

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

In the Matter of )
Tri-State Printer & Copier Supply Co., Inc. )
d/b/a Tri-State Printer and Supply )
d/b/a Tri-State Printer & Copier )
d/b/a Tri-State Printer & Copier Co. )
File No. EB-04-TC-102
NAL/Acct. No. 200832170059
FRN: 0016644700

FORFEITURE ORDER

Adopted: July 28, 2009

Released: July 29, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Forfeiture Order ("Order"), we issue a monetary forfeiture in the amount of \$9,000 against Tri-State Printer & Copier Supply Co. Inc. ("Tri-State") for willful or repeated violations of section 227 of the Communications Act of 1934, as amended ("Act") and the Commission's related rules and orders, by delivering at least two unsolicited advertisements to the telephone facsimile machines of at least two consumers.

II. BACKGROUND

2. The facts and circumstances surrounding this case are set forth in the Commission's Notice of Apparent Liability for Forfeiture and need not be reiterated at length.

3. 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

1 47 U.S.C. § 227.

2 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).

3 See Tri-State Printer & Copier Supply Co., Inc., Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 11036 (Enf. Bur. 2008) ("2008 NAL").

unsolicited advertisement.”<sup>4</sup> 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.”<sup>5</sup> Under the Commission’s rules, an “established business relationship”<sup>6</sup> 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.<sup>7</sup>

4. On June 4, 2004, in response to one or more consumer complaints alleging that Tri-State had faxed unsolicited advertisements, the Enforcement Bureau (“Bureau”) issued a citation<sup>8</sup> to Tri-State, pursuant to section 503(b)(5) of the Act.<sup>9</sup> The Bureau cited Tri-State for using a telephone facsimile machine, computer, or other device, to send unsolicited advertisements for printers, copiers and toner cartridges, in violation of section 227 of the Act and the Commission’s related rules and orders. The citation warned Tri-State 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.<sup>10</sup> The citation informed Tri-State 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. Tri-State did not request an interview or otherwise respond to the citation.

5. Following the issuance of the citation, the Commission received complaints from two consumers alleging that Tri-State faxed at least two unsolicited advertisements to them. These violations, which occurred after the Bureau’s citation, resulted in the issuance of a Notice of Apparent Liability for Forfeiture against Tri-State on June 27, 2007, in the amount of \$9,000.<sup>11</sup> The 2007 NAL ordered Tri-State to either pay the proposed forfeiture amount within thirty (30) days or submit evidence or arguments in response to the 2007 NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed. Tri-State did not respond to the 2007 NAL. Accordingly, on April 22, 2008, the Commission issued a Forfeiture Order to Tri-State based on the 2007 NAL in the amount of \$9,000. Following the

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<sup>4</sup> 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

<sup>5</sup> See 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(13).

<sup>6</sup> 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.” See 47 U.S.C. § 227(a)(2); see also 47 C.F.R. § 64.1200(f)(5).

<sup>7</sup> See 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. §§ 64.1200(a)(3)(i), (ii).

<sup>8</sup> Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, File No. EB-04-TC-102, issued to Tri-State on June 4, 2004.

<sup>9</sup> 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).

<sup>10</sup> Bureau staff mailed the citation to the following address: Tri-State, 16 Court Street, Brooklyn, NY 11241-0102, Attention: John Smith, Domenica Gambino, and Harry Samuel; 71 N. Franklin Street, Hempstead, NY 11550-3049, Attention: John Smith, Domenica Gambino, and Harry Samuel; 660 2<sup>nd</sup> S. Place, Garden City, NY, 11530-5204, Attention: John Smith, Domenica Gambino, and Harry Samuel.

