

CAUSE NO. 10-16065

FILED
2018 DEC 15 AM 8:38
CLERK
DALLAS COUNTY, TEXAS
DEPUTY

STATE OF TEXAS,)
)
 Plaintiff,)
 v.)
)
 THE DANNON COMPANY, INC.,)
 a Delaware corporation,)
)
 Defendant.)

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
298th
JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, acting by and through Attorney General GREG ABBOTT ("State"), filing Plaintiff's Original Petition complaining of and against The Dannon Company, Inc, ("Defendant") and would respectfully show the court the following:

AUTHORITY

1. This action is brought by Attorney General Greg Abbott, through his Consumer Protection Division, in the name of the STATE OF TEXAS and in the public interest under the authority granted him by §17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et seq.* ("DTPA"), upon the grounds that Defendant has engaged in false, misleading or deceptive acts or practices in the course of trade and commerce as defined in, and declared unlawful by §§17.46(a) and (b) of the DTPA.

PARTY DEFENDANT

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

VENUE

3. Venue of this action lies in Dallas County on the basis of §17.47(b) of the DTPA because Defendants' acts and practices that violate these statutes occurred throughout Texas, including Dallas County, Texas.

PUBLIC INTEREST

4. Because Plaintiff STATE OF TEXAS has reason to believe that Defendant has engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff STATE OF TEXAS has reason to believe that Defendant has caused and will cause immediate and irreparable injury, loss and damage to the STATE OF TEXAS, and its citizens, and will also cause adverse effects to legitimate business enterprises which conduct their trade and commerce in a lawful manner in this State. Therefore, the Attorney General of the STATE OF TEXAS believes and is of the opinion that these proceedings are in the public interest.

ACTS OF AGENTS

5. Whenever in this petition it is alleged Defendant did any act or thing, it is meant that Defendant performed or participated in such act or thing or that such act was performed by agents or employees of Defendant and in each instance, the agents or employees of Defendant were then authorized to and did in fact act on behalf of Defendant or otherwise acted under the guidance and direction of Defendant.

TRADE AND COMMERCE

6. Defendant has, at all times described below, engaged in conduct which constitutes “trade” and “commerce” as those terms are defined by §17.45(6) of the DTPA.

NOTICE BEFORE SUIT

7. Plaintiff informed Defendant herein at least seven (7) days before instituting this action of the alleged unlawful conduct of which complaint is now made.

NATURE OF DEFENDANT’S CONDUCT

8. Defendant has made health-related claims in the marketing, packaging, advertising, offering, and selling of their 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.

9. Concerning Activia, the State alleges that Defendant’s health claims, which asserted a benefit for combating slow intestinal transit time, temporary irregularity, diarrhea, constipation, bloating, digestive comfort, and other regularity problems, were misleading in that they were not adequately substantiated at the time the claims were made. Among other things, the State alleges that 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 (Dannon’s own studies showed three such servings a day were required for the claimed benefit.)

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

11. Concerning DanActive, the State alleges that Defendant's health claims which were positioned to provide "immunity" or support to the defensive system to fight germs were misleading in that they were not adequately substantiated at the time the claims were made.

12. Further, the State alleges that Defendant made claims to mitigate, prevent, or treat certain diseases, including antiviral and other "germ fighting" claims to fight the common cold and the flu that were unlawful since it is false, misleading, or deceptive to make such claims for a food, including but not limited to failing to disclose that only drugs approved by FDA or that comply with an over-the-counter drug monograph can make such claims.

SPECIFIC CONDUCT

Activia:

13. Activia is a yogurt product produced and distributed, since February, 2006, by Defendant that is sold at third-party retailers throughout the United States including in Texas at what amounts to a 30% to 50% premium over other yogurt products. Defendant began marketing Activia through an extensive marketing campaign that included television, radio, print, web, and in-store components. Currently, Defendant's Activia product line includes Activia, Activia Fiber, Activia Light, Activia Drinks, and Activia Dessert.

14. From the initial product launch of Activia, Defendant positioned Activia as helping to regulate one's digestive system and 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.

15. Initially, Defendant broadly asserted, in advertisements 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 eliminate from the body).

16. Defendant then 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.” Defendant made this false, misleading, or deceptive claim although its own scientific studies showed that three servings a day were necessary to receive the effect on consumers with slow transit time.

