

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

In the Matter of)
EZPMG, Inc. and)
Kenneth Elias) File Nos. EB-07-TC-1568,
) EB-07-TC-12725
Apparent Liability for Forfeiture)
) NAL/Acct. No. 200832170067
) FRN: 0017996802
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 15, 2008

Released: August 21, 2008

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL")¹, we find that EZPMG, Inc. and Kenneth Elias ("EZPMG")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 ninety unsolicited advertisements to the telephone facsimile machines of at least seventy-eight consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that EZPMG is apparently liable for a forfeiture in the amount of \$443,500.

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 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 EZPMG, Inc. has offices at 28 Harrison Avenue, Suite 213, Englishtown, NJ 07726. Kenneth Elias, owner and president of EZPMG, also has offices at 28 Harrison Avenue, Suite 213, Englishtown, NJ 07726, and is listed as the contact person for EZPMG. Accordingly, all references in this NAL to EZPMG also encompass the foregoing individual 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 April 17, 2007, in response to one or more consumer complaints alleging that EZPMG had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation⁸ to EZPMG, pursuant to section 503(b)(5) of the Act.⁹ The citation warned EZPMG 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. Soon thereafter, the Commission staff issued a citation to Mr. Kenneth Elias, owner of EZPMG.¹⁰ The Bureau cited both Kenneth Elias and EZPMG for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for mortgage services to a telephone facsimile machine, in violation of section 227 of the Act and the Commission’s related rules and orders.¹¹ The citations informed both Kenneth Elias and EZPMG that within 30 days of the date of the citation, they could either request an interview with Commission staff, or could provide a written statement responding to the citation. On April 24, 2007 and August 1, 2007, EZPMG responded to the citations.¹²

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-07-TC-1568 issued to EZPMG, Inc. on April 17, 2007 (“April 2007 citation”).

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 See Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-07-TC-12725 issued to Mr. Kenneth Elias on July 23, 2007 (“July 2007 citation”).

¹¹ Bureau staff mailed the April 17, 2007 citation to the following address: EZPMG, Inc., Attn: Kenneth Elias, 28 Harrison Avenue, Englishtown, NJ 07726. See n.2, *supra*. Bureau staff mailed the July 23, 2007 citation to the following address: Mr. Kenneth Elias, 28 Harrison Avenue, Suite 213, Englishtown, NJ 07726. See n.8, *supra*.

¹² On April 24, 2007, EZPMG, Inc. responded to the April 2007 citation. Mr. Kenneth B. Elias, President, EZPMG, Inc., to Kurt A., Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, dated April 24, 2007. On August 1, 2007, EZPMG, Inc. responded to the July 2007 citation. Mr. Kenneth B. Elias, President, EZPMG, Inc., to Kurt A., Schroeder, Deputy Chief, Telecommunications

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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 EZPMG continued to engage in such conduct after issuance of the citation.¹³ We base our action here specifically on complaints filed by seventy-eight consumers establishing that EZPMG continued to send ninety unsolicited advertisements to telephone facsimile machines after the date of the citation.¹⁴

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.¹⁵ 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."¹⁶

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Consumers Division, Enforcement Bureau, Federal Communications Commission, dated August 1, 2007. Both of EZPMG's responses stated, among other things, that the fax numbers used to transmit the advertisements were publicly listed on the Internet, and yellow page listings. Kenneth Elias, owner of EZPMG, included internet pages, from which the fax numbers were obtained. The Act and our rules, however, explicitly require that a fax sender must first have an established business relationship with the fax recipient before using a fax number from a voluntarily published source to send unsolicited fax advertisements. *See* 47 U.S.C. § 227(b)(1)(C)(i)-(iii); 47 C.F.R. § 64.1200(a)(3) (unsolicited fax ads prohibited unless sender has EBR with recipient *and* the fax number was obtained, inter alia, from a directory, advertisement, or Internet site to which the recipient voluntarily made the number available for distribution); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278 and 05-338, *Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3793-96 (2006)(burden of proof to demonstrate established business relationship is on the sender; senders of facsimile advertisements must have an EBR with the recipient in order to send the advertisement to the recipient's facsimile number; 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). Here, the record shows that EZPMG apparently did not have the requisite EBR with the fax recipients before using published fax numbers.

¹³ *See* Appendix for a listing of the consumer complaints against EZPMG requesting Commission action.

¹⁴ We note that evidence of additional instances of unlawful conduct by EZPMG may form the basis of subsequent enforcement action.

¹⁵ 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).

¹⁶ 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).

III. DISCUSSION

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

6. We find that EZPMG 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 ninety unsolicited advertisements to the seventy-eight consumers identified in the Appendix. This NAL is based on evidence that seventy-eight consumers received unsolicited fax advertisements from EZPMG after the Bureau's citation. The facsimile transmissions advertise mortgage services. Further, according to the complaints, the consumers neither had an established business relationship with EZPMG nor gave EZPMG permission to send the facsimile transmissions.¹⁷ The faxes at issue here therefore fall within the definition of an "unsolicited advertisement."¹⁸ Based on the entire record, including the consumer complaints, we conclude that EZPMG apparently violated section 227 of the Act and the Commission's related rules and orders by sending ninety unsolicited advertisements to seventy-eight consumers' facsimile machines.

