

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

In the Matter of)	
)	
SEPTIC SAFETY, INC.)	File No. EB-04-TC-064
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. 200532170005
)	
)	FRN 0012636247

ORDER OF FORFEITURE

Adopted: June 22, 2006

Released: June 23, 2006

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order of Forfeiture,¹ we assess a monetary forfeiture of \$9,000 against Septic Safety, Inc. and its affiliated companies² for willful or repeated violations of section 227 of the Communications Act of 1934, as amended (“Act”), and the Commission’s rules and orders by delivering at least two unsolicited prerecorded advertising messages to two consumers.³

II. BACKGROUND

2. The facts and circumstances surrounding this case are set forth in the *Notice of Apparent Liability for Forfeiture* issued by the Telecommunications Consumers Division (“the Division”) of the Enforcement Bureau (“Bureau”) on February 3, 2005,⁴ and need not be reiterated at length. Septic

¹ 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 hold a Commission authorization so long as (A) such person 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 *See infra* paragraph 2.

³ *See* 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. §§ 64.1200(a)(2); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003) (*TCPA Revisions Report and Order*).

⁴ *See Septic Safety, Inc., Notice of Apparent Liability*, 20 FCC Rcd 2179 (“NAL”). Prior to issuance of the NAL, Commission staff issued a citation to Septic Safety and its affiliated companies on April 30, 2004 for delivering one or more prerecorded, unsolicited advertisements to a residential telephone line, in violation of section 227 of (continued....)

Safety, Inc. and its affiliated companies (Environmental Safety International, Inc., Environmental Products International, DJC Holding Company, SAACA Industries, Inc., Inc., EPI, Inc., and ESI Products) (hereafter referred to collectively as “ESI”) are headquartered in New Jersey. Research revealed that Mr. Joseph Carney serves as the president of all of these companies, with Mr. Sean Carney listed as the vice president.⁵

3. In the *NAL*, the Division found that ESI, using the name “Septic Safety,” initiated prerecorded messages that invited customers to try its septic tank treatments. The Division determined that the messages were not made for emergency or non-commercial purposes or on behalf of a tax-exempt, non-profit organization. Rather, the Division determined that the messages were commercial in nature and included or introduced “unsolicited advertisements” or constituted “telephone solicitations.” Based on the record, the Division found that ESI lacked the prior express consent of the consumers at issue to deliver the unsolicited messages or solicitations. Accordingly, the Division concluded that ESI had apparently violated section 227(b)(1)(B) of the Act and section 64.1200(a)(2) of the Commission’s rules, and ordered ESI to pay the proposed forfeiture of \$14,500 or respond to the *NAL* within 30 days.

4. On February 18, 2005, prior to filing a response to the *NAL*, Mr. Joseph Carney, the president of ESI, sent a letter to the Division stating that Septic Safety, Inc. and another affiliated company, DJC Holdings, are no longer in business. Mr. Carney further stated, however, that since 1999, he has been selling septic treatment products under the names “Environmental Safety International, Inc.”⁶ and “Environmental Products”⁷ in Ridgefield, New Jersey and Toms River, New Jersey, respectively. Mr. Carney alleged that his competitors use the name “Septic Safety” in their advertising, and that he is being blamed unfairly for violations of section 227 of the Act because “our name are [sic] on the corporate books.” Further, Mr. Carney asserted that he “abides by the Federal Trade Commission’s do-not call list,” and that he uses a service called “Call Compliance, Inc.” to ensure that he does not violate the do-not-call rules. Finally, Mr. Carney contended that his companies have an “in house” do-not-call list that is updated daily.

5. On March 4, 2005, Mr. Carney filed a Response to the *NAL* on behalf of ESI. With

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the Act and the Commission’s rules and orders. See Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, April 30, 2004. Despite receipt of the citation, Septic Safety did not file a response. When the Commission continued to receive complaints indicating that a company identifying itself as “Septic Safety” apparently continued its practices after receiving the citation, the Division issued its *NAL*.

