

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

THE CITY OF NEW ORLEANS

ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket 9179. Complaint, May 10, 1984—Order, Jan. 3, 1985

This Order withdraws the Commission Complaint alleging that the City of New Orleans violated Sec. 5 of the FTCA by conspiring with taxicab operators to increase fares and limit the number of taxicab licenses, with the effect of eliminating competition. Following enactment of legislation by the State of Louisiana which provided that "[T]he policy of this state is to require that municipalities . . . regulate [taxicabs] and not to subject municipalities or municipal officers to liability under federal antitrust laws" and which specifically empowers cities to regulate entry and control fares for taxicabs, the Commission determined that continuing this matter would not presently serve the public interest.

COMPLAINT

The Federal Trade Commission, having reason to believe that The City of New Orleans, a municipal corporation subject to the jurisdiction of the Commission, hereinafter sometimes referred to as Respondent or the City, has violated the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

(A) *Taxicab* means a motor vehicle that is duly licensed to be operated as a taxicab by the City, that has a normal seating capacity of less than ten (10) passengers, and that is used for the transportation of passengers for hire primarily over streets of New Orleans by a route or to a destination controlled by the passenger(s).

(B) *CPNC* means a certificate of public necessity and convenience issued by the Director of the Department of Utilities of the City pursuant to the requirements of Section 12-4 of Chapter 12 of the

Code of the City of New Orleans permitting an individual or company to operate a taxicab in New Orleans.

(C) *Taxicab company* means any business organization, corporation, partnership, cooperative or person that as of the date of this complaint has a trade name and color scheme registered with the Taxicab and For Hire Vehicle Bureau as specified by Section 12-162 of Chapter 12 of the Code of the City of New Orleans for the purpose of operating taxicabs or providing services related to the business of owning, operating and/or driving taxicabs to taxicab owners, operators and/or drivers authorized to do business by the City.

PARAGRAPH 1. Respondent is a municipal corporation organized under the laws of the State of Louisiana and is a person or corporation within the meaning of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The City has passed and enforces certain ordinances that regulate the taxicab business in New Orleans.

PAR. 2. At all times relevant herein, Respondent's acts and practices have affected the businesses of taxicab companies and taxicab owners, operators and/or drivers that maintain, and have maintained, substantial courses of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. The acts and practices alleged herein are in or affect commerce by affecting at least the following activities that are in or affect commerce:

(A) Taxicabs and taxicab companies provide a primary method of transportation for interstate travelers between New Orleans International Airport and destinations in New Orleans.

(B) Taxicabs and taxicab companies provide transportation for interstate travelers between New Orleans and nearby cities in Mississippi.

(C) Taxicabs and taxicab companies provide transportation to interstate travelers between train stations, bus terminals and ports and other destinations in New Orleans.

(D) Taxicabs and taxicab companies provide transportation to interstate travelers between hotels, motels, convention centers, and tourist attractions and other destinations in New Orleans.

(E) Taxicabs are manufactured in other states and are transported into and sold in Louisiana.

(F) Items and services purchased in substantial quantities such as gasoline, tires, taximeters, two-way radios and various replacement parts for taxicabs originate in other states and are sold for use in and

1

Statement

(G) Employment opportunities as a New Orleans taxicab driver have attracted persons from other states.

PAR. 3. For many years and continuing up to and including the date of the issuance of this complaint, the City has combined, contracted or agreed with taxicab companies, to pursue the following policies and do the following acts, among others:

(A) To encourage taxicab companies to combine and to agree upon proposals to increase fares for taxicabs in New Orleans.

(B) To adopt uniform fares applicable to all taxicabs upon request by taxicab companies.

(C) To limit the number of CPNC's in New Orleans and to prohibit by other means, new entry of taxicab drivers, owners and operators into New Orleans.

(D) To raise unreasonable barriers to entry to new taxicab companies in New Orleans.

(E) To prohibit competition from vehicles-for-hire licensed outside New Orleans.

PAR. 4. The acts and practices of respondent, as alleged in Paragraph Three, have been and are now having the effects, among others, of:

(A) eliminating and preventing substantial competition between competitors and potential competitors in the operation of taxicabs in New Orleans;

(B) strengthening the market power of currently authorized taxicab companies operating in New Orleans taxicab market;

(C) raising, fixing, stabilizing, maintaining, or otherwise interfering or tampering with the rates charged for taxicab service in and from New Orleans; and

(D) depriving interstate and intrastate consumers of taxicab services in and from New Orleans of the benefits of free and open competition in taxicab services.

PAR. 5. The acts and practices of Respondent, as alleged herein, were and are to the prejudice and injury of the public and constituted and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT OF CHAIRMAN JAMES C. MILLER III

After extensive consideration of the issue, I have voted today to

issue complaints in accordance with my statutory responsibility to act when there is reason to believe that the law has been violated.

The action taken by the Commission today is based upon allegations of monopoly power and alleged violations of the U.S. antitrust laws in the taxi markets of Minneapolis [105 F.T.C. 304] and New Orleans. As a technical matter, the way a case is brought most effectively in such situations is to address regulations enacted by the city governments. I wish to stress that our concern is with allegations of monopoly power in taxi markets, and is not driven by any interest in limiting the lawfully-exercised powers of the cities themselves.

I also wish to stress that our concern is solely with restraints on *competition*; we have no concerns with rules affecting safety, insurance, and other related service standards.

The Commission's decision today comes after a 10-year staff study of taxi markets, after extensive inquiries and discussions with city officials and taxi operators, and after thorough briefing of the Commission by the agency's career staff.

STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK* DISSENTING
FROM THE ISSUANCE OF COMPLAINTS AGAINST THE CITIES OF
MINNEAPOLIS AND NEW ORLEANS

I dissent from the Commission's decision to issue complaints against the cities of Minneapolis [105 F.T.C. 304] and New Orleans charging each city with an illegal combination or conspiracy in violation of the Sherman and FTC Acts. The complaints allege that each city conspired with taxicab owners and drivers to restrain trade in the provision of taxicab services through the enactment of municipal regulations that establish fixed taxi fares and create barriers to entry into the market.

For the Commission to succeed under the theories alleged in these complaints, it must first prove that the challenged regulations were the result of an illegal combination or conspiracy rather than lawful actions taken by the cities in the interest of their citizens. I am troubled by the idea that a city's adoption of taxi regulations after consultation with the industry—when consultation is a necessary element of responsible government—transforms the city's regulations into an illegal conspiracy.

Second, when the federal antitrust laws come in apparent conflict with regulations enacted by a governmental entity such as a municipality, the Commission must be especially confident that federal intervention is warranted. Here it is at the very least unclear whether the economic theory of these complaints fits the facts as we know them. Studies commissioned by the Department of Transportation

1

Order

and others of cities where taxi service was deregulated do not demonstrate that the public benefited. Fares often rose and there is considerable doubt whether service improved. Finally, Congress is currently considering legislation which would exempt most municipal regulations from antitrust scrutiny. I note that the Assistant Attorney General in charge of the Antitrust Division has recently testified in support of that legislation. While the Commission need not consider pending legislation when deciding whether to act, the unpredictable effects of the Commission's action on the taxi market and the legitimate regulatory interests of the cities counsel restraint in these cases.

