IN THE SUPREME COURT OF OHIO

PHILIP J. CHARVAT,	:	
	:	
Appellant,	:	Case Nos. 06-1647 and 06-1855
	:	
v.	:	
	:	
THOMAS N. RYAN, D.D.S., *et al.*,	:	
	:	
Appellees.	:	

APPELLANT PHILIP J. CHARVAT'S NOTICE OF ADDITIONAL AUTHORITY TO BE RELIED UPON DURING ORAL ARUMENT

Respectfully submitted,

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Appellant's Notice of Additional Authority To Be Relied Upon During Oral Argument

Appellant, Philip J. Charvat, by and through his undersigned counsel, and pursuant to SCt R. IX, Section 8, hereby gives notice of his intent to cite during the oral argument in this matter recent authority that was not available at the time of the filing of his Merit Brief. Specifically, Appellant intends to cite the Federal Communication Commission's May 14, 2007 Order of Forfeiture issued in *In the Matter of Dynasty Mortgage, L.L.C.*, File No. EB-03-TC-100 (a copy of which is attached hereto).

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing document was served upon the below-named counsel of record, by regular first class U.S. Mail, this 18th day of May, 2007:

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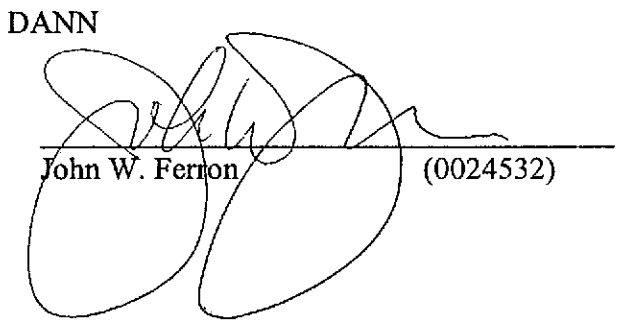

John W. Ferron (0024532)

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

In the Matter of	)	
	)	
DYNASTY MORTGAGE, L.L.C.	)	File No. EB-03-TC-100
	)	
	)	NAL/Acct. No. 200432170005
	)	FRN: 0012612156
	)	
	)	
	)	

ORDER OF FORFEITURE

Adopted: April 24, 2007 **Released: May 14, 2007**

By the Commission:

I. INTRODUCTION

1. In this Order of Forfeiture, we assess a monetary forfeiture of $748,000 against Dynasty Mortgage, L.L.C.[1] ("Dynasty") for willfully and repeatedly violating section 64.1200(c)(2) of the

[1] According to Dynasty, "Dynasty Mortgage" refers to two separate companies owned by Curtis L. White who serves both as President and Chief Executive Officer. *See* Dynasty Response to Apparent Liability for Forfeiture, dated April 12, 2005. The entities, both named Dynasty Mortgage L.L.C., were organized separately in Arizona and California in 2000 and 2002, respectively, although Dynasty's own website and internal documents have represented the companies as a single entity. Because of their common ownership and operations, and the fact that the Arizona and California companies have acted in concert to deliver telephone solicitations, we find both Dynasty entities jointly and severally liable for the forfeiture imposed herein. We have obtained information indicating that Dynasty may have ceased operations. *See* Better Business Bureau of Central and Northern Arizona, Reliability Report, Jan. 16, 2007 ("According to information in the Bureau files, it appears that the company is no longer in business. The numbers the Bureau had for this company are disconnected, and directory assistance does not have a listing for this company. The Bureau's mail to this company has been returned as undeliverable."). In addition, Dynasty's California telephone number is not in service, and the website that served both Dynasty's Arizona and California businesses is no longer operating. Further, the Arizona Department of Financial Institutions reports that on April 27, 2006, Dynasty's license as a mortgage broker was revoked. *See* Arizona Department of Financial Institutions, Summary of Actions Report at 42 (April 2006), http://azdfi.gov/Forms/SAR_2006_04.pdf. Records of the Arizona Corporation Commission show that in April 2006, an individual named Curtis White accepted appointment as the statutory agent for Preferred Mortgage Services, Inc., a company incorporated in the state of California in 1991 and seeking to do business in Arizona. *See* Preferred Financial Group, Inc. d/b/a Preferred Mortgage Services, Inc., Application for Authority to Transact Business in Arizona (Apr. 19, 2006). At the time of the telemarketing violations addressed herein, Dynasty operated out of two offices in Arizona and one in California: (1) 2633 E. Indian School Rd., Suite 370, Phoenix, Arizona 85016; (2) 5701 W. Talavi Blvd., Suite 110, Glendale, Arizona 85306; and (3) 4660 E. LaJolla Village Dr., Suite 400, San Diego, California 92122.

Commission's rules by making telephone calls for the purpose of delivering telephone solicitations to residential telephone consumers who registered their telephone numbers on the National Do-Not-Call Registry. This order imposes the maximum forfeiture amount of $11,000 for each of 68 calls made by Dynasty to 50 residential telephone consumers in Arizona and California between March 2, 2004 and January 20, 2005.

II. BACKGROUND

2. The facts and circumstances surrounding this case are set forth in the Commission's Notice of Apparent Liability for Forfeiture in this matter[2] and need not be reiterated at length. Dynasty offers mortgage financing services, and uses telephone solicitation as a means of advertising those services. Like other entities that employ telephone solicitations to promote commercially-available property, goods, or services, Dynasty is subject to do-not-call provisions contained in section 64.1200 of the Commission's rules.[3] Section 64.1200 incorporates two options for residential telephone consumers who wish to limit unwanted telephone solicitations: an opportunity to opt out of most telemarketing by signing on to the National Do-Not-Call Registry and an opportunity to direct particular entities to refrain from telemarketing by making a company-specific do-not-call request.[4] Dynasty's calls that are subject to forfeiture herein relate exclusively to provisions governing the National Do-Not-Call Registry.

3. Section 64.1200(c)(2) of the Commission's rules requires that "no person or entity shall initiate any telephone solicitation . . . to . . . a residential telephone subscriber who has registered his or her telephone number on the National Do-Not-Call Registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."[5] Not every promotional call, however, constitutes a prohibited telephone solicitation under this rule. As established by the Telephone Consumer Protection Act, the term "telephone solicitation" does not include calls (1) to any person with that person's prior express invitation or permission;[6] (2) to any person with whom the caller has an

[2] *Dynasty Mortgage, L.L.C.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 4901 (2005) ("*Dynasty NAL*" or "*NAL*"). The *Dynasty NAL* was issued pursuant to section 503 of the Communications Act of 1934, as amended, which gives the Commission authority to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provision of this Act or of any rule, regulation, or order issued by the Commission under this Act. . . ." 47 U.S.C. § 503(b)(1). Section 503 provides that the Commission must assess such penalties through the use of a written notice of apparent liability or notice of opportunity for hearing. *Id.* at § 503(b)(3), (4).

[3] 47 C.F.R. § 64.1200(c)(2), (d).

[4] *Id.* The Commission's do-not-call rules closely correspond to those of the Federal Trade Commission ("FTC"), which shares federal enforcement responsibilities with this Commission and also maintains and manages the National Do-Not-Call Registry. As provided in the Commission's 2003 order that incorporated the Registry in section 64.1200, we have focused our enforcement efforts in this area on entities that fall outside the FTC's jurisdiction: communications common carriers, airlines, insurance companies, banks, credit unions, savings and loans, and intrastate calls by any entity. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14138-39 (2003) ("*2003 TCPA Order*").

[5] 47 C.F.R. § 64.1200(c)(2).

[6] Section 64.1200(c)(2)(ii) of our rules requires that prior express invitation or permission to call a residential telephone consumer who has signed on to the National Do-Not-Call Registry "must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed." 47 C.F.R. § 64.1200(c)(2)(ii).

established business relationship;[7] or (3) by or on behalf of a tax-exempt nonprofit organization.[8] Accordingly, an advertising call that falls within one of these statutory exclusions does not violate section 64.1200(c)(2). In addition to the statutory exemptions, section 64.1200(c)(2)(iii) also permits delivery of telephone solicitations to National Do-Not-Call registrants in the limited situation in which the caller has a personal relationship with the called party.[9] Moreover, religious and political messages are not considered to be "telephone solicitations" and are, therefore, exempt from the Commission's National Do-Not-Call rules.[10]

4. To protect against prohibited telemarketing calls, entities that advertise through telephone solicitations are required to pay fees to access the National Do-Not-Call Registry and must "scrub" their call lists of non-exempt residential telephone numbers contained in the Registry.[11] Recognizing that parties who have made good faith efforts to comply with the national do-not-call rules may, nonetheless, occasionally make some calls in error to registered telephone lines, the Commission established standards for a safe harbor exemption from liability.[12]

5. To qualify for safe harbor protection, a seller must first demonstrate that, as part of its routine business practice, it has: (1) established and implemented written procedures to comply with the do-not-call rules; (2) trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to the do-not-call rules; (3) maintained and recorded a list of telephone numbers the seller may not contact; (4) used a process to prevent telemarketing to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the National Do-Not-Call Registry obtained from the administrator of the Registry within a designated time frame,[13] and has maintained

[7] For do-not-call purposes, the term "established business relationship" means "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(3).

