

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT

Docket 8232. Complaint, Dec. 27, 1960—Decision, Sept. 28, 1962

Order requiring Long Island City, N.Y., sellers of "Dannon Yogurt" to cease
advertising falsely in magazines, circulars, etc., and by radio broadcasts,

that their said product was "nature's perfect food", would correct poor eating habits, had reducing or antibiotic properties, or contained fewer calories than milk, except in the plain form.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dannon Milk Products, Inc., a corporation, and Juan E. Metzger, Don L. Grantham, and John F. Hazelton, individually and as officers of said corporation, hereinafter 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 in that respect as follows:

PARAGRAPH 1. Respondent Dannon Milk Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 22-11 38th Avenue, Long Island City 1, N.Y. Individual respondents Juan E. Metzger, Don L. Grantham, and John F. Hazelton are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. The respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of Yogurt which they sell under the name of Dannon Yogurt. Dannon Yogurt is a food product, as "food" is defined in the Federal Trade Commission Act. It is sold in plain, flavored and prune whip forms.

PAR. 3. Respondents cause and have caused said product, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other states of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, advertisements concerning the said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in magazines, brochures, circulars and pamphlets, and by radio broadcasts, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and have caused the dissemination of, ad-

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vertisements concerning the said product by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

Why yogurt is so healthful. Dannon is known as nature's perfect food that science made better.

How Dannon yogurt can help you to a new, more glamorous figure and a smoother complexion, you'll learn how to grow young gracefully with yogurt. . . .

Keep young with yogurt.

Sometimes it's the lure of the trim new waistline or perhaps it's a nicer complexion . . . or just that young, glad-to-be-alive feeling you get with Dannon Yogurt.

Tingling new fitness, a glowing new complexion, a trim waist line.

Try yogurt and in a few weeks your mirror will show a new, more attractive you. Slim, trim 'n terrific. . . . a nicer complexion. . . . The glamorous reflection of an inward glow of fitness. Grow young with Dannon Yogurt. Because there is magic in those Dannon cultures. . . . magical goodness that can work more wonders for you than all the lotions and creams on your vanity table.

* * * Has far less calories * * * than the same amount of milk.

Remarkably effective, as well, in control of . . . amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. The simple treatment for the usual case is one 8 ounce container of Dannon Prune Whip Yogurt at bedtime for a period of three weeks.

* * * * *

As a medicine . . . Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, obesity, in the correction of poor eating habits, and in chronic constipation (here try Dannon Prune Whip Yogurt for 30 days—it's dramatically effective.)

PAR. 5. By and through the statements made in said advertisements, disseminated and caused to be disseminated, as aforesaid, respondents represented, directly or by implication, that said product:

1. In all forms—

(a) Is nature's perfect food and is effective in the correction of poor eating habits.

(b) Is effective in maintaining youth, a youthful complexion, and in correcting skin disorders.

(c) Contains less calories than the same amount of milk.

(d) Has reducing properties.

(e) Is an adequate and effective treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition.

2. In prune whip form, is an adequate and effective treatment for

diarrhea, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis and chronic constipation.

PAR. 6. The advertisements containing the aforesaid statements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, said product:

1. In any form—

(a) Is not a perfect food, and is not effective in the correction of poor eating habits.

(b) Is not effective in maintaining youth, or a youthful complexion, or in correcting skin disorders.

(c) Has no reducing properties.

(d) Is not an adequate or effective treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerated colitis or salmonellosis and has no value in the treatment of chronic constipation except that the prune whip form provides temporary relief thereof.

2. Except as to the plain form does not contain less calories than the same quantity of milk.

PAR. 7. The dissemination by the respondents of the false advertisements, as aforesaid, constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Garland S. Ferguson for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds, Sr.*, *Mr. James L. Perkins*, and *Mr. Edward L. Foote*, of Chicago, Ill.; and *Mr. John P. Fox, Jr.*, of Chicago, Ill., for respondents.

INITIAL DECISION by LEON R. GROSS, HEARING EXAMINER

The hearing examiner finds and concludes from the evidence in this record that respondents' advertisements for Dannon Yogurt have a tendency and capacity to deceive as charged in the complaint filed herein on December 27, 1960. The representations in the advertisements violate the provisions of the Federal Trade Commission Act, as charged, and should be proscribed. They are so proscribed in the cease and desist order which is hereinafter entered. Counsel supporting the complaint have proven each and all of the material allegations of the complaint by reliable, probative, and substantial evidence. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

Respondent Dannon Milk Products, Inc., a New York corporation, has its offices and place of business at 22-11 38th Avenue, Long Island

City, New York. It is engaged in the business of manufacturing, advertising and selling yogurt under its trademark "Dannon." It distributes and sells its product in Boston, Massachusetts; Philadelphia, Pennsylvania; Washington, D.C., and their surrounding areas and in the Greater New York area. Its business is substantial.

Respondents Juan E. Metzger, Don L. Grantham, and John F. Hazelton are officers of the corporate respondent and formulate, direct and control its policies and practices.

Dannon Yogurt is a food product as "food" is defined in the Federal Trade Commission Act. Respondents have disseminated advertisements in the United States mails and by radio transmission for the purpose of inducing the purchase of "Dannon Yogurt." The advertisements have interstate circulation, and respondents are engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

Yogurt is a semi-solid food produced by inoculating milk with specific bacteria cultures and by incubating it under controlled conditions until it achieves the desired consistency and properties. Consumption of yogurt as a human food can be traced back to Biblical times. Although the popularity is increasing in this country, the witnesses in this proceeding testified that yogurt is more popular in the Middle East and in European countries than it is in the United States at the present time.

Dannon Yogurt is made from homogenized, pasteurized cow's milk from which a substantial portion of the butterfat has been removed and replaced with milk protein. *Lactobacillus Bulgaricus* and *Streptococcus thermophilus* bacteria cultures are added, causing the milk to ferment. Respondents testified that the processing takes place under atmospheric conditions which are "practically sterile." Respondents also produce and sell Dannon Yogurt which is flavored by adding vanilla, orange, strawberry, and pineapple preserves and flavoring, and prune whip to the basic yogurt. In the preparation of yogurt nothing happens to the fat content of the milk.¹ In other words, a person consuming an equal amount by weight of plain yogurt would be subjected to a slightly less caloric intake than if he consumed the same amount of milk by weight, but if the person were consuming any of the Dannon flavored yogurt he would be subjected to a slightly higher caloric intake.

