

No. 09-09347

FILED  
2009 JUL 27 AM 10:48  
MARY FITZGERALD  
DISTRICT CLERK  
DALLAS CO., TEXAS  
DEPUTY

STATE OF TEXAS,  
Plaintiff

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IN THE DISTRICT COURT OF

vs.

The SAT and ACT PREP CENTER, INC.;  
JOHN JOSEPH STUART, Individually;  
and FRANCES STUART, Individually,  
Defendants

DALLAS COUNTY, TEXAS

101st-E JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION  
FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, Plaintiff, acting by and through Attorney General GREG ABBOTT, filing Plaintiff's Original Petition for Civil Penalties and Injunctive Relief complaining of and against The SAT and ACT PREP CENTER, INC.; JOHN JOSEPH STUART, Individually, and FRANCES STUART, Individually.

**I. DISCOVERY CONTROL PLAN**

1. Discovery is intended to be conducted under Level 2 of the Texas Rules of Civil Procedure 190.

**II. AUTHORITY**

2. This suit is brought by the ATTORNEY GENERAL through the Consumer Protection Division in the name of the STATE OF TEXAS and in the public interest under the authority granted to him by Section 17.47 of the Deceptive Trade Practices-Consumer Protection Act ("TDTPA") (Tex. Bus. & Com. Code Ann. § 17.41 *et seq.*).

### III. DEFENDANTS

3.1 The SAT and ACT PREP CENTER, INC. is a foreign corporation that engages in business in the State of Texas. Service of process on Defendant may be accomplished by serving the company's registered agent, Mark L. Hill, at 901 Main Street, Suite 3900, Dallas, TX 75202.

3.2 Defendant JOHN JOSEPH STUART is an individual residing in Texas and may be served with citation and process at his home at 780 Lovern Street, Cedar Hill, TX 75014-6080 or at his place of business at 1203 Crestside Drive #310, Coppell, TX 75019 or wherever he may be found.

3.3 Defendant FRANCES STUART is an individual residing in Texas and may be served with citation and process at her home at 780 Lovern St., Cedar Hill, TX 75014-6080 or at her place of business at Crestside Drive #310, Coppell, TX 75019 or wherever she may be found.

### IV. VENUE

4.1 Venue of this action lies in Dallas County pursuant to Section 17.47(b) of the TDTPA because the transactions and events giving rise to this action occurred in Dallas County and/or because The SAT and ACT PREP CENTER, INC., JOHN JOSEPH STUART, Individually, and FRANCES STUART, Individually (hereinafter "Defendants") have done or are doing business in Dallas County.

4.2 Venue of this action also lies in Dallas County on the basis of section 15.002(a)(1) and (3) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to this cause of action occurred in Dallas County.

## **V. ACTS OF AGENTS**

5. 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 and that such act was performed by the officers, agents, or employees of Defendants, and in each instance, the officers, agents, or employees of 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.

## **VI. PUBLIC INTEREST**

6. By reason of the institution and operation of the unlawful practices set forth herein, Defendants have and will cause immediate and irreparable injury, loss and damage to the STATE OF TEXAS and its citizens, and will also cause adverse effects to legitimate business enterprise which conducts its trade and commerce in a lawful manner in this State. Therefore, the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

## **VII. TRADE AND COMMERCE**

7. Defendants are engaged in "trade" and "commerce" as defined by Section 17.45(6) of the TDTPA as that Defendants are engaged in the sale of SAT and ACT test preparation materials to consumers.

## **VIII. NOTICE BEFORE SUIT**

8. Plaintiff provided notice to Defendants regarding this action of the alleged unlawful conduct of which complaint is now made, pursuant to Section 17.47(a) of the TDTPA on July 10, 2009.

## IX. SPECIFIC FACTUAL ALLEGATIONS

9.1 The SAT and ACT PREP CENTER, INC., JOHN JOSEPH STUART, and FRANCES STUART sell materials to the parents of high school students, who are preparing to take ACT and SAT exams under deceptive pretexts. According to the Texas Secretary of State, JOHN JOSEPH STUART and FRANCES STUART have been transacting business in Texas since May 1, 2008 under the name The SAT and ACT PREP CENTER, INC. based in Coppell, Texas. JOHN JOSEPH STUART and FRANCES STUART are the directors of The SAT and ACT PREP CENTER, INC.

