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**RECEIVED**

DEC 15 2010

**SUPERIOR COURT OF NJ  
MERCER COUNTY  
CIVIL DIVISION**

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION  
MERCER COUNTY  
DOCKET NO. MER-C \_\_\_\_\_

PAULA T. DOW, Attorney General of the State of  
New Jersey, and THOMAS R. CALCAGNI,  
Acting Director of the New Jersey Division of  
Consumer Affairs,

Plaintiffs,

v.

THE DANNON COMPANY, INC.,

Defendant.

Civil Action

**COMPLAINT**

Plaintiffs Paula T. Dow, Attorney General of the State of New Jersey ("Attorney General"),  
with offices located at 124 Halsey Street, Fifth Floor, Newark, New Jersey, and Thomas R. Calcagni,  
Acting Director of the New Jersey Division of Consumer Affairs ("Director"), with offices located at  
124 Halsey Street, Seventh Floor, Newark, New Jersey, by way of Complaint state:

## JURISDICTION AND PARTIES

1. The Attorney General is charged with the responsibility of enforcing the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”), and all regulations promulgated thereunder, N.J.A.C. 13:45A-1.1 et seq. (“CFA Regulations”). The Director is charged with the responsibility of administering the CFA and the CFA Regulations on behalf of the Attorney General.

2. By this action, the Attorney General and the Director (collectively, “Plaintiffs”) seek injunctive and other relief for violations of the CFA. Plaintiffs bring this action pursuant to their authority under the CFA, specifically N.J.S.A. 56:8-8, 56:8-11, 56:8-13 and 56:8-19. Venue is proper in Mercer County, pursuant to R. 4:3-2, because it is a county in which Defendant has advertised and conducted business.

3. Defendant The Dannon Company, Inc. (“Dannon” or “Defendant”), is a Delaware corporation that maintains a principal place of business at 100 Hillside Avenue, White Plains, New York 10603.

4. At all relevant times, Defendant has manufactured, marketed, distributed and sold food products to consumers throughout the United States, including the State of New Jersey (“New Jersey” or “State”).

### GENERAL ALLEGATIONS COMMON TO ALL COUNTS

5. The 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.

6. Concerning Activia, Plaintiffs allege that the 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, Plaintiffs allege that the 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, Plaintiffs allege that the 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.

7. Concerning DanActive, Plaintiffs allege that the Defendant's health-related claims, which were positioned to provide "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, Plaintiffs allege that the 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

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

9. Currently, the Defendant's Activia product line includes Activia, Activia Fiber, Activia Light, Activia Drinks and Activia Dessert. The 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.

10. The 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, the Defendant positioned Activia as helping to regulate one's digestive system.

11. From the initial product launch, the 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, the Defendant asserted that "*Bifidus Regularis*" was a probiotic bacteria strain that helped to contribute to the purported regularity benefit.

12. Initially, the 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).



13. Later, the 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.”

14. The 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 claims at the time they were made.

15. The Defendant implicitly claimed through its broad, unqualified tagline “helps *regulate* the digestive system” 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.

16. The 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, the Defendant used the tagline “two delicious weeks to one happy tummy!”



17. Through advertisements that referenced bloating through statements like “some days does your digestive system feel irregular and bloated,” the Defendant asserted that Activia provided a benefit on bloating when it did not have competent and reliable scientific evidence to substantiate the claims at the time they were made.

18. The 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 claims at the time they were made. For example, the Defendant sent health professional Activia-branded informational brochures that prominently highlighted the Activia brand name and logo, contained the following excerpts:

#### b - Antibacterial 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*, *Shigella dysenteriae* and *Candida albicans*.

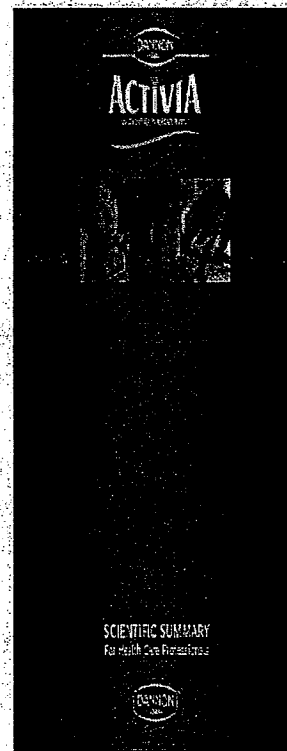
The antimicrobial action exhibited by these bifidobacteria is due in part to the production of substances such as bacteriocins and peroxides, but also to the production of organic acids, such as lactic acid and acetic acid. The latter, by reducing the pH within the intestinal medium, antagonizes the 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.<sup>28</sup> 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.<sup>29</sup> 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.



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

20. Currently, the 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.

21. In January 2007, following the release of Activia, the 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, the Defendant positioned the product as providing consumers with "immunity" rather than as a modest role in helping support or maintain the immune system. The tagline the Defendant used for DanActive was "help strengthen your body's defenses."



22. From the initial product launch, the 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, the Defendant asserted that the strains were probiotics.

23. The 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 they were made.

24. The 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 they were made. Example advertisements are shown below:



25. In national advertisements, the 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.

26. In its DanActive advertisements, the 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 they were made.

27. In other national advertisements ran during the peak of cold and flu season, the 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."