The following statements, alleged in the complaint to be representative of those contained in respondents' advertisements, are excerpts from CX-1—12, 13 and 16:

¹ See testimony of Juan E. Metzger, p. 10.

Why yogurt is so healthful. Dannon is known as nature's perfect food that science made better.

How Dannon yogurt can help you to a new, more glamorous figure and a smooth complexion, you'll learn how to grow young gracefully with yogurt . . .

Keep young with yogurt.

Sometimes it's the lure of the trim new waistline or perhaps it's a nicer complexion . . . or just that young glad-to-be-alive feeling you get with Dannon Yogurt.

Tingling new fitness, a glowing new complexion, a trim new waist line.

Try yogurt and in a few weeks your mirror will show a new, more attractive you. Slim, trim 'n terrific . . . a nicer complexion. . . . The glamorous reflection of an inward glow of fitness. Grow young with Dannon Yogurt. Because there is magic in those Dannon cultures. . . . magical goodness that can work more wonders for you than all the lotions and creams on your vanity table.

* * * Has far less calories * * * than the same amount of milk.

Remarkably effective, as well, in control of . . . amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. The simple treatment for the usual case is one 8 ounce container of Dannon Prune Whip Yogurt at bedtime for a period of three weeks.

As a medicine . . . Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, obesity, in the correction of poor eating habits, and in chronic constipation (here try Dannon Prune Whip Yogurt for 30 days—it's dramatically effective.)

The United States Department of Agriculture states that yogurt contains all the nutritional value of the milk from which it is made (Home and Garden Bulletin No. 57, issued May 1957, RX-3, p. 8).

The greater part of the record in this proceeding consists of the opinion testimony of experts called by both sides. The experts who appeared on behalf of counsel supporting the complaint are:

Dr. Oral L. Kline, B.S., Ph. D., Director of the Division of Nutrition of the Food & Drug Administration of the Department of Health, Education, and Welfare. He is a member of the American Institute of Nutrition, American Clinical Society, American Association for the Advancement of Science, and American Public Health Association. His current Government employment requires that he supervise research in nutrition and review labels of food products.

Dr. Naomi M. Kanof, B.A., M.D., Assistant Clinical Professor in Dermatology, George Washington University. Dr. Kanof is certified by the Board of Dermatology and is engaged in the practice of her profession. She is editor of the *Journal of Investigative Dermatology* and the author of several scientific articles relating to dermatology.

Dr. Irving B. Brick, A.B., M.D., Associate Professor of Medicine, and Chief, Division of Gastroenterology at Georgetown University Hospital. Dr. Brick is certified by the American Board of Internal Medicine and is a member of the American Gastroenterological Associ-

ation, American College of Physicians, and American Foundation of Clinical Research. He is the author of several scientific articles in the area of his specialty.

Respondents offered the testimony of a nutritionist and four medical doctors. They are:

Dr. Bernard L. Oser, B.S., M.S., Ph.D., President and Director of the Food & Drug Research Laboratories, Inc., which is a private, profit-making corporation engaging in consultation, research and evaluation of food, drugs and related products for private business, and in a few instances, for the U.S. Government. Dr. Oser is a Diplomate, certified in human nutrition by the American Board of Nutrition, and is the author of several scientific articles in his field.

Dr. Harry Seneca, M.D., M.S. (Med.), Assistant Professor, College of Physicians and Surgeons, Columbia University. Dr. Seneca specializes in gastroenterology, is a Diplomate of the American Board of Internal Medicine and a Fellow of the American College of Physicians. He has served on the faculties of medical schools and engages in medical research. He is the author of a substantial number of scientific articles, including a majority of the printed opinion testimony proffered by respondents.

Dr. Frederic Damrau, M.D., had not been in the active practice of medicine since 1925 (Tr. 280). He might be characterized as an entrepreneur in the field of new food and medical products who seeks out products to exploit and sell and capital with which to do it. CX-18 and CX-19 contain advertisements which Dr. Damrau had run in publications of recent date. CX-18 contains an ad reading:

MEDICAL CONSULTATIONS: Regarding your labels and advertising, in order to avoid FDA and FTC troubles. Legitimate claims are substantiated and objectionable points corrected. Also, ghost writing service for busy doctors who want publicity in medical journals is available. Full details are offered by Frederic Damrau, M.D., Medical Consultant, 2 Tudor City Pl., New York 17, N.Y.

In CX-19, Dr. Damrau advertised for some person to help him exploit and market what he characterized as "New Remedy for Athlete's Foot" and "New Remedy for Peptic Ulcer." The examiner finds that Dr. Damrau's appearance did not buttress the professional stature of respondents' witnesses as a group.

Dr. Shepard Shapiro, M.D., who had recently retired after 25 years in the general practice of medicine in New York City, had been on the staffs of Goldwater Memorial, Lincoln, and University Hospitals and had written medical articles. He was produced as a witness in this case in order to have his article on yogurt, RX-9-A through D, admitted in evidence. This exhibit which purports to

be a medically scientific article contains also this statement: "Yogurt used in this study supplied as *Dannon Yogurt* by Dannon Milk Products, Inc., 22-11 38th Avenue, Long Island City, N.Y." Dr. Shapiro's article alludes to Dr. Seneca's articles which are in evidence. The most that can be concluded from Dr. Shapiro's testimony and article is that he found in the observation of a very small number of patients that if they took yogurt at the time antibiotics are being administered this may tend to offset the side effects which some patients experience in the gastrointestinal tract as a result of the antibiotics. There is nothing in the record to show that yogurt's limited control of antibiotic side effects in the gastrointestinal tract would not be as easily accomplished by an equal portion of milk.

Dr. Francis P. Ferrer, M.D., Instructor in Medicine, New York Medical College, had and was engaged in the practice of medicine, specializing in internal medicine. Dr. Ferrer is on the staff of several New York hospitals and a member of the American Geriatrics Society, the American College of Gastroenterology, and the American Diabetes Association.

The fact that counsel supporting the complaint has only called three experts to testify whereas respondents had five expert witnesses is not necessarily related to the question of the weight and probative value of the evidence. The hearing examiner heard and observed the witnesses in the hearing room and on the stand. He observed their demeanor and their manner of answering questions. He was able to, and did, form an opinion as to their reliability, credibility, and knowledge of the subject, their background, education, professional experience, and qualifications, and the weight to be attached to the opinions which they expressed. The hearing examiner has formed a judgment as to the bias and prejudice of the witnesses and their personal interests in the outcome of this litigation. He was able to, and did, form a judgment as to the weight and probative value of the testimony of each.

