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14 UNITED STATES DISTRICT COURT  
15 CENTRAL DISTRICT OF CALIFORNIA  
16 WESTERN DIVISION

17 PATRICIA WIENER, On Behalf of  
18 Herself and All Others Similarly  
Situated and the General Public,

19 Plaintiff,

20 vs.

21 THE DANNON COMPANY, INC.,

22 Defendant.

) **VIA FAX**

) No.

) **CLASS ACTION**

) **CLASS ACTION COMPLAINT FOR:**

- 23 ) 1. VIOLATIONS OF CONSUMERS  
24 ) LEGAL REMEDIES ACT,  
25 ) Civil Code §1750 *et seq.*;  
26 ) 2. VIOLATION OF THE UNFAIR  
27 ) COMPETITION LAW, Business  
28 ) and Professions Code §17200 *et*  
*seq.*; and  
3. BREACH OF EXPRESS  
WARRANTY

**DEMAND FOR JURY TRIAL**

1 Plaintiff Patricia Wiener, by and through her attorneys, brings this action on  
2 behalf of herself and all others similarly situated and the general public against  
3 defendant The Dannon Company, Inc. (“Dannon”). The Court has jurisdiction of this  
4 action pursuant to 28 U.S.C. §1332(d)(2). Plaintiff alleges, on information and belief,  
5 except for information based on personal knowledge, as follows:

### 6 JURISDICTION AND VENUE

7 1. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2).  
8 The matter in controversy, exclusive of interest and costs, exceeds the sum or value of  
9 \$5,000,000 and is a class action in which members of the Class of plaintiffs are  
10 citizens of states different from Dannon. Further, greater than two-thirds of the Class  
11 members reside in states other than the state in which Dannon is a citizen.

12 2. Venue is proper in this Court pursuant to 28 U.S.C. §1391 in that many  
13 of the acts and transactions giving rise to this action occurred in this district and  
14 because defendant:

15 (a) is authorized to conduct business in this district and has  
16 intentionally availed itself of the laws and markets within this district through the  
17 promotion, marketing, distribution and sale of its products in this district;

18 (b) does substantial business in this district; and

19 (c) is subject to personal jurisdiction in this district.

### 20 NATURE OF THE ACTION

21 3. Dannon manufactures, markets and sells yogurt products known as  
22 Activia, Activia Lite and DanActive (collectively, the “Products”). Through an  
23 extensive and comprehensive nationwide marketing campaign, Dannon claims that the  
24 Products are “clinically” and “scientifically” “proven” to provide consumers with  
25 health benefits that other yogurt products cannot. Dannon claims in its advertising  
26 that these exclusive health benefits result from its proprietary strains of “probiotic”  
27 bacteria that are unique to the Products. Dannon’s representations are false,  
28 misleading and reasonably likely to deceive the public.

1           4.       Dannon’s own studies fail to support this advertising message, and a  
2 number of them flatly contradict Dannon’s claims. It is not proven that Dannon’s  
3 proprietary strains of probiotic bacteria deliver the unique health benefits claimed in  
4 its advertising campaign. Nonetheless, as a result of Dannon’s deceptive advertising  
5 campaign, Dannon is able to charge a premium for the Products.

6           5.       Dannon’s misleading marketing campaign begins with deceptive names  
7 for its proprietary strains of bacteria. These names sound scientific, and imply that the  
8 Products deliver the specific claimed health benefits. Dannon’s exhaustive  
9 advertising campaign builds on this deception.

10          6.       In February 2006, Dannon began marketing Activia. On its label and in  
11 its other advertisements, Dannon stated and continues to state that Activia contains the  
12 probiotic bacteria “*Bifidus Regularis*.” It advertised and continues to advertise that  
13 because of this proprietary “probiotic” bacteria, Activia is “proven” to improve one’s  
14 “intestinal rhythm” and “regulate your digestive system.”

15          7.       Less than a year following the release of Activia, in January 2007,  
16 Dannon launched DanActive. On its label and in its other advertisements, it stated  
17 and continues to state that DanActive contains the probiotic bacteria “*L. casai*  
18 *Immunitas*.” It advertised and continues to advertise that because of this “probiotic  
19 bacteria,” DanActive “has been clinically proven to help naturally strengthen the  
20 body’s defenses” and to improve the body’s “immune system.” On each package  
21 label and container, Dannon prominently prints “IMMUNITY.”

