

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

<p>GMO FREE USA d/b/a TOXIN FREE USA, P.O. Box 8273, New Fairfield, CT 06812,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>KIMBERLY-CLARK CORPORATION, 351 Phelps Dr, Irving, Texas 75038,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: right;">2024-CAB-006154</p> <p>COMPLAINT</p> <p><u>DEMAND FOR JURY TRIAL</u></p>
--	--

PREAMBLE

Plaintiff GMO Free USA d/b/a Toxin Free USA (“TFUSA” or “Plaintiff”) brings this action against Defendant Kimberly-Clark Corporation (“Kotex” or “Defendant”) regarding the false and deceptive marketing and sale of its U by Kotex-branded tampon products (the “Product”).¹ Kotex represents to District of Columbia consumers that the company is committed to “safety” and that heavy metals, such as lead, are “prohibited” from inclusion in the Product. Plaintiff’s testing, however, reveals that the Product contains lead, a toxic heavy metal, exposure to which can cause a range of harmful human health consequences. The presence of lead is especially concerning considering that the Product is intended for use inside of the human body. This Complaint is on behalf of the general public of the District of Columbia, in the interest of consumers. This is not a class action, and no class certification will be sought. Plaintiff alleges the following based upon personal knowledge, information, belief, and the investigation of Counsel:

¹ Plaintiff alleges that any Kotex products that contain heavy metals are within the scope of this Complaint. Plaintiff reserves the right to add future Products as a result of further discovery.

INTRODUCTION

1. Menstrual products, which are classified as medical devices by the U.S. Food & Drug Administration (“FDA”), have come under scrutiny as consumers become increasingly concerned about and aware of the substances they put into their bodies.

2. Tampons are a particular concern due to the nature of how they are used. As a result of this increased public concern, multiple states across the country have passed regulations requiring more ingredient transparency from tampon manufacturers, closing the regulatory gaps of the FDA.²

3. In the summer of 2024, a study was published in Environmental International which found measurable levels of heavy metals in various kinds of tampons (the “Shearston Study”).³

4. As a result of the Shearston Study, the FDA is conducting its own investigation into tampon manufacturers, emphasizing that they “must test [tampons] and its component materials before, during, and after manufacturing.”⁴

5. Plaintiff, acting under D.C. Code § 28-3905(k)(1)(C), facilitated its own heavy metal testing of tampons and detected lead in the Kotex sample.

6. Lead is a heavy metal known for its toxic effects on human health and the environment. According to the World Health Organization (WHO), “[l]ead exposure is estimated to account for 21.7 million years lost to disability and death [] worldwide due to long-term effects

² Erica Zurek, *Federal rules don't require period product ingredients on packaging labels. States are stepping in*, CBS News (Apr. 27, 2023), <https://www.cbsnews.com/news/menstrual-pads-tampons-fda-ingredients-labels/>.

³Jenni A. Shearston, et al., *Tampons as a source of exposure to metal(loid)s*, 190 *Env't Int'l* 108849 (Aug. 2024), <https://doi.org/10.1016/j.envint.2024.108849>.

⁴Sandee LaMotte, *Lead, arsenic and other heavy metals in tampons prompt FDA investigation*, CNN (Sept. 10, 2024), <https://www.cnn.com/2024/09/10/health/fda-tampons-heavy-metals-wellness/index.html>.

on health, including 30% of the global burden of idiopathic intellectual disability, 4.6% of the global burden of cardiovascular disease and 3% of the global burden of chronic kidney diseases.”⁵

7. D.C. consumers would not expect a toxic substance such as lead to be present in Kotex’s Product because Kotex represents to consumers that it is committed to “safety” and that heavy metals, such as lead, are “prohibited” ingredients.

8. This is a consumer-protection case alleging deceptive marketing representations about Defendant’s Kotex-branded tampon products. Plaintiff TFUSA is a nonprofit, public interest organization dedicated to consumer protection and education. Plaintiff seeks to end the deceptive marketing and advertising at issue and does not seek money damages.

9. Defendant Kotex manufactures and sells tampons and other menstrual products both in stores and online, to consumers in the District of Columbia.

10. Kotex’s representations mislead D.C. consumers into believing that the Product is safe for its intended use and does not contain heavy metals, when in fact, the Product contains a toxic heavy metal - lead. Thus, Kotex’s marketing of the Product is false and misleading to D.C. consumers.

