

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)	
)	File No. EB-02-TC-120
Fax.com, Inc.)	NAL/Acct. No. 200232170004
)	FRN 0007-2970-47
Apparent Liability for Forfeiture)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 2, 2002

Released: August 7, 2002

By the Commission: Commissioner Abernathy issuing a statement.

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that Fax.com, Inc. (Fax.com)¹ apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended (Act),² and the Commission's rules and orders, by sending unsolicited advertisements to telephone facsimile machines on 489 separate occasions.³ Based on the facts and circumstances surrounding these apparent violations, we find that Fax.com is apparently liable for forfeiture in the amount of \$5,379,000.⁴

¹ Fax.com, Inc. is headquartered at 120 Columbia Street, Suite 500, Aliso Viejo, California 92656. According to Dun & Bradstreet Business Information Report, Fax.com began operations in 1998. Fax.com is a closely held corporation whose president, Mr. Kevin Katz, owns 35% of the capital stock. Value Capital owns 33% of capital stock and Fax.com employees own the remaining 32% of capital stock. See Dun & Bradstreet Business Information Report, April 3, 2002. For purposes of this NAL, we specify that Fax.com encompasses all affiliated entities, successors, and assigns as well as its corporate officers, Mr. Katz, Thomas Roth, Jeffrey Dupree, and Eric Wilson.

² Section 227 was added to the Communications Act of 1934 by the Telephone Consumer Protection Act of 1991, Pub.L. 102-243, 105 Stat. 2394, and is most commonly known as the TCPA.

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*, 7 FCC Rcd 8752, 8779, (1992) (*TCPA Report and Order*) (stating that section 227 of the Act prohibits the use of telephone facsimile machines to send unsolicited advertisements).

⁴ 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"

II. BACKGROUND

2. Fax.com characterizes itself as a “fax broadcaster,” transmitting messages to telephone facsimile machines on behalf of other entities for a fee. According to its website, Fax.com specializes in transmitting its clients’ advertisements to telephone facsimile machines whose numbers are contained in the Fax.com database, which it touts as “the industry’s largest fax number database.”⁵ In its promotional materials, Fax.com also offers to design or improve its clients’ advertising copy.⁶ The unsolicited facsimile advertisements that are the subject of this NAL are the product of Fax.com’s fax broadcasting enterprise. With the exception of one message,⁷ the advertisements do not promote products, goods, or services provided by Fax.com but, instead, promote a wide variety of products, goods, or services offered by numerous entities that have employed Fax.com to send their advertisements to telephone facsimile machines.

3. In December 2000 and May 2001, after receiving correspondence from consumers who complained about having been faxed unsolicited advertisements on behalf of six Fax.com clients, the Commission staff issued citations to Fax.com⁸ pursuant to section 503(b)(5) of the Act.⁹ The staff cited Fax.com for allegedly violating section 227(b)(1)(C) of the Act and

⁵ See <http://www.fax.com/Services/faxblast.asp> (website accessed May 29, 2002). Fax.com’s website, copyrighted 2000, contains the following additional claims:

Fax.com is the only company that can boast 16 million fax numbers. With another 16 million records soon available, Fax.com will be the leading place to purchase fresh fax broadcasting data. http://www.fax.com/company_profile/our_business.asp (website accessed May 29, 2002).

Broadcast your advertising fax based on radius, Zip Codes, Metro Area, Area Code, County, State or the entire U.S. using a database that will exceed 30 million fax numbers. http://www.fax.com/Why_use_fax/direct.asp (website accessed May 29, 2002).

⁶ See http://www.fax.com/Consumer_support/FAQs.asp (website accessed May 29, 2002) (“If you would like, we can send you a questionnaire about your company, consult with you and design outstanding fax broadcast ads for you.”); http://www.fax.com?Services/addl_seerv.asp (website accessed May 29, 2002) (“Our design department will work with you to design your fax ad, choose type fonts, create graphics, and develop the ideal fax that will achieve the greatest response.”).

⁷ See note 40, *infra*.

⁸ Citation letters from Kurt A. Schroeder, Deputy Chief, FCC Telecommunications Consumers Division to Kevin Katz, Fax.com President (Dec. 26, 2000; May 11, 2001; May 31, 2001) (collectively *Fax.com Citations* or staff citations).

⁹ 47 U.S.C. § 503(b)(5). Under section 503(b)(5), the Commission may not assess a forfeiture penalty against any person that does not hold a license, permit, certificate, or other Commission authorization, and is not an applicant for such instruments, unless “(A) such person 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.” We note that this section does not require the multiple citations given by the staff here; only a single citation was necessary before initiation of a forfeiture proceeding.

section 64.1200(a)(3) of the Commission's rules by transmitting unsolicited advertisements to consumers' telephone facsimile machines on behalf of the six clients.¹⁰ The citations noted that

although entities that merely transmit facsimile messages on behalf of others are not liable for compliance with the prohibition on faxing unsolicited advertisements, the exemption from liability does not exist when a fax transmitter has "a high degree of involvement or actual notice of an illegal use and [has] fail[ed] to take steps to prevent such transmissions." Accordingly, fax transmitters do not enjoy an absolute exemption from liability under the TCPA and the Commission's Rules.¹¹

4. The citations informed Fax.com that it could face monetary forfeitures up to \$11,000 for each subsequent violation if Fax.com either (1) was highly involved on behalf of the sender of any unsolicited facsimile advertisements, or (2) continued to transmit advertisements for the six named clients without taking steps to ensure that those entities had obtained permission from recipients to fax the advertisements. The citations also directed Fax.com to answer several questions regarding its general practices with respect to its fax broadcasting activities and its specific arrangements with the six clients. Finally, the citations informed Fax.com that within 21 days of the date of each citation, it could either request a personal interview at the nearest Commission field office, or provide a written statement responding to the citation.

5. On January 31, 2001, June 1, 2001, and June 21, 2001, Fax.com responded to the citations with virtually identical pleadings that were filed jointly on behalf of Fax.com and its six cited clients. In each instance, Fax.com and the clients claimed that the prohibition on faxing unsolicited advertisements contained in section 227 and the Commission's implementing regulations is an unconstitutional infringement on the First Amendment free speech rights of Fax.com and its advertisers. Fax.com also addressed the staff's questions regarding its fax broadcasting operations. In that regard, Fax.com claimed that although it offers clients "advice and assistance relative to graphics presentations," it had not exercised any editorial control over any of the advertisements that were at issue in the six citations.¹² Nonetheless, Fax.com

¹⁰ The staff also cited the following Fax.com clients for alleged violations of section 227 and the Commission's rules and orders: Platinum Travel Club and Teleconcepts Technologies; Colorjet, Inc.; Millenium Marketing and Sales, Ltd.; Website University; US Travel Services, Inc.; and Advanced Cellular Communications, Inc. This proceeding does not encompass any actions against the cited companies.

