

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
SPARTANBURG DIVISION**

CHRISTOPHER SPELMAN and ALLAN  
INNISS, on behalf of themselves and all  
others similarly situated,

Plaintiffs,

v.

BAYER CORPORATION and  
BAYER HEALTHCARE LLC

Defendants.

CIVIL ACTION  
No. 7:10-91-HFF

**CIVIL ACTION COMPLAINT**

**I.  
NATURE OF ACTION**

1. Plaintiffs and proposed class representatives Christopher Spelman and Allan Inness, individually and on behalf of all other persons similarly situated, as defined below, bring this action against Defendants Bayer Corporation and Bayer Healthcare LLC (collectively, “Bayer” or “Defendants”) to recover the hundreds of millions of dollars paid to Bayer as a result of Bayer’s fraudulent and unlawful scheme to market and sell One-A-Day Men’s Multivitamins® and One-A-Day Men’s 50+ Advantage Multivitamins® (collectively, “Men’s Multis”).

2. Since at least 2002, Bayer has uniformly represented on package labels, in television and radio advertisements, on websites, and through other advertising methods that the selenium in its Men’s Multis will “support prostate health” and “reduce the risk of prostate cancer” in all men (collectively, “prostate claims”). Beginning on April 16, 2003, however, Bayer knew or should have known that the benefit of selenium supplementation for the

prevention of prostate cancer does not extend to all men, or anywhere near all men, and Bayer has since learned or should have learned that selenium supplementation does not reduce the risk of prostate cancer in any men.

3. Plaintiffs have been injured by purchasing Men's Multis as a result of Bayer's fraudulent and deceptive marketing scheme.

4. Bayer has violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, by using its association with others to implement a fraudulent, deceptive, and unsubstantiated marketing scheme that promoted Men's Multis as a prostate cancer preventative while emphasizing the dangers of prostate cancer.

5. Bayer's package labels and advertisements for Men's Multis were, and still are, deceptive, misleading, fraudulent, unfair, and unconscionable—and, therefore, in violation of the consumer protection statutes of Arkansas, Colorado, Connecticut, Florida, Kansas, Missouri, New Jersey, New Mexico, New York, Ohio, Vermont, and Washington.

6. Bayer's conduct in marketing Men's Multis as a prostate cancer preventative was fraudulent, negligent, and caused Bayer to be unjustly enriched under common law principles of all states.

## **II. PARTIES**

7. Plaintiff Christopher Spelman is a citizen and resident of South Carolina, residing in Roebuck, South Carolina. He purchased and ingested Men's Multis for approximately seven years, beginning in 2002 and ending in May 2009.

8. Plaintiff Allan Inniss is a citizen and resident of Connecticut, residing in Windsor, Connecticut. He purchased and ingested Men's Multis in May 2009.

9. Defendant Bayer Corporation is, and at all times relevant was, a corporation

organized under the laws of the State of Indiana with its headquarters and principal place of business at 100 Bayer Road, Pittsburgh, Pennsylvania 15205.

10. Defendant Bayer HealthCare LLC is, and at all times relevant was, a limited liability corporation organized under the laws of the State of Delaware with its headquarters and principal place of business at 100 Bayer Road, Pittsburgh, Pennsylvania 15205.

11. Defendant Bayer HealthCare LLC is wholly owned by Defendant Bayer Corporation.

12. At all times alleged herein, Defendant Bayer Corporation and Defendant Bayer Healthcare LLC (collectively, "Defendants") included any and all parents, subsidiaries, affiliates, divisions, franchises, partners, joint venturers, and organizational units of any kind, their predecessors, successors and assigns and their officers, directors, employees, agents, representatives.

13. At all times relevant hereto, Bayer acted through its agents and employees, and the acts of its agents and employees were within the scope of their agency and employment. The policies and practices alleged in this complaint were, on information and belief, set or ratified at Bayer's highest corporate levels.

14. At all times relevant hereto, Bayer was engaged in the business of developing, designing, licensing, manufacturing, distributing, selling, marketing, and/or introducing Men's Multis into interstate commerce throughout the United States, including the State of South Carolina and every other state, either directly or indirectly through third parties, subsidiaries, or related entities.

**III.  
JURISDICTION AND VENUE**

15. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, including 28 U.S.C. § 1964(c).

16. This Court also has subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2) because the matter in controversy in this civil action exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and this is a class action in which members of the Class are citizens of states other than Delaware, Indiana, and Pennsylvania, where Defendants are incorporated or have their principal places of business.

17. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a) as this action is between citizens of different States and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

18. This Court also has supplemental jurisdiction over Plaintiffs' state-law claims pursuant to 28 U.S.C. § 1367(a).

19. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) and (c) and 18 U.S.C. § 1965 because Defendants transact business, reside, and/or have agents in this District, and because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred within this District, including Defendants' deceptive and fraudulent marketing scheme that promoted Men's Multis as a prostate cancer preventative.

20. Defendants reside in this District for purposes of 28 U.S.C. § 1391 because they are subject to general personal jurisdiction in this District. Defendants have continuous and systematic contacts with South Carolina through marketing and selling Men's Multis in South Carolina. Defendants are also subject to specific personal jurisdiction in this District because their contacts with South Carolina gave rise to the instant action.

**IV.  
GENERAL ALLEGATIONS**

**A. Background on Men’s One-A-Day and Men’s One-A-Day 50+ Multivitamins and Selenium Supplementation**

21. Scientific research does not substantiate Bayer’s prostate cancer claims about Men’s Multis. In fact, the research shows that selenium supplementation does not help to prevent prostate cancer.

22. There have been two randomized controlled trials of selenium supplementation for the prevention of prostate cancer—the Nutritional Prevention of Cancer (“NPC”) trial and the federally funded Selenium and Vitamin E Cancer Prevention Trial (“SELECT”).

23. An analysis of the NPC data that was made available online on April 16, 2003 revealed that the vast majority of men in the NPC trial received no benefit at all from selenium supplementation. The NPC trial showed that the benefit of selenium supplementation for the prevention of prostate cancer was limited to a very small subgroup of men with the lowest levels of blood selenium and low baseline PSA scores. The 2003 analysis was published in the first of two May 2003 editions of the British Journal of Urology International.

24. In October 2008, the National Cancer Institute abruptly terminated the SELECT trial, the largest prostate cancer prevention trial ever undertaken, primarily because “selenium and vitamin E supplements, taken alone or together, did not prevent prostate cancer.”

25. The termination of the SELECT trial on account of the failure to show any benefit from selenium supplementation became public on October 27, 2008. The results of the SELECT trial were published online on December 9, 2008. And the results were published in the Journal of the American Medical Association on January 7, 2009. The results of National Cancer Institute and Ontario Institute of Cancer Research study were announced in April, 2009.

Nonetheless, Bayer continued to promote the use of selenium supplementation for the prevention of prostate cancer in advertisements, on its website, and on its package labels.

26. The authors of the SELECT trial concluded that it “has definitively demonstrated that selenium, vitamin E, or selenium + vitamin E (at the tested doses and formulations) ***did not prevent prostate cancer*** in the generally healthy, heterogenous population of men in SELECT.”

27. An editorial in the Journal of the American Medical Association accompanying publication of the SELECT results concluded that “***physicians should not recommend selenium or vitamin E - or any other antioxidant supplements - to their patients for preventing prostate cancer.***”

28. In their letter to the United States Federal Trade Commission (“FTC”) of June 18, 2009, nine prominent cancer researchers stated that the SELECT trial:

“[P]roduced strong evidence last October that selenium does not prevent prostate cancer in a generally healthy, heterogenous population of men in the United States and Canada. This Federally-financed study was the largest individually randomized cancer prevention trial ever conducted, and, given its high rates of adherence and its statistical power, it is unlikely to have missed detecting a benefit of even a very modest size. ***Bayer Healthcare is doing a disservice to men by misleading them about a protective role for selenium in prostate cancer.*** We ask that you take whatever steps are necessary to halt these ads as soon as possible.

29. These are not the only studies showing the failure of selenium to prevent prostate cancer. A recent study announced on April 26, 2009 at the annual meeting of the American Urological Association (“AUA”) showed that selenium failed to prevent the development of prostate problems.

30. In a three-year trial funded by the National Cancer Institute and the Ontario Institute of Cancer Research, men with precancerous lesions in the prostate called high-grade prostatic intraepithelial neoplasia who received a daily supplement of 200 micrograms of selenium, 40 grams of soy protein, and 800 IU of vitamin E were just as likely to develop invasive prostate cancer as men who received a placebo.

31. “Unfortunately, as this study shows, *we have yet to find a dietary supplement that will reliably prevent prostate cancer,*” said AUA spokesperson Christopher Amling, M.D. “The results of this study support the findings of the SELECT trial which also demonstrated no benefit using Vitamin E and selenium. These studies highlight the importance of conducting randomized trials of these agents since many of these supplements are promoted falsely to the general public as having beneficial effects on cancer prevention and progression.”

32. “There was great hope that this would be a magic bullet that would help prevent prostate cancer,” said lead researcher Dr. Neil E. Fleshner, a Clinical Studies Resource Centre Member at the Ontario Cancer Institute and Love Chair in Prostate Cancer Prevention at the University of Toronto. “Unfortunately, it doesn’t appear to be so.”

