

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

In the Matter of) File No.: EB-07-TC-1947
)
American Medical Services) NAL/Acct. Nos.: 200832170076 and
f/k/a American Health Services) 200932170015
)
) FRN: 0018140012

FORFEITURE ORDER

Adopted: October 27, 2011

Released: October 27, 2011

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“*Order*”), we issue a monetary forfeiture in the amount of \$9,000 against American Medical Services (“AMS”) for willful and repeated violations of section 227(b)(1)(C) of the Communications Act of 1934, as amended (“Act”),¹ and section 64.1200(a)(3) of the Commission’s rules,² by delivering two unsolicited advertisements, or “junk faxes,” to the telephone facsimile machines of two consumers.

II. BACKGROUND

2. The Telephone Consumer Protection Act of 1991 was enacted by Congress to address problems of abusive telemarketing, including junk faxes.³ Unsolicited faxes often impose unwanted burdens on the called party, including costs of paper and ink, and making fax machines unavailable for legitimate business messages. 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.”⁴ The prohibition, however, does not apply if certain conditions are satisfied, such as when the sender has an “established business relationship” with the recipient.⁵

3. Pursuant to section 503(b)(5) of the Act,⁶ the Enforcement Bureau (“Bureau”) issued a junk fax citation⁷ to AMS on June 26, 2007, in response to two consumer complaints alleging that AMS

¹ 47 U.S.C. § 227(b)(1)(C).

² 47 C.F.R. § 64.1200(a)(3).

³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, codified as amended at 47 U.S.C. § 227 (2009). See also Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

⁴ 47 U.S.C. § 227(b)(1)(C).

⁵ *Id.* For a definition of “established business relationship” and a discussion of the exception, see *infra* para. 10.

⁶ 47 U.S.C. § 503(b)(5) (requiring the Commission to issue a citation for a violation to a person who does not hold a license, permit, certificate or other authorization issued by the Commission, who is not an applicant for any such instrumentality, and who is not engaged in any activities for which such instrumentality is necessary, before imposing a forfeiture for a violation against such a person).

had faxed unsolicited advertisements. AMS responded by stating that “American Health Services” was no longer in business and was “very sorry for any troubles this has caused both parties.”⁸

4. Thereafter, the Commission received additional complaints from consumers alleging that AMS had faxed unsolicited advertisements. These violations, which occurred after the date of the citation, resulted in the Bureau issuing two Notices of Apparent Liability for Forfeiture (“NALs”) against AMS.⁹

5. The Bureau issued the first *NAL* in September 2008, and proposed a forfeiture of \$4,500.¹⁰ Thereafter, the Bureau sent both the complaint referenced in the *NAL*, as well as a second complaint, to AMS.

6. In response to these complaints, AMS claimed that it had “correspondence from persons at the companies who have complained but more than likely not from the person who filed the complaint.”¹¹ AMS went on to explain that it “would develop sales leads from our website, print advertising or from various Internet companies for people who were shopping for [a] healthcare or discount plan.”¹² With respect to the complaint referenced in the first *NAL* in particular, from S. Hardy at All American Quality Foods, AMS claimed its contact was an owner of that company, and provided contact information for that person.¹³ Concerning the second complaint, from D. Morris, AMS claimed that the complainant’s husband, T. Morris, was its contact, and again provided information for T. Morris.¹⁴

7. The Bureau issued the second *NAL* in 2009, based on D. Morris’s complaint, and stated that AMS’s knowledge of T. Morris’s contact information “does not demonstrate that T. Morris actually engaged in any inquiry, application, purchase or transaction with AMS.”¹⁵ The Bureau thus concluded that AMS had not met its burden of demonstrating the existence of an established business relationship and found AMS apparently liable for a second forfeiture in the amount of \$4,500.

8. AMS responded to the second *NAL* and requested cancellation of the proposed forfeiture.¹⁶ In support, AMS provided: (1) an affidavit claiming a prior relationship with the Morris family and the business “Realkids.com;” (2) Texas corporate records with information about the Morris

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⁷ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-07-TC-1947, to AMS (June 26, 2007).

⁸ Letter from Nick Braia, AMS, File No. EB-07-TC-1947, to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau at 1 (dated July 17, 2007). American Health Services is the name previously used by AMS.

⁹ *American Medical Services*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 13853 (2008) (“NAL 1”); *American Medical Services*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 1276 (2009) (“NAL 2”)(collectively NALs).

¹⁰ NAL 1, 23 FCC Rcd 13853.

¹¹ Letter from Nick Braia, AMS, File No. EB-07-TC-1947, to Office of the Secretary at 1 (dated October 20, 2008).

