

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

In the Matter of )
Elf Painting and Wallpapering ) File No. EB-03-TC-004
) NAL/Acct. No. 200432170003
) FRN 0012251880
)

ORDER OF FORFEITURE

Adopted: March 9, 2006

Released: March 10, 2006

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order of Forfeiture, we assess a monetary forfeiture of \$22,500 against Elf Painting and Wallpapering ("Elf") 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 unsolicited advertisements to telephone facsimile machines of at least five consumers.

II. BACKGROUND

2. On February 4, 2003, the Commission staff issued a citation to Elf pursuant to Section 503(b)(5) of the Act. The staff cited Elf for 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. The citation, which the staff sent by First Class and Certified Mail Return Receipt Requested to Elf's last known address, informed Elf that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation. The citation included a copy of the consumer complaint that formed the basis of the citation.

1See 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 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); 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, 14124-28 (2003) (2003 TCPA Report and Order).

2Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-03-TC-004, issued to Elf on February 4, 2003; 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).

3. 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 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, however, did not respond to the citation. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission received several consumer complaints stating that Elf had continued to engage in such conduct after receiving the citation.<sup>3</sup>

4. On December 1, 2004, the Bureau issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$22,500 for at least 5 apparent violations.<sup>4</sup> The NAL, which the staff sent by First Class and Certified Mail Return Receipt Requested to Elf's last two known addresses,<sup>5</sup> informed Elf that it had 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. The NAL ordered Elf to pay the forfeiture or respond to the notice within 30 days submitting evidence and arguments in response to this NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed.<sup>6</sup>

5. Elf did not respond to the NAL or pay the proposed forfeiture amount. The United States Postal Service returned the copies of the NAL to the Commission on December 3, 2004, and December 27, 2004, marked "unclaimed." On January, 25, 2005, the Commission staff personally served a copy of the NAL to Elf at 1835 Monroe Street, N.W. Washington, DC. As of the date of the release of this order, Elf has still not filed a response to the citation, and has not paid the forfeiture amount or submitted a response to the NAL.

### III. DISCUSSION

6. 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.<sup>7</sup> 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."<sup>8</sup>

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<sup>3</sup>See *Elf Painting and Wallpapering, Notice of Apparent Liability For Forfeiture*, 19 FCC Rcd. 23,517 (Enf. Bur. 2004) ("NAL").

<sup>4</sup>*Id.*

<sup>5</sup>According to our research, Elf's two addresses are: 10309 Cherry View Court, Oakton, Virginia, 22124-2530; and, 1835 Monroe Street, N.W., Washington, DC 20010-1014

<sup>6</sup>See NAL, 19 FCC Rcd 23,517 (Enf. Bur. 2004); 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

<sup>7</sup>Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraphs (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).

<sup>8</sup>47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

7. 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.<sup>9</sup> We apply that base amount to each of five apparent violations here. Elf has failed to identify facts or circumstances to persuade us that there is a basis for modifying the proposed forfeiture, and we are not aware of any further mitigating circumstances sufficient to warrant a reduction of the forfeiture penalty. In fact, Elf is continuing to ignore its apparent violations of the Act and the Commission's rules by continuing to send unsolicited faxes, despite the citation and its failure to respond to the Bureau's NAL.<sup>10</sup> For these reasons, we hereby impose a total forfeiture of \$22,500 for Elf's willful or repeated violation of Section 227 of the Act and the Commission's related rules and orders as set forth in the *NAL*.

#### IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and 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 Elf Painting and Wallpapering SHALL FORFEIT to the United States government the sum of \$22,500 for willfully and repeatedly violating the Commission's rules.

9. 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.<sup>11</sup> 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 12<sup>th</sup> Street, S.W., Washington, D.C., 20554.<sup>12</sup>

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<sup>9</sup>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).

<sup>10</sup> On September 28, 2005, four unsolicited faxes were sent by Elf to a Commission facsimile machine.

<sup>11</sup>47 U.S.C § 504(a).

<sup>12</sup>See 47 U.S.C § 1.1914.

10. IT IS FURTHER ORDERED that a copy of this Order shall be sent by First Class Mail and Certified Mail Return Receipt requested to Ed Faust, Elf Painting and Wallpapering at 10309 Cherry View Court, Oakton, Virginia, 22124-2530, and Ed Faust, Elf Painting and Wallpapering at 1835 Monroe Street, N.W., Washington, DC 20010-1014.

FEDERAL COMMUNICATIONS COMMISSION

Kris A. Monteith  
Chief, Enforcement Bureau