

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

In the Matter of)	
)	
FIRST CHOICE HEALTHCARE, INC.)	File No. EB-04-TC-116
)	
Apparent Liability for Forfeiture)	NAL/Acct. No. 200632170004
)	FRN: 0014650584
)	
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 28, 2006

Released: February 28, 2006

By the Commission: Commissioner Tate issuing a statement at a later date.

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”)¹, we find that First Choice Healthcare, Inc. (“First Choice”)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 98 unsolicited advertisements to the telephone facsimile machines of at least 37 consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that First Choice is apparently liable for a forfeiture in the amount of \$776,500.

II. BACKGROUND

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 is not a common carrier 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, First Choice is headquartered at 1055 F Street, San Diego, California 92101; an alternate address is provided at 1670 Kettner Boulevard, San Diego, California. Its registered agent is Thomas Dubiel. First Choice claims in its advertising to specialize in health insurance. Its owners are apparently Matt Flint, Matt Ryan, and Thomas Paul. Accordingly, all references in this NAL to “First Choice” encompass Matt Flint, Matt Ryan and Thomas Paul, as well as the corporate entity.

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*, 18 FCC Rcd 14014, 14124 (2003) (*TCPA Report and Order*) (stating that section 227 of the Act prohibits the use of telephone facsimile machines to send unsolicited advertisements).

2. On July 13, 2004, in response to consumer complaints alleging that First Choice had faxed unsolicited advertisements, the Commission staff issued a citation⁴ to First Choice, pursuant to section 503(b)(5) of the Act.⁵ The staff cited First Choice for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements to a telephone facsimile machine, in violation of section 227 of the Act and the Commission's related rules and orders. According to the complaints, the unsolicited advertisements offered health insurance.⁶ The citation, which the staff served by certified mail, return receipt requested, informed First Choice 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.⁷ The citation informed First Choice that within 21 days of the date of the citation, it could either request a personal interview at the nearest Commission office, or could provide a written statement responding to the citation. First Choice did not request an interview nor otherwise respond to the citation.

3. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission has received additional consumer complaints indicating that First Choice continued to engage in such conduct after receiving the citation.⁸ In addition, the Commission has received similar consumer complaints filed with the Tennessee Regulatory Authority (TRA), which has given valuable assistance to this Commission's enforcement efforts against First Choice. Among other things, the TRA provided a letter it had received from First Choice in which the company apparently admitted sending unlawful fax advertisements to consumers in Tennessee. The admissions in this letter provide strong supporting evidence, in addition to the complaints, of First Choice's illegal faxing activities.⁹ We base our action here specifically on sworn declarations from consumers establishing that First Choice sent unsolicited advertisements to telephone facsimile machines after the date of the citation.¹⁰

⁴ Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-04-TC-116, issued to First Choice on July 13, 2004.

⁵ 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).

⁶ See consumer complaint requesting action by the Attorney General of the State of Florida from Larry Roth, dated April 8, 2004, which was attached to the citation (stating that he received an unsolicited advertisement via facsimile from First Choice, without his permission, after which he called First Choice to request removal from their list; and subsequently received another unsolicited advertisement via facsimile from First Choice without his permission).

⁷ The U.S. Postal Service returned copies of the citation to the Commission marked "unclaimed." Commission staff has obtained further confirmation, however, that First Choice is located at the address listed on the citation (the same address is listed above in footnote 2). See Letter from Matt Flint, First Choice Health Care, to Kimberly Jo Moore, Tennessee Regulatory Authority, filed December 20, 2005 (listing the address of First Choice as 1055 F Street, San Diego, California 92101). Further, section 503(b)(5)(A) of the Act does not require actual receipt of the citation, but only that the Commission send the citation to the person who is charged with the violation. 47 U.S.C. § 503(b)(5)(A) (requiring that the charged person be "sent a citation of the violation charged").

⁸ See Appendix for a listing of the consumer declarations from complainants requesting Commission action.

