

CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

N<sup>o</sup> : 500-06-000482097

SUPERIOR COURT  
(Class Action)

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**EMMANUELLE SONEGO**, residing and domiciled at 5517 boul. Cavendish, in the City of Côte St-Luc, District of Montreal, Province of Quebec, H4V 2R9;

*Petitioner*

-vs-

**DANONE INC.**, a legal person duly incorporated according to the law, having its head office at 100 Rue Lauzon, in the City of Boucherville, District of Longueuil, Province of Quebec, J4B 1E6;

-and-

**DANNON COMPANY INC.**, a legal person duly constituted according to the law, having its principal place of business at 100 Hillside Avenue, White Plains, New-York, 10603-2863, United States of America

*Respondents*

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**AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND TO ASCRIBE THE STATUS OF REPRESENTATIVE**  
(Art. 1002 C.C.P. and following)

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TO (...) THE HONOURABLE JUSTICE ROBERT CASTIGLIO OF THE SUPERIOR COURT OF QUEBEC, SITTING IN AND FOR THE DISTRICT OF MONTREAL, THE PETITIONER STATES THE FOLLOWING:

**GENERAL PRESENTATION**

1. Petitioner wishes to institute a class action on behalf of the following group, of which she is member, namely:

- All residents in Canada who purchased the Activia and/or DanActive brand products produced, marketed, advertised, sold and/or distributed by Respondents, including any variations, formats or line extensions of the Activia and/or DanActive Brands, or any other group to be determined by the Court;

**alternately (or as a subclass):**

All residents in Quebec who purchased the Activia and/or DanActive brand products produced, marketed, advertised, sold and/or distributed by Respondents, including any variations, formats or line extensions of the Activia and/or DanActive Brands, or any other group to be determined by the Court;

(hereinafter, both Quebec resident and non-Quebec resident Class Members are collectively referred to as, "Petitioner(s)", "Class Member(s)", "Group Member(s)", the "Group", the "Class", the "Member", the "Consumer(s)");

2. Respondents Danone Inc., together with and/or in conjunction with Respondent Dannon Company Inc., produces, markets, advertises, sells and/or distributes food products throughout Canada, namely the brands Activia and DanActive including any variations, formats or line extensions thereof (hereinafter the "**Products**");

**FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER(...)**

3. Prior to the filing of the original Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative on October 5, 2009, and for an undetermined period thereafter, Respondents made (...) certain claims and/or statements and/or representations concerning its Activia brand product on its websites and other promotional material (...). As examples, the following representations and claims appeared on the Respondents' websites ([www.danone.ca/en/products/activia.aspx](http://www.danone.ca/en/products/activia.aspx) and [www.activia.ca/en/faq/](http://www.activia.ca/en/faq/)) prior to October 5, 2009, and for an undetermined period thereafter:

- a) "Activia yogurt from Danone combines your benefits: it's not only delicious, but good for you. Everybody will appreciate its rich and creamy texture and exquisite taste, all while enjoying the benefits offered.

The probiotic culture in Activia is unique to Danone: it consists of the BL Regularis strain (Bifidobacterium lactis DN-173 010), a friendly bacteria that remains active in the digestive system. Each serving contains over a billion of these live BL Regularis bacteria, which makes Activia so exceptional";

- b) "Activia® is the first of a new generation of yogurts with a probiotic culture.



This new yogurt contains a unique bifidobacteria called (Bifidobacterium animalis lactis) (BL Regularis™). BL Regularis™ is a probiotic bacteria that has undergone clinical studies and is scientifically proven for its ability to survive in the digestive system and for its effects on intestinal transit. It's also a delicious way to help make sure your digestive system functions well." (...)

