

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of
Message Communications, Inc.
File No.: EB-TCD-13-00007541

CITATION

FAILURE TO COMPLY WITH AN FCC ORDER

Adopted: October 23, 2013

Released: October 23, 2013

By the Chief, Telecommunications Consumers Division, Enforcement Bureau:

I. INTRODUCTION

1. This is an official CITATION, issued by the Federal Communications Commission (Commission or FCC) pursuant to Section 503(b)(5) of the Communications Act of 1934, as amended (Communications Act or Act) to Message Communications, Inc. and Mr. Robert Mahanian (collectively, Message Communications or Company) for failing to comply with a Commission order issued by the Enforcement Bureau (Bureau) pursuant to delegated authority in a Letter of Inquiry (LOI) dated March 28, 2013.

II. BACKGROUND

2. The Bureau's Telecommunications Consumers Division (Division) is investigating the Company for its compliance with federal laws and FCC regulations concerning the use of automatic dialing equipment and the federal Do-Not-Call regulations, specifically, Section 227(b) of the Communications Act and Section 64.1200 of the FCC's rules. On March 28, 2013, the Division sent an

1 47 U.S.C. § 503(b)(5).

2 See 47 U.S.C. § 155(c)(3).

3 Section 227(b)(1)(A) of the Communications Act and Section 64.1200(a)(1) of the Commission's rules specify that unless a call is made for emergency purposes or with the prior express consent of the called party, it is unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States, to initiate calls using an automatic telephone dialing system or an artificial or prerecorded voice: 1) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency); 2) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or 3) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call. See 47 U.S.C. § 227(b)(1)(A)(i)-(iii); 47 C.F.R. § 64.1200(a)(1)(i)-(iii). By making prerecorded message calls on behalf of itself or third parties (its clients), Message Communications necessarily "initiates" calls for the purposes of Section 64.1200 of the FCC's rules. See Joint Petition Filed by DISH Network, LLC, for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules, Declaratory Ruling, FCC 13-54, 2013 WL 1934349, at para. 26 (May 9, 2013) ("a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call.").

LOI to Message Communications initiating its investigation.⁴ On April 24, 2013, Division staff called and spoke with Robert Mahanian, president of Message Communications. Mr. Mahanian acknowledged that he had received the LOI and stated that he was represented by counsel. Mr. Mahanian stated that his attorney would be handling the Company's response and would contact the Division to discuss the matter.

3. Beginning on April 25, 2013, Division staff spoke by telephone and corresponded by email with David B. Felsenthal, counsel for Message Communications, concerning the LOI.⁵ On June 7, 2013, Message Communications filed its response to the LOI.⁶ The Response was materially deficient. Among other things, the LOI ordered the Company to provide certain documents and information relating to the Company's activities during the time period of September 1, 2012, to March 28, 2013. The Response, in contrast, only included documents and information dating from late March 2013 through mid- to late-April 2013—i.e., almost wholly outside the period of interest specified in the LOI.

4. On June 13, 2013, the Division e-mailed counsel for the Company and outlined the deficiencies in the Response.⁷ The Division requested that Mr. Felsenthal "contact [Division staff] as soon as possible to discuss/explain the apparent gaps in your client's response."⁸ When counsel for the Company failed to respond to the Division's e-mail, Division staff followed up by phone and by e-mail again on June 21, 2013, requesting that Mr. Felsenthal contact the Division "as soon as possible to discuss" the matter.⁹

5. Neither counsel for the Company nor Message Communications/Robert Mahanian ever responded to the Division's e-mail and telephone messages. To date, Message Communications has not provided any of the apparently missing documents and files, and has offered no explanation for its continued lack of compliance with the terms of the LOI.

⁴ Letter from Richard A. Hindman, Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to Message Communications, Inc. (March 28, 2013) (on file in EB-TCD-13-00007541) (LOI).

