

Procedure 190.

JURISDICTION

2. This suit is brought by the ATTORNEY GENERAL through the Consumer Protection and Public Health Division in the name of the STATE OF TEXAS and in the public interest under the authority granted to him by § 17.47 of the Deceptive Trade Practices-Consumer Protection Act (“DTPA”), TEX. BUS. & COM. CODE ANN. 17.41 *et seq.*

3. The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit against Defendants for violations of Chapter 39 of the Texas Business and Commerce Code, Cancellation of Certain Consumer Transactions, TEX. BUS. & COM. CODE ANN. § 39.001, *et seq.* (Vernon 1987 and Supp. 1999) (commonly known and hereinafter referred to as the “Home Solicitation Act”) and the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.* (Vernon 1987 and Supp. 1999) (hereinafter “DTPA”). The DTPA grants authority to the Attorney General to seek injunctive relief and civil penalties for violations of its provisions. TEX. BUS. & COM CODE ANN. § 17.47. The Home Solicitation Act also grants authority to the Attorney General to seek injunctive relief for violations of its provisions. TEX. BUS. & COM. CODE ANN. § 39.009.

DEMAND FOR TRIAL BY JURY

4. Plaintiff, STATE OF TEXAS demands trial by jury in this cause.

PARTY DEFENDANTS

5. Defendant CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS d/b/a CMS FORT WORTH d/b/a City Mtg. Servi is an active Texas corporation. The registered agent for service is Gustavo Duarte, director and shareholder and the service address is 6420 Richmond, Ste. 215, Houston, Texas 77057. Accordingly, Defendant may be cited by serving the Secretary of State of Texas pursuant to CPRC §17.044(a)(1), CPRC §17.026 and Bus. Corp. Act art. 2.11(B), provided that the citation and petition are forwarded to Defendant's last know home office address or principal place of business, P.O. Box 219010, Houston, Texas 77218 and 6420 Richmond, Ste. 215, Houston, Texas 77057, by certified mail, return receipt requested.

Defendant GUSTAVO DUARTE is an individual owning and operating Defendant CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS d/b/a CMS FORT WORTH d/b/a City Mtg. Servi, whose last driver's license address is 7307 River Pines Dr., Cypress, Texas 77057. His business address is 6420 Richmond, Ste. 215, Houston, Texas 77057 and 1880 Dairy Ashford #112, Houston, Texas 77077 and 14275 Midway, Addison, Texas 75001, and Defendant may be cited by serving the Secretary of State of Texas pursuant to CPRC §17.044(a)(3) and CPRC §17.045(b), provided that the citation and petition are forwarded to Defendant's last know home office address or principal place of business Defendant may be served with process by serving him at his last driver's license address at 7307 River Pines Dr., Cypress, Texas 77057.

Defendant ALFREDO MENDEZ is an individual who operates and is believed to own Defendant CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS, d/b/a CMS FORT WORTH d/b/a City Mtg. Servi who currently resides at 2211 Sentinal Oaks St., Sugarland, Texas 77478 and whose driver's license address is 7307 River Pines Dr., Cypress, Texas 77057. His business address is 6420 Richmond, Ste. 215, Houston, Texas 77057 and 1880 Dairy Ashford #112, Houston, Texas 77077 and 14275 Midway, Addison, Texas 75001, and Defendant may be cited by serving the Secretary of State of Texas pursuant to CPRC §17.044(a)(3) and CPRC §17.045(b), provided that the citation and petition are forwarded to Defendant's last know home office address or principal place of business Defendant may be served with process by serving him at his last driver's license address at 7307 River Pines Dr., Cypress, Texas 77057.

VENUE

6. Venue of this action lies in Dallas County pursuant to § 17.47(b) of the DTPA because the transactions and events giving rise to this action occurred in Dallas County and/or because Defendant is doing business in Dallas County.

