

1 BONNETT, FAIRBOURN, FRIEDMAN  
& BALINT, P.C.

2 Elaine A. Ryan (*Admitted Pro Hac Vice*)  
Patricia N. Syverson (CA SBN 203111)  
3 2325 E. Camelback Rd. Suite 300  
Phoenix, AZ 85016  
4 eryl@bffb.com  
psyverson@bffb.com  
5 Telephone: (602) 274-1100

6 BONNETT, FAIRBOURN, FRIEDMAN  
& BALINT, P.C.

7 Manfred P. Muecke (CA SBN 222893)  
mmuecke@bffb.com  
8 600 W. Broadway, Suite 900  
San Diego, California 92101  
9 Telephone: (619) 756-7748

10 BOODELL & DOMANSKIS, LLC

Stewart M. Weltman (*Admitted Pro Hac Vice*)  
11 sweltman@boodlaw.com  
Max A. Stein (*Admitted Pro Hac Vice*)  
12 mstein@boodlaw.com  
353 North Clark St, Suite 1800,  
13 Chicago, Illinois 60654  
Telephone: (312) 938-1670

14 (Additional counsel appear on signature page)  
15 Attorneys for Plaintiffs

16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA**

18 LIZA GERSHMAN, SEAN PORTER,  
19 MATTHEW KAPLAN, and  
CHANDRA LAW, On Behalf of  
20 Themselves and All Others Similarly  
Situated,

21 Plaintiffs,

22 v.

23 BAYER HEALTHCARE, LLC, a  
24 Delaware Limited Liability Company,

25 Defendant.

Case No.: 3:14-cv-05332-HSG

**REVISED SECOND AMENDED  
CLASS ACTION COMPLAINT FOR:**

1. VIOLATION OF THE UNFAIR  
COMPETITION LAW, Business  
and Professions Code §17200 *et seq*;
2. VIOLATION OF THE  
CONSUMERS LEGAL  
REMEDIES ACT,  
Civil Code §1750 *et seq*;
3. VIOLATION OF THE ILLINOIS  
CONSUMER FRAUD ACT, 815  
Ill. Comp. Stat. 502/1 *et seq*., and
4. VIOLATION OF THE FLORIDA  
DECEPTIVE AND UNFAIR  
TRADE PRACTICES ACT,  
§501.201 *et seq*.

1 Plaintiffs Liza Gershman, Sean Porter, Matthew Kaplan and Chandra Law,  
2 bring this action on behalf of themselves and all others similarly situated against  
3 Defendant Bayer Healthcare, LLC (“Bayer” or “Defendant”) and state:

#### 4 **NATURE OF ACTION**

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

11 2. Through an extensive, widespread, comprehensive and uniform  
12 nationwide marketing campaign, Bayer claims that consuming the Product will  
13 “Support[] Healthy Brain Function”. On each and every package immediately under  
14 the Product name it states “Healthy” above the phrase “BRAIN SUPPORT” (the  
15 latter being in a much larger font). In a separate box below this quoted language is  
16 the representation that “Omega-3 DHA Supports Healthy Brain Function.”<sup>1</sup>

17 3. The Flintstones Healthy Brain Support label – in smaller print – on the  
18 side of the bottle – carries a required “disclaimer” that the Product is not “intended  
19 to diagnose, treat, cure or prevent any disease.” This disclaimer language is required  
20 when a dietary supplement manufacturer makes a “structure/function” claim, such as  
21 Defendant has made here.

22 4. This disease disclaimer has no impact on the representations being  
23 challenged. The FDA regulations distinguish between “structure/function claims” –  
24 such as the brain support/function claims Bayer makes – and “disease claims” which  
25 require pre-market approval from the FDA. *See* FDA, Guidance for Industry:  
26 Structure/Function Claims, Small Entity Compliance Guide, available at,  
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28 <sup>1</sup> The other ingredients are sugars and a miniscule amount of vitamin C – 2% of the minimum daily value.

1 [http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInfo](http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm103340.htm)  
2 [rmation/ucm103340.htm](http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm103340.htm).

