JUDGE BRICCETTI **12 CIV 6901**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KRISTIE CONROY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

THE DANNON COMPANY, INC.,

Defendant.

CLASS ACTION COMPLAINT

CASE NO. _____

Plaintiff Kristie Conroy brings this action on behalf of herself and all others similarly situated against Defendant The Dannon Company, Inc. ("Dannon"). Plaintiff makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to the allegations specifically pertaining to herself and her counsel, which are based on personal knowledge.

NATURE OF THE ACTION

1. This is a class action lawsuit on behalf of purchasers of Dannon Activia, Activia Light, Activia Parfait, Activia Fiber, and Activia 24 oz. Tubs (collectively, "Activia"). Each of these products is labeled and marketed as "YOGURT," "LOWFAT YOGURT," or "NONFAT YOGURT." However, each of these products contains filler materials, such as water, corn starch, and Milk Protein Concentrate ("MPC"). The U.S. Food and Drug Administration ("FDA") has prohibited the use of these filler materials in yogurt. Because Activia contains these banned additives, as a matter of federal law it is not yogurt. It is a misbranded product, and it cannot legally be sold in the United States.

2. Even worse, MPCs are not Generally Recognized As Safe by the FDA, nor do they appear in the FDA's larger list of food additives, Everything Added to Food in the United States ("EAFUS"). In fact, the FDA has specifically banned MPCs from use as an ingredient in yogurt. Because Activia contains MPCs, it is an adulterated product.

3. Yogurt is created by fermenting milk with food-grade bacteria. During fermentation, the milk thickens and acidifies, giving yogurt its texture and tart flavor. It takes one gallon of milk to produce a gallon of regular yogurt. One cup of yogurt is one cup of fermented milk.

4. But Activia is different, because it is not made the way yogurt is supposed to be made. Unlike other brands, Dannon adds water and fillers to Activia in order to make a cheaper product. These filler materials include food starch, corn starch, acacia gum, xanthan gum, gelatin, inulin, and MPCs. The result is a product that appears to be yogurt, but in fact is not yogurt at all.

5. Just as the mineral pyrite resembles gold, Activia resembles yogurt. But fool's gold is not gold. And Activia is not yogurt.

6. Nevertheless, Dannon sells Activia as authentic yogurt. Doing so enables it to charge a substantial price premium. Just as real gold commands a price premium over fool's gold, authentic yogurt commands a higher price in the marketplace than imitation dairy products. In fact, the price premium for Activia is even larger, because Activia has no value whatsoever. The product is misbranded and adulterated, and it cannot legally be sold at any price. It is worthless.

7. Plaintiff is a purchaser of Activia who thought she was buying authentic yogurt. She had no idea that she was sold an illegal and adulterated product that was not, in fact, yogurt. Plaintiff asserts claims on behalf of herself and a nationwide class of purchasers of Activia, for breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, unjust enrichment, violation of New York Gen. Bus. Law § 349, violation of New York Gen. Bus. Law § 350, negligent misrepresentation, and fraud.

PARTIES

8. Plaintiff Kristie Conroy is a citizen of New York who resides in Long Beach, New York. Between 2009 and 2012, Plaintiff Conroy purchased vanilla-flavored Activia once

or twice per year from a Waldbaums supermarket in Long Beach and at various Stop & Shop stores on Long Island. She purchased Activia in packages of 4 single-serving containers and paid approximately $3.29. Activia's label identifies the product as "LOWFAT YOGURT" on the front of each package. Plaintiff Conroy read and understood these representations and believed she was purchasing (i) yogurt, (ii) that was not misbranded, (iii) that was not adulterated, and (iv) that was legal for sale in the United States. Plaintiff Conroy relied on these representations and warranties in deciding whether to purchase Activia, and these representations and warranties were part of the basis of the bargain, in that she would not have purchased Activia if she had known that any of these representations were false. Plaintiff Conroy also understood that in making the sale, the retailer was acting with the knowledge and approval of Dannon and/or as the agent of Dannon. She understood that the purchase involved a direct transaction between herself and Dannon, because Activia's packaging contains promises and representations by Dannon regarding the nature and quality of the product. Plaintiff Conroy purchased a misbranded and adulterated product that is not legal to sell in the United States. She also paid a price premium due to Activia's purported status as a yogurt product. The amount of the price premium can be reasonably quantified by an appropriate market study of the prices for comparable dairy products, or through a contingent valuation study, or through other means regularly employed by economic and valuation experts.

9. Defendant The Dannon Company, Inc. ("Dannon") is a Delaware corporation with its principal place of business in White Plains, New York. Dannon manufactures and sells a variety of consumer dairy products, including Activia, DanActive, Danimals, Dannon Fruit on the Bottom, Dannon Oikos, and Dannon Light & Fit. Dannon boasts on its corporate website that it is the "[b]est-selling brand of yogurt worldwide" and "[o]ne of the top two yogurt producers in the U.S."

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367 because this

case is a class action where the aggregate claims of all members of the proposed class are in excess of $5,000,000.00, exclusive of interest and costs, and most members of the proposed Class are citizens of states different from Dannon. In 2009, Dannon sold $505 million worth of Activia nationwide.[1]

11. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this District. Plaintiff Conroy is a citizen of New York, resides in this District, and purchased Activia in this District. Moreover, Dannon maintains its principal place of business in this District and has distributed, advertised, and sold Activia, which is the subject of the present complaint, in this District.

FACTUAL ALLEGATIONS

How Regular Yogurt Is Made

12. Yogurt is a dairy product that is produced by the fermentation of milk. When certain types of food-grade bacteria are added to milk, they ferment the milk's lactose (milk sugar) to produce lactic acid. The lactic acid acidifies the milk, which causes it to coagulate and thicken. This acidity gives yogurt its tangy flavor. Yogurt has a longer shelf life than milk, as it is inhospitable to destructive bacteria.

