

### (3) *Forfeiture Clause*

Horizon included a forfeiture clause in its contract that permitted it to terminate the purchaser's interest on default and retain all previously paid installments. A substantial number of contracts and sums of money have been forfeited under the Horizon contract (Findings 129-131). It will never be known how many customers continued making payments because of the Hobson's choice presented by the forfeiture clause. Although forfeiture clauses in installment contracts are legal in a majority of jurisdictions, they are unfair to the purchaser. Dobbs, *Remedies* Section 12.14 (1973). Upon forfeiture, the seller receives the benefit of the land and all previous payments; he is unjustly enriched at the expense of the purchaser.

In an effort to reach equitable results, an increasing number of states have departed either legislatively or judicially from the ancient common law rule of forfeiture. By preventing forfeitures, installment land sales contracts are brought into line with mortgages and installment sales of goods under the Uniform Commercial Code. Neither mortgage law nor the U.C.C. permits forfeiture, but limit the seller to his actual damages. Dobbs, *Remedies* Section 12.14(1973), U.C.C. Section 2-718.

Limiting recovery to actual damages is more compelling where the contract containing the forfeiture clause is an adhesion contract. In this case the stronger party, Horizon, has secured for itself a remedy for contract breach that far exceeds its anticipated actual damages. Had this been a liquidated damages clause, it would have been struck down as a penalty because it bears no relationship to anticipated damages. [290]

The penal nature of the forfeiture clause, particularly in combination with the duress of an adhesion contract, is indicative of the oppressiveness of forfeiture and the unfairness of Horizon's forfeiture clause. Concluding that the forfeiture provisions of Horizon's contracts are unfair represents a departure from an old and oppressive rule; yet, it does not break new ground, for equity has long abhorred a forfeiture.

#### J. Horizon Is Liable For The Unfair Or Deceptive Acts Of Its Sales Representatives

In reports filed with the Securities and Exchange Commission, ("SEC"), Horizon has reported that its sales representatives are full-time employees (CX 64D, 65E). For the fiscal year ended May 31, 1974, Horizon reported to the SEC that "the Company's own sales organization" accounted for 98 percent of its sales (CX 66C). Thus,

the relationship between Horizon's sales representatives and Horizon Corporation is that of principal and agent. Horizon, having clothed its sales representatives with apparent authority in the form of contracts, TBA maps, unit maps, property reports, films, presentation manuals, and Horizon-sponsored dinner parties, is responsible for their sales representations even if unauthorized. *Goodman v. F.T.C.*, 244 F.2d 584, (9th Cir. 1957). (The technical form of the relationship is not determinative; in a similar sales situation a corporation was liable for the acts of its jobbers considered independent contractors. *Star Office Supply Co.*, 77 F.T.C. 383, 446-46 (1970)).

Horizon points to the integration-disclaimer clause of its contract claiming exculpation from liability and lack of apparent authority in the sales representatives. It is clear from customer testimony that they perceived the representations of sales representatives as those of Horizon. Mere disclaimer clauses cannot absolve Horizon of the continuous and significant, both in substance and number, of misrepresentations made by its sales personnel. It is clear from the internal surveys of its sales offices that Horizon knew of these unfair and deceptive acts and practices and tacitly condoned them. In fact, testimony about sales training and the training manuals themselves show Horizon as the initiator of many of the unfair acts and practices.

Even if it were to be found that Horizon honestly and systematically dismissed sales representatives who violated their pledge, this would not exonerate Horizon of liability. As the Second Circuit Court of Appeals noted in *Standard Distributors, Inc. v. F.T.C.*, 211 F.2d 7, 13 (2d Cir. 1954): "unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act."

#### K. Neither Laches Nor Equitable Estoppel Bar Relief

The issuance of an order in this case is not barred by the equitable defenses of laches and equitable estoppel. As the Commission recently noted in *In the Matter of SKF Industries, Inc.*, Docket No. 9046, Opinion of the Commission, p. 8 n. 8 [94 F.T.C. 6 at 83] (July 25, 1979), neither equitable estoppel nor laches is a defense to an action brought by the government in the public interest. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917); *Times Picayune Publishing Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Firestone Tire & Rubber Co.*, [291]374 F. Supp. 431, 433 (N.D. Ohio 1974). The Commission's investigation of Horizon, which commenced in October 1971 (CX 65D), is of signifi-

cance to this proceeding in that Horizon, knowing it was under investigation, failed to take significant steps to correct its misleading and deceptive sales programs. Horizon's internal surveys alone constitute sufficient evidence to demonstrate that there has been no discontinuance of the unfair and deceptive practices prior to issuance of the Commission's complaint.