33. In addition, June M. Chan of the University of California at San Francisco and her colleagues at the Dana-Farber Cancer Institute, the Harvard Medical School, and the Fred Hutchinson Cancer Research Center found in their study of plasma selenium and manganese superoxide dismutase (“SOD2”) genotypes in men with prostate cancer that men with high blood

levels of selenium who carried the V allele had a more than two-fold increased risk (RR = 2.48) of presenting with aggressive prostate cancer, a finding that was statistically significant. About 75% of men carry the V allele.

34. They concluded that “for the 75% [of] men who carry a V allele, higher selenium levels might increase the likelihood of having worse tumor characteristics.” They cautioned “against broad use of selenium for men with prostate cancer.”

35. In fact, Philip Kantoff, MD, director of Dana-Farber’s Lank Center for Genitourinary Oncology and senior author of the study, said that “if you already have prostate cancer, it may be a bad thing to take selenium . . . . There is some precedent to this [because] research has suggested that antioxidants could be protective if you don’t have cancer, but once you do, then antioxidants may be a bad thing.”

36. This study involved an ongoing cohort of men diagnosed with prostate cancer who donated blood for research before undergoing any type of local therapy and who consented to clinical research follow-up. It was not a randomized controlled trial and could not demonstrate cause and effect. However, the researchers concluded that this study provided “strong support for the hypothesis that plasma selenium levels and SOD2 genotype interact to influence risk of presenting with aggressive prostate cancer at diagnosis in men with localized or locally advanced prostate cancer.”

37. Despite Bayer’s attempts to characterize this study as unexpected and unprecedented, the authors stated in their discussion of the results that data from previous studies indicated that higher doses of selenium could have adverse effects. And while they could not exclude the possibility that men with worse clinical features were taking extra selenium, they

went on to say that this was unlikely, in part because the blood was donated shortly after diagnosis.

38. The cumulative evidence thus shows that, rather than insuring that its marketing claims were substantiated by good science, Bayer has chosen to ignore the ever increasing scientific data on selenium and to continue to make false and deceptive claims about Men's Multis.

**B. Direct-to-Consumer Marketing of Men's Multis**

39. Bayer associated with advertising firms and other third parties to create and carry out a fraudulent and deceptive Direct-To-Consumer ("DTC") marketing campaign that misled the public by representing that Men's Multis promote prostate health and help reduce the risk of prostate cancer.

40. Bayer consulted and hired the marketing agency BBDO Worldwide, along with other marketing and advertising agencies, to disseminate Bayer's false and deceptive representations about Men's Multis.

41. Bayer and its associates have promoted the extra selenium in its Men's Multis as a prostate cancer preventative on package labels, in television and radio advertisements, on Bayer's website, and in other manners.

42. For example, the back of the package for One A Day Men's Health Formula bears this claim: "Did you know that prostate cancer is the most frequently diagnosed cancer in men and that emerging research suggests Selenium may reduce the risk of prostate cancer?"

43. Similarly, the back of the package for One A Day Men's 50+ Advantage claims that it contains "nearly twice the Selenium in Centrum Silver to support prostate health."

44. One of the radio ads claimed:

“Prostate cancer. It’s an important subject. Did you know that there are more new cases of prostate cancer each year than any other cancer? And here’s something else you should know. Now, there’s something that you can do that may help reduce your risk. Along with your regular doctor checkups, switch to One A Day men’s. A complete multivitamin plus selenium, which emerging research suggests may reduce the risk of prostate cancer. One A Day Men’s. Because staying healthy is serious business.”

45. Bayer’s website expanded on these claims: “Did you know that 1 in 6 men will face prostate issues? Prostate cancer is the most frequently diagnosed non-skin cancer in men, and emerging research suggests Selenium may reduce the risk of prostate cancer.”

46. Bayer and its associates have run at least eleven different television ads and at least nine different radio ads since 2008 linking its Men’s Multis to the prevention of prostate cancer.

47. In particular, Bayer ran a television commercial for One A Day Men’s Health Formula that said: “Did you know one in three men will face prostate issues? One in three, really? That’s why One A Day Men’s is a complete multivitamin with selenium which emerging research suggests can help prostate health. One A Day Men’s.”

48. Bayer ran a television commercial for One A Day Men's 50+ Advantage that said: “To stay on top of my game after 50, I switched to a complete multivitamin with more. Only One A Day Men’s 50+ Advantage has ginkgo for memory and concentration plus support for prostate and heart health. Safe. That’s a great call. One A Day Men’s.”

49. At all times, Bayer intended and expected to increase consumer demand for

Men's Multis by means of its DTC advertising campaign. Bayer, as part of its business strategy, sought to produce the greatest possible return on its marketing investment.