3.1 After the initial proceedings herein were filed on October 5, 2009, Respondents changed the wording of the representations and claims made on their websites, as cited at paragraph 3 above;

3.2 More particularly, concerning the representations or claims set out in paragraphs 3a) and 3b), which were on Respondents' website as at October 5, 2009, Respondents replaced the word "unique" with the word "exclusive" in the first lines of the second paragraphs of each statement, in both cases as more fully appears from extracts of Respondents' website, dated March 10, 2010, filed herewith as **Exhibit R-1**;

3.3. Petitioner is not aware of the reasons why Respondents changed the wording of their website in this manner after the institution of the present proceedings;

3.4. Furthermore, Petitioner, through its undersigned attorneys requested that Respondents confirm that what is cited above, at paragraphs 3a) and 3b), was in fact the wording on their websites as at October 5, 2009. Respondents, through their attorneys, have refused to confirm this;

4. Respondents make (...) certain claims and/or statements and/or representations concerning its DanActive brand product on its websites and other promotional material. (...) As examples, the following representations and claims appeared on the Respondents' website (www.danactive.ca/en/products) prior to October 5, 2009, and for an undetermined period thereafter:

a) "With its refreshing taste and convenient size, the new probiotic drink DanActive® is the everyday ally for your body's natural defenses.

Thanks to the unique bacterial culture L. casei Defensis™ (DN-114 001), exclusive to Danone, DanActive® helps strengthen the body's natural defenses when consumed daily. Scientific studies (37 more precisely) have proven DanActive's effectiveness."

b) "Does DanActive™ interact with the immune system?"

DanActive™ helps strengthen the body's natural defences, acting on the gut-associated lymphoid tissue (GALT) which is the major gate for stimulating an immune response, local at first, and later systemic.

GALT: Ex vivo studies have demonstrated the ability of DanActive™ to interact with immunocompetent cells of the intestinal mucosa, thus affecting the mucosa's defence mechanisms.



Systemic immunity: DanActive™ has shown to have an effect on the immune cells of subjects experiencing situations that can weaken natural defences, i.e. age, stress and lack of exercise.” (...)

- 4.1 After the initial proceedings herein were filed on October 5, 2009, Respondents changed the wording of the representations and claims made on their websites, which are cited at paragraph 4a) above. In particular, Respondents added the words “works within the intestine and” in the second line of the second paragraph, Respondents also replaced the number “37” with the number “24” in the third line of the second paragraph the whole as more fully appears from extracts of Respondents’ website, dated March 10, 2010, filed herewith as **Exhibit R-6**;
- 4.2. Once again, Petitioner is not aware of the reasons why Respondents made these further changes in the wording of their website after the institution of the present proceedings;
- 4.3. Furthermore, Petitioner, through its undersigned attorneys requested that Respondents confirm that what is cited above, at paragraphs 4a), was in fact the wording on their website as at October 5, 2009. Respondents, through their attorneys, have refused to confirm this;
- 4.4. Respondents also make the following representation or claim on their website, as more fully appears from the extract of Respondents’ website ([www.activia.ca/en/faq](http://www.activia.ca/en/faq)), filed herewith as **Exhibit R-7**:

“a) “What is a probiotic?

The word probiotic literally means “for life”. Essentially, a probiotic is a living micro-organism that, if eaten in sufficient quantities, provides a positive health effect for the host that goes beyond primary nutritional effects. A food is considered probiotic if it contains a sufficient quantity of probiotics and if all probiotic properties are maintained throughout the life of the product (alive in sufficient quantities and providing beneficial health effects)”

5. It is not proven that Respondents’ (...) proprietary strains of probiotic bacteria deliver the unique or exclusive health benefits claimed in its advertising campaign and other representations or claims. Nonetheless, as a result of Respondents’(...) deceptive advertising campaign, representations or claims, it charges a premium for the Products;
6. There is no scientific consensus about whether healthy people benefit from probiotic bacterial supplements. If probiotic bacteria do have any health benefits for healthy people, they must survive the digestive tract in sufficient quantities to achieve the possible benefit. However, there is no consensus on the quantities of probiotics people might require to achieve a probiotic effect, if probiotics have any such effect in healthy people. No scientific study has demonstrated that the