22          8.       Dannon’s nationwide advertising campaign has been massive and  
23 comprehensive, spending far more than \$100 million to convey these deceptive  
24 messages to consumers throughout the United States. Described as a “360-degree  
25 marketing plan,” Dannon conveyed and continues to convey its deceptive claims  
26 about the Products through a variety of media, including television, newspapers,  
27 magazines, direct mail, the Internet, in-store sampling, point of sale displays, and on  
28

1 the Products' labels and labeling. On the Internet, Dannon's Activia is the number  
2 one paid listing in the results for "yogurt" on Google.

3 9. Through this massive campaign, Dannon has conveyed one message:  
4 Dannon's proprietary bacteria strains provide the Products with clinically and  
5 scientifically proven health benefits that other yogurt products do not. Each person  
6 who has purchased the Products has been exposed to Dannon's misleading advertising  
7 message multiple times.

8 10. Dannon's advertising and marketing campaign is designed to cause  
9 consumers to buy the Products as a result of this deceptive message, and Dannon has  
10 succeeded. As a result of this campaign, Dannon's "probiotic" launch has been one of  
11 the most successful product launches in recent food-industry history. For example, in  
12 the first year, Activia reached sales numbers that less than one-tenth of one percent of  
13 all new foods and beverages achieve in their first year in the marketplace.

14 11. As a result of the misleading message conveyed through this campaign,  
15 Dannon has been able to, in its words, "justify" a 30% price premium for the Products  
16 over other yogurt products.

17 12. Plaintiff brings this action on behalf of herself and other similarly  
18 situated consumers in the United States to halt the dissemination of this false and  
19 misleading advertising message, correct the false and misleading perception it has  
20 created in the minds of consumers, and to obtain redress for those who have purchased  
21 the Products. Plaintiff alleges violations of the Consumers Legal Remedies Act, the  
22 Unfair Competition Law and breach of the express warranty created by its advertising,  
23 including its labeling.

#### 24 **PARTIES**

25 13. At all times relevant to this matter, plaintiff Patricia Wiener resided and  
26 continues to reside in this district. During the Class period, plaintiff was exposed to  
27 and saw Dannon's claims, purchased some of the Products in reliance on these claims,  
28

1 and suffered injury in fact and lost money as a result of the unfair competition  
2 described herein.

3 14. Defendant Dannon is incorporated in the state of Delaware and is  
4 headquartered in White Plains, New York. Dannon is registered to do business in the  
5 State of California, and does business in the State of California. Dannon promotes,  
6 markets, distributes and sells the Products throughout the United States, including to  
7 tens of thousands of consumers in California. Dannon is a wholly owned subsidiary  
8 of the French company, Danone Group S.A. (“Danone Group”).

9 **FACTUAL ALLEGATIONS**

10 15. On October 19, 2005, Dannon announced the February 2006 release of  
11 Activia, “trailblazing a new way to help Americans improve their intestinal rhythm.”  
12 Dannon was “thrilled to introduce the first-of-its-kind probiotic yogurt in the U.S.  
13 clinically proven to help regulate your digestive system.” Since that time, Dannon has  
14 consistently conveyed the message to consumers throughout the United States that its  
15 proprietary probiotic bacteria is “clinically” and “scientifically” “proven” to deliver  
16 health benefits, claims which are not substantiated, let alone established as fact. In  
17 January 2007, Dannon used the same marketing message when it launched  
18 DanActive, claiming that its proprietary probiotic bacteria is proven to “strengthen”  
19 one’s “defenses” and improve one’s “immune system.”

20 16. While scientists have not agreed on a common definition, the Food and  
21 Agricultural Division of the United Nations and the World Health Organization define  
22 probiotics as “live microorganisms which when administered in adequate amounts,  
23 confer a health benefit on the host.” There is no scientific consensus about whether  
24 healthy people benefit from probiotic bacterial supplements, such as those at issue. If  
25 probiotic bacteria do have any health benefits, they must survive the digestive tract in  
26 sufficient quantities to achieve the possible benefit. However, there is no consensus  
27 on the quantities of probiotics people might require to achieve a probiotic effect, if  
28 probiotics have any such effect in healthy people.



1 22. The label on each container of Activia substantially appears as follows:



12 23. The label on each carton of Activia substantially appears as follows:



23 24. On every Activia label, Dannon also prominently claims:  
24 “**CLINICALLY PROVEN** to help in two weeks, when eaten daily” and “contains  
25 natural probiotic culture – **Bifidus Regularis™** – only in Activia®.” The labeling  
26 promotes Activia as “[t]he delicious way to help naturally regulate your digestive  
27 system” and claims that “Activia® is scientifically proven to help reduce long  
28

1 intestinal transit time,” which benefits the digestive system. The labeling also  
2 contains the following claims:

3 **Frequently Asked Questions**

4 **Q. What is Activia™?**

5 A. Dannon® Activia™ is a delicious lowfat yogurt with the  
6 natural probiotic culture Bifidus Regularis™. Activia™ is clinically  
7 proven to help regulate your digestive system when eaten daily for two  
8 weeks by helping to reduce long intestinal transit time.