13. Humans have consumed yogurt for thousands of years. Anthropologists and historians believe yogurt originated in Central Asia during the Neolithic age, probably around 5,000 B.C. in Mesopotamia. In this period, milk was stored in bags made from the stomach lining of domesticated animals, where naturally-occurring bacteria and digestive fluids resulted in fermentation. The oldest confirmed writing of yogurt dates to the First Century, when Pliny the Elder of Rome wrote that the "barbarous nations" understood "how to thicken milk and form therefrom an acrid kind of milk with a pleasant flavour." In the Eleventh and Twelfth Centuries, Genghis Khan sustained his armies on yogurt rations. More recently, yogurt was popularized in

[1] Maureen Morrison, *Could FTC Settlement Derail Activia's Advertising?*, AD AGE, Dec. 17, 2010, http://adage.com/article/news/ftc-settlement-derail-activia-s-advertising/147746/.

the United States in the 1950's and 1960's, where health-conscious consumers learned of its nutritional benefits.

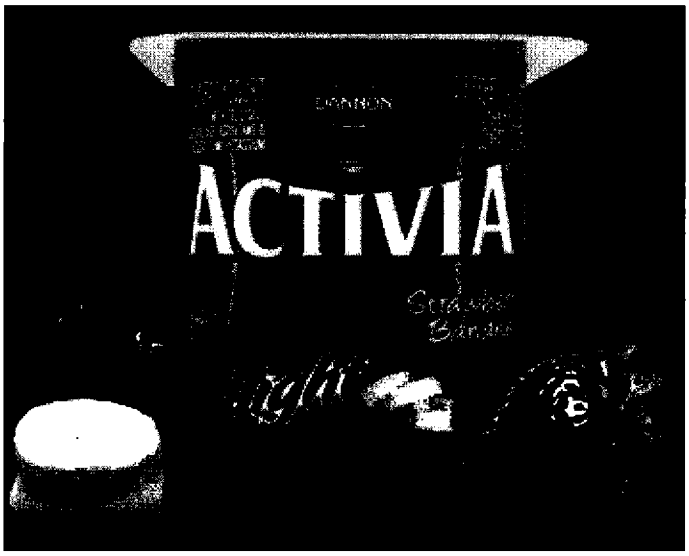
14. Yogurt manufacturing today is simple and standardized. First, the milk's fat content is reduced. Second, the milk is heated and homogenized. This process pasteurizes the milk to remove harmful bacteria, and denatures the protein to prevent the creation of clumps (curds). Third, the milk is cooled to 109.4 to 114.8°F and food-grade bacterial cultures are added, typically *Lactobacillus delbrueckii* subsp. *bulgaricus* or *Streptococcus salivarius* subsp. *thermophilus*. Fourth, the temperature is maintained for three to four hours, and fermentation occurs. The bacteria consume lactose and produce lactic acid, which thickens and acidifies the milk. Finally, when the desired pH is achieved, the product is ready for packaging.

15. Unfortunately, Dannon took a shortcut. Instead of making yogurt by traditional methods, Activia is made with water and "fillers," including food starch, corn starch, gelatin, xanthan gum, and MPCs. Dannon added these cheap filler materials to avoid the expense of making real yogurt.

Dannon Represents That Activia Is "YOGURT," But It Adds Prohibited Ingredients To Cut Costs

Dannon Represents That Activia Is Yogurt

16. Dannon represents that Activia is "YOGURT," "LOWFAT YOGURT," and "NONFAT YOGURT." This representation appears on the front of each package:



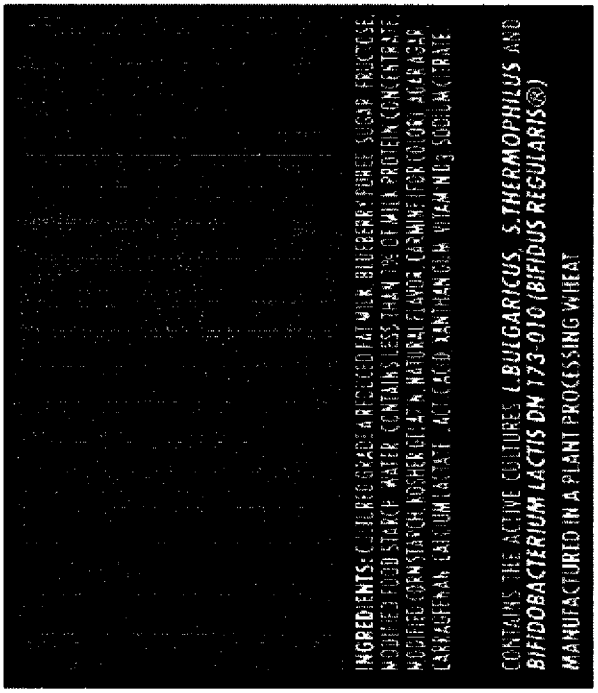
17. Additionally, Dannon's website represents that Activia is yogurt. In the product description page for Activia, Dannon writes: "Enrich your day with a delicious, creamy Activia lowfat yogurt. Rich in flavor and made with our exclusive probiotic culture, Bifidus Regularis® (*Bifidobacterium lactis* DN-173 010), Activia will please your taste buds and your tummy by helping to regulate your digestive system." *See* http://www.activia.us.com/products/activia.

18. The FAQ on Dannon's website states that "Activia is a lowfat yogurt with 120 calories per 4 oz serving. Activia Light is a nonfat yogurt with 70 calories per 4 oz serving." *See http://www.activia.us.com/activia-benefits/faqs.* The FAQ further states that, "Anyone can eat Activia! Activia is for anyone who wants to enjoy a delicious yogurt or smoothie...." *Id.*

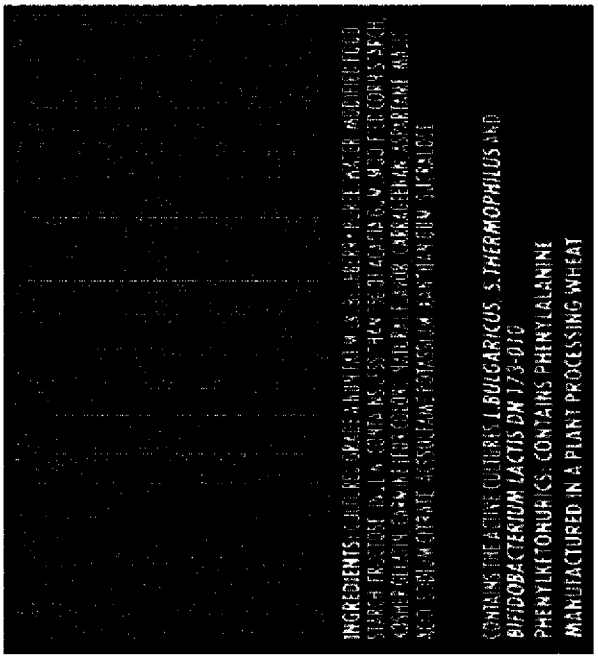
19. Activia is intentionally sold in the yogurt aisle, and Dannon suggests that consumers should "[l]ook for all of the delicious Activia varieties nationwide in the yogurt section of the dairy case at your favorite grocery store." *Id.*

