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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

GABRIEL JOSEPH CARRERA, on behalf  
of himself and all others similarly situated,

Plaintiff,

vs.

BAYER CORPORATION and BAYER  
HEALTHCARE, LLC,

Defendants.

Civil Action No. 08-04716(JLL)

**THIRD AMENDED CLASS ACTION  
COMPLAINT and DEMAND FOR  
JURY TRIAL**

Plaintiff Gabriel Joseph Carrera (“Plaintiff”), individually and on behalf of all others similarly situated (the “Class”), by his attorneys, hereby complains against Bayer Corporation and Bayer HealthCare, LLC (collectively “Bayer” or “Defendants”).

**INTRODUCTION**

1. Bayer has promoted, advertised and marketed its “One-A-Day WeightSmart” dietary supplement products as “a safe way to supplement the effort you are making to better control your weight.” Trusting consumers purchased these products hoping that the promises

made were true. These promises included promises that One-A-Day WeightSmart had the ability to, *inter alia*, increase metabolism, prevent weight gain associated with the decline in metabolism that occurs after the age of 30, and help to generally promote weight maintenance.

2. In reality, Bayer's One-A-Day WeightSmart products do not live up to these promises, a fact which was confirmed by the January 2007 Consent Decree entered into between Bayer and the Federal Trade Commission ("FTC"), in which Bayer agreed to pay a multi-million dollar civil penalty for violating an earlier FTC order governing the promotion, advertising and marketing of its "One-A-Day" products.

### **PARTIES**

3. Plaintiff Gabriel Carrera is citizen of the State of Florida, residing in Fort Lauderdale, Florida. He purchased Bayer's One-A-Day WeightSmart products. He brings this action on behalf of himself as an individual consumer and on behalf of all others similarly situated.

4. Defendant Bayer Corporation is an Indiana corporation with its headquarters located in Pittsburgh, Pennsylvania, and an office and place of business located in Morristown, New Jersey. Bayer Corporation, which has annual sales in excess of \$10 billion, through its subsidiaries, manufactures and sells a variety of products, including vitamins, dietary supplements, and over-the-counter and prescription drugs.

5. Defendant Bayer HealthCare, LLC, is a Delaware corporation with a principal place of business in Morristown, New Jersey. Bayer HealthCare, LLC is a subsidiary of Bayer Corporation. Bayer HealthCare, LLC markets and sells One-A-Day brand vitamins and supplements, including "One-A-Day WeightSmart" multivitamin and dietary supplements.

6. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, that the employees of Bayer, its subsidiaries, affiliates and other related entities, as well as the employees of those subsidiaries, affiliates and other related entities, were the agents, servants and employees of Bayer, and at all times herein mentioned, each was acting within the purpose and scope of said agency and employment. Whenever reference in this Complaint is made to any act or transaction of Bayer, such allegation shall be deemed to mean that the principals, officers, directors, employees, agents, and/or representatives of Bayer committed, knew of, performed, authorized, ratified and/or directed such act or transaction on behalf of Bayer while actively engaged in the scope of their duties.

#### **VENUE AND JURISDICTION**

7. This Court has jurisdiction over the subject matter presented by this Complaint because it is a class action arising under the Class Action Fairness Act of 2005 (“CAFA”), Pub. L. No. 109-2, 119 Stat. 4 (2005), which explicitly provides for the original jurisdiction of the Federal Courts of any class action in which any member of the Class is a citizen of a State different from any Defendant, and in which the matter in controversy exceeds in the aggregate the sum of \$5,000,000.00, exclusive of interest and costs. Plaintiff alleges that the total claims of individual Class members in this action are in excess of \$5,000,000.00 in the aggregate, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2), (5). Plaintiff is a citizen of Florida, whereas, as set forth above, Bayer Corporation can be considered a citizen of Indiana, Pennsylvania or New Jersey and Bayer HealthCare, LLC can be considered a citizen of Delaware or New Jersey for the purposes of diversity. Therefore, diversity of citizenship exists under CAFA as required by 28 U.S.C. § 1332(d)(2)(A). Furthermore, Plaintiff alleges that more than two-thirds of all of the members of the proposed Class in the aggregate are citizens of a

state other than New Jersey, where this action is originally being filed, and that the total number of members of the proposed Class is greater than 100, pursuant to 28 U.S.C. § 1332(d)(5)(B).

8. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims herein occurred in this district and because Bayer may be found in and is subject to personal jurisdiction in this district.

### **FACTUAL ALLEGATIONS**

#### **Bayer's Unlawful Promotion of One-A-Day WeightSmart**

9. All allegations in this Complaint are based on information and belief and/or are likely to have evidentiary support after reasonable opportunity for further investigation and discovery. Plaintiff repeats, realleges and incorporates by reference the paragraphs above.

10. Bayer has promoted, advertised and marketed One-A-Day WeightSmart as “a safe way to supplement the effort you are making to better control your weight.”

11. On or about January 3, 2007, the United States, acting upon the notification and authorization to the U.S. Attorney General by the FTC, filed an action against Bayer ( the “FTC Complaint”) in the United States District Court for the District of New Jersey,<sup>1</sup> under Sections 5(1), 13(b) and 16(a) of the Federal Trade Commission Act (the “FTCA”), 15 U.S.C. §§ 45(1), 53(b) and 56(a). The FTC Complaint sought monetary civil penalties, a permanent injunction, rescission of contracts, restitution, disgorgement of ill-gotten gains and other equitable relief from Bayer for violation of a final FTC order to cease and desist. A true and correct copy of the FTC Complaint is attached hereto as Exhibit 1 and incorporated by reference.

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<sup>1</sup> *United States of America v. Bayer Corporation*, United States District Court, District of New Jersey, Civil Action No. 07-01 (HAA).

12. The FTC Complaint was based on an earlier FTC proceeding,<sup>2</sup> in which the FTC charged Miles, Inc.,<sup>3</sup> a U.S. subsidiary of Bayer Group of Germany, with violating Sections 5(a) and 12 of the FTCA, 15 U.S.C. §§ 45(a) and 52. On January 28, 1991, the FTC entered a final order against Miles Inc., to cease and desist certain advertising practices with respect to One-A-Day brand vitamin and mineral supplements (the “Order,” a copy of which is attached as Exhibit A to the FTC Complaint (Exhibit 1 to this Complaint)). The Order was served upon Miles, Inc., in 1991, and remained in full force at all relevant times. The Order included a provision that:

respondent Miles Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of One-A-Day brand vitamins, including specifically, but not limited to, One-A-Day Maximum Formula, One-A-Day Stressguard, One-A-Day Essential, One-A-Day Plus Extra C, and One-A-Day Within, do forthwith cease and desist from making any representation, directly or by implication, concerning the need for or benefits to be derived from consumption of such product unless, at the time such representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence to substantiate the representation; competent and reliable scientific evidence shall mean those tests, analyses, research, studies or other evidence, conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

Order, Sect. II, pp. 2-3.

13. In the FTC Complaint, the United States alleged that Bayer had engaged in a national advertising campaign for One-A-Day WeightSmart that made unsubstantiated claims that the product increased metabolism, enhanced metabolism through its EGCG content,<sup>4</sup> helped prevent weight gain associated with age-related metabolism decline, and helped users control their weight by enhancing their metabolism.

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<sup>2</sup> Docket No. C-3323.

<sup>3</sup> Bayer is a successor to Miles, Inc., and subject to the Order.

<sup>4</sup> Epigallocatechin gallate, an extract from green tea.

14. The advertising campaign was conducted through the use of various media, including television, radio, the internet, newspapers and national magazines. The FTC Complaint alleged that these unsubstantiated claims violated the Order, specifically the section cited above requiring that all claims regarding the benefits of One-A-Day brand products be substantiated by competent and reliable scientific evidence.

15. On January 4, 2007, the FTC announced that it had entered into a consent decree (“Consent Decree”) by which the parties agree to settle the FTC action. A true and correct copy of the Consent Decree is attached hereto as Exhibit 2 and incorporated by reference.

16. Pursuant to the terms of the Consent Decree, Bayer agreed to pay a \$3.2 million civil penalty and is prohibited from violating the earlier FTC Order.

17. Additionally, the Consent Decree provides that, with regard to the manufacture, labeling, advertising, promotion, offer for sale, sale, or distribution of any dietary supplement, or multivitamin, including but not limited to One-A-Day WeightSmart, Bayer is permanently enjoined from:

Making any representation, including through endorsements or trade name, expressly or by implication:

- A. That such product or any of its ingredients:
  - 1. Increases metabolism;
  - 2. Enhances metabolism through its EGCG content;
  - 3. Helps prevent some of the weight gain associated with a decline in metabolism in users over age 30;
  - 4. Helps users control their weight by enhancing their metabolism;
  - 5. Makes a material contribution to any program or system that promotes weight maintenance;
  - 6. Can or will cure, treat, or prevent any disease; or
  - 7. Have any effect on the structure or function of the human body; or
- B. About the benefits, performance, efficacy, safety or side effects, of such product or any of its ingredients; unless at the time the

representation is made, Defendant Bayer Corporation possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Consent Decree, Sect. III, pp. 4-5.

