

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

In the Matter of)
)
)
1 Home Lending Corporation) File No. EB-03-TC-031
d.b.a. Capital Line Financial, LLC)
) NAL/Acct. No. 200732170002
) FRN: 0015635519
Apparent Liability for Forfeiture)
)

FORFEITURE ORDER

Adopted: March 9, 2009

Released: March 10, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of \$18,000 against 1 Home Lending Corporation d.b.a. Capital Line Financial, LLC ("Capital Line") 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 four unsolicited, prerecorded advertising messages to 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.

1 See 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200(a)(2). Throughout this forfeiture order, we will be citing the Commission's rules as they existed at the time of the violations; see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014 (2003) (2003 TCPA Report and Order).

2 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).

3 1 Home Lending Corporation d.b.a Capital Line Financial, LLC., Apparent Liability for Forfeiture, 21 FCC Rcd 11852 (Enf. Bur. 2006) ("NAL").

3. Section 227(b)(1)(B) of the Act prohibits any person from initiating “any telephone call to any residential telephone line using an 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 of the Commission.”⁴ 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 advertisement⁵ or constitute a telephone solicitation”;⁶ 4) to persons “with whom the caller has an established business relationship⁷ at the time the call is made”; and 5) “made by or on behalf of a tax-exempt nonprofit organization.”⁸

4. On April 22, 2003, in response to consumer complaints alleging that Capital Line had delivered unsolicited, prerecorded advertising messages to several consumers, the Commission staff issued a citation to Capital Line pursuant to section 503(b)(5) of the Act.⁹ The staff cited Capital Line for delivering one or more prerecorded, unsolicited advertisements to a residential telephone line, in violation of section 227 of the Act and the Commission’s rules and orders.¹⁰ According to the complainants, the unsolicited advertisements offered information concerning home loans.¹¹ The citation informed Capital Line 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. The citation informed Capital Line that within 30 days of the date of the citation, it could either request a personal interview at the nearest Commission field office, or could provide a written statement responding to the citation.

5. Capital Line filed a written response to the citation on May 21, 2003,¹² arguing that it placed calls only to established customers of its title company subsidiary. Capital Line did not, however,

⁴ 47 U.S.C. § 227(b)(1)(B).

⁵ “Unsolicited advertisement” means “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.” 47 C.F.R. § 64.1200(f)(10).

⁶ “Telephone solicitation” means “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person,” but “does not include a call or message: (i) to any person with that person’s prior express invitation or permission; (ii) to any person with whom the caller has an established business relationship; or (iii) by or on behalf of a tax-exempt nonprofit organization.” 47 C.F.R. § 64.1200(f)(9).

⁷ An “established business relationship” is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber’s purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(3).

⁸ 47 C.F.R. § 64.1200(a)(2).

⁹ See Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, issued to Capital Line on April 22, 2003.

¹⁰ See 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).

¹¹ See Complaints from Michele Robinson, Barbara Schneider, and Richard Stahl, requesting Commission action against Capital Line, which were attached to the citation.

¹² See Letter from William Raney, Copilevitz & Canter, LLC (representing Capital Line), to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, dated May 21, 2003.

provide any evidence of an established business relationship (“EBR”) with any of the complainants whose complaints formed the basis of the citation.¹³ On May 13, 2005, Capital Line filed a supplemental response in which it requested that the Commission rescind the citation.¹⁴ To support its request, Capital Line attached a decision from the Superior Court of California, which had dismissed a claim, filed by one of the citation complainants, for private damages under the Telephone Consumer Protection Act.¹⁵ Capital Line argued that the Commission should rescind the citation because the California court had found an EBR between the complainant and an affiliate of Capital Line.¹⁶ The Enforcement Bureau decided, however, that it was not bound by that court’s decision regarding that complainant’s relationship with Capital Line.¹⁷ Furthermore, the Bureau found that Capital Line did not provide any independent evidence of an EBR with that complainant or with the other two complainants whose complaints formed part of the basis for the citation. Accordingly, the Bureau did not rescind the citation.¹⁸

6. Following the issuance of the citation, the Commission received at least 3 complaints from consumers alleging that Capital Line sent at least 4 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 Capital Line on October 20, 2006 in the amount of \$18,000.¹⁹ The *NAL* ordered Capital Line 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. On November 21, 2006, Capital Line filed a response to the *NAL*, arguing that the Commission should substantially reduce the forfeiture.²⁰

III. DISCUSSION

7. 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, 2008.²¹ In exercising such authority, we are to take into

¹³ See n.11, *supra*.