Dannon Adds MPCs And Filler Materials To Activia, Thereby Reducing The Costs Of Production

20. Dannon adds water, food starch, corn starch, gelatin, xanthan gum, and MPCs to Activia:



21. Dannon adds water, food starch, corn starch, gelatin, acacia gum, xanthan gum, inulin, and MPCs to Activia Light:



22. Dannon adds water, food starch, corn starch, gelatin, xanthan gum, and MPCs to Activia Parfait:

Nutrition Facts

Serving Size: 1 Container (170g)
Calories 220
Fat Cal 25
*Percent Daily Values (DV) are based on a 2,000 calorie diet.

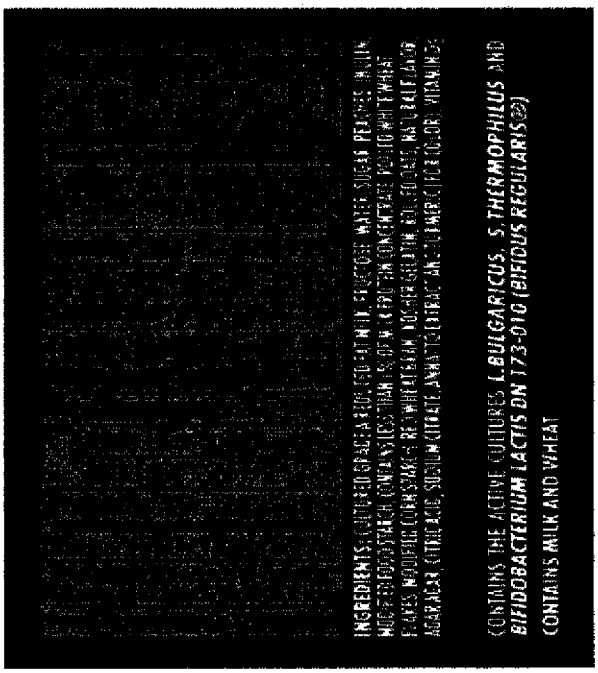
Amount/Serving	%DV*	Amount/Serving	%DV*
Total Fat 3g	5%	**Potassium** 250mg	7%
Saturated Fat 1.5g	8%	**Total Carbohydrate** 43g	14%
Trans Fat 0g		Dietary Fiber 2g	8%
Cholesterol 10mg	3%	Sugars 30g	
Sodium 95mg	4%	**Protein** 7g	14%

Vitamin A 0% • Vitamin C 0% • Calcium 20% • Iron 4%
Vitamin D 15% • Riboflavin 15% • Phosphorus 10%

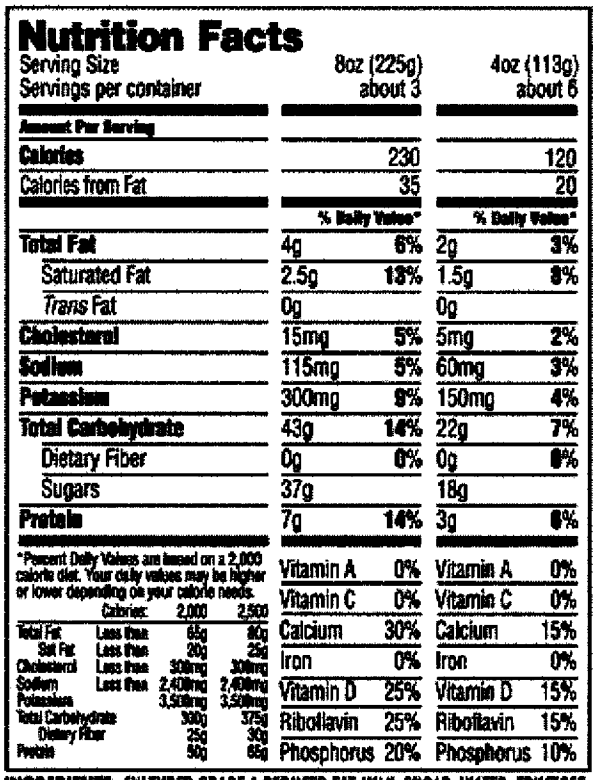
INGREDIENTS: MIXED BERRY LOWFAT YOGURT [CULTURED GRADE A REDUCED FAT MILK, SUGAR, FRUCTOSE, STRAWBERRIES, BLUEBERRY PUREE, WATER, MODIFIED FOOD STARCH, CONTAINS LESS THAN 1% OF MILK PROTEIN CONCENTRATE, MODIFIED CORN STARCH, NATURAL FLAVOR, KOSHER GELATIN, CARMINE (FOR COLOR), AGAR AGAR, LACTIC ACID, CARRAGEENAN, CALCIUM LACTATE, SODIUM CITRATE, XANTHAN GUM, VITAMIN D3], **GRANOLA TOPPINGS** [ROLLED WHITE WHEAT FLAKES, DRIED CANE SYRUP, ROLLED OATS, BROWN RICE FLOUR, MOLASSES, WHEY, HONEY, PUFFED BROWN RICE, CONTAINS LESS THAN 1% OF OAT MEAL, CARAMEL COLOR, SALT, CORN STARCH, MIXED TOCOPHEROLS [VITAMIN E] AND ASCORBIC ACID [VITAMIN C] (TO MAINTAIN FRESHNESS), SUGAR, CINNAMON, MALT EXTRACT].