**Plaintiff's Purchases of One-Day WeightSmart**

18. Plaintiff, believing generally in the good name and reputation of Bayer, and having been exposed to the advertising, marketing and labeling representations by Bayer that One-A-Day WeightSmart increased metabolism, enhanced metabolism through its EGCG content, helped prevent weight gain associated with age-related metabolism decline, and helped users control their weight by enhancing their metabolism, has purchased and spent money on the product. Specifically, immediately prior to purchasing One-A-Day WeightSmart, Plaintiff read the One-A-Day WeightSmart packaging itself, which claimed that One-A-Day WeightSmart was “Specifically Formulated to help you While You Control Your Weight” and which boasted of One-A-Day WeightSmart’s EGCG content and EGCG’s purported ability to “enhance your metabolism.” *See* FTC Complaint, Ex. J. In reliance on these representations on the One-A-Day WeightSmart packaging, Plaintiff purchased One-A-Day WeightSmart in approximately November 2006 from Walgreens Pharmacy in Fort Lauderdale, Florida and approximately four times thereafter between November 2006 and September 2007 from Walgreens Pharmacy in Fort Lauderdale, Florida and CVS Pharmacy in Tampa Florida. In exchange, he received a product that lacked the advertised benefits, and lost money on the purchase of an ineffective product.

**CLASS ALLEGATIONS**

19. Plaintiff realleges and incorporates by reference the allegations set forth in each of the preceding paragraphs of this Complaint.

20. Pursuant to Federal Rule of Civil Procedure (“FRCP”) 23, Plaintiff brings this action on behalf of himself and all other consumers who purchased One-A-Day WeightSmart during the Class period. Bayer’s practices were applied uniformly to all members of the Class, so that the questions of law and fact are common to all members of the Class. All putative Class members were and are similarly affected by having purchased One-A-Day WeightSmart, and the relief sought herein is for the benefit of Plaintiff and members of the proposed Class. Plaintiff is informed and believes, and on that basis alleges, that the proposed Class is so numerous that joinder of all members would be impractical.

21. Based on the annual sales of One-A-Day WeightSmart and the popularity of that product, it is apparent that the number of consumers of One-A-Day WeightSmart would at least be in the many thousands, thereby making joinder impossible.

22. Questions of law and fact common to the Class exist that predominate over questions affecting only individual members, including the following:

- (a) Whether Bayer’s conduct as set forth herein constitutes the act, use or employment of an unconscionable commercial practice, deceptive, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in violation of the New Jersey Consumer Fraud Act;
- (b) Whether Bayer negligently misrepresented the benefits of taking its One-A-Day WeightSmart products;
- (c) Whether Bayer intentionally misrepresented the benefits of taking its One-A-Day WeightSmart products;
- (d) Whether the product’s uniform labels were misleading;
- (e) Whether Bayer’s actions conform to the terms of its consent decree;
- (f) Whether Bayer’s conduct as set forth above injured consumers, and if so, the extent of the injury;



- (g) Whether Plaintiff and the Class are entitled to damages and attorneys' fees.

23. The claims asserted by Plaintiff in this action are typical of the claims of the members of the Class as the claims arise from the same course of conduct by Bayer, and the relief sought is common.

24. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class. Plaintiff has retained counsel competent and experienced in both consumer protection and class action litigation.

25. Certification of this class action is appropriate under FRCP 23(b), because the questions of law or fact common to the respective Class members predominate over questions of law or fact affecting only individual members.

26. This predominance makes class litigation superior to any other method available for the fair and efficient adjudication of these claims. Absent a class action, it would be highly unlikely that the representative Plaintiff or any other Class member would be able to protect their own interests because the cost of litigation through individual lawsuits might exceed expected recovery. Certification is also appropriate because Bayer acted or refused to act on grounds generally applicable to the Class. Further, given the large number of consumers of One-A-Day WeightSmart

27. Allowing individual actions to proceed in lieu of a class action would run the risk of yielding inconsistent and conflicting adjudications, an outcome that further supports the benefit of bringing this as a class action.

28. A class action is a fair and appropriate method for the adjudication of the controversy, in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the

prosecution of numerous individual actions and the duplication of discovery, effort, expense and burden on the courts that such individual actions would engender. The benefits of proceeding as a class action, including providing a method for obtaining redress for claims that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to the management of this class action.

29. In the aggregate, Plaintiff contends that the claims of the individual Class members exceed the sum of \$5,000,000.00, exclusive of interest and costs.

**COUNT ONE**  
**(Violation of the New Jersey Consumer Fraud Act,  
N.J.S.A. 56:8-1, *et seq.*)**

30. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

31. At all relevant times, Bayer Corporation and Bayer Healthcare, LLC were and are “persons,” as defined by N.J.S.A. 56:8-1(d).

32. At all relevant times, the One-A-Day WeightSmart products at issue constituted “merchandise,” as defined by N.J.S.A. 56:8-1(c).

33. At all relevant times, Bayer’s manufacturing, marketing, advertising, sales and/or distribution of the One-A-Day WeightSmart products at issue met the definition of “advertisement” set forth by N.J.S.A. 56:8-1(a).

34. At all relevant times, Bayer’s manufacturing, marketing, advertising, sales and/or distribution of the One-A-Day WeightSmart products at issue met the definition of “sale” set forth by N.J.S.A. 56:8-1(e).

35. N.J.S.A. 56:8-2 provides that “[t]he act, use or employment by any person of any unconscionable practice, deception, fraud, false pretense, false promise, misrepresentation, or the

knowing, concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission, . . . is declared to be an unlawful practice. . .

36. Bayer uniformly represented to Plaintiff and each Class Member by means of its advertising, marketing and other promotional materials, and on the One-A-Day WeightSmart labeling and packaging and, that One-A-Day WeightSmart:

(a) was “Specially formulated to help you While You Control Your Weight”;

(b) contained “EGCG, natural green tea extract to enhance your metabolism”; and that

(c) “Starting in your 30’s your body’s metabolism can slow down and you can gain weight. To help maintain healthy metabolism levels, you need to give your body key nutrients. That is why One A Day has created WeightSmart, a unique complete multivitamin with EGCG (a natural extract of green tea) to enhance your metabolism.”

As alleged herein, during the class period, Bayer uniformly misrepresented and failed to disclose the lack of substantiation of the claimed benefits of taking its One-A-Day WeightSmart products in its advertising, marketing and other promotional materials, and on its labeling and packaging of these products, all in violation of the FTC’s prior Order.

37. Bayer has therefore engaged in practices which are unconscionable, deceptive and fraudulent and which are based on false pretenses, false promises, misrepresentations, and the knowing concealment, suppression, or omission of material fact with the intent that others rely upon such concealment, suppression or omission in their manufacturing, advertising, marketing, selling and distribution of its One-A-Day WeightSmart products. Bayer has therefore violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, *et seq.*

38. As a direct and proximate result of Bayer’s improper conduct, Plaintiff and the other members of the Class have suffered damages and ascertainable losses of moneys and/or

property, by paying more for One-A-Day WeightSmart products than they would have, and/or by purchasing One-A-Day WeightSmart products which they would not have purchased, if the benefits of taking such products had not been misrepresented, in amounts to be determined at trial.

39. New Jersey has numerous contacts with the conduct alleged herein and a strong interest in applying the New Jersey Consumer Fraud Act to that conduct. Bayer is found, does business or transacts business within this district. Bayer HealthCare, LLC maintains its principal offices, as well as agents, in this district and is licensed to do, has done, and continues to do business in this district. Bayer Corporation maintains offices, as well as agents, in this district and is licensed to do, has done, and continues to do business in the state of New Jersey. Bayer's improper conduct set forth herein occurred in this district or was conceived of and executed from this district in whole or in part. Bayer's advertising, marketing, pricing, sales and distribution operations for its One-A-Day WeightSmart products sold throughout the United States, which form the basis of this litigation, originate from and/or are controlled by, Bayer's offices in this district. In addition, Bayer directly advertised, marketed and sold One-A-Day WeightSmart to consumers in this district.

40. As such, New Jersey's contacts to this litigation make it a desirable forum for this litigation and New Jersey's interest in applying the New Jersey Consumer Fraud Act in this litigation outweighs any interests other states or their laws may have.

**COUNT TWO**  
**(Negligent Misrepresentation)**

41. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

42. Bayer represented to Plaintiff and each Class Member by means of its advertising, marketing and other promotional materials, and the One-A-Day WeightSmart labeling and packaging, that One-A-Day WeightSmart:

(a) was “Specially formulated to help you While You Control Your Weight”;

(b) contained “EGCG, natural green tea extract to enhance your metabolism”; and that

(c) “Starting in your 30’s your body’s metabolism can slow down and you can gain weight. To help maintain healthy metabolism levels, you need to give your body key nutrients. That is why One A Day has created WeightSmart, a unique complete multivitamin with EGCG (a natural extract of green tea) to enhance your metabolism.”

43. Bayer’s representations were untrue as set forth above.

44. Bayer made the representations herein alleged with the intention of inducing Plaintiff and the public to purchase One-A-Day WeightSmart.

45. Plaintiff and Class members saw, believed, and relied on Bayer’s representations and, in reliance on them, purchased One-A-Day WeightSmart. Said reliance was reasonable, given Bayer’s generally good reputation among consumers. Plaintiff and the Class were without the ability to determine the truth of these statements on their own and could only rely on Bayer’s statements in its advertising, marketing and other promotional materials, and on the One-A-Day WeightSmart labeling and packaging.

46. At the time Bayer made the misrepresentations herein alleged, it had no reasonable grounds for believing the representations to be true, as it possessed no competent and reliable scientific evidence to substantiate the representations set forth in detail above, and was already subject to the above-referenced FTC Order.

47. As a proximate result of the foregoing negligent misrepresentations by Bayer, Plaintiff and Class members were induced to spend an amount to be determined at trial on One-A-Day WeightSmart and they were deprived of the weight loss benefits represented by Bayer. Accordingly, and as a proximate result of Bayer's misrepresentations as set forth herein, Plaintiff and Class members lost the money they paid for the product in an amount to be determined at trial in that it did not have the qualities they sought, which Bayer represented to them that it had. Had Plaintiff and the Class members known the true facts about the product, they would not have purchased it.