B. Proposed Forfeiture

7. We find that EZPMG is apparently liable for a forfeiture in the amount of \$443,500. 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.¹⁹ We apply that base amount to each of eighty-three 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.²⁰ Here, five consumers specifically requested that EZPMG cease sending facsimiles. Notwithstanding these requests, EZPMG sent seven additional facsimiles to these consumers. We therefore apply the \$10,000 amount to each of these seven apparent violations. Thus, a total forfeiture of \$443,500 is proposed. EZPMG 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.²¹

¹⁷ See, e.g., complaint dated August 27, 2007, from Stephen Wallace (stating that he has never done any business with the fax advertiser, never made an inquiry or application to the fax advertiser, never given permission for the company to send the fax, and requested that the fax advertiser not fax advertisements to him.). The complainants involved in this action are listed in the Appendix.

¹⁸ See 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13) (definition previously at § 64.1200(f)(10)).

¹⁹ 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).

²⁰ 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).

²¹ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

IV. CONCLUSION AND ORDERING CLAUSES

8. We have determined that EZPMG, 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 ninety unsolicited advertisements to the seventy-eight consumers identified in the Appendix. We have further determined that EZPMG, Inc. is apparently liable for a forfeiture in the amount of \$443,500.

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 EZPMG, Inc. is hereby NOTIFIED of this APPARENT LIABILITY FOR A FORFEITURE in the amount of \$443,500 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,²² within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, EZPMG, Inc. 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 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). EZPMG, 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.

²² 47 C.F.R. § 1.80.

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 EZPMG, Inc., Attention: Kenneth Elias, 28 Harrison Avenue, Suite 213, Englishtown, NJ 07726.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Complainants and Violation Dates

Complainant received facsimile solicitations	Violation Date(s)
Wallace, Stephen	8/27/07
Russell, Martha	8/28/07
Volodin, Dmitriy	8/28/07
Edgar, William	8/28/07
Leonard, Robert	8/29/07
Yurow, Lois	8/30/07
Asper, John	9/4/07
Drew, Rick	9/4/07
Lunt, Richard	9/4/07
Kanowitz, Joseph	9/5/07
LaVesser, Cindy	9/7/07
Baasch, Dennis	9/10/07
Bruno, Kenneth	9/10/07
Rizzuto, Hugo	9/11/07
Simon, Jeffrey	9/11/07
Teudt, Jr., Gerald	9/11/07
Wharton, Paul	9/10/07
Davies, Lawrence	9/12/07
Fan, Joseph	9/12/07
Host, Douglas	9/12/07
Huddleston, James	9/12/07
Porterfield, Charlotte	9/12/07
LeFountain, Kitty	9/12/07
Chapman, Michael	9/12/07
McCord, Jennifer	9/12/07
Luke, A.	9/12/07
Lidman, William	9/17/07
Cantor, Alicia	9/17/07
Barret, Paul	9/18/07
Moore, Paul	9/18/07, 10/9/07, 10/17/07
Yusem, Stuart	9/18/07
Clay, Jewel	9/19/07
Koennecke, John	9/19/07, 10/30/07
Shiver, Sandy	9/19/07
Brown, Christopher	9/19/07
McNair, Bruce	9/24/07
McWethy, Thomas	9/24/07
Hogg, Susan	9/26/07
Yurow, Louis	9/27/07
Borum, Darrell	10/1/07
Tilden, R. Bryan	10/1/07, 10/3/07
Hagar, Derek	10/1/07
Hickey, Betty	10/2/07
Hochhalter, Lanny	10/2/07, 10/12/07
Blue, Carter	10/2/07
Lopez, Giselle	10/2/07

Avery, L	10/3/07
Tepper, Samuel	10/5/07, 10/31/07
Berry, Carl	10/8/07
Mack, Larry	10/8/07
Freeman, Martin Lee	10/9/07
Gross, Lisa	10/9/07, 10/10/07, 10/17/07
Dye, Vicki	10/15/07
Adams, Cody	10/16/07
Brabham, Martin	10/31/07
Brooks, Pauletta	10/22/07
Bryant, Lynae	10/30/07
Busa, Anthony	10/24/07
Gierak, Richard	10/11/07
Goldstein, Paul	10/23/07
Haberberger, Susan	10/15/07
Little, Kathy	9/12/07
Manuel, Mel	10/30/07
Morris, Dan	10/30/07
Morton, Ann	10/11/07
Munoz-Vourakis, Marisa	10/10/07
Padsensky, Dj	10/22/07
Peacock, Scott	10/11/07
Pinera, Hector Y.	10/10/07
Ripley, Matthew	10/16/07
Rugh, Clayton	10/15/07
Sherman, Joe	9/20/07
Thometz, Tim	10/16/07
Veal, LaKeidra	10/16/07
Williams, Kevin	10/30/07

Complainant received facsimile solicitations after requesting no more be sent	Violation Date(s)
Adams, Cody	10/24/07
Farquharson, Bill	10/11/07
Gibbons, Cathy	10/10/07
Haberberger, Susan	10/25/07
Wharton, Paul	9/11/07, 9/17/07, 10/16/07