IN THE MATTER OF

ARKLA, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3265. Consent Order, Oct. 10, 1989--Modifying Order, April 5, 1995

This order reopens a 1989 consent order that settled allegations that Arkla's acquisition of natural gas pipeline assets from TransArk Transmission Co. could reduce competition in the transportation of natural gas out of the Arkoma basin and the transmission of gas to consumers in the Russellville, Arkansas, area. This order modifies the consent order by deleting the divestiture requirement, because changed market conditions, such as regulatory changes and new entry in the market, make it no longer necessary.

ORDER MODIFYING ORDER

On December 6, 1994, NorAm Energy Corporation, successor to Arkla, Inc. ("Arkla"), filed a Petition To Reopen and Vacate or Modify Consent Order ("Petition") in Docket C-3265, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. Arkla requests that the Commission reopen the consent order issued on October 10, 1989 ("order"), and set it aside or modify the order by eliminating the requirement to divest. For the reasons discussed below, the Commission has determined to reopen the order and to set aside the divestiture requirement.

I. BACKGROUND

The order, which became final on October 23, 1989, was issued by the Commission to remedy the alleged anticompetitive effects of Arkla's 1986 acquisition of a pipeline and right of way of TransArk Transmission Company ("TransArk Assets"). The Commission's complaint alleged that the acquisition eliminated the TransArk Assets as an actual and a potential competitor in the transportation of gas to consumers in the Russellville-Morrilton-Conway, Arkansas, area and in the transportation of gas out of the Affected portion of the Arkoma

Basin ("APAB"), as defined in the order. The complaint also alleged that entry into the relevant markets "is very difficult or unlikely."

The order requires Arkla, among other things, to divest by April 23, 1991, the TransArk Assets or, in the alternative, at the sole discretion of the Commission, the Arkla Pipeline Assets, as defined in the order.[1] The purpose of divestiture under the order is to remedy the lessening of competition alleged in the complaint. *See Arkla, Inc.*, 112 FTC 509 (1989), modified (March 28, 1994).

II. STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").[2]

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 CFR 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter").[3] For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from

[1] The Commission in June 1991 and March 1994 granted requests by Arkla for approval of proposed divestitures of the Arkla Pipeline Assets. Neither of the proposed divestitures was approved by the Federal Energy Regulatory Commission, however, and neither was completed. *See* Petition at 8-12.

[2] *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

[3] Reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

the order." *Damon Corp.*, 101 FTC 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

III. ARKLA'S PETITION

Arkla asserts in its Petition that reopening is required by changed conditions of fact. The changed conditions identified by Arkla are order 636 of the Federal Energy Regulatory Commission ("FERC"),[4] substantial new entry in the relevant markets and excess capacity in the relevant markets.[5] Arkla states that FERC order 636 has resulted

[4] Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 3 FERC Stats. & Regs. (CCH) ¶ 30,939 (1992); order on rehearing, order No. 636-A, 57 Fed. Reg. 36,128, 3 FERC Stats. & Regs. (CCH) ¶ 30,950 (Aug. 3, 1992); order on rehearing, order No. 636-B, 57 Fed. Reg. 57,911, 61 FERC ¶ 61,272 (Nov. 27, 1992) (collectively "FERC order 636").

[5] Petition at 13-26.

in sweeping changes in the pipeline industry, by requiring pipelines to unbundle their services into separate components and to become open access pipelines and by enabling shippers to sell unneeded pipeline capacity through a capacity release program. According to Arkla, these changes have fostered new entry. Arkla also claims that entry has occurred since the order was issued, that other pipeline companies are potential entrants in the markets, and that an incumbent firm has proposed increasing its capacity. Arkla's Petition was placed on the public record for thirty days; no comments were received.

IV. ARKLA HAS SHOWN CHANGED CONDITIONS OF FACT THAT REQUIRE REOPENING

Arkla has shown changed conditions of fact that require reopening to consider whether the order should be modified as requested. FERC order 636, issued in 1992, altered the nature of competition in the natural gas industry. Among other things, FERC order 636 requires interstate pipeline companies to "unbundle" the charges for the services that they provide. Before FERC order 636, a pipeline acted as a merchant of gas, buying gas at the wellhead, gathering and storing it, transporting it through the pipeline, and charging customers a single price for this integrated service. FERC order 636 requires pipeline companies to separate out the charges for each service, and customers may deal with different suppliers for each service. The unbundling required by FERC order 636 enables pipeline companies to compete in providing one or more services without being fully integrated. According to Arkla, FERC order 636 has converted pipelines "from merchants of gas into transporters of gas offering transportation-only service for hire for third parties." Petition at 19. FERC order 636 enables firms to engage in pipeline transportation without incurring the costs of building or acquiring gathering and storage facilities, thus easing conditions of entry. Petition at 35-36. The Commission previously reopened and modified the order to set aside the requirement that Arkla divest gathering facilities associated with pipeline assets, because a pipeline company no longer needs to own gathering facilities to compete.[6]