¹¹ *Fax.com Citations* at 2 (footnotes omitted) (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12407 (1995) (*TCPA Memorandum Opinion and Order*)); *TCPA Report and Order*, 7 FCC Rcd 8752, 8780 (1992) (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987)).

¹² January 31 Response at 27; June 1 Response at 28; June 21 Response at 27.

emphasized that it retains discretion to refuse to transmit any advertisement it deems “offensive or misleading.”¹³ Fax.com stated that it provided the fax distribution lists for each of six clients whose advertisements were addressed by the citations. Fax.com explained that it compiles its database of telephone facsimile numbers by (1) purchasing lists of fax numbers from independent vendors, (2) identifying fax numbers “through its own research methods,” and (3) recording fax numbers provided by individuals who have asked, through an automated process, to be included in Fax.com’s database. With respect to the telephone facsimile numbers obtained from independent vendors and Fax.com’s research efforts, Fax.com conceded that it “has historically taken no steps to verify consent or established business relationships.”¹⁴ Fax.com stated that it “routinely” sends what it characterizes as a “non-commercial” message regarding missing children to each number added to the Fax.com database.¹⁵ Entitled “Your Permission Please,” the message “asks” recipients to agree to receive from Fax.com alerts regarding missing children. The message states that “to help offset the cost’ of the missing children alerts, Fax.com will also send “a limited amount of commercial paid advertising” not to exceed one fax per week. The message instructs recipients who do not wish to receive the alerts or advertisements to call a toll-free “opt-out” number. Finally, Fax.com emphasized that it only transmits advertisements that contain such an opt-out number that fax recipients may call if they do not wish to receive similar advertisements in the future.¹⁶

6. Following Fax.com’s receipt of the staff’s citations, the Commission has continued to receive information from numerous consumers indicating that Fax.com is still conducting its fax broadcasting activities in a manner that apparently violates section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of the rules. The forfeiture proposed herein is based on this body of consumer information, which alleges that after Fax.com’s receipt of the staff’s citations, consumers continued to receive a variety of unsolicited facsimile advertisements, all traceable to Fax.com.

7. Table 1, “Unsolicited Advertisements Transmitted by Fax.com and Subject to Forfeiture Pursuant to FCC 02-226,” lists 489 unsolicited fax advertisements that form the basis of this NAL.¹⁷ Although only one of these advertisements mentions Fax.com in any way, some

¹³ January 31 Response at 27; June 1 Response at 29; June 21 Response at 28.

¹⁴ January 31 Response at 30; June 1 Response at 31-32; June 21 Response at 30.

¹⁵ January 31 Response at 30-31; June 1 Response at 32; June 21 Response at 31. Judging by information provided by consumers to this Commission, it does not appear that Fax.com is using this message routinely at the present time; only one such message is included in the instant forfeiture action. *See* note 40, *infra*.

¹⁶ January 31 Response at 28-29; June 11 Response at 27; June 21 Response at 27-28.

¹⁷ As set forth in Table 1, these unsolicited facsimile advertisements were received by 46 individuals, businesses, or government offices between September 2001 and March 2002. Although some consumers’ correspondence and related declarations detail additional unsolicited advertisements received before August 7, 2001, we do not list these violations in Table 1 because they are beyond the one-year statute of limitations set forth in section 503(b)(6)(B) of the Act, 5 U.S.C. § 503(b)(6)(B). Finally, we note that evidence of additional instances of unlawful conduct by Fax.com, subject to section 503(b)(6)(B)’s statute of limitations, may form the basis of additional enforcement actions.

consumers were able to discover that Fax.com had transmitted the ads. By obtaining information that identifies Fax.com as the telephone subscriber for (1) the various toll-free opt-out telephone numbers that are displayed on each advertisement, and/or (2) the telephone facsimile machine numbers from which various advertisements were sent, which are displayed in the advertisements' fax headers, the Commission staff has confirmed that Fax.com sent each advertisement listed in Table 1.

8. Nine consumers have provided information showing that they each received over 20 unsolicited and unwanted advertisements that were transmitted by Fax.com clients on behalf of its clients.¹⁸ The remaining 36 consumers have provided between one and 16 unsolicited fax ads each.¹⁹ Each consumer who has provided information regarding the fax messages at issue herein has signed a declaration, under penalty of perjury, attesting that he or she (1) is either the owner of or responsible for the telephone facsimile machine that received the advertisement(s); (2) did not have an established business relationship with either Fax.com or the entity whose products, goods, or services were being advertised; and (3) did not grant prior express permission or invitation for the faxes to be sent.²⁰

9. Consumer complaints about the faxes offer a snapshot of the disruption, expense, and inconvenience caused by Fax.com's unwanted fax transmissions.²¹ For instance, several

¹⁸ See Table 1 recording faxes received by Robert Isaac Carr (27 faxes), George D. Demet (29 faxes), Robert R. Dzimidas (21 faxes), L. ("Les") R. Docks (24 faxes), Allan Howard Frey (21 faxes), Heather Ann Hartnett (30 faxes), Douglas M. McKenna (95 faxes; 28 faxes – residential line, 67 faxes – business line), John P. Strang (30 faxes), and Wayne George Strang (48 faxes).

¹⁹ Some consumers indicate that they actually have received far more advertisements from Fax.com than they have submitted to the Commission. See Facsimile message from John Koltun to Evelyn Dyson, FCC Telecommunications Consumers Division (Apr. 12, 2002); facsimile message from George Craig (on behalf of Gary Chou, Internal Revenue Service) to Evelyn Dyson, FCC Telecommunications Consumers Division (Mar. 18, 2002).

²⁰ One consumer describes particular circumstances to show that he neither solicited the faxes nor permitted another individual to do so on his behalf. See Declaration of Wayne George Strang (Jul. 22, 2002) (stating that Mr. Strang is the only member of his household and, thus, the only individual entitled to grant access to his telephone facsimile machine).

