

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.:

MATTHEW KAPLAN, an individual, on
behalf of himself and all others similarly
situated,

Plaintiff,

v.

BAYER HEALTHCARE, LLC

Defendant.

COMPLAINT

Plaintiff Matthew Kaplan brings this action on behalf of himself and all others similarly situated against Defendant Bayer Healthcare, LLC (“Bayer” or “Defendant”) and states:

NATURE OF ACTION

1. In or around August 2013, Bayer began manufacturing, marketing, selling and distributing Flintstones Healthy Brain Support, a gummy-chewable Omega-3 DHA dietary supplement made with Life’s DHA (“the Product”)¹. The Product is not a multivitamin. The Product’s sole represented benefit is to support brain function. The Product is for adults and children two years and older.

2. Through an extensive, widespread, comprehensive and uniform nationwide marketing campaign, Bayer claims that taking the Product will “Support[] Healthy Brain Function.” On each and every package, immediately under the Product name “Flintstones Supplements,” where it cannot be missed by consumers, it states “Healthy” and in far larger print states “BRAIN SUPPORT.” Under these representations is the prominent claim that “Omega-3

¹ “Life’s DHA” – is a highly processed fermented algae Omega-3 DHA.

DHA Supports Healthy Brain Function” (collectively, “the brain function representations”).

3. The best evidence to judge whether algal DHA provides any brain function benefits are randomized controlled trials (“RCTs”). Five RCTs involving the *same* algal DHA as is in the Product have found no causative link between DHA algal oil supplementation and brain support/function. The RCTs found that algal DHA does *not* support brain function even though they were funded by the manufacturer of the DHA in the Product and used much higher doses of DHA than is found in the Product (at least eight times the recommended dosage for children 2-3 years old and 4 times the dosage for adults and children 4 years and older).

4. In fact, not only does the DHA algal oil in the Product not support brain function, it is completely superfluous. American children and adults, who are the target market for the Product, consume adequate amounts of DHA derived from dietary sources such as fish, soybean oil, canola oil, green leafy vegetables and flax seeds.

5. This has been confirmed by the Institute of Medicine (“IOM”)—the health arm of the National Academies—which issued a report stating that it does not recognize a dietary requirement for DHA as there is no DHA deficiency in adults or children in the United States. *See* Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients): The National Academies Press; 2005 at 5-6, 11, 469.

6. On April 22, 2014, the FDA embraced the IOM finding by publishing a Final Rule that acted on and expressly rejected Martek Biosciences Corp.’s (the maker of the Life’s DHA in Bayer’s Product) request that the FDA recognize a daily requirement for DHA. *See* <http://www.gpo.gov/fdsys/pkg/FR-2014-04-28/pdf/2014-09492.pdf>. In doing so, the FDA acknowledged that there is no dietary requirement for DHA as it is not an essential nutrient. *Id.*

7. Even if there were DHA deficient children and adults in the United States – which there are not – they would derive no brain health benefit from the Product because only a trivial amount of DHA in the Product enters the brain after it is consumed. The brain contains about 5000 mg of DHA, a serving of the Product would only replace about .000005% and .00001% of the brain’s DHA content in children 2-3 years of age and adults and children over 4, respectively, in the first day with less entering in each subsequent day. This amount is so trivial that it cannot and does not support the brain or its functioning in any manner.

8. Thus, the overwhelming weight of scientific evidence is that DHA supplementation does not support brain function. The only ingredient in the Product represented as providing brain support or function is the DHA. Thus, Bayer’s brain function representations are false, misleading, and reasonably likely to deceive the public.

9. Bayer has employed numerous methods to convey its uniform, deceptive brain function representations to consumers including the name of the Product and the front of the Product’s packaging and labeling.

10. As a result of Bayer’s deceptive brain function representations, consumers—including Plaintiff and members of the proposed Class—have purchased the Product, which does not perform as advertised. The only reason a consumer would purchase the Product is to obtain the advertised brain function benefits because it is the only stated benefit of the Product.

11. Plaintiff brings this action on behalf of himself and other similarly situated consumers who have purchased Flintstones Healthy Brain Support to halt the dissemination of this false, misleading and deceptive advertising message, correct the false and misleading perception it has created in the minds of consumers, and obtain redress for those who have purchased the Product. Based on violations of state law (detailed below), Plaintiff seeks

injunctive and monetary relief for consumers who purchased the Product.