9 **Q. What are probiotics?**

10 A. The word probiotic literally means “for life.” Essentially, a  
11 probiotic is a culture that, if eaten in sufficient quantities, provides a  
12 positive benefit for the host that goes beyond primary nutritional effects.

13 **Q. What is Bifidus Regularis™?**

14 A. Bifidus Regularis is a probiotic culture scientifically proven  
15 to survive passage through the digestive system, arriving into the large  
16 intestine as a live culture that stays active.

17 **Q. How long until I will feel a difference from Activia™?**

18 A. Activia is clinically proven to naturally regulate your  
19 digestive system in two weeks when eaten daily.

20 Dannon did not and does not have substantiation for these statements, which are false  
21 and misleading and reasonably likely to deceive the average consumer.

22 25. Dannon deceptively describes Bifidus Regularis on its activia.com  
23 webpage. This website is accessible to the general public and Dannon’s  
24 advertisements in other media promote this website. Without sufficient testing or  
25 adequate substantiation, Dannon makes the following claims:

26 **What It Does**

27 Specialists at Dannon® selected Bifidus Regularis™ for Activia®  
28 because it survives passage through the digestive tract, arriving in the

1 colon as a living culture. Once there, it plays a beneficial role in your  
2 intestinal ecosystem.

3 **Two Weeks Can Make a Difference** Eating, as part of a balanced  
4 diet and healthy lifestyle, Activia every day for two weeks delivers  
5 enough Bifidus Regularis™ to help regulate your digestive system by  
6 helping with slow intestinal transit. And continuing to eat Activia will  
7 maintain that benefit. Try it.

8 26. Dannon's Activia television commercials convey the same message  
9 conveyed by Dannon in other media. A typical Activia television commercial claims:  
10 "Eating Activia® everyday is clinically proven to help regulate your digestive system  
11 in two weeks."

12 27. Television commercials for Activia have aired regularly across the  
13 country since the launch of Activia. The first television advertisements began in  
14 February 2006 on broadcast networks and on cable channels that skew more heavily  
15 towards female viewers, such as the Lifetime channel and Food Network.

16 28. To reinforce the deceptive message, and in accordance with its pre-  
17 determined marketing plan, Dannon began in the fall of 2006 to tout a money-back  
18 guarantee offer which it named the "Activia Challenge." This part of Dannon's  
19 marketing campaign was included in all of the forms of media Dannon has used.

20 1st Woman: Sometimes I feel irregular and bloated.

21 2nd Woman: Does that ever happen to you?

22 3rd Woman: Not lately. I took the Activia challenge.

23 4th Woman: Eat it every day for two weeks.

24 5th Woman: It works or it's free.

25 Announcer: Seems everyone's talking about the Activia two week  
26 challenge. Activia with the natural culture *Bifidus*  
27 *Regularis* is clinically proven to help naturally regulate  
28 your digestive system in two weeks.

1 6th Woman: Mmmmm, heard about the Activia challenge?

2 7th Woman: I told you. [Laughter]

3 Announcer: Activia, it works or it's free.

4 29. In addition to making untested and unsubstantiated claims, Dannon's  
5 nationwide advertising claim that "it works or its free" is likely to deceitfully induce a  
6 placebo effect on consumers, irrespective of any actual probiotic effect.

7 30. Dannon's claims that "eating probiotic foods like Activia® . . . has been  
8 clinically proven to help regulate your digestive system" and that Activia is clinically  
9 proven to help "bloating, heaviness, and difficult and painful defecation," are also  
10 false and misleading. Dannon does not have adequate substantiation for these claims  
11 as they relate to the general public. Further, for some, Activia actually worsens  
12 conditions affiliated with the digestive system. For example, after consumers with  
13 irritable bowel syndrome try yogurt products such as Activia, the products can make  
14 them feel worse.

#### 15 **DANNON'S CLAIMS ABOUT DANACTIVE**

16 31. Less than one year following the release of Activia, in January 2007,  
17 Dannon launched DanActive, a "cultured probiotic dairy drink that has been clinically  
18 proven to help naturally strengthen the body's defenses when consumed daily."  
19 Dannon's chief marketing officer predicted "that DanActive will be the next  
20 blockbuster." On the strength of Dannon's deceptive marketing campaign, this  
21 prediction became a reality.