⁵ See E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (April 25, 2013, 5:48 PM EDT) (on file in EB-TCD-13-00007541); E-mail from David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (May 28, 2013, 7:30 PM EDT) (on file in EB-TCD-13-00007541); E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (May 29, 2013, 9:35 AM EDT) (on file in EB-TCD-13-00007541); E-mail from David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 5, 2013, 1:57 AM EDT) (on file in EB-TCD-13-00007541); E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 5, 2013, 10:52 AM EDT) (on file in EB-TCD-13-00007541).

⁶ See Letter from David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc., to Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission (June 7, 2013) (on file in EB-TCD-13-00007541).

⁷ See E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 13, 2013, 10:59 AM EDT) (on file in EB-TCD-13-00007541).

⁸ *Id.*

⁹ See E-mail from Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, to David B. Felsenthal, Novian & Novian LLP, Counsel to Message Communications, Inc. (June 21, 2013, 3:00 PM EDT) (on file in EB-TCD-13-00007541).

III. APPLICABLE LAW AND VIOLATIONS

6. Sections 4(i), 4(j), and 403 of the Communications Act¹⁰ afford the Commission broad authority to investigate potential violations of the Act. Section 4(i) authorizes the Commission to “issue such orders, not inconsistent with this [Act], as may be necessary in the execution of its functions.”¹¹ Section 4(j) states that “[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”¹² Section 403 grants the Commission “full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this [Act], or concerning which any question may arise under any of the provisions of this [Act], or relating to the enforcement of any of the provisions of this [Act].”¹³ Further, Section 403 gives “[t]he Commission . . . the power to make and enforce any order or orders” relating to its inquiries into compliance with the Act.¹⁴

7. Pursuant to this authority, the Division sent an LOI to Message Communications on March 28, 2013, directing the Company to provide certain information and documents in connection with its investigation into the Company’s compliance with Section 227(b) of the Act and Section 64.1200 of the FCC’s rules.¹⁵ Company president Robert Mahanian and Company counsel David B. Felsenthal acknowledged to Division staff that the Company had received the LOI, and by its counsel the Company provided a response on June 7, 2013. As noted above, however, the Response was materially deficient and failed to provide numerous documents and files required by the LOI.¹⁶ A party may not ignore the directives in a Commission order issued by the Bureau pursuant to delegated authority in an LOI.¹⁷ Message Communications’ violation is particularly egregious because “[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.”¹⁸

8. Accordingly, we find that Message Communications has violated a Commission order by failing to provide the information and documents required by the LOI and by the filing deadline of June 7, 2013.

IV. NOTICE OF DUTY TO COMPLY WITH LAW:

9. Message Communications is hereby on notice that if it subsequently engages in any conduct of the type described in this Citation it may be subject to further legal action, including monetary fines (forfeitures). Such forfeitures may be based on both the conduct that led to this Citation and the

¹⁰ 47 U.S.C. §§ 154(i), 154(j), 403.

¹¹ 47 U.S.C. § 154(i).

¹² 47 U.S.C. § 154(j).

¹³ 47 U.S.C. § 403.

¹⁴ *Id.*

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

¹⁶ *See* paras. 3–4, above.

¹⁷ *See* 47 U.S.C. § 503(b)(1)(B). *See also* *Technical Commc’n Network, LLC*, Notice of Apparent Liability for Forfeiture and Order, 28 FCC Rcd 1018 (Enf. Bur. 2013) (TCN 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); *LDC Commc’ns, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 27 FCC Rcd 300 (Enf. Bur. 2012); *SBC Commc’ns, Inc.*, Forfeiture Order, 17 FCC Rcd 7589 (2000).

¹⁸ *See* TCN NAL, 28 FCC Rcd at 1020; *Fox Television Stations, Inc.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 7074, 7081 (Enf. Bur. 2010) (“**Prompt** and full responses to Bureau inquiry letters are **essential** to the Commission’s enforcement function.”) (emphasis added).

conduct following it.¹⁹ In this regard, we warn Message Communications that it is under a continuing obligation to respond to the LOI. Further, failure to respond to the LOI is a continuing violation and each day that the Company fails to respond constitutes a separate violation for which enforcement action may be taken.²⁰ Accordingly, by this Citation, Message Communications is on notice that it is obligated to take immediate steps to comply with the LOI by providing the information and documents identified therein to ensure that it does not continue to violate the Communications Act.