JURISDICTION AND VENUE

12. This Court has original jurisdiction pursuant to 28 U.S.C. §1332(d)(2). The matter in controversy, exclusive of interest and costs, exceeds the sum or value of \$5,000,000 and is a class action in which there are in excess of 100 class members and Class members are citizens of a state different from Defendant.

13. This Court has personal jurisdiction over Defendant because Defendant is authorized to conduct and does conduct business in Florida. Defendant has marketed, promoted, distributed, and sold the Product in Florida and Defendant has sufficient minimum contacts with this State and/or sufficiently availed itself of the markets in this State through its promotion, sales, distribution and marketing within this State to render the exercise of jurisdiction by this Court permissible.

14. Venue is proper in this Court pursuant to 28 U.S.C. §§1391(a) and (b) because a substantial part of the events giving rise to Plaintiff's claims occurred while he resided in this judicial district. Venue is also proper under 18 U.S.C. §1965(a) because Defendant transacts substantial business in this District.

PARTIES

15. Plaintiff Matthew Kaplan is a citizen of Florida and resides in Miami Beach, Florida. Over the last year, Plaintiff purchased two bottles of Flintstones Healthy Brain Support from the Publix Supermarket in Miami Beach, Florida for his 2 year old son. He paid approximately \$15.00 for the Product. Prior to purchasing the Product, Plaintiff was exposed to and saw Bayer's brain function representations by reading the Product's label. Bayer's brain function representations caused Plaintiff to purchase the Product. Plaintiff understood that the

Product was not a multivitamin and the only represented benefit was to support healthy brain function. The Product Plaintiff purchased does not support healthy brain function as represented. As a result, Plaintiff suffered injury in fact and lost money. Had Plaintiff known the truth about Bayer's misrepresentations, he would not have purchased the Product.

16. Defendant Bayer Healthcare, LLC is a Delaware limited liability company with its principal place of business in Whippany, New Jersey. At all relevant times, Defendant manufactured, distributed, marketed and sold the Product and created the deceptive brain function representations, which it caused to be disseminated to consumers throughout the United States, including Florida.

FACTUAL ALLEGATIONS

Flintstones Healthy Brain Support

17. Since at least August 2013, Bayer has manufactured, distributed, marketed and sold the Product throughout the United States, including Florida. The Product is marketed as a supplement with the singular purpose of supporting healthy brain function. The Product is sold in virtually every major food, drug, and mass retail outlet in the country, and retails for approximately \$13-\$16 for 80 gummies. Each gummy contains 50 mg of DHA - children ages 2-3 are directed to take 1 gummy daily (*i.e.*, 50 mg DHA daily) and adults and children ages 4 and older are directed to take 2 gummies daily (*i.e.*, 100 mg DHA daily).

18. Since the Product's launch, Bayer has consistently conveyed the message to consumers throughout the United States, including Florida, that the Product "Supports Healthy Brain Function." Bayer's brain function representations are false, misleading and deceptive.

19. Each and every consumer who purchases the Product is exposed to Bayer's deceptive brain function representations, which are the only represented Product benefit and

appear prominently and conspicuously on the front of the Product's packaging, as well as in the Product name – "Flintstones Healthy Brain Support" as follows:



Flintstones Healthy Brain Support Does Not Support Healthy Brain Function

20. DHA is a long-chain omega-3 fatty acid typically found in cold water fish. The DHA in Bayer's Product is not derived from fish. Instead, the Life's DHA in the Product -- manufactured by Martek Biosciences -- is an immature short-chain omega-3 fatty acid made from an extract of mutated and fermented algae. Contrary to Bayer's representations made on each and every Product package, DHA algal oil does not support healthy brain function.

21. Several RCTs, regarded by experts in the field as the "gold standard" of scientific evidence, and the only credible means of proving whether a substance has an effect in humans, have found no brain function benefits from consumption of supplemental DHA even in much higher dosages than those recommended by Defendant.