3 5. The only ingredient in the Product that purportedly provides any brain  
4 health benefits is the 50mg-100mg of Omega-3 DHA in each daily dose.<sup>2</sup> The  
5 amount of algal oil derived DHA in the Product is superfluous as it is not used by the  
6 body once consumed, making it useless for any brain function or brain support  
7 benefit. In this regard, the scientific evidence shows that the body manufactures  
8 DHA from other readily available fatty acids derived from a variety of dietary  
9 sources. Thus, American children and adults, who are the target market for the  
10 Product, consume adequate amounts of DHA in their diet. There is no need for  
11 anyone to take a DHA supplement - their bodies make the needed amounts of DHA.

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

18 7. On April 22, 2014, the FDA embraced the IOM finding by publishing a  
19 Final Rule that acted on and expressly rejected Martek Biosciences Corp.’s (the  
20 maker of the Life’s DHA in Bayer’s Product) request that the FDA recognize a daily  
21 requirement for DHA. *See* [http://www.gpo.gov/fdsys/pkg/FR-2014-04-28/pdf/2014-](http://www.gpo.gov/fdsys/pkg/FR-2014-04-28/pdf/2014-09492.pdf)  
22 [09492.pdf](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  
23 for DHA as it is not an essential nutrient. *Id.* That is why there is no daily value  
24 listed on the Product label.

25 8. Moreover, only a trivial amount of the DHA in the Product ever enters  
26 the brain after it is consumed. The brain contains about 5000 mg of DHA. A daily

27 \_\_\_\_\_  
28 <sup>2</sup> 50 mg is the recommended daily dose for children 2 and 3 years of age and 100mg  
is the recommended daily dose for those 4 years of age and older.

1 dose of the Product would only provide about .000005% and .00001% of the brain's  
2 DHA content in children 2-3 years of age and adults and children over 4, respectively.  
3 This amount is so trivial that experts in the field can conclude, on this basis alone,  
4 that the DHA contained in the Product cannot and does not support the brain or its  
5 functioning in any manner.

6 9. Bayer has employed numerous methods to convey its uniform,  
7 deceptive brain function and brain support representations to consumers including  
8 the name of the Product and the front of the Product's packaging and labeling where  
9 they cannot be missed by consumers.

10 10. As a result of Bayer's deceptive brain function and brain support  
11 representations, consumers—including Plaintiffs and members of the proposed  
12 Classes—have purchased the Product, which does not perform as advertised. The  
13 only reason a consumer would purchase the Product is to obtain the advertised brain  
14 function and brain support benefits because these are the only stated benefits of the  
15 Product.

16 11. Plaintiffs bring this action on behalf of themselves and other similarly  
17 situated consumers who have purchased Flintstones Healthy Brain Support to obtain  
18 redress for those who have purchased the Product. Based on violations of state unfair  
19 competition laws (detailed below), Plaintiffs seek monetary relief for consumers who  
20 purchased the Product.

21 **JURISDICTION AND VENUE**

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

26 13. This Court has personal jurisdiction over Defendant because Defendant  
27 is authorized to conduct and does conduct business in California. Defendant has  
28

1 marketed, promoted, distributed, and sold the Product in California and Defendant  
2 has sufficient minimum contacts with this State and/or sufficiently availed itself of  
3 the markets in this State through its promotion, sales, distribution and marketing  
4 within this State to render the exercise of jurisdiction by this Court permissible.

5 14. Venue is proper in this Court pursuant to 28 U.S.C. §1391 because a  
6 substantial part of the events giving rise to Plaintiff Gershman's claims occurred  
7 while she resided in this judicial district. Venue is also proper because Defendant  
8 transacts substantial business in this District.

### 9 **PARTIES**

10 15. Plaintiff Liza Gershman is a citizen of California and resides in San  
11 Francisco, California. In or around the summer/spring of 2014, Plaintiff Gershman  
12 purchased one bottle of Flintstones Healthy Brain Support from Walgreens in San  
13 Francisco, California. Prior to purchasing the Product, Plaintiff Gershman was  
14 exposed to and saw Bayer's brain function and brain support representations by  
15 reading the Product's label. Plaintiff Gershman purchased the Product in reliance on  
16 Bayer's brain function and brain support representations. Plaintiff paid  
17 approximately \$15.00 for the Product. As alleged herein the Product Plaintiff  
18 Gershman purchased cannot and does not provide any brain health benefits. As a  
19 result, Plaintiff Gershman suffered injury in fact and lost money at the point when  
20 she purchased the Product. Had Plaintiff Gershman known the truth about Bayer's  
21 misrepresentations, she would not have purchased the Product.