[8] 47 U.S.C § 227(a)(3); 47 C.F.R. § 64.1200(f)(9).

[9] The term "personal relationship" means "any family member, friend, or acquaintance of the telemarketer making the call." 47 C.F.R. § 64.1200(f)(11).

[10] *2003 TCPA Order*, 18 FCC Rcd at 14040. A call containing such speech, however, may not be exempt if it merely "serve[s] as a pretext to an otherwise prohibited advertisement." *Id.* at 14040 n. 141.

[11] "Scrubbing" refers to comparing a company's call list to the National Do-Not-Call Registry and eliminating from the call list all non-exempt numbers contained in the National Registry that are not covered by an exemption. *2003 TCPA Order*, 18 FCC Rcd at 14023 n. 37.

[12] 47 C.F.R. § 64.1200(c)(2)(i); *2003 TCPA Order,* 18 FCC Rcd at 14040.

[13] Since January 1, 2005, telemarketers are required to use a version of the Registry that is no more than 31 days old. In other words, telephone solicitors are, in effect, required to scrub their call lists against the National Do-Not-Call Registry no more than 31 days before making any call. Consequently, unlawful calls may be prosecuted no sooner than 31 days after a consumer has signed on to the National Do-Not-Call Registry. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 19215 (2004) (amending section (continued....)

records documenting this process; and (5) used a process to ensure that it does not sell, rent, lease, purchase, or use the Registry for any purpose except national do-not-call compliance, and that it has purchased access to the Registry from the Registry administrator without participating in any cost sharing arrangement with any other entity. Finally, the safe harbor only applies if the seller is able to show that the unlawful calls were the result of identifiable error and made in spite of adherence to the enumerated do-not-call procedures.[14]

6. The Telecommunications Consumers Division ("Division") of the Commission's Enforcement Bureau began investigating Dynasty in October 2003 in conjunction with its review of consumer complaint data involving calls made to telephone numbers contained in the then-new National Do-Not-Call Registry.[15] The Division found a significant volume of complaints involving Dynasty, and in October and November 2003, sent letters to Dynasty seeking information both about its telemarketing practices generally and about specific complaints from consumers who allegedly received calls from Dynasty despite their registration on the National Do-Not-Call Registry.[16] After Dynasty failed to respond, the Division issued a citation[17] against Dynasty on December 22, 2003.[18] The citation warned Dynasty that future delivery of telephone solicitations to residential consumers registered on the National Do-Not-Call Registry could subject it to monetary forfeitures of up to $11,000 per call. In addition, the citation informed Dynasty that it could, within 30 days of the citation, either have a personal interview at a Commission field office or submit a written response to the citation.

7. Dynasty representatives contacted the Division by telephone in early January 2004. Initially, a Dynasty representative claimed that Dynasty was exempt from federal do-not-call regulations.[19] Later, after Dynasty apparently terminated that representative's employment, Dynasty acknowledged its obligation to comply with the Commission's do-not-call rules during telephone conversations with the Division.[20] Finally, by letter dated February 20, 2004, Dynasty responded in

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64.1200(c)(2)(i)(D)). Prior to January 1, 2005, and during the time period relevant to most of the calls at issue here, telemarketers were permitted to use a version of the Registry that was no more than three months old. *See* para. 23, *infra*.

[14] 47 C.F.R. § 64.1200(c)(2)(i).

[15] Division staff reviewed do-not-call complaints received by both this Commission and the FTC.

[16] Letters from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, to Dynasty Mortgage, dated Oct. 6, 2003 and Nov. 18, 2003.

[17] If, as here, an alleged violator does not hold a Commission license, permit, certificate, or authorization, the Commission may not initiate a forfeiture proceeding without first issuing a warning citation. 47 U.S.C. § 503(b)(5). If the citation recipient continues the unlawful behavior after receiving the citation, the Commission may propose monetary penalties, but only for those violations that occur after issuance of the citation.

[18] Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, to Dynasty Mortgage, dated Dec. 22, 2003.

[19] Commission staff disputed this claim and urged the Dynasty representative to respond to the citation in writing to fully explain the basis for its position. *Dynasty NAL*, 20 FCC Rcd at 4905.

[20] *See id.* (reporting January 30, 2004 and February 19, 2004 telephone conversations).

writing to the citation, reiterating the information provided orally: that Dynasty's failure to honor its do-not-call obligations and to respond timely to the Division's citation was attributable to incorrect advice from its terminated contract-employee, and that do-not-call compliance was now a priority for Dynasty.[21]

8. Despite Dynasty's assurances, consumers whose residential telephone numbers are registered on the National Do-Not-Call Registry continued to complain about telephone solicitations made by Dynasty. Accordingly, on July 6, 2004, the Division sent to Dynasty a Letter of Inquiry ("LOI") seeking information about consumer complaints received after issuance of the citation, 45 of which were filed after Dynasty's February 20 letter. The LOI directed Dynasty to provide information regarding each complaint including, *inter alia*, whether and why it called the complainants. In addition, the LOI sought information regarding Dynasty's internal procedures to ensure compliance with the National Do-Not-Call Registry and its own company-specific do-not-call list.

9. Dynasty responded to the LOI on July 28, 2004. Dynasty provided some information regarding its do-not-call efforts but did not fully answer the LOI. In particular, Dynasty did not address the complaints individually; instead it provided a broad general response regarding the purpose of its telephone solicitations. Dynasty did not deny making the calls in question but appeared to invoke the safe harbor defense, claiming to have routine business practices largely consistent with the safe harbor standards set forth in section 64.1200(c)(2)(i). As consumers continued to complain about Dynasty's telemarketing calls, the Division pursued its investigation, reviewing Dynasty's submission and contacting complaining consumers to obtain more information about the calls they had received.

10. On March 1, 2005, the Commission issued the *Dynasty NAL* to propose a forfeiture penalty against Dynasty for 70 telephone solicitations allegedly made to residential telephone subscribers who had placed their numbers on the National Do-Not-Call Registry.[22] On the basis of information provided by call recipients and Dynasty itself, along with review of FTC National Registry documentation, the *NAL* concludes that (1) Dynasty's calls were telephone solicitations made in violation of the Commission's national do-not-call requirements; (2) Dynasty had failed to demonstrate that it qualified for the safe harbor from liability; and (3) the maximum forfeiture should be applied given Dynasty's failure to implement effective national do-not-call procedures and its handling of the calls. Supporting these findings are sworn declarations from each consumer that outline the receipt of Dynasty's call(s) and attest to the lack of any mitigating factors that might justify a telephone solicitation, such as a transaction with or inquiry to Dynasty or explicit permission for Dynasty to solicit.[23]

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[21] Letter from Curtis L. White, President, Dynasty Mortgage, to Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, dated Feb. 20, 2004.

[22] As explained below, we are canceling the proposed forfeiture for two calls that were made prior to effectuation of the call recipient's do-not-call registration. *See* para. 13, *infra*.

[23] Each complainant has signed a declaration, under penalty of perjury, asserting that (1) receipt of a telephone call or calls from Dynasty Mortgage on the complainant's residential telephone line despite registration of that number on the National Do-Not-Call Registry; (2) absence of prior express permission or invitation for the call(s); and (3) absence of a transaction with Dynasty or any of its affiliated companies within the 18 months immediately preceding the call(s), or an inquiry or application to any of these entities within the three months immediately preceding the call(s). In addition, three complainants who recorded the name of the individual calling on behalf of Dynasty attest that they do not, to the best of their knowledge, have a personal relationship with the caller. Finally, 29 complainants (continued....)

11. Responding to the *NAL*, Dynasty initially submitted a brief letter challenging the proposed forfeiture. Subsequently, it filed a voluminous submission to explain and document its assertion that it should not be held liable for the calls at issue.[24] In short, Dynasty contends that it has implemented comprehensive procedures to prevent telephone solicitations to consumers on the National Do-Not-Call Registry, and that any calls reaching registered consumers were made unintentionally and constitute a miniscule percentage of its total telemarketing calls. Further, although Dynasty concedes that it placed 21 of the calls subject to forfeiture herein, it disputes the remaining 47 calls[25] for various reasons including that some calls could not or may not have been made and that some consumers actually were not on the Do-Not-Call Registry. Finally, Dynasty also argues that "imposing any forfeiture would ultimately bankrupt this company."[26]

12. With respect to Dynasty's claim of financial hardship, the Division urged Dynasty to provide a more thorough explanation of its financial status and to fully document and authenticate its financial claims.[27] To date, Dynasty has not provided this information or responded to the Division's request.