ORDER

Complaint counsel have moved for withdrawal of the complaint in this matter, on the ground that state legislation enacted after the complaint was issued makes effective relief impossible. The Administrative Law Judge has certified that motion to the Commission. The complaint alleges that the City of New Orleans has combined, contracted or agreed with taxicab companies in a number of respects relating to fare increases, fare uniformity, limitations on the number of certificates of public necessity and convenience issued, and barriers to entry, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

After the complaint was issued, the State of Louisiana enacted a statute that provides:

[T]he policy of this state is to require that municipalities . . . regulate [taxicabs] and not to subject municipalities or municipal officers to liability under federal antitrust laws.¹

The statute also specifically empowers cities to regulate entry and control fares for taxicabs.² After careful consideration, the Commission has determined that continuing this matter would not presently serve the public interest.³ We have therefore concluded that the complaint in this matter should be withdrawn. In taking this action, we express no opinion as to whether the liability of the City of New Orleans could have been established at trial, or whether an independent judicial proceeding might establish that federal statutes embodying the national policy of competition préempt the new Louisiana

¹ Act of June 6, 1984, NO. 518 (to be codified at LA. REV. STAT. ANN. Section 33:4792 A(e)).

² *Id.* Sections B(1), (2).

³ See *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978).

statute. We also express no opinion as to the merits of the complaint issued against the City of Minneapolis in Docket No. 9180.

Accordingly, *it is ordered*, that the complaint issued against the City of New Orleans in Docket No. 9179 be, and it hereby is, withdrawn.

IN THE MATTER OF

SOUTHWEST SUNSITES, INC., ET AL.

FINAL ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9134. Complaint, April 29, 1980—Final Order, Jan. 15, 1985

This order requires four companies and three individuals engaged in the advertising and sale of undeveloped land, among other things, to cease representing misleadingly or without proper substantiation that the purchase of any land is a sound financial investment; involves little or no monetary risk; and will benefit the purchaser economically as a result of profitable resale, mineral rights, exploration or extraction. The firms are prohibited from representing that any land is currently usable as a homesite, farm or ranch, unless that land can be used immediately for the represented purpose without any substantial improvement or development by the purchaser; and barred from misrepresenting the availability or cost of obtaining electric power, potable water, telephone service or sewage disposal. The order further requires that the firms prepare and furnish consumers with a fact sheet containing detailed information regarding the availability and cost of water, electric power, sewer disposal and telephone service, unless a federal property report accompanying sale transactions includes such information. The companies must also insert in advertisements, promotional material and sales presentations specified statements warning that investment in land is risky and prospective purchasers should consult a qualified professional before buying. Such warnings must also be included in contracts, as well as a clause giving purchasers seven days in which to cancel their transactions. Additionally, the firms are required to provide consumers with cancellation forms; honor all valid cancellation requests; and send prescribed notices to past purchasers advising them of the Commission's order; explaining the land's actual value and suitability for use, and outlining the alternative options available to these consumers. The order further requires that the companies provide their sales representatives with a copy of the order; institute a surveillance program designed to reveal those that fail to comply with the terms of the order; and maintain certain records for a specified period of time.

Appearances

For the Commission: *Gary D. Kennedy.*

For the respondent: *Glenn A. Mitchell and David U. Fierst, Stein, Mitchell & Mezines, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres,

Inc. II, corporations; Sydney Gross and Edwin Kritzler, individually and as officers or former officers of said corporations; Porter Realty, Inc., a corporation; and Irvin Porter, individually and as an officer or former officer of said corporation, hereinafter sometimes collectively referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II, hereinafter sometimes referred to as "corporate subdivider respondents," are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas, with their offices and principal places of business located at 16000 Ventura Boulevard, Encino, California.

Respondents Sydney Gross and Edwin Kritzler are officers or former officers of some or all of the corporate subdivider respondents. They formulate, direct and control, and for some time last past have formulated, directed and controlled, [2] the acts and practices of the corporate subdivider respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate subdivider respondents. Corporate subdivider respondents and respondents Gross and Kritzler are sometimes hereinafter referred to collectively as "subdivider respondents."

PAR. 2. Respondent Porter Realty, Inc., hereinafter sometimes referred to as "corporate broker respondent," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 717 Ponce de Leon Boulevard, Coral Gables, Florida.

Respondent Irvin Porter is an officer or former officer of the corporate broker respondent. He formulates, directs, and controls, and for some time last past has formulated, directed and controlled, the acts and practices of the corporate broker respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate broker respondent. Corporate broker respondent and respondent Irvin Porter are sometimes hereinafter referred to collectively as "broker respondents."

PAR. 3. All respondents mentioned herein cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 4. Subdivider respondents are now, and for some times last past have been, engaged in the business of acquiring undeveloped land, subdividing said land into five acre, ten acre and forty acre lots and advertising, offering for sale and selling said lots to the public, directly and through the use of agents, brokers and others. Among the

properties offered for sale and sold are Sunsites Ranch Unit I and Sunsites Ranch Unit II of Southwest Sunsites, Green Valley Acres and Green Valley Acres II, all located in Culberson or Jeff Davis Counties, Texas. The acreage of these properties, hereinafter sometimes referred to as "the subdivisions," is approximately forty thousand (40,000) acres.

PAR. 5. Subdivider respondents sell lots in the subdivisions to purchasers by use of standard form contracts whereby the purchaser agrees to pay monthly installments over terms ranging up to ten years. According to the provisions of the contract, title to the lots is retained by the subdivider respondents until the final payment is made. The contract specifies that title is to pass to the purchaser within a reasonable time after the final payment is made. Purchasers pay interest to subdivider [3] respondents during the contract term on the unpaid balance owing on the contract.

PAR. 6. Broker respondents are now, and for some time last past have been, engaged in the business of selling lots in the subdivisions to the public through telephone solicitations and direct mailings. Broker respondents have sent and are now sending through the mail brochures, fact sheets, contracts and other sales literature to potential purchasers. Signed contracts and downpayments are sent directly by purchasers to the subdivider respondents for acceptance. Broker respondents are paid by subdivider respondents a predetermined fee or commission over the course of the contract.

PAR. 7. In the course and conduct of their aforesaid businesses, respondents now cause, and for some time past have caused, their advertisements, promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from their various places of business to agents, representatives, employees, customers and prospective customers in various other States of the United States and in foreign countries. Subdivider respondents have maintained and operated places of business in the various States of the United States and both subdivider and broker respondents have made and are now making substantial sales to purchasers in various States of the United States and in foreign countries. Respondents maintain, and at all time mentioned herein have maintained, a substantial course of trade in undeveloped land in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 8. In the further course and conduct of their aforesaid businesses, subdivider respondents disseminate and have disseminated commercials through television and radio broadcasts and, both prior and subsequent to sales, subdivider respondents and broker respondents disseminate and have disseminated promotional materia

through the U.S. mail and in person to members of the public, and make and have made oral sales presentations by means of telephone calls, in-home solicitations, on-site presentations and free dinner parties.