#### L. Remedy

It is well established that the Commission "has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices," and that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 613 (1946). The courts have repeatedly affirmed the power of the Commission to go beyond the specific violations found and to prohibit similar practices, *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 392-93 (1959), "so that its order may not be by-passed with impunity." *FTC v. Ruberoid, Co.*, 343 U.S. 470, 473 (1952). The Order entered herein is necessary to achieve the objective of preventing unfair, misleading and deceptive sales practices in the future.

Horizon suggests that any order exempt (i) property which is exempt from the scrutiny of OILSR pursuant to 15 U.S.C. 1702, (ii) single transactions in which the purchase price is greater than \$25,000, (iii) parcels of 50 acres or more in size, and (iv) lots for which utilities are or will be available within a date certain and upon specified conditions (Respondent's Reply To Complaint Counsel's Proposed Order, pp. 12-13). Such exemptions are not justifiable. It is clear that the purchaser of large quantities of land is not immune from deception; indeed, large purchasers may be more in need of the protection provided by this Order since the ILSDA does not require disclosures on large parcels. The public interest is not served, nor Horizon's unfair or deceptive acts or practices stopped, by placing such limitations on the scope of this Order.

In consideration of Horizon's contention that the order should be limited to undeveloped land which is subject to no obligation to develop (Respondent's Reply To Complaint Counsel's Proposed Order, p. 11), the scope of the Order has been limited to vacant land, undeveloped land, predeveloped land, or any other land which is not immediately available as a building site with utilities in place or under construction. This limitation is intended to exclude from the coverage of the Order, building lots with houses constructed thereon,

or with utilities in place and available for immediate building purposes.

### *Section I*

Section I of the Order consists of three subsections which order Horizon to cease and desist from (A) making 15 specific representations, (B) referring to 8 listed topics, and (C) engaging in 9 listed acts or practices. Although a number of these prohibitions are far reaching, the findings would indicate that such unfair and deceptive conduct by Horizon [292] was instrumental in persuading customers to purchase Horizon property. The breadth of these prohibitions is a reasonable preventative measure against new but similar unfair or deceptive sales schemes which would enable Horizon to by-pass with impunity this Order.

### *Section II*

The provisions of Section II affirmatively require Horizon to notify prospective purchasers of the potential risks and the material facts regarding the purchase of land from Horizon, and to offer a refund or exchange where there has been a material failure to provide a contracted-for improvement.

Paragraph II A, "Notice To Buyers," provides consumers with basic factual information about the offered property two days prior to any in-person sales contact. The two-day period permits the consumer to assess the merits of the property without being subject to Horizon's sophisticated sales techniques and sales pressures. The Notice informs consumers in an objective way that (1) the topic is land sales; (2) the location and average cost of the land being sold; (3) the uncertainty of investment value or ability to resell; and (4) the availability and cost information for the following improvements: roads, water, sewers, electricity, telephone service and recreational facilities. At its conclusion, the "Notice To Buyers" states the advisability of seeking professional assistance and of reading the property report.

Paragraphs II B and C verbally and physically incorporate the "Notice To Buyers" into the sales contract.

Paragraph II D states the method and terms of a refund procedure in the event that Horizon has failed to provide contracted for improvements within six months of the time specified in the contract. This provision, to be included in all contracts, requires affirmative notification on the part of Horizon, which is justifiable under the circumstances of a failure to meet contract terms.

*Section III*

Section III requires Horizon to disclose the risky nature of land investment and the purchaser's right to reconsider and cancel the contract during a period of insulation from Horizon's sales representatives. The terms of the adhesion contract are cleansed of some unfairness by prohibiting the integration and forfeiture provisions.

Paragraph III A requires Horizon to "clearly and conspicuously" include in all sales and promotional materials a specified warning about the uncertainty of land values and of resale potential. Such an unequivocal disclosure about the risks in purchasing land should mitigate any conflicting implications of land as an excellent, risk-free investment.

Paragraph III B requires Horizon to incorporate into its contract a clause granting a right of cancellation within ten days after signing the contract. To insure that the purchaser can truly reflect on the sagacity of his purchase, all communications from Horizon must cease during the ten-day period. Other provisions insure that purchasers have knowledge of and do not waive or forfeit their cancellation right. [293] Horizon is required to include a separate paragraph calling the purchaser's attention to the ten-day period; to include two copies of a separate form entitled "Notice Of Right Of Cancellation"; to orally notify purchasers of the right to cancel; and to notify purchasers so that they can cure any deficiency in the "Notice Of Right Of Cancellation."