FERC order 636 requires virtually all pipelines to be open access carriers, that is, to provide transportation service to and from any

[6] Arkla, Inc., Docket C-3265, order (March 28, 1994).

point on the pipeline system, and eases the regulatory requirements to build new pipelines. FERC order 636 also altered competition in the pipeline transportation of natural gas by enabling customers that are contractually obligated to take a certain amount of gas on a daily basis (firm commitment customers) to resell unneeded capacity under so-called capacity release programs. In addition, under the flexible receipt and delivery points required by FERC order 636, a buyer of firm commitment capacity need not deliver gas to or receive gas from the same points as its seller but may use any receipt and delivery points along the pipeline system. As a result, firm commitment customers can compete with pipeline companies in offering pipeline transportation services to some customers. According to Arkla, capacity release by shippers is rapidly increasing. Petition at 32.

Significant entry and capacity expansion have occurred in the Affected Area of the Arkoma Basin ("APAB"), as defined in the order.[7] Ozark Gas Transmission Systems in 1991 converted its pipeline to open access.[8] Ozark also obtained FERC approval for a capacity expansion (although the project has not been completed). Petition at 15. NOARK Pipeline System in 1992 completed construction of and began operating a pipeline in the APAB.[9] The Ozark and NOARK pipelines have added capacity to the APAB that is six times the capacity of TransArk; if Ozark completes its planned expansion, the combined capacity will be ten times the capacity of TransArk.

The entry and expansion that have occurred since the order was issued have substantially reduced concentration in the APAB. In 1989, Arkla was the only open access pipeline in the market, and TransArk was a potential competitor.[10] The entry and expansion in the market reduce concentration, as does the availability of capacity

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[7] *Cf.* Louisiana Pacific Corp., Docket C-2956, letter to John C. Hart, June 5, 1986, at 8 (unpublished) (denying reopening and modification when respondent failed to show changes in structural conditions, such as ease of entry, that might obviate need for divestiture requirement).

[8] The Ozark pipeline is within 10 miles of the TransArk line through the APAB. Petition at 15.

[9] NOARK began construction of its pipeline in October 1991 and opened it for service in September 1992. The NOARK pipeline crosses the TransArk pipeline and is within 18 miles of it through the APAB.

[10] Independent entry by TransArk would have reduced the Herfindahl-Hirschmann Index ("HHI") by approximately 1404 points from 10,000 to 8596. The HHI is used by the enforcement agencies "[a]s an aid to the interpretation of market data." *See* 1992 Horizontal Merger Guidelines ¶ 1.5

under capacity release programs.[11] Although the volume of gas shipped by released capacity still is relatively small (8% nationally in 1994),[12] the proportion of capacity that is allocated to firm transportation contracts and, therefore, subject to release is increasing, which increases the potential for capacity release in the future. Petition at 32.

In addition to entry and expansion in the APAB, there has been substantial entry in other parts of the Arkoma Basin. Transok in 1989 began operating a pipeline in the Arkoma Basin and in 1990 built a second pipeline serving the Arkoma Basin. Natural Gas Pipeline of America ("NGPL") in 1991 completed a pipeline in the Arkoma Basin. The NGPL pipeline was completed in about six months after construction began. Petition at 14. Although the Transok and NGPL pipelines are not in the markets alleged in the complaint, their experience shows that entry conditions have eased. In addition, to the extent that Transok and NGPL may be potential entrants in the APAB, their presence in areas adjacent to the APAB helps alleviate the competitive concerns alleged in the complaint.

Entry and expansion coupled with flat production in the area have resulted in excess pipeline capacity. Petition at 25 & 39. In 1992, according to Arkla, most major pipelines in the Arkoma Basin were operating at less than 50% of capacity. Petition at 25. The existence of excess capacity may decrease the possibility of successful collusion, because participants will have incentives to undercut the collusive price. According to Arkla, excess pipeline capacity has increased competition in the Arkoma Basin. The Federal Energy Regulatory Commission, in setting rates for Ozark, said that "[t]he record reflects substantial excess capacity and thus considerable competition in the Arkoma Basin." Petition at 26, citing Ozark Gas Transmission System, 68 FERC ¶ 61,032, at 61,108 (1994). Under

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[11] Pipeline entry and expansion in the APAB reduces the HHI to 5140. Assigning capacity available for capacity release to the shippers that hold the capacity under contract reduces the HHI to 3346. *See* Petition at 33 n.22; letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 3.