I

PAR. 9. By and through the means described in Paragraph Eight, respondents have represented and are representing, directly or by implication, that the lots which respondents are offering for sale are a good investment [4] at the price respondents are offering them for sale, and that there is little or no financial risk involved in the purchase of said lots at said prices.

PAR. 10. In truth and in fact, lots which respondents have offered and are offering for sale, at the prices respondents have offered and are offering them for sale, have not been and are not good investments involving little or no financial risk to purchasers. Therefore, the acts and practices alleged in Paragraph Nine are unfair or deceptive.

PAR. 11. In the further course and conduct of their aforesaid businesses, respondents have offered and are offering lots for sale to prospective purchasers who have beliefs, regarding the potential investment and lack of financial risk, contrary to material facts not disclosed. Such facts are that said lots, at the price respondents are offering them, are a risky investment in that, *inter alia*, the future value of the lots is uncertain and the purchaser probably will be unable to sell his lot, or his interest in the lot under the contract, at or above the purchase price. Such facts, if known by certain purchasers, would be likely to affect materially their consideration of whether to purchase a lot from respondents. The failure to disclose such facts clearly and conspicuously is an unfair or deceptive act or practice.

II

PAR. 12. In the further course and conduct of their aforesaid businesses, by and through the means described in Paragraph Eight, respondents have represented and are representing, directly or by implication, that the lots in the subdivisions are suitable for use by purchasers as homesites, farms and ranches.

PAR. 13. In truth and in fact, all or most of the lots in the subdivisions, in the size parcels in which they are sold, are not suitable for use by purchasers as homesites, farms or ranches because of, *inter alia*,

(a) the unavailability of, or high cost of obtaining, utilities, water, financing, equipment, improvements and other amenities;

(b) the failure of subdivider respondents to install promised improvements to the subdivisions; and [5]

(c) certain practices of subdivider respondents which substantially impair the ability of purchasers to live on or use their lots.

Therefore, the acts and practices alleged in Paragraph Twelve are unfair or deceptive.

PAR. 14. In the further course and conduct of their aforesaid businesses, respondents have offered and are offering lots for sale to prospective purchasers who have beliefs, regarding the suitability for use of said lots as a homesite, farm or ranch, contrary to material facts not disclosed. Such facts, if known by certain purchasers, would be likely to affect materially their consideration of whether to purchase a lot from respondents. The failure to disclose such facts clearly and conspicuously is an unfair or deceptive act or practice.

III

PAR. 15. In the further course and conduct of their aforesaid businesses, respondents have induced and are continuing to induce purchasers of lots in the subdivisions to make payments due on their contracts, as well as additional payments substantially in advance of their due dates as provided for in said contracts. Respondents induce such due payments and such advanced payments on subdivision lots which are of little or no value to purchasers as an investment, homesite, farm, or for any other reasonable use as described in Paragraphs Nine through Fourteen above. Such purchasers have made and are making such payments toward the purchase of lots in reliance upon the aforementioned oral and written unfair and deceptive statements, representations and practices, and pursuant to continuing efforts by respondents to induce further payments by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning or relating to the subdivisions. Pursuant to respondents' continuing inducements as set forth herein, respondents have received and are receiving substantial sums of money and have failed to offer to refund or refused to refund such money to purchasers.

PAR. 16. The use by respondents of the practices described in Paragraph Fifteen and their continued retention of the monies collected, as aforesaid, are unfair acts or practices.

PAR. 17. The use by respondents of the aforementioned false, misleading, unfair and deceptive statements, representations, acts and practices, directly or by implication, and the failure of respondents to

disclose [6] the aforementioned material facts, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' lots by reason of said erroneous and mistaken belief.

PAR. 18. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

INITIAL DECISION BY

THOMAS F. HOWDER, ADMINISTRATIVE LAW JUDGE

JULY 29, 1982

PRELIMINARY STATEMENT

The Commission's complaint in this matter was issued on April 29, 1980, alleging three counts of unfair or deceptive acts or practices in the sale to the public of undeveloped parcels of land in far West Texas. [2]

Three corporations and two individuals were named as "subdivider" respondents, *viz.*, Southwest Sunsites, Inc., Green Valley Acres, Inc., and Green Valley Acres, Inc. II, together with Messrs. Sidney Gross and Edwin Kritzler who were alleged to "direct and control" these corporations.

The complaint also named Mr. Irvin Porter and Porter Realty, Inc. as "broker" respondents. Prior to the hearings, the "broker" respondents and complaint counsel entered into a consent agreement, and the charges as to these respondents were not litigated.¹

Count I charged respondents with falsely representing the land to be a good investment at the offered price, having little or no financial risk (pars. 9-10). Secondly, it alleged that respondents failed to disclose certain material facts concerning the risky nature of investing in the land by purchasers holding contrary beliefs. The undisclosed facts were identified as "*inter alia*, the future value of the lots is uncertain and the purchaser probably will be unable to sell his lot or

¹ Accordingly, the use of the word "respondents" in this decision will normally refer only to the subdivider respondents.

his interest in the lot under the contract, at or above the purchase price" (par. 11).

Count II charged respondents with falsely representing the subdivided lots as suitable for use as homesites, farms and ranches. Factors listed as precluding such use were: (1) the unavailability or high cost of obtaining utilities, water, financing, equipment, improvements and other amenities; (2) the failure of respondents to install promised improvements; and (3) certain practices of respondents which substantially impair the ability of purchasers to live on or use their lots. Count II alleges further that respondents failed to "clearly and conspicuously" disclose material facts concerning their lots (pars. 12-14).

Count III charged respondents with unlawfully inducing purchasers to make payments on their lots, which allegedly "are of little or no value to purchasers as an investment, homesite, farm, or for any other reasonable use . . ." Such payments are alleged to be made in reliance upon the representations and practices previously described, and "pursuant to continuing efforts by respondents to induce further payments by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning [3] or relating to the subdivisions." Respondents were also charged with receiving substantial sums of money, and with failing to offer to refund or refusing to refund this money (par. 15).

The acts and practices of respondents, as set forth in the three counts of the complaint were alleged to violate Section 5 of the Federal Trade Commission Act (par. 18).

Respondents answered, admitting the nature of their business and certain corporate data, but essentially denying all charges.

Prehearing conferences were held in Washington, D.C. on July 7, 1980, August 8, 1980 and January 16, 1981. Adjudicative hearings commenced in Dallas, Texas on April 13, 1981 and continued from time to time in that city and in Van Horn, Texas and in Albuquerque, New Mexico until completion of the case-in-chief and the defense in November, 1981. A brief rebuttal hearing was held in Washington, D.C. in January, 1982.