**COUNT THREE**  
**(Intentional Misrepresentation)**

48. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

49. Bayer represented to Plaintiff and each Class Member by means of its advertising, marketing and other promotional materials, and One-A-Day WeightSmart labeling and packaging, that One-A-Day WeightSmart:

(a) was "Specially formulated to help you While You Control Your Weight";

(b) contained "EGCG, natural green tea extract to enhance your metabolism"; and that

(c) "Starting in your 30's your body's metabolism can slow down and you can gain weight. To help maintain healthy metabolism levels, you need to give your body key nutrients. That is why One A Day has created WeightSmart, a unique complete multivitamin with EGCG (a natural extract of green tea) to enhance your metabolism."

50. Bayer's representations were untrue as set forth above.

51. Bayer made the representations herein alleged with the intention of inducing Plaintiff and the public to purchase its One-A-Day WeightSmart products.

52. Plaintiff and Class members saw, believed, and relied on Bayer's representations and, in reliance on them, purchased One-A-Day WeightSmart. Said reliance was reasonable, given Bayer's generally good reputation among consumers.

53. At the time Bayer made the representations herein alleged, Bayer knew the representations were false, as evidenced by the above-referenced FTC Order and Bayer's failure, despite that Order, to establish any competent or reliable scientific evidence to support its claims. Even so, Bayer continued to make the unsubstantiated, false claims.

54. Bayer made these misrepresentations with the intention of depriving Plaintiff and Class members of property or otherwise causing injury, and is guilty of fraud.

55. As a proximate result of the foregoing intentional misrepresentations by Bayer, Plaintiff and Class members were induced to spend an amount to be determined at trial on One-A-Day WeightSmart and they were deprived of the weight loss benefits represented by Bayer. Accordingly, and as a proximate result of Bayer's intentional misrepresentations as set forth herein, Plaintiff and Class members lost the money they paid for the product in an amount to be determined at trial in that it did not have the qualities they sought, which Bayer represented to them that it had. Had Plaintiff and the Class members known the true facts about the products, they would not have purchased them.

56. Plaintiff is informed and believes and thereon alleges that Bayer knew that One-A-Day WeightSmart did not provide the weight loss benefits it represented, and that it intended that customers and the unknowing public should rely on its representations. Such knowledge is evidenced by Bayer's actions as set forth above in continuing to make the representations regarding One-A-Day WeightSmart products during the pendency of the Order, despite Bayer's lack of competent and reliable scientific evidence to support its claims. Plaintiff and Class

members, in purchasing and using the products as herein alleged, did rely on Bayer's representations, all to their damage as hereinabove alleged. In doing these things, Bayer was guilty of malice, oppression and fraud, and Plaintiff and Class members are entitled to recover punitive damages.

**COUNT FOUR**  
**(For Injunctive and Declaratory Relief)**

57. Plaintiff repeats and realleges all preceding paragraphs, as if fully set forth herein.

58. As set forth above, through the improper practices described above, Bayer has intentionally misrepresented the nature of its One-A-Day WeightSmart products sold to Plaintiff and other members of the Class.

59. Bayer's practices described herein are unlawful and against public policy and, therefore, Bayer should be prohibited and enjoined from engaging in these practices in the future.

**NOTICE TO ATTORNEY GENERAL**

60. A copy of the original complaint filed in this action was mailed to the Attorney General of the State of New Jersey within 10 days of filing pursuant to N.J.S.A. 56:8-20.

WHEREFORE, Plaintiff and the Class pray that the Court enter judgment for them and against Bayer as follows:

- (a) Certifying the Class pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying Plaintiff as the representative of the Class, and designating Plaintiff's counsel as counsel for the Class;



- (b) Declaring that Bayer's acts and practices, as described herein, constitute unconscionable and deceptive commercial practices that are unlawful under the New Jersey Consumer Fraud Act;
- (c) Awarding Plaintiff and the Class refunds, damages, treble damages, attorneys' fees, expert witness fees and other costs; and
- (d) Granting any such other and further legal or equitable relief as this Court deems appropriate.

CARELLA, BYRNE, CECCHI,  
OLSTEIN, BRODY & AGNELLO, P.C.  
Attorneys for Plaintiff

By: James E. Cecchi  
JAMES E. CECCHI

Dated: August 17, 2010

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**DEMAND FOR JURY TRIAL**

Plaintiff demands a trial by jury on all claims so triable as a matter of right.

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OLSTEIN, BRODY & AGNELLO, P.C.  
Attorneys for Plaintiff

By: James E. Cecchi  
JAMES E. CECCHI

Dated: August 17, 2010

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# EXHIBIT 1

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AT 8:30  
WILLIAM T. WALSH  
CLERK M

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,

Plaintiff,

v.

BAYER CORPORATION,

Defendant.

COMPLAINT FOR CIVIL  
PENALTIES, INJUNCTIVE  
AND OTHER RELIEF

CIV. ACTION NO. 07-01 (HAA)

Plaintiff, United States of America, acting upon the notification and authorization to the Attorney General by the Federal Trade Commission ("Commission"), for its Complaint alleges that:

1. Plaintiff brings this action under Sections 5(l), 13(b) and 16(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(l), 53(b) and 56(a), to obtain monetary civil penalties, a permanent injunction, rescision of contracts, restitution, disgorgement of ill-gotten gains, and other equitable relief from defendant for its violations of a final Commission order to cease and desist.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1337(a), 1345 and 1355 and under 15 U.S.C. §§ 45(l), 53(b) and 56(a).
3. Venue in the United States District Court for the District of New Jersey is proper under 15 U.S.C. § 53(b) and under 28 U.S.C. §§ 1391(b-c) and 1395(a).

DEFENDANT

4. Defendant Bayer Corporation is an Indiana corporation with its headquarters located at 100 Bayer Road, Pittsburgh, PA 15205, and an office and place of business located within the District of New Jersey at 36 Columbia Road, Morristown, New Jersey 07962. Bayer Corporation, with annual sales exceeding \$10 billion, through its subsidiaries, manufactures and sells a variety of products, including vitamins, dietary supplements, and over-the-counter and prescription drugs. Bayer HealthCare, LLC is a subsidiary of defendant Bayer Corporation, and markets and sells One-A-Day brand vitamins and supplements, including One-A-Day WeightSmart.

5. At all times material herein, defendant has been engaged in the advertising, offering for sale, sale, or distribution of the One-A-Day WeightSmart multivitamin and dietary supplement in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

PRIOR COMMISSION PROCEEDING

6. In a Commission proceeding bearing Docket No. C-3323, in which the Commission charged Miles Inc., a U.S. subsidiary of Bayer Group of Germany, with violating Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, the Commission, on January 28, 1991, entered a final order against Miles Inc., to cease and desist certain advertising practices with respect to One-A-Day brand vitamin and mineral supplements ("Commission's Order"). The order was served upon Miles Inc., in 1991, and remains in full force.

7. Defendant Bayer Corporation is a successor to Miles Inc. and subject to the Commission's Order.

8. The Commission's Order, attached to this Complaint as Exhibit A, includes the following provision:

ORDER

\* \* \*

II.

IT IS FURTHER ORDERED that respondent Miles Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of One-A-Day brand vitamins, including specifically, but not limited to, One-A-Day Maximum Formula, One-A-Day Stressguard, One-A-Day Essential, One-A-Day Plus Extra C, and One-A-Day Within, do forthwith cease and desist from making any representation, directly or by implication, concerning the need for or benefits to be derived from consumption of such product unless, at the time such representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence to substantiate the representation; competent and reliable scientific evidence shall mean those tests, analyses, research, studies or other evidence, conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

\* \* \*

DEFENDANT'S ONE-A-DAY WEIGHTSMART

9. Each tablet of defendant's One-A-Day WeightSmart multivitamin and dietary supplement contains, among other things, 32 mg of EGCG (epigallocatechin gallate) from extract of green tea (*Camilla sinensis* leaf), as well as vitamins, minerals, and caffeine. (An earlier formulation of the product contained 27 mg of EGCG.) The recommended daily dose is one tablet. Various

retailers have sold One-A-Day WeightSmart to consumers at prices ranging from about \$8.99 for 50 tablets to about \$16.99 for 100 tablets.

DEFENDANT'S ADVERTISING FOR ONE-A-DAY WEIGHTSMART

10. On numerous occasions since January 2003, defendant has disseminated or caused to be disseminated advertisements for One-A-Day WeightSmart, including but not limited to 30- and 15-second commercials on network and cable television, print advertisements in various magazines, such as Better Homes and Gardens, Cooking Light, Family Circle, Redbook, and TV Guide, and Internet advertisements at www.oneaday.com. These advertisements, which include, but are not necessarily limited to, the attached Exhibits B-J, contain the following statements and depictions, among others:

A. Television Commercial: "Remember When" 30-second

MOM: I remember when I thought I could eat anything.

DAUGHTER: (*eating pizza*) Want another piece?

MOM: No thanks.

MOM: Then in my 30's, my metabolism slowed down. So, I got smart.

MOM: I watch what I eat. Exercise more.

MOM: Plus, I found a new multivitamin.

ANNOUNCER: One-A-Day WeightSmart. The first and only complete multivitamin with an ingredient to enhance your metabolism. EGCG, a natural green tea extract, to help you while you manage your weight.

MOM: A multivitamin for my metabolism. Now that's smart.

ANNOUNCER: One-A-Day WeightSmart.

(Exhibit B)

B. Television Commercial: "Boom Box" 15-second

VIDEO: Woman listening to radio inside home

MALE (VO) (*on radio*): Just in! Most women over 30 can gain 10 pounds a decade, due in part to slowing metabolism. (SUPER: Average female weight gain over a decade.)

VIDEO: Woman throwing radio out the window

MALE (VO) (*on radio*): So eat right, exercise, and take One-A-Day WeightSmart. The complete multi-vitamin with EGCG to enhance metabolism. (SUPER: For nutritional support only. Not a weight loss product.)