¹⁴ See Letter from William Raney, Copilevitz & Canter, LLC (representing Capital Line), to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, dated May 10, 2005 (“*Supplemental Response*”).

¹⁵ See 47 U.S.C. § 227(b)(3) (allowing a person or entity to bring, subject to the laws or rules of the State court, an action in State court for monetary damages resulting from violations of the Telephone Consumer Protection Act of 1991).

¹⁶ See *Supplemental Response*, Attachment. The Court did not require Capital line to pay damages for sending the prerecorded message to Ms. Schneider because of an alleged established business relationship between her and an alleged affiliate of Capital Line, “Countrywide.” In particular, the Court found that Countrywide had provided the first mortgage to Ms. Schneider’s residential property. *Id.*

¹⁷ *NAL*, 21 FCC Rcd at 11853-54, para. 3.

¹⁸ *NAL*, 21 FCC Rcd at 11854, para. 3.

¹⁹ See n.3 *supra*; see also 47 U.S.C. § 503(b)(1).

²⁰ Letter from Mr. William E. Raney, Copilevitz & Canter, LLC, to Enforcement Bureau, Telecommunications Consumers Division, FCC, re: *In the Matter of One Home Lending Corporation, D.B.A. Capital Line Financial, LLC, NAL/Account No. 200732170002*, dated November 20, 2006 (“*NAL Response*”).

²¹ 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

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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.”²²

8. Capital Line first argues that it believed it had an established business relationship (“EBR”) with one of the complainants, Mark Klein, at the time it sent the prerecorded messages.²³ Capital Line bases its EBR claim on the fact that Mr. Klein was a customer of Washington Mutual Bank, and Capital Line is a broker for Washington Mutual Bank.²⁴ To support these assertions, Capital Line provided the following documentation: 1) a title information document listing American Savings Bank as the lender on property purchased by Mr. Klein in 1996; 2) a 1996 news article discussing a proposed merger between Washington Mutual, Inc. and American Savings Bank; and 3) a 1999 brokerage agreement in which Capital Line agreed to be the broker for Washington Mutual, Inc.²⁵

9. Capital Line has not persuaded us that it had an EBR with Mr. Klein at the time it sent the prerecorded advertisement. Under section 62.1200(f) of the Commission’s rules, an EBR with a consumer does not extend to a company’s affiliate “unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.”²⁶ In the *2003 TCPA Report and Order*, the Commission emphasized that “a call from a company with which a consumer has not formed a business relationship directly, or does not recognize by name, would likely be a surprise and possibly an annoyance.”²⁷

10. We do not believe that Mr. Klein would reasonably have expected to receive a prerecorded message from Capital Line. According to the information submitted by Capital Line, Mr. Klein purchased a home in March 1996, with American Savings Bank as the lender.²⁸ Sometime after July 26, 1996, American savings Bank then merged with Washington Mutual, Inc.²⁹ Finally, Capital Line became a broker for Washington Mutual in 1999.³⁰ There was a three-year gap between when Mr. Klein took out the home loan and when Capital Line became the broker for Washington Mutual. This makes it

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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).

²² 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).

²³ *NAL Response* at 2. See 47 C.F.R. § 64.1200(a)(2)(iv).

²⁴ *NAL Response* at 2.

²⁵ *NAL Response*, Exhibit B.

²⁶ 47 C.F.R. § 64.1200(f)(3)(ii).

²⁷ *2003 TCPA Report and Order*, 18 FCC Rcd at 14083, para. 117.

²⁸ *NAL Response*, Exhibit B.