The record was closed for the reception of evidence on February 9, 1982, following the various record-correction activities of the parties. Extensive proposed findings were submitted, the final submission occurring on March 26, 1982.

Any motions not previously specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied.

This proceeding is before me upon the complaint, answer, testimony and other evidence, and the proposed findings of fact and conclusions of law filed by counsel. The proposed findings of fact, conclusions

and arguments of the parties have been considered, and those findings not adopted either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial issues not necessary for this decision.

Certain abbreviations, such as the following, are used in this decision:

- CX - Commission's exhibit.
- CPF - Complaint counsel's proposed finding.
- RX - Respondent's exhibit.
- RPF - Respondent's proposed finding.

The transcript of testimony is usually referred to with the last name of the witness and the page number or numbers upon which the testimony appears. [4]

Having heard and observed the witnesses, and after having reviewed the entire record in this proceeding, I make the following findings:

FINDINGS OF FACT

I. THE RESPONDENTS

1. Respondent Southwest Sunsites, Inc. ("SWS") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas. Its office and principal place of business is located at 16000 Ventura Boulevard, Encino, California. (complaint par. 1; answer, par. 1).

2. SWS was incorporated on February 26, 1973 under the name Southwest Land Sites, Inc. The name was changed to SWS on November 5, 1973, by amendment to the articles of incorporation (CX 1B, D).

3. Respondents Green Valley Acres, Inc. ("GVA") and Green Valley Acres, Inc. II ("GVA II") are likewise Texas corporations, with their offices located at 16000 Ventura Boulevard, Encino, California. GVA was incorporated on March 11, 1976 and GVA II was incorporated on May 9, 1977 (complaint, par. 1; answer, par. 1; CX 14B; CX 23B).

4. The business engaged in by SWS, GVA and GVA II is that of acquiring undeveloped land, subdividing this into smaller parcels of 5, 10, 20 or 40 acres, and selling these lots to the public (complaint, par. 4; answer, par. 4; Gross 296-98).

5. Individual respondents Sydney Gross and Edwin Kritzler, of the same business address, are alleged to formulate, direct and control the activities of the above corporate respondent (complaint, par. 1; answer, par. 1).

above corporate respondents (Gross 302-03; CX 13L).² Mr. Gross, a real estate broker, financed the purchase of the subject properties by the corporate respondents (Gross 296, 307). [5]

7. Respondent Gross, d/b/a Sydney Gross Collection Agency, is the sales agent for SWS (Gross 296; Shonfield 1245). That entity shares the function of sales agent for GVA and GVA II with Blue Chip Realty, another Gross enterprise (Shonfield 1245).

8. Mr. Gross' primary duties for the corporate respondents are financial and policymaking (Gross 314-15). Respondent Edwin Kritzler, also a real estate broker, shares in policymaking responsibility, and in addition is generally responsible for the day-to-day operations of the three companies, reporting to Mr. Gross (Gross 314; Kritzler 462-68). Mr. Kritzler, a vice president of SWS, serves as the general manager for each of the three corporate respondents (Kritzler 467).

9. Together Mr. Gross and Mr. Kritzler selected the three properties purchased by the corporate respondents (Gross 312). They decided upon the resale prices to be charged, the promotional materials and TV commercials, as well as the contract forms (Gross 309-12).

10. Respondent Porter Realty, Inc. through agreement signed by its president, respondent Irvin Porter, was retained by SWS in June 1974 to sell its land (CX 37). In addition, Porter also sold land in GVA and GVA II (Kritzler 592-93). These arrangements ceased in March 1978 (Kritzler 637; Porter 2359; Elfont, 4167).

II. THE PROPERTIES

11. As noted, this case involves the sale of undeveloped land in three subdivisions, *viz.*, SWS, GVA and GVA II, which in the aggregate total approximately 40,000 acres. The location of these properties in Culberson and Jeff Davis Counties, Texas (complaint, par. 4; answer, par. 4).

12. I, the Administrative Law Judge, personally toured and observed these lands, accompanied by counsel, on July 1, 1981. During subsequent hearings held later in the year in Van Horn, Texas, I had a second opportunity to observe the general vicinity of the properties. From time to time this initial decision may reflect the result of my observations. [6]

A. Southwest Sunsites

13. The Southwest Sunsites tract was acquired by respondent SWS in 1973.³ This land is located approximately 10 to 20 miles east of

² None of these family members is involved as a practical matter in the business activities of the corporation (Gross 303-04).

³ Technically, SWS was purchased by SWS, Inc., following a loan for this purpose to it by respondent SWS. The purchase price was \$1,000,000, which breaks down to a cost of \$20 to \$33.50 per acre (CX 3; CX 4).

town of Van Horn, Texas, itself located approximately 120 miles east, and somewhat to the south of El Paso. The property lies to the immediate north of Interstate Highway 10 (CX 86G-H; CX 87E-F).

14. By way of background, SWS originally contained about 20,000 acres (Bray 3770), generally being used as grazing land (Wolfe 4568). In 1968, it was sold by one, Hugh Wolfe, to Southwest Land Corp., which began to subdivide and sell the property (Wolfe 4551; Bray 3770). Approximately 2,000 acres of this property was sold in bulk to certain purchasers from Chicago (Wolfe 4552-53).⁴

15. In 1973 Southwest Land Corp. declared bankruptcy, and the property was repossessed by Mr. Wolfe. Subsequently, in December, 1973, the land was sold by Mr. Wolfe to respondents (Kritzler 474; Wolfe 4552; CX 3, 4A-C).⁵

16. SWS, consisting of 17,467 acres, is located entirely in Culberson County, in an area known as Wild Horse Valley, immediately north of Michigan Flats (Reed 2608, 2624; Compere 3227; RX 67 at 4).⁶ This valley lies generally between the [7] Sierra Diablo Mountains and the Diablo Plateau on the west, and the Apache Mountains on the east (RX 67 at 4, 33).⁷

17. SWS is subdivided into approximately 1,800 parcels of 5, 10, 20 and 40 acres.⁸ The larger lots are located in the eastern portion of SWS, where the property enters the foothills of the Apache Mountains, with its rougher topography.

18. Before its purchase by respondents, the western portion of SWS had been subdivided into 5 acre parcels by Southwest Land Corporation (Kritzler 4093). Subsequently, the eastern portion was platted by respondents under the name Sunsites Rancho (Lara 3883, 3885). (For purposes of this case, the name distinction does not appear to be significant, although the two properties used different contract documents and have different sized parcels.)

B. *Green Valley Acres and Green Valley Acres II*

19. Green Valley Acres was acquired by respondents in 1976.⁹ This

⁴ These 2,000 acres, located in the center of SWS, were never platted (Wolfe 4552; Lara 3884). In August, 1981, they were reacquired by Mr. Wolfe at a cost of \$100 an acre (Wolfe 4552-53).

