

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**STATE OF WASHINGTON  
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,  
  
Plaintiff,  
  
v.  
  
THE DANNON COMPANY, a  
Delaware corporation,  
  
Defendant.

NO. 10-2-43197-7 SEA  
  
COMPLAINT FOR INJUNCTIVE  
AND OTHER RELIEF UNDER THE  
CONSUMER PROTECTION ACT

The Plaintiff, State of Washington, by and through its attorneys Robert M. McKenna, Attorney General, and Robert A. Lipson, Assistant Attorney General, brings this action against the Defendant named below. The State alleges the following on information and belief:

**I. PLAINTIFF**

- 1.1 The Plaintiff is the State of Washington (State).
- 1.2 The Attorney General is authorized to commence this action pursuant to the Consumer Protection Act (CPA), RCW 19.86.080.

**II. DEFENDANT**

2.1 Defendant is The Dannon Company, a Delaware Corporation with its principal place of business in White Plains, New York.



1           5.3     This Complaint is being filed concurrently with a Consent Decree and Judgment  
2 as part of a simultaneous settlement between Defendant and approximately 39 states.

3           5.4     Plaintiff is charged with enforcing the CPA, which prohibits unfair or deceptive  
4 acts or practices affecting the conduct of trade or commerce. Pursuant to RCW 19.86.080, the  
5 Attorney General may initiate civil law enforcement proceedings in the name of the State to  
6 stop violations of the CPA and to secure such equitable and other relief as may be appropriate  
7 in each case. The State of Washington brings this action to secure a permanent injunction,  
8 attorneys' fees, civil penalties, and other equitable relief against the Defendant for engaging in  
9 unfair and deceptive acts or practices in connection with the advertising, marketing, and sale of  
10 its line of food products.  
11

12           5.5     The Defendant has made health-related claims in the marketing, packaging,  
13 advertising, offering, and selling of its line of Activia yogurt and DanActive food products that  
14 were not substantiated by competent and reliable scientific evidence at the time the claims  
15 were made in violation of state law.  
16

17           5.6     Concerning Activia, the State alleges that the Defendant's health-related claims,  
18 which asserted a benefit for combating slow intestinal transit time, temporary irregularity,  
19 diarrhea, constipation, bloating, digestive comfort, and other regularity problems, were  
20 misleading, deceptive and unfair in that they were not adequately substantiated at the time the  
21 claims were made. Among other things, the State alleges that the Defendant did not have  
22 adequate substantiation to support claims that Activia provided select health benefits at one  
23 four oz. serving per day for two weeks. Further, the State alleges that the Defendant made  
24 direct or implicit claims to mitigate, prevent, or treat certain diseases relating to digestive  
25  
26



1           6.4     From the initial product launch, the Defendant emphasized the presence of  
2 *Bifidobacterium animalis* DN-173-010, which it marketed under the fanciful, trademarked  
3 name *Bifidus Regularis* as a distinguishing component ingredient that differentiated Activia  
4 from traditional yogurt products and competitors. At the product launch and thereafter, the  
5 Defendant asserted that “*Bifidus Regularis*” was a probiotic bacteria strain that helped to  
6 contribute to the purported regularity benefit.  
7

8           6.5     Initially, the Defendant broadly asserted, in advertisements like the one shown  
9 below, that Activia “helps regulate your digestive system . . . naturally” without any  
10 disclaimer, while only holding scientific evidence purportedly showing an effect on consumers  
11 with “slow transit time,” (i.e. the length of time for food to travel from being ingested to  
12 eliminated from the body).  
13



21           6.6     Later, the Defendant attempted to qualify the “helps regulate your digestive  
22 system” tagline with an asterisk indicating that its claim referred only to “help[ing] with slow  
23 intestinal transit time when eaten every day for two weeks as part of a balanced diet and  
24 healthy lifestyle.”  
25  
26

1           6.7     The Defendant claimed that Activia provided a benefit to consumers with  
2 normal transit times when it did not have competent and reliable scientific evidence to  
3 substantiate the claim at the time it was made.

4           6.8     The Defendant implicitly claimed through its broad, unqualified tagline “helps  
5 *regulate* the digestive system” that Activia provided consumers with bowel movements at  
6 fixed, uniform, or normal intervals when it did not have competent and reliable scientific  
7 evidence to substantiate the claims at the time they were made.