WOMAN: Now you tell me.

MALE (VO) (*on radio*): One-A-Day WeightSmart. (SUPER: The multivitamin with more for your metabolism.)

(Exhibit C)

C. Television Commercial: "Saturday Morning" 30-second

WOMAN: There was a time when I ate like this. (*Visual of boy eating donut*)

WOMAN: But then, in my 30s, my metabolism slowed down. So now I exercise more, eat smarter. (*Visual of woman walking with her family*) And I found One-A-Day WeightSmart.

ANNOUNCER: (*Visual of WeightSmart package*) (SUPER: For nutritional support only. Not a weight loss product.) One-A-Day WeightSmart, the first complete multi-vitamin with EGCG, a natural green tea extract to enhance metabolism (*Visual of woman walking with boy*) to help you while you manage your weight.

WOMAN: A multivitamin for your metabolism, now that's smart.

ANNOUNCER: One-A-Day WeightSmart. (SUPER: The multivitamin with more for your health.)

(Exhibit D)

D. Television Commercial: "Simple Exercise" 30-second

WOMAN: After 30, your metabolism can slow down and you know how hard that can make things. Here's an easy exercise that can help. One-A-Day WeightSmart. Just lift, and twist and bend. (*woman opening WeightSmart bottle*)

ANNOUNCER: One-A-Day WeightSmart. A complete multivitamin with EGCG, a natural green tea extract, to enhance metabolism. (SUPER: For nutritional support only. Not a weight loss product.)

WOMEN (*women in an exercise class opening WeightSmart bottles*): And lift and twist and bend. (SUPER: Use with diet and exercise.)

WOMAN: Just once a day. That's easy.

ANNOUNCER and SUPER: One-A-Day WeightSmart. The multivitamin with more for your metabolism.

(Exhibit E)

E. Television Commercial: "Dessert" 15-second

(*Two women, JANE and MARTHA, sit at a table as a dessert cart rolls by.*)

JANE: Do you want some dessert?

MARTHA: Not with my metabolism.

JANE: Yea, in your 30's your metabolism slows.

MARTHA: What can you do?



JANE: You know what I do? I eat right, exercise (*visual of JANE walking with a dog*), and I switched to One-A-Day WeightSmart.  
(*visual of One-A-Day WeightSmart packaging in which the letters "EGCG" pop out and glow*)

JANE (cont.): It's a complete multivitamin, with EGCG, to help enhance metabolism.

(SUPER: For nutritional support only. Not a weight loss product.)

(SUPER (CBS): This statement have [sic] not been evaluated by the FDA. This product is not intended to diagnose, treat, cure, or prevent any disease.)

MARTHA: Every little bit helps.

ANNOUNCER: One-A-Day WeightSmart.

(Exhibit F)

F. Television Commercial: "Beach" 15-second

(*Two women, MOM 1 and MOM 2, walk along a beach and pass by an ice cream vendor.*)

MOM 2: Ice cream?

MOM 1: With my metabolism?

MOM 2: Yea, in your 30's, your metabolism slows. So I eat right, I exercise, and I switched to One-A-Day WeightSmart.

ANNOUNCER: It's a complete multivitamin... (SUPER: For nutritional support only. Not a weight loss product.)

ANNOUNCER (cont.): with EGCG to help enhance metabolism.

MOM 1: I'll take all the help I can get.

ANNOUNCER: One-A-Day WeightSmart. (SUPER: oneday.com)

(Exhibit G)

G. Print Advertisement

You're working on your metabolism.

(*Picture of two women walking*)

Is your multivitamin?

(*Picture of One-A-Day WeightSmart package*)

Introducing New One-A-Day WeightSmart.

Starting in your 30s, your metabolism slows down and you can gain weight. Now One-A-Day WeightSmart is the first and only complete multivitamin with EGCG, a natural green tea extract that enhances your metabolism to help while you work to control your weight. When you do your part by eating right and exercising, One-A-Day WeightSmart can help.

(*Picture of capsule with "One-A-Day" logo*) The multivitamin with more for your health.

For nutritional support as part of a healthy lifestyle. These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure, or prevent any disease.

(Exhibit H)

H. Internet Advertisement

One-A-Day WeightSmart

FREQUENTLY ASKED QUESTIONS

...

Q: How does your metabolism work?

A: Metabolism is the sum of all reactions in the body. Burning fat is an important part of metabolism. As you burn fat, you are using calories and if you burn more calories than you take in, you can lose weight. However, as you enter your 30's, your metabolism will naturally slow down and you may gain weight.

To help keep your metabolism going strong, One-A-Day created WeightSmart. With the key ingredient EGCG (Green Tea Extract), WeightSmart is a complete multi-vitamin plus more to enhance your metabolism while you are working to control your weight.

(Exhibit I)

I. Packaging

---

**NEW  
FORMULA**

**32 mg  
EGCG**

**ONE A DAY**

DIETARY SUPPLEMENT

***Weight Smart.***

EPHEDRA FREE

100 TABLETS

---

**MORE<sup>††</sup> OF A METABOLISM PROMOTING NUTRIENT\***

***Weight Smart.***

Complete  
Multivitamin  
Plus More to:

*Specially Formulated  
to help you  
While You Control  
Your Weight*

- ENHANCE YOUR METABOLISM  
WITH EGCG (GREEN TEA EXTRACT)\*
- CONVERT FOOD TO FUEL  
WITH EXTRA<sup>†</sup> CHROMIUM AND  
KEY B VITAMINS\*

\*These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.

†† Refers to 33% increase in Chromium compared to original formula.

---

(Exhibit J)

#### CAUSE OF ACTION

11. Through the means described in Paragraph 10, in connection with the advertising, offering for sale, sale, or distribution of One-A-Day WeightSmart multivitamin and dietary supplement, defendant has represented, directly or by implication, on numerous occasions that One-A-Day WeightSmart:

- a. Increases metabolism;
- b. Enhances metabolism through its EGCG content;
- c. Helps prevent some of the weight gain associated with a decline in metabolism in users over age 30; and
- d. Helps users control their weight by enhancing their metabolism.

12. Defendant has made the representations set forth in Paragraph 11 without possessing and relying upon competent and reliable scientific evidence to substantiate the representations, thereby violating Part II of the Commission's Order.

#### CIVIL PENALTIES AND EQUITABLE RELIEF

13. Each dissemination by defendant of an advertisement containing any representation in violation of the Commission's Order, in one or more of the ways described above, constitutes a separate violation for which plaintiff seeks monetary civil penalties.

14. Section 5(l) of the FTC Act, 15 U.S.C. § 45(l), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, and Section 1.98(c) of the FTC's Rules of Practice, 16 C.F.R. § 1.98(c), authorizes this Court to award monetary civil penalties of not more than \$11,000 for each violation of the Commission's Order.

15. Under Sections 5(l) and 13(b) of the FTC Act, 15 U.S.C. §§ 45(l) and 53(b), this Court is authorized to issue a mandatory injunction and such other and further equitable and ancillary relief as it may deem appropriate in the enforcement of the Commission's Order and the FTC Act, including disgorgement and restitution to prevent and remedy any violations of any provision of law enforced by the Commission.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests this Court, pursuant to 15 U.S.C. §§ 45(l) and 53(b), and pursuant to the Court's own equitable powers to:

- (1) Enter judgment against defendant and in favor of plaintiff for each violation alleged in this Complaint;
- (2) Award plaintiff monetary civil penalties from defendant for each violation of the Commission's Order alleged in this Complaint;
- (3) Enjoin defendant from violating the Commission's Order;
- (4) Award such equitable relief as the Court finds necessary to redress injury to consumers resulting from defendant's violations of the FTC Order, including, but not limited to, rescission of contracts, restitution, and disgorgement of ill-gotten gains; and
- (5) Award plaintiff such additional relief as the Court may deem just and proper.

DATED: January 3, 2007

OF COUNSEL:

JAMES A. KOHM  
Associate Director  
for Enforcement  
Federal Trade Commission

ROBERT M. FRISBY  
Assistant Director  
for Enforcement  
Federal Trade Commission

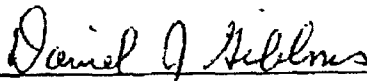
WALTER C. GROSS  
Attorney  
Division of Enforcement  
Federal Trade Commission

KEITH FENTONMILLER  
MATTHEW DAYNARD  
SARAH BOTHA  
Attorneys  
Division of Advertising Practices  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

FOR THE UNITED STATES OF AMERICA

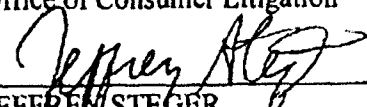
JEFFREY BUCHOLTZ  
Acting Assistant Attorney General  
Civil Division  
U.S. Department of Justice

CHRISTOPHER J. CHRISTIE  
United States Attorney  
District of New Jersey

By:   
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Assistant United States Attorney  
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Director  
Office of Consumer Litigation

KENNETH L. JOST  
Assistant Director  
Office of Consumer Litigation

  
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Trial Attorney  
Office of Consumer Litigation  
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1331 Pennsylvania Avenue  
Room 950 North  
Washington, D.C. 20044  
Phone: (202) 307-0047  
Fax: (202) 514-8742  
Jeffrey.Steger@usdoj.gov

**EXHIBIT A**

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

9023010  
8092205

COMMISSIONERS: Janet D. Steiger, Chairman  
Terry Calvani  
Mary L. Azcuenaga  
Andrew J. Strenio, Jr.  
Deborah K. Owen

In the Matter of  
MILES INC,  
a corporation.

DOCKET NO. C-3323  
DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of Complaint which the Cleveland Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing a Consent Order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such Complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and enters the following Order:

1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 1127 Myrtle Street, Post Office Box 40, Elkhart, Indiana 46515.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent(s), and the proceeding is in the public interest.

## **ORDER**

### **I**

**IT IS ORDERED** that respondent Miles Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of vitamin and/or mineral supplements, do forthwith cease and desist from representing, directly or by implication, that consumption of any such product:

- (A) affords any protection or benefit to human lungs;
- (B) is necessary or beneficial in replacing any vitamin and/or mineral lost through physical exercise;
- (C) is necessary or beneficial in replacing any vitamins and/or minerals lost as a result of, or provides any benefit with regard to, the stress of daily living;

unless, at the time such representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence to substantiate the representation; competent and reliable scientific evidence shall mean those tests, analyses, research, studies or other evidence, conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

### **II**

**IT IS FURTHER ORDERED** that respondent Miles Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of *One-A-Day* brand vitamins, including specifically, but not limited to, *One-A-Day Maximum Formula*, *One-A-Day*



Stressgard, One-A-Day Essential, One-A-Day Plus Extra C, and One-A-Day Within, do forthwith cease and desist from making any representation, directly or by implication, concerning the need for or benefits to be derived from consumption of such product unless, at the time such representation is made, respondent possesses and relies upon a reasonable basis consisting of competent and reliable scientific evidence to substantiate the representation; competent and reliable scientific evidence shall mean those tests, analyses, research, studies or other evidence, conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

### III

**IT IS FURTHER ORDERED** that, for three (3) years from the date that the representations are last disseminated, respondent shall maintain and upon request make available to the Commission for inspection and copying:

- (A) All materials relied upon to substantiate any claim or representation covered by this Order; and
- (B) All tests, reports, studies, surveys or other materials in its possession or control that contradict, qualify or call into question such representation or the basis upon which respondent relied for such representation.

### IV

**IT IS FURTHER ORDERED** that respondent shall distribute a copy of this Order to each officer and other person responsible for the preparation or review of advertising material for products subject to this Order.

### V

**IT IS FURTHER ORDERED** that respondent shall notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

VI

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service of this Order, file with the Commission a report, in writing, setting forth in detail the manner in which it has complied with this Order.

By the Commission. Commissioner Starek did not participate.

*Donald S. Clark*  
DONALD S. CLARK  
Secretary

SEAL:

ISSUED: January 28, 1991.

**EXHIBIT B**

One-A-Day WeightSmart  
"Remember When" :30



MOM: I remember when I thought...



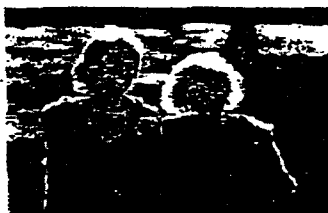
I could eat anything.



DAUGHTER: Want another piece?  
MOM: No Thanks.



MOM: Then in my 30's, and my metabolism slowed down. So, I got smart.



MOM: I watch what I eat. Exercise more.



MOM: Plus, I found a new multivitamin.



AVO: One-A-Day WeightSmart.



AVO: The first and only complete multivitamin with an...



AVO: ...ingredient to enhance your metabolism.



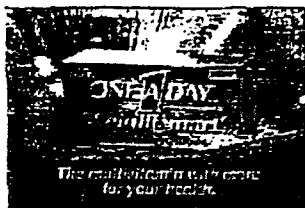
AVO: EGCG, a natural green tea extract, to help you...



AVO: ...while you manage your weight.



MOM: A multivitamin for my metabolism. Now that's smart.



AVO: One-A-Day WeightSmart.

EXHIBIT C

One-A-Day WeightSmart "Boom Box" :15 MWTS4306 (ALL other)



MALE (VO) (ON RADIO): Just in



Most women over 30



can gain 10 pounds a decade,



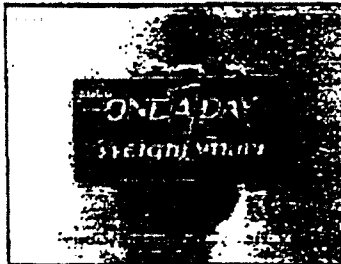
due in part to slowing metabolism.



[SFX: WHOOSH IN & OUT] So



[SFX: RADIO FLYING OUT THE WINDOW] eat right, exercise,



and take One A Day Weight Smart. The complete multi-vitamin with EGCG to enhance metabolism.



WOMAN: Now you tell me.



MALE (VO) (ON RADIO): One A Day Weight Smart.

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS

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330 West 42nd Street, New York, NY 10025 T 212 734 2810

**EXHIBIT D**

One A Day WeightSmart "Saturday Morning" :30 MTRWS4023 (ALL other)



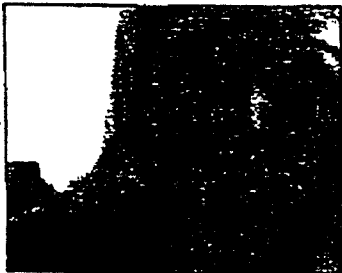
(MUSIC IN)



WOMAN: There was a time when I ate like this.



(MUSIC)



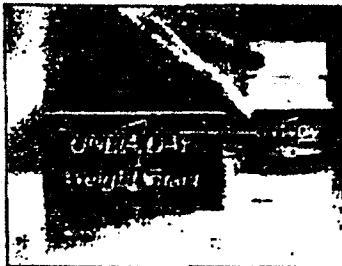
But then, in my 30s, my metabolism slowed down.



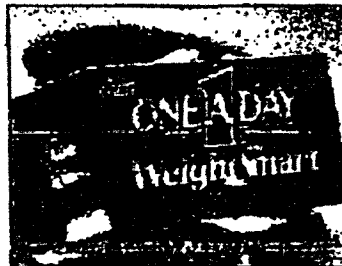
So now I exercise more, eat smarter.



And I found One A Day Weight Smart.



FEMALE ANNCR: One A Day Weight Smart.



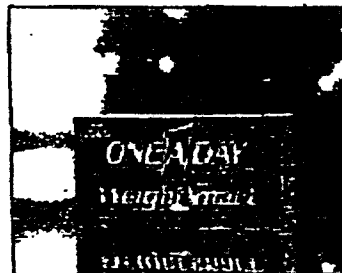
The first complete multivitamin with EGCG, a natural green tea extract to enhance metabolism



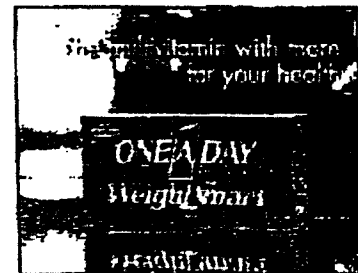
to help you while you manage your weight.



WOMAN: A multivitamin for my metabolism, now that's smart.



ANNCR: One A Day



Weight Smart. (MUSIC OUT)

VIDEO ALSO AVAILABLE IN ANALOG & DIGITAL FORMATS







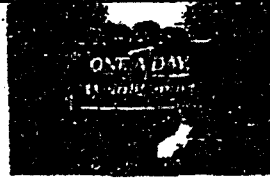
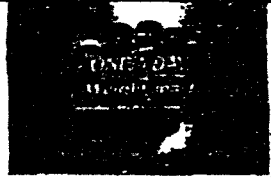


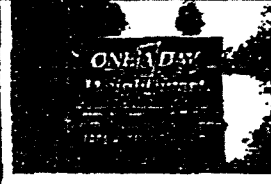
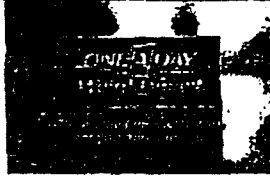
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**EXHIBIT E**

WeightSmart "Simple Exercise" :30 (ABC/FOXWB/CBL/SYND)

		
WOMAN(OC) After 30, your metabolism can slow down	and you know how hard that can make things.	Here's an easy exercise
		
that can help.	One-A-Day WeightSmart.	Just sit, and twist and bend.
		
AVO: One-A-Day WeightSmart.	A complete multivitamin with EGCG, a natural green tea extract, to enhance metabolism.  SUPER: For nutritional support only. Not a weight loss product.	WOMEN: And lift and twist and bend.  SUPER: Use with diet and exercise.
		
WOMAN: Just once a day. That's easy.	AVO: One-A-Day WeightSmart.	The multivitamin with more for your metabolism.  SUPER: The multivitamin with more for your metabolism.

**EXHIBIT F**

One-A-Day WeightSmart / "Dessert" :15



JANE: Do you want some dessert?

MARTHA: Not with my metabolism.



JANE: Yes, in your 30's your metabolism slows.



MARTHA: What can you do?



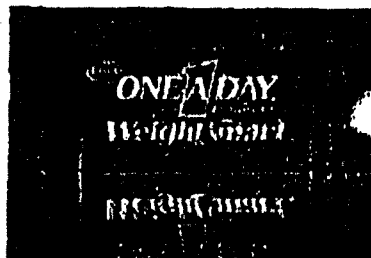
JANE: You know what I do? I eat right,



JANE: exercise,



JANE: and I switched to One-A-Day WeightSmart.



VISUAL: ECGG POPS OUT AND GLOWS.

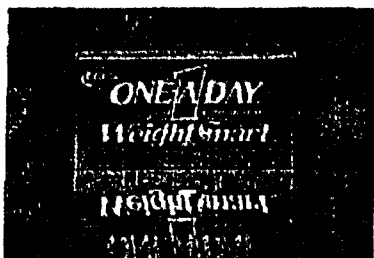
JANE: It's a complete multivitamin, with ECGG, to help enhance metabolism.

SUPER: For nutritional support only. Not a weight loss product.

SUPER (CBS): This statement have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent any disease.



MARTHA: Every little bit helps.



AVD: One-A-Day WeightSmart.