²¹ Although not the basis for our action here, we note that accounts in public media, litigation against Fax.com, and correspondence to the Commission describe in detail substantial disruption and expense caused by Fax.com's widespread fax broadcasting of unsolicited advertisements. See "E-Mail Bill May Fail to Curtail Spamming," Brett Arquette, eWEEK Magazine, www.eweek.com/article/0,3658,s=1868&a=8229,00.asp, 2001 WL 4412169 (July 16, 2001) (describing disruption caused by business organization's receipt of up to 1,000 faxes per week from Fax.com):

We have 320 DID (direct inward dialing) fax numbers assigned to our organization and recently had to add two more inbound trunks to keep up with the number of unsolicited faxes Fax.com was pumping out. During one week, Fax.com took up all four of the inbound lines that feed our 320 RightFax server numbers for 1.5 hours, virtually shutting down our fax system for that time.

consumers describe being awakened very late at night or in the early hours of the morning by the noise of their fax machines receiving an unsolicited advertisement from a Fax.com client.²² Another consumer, Elkins Cox, describes the expense and inconvenience of receiving Fax.com's unwanted transmission on an older telephone facsimile machine and states that he has chosen to turn off his machine rather than deal with the stream of unsolicited advertisements.²³ Robert McMeekin, M.D., complains about receiving unsolicited advertisements on a line that is reserved

See also "Fighting Back on the Fax," Ed Foster, InfoWorld Magazine, 2001 WL 22048648 (Aug. 13, 2001) (relaying readers' reports of disruption caused by Fax.com: "We received over 100 faxes from Fax.com even though we had previously opted out for all our 135 or so incoming phone numbers. . ."); *Covington & Burling v. International Marketing & Research, Inc., et.al.*, Second Amended Complaint, Civil Action No. 01-004360 (D.C. Superior Court, filed Dec. 13, 2001) (\$2.45 million lawsuit alleging Fax.com "bombed" law firm with 1,634 unsolicited advertisements during one week, "substantially interfer[ing] with the work of the firm."); Letter from Phillip L. Verveer and David M. Don, counsel for j2 Global Communications, Inc. to Kurt Schroeder, Deputy Chief, FCC Telecommunications Consumers Division (May 9, 2001) (describing disruption to j2's business operations caused by faxes transmitted by Fax.com and other fax broadcasters that send unsolicited advertisements):

Over the last several months, Fax.com and American Blast Fax (and its affiliates) have flooded j2s telephone facsimile lines with hundreds of unsolicited faxes, despite j2's requests that they cease and desist transmission of unsolicited faxes. The flood of unsolicited advertisements severely disrupts the j2 service, interferes with customers' abilities to utilize the services, and on many occasions, crashes j2's servers for several hours at a time during the workday. When a server crashes, j2 customers are unable to access their accounts and thus cannot receive or send faxes and voicemails using the j2 service. Delivery of legitimate faxes to customers' email accounts is often delayed for hours.

See also "j2 Global Communications, Inc. Secures Agreement to End Unsolicited Fax Spam," j2 Global Communications, Inc. Press Release, <http://biz.yahoo.com/prnews/020130/law050> (Jan 30, 2002) (reporting that j2 secured an agreement to end Fax.com's transmission of unsolicited fax advertisements to j2's more than 4.5 million customers).

²² *See* Letter from James Allan Dobbins to the Direct Marketing Association (Oct. 4, 2001); facsimile message from Richard V.N. Ginn to Carmen Bates, FCC Telecommunications Consumers Division (Mar. 16, 2002); Letter from Steven M. Greenberg to FCC (Dec. 7, 2001); Letter from Sally Collins to FCC Consumer Information Bureau (Dec. 13, 2001).

²³ Letter from Elkins Cox to FCC Consumer Information Bureau (Sep. 21, 2001) and attached letter from Elkins Cox to Georgia Governor's Office of Consumer Affairs (Sep. 5, 2001) ("In my home setup, I must answer the phone, realize it is a fax call, and transfer the call to the fax machine," which prints the fax at a cost of \$.30 per page).

for the receipt of patient medical data, and emphasizes the serious disruption to patient care caused by such unwanted faxes.²⁴

10. Some consumers complain about unsuccessful attempts to remove their telephone facsimile machine numbers from Fax.com's database and describe frustration with Fax.com's automated opt-out lines, which do not identify Fax.com as the entity responsible for the fax number database.²⁵ Fax.com is not identified on its clients' advertisements and similarly, in many cases, the advertiser itself is unnamed.²⁶ In such instances, consumers describe difficulties in ascertaining the entity to which they should direct a complaint about receipt of the faxes. Some consumers who were able to contact either the advertiser or Fax.com report that they encountered hostility, misrepresentation, and unresponsiveness. For example, Andrew Hansis has asked the Commission to take action with respect to two unsolicited advertisements he received in October 2001, neither of which identified the company whose service was being

²⁴ Letter from Robert R. McMeekin, M.D. to FCC Consumer Information Bureau (Jan. 11, 2002). Dr. McMeekin mistakenly identifies two faxes as being transmitted on October 31 and December 31, 2000. The faxes included with Dr. McMeekin's letter contain header information that shows that they actually were received on those days in the year 2001.

²⁵ Information provided by consumers indicates that Fax.com continued to send faxes even after receiving opt-out calls. For instance, a log provided by William Robert White, President of Regency Sales, Inc., documents over 50 attempts between May 2000 and August 2001 to use Fax.com's opt-out numbers to halt Regency's receipt of unsolicited advertisements from Fax.com clients. Despite these attempts, Fax.com continued to transmit unsolicited advertisements to Regency, as evidenced by at least 12 faxes received by Regency from December 2001 to February 2002. See Table 1; see also Letter from Andrew Hansis to Consumer Information Bureau (Oct. 5, 2001) (*October 5 Hansis Letter*) (stating that Mr. Hansis continued to receive faxes even after using Fax.com's automated opt-out system and speaking with a senior Fax.com employee in an effort to end the faxing); Consumer Form for Telephone-Related Issues from Norman Jensen, III (rec'd Jan. 8, 2002) (consumer continued to receive at least one advertisement a week despite "repeatedly" calling opt-out numbers and faxing a message to the originating fax number asking that his telephone facsimile number be removed from the fax number database); Consumer Form for Telephone-Related Issues from Dora Wong Goto (rec'd Oct. 15, 2001) (*Goto Complaint Form*); annotated copies of faxes submitted by James Allan Dobbins. It is clear that a call to one Fax.com opt-out line does not end all fax transmissions from the company. We emphasize here that even an effectively administered opt-out system does not change the statutory ban on sending unsolicited facsimile advertisements or insulate such transmissions from statutory penalties. However, the fact that Fax.com apparently does not even adhere to its own stated procedures makes its conduct even more egregious.