CONTAINS THE ACTIVE CULTURES *L.BULGARICUS, S.THERMOPHILUS* AND *BIFIDOBACTERIUM LACTIS DN 173-010 (BIFIDUS REGULARIS®)*
CONTAINS MILK AND WHEAT
MANUFACTURED IN A PLANT PROCESSING SOY, PEANUTS AND TREE NUTS

23. Dannon adds water, food starch, corn starch, gelatin, inulin, wheat bran, and MPCs to Activia Fiber:



24. Dannon adds water, food starch, corn starch, gelatin, guar gum, and MPCs to Activia 24 oz. Tubs:



Nutrition Facts

Serving Size	8oz (225g)		4oz (113g)	
Servings per container	about 3		about 6	
Amount Per Serving				
Calories	230		120	
Calories from Fat	35		20	
		% Daily Value*		% Daily Value*
Total Fat	4g	6%	2g	3%
Saturated Fat	2.5g	13%	1.5g	8%
Trans Fat	0g		0g	
Cholesterol	15mg	5%	5mg	2%
Sodium	115mg	5%	60mg	3%
Potassium	300mg	9%	150mg	4%
Total Carbohydrate	43g	14%	22g	7%
Dietary Fiber	0g	0%	0g	0%
Sugars	37g		18g	
Protein	7g	14%	3g	6%
Vitamin A		0%		0%
Vitamin C		0%		0%
Calcium		30%		15%
Iron		0%		0%
Vitamin D		25%		15%
Riboflavin		25%		15%
Phosphorus		20%		10%

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs:

Calories:		2,000	2,500
Total Fat	Less than	65g	80g
Sat Fat	Less than	20g	25g
Cholesterol	Less than	300mg	300mg
Sodium	Less than	2,400mg	2,400mg
Potassium		3,500mg	3,500mg
Total Carbohydrate		300g	375g
Dietary Fiber		25g	30g
Protein		50g	65g

INGREDIENTS: CULTURED GRADE A REDUCED FAT MILK, SUGAR, WATER, FRUCTOSE, MODIFIED FOOD STARCH, CONTAINS LESS THAN 1% OF MILK PROTEIN CONCENTRATE, MODIFIED CORN STARCH, NATURAL VANILLA FLAVOR, KOSHER GELATIN, AGAR AGAR, GUAR GUM, LACTIC ACID, CALCIUM LACTATE, VITAMIN D3, SODIUM CITRATE.

CONTAINS THE ACTIVE CULTURES *L.BULGARICUS, S.THERMOPHILUS* AND *BIFIDOBACTERIUM LACTIS DN-173-010*

25. Food starch, corn starch, gelatin, inulin, and xanthan gum are inexpensive filler materials. It is cheaper to add water and fillers than it is to use more milk. Instead of making an authentic yogurt product, Dannon simply added water and fillers to increase Activia's thickness and protein content.

26. MPCs, another filler material, are typically created as a byproduct of cheese manufacturing. After separating the curds from the whey following fermentation, the resulting liquid was historically discarded. In modern times, the liquid whey is passed through an extremely fine filter. The filter strains water, minerals, and other organic materials but retains milk proteins, which are too large to pass through. Any remaining liquid is fully evaporated from these proteins. The resulting product is a mostly flavorless protein powder. It is called Milk Protein Concentrate if it contains whey protein and casein proteins in the same proportion

as it appears in cow's milk (about 20% and 80%, respectively). However, MPCs are not necessarily made from cow's milk. Manufacturers may need to add extra casein protein to arrive at the correct proportions. MPCs are often imported from foreign countries, including the Ukraine, India, China, Argentina, China, Poland, Australia, and New Zealand. Many of these countries have lower food standards than the U.S.

27. Dannon's conduct is not industry standard. The majority of yogurt brands in the U.S. do not add water, MPCs, and filler materials.

28. Dannon intentionally added water and fillers to shortchange consumers. As discussed above, it is *not necessary* to add MPCs and filler materials to yogurt. Most domestic manufacturers do not add MPCs, and there is no plausible reason why these ingredients are needed to make yogurt.

29. By adding MPCs and fillers to its yogurt, Dannon deprives consumers of the benefit of their bargain. When consumers purchase Activia, they expect yogurt. But they do not get yogurt. They get a misbranded product that contains filler material, violates federal law, violates FDA regulations, and is not legal to sell in the U.S.

30. Furthermore, consumers are damaged by paying a price premium for a product that is supposedly yogurt. The amount of the price premium can be reasonably quantified by an appropriate market study of the prices for comparable dairy products, or through a contingent valuation study, or through other means regularly employed by economic and valuation experts.

Activia Is Misbranded Because Adding Water, MPCs, And Filler Materials Violates The FDA's "Standard Of Identity" For Yogurt

The FDCA And FDA Standards Of Identity

31. The Federal Food, Drug, and Cosmetic Act ("FDCA") gives the FDA authority to regulate food products. Where "such action will promote honesty and fair dealing in the interest of consumers," the FDA may "promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity." 21 U.S.C. § 341.

32. The FDA's Standards of Identity define a category of foods, and specifies which ingredients may be used. The FDA has promulgated roughly 300 Standards of Identity in 20 categories of food. *See generally* 21 C.F.R. §§ 130-69. This includes all types of dairy products, bakery products, frozen desserts, cereal flours, macaroni products, fruit pies, eggs, and margarine. *Id.*

33. Any food that fails to comply with the Standards of Identity is "misbranded" under the FDCA. *See* 21 U.S.C. § 343 (g) (specifying that if a standard of identity exists, a food is "misbranded" unless "(1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard"). Furthermore, food is misbranded under the FDCA if "its labeling is false or misleading in any particular." 21 U.S.C. § 343(a).

The FDA's Standard Of Identity For Yogurt Is An Exhaustive List Of Ingredients Permitted In Yogurt

34. In 1981, the FDA promulgated Standards of Identity for yogurt, lowfat yogurt, and nonfat yogurt. 21 C.F.R. §§ 131.200, 131.203, 131.206. They became effective on July 1, 1983. 46 Fed. Reg. 9924; 47 Fed. Reg. 41519.