22 16. Plaintiff Sean Porter is a citizen of Illinois and resides in Roselle,  
23 Illinois. In or around July 2014, Plaintiff Porter purchased one bottle of Flintstones  
24 Healthy Brain Support from Walgreens in Roselle, Illinois. Prior to purchasing the  
25 Product, Plaintiff Porter was exposed to and saw Bayer's brain function and brain  
26 support representations by reading the Product's label. Plaintiff Porter purchased the  
27 Product in reliance on Bayer's brain function and brain support representations. As  
28

1 alleged herein the Product Plaintiff Porter purchased cannot and does not provide any  
2 brain health benefits. As a result, Plaintiff Porter suffered injury in fact and lost  
3 money at the point when he purchased the Product. Had Plaintiff Porter known the  
4 truth about Bayer's misrepresentations, he would not have purchased the Product.

5 17. Plaintiff Matthew Kaplan is a citizen of Florida and resides in Miami  
6 Beach, Florida. Over the last year, Plaintiff purchased two bottles of Flintstones  
7 Healthy Brain Support from the Publix Supermarket in Miami Beach, Florida for his  
8 2 year old son. He paid approximately \$15.00 for the Product. Prior to purchasing  
9 the Product, Plaintiff was exposed to and saw Bayer's brain function and brain  
10 support representations by reading the Product's label. Plaintiff Kaplan purchased  
11 the Product in reliance on Bayer's brain function and brain support representations.  
12 As alleged herein the Product Plaintiff Kaplan purchased cannot and does not provide  
13 any brain health benefits. As a result, Plaintiff Kaplan suffered injury in fact and lost  
14 money when he purchased the Product. Had Plaintiff Kaplan known the truth about  
15 Bayer's misrepresentations, he would not have purchased the Product.

16 18. Plaintiff Chandra Law is a citizen of Florida and resides in Plant City,  
17 Florida. In or around August 2014, Plaintiff purchased one bottle of Flintstones  
18 Healthy Brain Support from Walmart/Winn Dixie in Plant City, Florida for her 3 year  
19 old granddaughter. She paid approximately \$11.99 for the Product and purchased it  
20 approximately 12 times over the last year and half. Prior to purchasing the Product,  
21 Plaintiff was exposed to and saw Bayer's brain function and brain support  
22 representations by reading the Product's label. Plaintiff Law purchased the Product  
23 in reliance on Bayer's brain function and brain support representations. As alleged  
24 herein the Product Plaintiff Law purchased cannot and does not provide any brain  
25 health benefits. As a result, Plaintiff Law suffered injury in fact and lost money when  
26 she purchased the Product. Had Plaintiff Law known the truth about Bayer's  
27 misrepresentations, she would not have purchased the Product.



1 only represented Product benefits and appear prominently and conspicuously on the  
2 front of the Product's packaging, as follows:



16 ***The Product Does Not Provide Healthy Brain Support and Does Not Support Healthy Brain Function***

17 24. DHA is a long-chain Omega-3 fatty acid typically found in cold water  
18 fish. The DHA in Bayer's Product is not derived from fish. Instead, the Life's DHA  
19 in the Product -- manufactured by Martek Biosciences -- is from algae.

20 25. The Product cannot and does not support brain function or brain support  
21 because: (1) a trivial and meaningless amount of DHA is provided to the brain by the  
22 Product; and (2) American children and adults get sufficient DHA in their daily diet.

23 26. While *molecular* DHA does play a role in the brain, this does not mean  
24 *supplemental* DHA supports brain function. Much as the brain needs oxygen to  
25 function, humans do not need to supplement their diets with oxygen; nor do humans  
26 need DHA supplementation. In fact, there is only one reported case of Omega-3  
27 deficiency in the United States in the last thirty years and it involved a girl on an  
28

1 intravenous diet.