22 32. As with Activia, Dannon conveys that DanActive can provide clinically  
23 and scientifically proven health benefits that other similar products cannot because it  
24 contains proprietary probiotic bacteria. Dannon's marketing for DanActive claims  
25 that the bacteria "*L. casei* Immunitas™," found only in DanActive, is "clinically  
26 proven to help strengthen your body's defenses" and "has a physiological effect on  
27 our body's regular natural defense functions." Dannon unequivocally claims that "[i]t  
28 is due to DanActive™ and its *L. casei* Immunitas™ contribution to the intestine's 3

1 defense levels that our body is more efficient in responding against small daily  
2 challenges.”

3 33. *L. casei* Immunitas is Dannon’s trademarked probiotic *L. casei* strain  
4 DN-114 001. Just as with its use of “Regularis” in Activia, Dannon’s marketing  
5 department chose the “Immunitas” name to imply scientific certainty and give  
6 credibility to Dannon’s claims when in fact Dannon does not have adequate  
7 substantiation for the claims.

8 34. The average consumer, unaware that Immunitas is nothing more than  
9 Dannon’s cleverly developed marketing name, is led to believe that Dannon’s strain  
10 will improve one’s immune system and protect against developing disease and illness.  
11 The Latinate “Immunitas” is nothing more than Dannon’s deceptive attempt to  
12 suggest scientific derivation.

13 35. Dannon claims that DanActive is for “everybody who wishes to  
14 strengthen his body’s defenses.” However, there is no adequate support for this claim.  
15 In fact, one of Dannon’s own studies concluded that DanActive did not perform better  
16 than traditional yogurt.

17 36. On DanActive labels and labeling, Dannon also prominently states:  
18 “Clinically Proven To Help Strengthen Your Body’s Defenses.”  
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1 **What makes DanActive™ work?**

2 A key ingredient in DanActive™ is its exclusive *L. casei*  
3 Immunitas™ culture. Each bottle of DanActive™ contains 10 billion *L.*  
4 *casei* Immunitas™ cultures. These cultures remain active in the  
5 digestive tract where they have a positive effect on your digestive tract’s  
6 immune system. Evidence from many studies demonstrate that daily  
7 consumption of DanActive™ with *L. casei* Immunitas™ helps  
8 strengthen your body’s defenses.

9 **What are probiotics?**

10 The word probiotic literally means “for life.” Essentially, a  
11 probiotic is a culture that, if eaten in sufficient quantities, gives health  
12 benefits beyond basic nutrition.

13 39. Dannon claims that DanActive will improve everyone’s immune system,  
14 including those of young children, older children, adults and seniors. For example, an  
15 advertisement on danactive.com represents that DanActive helps the daily lives of the  
16 whole family:

- 17 • Sam, 6 years old, reports “My mom says DanActive helps our  
18 bodies stay alert against challenges.”



- Claire, 12 years old, has a stressful and hectic lifestyle because of homework and chores, but she stays healthy because “DanActive helps me strengthen my body’s defenses.”

A day in her life  
Her DanActive  
Her seasons

**Claire, 12 years old**

Hey, I'm Claire and I love my life... most of the time!

The worst is homework and chores; the fun is friends, sports, creative activities, playing, dancing...

I'm crazy busy all the time, I have a stressful and hectic lifestyle which may run me down, so DanActive helps me strengthen my body's defenses...

So, anything exciting to do?

**OUR ADVICE**  
"A child's life is filled with fun, adventure and activities. We don't always notice, but they are exposed to increasing pressure."  
Learn more

- Rachel, 36 years old, has a mother’s typical life of “kids, traffic, work, stress, groceries, home” where “[e]ven eating and sleeping seem to become secondary.” But, she stays fit and healthy because “DanActive helps me keep my balance and my defenses at their best.”

A day in her life  
Her DanActive  
Her seasons

**Rachel, 36 years old**

Hello, I'm Rachel!

Unless you're a mother, chances are, you won't understand what a day in my life is really like: kids, traffic, work, stress, groceries, home...

Even eating and sleeping seem to become secondary. DanActive helps me keep my balance and my defenses at their best.

I can't stop running, but can still take DanActive... and if I forget, Sam opens the fridge and hands me one, because he'll never leave without it.

**OUR ADVICE**  
"An active life provides challenges and a lot of interest, but also a constant stress and pressure of managing both home and work."  
Learn more

- Grandparents Anne and Louis are at a “vulnerable” age and “take DanActive to help strengthen [their] body’s natural defenses.”

A day in their life  
Their DanActive  
Their Seasons

**Anne and Louis**

My name is Anne, and this is my dear husband, Louis.

We know that we are more vulnerable at our age but there's so much to take advantage of at this point in life that we need to stay in shape: we want to see our kids, our grandkids and see the world!

