

TONY WEST  
Assistant Attorney General, Civil Division  
U.S. DEPARTMENT OF JUSTICE

PAUL J. FISHMAN  
United States Attorney  
By: Susan J. Steele  
Assistant U.S. Attorney  
970 Broad Street, 7th Floor  
Newark, New Jersey 07102  
PHONE: 973-645-2700  
FAX: 973-645-2702

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELECTRIC MOBILITY  
CORPORATION,  
d/b/a RASCAL SCOOTERS,  
a New Jersey corporation, and

MICHAEL J. FLOWERS,  
individually and as an officer of  
Electric Mobility Corporation,

Defendants.

**Civil Action No.**

**COMPLAINT FOR CIVIL  
PENALTIES, PERMANENT  
INJUNCTION, AND OTHER  
RELIEF**

Plaintiff, the United States of America, acting upon notification and

authorization to the Attorney General by the Federal Trade Commission (“FTC” or “Commission”), pursuant to Section 16(a)(1) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 56(a)(1), for its Complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), and 16(a) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 56(a), and Section 6 of the Telemarketing and Consumer Fraud and Abuse Prevention Act (the “Telemarketing Act”), 15 U.S.C. § 6105, to obtain monetary civil penalties, a permanent injunction, and other equitable relief from Defendants for their violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC’s Telemarketing Sales Rule (the “TSR” or “Rule”), 16 C.F.R. Part 310, as amended.

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and under 15 U.S.C. §§ 45(m)(1)(A), 53(b), and 56(a). This action arises under 15 U.S.C. § 45(a).

3. Venue is proper in the District of New Jersey under 28 U.S.C. §§ 1391(b-c) and 1395(a), and 15 U.S.C. § 53(b).

### **DEFENDANTS**

4. Defendant Electric Mobility Corporation (“EMC”), also doing business as Rascal Scooters, is a New Jersey for-profit corporation with its

principal place of business at 591 Mantua Boulevard, Sewell, NJ 08080. EMC manufactures and sells electric scooters and power wheelchairs for mobility-challenged consumers (“mobility devices”). EMC is a seller and telemarketer that initiates outbound telephone calls to induce consumers to purchase goods from EMC. Defendant EMC transacts or has transacted business in this District.

5. Defendant Michael J. Flowers is the president, a director, and an owner of EMC. In connection with the matters alleged herein, he resides or has transacted business in this District. At all times material to this Complaint, acting alone or in concert with others, he has had the authority and responsibility to prevent or correct the unlawful telemarketing practices of EMC, and has formulated, directed, controlled, or participated in the acts and practices of EMC including the acts and practices set forth in this Complaint.

#### **COMMERCE**

6. At all times relevant to this Complaint, Defendants have maintained a substantial course of trade or business in the offering for sale and sale of goods or services via the telephone, in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

**THE TELEMARKETING SALES RULE**  
**AND THE NATIONAL DO NOT CALL REGISTRY**

7. Congress directed the FTC to prescribe rules prohibiting abusive and deceptive telemarketing acts or practices pursuant to the Telemarketing Act, 15 U.S.C. §§ 6101-6108. The FTC adopted the original TSR in 1995, extensively amended it in 2003, and amended certain provisions thereafter. 16 C.F.R. Part 310.

8. Among other things, the 2003 amendments to the TSR established a do not call registry, maintained by the Commission (the “National Do Not Call Registry” or “Registry”), of consumers who do not wish to receive certain types of telemarketing calls. Consumers can register their telephone numbers on the Registry without charge either through a toll-free telephone call or over the Internet at [donotcall.gov](http://donotcall.gov).

9. Consumers who receive telemarketing calls to their registered numbers can complain of Registry violations the same way they registered, through a toll-free telephone call or over the Internet at [donotcall.gov](http://donotcall.gov), or by otherwise contacting law enforcement authorities.

