

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

In the matter of)	
)	
Western Aviation, Inc.)	File No. EB-07-TC-12684
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. 200932170005
)	FRN: 0018235283
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: October 31, 2008

Released: November 3, 2008

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”)¹, we find that Western Aviation, Inc. (“Western Aviation”)² apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended (“Act”), and the Commission’s related rules and orders, by delivering at least one unsolicited advertisement to the telephone facsimile machine of at least one consumer.³ Based on the facts and circumstances surrounding the apparent violation, we find that Western Aviation is apparently liable for a forfeiture in the amount of \$4,500.

II. BACKGROUND

2. 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 any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an

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 hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities 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 publicly available information, Western Aviation has offices at 6701 Highway Blvd., Suite 105, Katy, TX 77494. David L. Fisher, President, is listed as the contact person for Western Aviation. Accordingly, all references in this NAL to “Western Aviation” also encompass the foregoing individual and all other principals and officers of this entity, as well as the corporate entity itself.

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 and Third Order on Reconsideration*, 21 FCC Rcd 3787 (2006).

unsolicited advertisement.”⁴ The term “unsolicited advertisement” is defined in the Act and the 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 in writing or otherwise.”⁵ Under the Commission’s rules, an “established business relationship”⁶ exception permits a party to deliver a message to a consumer if the sender has an established business relationship with the recipient *and* the sender obtained the number of the facsimile machine through the voluntary communication by the recipient, directly to the sender, within the context of the established business relationship, or through a directory, advertisement, or a site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution.⁷

3. On July 6, 2007, in response to one or more consumer complaints alleging that Western Aviation had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁸ to Western Aviation, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited Western Aviation for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for airplanes to a telephone facsimile machine, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation warned Western Aviation 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.¹⁰ The citation informed Western Aviation that within 30 days of the date of the citation, it could either request an interview with Commission staff, or could provide a written statement responding to the citation. Western Aviation responded by letter that the company only sends faxes to its customers and that the fax in the complaint “had to be sent in error.”¹¹ Western Aviation also said it made sure that the complainant and his company are not in its database and that the number was blocked from receiving a fax again.

4. Despite the citation’s warning that subsequent violations could result in the imposition of monetary forfeitures, we have received an additional consumer complaint indicating that Western Aviation continued to engage in such conduct after issuance of the citation.¹² We base our action here specifically on a complaint filed by a consumer establishing that Western Aviation continued to send one

⁴ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

⁵ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13).

⁶ An “established business relationship” is defined as a prior or existing relationship formed by a voluntary two-way communication “with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(5). *See also* 47 U.S.C. § 227(a)(2).

⁷ *See* 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3)(i), (ii).

⁸ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-07-TC-12684 issued to Western Aviation on July 6, 2007.

⁹ *See* 47 U.S.C. § 503(b)(5) (authorizing the Commission to issue citations to persons who do not hold a license, permit, certificate or other authorization issued by the Commission or an applicant for any of those listed instrumentalities for violations of the Act or of the Commission’s rules and orders).

¹⁰ Bureau staff mailed the citation to the following address: Western Aviation, Inc., Attn: David L. Fisher, President, 6701 Highway Blvd., Suite 105, Katy, TX 77494. *See* n.2, *supra*.

¹¹ Letter from David Fisher, Western Aviation to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, dated July 16, 2007.

¹² *See* Appendix for a listing of the consumer complaint against Western Aviation requesting Commission action.

unsolicited advertisement to a telephone facsimile machine after the date of the citation.¹³

5. Section 503(b) of the Act authorizes the Commission to assess a forfeiture 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. The maximum penalty for such a violation is \$11,000 for a violation occurring before September 2, 2008, and \$16,000 for a violation occurring on or after September 2, 2008.¹⁴ 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.”¹⁵

III. DISCUSSION

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

6. We find that Western Aviation apparently violated section 227 of the Act and the Commission’s related rules and orders by using a telephone facsimile machine, computer, or other device to send at least one unsolicited advertisement to the consumer identified in the Appendix. This NAL is based on evidence that one consumer received an unsolicited fax advertisement from Western Aviation *after* the Bureau’s citation. The facsimile transmission advertises airplanes. Further, according to the complaint, the consumer neither had an established business relationship with Western Aviation nor gave Western Aviation permission to send the facsimile transmission.¹⁶ The fax at issue here therefore falls within the definition of an “unsolicited advertisement.”¹⁷ Based on the entire record, including the consumer complaint, we conclude that Western Aviation apparently violated section 227 of the Act and the Commission’s related rules and orders by sending one unsolicited advertisement to one consumer’s facsimile machine.

¹³ We note that evidence of additional instances of unlawful conduct by Western Aviation may form the basis of subsequent enforcement action.

¹⁴ Section 503(b)(2)(C) provides for forfeitures 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). 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) first to \$11,000 and more recently to \$16,000. *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) (forfeiture maximum for this type of violator set at \$11,000); *Amendment of Section 1.80(b) of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000); *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008) (amendment of section 1.80(b) to reflect inflation increased the forfeiture maximum for this type of violator to \$16,000).

¹⁵ 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, 17100-01 para. 27 (1997) (*Forfeiture Policy Statement*), *recon. denied*, 15 FCC Rcd 303 (1999).

¹⁶ *See* complaint dated December 18, 2007, from Peter Lowry (stating that he has never done any business with the fax advertiser, never made an inquiry or application to the fax advertiser, and never gave permission for the company to send the fax.) The complainant involved in this action is listed in the Appendix.

¹⁷ *See* 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13) (definition previously at § 64.1200(f)(10)).

B. Proposed Forfeiture

7. We find that Western Aviation is apparently liable for a forfeiture in the amount of \$4,500. Although the *Commission's Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition against 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.¹⁸ We apply that base amount to one apparent violation. Thus, a total forfeiture of \$4,500 is proposed. Western Aviation will 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.¹⁹

IV. CONCLUSION AND ORDERING CLAUSES

8. We have determined that Western Aviation, Inc. apparently violated section 227 of the Act and the Commission's related rules and orders by using a telephone facsimile machine, computer, or other device to send at least one unsolicited advertisement to the consumer identified in the Appendix. We have further determined that Western Aviation, Inc. is apparently liable for a forfeiture in the amount of \$4,500.

9. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 1.80 of the rules, 47 C.F.R. § 1.80, and under the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Western Aviation, Inc. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$4,500 for willful or repeated violations of section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), section 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.

10. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules,²⁰ within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, Western Aviation, Inc. SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

11. 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/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in

¹⁸ 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, 15 Rcd 16999 (2000); *US Notary, Inc.*, Forfeiture Order, 16 FCC Rcd 18398 (2001); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability For Forfeiture, 15 FCC Rcd 11295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23198 (2000).

¹⁹ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²⁰ 47 C.F.R. § 1.80.

block number 24A (payment type code). Western Aviation will also send electronic notification on the date said payment is made to Johnny.drake@fcc.gov. Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures.

12. The response, if any, must be mailed both to the Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, and must include the NAL/Acct. No. referenced in the caption.

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; 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. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested and First Class mail to Western Aviation, Inc., Attention: David L. Fisher, President, 6701 Highway Blvd., Suite 105, Katy, TX 77494.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

APPENDIX

Complainants and Violation Dates

Complainant received facsimile solicitations	Violation Date(s)
Peter Lowry	12/18/2007