

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

In the Matter of)	
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)	
WARRIOR CUSTOM GOLF, INC.)	File No. EB-03-TC-036
a.k.a. WARRIOR GOLF)	NAL/Acct. No. 200432170004
)	FRN 0012264933
)	
Apparent Liability for Forfeiture)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 7, 2004

Released: December 8, 2004

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability For Forfeiture ("NAL")¹, we find that Warrior Custom Golf, Inc., a.k.a. Warrior Golf ("WCG"),² apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended (the "Act"), and the Commission's rules and orders, by delivering at least four unsolicited, prerecorded advertising messages to at least three consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that WCG is apparently liable for forfeiture in the amount of \$23,500.

II. BACKGROUND

2. On April 29, 2003, in response to a consumer complaint alleging that WCG had left three, unsolicited, prerecorded advertisement messages on the consumer's voicemail, the Commission staff issued a citation⁴ to WCG, pursuant to section 503(b)(5) of the Act.⁵ The staff cited WCG for

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 does not fall within certain categories (e.g., common carrier, broadcaster, cable operator, radio licensee), 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 resident; and (c) subsequently engages in conduct of the type described in the citation).

² WCG is headquartered at 15 Mason, Suite A, Irvine, CA 92618.

³ See 47 U.S.C. § 227(b)(1)(B) and section 64.1200(a)(2) of the Commission's rules, 47 C.F.R. §§ 64.1200(a)(2); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*TCPA Revisions Report and Order*).

⁴ See Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, issued to WCG on April 29, 2003 ("*April 29, 2003 Citation*").

delivering one or more prerecorded, unsolicited advertisements to a residential telephone line, in violation of section 227 of the Act and the Commission's rules and orders.⁶ According to the consumer, the unsolicited advertisements offered the opportunity to try custom golf clubs without charge and requested that the consumer call a toll-free number to take advantage of the special offer.⁷ The citation, which the staff served by certified mail, return receipt requested, informed WCG 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 letter that formed the basis of the citation. The citation informed WCG that within 21 days of the date of the citation, it could either request a personal interview at the nearest Commission field office, or could provide a written statement responding to the citation. The Commission received a signed return receipt evidencing WCG's receipt of the citation on May 20, 2003.

3. WCG responded to the citation, apologizing to the consumer for any inconvenience caused by the telephonic messages, but denying any violations, claiming mistake or inadvertence.⁸ WCG stated:

At the outset, by copy of this letter to Mr. Pollard, WCG apologizes to him for any inconveniences caused by telephonic messages [sic] he may have received. And, to the extent WCG may have violated FCC rules and regulations pertaining to the sending of prerecorded messages, which event WCG denies, any such purported violation was done through mistake or inadvertence.⁹

WCG also stated that it had reorganized its marketing strategy and telephone communications systems to ensure compliance with FCC rules and regulations regarding unsolicited prerecorded messages and "to ensure that unwanted prerecorded messages are not sent to anyone except to those customers with whom [sic] WCG has a pre-existing relationship."¹⁰

4. 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 WCG apparently continued to send illegal prerecorded, unsolicited advertisements after receiving the citation.¹¹

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

⁶ See 47 U.S.C. § 227; 47 C.F.R. § 64.1200.

⁷ See consumer complaint from Todd Pollard, dated August 15, 2002, which was attached to the citation.

⁸ See Letter from Joseph R. Donahue, Law Offices of Joseph R. Donahue & Associates, dated May 27, 2003, to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau ("WCG Response"). The WCG Response was misdated as 2002 on the first page. Additionally, a previous response letter, also misdated as May 19, 2002, was not signed.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See the following consumer complaints: 1) Monte J. Dye, IC No. 04-W7795243, received February 16, 2004 (stating that prerecorded message was received on February 15, 2004); 2) Andrew Pong, IC No. 04-W7875742, received February 27, 2004 (stating that prerecorded message was received on February 15, 2004); and 3) Mark James, received February 20, 2004 (stating that prerecorded messages were received November 13, 2003 and February 13, 2004). All complainants signed declarations stating that they did not have established business relationships with WCG. With regard to the prerecorded message received by Mark James on November 13, 2003, WCG entered into a Tolling Agreement (the "Agreement") with the Bureau, whereby the one-year statute of limitations set forth in 47 U.S.C. § 503(b)(6) is tolled from September 10, 2004 until the earlier of: (a) the date the FCC releases a NAL regarding any of the alleged violations described in the Agreement; (b) the date the FCC

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The complaints indicate that the prerecorded messages were substantially the same as those described in the citation.¹²