35. The Standards of Identity for yogurt, lowfat yogurt, and nonfat yogurt are similar. They specify that, "Yogurt is the food produced by culturing one or more of the optional dairy ingredients specified in paragraph (c) of this section with a characterizing bacterial culture that contains the lactic acid-producing bacteria, *Lactobacillus bulgaricus* and *Streptococcus thermophilus*. One or more of the other optional ingredients specified in paragraphs (b) and (d) of this section may also be added. When one or more of the ingredients specified in paragraph (d)(1) of this section are used, they shall be included in the culturing process. All ingredients used [must be] safe and suitable." 21 C.F.R. § 131.200(a).

36. The "optional dairy ingredients" that may be cultured under paragraph (c) are, "Cream, milk, partially skimmed milk, or skim milk, used alone or in combination." 21 C.F.R. § 131.200(c). Paragraph (b) permits the addition of vitamin A and D. Paragraph (d) permits the addition of a number of assorted ingredients, including, "(1) Concentrated skim milk, nonfat dry

milk, buttermilk, whey, lactose, lactalbumins, lactoglobulins, or whey modified by partial or complete removal of lactose and/or minerals.... (2) Nutritive carbohydrate sweeteners. Sugar (sucrose), beet or cane; invert sugar (in paste or sirup form); brown sugar; refiner's sirup; molasses (other than blackstrap); high fructose corn sirup; fructose; fructose sirup; maltose; maltose sirup, dried maltose sirup; malt extract, dried malt extract; malt sirup, dried malt sirup; honey; maple sugar.... (3) Flavoring ingredients. (4) Color additives. (5) Stabilizers." 21 C.F.R. § 131.200(d).

37. In totality, the Standard of Identity for yogurt is an *exclusive list* of ingredients that may be added to yogurt. If "yogurt" contains any ingredient not on that list, as a matter of federal law it is not yogurt, and it is misbranded. 21 C.F.R. §§ 131.200, 131. 203, 131.206; 21 U.S.C. § 343 (a), (g).

The FDA's Standard Of Identity For Yogurt Prohibits The Addition Of Water, MPCs, And Fillers

38. The FDA's Standard of Identity for yogurt does not list water, food starch, corn starch, xanthan gum, inulin, or MPCs in the list of permitted ingredients. Therefore, they are prohibited.

39. In fact, the FDA has specifically banned the use of MPCs and a similar ingredient, Whey Protein Concentrate ("WPCs"). *See* 74 Fed. Reg. 2443, 2452-53 (2009) ("[T]he current standard makes no allowance for the use of whey protein concentrate as a basic ingredient in yogurt."); *see also* Dec. 18, 2002 FDA Warning Letter to Kraft Foods North America Inc., http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2002/ucm145363.htm (accessed July 30, 2012) ("The use of milk protein concentrate in these products constitutes a violation of Section 403(g)(1) of the Act because the products are represented as foods for which standards of identity have been prescribed by regulation and the use of milk protein concentrate in these products does not conform to the standards.").

40. Dannon has knowledge that their conduct violates FDA regulations. In 2003, a trade organization called the National Yogurt Association ("NYA") proposed that the FDA

change its regulations to permit the addition of whey protein concentrate, a similar additive to MPCs. *See* Exh. B (policy statement by the National Milk Producers Federation, a competing trade organization, that summarizes and opposes the NYA's proposed changes). However, the FDA ultimately rejected the NYA's proposal. Of note, Dannon holds two of the five seats on the NYA's board of directors.[2] Based on its position in the NYA, Dannon was surely aware that the FDA rejected its proposal rule to allow the use of whey protein concentrates. But Dannon ignored the FDA's rules, and it continues to sell Activia with water, MPCs, and fillers.

Activia Is Adulterated Because MPCs Are Not "Generally Recognized As Safe" By The FDA

41. Under the FDCA, food additives must be Generally Recognized As Safe ("GRAS") by the FDA.

42. If the FDA has not made a GRAS determination, manufacturers may use the additive if and only if they conduct an internal self-determination and submit their evidence to the FDA, including the manufacturer's own scientific evidence.

43. Any food containing an additive that has not followed these producers is adulterated under the FDCA, which defines food additives as "all substances … the intended use of which results or may reasonably be expected to result … in their becoming a component or food otherwise affecting the characteristic of food." 21 U.S.C. § 321(s).

44. MPCs do not have GRAS status. It is not found in the FDA's Database of Select Committee on GRAS Substances (SCOGS) Reviews.

45. Because MPCs do not appear in the FDA's GRAS Notice Inventory, no manufacturer has conducted an internal self-determination of MPCs, nor has the FDA ever received a manufacturer's self-determination. Furthermore, MPCs do not appear in the FDA's larger list of food additives, Everything Added to Food in the United States ("EAFUS").

[2] *See Member And Office Listing*, NATIONAL YOGURT ASSOCIATION, http://aboutyogurt.com/index.asp?bid=51.

46. Because Activia contains unapproved additives, it is adulterated. It violates the FDCA and applicable regulations thereunder.

CLASS ACTION ALLEGATIONS

47. Plaintiff seeks to represent a class defined as all persons in the United States who purchased Activia (the "Class"). Excluded from the Class are persons who made such purchase for purpose of resale.

48. Plaintiff Conroy also seeks to represent a subclass of all Class members who purchased Activia in New York (the "New York Subclass").

49. Members of the Class and New York Subclass are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class and New York Subclass number in the hundreds of thousands. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Dannon and third party retailers and vendors.

50. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to whether Dannon warranted that Activia (i) was yogurt, (ii) was not misbranded, (iii) was not adulterated, and (iv) was legal for sale in the United States; whether Dannon breached those warranties; and whether Dannon committed statutory and common law fraud by doing so.

51. The claims of the named Plaintiff are typical of the claims of the Class in that the named Plaintiff purchased Activia in reliance on the representations and warranties described above, and suffered a loss as a result of that purchase.

52. Plaintiff is an adequate representative of the Class and New York Subclass because her interests do not conflict with the interests of the Class and Subclass members she seeks to represent, she has retained competent counsel experienced in prosecuting class actions,

and she intends to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and her counsel.

53. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class and Subclass members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Dannon's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Dannon's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I

Breach Of Express Warranty

54. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

55. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Dannon.