50. Bayer was under a duty to disclose the truth about Men's Multis to consumers, including Plaintiffs and Class members.

51. In all the above acts and omissions, Bayer had the intention and specific desire to influence and distort the judgment of consumers through its false and deceptive promotion of Men's Multis. At all times, Bayer also intended that consumers would rely on its misrepresentations and otherwise improper promotion in purchasing Men's Multis.

52. Bayer designed and implemented its wrongful campaigns with the express purpose of obtaining greater Men's Multis sales and profits than it could achieve by limiting its promotion to truthful representations, and it succeeded in doing so.

53. Plaintiffs have been injured by expending money on the purchase of Men's Multis, where such purchases were caused by Bayer's fraudulent and unlawful promotion, as set forth above.

54. Bayer's misrepresentations were, and still are, uniform throughout the country. Regardless of the manner in which it is communicated, Bayer's message has always been the same—Men's Multis are a prostate cancer preventative.

55. Consumers across the country, including Plaintiffs, viewed the above-described product labeling, television and radio advertisements, and Bayer website, and purchased Men's Multis as a result of Bayer's deceptive and fraudulent marketing of Men's Multis as a prostate cancer preventative.

56. Plaintiffs justifiably relied on Bayer's deceptive and fraudulent marketing to their detriment when purchasing Men's Multis. If Bayer had not falsely and deceptively promoted

Men's Multis through its prostate claims, Plaintiffs would not have purchased Men's Multis or any other multivitamin because they were only interested in purchasing a product that was a prostate cancer preventative.

57. Bayer thus intended to, and did, cause Plaintiffs to spend greater amounts for Men's Multis than they would have if Bayer had confined its promotional efforts to truthful representations about Men's Multis.

58. Furthermore, any applicable statutes of limitations have been tolled by Bayer's knowing and active concealment of the facts alleged herein from consumers. Plaintiffs could not reasonably have discovered the fraudulent nature of Bayer's conduct. Accordingly, Bayer is estopped from relying on any statute of limitations to defeat any of Plaintiffs' or Class members' claims.

59. Bayer has been caught in illegal behavior many times in the past, including:

- In 2001, Bayer paid \$14 million to U.S. and state governments to settle allegations that the company's actions helped health care providers submit inflated Medicaid claims for drugs.
- In 2003, Bayer pleaded guilty to a criminal charge and paid \$257 million in fines and penalties after a whistleblower exposed a scheme by the company to overcharge for the antibiotic Cipro. Media accounts at the time described it as the biggest recovery for Medicaid fraud in the nation's history.
- In 2004, Bayer pleaded guilty to a criminal charge and paid a \$66 million fine after a Justice Department investigation into Bayer's role in a price-fixing conspiracy involving a chemical used to make rubber products.

Two Bayer executives separately pleaded guilty and were sentenced to prison for their role in the scandal.

- In 2007, Bayer paid \$8 million to resolve allegations by state attorneys general that the company failed to warn physicians and consumers about safety issues surrounding its cholesterol-lowering drug Baycol, which is no longer on the market.
- Bayer has even gotten into hot water with the federal government in the past over its One A Day marketing. In 2007, it paid a \$3.2 million civil fine as part of a consent decree reached with the FTC and the Department of Justice. The case centered on weight loss claims that the FTC said violated an earlier order requiring that all health claims for One A Day be supported by competent and reliable scientific evidence. Bayer's prostate claims for the Men's Multis violate this consent decree.
- In 2009, Bayer was required to run a \$20 million corrective advertising campaign about its birth control pill YAZ and to submit its future YAZ ads to the FDA for approval as part of a settlement secured by a number of state attorneys general and the FDA.

## **V. CLASS ACTION ALLEGATIONS**

60. Pursuant to Rules 23(b) and (c) of the Federal Rules of Civil Procedure, Plaintiffs bring this action on their own behalf and on behalf of the proposed Class consisting of residents of all states who relied on Bayer's false and deceptive prostate claims in purchasing Men's Multis since April 16, 2003.

61. Plaintiffs and the Class bring the RICO, fraud, negligence, and unjust enrichment claims in Counts I-IV.

62. The Class is composed of at least tens of thousands of persons, and possibly exceeds several hundred thousand individuals who purchased Bayer's Men's Multis because of Bayer's prostate claims. The Class is so numerous that joinder of all Class members in one action is impracticable. The disposition of the claims of the proposed Class members through this class action will benefit both the parties and the Court. The identities of individual members of the Class are readily ascertainable.