17. 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 since it is false, misleading, or deceptive to make such claims for a food, including but not limited to, failing to disclose that only drugs approved by FDA or that comply with an over-the-counter drug monograph can make such claims. Additionally, Defendant sent health professionals, including physicians, Activia-branded informational brochures making such claims and Activia prescription pads.

18. 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.

19. 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.

20. 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!”

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

DanActive:

22. DanActive is a dairy drink product produced and distributed by Defendant that is sold at third-party retailers throughout the United States including in Texas. Currently, Defendant’s DanActive product line includes DanActive and DanActive Light. DanActive is packaged in 100 mL “daily dose” bottles and come in a variety of flavors.

23. 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 playing a modest role in helping support or maintain the immune system. The tagline Defendant used for DanActive was “helps strengthen your body’s defenses.”

24. 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, the Defendant asserted that the strains were probiotics.

25. In national advertisements and on its websites, Defendant directly and implicitly made claims to cure, treat, prevent, or mitigate diseases by claiming that DanActive provided germ fighting, antiviral, cold prevention, flu prevention and other disease prevention benefits, including but not limited to colon cancer and acute diarrhea in children. Such claims by

Defendant are false, misleading, or deceptive for a food because such claims can only be made for drugs approved by FDA or that comply with an over-the-counter drug monograph.

26. Defendant represented that DanActive would provide health benefits to consumers with normal functioning immune systems and to 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.

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.

28. 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. Additionally, in other 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 these animations conveys that DanActive can prevent, treat, cure or mitigate diseases although only drugs, not foods, can make such claims.

**VIOLATIONS OF TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER
PROTECTION ACT**

29. Defendant as set forth above, in the course and conduct of trade and commerce, has directly and indirectly engaged in false, misleading, and deceptive acts and practices declared unlawful by §17.46 (a) and (b) of the Texas Deceptive Trade Practices-Consumer Protection Act, including but not limited to:

- a. Causing confusion as to the approval of a good by making claims to prevent, treat, mitigate, or cure diseases that are unlawful for foods because only drugs approved by FDA or that comply with an over-the-counter drug monograph can make such claims;
- b. Causing confusion as to the approval of a good by making claims for foods without competent and reliable scientific evidence to substantiate the claims at the time they were made;
- c. Representing that foods have characteristics, uses, or benefits of a drug which they cannot have as a food;
- d. Failing to disclose that Defendant lacked competent and reliable scientific evidence to substantiate claims when the claims were made for its foods;
- e. Failing to disclose that foods cannot legally make claims to prevent, treat, mitigate, or cure diseases;
- f. Falsely representing that one serving of Activia a day for two weeks will provide the benefits claimed when its own studies showed three servings were required;
- g. Falsely representing that DanActive provided immunity from diseases and strengthened the defense system of the body when such claims cannot legally be made for a food;
- h. Causing confusion as to the approval of a good by linking the websites for its foods to research studies and research websites that make claims for probiotics, an ingredient in Activia and DanActive, to prevent, treat, cure, or mitigate diseases; and
- i. Representing that foods have the benefits of drugs when they are labeled and marketed as foods.

30. The above actions by Defendant specifically violate §17.46 (a) and the following provisions of §17.46 of the DTPA:

- (b)(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (b)(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have;
- (b)(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (b)(24) failing to disclose information concerning goods or services which was known at the time of the transaction when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

INJURY TO CONSUMERS

31. By means of the foregoing unlawful acts and practices which were producing causes of injury to the persons affected, Defendant has acquired money or other property from identifiable persons to whom such money or property should be restored, or who in the alternative are entitled to an award of damages.

CONTINUING VIOLATIONS

32. Defendant has violated and could continue to violate the laws as hereinabove alleged. Defendant, unless restrained by this Honorable Court, could continue violating the laws of the State of Texas. Defendant has violated and could continue to violate the Deceptive Trade Practices-Consumer Protection Act.