²⁶ Over 20 per cent of the faxes listed in Table 1 do not identify the entity whose products, goods, or services are being advertised. Section 227(d)(1)(B) of the Act and section 68.318 of the Commission's rules require that all faxes display in a margin at the top or bottom of each page or on the first page of a fax transmission, the following information: the date and time of transmission; the name of the individual, business, or other entity that sent the fax; and the telephone number of either the sending machine or the individual, business, or other entity responsible for sending the fax. With respect to identification requirements for the fax sender and the telephone number of the sender or sending machine, the Commission has determined that the entity that creates the content of the fax message is generally responsible for compliance. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Order on Further Reconsideration*, 12 FCC Rcd 4609, 4610 n.7, 4613 (1997) (finding that liability rests with entity that is responsible for the content of the fax message, not with a fax broadcaster that does "not determine the message content or to whom they are sent.") If, however, a fax broadcaster voluntarily chooses to place its own identifying information on a message faxed for another entity, "it must be clear which entity is the content originator and which entity is merely the transmitter of the message." 12 FCC Rcd at 4613.

advertised.²⁷ With respect to the first advertisement, Mr. Hansis states that he called the telephone number provided on the advertisement for service orders and was provided with a name and telephone number of a “responsible individual” with whom he could discuss the unsolicited advertisement. After unsuccessfully attempting to reach this individual, Mr. Hansis reports he received a telephone call from Charles Martin, an employee of Fax.com. According to Mr. Hansis, Mr. Martin “was unwilling to tell me the source of how the number was placed in the database, only that it was ‘called in’” at an earlier date.²⁸

III. DISCUSSION

11. Section 227(b)(1)(C) of the Act prohibits any person from using “a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”²⁹ An unsolicited advertisement is defined 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.”³⁰ The Commission has determined that an established business relationship between a fax sender and recipient demonstrates consent to receive telephone facsimile advertisement transmissions.³¹ The mere distribution or publication of a telephone facsimile number, however, does not confer invitation or permission to transmit advertisements to a particular telephone facsimile machine.³²

A. Constitutional Issue.

12. Fax.com and its client advertisers have argued that the broad prohibition on sending unsolicited facsimile advertisements violates their constitutional right to free speech guaranteed under the First Amendment. Federal courts have previously considered similar arguments. For example, the Court of Appeals for the Ninth Circuit, where Fax.com is located, has determined that the TCPA does not violate the First Amendment’s protection of commercial

²⁷ Letter from Andrew Hansis to Consumer Information Bureau (Oct. 4, 2001) (*October 4 Hansis Letter*); *October 5 Hansis Letter*.

²⁸ *October 4 Hansis Letter*; see, e.g., *Goto Complaint Form* (consumer made two calls to Fax.com but was unable to reach a live person or have calls returned).

²⁹ 47 U.S.C. § 227(b)(1)(C). Section 227 defines a telephone facsimile machine as “equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” *Id.* § 227(a)(2). This blanket prohibition applies to all unsolicited advertisements transmitted to telephone facsimile machines. The Act does not permit the sending of unsolicited advertisements by facsimile to either business or residential telephone facsimile machines.

³⁰ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

³¹ See *TCPA Report and Order*, 7 FCC Rcd at 8779 n. 87; *TCPA Memorandum Opinion and Order*, 10 FCC Rcd at 12408.

³² *Id.*

speech.³³ Moreover, administrative agencies are to presume that the statutes that Congress directs them to implement are constitutional.³⁴ Accordingly, we reject Fax.com's arguments in this regard.

B. Fax.com's Liability Under 47 U.S.C. § 227(b)(1)(C) and 47 C.F.R. § 64.1200(a)(3).

13. Because of the nature of its operations, Fax.com is liable for violations of section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of our rules even though it generally acts on behalf of other parties in sending unsolicited advertisements to telephone facsimile machines. The Commission has held that the prohibition on sending unsolicited fax advertisements does not apply to fax broadcasters that operate like common carriers by merely transmitting their customers' messages without determining either content or destination.³⁵ In finding that such entities are not liable under section 227(b)(1)(C) of the Act or section 64.1200(a)(3) of the rules, the Commission has focused on the nature of an entity's activity rather than any label that that entity may claim. Specifically, the Commission's rulings clearly indicate that a fax broadcaster's exemption from liability is based on the type of activities it undertakes, and only exists "[i]n the absence of 'a high degree of involvement or actual notice of an illegal use and failure to prevent such transmissions.'"³⁶ Regardless of whether Fax.com characterizes itself as a disinterested fax broadcaster, it is clear that the company's activities place it outside the exempted category of fax broadcasting applied by Commission and render it a fax sender within the meaning of section 227(b)(1)(C).

14. The record here clearly establishes that Fax.com uses its own extensive distribution list of telephone facsimile numbers to send its clients' advertisements, and that it knowingly sends advertisements to such numbers without regard to whether the facsimile machine owner or responsible party either granted permission to send the advertisement or had

³³ See *Destination Ventures v. FCC*, 46 F.3d 54, 55-57 (9th Cir. 1995) (ban on unsolicited fax advertisements does not violate the advertiser's First Amendment rights because it reasonably fits the government's interest in preventing the shifting of advertising costs to consumers); see also *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1167-69 (S.D. Ind. 1997) (ban on unsolicited fax advertisements is narrowly tailored to achieve the government's intended purpose and does not violate the First Amendment guarantee of commercial free speech); *Texas v. American Blast Fax*, 121 F. Supp. 2d 1085, 1091-92 (W.D. Tex. 2000). But see *Missouri v. American Blast Fax*, 196 F. Supp. 920 (E.D. Mo. 2002), appeal pending Nos. 02-2705, 02-2707 (8th Cir.) (government failed to demonstrate that the harms associated with unsolicited facsimile advertisements are real, that the blanket prohibition on faxing such materials would significantly alleviate such harms, and that the prohibition was not more extensive than necessary to serve the government's interests). The latter case is not implicated in this NAL because none of the fax transmissions for which we are assessing a forfeiture were received in or, to our knowledge, sent from the eastern judicial district of Missouri.

³⁴ *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (quoting *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdictions of administrative agencies.")).