Where an exchange privilege exists, Paragraph III F requires Horizon to specifically disclose the fact that building exchange lots may increase purchaser indebtedness and may not be in desirable locations.

Paragraph III G institutes a mandatory refund privilege conditioned on the purchaser making a personal visit to the property within one year. Although this provision turns Horizon's refund privilege from an optional to a mandatory one, requiring that Horizon provide a personal visit-refund provision is not unreasonable in light of the time limitation imposed, Horizon's unfair and deceptive acts and practices in the past, and Horizon's chosen method of selling its land sight unseen to buyers located at great distances from the property.

Despite the fact that Horizon routinely included a personal visit-refund provision coupled with a property visit credit in its contracts, the record shows that few people exercised this refund option and in fact often were reloaded when they did make a property visit, even though they were not satisfied with their original purchase. To

protect against a reoccurrence of the above situation, Horizon is required to: (1) clearly disclose the terms of the refund privilege, (2) provide the purchaser with a specific "Notice Of Cancellation After Inspection," and (3) refrain from communicating with the purchaser during the five-day refund period subsequent to the property visit.

Paragraph III H requires Horizon to make public the names and addresses of purchasers of its lots. This will enable the public, including builders, to contact lot purchasers about the purchase or sale of the property. It takes away the monopoly which Horizon has on the names and addresses of lot purchasers prior to recording a deed to the property.

Subsections I through L of Section III go to remedying the evil of forfeiture in Horizon's adhesion contract. Horizon will be permitted to collect or retain only its actual damages both in future contracts and in contracts which are in existence as of the time this Order becomes final. This Order does not grant complaint counsel's requested retroactive relief for contracts in which forfeitures have occurred prior to the effective date of this Order. In light of *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) and 15 U.S.C. 57(b), such restitution is not ordered. However, failure to grant administrative relief in the form of restitution should not be considered indicative of a failure of Horizon's customers to qualify for relief; rather, the Commission should seek judicial redress for penal forfeitures in accordance with 15 U.S.C. 57(b).

In addition, Horizon is prohibited from enforcing the integration clause of its contract. The record shows a substantial number of material representations made apart from the written contract. These representations were unfair and deceptive and were relied on by [294] purchasers. Purchasers should not be prevented from using these representations as proof in any contract dispute with Horizon or in any subsequent litigation.

Paragraph III N authorizes a letter (Appendix A) be sent to all purchasers of Horizon's land. The letter serves to inform purchasers of this lawsuit and of the rights and options open to them.

#### *Section IV*

Section IV requires a change in the management structure of the HCIA's. Horizon is prohibited from controlling the management of the associations and is thereby prevented from utilizing the resources of the HCIA's for its own benefit. Further, HCIA members are given the opportunity to postpone payment of HCIA assessments until the lot being assessed is ready for development. Payments over

a forty-year period on a lot which may never be developed is particularly onerous. Further, HCIA payments to an association by those who have forfeited on their lots, and have no interest whatsoever in the development should be refunded. These payments are in an escrow account, are readily available for refunds, and refunds seem just and proper.

#### *Section V*

Section V requires Horizon to inform its present and future agents and affiliates of the contents of this Order. It further commands Horizon to police the activities of its agents and affiliates to insure compliance with this Order. In light of Horizon's past history of failure to prevent misrepresentations by its sales force, this section is both reasonable and necessary.

While the notice and disclosure requirements of this Order duplicate in some respects information in the property reports, such additional disclosures are obviously necessary since the property reports have not apprised purchasers of all information material to a decision to purchase respondent's land.

#### *Redress*

The Commission has stated in its complaint that it may seek redress for injury to consumers in the form of restitution and refunds for past, present and future consumers, and such other types of relief as are set forth in Section 19(b) of the Federal Trade Commission Act, as amended (15 U.S.C. 57(b)), if the record of this proceeding, and other factors, make such course of action necessary and appropriate. For this reason, full redress for consumers has not been ordered by the undersigned. However, it is recommended that the Commission now proceed under Section 19(b).

The record in this proceeding reveals a course of conduct filled with deliberate misrepresentations and the withholding of material information from consumers. The end result of this planned course of conduct was to appropriate from consumers millions of dollars for virtually worthless desert land that was represented to be an excellent [295] investment. This entire sales scheme was made with deliberateness and with the knowledge of its falsity, and it unjustly enriched a few at the expense of thousands of unsuspecting consumers. Commission redress for these helpless victims of a vicious consumer fraud is not only warranted, but may be the sole remaining hope for any consumer relief.

## CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

2. The challenged acts, practices and methods of competition of respondent are in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

3. Respondent Horizon Corporation has engaged in the sale of land, located in the States of Texas, Arizona and New Mexico, and has utilized in connection therewith false, misleading, deceptive and unfair representations and acts and practices, and has failed to disclose to purchasers material information in respect to such land.

4. Through the use of the aforesaid unfair or deceptive acts or practices, respondent has caused purchasers of its land to pay substantial sums of money to it for land that has little value as investments and little use as homesites, and has received and retained such sums of money and has failed to offer to refund or refused to refund such money to such purchasers.

5. The use by respondent of the aforementioned unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are true, and into the purchase of substantial amounts of respondent's land because of said mistaken and erroneous belief.

6. The aforementioned acts or practices were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. [296]

## ORDER

## I

*It is ordered,* That respondent Horizon Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, contracting or other promotion of vacant land, undeveloped land, predeveloped land, or any vacant land which is not immediately usable as a building site with utilities in place or under construction, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:



A. Representing, directly or by implication, through the use of any means, that:

1. The purchase of land which respondent is offering or has offered for sale, has been, is or will be a good, profitable, safe or sound investment;
2. There is little or no financial risk involved in the purchase of respondent's land;
3. The resale of land purchased from respondent is not, or [297] will not be difficult;
4. Respondent will repurchase, resell, or assist in the resale of land purchased from respondent, *unless* such is a fact, and *unless* the terms, conditions and arrangements for repurchase, resale, or assistance are clearly and conspicuously disclosed at the time such representation is made;
5. The value of any land, wherever situated, whether or not marketed by respondent, has risen, is rising, or will rise;
6. Lots designated by respondent as "single-family residential", "multi-family residential", "commercial", or terms of similar import have a significant difference in present or expected value;
7. The price set by respondent for the land is equivalent to the market value of the land, *unless* adequate market data on resales of similar land (land in a similar location with the same degree of development) by previous purchasers in the possession of respondent substantiates this representation;
8. The purchase of land from respondent is a way to achieve financial security, to deal with inflation, or to make money;
9. The purchase of land in general is a good, profitable, safe or sound investment; [298]
10. The demand for land offered for sale by respondent has increased, is increasing, or will increase;
11. Land being offered for sale by respondent will soon be unavailable because of the pace of sales or dwindling supply, or that the supply of any other land is decreasing;
12. Purchasers must purchase immediately in order to ensure that a particularly desirable location will be available, or that lots similar to those being offered for sale may not or will not be available at the same price in the foreseeable future;
13. Purchasers have been specially selected;
14. The signing of a contract does not immediately create a binding legal obligation on the part of the purchaser including, but not limited to, representations that the purchaser is only making a deposit, is only reserving the land, is only taking the first step, or is

not making a final decision, or in any manner whatsoever obscuring or misrepresenting the legal or practical significance of signing a contract; *provided*, that respondent may accurately recite the terms and conditions of the contract and of a refund privilege, if any, or of a cancellation right, if applicable; [299]

15. The federal property report or state property report is in any way an endorsement of or a judgment of the merits or value of the land being offered by any federal or state agency, unit, or official.

B. Making any reference, directly or by implication, through the use of any means, to:

1. The past or future price of land offered by respondent, or the past or future value of land offered by respondent, or the past or future increases in prices, including reference by actual dollar amount, percentage increase, or by any other means as indicative of market value, or of a change in market value;

2. The past, present or future population, employment or industrial statistics or trends or other statistics or trends in a geographic area, unless respondent has a reasonable basis at the time of the statement or representation to conclude that such statistic or trend either now has or, within the near future, will have a significant effect on respondent's property or a part thereof, other than those parts of each property which respondent has reserved for development, to which such statement or representation refers or relates;

3. The present, planned, proposed or potential development, improvement or facilities of the particular land being offered or of the subdivision or project in which the offered land is located that [300]differs in any material respect from the relevant language of the most current property report or from the "Notice to Buyers" (set forth in Part II of this Order);

4. Investments of any sort, including any reference to insurance, stocks, the stock, commodity or options markets, savings accounts or certificates, annuities, or land as an investment;

5. The purchase, reservation, contracting or consideration by any individual other than the immediate purchaser, of any land being offered by respondent, including but not limited to, any reference to any other person having a "hold" on a lot;

6. Respondent's reputation, size, assets or listing on any stock exchange; *provided*, that respondent may make such references as are required by statute or regulation in the place and manner required by such statute or regulation;