That's why we keep moving to stay fit and take DanActive to help strengthen our body's natural defenses!

**OUR ADVICE**  
"When reaching a certain age we have the opportunity to live more fully our personal passions and enjoy family."

1           40.    The following typical Dannon television commercial conveys the same  
2 message regarding the health benefits of DanActive:

3           Father:     [Reading newspaper at breakfast and sitting with his  
4                           family.] It says hear that stress [pause] can weaken our  
5                           immune system.

6           Daughter: [Opening refrigerator and reading a DanActive box.] And  
7                           about 70% of our immune system is in our digestive tract.  
8                           [Bottom of screen reads: 70%. About 70% of your immune  
9                           system is in your digestive tract.].

10          Father:     Right, apparently a culture called *L. casei* Immunitas can  
11                           help. It's clinically proven to help strengthen your body's  
12                           defense system.

13          Daughter: [While mother is pictured drinking DanActive.] Only  
14                           DanActive has *L. casei* Immunitas.

15          Father:     [While son is pictured drinking DanActive.] We should try  
16                           this DanActive.

17          Announcer: New DanActive. Help strengthen your body's defenses.

18           41.    Dannon also conveys in its print and other advertising that DanActive is  
19 clinically and scientifically proven to benefit students under the stress of exams, build  
20 seniors' resistance to infections, and improve the body's "defense response" during  
21 periods of "intense exercise." These statements are not adequately supported by the  
22 scientific evidence or otherwise substantiated.

23           42.    Dannon's statements about the ability of its proprietary strains of bacteria  
24 to survive the gastrointestinal system in sufficient numbers to have probiotic effects  
25 are also unsubstantiated, false and misleading.

26           43.    No bacteria of the type at issue has been found to survive the  
27 gastrointestinal tract without the loss of a high percentage of the bacteria.

28

1           44.     Nonetheless, Dannon claims that all of its purportedly probiotic bacteria  
2 survive. For example, on every package of DanActive sold it states: “Each bottle of  
3 DanActive contains 10 billion *L. casei* Immunitas™ cultures. These cultures remain  
4 active in the digestive tract where they have a positive effect on your digestive tract’s  
5 immune system.” In one of its own studies, Dannon concedes that only 10%-51.2%  
6 of the cultures survived in the small intestine and just 28.4% in feces. Further, the  
7 actual data in this study supports the conclusion that even less than these amounts  
8 survive the intestinal tract. Activia’s survival rate claims are similarly misleading.  
9 Contrary to Dannon’s claim that “many” of the “billions of natural *Bifidus*  
10 *Regularis*™ cultures” survive and remain active in the digestive tract, a *Consumer*  
11 *Reports* test (Dannon Activia August 2006) found that of the original three billion  
12 cultures of *Bifidus Regularis* in a 4-ounce serving of Activia only three million  
13 cultures survived to the colon.

14                           **DANNON’S OWN SUBSTANTIATION DEMONSTRATES**  
15                           **THE FALSITY OF ITS CLAIMS**

16           45.     According to a June 2006 report on probiotics published by the American  
17 Academy of Microbiology – a project which received financial support from Dannon  
18 itself – “there is no conclusive evidence that altering the microbiota of a healthy  
19 human adult is beneficial.” The report, entitled “Probiotic Microbes: The Scientific  
20 Basis,” was prepared by the American Academy of Microbiology, a leadership group  
21 of the American Society of Microbiology, which is the leading professional  
22 association of microbiologists.

23           46.     Dannon deceptively conveys the marketing message that the Products  
24 have been clinically proven by “many studies” to deliver unique benefits, and by  
25 citing to 25 to 30 clinical studies, depending on when the claim was made.

26           47.     A typical example of Dannon’s reference to studies occurred on  
27 August 30, 2007, when Dannon aired a DanActive television advertisement that ended  
28 by stating at the top of the screen “25 studies of DanActive and Lactobacillus