22. For example, a 2008 RCT funded by Martek Biosciences, the manufacturer of the Life's DHA in the Product – examined algal DHA supplementation (400 mg) in 4-year old children for 16 weeks and reported no effect of DHA on 4 measures of cognitive function in children. See Ryan, A., et al., *Assessing The Effect Of Docosahexaemoic Acid On Cognitive Functions In Healthy Preschool Children*, 47(4) Clin. Pediatr. 355-62 (2008).

23. In a 2008 RCT, Johnson and colleagues divided subjects into groups, taking sixteen weeks of either DHA supplementation at 800 mg per day or placebo. DHA was found to be beneficial in one test on verbal fluency and no better than placebo on over twenty other tests. Because the authors defined statistical significance as $p < 0.05$, that one result was statistically insignificant, indicating that the 800mg per day of DHA did not provide any brain health benefit over placebo. See Johnson EJ, et. al., *Cognitive Findings Of An Exploratory Trial Of Docosahexaenoic Acid And Lutein Supplementation In Older Women*, 11 Nutr. Neurosci. 75-8 (2008).

24. In a 2009 RCT, David Kennedy and colleagues examined the effects of 400 or 1000 mg of DHA per day compared to placebo on a battery of cognitive tests in children ages 10 to 12. See Kennedy, DO, et al., *Cognitive And Mood Effects Of 8 Weeks' Supplementation With 400 Mg Or 1000 Mg Of The Omega-3 Essential Fatty Acid Docosahexaenoic Acid (DHA) In Healthy Children Aged 10–12 Years*, 12 Nutr. Neurosci. 48-56 (2009). At a dose of 400 mg per day, scores on 1 of 35 measures improved while 1 score out of 35 was worse upon 1000 mg per day, and no effect was observed on 68 other measures. *Id.* Because so many tests were conducted, both the one positive and the one negative finding are due to chance but the 33 that showed no effect by their sheer weight are not due to chance and demonstrate a lack of efficacy. *Id.* In fact, the authors conclude: “The results here do not suggest that supplementation with

these doses of DHA for 8 weeks has any beneficial effect on brain function in cognitively intact children.” *Id.*

25. Similarly, a RCT reported by McNamara, RK, et al., *Docosahexaenoic Acid Supplementation Increases Prefrontal Cortex Activation During Sustained Attention In Healthy Boys; A Placebo-Controlled, Dose-Ranging, Functional Magnetic Resonance Imaging Study*, 91 Am. J. Clin. Nutr., 1060-7 (2010), examined the effect of 400 or 1200 mg DHA per day compared to placebo on attention scores in healthy boys. For the four endpoints that were registered with clinicaltrial.gov², McNamara and colleagues reported no effects of DHA on all four measures. *Id.*

26. Finally, in a 2012 RCT, Richardson and colleagues examined placebo or 600 mg of DHA per day for 16 weeks in school children ages 7 to 9 who were under the 33rd percentile in reading scores. See Richardson, AJ, et al., *Docosahexaenoic Acid For Reading, Cognition And Behavior In Children Aged 7–9 Years: A Randomized, Controlled Trial (The DOLAB Study)*, PLoS One, 7:e43909 (2012). To the extent that Richardson and colleagues represents the general population, at the end of the study, Richardson and colleagues reported no differences between DHA and placebo on reading scores, reading age, two working memory scores or 14 behavior scores whether rated by parents, teachers or using intent-to-treat (all subjects) or per protocol design (only those who completed the study). *Id.* Thus, this study also showed no efficacy.

27. All of the RCTs using the DHA in the Product showed no benefit on the primary registered endpoints—the only endpoints from which cause and effect conclusions can be drawn.

² Every clinical trial is required to register its study with clinicaltrial.gov, setting forth, among other things, the endpoints that the study is designed to examine. Under universally accepted scientific protocols, conclusions can only be drawn from the results of the registered endpoints.

Each of the studies had adequate sample sizes, were typical of the size commonly used in and relied upon in the scientific community and were adequate to test the hypotheses presented in each study. Additionally, the RCTs used much higher doses of DHA than that found in the Product – at least eight times the amount of DHA in the recommended dosage for children 2-3 years old and 4 times the amount in the recommended dosage for adults and children 4 years and older – making it even more likely that a positive result would be found, yet there were none that could not be attributed to chance alone.