2 27. In this regard, it should also be understood that the human body  
3 produces DHA from other Omega-3 fatty acids that are consumed on a daily basis.  
4 As result, the target population for this Product produces sufficient amounts of DHA  
5 from a variety of dietary sources, even if they do not consume dietary DHA from  
6 such foods as fish rich in DHA.

7 28. Furthermore, a trivial amount of the DHA in a daily dose of the Product  
8 actually enters the brain – so small that experts in the field deem this amount as  
9 incapable of providing any brain function or brain support benefit. Based on the  
10 amount of DHA available to the brain in the plasma pool and the amount of DHA the  
11 brain uptakes from this plasma pool, it is estimated that approximately 0.0005% of  
12 an oral dosage enters the brain in 24 hours. And, because the brain contains about  
13 5000 mg of DHA, a daily dose of the Product would only replace about .000005%  
14 and .00001% of the brain’s DHA content in children 2-3 years of age and adults and  
15 children over 4, respectively, on a daily basis. While these estimates may vary as  
16 much as 10-100 times in either direction, even at the highest point in the estimate  
17 range (e.g. 100 x .00001% or .00100%), experts in the field deem this amount of  
18 DHA to be trivial and that it cannot contribute to brain function or brain support.

19 29. In this vein, the IOM—the health arm of the National Academies—has  
20 issued a report stating that it does not recognize a dietary requirement for DHA as  
21 there is no DHA deficiency in adults or children in the United States. *See* Dietary  
22 Reference Intakes for Energy, Carbohydrate, Fiber, Fat, Fatty Acids, Cholesterol,  
23 Protein, and Amino Acids (Macronutrients): The National Academies Press; 2005 at  
24 5-6, 11, 469. Specifically, the IOM concluded that Americans consume sufficient  
25 amounts of alpha-linolenic acid (ALA), a dietary precursor to DHA, in their daily  
26 diet. ALA is converted to DHA by a series of enzymes, largely in the liver. Thus,  
27 the algal oil derived DHA in the Product has no effect on brain function or brain  
28

1 support as it is not an essential nutrient and American adults and children are already  
2 producing adequate amounts of DHA from its dietary precursor ALA.

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

12 31. In sum, the DHA in the Product is superfluous and does not provide  
13 brain function or brain support benefits because: a) DHA is not an essential nutrient;  
14 b) Americans already get plenty of DHA in their diet; c) there are virtually no  
15 reported cases of a DHA deficiency in the United States; d) basic chemistry and  
16 biology show that the human body makes sufficient DHA by converting a different  
17 substance, ALA, into DHA; and e) the amount of DHA in Flintstones Healthy Brain  
18 Support is trivial and incapable of supporting brain function or brain support

19 32. Thus, the scientific evidence is that the DHA in a daily dose of  
20 Defendant's Product does not support brain function or provide brain support in U.S.  
21 consumers aged 2 and older.

### 22 ***The Impact of Bayer's Wrongful Conduct***

23 33. Even though the DHA in the Product is trivial in amount and  
24 superfluous such that it does not support healthy brain function, Bayer continues to  
25 unequivocally claim that its Product provides "brain support" and "Supports Healthy

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26 <sup>3</sup> The Martek notification proposed the following exact wording for these claims:  
27 "“Excellent source of DHA.” (‘High in DHA,’ ‘Rich in DHA’) contains \_\_\_ mg of  
28 DHA per serving, which is \_\_\_ % of the 160 mg daily value for DHA.” 79 Fed. Reg.  
at 23263 n.3.

1 Brain Function” in children ages 2 and older, as well as adults.

2 34. Plaintiffs and Class members have been and will continue to be deceived  
3 or misled by Bayer’s deceptive brain function and brain support representations.  
4 Plaintiffs purchased the Product during the relevant time period and in doing so, read  
5 and considered the Product label and based their decision to buy the Product on the  
6 brain function and brain support representations. Bayer’s brain function and brain  
7 support representations were a material factor in influencing Plaintiffs’ decision to  
8 purchase the Product. Plaintiffs would not have purchased the Product had they  
9 known that Bayer’s brain function and brain support representations were false and  
10 misleading.

