

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

In the Matter of
SMC, LLC
Apparent Liability for Forfeiture
File No. EB-05-TC-040
NAL/Acct. No. 200832170009
FRN: 0017313230

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: July 23, 2008

Released: July 24, 2008

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL")¹, we find that SMC, LLC ("SMC")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 fifty-nine unsolicited advertisements to the telephone facsimile machines of at least thirty consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that SMC is apparently liable for a forfeiture in the amount of \$348,000.

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 SMC has its office at 13612 Midway Road, #405, Farmers Branch, TX 75244. Greg Horne is listed as the contact person for SMC. In addition, SMC has offices at 6009 W. Parker Road, Suite 149-114, Plano, TX 75093; 13612 Midway Road, #405, Dallas, TX 75244 and 16901 Dallas Parkway, Addison, TX 75001. Accordingly, all references in this NAL to SMC also encompass the foregoing individual and all other principals and officers of this entity, as well as the corporate entity itself. Mr. Horne is also the contact person for The Hot Lead, LLC and RMG Communications, which have been the subject of prior enforcement actions. See RMG Communications, Notice of Apparent Liability for Forfeiture, 22 FCC RCD 17133 (2007); The Hot Lead, LLC, Forfeiture Order, 23 FCC Red 5282 (2008).

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 October 12, 2005, in response to one or more consumer complaints alleging that SMC had faxed unsolicited advertisements, the Commission’s Enforcement Bureau (“Bureau”) issued a citation⁸ to SMC, pursuant to section 503(b)(5) of the Act.⁹ The Bureau cited SMC for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for medical services offered by another entity, 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 SMC 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 SMC 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. SMC did not request an interview or otherwise respond to the citation.¹¹

4. Despite the citation’s warning that subsequent violations could result in the imposition of monetary forfeitures, we have received additional consumer complaints indicating that SMC continued to engage in such conduct after issuance of the citation.¹² We base our action here specifically on the

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-05-TC-040, issued to SMC on October 12, 2005.

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: 13612 Midway Road, Suite 405, Dallas, TX 75244-3410. See n.2, *supra*.

¹¹ Following the issuance of the citation, the Commission continued to receive complaints from multiple consumers alleging that SMC faxed unsolicited advertisements to them. These complaints, received after the Commission’s citation, resulted in the issuance of a Notice of Apparent Liability for Forfeiture against SMC on February 29, 2008, in the amount of \$458,500. See *SMC, LLC*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 3497 (2008).

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

(continued....)

complaints filed by thirty consumers establishing that SMC continued to send fifty-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 SMC 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 fifty-nine unsolicited advertisements to the thirty consumers identified in the Appendix. This NAL is based on evidence that the consumers received unsolicited fax advertisements from SMC *after* the Commission’s citation. The facsimile transmissions advertise affordable life insurance. Further, according to the complaints, the consumers neither had an established business relationship with SMC nor gave SMC 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 SMC apparently violated section 227 of the Act and the Commission’s related rules and orders by sending fifty-nine unsolicited advertisements to thirty consumers’ facsimile machines.

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¹³ We note that evidence of additional instances of unlawful conduct by SMC 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) (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*, FCC 08-154, rel. June 13, 2008 (when effective, forfeiture maximum for this type of violator increased to \$16,000).

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 August 25, 2007, from David Brown (stating that he has never done any business with the fax advertiser, never made an inquiry or application to the fax advertiser and never given permission for the company to send the fax); complaint dated August 22, 2007, from Melissa Spencer (stating that she has never done any business with the fax advertiser, never made an inquiry or application to the fax advertiser and never given permission for the company to send the fax). The complainants involved in this action are listed in the 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)).

B. Proposed Forfeiture

7. We find that SMC is apparently liable for a forfeiture in the amount of \$348,000. 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 each of forty-four 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, eight consumers specifically requested that SMC cease sending facsimiles. Notwithstanding these requests, SMC sent fifteen additional facsimiles to these consumers. We therefore apply the \$10,000 amount to each of these fifteen apparent violations. Thus, a total forfeiture of \$348,000 is proposed. SMC 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 SMC, LLC 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 fifty-nine unsolicited advertisements to the thirty consumers identified in the Appendix. We have further determined that SMC, LLC is apparently liable for a forfeiture in the amount of \$348,000.

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 SMC, LLC is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$348,000 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*, SMC, LLC 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 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

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.

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). SMC, LLC 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 SMC, LLC, Attention: Greg Horne, 13612 Midway Road, #405, Farmers Branch, TX 75244, 6009 W. Parker Road, Suite 149-114, Plano, TX 75093, 13612 Midway Road, #405, Dallas, TX 75244 and 16901 Dallas Parkway, Addison, TX 75001.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Complainants and Violation Dates

Complainant received facsimile solicitations	Violation Date(s)
Thomas Abbott	8/16/07
Todd Arnold	9/9/07, 9/12/07, 9/25/07
David Brown	8/25/07
Brenda Carlson	10/25/07
Jan Deswik	10/10/07
Constance Elliott	9/22/07, 10/18/07
D'Auric Gladney	8/10/07
Marla Goldstein	10/17/07
Tammy Kloser	9/11/07, 10/4/07
Kurt Kolb	9/19/07
Andrew Kraus	10/24/07
Alan MacIntyre	9/1/07, 9/30/07, 10/26/07
Laura Palmberg	10/1/07
Gisela Palmero	9/2/07
Ronald Sanders	8/8/07, 9/5/07
Harry Schultz	8/16/07, 9/11/07, 10/8/07
James Scielzo	9/25/07
Sung Shim	8/29/08
Wayne Smith	8/28/07, 9/11/07, 9/25/07
Melissa Spencer	8/17/07, 8/22/07
Gary Stacharowski	8/20/07, 9/7/07, 9/22/07
Carolyn Stock	9/26/07, 9/28/07, 10/4/07, 10/12/07
Ira Sutker	8/16/07, 10/11/07
Dewey Watkins	10/23/07
Gary Willis	8/26/07
Marvin Zekowitz	9/21/07

Complainant received facsimile solicitations after requesting no more be sent	Violation Date(s)
Mona Ewest	8/3/07, 8/6/07, 8/28/07
Randal Miles	7/25/07; 8/25/07
Marsha Montgomery	9/11/07
James Scielzo	10/4/07, 10/10/07
Wayne Smith	10/4/07, 10/9/07
Melissa Spencer	8/27/08, 9/11/07, 9/25/07
Carolyn Stock	10/16/07
Katie Williams	8/28/07