The findings and conclusions incorporated in and made a part of this opinion are based upon an application of all these principles just stated to the expert testimony in this record.

Respondents supplemented the opinion testimony of their experts by RX-4A to I, RX-5A to D, RX6-A to D, RX-7, RX-8 and RX-9.

The RX-4 series represents a collection in one place by respondents' witness, Dr. Seneca, of the opinion testimony which he had collected in 1950 by examining the articles on yogurt of other authors. The authors who made the original studies were not produced for cross-examination by counsel supporting the complaint. Dr. Seneca's

testimony at page 245, *et seq.*, reveals further that the article which he claims was responsible for his original interest in the properties of yogurt, RX-4, is based upon *in vitro* experiments with yogurt. In simple words this means that the findings in Dr. Seneca's basic article, RX-4, are not based upon observations of the effect of yogurt on human beings but merely upon test tube observations. RX-5A to D is also a Seneca production. RX-6A to D is also a Seneca production. RX-7 is also a Seneca production. RX-8 is one of Dr. Damrau's articles and RX-9A to D is an article by Dr. Shapiro. CX-17A to D is a report of a study made by Dr. Ferrer on the effect of Dannon Yogurt with Prune Whip on 194 patients suffering from constipation.

It is a fair inference from Dr. Ferrer's testimony and other evidence in the record that prunes or products made therefrom have a tendency to alleviate constipation, without any yogurt whatsoever being added to the prunes or prune whip.

Dr. Seneca's answers on cross-examination, at page 244, *et seq.*, cast serious doubts upon the reliability of the conclusions which he was willing to state in his published articles, about the antibiotic properties of yogurt. Dr. Seneca evaded answering the question of how many quarts of yogurt would be required to equate the minimum dosage of penicillin. Out of the evasion in which Dr. Seneca indulged, it would appear that it would take approximately *twenty quarts* of yogurt to equate *one* minimum dosage of penicillin. The record does not contain the doctors' opinions as to what other effects would be produced in a person eating twenty quarts of yogurt at one sitting. It is, and would be, potentially dangerous to allow the public to gather the impression from respondents' advertising that yogurt can be substituted for antibiotics as a medicine. However, the examiner finds that respondents intended to convey the impression in their advertisements that Dannon Yogurt may be so substituted. This deception is proscribed by the Federal Trade Commission Act.

The hearing examiner adopts the cullings from the reported cases which respondents state on pages 5 and 6 of their proposed findings, to wit,

(W)hatever statements are made, must be taken with and accepted in their ordinary sense. *DeForest's Training, Inc. v. FTC*, 134 F. 2d 819, 821 (7th Cir. 1943). Words mean what they are intended and understood to mean. *Bennett, et al. v. FTC*, 200 F. 2d 362, 363 (D.C. Cir. 1952). The Commission cannot interpolate language into advertising that is not there in order to construe it as misleading. *International Parts Corp. v. FTC*, 133 F. 2d 883, 888 (7th Cir. 1943). Advertisements must be considered in their entirety. *Aronberg v. FTC*, 132 F. 2d 165, 167 (7th Cir. 1942). The important question to be resolved

is the impression given by the advertisement as a whole. *Rhodes Pharmacal Co. v. FTC*, 208 F. 2d 382, 387 (7th Cir. 1953), and authorities cited. Advertisements must be considered as they would be read by those to whom they appeal. *Aronberg v. FTC*, 132 F. 2d 165, 167 (7th Cir. 1942); *FTC v. National Health Aids*, 108 F. Supp. 340 (D.C. Md. 1952).

To those excerpts from the above decisions, the examiner should like to add the following: It is in the public interest to prevent the sales of commodities by the use of false, and misleading statements and representations.² Capacity to deceive and not actual deception is the criterion by which practices are tested under the Federal Trade Commission Act.³ To tell less than the whole truth is a well-known method of deception; and he who deceives by resorting to such method cannot excuse the deception by relying upon the truthfulness per se of the partial truth by which it has been accomplished.⁴ "A statement may be deceptive even if the words may be literally or technically construed so as to not constitute a misrepresentation. . . . The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser."⁵ Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance.⁶

In *Bristol-Myers Co. v. FTC*, 185 F.2d 58, 62, the court said:

. . . Opinion evidence based on the general medical and pharmacological knowledge of qualified experts has often been held to constitute substantial evidence, even if the experts have had no personal experience with the product. *Goodwin v. United States*, 6 Cir., 2 F.2d 200, 201; *Dr. W. B. Caldwell, Inc. v. F.T.C.*, 7 Cir., 111 F.2d 889, 891; and this has been done even where witnesses who had personally observed the effects of the product testified to the contrary. (Citing cases)

Additionally, where one of two meanings conveyed by an advertisement is false the advertisement is misleading. *Rhodes Pharmacal Co., Inc. v. FTC*, 208 F.2d 382 (7th Cir. 1953); *United States v. 95 Barrels of Vinegar*, 265 U.S. 438 (1924).

The hearing examiner rejects respondents' contention, which has not been seriously pressed, that some of the statements made were in fact mere puffing statements. Respondents have not defended this

² *Parke, Austin & Lipscomb v. FTC*, 142 F. 2d 437, citing *L. & E. Mayer Co. v. FTC*, 97 F. 2d 365, 367.

³ *Goodman v. FTC*, 244 F. 2d 584, 604 (C.A. 9th 1957).

⁴ *P. Lorillard Co. v. FTC*, 186 F. 2d 52, 58 (C.A. 4th 1950).

⁵ *Kalwajtys v. FTC*, 237 F. 2d 654, cert. den. 352 U.S. 1025.

⁶ *Ward Laboratories, Inc., et al. v. FTC*, 276 F. 2d 952, 954 (C.A. 2d 1960).

action on that theory but have introduced evidence for the purpose of showing that the nutritional, dietary, cosmetic, and medical claims for Dannon Yogurt are justified by expert medical testimony. The examiner finds that such claims are not supported by the expert medical testimony.

The hearing examiner also rejects respondents' contention that because their advertising which makes most of the medicinal claims for Dannon Yogurt is mailed chiefly to a list of people who have been represented to respondents as doctors it is therefore proper for respondents to make such medical claims. There is no showing in the record that the medicinal claims for Dannon Yogurt actually reach only the eyes and ears of M.D.'s who are qualified to pass upon the validity of the claims, or that the nutritional claims reach only the eyes and ears of nutritionists, or that the cosmetic claims reach only the eyes and ears of dermatologists. The record makes it abundantly clear that respondents' advertisements are of such a character, in such form, and disseminated in such a general and all-inclusive manner that if they contain any deception at all the public interest will be injured within the intent and meaning of the Federal Trade Commission Act.