⁵ Respondent Kritzler testified that Southwest Land Corporation is in no way affiliated with the respondent SWS (Kritzler 647). Mr. Wolfe testified that SWS in reality "took over" the contract he had with Southwest "through the bankruptcy court," with both parties honoring previous sales of parcels to the public (Wolfe

⁶ Wild Horse Valley is sometimes referred to as Wild Horse Flat or Flats (RX 67).

⁷ The Baylor and Beach Mountains also lie to the west of the SWS property, and the Wylie Mountains lie to the east (See, e.g., RX 67, figure 7).

⁸ Kritzler furnished the following "ballpark" breakdown: 650 5 acres; 500-700 10 acres; 100 20 acres; and 100 40 acres (Kritzler 481).

⁹ The purchaser of record in this instance was respondent Sydney Gross. Respondent Kritzler executed the contract as "attorney-in-fact." The purchase price was \$750,000, which breaks down to a cost of \$40.48 per acre (Compere 3271-72).

property is located from 18 to 25 miles south of Van Horn (Kritzler 488; CX 88; CX 89).

20. GVA, consisting of approximately 15,000 acres in Culberson and Jeff Davis Counties, is located in an area known as Lobo Valley (Kritzler 491; Reed 2608-09).¹⁰ This valley is bordered by the Chispa Mountains on the east and the Van Horn Mountains on the west. GVA is in the western portion of Lobo Valley, and the western border of the property extends into the foothills of the Van Horn Mountains (Reed 2608-09; Holtz 3036; RX 67, figure 11). [8]

21. Prior to its purchase by respondents, GVA was used for grazing and some farming activity (Gross 309). Subsequently the property was subdivided into approximately 1,200 parcels of 5, 10, 20 and 40 acres.¹¹

22. GVA II was acquired by respondents in 1977.¹² This property is located in close proximity to GVA, in Lobo Valley south of Van Horn (Kritzler 488).

23. GVA II consists of 9,611 acres (Compere 3273). As in the case of the other properties, this property was similarly subdivided by respondents, into approximately 900 parcels. Because of the roughness in the terrain in the southern portion of GVA II, surrounding Needle Peak (RX 37), the land there was subdivided into 40-acre parcels. According to Mr. Kritzler, the use of this land is intended to be for camping or hunting (Kritzler 4098-4100; Gilmore 3961).

III. RESPONDENTS' MARKETING PRACTICES

A. *The Houston And Dallas Offices*

24. Respondents opened sales offices in Houston in 1973, and in Dallas in 1975, to sell SWS land (Kritzler 475). Upon the acquisition of GVA in 1976, and GVA II in 1977, both sales offices were charged with selling these properties as well (Gross 375).¹³ [9]

25. Mr. Ted Rose was hired as a salesman by respondent Gross upon the opening of the Houston office (Rose 677-78).¹⁴ Mr. Rose remained in that capacity for a period of some months, following which he became operations manager (Rose 679). In 1975, he was sent to Dallas to open up and manage that office (Rose 679-81). Mr. Victor Novaez eventually succeeded Mr. Rose as manager of the Houston office (Kritzler 475-77; Novaez 858).¹⁵ Both office managers reported directly to respondent Kritzler, and Mr. Novaez testified that Mr. Kritzler

¹⁰ Lobo Valley is sometimes referred to as Lobo Flat (RX 67).

¹¹ Mr. Kritzler furnished the following approximations: 200 five-acres; 800 ten-acres; 100 twenty-acres; and 100 forty-acres (Kritzler 489).

¹² Green Valley Acres, Inc. was the "purchaser" of record in this instance, with execution by Mr. Kritzler. The purchase price was \$602,550, which breaks down to a cost of \$60.64 per acre (Compere 3272-73).

¹³ There is some testimony which indicates that, at least in the Dallas office, sales efforts were concentrated on GVA and GVA II, following their appearance on the market (Rose 684).

¹⁴ As it happened, Mr. Rose's father was a cousin of Mr. Gross's wife (Rose 677).

¹⁵ Mr. Novaez began as a salesman in the fall of 1976, and became operations manager in the spring of 1977, replacing a Mr. James Layne (Novaez 858-59).

kept a close watch over the Houston office, visiting it personally "probably every three weeks or so" (Novaez 863; *see* Rose 688 and Novaez 862).

26. Both the Houston and Dallas offices remained open and active until 1978 (Kritzler 475; Rose 679, 686; Novaez 858). While the number of salespersons tended to fluctuate, as many as eight or nine persons were engaged in sales activity during peak periods (Kritzler 476; Hammer 649; Rose 682; Novaez 884). The operations managers were authorized to hire, supervise and fire office personnel, while respondents Gross and Kritzler maintained control over sales policies and contractual terms (Kritzler 476-77, 584; Rose 688-89; Novaez 861).

27. Respondents' Houston and Dallas sales personnel did not operate under written contracts of employment (Gross 376-77; *see* Hammer 651; Novaez 859-60; Rose 694). Previous sales or real estate experience were not prerequisites for employment (Rose 696; Hammer 650-51).¹⁶ Compensation was solely by commission (Hammer 651-52; Rose 687).¹⁷ [10]

28. There were no organized formal training sessions for newly-hired sales personnel. Neither were there any training manuals (Kritzler 587; Hammer 652-53; Rose 697; *see* Novaez 864-65). Prior to being sent out alone, a newly hired salesman would be provided with sales materials, given instructions what to say, and accompanied by experienced salesmen on their visitations for a few days (Hammer 652-54).

29. It was the testimony of respondent Edwin Kritzler that, under company policy, salesman were basically limited in their presentations to the written words contained in the brochure (CX 87), the fact sheet (CX 79), and the contract (CX 74) (Kritzler 4107). All sales personnel who testified maintained that they did not deviate from this policy (Hammer 652, 657, 660; Rose 695, 698, 714-17; Novaez 861, 864).

30. In respondents' Houston and Dallas operations, leads were typically generated through media advertisements, on TV, radio or in the newspaper. Interested prospects responded to an answering service (Rose 689; Novaez 871).¹⁸ Subsequently, these callers were contacted by phone by employees of respondents (apparently women in the "phone room"), who undertook to answer preliminary questions. Arrangements would then be made for a personal visit by a salesman

¹⁶ Most of respondents' sales personnel were not licensed to sell real estate in Texas (Rose 696; Hammer 650-51, 654). It appears, however, that a salesman's license was not required in Texas during the relevant time period (Hammer 673; Rose 696). In any event, Mr. Kritzler testified that he had a Texas broker's license (Kritzler 589-90).

¹⁷ Total commission amounted to 10% of the selling price. This included 70%-75% of the downpayment, with the remainder being paid the salesmen as "residuals," so long as the purchaser continued payments on the contract (Novaez 860).

(Rose 690; Novaez 873-74).¹⁹

31. If the salesman was successful in his efforts, a purchase agreement would be executed (CXs 74-78). While, as noted, the salesman was not authorized to alter the purchase prices set by Messrs. Gross and Kritzler, he was permitted a certain leeway in negotiating the down payment (Rose Tr. 689). All purchase agreements declare themselves not to be binding contracts prior to acceptance by respondents' home office (CXs 74A, 75A, 76A, 77A, 78A).²⁰ [11]

32. Both the Houston and Dallas offices became inactive in 1978, although mailing addresses were still maintained in those cities at the time of trial (Kritzler 475-77; R. Ad. 354, 355). Mr. Novaez, in Houston, attributed the diminished market to "saturation", but testified that he still answers a telephone for Green Valley (Novaez 884, 888).