1 Immunitas” with “Clinically proven” at the lower right. As with the rest of the subject  
2 marketing campaign, Dannon intended to convey the message that its claims have  
3 been clinically proven by 25 scientifically reliable studies performed on humans.  
4 Dannon claims that 30 publications substantiate its claims. Of these 30, two were  
5 duplicate studies and one was a review, leaving 27 separate studies. Less than half of  
6 these 27 studies were conducted on people and could rightfully be called clinical  
7 studies. (According to the National Institutes of Health, a clinical study is “a type of  
8 research study that tests how well new medical approaches work in people.”) Ten of  
9 the 27 studies were conducted in animals and six were *in vitro*, meaning in neither  
10 animal or human. Only eleven studies involved people and only four of these looked  
11 at whether DanActive could prevent illness. None of these four studies provided by  
12 Dannon show that DanActive prevents illness in healthy adults. *In vitro* and animal  
13 testing are the basis for the majority of Dannon’s “clinical” studies of DanActive.  
14 This type of testing does not, and cannot, provide an adequate basis for the claims that  
15 Dannon makes for the effect of DanActive in people. According to a report of a Joint  
16 FAO/WHO Working Group on Drafting Guidelines for the Evaluation of Probiotics in  
17 Food (FAO Food and Nutrition, 2002), while *in vitro* tests “are critical to assess the  
18 safety of probiotic microbes,” the currently available tests “are not fully adequate to  
19 predict the functionality of probiotic microorganisms in the human body.” The  
20 Working Group encourages the study of probiotics in animals in those cases where  
21 appropriate animal models exist, but animal studies are not a substitute for human  
22 trials.

23 48. According to the report of a Joint FAO/WHO Working Group on  
24 Drafting Guidelines for the Evaluation of Probiotics in Food (FAO Food and  
25 Nutrition, 2002): “Probiotics for human use will require substantiation of efficacy  
26 with human trials. . . . The principal outcome of efficacy studies on probiotics should  
27 be proven benefits in human trials, such as statistically and biologically significant  
28

1 improvement in condition, symptoms, signs, well-being or quality of life; reduced risk  
2 of disease or longer time to next occurrence; or faster recovery from illness.”

3 49. Dannon’s claims about the benefits of DanActive are not substantiated by  
4 its own studies. Despite Dannon’s advertisements and websites depicting the benefits  
5 of DanActive in healthy children and adults, few of its studies looked at healthy  
6 children and adults and only one tested whether DanActive could keep healthy people  
7 well.

8 50. Dannon’s claim that DanActive benefits students under stress is not  
9 substantiated by its one study in students. Dannon claims that DanActive “helped to  
10 improve the body’s production of defense cells in situation of intense intellectual  
11 stress during exams periods.” In its one study, DanActive had no effect on stress,  
12 since stress increased equally in both DanActive consumers and placebo consumers.  
13 And this study provides no evidence that the effect of DanActive on lymphocytes and  
14 CD56 cells was significant enough to matter. The study did not compare illness rates  
15 between those consuming DanActive and those consuming a placebo.

16 51. Likewise, Dannon’s claim that numerous studies substantiate the ability  
17 of DanActive to build seniors’ resistance to infections is not substantiated by its one  
18 study in healthy adults. Dannon researchers gave older Italian men and women  
19 DanActive to drink every day for three weeks in an “open pilot” study, meaning they  
20 knew they were taking something that might help them. Nevertheless, they were just  
21 as likely to get colds or gastrointestinal illnesses as a comparable group of seniors who  
22 did not drink DanActive. Rather than conclude that DanActive improved seniors’  
23 resistance, the Dannon researchers recommended doing a larger, double-blind study.

24 52. Similarly, Dannon’s claim that DanActive improves the body’s defense  
25 response during periods of “intense exercise” is not based on 25 to 30 studies, but on a  
26 single study in which competitive athletes consumed the equivalent of five bottles of  
27 DanActive – five times the recommended amount of DanActive. Researchers did not  
28

1 determine whether the lesser decrease in Natural Killer (NK) cells in DanActive  
2 drinkers was significant enough to protect the athletes from getting sick.

3 53. Likewise, Dannon's commercials, print advertisements, Internet  
4 advertisements, and labels all claim that Activia with *Bifidus Regularis* is "for anyone  
5 who wants to help naturally regulate their digestive system." However, Dannon  
6 reveals in its Scientific Summary for Health Care Professionals that "[i]n subjects  
7 whose digestive system functions regularly, no marked change or risk of diarrhea was  
8 observed." See [http://www.activia.us.com/pdf/Act\\_scientific\\_summary.pdf?v1](http://www.activia.us.com/pdf/Act_scientific_summary.pdf?v1).

9 54. For example, as part of its message about Activia's benefits to the  
10 digestive system, Dannon says that it has found that "slow intestinal transit is a source  
11 of true discomfort for a large proportion of the population and results in daily distress"  
12 and that "some of the symptoms include bloating, heaviness, and difficult and painful  
13 defecation." However, Dannon never studied this. In none of the four human studies  
14 of Activia did researchers ask the participants if Activia helped relieve bloating,  
15 heaviness, or difficult and painful defecation, so Dannon's studies do not show that  
16 Activia can relieve the symptoms described in their advertisements and on their  
17 website. As even one of Dannon's studies' notes, among the data concerning the  
18 effects of Activia by Danone Group and its specific proprietary strain on intestinal  
19 transit, there are currently relatively few results available concerning the relationship  
20 between intestinal transit and bifidobacteria.