III. DISCUSSION

13. At the outset, we have carefully reviewed records pertaining to each of the 70 telephone solicitations addressed in the *Dynasty NAL*. We have considered Dynasty's NAL Response and conclude that with respect to 68 of the calls, Dynasty has failed to present evidence to warrant rescinding or reducing the proposed forfeiture for these violations. Dynasty's arguments against forfeiture are rooted in three assertions: (1) that some of the calls subject to forfeiture either were not made or cannot be proven to have been made; (2) that Dynasty has comprehensive procedures to prevent telemarketing to consumers on the National Do-Not-Call Registry and that any calls made in spite of these procedures are excusable error, falling within the safe harbor from liability; and (3) that any forfeiture threatens Dynasty's financial solvency. We address these contentions below. Finally, we are rescinding the proposed forfeiture with respect to two calls because they were made one day before the recipient's Do-Not-Call registration became effective and, thus, do not constitute violations.[28]

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also attest to receipt of caller ID information, which either explicitly identified Dynasty or displayed a telephone number traceable to Dynasty in the case of 44 calls.

[24] Letter from Curtis L. White, President, Dynasty Mortgage, to Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, dated Mar. 31, 2005 ("March 31 NAL Response"); Response to Apparent Liability for Forfeiture, dated Apr. 14, 2005 ("April 14 NAL Response") (collectively "NAL Response").

[25] This figure does not include the two calls for which we are canceling the proposed forfeiture. *See* n. 22, *supra*, and para. 13, *infra*.

[26] March 31 NAL Response.

[27] Letter from Kurt Schroeder, Deputy Chief, Telecommunications Consumers Division, to Curtis L. White, President, Dynasty Mortgage, dated Dec. 22, 2005.

[28] The two calls at issue were received by Hal Stewart on December 22, 2004. Mr. Stewart's residential telephone number was registered on the National Do-Not-Call Registry on September 23, 2004 and that registration became effective on December 23, 2004. The December 22nd calls, therefore, are not violations. Mr. Stewart received
(continued....)

A. Dynasty Has Not Rebutted Evidence of Unlawful Telemarketing Calls

14. Based upon review of its telemarketing records, Dynasty claims that 45 of the 68 calls subject to forfeiture here either were not made or cannot conclusively be confirmed to have been made.[29] Specifically, Dynasty denies making nine calls and notes that it either does not have records, or its records are inconclusive with respect to 36 of the disputed calls.[30] In summary, Dynasty (1) admits making 21 unlawful calls, (2) is unable to confirm or deny making 36 calls,[31] (3) denies making nine calls, and (4) alleges that two calls went to telephone numbers that were not on the National Do-Not-Call Registry.

15. We find Dynasty's claims unpersuasive. With respect to the 45 calls that Dynasty either denies or is unable to confirm, we note again that each of the 50 consumers who filed a complaint about receiving calls from Dynasty has signed, under penalty of perjury, a declaration that details the circumstances surrounding the call or calls that each claims to have received.[32] The fact that Dynasty cannot independently confirm each of the 45 disputed calls at issue does not establish that the calls were not made. First, as Dynasty admits, 21 of these calls were made prior to full implantation of its automated calling system, and it retained no records that would indicate whether or not it placed the calls.[33] Second, given that the record indicates that Dynasty's attention to its telemarketing obligations during the time period at issue was incomplete at best,[34] we believe that the sworn statements provided by consumers are more reliable than Dynasty's records, even over those generated by Dynasty's automated telemarketing operations.[35] In this regard, we also note that Dynasty's automated telemarketing system is not the only means by which Dynasty's telemarketing calls could be made. In fact, Dynasty itself raises

(Continued from previous page)
another call from Dynasty on December 29, 2004, which is a violation and subject to forfeiture herein. *See* Appendix A, *infra*.

[29] Dynasty concedes making 21 calls but claims without elaboration that 10 of those calls were never actually completed ("21 prohibited calls . . . are confirmed to have been dialed of these 10 only were connected"). April 12 NAL Response at 20.

[30] Dynasty notes that its review is complicated by the fact that its original paper-based telemarketing system did not generate records that can be reviewed now to determine whether particular calls were made.

[31] Dynasty makes this claim with respect to 38 of the 70 calls specified in the *Dynasty NAL*. As indicated above, however, we are rescinding the proposed forfeiture for two of these calls. *See* para. 13, *supra*. Dynasty's position with respect to these calls is not entirely clear: Dynasty both states that the identified complainants "are assumed to have been called" and that the calls to those individuals "can not be confirmed nor denied." April 12 NAL Response at 18, 20.

[32] *See* n. 23, *supra*.

[33] Dynasty's position with respect to these calls is not entirely clear: Dynasty both states that the identified complainants "are assumed to have been called" and that the calls to those individuals "can not be confirmed nor denied." April 12 NAL Response at 18, 20.

[34] *See* paras. 19-34, *infra*.

[35] Dynasty reports that its automated records are "inconclusive" with respect to 17 calls that complainants claim to have received after Dynasty's new automated telemarketing system was introduced in June 2004. April 12 NAL Response at 20.

questions about the reliability of its telemarketing workforce, specifically suggesting that personnel eager to meet or exceed sales goals may have made unauthorized calls not permitted under Dynasty's own national do-not-call policies.[36]

16. We also reject Dynasty's more specific claims regarding particular calls. Dynasty is incorrect in claiming that two consumers who reported receiving a total of six calls[37] were not on the National Do-Not-Call Registry at the time they were called. The telephone numbers that Dynasty associates with the consumers at issue, however, are not the telephone numbers reported by the complainants.[38] The residential numbers provided by the two consumers were indeed registered on the National Do-Not-Call Registry for the required time as of the date of the calls.[39]

17. We are also unpersuaded by Dynasty's assertion that three calls cannot have occurred because the originating telephone number obtained by the complainants through caller ID cannot be used to make outgoing telephone calls.[40] It is unclear whether Dynasty is asserting that it is actually physically impossible to make outgoing telephone calls from the number in question, which is the main telephone number for Dynasty's San Diego office, or that placing such calls violates company policy because it could tie up the office telephone system.[41] We also note that telemarketers may lawfully transmit through caller ID any telephone number associated with the telemarketer or party on whose behalf a call is made, as long as the transmitted number allows the consumer to identify the caller.[42] A

[36] *Id.* at 20, 23.

[37] Dynasty admits two of the calls but maintains that its automated records do not show that the remaining four calls were made. April 12 NAL Response at 19.

[38] The residential telephone numbers provided in the consumers' sworn declarations are different from those that Dynasty attributes to its calls. In one case, Dynasty indicates that it called a consumer, Michelle Logan, at a California telephone number that was supposedly not on the National Do-Not-Call Registry at the time of the call. The *NAL*, however, applies to calls made to an individual named Michelle Logan at an Arizona telephone number. Ms. Logan reports receiving a total of five calls within less than one month. In the other case, involving a call received by Antoinette Jaycox, two online telephone directories confirm that the telephone number provided in Ms. Jaycox 's declaration is listed under the name "Antoinette Jaycox" while the number that Dynasty claims to have used to call Ms. Jaycox is listed under another name. Dynasty's errors in this regard may stem from the fact that it apparently reviewed its telemarketing records by call recipients' name, and did not request from the Division the consumer declarations, each of which lists the telephone number at which the consumer received Dynasty's call(s). For privacy reasons, the declarations are not routinely-available Commission records like the *NAL* itself. The Division, however, makes such materials available to NAL recipients upon request.

[39] As shown in Appendix A, we have confirmed that each residential telephone number provided by the 50 complainants in this case was timely and properly registered on the National Do-Not-Call Registry at the time the 68 calls subject to forfeiture were made.

[40] Appendix A of the *NAL* incorrectly noted that one consumer, Joe Fernando, had provided caller ID information. Instead, as indicated in Mr. Fernando's declaration, the listed telephone number was provided orally by Dynasty's telemarketer.

[41] "This phone line is not used for outbound calls; doing so would occupy the main incoming line preventing incoming calls. The phone system at 4660 E. La Jolla Village Dr. Ste. 400 San Diego, CA 92122 does not allow outbound calls using the phone line 858-362-8585." Dynasty April 12 NAL Response at 20.

telemarketer or seller such as Dynasty could, therefore, transmit the main office or customer service telephone number in lieu of the actual telephone numbers from which calls were placed. Again, given Dynasty's uncertain support for its assertion, we believe that the complainants' sworn declarations are the more reliable source.

18. In short, Dynasty has failed to demonstrate that it did not make any of the 68 calls subject to forfeiture and detailed in complainants' sworn declarations. We turn next to whether these calls fall within the safe harbor from liability.