10. The FTC allows sellers, telemarketers, and other permitted organizations to access the Registry over the Internet at

telemarketing.donotcall.gov, to pay the fee(s) if required, and to download the numbers not to call.

11. Under the TSR, an “outbound telephone call” means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution. 16 C.F.R. § 310.2(u).

12. The TSR prohibits sellers and telemarketers from initiating an outbound telephone call to numbers on the Registry in violation of the TSR. 16 C.F.R. § 310.4(b)(1)(iii)(B).

13. A seller or telemarketer may initiate an outbound telephone call to a telephone number on the Registry if it can prove that the seller on whose behalf the call is made has the “express agreement, in writing” of the consumer to make calls to that number, so long as the consumer has not subsequently made an entity-specific do-not-call request stating that he or she does not wish to receive calls made by or on behalf of the seller. 16 C.F.R. § 310.4(b)(1)(iii)(B)(i). The written agreement must “clearly evidence such person’s authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person.” *Id.*

14. Such written agreement must be “clear and conspicuous,” 68 Fed. Reg. 4580, 4634, and “authorization” obtained through subterfuge, such as sweepstakes entry forms used in a deceptive manner, is ineffective and does not constitute express consent under the Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B)(i). *See* “The Written Permission to Call Exemption,” Complying with the Telemarketing Sales Rule, available at <http://business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule>.

15. A seller or telemarketer may also initiate an outbound telephone call to a telephone number on the Registry if it can prove that the seller has an “established business relationship” (“EBR”) with the consumer, 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii), and the consumer has not made an entity-specific do-not-call request stating that he or she does not wish to receive calls from that seller, 16 C.F.R. § 310.4(b)(1)(iii)(A). An EBR exists between a seller and the consumer if: (a) the consumer has purchased, rented, or leased the seller’s goods or services, or the consumer and seller have completed a financial transaction, within the eighteen months immediately preceding the date of a telemarketing call; or (b) the consumer has made an inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of the call. 16 C.F.R. § 310.2(n).

16. Pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. §6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

### **DEFENDANTS' BUSINESS ACTIVITIES**

#### **Calls to Consumers on the National Do Not Call Registry**

17. EMC is a “seller” and “telemarketer” engaged in “telemarketing,” as defined by the TSR, 16 C.F.R. § 310.2.

18. EMC is a seller of mobility devices and a telemarketer that initiates outbound telephone calls to consumers in the United States to induce the purchase of its products.

19. Defendants have engaged in telemarketing by a plan, program, or campaign conducted to induce the purchase of goods or services by use of one or more telephones and which involves more than one interstate telephone call.

20. Since October 17, 2003, in telemarketing campaigns to induce consumers to purchase EMC’s mobility devices, EMC has made more than three million calls to telephone numbers on the National Do Not Call Registry in violation of the TSR.

21. Almost two million of the over three million outbound calls that EMC has made since October 17, 2003 to telephone numbers on the National Do Not Call Registry in violation of the TSR were made to telephone numbers that were provided by consumers who entered sweepstakes promoted by EMC and with whom EMC never had an EBR. The remainder of the calls were made to consumers with whom EMC had an EBR that had expired; EMC attempted to revive the EBR by inducing those consumers to enter its sweepstakes.

22. Through publications, mailings, broadcasting and the Internet, EMC has encouraged consumers to enter sweepstakes to win a free Rascal Scooter, a mobility device marketed by the Defendants. The sweepstakes entry forms that EMC has distributed, examples of which are appended to this Complaint as Attachments 1-3, state that consumers could "Win A Free Rascal!" by providing their name, address, and telephone number on the entry form. In small print under the portion of the sweepstakes entry form that is provided for the entrants' phone numbers, EMC reminds entrants to list their phone numbers so that EMC may contact them if they win. EMC also allows consumers to enter these sweepstakes by telephoning a toll-free number. Consumers are not required to make a purchase, apply to make a purchase, or inquire about purchasing EMC products to be eligible for these sweepstakes.



