

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

In the Matter of
Progressive Business
Apparent Liability for Forfeiture
File No. EB-06-TC-336
NAL/Acct. No. 200832170047
FRN: 0017770504

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 3, 2008

Released: June 3, 2008

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL")¹, we find that Progressive Business Publications, Inc. ("Progressive Business")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 nine unsolicited advertisements to the telephone facsimile machines of at least two consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that Progressive Business is apparently liable for a forfeiture in the amount of \$84,500.

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, Progressive Business Publications, Inc. is also doing business as Progressive Business and Progressive Business Compliance. Therefore, all references in this NAL to "Progressive Business" encompass Progressive Business Publications, Inc. as well as Progressive Business and Progressive Business Compliance. Progressive Business has offices at 370 Technology Drive, Malvern, PA 19355. Ed Satell, CEO, and Thomas D'Agostino, Esq., are listed as the contact persons for Progressive Business. Accordingly, all references in this NAL to "Progressive Business" also encompass the foregoing individuals 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).

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 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 September 11, 2006, in response to one consumer complaint alleging that Progressive Business had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁸ to Progressive Business, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited Progressive Business for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for business posters to a telephone facsimile machine, 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 Progressive Business 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 complaint that formed the basis of the citation.¹⁰ The citation informed Progressive Business that within 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. By letter dated September 19, 2006, Progressive Business asserted in reply that it did not send unsolicited faxes and claimed an established business relationship with the complainant, which Progressive Business identified as National By Products Co.¹¹ In fact, however, the complainant said he was an employee of the City of Wichita, Kansas and had not purchased anything from the company, made an inquiry to the company, or given consent to send the fax. Bureau staff spoke with counsel for Progressive Business by phone in an effort to resolve this inconsistency. Progressive Business did not, however, submit a further response or provide any basis for concluding that the complainant was in fact associated with National By Products Co. or otherwise had an established

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-06-TC-336, issued to Progressive Business on September 11, 2006.

⁹ 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).

¹⁰ Commission staff mailed the citation to Progressive Business, 370 Technology Drive, Malvern, PA 19355. See n.2, *supra*.

¹¹ Letter from Thomas D’Agostino, Esq., Progressive Business Publications to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, dated September 19, 2006.

business relationship with Progressive Business.

4. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, we have received three additional consumer complaints indicating that Progressive Business continued to engage in such conduct after receiving the citation.¹² We base our action here specifically on three complaints filed by two consumers establishing that Progressive Business continued to send nine unsolicited advertisements to telephone facsimile machines after the date of the citation.¹³

5. 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.¹⁴ 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."¹⁵

III. DISCUSSION

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

6. We find that Progressive Business 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 nine unsolicited advertisements to the two consumers identified in the Appendix. This NAL is based on evidence that two consumers received nine unsolicited fax advertisements from Progressive Business *after* the Bureau's citation. The facsimile transmissions advertise minimum wage posters for businesses. Further, according to the complaints, the consumers neither had an established business relationship with Progressive Business nor gave Progressive Business permission to send the facsimile transmissions.¹⁶ The faxes at issue here therefore fall within the definition of an "unsolicited advertisement."¹⁷ Based on the entire record, including the consumer complaints, we conclude that

¹² See Appendix for a listing of the consumer complaints against Progressive Business requesting Commission action.

¹³ We note that evidence of additional instances of unlawful conduct by Progressive Business may form the basis of subsequent enforcement action.

¹⁴ 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).

¹⁵ 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).

¹⁶ See, e.g., complaint dated July 18, 2007, from Morgan Muhlhauser; Superior Systems, Inc., (stating that he or she has never done any business with the fax advertiser, never made an inquiry or application to the fax advertiser, never gave permission for the company to send the fax, and requested the company not to fax an advertisement). The complainants involved in this action are listed in the attached Appendix.

¹⁷ See 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13) (definition previously at § 64.1200(f)(10)).

Progressive Business apparently violated section 227 of the Act and the Commission's related rules and orders by sending nine unsolicited advertisements to two consumers' facsimile machines.

B. Proposed Forfeiture

7. We find that Progressive Business is apparently liable for a forfeiture in the amount of \$84,500. 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.¹⁸ We apply that base amount to one of the apparent violations. In 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.¹⁹ Here, one consumer specifically requested that Progressive Business cease sending facsimiles. Notwithstanding these requests, an additional eight facsimiles were sent to this consumer. Thus, we apply the \$10,000 amount to each of eight apparent violations. Thus, a total forfeiture of \$84,500 is proposed. Progressive Business 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.²⁰

IV. CONCLUSION AND ORDERING CLAUSES

8. We have determined that Progressive Business Publications, Inc. 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 nine unsolicited advertisements to the two consumers identified in the Appendix. We have further determined that Progressive Business Publications, Inc is apparently liable for a forfeiture in the amount of \$84,500.

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, that Progressive Business Publications, Inc is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$84,500 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.

10. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's rules,²¹ within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, Progressive Business Publications, Inc SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

¹⁸ 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).

¹⁹ 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).

²⁰ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²¹ 47 C.F.R. § 1.80.

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 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). Progressive Business Publications, Inc. 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 to Progressive Business Publications, Inc., Attention: Ed Satell, CEO, and Thomas D’Agostino, Esq., 370 Technology Drive, Malvern, PA 19355.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Complainants and Violation Dates

Complainant received facsimile solicitations	Violation Date(s)
Brandon Schuster, Meadville Medical Center	7/18/2007

Complainant received facsimile solicitations after requesting no more be sent	Violation Date(s)
Morgan Muhlhauser; Superior Systems, Inc.	6/4/2007; 6/11/2007; 6/18/2007; 6/18/2007; 6/18/2007; 6/25/2007; 7/2/2007
Morgan Muhlhauser; Superior Systems, Inc.	7/18/2007