⁵See *NAL*, 20 FCC Rcd at 2179 n.2. The *NAL* was sent to all of the known addresses for Septic Safety and its affiliated companies via certified mail and electronic mail.

⁶We note that Environmental Safety Products, Inc.’s letterhead stationery includes the exact telephone number that had belonged to Septic Safety, (201) 313-0031. Indeed, the Lexis/Nexis database also has Septic Safety listed at the same address printed on Environmental Safety Products’ letterhead, 205 Anderson Avenue, Fairview, New Jersey 07022.

⁷Additional research revealed that “Environmental Products” also does business as “EPI” and “EPIU,” both listed at 205 Anderson Avenue, Fairview, New Jersey 07022, with Joseph Carney associated with both companies. Accordingly, this forfeiture order applies to the latter two companies as well.

regard to the Cusick complaint, ESI claims that the phone number listed in the complaint belongs to one of its septic product customers, Ms. Linda Peek. As to the Keehner complaint, ESI admits that it called Keehner in November 2004, but claims that it complied with Keehner's request to be added to ESI's do-not-call list. Mr. Carney denies that ESI called Mr. Keehner in July 2004. Finally, ESI reiterates that it is no longer named Septic Safety, and asserts that it is "call compliant." In light of the foregoing, ESI asks the Bureau to rescind the proposed forfeiture.⁸ As discussed below, we conclude that the facts and circumstances before us do not warrant cancellation of the proposed forfeiture. We do, however, reduce the forfeiture assessed in connection with the Keehner complaint.

III. DISCUSSION

6. As noted above, the Division concluded that ESI apparently violated section 227(b)(1)(B) of the Act and section 64.1200(a)(2) of the Commission's rules. Section 227(b)(1)(B) of the Act prohibits any person from initiating "any telephone call to any residential telephone line using any 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." Section 64.1200(a)(2) of the Commission's rules provides exemptions for calls: 1) made for emergency purposes; 2) made for non-commercial purposes; 3) made for commercial purposes that do not "include or introduce an unsolicited advertisement or constitute a telephone solicitation"; 4) to persons "with whom the caller has an established business relationship at the time the call is made"; and 5) "made by or on behalf of a tax-exempt nonprofit organization."

7. The proposed forfeiture in this case was assessed in accordance with section 503(b) of the Act,⁹ section 1.80 of the Commission's rules,¹⁰ and the Commission's *Forfeiture Policy Statement*.¹¹ In examining ESI's response, section 503(b) of the Act requires that we take into account the nature,

⁸Against this backdrop, the Commission has continued to receive consumer complaints similar to the ones upon which this forfeiture is based, all of which allege violations that appear to be attributable to ESI. *See, e.g.*, Complaint of Ben Banks, filed June 27, 2005 (alleging he received an unsolicited prerecorded message on June 26, 2005 from a company identifying itself as "Septic Safety"); Complaint of Leonard Ledoux, filed March 19, 2006 (alleging he received an unsolicited prerecorded call on March 19, 2006 from a company identifying itself as "Septic Safety").

⁹Section 502(b)(2)(C) provides for forfeitures of up to \$10,000 for each violation in 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). Pursuant to the Debt Collection Improvement Act of 1996, P.L. 104-134, 110 Stat. 1321-358, the statutory maximum amount for a forfeiture penalty shall be adjusted for inflation at least once every four years. Accordingly, the \$10,000 forfeiture ceiling has been adjusted to \$11,000. 47 C.F.R. § 1.80(b)(5). *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004).

¹⁰*See* 47 C.F.R. § 1.80.