11 35. As a result, Plaintiffs and the Class members have been damaged in their  
12 purchases of the Product and have been deceived into purchasing a Product that they  
13 believed, based on Bayer’s representations, provides brain function benefits and  
14 brain support benefits, when, in fact, it does not.

15 **CLASS DEFINITION AND ALLEGATIONS**

16 36. Plaintiff Gershman brings this action on behalf of herself and all other  
17 similarly situated California consumers pursuant to Rule 23(a) and (b)(3) of the  
18 Federal Rules of Civil Procedure and seeks certification of the following Class:

19 **California-Only Class Action**

20 All California consumers who, within the applicable statute  
21 of limitations, purchased Flintstones Healthy Brain  
Support until the date notice is disseminated.

22 Excluded from this Class are Defendant and its officers,  
23 directors and employees, and those who purchased  
24 Flintstones Healthy Brain Support for the purpose of  
resale.

25 37. Plaintiff Porter brings this action on behalf of himself and all other  
26 similarly situated Illinois consumers pursuant to Rule 23(a) and (b)(3) of the Federal  
27 Rules of Civil Procedure and seeks certification of the following Class:



1 (c) whether the alleged conduct constitutes violations of the laws  
2 asserted;

3 (d) whether Bayer engaged in false or misleading advertising; and

4 (e) whether Plaintiffs and Class members are entitled to appropriate  
5 remedies.

6 41. **Typicality.** Plaintiffs' claims are typical of the claims of the members  
7 of the Class because, *inter alia*, all Class members were injured through the uniform  
8 misconduct described above and were subject to Bayer's deceptive brain  
9 function/support representations that accompanied each and every bottle of  
10 Flintstones Healthy Brain Support. Plaintiffs are advancing the same claims and  
11 legal theories on behalf of themselves and all members of the Class.

12 42. **Adequacy of Representation.** Plaintiffs will fairly and adequately  
13 protect the interests of the members of the Class. Plaintiffs have retained counsel  
14 experienced in complex consumer class action litigation, and Plaintiffs intend to  
15 prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests  
16 to those of the Class.

17 43. **Superiority.** A class action is superior to all other available means for  
18 the fair and efficient adjudication of this controversy. The damages or other financial  
19 detriment suffered by individual Class members is relatively small compared to the  
20 burden and expense that would be entailed by individual litigation of their claims  
21 against Bayer. It would thus be virtually impossible for Plaintiffs and Class  
22 members, on an individual basis, to obtain effective redress for the wrongs done to  
23 them. Furthermore, even if Class members could afford such individualized  
24 litigation, the court system could not. Individualized litigation would create the  
25 danger of inconsistent or contradictory judgments arising from the same set of facts.  
26 Individualized litigation would also increase the delay and expense to all parties and  
27 the court system from the issues raised by this action. By contrast, the class action  
28

1 device provides the benefits of adjudication of these issues in a single proceeding,  
2 economies of scale, and comprehensive supervision by a single court, and presents  
3 no unusual management difficulties under the circumstances here.

4  
5 **COUNT I**  
6 **Violation of Business & Professions Code §17200, et seq.**  
7 **Fraudulent Business Acts and Practices**  
8 **(On Behalf of the California-Only Class)**

9 44. Plaintiff Gershman repeats and re-alleges the allegations contained in  
10 the paragraphs above, as if fully set forth herein.

11 45. Plaintiff Gershman brings this claim individually and on behalf of the  
12 Class.

13 46. As alleged herein, Plaintiff Gershman has suffered injury in fact and lost  
14 money or property as a result of Defendant's conduct because she purchased  
15 Flintstones Healthy Brain Support in reliance on Defendant's claim that the Product  
16 would provide brain function and brain support benefits, but did not receive a Product  
17 that provides these benefits.

18 47. The Unfair Competition Law, Business & Professions Code §17200, et  
19 seq. ("UCL"), prohibits any "fraudulent" business act or practice and any false or  
20 misleading advertising.

21 48. In the course of conducting business, Defendant committed "fraudulent  
22 business act[s] or practices" by, *inter alia*, making the brain support and brain  
23 function representations (which also constitutes advertising within the meaning of  
24 §17200) regarding the Product in its advertising campaign, including the Product's  
25 packaging, as set forth more fully herein.