63. There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Class. The questions of law and fact common to the Class predominate over questions affecting only individual Class members, and include, but are not limited to, the following:

- a) whether Bayer's prostate claims were and still are false;
- b) whether Bayer knew at the time the consumer transactions took place that all consumers would not receive the benefit from Men's Multis that Bayer was claiming all consumers would receive;
- c) whether Bayer acted with reckless disregard for the truth when making unsubstantiated, false, and deceptive representations about Men's Multis' ability to prevent prostate cancer;
- d) whether Bayer had fraudulent pretenses and intended to deceive consumers when marketing Men's Multis as a prostate cancer preventative;
- e) whether Bayer's conduct violated 18 U.S.C. § 1962(c);
- f) Whether Bayer breached its duty of care to customers by making the prostate claims;
- g) whether Bayer's fraudulent and deceptive marketing of Men's Multis violated the common law of unjust enrichment;

- h) whether Plaintiffs and Class members are entitled to recover compensatory damages and attorney's fees as a result of Bayer's wrongful and unlawful scheme; and
- i) whether Plaintiffs and Class members are entitled to recover punitive damages as a result of Bayer's particularly egregious wrongful and unlawful marketing scheme.

64. Plaintiffs assert claims that are typical of the Class because Plaintiffs' claims arise out of and are based on their having purchased Men's Multis as a result of Bayer's fraudulent and deceptive marketing. Plaintiffs and RICO Class members have similarly suffered harm arising from Bayer's violations of the law as alleged herein.

65. Injuries sustained by Plaintiffs and Class members flow, in each instance, from a common nucleus of operative facts—Bayer's misconduct.

66. Plaintiffs are adequate representatives of the Class because their interests do not conflict with the interests of the Class members they seek to represent. Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs' interests are not antagonistic to those of the Class members. Plaintiffs have retained counsel who are competent and experienced in the prosecution of class litigation.

67. A class action is superior to other available means for the fair and efficient adjudication of Plaintiffs' and Class members' claims. Plaintiffs and Class members have suffered irreparable harm as a result of Bayer's fraudulent, deceitful, unlawful, and unfair conduct. Because of the size of the individual Class members' claims, few, if any, Class members could afford to seek legal redress for the wrongs complained of herein. Absent class action, the violations of the law described herein will continue without remedy because Bayer continues to engage in fraudulent and otherwise unlawful conduct in promoting Men's Multis as a prostate cancer preventative, and Bayer will be permitted to retain the proceeds of its misdeeds while the victims of Bayer's wrongful conduct will go uncompensated.

68. Pursuant to Rules 23(b) and (c) of the Federal Rules of Civil Procedure, Plaintiff Inniss also brings this action on behalf of the proposed Consumer Protection Sub-Class consisting of all residents of Arkansas, Colorado, Connecticut, Florida, Kansas, Ohio, Missouri, New Jersey, New Mexico, New York, Vermont, and Washington who relied on Bayer's false and deceptive prostate claims in purchasing Men's Multis since April 16, 2003.

69. Plaintiff Inniss and the Consumer Protection Sub-Class bring the claim for violation of state consumer protections statutes in Count V.

70. Excluded from the proposed Sub-Class are Defendants herein and any person, firm, trust, corporation or other entity related to or affiliated with any Defendant.

71. The Consumer Protection Sub-Class is composed of at least tens of thousands of persons, and possibly exceeds several hundred thousand individuals who purchased Bayer's Men's Multis because of Bayer's prostate claims. This sub-class is so numerous that joinder of all members of this subclass in one action is impracticable. The disposition of the claims of the proposed Sub-Class members through this class action will benefit both the parties and the Court. The identities of individual members of the Consumer Protection Sub-Class are readily ascertainable.

72. There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Consumer Protection Sub-Class. The questions of law and fact common to the Consumer Protection Sub-Class predominate over questions affecting only individual Sub-Class members, and include, but are not limited to, the following:

- a. whether Bayer's trade practices and acts were and still are deceptive or unfair;
- b. whether Bayer knew or should have known that the representations and advertisements regarding Men's Multis were unsubstantiated, false, and/or deceptive;

- c. whether it was objectively reasonable for Plaintiffs and Sub-Class members to rely on Bayer's prostate claims in purchasing Men's Multis;
- d. whether Bayer intended to deceive consumers when making its prostate claims;
- e. whether Plaintiffs and Sub-Class members are entitled to recover compensatory damages and attorney's fees as a result of Defendants' wrongful and unlawful scheme; and
- f. whether Plaintiffs and Sub-Class members are entitled to recover punitive damages as a result of Bayer's particularly egregious wrongful and unlawful marketing scheme.

73. Plaintiff Inniss asserts claims that are typical of the Consumer Protection Sub-Class because he has brought a claim under Connecticut's Unfair Trade Practices Act, which prohibits unfair or deceptive trade acts or practices.