28. These scientific studies establish that there is no cause and effect relationship between intake of DHA dietary supplements like the DHA in the Product and cognitive development. Bayer's brain function representations are false and misleading and reasonably likely to deceive the consumer.

29. Furthermore, American children and adults get sufficient DHA in their daily diet. *Molecular* DHA does play a role in the brain. But, this does not mean *supplemental* DHA supports brain function. Much as the brain needs oxygen to function, humans do not need to supplement their diets with foods containing oxygen; nor do humans need DHA supplementation. In fact, there is only one reported case of DHA deficiency in the United States in the last thirty or so years and it involved a girl on an intravenous diet.

30. The IOM—the health arm of the National Academies—has issued a report stating that it does not recognize a dietary requirement for DHA as there is no DHA deficiency in adults or children in the United States. *See* Dietary Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol, Protein, and Amino Acids (Macronutrients): The National Academies Press; 2005 at 5-6, 11, 469. Specifically, the IOM concluded that Americans consume sufficient amounts of alpha-linolenic acid (ALA), a dietary precursor to DHA, in their

daily diet by eating fish, soybean oil, canola oil, green leafy vegetables and flax seeds among other vegetables. ALA is converted to DHA by a series of enzymes, largely in the liver. Thus, the algal oil derived DHA in the Product has no effect on brain function as it is not an essential nutrient and American adults and children are already consuming adequate amounts of its precursor ALA.

31. And, on April 22, 2014, the FDA, citing the 2005 IOM report, published a Final Rule that acted on and expressly rejected Martek's request that the FDA recognize a daily requirement for DHA.³ See 79 Fed. Reg. 23262 available at <http://www.gpo.gov/fdsys/pkg/FR-2014-04-28/pdf/2014-09492.pdf>. In doing so, the FDA acknowledged that there is no dietary requirement for DHA as it is not an essential nutrient. *Id.* The FDA's ruling applies to the entire U.S. population, including adults and children ages 2 years and older – Bayer's target market for the Product.

32. Even if the algal oil derived DHA was not superfluous, such a trivial amount of the DHA in a serving of Product is incapable of providing any brain function benefit. Based on the amount of DHA available to the brain in the plasma pool and the amount of DHA the brain uptakes from this plasma pool, approximately 0.0005% of an oral dosage of 50 mg of DHA enters the brain in 24 hours with much less entering in each subsequent day. And, because the brain contains about 5000 mg of DHA, a serving of the Product would only replace about .000005% and .00001% of the brain's DHA content in children 2-3 years of age and adults and children over 4, respectively, in the first day. Even at the highest point in the range of DHA in the Product, this amount of DHA is trivial and does not contribute to brain function. Indeed, RCTs have found that DHA in much higher dosages does not provide brain health benefits.

³ The Martek notification proposed the following exact wording for these claims: "Excellent source of DHA.' ('High in DHA,' 'Rich in DHA') contains ___ mg of DHA per serving, which is ___ % of the 160 mg daily value for DHA." 79 Fed. Reg. at 23263 n.3.

33. Thus, the overwhelming weight of scientific evidence is that DHA supplementation does not support healthy brain function in U.S. consumers aged 2 and older.

The Impact of Bayer's Wrongful Conduct

34. Even though the DHA in the Product is trivial in amount, superfluous, and proven to not support healthy brain function, Bayer continues to unequivocally claim that the Product "Supports Healthy Brain Function" in children ages 2 and older, as well as adults.

35. Plaintiff and Class members have been and will continue to be deceived or misled by Bayer's deceptive brain function representations. Plaintiff purchased the Product during the relevant time period and in doing so, read and considered the Product label and based his decision to buy the Product on the brain function representations. Bayer's brain function representations were a material factor in influencing Plaintiff's decision to purchase the Product. Plaintiff would not have purchased the Product had he known that Bayer's brain function representations were false and misleading.

36. As a result, Plaintiff and the Class members have been damaged in their purchases of the Product and have been deceived into purchasing a Product that they believed, based on Bayer's representations, supported healthy brain function, when, in fact, it does not.