PUBLIC INTEREST

7. Plaintiff STATE OF TEXAS has reason to believe that Defendants are engaging in, have engaged in, or are about to engage in, the unlawful acts or practices set forth below, that Defendants have, by means of these unlawful acts and practices, caused damage to and acquired money or

property from consumers, and that Defendants adversely affect the lawful conduct of trade and commerce, thereby directly or indirectly affecting the people of this State. Therefore, the Consumer Protection and Public Health Division of the Office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

8. Defendants have, at all times described below, engaged in conduct which constitutes “trade” and “commerce,” as those terms are defined by § 17.45(6) of the DTPA.

ACTS OF AGENTS

9. Whenever in this petition it is alleged that Defendants did any act or thing, it is meant that Defendants performed or participated in such act or thing or that such act was performed by the officers, agents or employees of said Defendant, and in each instance, the officers, agents or employees of said Defendants that were then authorized to and did in fact act on behalf of Defendants or otherwise acted under the guidance and direction of the Defendants.

NOTICE BEFORE SUIT

10. Pursuant to the Deceptive Trade Practices Act, there is good cause to believe that immediate and irreparable injury, loss, or damage would occur as a result of a delay in obtaining a temporary restraining order to enjoin Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS d/b/a CMS FORT

WORTH d/b/a City Mtg. Servi AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually from continued violations of the DTPA. Sworn affidavits attached hereto establish that Defendants made home solicitation promises to lower the consumers' mortgage payments over the term of their mortgage loan by making bi-weekly payments instead of monthly. The affidavits further show that these Spanish speaking consumers signed contracts by which they sent their mortgage payments and/or allowed Defendants to draft their bank accounts plus an administrative fee to Defendants twice a month and Defendants agreed to forward the payments to consumers' mortgage company. Defendants retained instead of forwarding the mortgage payments.

If Defendants are not immediately restrained, they will continue to draft the mortgage payment from consumers' bank accounts and not forward to the mortgage company and may cause many more consumers to lose their money by such deception. These acts of Defendants continue to the present. As such, the State is initiating this action without notice to Defendant as authorized by § 17.47 (a) of the DTPA.

NATURE OF DEFENDANTS' CONDUCT

11. Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS d/b/a CMS FORT WORTH d/b/a City Mtg. Servi AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually engage in false, misleading, or deceptive conduct by securing a contract by home solicitation and promising to draft consumers' account and forward the mortgage draft to the consumers' mortgage company but fail to do so. Defendants also demand consumers pay a processing fee. It is believed that

Defendants also operate under the fictitious names CITY MORTGAGE SERVICES, CMS and SMART FINANCIAL SAVINGS d/b/a CMS FORT WORTH d/b/a City Mtg. Servi.

12. Defendants' representatives personally solicited consumers for this mortgage scheme in and around the state of Texas and Oklahoma, and specifically in Dallas County, Texas, by making oral presentations at the consumers' homes. In most instances, Defendants' representatives used the Spanish language to conduct the oral presentations to Spanish-speaking consumers.

13. The home solicitation presentation of Defendants included a promise to lower the consumers' mortgage payments and shorten the term of their mortgage loan by making bi-weekly payments instead of monthly and making increased payment amounts. In many cases, the Defendants represented to consumers that the mortgage repayment plan Defendants were proposing was a City of Dallas plan and/or approved/sanctioned by the City of Dallas. The affidavits further show that these Spanish speaking consumers signed contracts by which they sent their mortgage payments plus an administrative fee to Defendants bi-weekly or in some cases permitted Defendants to draft from their bank account bi-weekly and forward the payments to the mortgage company. Defendants did not forward the drafted mortgage payments to the consumers' mortgage lenders as promised. Many consumers have requested that Defendants void the drafts and reimburse them for the drafts taken but not forwarded to the mortgage company. Defendants are not responsive to complaints from consumers about Defendants failing to forward mortgage payments. Defendants do not return phone calls from complaining

consumers, and fail to inform consumers that they cannot or will not resolve the problem and/or intend to retain the consumers' money. If Defendants promise reimbursement, it is not provided. Additionally, Defendants provide the consumers with various unsubstantiated excuses for Defendants' failure to forward the mortgage payments and many consumers believe that Defendants have closed their offices and disconnected their telephones. Most consumers are left with no recourse but to pay the mortgage payments again, this time forwarding the payments themselves directly to the mortgage company to avoid foreclosure.

