

**Before the
Federal Communications Commission
Washington, DC 20554**

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| In the Matter of |) | File No.: EB-TCD-13-00007541 |
| |) | |
| Message Communications, Inc. |) | NAL/Acct. No.: 201432170012 |
| |) | |
| |) | FRN: 0020352423 |

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: July 11, 2014

Released: July 11, 2014

By the Acting Chief, Enforcement Bureau:

I. INTRODUCTION

1. We propose a penalty of \$25,000 against Message Communications, Inc. (Message Communications or Company) for obstruction of an Enforcement Bureau (Bureau) investigation into the Company's compliance with the Communications Act and our rules relating to the practice of making calls using artificial or prerecorded voice messages—"robocalling." Robocalls may be made to consumers' cell phones only if the consumer has consented or during an emergency—all other robocalls to cell phones are illegal. Congress has authorized the Federal Communications Commission to investigate illegal robocalls and, where we find violations, to enforce these consumer protection laws. The Bureau is investigating Message Communications' compliance with robocalling rules, yet the Company has repeatedly failed to answer the Bureau's questions and to produce documents. We will not tolerate attempts by Message Communications or any other company to evade or ignore our lawful inquiries—particularly questions related to compliance with laws that protect consumers from harm.

II. BACKGROUND

2. Message Communications offers robocalling services to various third-party clients. Message Communications' clients pay the Company to make artificial or prerecorded voice calls to telephone numbers of the clients' choosing.¹

3. The Bureau's Telecommunications Consumers Division (Division) initiated an investigation of Message Communications to determine whether the Company had violated federal laws and FCC regulations governing robocalls.² On March 28, 2013, the Division sent a letter of inquiry (LOI) to Message Communications, ordering the Company to provide certain information and documents.³ On April 24, 2013, Division staff spoke by telephone to Robert Mahanian, president of Message Communications. Mr. Mahanian stated that he had received the LOI and was represented by counsel who would handle the Company's response and would contact the Division to discuss the investigation.

¹ See Message Communications Website, Voice Broadcasting Features, <http://www.messagecommunications.com/Features.html> (last visited Jul. 8, 2014).

² 47 U.S.C. § 227(b)(1)(A)(i)–(iii); 47 C.F.R. § 64.1200(a)(1)(i)–(iii)

³ Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Robert Mahanian and Message Communications (Mar. 28, 2013) (on file in EB-TCD-13-00007541) (LOI).

4. On April 25, 2013, Division staff began speaking to and e-mailing with David B. Felsenthal, counsel for Message Communications, concerning the LOI.⁴ Message Communications requested an extension of time to respond to the LOI until June 7, 2013, when the Company filed its response to the LOI (Response).⁵ Upon review, the Division determined that the Response was materially deficient. The LOI required the Company to provide documentation and information for the specific time period identified in the LOI, namely, September 1, 2012, to March 28, 2013. Instead, the Response included only documents and information dating from late March 2013 to mid- to late-April 2013; a time period almost wholly outside the period of interest specified in the LOI.

5. On June 13, 2013, the Division e-mailed Mr. Felsenthal and made him aware of the deficiencies in the Response.⁶ The Division requested that Mr. Felsenthal “contact [Division staff] as soon as possible to discuss/explain the apparent gaps” in the Response.⁷ Mr. Felsenthal failed to respond to the Division’s June 13 e-mail. Division staff followed up by telephone and e-mail on June 21, 2013, requesting that counsel contact the Division “as soon as possible to discuss the deficiencies in your client’s response.”⁸ Neither Mr. Felsenthal nor the Company responded to the Division’s request.

6. On October 23, 2013, the Division issued a Citation to Message Communications for failure to comply with an FCC order and required the Company to take immediate steps to comply with the LOI by providing the missing information and documents.⁹ The Citation warned Message Communications that it is under a continuing obligation to respond to the LOI and that each day the Company fails to respond is a continuing violation, each day of which constitutes a separate violation for which enforcement action may be taken.¹⁰ The Company was given until November 22, 2013, to respond to the Citation.¹¹

⁴ E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (Apr. 25, 2013, 17:48 EDT) (on file in EB-TCD-13-00007541); E-mail from David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc., to Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (May 28, 2013, 19:30 EDT) (on file in EB-TCD-13-00007541); E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (May 29, 2013, 9:35 EDT) (on file in EB-TCD-13-00007541); E-mail from David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc., to Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (June 5, 2013, 1:57 EDT) (on file in EB-TCD-13-00007541); E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 5, 2013, 10:52 EDT) (on file in EB-TCD-13-00007541).

⁵ Letter from David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc., to Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (filed June 7, 2013, in EB-TCD-13-00007541).

⁶ See E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 13, 2013, 10:59 EDT) (on file in EB-TCD-13-00007541).

⁷ *Id.*

⁸ E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 21, 2013, 15:00 EDT) (on file in EB-TCD-13-00007541).

⁹ *Message Comm’s, Inc.*, Citation - Failure to Comply with an FCC Order, 28 FCC Rcd 14523 (Enf. Bur. 2013) (Citation).

