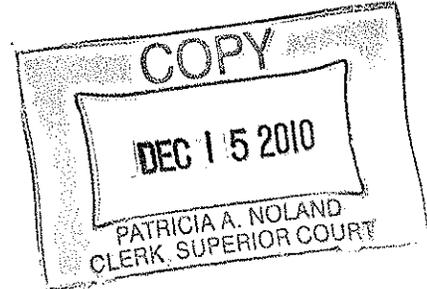


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ARIZONA SUPERIOR COURT

COUNTY OF PIMA

11 STATE OF ARIZONA, *ex rel.* TERRY
12 GODDARD, Attorney General,

13 Plaintiff

14 vs.

15 THE DANNON COMPANY, INC., a
16 Delaware corporation,

17 Defendant.

No.

C20109717

**COMPLAINT FOR INJUNCTIVE AND
OTHER RELIEF**

Christopher P. Staring

18
19 Plaintiff State of Arizona, by and through its attorney, alleges the following:

20 **JURISDICTION AND VENUE**

21 1. The State of Arizona brings this action pursuant to the Arizona Consumer Fraud
22 Act, A.R.S. § 44-1521 *et seq.*, to obtain restitution, declaratory and injunctive relief, civil
23 penalties, attorneys' fees and costs, investigative expenses and other relief to prevent the
24 unlawful acts and practices alleged in this Complaint and to remedy the consequences of such
25 unlawful practices.

26 2. Venue is proper in Pima County, Arizona.

27 3. The Superior Court has jurisdiction to enter appropriate orders, both prior to and
28

1 following a determination of liability, pursuant to A.R.S. § 44-1528.

2 **THE PARTIES**

3 4. Plaintiff is the State of Arizona, ex rel. Terry Goddard, who is authorized to
4 bring this action under the Arizona Consumer Fraud Act, A.R.S. § 44-1521 *et seq.*

5 5. The Defendant, the Dannon Company, Inc., is incorporated in Delaware with its
6 principal place of business in White Plains, New York. The Defendant has manufactured,
7 marketed, distributed, and sold food products to consumers throughout the United States,
8 including Arizona. The Dannon Company, Inc., is a privately-held corporation that is wholly
9 owned by Groupe Danone, its French parent corporation.

10 **ALLEGATIONS**

11 6. Activia is a yogurt product produced and distributed by Defendant that is sold at
12 third-party retailers throughout the United States including in Arizona at what amounts to a
13 30% to 50% premium over other yogurt products.

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

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

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

28 10. Initially, Defendant broadly asserted, in advertisements, that Activia "helps

1 regulate your digestive system . . . naturally” without any disclaimer, while only holding
2 scientific evidence purportedly showing an effect on consumers with “slow transit time,” (*i.e.*
3 the length of time for food to travel from being ingested to eliminated from the body). *See*
4 *Exhibit A.*

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

9 12. Although, Defendant claimed that Activia provided a benefit to consumers with
10 normal transit times, Defendant did not have competent and reliable scientific evidence to
11 substantiate the claim at the time it was made.

12 13. Defendant implicitly claimed through its broad, unqualified tagline “helps
13 *regulate* the digestive system” that Activia provided consumers with bowel movements at
14 fixed, uniform, or normal intervals when it did not have competent and reliable scientific
15 evidence to substantiate the claims at the time they were made.

16 14. Defendant also asserted that Activia had an effect on the stomach and the
17 process of digestion when it did not have competent and reliable scientific evidence to
18 substantiate the claims at the time they were made. For example, in several nationwide
19 advertisements, Defendant used the tagline “two delicious weeks to one happy tummy!” *See*
20 *Exhibit B.*

21 15. Defendant asserted that Activia provided a benefit on bloating, through
22 advertisements with taglines like “some days does your digestive system feel irregular and
23 bloated,” when it did not have competent and reliable scientific evidence to substantiate the
24 claim at the time it was made.

25 16. Defendant implicitly asserted that Activia had antimicrobial benefits, anti-
26 infectious benefits, and an effect on colon cancer when it could not make these claims without
27 pre-approval as a drug since it is false, misleading, or deceptive to make such claims for a food,
28 including but not limited to failing to disclose that only drugs approved by FDA or that comply

1 with an over-the-counter drug monograph can make such claims. For example, Defendant sent
2 health professionals Activia-branded informational brochures that prominently highlighted the
3 Activia brand name and logo and claimed antimicrobial and/or anti-infectious benefits. *See*
4 *Exhibit C*.