14. For those consumers who agreed to the mortgage repayment plan, the Enrollment Form And Automatic Debit Authorization (herein referred to as "the contract") was executed by Defendants' representative at the consumer's home. At the time of its execution, Defendants' representative provided some of the Spanish-speaking consumers with a copy of the contract pertaining to the consumer transaction, which contract contained small print near the bottom of the page regarding cancellation.

15. During the oral presentations to consumers, Defendants' representatives employed various methods that were used to defeat the exercise of the consumer's right to cancel the transaction within the third business day after the date of the transaction. Specifically, Defendants' representatives did not inform some consumers orally at the time the contract was signed of their right to cancel the transaction. Defendants failed to provide consumers with proper "Notice of Cancellation" forms in easily detachable, duplicate form. These methods kept

consumers from exercising their right to cancel the consumer transaction in a timely fashion.

16. Furthermore, Defendants' representatives made misrepresentations to consumers concerning the terms of the mortgage payments and promise to forward the mortgage payments to the mortgage company in order to induce them into signing the contract and permitting Defendants to begin drafting the consumers' bank account. Specifically, during the oral representations, Defendants' representatives promised that the mortgage repayment plan would provide for consumers to pay off their mortgage earlier, pay less overall interest and that the plan was affiliated with the City of Dallas.

17. Defendants' representatives failed to disclose information to consumers concerning the failure of Defendants to forward the mortgage payments with the intention of inducing them into signing the contract and permitting Defendants to draft from the consumers' bank account. Specifically, Defendants' representatives did not tell consumers that Defendants would not forward the mortgage payments to the mortgage company. If this information had been disclosed, consumers would not have signed the contract and would not have permitted Defendants to draft their bank account.

18. Consumers in the Spanish speaking communities remain vulnerable. Many consumers have complained of Defendants actions and consumers' attempts at securing reimbursement are stymied by Defendants' efforts to ignore, placate and deceive or mislead the consumers.

HOME SOLICITATION ACT VIOLATIONS

19. Defendants, as alleged above, have in the course of trade and commerce violated Chapter 39 of the Texas Business and Commerce Code, Cancellation of Certain Consumer Transactions, TEX. BUS. & COM. CODE ANN. § 39.001, *et seq.* (herein referred to as “Home Solicitation Act”) as follows:

A. By failing to inform consumers orally at the time the contract was signed of their right to cancel the contract, Defendants are in violation of TEX. BUS. & COM. CODE ANN. § 39.008(a)(3); and

B. By failing to provide consumers with proper “Notice of Cancellation” forms in easily detachable, duplicate form, Defendants are in violation of TEX. BUS. & COM. CODE ANN. § 39.004(c).

DTPA VIOLATIONS

20. Defendants, as alleged above, have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful in §§ 17.46(a) and (b) of the DTPA as follows:

A. By causing confusion or misunderstanding as to connection with or certification by Defendants to induce consumers to enter into the contract whereby consumers would permit Defendants to draft their bank account with the understanding that Defendants would remit the consumers’ mortgage payment to the mortgage companies, including but not limited to alleged affiliation with the City of Dallas. These acts of Defendants are in violation of § 17.46(b)(3) of the

DTPA;

B. By representing that the mortgage repayment plan of Defendants have an approval, characteristic, use, benefit or quality which they do not have or that Defendants have an approval, status, affiliation or connection, including but not limited to the City of Dallas, which they do not in violation of DTPA § 17.46(b)(5);

C. By representing that the mortgage repayment plan was of a particular standard, quality or grade in violation of DTPA § 17.46(b)(7);

D. By representing to consumers that the mortgage repayment plan had rights, remedies or obligations which it does not have or involve, Defendants are in violation of DTPA § 17.46(b)(12) of the DTPA;

E. By failing to disclose that information concerning the mortgage repayment plan which was known at the time of the home solicitation which was intended to induce the consumer into signing the contract which the consumer would not have entered into if the information had been disclosed and therefore, Defendants are in violation of § 17.46(b)(24) of the DTPA; and

F. By violating Chapter 39 of the Texas Business and Commerce Code, Cancellation of Certain Consumer Transactions, TEX. BUS. & COM. CODE ANN. § 39.001, *et seq.* (herein referred to as the Home Solicitation Act), Defendants are in violation of § 17.46(b) of the DTPA. Section 39.008(e) of the Home Solicitation Act provides that a violation of the Act is a false, misleading, or deceptive act or practice and is actionable under the DTPA.