8           6.9     The Defendant also asserted that Activia had an effect on the stomach and the  
9 process of digestion when it did not have competent and reliable scientific evidence to  
10 substantiate the claims at the time they were made. For example, in several nationwide  
11 advertisements, the Defendant used the tagline “two delicious weeks to one happy tummy!”  
12  
13



20  
21           6.10    Through advertisements that referenced bloating through statements like “some  
22 days does your digestive system feel irregular and bloated,” the Defendant asserted that Activia  
23 provided a benefit on bloating when it did not have competent and reliable scientific evidence  
24 to substantiate the claim at the time it was made.  
25  
26

1           6.11 The Defendant implicitly asserted that Activia had antimicrobial benefits, anti-  
2 infectious benefits, and an effect on colon cancer when it could not make these claims without  
3 pre-approval as a drug and also did not have competent and reliable scientific evidence to  
4 substantiate the claim at the time it was made. For example, the Defendant sent health  
5 professional Activia-branded informational brochures that prominently highlighted the Activia  
6 brand name and logo, contained the following excerpts:

8           b - Antimicrobial action

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

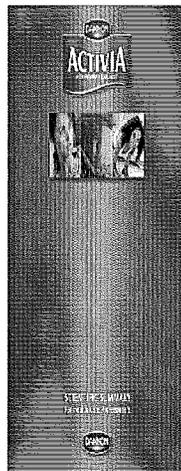
12           The antimicrobial action exhibited by these bifidobacteria is due in part to the production of substances  
13 such as bacteriocins and peroxides, but also to the production of organic acids, such as lactic acid and  
14 acetic acid. The latter, by reducing the pH within the intestinal medium,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

16           c - Action on immunity

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

21           d - Bifidobacteria and colon cancer

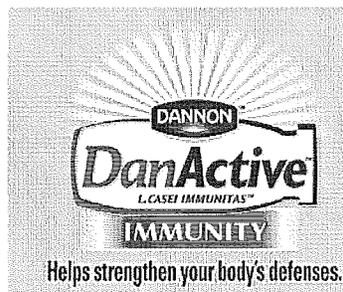
22           Many studies have focused on bifidobacteria and colon cancer in recent years.<sup>14</sup> A number of these  
23 studies performed in animal models demonstrate an effect on certain experimental cancers.  
24 In man, bifidobacteria have shown an effect on the activity of enzymes involved in conversion of  
25 procarcinogens to carcinogens, such as nitrosamines and secondary amines.<sup>15</sup> The mechanisms  
26 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.



1  
2           6.12 DanActive is a dairy drink product produced and distributed by the Defendant  
3 that is sold at third-party retailers throughout the United States including in Washington.

4           6.13 Currently, the Defendant's DanActive product line includes DanActive and  
5 DanActive Light. DanActive is packaged in 100 mL "daily dose" bottles and come in a variety  
6 of flavors.  
7

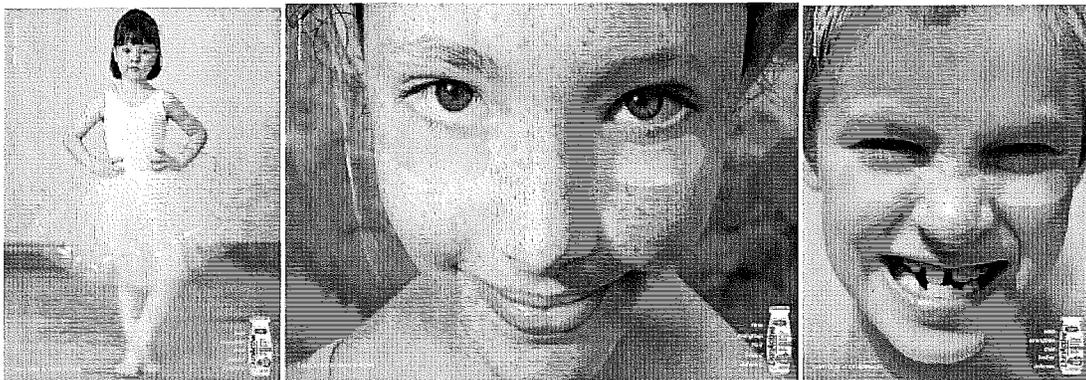
8           6.14 In January 2007, following the release of Activia, the Defendant launched  
9 DanActive nationally with an extensive nationwide marketing campaign that included  
10 television, radio, print, web, and in-store components. From the initial product launch of  
11 DanActive, the Defendant positioned the product as providing consumers with "immunity"  
12 rather than as modest role in helping support or maintain the immune system. The tagline the  
13 Defendant used for DanActive was "helps strengthen your body's defenses."  
14



21           6.15 From the initial product launch, the Defendant emphasized the presence of  
22 *Lactobacillus casei* strain DN-114 001, which it marketed under the fanciful, trademarked  
23 name *L. casei Defensis* and later *L. casei Immunitas*. At the product launch and thereafter, the  
24 Defendant asserted that the strains were probiotics.  
25  
26

1           6.16 The Defendant represented that DanActive would provide health benefits to  
2 consumers with normal functioning immune systems when it did not have competent and  
3 reliable scientific evidence to substantiate the claims at the time that they were made.

4           6.17 The Defendant also represented that DanActive would provide health benefits  
5 on the immune systems of children when it did not have competent and reliable scientific  
6 evidence to substantiate the claims at the time that they were made. Example advertisements  
7 are shown below:  
8



16           6.18 In national advertisements, the Defendant directly and implicitly claimed that  
17 DanActive provided germ fighting, antiviral, cold prevention, flu prevention and other disease  
18 prevention benefits when it did not have competent and reliable scientific evidence to  
19 substantiate the claims at the time that they were made.