26 49. Defendant's actions, claims and misleading statements, as more fully set  
27 forth above, are false, misleading and/or likely to deceive the consuming public  
28 within the meaning of Business & Professions Code §17200, et seq.

50. Plaintiff Gershman and other members of the Class have in fact been

1 deceived as a result of their reliance on Defendant’s material brain support and brain  
2 function representations. Plaintiff Gershman and the other Class members have  
3 suffered injury in fact and lost money as a result of their purchase(s) of Defendant’s  
4 Product which does not provide brain support or function benefits.

5 51. Plaintiff Gershman, on behalf of herself, all others similarly situated,  
6 and the general public, seeks restitution of all money obtained from Plaintiff and the  
7 members of the Class collected as a result of unfair competition and all other relief  
8 this Court deems appropriate, consistent with Business & Professions Code §17203.

9 **COUNT II**  
10 **Violations of the Consumers Legal Remedies Act – Civil Code §1750 *et seq.***  
11 **(On Behalf of the California-Only Class)**

12 52. Plaintiff Gershman repeats and re-alleges the allegations contained in  
13 the paragraphs above, as if fully set forth herein.

14 53. Plaintiff Gershman brings this claim individually and on behalf of the  
15 California-only Class.

16 54. This cause of action is brought pursuant to the Consumers Legal  
17 Remedies Act, California Civil Code §1750, *et seq.* (the “Act”).

18 55. Plaintiff Gershman is a consumer as defined by California Civil Code  
19 §1761(d). Defendant’s Flintstones Healthy Brain Support is a “good” within the  
20 meaning of the Act.

21 56. Defendant violated and continues to violate the Act by engaging in the  
22 following practices proscribed by California Civil Code §1770(a) in transactions with  
23 Plaintiff Gershman and the Class which were intended to result in, and did result in,  
24 the sale of Flintstones Healthy Brain Support:

- 25 (5) Representing that [Flintstones Healthy Brain Support has] . . . approval,  
26 characteristics, . . . uses [and] benefits . . . which [it does] not have . . . .

27 \* \* \*

1 (7) Representing that [Flintstones Healthy Brain Support is] of a particular  
2 standard, quality or grade . . . if [it is] of another.

3 \* \* \*

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

5 \* \* \*

6 (16) Representing that [Flintstones Healthy Brain Support has] been supplied  
7 in accordance with a previous representation when [it has] not.

8 57. Defendant violated the Act by misrepresenting material facts on the  
9 Flintstones Healthy Brain Support labeling and packaging and associated advertising,  
10 as described above, when the representations were false and misleading.

11 58. As alleged herein, Plaintiff Gershman has suffered injury in fact and lost  
12 money or property as a result of Defendant's conduct because she purchased  
13 Flintstones Healthy Brain Support in reliance on Defendant's false representations.

14 59. Plaintiff Gershman and other members of the California-only Class have  
15 in fact been deceived as a result of their reliance on Defendant's material false  
16 representations described above. This reliance has caused harm to Plaintiff Gershman  
17 and other members of the California-only Class who each purchased Flintstones  
18 Healthy Brain Support. Plaintiff Gershman and the other California-only Class  
19 members have suffered injury in fact and lost money as a result of these deceptive  
20 and fraudulent practices.

21 60. Pursuant to California Civil Code §1782(d), Plaintiff Gershman and the  
22 California-only Class seek restitution and disgorgement.

23 61. Pursuant to §1782 of the Act, on December 4, 2014, Plaintiff Gershman  
24 notified Defendant in writing by certified mail of the particular violations of §1770  
25 of the Act and demanded that Defendant rectify the problems associated with the  
26 actions detailed above and give notice to all affected consumers of Defendant's intent  
27 to so act.

28



1 rely on its deceptive acts.

2 72. The conduct of Bayer constituted a consumer fraud under the Illinois  
3 Consumer Fraud Act.

4 **COUNT IV**  
5 **Violation of Florida Deceptive and Unfair Trade Practices Act**  
6 **(On Behalf of the Florida-Only Class)**

7 73. Plaintiffs Kaplan and Law re-allege and incorporate by reference the  
8 allegations contained in the paragraphs 1 through 43 above as if fully set forth herein.