23. The completed sweepstakes entry forms referred to in paragraph 22 are not express written agreements that clearly evidence consumer authorization to receive calls from EMC. The forms did not advise consumers clearly and conspicuously that supplying a telephone number on the entry form would authorize EMC to use that telephone number for telemarketing purposes. Accordingly, consumer entries in EMC's sweepstakes did not permit EMC to call consumers whose numbers were on the National Registry under the express written agreement exception pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B)(i).

24. The completed sweepstakes entry forms referred to in paragraph 22 did not constitute consumer inquiries or application regarding a product or service offered by the seller. A reasonable consumer would not expect entry in EMC's no-obligation sweepstakes to trigger a telemarketing call from EMC about its mobility devices. Accordingly, consumer entries in EMC's sweepstakes did not permit EMC to call consumers whose numbers were on the National Registry under the EBR exception pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii).

### **VIOLATIONS OF THE TELEMARKETING SALES RULE**

#### **Count I (Violating the National Do Not Call Registry)**

25. In numerous instances, in connection with telemarketing, Defendants engaged in or caused others to engage in initiating outbound telephone calls to

telephone numbers on the National Do Not Call Registry in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

### **CONSUMER INJURY**

26. Consumers have suffered and will continue to suffer injury as a result of Defendants' violations of the TSR. Absent injunctive relief by this Court, Defendants are likely to continue to injure consumers and harm the public interest.

### **THIS COURT'S POWER TO GRANT RELIEF**

27. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress violations of any provision of law enforced by the FTC.

28. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, and as implemented by 16 C.F.R. § 1.98(d), authorizes this Court to award monetary civil penalties of not more than \$11,000 for each violation of the TSR occurring on or before February 9, 2009, and up to \$16,000 for each violation of the TSR occurring after February 9, 2009. *See* 74 Fed. Reg. 857 (Jan. 9, 2009). Defendants' violations of the TSR were committed with the knowledge required by Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A).

29. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by Defendants violations of the FTC Act and the TSR.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A), and 13(b) of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), and 53(b), and pursuant to its own equitable powers:

- A. Enter judgment against Defendants and in favor of Plaintiff for each violation alleged in this Complaint;
- B. Award Plaintiff monetary civil penalties from each Defendant for every violation of the TSR;
- C. Enter a permanent injunction to prevent further violations of the TSR, and the FTC Act by Defendants; and
- D. Award Plaintiff such other and additional relief as the Court may determine to be just and proper.

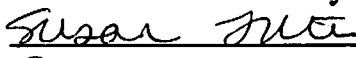
OF COUNSEL:

LEONARD L. GORDON  
Director  
Northeast Region  
FEDERAL TRADE  
COMMISSION

NUR-UL-HAQ  
THEODORE ZANG  
Attorneys  
Federal Trade Commission  
Northeast Region  
One Bowling Green, Suite 318  
New York, NY 10004  
PHONE: 212-607-2829  
FAX: 212-607-2922

FOR THE UNITED STATES OF AMERICA:

TONY WEST  
Assistant Attorney General  
Civil Division  
U.S. DEPARTMENT OF JUSTICE

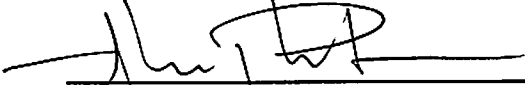
PAUL J. FISHMAN  
United States Attorney  
District of New Jersey  


---

*Susan J. Steek*  
Assistant U.S. Attorney  
970 Broad Street, 7th Floor  
Newark, NJ 07102  
PHONE: 973-645-2700  
FAX: 973-645-2702

EUGENE M. THIROLF  
Director  
Office of Consumer Litigation

KENNETH L. JOST  
Deputy Director  
Office of Consumer Litigation



---

ALAN PHELPS  
Trial Attorney  
Office of Consumer Litigation  
U.S. Department of Justice  
P.O. Box 386  
Washington, DC 20044  
Phone: 202-307-6154  
Alan.Phelps@usdoj.gov