V. RESPONDING TO THIS CITATION

10. Message Communications may respond to this Citation within thirty (30) days from the release date of this Citation either through (1) a written statement, (2) a teleconference interview with the Commission's Telecommunications Consumers Division in Washington, DC, or (3) a personal interview at the Commission Field Office nearest to its place of business.

11. If the Company would like to arrange a teleconference or personal interview, please contact Kristi Thompson at (202) 418-1318. Such teleconference or interview must take place within thirty (30) days of the date of this Citation. If the Company would like to submit a written response, including any supporting documentation, the Company must send the response within thirty (30) days of the date of this Citation to the address below:

Richard A. Hindman, Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, SW, Rm. 4-C224
Washington, DC 20554

In addition, the Company must send an electronic copy to Kristi Thompson at kristi.thompson@fcc.gov. **Reference EB-TCD-13-00007541 when corresponding with the Commission.**

12. Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation needed including as much detail as possible. Also include the name and contact information for the individual we can contact if we need more information. Please allow at least five (5) business days advance notice; last minute requests will be accepted, but may be impossible to fill. Send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations: 202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format): 202-418-0531 (voice), 202-418-7365 (tty).

13. If the Company chooses to respond to this Citation, be advised that it is a violation of Section 1.17 of the Commission's rules (47 C.F.R. § 1.17) for any person or a staff member of that person to make any false or misleading written or oral statement of fact. Specifically, no person shall:

¹⁹ See 47 U.S.C § 503(b)(5). See also S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (if a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability “**would attach not only for the conduct occurring subsequently but also for the conduct for which the citation was originally sent.**”) (emphasis added).

²⁰ 47 U.S.C. § 503(b)(2)(D). See Section VI—Future Compliance, below.

In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.²¹

14. Further, the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation is punishable by fine or imprisonment under 18 U.S.C. § 1001.

15. If Message Communications violates Section 1.17 of the Commission's rules or the criminal statute referenced above, the Company may be subject to further legal action, including monetary fines pursuant to Section 503 of the Communications Act.

16. Under the Privacy Act of 1974, 5 U.S.C. § 552a(e)(3), we are informing you that the Commission's staff will use all relevant material information before it, including information that you disclose in your interview or written statement, to determine what, if any, enforcement action is required to ensure your compliance with the Communications Act and the Commission's rules.

VI. FUTURE COMPLIANCE

17. If, after receipt of this Citation, Message Communications violates the Communications Act or the FCC's rules by engaging in conduct of the type described herein, the Commission may impose monetary forfeitures of up to \$16,000 for each such violation or each day of a continuing violation, up to a statutory maximum of \$122,500 for any single continuing violation.²² In addition, violations of the Communications Act or the Commission's rules can result in criminal sanctions, including imprisonment.²³

²¹ 47 C.F.R. § 1.17.

²² 47 U.S.C. § 503(b)(2)(D). 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, DA 13-1615, 78 FR 49371 (Rel. Aug. 1, 2013) (amendment of section 1.80(b) to reflect inflation increased the forfeiture maxima applicable in this case).

²³ *See* 47 U.S.C. §§ 401, 501.

VII. ORDERING CLAUSES

18. **IT IS ORDERED** that a copy of this Citation shall be sent by first class mail and certified mail to Robert Mahanian, 861 N. Norman Place, Los Angeles, CA 90049, with a copy to David B. Felsenthal, Novian & Novian, LLP, 1801 Century Park East, Suite #1201, Los Angeles, CA 90067.

FEDERAL COMMUNICATIONS COMMISSION

Richard A. Hindman
Chief
Telecommunications Consumers Division
Enforcement Bureau