FACT ALLEGATIONS

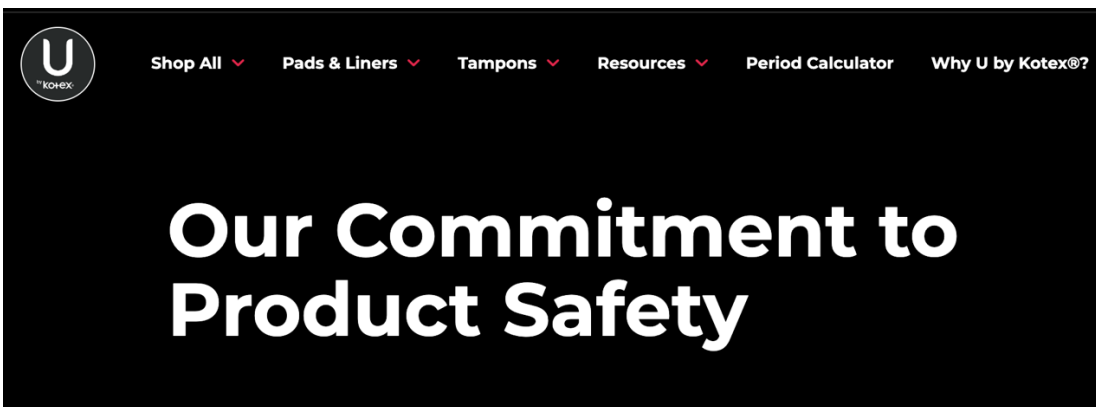
I. Defendant Makes Representations About Product Safety and Heavy Metals.

11. Kotex makes many representations about the safety of the Product and heavy metals, collectively known as the “Safety Representations.”

12. On its website, Kotex states on its “Our Commitment to Product Safety” webpage that “safety and quality always come first...”⁶

⁵ *Lead poisoning*, WHO (Aug. 11, 2023), <https://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health>.

⁶ *Our Commitment to Product Safety*, Kotex, <https://www.ubykotex.com/en-us/product-safety> (last visited Sept. 27, 2024).



OUR COMMITMENT TO SAFETY

At Kotex, nothing is more important to us than the wellbeing of our consumers. Safety and quality always come first, and we are proud of our long track record of producing safe and effective products that adhere to rigorous quality requirements and standards.

For over 100 years, we have been a trusted brand providing the comfort, confidence, and care our consumers expect – and deserve. We take this trust very seriously and work hard to earn it every day.

Trust begins with transparency. That is why we maintain a publicly available Restricted Substances List that explicitly sets out our commitment to safeguarding consumers from exposures to potential ingredients of concern.

13. Kotex also represents that it is “proud of our long track record of producing safe and effective products...”⁷

14. Further, Kotex states that it is an “active participant in developing a harmonized international standard for performance and safety requirements for all menstrual products.”⁸

15. Kotex then gives consumers examples about its commitment to product safety, such as the fact that it is a “part of the United States delegation to the International Standards

⁷ *Id.*

⁸ *Id.*

Organization (ISO) Technical Committee 338, which is an international effort involving the top experts and advocates for menstrual health, . . . and manufacturers of menstrual products to standardize the performance and safety requirements for all menstrual products.”⁹

16. Kotex further assures consumers of its safety commitment by representing that “[i]n addition to adhering to the FDA regulations, we also test our products against standards such as ISO-10993, which are internationally recognized safety standards for medical devices. We use independent, third-party labs to test our products following ISO-10993.”¹⁰

17. The Product’s packaging also states under a “Your Body, Your Planet” label that the Product contains “no harsh ingredients” and is “gynecologist tested.”¹¹



⁹ *Id.*

¹⁰ *Id.*

¹¹ *U by Kotex Click Compact Multipack Tampons, Regular/Super, Unscented, 30 Count*, Walmart, <https://www.walmart.com/ip/U-by-Kotex-Click-Compact-Multipack-Tampons-Regular-Super-Unscented-30-Count/610023504> (last visited Sept. 27, 2024).

18. The Safety Representations made by Kotex, *see supra* ¶¶ 12-17, are intended to, and do, lead D.C. consumers to believe that the Products are safe, and free from substances that are harmful to human health. In reality, the Products contain lead, a heavy metal known to cause negative health consequences.

18. In response to consumer concern about the Shearston Study, Kotex updated its “Our Commitment to Product Safety” webpage to address whether heavy metals are in the Product.