⁹ Mr. Edwin Mimms, Program Manager at the Tennessee Regulatory Authority, provided the Commission with a letter that First Choice had written in response to 75 Notices of Alleged Violation from the Tennessee Regulatory Authority. In the response letter, First Choice apologized to the Tennessee recipients of the fax advertisements, and stated that First Choice would no longer advertise via facsimile in the state of Tennessee. See Letter from Matt Flint, First Choice Health Care, to Kimberly Jo Moore, Tennessee Regulatory Authority, filed December 20, 2005.

¹⁰ We note that evidence of additional instances of unlawful conduct by First Choice may form the basis of subsequent enforcement action.

III. DISCUSSION

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

4. 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 a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”¹¹ 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.” Under Commission rules and orders currently in effect, the Commission views an established business relationship between a fax sender and recipient as constituting prior express invitation or permission to send a facsimile advertisement.¹²

5. This NAL is based on evidence that 37 consumers received unsolicited fax advertisements from First Choice *after* the Bureau’s citation. Each of those facsimile transmissions advertises the availability of the same commercial service: health insurance offered by First Choice. For example, one facsimile transmission sent by First Choice included the following language: “American Benefits . . . \$59.95 per month! Unlimited PPO savings nationwide . . . Call now for this yearly promotion!! This promotion ends Friday . . .”¹³ Another transmission sent to the same consumer included the following language: “Complete Medical Health Plan . . . Join today! . . . \$79.95 a month! . . . Offer ends Friday! ACT NOW”¹⁴ These facsimiles, which are representative of the others on which this NAL is based, fall within the definition of unsolicited advertisements.¹⁵

6. Further, according to their declarations, none of the consumers had an established business relationship with First Choice, and the consumers did not give First Choice permission to send the facsimile transmissions.¹⁶ In fact, 22 of these consumers actually contacted First Choice to tell First Choice not to send any additional facsimiles.¹⁷ Therefore, First Choice appears to have sent each

¹¹ 47 U.S.C. § 227(b)(1)(B).

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12405 (1995) (*1995 TCPA Reconsideration Order*); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 05-132 (rel. June 27, 2005). Under the recently enacted Junk Fax Prevention Act of 2005, Pub. L. 109-21, 119 Stat. 359 (2005), Congress amended the Communications Act to specify, among other things, the conditions under which an established business relationship provides an exception to the prohibition on unsolicited fax advertising.

¹³ Declaration dated November 3, 2005, from Steven Duelfer, Equus Systems, Inc., 1st facsimile attachment.

¹⁴ Declaration dated November 3, 2005, from Steven Duelfer, Equus Systems, Inc., 2nd facsimile attachment.

¹⁵ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(10). Under section 64.1200(f)(10), the term “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.”

¹⁶ See, e.g., Declaration dated November 7, 2005, from Michael A. Barasch (stating that, to the best of his knowledge, at no time did anyone in his household give First Choice prior express consent to deliver a facsimile advertisement, nor did anyone engage in any business transaction with First Choice). All of the complainants involved in this action are listed in the Appendix, located below at pages 6-7.

¹⁷ See, e.g., Declaration dated December 12, 2005, from Sue Berry (stating that First Choice continued to send her facsimile advertisements after she called and asked First Choice to stop sending such messages). All of the complainants who were sent facsimile solicitations after requesting that no more be sent are listed below at page 7.

facsimile transmission without prior express consent of the consumers.¹⁸ First Choice did not respond to the Commission's citation and thus has offered no evidence or arguments to defend or justify its actions. Based on the entire record,¹⁹ including the consumer declarations, we find that First Choice apparently violated section 227 of the Act and the Commission's related rules and orders by sending 98 unsolicited advertisements to 37 consumers' facsimile machines.

B. Proposed Forfeiture

7. We conclude that First Choice apparently willfully or repeatedly violated the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send unsolicited advertisements to telephone facsimile machines. First Choice apparently did not cease its unlawful conduct even after the Commission staff issued a citation warning that it was engaging in unlawful conduct and could be subject to monetary forfeitures. Accordingly, a proposed forfeiture is warranted against First Choice for its apparent willful or repeated violations of section 227 of the Act and of the Commission's related rules and orders regarding the faxing of unsolicited advertisements.