³⁵ *TCPA Memorandum Opinion and Order*, 10 FCC Rcd at 12407. See *TCPA Report and Order*, 7 FCC Rcd at 8780.

³⁶ *Id.* (quoting *Use of Common Carriers*, 2 FCC Rcd at 2820).

an established business relationship with the advertiser or Fax.com.³⁷ In addition, Fax.com apparently reviews the text of its clients' advertisements, not only to assist with graphic design,³⁸ but also to assess content.³⁹ Such conduct is clear evidence of Fax.com's high degree of involvement in the unlawful activity. Moreover, the staff's citations provided Fax.com with actual notice that its fax broadcasting activities do not comply with federal law.

C. Violations Evidenced by the Consumer Correspondence.

15. As an initial matter, the staff has reviewed every facsimile that forms the basis for this NAL to confirm that each message advertises the commercial availability or quality of a product, good or service and, thus, constitutes an advertisement as set forth by section 227(a)(4) of the Act and section 64.1200(f)(5) of our rules.⁴⁰ Further, the record indicates that the consumers at issue neither granted express permission to send the advertisements nor had an established business relationship with either Fax.com or the entities on whose behalf the advertisements were faxed.⁴¹ In light of this information, we conclude that the 489 faxes

³⁷ See para. 5, *supra*.

³⁸ See note 6, *supra*.

³⁹ Fax.com's website states that "[a]s a responsible service provider, Fax.com makes a conscious effort to censor any offensive literature or graphic content from its platform." http://www.fax.com/company_profile/our_business.asp (website accessed May 29, 2002). In addition, as indicated above, in response to our citations, Fax.com has suggested that it may review its clients' advertisements to ensure that they are not "offensive or misleading." See para. 5, *supra*. Such editorial influence is inconsistent with Fax.com's claim that it does not exercise control over the content of its clients' advertisements. Fax.com's close involvement in the undertakings of its clients is evidenced by the fact that Fax.com is the subscriber for the toll-free sales number (800-550-0406) displayed on one of its client's advertisements. See, e.g., Advertisements from Infinity Communications to Heather Ann Hartnett (Nov. 2, 2001; Dec. 12, 2001).

⁴⁰ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5); see para. 8, *supra*. The advertisements include promotions for cellular telephone service, stock market offerings, commercially offered seminars, clocks, vacation packages, office supplies and equipment, and insurance services. The Moneyline Report's stock advertisements, claim, "This Fax is intended for information purposes only and is not a commercial solicitation under the Telephone Consumer Protection Act. It is not an offer to buy or sell anything." Despite this disclaimer, the faxes clearly promote a stock offering and thus constitute an advertisement under 47 U.S.C. § 227(a)(4) and 47 C.F.R. § 64.1200(f)(4). See, e.g., Advertisement from Moneyline Report to John P. Strang (Oct. 16, 2001) ("Moneyline Report is putting FXGP on our Strong Buy-Aggressive Growth recommendation list. . ."). Finally, one of the advertisements included in this forfeiture action is Fax.com's own "Your Permission Please" message, which purportedly seeks permission to fax consumers both missing children alerts and "a limited amount of paid commercial advertising." See Advertisement from Fax.com to Heather Ann Hartnett (Dec. 31, 2001). Contrary to Fax.com's assertion, such messages are indeed both commercial and prohibited under section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of our rules. See *TCPA Memorandum Opinion and Order*, 10 FCC Rcd at 12408 ("[F]acsimile requests for permission to transmit would impose costs on facsimile recipients unless and until the recipient were able to ask that such transmissions be stopped. This kind of 'negative option' (in which the sender presumes consent unless advised otherwise) is contrary to the statutory requirement for prior express permission or invitation.").

⁴¹ In fact, several consumers indicate that Fax.com continued to fax advertisements to them even after they attempted to stop such faxes by calling one or more of Fax.com's toll-free opt-out numbers. See note 25, *supra*.

detailed in Table 1 all are unsolicited advertisements and, thus, violate the statutory prohibition on faxing such materials.

D. Forfeiture Amount.

16. As set forth above, we conclude that Fax.com apparently willfully or repeatedly violated the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send unsolicited advertisements to telephone facsimile machines. Fax.com apparently did not cease its unlawful conduct even after the Commission staff issued citations warning that it was engaging in unlawful conduct and could be subject to monetary forfeitures for subsequent violations. Accordingly, a proposed forfeiture is warranted against Fax.com for its apparent willful or repeated violations of the ban on unsolicited facsimile advertisements contained in section 227 of the Act and the Commission's rules and orders.

17. 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.⁴² 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."⁴³

18. Although the Commission's *Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the prohibition on sending unsolicited advertisements to a telephone facsimile machine, we have previously considered \$4,500 per unsolicited fax advertisement as an appropriate base amount.⁴⁴ In addition, we have previously assessed a higher forfeiture of \$10,000 per unsolicited fax advertisement in instances in which the fax recipient had previously asked the sender to refrain from faxing such materials.⁴⁵

⁴² Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation by 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).

⁴³ 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, 17100-17101, (1997), recon. denied, 15 FCC Rcd 303 (1999) (*Forfeiture Policy Statement*).

⁴⁴ See *Get-Aways, Inc., Notice of Apparent Liability For Forfeiture*, 15 FCC Rcd. 1805, 1812 (1999); see also *Carolina Liquidators, Inc., Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 16837, 16842 (2000) (*Carolina Liquidators NAL*); *Tri-Star Marketing, Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 11295, 11300 (2000) (*Tri-Star NAL*); *US Notary, Inc. Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 16999, 17003 (2000).

⁴⁵ See *Carolina Liquidators NAL*, 15 FCC Rcd at 16842; *Tri-Star NAL*, 15 FCC Rcd at 11300.

19. In the instant case, we believe that the maximum forfeiture amount of \$11,000 per violation is warranted for each unsolicited advertisement transmitted by Fax.com and documented by the consumer correspondence. It is clear from Fax.com's own promotional materials and its responses to our citations that Fax.com's primary business activity itself constitutes a massive⁴⁶ on-going violation of section 227(b)(1)(C) of the Act and section 64.1200(a)(3) of the Commission's rules, and that Fax.com is well aware of this fact. Fax.com's primary commercial offering is a fax broadcasting service that clearly does not comply with federal restrictions governing facsimile advertisements. As outlined above, by its own admission and as demonstrated by the consumer information, Fax.com generally conducts its fax broadcasting without any regard to whether the fax recipient has an established business relationship with either Fax.com or the advertiser, or has otherwise granted express permission for the advertisement to be sent. We conclude that this unlawful undertaking merits maximum forfeitures for each of the violations at issue here. Although we believe that the nature of Fax.com's enterprise by itself warrants imposition of a maximum forfeiture for each violation, we discuss below the particularly egregious aspects of Fax.com's conduct.