- bacteria Respondents put (...) in the Products is "probiotic" at all;
7. Using the term "probiotic" as a marketing tool, without regard to whether it actually delivers any probiotic benefits, Respondents define(...) the bacteria in its Products as probiotic, which it claims "provides a positive health benefit for the host that goes beyond primary nutritional effects";
  8. Through this massive campaign, representations and claims, Respondents have (...) conveyed one message: that its proprietary bacteria strains provide the Products with clinically proven health benefits that other yogurt products do not. Each person who has purchased the Products has been exposed to Respondents'(...) misleading advertising message, representations and claims multiple times;
  9. Respondents'(...) advertising and marketing campaign, representations and claims are (...) designed to cause consumers to buy the Products as a result of this deceptive message, and Respondents have(...) succeeded. As a result of this campaign, Respondents'(...) "probiotic" launch has been one of the most successful product launches in recent food industry history;
  10. Respondents'(...) affiliated or related companies have marketed and distributed the Products in Canada, the United States of America and elsewhere in the world;
  11. Petitioner hereby files herewith, as **Exhibit R-2**, as though recited at length herein, the "First Amended Class Action Complaint", filed before the United States District Court, Northern District of Ohio, Eastern division, in Court file No. CV-08-236, (the "Gemelas Action") which describes in great detail the nature and extent of the misleading advertising campaign, representations and claims made (...) by Respondents(...), concerning the Products;
  - 11.1 The Gemelas Action is currently the subject of a settlement between the parties of that action, notably the Defendant Dannon Company, Inc.. Petitioner hereby files herewith, as though recited at length, the following documents from the Gemelas Action:
    - a) the Amended Stipulation of Settlement (excluding exhibits), signed by the parties on or about January 20, 2010, which is filed as **Exhibit R-3**;
    - b) the Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, Providing for Notice and Scheduling Order, which is filed as **Exhibit R-4**;
    - c) Legal Notice to Class Members, which is filed as **Exhibit R-5**;
  12. As was done in the United States of America, Respondents engaged in similar if not identical misleading advertising campaign, representations and claims here in Canada and Respondents knew or should have known that Canadian consumers

would be affected and influenced by both the Canadian and the US campaigns;

12.1. That being said, Respondents have not offered any compensation to Canadian Class Members, although they settled the US Gemelas Action;

### FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

13. Every member of the Group has purchased the Products;
14. Every member of the Group's consent when purchasing the Products was vitiated as a result of the false and/or misleading statements made by Respondents, which are described hereinabove;
15. Every member of the Group would not have purchased the Products at all, or would not have paid the inflated price paid for the Products, if it wasn't for Respondents' (...) misleading marketing campaign, representations and claims described above regarding the Products' supposed health benefits;

### CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

16. The composition of the group makes the application of article 59 or 67 C.C.P. impractical or impossible for the reasons detailed below;
17. The number of persons included in the Group is estimated at being in the tens or even hundreds of thousands and scattered across Canada;
18. The names and addresses of all persons included in the Group are not known to the Petitioner, however, Respondents are (...) likely to possess data regarding sales and distribution figures. To date, and since the filing of the original Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative on October 5, 2009, 143 class members, from different Canadian Provinces, have signed up and provided their contact information, on a confidential basis, to the undersigned attorneys' website [www.merchantlaw.com](http://www.merchantlaw.com);
19. In addition, given the costs and risks inherent in an action before the Courts, many people will hesitate to institute an individual action against Respondents. Even if the Class Members themselves could afford such individual litigation, the Court system could not as it would be overloaded. Furthermore, individual



litigation of the factual and legal issues raised by the conduct of Respondents would increase delay and expense to all parties and to the Court system;

20. Moreover, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province) risks having contradictory judgments on questions of fact and law that are similar or related to all Members of the Class;
21. These facts demonstrate that it would be impractical, if not impossible, to contact each and every Member of the Class to obtain mandates and to join them in one action;
22. In these circumstances, a class action is the only appropriate procedure for all of the Members of the Class to effectively pursue their respective rights and have access to justice;
23. The recourses of the Members raise identical, similar or related questions of fact or law, namely:
  - a) were the claims and/or representations Respondents made regarding the Products unfair, misleading or deceptive;
  - b) did Respondents make claims and/or representations that the Products have certain performance characteristics, uses or benefits that they do not have;
  - c) did Respondents make claims and/or representations that the Products are of a particular standard, quality and/or grade, when they are not;
  - d) did Respondents know at the time the consumer transactions took place that the consumer would not receive the benefit from the consumer product that Respondents were (...) claiming and/or representing the consumer would receive;
  - e) did Respondents knowingly make a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
  - f) did Respondents know or should they (...) have known that the representations and advertisements regarding the Products were unsubstantiated, false and/or misleading;
  - g) did Respondents engage in false and/or misleading advertising;
  - h) did Respondents use deceptive representations in connection with the sale of goods;