9.2 Consumers complain that representatives of The SAT and ACT PREP CENTER, INC. place telephone calls to the parents of high school students, recite the name of the student, the student's school identification number, the name of the child's school, and state the child has expressed an interest in receiving preparation materials for the SAT and/or ACT college entrance exams. The SAT and ACT PREP CENTER, INC. representatives then offer to sell a CD ROM with test preparation materials to the parents for \$119.99. Parents are also told that if their child does not like the program, the parents will receive a full refund if the materials are returned within 30 days. After the parents place the orders, the parents discover that their child had not expressed an interest in receiving SAT and ACT preparation materials.

9.3 Upon receipt of the test preparation materials, some parents discovered that the CD ROM was a 2006 version of a national brand test preparation CD ROM and that the parents could have purchased the same materials for \$10.00 or less on-line or at a local big box store. Additionally, parents complain that when they returned the test preparation materials, they did not receive a refund. Some consumers who returned the materials were told they would not receive a refund because the

package had been opened. Others were told that SAT and ACT PREP CENTER, INC. had received the returned package but that the package was still “in receiving.” After numerous phone calls, no refund was provided to the consumer. Still other consumers were told that they would only receive a refund of \$94.00 because they were being charged a \$25.00 “surrender charge.” Consumers complain they had not been notified about the “surrender charge” prior to returning the materials to SAT and ACT PREP CENTER, INC. Still other consumers complained they never received the product and even though they requested a refund, they did not receive one.

9.4 When consumers purchased the CD ROM, they were also offered access to The SAT and ACT PREP CENTER, INC. web page for \$49.95 per month so that they and their children could receive scholarship information. Some consumers complain they could not access the web page, while others complain they were not told that they would be charged \$49.95 per month for the service.

## **X. VIOLATIONS OF THE DECEPTIVE TRADE PRACTICES ACT**

10.1 Defendants, as set out in Paragraphs 1 through 8, in the course and conduct of trade and commerce, have directly and indirectly engaged in and will continue to engage in false, misleading, deceptive or unconscionable acts and practices declared unlawful by Sections 17.46(a) and (b) of the TDTPA, including but not limited to:

- A. Causing confusion or misunderstanding as to the affiliation as to the source, sponsorship, approval, or certification of SAT and ACT prep materials in violation of Section 17.46(b)(2) of the TDTPA;
- B. Causing confusion or misunderstanding as to the affiliation, connection, or

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certification of the materials offered for sale by SAT and ACT PREP CENTER, INC. in violation of Section 17.46(b)(3) of the TDTPA.

- C. Representing that the SAT and ACT prep materials offered for sale have sponsorship, approval, characteristics which they do not possess in violation of Section 17.46(b)(5) of the TDTPA;
- D. Advertising SAT and ACT prep materials with the intent not to sell them as advertised in violation of Section 17.46(b)(9) of the TDTPA;
- E. Representing that a guarantee or warranty confers or involves rights or remedies, including but not limited to a full refund, which it does not have or involve in violation of Section 17.46(b)(20) of the TDTPA; and
- F. Failing to disclose information that the purchase of SAT and ACT prep materials automatically enrolled the individual in an agreement to purchase monthly scholarship information for \$49.95. The failure to disclose the automatic enrollment was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of Section 17.46(b)(24) of the TDTPA.

## **XI. LIABILITY OF JOHN JOSEPH STUART, INDIVIDUALLY AND FRANCES**

### **STUART, INDIVIDUALLY**

11. The Texas Business Corporation Act provides that a holder of shares, an owner of a beneficial interest in shares is under no obligation to the corporation or to the obligees. . . unless the obligee demonstrates that the owner, subscriber, or affiliate caused the corporation to be sued for the

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purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate. Tex. Bus. Corp. Act Art. 2.21(A)(2). Moreover, "Courts will not disregard the corporation fiction and hold individual officers, directors, or stockholders liable on the obligation of a corporation except where it appears the individuals are using the corporate entity as a sham to perpetrate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations." *Bell Oil & Gas Co. v. Allied Chemical Corp.*, 41 S.W.2d 336, 340 (Tex. 1968). Consequently, JOHN JOSEPH STUART and FRANCES STUART are each individually liable because they each used the entity SAT and ACT PREP CENTER, INC. as a sham to perpetrate a fraud and to avoid personal liability in their deceptive sale of SAT and ACT prep materials to consumers.