20. Fax.com's Actions with Respect to Private Suits to Enforce Section 227. We are especially concerned because it appears that Fax.com has acted in a manner that thwarts the unique statutory enforcement mechanism established by section 227 of the Act. Under the statute, the Commission, state attorneys general, or aggrieved consumers may initiate actions to enforce certain prohibitions and restrictions contained in section 227 of the Act, including the prohibition on sending unsolicited fax advertisements. Section 227(b)(3) affords consumers an opportunity to initiate actions in state courts to enjoin violations of, *inter alia*, the prohibition on faxing unsolicited advertisements, and/or to recover damages equivalent to the actual monetary loss caused by such violations or \$500, whichever is greater, for each violation. Damages may be trebled if a court determines that the violation was "willful and knowing." As we describe below, Fax.com appears to have engaged in a pattern of deception and intimidation to conceal its involvement in sending prohibited faxes⁴⁷ and to frustrate consumers' efforts to exercise the statutory private right of action.

⁴⁶ Fax.com's website, copyrighted 2000, claims:

By mid-1999, all systems were in place with an initial broadcasting capacity of two million faxes per day. Following its plan to continue increasing line capacity to three million faxes per day by 2001, Fax.com is well on its way.

http://www.fax.com/company_profile/about.asp (website accessed May 29, 2002).

⁴⁷ As mentioned above, only one of the 489 faxes that form the basis for this NAL identifies Fax.com in any way. Nonetheless, Fax.com's various toll-free opt-out numbers appear on each advertisement. In fact, the wording of the opt-out notices, and the fact that they are contained on advertisements for individual entities, clearly convey the erroneous impression that opt-out numbers are associated with individual advertisers. *See, e.g.*, Advertisement from Y2 Marketing to D. Leon Taylor (Oct. 16, 2001) ("If you received this fax in error and would like to have your number removed from our database, call toll-free at 800-822-9033; Advertisement from eStock Pick of the Week to Robert Isaac Carr (Jan. 9, 2002) ("To have your name removed from our database, please call our toll free service at: (800)-331-4510); Advertisements from Central Imaging Supply to L. ("Les") R. Docks (Nov. 2 and 8, 2001) ("To

21. We have obtained evidence that Fax.com employee Charles Martin filed an apparently false statement regarding his employment status before a California court considering a consumer's section 227(b)(3) claim for damages against Fax.com client American Benefit Mortgage. In two statements filed with the Los Angeles Superior Court and signed under penalty of perjury, Mr. Martin falsely identifies himself both as "Compliance Manager for American Benefit Mortgage, Inc." and as "Officer of the Company [American Benefit Mortgage] – Manager of Human Resources."⁴⁸ Through Mr. Martin's false claim to be employed by a client, Fax.com subverts the judicial decision-making process and skews the statutory private right of action accorded under section 227 by ensuring that the court does not have an accurate record upon which to base its decision.

22. We have also obtained letters, signed by Mr. Martin, that were received by consumers in response to "demand letters"⁴⁹ that the consumers sent to Fax.com clients seeking to obtain monetary damages for unsolicited advertisements. Mr. Martin's letters are labeled "Inadmissible Settlement Communication," and state that the consumers that "fall under . . . exceptions . . . to receiving facsimile messages under 47 U.S.C. Section 227."⁵⁰ In addition, Mr. Martin warns the consumers to expect countersuits that if they pursue their private right of action in the state courts where they reside:

If you pursue this matter in Virginia our company will seek civil and criminal charges in California.⁵¹

have your number removed from our database, please call our automated toll-free center at 800-457-5410). As shown in Tables 2 and 3, however, opt-out numbers are not assigned uniquely to individual advertisers. These tables reveal that a single advertiser may be associated with multiple opt-out numbers and likewise a single opt-out number may be associated with multiple advertisers.

⁴⁸ "Representative Appearance Declaration Pursuant to CCP 116.540(B)" signed by Charles Martin and filed in Los Angeles Superior Court (Feb. 26, 2001, Apr. 3, 2001). According to Dun & Bradstreet, Charles Martin is not an officer of American Benefit Mortgage. See Dun & Bradstreet Business Information Report (June 7, 2002). In addition, an Enforcement Bureau staff member called American Benefit Mortgage's automated telephone directory, followed instructions to press keypads to spell Mr. Martin's name, and received a message that the name could not be found in the directory.

⁴⁹ Demand letters are a popular tool among TCPA advocates and consumers who seek to self-enforce section 227 though the statute's private right of action. In such demand letters, a consumer generally complains about receiving a prohibited advertisement, asserts the private right of action to recover monetary damages, and asks the advertiser to pay a specified amount to avoid being sued in state court. We do not suggest that any advertiser or fax broadcaster is obligated to accede to a demand letter or that failure to do so somehow indicates an alleged violator's bad faith.

⁵⁰ See Letter from Charles Martin to Terry P. Carter (Oct. 25, 2001) (*Carter Letter*); Letter from Charles Martin to Amy K.C. Goebel (Nov. 2, 2001) (*Goebel Letter*).

⁵¹ *Carter Letter*.

If you think you have an action under the TCPA then file it in New Jersey. I will then pursue civil and criminal actions against you in the California Superior Courts. You can hire local legal counsel and we will litigate these matters with a jury trial.⁵²

If you pursue this matter in Massachusetts we will then file the appropriate actions in California Superior Court.⁵³

Mr. Martin does not identify who “we” or “our company” is, and there is no information on the face of the letters that would reveal the identity of Mr. Martin’s employer or the corporate entity he actually represents.⁵⁴ In two cases, however, consumers have provided us with photocopies of the envelopes in which Mr. Martin’s letters arrived. In each case, the return address shows the name and address of the individual advertisers to which the consumers directed their demand letters. The envelopes also show a metered mail stamp indicating that the letters were mailed from Aliso Viejo, California – Fax.com’s corporate headquarters – despite the fact that the return address was in a different location.⁵⁵

23. Fax.com’s letters are troublesome in several respects. First, Fax.com’s apparent deception regarding its authorship of the correspondence appears to be part of a concerted effort to discourage private enforcement actions against Fax.com’s individual clients while, at the same time, concealing Fax.com’s potential liability for the violations. In addition, the letters go beyond valid legal defenses and misrepresent the requirements of section 227(b)(1)(C),⁵⁶ again

⁵² Letter from Charles Martin to Richard M. Zelma (Nov. 9, 2001) (*Zelma Letter*).