B. Dynasty's Practices during the Period March 2004 – January 2005 Do Not Satisfy All Safe Harbor Criteria

19. The safe harbor from liability for unlawful telemarketing calls applies only when a seller meets each of five separate operational criteria and also demonstrates that any unlawful calls were made as a result of identifiable error. The *Dynasty NAL* discusses in detail various aspects of Dynasty's operations that preclude application of the safe harbor defense to the 68 calls at issue. In determining whether those calls fall within the safe harbor from liability, the *NAL* examined information supplied by Dynasty in response to the LOI; the complainants' declarations; and data maintained by the FTC in connection with the National Registry. We need not repeat the *NAL's* detailed analysis of how that information, available to the Commission as of March 2005, was inconsistent with safe harbor standards.[43] Instead, we focus our discussion now on the new information provided by Dynasty in its NAL Response to determine whether that information alters our previous conclusions regarding Dynasty's failure to demonstrate applicability of the safe harbor defense.

20. As set forth below, and reflected in Appendix A, we find that 51 of Dynasty's calls do not fall within the safe harbor because they were made during a period that Dynasty either had not accessed relevant portions of the National Do-Not-Call Registry at all or had not obtained updated versions of the Registry. The remaining 17 calls were made at times when Dynasty had obtained relevant portions of the Registry within required time frames. We find, nonetheless, that Dynasty has failed to demonstrate that the safe harbor applies to those 17 calls. The evidence before us does not show that Dynasty conducted the required scrubs of its call lists or fully implemented an accurate and effective written national do-not-call policy during any part of the forfeiture period. Because Dynasty failed to meet these safe harbor criteria, it is liable for the calls at issue.

1. Accessing the National Do-Not-Call Database – Section 64.1200(c)(2)(i)(D)

21. Under section 64.1200(c)(2)(i)(D), the safe harbor defense reflects the linchpin of sellers' national do-not-call obligations: the requirement to refrain from calling residential telephone consumers who have placed their numbers on the National Do-Not-Call Registry. Accordingly, section 64.1200(c)(2)(i)(D) limits the safe harbor defense to an entity that can demonstrate, *inter alia*, that as part

(Continued from previous page)
[42] 47 U.S.C. § 64.1601(e); *2003 TCPA Order*, 18 FCC Rcd at 14122.

[43] The *Dynasty NAL* does not address Dynasty's compliance with the safe harbor requirement to record company-specific do-not-call requests, 47 C.F.R. § 64.1200(c)(2)(i)(C). Likewise, we do not address this safe harbor aspect here although we note that we have not received complaints that Dynasty has failed to honor company-specific do-not-call requests within the required 31-day period.

of its routine business practices, it "use[s] a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry . . . [within a specified timeframe],[44] and maintains records documenting this process."[45]

22. This safe harbor provision thus contains three distinct elements: (1) the requirement to access the National Do-Not-Call Registry at appointed times to obtain numbers that may not be called; (2) the requirement to have a routine process for using that information to prevent delivery of unlawful telephone solicitations, *i.e.*, scrubbing telemarketing lists; and (3) the requirement to maintain records that document such access to and use of the Registry.

23. To facilitate access to the Registry, the FTC assigns a unique subscription account number ("SAN") to each entity that purchases the right to access the Registry. The FTC maintains a database, which is available to law enforcement entities such as this Commission, that records each time that a particular SAN is used to obtain the Registry and what portion (*i.e.*, area codes) of the Registry is accessed. The FTC thus maintains records that document whether a seller has complied with requirements governing the means and timing of accessing the Registry.[46] For 62 of the calls at issue here, Dynasty was required to use a version of the Do-Not-Call Registry obtained no more than three months prior to the date it made any telemarketing call. Six calls made by Dynasty after January 1, 2005 are subject to a rule amendment that requires use of a version of the Registry obtained no more than 31 days before any telemarketing call.[47]

a. Dynasty Has Failed to Access the National Do-Not-Call Registry at Appointed Times to Obtain Numbers That May Not Be Called

24. As emphasized in the *Dynasty NAL*, Dynasty did not access the Registry at all between March 15, 2004 and January 6, 2005.[48] During this almost ten month period, Dynasty missed three

[44] *See* n. 13, *supra*.

[45] 47 C.F.R. § 64.1200(c)(2)(i)(D)

[46] In addition, the FTC's Internet do-not-call complaint system automatically checks the complainant's telephone number to determine whether and when that number was added to the National Do-Not-Call Registry. The system then compares the registration date against the date of the alleged telemarketing call, and only accepts complaints in which the complainant's telephone number was timely registered at the time of the alleged call. In this case, our staff has independently confirmed that each complainant's telephone number was registered on the National Do-Not-Call Registry for the required three months or 31 days before the alleged call was made. As indicated above, we have discovered that two calls for which we proposed a forfeiture penalty were made one day prior to effectuation of the call recipient's do-not-call registration. *See* para 13, *supra*. This complainant also received a call from Dynasty after effectuation of his do-not-call registration, which was accepted by the FTC's automated complaint system.

[47] *See* n. 13, *supra*.

[48] *Dynasty NAL*, 20 FCC Rcd at 4912. As indicated in the *NAL*, our staff obtained FTC do-not-call records that show that Dynasty's SAN was used to access portions of the National Registry twice during the forfeiture period: first, over the course of one week in March 2004, and second, on January 6, 2005. Between March 8 and March 15, 2004, Dynasty accessed portions of the Do-Not-Call Registry for three Arizona and three California area codes. On January 6, 2005, Dynasty accessed these same portions of the Registry and, in addition, portions for two new Arizona area codes, one new California area code, and one Nevada area code.

deadlines – June 8-15, 2004; September 8-15, 2004; and December 8-15, 2004 – to obtain relevant portions of the Registry in order to scrub its telemarketing lists within the three-month period then in effect. Dynasty made 45 calls that are subject to forfeiture herein during the lapsed period from June 8-15, 2004 until January 5, 2005. In addition, six of the calls at issue herein were made between March 2 and March 9, 2004 before Dynasty even accessed appropriate portions of the Registry for the first time. Dynasty made 51 calls, therefore, either using outdated Registry information or no information at all.

25. Dynasty's 2004 telemarketing plan appears to have called for Dynasty to access the National Do-Not-Call Registry through third party lead generators that it hired to obtain relevant portions of the Registry on its behalf, using its SAN, and then providing scrubbed call lists.[49] Dynasty does not allege that any of its lead generators either failed to obtain the Registry as ordered by Dynasty or to properly scrub call lists; instead Dynasty briefly addresses the lapse in accessing the Registry by referring to "stretching call lists usage."[50] It appears, therefore, that Dynasty consciously used outdated call lists for over five months. Moreover, in March 2004 – more than a month after a Dynasty representative orally admitted to Division staff the company's obligation to comply with the Commission's national do-not-call requirements and more than two weeks after Dynasty's president committed, in writing, to prompt and rigorous compliance[51] – Dynasty made calls without ever having accessed relevant portions of the Registry.[52] For the 51 calls made using either outdated National Registry data or no data at all, Dynasty's safe harbor defense fails on these facts alone. While acceptable written do-not-call policies, training techniques, manner of recording company-specific do-not-call requests, and actual scrubbing of call lists may differ from seller to seller, the safe harbor affords no discretion or variation as to a seller's obligation to access the National Do-Not-Call Registry at the required time.

b. Dynasty Has Failed to Demonstrate That It Implemented a Routine Process to Use Information from the National Do-Not-Call Registry to Prevent Delivery of Unlawful Telephone Solicitations

26. It is clear that Dynasty could not have properly scrubbed any call list during the period June 8-15, 2004 through January 5, 2005; its failure to access the National Do-Not-Call Registry during this period precludes any acceptable scrub. Further, even apart from this period, evidence suggests that Dynasty never completely scrubbed all its call lists.

27. Either Dynasty or its third party lead generators accessed the National Do-Not-Call Registry on March 8-15, 2004 and January 6, 2005. Evidence does not establish, however, that Dynasty actually *used* the Registry data accessed at these times to implement "a process to prevent telephone solicitations to any telephone number" on the Registry as required by section 64.1200(c)(2)(1)(D).

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[49] April 12 NAL Response at 16-17, Exhibit A (5-16). Dynasty notes that beginning on January 6, 2005, it also "began accessing the National Registry directly and appending the change list to its company specific internal do not call list." April 12 NAL Response at 17.

[50] April 12 NAL Response at 27.

[51] *See* para. 7, *supra*.

[52] Dynasty states that it began an interim "lead database" system of managing its do-not-call obligations in February 2004. April 12 NAL Response at 3. Yet it did not access the National Do-Not-Call Registry until March 8-15, 2004.