## **XII. INJURY TO CONSUMERS**

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

## **XIII. DISGORGEMENT**

13. All of the 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 or profits that result from Defendants putting fraudulently converted property to a profitable use. Defendants should be ordered to disgorge all monies fraudulently taken from individuals and businesses together with all of the proceeds, profits, income, interest and accessions thereto. Such disgorgement should be for the benefit of victimized consumers and the

State of Texas.

#### **XIV. NECESSITY OF IMMEDIATE HALT TO DECEPTIVE TRADE PRACTICES**

14. Plaintiff requests immediate relief by way of a Temporary Injunction to prevent Defendants from harming additional consumers resulting in the consumers' loss of money.

#### **XV. DISCOVERY REQUEST**

15. Under Texas Rule of Civil Procedure 194, Defendants The SAT and ACT PREP CENTER, INC., JOHN JOSEPH STUART, INDIVIDUALLY, AND FRANCES STUART, INDIVIDUALLY, are each requested to disclose, within 50 days of service of this request, the information or material described in Texas Rule of Civil Procedure 194.2 (a), (b), (c), (d), (e), (f), (g), (h),(i) and (l).

#### **XVI. PRAYER**

16.1 WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that upon hearing a TEMPORARY INJUNCTION and upon final hearing a PERMANENT INJUNCTION be issued restraining and enjoining Defendants, The SAT and ACT PREP CENTER, INC., JOHN JOSEPH STUART, INDIVIDUALLY, AND FRANCES STUART, INDIVIDUALLY, Defendants' successors, assigns, officers, agents, servants, employees, and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices or making representations including:

- A. Making deceptive, misleading, and/or false claims regarding the benefits of utilizing SAT and ACT prep materials in improving scores on college entrance exams and improving the likelihood of acceptance to college.

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B. Making deceptive, misleading, and/or false claims regarding the benefits of accessing The SAT and ACT PREP CENTER, INC. on-line scholarship information.

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C. Making deceptive, misleading, and/or false claims regarding the cost of accessing The SAT and ACT PREP CENTER, INC. on-line scholarship information.

D. Making false representations regarding a child's expressed desire to utilize The SAT and ACT PREP CENTER, INC. materials.

E. Advertising SAT and ACT prep materials without the intent to sell the materials as advertised.

F. Failing to disclose, truthfully, and clearly and conspicuously, before obtaining a consumer's express authorization to bill or charge the consumers for any goods or services, all material terms and conditions for the purchase of any such goods or services including but not limited to:

(1) The quantity of goods or services that are subject to the sales offer.

(2) All material restrictions, limitations, or conditions to purchase, receive or use the goods or services that are the subject of the sales offer.

(3) All policies regarding refunds, guarantees, cancellations, exchanges and repurchases, including any policy that refunds will not be made, or that cancellations or exchanges will not be accepted.

(4) The number of payments that must be made (if more than one), the dates or time periods when the payments will be required or charged, the amount of each payment, and the total cost.

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(5) If true, that billing information that the seller already possesses, either because the customer previously provided it to the seller, or the seller obtained it from another source will be used to bill or charge the consumer.

(6) If the offer includes a Negative Option Feature or Membership, all material terms and conditions of the Negative Option Feature or Membership, including but not limited to the fact that the consumer's account will be automatically charged unless the consumer takes affirmative action to avoid the charges, when the charges will be submitted for payment, the specific steps the consumer must take to avoid the charges, when a consumer cancellation request must be received by the Defendants, and a telephone number or address where the consumer's cancellation request should be directed; provided that with respect to the first such automatic shipment or automatic renewal, the telephone disclosures must identify the specific date by which the consumer must take an affirmative action to avoid the charge.

