

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

In the Matter of)
American Medical Services) File No. EB-07-TC-1947
Apparent Liability for Forfeiture) NAL/Acct. No. 200932170015
) FRN: 0018140012
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 6, 2009

Released: February 6, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL")¹, we find that American Medical Services ("AMS")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 this apparent violation, we find that AMS 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

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, AMS is also doing business as Taylor Development, Inc. Therefore, all references in this NAL to "AMS" encompass AMS as well as Taylor Development, Inc. AMS has offices at 2471 McMullen Booth Road, Suite 301, Clearwater, FL 33759-1351. Nick Braia, Owner, is listed as the contact person for AMS. Accordingly, all references in this NAL to "AMS" 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).

telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an 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 June 26, 2007, in response to two consumer complaints alleging that AMS had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁸ to AMS, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited AMS for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for health insurance to a telephone facsimile machine, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation warned AMS 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.¹⁰ The citation informed AMS 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. AMS responded by stating that “American Health Services” was no longer in business¹¹ and that it was “very sorry for any troubles this has caused both parties.”¹²

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 AMS continued to engage in such conduct after issuance of the citation.¹³ We base our action here specifically on a complaint filed by one consumer establishing that AMS continued to send one unsolicited advertisement

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).

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-1947 issued to AMS on June 26, 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: American Medical Services, Attn: Nick Braia, Owner, 2471 McMullen Booth Road, Suite 301, Clearwater, FL 33759-1351. See n.2, *supra*.

¹¹ In fact, however, AMS apparently did remain in business and later withdrew this claim. See ¶ 6, *infra*.

¹² Following the issuance of the citation, the Commission received another complaint alleging that AMS faxed an unsolicited advertisement. That complaint, received after the Commission citation, resulted in the issuance of a Notice of Apparent Liability for Forfeiture against AMS in the amount of \$4,500, *American Medical Services*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 13853 (2008). AMS filed a response, dated October 20, 2008. See ¶ 6, *infra*.

¹³ See Appendix for a listing of the consumer complaint against AMS requesting Commission action.

to telephone facsimile machines after the date of the citation.¹⁴

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, 2008.¹⁵ 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.”¹⁶

III. DISCUSSION

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

6. We find that AMS 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 one unsolicited fax advertisement from AMS *after* the Bureau’s citation. The facsimile transmission advertised health care. Further, according to the complaint, the consumer neither had an established business relationship with AMS nor gave AMS permission to send the facsimile transmission.¹⁷ The fax at issue here therefore falls within the definition of an “unsolicited advertisement.”¹⁸ We note that Commission staff provided a copy of this complaint to AMS at the same time that it provided a copy of the complaint that was the subject of an earlier Bureau *NAL*.¹⁹ In its October 20, 2008 Response, AMS says that it did not in fact go out of business but “settled on a name change and reorganization” and has only “a handful of customers.” AMS further claims that the Ms. Morris’s husband was “[t]he contact from the complaint.” However, AMS only supports this claim with

¹⁴ We note that evidence of additional instances of unlawful conduct by AMS may form the basis of subsequent enforcement action.

¹⁵ 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).

¹⁶ 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).

¹⁷ *See*, complaint dated February 21, 2008, from Deborah Morris, (stating that she 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 also listed in the Appendix.

¹⁸ *See* 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13) (definition previously at § 64.1200(f)(10)).

¹⁹ *See* n.11, *supra*

a listing that it says shows Mr. Morris's first name and contact information. Even if this listing is accurate, the fact that AMS knows this information does not demonstrate that Mr. Morris actually engaged in any inquiry, application, purchase or transaction with AMS.²⁰ Accordingly, we do not find that AMS has met its burden of demonstrating the existence of an established business relationship with Ms. or Mr. Morris. Based on the entire record, including the consumer complaint and AMS' October 20, 2008 Response, we conclude that AMS 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.

B. Proposed Forfeiture

7. We find that AMS 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.²¹ We apply that base amount to the apparent violation. Thus, a total forfeiture of \$4,500 is proposed. AMS 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.²²

IV. CONCLUSION AND ORDERING CLAUSES

8. We have determined that American Medical Services 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 American Medical Services 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 American Medical Services 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,²³ within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, American Medical Services 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*

²⁰ See 47 C.F.R. § 64.1200(f)(5); 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, 3796-97 ¶ 12 (2006).

²¹ 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).

²² See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²³ 47 C.F.R. § 1.80.

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). American Medical Services 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 American Medical Services, Attn: Nick Braia, Owner, 2471 McMullen Booth Road, Suite 301, Clearwater, FL 33759-1351

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

APPENDIX

Complainant and Violation Date

Complainant received facsimile solicitation	Violation Date
Deborah Morris	02/21/2008