The hearing examiner specifically rejects respondents' proposal on page 45 of its Proposed Findings that "respondents' representations, as made, are representations of opinions as to the therapeutic value of yogurt, and not statements of fact." Without intending any reflection whatsoever upon counsel, the examiner finds that the reasoning based upon *Koch v. FTC*, 206 F. 2d 311 (6th Cir. 1953) is specious and contrary to the facts proven in this record and the law applicable to these facts. If the product which respondents are advertising were opinion, it is possible that the rationale of *Scientific Manufacturing Co. v. FTC*, 124 F. 2d 640, might have some validity. However, even in *Scientific*, the court concluded by stating:

. . . Surely Congress did not intend to authorize the Federal Trade Commission to foreclose expression of honest opinion in the course of one's business of voicing opinion. The same opinion, however, may become material to the jurisdiction of the Federal Trade Commission and enjoinable by it if, wanting in proof or basis in fact, it is utilized in the trade to mislead or deceive the public or to harm a competitor. (citing cases)

These respondents are not in the "business of voicing opinion." They are in the business of selling Dannon Yogurt.

It is interesting that Dr. Seneca's article, RX-6, in at least one place equates yogurt with buttermilk. The article, "A New Approach to the Etiology and Management of Constipation" says "promising results were obtained by using a combined antibacterial (phthalylsulfaceta-

mide) and yogurt or *buttermilk* therapy through the reduction and/or modification of the intestinal flora." (Emphasis supplied; Resp. Fdgs. p. 52)

The representations made in respondents' advertisements are intended to convey and do convey to the prospective purchaser the impression that Dannon Yogurt has special therapeutic properties. And the entire defense of respondents to this charge in the complaint was for the purpose of showing that Dannon Yogurt does have special therapeutic value which is not proven in the record.

The statements made in respondents' advertisements for Dannon Yogurt disseminated and caused to be disseminated respondents' representations, directly or by implication, that Dannon Yogurt in all forms:

- (1) Is nature's perfect food and is effective in the correction of poor eating habits;
- (2) Is effective in maintaining youth, a youthful complexion, and in correcting skin disorders;
- (3) Contains less calories than the same amount of milk;
- (4) Has reducing properties;
- (5) Is an adequate and effective treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition. In prune whip form, is an adequate and effective treatment for diarrhea, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis and chronic constipation.

The hearing examiner hereby finds and concludes as a matter of law and of fact that each and all of these representations in respondents' advertisements as to Dannon Yogurt are false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act and the decisions adjudicating the same. Such deception should be proscribed in the public interest.

The findings of fact and conclusions of law stated in this opinion are based upon the entire record including the exhibits which have been received. Any findings or conclusions proposed by the parties which have not heretofore been made in the precise form in which they were proposed, or in substantially that form, hereby are rejected. The fact that no finding or conclusion in this opinion summarizes the evidence or the law in the manner in which any of the parties have requested such facts and law to be summarized does not mean that the hearing examiner has not considered such evidence and law. It means merely that the examiner deems that the evidence which has been summarized as stated in the facts in this opinion is sufficiently probative, substantial and material to dispose of the issues.

The citation of legal authorities has been chiefly confined to a restatement of the criteria for determining whether advertising is false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act. The statement of the criteria by which the examiner has determined the weight to be ascribed to the expert testimony is Hornbook law. In this case the examiner finds not only that the opinion testimony of respondents' witnesses does not justify respondents' advertising claims but he further finds that each and all of respondents' witnesses have a bias and prejudice resulting from a personal interest in the outcome of this litigation. The officials of the corporate respondent are naturally determined to attempt to support their advertising claims. The doctors who testified did not possess that degree of medical, scientific objectivity which would justify giving great weight to their testimony. Some of the so-called "studies" of yogurt were obviously made by Doctors Seneca, Shapiro, and Ferrer for the purpose of supplying respondents with a "medically scientific" basis for their advertising claims. The articles failed to do this. A careful analysis of the nature of the articles and of the publications in which they appeared created the impression in the mind of the hearing examiner that this was a thinly disguised effort by Dannon to pull themselves up by their own bootstraps, so to speak. This they have not succeeded in doing. Respondents' documentary evidence is, in most instances, hearsay and of little probative value particularly since adequate opportunity was not afforded counsel supporting the complaint to probe the details of the alleged observations. For instance, it would be deceptive to conclude that yogurt with prune whip can be used in the treatment of constipation without running a control test to observe what prune whip *without* yogurt would do.

All motions made by the parties which have not previously been ruled upon or which are not herein specifically ruled upon hereby are overruled and denied.

The examiner has no doubt that yogurt, including Dannon Yogurt, is an acceptable food product. It probably has beneficial effects upon certain classes of people when purchased as a food, consumed as a food, and considered as a food. Respondents' self-serving efforts to ascribe to Dannon Yogurt rejuvenative qualities which only an endocrinologist is competent to judge, cosmetic benefits which only a dermatologist is competent to evaluate, nutritional value which far exceeds the actual fact, gastrointestinal effects which are not substantiated by reliable and dependable scientific evidence, and antibiotic qualities which should be confined within the area of the pharmaceutical producers

of ethical drugs simply borrow trouble for the respondents. They easily could have avoided this difficulty by keeping their advertising claims within the bounds of well-accepted scientific fact and known medical findings.

Respondents' advertisements will not be analyzed as respondents suggest. "The buying public does not weigh each word in an advertisement or misrepresentation. It is important to ascertain the impression that is likely to be created upon the prospective purchaser." Advertisements are not to be judged by their effect upon the scientific or legal mind, which will dissect and analyze each phrase, but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a first glance. See *Kalwajty's* and *Ward Laboratories, supra*. As the court said in *Associated Laboratories, Inc. v. FTC*, 150 F.2d 629:

. . . The company claimed that its tablets would serve to cure a number of human deficiencies and ailments. The Commission's experts testified that the vitamins and minerals which they contained were too small in quantity to restore such deficiencies or to cure such ailments; and the only issue was whether that was true. The company offered evidence to prove that the tablets were a 'dietary supplement'; that is, that they contained some quantities of those substances which are necessary to a well balanced ration, and which, had they been in greater quantity, might have been restorative or curative, as the company asserted. . . . The company had not advertised its tablets as useful adjuncts to a proper diet; it had claimed for them powers which they did not possess, and which it really did not try to prove that they possessed.