PRAYER

33. WHEREFORE, PREMISES CONSIDERED, the STATE OF TEXAS prays that Defendant be cited according to law to appear and answer herein and that upon final hearing a PERMANENT INJUNCTION be issued restraining and enjoining Defendant and its agents, servants, employees, and representatives from making the representations, doing the acts, and engaging in the practices set out in the preceding paragraphs as well as from making the

following representations and doing the following acts and engaging in the following practices in the pursuit and conduct of trade or commerce within the State of Texas as follows:

- a. Making any representation which directly states or implies that foods may be used in the diagnosis, cure, mitigation, treatment, or prevention of a disease by claiming that the food or any of its ingredients “strengthens your body’s defenses” or implies active germ fighting;
- b. Representing that any food can be used to treat, mitigate, cure or prevent diarrhea since such claims cannot be made for a food;
- c. Representing that any food supports or promotes relief from temporary or occasional diarrhea, unless Defendant possesses and relies upon competent and reliable scientific evidence that the representation is true;
- d. Representing that a food can be used to treat, mitigate, cure, or prevent constipation, including through the use of depictions to symbolize relief from constipation;
- e. Representing that a food supports or promotes relief from temporary and occasional constipation, unless Defendant possesses and relies upon competent and reliable scientific evidence that the claim is true;
- f. Using the word “immunity,” or the phrase, “*L. casei immunitas*”, unless Defendant clearly and conspicuously modifies the word “immunity” or the phrase, “*L. casei Immunitas*” with a statement that the food merely helps to promote, support or maintain the immune system of persons who consume the food and unless the Defendant possesses and relies upon competent and reliable scientific evidence that the claim is true;
- g. Citing, summarizing, or linking to clinical studies or research on websites

or in the labeling of a food if the citation, summary, or link to the clinical studies or research implies that a food or an ingredient in a food treats, mitigates, cures, or prevents a disease;

h. Depicting a cellular wall fortified with Defendant's food that repels germs;

i. Making any representations, including through the use of a product name, endorsement, depiction, or illustration, that a food reduces the likelihood of getting a cold or the flu;

j. Making any representation in connection with Activia yogurt, including through the use of a product name, endorsement, depiction, or illustration, that Activia yogurt relieves temporary irregularity or helps with slow intestinal transit time, unless the representation is non-misleading, conveys that eating three servings a day is required to obtain the benefit and, at the time the claim is made, the Defendant possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true;

k. Making any representation for a food that it relieves temporary irregularity or helps with slow intestinal transit time, unless the representation is non-misleading and, at the time the claim is made, Defendant possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true;

l. Making any representation for a food about the health benefits, performance, efficacy or safety of a food, unless the representation is non-misleading, and, at the time the claim is made, the Defendant possesses and relies upon competent and reliable scientific to substantiate that the representation is true;

- m. Making any representation about the existence, contents, methodology, statistical analyses, study scope, validity, results, conclusions, or interpretations of any test, study, or research that is false, misleading or deceptive, or that is misleading or deceptive when considered together with other representations or depictions;
- n. Using the term Bifidus Regularis™, or any other fanciful term that represents that a food helps regulate the digestive system unless Defendant clearly and conspicuously identifies the true scientific name of the bacteria, including its genus, species and strain; and
- o. Using, in connection with the labeling of a food, the term L. casei Immunitas™, or any other fanciful term that represents that a food supports, promotes, or maintains the functioning of the immune system unless the Defendant clearly and conspicuously identifies the true scientific name of the bacteria, including its genus, species and strain.

34. The STATE OF TEXAS further prays, that upon final hearing, this Court order Defendant to pay civil penalties of not more than \$20,000.00 per violation, as provided in §17.47(c)(1) of the DTPA.

35. The STATE OF TEXAS further prays that the Office of the Attorney General be awarded their investigative costs, court costs, reasonable attorneys' fees, expenses, and witness fees pursuant to the laws of the State of Texas including the TEX. GOV'T CODE ANN. §402.006(c).

36. The STATE OF TEXAS further prays that upon final hearing that this Court grant all other relief to which the State may be justly entitled.

Plaintiff State of Texas

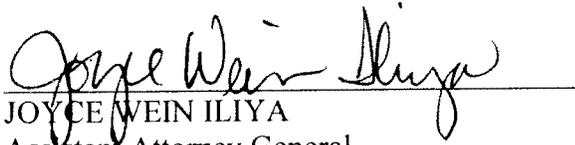
GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

PAUL D. CARMONA
Chief, Consumer Protection and Public Health Division

D. ESTHER CHAVEZ
Deputy Chief, Consumer Protection and Public Health Division



JOYCE WEIN ILIYA
Assistant Attorney General
State Bar No. 00784319

JODIE SCIVETTI
Assistant Attorney General
State Bar No. 24058099
Consumer Protection and Public Health Division
1412 Main Street, Suite 810
Dallas, Texas 75202
(214) 969-7639, ext. 8811
Facsimile: (214) 969-7615
Attorneys for the State