Despite its obligation to maintain records documenting its actions,[53] Dynasty does not present evidence that either the company itself or its third party lead generators successfully scrubbed all of Dynasty's call lists. Dynasty provides invoices from five lead generators relating to its purchase of lead lists intermittently over the period December 2003 through February 2005.[54] These records do not demonstrate that Dynasty consistently purchased scrubbed call lists, much less that it took steps to ensure that it actually used only scrubbed call lists. Of the 16 invoices provided by Dynasty, only one lists Dynasty's SAN that must be used to access the National Do-Not-Call Registry on Dynasty's behalf;[55] 12 invoices, on the other hand, contain no entry in the space on the form marked "SAN." One invoice contains the entry "Scrubbed Against the National Do Not Call List."[56] Some invoices specify area codes for which Dynasty purchased leads while others contain generic descriptions such as "homeowners." These scattered and vague records do not establish that Dynasty consistently purchased scrubbed call lists or that it took steps to ensure that every call list it used was properly scrubbed. The mere fact that on occasion Dynasty accessed the Registry itself or obtained scrubbed call lists does not mean that it actually used such lists properly.

28. The lack of documentation in the record to prove that Dynasty actually purchased scrubbed call lists or produced them on its own is not the only factor that raises questions as to whether Dynasty properly used information from the National Do-Not-Call Registry after its March 2004 and January 2005 access. Dynasty suggests that its failure to obtain updated versions of the National Do-Not-Call Registry may have resulted in calls to newly-registered consumers.[57] The record, however, indicates that 23 of the 32 complainants that Dynasty called between June 8, 2004 and January 5, 2005 – the period during which it failed to obtain updated versions of the Registry – had, in fact, been registered on the version of the Registry obtained by Dynasty or by its lead generators in March 2004. In short, even though Dynasty failed to obtain updated Registry information, it could have prevented 29 of the 45 unlawful telemarketing calls made during the lapsed period simply by using the March 2004 versions of the Registry, which it possessed at the time it made the calls.

29. Finally, although Dynasty accessed the Registry for a second time on January 6, 2005, it did not access the Registry again until March 2, 2005, one day after the *Dynasty NAL* was released and served upon Dynasty via fax.[58] Dynasty thus failed to access the Registry in February 2005 as required. Although, the *NAL* does not include any calls made in February or March 2005 after Dynasty's January 6 access expired, Dynasty's continued failure to timely access the National Do-Not-Call Registry is yet

[53] *See* para. 30, *infra*.

[54] April 12 NAL Response at Exhibit C.

[55] The FTC's National Registry documentation does not indicate that Dynasty's SAN was used to access the Registry around the time specified in the invoice, January 2004.

[56] Again, however, FTC records do not show that Dynasty's SAN was used to access the Registry around the time of this invoice, November 2004.

[57] Dynasty April 12 NAL Response at 22.

[58] A December 2004 amendment to Dynasty's June 2004 Telephone Solicitation Policy explicitly recognizes that, beginning January 1, 2005, Dynasty must access the Registry no less than every 31 days rather than every three months. Dynasty April 12 NAL Response at Exhibit A (Amendment).

further support for our finding that it failed to fully implement a process whereby it used the National Do-Not-Call Registry to prevent delivery of telephone solicitations to registered numbers.

c. Dynasty Has Failed to Demonstrate That It Has Maintained Records Documenting Access to and Use of the National Do-Not-Call Registry

30. Section 64.1200(c)(2)(i)(D) conditions a safe harbor defense upon a seller's maintenance of records documenting access to and use of the National Do-Not-Call Registry. As provided in Dynasty's April 12 NAL Response, documentation for the period March 2, 2004 through January 20, 2005 is incomplete and inconclusive. The only documentation submitted by Dynasty related to its access to the Registry or scrubs of its call lists are the 16 invoices described above, which fail to demonstrate that Dynasty properly or completely scrubbed its call lists during the forfeiture period.[59] In fact, Dynasty does not provide any records that document its March 2004 and January 2005 access to the National Do-Not-Call Registry; were it not for the FTC records regarding these access dates, which Commission staff acquired, there would be no clear and conclusive documentation that Dynasty's SAN was ever used to obtain the Registry.

2. *Written Procedures* – Section 64.1200(c)(2)(i)(A)

31. To qualify for the safe harbor exemption, a seller must demonstrate that as part of its routine business practice, "it has established and implemented written procedures to comply with the national do-not-call rules."[60] In its NAL Response, Dynasty describes at length the procedures that it has adopted to prevent telemarketing calls to consumers on the National Do-Not-Call Registry and to others who have told Dynasty that they do not wish to receive its telephone solicitations. We emphasize, however, that Dynasty's current compliance plan and telemarketing operations are not at issue here.

32. According to Dynasty, it immediately took steps to implement effective national do-not-call procedures when it realized in late January 2004 that it must honor the National Do-Not-Call Registry, contrary to its contractor's advice.[61] Dynasty states that it made significant and immediate changes to its telemarketing operations while it worked to develop an automated calling system, which it introduced on June 1, 2004 to replace its paper-based system for maintaining both telemarketing "leads" and the company-specific do-not-call list.[62] In its NAL Response, Dynasty provides detailed descriptions of both its automated and paper-based systems for complying with both national and company-specific do-not-call requirements along with its training materials and its formal do-not-call policy. These materials stand in stark contrast to the summary responses and scant documentation that Dynasty provided in July 2004 in response to the Division's LOI, and it is difficult to understand why Dynasty would not have provided the Division with complete descriptions and internal company records in response to the LOI, which explicitly directed their submission. Even assuming, however, that the detailed telemarketing handbook, training materials, and other written procedures set forth in Dynasty's

[59] *See* para. 27, *supra*.

[60] 47 C.F.R. § 64.1200(c)(2)(i)(A).

[61] April 12 NAL Response at 2-8.

[62] *Id.*

April 12 NAL Response existed during the forfeiture period, Dynasty does not meet the criteria established by section 64.1200(c)(2)(i)(A).

33. A compliance plan, however well-conceived and expressed, is meaningless if it is not fully implemented. Dynasty clearly failed multiple times to implement a critical element. Dynasty's Telephone Solicitation Policy calls for the company to access the National Do-Not-Call Registry every eight to ten weeks until January 1, 2005[63] when access was required every month.[64] As detailed above and in the *NAL*, Dynasty missed three deadlines for accessing the Registry during the period June 15, 2004 to January 5, 2005. In addition, when Dynasty actually did access the National Do-Not-Call Registry (March 8-15, 2004 and January 6, 2005), evidence does not establish that Dynasty effectively used the Registry in the manner described in its April 12 NAL Response narrative and accompanying internal documents. These failures to follow its own procedures to both access the National Do-Not-Call Registry at required intervals and use such information to prevent unlawful telephone solicitations not only fall short of the safe harbor standard to properly access and use the National Do-Not-Call Registry but also separately indicate that Dynasty did not effectively or fully implement its written procedures. On this basis, Dynasty does not meet the safe harbor standard contained in section 64.1200(c)(2)(i)(A).

34. The evidence in the record makes it difficult to avoid the conclusion that careful implementation of a national do-not-call compliance plan did not become a priority for Dynasty until after issuance of the *Dynasty NAL*. Dynasty provided detailed written materials concerning such a plan to the Commission only in response to the *NAL*, despite the fact that the staff specifically requested such records in the July 2004 LOI. This conclusion is further supported by evidence establishing that Dynasty only began regularly accessing the National Do-Not-Call Registry within the required time interval after the *Dynasty NAL*.[65] Such a record cannot support a finding that Dynasty properly implemented its written compliance plan during the forfeiture period.[66]

3. *Training of Personnel* – Section 64.1200(c)(2)(i)(B)

35. Section 64.1200(c)(2)(i)(B) of the safe harbor defense requires a seller to demonstrate that as part of its routine business practice, "it has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules."[67] In the *Dynasty NAL*, we found that Dynasty's LOI response did not reasonably demonstrate the existence of an adequate training program to meet this safe harbor requirement. By contrast, the materials provided by Dynasty in

[63] We note that accessing the Registry every 8-10 weeks goes beyond the requirements in effect for most of the forfeiture period: that call lists had to be scrubbed against a version of the National Do-Not-Call Registry no more than three months old. *See* n. 13, *supra*.

[64] April 12 NAL Response, Exhibit A.

[65] Between March 2, 2005 and September 27, 2005 Dynasty accessed the Registry on ten different dates. During this time, Dynasty twice briefly exceeded the 31-day maximum; the interval between access was 33 days between April and May and 36 days between August and September.

[66] Although Dynasty's current conduct is not subject to forfeiture herein, FTC records show that Dynasty's last access to the Registry occurred on September 27, 2005.