[12] According to Arkla, "[a]s much as 90% of Ozark's total capacity was released through capacity release," driving pipeline rates down. Petition at 33. Rates for firm pipeline capacity consist of two parts: a demand or reservation charge, which must be paid whether or not the capacity is used; and a usage charge. According to Arkla, a firm shipper has incentives to sell its unused capacity rights to defray the demand or reservation charge. Petition at 22. According to the Energy Information Administration of the Department of Energy, although firm commitment customers theoretically could make a profit on released capacity, "[i]n practice so far . . . released capacity has sold at a discount." Energy Information Administration, Natural Gas 1994: Issues and Trends 49 (July 1994), Petition Exhibit Q.

conditions of excess capacity, Arkla is selling its services in the Arkoma Basin "at a considerable discount under the rates authorized by the FERC." Petition at 40.

Pipeline entry and expansion also have affected the Russellville-Morrilton-Conway ("RMC") corridor. Both the Ozark and NOARK pipelines are near the TransArk pipeline in the RMC corridor and could provide cost-effective hook ups for customers in the corridor. *See* Petition at 38 n.27. Therefore, Arkla has shown changed conditions that require reopening to consider whether the order should be modified as requested.

V. THE ORDER SHOULD BE MODIFIED

Arkla has shown significant changes in circumstances such that there is no further need for the order's requirement to divest. The changes in competitive conditions in the relevant markets resulting from FERC order 636 and the entry and expansion that have occurred since the order was issued eliminate the need for divestiture that was required by the order.

Arkla has not shown that the prior approval requirement of the order should be set aside. Paragraph V of the order, in relevant part, requires Arkla, for ten years, to obtain the approval of the Commission before acquiring certain pipeline interests in the relevant markets. Arkla claims that the prior approval requirement rested on the presumption that any pipeline acquisition by Arkla "would impermissibly augment [Arkla's] perceived ability to exercise market power in the relevant markets."[13] Arkla fails to show that there is no longer a continuing need for prior approval of acquisitions by Arkla in the relevant markets.

The relevant markets identified in the complaint still are highly concentrated, and Arkla still is a substantial competitor in the relevant markets. The conclusion that the requirement to divest the TransArk assets should be set aside in light of changed conditions does not imply that any subsequent acquisition by Arkla would not raise competitive concerns. For example, an acquisition by Arkla of either NOARK or Ozark, the two pipelines that compete directly with Arkla in both the APAB and the RMC corridor, would eliminate a significant, direct competitor, increase concentration substantially and likely raise antitrust concerns that would warrant further

[13] Letter from Tom D. Smith, Esq., to Kenneth A. Libby, Esq., Feb. 8, 1995, at 4.

examination. Under the circumstances, the prior approval clause should not be set aside. *See Damon Corporation*, Docket C-2916 (March 29, 1983) (denying request to set aside prior approval clause when respondent had not shown that acquisitions "would no longer pose any antitrust concern");[14] *see also Canada Cement Lafarge, Ltd.*, 111 FTC 590 (1989) (prior approval clause not set aside when respondent failed to show that no acquisition that it might make would raise competitive concerns).

VI. CONCLUSION

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened and that the order in Docket C-3265 be, and it hereby is, modified to set aside paragraphs II, III and IV, as of the effective date of this order.

Commissioner Starek concurring only in the result.

[14] Letter to Joel Hoffman, reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207, at 22,585.

IN THE MATTER OF

NINZU, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3566. Complaint, April 7, 1995--Decision, April 7, 1995

This consent order requires, among other things, the Maryland-based marketers to possess and rely upon competent and reliable scientific substantiating evidence to support any performance, benefits, efficacy, or safety claims they make for any weight loss or weight control product or program or any acupressure device they market in the future.

Appearances

For the Commission: *Richard L. Cleland.*

For the respondents: *Michael B. Metzger*, President, Baltimore, MD.