**EXHIBIT G**

One-A-Day WeightSmart / "Beach" :15 TV / 6.21.05



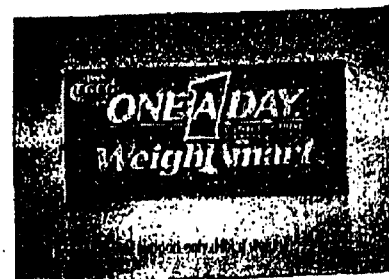
MOM 2: Ice cream?



MOM 1: With my metabolism?



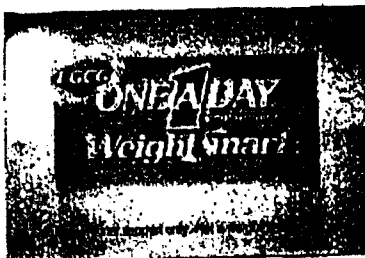
MOM 2: Yea, in your 30's, your metabolism slows. So I eat right, I exercise, and I switched to One-A-Day WeightSmart.



AVO: It's a complete multivitamin...

SUPER: For nutritional support only. Not a weight loss product.

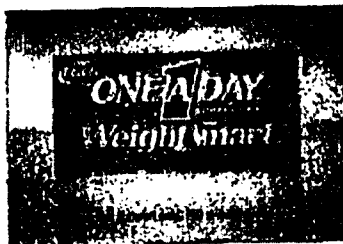
SUPER (CBS): These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.



AVO: with EGCG...

SUPER: For nutritional support only. Not a weight loss product.

SUPER (CBS): These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.



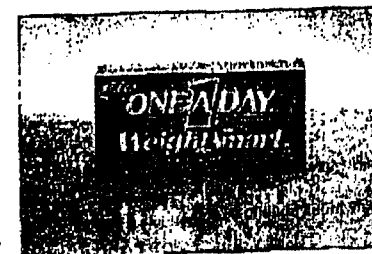
AVO: to help enhance metabolism.

SUPER: For nutritional support only. Not a weight loss product.

SUPER (CBS): These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.



MOM 1: I'll take all the help I can get.

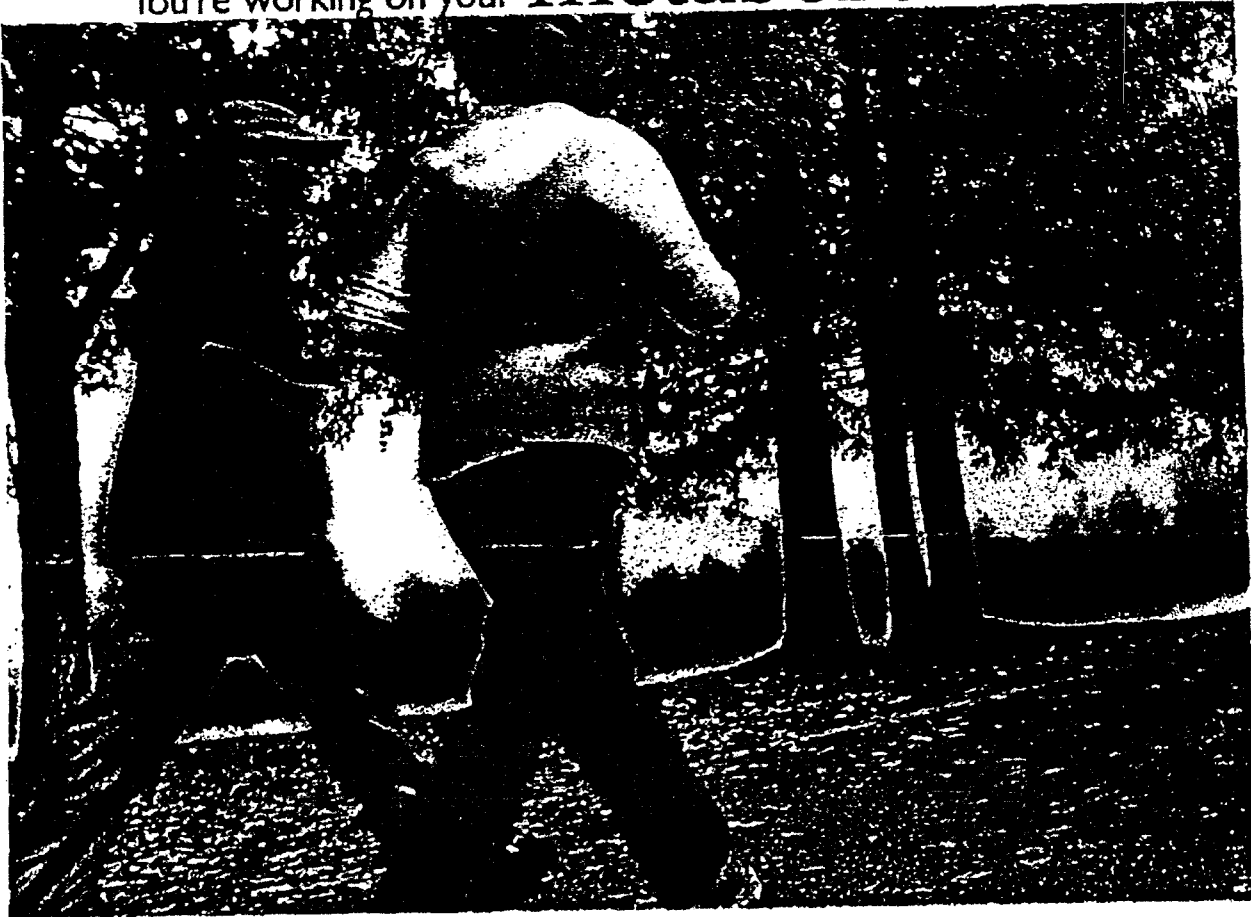


AVO: One-A-Day WeightSmart.

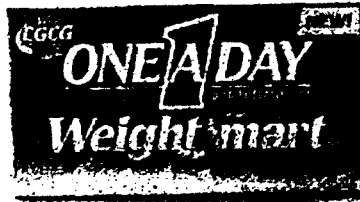
SILENT SUPER: [oneaday.com](http://oneaday.com)

**EXHIBIT H**

You're working on your **metabolism.**

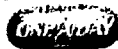


Is your **multivitamin?**



**Introducing New One-A-Day WeightSmart.**

Starting in your 30s, your metabolism slows down and you can gain weight. Now One-A-Day WeightSmart is the first and only complete multivitamin with EGCG, a natural green tea extract that enhances your metabolism to help while you work to control your weight. When you do your part by eating right and exercising, One-A-Day WeightSmart can help.



The multivitamin with more for your health.



For nutritional support as part of a healthy lifestyle. These statements have not been evaluated by the FDA. This product is not intended to diagnose, treat, cure or prevent any disease.



**EXHIBIT I**

# One-A-Day WeightSmart

## FREQUENTLY ASKED QUESTIONS

- Q. Where can I purchase One-A-Day WeightSmart?
- Q. What is EGCG?
- Q. Does this product contain caffeine?
- Q. Can I use this product with my medication?
- Q. Can I take One-A-Day WeightSmart with another multivitamin?
- Q. Will this product help control my weight?
- Q. How does your metabolism work?
- Q. Does this product contain ephedra?
- Q. Is One-A-Day WeightSmart safe?
- Q. This product didn't work for me - it doesn't seem to help control my weight.
- Q. Can a teenager or man use this product?
- Q. How does One-A-Day WeightSmart differ from weight loss products like Dexatrim and Metabolife?
- Q. How is WeightSmart different from other multivitamins?

Q. Where can I purchase One-A-Day WeightSmart?

A. WeightSmart can be found in the multivitamin section of most drug stores, food stores, mass merchandisers, and club stores. In select stores, WeightSmart may also be located in the diet section to help promote a healthy lifestyle and provide general nutritional support while you work to control your weight. If you do not find it on your local store shelf, ask the store manager to order it for you. We have found that most stores make their purchasing decisions based on consumer interest.

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Q. What is EGCG?

A. EGCG, short for epigallocatechin gallate, is a natural extract of Green Tea that enhances metabolism to help consumers who are working to control their weight with diet and exercise.

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Q. Does this product contain caffeine?

A. Yes, One-A-Day WeightSmart does contain a small amount of caffeine (15mg) equivalent to less than 1/4 cup of coffee. This amount falls far below the levels contained in traditional diet aids, which can exceed 100mg and create a "jittery" feeling.

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Q. Can I use this product with my medication?

A. We recommend that you consult with your physician before using any One-A-Day product if you are taking medications.

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Q. Can I take One-A-Day WeightSmart with another multivitamin?

A. We do not recommend taking One-A-Day with another multivitamin.

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Q. Will this product help control my weight?

A. No. This is a multivitamin supplement to enhance your metabolism while you're working to control your weight. It is one thing you can do as part of a healthy lifestyle while you're working to control your weight.

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**Q. How does your metabolism work?**

**A.** Metabolism is the sum of all reactions in the body. Burning fat is an important part of metabolism. As you burn fat, you are using up calories and if you burn more calories than you take in, you can lose weight. However, as you enter your 30's, your metabolism will naturally slow down and you may gain weight.

To help keep your metabolism going strong, One-A-Day created WeightSmart. With the key ingredient EGCG (Green Tea Extract), WeightSmart is a complete multivitamin plus more to enhance your metabolism while you are working to control your weight.

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**Q. Does this product contain ephedra?**

**A.** No! One-A-Day WeightSmart does not contain ephedra or any other ephedra-based ingredient, such as ma huang or guarana.

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**Q. Is One-A-Day WeightSmart safe?**

**A.** Yes! The health of our consumers is our top priority. We work to ensure that our products do not cause adverse reactions.