56. Dannon, as the designer, manufacturer, marketers, distributors, and/or sellers expressly warranted that Activia was fit for its intended purpose by representing that it (i) was yogurt, (ii) was not misbranded, (iii) was not adulterated, and (iv) was legal for sale in the United States.

57. In fact, Activia is not fit for such purposes because each of these express warranties is false. Particularly, Activia (i) is not yogurt, (ii) is misbranded, (iii) is adulterated, and (iv) is not legal for sale in the United States.

58. As a direct and proximate cause of Dannon's breach of express warranty, Plaintiff and Class members have been injured and harmed because: (a) they would not have purchased Activia on the same terms if the true facts were known concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply with FDA regulations; (b) they paid a price premium for Activia due to its supposed status as yogurt; and (c) Activia did not have the quality, functionality, or value as promised.

59. September 10, 2012, prior to the filing of this Complaint, Plaintiff served a notice letter on Dannon which complies in all respects with N.Y. U.C.C. LAW § 2--607(3)(a). Plaintiff sent a letter via certified mail, return receipt requested, advising Dannon that it was in violation of state warranty law and must correct, repair, replace or otherwise rectify the goods alleged to be in violation. A true and correct copy of Plaintiff's notice letter is attached hereto as Exhibit A.

COUNT II

Breach Of Implied Warranty Of Merchantability

60. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

61. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Dannon.

62. Dannon as the designer, manufacturer, marketers, distributors, and/or sellers impliedly warranted that Activia was fit for its intended purpose in that it (i) was yogurt, (ii) was in fact yogurt, (iii) was not adulterated, and (iv) was legal for sale in the United States.

63. Dannon breached the warranty implied in the contract for the sale of Activia because it could not pass without objection in the trade under the contract description, the goods were not of fair average quality within the description, and the goods were unfit for their intended and ordinary purpose because Activia (i) is not yogurt, (ii) is misbranded, (iii) is adulterated, and (iv) is not legal for sale in the United States. As a result, Plaintiff and Class members did not receive the goods as impliedly warranted by Dannon to be merchantable.

64. In reliance upon Dannon's skill and judgment and the implied warranties of fitness for the purpose, Plaintiff and Class members purchased Activia as a yogurt product.

65. Activia was not altered by Plaintiff or Class members.

66. Activia was defective when it left the exclusive control of Dannon.

67. Dannon knew that Activia would be purchased and used without additional testing by Plaintiff and Class members.

68. Activia was defectively designed and unfit for its intended purpose, and Plaintiff and Class members did not receive the goods as warranted.

69. As a direct and proximate cause of Dannon's breach of the implied warranty, Plaintiff and Class members have been injured and harmed because: (a) they would not have purchased Activia on the same terms if the true facts were known concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply with FDA regulations; (b) they paid a price premium for Activia due to its supposed status as yogurt; and (c) Activia did not have the quality, functionality, or value as promised.

COUNT III

Breach Of Implied Warranty Of Fitness For A Particular Purpose

70. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

71. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Dannon.

72. Dannon marketed, distributed, and/or sold Activia with implied warranties that it was fit for its intended purposes in that it (i) was yogurt, (ii) was not misbranded, (iii) was not adulterated, and (iv) was legal for sale in the United States. At the time that Activia was sold, Dannon knew or had reason to know that Plaintiff and Class members were relying on Dannon's skill and judgment to select or furnish a product that was suitable for sale as yogurt.

73. In reliance upon Dannon's implied warranties, Plaintiff and Class members purchased Activia because they believed that it was yogurt.

74. Activia was not altered by Plaintiff or Class members.

75. As a direct and proximate cause of Dannon's breach of the implied warranty, Plaintiff and Class members have been injured and harmed because: (a) they would not have purchased Activia on the same terms if the true facts were known concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply with FDA regulations; (b) they paid a price premium for Activia due to its supposed status as yogurt; and (c) Activia did not have the quality, functionality, or value as promised.

COUNT IV

Unjust Enrichment

76. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

77. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Dannon.

78. Plaintiff and Class members conferred benefits on Dannon by purchasing Activia.

79. Dannon has been unjustly enriched in retaining the revenues derived from Plaintiff and Class members' purchases of Activia. Retention of those moneys under these circumstances is unjust and inequitable because Dannon misrepresented that Activia was yogurt, which caused injuries to Plaintiff and Class members because they would not have purchased Activia if the true facts were known.

80. Because Dannon's retention of the non-gratuitous benefits conferred on it by Plaintiff and Class members is unjust and inequitable, Dannon must pay restitution to Plaintiff and Class members for their unjust enrichment, as ordered by the Court.

81. Because Dannon's retention of the non-gratuitous benefits conferred on it by Plaintiff and Class members is unjust and inequitable, Dannon must pay restitution to Plaintiff and Class members for their unjust enrichment, as ordered by the Court.

COUNT V

Deceptive Acts Or Practices, New York Gen. Bus. Law § 349

82. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

83. Plaintiff brings this claim individually and on behalf of the members of the proposed New York Subclass against Dannon.

84. By the acts and conduct alleged herein, Dannon committed unfair or deceptive acts and practices by misrepresenting that Activia (i) was yogurt, (ii) was not misbranded, (iii) was not adulterated, and (iv) was legal for sale in the United States.

85. The foregoing deceptive acts and practices were directed at consumers.

86. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent Activia's manufacturing, ingredients, status as a yogurt product, and failure to comply with FDA regulations in order to induce consumers to purchase same.

87. Plaintiff and members of the New York Subclass were injured because they paid for Activia, which they would not have done had they known the truth about the product.

88. On behalf of herself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or fifty dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT VI

False Advertising, New York Gen. Bus. Law § 350

89. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

90. Plaintiff brings this claim individually and on behalf of the members of the proposed New York Subclass against Dannon.

91. Based on the foregoing, Dannon has engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law.

92. Dannon's false, misleading and deceptive statements and representations of fact include, but are not limited to, representations that Activia (i) was yogurt, (ii) was not misbranded, (iii) was not adulterated, and (iv) was legal for sale in the United States.