19. Kotex’s statement asserts that they “do not add heavy metals to our Kotex products. In fact, we prohibit them in our manufacturing processes.”¹²

20. In fact, Kotex specifically mentions lead as a substance that is “prohibited” from the Products’ manufacturing process.¹³

INGREDIENTS WE DON’T USE IN OUR PRODUCTS

We prohibit the inclusion of certain substances, including heavy metals such as lead, mercury, arsenic, and cadmium in our manufacturing processes for all of our products globally. This means that at no point do we add these substances to our products.

21. The foregoing statements made by Kotex in Paragraphs 18 through 20 (the “Heavy Metal Representations”) (together with the “Safety Representations,” the “Representations”) are intended to, and do, lead D.C. consumers to believe that the Products are free from heavy metals,

¹² *Our Commitment to Product Safety*, *supra* note 6.

¹³ *Id.* See also *Kimberly-Clark Restricted Substances List*, Kimberly-Clark (May 10, 2024), at 6, https://www.kimberly-clark.com/-/media/kimberly/pdf/ingredients/st-14665-kimberly-clark-restricted-substances-list_may-2024.pdf?la=en-us.

including lead. In reality, the Products contain lead, a heavy metal known to cause negative health consequences.

II. Defendant's Representations are Material to Consumers.

22. Kotex's Representations that its Product is safe and free from heavy metals are material to D.C. consumers.

23. One study found that "61% of Americans are concerned about the products they put in, on and around their bodies" and "81% assume the personal care products they use adhere to strict quality and safety standards."¹⁴

24. Other research has found that "[c]onsumers want brands and retailers to be more transparent and open about their products."¹⁵ In fact, "1 in 5 U.S. consumers use the internet to learn about a company's sustainability practices, and 1 in 3 use online resources to see how ingredients are sourced."¹⁶ Also, "72% of U.S. shoppers said brand transparency is 'extremely important' or 'important.'"¹⁷

25. Here, Defendant is selling a Product meant to be inserted into the human body and makes many specific Safety Representations about the Product. Thus, Defendant's Representations are material to consumers.

III. The Product Contains Lead.

26. TFUSA purchased Kotex's Click® Compact Tampons, Regular product to evaluate it for heavy metals.

¹⁴ *Most Americans Are Concerned About the Safety of Many Consumer Products – Yet Few Research Claims*, NSF (May 16, 2019), <https://www.nsf.org/news/most-americans-are-concerned-about-the-safety-of-many-consumer-products>.

¹⁵ Elizabeth Christenson, *Transparency influences shopper's beauty, personal care purchases*, Drug Store News (Nov. 15, 2022), <https://drugstorenews.com/transparency-influences-shoppers-beauty-personal-care-purchases>.

¹⁶ *Id.*

¹⁷ *Id.*

27. Testing conducted by an independent laboratory found 126 parts per million of lead in the Product.

28. According to WHO, “[t]here is no known safe blood lead concentration; even [low blood lead concentrations] may be associated with decreased intelligence in children, [behavioral] difficulties and learning problems.”¹⁸

29. A study has also shown that “metals in tampons can be absorbed through contact,” and that higher concentrations of heavy metals have been found in tampon users.¹⁹

30. The Shearston Study also points out that lead absorbed directly into the body “do[es] not undergo first-pass metabolism and detoxification via the liver.”²⁰ In other words, the lead in tampons is absorbed more efficiently by the body than lead in food, for example, which is typically ingested orally.

31. Lead can bioaccumulate,²¹ which is an issue considering a consumer “may use 7,400 tampons over the course of their reproductive years.”²² Thus, consumers using Kotex risk being exposed to lead multiple times a day.

IV. Defendant Is Misleading D.C. Consumers About Its Product.

32. Consumers see Kotex’s safety commitments, assurances about heavy metals being prohibited substances, plus on-package representations about the Product’s ingredients and being “gynecologist tested,” and believe that the Product would not contain and subsequently expose them to a heavy metal that has toxic health and environmental effects.

¹⁸ *Lead poisoning, supra* note 5.

¹⁹ *Democratic Women’s Caucus Urges FDA to Address Tampon Safety Concerns*, Democratic Women’s Caucus (Sept. 5, 2024), <https://democraticwomenscaucus.house.gov/media/press-releases/democratic-womens-caucus-urges-fda-address-tampon-safety-concerns>.

²⁰ Shearston, *supra* note 3.

²¹ *Lead poisoning, supra* note 5.

²² *Democratic Women’s Caucus, supra* note 19.

33. The length Kotex goes to advertise its testing processes only further supports consumer belief that the Product does not contain unsafe substances, especially any heavy metals.

34. Yet, TFUSA's testing shows that the Product contains lead.

35. Kotex omits the fact that the Product may contain lead from its marketing materials.

36. D.C. Consumers are, therefore, at risk of real, immediate, and ongoing harm if the Product continues to be sold with the misleading representations and omissions.