⁵³ *Goebel Letter*.

⁵⁴ The line below Mr. Martin’s name simply reads, “Compliance Department.” *See Carter Letter* (reference line refers to Advanced Communications); *Goebel Letter* (reference line refers to Advanced Communications); *Letter Zelma Letter* (reference line refers to Colorjet, Inc.).

⁵⁵ The envelope for the *Zelma Letter* shows a return address for Colojet, Inc. in Louisville, Kentucky while the metered postal stamp, PB8722193, shows that the envelope was mailed from Aliso Viejo, California. Likewise, the envelope for the *Goebel Letter* shows a return address for Advanced Communications in Long Beach, California (located in Los Angeles County) and the identical metered postal stamp number, which shows that the envelope was mailed from Aliso Viejo, California (located in Orange County).

⁵⁶ One letter states, “As you are aware there are three exceptions to receiving facsimile messages under 47 U.S.C. Section 227. You fall under two of those exceptions.” *Carter Letter*. In reality, there is one exception to the ban on faxing unsolicited advertisements: when the recipient has given prior express permission or invitation to send the advertisement. 47 U.S.C. § 227(b)(1)(C). As noted above, the Commission has determined that an established business relationship between the fax sender and recipient constitutes the requisite permission or invitation to fax. *See* para. 11, *supra*. Other information from consumers also indicates Mr. Martin’s deception regarding the section 227(b)(1)(C) of the Act:

Mr. Martin has continued to attempt to misinform me about the TCPA, stating at various times that Fax.com is exempt from the TCPA, that California law overrides the TCPA, that Fax.com was a non-profit organization and thus exempt from § 227(b)(1)(C), that Fax.com has never lost a case, that the FCC has not cited Fax.com, etc.

in an apparent effort to convince the recipients that they do not have a cause of action. Finally, the letters allude to retaliatory and possible vexatious court actions if recipients exercise the private right of action provided by section 227(b)(3).⁵⁷ Fax.com's obvious attempts to thwart consumers' statutory private right of action threaten the effectiveness of the unique three-pronged enforcement mechanism that Congress created in section 227.

24. Fax.com's Marketing of Its Fax Broadcasting Service. The record indicates that Fax.com does not disclose to its clients the broad prohibition on faxing unsolicited advertisements imposed by section 227 of the Act and our rules and orders. Fax.com's extensive promotional website does not mention section 227 at all. Information on the website creates the erroneous impression that opt-out numbers provide the only recourse for consumers who object to receiving unsolicited fax advertisements.⁵⁸ As indicated above, federal law does not address opt-out numbers in any way and even the effective use of such numbers in no way mitigates the fact that every unsolicited fax advertisement violates federal law.⁵⁹ In addition to deceiving prospective customers by omitting crucial information, Fax.com apparently has affirmatively misstated federal law governing unsolicited facsimile advertisements. One consumer reports a conversation with a Fax.com salesperson:

I acted hesitant about the legality of the whole thing, but Mr. Horvat assured me that Fax.com works with the FCC and other agencies to act within the Federal Guidelines. He further stated that Fax.com includes a federally required 'opt-out' number at the bottom of the fax which makes sending the faxes legal.⁶⁰

In addition to subjecting consumers to greater numbers of unlawful faxes, Fax.com's deceptive marketing leaves its clients, which include small businesses, vulnerable to federal, state, and private enforcement actions that may involve substantial monetary penalties.

Letter from Mark James, Marketing Power, Inc. to Yanic Hardie, FCC (Apr. 2, 2001) (*James Letter*).

⁵⁷ One consumer has alleged that he was a victim of such a retaliatory lawsuit. Richard Zelma, a well-known TCPA advocate, claims that Charles Martin falsely swore out a complaint in the state of New Jersey charging Mr. Zelma with harassment. *State of New Jersey v. Richard Zelma*, Norwood Municipal Court Summons No. S-2001-000002-0241, File No. 8875.1000 (Jan. 23, 2001). The case was dismissed for failure to prosecute. The claims made by Mr. Zelma and Mr. Martin are moot, and in any event, would not be properly before this Commission; we therefore take no position on the validity of such claims.

⁵⁸ See http://www.fax.com/Customer_support/FAQs.asp (website accessed May 29, 2002) ("Q: Do prospective clients complain about receiving the faxes? A: If someone does not want to receive any more faxes, there is an 800 number at the bottom of each and every fax sent through Fax.com that an individual can call to have the fax number removed from your campaign list.")

⁵⁹ See note 25, *supra*. We note that the broad federal prohibition on faxing unsolicited advertisements applies to both interstate and intrastate transmissions. See 47 U.S.C. § 152(b) (section 227, *inter alia*, is not subject to the provision that generally excludes Commission jurisdiction over intrastate matters); 47 U.S.C. § 227(e) (section 227 does not preempt state law that imposes *more restrictive* intrastate requirements).

⁶⁰ *James Letter*.

25. Fax.com's Dealings with the Commission. Fax.com has not been forthcoming in its dealings with the Commission. The staff's citations directed Fax.com to describe in detail its involvement in "providing, compiling, generating, or editing" distribution lists of telephone facsimile numbers used to transmit advertisements on behalf of clients. Specifically, the staff asked

Does your company employ or compensate any individuals or entities outside the company, including any tax-exempt nonprofit organizations, for any service, activity, assistance, or facilities used in connection with your company's providing, compiling, generating, or editing of such [distribution] lists? Please describe such arrangements in detail.