The appeal is entirely devoid of merit; the company represented the tablets as a panacea, and the Commission showed that they would cure nothing; it was to protect the public from precisely this kind of unscrupulous exploitation to which it so easily succumbs, that the Commission was in substantial part created.

In view of the examiner's findings and conclusions that respondents' advertisements for Dannon Yogurt are false, misleading, and deceptive within the intent and meaning of the Federal Trade Commission Act; that counsel supporting the complaint has proven each and all of the material allegations of the complaint by reliable, probative and substantial evidence in the record; and that this proceeding is in the public interest.

It is ordered, That respondents Dannon Milk Products, Inc., a corporation, and its officers, and Juan E. Metzger, Don L. Grantham, and John P. Hazelton, individually and as officers of said corporation, their representatives, agents and employees directly or through any corporate or other device, in connection with the sale of their product "Dannon Yogurt," including the plain, flavored and prune whip forms, or any other product containing substantially the same in-

gredients, or possessing substantially the same properties, whether sold under the same or any other name, do forthwith cease and desist from:

1. Representing directly or by implication in their advertisements or otherwise that "Dannon Yogurt," or any other product containing substantially the same ingredients or substantially the same properties:

- (a) Is nature's perfect food; or
- (b) Will correct poor eating habits; or
- (c) Is effective in maintaining youth; or
- (d) Possesses dermatological and cosmetic values and properties; or
- (e) Except in the plain form contains less calories than the same quantity of milk by volume and weight; or
- (f) Has properties which make it uniquely effective in helping human beings to reduce their body weight; or
- (g) Is a preventative treatment or a cure for gastrointestinal disorders, including but not limited to diarrhea, auto-intoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis or salmonellosis, or chronic constipation; or
- (h) Has antibiotic properties and qualities as the term "antibiotic" is generally understood; and

2. Misrepresenting in any manner, by advertising or otherwise, any of respondents' products.

OPINION OF THE COMMISSION

By Kern, *Commissioner*:

This matter is before the Commission upon respondents' appeal from the hearing examiner's initial decision filed October 12, 1961, holding that respondents violated the Federal Trade Commission Act, as charged, by disseminating false advertisements in connection with the sale of yogurt. The examiner ordered respondents to cease and desist the practices so found to be unlawful.

The questions respondents raise on their appeal are:

- (1) Is there substantial, probative evidence to support the examiner's findings that they have falsely represented "Dannon Yogurt" as charged?
- (2) Is paragraph 2 of the order too broad?
- (3) Did the examiner err in including in his order respondents Hazelton and Grantham in their individual capacities?

Respondents do not challenge all provisions of the order.

Respondent Dannon Milk Products, Inc., is a New York corporation, with offices in Long Island City, New York. The individual respondents, Juan E. Metzger, Don L. Grantham and John F. Hazelton, are officers in the corporation. The respondents advertise and sell in commerce the product yogurt under the trade name Dannon Yogurt, a food as defined in the Federal Trade Commission Act.

The complaint alleges that respondents in their advertising falsely represented their Dannon Yogurt, as follows: that the product is nature's perfect food and is effective in the correction of poor eating habits; that it is effective in maintaining youth, a youthful complexion and in correcting skin disorders; that it contains less calories than the same amount of milk; that it has reducing properties; and that it is an adequate and effective treatment in all forms for certain named disorders and in the prune whip form for other disorders. In addition, during the proceeding an issue was raised concerning respondents' representation that their product has antibiotic properties and qualities.

The hearing examiner uncritically adopted the complaint allegations as to the representations made and he found, in a conclusionary finding, that such were false, misleading and deceptive. He failed to mention the large amount of evidence adduced by complaint counsel to support the charges. The examiner ruled that respondents' experts "have a bias and prejudice" and that the testimony of the doctors called by respondents did not possess that degree of medical, scientific objectivity which would justify giving it great weight. This, however, does not make an affirmative case. The examiner neglected one of his basic and principal functions, i.e., to make appropriate findings of fact.

The greater part of the record in this proceeding consists of the opinion testimony of experts called by both parties. Counsel supporting the complaint called Dr. Oral L. Kline, B.S., Ph.D., Director of the Division of Nutrition, Food & Drug Administration of the Department of Health, Education and Welfare; Dr. Naomi M. Kanof, B.A., M.D., Assistant Clinical Professor in Dermatology, George Washington University; and Dr. Irving B. Brick, A.B., M.D., Associate Professor of Medicine, and Chief, Division of Gastroenterology at Georgetown University Hospital.

Respondents' expert witnesses were: Dr. Bernard L. Oser, B.S., M.S., Ph.D., a nutritionist, President and Director of the Food & Drug Research Laboratories, Inc.; Dr. Harry Seneca, M.D., M.S., a specialist in gastroenterology, Assistant Professor, College of Physicians and Surgeons, Columbia University; Dr. Frederic Damrau,

M.D., not active in the practice of medicine; Dr. Shepard Shapiro, M.D., retired from general practice of medicine; and Dr. Francis P. Ferrer, M.D., Instructor in Medicine, New York Medical College. In addition to such testimony, respondents put in evidence various articles or papers prepared by certain of these witnesses and other persons.

We have considered all the evidence of record and conclude that the allegations of the complaint, with the exceptions noted below, are supported by substantial, probative evidence. Comment on questions raised as to the various alleged misrepresentations will follow.

The complaint alleges that statements such as ". . . Dannon is known as nature's perfect food that science made better" and "As a medicine . . . Dannon Yogurt is valuable . . . in the correction of poor eating habits . . ." represent that Dannon Yogurt is nature's perfect food and is effective in the correction of poor eating habits.

Dr. Oral L. Kline, expert witness and a specialist in nutrition who testified for the complaint, stated that he regarded a perfect food as "one which would supply all of the nutrients essential for maintenance of life, growth, development and so on." This is a view we believe likely to be held by many consumers. He further testified that yogurt was lacking in certain well-defined nutrients and that a person consuming yogurt over a period of time as a sole item of diet would not be able to maintain his nutritional status adequately. Respondents offered no expert witness on this issue. They adduced testimony that the World Book Encyclopedia refers to milk as the most *nearly* perfect food, but this hardly justifies a claim that yogurt is a perfect food.