COMPLAINT

The Federal Trade Commission, having reason to believe that Ninzu, Inc. d/b/a Davish Enterprises and Davish Health Products, Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc., corporations; and Michael Metzger, individually and as an officer and director of said corporations ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Ninzu, Inc. is a Maryland corporation doing business under its own name and under the names Davish Enterprises and Davish Health Products. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Davish Merchandising, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Order By Phone, Inc. is a Maryland corporation and the parent corporation of Auricle Clip, Inc. Its principal place of business is located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Auricle Clip, Inc. is a Maryland corporation with its principal place of business located at 1 East Chase Street, Suite 200, Baltimore, Maryland.

Respondent Michael Metzger is or was at relevant times herein an officer and director of Ninzu, Inc., Davish Merchandising, Inc., Order By Phone, Inc., and Auricle Clip, Inc. Individually or in concert with others, he participated in and/or formulated, directed and controlled the acts and practices of the respondent corporations. His address is 12135 Heneson Garth, Owings Mills, Maryland.

PAR 2. Respondents have advertised, offered for sale, sold, and distributed the Ninzu, Auricle Clip, and B-Trim, acupressure weight-loss devices that clip onto the ear. The Ninzu, Auricle Clip, and B-Trim are devices within the meaning of Sections 12 and 15 of the Federal Trade Commission Act, 15 U.S.C. 52 and 55.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

NINZU

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Ninzu, including but not necessarily limited to the attached Exhibits A and B. The aforesaid advertisements contain the following statements:

A. NO DIET! NO EXERCISE! LOSE 30 POUNDS IN 30 DAYS!

No conventional diet is better than any other. Don't kid yourself, they just do not work (Read the June issue of *Consumer Reports*).

NINZU™ is the first effortless weight loss product that really works. Now available in the U.S. You must be satisfied with your results in just 30 days or we will completely refund your money... no questions asked!

NINZU™ is a tiny acupressure device that fits snugly on your ear. This product utilizes the ancient science of acupressure to make you lose weight. It's safe and it works...we guarantee it.

NINZU™ does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. Wearing NINZU™ for less than 3 hours a day will produce dramatic results.

JOIN OUR LIST OF SATISFIED CUSTOMERS

I have tried every diet known to man. This is the first time I actually lost weight and I'm keeping it off. Mr. C.D. of Texas.

I lost 32 pounds last month by using NINZU. My husband says that I've never looked better. Mrs. J.R. of Ohio.

At first I thought it was a joke but after dropping 47 pounds in 2 months, I'm a true believer. Mr. T.U. of Maryland. (Exhibit A).

B. Would you put a needle in your ear to help you lose weight? Medical doctors in China use acupuncture every day to successfully help millions of patients.

Now for the first time in America you can actually lose weight using the proven principles of acupuncture without needles.

Introducing Ninzu, an amazing device guaranteed to help you lose weight by controlling your hunger. Just attach the small device to the triangular portion of your outer ear for one hour before eating, during the meal, and one hour after eating. It's completely painless, and totally effective. In just seconds your hunger pains disappear. You eat less, you lose weight quickly and safely.

Here's how it works. In Chinese medicine the hunger point is the tragus. The tragus is connected to the major nerve ending that controls your stomach and upper intestine. When you apply pressure to the nerve ending it actually inhibits your stomach's contractions. Your brain receives the signal that your stomach is full, reducing your craving. Imagine, no calorie counting, no diet shakes, no special fads, no pills or drugs. Just a safe, effective method that really works.

* * * *

"I dropped two dress sizes, so simple, yet so incredibly effective."

* * * *

"You can't notice it but I'm wearing it right now and I literally cut my food intake in half." (Exhibit B).

PAR. 5. Through the use of the statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that:

A. Ninzu causes significant weight loss;
B. Ninzu causes significant weight loss without the need to diet or exercise;
C. Ninzu controls appetite or eliminates a person's craving for food; and
D. Ninzu is scientifically proven to cause significant weight loss and control appetite.

PAR. 6. In truth and in fact:

A. Ninzu does not cause significant weight loss;

B. Ninzu does not cause significant weight loss without the need to diet or exercise;

C. Ninzu does not control appetite or eliminate a person's craving for food; and

D. Ninzu is not scientifically proven to cause significant weight loss and control appetite.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph five. (A), (B), and (C), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 8. In truth and in fact, at the time they made the representations set forth in paragraph five (A), (B), and (C), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

PAR. 9. Through the use of statements contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A and B, respondents have represented, directly or by implication, that testimonials from consumers appearing in advertisements for the Ninzu reflect the typical or ordinary experience of members of the public who have used the product.