5 17. Defendant represented that Activia provided select health benefits at one 4 oz.
6 serving per day for two weeks, but did not have adequate substantiation to support this claim.

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

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

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

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

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

25 23. Defendant also represented that DanActive would provide health benefits on the
26 immune systems of children when it did not have competent and reliable scientific evidence to
27 substantiate the claims at the time that they were made. *See Exhibit E*.

28 24. In national advertisements, Defendant directly and implicitly claimed that

1 DanActive provided germ fighting, antiviral, cold prevention, flu prevention and other disease
2 prevention benefits.

3 25. In its DanActive advertisements, Defendant featured situations commonly
4 associated with cold, flu, or virus transmission including, but not limited to getting sneezed on,
5 standing in the rain or snow without adequate clothing coverage, digging through a commercial
6 dumpster, and accepting food, money, and other items that have been handled in an unhygienic
7 manner.

8 26. In other national advertisements that ran during the peak of cold and flu season,
9 Defendant featured advertisements with depictions of the DanActive bottle with a winter hat
10 and scarf under the taglines “Winter is right around the corner. Are you ready?” and “Bundle
11 Up Your Body’s Defenses. It’s that time of year.” *See Exhibit F.*

12 27. In DanActive television advertisements, Defendant featured an animation
13 depicting a cellular membrane “fortified with L. casei Immunitas” repelling all or nearly all of
14 animated depictions of germs.

15 28. In DanActive television advertisements, Defendant also symbolized a weak
16 immune system by depicting the actors in grayscale while the rest of the screenshot remained in
17 color. In these advertisements, once the actor drank DanActive he or she returned to color and
18 then conveyed a yellow halo in the same color yellow used on the DanActive bottle and logo.
19 The use of this animation conveyed that DanActive provides disease protection to consumers.

20 VIOLATIONS OF THE ARIZONA CONSUMER FRAUD ACT

21 A. FIRST CLAIM FOR RELIEF

22 29. The State re-alleges all preceding paragraphs.

23 30. The Arizona Consumer Fraud Act prohibits deceptive acts or practices in the
24 sale or advertisement of any merchandise.¹

25
26 _____
27 ¹ The act, use or employment by any person of any deception, deceptive act or practice,
28 fraud, false pretense, false promise, misrepresentation, or concealment, suppression or
omission of any material fact with intent that others rely upon such concealment,
suppression or omission, in connection with the sale or advertisement of any

1 31. Defendant made health-related claims in the marketing, packaging, advertising,
2 offering, and selling of their line of Activia yogurt and DanActive food products that were not
3 substantiated by competent and reliable scientific evidence at the time the claims were made.

4 These acts include, but are not limited to:

5 a. Deceptively asserting a benefit for combating slow intestinal transit time,
6 temporary irregularity, diarrhea, constipation, bloating, digestive
7 comfort, and other regularity problems when such assertions were not
8 adequately substantiated at the time the claims were made.

9 b. Making direct or implicit claims to mitigate, prevent, or treat certain
10 diseases relating to digestive health, that were unlawful since it is false,
11 misleading, or deceptive to make such claims for a food, including but
12 not limited to failing to disclose that only drugs approved by FDA or that
13 comply with an over-the-counter drug monograph can make such claims.

14 c. Making health claims, which were positioned to provide “immunity,” a
15 general wellness benefit and which claimed antiviral and other “germ
16 fighting” benefits when these claims were not adequately substantiated at
17 the time the claims were made.

18 d. Making direct or implicit claims to mitigate, prevent, or treat certain
19 diseases, including the common cold and the flu, that were unlawful
20 since it is false, misleading, or deceptive to make such claims for a food,
21 including but not limited to failing to disclose that only drugs approved
22 by FDA or that comply with an over-the-counter drug monograph can
23 make such claims.

24 **B. SECOND CLAIM FOR RELIEF**

25
26 merchandise whether or not any person has in fact been misled, deceived or damaged
27 thereby, is declared to be an unlawful practice.

28 A.R.S. § 44-1522(A).