B. Respondents' Home Sales

33. In or about the latter part of 1978, respondents commenced selling parcels from their home office in Encino, California (Gross 375-76). Two salesmen were used for this purpose, Mr. Brody and Mr. Frank, neither of whom were called as witnesses (Kritzler 565-66). These salesmen did not solicit new customers, but merely contacted previous purchasers for the purpose of selling them additional land (Kritzler 565).

34. According to Mr. Kritzler (Kritzler 566):

They would call the customers that were on the books, tell them of recent events in reference to the property; and if there was a parcel of land that was next to theirs and they appeared interested, to sell them that piece of land.²¹

C. On-Site Sales

35. According to Mr. Kritzler, respondents do not have an on-site sales program, as such (Kritzler 474). However, since approximately 1975, respondents have employed an on-site representative whose duties have included selling land when the occasion called for it (Kritzler 471-72). Mr. W.D. Smith was respondents' representative until 1978, when he was replaced with Mr. Gilmore (Gilmore 983). [12]

36. Mr. Smith testified that he sold "some" (Smith 941) and "very little land" (Smith 917), although he was authorized to sell all three properties at the standard 10% commission (Smith 913).

36a. Mr. Gilmore, who described himself as an "on-site salesman,"

¹⁹ Salesmen were assigned by Mr. Rose on a rotational basis (Hammer 655-56).

²⁰ CXs 74 and 75, pertaining to SWS are entitled "Purchase Agreement." The forms pertaining to both Green Valley properties are entitled "Agreement for Deed and Purchase of Real Estate."

²¹ Mr. Brody apparently passed on information concerning a newly-built cotton gin, and concerning a rubber producing "Guayule" plant (Kritzler 567-74). If Mr. Brody was unable to make telephone contact, the customer would be sent a "special memo" requesting a collect call to Mr. Brody (CX 115).

had previously worked as a salesman for Southwest Land Corporation (Gilmore 983-84). He testified that since the inception of his employment with respondents in November, 1978, he had only sold about eight pieces of the three properties (Gilmore 984-85). He also stated that no on-site sales had been made for about one year prior to his appearance as a witness in April 1981.

D. Sales Through Brokers

37. In addition to their own efforts, respondents have engaged the services of independent real estate brokers to sell their properties. Respondents provided these brokers with brochures, fact sheets and contract forms (Gross 383-84). The purchase prices for the properties and the terms and conditions of sale were established by respondents (Kritzler 591-96).²² Brokers had no authority to alter these terms, and respondents retained the right to approve or disapprove all sales (Kritzler 593).

38. Following the formation of SWS, Inc., a broker named Mr. O'Brien was hired in Boston, Massachusetts (Kritzler 470). Mr. O'Brien performed in this capacity for approximately nine months or a year (Kritzler 470).

39. For a brief time respondents also employed broker services in El Paso, Texas in the mid-1970's (Kritzler 470).

40. But it is the events which occurred by virtue of respondents' arrangements with Porter Realty of Coral Gables, Florida, which form the focus of the broker-sales aspect of this case. [13]

41. As heretofore noted, the listed respondents in the caption of this case include the names of Porter Realty, Inc., and its president Irvin W. Porter (*supra*, p. 2). Because of the execution of a consent agreement the charges against them were not litigated in this proceeding.

1. Sales Through Porter Realty

42. Respondents dealings through Porter Realty commenced in June, 1974 and lasted until April of 1978 (CX 37A; Kritzler 4117; Porter 2262, 2336).

43. Porter Realty was incorporated in Florida in 1972 (CX 33). Its principal base of operations was in Coral Gables, near Miami (Kritzler 585).²³ During the time of its association with respondents, it sold only respondents' properties (Porter 2263).

44. Porter Realty used both in-house personnel and outside sub-

²² See CX 37A, para. 2. This agreement between respondents and Porter Realty with regard to SWS sales is the only such written agreement in evidence. Apparently agreements with Porter to sell other properties of respondents', as well as respondents' agreement with other brokers, were made orally (Kritzler 592-93).

²³ Prior to its arrangements with respondents, Porter Realty (and especially Mr. Irvin W. Porter) had been involved in selling other properties (Porter 2238-39, 2241-45). At least one of these properties was located in the vicinity of Sanderson, Texas, which according to the map is located in the southwestern part of the state (Porter

brokers to sell respondents' properties.²⁴ Unlike respondents' own local operations in Houston and Dallas, Porter did not employ media advertising (Porter 2325). All, or virtually all, of its selling was done by telephone (Porter 2325).

45. To obtain leads, customer lists would be purchased from any one of the numerous land sales companies which had such lists available (Porter 2325). The lists consisted of the names of previous purchasers of land. These prospects would then be [14] contacted by telephone (Porter 2325).²⁵ In this manner sales were made throughout the United States (Porter 2325).²⁶

46. The record shows that Porter Realty was very successful in selling respondents' properties. In fact, the company outsold all other sellers, even respondents' sales force which ranked number two in such sales (Kritzler 591). It was Mr. Kritzler's testimony that Porter accounted for approximately 55% to 60% of all sales, and up to 70% in 1977 (Kritzler 591, 4117).

47. According to more specific information in the record, even these figures may be on the low side. Mr. Kritzler's estimate of the number of present purchasers of respondents' three properties totals 2,600 (Kritzler 481, 490, 492 (SWS-1400; GVA-650; GVA II-550)). The number of purchasers reported by Mr. Porter totals 2150 (CX 38B). If these figures are accurate, and my calculations correct, the resultant overall percentages of Porter sales of respondents' properties would be over 80%.

48. As noted, respondents terminated their business relationship with Porter Realty in April, 1978. Respondent Sydney Gross described this action as "mutual," and indicated that sales had been tapering off (Gross 381-82). According to Mr. Porter, "it was sort of a 50/50 affair", with respondents desiring "to get out of the phone business" (Porter 2336). Mr. Porter further testified that respondents Gross and Kritzler felt that "there might be too much being relied on about oil or whatever" (Porter 2359).

49. In the view of Mr. Kritzler, the reason for the termination was the steadily increasing instances of representations by Porter sales personnel concerning oil exploration activity on respondents' GVA and GVA II properties (Kritzler 596-97, 4126). While earlier complaints about Porter representations had involved whether purchasers would be able to resell their properties at a profit, "toward the end of 1977 and the beginning of 1978 the oil situation did arise" [15]

²⁴ Mr. Porter testified that the greatest number of persons employed at any one time to sell the properties were approximately 12 in-house and 5 or 6 sub-brokers (Porter 2255).