¹⁰ *Id.* at 14525–26, para. 9.

¹¹ *Id.* at 14526, para. 10.

7. On November 25, 2013, Robert Mahanian submitted a written response to the Citation on behalf of Message Communications. The Company's response, in its entirety, was "[t]he Company stands by its June 7, 2013 written response and documents provided to the FCC in response to the FCC's [LOI] dated March 28, 2013."¹² To date, Message Communications has not provided any of the missing documents and files, and it has offered no explanation for its continued lack of compliance with the terms of the LOI and requirements of the Citation.

I. DISCUSSION

A. Failure to Respond Fully to the LOI

8. Section 503(b)(1) of the Communications Act of 1934, as amended (Act), states that any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹³ It is well established that a failure to respond to a letter of inquiry from the Bureau constitutes a violation of a Commission order.¹⁴ The LOI directed Message Communications to provide certain information related to use of automatic dialing equipment and the Company's compliance with federal Do-Not-Call regulations. This information is necessary to enable the Bureau to perform its investigatory function. Message Communications has not provided any explanation for its failure to provide the requested information, despite attempts by Division staff to discuss and rectify the matter.

9. Moreover, the Citation provided actual notice to the Company that its failure to respond to the LOI was an actionable violation of a valid Commission order¹⁵ and gave the Company an opportunity to take corrective action without penalty.¹⁶ The Citation directed the Company to provide the missing documents and information and warned Message Communications that if it continued to ignore its obligation to respond, then it could be subject to further legal action, including forfeiture penalties based on both the conduct that led to the Citation and any conduct following it.¹⁷ In response to the Citation, Message Communications provided no additional information or documentation but instead sent a single-sentence reply that the Company "stands behind" its original, insufficient response.¹⁸ Therefore, in light of well-established Commission precedent, Message Communications' failure to provide the information and documents required by the Bureau's LOI constitutes an apparent willful and repeated violation of a Commission Order.

¹² Letter from Robert Mahanian, president of Message Communications, Inc., to Telecommunications Consumers Division, Federal Communications Commission (Nov. 25, 2013) (on file in EB-TCD-13-00007541) (Citation Response).

¹³ 47 U.S.C. § 503(b)(1)(B). *See also* 47 C.F.R. § 1.80(a)(1).

¹⁴ 47 U.S.C. § 503(b)(1)(B). *See Conexions, LLC d/b/a Conexion Wireless*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 15318 (2013); *Technical Commc'n Network, LLC*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 1018 (Enf. Bur. 2013); *Google, Inc.*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 4012 (Enf. Bur. 2012) (*Google NAL*); *Net One Int'l, Net One, LLC, Farrahtel Int'l, LLC*, Notice of Apparent Liability for Forfeiture and Order, 26 FCC Rcd 16493 (Enf. Bur. 2011) (*Net One NAL*); *SBC Commc'ns, Inc.*, Forfeiture Order, 17 FCC Rcd 7589 (2002) (*SBC Forfeiture Order*).

¹⁵ *See* 47 U.S.C. § 155(c)(3) ("Any order . . . or action made or taken pursuant to any [] delegation . . . shall have the same force and effect . . . and [be] enforced in the same manner, as orders . . . of the Commission").

¹⁶ Citation, 28 FCC Rcd at 14525–26, para. 9.

¹⁷ *Id.*

¹⁸ *See* Citation Response.

B. Proposed Forfeiture Amount

10. Section 503(b)(2)(D) of the Act authorizes the Commission to assess a forfeiture against the Company of up to \$16,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$122,500 for any single continuing violation.¹⁹ In determining the appropriate forfeiture amount, we consider the factors enumerated in Section 503(b)(2)(E) of the Act, including 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.”²⁰ Our forfeiture guidelines set forth the base amount for certain kinds of violations, and identify criteria consistent with the Section 503(b)(2)(E) factors, that may influence whether we adjust the base amount downward or upward. For example, we may adjust a penalty upward for “[e]gregious misconduct,” or where the subject of an enforcement action has engaged in an “[i]ntentional violation” or a “[r]epeated or continuous violation.”²¹

11. Pursuant to Section 1.80 of the Commission’s rules and the Commission’s *Forfeiture Policy Statement*, the base forfeiture amount for failure to respond to Commission communications is \$4,000.²² However, we have issued penalties for failure to respond that far exceeded the \$4,000 base forfeiture, including cases in which the targets answered some of the LOI questions, but failed to answer them completely or provide all of the required information. For example, in 2012, the Bureau assessed Google, Inc. a forfeiture of \$25,000 for failing to answer all of the Bureau’s questions and failing to produce required documents.²³ Similarly, in 2010, the Bureau penalized Fox Television Stations, Inc. \$25,000 for submitting an incomplete response to an LOI.²⁴