DISGORGEMENT

21. All of Defendants' assets are subject to the equitable remedy of disgorgement, which is the forced relinquishment of all benefits that would be unjust for Defendants to retain, including all ill-gotten gains and benefits. Defendants should be ordered to disgorge all monies secured through deception, together with all of the proceeds, profits, income, interest and accessions thereto. Such disgorgement should be for the benefit of the victimized consumers and the State of Texas.

CONSTRUCTIVE TRUST

22. A constructive trust should be placed upon all of Defendants' assets, in favor of all consumers victimized by Defendants and in favor of the State of Texas until this court determines the appropriate amount of restitution and disgorgement.

APPLICATION FOR EX PARTE TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION AND ASSET FREEZE

23. The State alleges that by reason of the foregoing, Defendants should not continue to market their mortgage repayment plan, enter into contracts for the mortgage replacement plan in violation of the laws of the State of Texas, and draft consumer bank accounts. Unless injunctive relief is immediately granted, Defendants will continue to use false, misleading, or deceptive trade practices to market and enter into contracts for their mortgage replacement plan and fail to

remit the mortgage payments deducted from consumer's bank accounts to the mortgage lender. Specifically, Defendants will continue to conduct home solicitations for their mortgage repayment plan; will continue to enter into contracts with consumers' to deducted mortgage payments from the consumer's bank accounts; will continue to fail to remit the mortgage payments to the consumers' mortgage company; will continue to be untruthful, misleading, deceptive, evasive and or unresponsive to complaints of consumers; will continue to be misleading or deceptive about the failure to remit the consumers' mortgage payment to the mortgage company; will continue to be misleading or deceptive about Defendants' intentions or efforts to reimburse consumers; and will continue to not provide the consumers reimbursements for non-remitted payments. If Defendants are not immediately restrained, many more consumers may lose their money and have un-remitted deductions to their bank accounts through Defendants' false, misleading, or deceptive practices and have their homes go into foreclosure status due to un-remitted mortgage payments.

24. The State of Texas also asks that the assets of Defendants be frozen during the pendency of these legal proceedings to preserve monies for consumer restitution upon final judgment. Defendants received large sums of money from the consumer victims by inducing consumers into mortgage repayment contracts during home solicitations by deducting from the consumer's bank account for the purpose of remitting the deducted mortgage payment to the mortgage company and failing to remit the payment. Unless the injunctive relief is granted, Defendants' assets may be dissipated, lost, altered, removed or materially injured. The interests of the State of Texas and

the public require an Ex Parte Asset Freeze to preserve monies for consumer restitution.

25. Defendants, unless immediately restrained by this Honorable Court, will continue violating the laws of the State of Texas, and injury, loss, and damage will result to the State of Texas and to the general public. For the reasons set forth above, the STATE OF TEXAS requests an Ex Parte Temporary Restraining Order; and after notice and hearing, a Temporary and Permanent Injunction as set out below, as authorized pursuant to § 17.47(a) of the DTPA.

REQUEST TO CONDUCT DISCOVERY PRIOR TO TEMPORARY INJUNCTION HEARING

26. The STATE OF TEXAS requests leave of this Court to conduct telephone, oral, written, and other depositions of witnesses prior to any scheduled Temporary Injunction Hearing and prior to Defendants' answer date. There are a number of witnesses who may need to be deposed prior to any scheduled Temporary Injunction Hearing. Any depositions, telephonic or otherwise, would be conducted with reasonable shortened notice to Defendants and defense attorneys if known.

INJURY TO CONSUMERS

27. Defendants have, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored or who, in the alternative, are entitled to an award of damages.

28. Because Defendants have engaged in the unlawful acts and practices described above,

Defendants have violated the law as alleged in this petition. Unless restrained by this Honorable Court, Defendants will continue to violate the laws of the STATE OF TEXAS and cause damage to the general public.

