

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N^o : 500-06-000482-097

SUPERIOR COURT
(Class Action)

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;

Respondent

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

**TO ONE OF THE HONOURABLE JUSTICES 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 Respondent, 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 Respondent, 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. Respondent 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 PETITIONERS

3. Respondent makes certain claims and/or statements and/or representations concerning its Activia brand product on its websites and other promotional material, such as:
 - 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."

the whole as more fully appears from extracts of Respondent's website, filed herewith as **Exhibit R-1**;

4. Respondent makes certain claims and/or statements and/or representations concerning its DanActive brand product on its websites and other promotional material, such as:

- 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.”

the whole as more fully appears from extracts of Respondent's website, Exhibit R-1;

5. It is not proven that Respondent's proprietary strains of probiotic bacteria deliver the unique health benefits claimed in its advertising campaign. Nonetheless, as a result of Respondent's deceptive advertising campaign, 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 Respondent puts in the Products is “probiotic” at all;

7. Using the term as a marketing tool, without regard to whether it actually delivers any probiotic benefits, Respondent defines 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, Respondent has 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 Respondent’s misleading advertising message multiple times;
9. Respondent’s advertising and marketing campaign is designed to cause consumers to buy the Products as a result of this deceptive message, and Respondent has succeeded. As a result of this campaign, Respondent’s “probiotic” launch has been one of the most successful product launches in recent food industry history;
10. Respondent’s affiliated or related companies have marketed and distributed the Products in 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, which describes in great detail the nature and extent of the misleading advertising campaign launched by Respondent’s US counterparts, concerning the Products;
12. Respondent engaged in similar if not identical misleading advertising campaign here in Canada and Respondent knew or should have known that Canadian consumers would be affected and influenced by both the Canadian and the US campaigns;

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 Respondent, 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 Respondent's misleading marketing campaign 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, Respondent is likely to possess data regarding sales and distribution figures;
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 Respondent. 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 Respondent 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 Respondent made regarding the Products unfair, misleading or deceptive;
- b) did Respondent make claims and/or representations that the Products have certain performance characteristics, uses or benefits that they do not have;
- c) did Respondent make claims and/or representations that the Products are of a particular standard, quality and/or grade, when they are not;
- d) did Respondent know at the time the consumer transactions took place that the consumer would not receive the benefit from the consumer product that Respondent was claiming and/or representing the consumer would receive;
- e) did Respondent knowingly make a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- f) did Respondent know or should it have known that the representations and advertisements regarding the Products were unsubstantiated, false and/or misleading;
- g) did Respondent engage in false and/or misleading advertising;
- h) did Respondent use deceptive representations in connection with the sale of goods;
- i) did Respondent's representations cause a likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods;
- j) did Respondent represent that goods have a certain sponsorship, approval, characteristic, ingredient, use or benefit that they do not have;
- k) did Respondent represent that goods are of a particular standard, quality or grade when they are of another;
- l) did Respondent 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 Defendant;

CONDEMN Defendant 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 Defendant 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) Respondent 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 Respondent's misleading marketing campaign 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 Respondent's misleading marketing campaign 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 Respondent, 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 Respondent, 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 Respondent made regarding the Products unfair, misleading or deceptive;
- b) did Respondent make claims and/or representations that the Products have certain performance characteristics, uses or benefits that they do not have;
- c) did Respondent make claims and/or representations that the Products are of a particular standard, quality and/or grade, when they are not;
- d) did Respondent know at the time the consumer transactions took place that the consumer would not receive the benefit from the consumer product that Respondent was claiming and/or representing the consumer would receive;
- e) did Respondent knowingly make a misleading statement in connection with a consumer transaction that the consumer was likely to rely upon to his detriment;
- f) did Respondent know or should it have known that the representations and advertisements regarding the Products were unsubstantiated, false and/or misleading;
- g) did Respondent engage in false and/or misleading advertising;

- h) did Respondent use deceptive representations in connection with the sale of goods;
- i) did Respondent's representations cause a likelihood of confusion or misunderstanding as to the source, sponsorship, approval or certification of goods;
- j) did Respondent represent that goods have a certain sponsorship, approval, characteristic, ingredient, use or benefit that they do not have;
- k) did Respondent represent that goods are of a particular standard, quality or grade when they are of another;
- l) did Respondent 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 Defendant;

CONDEMN Defendant 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 Defendant 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;

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, October 5, 2009

(s) Merchant Law Group LLP

MERCHANT LAW GROUP LLP
Attorneys for Petitioner and the
Class Members