¹¹*See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

circumstances, extent and gravity of the violations and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such matters as justice may require.¹²

8. ESI asserts that we should rescind our proposed forfeiture because it no longer does business under the name “Septic Safety,” although it has sold septic treatment products under the company names “Environmental Safety International, Inc.” and “Environmental Products” since 1999. We disagree. As described in the *NAL*, each of the complainants submitted complaints alleging that they received unsolicited, prerecorded advertising messages from a company identifying itself as “Septic Safety.”¹³ In proposing a forfeiture against Septic Safety, the Division noted that Septic Safety also does business as numerous New Jersey-based companies, including Environmental Safety International, Inc., Environmental Products International, DJC Holding Company, SAACA Industries, Inc., EPI, Inc., and ESI Products. The Division explained that all of these companies are run by Joseph and Sean Carney, and specifically stated that the *NAL* “applies to these companies as well.”¹⁴ In light of this statement, we conclude that Septic Safety’s affiliated companies are liable for the forfeiture amount discussed below. ESI cannot escape liability for violations of our rules and orders simply by hiding behind a variety of company names.

9. Nor do we find persuasive ESI’s contention that it is being fined for the actions of “competitors” that use the name “Septic Safety” in their advertising. ESI has submitted no evidence regarding these alleged competitors, such as their identities or their contact information. Nor has ESI provided any consumer declarations describing any alleged competitors’ telemarketing practices. In fact, in its response to the *NAL*, ESI acknowledges calling at least one of the two complainants, Mr. Keehner, which undermines ESI’s argument that competitors masquerading as “Septic Safety” made the calls at issue.¹⁵ As noted in the *NAL*, Mr. Keehner stated that he received prerecorded, unsolicited advertisements from a company that identified itself as “Septic Safety.”¹⁶

10. ESI also argues that we should modify our proposed forfeiture based on information concerning the Cusick complaint. First, ESI claims, without providing supporting documentation, that the phone number listed in the Cusick complaint belongs to one of its septic product customers, a woman named “Linda Peek.” Our research, however, demonstrates that the phone number belonged to Mr. Cusick during the period that the prerecorded message was delivered. Mr. Cusick alleged that ESI delivered its prerecorded message on August 30, 2004, and our research establishes that Mr. Cusick subscribed to the number from at least August 2002 through August 2004.¹⁷ Hence, if a consumer named

¹²See 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

¹³See *NAL*, 20 FCC Rcd at 2180. We note that, through a clerical error, the complainants’ declarations were not forwarded to them for signature until after the *NAL* was issued. The record before us includes both consumers’ sworn declarations, in addition to their complaints.

¹⁴See *id.* at 2179 n.2.

¹⁵See ESI Response to *NAL*, filed March 4, 2005.

¹⁶See *NAL* at 2181.

¹⁷See E-mail from Earvenia Brooks, BellSouth, Compliance & Governance (Nov. 26, 2005, 9:18 EST) (confirming “Richard Cusick” as the billing name, and at the address and phone number listed in Cusick’s (continued....))

Linda Peek did, in fact, hold the phone number at issue at some point in time, it would have been prior to August 2002, more than two years before the prerecorded message was delivered. Further, even if ESI had believed that it had an “established business relationship”¹⁸ with Ms. Peek that allowed it to deliver a prerecorded message, it would have been unreasonable for ESI to have assumed that such a relationship extended back for two years or more. Section 64.1200(f)(3) of the Commission’s rules specifically states that the established business relationship exemption for prerecorded calls is limited in duration to eighteen months from any purchase or transaction and three months from any inquiry or application.¹⁹ Accordingly, we find no merit in ESI’s unsubstantiated claim. Hence, we impose a \$4,500 forfeiture for the violation associated with ESI’s prerecorded call to Mr. Cusick, as proposed in the *NAL*.