Respondents argue that the perfect food representation is mere puffing, citing *Carlay Co., et al. v. Federal Trade Commission*, 153 F. 2d 493, 496 (7th Cir. 1946), and *Kidder Oil Co. v. Federal Trade Commission*, 117 F. 2d 892, 901 (7th Cir. 1941). With present day emphasis on dieting and the importance of nutritional values, to make a claim that a food is perfect (a claim which concerns nutrition), is more than mere puffing or an exaggeration of qualities; it is a misrepresentation as to a material fact. We conclude that the representation is false and deceptive.

As to the representation on poor eating habits, Dr. Irving B. Brick, expert medical witness for the complaint, testified that he did not think one ingredient or one medication was going to correct the eating habits of anybody or make a poor diet sufficient. We believe the evidence sufficient to sustain the charge on this representation.

The next charge in the complaint is that respondents have falsely

represented that Dannon Yogurt is effective in maintaining youth, a youthful complexion and in correcting skin disorders. Among the statements upon which this charge apparently is based are the following:

How Dannon Yogurt can help you to a
 . . . smooth complexion, you'll
 learn to grow young gracefully with
 yogurt

* * * * *

Keep young with yogurt.

The evidence adduced by counsel supporting the complaint on the question of the effectiveness of Dannon Yogurt in the areas covered by this charge was limited to the testimony of one witness, Dr. Naomi M. Kanof, a dermatologist. Except to testify to the effect that yogurt would not give a person a "new" complexion, in the sense that a dermatologist uses the term "complexion", Dr. Kanof's testimony on direct examination failed to support the aforementioned charges. On cross-examination, relative to complexion, Dr. Kanof testified that what a person eats is a significant part of what the skin will look like. No other evidence was adduced in support of the allegations as to youth, complexion and skin disorders. In this state of the record, we conclude that the charges on these issues have not been sustained. The circumstances, including the nature of the statements made, do not in our opinion justify a remand of the matter on such questions.

Respondents' next challenge is to paragraph (f) of the order prohibiting the representation that their product has properties which make it uniquely effective in helping human beings to reduce their body weight. They claim they never so represented. The complaint alleges specifically that respondents falsely represented that their yogurt has "reducing properties". This was treated in the course of the hearing as meaning "intrinsic reducing properties", i.e., properties inherent in the product aside from a low butter fat content in relation to milk. An example of such representation is as follows:

As a medicine . . . Dannon Yogurt is
 valuable, both prophylactically and
 therapeutically, in a variety of
 indications, including . . . obesity

This suggests, in our opinion, that respondents' yogurt has reducing properties inherent in the product. Dr. Brick testified that yogurt has no intrinsic reducing properties. This and other evidence supports the charges in the complaint on the question. The provision

of the order covering weight reduction will be modified to conform to findings supported by the record, i.e., it will prohibit representations as to intrinsic reducing properties.

Respondents appeal from paragraph (g) of the order, but only insofar as it, assertedly, (1) prohibits them from representing that Dannon Yogurt is an appropriate dietary supplement or adjuvant in the treatment of gastrointestinal disorders, and (2) prohibits them from representing that such product has therapeutic value in the treatment of nonorganic diarrhea and constipation. They propose that said paragraph (g) be modified to read:

(g) Is an exclusive or complete treatment or cure for gastrointestinal disorders, including but not limited to organic diarrhea, auto-intoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis or chronic, organic constipation.

This form of order as proposed would not be justified by the showing in this record.

Dr. Brick, expert medical witness for the complaint, testified specifically that yogurt would not be effective in cases of salmonellosis, shigellosis, colitis, amebic dysentery and chronic constipation. In fact, on colitis, he testified that the use of yogurt cultures might be dangerous, particularly if used to the exclusion of more specific medication. He also indicated that yogurt lacked value in other instances of gastrointestinal disorders. While he testified that yogurt "might be helpful" for post antibiotic diarrhea, he made it clear that he was not referring to such use as a treatment. The substance of Dr. Brick's testimony, taken as a whole, is that yogurt, including Dannon Yogurt, will not prevent and is ineffective as a cure or a treatment for gastrointestinal disorders, including those referred to in this proceeding.

Dr. Harry Seneca, possibly the most highly qualified of the experts which respondents put on the stand, testified as to the use of yogurt in certain cases of constipation and diarrhea. It is significant, however, that he refused to characterize yogurt even as a "treatment" for such gastrointestinal disorders. He testified: ". . . No, we don't propose, as I said in the morning—we don't use yogurt to treat disease. Its a supplement, a dietary supplement for the management of certain disturbances of the intestinal tract."

We believe there is substantial, probative evidence to support a finding that yogurt will not prevent and is ineffective as a cure or a treatment of intestinal tract disorders, and, therefore, we reject respondents' proposal to exempt from the order representations that yogurt is a dietary supplement or adjuvant in the *treatment* of such disorders.

Their second proposal, which is to limit the order so as to include for diarrhea and constipation only representations relating to organic diarrhea and organic constipation, is also rejected. Where, as in this case, the relief or benefit, if any, is that which results from an improved diet, statements of medical or therapeutic value are unjustified. As mentioned above, even respondents' witness, Dr. Seneca, would not characterize the use of yogurt as a "treatment". We believe, therefore, that regarding gastrointestinal disorders, all therapeutic as well as prophylactic claims should be prohibited. The form of order proposed by respondents is rejected.

Respondents further contest the breadth of the order in that it forbids respondents to misrepresent "in any manner, by advertising or otherwise, any of respondents' products". We believe this is too sweeping and that any such provision should be limited to misrepresentations as to the quality, properties and merits of respondents' product. Since Section 12 of the Federal Trade Commission Act is involved in this proceeding, the order will also be modified to conform to the provisions of that Section.

Respondents last challenge the inclusion of respondents Hazelton and Grantham in the order in their individual capacities. Respondents cite *Kay Jewelry Stores, Inc., et al.*, 54 F.T.C. 548 (1957), in which matter admissions in the answer that individual respondents were officers and directors of the corporations and formulated, directed and controlled the policies, acts and practices of the corporations, were held not sufficient justification for including the officers in the order in their individual capacities. The individuals named in this proceeding admit not only that they formulate, direct and control the policies of the corporate respondent, they admit that they have engaged in advertising, offering for sale, and the sale of Dannon Yogurt, that they have caused the product to be transported in commerce, and that they have disseminated and caused to be disseminated advertisements in commerce to promote the sale of Dannon Yogurt. Such advertisements contained the representations challenged in the complaint. This is much more than was admitted or shown in the *Kay Jewelry* case. We believe it demonstrates direct participation in the practices alleged and found to be unlawful. Accordingly, the mentioned individuals were correctly named in the order in their individual capacities. See *Trans-Continental Clearing House, Inc., et al.*, 56 F.T.C. 390 (1959), and court cases cited therein.

The appeal of respondents is granted in part and denied in part. The initial decision is vacated and set aside, and the Commission, in conformity with the views expressed in this opinion, will make its

own findings of fact, conclusions and proposed order in lieu of those contained in the initial decision.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND PROPOSED ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 27, 1960, issued and subsequently served its complaint in this proceeding upon respondents, charging them with violations of the Federal Trade Commission Act. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. The hearing examiner, in his initial decision filed October 12, 1961, found that the charges of the complaint were sustained and he entered an order against respondents to cease and desist the practices so found to be unlawful. Respondents have appealed.

The Commission having considered said appeal and the briefs and oral argument in support thereof and in opposition thereto, and the entire record herein, and having granted in part and denied in part the appeal, and having vacated and set aside the initial decision, now makes this its findings as to the facts, conclusions drawn therefrom and proposed order, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the said initial decision.

FINDINGS AS TO THE FACTS

1. Respondent Dannon Milk Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 22-11 38th Avenue, Long Island City 1, N.Y. Individual respondents Juan E. Metzger, Don L. Grantham, and John F. Hazelton are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. Their address is the same as that of the corporate respondent.

2. The respondents are now, and have been, engaged in the advertising, offering for sale and sale of Yogurt which they sell under the name of Dannon Yogurt. Dannon Yogurt is a food product, as "food" is defined in the Federal Trade Commission Act. It is sold in plain, flavored and prune whip forms.

3. Respondents cause and have caused said product, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other states of the United States. Respondents maintain, and have maintained, a course of

trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their aforesaid business, respondents have disseminated, and have caused the dissemination of, advertisements concerning the said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in magazines, brochures, circulars and pamphlets, and by radio broadcasts, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and have caused the dissemination of, advertisements concerning the said products by various means, including but not limited to the aforesaid media, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Among and typical of the statements contained in said advertisements, disseminated and caused to be disseminated, as aforesaid, are the following:

Why yogurt is so healthful. Dannon is known as nature's perfect food that science made better.

How Dannon yogurt can help you to a new, more glamorous figure and a smooth complexion, you'll learn how to grow young gracefully with yogurt . . .

Keep young with yogurt.

Sometimes it's the lure of the trim new waistline or perhaps it's a nicer complexion . . . or just that young, glad-to-be-alive feeling you get with Dannon Yogurt.

Tingling new fitness, a glowing new complexion, a trim new waist line.

Try yogurt and in a few weeks your mirror will show a new, more attractive you. Slim, trim 'n terrific. . . . a nicer complexion. . . . The glamorous reflection of an inward glow of fitness. Grow young with Dannon Yogurt. Because there is magic in those Dannon cultures. . . . magical goodness that can work more wonders for you than all the lotions and creams on your vanity table.

* * * Has far less calories * * * than the same amount of milk.

Dannon Prune Whip Yogurt. . . . Remarkably effective, as well, in control of . . . amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. The simple treatment for the usual case is one 8 ounce container of Dannon Prune Whip Yogurt at bedtime for a period of three weeks.

* * * * *
As a medicine . . . Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition, obesity, in the correction of poor eating habits, and in chronic constipation (here try Dannon Prune Whip Yogurt for 30 days—it's dramatically effective).

Findings

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Yogurt cultures are capable of destroying most disease producing bacteria, thus helping restore normal intestinal function in many disturbances of the system.

And yogurt helps overcome those harmful bacteria in the system which may cause you to feel below par.

* * * * *

6. By and through the statements made in said advertisements, disseminated and caused to be disseminated, as aforesaid, respondents represented, directly or by implication, that said product:

1. In all forms—

(a) Is nature's perfect food and is effective in the correction of poor eating habits.

(b) Is effective in maintaining youth, a youthful complexion, and in correcting skin disorders.

(c) Contains less calories than the same amount of milk.

(d) Has reducing properties.

(e) Is an adequate and effective treatment, cure and preventive for gastrointestinal disorders, diarrhea, autointoxication, flatulence, sub-optimal nutrition.

(f) Has antibiotic properties and qualities.

2. In prune whip form, is an adequate and effective treatment and cure for diarrhea, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis and chronic constipation.

7. Representation that Dannon Yogurt is nature's perfect food.

Dr. Oral L. Kline, a specialist in nutrition, testifying for the complaint, stated that he regarded a perfect food as "one which would supply all the nutrients essential for the maintenance of life, growth, development and so on." He further testified that yogurt lacks certain well-defined nutrients and that a person consuming yogurt over a period of time as a sole item of diet would not be able to maintain his nutritional status adequately. There is no contrary expert testimony on the question whether yogurt contains all essential nutrients. Accordingly, the finding is that yogurt is not a perfect food and that such representation of respondents is false and deceptive and misleading in a material respect.

8. Representation that Dannon Yogurt is effective in the correction of poor eating habits.

Dr. Irving B. Brick, expert medical witness called by counsel supporting the complaint, testified that he did not think one ingredient or one medication would correct the eating habits of anybody or make a poor diet sufficient; accordingly, the finding is that respondents' product will not correct poor eating habits and that this representation is false and deceptive and misleading in a material respect.

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Findings

9. Representations that Dannon Yogurt is effective in maintaining youth, a youthful complexion, or in correcting skin disorders.

The record does not contain substantial evidence to sustain these allegations.

10. Representation that Dannon Yogurt contains less calories than the same amount of milk.

Respondents' charts as to the calories contained in the several kinds of Dannon Yogurt show the following:

Flavor:	Calories per 8 oz. Cup
Plain yogurt.....	120
Orange yogurt.....	170
Vanilla yogurt.....	170
Prune Whip yogurt.....	220
Strawberry yogurt.....	220
Pineapple yogurt.....	220

(Commission Exhibit 16, page 31.)

The calories in one cup of whole milk (8 oz.) are stated to be 165. (Commission Exhibit 16, page 21.) Except for the plain flavor, Dannon Yogurt contains more calories than the same amount of milk, and, accordingly, the representation that Dannon Yogurt has less calories, which representation includes all flavors, is false. This representation is misleading in a material respect.

11. Representation that Dannon Yogurt has intrinsic reducing properties.

The complaint alleges that respondents falsely represented that their yogurt has "reducing properties", and this was treated in the course of the hearing as meaning "intrinsic reducing properties", i.e., properties inherent in the product aside from a low butter fat content in relation to milk. For example, respondents have represented as follows: "As a medicine, Dannon Yogurt is valuable, both prophylactically and therapeutically, in a variety of indications, including . . . obesity. . . ." Since this advertises the product as a medicine for obesity, it clearly suggests that it has intrinsic reducing properties. Dr. Irving B. Brick, expert medical witness for the complaint, testified that yogurt has no intrinsic reducing properties. The finding is, therefore, that Dannon Yogurt has no intrinsic reducing properties and that the representation as to such properties is false and deceptive and misleading in a material respect.

12. Representation that Dannon Yogurt is an adequate and effective preventive, treatment and cure in all forms for certain named disorders and effective as a treatment and cure in the prune whip form for others.

Respondents have represented that their product in all forms is a preventive, cure and treatment for gastrointestinal disorders, diarrhea, autointoxication, flatulence, chronic constipation, and sub-optimal nutrition, and in the prune whip form is a treatment and a cure for chronic diarrhea, amebic dysentery, shigellosis, ulcerative colitis and salmonellosis. Each of the specific disorders listed is considered herein as a gastrointestinal disorder.

Dr. Irving B. Brick, expert medical witness for the complaint, testified specifically that yogurt would not be effective in cases of salmonellosis, shigellosis, colitis, amebic dysentery and chronic constipation. In fact, on colitis, he testified that the use of yogurt cultures might be dangerous, particularly if used to the exclusion of more specific medication. He also indicated that yogurt lacked value in other gastrointestinal disorders mentioned herein. The substance of Dr. Brick's testimony, taken as a whole, is that yogurt, including Dannon Yogurt, will not prevent and is ineffective as a cure or a treatment for gastrointestinal disorders, including those referred to in this proceeding. Dr. Harry Seneca, possibly the most highly qualified of the experts which respondents put on the stand, testified as to the use of yogurt in certain cases of constipation and diarrhea. It is significant, however, that he refused to characterize yogurt even as a "treatment" for such gastrointestinal disorders. He testified: ". . . No, we don't propose, as I said in the morning—we don't use yogurt to treat disease. It's a supplement, a dietary supplement for the management of certain disturbances of the intestinal tract." The finding is that respondents' product will not prevent and is ineffective as a treatment or cure for gastrointestinal disorders, including diarrhea, autointoxication, flatulence, chronic constipation, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, and salmonellosis. Such representations by the respondents, therefore, are false and deceptive and misleading in a material respect.

13. Representation as to antibiotic properties and qualities.

This representation, while not detailed in the complaint, is covered generally in allegations therein as to false advertisements and clearly was put in issue during the course of the hearings. Respondents made representations as follows:

Yogurt cultures are capable of destroying most disease producing bacteria, thus helping to restore normal intestinal function in many disturbances of the system. (Commission Exhibit 16, page 25; footnotes omitted.)

And Yogurt helps overcome those harmful bacteria in the system which may cause you to feel below par. (Commission Exhibit 13, page 7.)

Such would suggest to many people that yogurt has antibiotic qualities and properties, similar to substances such as penicillin.

Dr. Irving Brick testified that the consumption of yogurt will change the bacterial flora in the intestine but that, to his knowledge, this would not kill any pathogenic bacteria causing disease. Dr. Harry Seneca, respondents' witness, testified that as far as the curative effect of yogurt is concerned, it is "not anything that approaches the therapeutic level."

The finding is that Dannon Yogurt will not destroy disease producing bacteria, and that it does not have antibiotic properties and qualities. Therefore, such representation by respondents is false and deceptive and misleading in a material respect.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The proceeding is in the public interest.
3. The advertisements herein found to be disseminated and caused to be disseminated by respondents and found to be misleading in material respects constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.
4. The dissemination and the causing to be disseminated of the false advertisements, as aforesaid, constituted and now constitute unfair and deceptive acts and practices in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

PROPOSED ORDER*

It is ordered, That respondents, Dannon Milk Products, a corporation, and its officers, and Juan E. Metzger, Don L. Grantham, and John F. Hazelton, individually and as officers of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of their product "Dannon Yogurt", including the plain, flavored and prune whip forms, or any other product containing substantially the same ingredients, or possessing substantially the same properties, whether sold under the same or any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that said product:

- (a) Is nature's perfect food;
- (b) Will correct poor eating habits;

*Issued July 23, 1962.

(c) Except in the plain form contains less calories than the same quantity of milk;

(d) Has intrinsic reducing properties;

(e) Has therapeutic or prophylactic value or is an adequate or effective treatment or cure for gastrointestinal disorders, including but not limited to diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis, or chronic constipation.

(f) Has any antibiotic properties and qualities.

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as commerce is defined in the Federal Trade Commission Act, which advertisement misrepresents in any manner, directly or by implication, the quality, properties or merits of such product.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said product, any advertisement which contains any of the representations or misrepresentations prohibited in paragraphs 1 and 2 of this order.

FINAL ORDER

Respondents having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed an answer to said exceptions, opposing them in part and supporting them in part; and

The Commission having determined that the said proposed order to cease and desist should be modified and, as so modified, entered and adopted as the Final Order of the Commission:

It is ordered, That the proposed order issued in this proceeding, on July 23, 1962, be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Dannon Milk Products, a corporation, and its officers, and Juan E. Metzger, Don L. Grantham, and John F. Hazelton, individually and as officers of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of their product "Dannon Yogurt", including the plain, flavored and prune whip forms, or any other product containing substantially the same ingredi-

ents, or possessing substantially the same properties, whether sold under the same or any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that said product:

- (a) Is nature's perfect food;
- (b) Will correct poor eating habits;
- (c) Except in the plain form contains less calories than the same quantity of milk;
- (d) Has intrinsic reducing properties;
- (e) Has therapeutic or prophylactic value or is an adequate or effective treatment or cure for gastrointestinal disorders, including but not limited to diarrhea, autointoxication, flatulence, sub-optimal nutrition, amebic dysentery, shigellosis, ulcerative colitis, salmonellosis, or chronic constipation, except that nothing herein shall apply to representations:
 - (1) as to the relief of post antibiotic diarrhea, or
 - (2) as to the temporary relief of chronic constipation provided by Dannon Yogurt in the prune whip form;
- (f) Has any antibiotic properties and qualities.

2. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement misrepresents in any manner, directly or by implication, the quality, properties or merits of such product.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said product, any advertisement which contains any of the representations or misrepresentations prohibited in Paragraphs 1 and 2 of this order.

It is further ordered, That the proposed order as modified be, and it hereby is, entered and adopted as the Final Order of the Commission.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in