²⁹ *NAL Response*, Exhibit B. Capital Line attached an article dated July 26, 1996 that discussed a “proposed” merger between American Savings Bank and Washington Mutual. So the merger happened at some point after that date.

³⁰ *NAL Response*, Exhibit B.

implausible that Mr. Klein would have considered himself to be in a direct business relationship with Capital Line so that he would expect a prerecorded message from them. Accordingly, we find that Capital Line has not met the requirements for demonstrating an EBR with Mr. Klein under the Commission's rules.³¹

11. In addition, Capital Line has not persuaded us to substantially reduce the fine for the prerecorded messages it sent to the remaining complainants from \$4,500 to \$500 per call. Capital Line first argues that it has always honored the National Do-Not-Call Registry and individual do-not-call requests.³² Complying with the Commission's Do-Not-Call rules, however, does not provide an exemption for a violation of our prerecorded message rules.³³ And even in cases where a company has taken remedial steps to correct its violation of the Commission rules, the Commission has not seen that as sufficient reason to reduce a forfeiture.³⁴ So Capital Line's mere claim of past compliance with the do-not-call rules does not persuade us to reduce the forfeiture. Capital Line adds that it has never knowingly called a consumer with whom it did not have an EBR, and that there is no way for it to determine whether it had an EBR with the remaining complainants.³⁵ If Capital Line cannot prove that it had an EBR with the remaining complainants, however, we cannot find that the messages left for those complainants fall under the EBR exemption to the rules.³⁶

12. Capital Line 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 \$18,000 for Capital Line'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

13. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Act, 47 U.S.C. § 503(b), and section 180(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), 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 Capital Line IS LIABLE FOR A MONETARY FORFEITURE to the United States Government in the sum of \$18,000 for willful or repeated violations of section 227(b)(1)(B) of the Act, 47 U.S.C. § 227(b)(1)(B),

³¹ 47 C.F.R. § 64.1200(f)(3)(ii).

³² *NAL Response* at 2. Capital Line included in its response to the *NAL* a one-page flow chart outlining its do-not-call compliance procedures. *NAL Response*, Exhibit B.

³³ As we discuss above, under the Commission's rules exemptions for prerecorded calls are limited to 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. *See* para. 3, *supra*.

³⁴ *See Coleman Enterprises, Inc. d/b/a Local Long Distance, Inc.*, Order of Forfeiture, 15 FCC Rcd 24,385, 24,388, para. 8 (2000) (finding remedial steps to address unauthorized preferred carrier changes and cessation of telemarketing services insufficient to reduce forfeiture); *America's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22,350, 22,355-56, para. 15 (2001) (finding remedial measures to be an insufficient basis to reduce forfeiture).

³⁵ *NAL Response* at 2. Capital Line explains that it no longer possesses the infrastructure for prerecorded messages, having terminated its prerecorded marketing campaigns as of March, 2006. *Id.*

³⁶ In a related area of Telephone Consumer Protection Act enforcement, unsolicited facsimiles, the Commission has stated that the sender of the facsimile has the burden of proving the existence of an EBR. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3794, para. 12 (2006).

section 64.1200(a)(2) of the Commission's rules, 47 C.F.R. § 64.1200(a)(2), and the related orders described in the paragraphs above.

14. 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 the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.³⁷ 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). Capital Line 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.

15. **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 1 Home Lending Corporation d.b.a. Capital Line Financial, LLC in care of Mr. William E. Raney, Esq., Copilevitz & Canter, LLC, 423 W. Eighth Street, Suite 400, Kansas City, Missouri 64105; to 1 Home Lending Corporation d.b.a. Capital Line Financial, LLC, Attention: William J. Tessar, 23925 Park Sorrento, Suite 200, Calabasas, CA 91302-4010; and to 1 Home Lending Corporation d.b.a. Capital Line Financial, LLC, Attention: William J. Tessar, 22801 Ventura Boulevard, #205, Woodland Hills, CA 91367.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau

³⁷ 47 U.S.C. § 504(a).