74. Injuries sustained by Plaintiff Inniss and Sub-Class members flow, in each instance, from a common nucleus of operative facts—Bayer's misconduct.

75. Plaintiff Inniss is an adequate representative of the Consumer Protection Sub-Class because his interests do not conflict with the interests of its members. Plaintiff Inniss will fairly and adequately represent the interests of the Sub-Class. Plaintiff Inniss has retained counsel who are competent and experience in the prosecution of class litigation.

76. A class action is superior to other available means for the fair and efficient adjudication of Plaintiff Inniss's and the Consumer Protection Sub-Class members' claims. Plaintiffs and Sub-Class members have suffered irreparable harm as a result of Bayer's deceptive, unfair, unlawful, and unconscionable conduct. Because of the size of the individual Sub-Class members' claims, few, if any, Sub-Class members could afford to seek legal redress for the wrongs complained of herein. Absent class action, the violations of the consumer protections statutes described herein will continue without remedy because Bayer continues to

engage in deceptive and unfair conduct in promoting Men's Multis as a prostate cancer preventative, and Bayer will be permitted to retain the proceeds of its misdeeds while the victims of Bayer's wrongful conduct will go uncompensated.

**VI.  
CAUSES OF ACTION**

**COUNT I  
VIOLATION OF 18 U.S.C. § 1962(C)**

77. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein and further alleges as follows.

78. Each Defendant is a "person" within the meaning of 18 U.S.C. § 1961(3).

79. Bayer conducted the affairs of the Men's Multis Direct-to-Consumer Marketing Enterprise (the "Men's Multis DTC Enterprise") through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

80. The Men's Multis DTC Enterprise is an association-in-fact within the meaning of 18 U.S.C. § 1961(4), consisting of Bayer, the advertising agency BBDO, other advertising agencies and marketing firms, web designers, and other third parties with whom Bayer associated to market Men's Multis to consumers.

81. Defendants are RICO "persons" distinct from the Men's Multis DTC Enterprise.

82. Bayer used the Men's Multis DTC Enterprise to carry out its scheme to obtain money by means of false and fraudulent pretenses and representations about Men's Multis' preventative effect.

83. The Men's Multis DTC Enterprise was an ongoing organization that functioned as a continuing unit.

84. Bayer and the other members of the Men's Multis DTC Enterprise created and

maintained systematic links for the common purpose of gaining revenue from marketing Men's Multis. Each of the participants in the Men's Multis DTC Enterprise received substantial revenue from marketing Men's Multis. Such revenue was exponentially greater than it would have been if Men's Multis had been marketed appropriately. All participants were aware of Bayer's control over the activities of the Men's Multis DTC Enterprise. Furthermore, each portion of the Enterprise benefited from the existence of other parts.

85. The Men's Multis DTC Enterprise engaged in and affected interstate commerce, because, *inter alia*, it marketed, sold, or provided Men's Multis to thousands of individuals throughout the United States.

86. The Men's Multis DTC Enterprise has a hub and spoke organizational, decision-making structure, with Bayer serving as the hub.

87. Bayer has exerted control over the Men's Multis DTC Enterprise and has managed the Enterprise's affairs through a pattern of racketeering activity that includes acts indictable under 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), and § 1952 (use of interstate facilities to conduct unlawful activity).

88. Bayer's use of the mails and wires to perpetrate its fraud through the Men's Multis DTC Enterprise has involved at least hundreds of communications, including, but not limited to:

- a. televisions ads that misrepresented that Men's Multis are a prostate cancer preventative;
- b. radio ads that misrepresented that Men's Multis are a prostate cancer preventative;
- c. advertising the Men's Multis are a prostate cancer preventative on Bayer's

website; and

d. receiving the proceeds of its improper scheme.

89. In addition, Bayer's corporate headquarters have communicated by United States mail, e-mail, telephone, and facsimile with various local district managers and others, including Bayer's associates, in furtherance of Bayer's use of the Men's Multis DTC Enterprise to carry out Bayer's fraudulent and deceptive marketing scheme.

90. The racketeering activities that Bayer carried out through the Men's Multis DTC Enterprise amounted to a common course of conduct intended to deceive and harm Plaintiffs and all Class members. Each racketeering activity was related, had similar purposes, involved the same or similar participants and methods of commission, and had similar results affecting similar victims, including Plaintiffs and Class members. Bayer's racketeering activities are part of their ongoing business and constitute a continuing threat to the property of Plaintiffs and Class members.

91. Bayer's repeated use of the Men's Multis DTC Enterprise to conduct its fraudulent scheme constitutes a "pattern of racketeering activity" within the meaning of 18 U.S.C. § 1961(5).