STATUTORY FRAMEWORK

37. This action is brought under the District of Columbia Consumer Protection Procedures Act ("CPPA"), D.C. Code § 28-3901, *et seq.*

38. The CPPA makes it a violation for "any person" to, *inter alia*:

Represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;

Represent that goods or services are of a particular standard, quality, grade, style, or model, if in fact they are of another;

Misrepresent as to a material fact which has a tendency to mislead;

Fail to state a material fact if such failure tends to mislead;

Use innuendo or ambiguity as to a material fact, which has a tendency to mislead; or

Advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered.

D.C. Code § 28-3904(a), (d), (e), (f), (f-1), (h).

39. While the CPPA enumerates a number of specific unlawful trade practices, *see* D.C. Code § 28-3904, the enumeration is not exclusive; a main purpose of the CPPA is to "assure that a just mechanism exists to remedy all improper trade practices." D.C. Code § 28-3901 (b)(1); *see also, e.g., Dist. Cablevision Ltd. P'ship v. Bassin*, 828 A.2d 714, 722-23 (D.C.

2003); *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325-26 (D.C. 1999); *Atwater v. D.C. Dep't of Consumer & Reg. Affairs*, 566 A.2d 462, 465 (D.C. 1989).

40. A violation of the CPPA may occur regardless of “whether or not any consumer is in fact misled, deceived or damaged thereby.” *Id.* § 28-3904.

41. The CPPA “establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or received in the District of Columbia.” *Id.* § 28-3901(c). The statute “shall be construed and applied liberally to promote its purpose.” *Id.*

42. Plaintiff in this case is a nonprofit, public interest organization statutorily empowered pursuant to D.C. Code Section 28-3905(k)(1)(C) & (D) to represent the interests of District of Columbia consumers.

43. Because Plaintiff is a public interest organization, TFUSA may act on behalf of the general public and bring any action that an individual consumer would be entitled to bring:

[A] public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

Id. § 28-3905(k)(1)(D)(i). Subparagraph (A) provides: “A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.” Pursuant to § 28-3901(c), placing misinformation into the D.C. marketplace is a trade practice in violation of the CPPA. Accordingly, Plaintiff has standing to challenge Kotex’s misrepresentations about the Product in the District.

44. A public interest organization (*see* D.C. Code § 28-3901(15)) may act on behalf of the interests of consumers, *i.e.*, the general public of the District of Columbia, so long as the

organization has “sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.” *Id.* § 28-3905(k)(1)(D)(ii). As set forth in this Complaint, *see infra* ¶¶ 51-54, Plaintiff is an organization dedicated to consumer advocacy and has previously represented consumers in similar actions under the CPPA. TFUSA has a sufficient nexus to D.C. consumers to represent their interests adequately.

45. Alternatively, a nonprofit organization (*see* D.C. Code § 28-3901(14)) that has purchased or received a good in order to test or evaluate its qualities, as Plaintiff TFUSA has done here, has standing under the CPPA to act on behalf of itself and the general public and bring an action as a “tester” organization:

A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

Id. § 28-3905(k)(1)(C).

46. This is not a class action, or an action brought on behalf of any specific consumer, but an action brought by Plaintiff on behalf of the general public, *i.e.*, D.C. consumers generally. No class certification will be requested.

47. This action does not seek money damages. Instead, Plaintiff seeks to end the unlawful conduct directed at D.C. consumers, *i.e.*, Defendant’s false and deceptive marketing of the Product. Remedies available under the CPPA include “[a]n injunction against the use of the unlawful trade practice.” *Id.* § 28-3905(k)(2)(D), (F). TFUSA also seeks declaratory relief in the form of an order holding Kotex’s conduct to be unlawful in violation of the CPPA and requests its attorneys’ fees and costs incurred in bringing this action.

JURISDICTION AND VENUE

48. This Court has personal jurisdiction over the Parties in this case. Plaintiff consents to this Court having personal jurisdiction over it.

49. This Court has personal jurisdiction over Defendant because Kotex has purposefully directed its conduct to the District and availed itself to the benefits and protections of District of Columbia law.

50. Defendant markets to consumers within the District. The Product can be, and is, purchased in the District by D.C. consumers, who have access to Kotex's marketing representations about the Product.

51. The beneficiaries of this action are District of Columbia consumers, and this case concerns representations made in the District of Columbia, to residents of the District of Columbia, and with the intent that residents would act upon those representations and purchase products within the District of Columbia.