8. 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.²⁰ 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."²¹

9. Although the *Commission's Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition on 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.²² We apply that base amount to each of 37 of the apparent violations. In

¹⁸ Mere distribution or publication of a fax number does not establish consent to receive advertisements by fax. *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09; see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 18 FCC Rcd 14014, 14128 (2003) (concluding that mere publication of a fax number in a trade publication or directory does not demonstrate consent to receive fax advertising).

¹⁹ See Letter from Matt Flint, First Choice Health Care, to Kimberly Jo Moore, Tennessee Regulatory Authority, filed December 20, 2005 (apologizing to the Tennessee recipients of the fax advertisements, and stating that First Choice will no longer advertise via facsimile in the state of Tennessee).

²⁰ 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) 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 recent amendment of section 1.80(b) to reflect inflation left the forfeiture maximum for this type of violator at \$11,000).

²¹ 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, 17100-17101 (1997) (*Forfeiture Policy Statement*), recon. denied, 15 FCC Rcd 303 (1999).

²² 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, 16 Rcd 18,298 (2001); *US Notary, Inc.*, Forfeiture Order, 16 FCC Rcd 18,398 (2001); *Tri-Star Marketing, Inc.*, Notice

(continued...)

addition, where the consumer requests the company to stop sending facsimile messages, and the company continues to send them, the Commission has previously considered \$10,000 per unsolicited fax advertisement the appropriate forfeiture for such egregious violations.²³ Here, 22 consumers specifically requested that First Choice cease sending facsimiles. Notwithstanding these requests, an additional 61 facsimiles were sent to these consumers. Thus, we apply the \$10,000 amount to each of 61 of the apparent violations. Thus, a total forfeiture of \$776,500 is proposed. First Choice shall 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.²⁴

IV. CONCLUSION AND ORDERING CLAUSES

10. We have determined that First Choice Healthcare, Inc. apparently violated section 227 of the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send at least 98 unsolicited advertisements to the 37 consumers identified in the Appendix. We have further determined that First Choice Healthcare, Inc. is apparently liable for forfeiture in the amount of \$776,500.

11. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Act, and section 1.80 of the Rules, 47 C.F.R. § 1.80, 47 U.S.C. § 503(b), that First Choice Healthcare, Inc. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$776,500 for willful or repeated violations of section 227(b)(1)(C) of the Communications Act, 47 U.S.C. § 227(b)(1)(C), sections 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.

12. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules,²⁵ within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, First Choice Healthcare SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

13. Payment by check or money order, payable to the order of the "Federal Communications Commission," may be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 358340, Pittsburgh, Pennsylvania 15251. Payment by overnight mail may be sent to Mellon Client Service Center, 500 Ross Street, Room 670, Pittsburgh, Pennsylvania 15262-0001, Attn: FCC Module Supervisor. Payment by wire transfer may be made to: ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6229. The payment should note NAL/Acct. No. 200332170006.

14. The response if any must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division, and must include the NAL/Acct. No. referenced in the caption.

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of Apparent Liability For Forfeiture, 15 FCC Rcd 11, 295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23, 198 (2000).

²³ See *Carolina Liquidators, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC 16,837, 16,842 (2000); *21st Century Fax(es) Ltd., AKA 20th Century Fax(es)*, 15 FCC Rcd 24,406, 24,411 (2000).

²⁴ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²⁵ 47 C.F.R. § 1.80.

15. 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.