¹² *Id.*

¹³ *Id.*, Exhibit A.

¹⁴ *Id.*, Exhibit B.

¹⁵ NAL 2, 24 FCC Rcd at 1279 para. 6.

¹⁶ Letter from Nick Braia, AMS, File No. EB-07-TC-1947, to Office of the Secretary (dated March 19, 2009).

company; (3) “lead information” relating to T. Morris; and (4) contact information for T. Morris and another person allegedly associated with the Morris family or the business Real Kids.¹⁷

III. DISCUSSION

9. We now assess the \$9,000 penalties proposed in the two *NALs*. In doing so, we find that AMS has not adequately shown that it did, in fact, have an “established business relationship” with the complainants, or that it obtained their fax numbers permissibly under the Commission’s rules.

10. Under the Commission’s rules, a person may not fax an unsolicited ad unless the sender and the recipient have an “established business relationship” (“EBR”) and certain other conditions are satisfied. An EBR is defined as:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber 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.¹⁸

A fax may be sent to a person with whom the sender has an EBR only if the sender obtained the recipient’s fax number through “voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship” or through a “directory, advertisement, or site on the Internet to which the recipient agreed to make available its facsimile number for public distribution.”¹⁹ The Commission has made clear that the entity sending an unsolicited fax ad is responsible for demonstrating the existence of the established business relationship, for example, through relevant business records such as purchase agreements and application records.²⁰ Thus, AMS bears the burden of demonstrating a voluntary two-way communication on the basis of an inquiry, application, purchase, or transaction.²¹

11. AMS has not satisfied its burden of proof. As we pointed out in the second *NAL*, the fact that AMS has contact information for someone at a company to which it sent a fax advertisement is insufficient to show that it formed a relationship with the company through a voluntary two-way communication, on the basis of an inquiry or transaction. Indeed, contact information is little more than that necessary for AMS to fax an unsolicited ad in the first place. Simple “lead information” pertaining to an individual likewise does not demonstrate an EBR between AMS and that individual, as AMS could have acquired this information through means other than an EBR, such as from another company that provides sales leads. An affidavit attesting to a relationship of some unspecified type between AMS and a company or individual similarly fails to establish that AMS had an EBR with that company or

¹⁷ *Id.* at 3-8. The lead information was contact information, plus certain additional personal information.

¹⁸ 47 C.F.R. § 64.1200(f)(5). *See also* 47 U.S.C. § 227(a)(2).

¹⁹ 47 C.F.R. § 64.1200(a)(3). In addition, for a person to fax an unsolicited ad under the Commission’s rules, the ad must notify the recipient how to opt out of receiving future such ads, and do so in compliance with certain requirements.

²⁰ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act, Report and Order and Third Order on Reconsideration*, CG Docket Nos. 02-278, 05-338, 21 FCC Rcd 3787, 3793-94 para. 12 (2006) (*Junk Fax Prevention Act R&O*).

²¹ *See Junk Fax Prevention Act R&O*, 21 FCC Rcd at 3796 para. 15 (“senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisements to the recipient’s facsimile number. The fact that the facsimile number was made available in a directory, advertisement or website does not alone entitle a person to send a facsimile advertisement to that number.”).

individual.²² Again, it is AMS's burden to show that it formed a relationship with the complainants through a voluntary communication on the basis of an inquiry or transaction, and that it obtained and used the fax numbers at issue in the context of that relationship or through another permissible means. Business records evidencing such a relationship – again, for example, applications or purchase agreements – might meet the burden – but AMS did not provide any such records.

12. Thus, AMS has failed to identify any facts or circumstances to persuade us that there is a basis for modifying the forfeitures proposed in the *NALs*, 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 \$9,000 for AMS's willful and repeated violation of section 227(b)(1)(C) of the Act, and section 64.1200(a)(3) of the Commission's rules, as set forth in the *NALs* and herein.

IV. ORDERING CLAUSES

13. 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 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that American Medical Services **IS LIABLE FOR A MONETARY FORFEITURE** to the United States Government in the sum of \$9,000 for willfully and repeatedly violating section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), and section 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3).

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 enforcement pursuant to section 504(a) of the Act.²³ 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 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 shall 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.

²² It is unclear how the other documents and information that AMS provided – *i.e.*, public records about one of the companies associated with a complaint, and the fact that one of the complainants frequently uses the Internet – are in any way relevant to whether AMS had an EBR with either of the companies involved in the complaints.

²³ 47 U.S.C. § 504(a).

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

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau