STATE OF VERMONT

SUPERIOR COURT
Washington Unit

2010 DEC 15 A 10: 09

CIVIL DIVISION
Docket No. Wncv
887-12-10

STATE OF VERMONT,
Plaintiff,

v

THE DANNON COMPANY, INC.,
a Delaware corporation,
Defendant.

COMPLAINT FOR PERMANENT INJUNCTION AND OTHER RELIEF

The State of Vermont ("the State," "Attorney General," or "Plaintiff"), by and through Attorney General William H. Sorrell, brings this action against the Dannon Company, Inc. ("Defendant"), and states as follows:

JURISDICTION AND VENUE

1. This action is brought for and on behalf of the State of Vermont under the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451-66.
2. This Court has jurisdiction over Defendant under 9 V.S.A. § 2458(a).
3 Venue for this action is in Washington County under 9 V.S.A. § 2458(a).

PARTIES

4. The Attorney General is charged, *inter alia*, with enforcement of the Consumer Fraud Act, 9 V.S.A. §§ 2451-66.
5. Defendant is incorporated with its principal place of business in White Plains, New York. Defendant has manufactured, marketed, distributed, and sold food products to consumers throughout the country, including Vermont. Defendant is

a privately held corporation that is wholly owned by Groupe Danone, its French parent corporation.

GENERAL ALLEGATIONS

6. Defendant has made health-related claims in the marketing, packaging, advertising, offering, and selling of its line of Activia yogurt and DanActive food products that were not substantiated by competent and reliable scientific evidence at the time the claims were made in violation of state law

7 Concerning Activia, Defendant's health-related claims – which asserted a benefit for combating slow intestinal transit time, temporary irregularity, diarrhea, constipation, bloating, digestive comfort, and other regularity problems – were misleading, deceptive and unfair in that they were not adequately substantiated at the time the claims were made. Among other things, Defendant did not have adequate substantiation to support claims that Activia provided select health benefits at one 4 oz. serving per day for two weeks. Further, Defendant made direct or implicit claims to mitigate, prevent, or treat certain diseases relating to digestive health, that were unlawful and also not substantiated by competent and reliable scientific evidence at the time the claims were made.

8. Concerning DanActive, Defendant's health-related claims – which asserted "immunity," a general wellness benefit and which claimed antiviral and other "germ fighting" benefits – were misleading, deceptive and unfair in that they were not adequately substantiated at the time the claims were made. Further, Defendant made direct or implicit claims to mitigate, prevent, or treat certain diseases, including the common cold and the flu, that were unlawful and also not

substantiated by competent and reliable scientific evidence at the time the claims were made.

SPECIFIC ALLEGATIONS

9 Activia is a yogurt product produced and distributed by Defendant that is sold at third-party retailers throughout the United States including in Vermont at what amounts to a 30% to 50% premium over other yogurt products.

10 Currently, Defendant's Activia product line includes Activia, Activia Fiber, Activia Light, Activia Drinks, and Activia Dessert. Defendant's yogurt products are packaged in 4 oz. units or 24 oz. tubs in a variety of flavors including vanilla, strawberry, blueberry, mixed berry, and prune.

11. Defendant began marketing Activia in February 2006 through an extensive marketing campaign that included television, radio, print, web, and in-store components. From the initial product launch of Activia, Defendant positioned Activia as helping to regulate one's digestive system.

12. From the initial product launch, Defendant emphasized the presence of *Bifidobacterium animalis* DN-173-010, which it marketed under the fanciful, trademarked name *Bifidus Regularis* as a distinguishing component ingredient that differentiated Activia from traditional yogurt products and competitors. At the product launch and thereafter, Defendant asserted that "*Bifidus Regularis*" was a probiotic bacteria strain that helped to contribute to the purported regularity benefit.

13 Initially, Defendant broadly asserted in advertisements like the one shown below, that Activia "helps regulate your digestive system naturally" without

any disclaimer, while only holding scientific evidence purportedly showing an effect on consumers with "slow transit time," (i.e. the length of time for food to travel from being ingested to eliminated from the body).

14. Later, Defendant attempted to qualify the "helps regulate your digestive system" tagline with an asterisk indicating that its claim referred only to "help[ing] with slow intestinal transit time when eaten every day for two weeks as part of a balanced diet and healthy lifestyle."

15. Defendant claimed that Activia provided a benefit to consumers with normal transit times when it did not have competent and reliable scientific evidence to substantiate the claim at the time it was made.

16. Defendant's implicitly claimed through its broad, unqualified tagline "helps *regulate* the digestive system" (emphasis added) that Activia provided consumers with bowel movements at fixed, uniform, or normal intervals when it did not have competent and reliable scientific evidence to substantiate the claims at the time they were made.