[67] 47 C.F.R. § 64.1200(c)(2)(i)(B).

its NAL Response detail a rigorous telemarketing training program that includes, as a primary component, Dynasty's obligations with respect to both national and company-specific do-not-call requirements. We have no information, however, to verify that such training was conducted during the time frame in question or in the manner described in Dynasty's most recent pleading. Further, claims made by Dynasty telemarketers to consumers who questioned or challenged Dynasty's calls raise questions as to whether Dynasty accurately and effectively educated its personnel.[68] Nonetheless, because we have determined above that Dynasty has not met other safe harbor criteria, we need not rule here on the adequacy of its training program during the forfeiture period.

4. *Purchasing the Registry* – Section 64.1200(c)(2)(i)(E)

36. The safe harbor requires a telephone solicitor to demonstrate that it "uses a process to ensure that it does not sell, rent, lease, purchase, or use the national do-not-call database, or any part thereof, for any purpose except compliance with [the do-not-call rules] and any such state or federal law to prevent telephone solicitations to telephone number registered on the national database."[69] It must demonstrate that it "purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the cost to access the national database among various client sellers."[70] Dynasty's LOI response failed to provide any information or statement regarding this aspect of the safe harbor, and the *NAL* so noted this deficiency. In its April 122 NAL Response, however, Dynasty states that it (1) purchases the National Do-Not-Call Registry from the administrator; (2) uses the National Do-Not-Call Registry solely for compliance with do-not-call requirements; and (3) does not participate in any arrangement to share costs of accessing the National Do-Not-Call Registry.[71] We have no reason to question Dynasty's assertions in this regard. Compliance with a single safe harbor requirement, however, does not remove liability for unlawful calls.

5. *Error* – Section 64.1200(c)(2)(i)

37. The error aspect of the safe harbor defense exempts from liability telephone solicitations that are the result of specific identifiable errors that occurred during telemarketing conducted in compliance with each do-not-call safe harbor provision contained in section 64.1200(c)(2)(i). Accordingly, failure to meet a single safe harbor standard renders error irrelevant. Moreover, as emphasized in the *Dynasty NAL*, the error defense does not apply simply because an entity meets all

[68] Despite Dynasty's February 20, 2004 written assurance that it would abandon its previous claim that it was exempt from national do-not-call rules, two complainants report telephone solicitations they received in June and July 2004 during which they were told – once by an individual identified as a Dynasty supervisor – that Dynasty was exempt from national do-not-call requirements. Declaration of Theodore A. Wassel (during June 1, 2004 call, Dynasty manager stated Dynasty is exempt from the National Do-Not-Call Registry); declaration of Stuart Novitz (during July 20, 2004 call, Dynasty claimed to be a "federally exempt company for telemarketing purposes"). We expect that effective training of Dynasty's telemarketers would preclude such claims, especially by supervisory personnel.

[69] 47 C.F.R. § 64.1200(c)(2)(i)(E).

[70] *Id.*

[71] April 12 NAL Response at 16.

other safe harbor criteria.[72] Instead, once an entity has demonstrated compliance with each safe harbor standard,[73] it may then invoke an error claim by showing that unlawful telephone solicitation occurred as a result of a specific error. As explained above, we conclude that Dynasty has failed to demonstrate compliance with at least two safe harbor standards for the time frame at issue, and thus cannot claim the safe harbor defense even if it were able to demonstrate that particular calls are attributable to identifiable errors.

38. Dynasty's NAL Response claims stringent procedures to ensure compliance with National Do-Not-Call rules and appears to suggest that any unlawful calls should be found to have been made in error. In this regard, Dynasty compares the total number of telemarketing calls that it has made during various periods between February 2004 and March 2005 against the number of national do-not-complaints lodged against it during those time frames, yielding claimed complaint rates between .00014 and .00129 percent.[74] According to Dynasty, these miniscule complaint levels attest to the efficacy of its do-not-call practices and demonstrate that any unlawful calls are the result of error.

39. Further, although Dynasty does not indicate that it has discovered specific events or oversights that may have caused such alleged errors,[75] it outlines possible breakdowns that could lead to unlawful calls being made outside its normal do-not-call procedures.[76]

40. Dynasty's arguments about complaint levels and possible glitches in national do-not-call compliance might be credible if it had fully implemented its compliance plan and accessed the National Do-Not-Call Registry as required, but it did not. In addition, some of the possible breakdowns to national do-not-call compliance that Dynasty posits are more indicative of an inherently flawed compliance program than error.[77]

41. Finally, Dynasty appears to misunderstand the interplay between error and intent. While intent is relevant in assessing whether an unlawful telephone solicitation made by an otherwise compliant

[72] 20 FCC Rcd at 4909.

[73] *See* para. 5, *supra*.

[74] April 12 NAL Response at 12-14.

[75] Dynasty briefly acknowledges its lapse in accessing the National Do-Not-Call Registry. *See* April 12 NAL Response at 21, 27. Dynasty appears to believe that it unlawfully failed to access the Registry in March, August, and December 2004. *Id.* at 21. However, as indicated above, Dynasty's three missed deadlines to access the Registry occurred in June, September, and December 2004. *See* para. 24, *supra*.

[76] April 12 NAL Response at 21-23 (describing various possible technical and human errors).

[77] April 12 NAL Response at 23 ("A telemarketer will often deviate from established scripts or training in an attempt to entice a sale. . . . Telemarketers have been found to have created and utilized their own call lists not in accordance with Dynasty's established procedures for obtaining current call lists.") *Id.* at 21 ("If data in call lists or do not call lists are not formatted correctly information can pass through. A phone number in a call list formatted as (123) 456-7890 will not be scrubbed if the same number is in the do not call list as 1234567890.").

telemarketer constitutes error,[78] a call is not made in error simply because a telemarketer did not intend to violate national do-not-call requirements or did not intend to call numbers on the National Do-Not-Call Registry. Whatever a seller's specific intent in making a particular telemarketing call, calling a number on the National Registry cannot be deemed unintentional when a seller has failed to implement basic threshold procedures to guard against making such calls. Further, it does not matter whether or not a seller's failure to implement is intentional when such failure is substantial, pervasive, and recurring. The safe harbor in our rules thus recognizes that a telemarketer's intent to avoid unlawful calls is best evidenced by detailed compliance procedures and adherence to basic requirements such as timely access to the Registry. In short, the error defense only applies to unlawful actions that occur despite comprehensive policies and procedures to prevent them. Dynasty clearly did not adhere to such procedures during the forfeiture period.

C. Dynasty Has Failed to Show that the Proposed Forfeiture for 68 Calls Should Be Reduced or Canceled

42. 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.[79] 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."[80]

43. The *Dynasty NAL* proposes the maximum forfeiture of $11,000 for each alleged violation of section 64.1200(c)(2) of the Commission's rules. Although the *Dynasty NAL* is the Commission's first proposed forfeiture for violations of the national do-not-call rules, we determined that a national do-not-call violation implicates the same concern as a violation of the company-specific do-not-call rules and, accordingly, applied the $10,000 base amount that the Commission had previously proposed for company-specific do-not-call violations.[81] In Dynasty's case, we adjusted the base amount upward to the $11,000 maximum to reflect that (1) Dynasty's practices were "wholly inadequate" to promote compliance with national do-not-call rules; (2) Dynasty's violations continued despite being informed by

[78] The *NAL* notes that "an error claim should be supported by evidence showing that otherwise unlawful telephone solicitations were made unintentionally and detailing any procedural breakdowns that led to such calls, as well as the steps that the seller has taken to minimize future errors." *See Dynasty NAL*, 20 FCC Rcd at 4909.

[79] Section 503(b)(2)(C) provides for forfeitures up to $10,000 for each violation in cases not covered by subparagraphs (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. *See* 47 U.S.C. § 503(b). Pursuant to the Debt Collection Improvement Act of 1996, P.L. 104-134, 110 Stat. 1321-358, the statutory maximum amount for a forfeiture penalty shall be adjusted for inflation at least once every four years. Accordingly, the $10,000 forfeiture ceiling has been adjusted to $11,000. 47 C.F.R. § 1.80(b)(5). *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004).

[80] 47 U.S.C. § 503(b)(2)(D); 47 C.F.R. § 1.80(b)(4).

[81] *Dynasty NAL*, 20 FCC Rcd at 4913 (citing *AT&T Corporation*, Notice of Apparent Liability for Forfeiture, 18 FCC Rcd 23398 (2003)).

the Commission's staff that it was relying upon a non-existent exemption to justify its calls; and (3) Dynasty continued to misinform consumers that it is exempt from national do-not-call rules even after admitting, in correspondence to the Commission, that it is subject to these rules.[82]

44. In the NAL Response, Dynasty seeks cancellation of the forfeiture claiming that it has implemented a rigorous and costly national do-not-call plan on short notice and that it did not willfully make telephone solicitations to consumers on the National Do-Not-Call Registry.[83] Finally, Dynasty contends that imposition of any forfeiture threatens its financial solvency. For the reasons set forth below, we find that Dynasty has failed to present evidence justifying reduction or cancellation of the proposed forfeiture with respect to the 68 calls at issue here.