7. The present, planned, proposed or potential development of any land by anyone other than respondent;

8. The time within which land purchased from respondent can be resold.

C. Engaging in any of the following acts or practices, directly or by implication, through the use of any means: [301]

1. Discouraging purchasers from obtaining the assistance of counsel or other professional or personal advice in connection with the purchase decision or the purchase of respondent's land;

2. Failing to provide any required federal or state property report sufficiently in advance of the signing of a contract so as to enable the purchaser to read it completely without interruption or distraction by respondent's representatives or employees;

3. Filling out a contract with the purchaser's personal information prior to the purchaser signifying, by affirmative statement, that he desires to purchase the land being offered;

4. Subjecting a purchaser who has evidenced a desire not to purchase respondent's land to continued sales effort from any sales representative or other employee other than the original sales person, *i.e.*, any continuation of the "T.O." or "takeover" system;

5. Including in any contract or in any other documents shown or provided to purchasers, language stating that no express or implied representations have been made in connection with the sale of respondent's land, or that any particular representation has not been made in connection therewith;

6. Making any statement or representation concerning the rights or obligations of respondent or the purchaser which differs in any [302]material respect from the rights or obligations of the parties as stated in the contract of sale, the Notice to Buyers provided for in Section II of this Order, and the property report;

7. Including any contract language permitting respondent to retain all sums previously paid by the purchaser upon the failure of the purchaser to pay any installment due or upon the failure to perform any other obligation under the contract;

8. Failing to disclose, clearly and conspicuously, in all sales presentations, promotional materials, contracts and advertising relating to specific lots the existence, nature, location, size and significance of any and all easements, and any other physical features which could affect the full use and enjoyment of a lot;

9. Misrepresenting the true nature and purpose of any event or activity, including, but not limited to telephone calls, sales calls, dinner parties or other similar gatherings, contests, awards of free or reduced price gifts or vacations, and sightseeing tours.

Order ..... 97-F.T.C.

## II

*It is further ordered, That respondent Horizon Corporation shall:*

A. Distribute to all purchasers a copy of the following "Notice to Buyers" at least two days prior to any in-person sales contact. (1) In [303]cases where the purchaser is invited by mail to attend a meeting sponsored by respondent, the Notice shall be included with the invitation. (2) In cases where respondent arranges to meet with the purchaser in the purchaser's home, or other location, respondent shall mail the Notice to the purchaser allowing sufficient time for the Notice to arrive two days prior to the meeting. (3) In cases where the initial contact with the purchaser is in-person (as, for example, at a booth located in a public place) respondent shall, after identifying briefly the purpose of the contact, give the Notice to the purchaser, request that the purchaser read it, and provide ample uninterrupted time for the purchaser to read it completely before continuing with any sales presentation. (4) In cases where the sale is to be completed entirely through the mail, the Notice shall accompany the initial mailing to the purchaser. The Notice shall be on a separate sheet of paper not attached to any other paper and shall contain only the required information and no other writing, unless approved in advance by the Commission. The Notice shall be in the following format and content:

NOTICE TO BUYERS

NAME OF SUBDIVISION  
 NAME OF SELLER  
 EFFECTIVE DATE OF NOTICE

THE PURPOSE OF [DESCRIBE THE TYPE OF MEETING OR CONTACT] IS TO PERSUADE YOU TO SIGN A CONTRACT FOR THE PURCHASE OF LAND IN [NAME OF STATE] AT AN [304]APPROXIMATE COST OF [AVERAGE LIST PRICE FOR THE LOTS BEING OFFERED], OF AN AVERAGE SIZE OF \_\_\_\_\_ ACRE(S), WHICH IS A COST PER ACRE OF \$ \_\_\_\_\_.

IMPORTANT

THE SELLER ADVISES YOU THAT IT IS NOT SELLING THE LOTS IN THIS SUBDIVISION AS A FINANCIAL INVESTMENT. THEREFORE, DO NOT COUNT ON YOUR LOT RISING IN VALUE OR YOUR BEING ABLE TO RESELL IT. THE FUTURE VALUE OF LAND IS VERY UNCERTAIN. EVEN IF THE DEVELOPMENT PROCEEDS ON SCHEDULE, YOU WILL FACE THE COMPETITION OF THE SELLER'S OWN SALES PROGRAM IF YOU OFFER YOUR LOT FOR SALE. THIS USUALLY INVOLVES AN EXTENSIVE SALES CAMPAIGN BY THE SELLER AND MARKETING COMMISSIONS WHICH YOU MAY NOT BE ABLE TO MATCH. YOU MAY ALSO FACE THE POSSIBILITY THAT REAL ESTATE