52. The District has a strong interest in protecting its consumers through enforcement of the CPPA. The general public of the District has a corresponding interest in the vigorous enforcement of laws established to protect District consumers.

53. TFUSA, which has agreed to represent the interest of those consumers, has an interest in vindicating rights conferred by the CPPA as related to misrepresentations made to D.C. consumers. Plaintiff has an interest in prosecuting this case within the District, which is where the alleged injuries occurred and where the relevant Products were advertised for purchase and/or purchased.

54. This Court has subject-matter jurisdiction over this action under the CPPA, D.C. Code § 28-3901 *et seq.*

PARTIES

55. Plaintiff Toxin Free USA, also known as GMO Free USA, is a 501(c)(3) non-profit organization whose mission is to harness independent science and agroecology concepts to advocate for clean and healthy food and ecological systems. Toxin Free USA educates consumers about the potential hazards of synthetic ingredients, pesticides and biocides, and genetically engineered organisms (“GMOs”).

56. In 2020, GMO Free USA expanded its public education mission beyond GMOs and GMO-related pesticides, establishing Toxin Free USA as a complementary arm to the existing organization on the basis that it is impossible to have clean food and a clean environment without addressing the many toxins and pesticides, such as PFAS chemicals, that have become pervasive in our food system and environment.

57. Toxin Free USA performs its work and advocates for consumers throughout the United States, including in the District of Columbia.

58. TFUSA’s website, publications, public education, research, network building, and mobilization activities provide an important service to consumers and community activists every month.

59. On August 26, 2024, TFUSA purchased Kotex’s Regular Click® Compact Tampons through Amazon.

60. Testing commissioned by TFUSA through a third-party lab revealed the presence of lead in the Product.

61. Defendant is incorporated in Delaware and headquartered in Texas.

62. Defendant markets and sells the Product in stores and online in the District of Columbia.

63. Through its misrepresentations, Defendant has caused harm to the general public of the District of Columbia.

CAUSE OF ACTION

Violations of the District of Columbia Consumer Protection Procedures Act

64. Plaintiff incorporates by reference all the allegations of the preceding paragraphs of this Complaint.

65. Plaintiff is a nonprofit, public interest organization that brings these claims on behalf of the general public of D.C. consumers. *See* D.C. Code § 28-3905(k)(1)(D).

66. Through section 28-3905(k)(1)(D), the CPPA explicitly allows for public interest standing and allows a public interest organization to stand in the shoes of consumers to seek relief from any violation of the CPPA.

67. Additionally, pursuant to section 28-3905(k)(1)(C), the CPPA explicitly allows a nonprofit organization acting on behalf of the general public to establish “tester” standing, which Plaintiff has established here.

68. Defendant is a “person” and a merchant that provides “goods” within the meaning of the CPPA. *See* D.C. Code § 28-3901(a)(1), (3), (7).

69. As alleged in this Complaint, Defendant has falsely and deceptively represented, through false statements, material omissions, and ambiguous language, that the Product is safe and does not contain heavy metals, such as lead.

70. Thus, Defendant has violated the CPPA by “represent[ing] that goods . . . have a source . . . [or] characteristics . . . that they do not have”; “represent[ing] that goods . . . are of a particular standard, quality, grade, style, or model, if in fact they are of another”; “misrepresent[ing] as to a material fact which has a tendency to mislead”; “fail[ing] to state a material fact if such failure tends to mislead”; “us[ing] innuendo or ambiguity as to a material fact,

which has a tendency to mislead”; and “advertis[ing] . . . goods . . . without the intent to sell them as advertised.” D.C. Code § 28-3904(a), (d), (e), (f), (f-1), (h).

JURY TRIAL DEMAND

71. Plaintiff hereby demands a trial by jury.

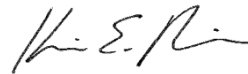
PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against Defendant and request the following relief:

- A. A declaration that Kotex’s conduct is in violation of the CPPA;
- B. An order enjoining Kotex’s conduct found to be in violation of the CPPA; and requiring redress of consumer misunderstanding about the safety of the Products;
- C. An order granting TFUSA costs and disbursements, including reasonable attorneys’ fees and expert fees, and prejudgment interest at the maximum rate allowable by law.

DATED: September 27, 2024

RICHMAN LAW & POLICY



Kim E. Richman (D.C. Bar No. 1022978)
1 Bridge Street, Suite 83
Irvington, NY 10533
T: (914) 693-2018
krichman@richmanlawpolicy.com

Attorney for Plaintiff