(7) If any of the Defendants obtain a consumer's Billing Information to purchase any goods or services and then solicits the purchase of other goods or services, an affirmative disclosure must be made of all material terms and conditions for the purchase of each additional good or service before obtaining the consumer's express authorization to bill or charge for such additional good or service.

G. Failing to provide, prior to charging the consumer for any goods or services

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supplied pursuant to a Negative Option Feature, a written document clearly and conspicuously disclosing all material terms and conditions of the sale including, but not limited to the fact that the consumer is currently enrolled in Defendants' Negative Option Feature, that the consumer's account will be charged for the first and all successive product shipments or monthly usage of Defendants' service under the Negative Option Feature unless the consumer cancels his or her enrollment in the Negative Option Feature, including a telephone number, physical address, or email address where a notice to cancel enrollment may be directed and the amount of time the consumer has to submit such notice to the Defendants. The disclosure document required under this Paragraph G must be a separate, stand-alone document and not contain any sales or promotional material and shall be conspicuously placed with the shipment so as to be unavoidable. The document shall also provide clear and conspicuous notice that the consumer has the right to a refund, along with instructions on how to exercise such right; provided that Defendants may set terms and conditions for refund policies (such as a reasonable time limit within which consumers may request a refund, or that shipping and handling charges will not be refunded), only if Defendants have clearly and conspicuously disclosed such terms with the offer.

(1) If any of the Defendants obtains a consumer's Billing Information to purchase any goods or services and then solicits the purchase of other goods or services, an affirmative disclosure must be made of all material terms and

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conditions for the purchase of each additional good or service before obtaining the consumer's express authorization to bill or charge for such additional good or service.

H. Failing to provide, prior to charging the consumer for any goods or services supplied pursuant to a Negative Option Feature, a written document clearly and conspicuously disclosing all material terms and conditions of the sale including, but not limited to the fact that the consumer is currently enrolled in Defendants' Negative Option feature, that the consumer's account will be charged for the first and all successive product shipments under the Negative Option Feature unless the consumer cancels his or her enrollment in the Negative Option Feature, the specific steps the consumer must take to cancel enrollment in the Negative Option Feature, including a telephone number, physical address, or email address where a notice to cancel enrollment may be directed and the amount of time the consumer has to submit such notice to the Defendants. The disclosure document required under this Paragraph H must be in a separate, stand-alone document and not contain any sales or promotional material and shall be conspicuously placed within the shipment so as to be unavoidable. The document shall also provide clear and conspicuous notice that the consumer has the right to a refund, along with instructions on how to exercise such right; provided that Defendants may set terms and conditions for refund policies (such as a reasonable time limit within which consumers may request a refund, or that shipping and handling charges will not be refunded), only if Defendants have

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clearly and conspicuously disclosed such terms with the offer.

I. Violating any provision of the federal Telemarketing Sales Rule, 16 C.F.R. Part 310 or Texas statute Section 44.102(a) Texas Business and Commerce Code, as in effect now or as it may be amended.

J. Conducting any Telemarketing calls, whether inbound or outbound, which result in the shipment of goods or services, and any related customer service calls, without such calls being recorded in their entirety and such recordings being kept on file with Defendants for a period of one (1) year from the date of such call.

K. With respect to any good or service offered with a money-back guarantee by Defendants, failing to submit a request to the appropriate credit card processor or mail a check if appropriate, within seven (7) business days of Defendants' receipt of a refund request, a full refund of the purchase price of the good or service, including any shipping costs, insurance, handling, or any other fee or charge paid by the consumer; provided, however, that Defendants may set terms and conditions for such money-back guarantee (such as a reasonable time limit within which consumers may request a refund, or that shipping and handling charges will not be refunded), only if Defendants have clearly and conspicuously disclosed such terms and conditions in close proximity to the money-back guarantee offer.

L. Failing to honor any representations made by Defendants regarding refunds.

M. Failing to clearly and conspicuously disclose, at the time a consumer makes a new order, modifies his/her order, or requests a refund, all the terms and conditions

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that may impact any refund policy or money-back guarantee that the Defendants are providing. Such disclosure shall be made by the Defendants prior to accepting any modified or new order by the consumer.