37. Bayer, by contrast, reaped enormous profits from its false marketing and sale of the Product.

CLASS DEFINITION AND ALLEGATIONS

38. Pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, Plaintiff seeks to represent a Florida class defined as all consumers in Florida who purchased Flintstones Healthy Brain Support (the "Class"). Excluded from this Class are Defendant and its officers, directors and employees and those who purchased Flintstones Healthy Brain Support for

the purpose of resale.

39. **Numerosity.** The members of the Class are so numerous that joinder of all members of the Class is impracticable. Plaintiff is informed and believes that the proposed Class contains thousands of purchasers of Flintstones Healthy Brain Support who have been damaged by Bayer's conduct as alleged herein. While the exact number and identities of the Class members are unknown at this time, such information can be ascertained through appropriate investigation and discovery.

40. **Existence and Predominance of Common Questions of Law and Fact.** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members. These common legal and factual questions include, but are not limited to, the following:

- (a) whether the claims discussed above are true, or are misleading, or objectively reasonably likely to deceive;
- (b) whether Bayer's alleged conduct violates public policy;
- (c) whether the alleged conduct constitutes violations of the laws asserted;
- (d) whether Bayer engaged in false or misleading advertising; and
- (e) whether Plaintiff and Class members are entitled to other appropriate remedies, including corrective advertising and injunctive relief.

41. **Typicality.** Plaintiff's claims are typical of the claims of the members of the Class because, *inter alia*, all Class members were injured through the uniform misconduct described above and were subject to Bayer's deceptive brain function representations that accompanied each and every bottle of Flintstones Healthy Brain Support. Plaintiff is advancing the same claims and legal theories on behalf of himself and all members of the Class.

42. *Adequacy of Representation.* Plaintiff will fairly and adequately protect the interests of the members of the Class. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

43. *Superiority.* A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against Bayer. It would thus be virtually impossible for Plaintiff and Class members, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

44. Plaintiff seeks preliminary and permanent injunctive and equitable relief on behalf of the entire Class, on grounds generally applicable to the entire Class, to enjoin and prevent Bayer from engaging in the acts described, and requiring Bayer to provide full restitution to Plaintiff and Class members.

45. Unless a Class is certified, Bayer will retain monies received as a result of its conduct that were taken from Plaintiff and Class members. Unless a Class-wide injunction is

issued, Bayer will continue to commit the violations alleged, and the members of the Class and the general public will continue to be deceived.

46. Bayer has acted and refused to act on grounds generally applicable to the Class, making appropriate final injunctive relief with respect to the Class as a whole.

COUNT I
For Violations of the Florida Deceptive and Unfair Trade Practices Act,
§ 501.201, Florida Statutes, *et seq.*

47. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1-46 as if fully set forth herein.

48. This cause of action is brought pursuant to the Florida Deceptive and Unfair Trade Practices Act, section 501.201, Fla. Stat., *et seq.* (“FDUTPA”). The stated purpose of the FDUTPA is to “protect the consuming public . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.” § 501.202(2), Fla. Stat.

49. Plaintiff is a consumer as defined by section 501.203, Fla. Stat. Flintstones Healthy Brain Support is a good within the meaning of the FDUTPA. Defendant is engaged in trade or commerce within the meaning of the FDUTPA.

50. Florida Statute section 501.204(1) declares unlawful “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.” The FDUTPA also prohibits false and misleading advertising.

51. Florida Statute section 501.204(2) states that “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to [section] 5(a)(1) of the Federal Trade Commission Act.” Defendant’s unfair and

deceptive practices are likely to mislead – and have misled – consumers acting reasonably in the circumstances, and violate section 500.04, Fla. Stat., and 21 U.S.C. § 343.

52. Defendant has violated the FDUTPA by engaging in the unfair and deceptive practices as described herein which offend public policies and are immoral, unethical, unscrupulous and substantially injurious to consumers.

53. Plaintiff and Florida consumers have been aggrieved by Defendant's unfair and deceptive practices and acts of false advertising in that they paid for the Product that did not support brain health as represented.

54. The harm suffered by Plaintiff and Florida consumers was directly and proximately caused by the deceptive, misleading and unfair practices of Defendant, as more fully described herein.

55. Pursuant to section 501.211(1), Fla. Stat., Plaintiff and Florida consumers seek a declaratory judgment and court order enjoining the above-described wrongful acts and practices of Defendant and for restitution and disgorgement.