PAR. 10. In truth and in fact, testimonials from consumers appearing in advertisements for the Ninzu do not reflect the typical or ordinary experience of members of the public who have used the product. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

AURICLE CLIP

PAR. 11. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the Auricle Clip, including but not necessarily limited to the attached Exhibit C. The aforesaid advertisement contains the following statements:

AURICLE CLIP™

The Effortless Weight Loss Product

A Board Certified internist born in China has uncovered the secret of using acupressure for quick and effortless weight loss. The introduction of the Auricle Clip makes available to the public the work of Dr. Daniel S.J. Choy, a qualified medical professional. The Auricle Clip is the product that will make dieting obsolete.

Through the science of acupressure, the Auricle Clip allows the user to lose weight without having to think about calories or grams of fat. Now, people who have failed as dieters because they could not stand to deprive themselves of the foods they love, will be able to take control of their lives and become happier, thinner people.

The Auricle Clip attaches to a pressure point on the tragus, the triangular portion of the outer ear, where it slows the wave-like muscular movement of food from the stomach into the intestines (peristalsis). This simply means that the stomach thinks that it is half-full before the user even begins eating. After a few bites the user feels full. In effect, the stomach seems smaller so the user eats less.

The Auricle Clip does not involve the use of drugs. There are no needles, no shakes, no special diet foods to buy again and again. By wearing the Auricle Clip on the tragus of each ear a half hour before eating and one hour after eating the user will change his/her eating habits, which is the real key to losing weight and keeping it off. (Exhibit C).

PAR. 12. Through the use of the statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that:

A. Auricle Clip causes significant weight loss;

B. Auricle Clip causes significant weight loss without the need to diet;

C. Auricle Clip controls appetite; and

D. Auricle Clip is scientifically proven to cause significant weight loss and control appetite.

PAR. 13. In truth and in fact:

A. Auricle Clip does not cause significant weight loss;

B. Auricle Clip does not cause significant weight loss without the need to diet;

C. Auricle Clip does not control appetite; and

D. Auricle Clip is not scientifically proven to cause significant weight loss and control appetite.

Therefore, the representations set forth in paragraph twelve were, and are, false and misleading.

PAR. 14. Through the use of statements contained in the advertisements referred to in paragraph eleven, including but not necessarily limited to the advertisement attached as Exhibit C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph twelve (A), (B), and (C), they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 15. In truth and in fact, at the time they made the representations set forth in paragraph twelve (A), (B), and (C), respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph fourteen was, and is, false and misleading.

B-TRIM

PAR. 16. Respondents have disseminated or have caused to be disseminated advertisements and promotional materials for the B-Trim, including but not necessarily limited to the advertisement attached as Exhibit D. The aforesaid advertisement contains the following statements:

SUCCESSFUL DIETING

(NAPS)--If you're ready to lose your share of the millions of pounds Americans are overweight, experts suggest you follow this sensible advice:

1. If you're thinking of a major weight loss, see a doctor before you start.

[DRAWING OF A WOMAN STANDING ON A BATHROOM SCALE OVER THE FOLLOWING CAPTION: A modern invention based on the ancient science of acupressure can reduce your craving for food.]

2. Make sure the diet you choose contains the proper amount of protein, fats, carbohydrates, water and vitamins. The U.S. Dept. of Health recommends that no more than 30 percent of your calories should come from fat.

3. Be aware of new techniques for dieters. One new product is reported to be able to help you lose weight without feeling hungry. Called B-Trim, this inexpensive acupressure product was developed by a Chinese born, board certified internist on the staff of two New York hospitals. When you attach a small, specially designed clip to the triangular portion of your outer ear, a message is sent to your brain via the vagus nerve that tells your stomach it is partially full. This effect makes dieting practically effortless. The device is worn for a half hour before and an hour after meals. (Exhibit D).

PAR. 17. Through the use of the statements contained in the advertisements referred to in paragraph seventeen, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that:

A. B-Trim causes significant weight loss; and

B. B-Trim reduces the user's craving for food and causes weight loss without the user feeling hungry.

PAR. 18. In truth and in fact:

A. B-Trim does not cause significant weight loss; and

B. B-Trim does not reduce the user's craving for food or cause weight loss without the user feeling hungry.

Therefore, the representations set forth in paragraph seventeen were, and are, false and misleading.

PAR. 19. Through the use of statements contained in the advertisements referred to in paragraph sixteen, including but not necessarily limited to the advertisement attached as Exhibit D, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraph seventeen, they possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 20. In truth and in fact, at the time they made the representations set forth in paragraph seventeen, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nineteen was, and is, false and misleading.

PAR. 21. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices and the making of false advertisements in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.