

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

In the Matter of
Mario's Roofing
File No. EB-05-TC-079
NAL/Acct. No. 200832170002
FRN: 0017020017

FORFEITURE ORDER

Adopted: April 18, 2008

Released: April 22, 2008

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of \$13,500 against Mario's Roofing for willful or repeated violations of section 227 of the Communications Act of 1934, as amended, ("Act") and the Commission's related rules and orders, by delivering at least three unsolicited advertisements to the telephone facsimile machines of at least three consumers.

II. BACKGROUND

2. The facts and circumstances surrounding this case are set forth in the Commission's Notice of Apparent Liability for Forfeiture and need not be reiterated at length.

3. 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 unsolicited advertisement." 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

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 Mario's Roofing, Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 18512 (Enf. Bur. 2007) ("NAL").

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

permission in writing or otherwise.”⁴ Under the Commission’s rules, an “established business relationship”⁵ 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.⁶

4. On December 14, 2005, in response to one or more consumer complaints alleging that Mario’s Roofing had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁷ to Mario’s Roofing, pursuant to section 503(b)(5) of the Act.⁸ The Bureau cited Mario’s Roofing for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation, which was served by certified mail, return receipt requested, warned Mario’s Roofing 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 complaints that formed the basis of the citation.⁹ The citation informed Mario’s Roofing that within thirty (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. Mario’s Roofing did not request an interview but counsel for Mario’s Roofing did respond to the citation on January 3, 2006.¹⁰ In the response, counsel for Mario’s Roofing indicated that the company would not violate the Commission’s rules governing telephone solicitations and unsolicited advertisements and that it had disconnected the telephone line in question.

5. Following the issuance of the citation, the Commission received at least three complaints from consumers alleging that Mario’s Roofing faxed at least three unsolicited advertisements to them. These violations, which occurred after the Bureau’s citation, resulted in the issuance of a Notice of Apparent Liability for Forfeiture against Mario’s Roofing on October 16, 2007, in the amount of \$13,500.¹¹ The *NAL* ordered Mario’s Roofing to either pay the proposed forfeiture amount within thirty (30) days or submit evidence or arguments in response to the *NAL* to show that no forfeiture should be imposed or that some lesser amount should be assessed. Mario’s Roofing did not respond to the *NAL* or pay the proposed forfeiture amount.

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

⁵ 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).

⁶ See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3)(i), (ii).

⁷ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-05-TC-079 issued to Mario’s Roofing on December 14, 2005.

⁸ 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).

⁹ Bureau staff mailed the citation to Mario’s Roofing, 1168 Dixwell Avenue, Hamden, CT 06514 and 1021 Asylum Avenue 218, Hartford, CT 06105.

¹⁰ Letter from Richard C. Marquette, Counsel for Mario’s Roofing, dated January 3, 2006.

¹¹ See n.2 *supra*; see also 47 U.S.C. § 503(b)(1).

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.¹² 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.”¹³

7. 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.¹⁴ We apply that base amount to the three apparent violations.

8. Mario’s Roofing did not respond to the NAL or pay the proposed forfeiture amount. Mario’s Roofing 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. For these reasons, and based on the information before us, we hereby impose a total forfeiture of \$13,500 for Mario’s Roofing’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

9. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b) and section 1.80(f)(4) of the Commission’s rules, 47 C.F.R. § 1.80(f)(4), and under the authority delegated by sections 0.111, 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that Mario’s Roofing IS LIABLE FOR A MONETARY FORFEITURE to the United States Government the sum of \$13,500 for willfully and repeatedly violating 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 as described in the paragraphs above.

10. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission’s rules within thirty (30) days of the release of this Order. If the forfeiture is not paid within

¹² Section 503(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). 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*, 19 FCC Rcd 10945 (2004) (this most recent amendment of section 1.80(b) maintained the forfeiture maximum for this type of violator at \$11,000).

¹³ See 47 U.S.C. § 503(b)(2)(D); see also *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).

¹⁴ 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).

the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.¹⁵ 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 block number 24A (payment type code). 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.

11. **IT IS FURTHER ORDERED** that a copy of the Forfeiture Order shall be sent by first class mail and certified mail return receipt requested to Mario’s Roofing, Attention: Mario Stevens, 1168 Dixwell Avenue, Fl. 2, Hamden, CT 06514-4732.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

¹⁵ 47 U.S.C. § 504(a).