PRAYER

29. WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS d/b/a CMS FORT WORTH d/b/a City Mtg. Servi AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY RESTRAINING ORDER with asset freeze be issued; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued restraining and enjoining Defendants individually and by agents, servants, employees, and representatives from making the representations, doing the acts, and engaging in the practices set out in the proceeding paragraphs as well as from making the following representations and doing the following acts and engaging in the following practices in the pursuit and conduct of trade or commerce within the State of Texas as follows:

- A. Transferring, concealing, destroying, or removing from the jurisdiction of this Court any books, records, documents, invoices or other written materials relating to business of Defendant currently or hereafter in Defendants' possession, custody or control except in response to further orders or subpoenas in this cause;
- B. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

- C. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which they do not have;
- D. Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- E. Representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
- F. Failing to disclose information concerning goods or services which was known at the time of the transaction when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
- G. Failing and/or refusing to remit mortgage payments deducted from consumers' bank accounts to the consumers' mortgage lender;
- H. Falsely representing that the Defendants' mortgage repayment plan has the approval of or affiliation with the City of Dallas, which it does not;
- I. Failing to disclose that Defendants may fail to remit to the consumers' mortgage company the mortgage payments that Defendants have deducted from the consumers' bank account, which Defendants know at the time of the transaction and do not disclose to the consumers in order to induce them into transactions into which they would not enter had the information about the unauthorized charges been disclosed;
- J. Falsely representing to consumers that Defendants will void or refund the draft authorization and/or reimburse the consumer for the un-remitted mortgage payment and the payments the consumers must make to the mortgage company to prevent foreclosure, when such remedial action are not intended or performed;
- K. Falsely representing to consumers that the un-remitted mortgage payments will be refunded/reimbursed to consumers, when such remedial action is not intended or performed;

- L. Falsely representing to consumers that they will be contacted in efforts to resolve the consumers' complaints about un-remitted mortgage payments;
- M. Failing to inform consumers orally at the time the contract is signed of their right to cancel the contract;
- N. Failing to provide consumers with proper "Notice of Cancellation" forms in easily detachable, duplicate form; and,
- O. Failing to provide to any of Defendants' agents, servants, employees or representatives, written notice of the existence and terms of any injunction entered in this case, and of their duty to comply with its terms.

30. Plaintiff further prays that upon final hearing this Court order Defendants to restore all money or other property taken from identifiable persons by means of Defendants' unlawful acts or practices, or, in the alternative, award judgment for damages to compensate identifiable persons for such losses as provided in §17.47(d) of the DTPA.

31. Plaintiff further prays that upon final hearing this Court order Defendants to pay civil penalties of \$20,000.00 per violation of the DTPA to the State of Texas, as authorized by §17.47(c)(1) of the DTPA.

32. Plaintiff further prays that Defendants, officers, agents, servants, employees, and attorneys and any other persons in active concert or participation with Defendants, be ordered and compelled to declare null and void the contracts in each consumer case in which Defendants are found to have engaged in any violation of the Home Solicitation Act or DTPA; refund all payments made under the contracts in each consumer case in which Defendants are found to have engaged in

any violation of the Home Solicitation Act or DTPA; pay in full the amount owed to third parties/mortgage companies arising from Defendants' failure to remit the mortgage payment Defendants deducted from the bank account of each consumer to the mortgage company, including finance charges and late payment fees, in each consumer case in which Defendants are found to have engaged in any violation of the Home Solicitation Act or DTPA; indemnify consumers for loss suffered or from liability in each consumer case in which Defendants are found to have engaged in any violation of the Home Solicitation Act or DTPA; and

33. Adjudge against Defendants prejudgment and postjudgment interest at the highest lawful rate; and Order that all fines, civil penalties, or forfeitures payable to and for the benefit of the State are not dischargeable under bankruptcy pursuant to 11 U.S.C. § 523(a)(7). Plaintiff further prays for costs of Court, reasonable attorney fees as provided in Tex. Gov't. Code Ann. § 402.006(c), and such other relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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