93. Dannon's false, misleading and deceptive statements and representations of fact were and are directed to consumers.

94. Dannon's false, misleading and deceptive statements and representations of fact were and are likely to mislead a reasonable consumer acting reasonably under the circumstances.

95. Dannon's false, misleading and deceptive statements and representations of fact have resulted in consumer injury or harm to the public interest.

96. As a result of Dannon's false, misleading and deceptive statements and representations of fact, Plaintiff has suffered and continues to suffer economic injury.

97. Plaintiff and members of the New York Subclass suffered an ascertainable loss caused by Dannon's misrepresentations because they paid for Activia, which they would not have done had they known the truth about the product.

98. On behalf of herself and other members of the New York Subclass, Plaintiff seeks to enjoin the unlawful acts and practices described herein, to recover her actual damages or five hundred dollars, whichever is greater, three times actual damages, and reasonable attorneys' fees.

COUNT VII

Negligent Misrepresentation

99. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

100. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Dannon.

101. As discussed above, Dannon represented that Activia was yogurt but failed to disclose that it (i) is not yogurt, (ii) is misbranded, (iii) is adulterated, and (iv) is not legal for sale in the United States. Dannon had a duty to disclose this information.

102. At the time Dannon made these representations, Dannon knew or should have known that these representations were false or made them without knowledge of their truth or veracity.

103. At an absolute minimum, Dannon negligently misrepresented and/or negligently omitted material facts about Activia.

104. The negligent misrepresentations and omissions made by Dannon, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase Activia.

105. Plaintiff and Class members would not have purchased Activia if the true facts had been known.

106. The negligent actions of Dannon caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

COUNT VIII

Fraud

107. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

108. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against Dannon.

109. As discussed above, Dannon provided Plaintiff and Class members with false or misleading material information and failed to disclose material facts about Activia, including but not limited to the fact that it (i) is not yogurt, (ii) is misbranded, (iii) is adulterated, and (iv) is not legal for sale in the United States. These misrepresentations and omissions were made with knowledge of their falsehood.

110. The misrepresentations and omissions made by Dannon, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase Activia.

111. The fraudulent actions of Dannon caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Dannon, as follows:

a. For an order certifying the nationwide Class and New York Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and New York Subclass and Plaintiff's attorneys as Class Counsel to represent members of the Class and New York Subclass;

b. For an order declaring Dannon's conduct violates the statutes referenced herein;

c. For an order finding in favor of Plaintiff, the nationwide Class, and the New York Subclass on all counts asserted herein;

d. For compensatory and punitive damages in amounts to be determined by the Court and/or jury;

e. For prejudgment interest on all amounts awarded;

f. For an order of restitution and all other forms of equitable monetary relief;

g. For injunctive relief as pleaded or as the Court may deem proper; and

h. For an order awarding Plaintiff and the Class and New York Subclass their reasonable attorneys' fees and expenses and costs of suit.

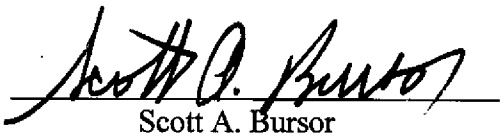
DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury on all issues so triable.

Dated: September 11, 2012

Respectfully submitted,

BURSOR & FISHER, P.A.

By: 
Scott A. Bursor

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Attorneys for Plaintiff

EXHIBIT A

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September 10, 2012

Via Certified Mail - Return Receipt Requested

The Dannon Company, Inc.
100 Hillside Ave.
White Plains, NY 10603

Re: *Notice Letter Pursuant to N.Y. U.C.C. LAW § 2--607.*

To Whom It May Concern:

This letter serves as a preliminary notice and demand for corrective action by The Dannon Company, Inc. ("Dannon") pursuant to N.Y. U.C.C. LAW § 2--607(3)(a), on behalf of our client, Kristie Conroy, and all other persons similarly situated.

This notice concerns Activia, which Dannon markets as "a creamy, delicious lowfat yogurt." Packages of Activia are affixed with the label "LOWFAT YOGURT." However, Activia contains Milk Protein Concentrate ("MPC") and added water, which are prohibited by the Standards of Identity for yogurt products promulgated by the U.S. Food and Drug Administration ("FDA"). *See* 21 C.F.R. §§ 131.200, 131.203. Therefore, Activia is not yogurt.

Ms. Conroy purchased Activia in New York. Dannon expressly represented to her that Activia was yogurt. Dannon breached that express warranty because Activia is not yogurt. *See* N.Y. U.C.C. LAW § 2--313.

We hereby demand that Dannon immediately (1) cease and desist from continuing to label and sell Dannon Activia as "yogurt," (2) issue an immediate recall of any Activia product bearing false labels representing the product is yogurt; and (3) make full restitution to all purchasers of Activia of all purchase money obtained from sales thereof.

We also demand that Dannon preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to, the following:

1. All documents concerning the ingredients, formula, and manufacturing process for Activia;

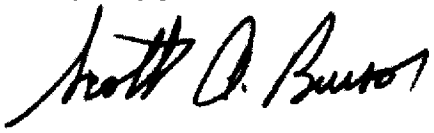
2. All communications with the FDA concerning Activia or MPC's;

3. All documents concerning the advertisement, marketing and/or sale of Activia; and

4. All communications with customers concerning complaints or comments concerning Activia.

If Dannon contends that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents immediately upon receipt of this letter.

Very truly yours,



Scott A. Bursor
scott@bursor.com

EXHIBIT B

National Milk Producers Federation

6549 '03 OCT -8 P1:37

National Milk Producers Federation • 2101 Wilson Blvd., Arlington, VA 22201 • 703-243-6111 FAX 703-841-9328

September 29, 2003

Division of Dockets Management (HFA-305)
Food and Drug Administration
5630 Fishers Lane, rm. 1061
Rockville, MD 20852

RE: Advance notice of proposed rulemaking; Petition to revoke standards for lowfat yogurt and nonfat yogurt and to amend standards for yogurt and cultured milk (Docket No. 00P-0685)

Dear Sir or Madam:

The following comments are being submitted on behalf of the National Milk Producers Federation (NMPF). NMPF, headquartered in Arlington, VA, develops and carries out policies that advance the well-being of U.S. dairy producers and the cooperatives they collectively own. The members of NMPF's 34 cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of 60,000 dairy producers on Capitol Hill and with government agencies.