11. Upon consideration of the *NAL* response, however, we will modify the \$10,000 increased forfeiture amount that the Division proposed in connection with the Keehner complaint. In cases where a party has continued to deliver prerecorded messages after a request to stop, we have increased the forfeiture amount to \$10,000 per violation.²⁰ Although Mr. Keehner contends that he received his third prerecorded message from ESI on July 17, 2004, the record lacks adequate evidence that Mr. Keehner affirmatively requested before that time that ESI refrain from delivering messages to his residence. Rather, the record reflects that when ESI delivered an unsolicited, prerecorded advertising message in November 2004, Mr. Keehner was able to then request that the messages cease. As noted above, ESI admits that it called Mr. Keehner in November 2004, but claims that it complied with his request to be added to ESI’s do-not-call list at that time. Based on ESI’s admission that it called Mr. Keehner in November 2004, we impose a \$4,500 forfeiture for the violation associated with ESI’s prerecorded call to Mr. Keehner. We emphasize, however, that regardless of whether ESI abides by the Commission’s do-not-call rules, as it claims, it nevertheless violated the Commission’s separate rules and orders prohibiting the delivery of unsolicited, prerecorded advertising messages. Hence, ESI’s assertions that it complies with do-not-call requirements are not relevant to the instant violations.²¹ As described above, the use of prerecorded advertising or solicitation messages is unlawful under most circumstances, even if the recipient has not made a do-not-call request.

IV. CONCLUSION AND ORDERING CLAUSES

12. We have examined ESI’s response to the *NAL* pursuant to the statutory factors set forth in

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complaint, from August 2002 through August 2004). *See also* E-mail from Rick Cusick, (March 29, 2005, 11:44 EST) (stating that he has owned his telephone number since July 2000, and that he is unaware of the identity of “Linda Peek”).

¹⁸*See* 47 C.F.R. § 64.1200(a)(2)(iv), which provides an exemption to the prohibition against the delivery of unsolicited prerecorded advertising messages to residents with whom the caller has an established business relationship.

¹⁹47 C.F.R. § 64.1200(f)(3); *see also* *TCPA Revisions Report and Order*, 18 FCC Rcd 14014, 14043 n.156 (2003).

²⁰*See* *Warrior Custom Golf, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 23648, 23652 (EB 2004) (*Warrior Custom Golf*).

²¹Nonetheless, we expect that ESI will continue its compliance efforts, including maintenance of its do-not-call list in accordance with consumers’ requests.

section 503(b) of the Act, as well as in conjunction with the *Forfeiture Policy Statement*. Based on our review of the record, we hereby impose a forfeiture of \$9,000 for ESI's willful or repeated violation of section 227 of the Act and the Commission's rules and orders by delivering at least two unsolicited, prerecorded advertising messages to two consumers.

13. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, and authority delegated by sections 0.111 and 0.311 of the Rules, 47 C.F.R. §§ 0.111, 0.311, that Septic Safety, Inc., and all of its affiliated companies, including Environmental Safety International, Inc., Environmental Products International, Environmental Products, EPI, EPIU, DJC Holding Company, SAACA Industries, Inc., EPI, Inc., and ESI Products, SHALL FORFEIT to the United States Government the sum of \$9,000 for willfully and repeatedly violating the Communications Act and the Commission's rules and orders.

14. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's rules within 30 days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²² 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. and FRN No. referenced above. Payment by check or money order may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251. Payment by overnight mail may be sent to Mellon Client Service Center, 500 Ross Street, Room 670, Pittsburgh, Pennsylvania 15262-0001, Attn: FCC Module Supervisor. Payment by wire transfer may be made to: ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229. Please include your NAL/Acct. No. with your wire transfer remittance. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C., 20554.²³

15. IT IS FURTHER ORDERED that a copy of this Order shall be sent by first class mail and certified mail return receipt requested to Mr. Joseph Carney, President, Environmental Safety International, Inc., Environmental Products International, Environmental Products, EPI, EPI, Inc., EPIU, SAACA Industries, Inc., and ESI Products, at the following seven addresses: 316 Prospect Avenue, Hackensack, New Jersey 07601-2625; 205 Anderson Avenue, Fairview, New Jersey 07022; 344 Broad Avenue, Palisades Park, New Jersey 07650; 43 Industrial Avenue, Fairview, New Jersey 07022; P.O. Box 397, Fairview, New Jersey 07022; 44 Washington Street, Suite 109, Toms River, New Jersey 08753; and P.O. Box 625, Palisades Park, New Jersey 07650.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith

²²47 U.S.C § 504(a).

²³See 47 U.S.C § 1.1914.

Chief, Enforcement Bureau