20           6.19 In its DanActive advertisements, the Defendant featured situations commonly  
21 associated with cold, flu, or virus transmission including, but not limited to getting sneezed on,  
22 standing in the rain or snow without adequate clothing coverage, digging through a commercial  
23 dumpster, accepting food, money, and other items that have been handled in an unhygienic  
24 manner, when it did not have competent and reliable scientific evidence to substantiate the  
25 claims at the time that they were made.  
26

1           6.20    In other national advertisements ran during the peak of cold and flu season, the  
 2 Defendant featured advertisements with depictions of the DanActive bottle with a winter hat  
 3 and scarf under the taglines “Winter is right around the corner. Are you ready?” and “Bundle  
 4 Up Your Body’s Defenses. It’s that time of year.”

5  
 6           **BUNDLE UP YOUR  
 BODY’S DEFENSES**

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



Help Strengthen Your Body's Defenses

For more information visit danactive.com



6.21    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.

6.22    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.

1           6.23    The Defendant misled consumers, including those in Washington, as to matter  
2 of facts in their advertisements, product labeling, and marketing materials as set forth in  
3 paragraph 6.22 above.  
4

5                                   **VII.    FIRST CAUSE OF ACTION—CPA VIOLATIONS**

6           7.1    State realleges Paragraphs 1.1 through 6.23.

7           7.2    Defendant’s conduct of advertising, promoting and selling of its yogurt and  
8 dairy drink food products as alleged in the Complaint violates the CPA.  
9

10          7.3    Defendant’s conduct of making health-related or other claims without  
11 competent and reliable scientific evidence to substantiate them violates the CPA.

12          7.4    Defendant’s conduct of making health-related claims in its advertisements  
13 claiming to prevent, treat, or cure disease violates the CPA.

14          7.5    All of the acts and practices engaged in and employed by the Defendant as  
15 alleged herein, are unfair or deceptive acts or practices affecting the conduct of trade or  
16 commerce in Washington, which are declared unlawful by RCW 19.86.020.  
17

18          7.6    Each and every unfair or deceptive act or practice engaged in by Defendant as  
19 recited above constitutes a separate violation of the CPA.

20                                   **VIII.   PRAYER FOR RELIEF**

21           WHEREFORE, Plaintiff, State of Washington, prays for relief as follows:

22          8.1    That the Court decree that the Defendant has engaged in acts or practices which  
23 violate the CPA.  
24

25          8.2    That the Court issue a permanent injunction enjoining and restraining the  
26 Defendant and its representatives, successors, assigns, officers, agents, servants, employees,

1 and all other persons acting or claiming to act for, on behalf of, or in active concert or  
2 participation with the Defendant from continuing or engaging in the unlawful conduct  
3 complained of herein.

4 8.3 That the Court assess civil penalties, pursuant to RCW 19.86.140, of up to two  
5 thousand dollars (\$2000) per violation for each and every violation of RCW 19.86.020.  
6

7 8.4 That the Court make such orders pursuant to RCW 19.86.080 to provide that the  
8 Plaintiff, State of Washington, recover its costs, including reasonable attorneys' fees.

9 For such other relief as the Court may deem just and proper.

10 DATED this 15<sup>th</sup> day of December, 2010.  
11

12 ROBERT M. MCKENNA  
13 Attorney General

14   
15 ROBERT A. LIPSON, WSBA #11889  
16 Assistant Attorney General  
17 Attorneys for the State of Washington  
18  
19  
20  
21  
22  
23  
24  
25  
26

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

**EXHIBIT A**

**GOVERNMENT-ORDERED DISCLOSURE**  
[on Dannon Company, Inc., letterhead]

[Insert Date]

[Addressee]

Dear Dannon Company, Inc., Distributor, Reseller, or Retailer:

The Dannon Company, Inc., (Dannon) recently reached a settlement with the Attorneys General of thirty-eight states and the State of Hawaii, Office of Consumer Protection (State AGs) resolving an investigation into what the State AGs believed to be unsubstantiated and/or deceptive and unlawful claims concerning Dannon's Activia and DanActive products. Although we dispute the views of the State AGs and deny any wrongdoing, we have agreed to resolve the State AGs' investigation.

Dannon will work with you to ensure the advertisements that you distribute are in compliance with the Settlement Agreement. To comply with the Settlement Agreement reached with the State AGs, Dannon offers its assistance in ensuring that the advertising or promotional materials that you disseminate regarding Activia and DanActive products will be in compliance with the terms of the Settlement Agreement, including claims identified in the Consent Judgment. Such claims about Activia and DanActive products may only be made if they are true, adequately substantiated and otherwise permitted by law as stated in the Settlement Agreement.

A copy of the settlement with the State AGs is attached. If you have any questions, please call [insert name and telephone numbers of the responsible Dannon Company, Inc. Attorney or Officer].

Sincerely,

The Dannon Company, Inc.