

NO. 04-11805

STATE OF TEXAS,
Plaintiff

vs.

CITY MORTGAGE SERVICES, INC.
d/b/a CITY MORTGAGE SERVICES
d/b/a CMS d/b/a SMART FINANCIAL
SAVINGS AND GUSTAVO DUARTE,
individually AND ALFREDO MENDEZ,
individually,
Defendants

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

298th JUDICIAL DISTRICT

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PERMANENT INJUNCTION AND FINAL ORDER

The STATE OF TEXAS, Plaintiff, acting by and through its Attorney General Greg Abbott, has brought htis suit for injunctive relief, civil penalties, and restitution against Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually (hereinafter "Defendants") under the Texas Deceptive Trade Practices - Consumer Protection Act ("D.T.P.A."), TEX.BUS&COM.CODE §§ 17.41 *et seq.*, and § 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").

The State of Texas, Plaintiff appeared by and through Assistant Attorney General Deanya T. Kueckelhan and announced ready.

Defendant CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES

d/b/a CMS d/b/a SMART FINANCIAL SAVINGS although duly cited, failed to appear.

Defendant GUSTAVO DUARTE although duly cited, failed to appear.

Defendant ALFREDO MENDEZ although duly cited, failed to appear.

The Court, having considered the pleadings and affidavits attached thereto and on file in this cause and find that the requirements of the Texas Deceptive Trade Practices - Consumer Protection Act ("D.T.P.A."), TEX.BUS&COM.CODE §§ 17.41 *et seq.*, and § 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") have been met and renders this Permanent Injunction and Final Judgment.

The Court FINDS that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually violated §§ 17.46(a) and (b) of the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), TEX. BUS. & COM. CODE § 17.41 *et seq.*:

The Court FINDS that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually violated § 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");

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The Court FINDS that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually engaged in false, misleading, and deceptive acts by not advising consumers that the service that the Defendants were selling was available to the consumers without hiring the Defendants, in that they could prepay themselves.

The Court FINDS that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually falsely represented that mortgage payment amounts debited from the consumers' bank account would be remitted to the mortgage company, which they were not.

Based upon the Court's findings in the preceding paragraphs above the Court has reason to issue a permanent injunction as set out below. The Court finds that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually have caused injuries described in the preceding paragraphs. The Court also finds that those injuries are irreparable.

The Court FINDS that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually used false, misleading, or deceptive trade practices in making the home solicitations and in failing to disclose that the

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service is something that the consumer could do for themselves without the help of Defendants and in failing to remit the debited mortgage payments to the consumer's mortgage company and in failing to advise the consumer of the 3 day right to cancel and failing to provide the Notice of Cancellation.

The Court FINDS that unless Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually is immediately restrained from the acts prohibited below, Defendants will continue to commit the acts described in paragraph above, and Defendants will continue to use false, misleading, or deceptive trade practices in their home solicitation mortgage payment business, which Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually uses for their own benefit.

IT IS THEREFORE ORDERED that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually and officers, agents, servants, employees, attorneys and any other persons in active concert or participation with Defendants, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other devise, shall be restrained from engaging in the following acts or practices:

- A. Transferring, concealing, destroying, or removing from the jurisdiction of this

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Court any books, records, documents, invoices or other written materials relating to business of Defendants 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;

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- 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.

IT IS FURTHER ORDERED that any financial or brokerage institution, escrow agent, title company, storage facility, commodity trade company, business entity or person maintaining or having custody or control of any account or other assets of Defendants which receives actual notice of this Order by personal service or otherwise, shall:

- A. within five (5) business days of the date of service of this Order, provide to counsel of the Plaintiff and Defendant or account holder a statement or letter setting forth:
 - 1. the identification of each account or asset titled in the name, individually or jointly, of Defendants, or held on behalf of, or for the benefit of, Defendants;
 - 2. the balance of each such account, or a description and appraisal of the value of such assets, as of the close of business on the day on which the Order is served, and if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the account, and the name of the person or entity to whom such account or other assets were remitted; and

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- C. the identification of any safe deposit box or storage facility that is either titled in the name individually or jointly, of Defendants, or is otherwise subject to access or control by Defendants.

The Clerk of the above Court shall forthwith issue a writ of Permanent Injunction in conformity with the law and the terms of this Order. This Order shall be effective without the execution and filing of a bond as Plaintiff, STATE OF TEXAS is exempt from such bonds under TEX. BUS. & COM. CODE ANN. § 17.46(b).

IT IS FURTHER ORDERED that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually shall pay to the State of Texas the amount of TWO HUNDRED TEN THOUSAND FIVE HUNDRED THREE AND 00/100 DOLLARS (\$210,503.00) in restitution pursuant to D.T.P.A. §17.47(d).

IT IS FURTHER ORDERED that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually shall pay to the State of Texas the amount of THREE MILLION THREE HUNDRED THOUSAND AND 00/100 DOLLARS (\$3,300,000.00) in civil penalties pursuant to D.T.P.A. § 17.46(c)(1)-(2).

IT IS FURTHER ORDERED that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually shall pay to the State of Texas the amount of THIRTY FOUR THOUSAND TWO HUNDRED EIGHTY AND 00/100 DOLLARS (\$34,280.00) in reasonable attorneys' fees pursuant to TEX.GOV'T CODE §

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402.006(c).

IT IS FURTHER ORDERED that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually shall pay to the State of Texas the amount of Six hundred sixty nine AND 00/100 DOLLARS (\$ 669.⁰⁰) in reasonable court costs. DK

IT IS FURTHER ORDERED that Defendants CITY MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually shall pay reasonable attorneys' fees, court costs, and other costs if it becomes necessary to collect or enforce this Judgment. These expenses will bear interest from the date of advance at five percent (5%) simple interest per annum. Defendants will pay to the State these expenses and interest on demand at the Office of the Attorney General, Consumer Protection and Public Health Division at 1600 Pacific Ave., Ste 1700, Dallas, Texas 75201. These expenses and interest will become part of the debt evidenced by the Judgment.

Any and all payments made pursuant to this Judgment shall be made by cashier's check or money order, made payable to the STATE OF TEXAS, and mailed to the attention of Dcanya T. Kueckelhan, Assistant Attorney General, Consumer Protection and Public Health Division, Dallas Regional Office, 1600 Pacific Ave., Ste 1700, Dallas, Texas 75201, referencing AG NO. 04037609.

This judgment binds **IT IS FURTHER ORDERED** that Defendants CITY

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MORTGAGE SERVICES, INC. d/b/a CITY MORTGAGE SERVICES d/b/a CMS d/b/a SMART FINANCIAL SAVINGS AND GUSTAVO DUARTE, individually AND ALFREDO MENDEZ, individually and their agents, employees, attorneys, and his officers, agents, servants, employees, attorneys and any other persons in active concert or participation with Defendants, who receive actual notice of this Judgment by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other devise.

The Clerk of this Court shall forthwith issue a writ of Permanent Injunction.

This Judgment shall be effective immediately without the execution and filing of a bond as the State is exempt from such bond under TEX. BUS. & COM. CODE ANN. § 17.46(b) and TEX. CIV. PRAC. & REM. CODE § 6.001.

All other relief not expressly granted herein is denied.

SIGNED this 24 day of January, 2005 at 9:38 a.m..



District Judge Presiding
298th Judicial District Court