III. DISCUSSION

A. Violations of the Commission's Rules Restricting Prerecorded Messages

5. Section 227(b)(B) of the Act prohibits any person from initiating "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission."¹³ Section 64.1200(a)(2) of the Commission's rules provides exemptions for calls made for: 1) emergency purposes; 2) non-commercial purposes; 3) commercial purposes that do "not include or introduce an unsolicited advertisement"¹⁴ or constitute a telephone solicitation¹⁵; 4) calls to persons "with whom the caller has an established business relationship"¹⁶ at the time the call is made; and 5) calls "made by or on behalf of a tax-exempt nonprofit organization."¹⁷

6. As noted above, WCG initiated prerecorded messages that invited customers to try, without charge, custom golf clubs and requested that the consumer call a toll-free number to take advantage of the special offer. We find that the prerecorded messages at issue here were not made for any emergency, non-commercial, or non-profit purposes, but were commercial in nature and included or introduced "unsolicited advertisements" or constituted "telephone solicitations." We have previously found that "prerecorded messages containing free offers and information about goods and services that are commercially available are prohibited to residential telephone subscribers, if not otherwise exempt."¹⁸ The Commission's rationale was based on a finding by Congress that consumers considered the prerecorded telephone calls to be "a nuisance and an invasion of privacy."¹⁹

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informs WCG in writing that it has terminated the investigation; or (c) 180 days after the date of the Agreement. See the Agreement, signed on behalf of Kurt Schroeder of the Bureau on September 2, 2004 and by Brendan Flaherty, President of WCG, on September 10, 2004.

¹² See the Declarations of Monte J. Dye, Andrew Pong, and Mark James, all declaring under penalty of perjury that the messages advertised golf products offered by Warrior Custom Golf, Inc.

¹³ 47 U.S.C. § 227(b)(1)(B).

¹⁴ "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." 47 C.F.R. § 64.1200(f)(10).

¹⁵ "Telephone solicitation" means "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(9).

¹⁶ An "established business relationship" is defined as "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscribers purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(3).

¹⁷ 47 C.F.R. § 64.1200(a)(2).

¹⁸ *TCPA Revisions Report and Order*, 18 FCC Rcd at 14097-98 (2003).

¹⁹ *Id.* at 14,097. The Commission also noted that Congress had determined that the prerecorded messages "cause greater harm to consumers' privacy than telephone solicitations by live telemarketers" because consumers feel

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7. The record also indicates that WCG did not have the prior express consent of the consumers here to deliver this unsolicited advertisement or telephone solicitation. In fact, WCG continued to deliver the messages to one consumer even after a request to refrain.²⁰ The record also indicates that WCG did not have established business relationships with any of the three consumers whose complaints form the basis of this action.²¹ Despite conversations with counsel for WCG regarding the consumer complaints at issue, WCG has provided no argument nor submitted evidence to prove an established business relationship, a tax-exempt status, or any other evidence to provide a defense to the allegations at issue here.²² Therefore, based on the evidence in the record, including the consumers' affidavits, we find that the prerecorded messages were unsolicited advertisements or telephone solicitations that were prohibited by section 227(b)(B) of the Act²³ or section 64.1200 (a)(2)²⁴ of the Commission's rules.

B. Proposed Forfeiture

8. We conclude that WCG apparently willfully or repeatedly violated the Act and the Commission's rules and orders by delivering unsolicited, prerecorded advertisement messages. WCG 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. Accordingly, a proposed forfeiture is warranted against WCG for its apparent willful or repeated violations of section 227 of the Act and of the Commission's rules and orders regarding restrictions on telephone solicitations.

9. 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 the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act.²⁵ In

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powerless to stop the messages, which are often delivered to answering machines and often provide no means to request placement on the do-not-call list. *Id.*

²⁰ See the complaint of Mark James (stating, "I telephoned Warrior Custom Golf regarding the first call at 1-800-600-5113. I was directed to a 'Mr. Ross' who called me back shortly. . . 'Mr. Ross' became rude and informed me that my name and number would be removed from their database. . . After that conversation, calls from the company ceased for several months. Recently, I received at least two more calls, including the February 13th call.").

²¹ See the Declarations of Monte J. Dye, Andrew Pong, and Mark James, all declaring under penalty of perjury that: "To the best of my knowledge, at no time did I or anyone else in my household give Warrior Custom Golf, Inc. prior express consent to deliver an artificial or prerecorded voice advertisement to my residential telephone line. Nor, to the best of my knowledge, did I or anyone else in my household (a) have any transaction with, including any purchase from, this entity within the 18 months immediately preceding the date(s) of the above-referenced call(s); or (b) make any inquiry or application to this entity within the three months immediately preceding the date(s) of the above-referenced calls."