12. In view of the facts and circumstances apparent from the record, we find that Message Communications’ apparent failure to fully respond to the Bureau’s LOI in the circumstances presented here warrants a forfeiture of \$25,000. This forfeiture is appropriate given the extent and willfulness of the continuing violation, and the insufficiency of the Response and Citation Response.²⁵ After receiving follow-up telephone calls and e-mails, a formal Citation, and ample opportunity to comply, Message Communications has still not fully responded to the LOI or provided any explanation for its continued lack of compliance with an FCC order. Moreover, the Company’s willful disregard of its obligation to

¹⁹ 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(7). Section 503(b)(2)(D) provides for forfeitures of up to \$10,000 for each violation or each day of a continuing violation, up to a maximum of \$75,000 for a single continuing violation in cases, as here, where the violation does not involve a Commission licensee or common carriers, among others. *See* 47 U.S.C. § 503(b)(2)(D). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(D) to \$16,000 for each violation or each day of a continuing violation, up to a maximum of \$112,500 for any single continuing violation. *See* 47 C.F.R. § 1.80(b). *See also* *Amendment of Section 1.80(b) of the Commission’s Rules, Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008). In 2013, the Commission increased its maximum statutory forfeitures to reflect further inflation. *See Amendment Of Section 1.80(b) Of The Commission’s Rules, Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 28 FCC Rcd 10785 (Enf. Bur. 2013); *see also* *Inflation Adjustment of Monetary Penalties*, 78 Fed. Reg. 49,370-01 (Aug. 14, 2013) (setting Sept. 13, 2013, as the effective date for the increases).

²⁰ 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

²¹ 47 C.F.R. § 1.80(b)(8) & note.

²² 47 C.F.R. § 1.80; *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, 17114, Appendix A, Section I (1997) *recons. denied*, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

²³ *See generally* *Google NAL*, 27 FCC Rcd 4012.

²⁴ *See Fox Television Stations, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 7074 (Enf. Bur. 2010) (*Fox NAL*).

²⁵ *See* 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8) & note.

comply continues unabated. As we have noted in previous cases involving a failure to respond to FCC inquiries, “[m]isconduct of this type exhibits contempt for the Commission’s authority, and threatens to compromise the Commission’s ability to adequately investigate violations of its rules.”²⁶

13. We also direct Message Communications to respond fully to the LOI within ten (10) calendar days of the date of this Notice of Apparent Liability for Forfeiture and Order (NAL). Failure to do so may constitute an additional, continuing violation subjecting the Company to future enforcement action. Consistent with our precedent, other parties that engage in activities subject to the Act and the Commission’s rules are on notice that a failure to respond properly to a Bureau letter of inquiry constitutes a violation of a Commission order that is subject to enforcement action. Moreover, we notify the Company that Section 409(m) of the Act provides for criminal penalties, including fines and incarceration for up to one year, for any person who “neglect[s] or refuse[s] to . . . answer any lawful inquiry” or produce documents when required by subpoena or other lawful requirement of the FCC.²⁷ Continued neglect or refusal to answer the Bureau’s inquiries may subject the Company and its principals to both fine and imprisonment.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission’s rules, 47 C.F.R. § 1.80, Message Communications, Inc. is hereby **NOTIFIED** of this **APPARENT LIABILITY FOR FORFEITURE AND ORDER** in the amount of \$25,000 for willfully violating an Enforcement Bureau directive to respond to a letter of inquiry.

15. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Commission’s rules, 47 C.F.R. § 1.80, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Message Communications, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

16. **IT IS FURTHER ORDERED** that Message Communications, Inc. **SHALL FULLY RESPOND**, not later than ten (10) calendar days from the release date of this NAL, to the Bureau’s letter of inquiry dated March 28, 2013, in accordance with the delivery instructions set forth therein.

17. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Message Communications, Inc. shall send electronic notification of payment to Johnny Drake at Johnny.Drake@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²⁸ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions you should follow based on the form of payment you select:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

²⁶ See *Net One NAL*, 26 FCC Rcd at 16495, para. 7 (quoting *Fox NAL*, 25 FCC Rcd at 7081, para. 15).

²⁷ 47 U.S.C. § 409(m).

²⁸ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

Any request for full payment under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.²⁹ If you have questions regarding payment procedures, please contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

16. The response, if any, must be mailed both to: Marlene H. Dortch, Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554, ATTN: Enforcement Bureau – Telecommunications Consumers Division; and to Richard A. Hindman, Division 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. Documents sent by overnight mail (*other than* United States Postal Service Express Mail) must be addressed to: Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. Hand or messenger-delivered mail should be directed, without envelopes, to: Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, DC 20554 (deliveries accepted Monday through Friday 8:00 a.m. to 7:00 p.m. only). See www.fcc.gov/osec/guidelines.html for further instructions on FCC filing addresses.

17. The Commission will not consider reducing or canceling a proposed 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.

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by Certified Mail Return Receipt Requested and First Class mail to Message Communications, Inc. c/o David B. Felsenthal, Novian & Novian LLP, 1801 Century Park East, Suite 1201, Los Angeles, CA 90067.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Acting Chief
Enforcement Bureau

²⁹ See 47 C.F.R. § 1.1914.