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ELECTRONICALLY  
**FILED**  
Superior Court of California,  
County of San Francisco

09/13/2022  
Clerk of the Court  
BY: JEFFREY FLORES  
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SAN FRANCISCO

11 DONATUS MCCOY,

12 Plaintiff,

13 vs.

14 KIMBERLY-CLARK CORPORATION,  
15 KIMBERLY-CLARK WORLDWIDE,  
16 INC.,

17 Defendants.

Case No.:

**CGC-22-601753**

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

**(Violation of Health & Safety Code § 25249.5 et  
seq.)**

18 Plaintiff Donatus McCoy (“Plaintiff”), by and through his attorneys, alleges the following  
19 cause of action in the public interest of the citizens of the State of California.

20 **BACKGROUND OF THE CASE**

21 1. Plaintiff brings this representative action on behalf of all California citizens to  
22 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified at  
23 the Health and Safety Code § 25249.5 et seq (“Proposition 65”), which reads, in relevant part,  
24 “[n]o person in the course of doing business shall knowingly and intentionally expose any  
25 individual to a chemical known to the state to cause cancer or reproductive toxicity without first  
26 giving clear and reasonable warning to such individual ...”. Health & Safety Code § 25249.6.

27 2. This complaint is a representative action brought by Plaintiff in the public interest  
28 of the citizens of the State of California against Defendants Kimberly-Clark Corporation and  
Kimberly-Clark Worldwide, Inc. (collectively “Kimberly-Clark” or “Defendants”) to enforce the

1 the use of Kleenguard V90 shields that are manufactured, distributed, offered for sale and/or sold  
2 by Kimberly-Clark in California.

3 3. BPA is a harmful chemical known to the State of California to cause reproductive  
4 toxicity. On May 11, 2015, the State of California listed BPA as a chemical known to the State to  
5 cause reproductive toxicity and BPA has come under the purview of Proposition 65 regulations  
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &  
7 25249.10(b).

8 4. Proposition 65 requires all businesses with ten (10) or more employees that operate  
9 within California or sell products therein to comply with Proposition 65 regulations. Included in  
10 such regulations is the requirement that businesses must label any product containing a Proposition  
11 65-listed chemical with a “clear and reasonable” warning before “knowingly and intentionally”  
12 exposing any person to any such listed chemical.

13 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
14 for up to 365 days to be imposed upon defendants in a civil action for violations of Proposition 65.  
15 Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent  
16 jurisdiction to enjoin the actions of a Defendants which “violate or threaten to violate” the statute.  
17 Health & Safety Code § 25249.7.

18 6. Plaintiff alleges that Kimberly-Clark distributes and/or offers for sale in California,  
19 without a requisite Proposition 65 exposure warning, Kleenguard V90 shields (the “Products”)  
20 that expose persons to BPA when used as intended and/or for its intended purpose.

21 7. Kimberly-Clark’s failure to warn consumers and other individuals in California of  
22 the health hazards associated with exposure to BPA from use of the Products in conjunction with  
23 the sale and/or distribution of the Products is a violation of Proposition 65 and subjects Kimberly-  
24 Clark to the enjoinder and civil penalties described herein.

25 8. Plaintiff seeks civil penalties against Kimberly-Clark for its violations of  
26 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
28 Kimberly-Clark to provide purchasers or users of the Products with required warnings related to

1 the dangers and health hazards associated with exposure to BPA from use of the Products pursuant  
2 to Health and Safety Code § 25249.7(a).

3 10. Plaintiff further seeks a reasonable award of attorney’s fees and costs.

4 **PARTIES**

5 11. Plaintiff is a citizen of the State of California acting in the interest of the general  
6 public to promote awareness of exposures to toxic chemicals in products sold in California and to  
7 improve human health by reducing hazardous substances contained in such items. He brings this  
8 action in the public interest pursuant to Health and Safety Code § 25249.7(d).

9 12. Defendant Kimberly-Clark Corporation, through its business, effectively imports,  
10 distributes, sells and/or offers the Products for sale or use in the State of California, or it implies  
11 by its conduct that it imports, distributes, sells and/or offers the Products for sale or use in the State  
12 of California.

13 13. Plaintiff alleges that Defendant Kimberly-Clark Corporation is a “person” in the  
14 course of doing business within the meaning of Health & Safety Code sections 25249.6 and  
15 25249.11.