²⁵ The lists purchased by Porter Realty would be given only to in-house personnel. It was left up to the sub-brokers to obtain their own leads. For this reason, and for using their own telephones and facilities, sub-brokers were entitled to a higher commission on sales (Porter 2326, 2251-52; CXs 437-42).

²⁶ Calls were not placed to every state, however. Mr. Porter explained that there were a "handful" of states where such method of solicitation was not permitted (Porter 2325).

Kritzler 598). According to Mr. Kritzler, the percentage of Porter sales involving oil representations rose during that time from 10% to perhaps 60% (Kritzler 598).

50. Of particular objection to Mr. Kritzler was the use by Porter salesmen of an "oil map" (CX 129A-C). While Mr. Porter testified that Mr. Kritzler was aware of its use by Porter Realty, Mr. Kritzler testified that he did not become aware of this use until "the late fall of 1977," and that respondents had not previously authorized its use (Porter 2314; Kritzler 4124-25). Mr. Kritzler stated that he "[c]alled Porter immediately and told him not to use the map, that it was outside of his jurisdiction to do that" (Kritzler 4125). When in early 1978, Mr. Kritzler learned of its continued use, he testified that he again "told him to absolutely discontinue using the map" (Kritzler 4126). When the use of the map continued, and further instances of oil representations occurred, respondents, according to Mr. Kritzler, terminated the association with Porter Realty (Kritzler 4126).

2. Sales Through Diversified Realty

51. Respondents also employed the services of another Miami area broker, Diversified Realty Investment Corporation (Gross 377-78).²⁷ Diversified was not listed as a respondent in this case, and its principal officer, Mr. Louis Beck was not called as a witness (Gross 391-92; Kritzler 609).

52. Diversified accounted for the third largest total sales of respondents' properties, following Porter Realty and respondents' own sales force (Kritzler 591).

53. As in the case of Porter Realty, respondent Kritzler became aware of problems arising from Diversified's sales representations (Kritzler 609). Generally speaking, their problems were of the same nature as those associated with Porter, *viz.*, quick-profit-resale and oil (Kritzler 610). In approximately early 1978, Mr. Kritzler came to learn that Diversified too was using an oil map (Kritzler 610-12). [16]

54. As Mr. Kritzler put it: "In the beginning they [number of oil complaints] were smaller and then they grew to a proportion which caused us to dismiss them as a broker" (Kritzler 610).

55. CX 221 is a letter dated February 24, 1978, from Mr. Gross to Mr. Beck terminating their relationship in view of Mr. Beck's "recent difficulties with the Federal Grand Jury, regarding your association with another land company." Mr. Gross testified that this was a reason for termination, and that a possible additional reason might have been "one or two" complaints regarding Diversified which Mr. Kritzler handled (Gross 391).

²⁷ Diversified's employment with respondents probably commenced in the year 1976, when GVA came on the market (Gross 381). That company apparently sold GVA and GVA II property, not SWS (Gross 378).

3. Sales In South Pacific

56. A broker named Mr. Holgin was engaged by respondents in 1978 to sell GVA II property in the South Pacific (Kritzler 586, 612; Gross 382). This relationship was apparently ended in 1980 (Kritzler 586-87). Mr. Holgin's activities included sales to citizens of Tuvalu, a small island nation in the South Pacific (Gross 390). Mr. Kritzler testified that subsequently a group of Tuvalu purchasers visited their Texas properties, accompanying a Mr. Lauti, the Prime Minister, who apparently was himself a purchaser (Kritzler 621, 4145-47).

IV. COUNT I

57. As earlier noted, Count I of the complaint charged respondents with falsely representing the SWS, GVA and GVA II properties as being a good investment at the offered price, with little or no financial risk involved.

A. *The Representations Concerning Investment And Financial Risk*

1. TV and Radio Advertising

58. As previously found (Finding 30), respondents employed TV and radio advertising in their Houston and Dallas operations. TV advertising was also done at various times in [17] Boston, Atlanta and Midland, Texas (R. Adm. 4, 5, 6, 7, 11, 21).²⁸

59. CXs 42 through 71 were admittedly utilized by respondents as scripts for the preparation of TV and radio advertising for SWS, GVA and GVA II (R. Adm. 17). The two commercials whose script appears on CX 72B were aired on KHTV in Houston in April-June 1978, approximately 80 and 110 times, respectively (R. Adm. 13, 14, 15, 16). CX 395 is a TV commercial script also aired in Houston, in 1977 (Kritzler 579-81).

60. I have examined these materials and can find no reference in them, with one or two possible exceptions, to investment or accompanying financial risk. While the point is emphasized that the offered price is affordable, the messages are all oriented toward the uses which may be made of the land by purchasers, not resale profitability. Over and over again the theme is repeated: *viz.*, fertile valley; sunshine; clean air; quiet environment; mountain scenery; abundant water; farming; ranching; hunting; camping; retirement; satisfaction in owning land. While "combating inflation" is prominent in several of the scripts, it appears nearly, if not always, to be in the context of using the property to produce one's food, thereby reducing expenses (See CXs 51, 52, 58, 59, 60).

²⁸ The abbreviation "R. Adm." used in this portion of the initial decision refers to respondents' responses to complaint counsel's requests for admissions. These responses are dated October 14 and December 11, 1980.

61. On the other hand, CX 43, in offering inflation protection advice, contains the statement "Land is always your best buy." This representation is set forth in a context which includes references to an individual's independence, the fertility of the land, and the availability of water.

62. Only one of the scripts mentions the word "investment," CX 58 (it was crossed out in CX 43, above, and the word "buy" substituted). It refers to "five acres of fertile farm and investment property." This is represented as "the answer to inflation and the drugery of city life." The script goes on to state (CX 58):

Your five-acre site is awaiting you near the pleasant West Texas [18] community of Van Horn . . . where the soil is fertile and water plentiful. This fertile land will grow fruits, vegetables, meat and poultry . . . for your *own* table as well as sale to others. So stop worrying about inflation and the hectic city life. Think about it! Your own five acres of fertile land. . . .

Another script speaks of "just holding [the land] for the future," as an alternative to using the property for hunting and farming (CX 67). This material features a "celebrity", James Drury, the Virginian. Mr. Drury or his name also appear in other scripts, which often contain references to the hunting available on or in the vicinity of respondents properties (CXs 61-68, 72).²⁹

2. The Brochures, Fact Sheets And Contracts

63. According to respondents, their sales policy from the beginning was to furnish prospective purchasers only such information as was contained in the brochure (CX 87), fact sheet (CX 79) and the contract (CX 74; Kritzler 4097, 4107). Respondents sales representatives testified to like effect (Rose 695, 698, 714-15; Hammer 652, 657, 660; Novaez 861).

64. In examining these documents, it does not appear that either the various fact sheets (CXs 79-85) or the contracts (CXs 74-78) contain any reference to or representation concerning investment or risk.