- i) did Respondents' (...) representations cause a likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods;
  - j) did Respondents represent that goods have a (...) characteristic, ingredient, use or benefit that they do not have;
  - k) did Respondents represent that goods are of a particular standard, quality or grade when they are of another;
  - l) did Respondents advertise goods with intent not to sell them as advertised;
  - m) did the Class members that purchased the Products suffer monetary damages and, if so, what is the measure of said damages;
  - n) are the Class members entitled to an award of punitive damages;
24. The interests of justice favour that this motion be granted in accordance with its conclusions;

**NATURE OF THE ACTION AND CONCLUSIONS SOUGHT**

25. The action that Petitioner wishes to institute for the benefit of the members of the class is an action in damages;
26. The conclusions that Petitioner wishes to introduce by way of a motion to institute proceedings are:

**GRANT** Plaintiff's action against Defendants;

**CONDEMN** Defendants to reimburse to the Members of the Group the purchase price paid for the Products, plus interest as well the additional indemnity since the date of purchase;

**CONDEMN** Defendants to pay an amount in punitive and/or exemplary damages to every Group Member, amount to be determined by the Court, plus interest as well the additional indemnity;

**GRANT** the class action of Petitioner on behalf of all the Members of the Group;

**ORDER** the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.P.;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;

**THE WHOLE** with interest and additional indemnity provided for in the



Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

27. Petitioner suggests that this class action be exercised before the Superior Court in the District of Montreal for the following reasons:
- a) Many Class Members, including Petitioner, are domiciled in the District of Montreal;
  - b) Respondents conducted business in and has a postal address in the District of Montreal;
  - c) Class Counsel are domiciled in the District of Montreal;
28. Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Members of the Group, since Petitioner:
- a) purchased and consumed both the Activia and DanActive Products, multiple times per week, over many years, the whole as a result of Respondents'(...) misleading marketing campaign, claims and representations described above;
  - b) was not given the chance to make an informed decision and give an informed consent before purchasing and consuming the Products, again due to Respondents'(...) misleading marketing campaign, claims and representations described above;
  - c) understands the nature of the action and has the capacity and interest to fairly and adequately protect and represent the interests of the Members of the Group;
  - d) is available to dedicate the time necessary for the present action before the Courts of Quebec and to collaborate with Class attorneys in this regard;
  - e) is ready and available to manage and direct the present action in the interest of the Class Members that Petitioner wishes to represent, and is determined to lead the present file until a final resolution of the matter, the whole for the benefit of the Class;
  - f) does not have interests that are antagonistic to those of other members of the Group;
  - g) has given the mandate to the undersigned attorneys to obtain all relevant information to the present action and intend to keep informed of all developments;

- h) is, with the assistance of the undersigned attorneys, ready and available to dedicate the time necessary for this action and to collaborate with other Members of the Group and to keep them informed;
29. The present motion is well founded in fact and in law;

**FOR THESE REASONS, MAY IT PLEASE THE COURT:**

**GRANT** the present motion;

**AUTHORIZE** the bringing of a class action in the form of a motion to institute proceedings in damages;

**ASCRIBE** the Petitioner the status of representative of the persons included in the group herein described as:

- All residents in Canada who purchased the Activia and/or DanActive brand products produced, marketed, advertised, sold and/or distributed by Respondents, including any variations, formats or line extensions of the Activia and/or DanActive Brands, or any other group to be determined by the Court;

**alternately (or as a subclass):**

All residents in Quebec who purchased the Activia and/or DanActive brand products produced, marketed, advertised, sold and/or distributed by Respondents, including any variations, formats or line extensions of the Activia and/or DanActive Brands, or any other group to be determined by the Court;

**IDENTIFY** the principle questions of fact and law to be treated collectively as the following:

- a) were the claims and/or representations Respondents made regarding the Products unfair, misleading or deceptive;
- b) did Respondents make claims and/or representations that the Products have certain performance characteristics, uses or benefits that they do not have;
- c) did Respondents make claims and/or representations that the Products are of a particular standard, quality and/or grade, when they are not;
- d) did Respondents know at the time the consumer transactions took place that the consumer would not receive the benefit from the consumer



product that Respondents<sub>u</sub> was claiming and/or representing the consumer would receive;