16 14. Defendant Kimberly-Clark Worldwide, Inc., through its business, effectively  
17 imports, distributes, sells and/or offers the Products for sale or use in the State of California, or it  
18 implies by its conduct that it imports, distributes, sells and/or offers the Products for sale or use in  
19 the State of California.

20 15. Plaintiff alleges that defendant Kimberly-Clark Worldwide, Inc. is a “person” in  
21 the course of doing business within the meaning of Health & Safety Code sections 25249.6 and  
22 25249.11.

23 **VENUE AND JURISDICTION**

24 16. Venue is proper in the County of San Francisco because one or more of the  
25 instances of wrongful conduct occurred and continues to occur in this county and/or because  
26 Kimberly-Clark conducted, and continues to conduct, business in the County of San Francisco  
27 with respect to the Products.

1 17. This Court has jurisdiction over this action pursuant to California Constitution  
2 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those  
3 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement  
4 of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has  
5 jurisdiction over this lawsuit.

6 18. This Court has jurisdiction over Kimberly-Clark because Defendants are either a  
7 citizen of the State of California, have sufficient minimum contacts with the State of California,  
8 are registered with the California Secretary of State as foreign corporations authorized to do  
9 business in the State of California and/or has otherwise purposefully availed itself of the California  
10 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts  
11 consistent and permissible with traditional notions of fair play and substantial justice.

12 **STATUTORY BACKGROUND**

13 19. The people of the State of California declared in Proposition 65 their right “[t]o be  
14 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive  
15 harm.” (Section 1(b) of Initiative Measure, Proposition 65.)

16 20. To effect this goal, Proposition 65 requires that individuals be provided with a  
17 “clear and reasonable warning” before being exposed to substances listed by the State of California  
18 as causing cancer or reproductive toxicity. H&S Code § 25249.6 states, in pertinent part:

19 No person in the course of doing business shall knowingly and intentionally expose any  
20 individual to a chemical known to the state to cause cancer or reproductive toxicity without  
21 first giving clear and reasonable warning to such individual...

22 21. An exposure to a chemical in a consumer product is one “which results from a  
23 person’s acquisition, purchase, storage, consumption or other reasonably foreseeable use of a  
24 consumer good, or any exposure that results from receiving a consumer service.” (27 CCR §  
25 25602, para (b).) H&S Code § 25603(c) states that “a person in the course of doing business ...  
26 shall provide a warning to any person to whom the product is sold or transferred unless the product  
27 is packaged or labeled with a clear and reasonable warning.”  
28

1 22. Pursuant to H&S Code § 25603.1, the warning may be provided by using one or  
2 more of the following methods individually or in combination:<sup>1</sup>

3 a. A warning that appears on a product's label or other labeling.

4 b. Identification of the product at the retail outlet in a manner which provides  
5 a warning. Identification may be through shelf labeling, signs, menus, or a combination  
6 thereof.

7 c. The warnings provided pursuant to subparagraphs (a) and (b) shall be  
8 prominently placed upon a product's labels or other labeling or displayed at the retail outlet  
9 with such conspicuousness, as compared with other words, statements, designs, or devices  
10 in the label, labeling or display as to render it likely to be read and understood by an  
11 ordinary individual under customary conditions of purchase or use.

12 d. A system of signs, public advertising identifying the system and toll-free  
13 information services, or any other system that provides clear and reasonable warnings.

14 23. Proposition 65 provides that any "person who violates or threatens to violate" the  
15 statute may be enjoined in a court of competent jurisdiction. (H&S Code § 25249.7.) The phrase  
16 "threaten to violate" is defined to mean creating "a condition in which there is a substantial  
17 probability that a violation will occur." (H&S Code § 25249.11(e).) Violators are liable for civil  
18 penalties of up to \$2,500.00 per day for each violation of the Act (H&S Code § 25249.7) for up to  
19 365 days (up to a maximum civil penalty amount per violation of \$912,000.00).

20 **FACTUAL BACKGROUND**

21 24. On May 11, 2015, the State of California listed BPA as a chemical known to the  
22 State to cause female reproductive toxicity and BPA has come under the purview of Proposition  
23 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§  
24 25249.8 & 25249.10(b).

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26  
27 <sup>1</sup> Alternatively, a person in the course of doing business may elect to comply with the warning  
28 requirements set out in the amended version of 27 CCR 25601, *et.seq.*, as amended on August 30,  
2016, and operative on August 30, 2018.