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**Q. This product didn't work for me - It doesn't seem to help control my weight.**

**A.** One-A-Day WeightSmart is not a weight-control product. There are many factors involved in weight control: it is a long-term process that includes eating right and exercising. WeightSmart is a multivitamin supplement to help you while you control your weight with diet and exercise. It is not a diet aid or weight loss product.

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**Q. Can a teenager or man use this product?**

**A.** We have designed this product for men and women 18 years of age and older. It will provide the benefits of a complete multivitamin.

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**Q. How does WeightSmart differ from weight loss products like Dexatrim and Metabolife?**

**A.** One-A-Day WeightSmart is not a weight loss product. One-A-Day WeightSmart is a complete multivitamin specially formulated with 100% or more of key vitamins and minerals men and women need when watching their weight. Plus, it contains EGCG (Green Tea Extract), to enhance their metabolism as they work to control their weight. WeightSmart is a safe way to supplement consumers' weight control regimen and should be used as part of a healthy lifestyle that includes a balanced diet and exercise.

Diet aids, on the other hand, are designed to deliver weight loss results. As a result, they may contain ingredients, such as ephedra, ma huang, or guarana. At the same time, these products only provide a few nutrients and at low % Daily Value levels so consumers may not get the vitamins and minerals they need, which is particularly important when watching their weight.

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**Q. How is WeightSmart different from other multivitamins?**

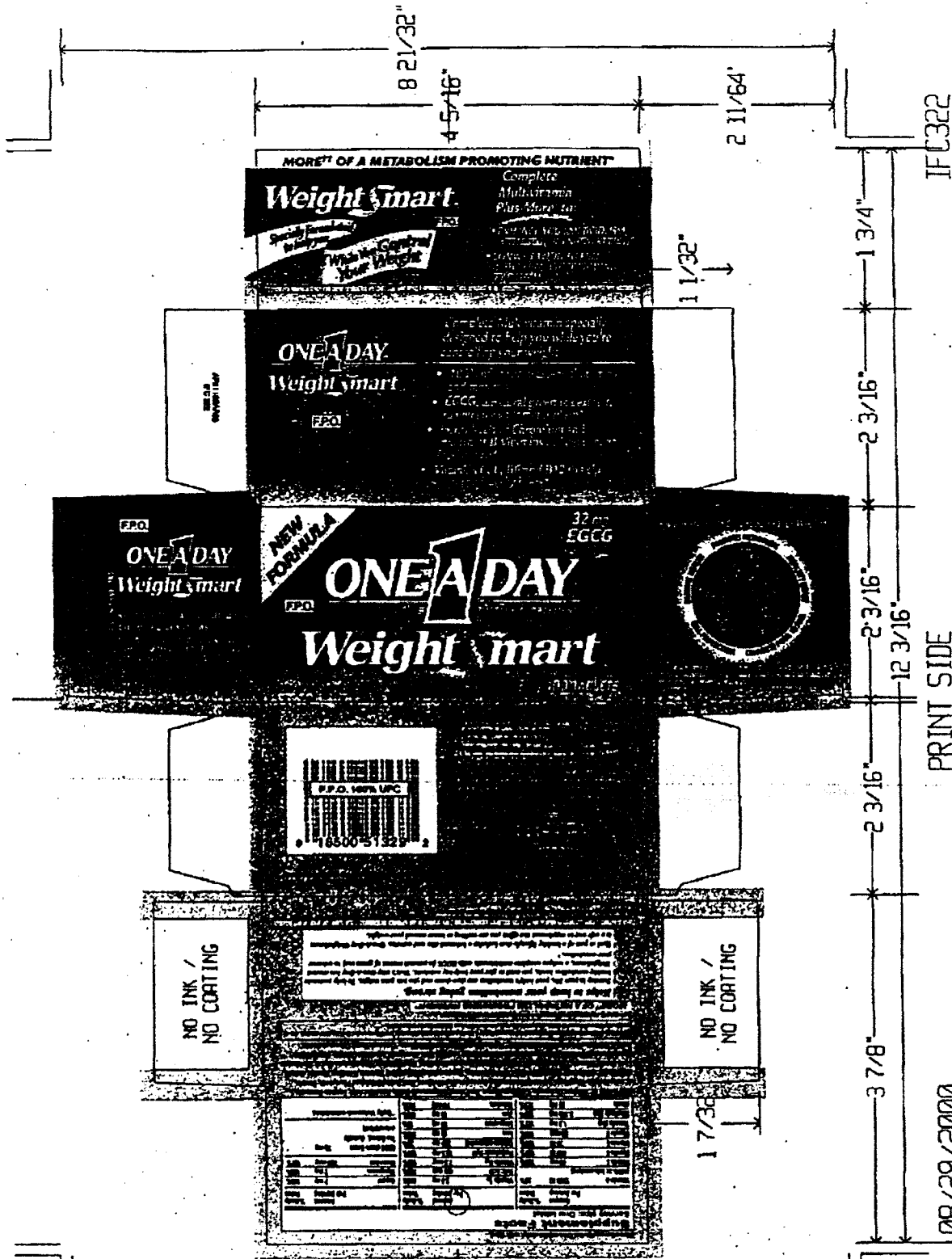
**A.** When adults are controlling their weight, they are eating less than they normally do and they may not be getting all the nutrients they need. To meet this need, One-A-Day WeightSmart was formulated especially for consumers who are watching their weight. It starts as a complete multivitamin with 100% of essential vitamins and minerals men and women need when watching their weight including:

Calcium which is one of the most overlooked nutrients when controlling one's weight. At 300mg or 30% of the Daily Value, this level in WeightSmart far exceeds what most adults get in a multivitamin. Centrum® for example contains only 162mg or 16% of the Daily Value.

Chromium and B-Vitamins are essential in helping to convert food to energy. At 100% or more of the Daily Value, these B Vitamins and chromium are an important component of One-A-Day WeightSmart.

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EXHIBIT J



IFC322

PRINT SIDE

08/29/2000

a global resource of Schwab Inc.  
 dies & plates  
**arthen group**  
 1-877-733-7877  
 Job #: 179488  
 Date: 12/31/00 X 8 21/32" (IFC 322)  
 Techs: Helenica, Pamela, Della Jaeger, Giovanni, Lacey Sam,  
 OCRS  
 P/C: 8 16682 61228 2

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PRINTING AND COLOR MANAGEMENT INFORMATION  
 PLEASE ONLY USE THE COLORS SPECIFIED  
 REFLECT PRINTING PRODUCTIONS

PROCESS YELLOW	PROCESS BLACK	PROCESS CYAN
PROCESS MAGENTA	PROCESS RED	PROCESS BLUE

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Headings	0 pt	0 pt	
Footnotes	0 pt	0 pt	
Call to Action	0 pt	0 pt	
Copyright Line	0 pt	0 pt	
Instructions	16.20 pt	25 pt	
Box	16.20 pt	25 pt	
Text Frame	16.20 pt	25 pt	
GENEA Discussion	0 pt	0 pt	

# EXHIBIT 2

CHRISTOPHER J. CHRISTIE  
United States Attorney

Daniel Gibbons  
Assistant United States Attorney  
Peter W. Rodino Federal Building  
7<sup>th</sup> Floor  
970 Broad Street  
Newark, NJ 07102

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIV. ACTION NO.
BAYER CORPORATION,	)	
	)	
Defendant	)	
	)	

**CONSENT DECREE**

WHEREAS: Plaintiff, the United States of America, has commenced this action by filing the Complaint herein; defendant, Bayer Corporation, has waived service of the Summons and Complaint; the parties have been represented by the attorneys whose names appear hereafter; defendant does not admit that it has violated the law as alleged in the complaint or that the facts as alleged in the complaint, other than the jurisdictional facts, are true; and the parties have agreed to settlement of this action upon the following terms and conditions, without adjudication of the merits of any issue of fact or law;



THEREFORE, on the joint motion of plaintiff and defendant, it is hereby ORDERED and DECREED as follows:

1. This Court has jurisdiction over the subject matter and the parties.
2. The Complaint states a claim upon which relief may be granted against defendant under Sections 5(l), 13(b) and 16(a) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(l), 53(b) and 56(a).

#### DEFINITIONS

1. "Bayer Corporation" means Bayer Corporation and all of its divisions and subsidiaries, including, but not limited to, Bayer Healthcare, LLC;
2. "Commerce" means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44;
3. "Competent and reliable scientific evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.
4. "FTC" or "Commission" means the Federal Trade Commission.
5. "FTC Order" means the FTC Order in FTC Docket No. C-3323, a copy of which is attached hereto as Exhibit A and made part of this Consent Decree.
6. "Person" means a natural person, organization or other legal entity, including a partnership, corporation, proprietorship, association, cooperative, or any other group acting together as an entity.
7. "Weight control product" means any dietary supplement or food product or program designed or used to prevent weight gain, or to produce weight loss, reduction or elimination of fat, slimming, or caloric deficit, in a user of the product or program.

8. The terms “and” and “or” in this Consent Decree shall be construed conjunctively or disjunctively, as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.
9. The term “including” in this Consent Decree means “including, without limitation.”

**I.**

**CIVIL PENALTY**

**IT IS FURTHER ORDERED** that:

- A. Pursuant to Section 5(l) of the FTC Act, 15 U.S.C. § 45(l), defendant Bayer Corporation, and its successors and assigns, shall pay a monetary civil penalty of three million, two hundred thousand dollars (\$3,200,000);
- B. Defendant, and its successors and assigns, shall make the payment required by Subpart A of this Part within five (5) days after the date of entry of this Consent Decree by electronic fund transfer in accordance with the instructions provided by: The Office of Consumer Litigation, Civil Division, U.S. Department of Justice, Washington, D.C. 20530; and
- C. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the entire unpaid penalty, together with interest as computed pursuant to 28 U.S.C. § 1961 from the date of default to the date of payment, immediately will become due and payable.

