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POST-HEARING BRIEF

SUBMITTED BY

THE DANNON COMPANY, INC.

REGARDING

THE PUBLIC HEARING OF JUNE 2005

HELD UNDER

DOCKET NO. AO-14-A73, ET AL.

DA-03-10

AT PITTSBURGH, PA

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Submitted: September 2, 2005

September 2, 2005

Hearing Clerk  
USDA  
Stop 9200-Room 1031  
1400 Independence Avenue, SW  
Washington, DC 20250-9200

Dannon is pleased to submit this post-hearing brief to the U.S. Department of Agriculture regarding the subjects discussed during the hearing of June 2005 in Pittsburg, PA on several proposals to amend the definition of fluid milk within the Federal Milk Marketing Order Program. At the hearing and now, Dannon supports Proposal 8 and opposes Proposal 7. We request that the Secretary consider each of the points we have noted as part of our testimony given during the hearing as well as in this document. All points made by Dannon are individually and in their entirety relevant to the decision the Secretary must render based upon the evidence introduced at the hearing.

The Dannon Company, Inc. is a member of the National Yogurt Association (NYA). Dannon supports and hereby endorses the NYA post-hearing brief separately submitted. Dannon requests that the Department recognize that the yogurt community is fully unified as we conclude our comments on this proceeding.

Dannon wishes to highlight the following points:

- Milk cost is one of the most significant components of Dannon's cost drivers (Tr. Pg. 650. lines 11-15).
- The California state milk order classifies all yogurts as Class II (Tr. Pg. 650, lines 17-22). Class I Yogurt containing beverages produced under federal milk marketing order regulation are disadvantaged when they compete against yogurt produced and marketed in California (Tr. Pg. 651, lines 2-11).
- Not all milk and milk derived products compete with fluid milk.
- The definition of Class I products should be limited to fluid whole milk and those products that are "closely related fluid products, such as skim milk and flavored milk" as recommended in the Nourse Report (Tr. Pgs. 661-662).
- Yogurt drinks and yogurt containing beverages are not similar to fluid milk (Tr. Pg. 663).
- The fact that a milk product is packaged in a bottle does not necessarily mean the product competes with fluid milk (Tr. Pg. 664).
- Classifying all milk derived drinks as Class I will harm the dairy industry through reduced product innovation (Tr. Pg. 666-667). No less than 37% of Dannon's sales (by volume) in 2004 came from products that were innovated within the last five years (Tr. Pg. 667)

- The Cornell econometric model proves that in the long run the best case for all parties is to classify questionable new milk derived products as Class II (testimony and cross-examination of Dr. Mark Stephenson and Tr. Pgs. 667-671).
- The price elasticity of yogurt is three to four times as high as that for bottled fluid milk (Tr. Pgs. 671-673 and 703-704).
- Yogurts' origin and production differs significantly from that of bottled fluid milk. Yogurts' taste, texture and flavor are derived from advanced technology not used or authorized for, fluid milk. (Tr. Pgs. 673-676)
- Yogurt production also differs from that of cultured buttermilk (Tr. Pgs. 676-677).
- Almost all yogurts and containing products are sold in single serve containers whereas fluid milk is usually sold in multiple serving containers (Tr. Pgs. 679-680).
- Fluid milk and yogurts, including yogurt containing products (even in a beverage form) are not displayed in the same case in grocery stores where more than 70% of yogurt sales occur (Tr. Pg. 681 and Tr. Pg. 687). The consumer makes a clear distinction between fluid milk and yogurt containing products and the products are not substitutable (Tr. Pg. 682-683).
- Consumers think of yogurt as a food replacement regardless of the form in which the product is offered. (Tr. Pgs. 684-685).

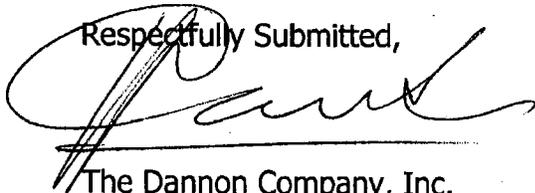
- Dannon's advertisements promote the fact that yogurt is a wholesome and nutritious food suitable for snacking occasions (Tr. Pgs. 685-686).
- The yogurt market changed drastically between 1993 and 2005. One of the major changes is the apparition of the so called "drinkable" yogurt and drinkable yogurt containing products segment, almost non existent in 1993 (less than 1% market share). Currently, adult yogurt shakes and drinks represent 8.7% of the yogurt category, while children-focused products represent 6.5% of yogurt category (Tr. Pgs. 691).
- Dannon's "Carb Control" Brand Smoothie will fall under Class 1 if proposal #7 is adopted (Tr. Pgs. 700).
- While fluid milk and plain yogurt (in whatever form) are very similar in nutritional composition, these two types of products do not compete against each other and should not be placed in the same Federal Milk Marketing Order Classification.

Further to the above points, Dannon opposes Proposal 7 because it would result in the inclusion in the federal milk marketing orders "Fluid Milk Products" definition of a protein threshold. Proponents of Proposal 7 did not offer any evidence at the hearing that is compelling for the Secretary to adopt such a protein threshold. No justification was submitted on the record by proponents for Proposal 7. The record contains one over-riding "opinion" offered during testimony of proponents of Proposal 7 at the hearing: the dairy processing

industry has the ability to test for protein fractionates and, therefore, the fluid milk product definition should embrace the protein component. However, fluid milk bottling plants do not produce bottled milk based on the proteins in the milk. They never have and probably never will. Fluid milk bottlers are not invoiced under the federal orders based on the proteins contained in the milk they use as Class I. The point suggested by the proponents of Proposal 7, as discussed during the hearing, is simply that since the dairy processing industry now has the technological ability to test for proteins, the definition of fluid milk product should contain a protein threshold. This logic is flawed and if adopted will serve as a detriment to all: dairy farmers, processors and consumers.

For the reasons described in the testimony given during the hearing and further developed in this document, Dannon asks that the Secretary not adopt Proposal 7, and in contrast adopt Proposal 8.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Philippe Caradec", written over a horizontal line.

The Dannon Company, Inc.  
Philippe Caradec  
Vice-President for Regulatory and Corporate Affairs