1 32. Plaintiff provided the Chemical Test Report and Product to an analytical chemist  
2 to determine if, based on the findings of the Chemical Test Report and the reasonable and  
3 foreseeable use of the Product, exposure to BPA will occur at levels that require Proposition 65  
4 warnings under the Clear and Reasonable Warnings section 25601 of Title 27 of the California  
5 Code of Regulations.

6 33. On September 13, 2021, Plaintiff received from the analytical chemist an exposure  
7 assessment report which concluded that persons in California who use the Products will be exposed  
8 to levels of BPA that require a Proposition 65 exposure warning.

9 34. On September 13, 2021, Plaintiff gave notice of alleged violation of Health and  
10 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens  
11 to BPA from use of the Products without proper warning, subject to a private action to Defendants  
12 and to the California Attorney General's office and the offices of the County District attorneys and  
13 City Attorneys for each city with a population greater than 750,000 persons wherein the herein  
14 violations allegedly occurred.

15 35. The Notice complied with all procedural requirements of Proposition 65 including  
16 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at  
17 least one person with relevant and appropriate expertise who reviewed relevant data regarding  
18 BPA exposure, and that counsel believed there was meritorious and reasonable cause for a private  
19 action.

20 36. After receiving the Notice, and to Plaintiff's best information and belief, none of  
21 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a  
22 cause of action against Defendants under Proposition 65 to enforce the alleged violations which  
23 are the subject of the Notice.

24 37. Plaintiff is commencing this action more than sixty (60) days from the date of the  
25 Notice to Defendants, as required by law.

26 **FIRST CAUSE OF ACTION**

27 **(By Plaintiff against Defendants for its Violation of Proposition 65)**

1           38.     Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 37 of  
2 this first amended complaint as though fully set forth herein.

3           39.     Defendants have, at all times mentioned herein, acted as a distributor and/or retailer  
4 of the Products.

5           40.     Use of the Products will expose users and consumers thereof to BPA, a hazardous  
6 chemical found on the Proposition 65 list of chemicals known to be hazardous to human health.

7           41.     The Products do not comply with the Proposition 65 warning requirements.

8           42.     Plaintiff, based on his best information and belief, avers that at all relevant times  
9 herein, and at least since September 13, 2021, continuing until the present, that Defendants have  
10 continued to knowingly and intentionally expose California users and consumers of the Products  
11 to BPA without providing required warnings under Proposition 65.

12           43.     The exposures that are the subject of the Notice result from the purchase,  
13 acquisition, handling, and recommended use of the Products. The primary route of exposure to  
14 BPA is through dermal absorption directly through the skin when consumers use, touch, or handle  
15 the Products. Some amount of exposure through ingestion can occur by touching the Product with  
16 subsequent touching of the user's hand to mouth. No clear and reasonable warning is provided  
17 with the Products regarding the health hazards of exposure to BPA.

18           44.     Plaintiff, based on his best information and belief, avers that such exposures will  
19 continue every day until clear and reasonable warnings are provided to purchasers and users or  
20 until BPA is removed from the Products.

21           45.     Defendants have knowledge that the normal and reasonably foreseeable use of the  
22 Product exposes individuals to BPA, and Defendants intend that those exposures to BPA will occur  
23 by its deliberate, non-accidental participation in the importation, distribution, sale and offering of  
24 the Products to consumers in California.

25           46.     Plaintiff has engaged in good faith efforts to resolve the herein claims prior to the  
26 filing of the first amended complaint.

27           47.     Pursuant to Health and Safety Code § 25249.7(b), because of the above-described  
28 acts, Defendants are liable for a maximum civil penalty of \$2,500 per day per violation.



1 48. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
2 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiff demands judgment against Defendants and requests the following  
5 relief:

6 A. That the court assess civil penalties against Defendants in the amount of \$2,500 per  
7 day for each violation for up to 365 days in accordance with Health and Safety Code §  
8 25249.7(b);

9 B. That the Court preliminarily and permanently enjoin Defendants mandating  
10 Proposition 65 compliant warnings on the Products;

11 C. That the Court grant Plaintiff reasonable attorney's fees and costs of suit, in the  
12 amount of \$50,000.00.

13 D. That the Court grant any further relief as may be just and proper.

14 Dated: September 13, 2022

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