NMPF's interest in this matter lies in the fact that many of our organization's members supply the raw ingredients used to manufacture yogurt and some of NMPF's cooperative members manufacture yogurt directly. In addition, NMPF is very interested in ensuring that any changes to the standards of identity for yogurt products do not have an adverse impact on consumers or consumers' perceptions of the nutritious and wholesome nature of these or any other dairy products. For these reasons, NMPF does not agree with several of the changes proposed by the National Yogurt Association (NYA) because they will have an adverse impact on both dairy producers and consumers throughout the U.S.

For example, the proposal to maintain all three categories of yogurt (nonfat yogurt, lowfat yogurt, and yogurt) in one standard does not appear to be logical or consistent with current consumer understanding of the labeling of standardized foods. Virtually all standardized food products must follow the regulations passed as a result of the Food Labeling and Education Act of 1990. These regulations include requirements for standardized foods in which

00P-0685 C10

a nutrient content claim descriptor is used. In 1995, FDA made a change to the standards of identity for milk products in this regard and FDA chose to maintain one standard of identity and allow for the use of nutrient content claims for reduced fat, lowfat, and nonfat milks. NMPF does not see why yogurt standards of identity should be treated differently than any other food product in the U.S.

The rationale for seeking this special exception for yogurt appears to be related to a desire by the member companies of NYA to not fortify lower fat yogurt products with vitamin A. When FDA established the labeling regulations pertaining to the use of nutrient content claims in conjunction with standardized foods, one of the key components was to ensure that consumers did not suffer a decrease in beneficial nutrients when they sought lower fat versions of foods. Because of this, FDA established the requirement of nutritional equivalency for these products as it relates to nutrients lost as fat is removed. NMPF fails to see why yogurt should be exempt from this requirement. NMPF is not aware of any special processing or technological rationale that would explain why yogurt manufacturers should not or can not add vitamin A to the lower fat versions of the products. In fact, vitamin addition will occur prior to processing, just as it is currently done for fluid milk products. In addition, yogurt manufacturers are currently adding other nutrients or ingredients, such as inulin, to yogurt on a voluntary basis for marketing and nutritional reasons. NMPF believes Vitamin A addition will not be difficult to accomplish.

Regarding the addition of ingredients after culturing, NMPF does not believe that optional milk-derived ingredients should be added after pasteurization and culturing. Dairy products readily support the growth of microorganisms, including pathogenic microorganisms. NMPF considers it to be a good manufacturing process for manufacturers to ensure that all dairy ingredients are pasteurized just prior to any additional processing. If previously pasteurized ingredients are permitted to be added to yogurt after culturing, NMPF believes that the potential for unintentional contamination exists. While it may not happen every time, NMPF believes that the risk is too great. In order to ensure that consumers are adequately protected, FDA should require that all dairy ingredients be pasteurized immediately prior to any additional processing step, such as culturing.

Regarding the use of dairy ingredients, NMPF does not agree with the addition of whey protein concentrate (WPC) as a standard dairy ingredient. Currently, the yogurt standard of identity allows for cream, milk, partially skimmed milk, or skim milk, used alone or in combination. This current list of ingredients has resulted in a product of consistent quality - made from fresh, high quality ingredients - that consumers have come to expect. The use of WPC may result in an inferior quality product. In fact, NYA acknowledges the potential for inferiority by placing a limit on the level of WPC that can be used. NMPF

believes that consumers do not expect that yogurt will contain more whey proteins than are naturally present in milk. While there are many very good sources of WPC available for use, the potential for using lower quality ingredients also exists. One of the paramount purposes of standards of identity is to ensure honesty and fair dealing in the interest of consumers. Allowing for lower quality ingredients will not achieve this goal. Consumers expect yogurt to be made from fresh ingredients.

NMPF does not agree with the proposal to allow for any milk-derived ingredient that provides a technical or functional purpose. The list of optional ingredients that may be added to yogurt under the current standard of identity has an important provision that the ratio of protein to total nonfat solids and the protein efficiency ratio of all protein present must not be decreased. This provision is not included in the NYA petition and NMPF believes that this omission may result in inferior quality products reaching consumers. The intent of allowing for optional ingredients above the minimum required by the standard dairy ingredients is to allow for increasing the solids content of the product while still using a definite set of well-defined ingredients. NMPF feels that this intent must be maintained. To allow for any additional milk-derived ingredient to be used is too open for a standard of identity. The uncertain phrase "provides a technical or functional purpose" is open to much interpretation and will not ensure that consumers receive the high quality product that they have come to expect when they purchase yogurt. NYA does not provide any examples of what cannot be accomplished technologically with the current list of ingredients or what limitations the current ingredients impose. In the absence of such information, it appears that the true rationale for allowing more ingredients is to allow for a lower cost of manufacturing. Unfortunately, this often results in a lower quality finished product, as well. In addition, NMPF is uncertain as to who will enforce this requirement for providing a technical or functional purpose. State Regulatory Agencies and FDA do not have the resources to enforce such loose provisions in a standard of identity.

The request to amend the standard of identity for cultured milk contains many of the same concerns to NMPF in the ingredient area. In addition to adding the term "fermented milk" as a labeling option for cultured milk products, NYA seeks to expand the use of whey protein concentrate and other milk-derived dairy ingredients. NMPF has the same concerns about this change as we do with the changes suggested to the yogurt standard of identity.

Overall, NMPF has many concerns about the changes proposed by NYA. Many of them appear to be merely seeking an allowance to potentially use cheaper ingredients in the manufacture of yogurt. NMPF believes such actions will have a negative impact on the use of milk in yogurt making and will also negatively impact dairy producers across the U.S. Of equal importance is the fact that the potential for confusing labeling inconsistencies and for inferior

quality products will not promote honesty and fair dealing in the interest of consumers.

Thank you for the opportunity to provide these comments to the advance notice of proposed rulemaking. Please feel free to contact us if you have any questions or would like additional information.

Sincerely,

Robert D. Byrne, Jr.

Robert D. Byrne, Ph.D.
Vice President of Regulatory Affairs