- e) did Respondents<sub>u</sub> knowingly make a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- f) did Respondents<sub>u</sub> know or should it have known that the representations and advertisements regarding the Products were unsubstantiated, false and/or misleading;
- g) did Respondents<sub>u</sub> engage in false and/or misleading advertising;
- h) did Respondents<sub>u</sub> use deceptive representations in connection with the sale of goods;
- i) did Respondents'(...) representations cause a likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods;
- j) did Respondents<sub>u</sub> represent that goods have a (...) characteristic, ingredient, use or benefit that they do not have;
- k) did Respondents<sub>u</sub> represent that goods are of a particular standard, quality or grade when they are of another;
- l) did Respondents<sub>u</sub> advertise goods with intent not to sell them as advertised;
- m) did the Class members that purchased the Products suffer monetary damages and, if so, what is the measure of said damages;
- n) are the Class members entitled to an award of punitive damages;

**IDENTIFY** the conclusions sought by the class action to be instituted as being the following:

**GRANT** Plaintiff's action against Defendants;

**CONDEMN** Defendants<sub>u</sub> to reimburse to the Members of the Group the purchase price paid for the Products, plus interest as well the additional indemnity since the date of purchase;

**CONDEMN** Defendants<sub>u</sub> to pay an amount in punitive and/or exemplary damages to every Group Member, amount to be determined by the Court, plus interest as well the additional indemnity;

**GRANT** the class action of Petitioner on behalf of all the Members of the Group;

**ORDER** the treatment of individual claims of each Member of the Group in accordance with articles 1037 to 1040 C.C.;

**RENDER** any other order that this Honourable Court shall determine and that is in the interest of the Members of the Group;

**THE WHOLE** with interest and additional indemnity provided for in the Civil Code of Quebec and with full costs and expenses including expert's fees and publication fees to advise members;

**DECLARE** that all Members of the Group that have not requested their exclusion from the Group in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;


**FIX** the delay of exclusion at 30 days from the date of the publication of the notice to the Members;

**ORDER** the publication of a notice to the Members of the Group in accordance with article 1006 C.C.P.;

**THE WHOLE** with costs to follow.

**MONTREAL, December 30, 2010**

*Copie conforme / True Copy*  
*(s) / (sgd.) Merchant Law Group, LLP*  
*Merchant Law Group, LLP*



**MERCHANT LAW GROUP LLP**  
Attorneys for Petitioner and the  
Class Members



CANADA

PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

N<sup>o</sup> : 500-06-000482097

SUPERIOR COURT  
(Class Action)

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EMMANUELLE SONEGO

*Petitioner*

-vs-

DANONE INC.

-and-

DANNON COMPANY INC.

*Respondents*

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**LIST OF EXHIBITS**

**AMENDED MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION AND  
TO ASCRIBE  
THE STATUS OF REPRESENTATIVE**

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- EXHIBIT R-1: Extracts from Respondent Danone Inc.'s website ([www.danone.ca](http://www.danone.ca));
- EXHIBIT R-2: "First Amended Class Action Complaint", filed in United States District Court, Northern District of Ohio, Eastern Division, Court file No. CV-08-236, James Gemelas v. The Dannon Company Inc.;
- EXHIBIT R-3: "Amended Stipulation of Settlement", United States District Court, Northern District of Ohio, Eastern Division, Court file No. CV-08-236, James Gemelas v. The Dannon Company Inc.;
- EXHIBIT R-4: "Order Preliminarily Approving Class Action Settlement, Conditionally Certifying the Settlement Class, Providing for Notice and Scheduling Order", United States District Court, Northern District of Ohio, Eastern Division, Court file No. CV-08-236, James Gemelas v. The Dannon Company Inc.;
- EXHIBIT R-5: Public Notice for class action settlement, United States District Court, Northern District of Ohio, Eastern Division, Court file No. CV-08-236, James Gemelas v. The Dannon Company Inc.;

EXHIBIT R-6: Extracts from Respondent Danone Inc.'s website ([www.danactive.ca](http://www.danactive.ca));

EXHIBIT R-7: Extracts from Respondent Danone Inc.'s website ([www.activia.ca](http://www.activia.ca))

**MONTREAL, August 17, 2010**

**MERCHANT LAW GROUP LLP**

Per: *Owen Falquero*  
**OWEN FALQUERO**  
Attorneys for Petitioner

*Copie conforme / True Copy*  
(s) / (sgd.) Merchant Law Group, LLP  
Merchant Law Group, LLP