**BUNDLE UP YOUR BODY'S DEFENSES**



It's that time of year. Time to start strengthening your natural defenses with DanActive. About 70% of your immune system is in your digestive tract. DanActive's "Probiotic Defense" helps and is clinically proven to help strengthen your body's defenses.

**Help Strengthen Your Body's Defenses**

For more information visit [www.danactive.com](http://www.danactive.com)

• Kroger 10/23 Retail Connection  
 -- Circulation: 2,130,000

Winter is right around the corner. Are you ready?

New DanActive helps strengthen your body's defenses.

Save on NEW DanActive from DANADON! at Kroger!

SAVE \$1.00

Customer Marketing

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

29. In DanActive television advertisements, the 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 the Defendant did not have competent and reliable scientific evidence to substantiate the claims at the time they were made.

30. The Defendant misled consumers, including those in New Jersey, as to matter of facts in their advertisements, product labeling and marketing materials as set forth in paragraphs 8 through 30 above.

### COUNT I

#### VIOLATION OF THE CFA BY DEFENDANT UNCONSCIONABLE COMMERCIAL PRACTICES

31. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 30 as if more fully set forth herein.

32. The CFA, N.J.S.A. 56:8-2, prohibits:

The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing[] 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 merchandise . . . .

33. Defendant's yogurt and dairy drink food products comprise "merchandise" within the meaning of the CFA, N.J.S.A. 56:8-1(c).

34. In its advertisement and sale of its yogurt and dairy drink food products to consumers in New Jersey, Defendant has engaged in the use of unconscionable commercial practices.

35. Defendant's conduct in violation of the CFA includes, but is not limited to, the following unconscionable commercial practices:

- a. Making health-related or other claims without competent and reliable scientific evidence to substantiate such claims; and
- b. Making health-related claims in its advertisements claiming to prevent, treat, or cure disease that were unlawful because Defendant failed to obtain advance approval for such claims.


36. Each unconscionable commercial practice by Defendant constitutes a separate violation under the CFA, N.J.S.A. 56:8-2.

**PRAYER FOR RELIEF**

WHEREFORE, based upon the foregoing allegations, Plaintiffs respectfully request that the Court enter judgment:

- (a) Finding that the acts and omissions of the Defendant constitute multiple instances of unlawful practices in violation of the CFA, N.J.S.A. 56:8-1 et seq.;
- (b) Permanently enjoining the Defendant and its owners, officers, directors, shareholders, founders, managers, agents, servants, employees, representatives, independent contractors, corporations, subsidiaries, affiliates, successors, assigns and all other persons or entities directly under its control, from engaging in, continuing to engage in, or doing any acts or practices in violation of the CFA, N.J.S.A. 56:8-1 et seq., including, but not limited to, the acts and practices alleged in this Complaint;
- (c) Assessing the maximum statutory civil penalties against the Defendant for each and every violation of the CFA, in accordance with N.J.S.A. 56:8-13;
- (d) Directing the assessment of costs and fees, including attorneys' fees, against the Defendant for the use of the State of New Jersey, as authorized by the CFA, N.J.S.A. 56:8-11 and N.J.S.A. 56:8-19; and
- (e) Granting such other relief as the interests of justice may require.

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Plaintiffs

By:   
Ajina Wells  
Deputy Attorney General  
Consumer Fraud Prosecution Section

Dated: December 14, 2010  
Newark, New Jersey

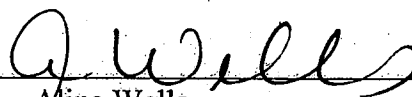
**RULE 4:5-1 CERTIFICATION**

I certify, to the best of my information and belief, that the matter in controversy in this action involving the aforementioned violations of the CFA, N.J.S.A. 56:8-1 et seq., is not the subject of any other action pending in any other court of this State.

I further certify that the matter in controversy in this action is not the subject of a pending arbitration proceeding in this State, nor is any other action or arbitration proceeding contemplated. I certify that there is no other party who should be joined in this action at this time.

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Plaintiffs

By: \_\_\_\_\_




Alina Wells  
Deputy Attorney General  
Consumer Fraud Prosecution Section

Dated: December 14, 2010  
Newark, New Jersey

**RULE 1:38-7(c) CERTIFICATION OF COMPLIANCE**

I certify that confidential personal identifiers have been redacted from documents now submitted to the court, and will be redacted from all documents submitted in the future in accordance with Rule 1:38-7(b).

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Plaintiffs

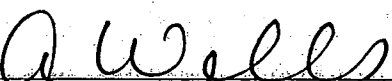
By:   
Alina Wells  
Deputy Attorney General  
Consumer Fraud Prosecution Section

Dated: December 14, 2010  
Newark, New Jersey

**DESIGNATION OF TRIAL COUNSEL**

Pursuant to R. 4:25-4, Alina Wells, Deputy Attorney General, is hereby designated as trial counsel on behalf of Plaintiffs in this action.

PAULA T. DOW  
ATTORNEY GENERAL OF NEW JERSEY  
Attorney for Plaintiffs

By:   
Alina Wells  
Deputy Attorney General  
Consumer Fraud Prosecution Section

Dated: December 14, 2010  
Newark, New Jersey