Initially, Fax.com suggests that the staff's inquiry "appear[s] to be completely irrelevant and immaterial to the violations alleged in the Citations."⁶¹ The Commission, however, has broad authority and discretion to investigate conduct under its jurisdiction⁶² and to "conduct its proceedings in such manner as will best conduce the proper dispatch of business and to the ends of justice."⁶³ Despite its reservations, Fax.com nonetheless purports to substantively answer the staff's question, summarily stating that it uses "its own research methods" as one means of compiling its facsimile number database.⁶⁴ In addition, Fax.com states, "Fax.com does not, to its knowledge, employ or compensate *any tax-exempt non profit organization(s)* in connection with Fax.com's business, including the providing, compiling, generating or editing of distribution list(s) of telephone numbers."⁶⁵ By limiting its answer to tax-exempt nonprofit entities, Fax.com has failed to answer the staff's inquiry, which clearly sought information pertaining to "*any* individuals or entities outside the company, *including* any tax-exempt nonprofit organizations."⁶⁶ Despite the staff's warning that the concealment of any material fact is punishable by fine or imprisonment,⁶⁷ Fax.com did not disclose to the Commission its remunerative relationship with at least one individual who apparently housed automatic telephone dialing equipment that Fax.com used to "war dial" massive blocks of telephone numbers to determine which numbers belong to telephone facsimile machines.⁶⁸

⁶¹ January 31 Response at 29; June 1 Response at 29-30; June 21 Response at 28-29.

⁶² 47 U.S.C. § 403 provides that "[t]he Commission shall have 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 any question may arise under any provisions of this Act, or relating to the enforcement of any of the provisions of this Act."

⁶³ 47 U.S.C. § 154(j).

⁶⁴ See January 31 Response at 29; June 1 Response at 30; June 11 Response at 29.

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Fax.com Citations* at 2 (emphasis added).

⁶⁷ *Id.*

⁶⁸ In this context, war dialing uses automated equipment to dial telephone numbers, generally sequentially, and software to determine whether each number is associated with a fax or voice line. In April 2000, the state of

26. Maximum Forfeiture Is Warranted. Fax.com's pervasive and egregious pattern of deception confirms our determination that the maximum forfeiture amount is warranted for each violation set forth in Table 1. The record here shows that even after the staff notified Fax.com that its actions violated the Act and the Commission's rules and orders, Fax.com continued its massive unlawful enterprise. The *Forfeiture Policy Guidelines* provide for upward adjustments to the maximum statutory forfeiture amount in cases such as this which involve egregious misconduct and intentional violation.⁶⁹ Accordingly, based on the nature and gravity of Fax.com's conduct and the continued need to ensure compliance with section 227(b)(1)(C) of the Act, we find Fax.com apparently liable in the amount of \$11,000 for each of 489 violations. This results in a proposed total forfeiture of \$5,379,000. Fax.com shall 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.⁷⁰

IV. CONCLUSION AND ORDERING CLAUSES

27. We have determined that Fax.com apparently violated section 227 of the Act and the Commission's rules and orders by using a telephone facsimile machine, computer, or other device to send the 489 unsolicited advertisements identified in Table 1 and discussed above. We have further determined that Fax.com is apparently liable for forfeitures in the amount of \$5,379,000.

28. Accordingly, IT IS ORDERED, pursuant to section 503(b)(5) of the Act, as amended, 47 U.S.C. § 503(b)(5), and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that Fax.com, Inc. IS HEREBY NOTIFIED of an Apparent Liability for Forfeiture in the amount of \$5,379,000 for willful or repeated violations of section 227(b)(1)(C) of the Act, 47 U.S.C. §

Washington entered into a consent decree with Fax.com to settle its complaint alleging that this war-dialing scheme had resulted in a barrage of calls to telephone lines at the University of Washington Medical Center, including lines for emergency services and patient rooms, in violation of section 227(a)(1)(A) of the Act and section 64.1200(a)(1) of our rules. *State of Washington v. Fax.com, Inc.*, No. C01-0369 (W.D. Wash. May 13, 2001) (consent decree permanently enjoining Fax.com from, *inter alia*, using automated dialing equipment to call any hospital patient room or emergency medical telephone number within Washington state and providing for \$90,000 payment to the state in civil penalties, damages, and attorneys fees). We recognize that although Fax.com has agreed to an injunction and monetary payment, it does not admit the allegations in Washington's complaint. We do not address or pass judgment on all aspects of Fax.com's conduct in this regard, which, in any event, is beyond the statute of limitations set by the Act. Nonetheless, we need not ignore materials that document an arrangement whereby Fax.com paid an individual to house and operate the war-dialing equipment. See Participation Agreement between Fax Broadcast Systems and Mike Salvus (Apr. 4, 2000) (providing for Mr. Salvus's agreement to house in his residence war-dialing, or "casting," equipment as part of Fax Broadcast Systems' "Fax Broadcast Placement Program"); "Dear Participant" Form Letter from Paul L. Stanton, Fax Broadcast Systems (Mar. 30, 2000) (informing recipients that Fax.com has taken over from Fax Broadcast Systems, payments to participants in the fax broadcast placement program). In light of this information, it is clear that Fax.com did not honestly answer the staff's questions. We do not address here possible sanctions against Fax.com for its concealment.

⁶⁹ *Forfeiture Policy Statement*, 12 FCC Rcd at 17,101.

⁷⁰ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

227(b)(1)(C), and section 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.

29. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release of this Notice, Fax.com, Inc. SHALL PAY the full amount of the proposed forfeiture⁷¹ OR SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

30. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture SHALL BE SENT by certified mail to Kevin Katz, President, Fax.com, Inc., 120 Columbia Street, Suite 500, Aliso Viejo, California 92656.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷¹ The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on Fax.com, Inc.'s check or money order to "NAL/Acct/No. 200232170004." Such remittances must be mailed to Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Fax.com Apparent Liability for Forfeiture, File No. EB-02-TC-120, NAL/Acct. No. 200232170004

I strongly support this Notice of Apparent Liability and hope that other fax broadcasters will take notice that the Commission will strictly enforce the Telephone Consumer Protection Act. As set forth in detail in the NAL, Fax.com appears to have founded its business on the practice of sending unsolicited faxes in flagrant violation of the TCPA. The record also suggests that Fax.com deliberately misled consumers regarding the company's requirements and consumers' rights under the TCPA. Despite repeated warnings from the Commission and numerous consumer complaints, the company appears to have made no effort to mend its ways. As a result, many consumers have been harassed in their homes and had their businesses disrupted by unwanted fax solicitations — and, adding insult to injury, were forced to pay for this privilege.

This NAL makes clear that the Commission will not tolerate such conduct; indeed, we propose to punish Fax.com to the maximum extent of our statutory authority. When I became a Commissioner, I pledged to protect consumers by stringently enforcing the Communications Act and the Commission's rules. I am proud that the Commission is taking this responsibility seriously and sending such a strong signal that companies cannot violate the law with impunity.