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

14 75. Plaintiffs Kaplan and Law and the Florida-only Class are consumers as  
15 defined by section 501.203, Fla. Stat. Bayer’s Flintstones Healthy Brain Support are  
16 goods within the meaning of the FDUTPA. Bayer is engaged in trade or commerce  
17 within the meaning of the FDUTPA.

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

22 77. Florida Statute section 501.204(2) states that “due consideration and  
23 great weight shall be given to the interpretations of the Federal Trade Commission  
24 and the federal courts relating to [section] 5(a)(1) of the Federal Trade Commission  
25 Act.” Bayer’s unfair and deceptive practices are likely to mislead - and have misled  
26 - consumers acting reasonably in the circumstances, and violate section 500.04, Fla.  
27 Stat., and 21 U.S.C. § 343.

28 78. Plaintiffs Kaplan and Law and the Florida-only Class have been  
aggrieved by Bayer’s unfair and deceptive practices and acts of false advertising in

1 that they paid for the Product that did and cannot provide the brain health benefits  
2 that Defendant has represented that the product provides. The harm suffered by  
3 Plaintiffs and Florida consumers was directly and proximately caused by the  
4 deceptive, misleading and unfair practices of Bayer, as more fully described herein.

5 79. Pursuant to sections 501.211(2) and 501.2105, Fla. Stat., Plaintiffs and  
6 Florida consumers seek damages, attorneys' fees and costs.

7  
8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiffs pray for a judgment:

- 10 A. Certifying the Classes as requested herein;  
11 B. Awarding restitution and disgorgement of Defendant's revenues to  
12 Plaintiffs and the proposed Class members;  
13 C. Awarding statutory and punitive damages, as appropriate;  
14 D. Awarding attorneys' fees and costs; and  
15 E. Providing such further relief as may be just and proper.

16 Dated: June 5, 2015

17 BONNETT, FAIRBOURN, FRIEDMAN  
18 & BALINT, P.C.

19 *s/ Patricia N. Syverson*

20 ELAINE A. RYAN (*Admitted Pro Hac Vice*)  
21 PATRICIA N. SYVERSON (CA SBN 203111)  
22 2325 E. Camelback Rd. Suite 300  
23 Phoenix, AZ 85016  
24 eryan@bffb.com  
25 psyverson@bffb.com  
26 Telephone: (602) 274-1100

23 BONNETT, FAIRBOURN, FRIEDMAN  
24 & BALINT, P.C.

25 Manfred P. Muecke (CA SBN 222893)  
26 600 W. Broadway, Suite 900  
27 San Diego, California 92101  
28 mmuecke@bffb.com  
Telephone: (619) 756-7748

BOODELL & DOMANSKIS, LLC  
Stewart M. Weltman (*Admitted Pro Hac Vice*)

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sweltman@boodlaw.com  
Max A. Stein (*Admitted Pro Hac Vice*)  
mstein@boodlaw.com  
353 North Clark St, Suite 1800,  
Chicago, Illinois 60654  
Telephone: (312) 938-1670

SIPRUT PC  
Joseph Siprut (*To be Admitted Pro Hac Vice*)  
17 North State Street  
Suite 1600  
Chicago, IL 60602  
Telephone: 312.236.0000

HARKE CLASBY & BUSHMAN LLP  
Lance A. Harke, P.A. (*To be Admitted Pro Hac Vice*)  
lharke@harkeclasby.com  
Sarah Clasby Engel, P.A. (*To be Admitted Pro Hac Vice*)  
sengel@harkeclasby.com  
Howard M. Bushman, P.A. (*To be Admitted Pro Hac Vice*)  
hbushman@harkeclasby.com  
9699 NE Second Avenue  
Miami Shores, Florida 33138  
Telephone: (305) 536-8220

*Attorneys for Plaintiffs*

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**CERTIFICATE OF SERVICE**

I, hereby certify that on June 5, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic mail notice list.

I certify under penalty of perjury that the foregoing is true and correct.  
Executed this 5<sup>th</sup> day of June 2015.

/s/ Patricia N. Syverson  
Patricia N. Syverson