<sup>11</sup> See *Tri-State Printer & Copier Supply Co., Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 11556 (Enf. Bur. 2007) (“2007 NAL”); see also 47 U.S.C. § 503(b)(1).

issuance of the Forfeiture Order, the Commission received additional complaints from two consumers alleging that Tri-State faxed at least two unsolicited advertisements to them. These violations resulted in the issuance of a Notice of Apparent Liability for Forfeiture against Tri-State on July 18, 2008, in the amount of \$9,000.<sup>12</sup> The 2008 NAL ordered Tri-State to either pay the proposed forfeiture amount within thirty (30) days or submit evidence or arguments in response to the 2008 NAL to show that no forfeiture should be imposed or that some lesser amount should be assessed. Tri-State responded to the 2008 NAL, stating that it had created fax lists from customer contacts and requesting copies of the complaints that formed the basis of both the 2007 NAL and the 2008 NAL.<sup>13</sup> The Bureau provided copies of the complaints to Tri-State.<sup>14</sup> Tri-State did not file a supplemental response to either the 2007 NAL or the 2008 NAL.

### III. DISCUSSION

6. Section 503(b) of the Act authorizes the Commission to assess a forfeiture 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. The maximum penalty for such a violation is \$11,000 for a violation occurring before September 2, 2008, and \$16,000 for a violation occurring on or after September 2, 2008.<sup>15</sup> 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.”<sup>16</sup>

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<sup>12</sup> See n.3 *supra*; see also 47 U.S.C. § 503(b)(1).

<sup>13</sup> Letter from Harry Samuel to Colleen Heitkamp, Chief, Telecommunications Consumers Division, Enforcement Bureau, FCC, received August 22, 2008.

<sup>14</sup> Fax from Kimberly A. Wild, Attorney, Telecommunications Consumers Division, Enforcement Bureau, FCC, to Harry Samuel, Tri-State, dated September 25, 2008.

<sup>15</sup> Section 503(b)(2)(C) provides for forfeitures of 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) first to \$11,000 and more recently to \$16,000. 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)(forfeiture maximum for this type of violator set at \$11,000); *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*, 23 FCC Rcd 9845 (2008) (amendment of section 1.80(b) to reflect inflation increased the forfeiture maximum for this type of violator to \$16,000).

<sup>16</sup> See 47 U.S.C. § 503(b)(2)(D); see also *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).

7. 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.<sup>17</sup> We apply that base amount to the two apparent violations.

8. Tri-State, in its response to the *2008 NAL*, appeared to raise an established business relationship defense for the complaints in question. After receiving copies of the complaints, however, it did not substantiate that defense with the necessary documentation, despite repeated requests from the Bureau to do so. Tri-State has failed to identify facts or circumstances to persuade us that there is a basis for modifying the proposed forfeiture, and we are not aware of any further mitigating circumstances sufficient to warrant a reduction of the forfeiture penalty. For these reasons, and based on the information before us, we hereby impose a total forfeiture of \$9,000 for Tri-State's willful or repeated violation of section 227 of the Act and the Commission's related rules and orders, as set forth in the *2008 NAL*.

#### IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), and under authority delegated by sections 0.111, 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, that Tri-State Printer & Copier Supply Co., Inc. IS LIABLE FOR A MONETARY FORFEITURE to the United States Government the sum of \$9,000 for willfully and repeatedly violating section 227(b)(1)(c) of the Communications Act, 47 U.S.C. § 227(b)(1)(c), section 64.1200(a)(3) of the Commission's rules, 47 C.F.R. § 64.1200(a)(3), and the related orders as described in the paragraphs above.

10. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within thirty (30) days of the release of this Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to section 504(a) of the Act.<sup>18</sup> 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). Tri-State will also send electronic notification on the date said payment is made to [Johnny.drake@fcc.gov](mailto: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](mailto:ARINQUIRIES@fcc.gov) with any questions regarding payment procedures.

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<sup>17</sup> 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).

<sup>18</sup> 47 U.S.C. § 504(a).

11. IT IS FURTHER ORDERED that a copy of the Forfeiture Order shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Tri-State, Attn: Harry Samuel, 930 Briars Bend, Alpharetta, GA 30004.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief, Enforcement Bureau