21 55. Despite inadequate and inapposite testing, Dannon continues to  
22 unequivocally claim that because of its specially formulated and unique bacteria in the  
23 Products, the Products are clinically and scientifically proven to deliver health benefits  
24 other yogurt products cannot.

### 25 **DANNON'S MARKETING SUCCESS**

26 56. Despite merely providing the benefits of traditional yogurt products,  
27 Dannon's Products cost significantly more than traditional yogurt. For example,  
28 *Consumer Reports* found that Activia costs about 30% more per ounce than Dannon's

1 own traditional yogurt. Through the uniform deceptive and misleading marketing  
2 campaign, Dannon leads consumers to believe that the scientifically and clinically  
3 proven probiotic benefits “justify” the price differential.

4 57. Through its marketing campaign, Dannon set out to not merely sell its  
5 Products, but to sell them at a premium by creating a compelling story about its  
6 “probiotic” bacteria. Because of its claims, Dannon was able to, in its own words,  
7 justify the premium charged for its Products over other yogurt products. Dannon’s  
8 chief marketing officer explained: “To justify this type of price increase, you have to  
9 have a relevant offer and the marketing has to tell the story.” Franck Riboud, Danone  
10 Group’s Chairman and CEO, echoed these sentiments. The CEO stated that his goal  
11 was to “cannibalize” the regular Dannon yogurt market in exchange for the higher  
12 profit margins afforded by the so-called “blockbuster” product, Activia:

13 I’m very pleased to organize a cannibalization between a plain yoghurt  
14 and Activia. Please switch all of you from the plain yoghurt to Activia.

15 I will find [inaudible] solution for the plain yoghurt, but I am making  
16 more money on Activia than the plain yoghurt.

17 58. Dannon’s CEO acknowledged that the success of Activia depended not  
18 on the proven benefits of the product, but rather on how effective their advertising  
19 proved. Addressing analysts, he stated:

20 The success of Activia is not coming from the product itself. The  
21 probiotic, everybody knows now about probiotic all over the world. The  
22 success is coming from the way you launch the product, how do you  
23 enrich the product, the marketing . . . .

24 59. As one financial analyst wrote in describing the subject advertising  
25 campaign: “Like antioxidants, most Americans don’t understand what probiotics  
26 actually do. But, it’s a great marketing word.” To accomplish this goal – persuading  
27 consumers to switch from a less expensive yogurt product – Dannon had to paint a  
28

1 compelling story that all persons would enjoy the Products' added and exclusive  
2 health benefits. The story Dannon's marketing tells is more fiction than fact.

3 60. Dannon spent over \$100 million from January 2006 through July 2007 on  
4 the subject advertising campaign. As a result of this campaign, the sale of the  
5 Products skyrocketed. The response from retailers and consumers has exceed  
6 Dannon's expectations. Activia accounted for \$128 million of Dannon's \$678 million  
7 yogurt sales in 2006. That number was expected to reach \$300 million by the end of  
8 2007.

9 61. Dannon's "probiotic" yogurt advertising launch was one of the most  
10 successful product launches in recent food-industry history. For example, in the first  
11 year, Activia reached sales that less than one-tenth of one percent of all new foods and  
12 beverages achieve in their first year in the marketplace. Further, within six months of  
13 launch, Activia alone had achieved a remarkable 70% to 80% aided awareness among  
14 all consumers, not just Dannon customers.

### 15 **CLASS ACTION ALLEGATIONS**

16 62. Plaintiff brings this lawsuit on behalf of herself and the proposed  
17 plaintiff Class members under Rule 23(b)(2) and (3) of the Federal Rules of Civil  
18 Procedure. The proposed Class consists of:

19 All persons who purchased in the United States DanActive or Activia or  
20 Activia Lite. Excluded from the Class are defendant's officers, directors  
21 and employees and those who purchased the Products for the purpose of  
22 resale.

23 63. The Class comprises many tens of thousands of consumers  
24 throughout California and the United States. The Class is so numerous that joinder  
25 of all members of the Class is impracticable. There are questions of law and fact  
26 common to the Class. The common questions include:

27 (a) whether Dannon had adequate substantiation for its claims prior to  
28 making them;

1 (b) whether the claims discussed above are true, or are misleading, or  
2 reasonably likely to deceive;

3 (c) whether Dannon's alleged conduct violates public policy;

4 (d) whether the alleged conduct constitutes violations of the laws  
5 asserted herein;

6 (e) whether Dannon engaged in false or misleading advertising;

7 (f) whether plaintiff and Class members have sustained monetary loss  
8 and the proper measure of that loss;

9 (g) whether plaintiff and Class members are entitled to an award of  
10 punitive damages; and

11 (h) whether plaintiff and Class members are entitled to declaratory and  
12 injunctive relief.