N. Failing to honor a request that Defendants receive to cancel enrollment in a Continuity Program, when such a request is consistent with clearly and conspicuously disclosed terms and conditions of the Continuity Program. Provided, however, that if Defendants receive or discover credible evidence that any of their agents, servants, representatives, employees, and all persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, have made any representation to a consumer during a transaction that is inconsistent with or contradicts any of the disclosures required by this Order, Defendants must offer to the consumer an appropriate refund and cancellation of his or her enrollment in the Continuity Program. If a consumer asserts, directly or through a third party, without any evidence, that a representation inconsistent with or contradicting any of the disclosures required by this Order was made, the Defendants, unless they can produce evidence to the contrary, must offer to the consumer an appropriate refund and cancellation of his or her enrollment in the Continuity Program.

O. Failing to ensure consumer accessibility to personnel manning any telephone number that Defendants provide for canceling any order for products, goods or services, for requesting refunds, or for effectuating any money-back guarantee. For

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purposes of the paragraph O, “consumer accessibility” shall mean that, under normal operating conditions, at least ninety percent (90%) of all calls placed during each consecutive three (3) month period to such telephone numbers shall be connected to Defendants’ personnel no later than (4) minutes after the call is answered. In addition, for purposes of this Paragraph O, “calls placed” shall exclude any call placed by a consumer if a consumer voluntarily disconnects within twenty (20) seconds. Further Defendants shall ensure that all telephone calls placed to such numbers are answered within four (4) rings and that if live personnel are not immediately available to conduct business with the consumer when the phone is answered, Defendants must deliver over the telephone a Clear and Conspicuous recording that live personnel should be available to assist the consumer within four (4) minutes.

P. Failing to investigate and promptly resolve any consumer complaint or request for refund received by Defendants and to notify the consumer of the resolution of the complaint or request and the reason therefore.

Q. Failing to include in any contract with any wholesaler, distributor, or known reseller of Defendants’ Products terms and conditions that conflict with the requirements of the terms of any Temporary Injunction or Final Judgment and Permanent Injunction.

R. Failing to provide all wholesalers, distributors, and known resellers of Defendants’ Products with a copy of any Temporary Injunction, as may be issued by

this Court within ten (10) business days of the entry of any such Injunction. For any wholesalers, distributors, and known resellers that initiates distribution of Defendants' Products ten (10) or more business days after the entry of this Injunction, and that has not previously received a copy of any Injunction, Defendants shall immediately transmit a copy to the wholesaler or known seller.

S. Providing to, or approving the use of, marketing materials or information, labeling, product packaging or package inserts, or products, to wholesalers, distributors, and known resellers of Defendants' products that do not comply with the requirements of any Temporary Injunction or Final Judgment and Permanent Injunction.

16.2 FURTHER, THE STATE OF TEXAS prays that the Court:

- A. Adjudge against Defendants civil penalties in favor of Plaintiff in the amount of \$20,000 per violation of the Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.47(c)(1));
- B. Adjudge against Defendants civil penalties in favor of Plaintiff in the amount of \$250,000 for violations of the Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.47(c)(2));
- C. Order Defendants to restore all money or other property taken from identifiable people by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses;
- D. Adjudge against Defendants reasonable attorneys' fees, investigative fees and

court costs pursuant to Section 401.006 of the Texas Government Code.

- E. Adjudge against Defendants prejudgment and post judgment interest at the highest lawful rate;
- F. Order disgorgement of all monies taken by Defendants as a result of its deceptive sale of SAT and ACT prep materials.
- G. Adjudge that all fines, penalties, or forfeitures payable to and for the benefit of the State are not dischargeable under bankruptcy pursuant to Title 11 of the United States Code, Section 523(a)(7).
- H. Adjudge that all Defendants are jointly and severally liable for all fines, penalties, restitution, and attorneys fees.

16.3 FURTHER , Plaintiff, STATE OF TEXAS, respectfully prays for all other relief to which Plaintiff may be justly entitled.

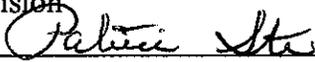
Respectfully submitted,

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