**II.**

**PROHIBITION AGAINST VIOLATING FTC ORDER**

**IT IS FURTHER ORDERED** that defendant Bayer Corporation, and its successors and assigns, and their officers, agents, representatives, and employees, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent

Decree by personal service or otherwise, are hereby permanently enjoined from ever violating, directly or through any corporation, subsidiary, division, or other device, any provision of the FTC Order; *provided, however*, that, in the event that the FTC Order is hereafter modified, defendant's compliance with such Order as so modified will not be deemed a violation of this Part.

### III.

#### PROHIBITED UNSUBSTANTIATED REPRESENTATIONS

**IT IS FURTHER ORDERED** that defendant Bayer Corporation, and its successors and assigns, and their officers, agents, representatives, and employees, and all persons in active concert or participation with any one or more of them who receive actual notice of this Consent Decree by personal service or otherwise, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any dietary supplement, multivitamin, including but not limited to One-A-Day WeightSmart, or weight-control product, in or affecting commerce, are hereby permanently enjoined from making any representation, including through endorsements or trade name, expressly or by implication:

- A. That such product or any of its ingredients:
  - 1. Increases metabolism;
  - 2. Enhances metabolism through its EGCG content;
  - 3. Helps prevent some of the weight gain associated with a decline in metabolism in users over age 30;
  - 4. Helps users control their weight by enhancing their metabolism;
  - 5. Makes a material contribution to any program or system that promotes weight maintenance;

6. Can or will cure, treat, or prevent any disease; or
  7. Have any effect on the structure or function of the human body; or
- B. About the benefits, performance, efficacy, safety or side effects, of such product or any of its ingredients;

*unless* at the time the representation is made, defendant Bayer Corporation possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

#### IV.

#### FOOD AND DRUG ADMINISTRATION

**IT IS FURTHER ORDERED** that nothing in this Consent Decree prohibits defendant Bayer Corporation from making:

- A. Any representation for any drug that is permitted in the labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. Any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

**DISTRIBUTION OF CONSENT DECREE BY DEFENDANT**

**IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Consent Decree, defendant Bayer Corporation, and its successors and assigns, shall:

- A. Provide a copy of the Consent Decree and FTC Order to, and obtain a signed and dated acknowledgment of receipt from: each officer and director; and all personnel, whether such persons are designated as employees, consultants, independent contractors or otherwise, having supervisory responsibilities with respect to the advertising or promotion of any product or program covered by this Consent Decree. A copy of the Consent Decree and FTC Order shall be delivered to current personnel within thirty (30) days after the date of entry of the Consent Decree, and to future personnel within thirty (30) days after the person assumes such position or responsibilities; and
- B. Maintain, for a period of three (3) years after creation, and upon request, make available to representatives of the Commission, the original signed and dated acknowledgments required in Subpart A of this Part.

VI.

**RECORD-KEEPING PROVISIONS**

**IT IS FURTHER ORDERED** that, for a period of five (5) years from the date of entry of this Consent Decree, defendant Bayer Corporation, and its successors and assigns, shall maintain and, upon request, make available to the Commission, copies of all business records demonstrating compliance with the terms and provisions of this Consent Decree, including but not limited to:

- A. Accounting records that reflect the cost of products and programs sold, revenues generated and the disbursement of such revenues;
- B. Personnel records accurately reflecting the name, address, and telephone number of each officer and director; and all personnel, whether such persons are designated as employees, consultants, independent contractors or otherwise, having supervisory responsibilities with respect to the advertising or promotion of any product or program covered by this Consent Decree; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;
- C. A copy of each advertisement containing any representation covered by this Consent Decree, including a videotape of any television advertisement and an audiotape of any radio advertisement;
- D. All materials that were relied upon in disseminating such representation; and
- E. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including *complaints and other communications with consumers or with governmental or consumer protection organizations.*

## VII.

### COMPLIANCE REPORTING BY DEFENDANT

**IT IS FURTHER ORDERED** that:

- A. For a period of ten (10) years from the date of entry of this Consent Decree, defendant *Bayer Corporation*, and its successors and assigns, shall notify the Commission of any changes in corporate structure that may affect compliance obligations arising out of this Consent Decree, including but not limited to,

dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation, the creation or dissolution of a subsidiary, parent or affiliate that engages in the acts or practices subject to this Consent Decree, the filing of a bankruptcy petition, or change in the corporate name or address, at least thirty (30) days prior to the effective date of any proposed change; *provided* that, with respect to any proposed change in a corporation about which defendant learns less than thirty (30) days prior to the date such action is to take place, defendant shall notify the Commission as soon as is practicable after obtaining such knowledge;

- B. Within thirty (30) days after receipt of a written request by a representative of the Commission, defendant Bayer Corporation, and its successors and assigns, shall submit written reports (under oath, if requested) and produce documents with respect to any conduct subject to this Consent Decree; and
- C. Defendant Bayer Corporation shall, in accordance with 31 U.S.C. § 7701, furnish to the Commission its taxpayer identifying number (employer identification number), which will be used for purposes of collecting and reporting on any delinquent amount arising out of defendant's relationship with the government.

#### VIII.

#### WRITTEN NOTIFICATIONS BY DEFENDANT

**IT IS FURTHER ORDERED** that, for the purposes of this Consent Decree, defendant Bayer Corporation shall, unless otherwise directed by the Commission or its representatives, mail all written notifications to the Commission or the Commission's Associate Director for Enforcement to:

Associate Director for Enforcement

Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580  
Re: U.S. v. Bayer Corporation (Miles, Inc.)

**IX.**

**CONTINUING JURISDICTION**

**IT IS FURTHER ORDERED** that this Court will retain jurisdiction of this matter for the purpose of enabling any of the parties to the Consent Decree to apply to the Court at any time for such further orders or directives as may be necessary or appropriate for the interpretation or modification of this Consent Decree, for the enforcement of compliance therewith, for the redress of any violations thereof, or for the punishment of any violations thereof.

**X.**

**SCOPE OF CONSENT DECREE**

**IT IS FURTHER ORDERED** that:

- A. Except with regard to its enforcement by the United States, this Consent Decree does not constitute evidence of any liability, wrongdoing, or fault by defendant Bayer Corporation, and it shall not have any preclusive effect on any claim or defense of any person or entity in any pending or future legal or administrative proceeding or action; and
- B. This Consent Decree resolves only claims against the named defendant and does not preclude the United States from initiating further action or seeking any remedy against any other persons or entities, including without limitation persons or entities who may be subject to portions of this Consent Decree by virtue of actions taken in concert or participation with defendant, and persons or entities in any type of indemnification or contractual relationship with defendant.



**SO ORDERED.**

**APPROVED** this \_\_\_\_\_ day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
United States District Judge

The parties, by their respective counsel, hereby consent to the terms and conditions of the Consent Decree as set forth above and consent to the entry thereof. Defendant waives any rights that may arise under the Equal Access to Justice Act, 28 U.S.C. § 2412, amended by Pub. L. 104-21, 110 Stat. 847, 863-64 (1996).

**FOR THE UNITED STATES OF AMERICA:**

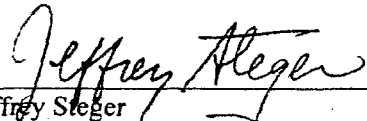
**PETER D. KEISLER**  
Assistant Attorney General  
Civil Division  
United States Department of Justice

**CHRISTOPHER J. CHRISTIE**  
United States Attorney  
District of New Jersey

By: \_\_\_\_\_

**Daniel Gibbons**  
Assistant United States Attorney  
Peter W. Rodino Federal Building  
7<sup>th</sup> Floor  
970 Broad Street  
Newark, NJ 07102  
(973) 645-2828

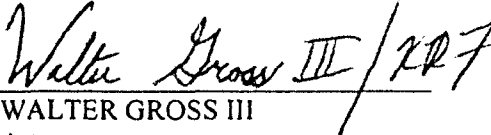
EUGENE M. THIROLF  
Director  
Office of Consumer Litigation

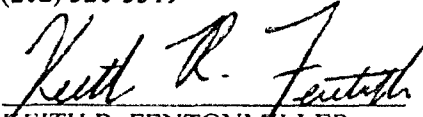
  
\_\_\_\_\_  
Jeffrey Steger  
Attorney  
Office of Consumer Litigation  
Civil Division  
U.S. Department of Justice  
Washington, D.C. 20530  
(202)-307-0047

FOR THE FEDERAL TRADE COMMISSION:

JAMES A. KOHM  
Associate Director for Enforcement

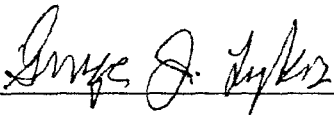
ROBERT FRISBY  
Assistant Director for Enforcement

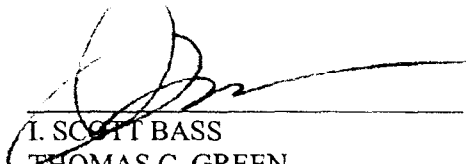
  
\_\_\_\_\_  
WALTER GROSS III  
Attorney  
Division of Enforcement  
Bureau of Consumer Protection  
Federal Trade Commission  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580  
(202) 326-3319

  
\_\_\_\_\_  
KEITH R. FENTON MILLER  
MATTHEW DAYNARD  
Attorneys  
Division of Advertising Practices  
Bureau of Consumer Protection  
Federal Trade Commission  
Washington, D.C. 20580  
(202) 326-2775 (KRF)  
(202) 326-3291 (MD)

FOR THE DEFENDANT:

BAYER CORPORATION

By:  \_\_\_\_\_

By:  \_\_\_\_\_  
I. SCOTT BASS  
THOMAS C. GREEN  
DEBORAH F. ZERWITZ  
Sidley Austin LLP  
Attorneys for Defendant Bayer Corporation