17 Defendant also asserted that Activia had an effect on the stomach and the process of digestion when it did not have competent and reliable scientific evidence to

substantiate the claims at the time they were made. For example, in several nationwide advertisements, Defendant used the tagline "Two delicious weeks to one happy tummy, Guaranteed!"

18. Through advertisements that referenced bloating through statements like "some days does your digestive system feels irregular and bloated," Defendant asserted that Activia provided a benefit on bloating when it did not have competent and reliable scientific evidence to substantiate the claim at the time it was made.

19 Defendant implicitly asserted that Activia had antimicrobial benefits, anti-infectious benefits, and an effect on colon cancer when it could not make these claims without pre-approval as a drug and also did not have competent and reliable scientific evidence to substantiate the claim at the time it was made. For example, Defendant sent health professionals Activia-branded informational brochures that prominently highlighted the Activia brand name and logo, contained the following excerpts:

b – Antimicrobial action

In vitro, bifidobacteria have demonstrated antibacterial activity with regard to a certain number of pathogenic microorganisms, such as *Escherichia coli*, *Staphylococcus aureus*, *Salmonella typhi*, *Schigella dysenteriae* and *Candida albicans*.

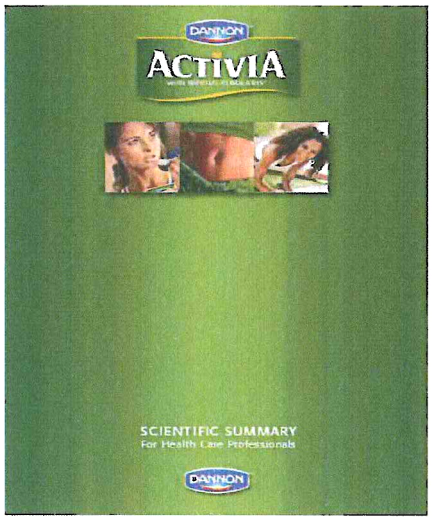
The antimicrobial action exhibited by these bifidobacteria is due in part to the production of substances such as bacteriocins and peroxides, but also to the production of organic acids, such as lactic acid and acetic acid. The latter, by reducing the pH within the intestinal medium, antagonizes the growth of certain microorganisms.

c – Action on immunity

Beneficial action of bifidobacteria on cellular immunity has been widely demonstrated *in vitro*, but there are, as of today, relatively few positive results *in vivo*. A number of studies performed in animals and in man suggest that ingestion of certain strains of bifidobacteria improves nonspecific, anti-infectious, defense mechanisms.

d – Bifidobacteria and colon cancer

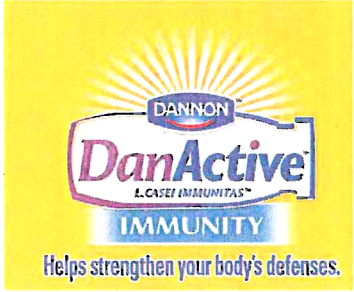
Many studies have focused on bifidobacteria and colon cancer in recent years.[11] A number of these studies performed in animal models demonstrate an effect on certain experimental cancers. In man, bifidobacteria have shown an effect on the activity of enzymes involved in conversion of procarcinogens to carcinogens, such as nitrosamines and secondary amines.[12] The mechanisms responsible and the long-term effects of these changes have not yet been fully elucidated. Considerable research is currently being carried out in this domain.



20. DanActive is a dairy drink product produced and distributed by Defendant that is sold at third-party retailers throughout the United States including in Vermont.

21 Currently, Defendant's DanActive product line includes DanActive and DanActive Light. DanActive is packaged in 100 mL "daily dose" bottles and comes in a variety of flavors.

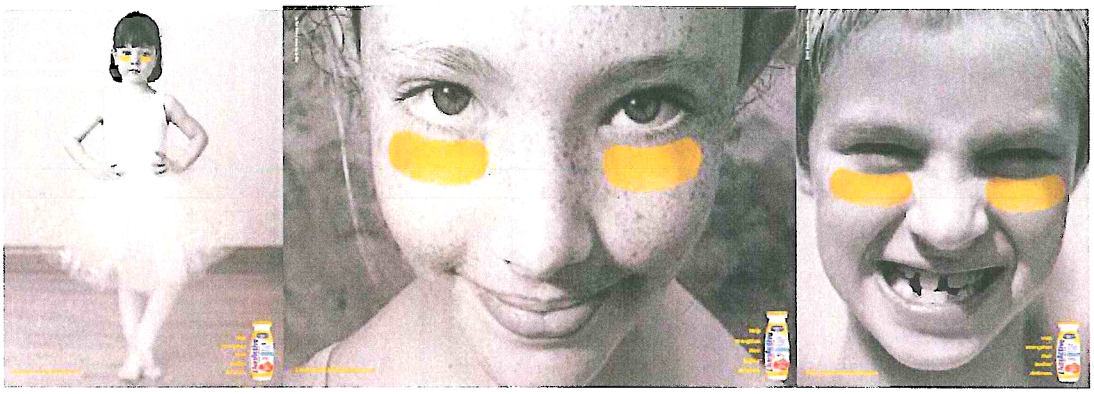
22. In January 2007, following the release of Activia, Defendant launched DanActive nationally with an extensive nationwide marketing campaign that included television, radio, print, web, and in-store components. From the initial product launch of DanActive, Defendant positioned the product as providing consumers with "immunity" rather than as modest role in helping support or maintain the immune system. The tagline Defendant used for DanActive was "helps strengthen your body's defenses."



23 From the initial product launch, Defendant emphasized the presence of *Lactobacillus casei* strain DN-114 001, which it marketed under the fanciful, trademarked name *L. casei Defensis* and later *L. casei Immunitas.* At the product launch and thereafter, Defendant asserted that the strains were probiotics.

24. Defendant represented that DanActive would provide health benefits to consumers with normal functioning immune systems when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made.

25. Defendant also represented that DanActive would provide health benefits on the immune systems of children when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made. Example advertisements are shown below·



26. In national advertisements, Defendant directly and implicitly claimed that DanActive provided germ fighting, antiviral, cold prevention, flu prevention and other disease prevention benefits when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made.

27 In its DanActive advertisements, Defendant featured situations commonly associated with cold, flu, or virus transmission including, but not limited to getting sneezed on, standing in the rain or snow without adequate clothing coverage, digging through a commercial dumpster, accepting food, money, and other items that have been handled in an unhygienic manner, when it did not have competent and reliable scientific evidence to substantiate the claims at the time that they were made.

28. In other national advertisements ran during the peak of cold and flu season, Defendant featured advertisements with depictions of the DanActive bottle with a winter hat and scarf under the taglines "Winter is right around the corner Are you ready?" and "Bundle Up Your Body's Defenses. It's that time of year "

29. In DanActive television advertisements, Defendant featured an animation depicting a cellular membrane "fortified with L. casei Immunitas" repelling all or nearly all of animated depictions of germs.

30. In DanActive television advertisements, Defendant also symbolized a weak immune system by depicting the actors in grayscale while the rest of the screenshot remained in color. In these advertisements, once the actor drank DanActive he or she returned to color and then conveyed a yellow halo in the same color yellow used on the DanActive bottle and logo. The use of this animation conveyed that DanActive provides disease protection to consumers when Defendant did not have competent and reliable scientific evidence to substantiate the claims at the time they were made.

31 Defendant misled consumers, including those in Vermont, as to facts in its advertisements, product labeling, and marketing materials as set forth above.

VIOLATIONS OF LAW

32. The State of Vermont incorporates and realleges paragraphs 1-31 above.

33 The Attorney General may bring an action to enjoin a defendant from engaging in a method, act, or practice that is in violation of the Consumer Fraud Act, 9 V.S.A. § 2458(a)

34. Defendant has engaged in acts and practices in commerce that are unfair or deceptive in violation of the Consumer Fraud Act, 9 V.S.A. § 2453 Specifically·

a. By making health or other claims without competent and reliable scientific evidence to substantiate them, Defendant has violated the Consumer Fraud Act, 9 V.S.A. § 2453, and

b. By making health claims in its advertisements to prevent, treat, or cure disease that were unlawful because Defendant failed to obtain advance approval for such claims, Defendant has violated the Consumer Fraud Act, 9 V.S.A. § 2453

RELIEF SOUGHT

WHEREFORE, based on the allegations set forth above, the State of Vermont respectfully requests that the Court award the following relief·

A. Issue a permanent injunction prohibiting Defendant, its agents, employees, and all other persons and entities, corporate or otherwise, in active concert or participation with any of them, from engaging in unfair or deceptive conduct;

B. Order Defendant to pay all costs for the prosecution and investigation of this action, as provided by 9 V.S.A. § 2458(b)(3);

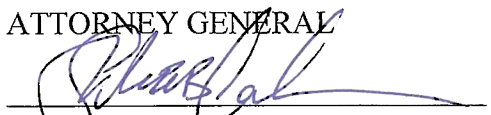
C. Order Defendant to pay civil penalties of $ 10,000.00 pursuant to 9 V.S.A. § 2458(b)(l) for each and every violation of the Consumer Fraud Act; and

D Grant such other and further relief as the Court deems equitable and proper

DATED at Montpelier, Vermont this 15th day of December, 2010.

Respectfully submitted,

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

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