1. Dynasty's Conduct

45. Dynasty failed to meet critical elements of its obligations under the Commission's national do-not-call rules, most notably the threshold duties to timely access the National Do-Not-Call Registry and scrub its telemarketing lists to ensure that calls are not made to registered numbers.[84] Dynasty's record thus belies its claim to have implemented an effective national do-not-call compliance plan during the forfeiture period. Dynasty chose to engage in telemarketing without ensuring compliance with the most basic do-not-call requirements mandated by section 64.1200(c)(2), resulting in multiple calls to consumers registered on the National Do-Not-Call Registry.[85] Regardless of Dynasty's intentions, its violations are, therefore, both willful and repeated.[86]

46. Dynasty's NAL Response provides detailed information about the steps it has taken to

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[82] *Id.* at 4914.

[83] As a related matter, Dynasty contends that it did not misinform consumers, arguing that reported conversations between Dynasty telemarketers and complainants are of questionable accuracy or isolated and ambiguous. April 12 NAL Response at 25 We note that each of these complainants signed a sworn declaration attesting to statements made by Dynasty telemarketers, including supervisory personnel. Moreover, our forfeiture, including the upward adjustment, is rooted in the totality of Dynasty's noncompliant conduct, not simply its reported conversations with call recipients. *Dynasty NAL*, 20 FCC Rcd at 4014.

[84] *See* paras.

[85] When Dynasty discovered in January 2004 that its telemarketing operations were unlawful, it could have chosen to suspend telemarketing operations briefly until it was able to ensure compliance. As discussed below, we have not imposed a forfeiture penalty for any of Dynasty's unlawful telephone solicitations delivered before March 2, 2004. *See* Appendix A, para. 47, *infra.*

[86] "Willful" in this context means that the violator knew that he was doing the act in question, in this case, initiating a telephone solicitation. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California*"). A violator need not know that his action or inaction constitutes a violation; ignorance of the law is not a defense or mitigating circumstance. *Id.* (citing *Vernon Broadcasting, Inc.*, 60 RR 2d 1275, 1277 (1986); *Fay Neel Eggleston*, 19 FCC 2d 829 (1969)). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc.*, 16 FCC Rcd 1359 (2001) ("*Callais Cablevision*") (issuing a notice of apparent liability for forfeiture for, *inter alia*, a cable television operator's repeated signal leakage). The term "repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Callais Cablevision*, 16 FCC Rcd at 1362; *Southern California*, 6 FCC Rcd at 4388.

comply with national do-not-call rules.[87] Whatever Dynasty's current procedures may be, however, we must consider here the state of Dynasty's compliance at the time it made the calls currently at issue. Even if Dynasty ultimately brought its telemarketing activities into full and consistent compliance with national do-not-call rules,[88] that fact alone would not militate against forfeiture.[89] Consumers should be able to expect that sellers who choose to use telemarketing to advertise their property, goods, or services will comply with do-not-call requirements without the necessity of costly and time-consuming enforcement actions.

47. As emphasized in the *NAL*, our initial goal in this case was to seek Dynasty's compliance with the law; not to seek a forfeiture.[90] First, as required by the Act, we issued a citation to Dynasty, warning it specifically about its non-compliance and requesting that it take corrective action immediately. Next, after the citation was issued, we took into consideration its assertion regarding the basis for its initial noncompliance and its claim of immediate remedial actions, and we then monitored complaints filed against Dynasty rather than beginning a forfeiture action immediately. We commenced our forfeiture action only after complaint levels indicated that Dynasty was still making unlawful telephone solicitations and Dynasty's response to our LOI revealed the insufficiency of Dynasty's national do-not-call compliance program. Nonetheless, we did not impose a forfeiture for any calls made by Dynasty before its February 20, 2004 letter to the Division, which formally acknowledged its do-not-call obligations and pledged effective enforcement. Dynasty has not met even minimal compliance standards. Its conduct, therefore, does not merit reduction or cancellation of the proposed forfeiture for the 68 unlawful calls.

2. Financial Hardship

48. Dynasty details its financial challenges and submits numerous financial documents to support its claim that any forfeiture would threaten its financial solvency, jeopardizing the continued operation of both the Arizona and California entities.[91] As explained in the *Dynasty NAL*, the Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2)

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[87] *See* para. 32, *supra*.

[88] As noted above, Dynasty again has neglected to access the National Do-Not-Call Registry within the required time frame. *See* n. 65, *supra*. Assuming that Dynasty is continuing its telemarketing activities, the most recent lapse – failure to access the Registry since September 27, 2005 – is another indication that Dynasty's do-not-call compliance remains haphazard.

[89] *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994) ("Corrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.'").

[90] *Dynasty NAL*, 20 FCC Rcd at 4914.

[91] Dynasty lists various factors that it claims threaten the companies' financial viability ranging from losses from embezzlement and failed business ventures, to expenditures associated with its national do-not-call compliance program, to increased competition and cyclical downswings, to negative publicity associated with our warning citation and *NAL*. *See* NAL Response at 27-28. We note here that national do-not-call compliance costs do not appropriately factor into a financial hardship analysis; entities that cannot afford full do-not-call compliance should not be engaged in telemarketing.

financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.[92] Despite these clear requirements, Dynasty does not include a succinct statement of its financial status beyond a summary assertion regarding its liabilities. More critically, Dynasty fails to provide the documentation necessary to justify reducing or canceling the forfeiture based on financial hardship. Dynasty has not provided any federal tax returns to support its hardship claim. Further, although Dynasty has submitted over 30 pages of financial records pertaining to its Arizona and California companies, crucial information is missing. Dynasty provides various bank account records, profit and loss statements, and balance sheets along with copies of sworn statements from its president and chief operating officer attesting to the accuracy of unidentified financial records. We cannot be certain, however, as to which records the sworn statements pertain because these statements actually predate some of Dynasty's financial documentation. In addition, the documentation does not include 2004 financial data for Dynasty's California operations despite indication to the contrary in the NAL Response. This omission prevents our consideration of a key factor necessary to assess Dynasty's financial status and hardship claim: its total gross revenues. Commission staff urged Dynasty to provide a more complete and clear financial showing, including copies of its federal tax returns, yet Dynasty has not to date responded.[93] Dynasty's incomplete showing fails to reliably and objectively document the company's financial status and, thus, does not justify reducing or canceling the forfeiture.

IV. CONCLUSION AND ORDERING CLAUSES

49. After reviewing the information and documentation filed by Dynasty in its NAL Response, we find that Dynasty has failed to identify facts or circumstances to persuade us that there is a reasonable basis for modifying the forfeiture proposed in the *Dynasty NAL* with respect to the 68 telephone solicitations listed in Appendix A. As discussed above, Dynasty has failed to show any mitigating circumstances or demonstrate financial hardship sufficient to warrant a reduction of the forfeiture penalty. We are, however, canceling the proposed forfeiture with respect two calls that were made one day before effectuation of the call recipient's national do-not-call registration.

50. 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), that Dynasty Mortgage, L.L.C. SHALL FORFEIT to the United States Government the sum of $748,000 for willfully and repeatedly violating of section 64.1200(c)(2) of the Commission's rules, as described in the paragraphs above and detailed in Appendix A. We find that Dynasty's Arizona and California companies are jointly and severally liable for this forfeiture because of their common ownership and operations, and the fact that they have acted in concert to deliver telephone solicitations.

51. Payment of the forfeiture shall be made in the manner provided for in section 1.80 of the Commission's rules within 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

[92] 20 FCC Rcd at 4914, n. 58.

[93] *See* para. 12, *supra*.

Section 504(a) of the Act.[94] 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/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C., 20554.[95]

52. IT IS FURTHER ORDERED that a copy of this Order shall be sent by first class mail and certified mail return receipt to Dynasty Mortgage, L.L.C. at: (1) 2633 E. Indian School Rd., Suite 370, Phoenix, Arizona 85016; (2) 5701 W. Talavi Blvd., Suite 110, Glendale, Arizona 85306; and (3) 4660 E. LaJolla Village Dr., Suite 400, San Diego, California 92122.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[94] 47 U.S.C § 504(a).

[95] *See* 47 U.S.C § 1.1914.

