consumers. Mere distribution or publication of a fax number does not establish consent to receive advertisements by fax.¹² Based on the entire record, including declarations, we find that Elf apparently violated Section 227 of the Act and the Commission's related rules and orders by sending unsolicited advertisements to the five consumers' facsimile machines.

B. Proposed Forfeiture

6. We conclude that Elf apparently willfully or repeatedly violated the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send unsolicited advertisements to telephone facsimile machines. Elf apparently did not cease its unlawful conduct even after the Commission staff issued a citation warning that it was engaging in unlawful conduct and could be subject to monetary forfeitures. In fact, Elf apparently intentionally ignored the Commission's citation. Accordingly, a proposed forfeiture is warranted against Elf for its apparent willful or repeated violations of section 227 of the Act and of the Commission's rules and orders regarding the faxing of unsolicited advertisements.

7. Section 503(b) of the Act authorizes the Commission to assess a forfeiture of up to \$11,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under

¹⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12405 (1995) (*1995 TCPA Reconsideration Order*). In June 2003, the Commission amended its rules to specify that prior express invitation or permission to receive a facsimile advertisement must be recorded in a "signed written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender." *2003 TCPA Report and Order*, 18 FCC Rcd at 14124-28 (adopting new section 64.1200(a)(3)(i). This new provision, which supercedes the established business relationship exception, is scheduled to take effect June 30, 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 04-223 (rel. Oct. 1, 2004); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 03-230 (rel. Oct. 3, 2003). The Commission is currently considering petitions that seek to retain the established business relationship exception or require methods other than a signed written statement to demonstrate prior express consent to receive fax advertising.

¹¹ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(10). Under Section 64.1200(f)(10), the term "unsolicited advertisement" means "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."

¹² *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09; *see also 2003 TCPA Report and Order*, 18 FCC Rcd at 14128 (concluding that publication of a fax number in a trade publication or directory does not demonstrate consent to receive fax advertising).

the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act.¹³ In exercising such authority, we are to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁴

8. Although the *Commission's Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition on using a telephone facsimile machine to send unsolicited advertisements, the Commission has previously considered \$4,500 per unsolicited fax advertisement to be an appropriate base amount.¹⁵ We apply that base amount to each of five of the apparent violations. This results in a proposed total forfeiture of \$22,500. Elf shall have the opportunity to submit evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.¹⁶

IV. CONCLUSION AND ORDERING CLAUSES

9. We have determined that Elf Painting and Wallpapering apparently violated section 227 of the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send the five unsolicited advertisements to the consumers identified above. We have further determined that Elf Painting and Wallpapering is apparently liable for forfeiture in the amount of \$22,500.

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and authority delegated by Sections 0.111 and 0.311 of the Rules, 47 C.F.R. §§ 0.111, 0.311, that Elf Painting and Wallpapering is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of Twenty-Two Thousand Five Hundred Dollars (\$22,500) for willful or repeated violations of section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), sections 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3), and the related orders described in the paragraphs above.

11. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's

¹³ Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation by cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) to \$11,000. See 47 C.F.R. § 1.80(b)(3); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000); see also *Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, FCC 04-139 (released June 18, 2004) (this recent amendment of Section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000).

¹⁴ 47 U.S.C. § 503(b)(2)(D); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order*, 12 FCC Rcd 17087, 17100-17101, (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

¹⁵ See *Get-Aways, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 1805 (1999); *Get-Aways, Inc.*, Forfeiture Order, 15 FCC Rcd 4843 (2000); see also *US Notary, Inc.*, Notice of Apparent Liability for Forfeiture, 16 Rcd 18,298 (2001); *US Notary, Inc.*, Forfeiture Order, 16 FCC Rcd 18,398 (2001); *Carolina Liquidators, Inc.*, Notice of Apparent Liability For Forfeiture, 15, FCC Rcd 26,837 (2000), *Carolina Liquidators, Inc.*, Forfeiture Order 15 FCC Rcd 21,775 (2000); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11, 295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23, 198 (2000).

¹⁶ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

Rules,¹⁷ within thirty days of the release date of this *Notice of Apparent Liability for Forfeiture*, Elf Painting and Wallpapering SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

12. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673 -7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, IL 60661. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.¹⁸

13. The response if any must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and must include the NAL/Acct. No. referenced in the caption.

14. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

15. Requests for payment of the full amount of this *Notice of Apparent Liability for Forfeiture* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁹

16. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested to, Mr. Ed Faust, Owner, Elf Painting and Wallpapering, 10309 Cherry View Court, Oakton, Virginia 22124-2530, and Mr. Ed Faust, Owner, Elf Painting and Wallpapering, 1835 Monroe Street, N.W., Washington, DC 20010-1014.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

¹⁷ 47 C.F.R. § 1.80.

¹⁸ See 47 C.F.R. § 1.1914

¹⁹ *Id.*