16. Requests for payment of the full amount of this *Notice of Apparent Liability for Forfeiture* under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁶

17. IT IS FURTHER ORDERED that a copy of this *Notice of Apparent Liability for Forfeiture* shall be sent by Certified Mail Return Receipt Requested to, Thomas Dubiel, 1670 Kettner Boulevard, San Diego, California and to Matt Flint, Matt Ryan and Thomas Paul, First Choice Healthcare, 1055 F Street, San Diego, California 92101.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁶ *Id.*

APPENDIX

<u>Complainants who were sent one facsimile solicitation</u>	<u>Violation Date</u>
Michael A Barasch	5/11/05
Back Yard Boutique	5/15/05
Wood Essentials	4/27/05
Pasco Kids First Inc.	6/27/05
Bob Pianka	8/28/05
Enchanted Florist Inc.	3/11/05
XTC SuperCenter	7/08/05
Waterproofing Contractors of Florida ²⁷	8/22/05
Liebig International Inc. ²⁸	6/23/05
Marvin Shuman ²⁹	7/18/05
Half Halt Press Inc. ³⁰	7/13/05
Avant Personnel LLC ³¹	3/03/05
Lois A. Roe ³²	6/15/05
John Staurulakis Inc. ³³	5/05/05
American Flags Express ³⁴	3/01/05

²⁷ Waterproofing Contractors asked First Choice not to send additional faxes and received at least one additional fax, but could not indicate when it received the fax.

²⁸ Liebig International asked First Choice not to send additional faxes and received additional faxes, but could not indicate when it received them.

²⁹ Mr. Shuman asked First Choice not to send additional faxes and received additional faxes, but could not indicate when he received them.

³⁰ Half Halt Press asked First Choice not to send additional faxes and received additional faxes, but could not indicate when it received them.

³¹ Avant Personnel asked First Choice not to send additional faxes and received additional faxes, but could not indicate when it received them.

³² Ms. Roe asked First Choice not to send additional faxes and received additional faxes, but could not indicate when she received them.

³³ John Starulakis Inc. asked First Choice not to send additional faxes and received additional faxes, but could not indicate when it received them.

³⁴ American Flags Express asked First Choice not to send additional faxes and received additional faxes, but could not indicate when it received them.

Complainants who were sent facsimile solicitations
after requesting that no more be sent

	<u>Violation Date</u>
Postal Plus Express	5/10/05, 7/18/05
Laurie Sieling	3/07/05, 3/08/05, 3/22/05, 3/23/05, 3/24/05
John S. Burke	10/12/05, 7/18/05, 7/21/05
Ronald Hodgins	7/13/05, 10/17/05, 10/26/05
Servisair/Globe Ground	3/10/05, 5/11/05, 5/17/05, 5/19/05, 5/25/05
Storybook Cruises, LLC	9/07/05, 10/24/05
Universal Interior	8/29/05, 10/05/05, 10/26/05
U.S. District Court Probation Office	9/09/05, 9/28/05, 10/25/05
My Music Store	8/25/05, 9/08/05, 9/20/05, 9/30/05, 10/27/05
Paper Trace Studio	9/19/05, 9/29/05
Equus Systems, Inc.	9/28/05, 10/04/05, 10/17/05
Panhandle Area Educational Consortium	10/03/05, 10/28/05
Danville Redevelopment and Housing Authority	9/22/05, 10/12/05, 10/24/05
It's Time to Travel	7/11/05, 7/11/05
Richard Payne	10/13/05, 10/14/05, 10/18/05, 10/21/05, 11/22/05
Kim Kohner	8/21/05, 11/07/05
Performance Insulation ³⁵	7/13/05, 7/20/05, 8/30/05, 9/09/05, 9/23/05, 9/28/05, 11/16/05
Mosetta Cohen	10/05/05, 10/07/05, 10/21/05, 11/03/05, 11/17/05
Capital Sheds, Inc.	7/27/05, 8/23/05, 8/24/05, 9/17/05, 10/12/05
Jerome Courshon	8/10/05, 8/31/05, 9/23/05, 10/06/05, 10/13/05, 10/17/05, 10/19/05
Sue Berry	8/02/05, 8/15/05, 9/09/05, 9/10/05, 10/12/05
Tees & Tops Uniforms	7/14/05, 7/30/05, 11/07/05, 11/23/05

³⁵ Performance Insulation received the first three of these faxes before it requested that First Choice not send any more faxes. However, after requesting that it receive no additional faxes, Performance Insulation received four more faxes on the dates indicated above.