Appendix A

DYNASTY MORTGAGE, L.L.C.
NATIONAL DO-NOT-CALL VIOLATIONS SUBJECT TO FORFEITURE

	Telephone Solicitation Recipient	Call Recipient's Area Code	Call Recipient's D-N-C- Registration		Dynasty's Telephone Solicitation					Caller ID Displayed
			Registration Date	Effectuation Date	Date of Call	Date of Dynasty's Access to D-N-C Registry [1]	Timely Access to D-N-C Registry	Expired Access to D-N-C Registry	No Access to D-N-C Registry	
1	Adams, Robert	858 (CA)	8/13/03	10/1/03	8/3/04	3/8/04		X		
2	Atkinson, Nigel	619 (CA)	6/28/03	10/1/03	8/31/04	3/13/04		X		
3	Berens, Barbara	602 (AZ)	8/18/04	11/18/04	12/27/04	3/15/04		X		602-218-9221
4	Bonomo, Robert	858 (CA)	7/23/03	10/1/03	8/3/04	3/8/04		X		
5	Carlson, Jay E.	623 (AZ)	6/28/03	10/1/03	3/9/04	3/15/04			X	602-445-9276
6	Chute, William P.	619 (CA)	6/28/03	10/1/03	8/14/04	3/13/04		X		Dynasty Mortgage 602-218-9221
7	Demchak, Barry	858 (CA)	7/26/03	10/1/03	3/26/04	3/8/04	X			858/362-8695
8	Denisac, Frank	858 (CA)	6/28/03	10/1/03	3/2/04	3/8/04			X	858-362-8695
9	Epps, John	858 (CA)	6/28/03	10/1/03	7/13/04	3/8/04		X		602-218-9221
10					8/2/04			X		602-218-9221
11					8/11/04			X		602-218-9221
12	Ferguson, Bruce	760 (CA)	6/27/03	10/1/03	8/14/04	3/13/04		X		602-218-9221
13	Fernando, E. Joe A. IV	619 (CA)	7/26/03	10/1/03	4/13/04	3/13/04	X			
14	Finnegan, Philip (Jay)	619 (CA)	7/26/03	10/1/03	4/12/04	3/13/04	X			

[1] Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

	Telephone Solicitation Recipient	Call Recipient's Area Code	Call Recipient's D-N-C- Registration		Dynasty's Telephone Solicitation					Caller ID Displayed
			Registration Date	Effectuation Date	Date of Call	Date of Dynasty's Access to D-N-C Registry [1]	Timely Access to D-N-C Registry	Expired Access to D-N-C Registry	No Access to D-N-C Registry	
15	Frank, Kevin	619 (CA)	1/22/04	4/22/04	11/30/04	3/13/04		X		888-508-5592
16	Gittus, Michael	623 (AZ)	7/6/03	10/1/03	6/7/04	3/15/04	X			602-445-9277
17	Grimes, Larry A.	619 (CA)	6/28/03	10/1/03	5/10/04	3/13/04	X			858-362-8468
18					5/11/04		X			858-362-8598
19	Hansen, Patricia	619 (CA)	6/29/03	10/1/03	8/7/04	3/13/04		X		602-218-9221
20	Holland, Christopher J.	858 (CA)	8/6/03	10/1/03	3/5/04	3/8/04			X	
21	Holmes, Mark	858 (CA)	9/22/03	12/22/03	11/22/04	3/8/04		X		888-508-5592
22	Jaycox, Antoinette	480 (AZ)	10/13/03	1/13/04	8/2/04	3/15/04		X		
23	Johnson, Todd	602 (AZ)	4/14/04	7/14/04	10/26/04	3/15/04		X		
24	Kertesz, Joe	480 (AZ)	4/25/04	7/25/04	8/16/04	3/15/04		X		602-218-9221
25	Koepke, Kevin	480 (AZ)	8/2/04	11/2/04	1/6/05	1/06/05	X			602-218-9221
26					1/19/05		X			602-218-9221
27					1/20/05		X			602-218-9221
28	Langevin, Edwin	858 (CA)	7/26/03	10/1/03	9/27/04	3/8/04		X		Dynasty Mortgage 888-508-5592
29	Lauterbach, Lynette	480 (AZ)	8/16/04	11/16/04	12/13/04	3/15/04		X		602-218-9221
30					12/13/04			X		602-218-9221
31	Lewis, Jeffrey	619 (CA)	6/30/03	10/1/03	7/10/04	3/13/04		X		
32	Logan, Michelle	623 (AZ)	5/15/04	8/15/04	11/30/04	3/15/04		X		602-218-9221
33					12/1/04			X		602-218-9221
34					12/6/04			X		602-218-9221
35					12/18/04			X		602-218-9221

[1] Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

	Telephone Solicitation Recipient	Call Recipient's Area Code	Call Recipient's D-N-C- Registration		Dynasty's Telephone Solicitation					Caller ID Displayed
			Registration Date	Effectuation Date	Date of Call	Date of Dynasty's Access to D-N-C Registry [1]	Timely Access to D-N-C Registry	Expired Access to D-N-C Registry	No Access to D-N-C Registry	
35	Logan, Michelle (cont.)	623 (AZ)	5/15/04	8/15/04	12/19/04	3/15/04		X		602-218-9221
37	Madden, William	619 (CA)	7/26/03	10/1/03	7/8/04	3/13/04		X		602-218-9221
38					7/19/04			X		602-218-9221
39					8/11/04			X		602-218-9221
40					8/18/04			X		602-218-9221
41	Marler, James	619 (CA)	6/29/03	10/1/03	7/19/04	3/13/04		X		
42	McKenzie, James	858 (CA)	7/1/03	10/1/03	12/7/04	3/8/04		X		
43	McKenzie, Thomas	619 (CA)	7/1/03	10/1/03	7/8/04	3/13/04		X		
44	Mitchell, Kelly	619 (CA)	7/18/03	10/1/03	4/6/04	3/13/04	X			
45	Neuberg, Karen	480 (AZ)	7/10/04	10/10/04	12/20/04	3/15/04		X		602-445-0070
46	Novitz, Stuart	858 (CA)	6/27/03	10/1/03	7/20/04	3/8/04		X		Dynasty Mortgage 602-218-9221
47	Oleska, Myron	619 (CA)	7/13/03	10/1/03	8/18/04	3/13/04		X		
48	Pickwell, Sheila	858 (CA)	6/30/03	10/1/03	3/2/04	3/8/04			X	
49	Ramsey, Marian	480 (AZ)	7/1/03	10/1/03	5/8/04	3/15/04	X			Dynasty Mortgage 602-445-9256
50	Recker, Irene	858 (CA)	6/29/03	10/1/03	7/12/04	3/8/04		X		
51	Rice, Marilyn	858 (CA)	6/29/03	10/1/03	Sometime between 10/27/04 and11/8/04	3/8/04		X		602-218-9221
52					11/8/04			X		

[1] Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.

	Telephone Solicitation Recipient	Call Recipient's Area Code	Call Recipient's D-N-C- Registration		Dynasty's Telephone Solicitation					Caller ID Displayed
			Registration Date	Effectuation Date	Date of Call	Date of Dynasty's Access to D-N-C Registry [1]	Timely Access to D-N-C Registry	Expired Access to D-N-C Registry	No Access to D-N-C Registry	
53	Rippetoe, Patrick	858 (CA)	6/27/03	10/1/03	8/9/04	3/8/04		X		
54	Rumsey, Eric	619 (CA)	6/27/03	10/1/03	4/10/04	3/13/04	X			
55	Scotti, Diane	623 (AZ)	9/25/04	12/25/04	12/30/04	3/15/04		X		602-218-9221
56					1/4/05			X		602-218-9221
57					1/6/05		X			
58					1/13/05		X			
59	Stewart, Hal	480 (AZ)	9/23/04	12/23/04	12/29/04	3/15/04		X		602-445-0070
60	Taub, Charles	858 (CA)	7/10/03	10/1/03	3/9/04	3/8/04	X			
61	Torkington, Adrian	619 (CA)	8/29/03	10/1/03	5/13/04	3/13/04	X			858-362-8585
62	Van Hoven, Lynn	480 (AZ)	6/28/03	10/1/03	3/8/04	3/15/04			X	602-445-9276
63					3/8/04				X	602-445-9276
64	Vizcarra, Victor	760 (CA)	7/26/03	10/1/03	7/13/04	3/13/04		X		602-218-9221
65	Walker, Claire	619 (CA)	4/9/04	7/9/04	9/23/04	3/13/04		X		888-508-5592
66	Wassel, Theodore A.	858 (CA)	7/26/03	10/1/03	6/1/04	3/8/04	X			Dynasty Mortgage 858-362-8585
67	Worthington, Mary	858 (CA)	6/28/03	10/1/03	8/25/04	3/8/04		X		
68	Zanelli, Elizabeth	858 (CA)	7/26/03	10/1/03	8/6/04	3/8/04		X		

[1] Shows Dynasty's most recent access to the National Do-Not-Call Registry prior to the date of its telephone solicitation. When Dynasty failed to access the Registry before making a telephone solicitation, the date provided is the access date closest to the date of the telephone solicitation.