²² On September 9, 2004, during one of numerous telephone calls between Bureau staff and WCG counsel, Mr. Joseph R. Donahue, Mr. Donahue requested copies of the consumer complaints at issue to ascertain whether WCG had established business relationships with these consumers. The requested consumer complaint information was sent by facsimile to Mr. Donahue on September 10, 2004. To date, however, despite many more communications between Bureau staff and Mr. Donahue by telephone and email, no claims of established business relationships or other defenses have been raised.

²³ 47 U.S.C. § 227(b)(1)(B).

²⁴ 47 C.F.R. § 64.1200(a)(2).

²⁵ 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

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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."²⁶

10. Although the Commission's Forfeiture Policy Statement does not establish a base forfeiture amount for violating the prohibition on delivering unsolicited, prerecorded advertisement messages to a residential telephone line, we believe these violations are similar in nature to violating the prohibition on delivering unsolicited advertisements to telephone facsimile machines. The Commission has previously considered \$4,500 per unsolicited fax advertisement as an appropriate base amount²⁷ and we apply that amount here to each of three of the four apparent unsolicited, prerecorded advertisement violations. We find that the other apparent violation at issue here justifies a higher proposed forfeiture because WCG continued to deliver the messages to this consumer even after repeated requests to refrain. Where a party has delivered unsolicited advertisements to a telephone facsimile machine after a request to stop, the Commission has increased the forfeiture to \$10,000 per violation.²⁸ Accordingly, we find WCG apparently liable in the amount of \$10,000 for the violation where WCG ignored the specific consumer requests to discontinue the calls.²⁹ This results in a proposed total forfeiture of \$23,500. WCG 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.³⁰

IV. CONCLUSION AND ORDERING CLAUSES

11. We have determined that WCG apparently violated section 227 of the Act and the Commission's rules and orders by delivering at least four unsolicited, prerecorded advertisement messages as identified above. We have further determined that WCG is apparently liable for forfeitures in the amount of \$23,500.

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of the maximum statutory forfeiture under section 503(b)(2)(C) to \$11,000. See 47 C.F.R. § 1.80(b)(3). The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new rates will apply to violations that occur after September 7, 2004. *In the Matter of Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, FCC 04-139 (rel. June 18, 2004).

²⁶ 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*).

²⁷ 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); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11,295 (2000) (*Tri-Star Marketing NAL*); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23,198 (2000) (*Tri-Star Marketing Forfeiture Order*); *Carolina Liquidators, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd. 16,837 (2000) (*Carolina Liquidators NAL*); *Carolina Liquidators, Inc.*, Forfeiture Order, 15 FCC Rcd 21,775 (2000) (*Carolina Liquidators Forfeiture Order*); *21st Century Fax(es) Ltd. a.k.a. 20th Century Fax(es)*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 24,406 (2000); *21st Century Fax(es) Ltd. a.k.a. 20th Century Fax(es)*, Forfeiture Order, 17 FCC Rcd 1384 (2002).

²⁸ See *Tri-Star Marketing NAL*, 15 FCC Rcd at 11,300; *Carolina Liquidators NAL*, 15 FCC Rcd at 16,842.

²⁹ See *Tri-Star Marketing NAL*, 15 FCC Rcd at 11,300; *Carolina Liquidators NAL*, 15 FCC Rcd at 16,842.

³⁰ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

12. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(5), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, and under the authority delegated by section 0.11 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.11, 0.311, that WCG, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of \$23,500 for willful or repeated violations of section 227(b)(1)(B) of the Act, 47 U.S.C. § 227(b)(1)(B), section 64.1200(a)(2) of the Commission's rules, 47 C.F.R. §§ 64.1200(a)(2), and the related orders described in the paragraphs above.

13. 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 ("GAAP"); 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.

14. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.³¹

15. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice, WCG, Inc. SHALL PAY the full amount of the proposed forfeiture³² OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

16. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Brendan Flaherty, President, and H. Peter Wheelahan, Vice President, 15 Mason, Suite A, Irvine, California 92618 and to Joseph R. Donahue, Esq., 4621 Teller Avenue, Suite 200, Newport Beach, California 92660.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

³¹ 47 C.F.R. § 1.1914.

³² The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on WCG's check or money order to "NAL/Acct/ No. 200432170004." Such remittances must be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.