65. On the other hand, there are certain references to "investment" in the brochures (CXs 86-89).

66. CX 86A-N was the brochure used by Southwest Land Corporation prior to its going out of business in 1973 (*see* Findings 14, 15, *supra*; Kritzler 644). When sales of SWS [19] began, respondents continued to utilize the brochure for a period of perhaps 60 to 90 days (Kritzler 644). During this interim period respondents assertedly pre-

²⁹ Other individuals featured in the scripts are a Dewey Compton, described as a "prominent" and "respected" agronomist (Kritzler 4096; CXs 44-52, 58-60); a Murray Cox (CXs 42, 53-55); a Harold Gunn (CXs 56-57, 72); and

pared their own brochure, CX 87A-L, which thereupon replaced CX 86A-N (Kritzler 645).

67. On CX 86B, the following statement appears:

This is Van Horn, Texas. Home of Southwest Sunsites. The new prime investment spot in the Southwest.

68. On the replacement document, CX 87B, the second sentence of that language was revised to read: "The prime land spot in the Southwest."

69. Also on the same page of the old brochure, CX 86B, is the statement "Its the ideal spot for investors." This language remained unchanged in the new brochure (CX 87B).

70. On CX 86E, the old brochure, appears the statement "For the investor, Van Horn offers potential as rich as the land itself." The same statement is in the later SWS brochure (CX 87D).

71. On CX 86I, in answer to the question "What can you do with your five-acre sunsite?", it is stated:

The land uses are almost limitless. Obviously, a five-acre or larger tract offers you infinitely more possibilities both as an investor, or a prospective resident, than the smaller lots generally offered by developers. The value of acreage in the Southwest is leaping every year. Last year alone, this land increased in value by over 20%. Its future growth potential is even greater.

72. This language was revised in the new brochure, CX 87J, to read:

The land uses are almost limitless. Obviously, a five-acre or larger tract offers you infinitely more possibilities both as an investor, or a prospective [20] resident, than the smaller lots generally offered by developers. The value of acreage in the Southwest is leaping every year. Its future growth potential is unlimited.

Mr. Kritzler testified that the changes—the deletion of reference to a 20% increase in value, and of the statement concerning even greater future growth potential—were made because "we were not selling an appreciation of the land. We were selling use" (Kritzler 4103).

73. As for CXs 88 and 89, the brochures prepared for GVA and GVA II, which originated in 1976 and 1977, respectively, further changes were made (Kritzler 4103-06). There is no reference in these brochures to "investment" or "investor." According to Mr. Kritzler, these steps were taken because of the questioning by various regulatory agencies, state and federal, of the use of such terminology in connection with the sale of land (Kritzler 4105).

74. Apart from the foregoing, each of the brochures (CXs 86N, 87L, 88K, 89L) contains quotations of historical American figures concerning the monetary benefits which derive from land ownership general-

ly. Respondents' proposed findings describe these quotations as "aphorisms" (RPF 40), and Mr. Kritzler belittled reliance upon them as a basis for purchasing respondents' properties (Kritzler 4144).

3. Other Sales Aids

75. Both respondents' own salesmen, as well as its hired brokers, sometimes employed various pictures and articles in connection with their sales presentations to prospective purchasers.

76. I have examined these materials and can find little or no probative evidence that the land was represented as a good investment carrying little or no risk.

77. According to former salesman Hammer, CX 170B-Z20 is a "picture book" which was used by respondents' salesmen in home visitations. It contains "various and sundry pictures and articles relating to the area and to the property itself" (Hammer 662). The purpose of the "picture book" was, according to Mr. Hammer (Hammer 663): [21]

Here, again, to help—for those that may be unfamiliar with the area, as to what they could expect when they got there. It was to how the land would look to them. It was raw land and some people just—you can't explain well enough for them to comprehend what raw land is. So we hoped that with these pictures we could make it a little clearer to them, what they could expect to find.

78. Apart from the pictures, there are a number of articles and statements in the book generally extolling the land (CX 1706V, X and Z-6, 17, 18, 20).

79. As earlier described, it was respondents' practice, following sales of property, to keep purchasers informed of newsworthy items generally affecting their purchase, or of specific interest in the Van Horn area (Gross 353-54). I have examined these materials, and cannot conclude from them that purchasers were thereby informed that they had made a risk-free investment.

80. These communications, often in the form of newsletters, include the following: CXs 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 102, 103, 109, 110, 111, 112, 113, 116, 117, 119, 120A-B, 127, 128, 131, 187, 170T, 237, 239, 242 and 491.

4. Representations To Purchasers

81. The former members of respondents' sales force who appeared in this proceeding uniformly testified that they had adhered to the policy of limiting the dissemination of material information to the documents furnished them by respondents for that purpose (Hammer 657, 660; Rose 698, 713-19; Novaez 866-71). Mr. Novaez, respondents' former Houston manager, testified that he never responded to a customer's question about investment, and would tell him to go to the

property personally and investigate, before answering the question for himself (Novaez 878-79). Mr. Smith, the on-site manager, testified that he "never told anybody they was going to get rich or be able to sell it for a profit" (Smith 940).

82. The testimony of complaint counsel's consumer witnesses does not reflect a pattern, at least on the part of respondents' employee sales force of good, risk-free investment representations (Baldrige 834; Buck 1498-1577; Sowell 2501-19). [22]

83. We turn now to analyzing more specifically the testimony of purchasers contained in this record.

84. There is nothing in the testimony of *Norma Baldrige* which goes to Count I of the complaint (Baldrige 804-36; *See especially* 833-34).

85. In her testimony, *Paula Bear* indicated that respondents' salesman represented the property as a good investment because of oil considerations and Texas A&M projects (Bear 1117-18). According to Mrs. Bear, she was informed that within 2 or 3 years the land would triple in value (Bear 1118). She later amended this testimony to "double or triple" (Bear 1168). However, an examination of her testimony reveals that it was so contradictory and her memory so faulty that it cannot be credited. The salesman's visit occurred in 1973, nearly 8 years prior to her appearance as a witness (Bear 1116). She admittedly was present for only about half of the sales presentation, and she admitted not knowing what the salesman said to her husband in her absence or what documents were furnished (Bear 1120, 1150). She agreed with respondents' counsel that she really didn't pay much attention to the transaction at the time (Bear 1161). Many other particulars can be recited, but it is quite apparent that Paula Bear's testimony is not reliable and probative enough upon which to base an accurate finding of fact.

86. Witness *Clement Switaj* testified that he was informed by a Porter Realty representative that he could profit from reselling his land, and that this could be done in a short period of time (Switaj 1276, 1279-80, 87). However, on cross-examination it was brought out that this witness understood that in making this investment he was incurring a risk, and that he nevertheless invested despite such risk (Switaj 1332-32).

87. Witness *Richard Morley* was allegedly informed by a Porter representative that the property was a short-term investment involving a 2 or 3 year period (Morley 1340-42). He testified that he believed he would make a "little money" based upon a possible resale of his land to Texaco, or if this fell through, make some money from "a little farming" during his retirement (Morley 1341, 1350-51). The witness, however, revealed himself to be aware that the Porter salesman's