13 64. Plaintiff's claims are typical of the claims of the proposed Class, and  
14 plaintiff will fairly and adequately represent and protect the interests of the proposed  
15 Class. Plaintiff does not have any interests antagonistic to those of the Class.  
16 Plaintiff has retained counsel competent and experienced in the prosecution of this  
17 type of litigation. The questions of law and fact common to the Class members,  
18 some of which are set out above, predominate over any questions affecting only  
19 individual Class members.

20 65. A class action is superior to other available methods for the fair and  
21 efficient adjudication of this controversy. The expense and burden of individual  
22 litigation would make it impracticable or impossible for proposed Class members to  
23 prosecute their claims individually. The trial and the litigation of plaintiff's claims  
24 is manageable.

25 66. Unless a class is certified, defendant will retain monies received as a  
26 result of its conduct that was taken from plaintiff and proposed Class members.  
27 Unless a classwide injunction is issued, defendant will continue to commit the  
28

1 violations alleged, and the members of the Class and the general public will continue  
2 to be misled.

3 67. Dannon has acted and refused to act on grounds generally applicable to  
4 the Class, making appropriate final injunctive relief with respect to the Class as a  
5 whole.

6 **COUNT I**

7 **For Violations of the Consumers Legal Remedies Act –**  
8 **Civil Code §1750 *et seq.* on Behalf of Plaintiff and the Class**

9 68. Plaintiff realleges and incorporates by reference the allegations contained  
10 in the paragraphs above as if fully set forth here.

11 69. This cause of action is brought pursuant to the Consumers Legal  
12 Remedies Act, California Civil Code §1750, *et seq.* (the “Act”). Plaintiff is a  
13 consumer as defined by California Civil Code §1761(d). The Products are goods  
14 within the meaning of the Act.

15 70. Dannon violated and continues to violate the Act by engaging in the  
16 following practices proscribed by California Civil Code §1770(a) in transactions with  
17 plaintiff and the Class which were intended to result in, and did result in, the sale of  
18 the Products:

19 (5) Representing that [the Products have] . . . characteristics, . . . uses  
20 [or] benefits . . . which they do not have . . . .

21 \* \* \*

22 (7) Representing that [the Products] are of a particular standard,  
23 quality or grade . . . if they are of another.

24 \* \* \*

25 (9) Advertising goods . . . with intent not to sell them as advertised.

26 \* \* \*

27 (16) Representing that [the Products have] been supplied in accordance  
28 with a previous representation when [they have] not.



1 violating California Civil Code §§1572, 1573, 1709, 1710, 1711, 1770, Business &  
2 Professions Code §17200 *et seq.*, California Health & Safety Code §110765, and the  
3 common law.

4 78. Plaintiff and the Class reserve the right to allege other violations of law  
5 which constitute other unlawful business acts or practices. Such conduct is ongoing  
6 and continues to this date.

7 79. California Business & Professions Code §17200 also prohibits any  
8 “unfair . . . business act or practice.”

9 80. Dannon’s acts, omissions, misrepresentations, practices and non-  
10 disclosures as alleged herein also constitute “unfair” business acts and practices within  
11 the meaning of Business & Professions Code §17200 *et seq.* in that its conduct is  
12 substantially injurious to consumers, offends public policy, and is immoral, unethical,  
13 oppressive, and unscrupulous as the gravity of the conduct outweighs any alleged  
14 benefits attributable to such conduct.

15 81. As stated in this Complaint, plaintiff alleges violations of consumer  
16 protection, unfair competition and truth in advertising laws in California and other  
17 states resulting in harm to consumers. Plaintiff asserts violation of the public policy  
18 of engaging in false and misleading advertising, unfair competition and deceptive  
19 conduct towards consumers. This conduct constitutes violations of the unfair prong of  
20 California Business & Professions Code §17200 *et seq.*

21 82. There were reasonably available alternatives to further Dannon’s  
22 legitimate business interests, other than the conduct described herein.

23 83. Business & Professions Code §17200 also prohibits any “fraudulent  
24 business act or practice.”

25 84. Dannon’s claims, nondisclosures and misleading statements, as more  
26 fully set forth above, were false, misleading and/or likely to deceive the consuming  
27 public within the meaning of Business & Professions Code §17200.

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