92. By virtue of these violations of 18 U.S.C. § 1962(c), Defendants are liable to Plaintiffs and RICO Class members for three times the damages they have sustained, plus the cost of this suit, including reasonable attorney's fees.

93. The fraudulent scheme that Bayer perpetrated through the Men's Multis DTC Enterprise consisted of, *inter alia*: deliberately misrepresenting that Men's Multis are a prostate cancer preventative on package labels and in advertisements for Men's Multis.

94. In implementing its fraudulent scheme, Bayer was acutely aware that Plaintiffs

and Class members depended on the honesty and integrity of Bayer in marketing Men's Multis.

95. Bayer's scheme was calculated to ensure that Plaintiffs and Class members would pay for Men's Multis because Bayer knew that consumers such as Plaintiffs and Class members only purchased Men's Multis for their purported preventative effect on prostate cancer.

96. Plaintiffs and Class members have been injured in their business and property by reason of these violations in that they expended millions of dollars for Men's Multis that they would not have purchased had Bayer not engaged in its pattern of racketeering activity.

97. Bayer's above-described racketeering activity directly and proximately caused Plaintiffs and Class members ascertainable loss and damages.

**COUNT II**  
**FRAUD & MISREPRESENTATION**

98. Plaintiffs incorporate by reference the foregoing allegations as if set forth at length herein.

99. As described more fully above, Bayer willfully and knowingly marketed Men's Multis through fraudulent, deceptive, and otherwise wrongful and unlawful means, including promoting as a prostate cancer preventative on the product label, in television and radio ads, on Bayer's websites, and through other advertising methods.

100. Bayer had a duty to promote Men's Multis through truthful, non-deceptive means.

101. Bayer knew that the Plaintiffs and Class members would not be in a position to discover and understand the true benefits of using Men's Multis.

102. By controlling and directing the Men's Multis DTC Enterprise's marketing of Men's Multis to consumers, Bayer knew and intended that consumers would rely on its representations and promotions. By so doing, Bayer expected and intended that Plaintiffs and Class members would purchase of Men's Multis as a result of Bayer's fraudulent

representations.

103. Plaintiffs and Class members justifiably relied to their detriment on Bayer to provide fair, accurate, and complete information about Men's Multis.

104. Bayer knew that the representations that were relied on by Plaintiffs and Class members were false or were made recklessly without any regard for the truth.

105. Plaintiffs and Class members expended significant amounts of money for Men's Multis purchases that were directly caused by Bayer's fraudulent representations.

106. Each of Defendants' false and deceptive statements, representations, and advertisements were material to Plaintiffs' and Class members' purchases of Men's Multis in that Plaintiffs and Class members expended millions of dollars for Men's Multis that they would not have made had Defendants not engaged in their pattern of racketeering activity.

**COUNT III**  
**NEGLIGENCE**

107. Plaintiffs incorporate by reference the foregoing allegations as if set forth at length herein.

108. Bayer owed Plaintiffs and Class members a duty to use reasonable care in the marketing of Men's Multis. Specifically, Bayer owed Plaintiffs and Class members a duty to refrain from misleading them about or misrepresenting the efficacy of Men's Multis for the prevention of prostate cancer, and inducing demand for Men's Multis by improper means.

109. Bayer negligently, carelessly, recklessly, willfully, and/or intentionally violated its respective duties by the conduct and acts described above.

110. Bayer's negligent, careless, reckless, willful, and/or intentional conduct was the proximate cause of injuries and damages sustained by Plaintiffs and Class members.

111. Due to the negligent, careless, reckless, willful, and/or intentional conduct of

Bayer, as set forth above, Plaintiffs and Class members expended millions of dollars for Men's Multi that they would not otherwise have spent.

112. The reprehensible nature of Bayer's conduct entitles Plaintiffs and Class members to an award of punitive damages.

**COUNT IV**  
**UNJUST ENRICHMENT**

113. Plaintiffs incorporate by reference the foregoing allegations as if set forth at length herein.

114. Through its wrongful conduct described above, Bayer has reaped substantial profits from payments Plaintiffs and the Class made for Men's Multis. Bayer's profits would have been reduced but for its wrongful and unlawful conduct.

115. In equity and good conscience, it would be unjust and inequitable to permit Bayer to retain the benefit it obtained from Plaintiffs' and the Class' expenditures on Men's Multis as a result of Bayer's wrongful and unlawful conduct. Bayer has been unjustly enriched under common law principles.

116. Bayer must therefore disgorge its unjustly acquired profits and other monetary benefits resulting from its unlawful conduct and confer such profits and monetary benefits on Plaintiffs and the Class.

**COUNT V**  
**VIOLATION OF STATE CONSUMER PROTECTION STATUTES**

117. Plaintiffs incorporate by reference all preceding paragraphs as if fully set forth herein and further alleges as follows.

118. For the reasons explained above, Bayer's prostate claims do not have prior substantiation and are false, misleading, deceptive, unfair, and unconscionable.

119. Bayer's prostate claims misled Plaintiffs and the Consumer Protection Sub-Class into believing that the Men's Multis contain a benefit that they do possess—the prevention of prostate cancer. Bayer's labeling and marketing of Men's Multis was and still is unfair and deceptive because they stress the serious dangers of prostate cancer and promote Men's Multis as a prostate cancer preventative.

120. Each of the following prostate claims is unlawful, unfair, or deceptive and evidences the uniform nature of Bayer's fraudulent and deceptive marketing scheme:

- “Did you know that prostate cancer is the most frequently diagnosed cancer in men and that emerging research suggests Selenium may reduce the risk of prostate cancer?”
- “[N]early twice the Selenium in Centrum Silver to support prostate health.”
- “Prostate cancer. It's an important subject. Did you know that there are more new cases of prostate cancer each year than any other cancer? And here's something else you should know. Now, there's something that you can do that may help reduce your risk. Along with your regular doctor checkups, switch to One A Day men's. A complete multivitamin plus selenium, which emerging research suggests may reduce the risk of prostate cancer. One A Day Men's. Because staying healthy is serious business.”
- “Did you know that 1 in 6 men will face prostate issues? Prostate cancer is the most frequently diagnosed non-skin cancer in men, and emerging research suggests Selenium may reduce the risk of prostate cancer.”
- “Did you know one in three men will face prostate issues? One in three, really? That's why One A Day Men's is a complete multivitamin with selenium which emerging research suggests can help prostate health. One A Day Men's.”
- “To stay on top of my game after 50, I switched to a complete multivitamin with more. Only One A Day Men's 50+ Advantage has ginkgo for memory and concentration plus support for prostate and heart health. Safe. That's a great call. One A Day Men's.”

121. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of Ark. Code § 4-88-101, *et seq.*

122. Bayer has engaged in unfair competition or unfair or deceptive acts or practices or has made false representations in violation of Colo. Rev. Stat. § 6-1-105, *et seq.*

123. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of Conn. Gen. Stat. § 42-110b, *et seq.*

124. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of Fla. Stat. § 501.201, *et seq.*

125. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of 815 Defendant has engaged in unfair competition or unfair or deceptive acts or practices in violation of Kan. Stat. § 50-623, *et seq.*

126. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of Vernon's Missouri Stat. § 407.010, *et seq.*

127. Bayer has engaged in unfair competition or unfair, unconscionable or deceptive acts or practices in violation of N.J. Rev. Stat. § 56:8-1, *et seq.*

128. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of N.M. Stat. § 57-12-1, *et seq.*

129. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of N.Y. Gen. Bus. Law § 349 *et seq.*

130. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of Ohio Rev. Stat. § 1345.01, *et seq.*

131. Bayer has engaged in unfair competition or unfair or deceptive acts or practices in violation of 9 Vt. § 2451, *et seq.*

132. Bayer has engaged in unfair competition or unfair, deceptive or fraudulent acts or practices in violation of Wash. Rev. Code. § 19.86.010, *et seq.*

133. As a result of Bayer's unfair and deceptive business practices, Plaintiff Inniss and members of the Consumer Protection Sub-Class have suffered damage and lost money in that they paid for Men's Multis that were not as represented, and which they would not have purchased if they had not been exposed to those unfair and deceptive methods of competition, acts, and practices.

134. Accordingly, Plaintiff Inniss and members of the Consumer Protection Sub-Class are entitled to compensatory damages.

## **VII. DEMAND FOR RELIEF**

THEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for:

- An order certifying this matter as a class action with Plaintiffs as Class representatives and designating Plaintiffs' counsel as Class Counsel;
- Judgment in favor of Plaintiffs and the Class on each of the foregoing causes of action;
- An award of all statutorily available damages under RICO;
- An award of compensatory and punitive damages for negligence;
- An award of compensatory and punitive damages for fraud and misrepresentation;
- An award of the increased revenue by which Bayer has been unjustly enriched;
- An award of compensatory and punitive damages for consumer protection violations;
- Pre-judgment and post judgment interest on such monetary relief;
- An award of reasonable attorney's fees and costs of Plaintiffs and the Class; and
- Such other and further relief as the nature of the case may require or as may be

determined to be just, equitable, and proper by this Court.

Respectfully submitted,

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January 13, 2010

Spartanburg, South Carolina