56. Additionally, pursuant to sections 501.211(2) and 501.2105, Fla. Stat., Plaintiff and Florida consumers seek damages, attorneys' fees and costs.

COUNT II Unjust Enrichment

57. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1-46 above as if fully set forth herein.

58. At all times relevant hereto, Defendant manufactured, produced, promoted, marketed and sold Flintstones Healthy Brain Support.

59. Plaintiff and Florida consumers conferred upon Defendant non-gratuitous payments for Flintstones Healthy Brain Support. Defendant accepted and retained the non-

gratuitous benefits conferred by Plaintiff and the other Florida consumers with full knowledge and awareness that, as a result of Defendant's deceptive marketing, they were not receiving a DHA-fortified Product of the quality, nature, fitness or value that had been represented by Defendant.

60. Defendant profited from its unlawful, unfair, misleading, and deceptive practices and advertising at the expense of Plaintiff and consumers in Florida, under circumstances in which it would be unjust for Defendant to be permitted to retain the benefit. Under common law principles of unjust enrichment, Defendant should not be permitted to retain the benefits of this unjust enrichment.

61. Because Defendant's retention of the non-gratuitous benefits conferred by Plaintiff and Florida consumers is unjust and inequitable, Plaintiff and Florida consumers are entitled to, and hereby seek disgorgement and restitution of Defendant's wrongful profits, revenue, and benefits in a manner established by the Court.

62. Plaintiff and Florida consumers do not have an adequate remedy at law against Defendant.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for a judgment:

- A. Certifying the Class as requested herein with the Plaintiff as the class representative and undersigned as class counsel;
- B. Awarding restitution to Plaintiff and the proposed Class members;
- C. Awarding injunctive relief as permitted by law or equity, including: enjoining Defendant from continuing the unlawful practices as set forth herein;
- D. Awarding against Defendant the damages that Plaintiff and the other members of

the Class suffered as a result of Defendant's actions, the amount of such damages to be determined at trial, plus punitive and treble damages in an amount to be determined at trial;

- E. Ordering Defendant to engage in a corrective advertising campaign
- F. Awarding attorneys' fees and costs; and
- G. Providing such further relief as may be just and proper.

DATED: October 14, 2014

Respectfully submitted,

s/ Lance A. Harke

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JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS MATTHEW KAPLAN, an individual, on behalf of himself and all others similarly

DEFENDANTS BAYER HEALTHCARE, LLC

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known)

(c) Attorneys (Firm Name, Address, and Telephone Number) Harke Clasby & Bushman LLP Tel: 305-536-8220 9699 NE Second Avenue Fax: 305-536-8229 Miami Shores, FL 33138

(d) Check County Where Action Arose: [X] MIAMI-DADE [] MONROE [] BROWARD [] PALM BEACH [] MARTIN [] ST. LUCIE [] INDIAN RIVER [] OKEECHOBEE [] HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant (Excl. Veterans)
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State PTF DEF [X] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [] 3
Foreign Nation [] 6 [] 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Table with columns: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Insurance, Personal Injury, Real Estate, etc.

V. ORIGIN

- 1 Original Proceeding
2 Removed from State Court
3 Re-filed (See VI below)
4 Reinstated or Reopened
5 Transferred from another district (specify)
6 Multidistrict Litigation
7 Appeal to District Judge from Magistrate Judgment
8 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S) (See instructions):

a) Re-filed Case [] YES [X] NO b) Related Cases [] YES [X] NO

JUDGE DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 1332. This is an action to recover damages sustained as a result of Defendant's sale of gummy-chewable. LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

[X] CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMANDS CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

DATE: October 14, 2014 SIGNATURE OF ATTORNEY OF RECORD: [Signature]

FOR OFFICE USE ONLY

RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Florida

MATTHEW KAPLAN, an individual, on behalf of himself and all others similarly situated,

Plaintiff(s)

v.

BAYER HEALTHCARE, LLC

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Bayer Healthcare LLC Corporation Service Company, Registered Agent 1201 Hays Street Tallahassee, FL 32301

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Lance A. Harke, P.A. Harke Clasby & Bushman LLP 9699 NE Second Avenue Miami Shores, FL 33138 Telephone: 305-536-8220 Facsimile: 305-536-8229

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc: