



Plaintiff Scott Cholewa (“Plaintiff”) brings this action on behalf of himself and all other consumers similarly situated, and alleges upon information and belief, formed after an inquiry reasonable under the circumstances, except as to those allegations which pertain to Plaintiff (which are alleged on personal knowledge), as follows:

### **NATURE OF THE ACTION**

1. Plaintiff brings this class action against Defendants CVS Health Corporation (“CVS”) and Nice-Pak Products, Inc. (“Nice-Pak”) (collectively referred to as “Defendants”) to recover for the harm caused by Defendants’ deceptive, improper, or unlawful conduct in the design, marketing, manufacturing, distribution, and sale of wipes labeled as “flushable.” Purportedly flushable wipes (referred to herein as “Flushable Wipes”) include all moist wipe products marketed and labeled as safe to flush, safe for plumbing, safe for sewer systems, and/or biodegradable, including CVS Health Flushable Cleansing Wipes and CVS Health Maximum Strength Formula Medicated Wipes (“CVS Flushable Wipes”).

2. The term “flushable” is commonly defined and understood to mean suitable for disposal by flushing down a toilet. The FTC, for example, has defined “flushability” as follows: “disperses in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment[.]”<sup>1</sup>

3. Thus, to be suitable for flushing, an item needs to be able to disintegrate into smaller pieces rapidly enough to pass through sewer and septic systems, at the very minimum.

4. Toilet paper has historically been considered the benchmark for flushability because it immediately begins to break apart after making contact with water, and is therefore in small enough

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<sup>1</sup> See *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 494 (E.D.N.Y. 2017).

pieces to pass through sewer and septic systems without causing a clog. CVS Flushable Wipes, on the other hand, do not perform as advertised or marketed, and as a result, they do not disintegrate as effectively as toilet paper and can coningle to cause clogs. Therefore, CVS Flushable Wipes should not be labeled as flushable or safe for sewer or septic systems.

5. The Environmental Protection Agency has taken the stance that the public should not flush any type of wipe.<sup>2</sup> New York City alone spends millions of dollars a year to address and remediate sewer systems and repair plant equipment that has been damaged by “non-flushable items (like wet wipes)” and has warned, “[w]hen wipes and other stuff aren’t busy making fatbergs in our sewers, they are wreaking havoc on our wastewater treatment plants! These materials don’t break down in the sewer system like toilet paper, so they arrive at our plants jamming mechanisms, clogging pumps, and breaking critical machinery.”<sup>3</sup>

6. Plaintiff and other consumers (the “Class”) purchased CVS Flushable Wipes designed, marketed, manufactured, distributed, and sold by Defendants as safe to be flushed. Through the ordinary and/or directed use of Flushable Wipes, consumers across the country have experienced plumbing issues, including clogged toilets, clogged pipes, flooding, and other plumbing problems. The ordinary and/or directed use of Flushable Wipes has also caused issues for public nationwide wastewater systems, where industry officials have stated: “Regardless of the packaging, ‘flushable’ wipes should not be flushed! They are bad for the sanitary sewer system as well as the

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<sup>2</sup> United States Environmental Protection Agency, *Is it okay to flush disinfecting wipes?*, available at: <https://www.epa.gov/coronavirus/it-okay-flush-disinfecting-wipes> (last visited Oct. 28, 2020). Unless otherwise noted, internal citations are omitted and emphasis is added throughout.

<sup>3</sup> City of New York, *Trash it. Don’t Flush it.*, available at: [https://www1.nyc.gov/site/dep/whats-new/trash-it-dont-flush-it.page?utm\\_source=FB&fbclid=IwAR39RXn1VE6kudzLbfdqZXa0uE5scaO\\_-CIZrPR-PETTvxw5ffpw8kEcyA](https://www1.nyc.gov/site/dep/whats-new/trash-it-dont-flush-it.page?utm_source=FB&fbclid=IwAR39RXn1VE6kudzLbfdqZXa0uE5scaO_-CIZrPR-PETTvxw5ffpw8kEcyA) (last visited Oct. 28, 2020).

pump station equipment.”<sup>4</sup> They have generally been described as “*wreaking havoc*,”<sup>5</sup> and “*murder on [] sewers*.”<sup>6</sup>

7. Defendants’ Flushable Wipes are worth less than what Plaintiff paid for them and what members of the Class paid and continue to pay for them.

8. Plaintiff and members of the Class would not have purchased the Flushable Wipes and/or paid the purchase price for the Flushable Wipes absent Defendants’ false and misleading misrepresentations that Flushable Wipes are suitable to be flushed.

9. Defendants’ conduct constitutes negligent misrepresentation, breach of express warranties, and violates New York General Business Law §§349 and 350.

#### **THE PARTIES**

10. Plaintiff is, and was at all relevant times, a resident of Jericho, New York. Plaintiff purchased CVS Flushable Wipes from CVS Pharmacy (defined below) retail stores near his home.

11. Defendant CVS, headquartered in Woonsocket, Rhode Island, is a healthcare company that owns CVS Pharmacy, Inc. (“CVS Pharmacy”), a retail pharmacy chain that sells prescription drugs and a wide variety of general merchandise, including CVS Flushable Wipes, and is likewise headquartered in Woonsocket, Rhode Island. CVS common stock trades on the New York Stock Exchange (“NYSE”) under the ticker symbol “CVS.”

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<sup>4</sup> Increase In Sewer Blockages Reported Since Stay-At-Home Order Started (May 3, 2020), available at: <http://levittownnow.com/2020/05/03/increase-in-sewer-blockages-reported-since-stay-at-home-order-started/> (last visited Nov. 9, 2020).

<sup>5</sup> Detroit Free Press, Christina Hall, *Flushable wipes clogging sewer pumps and pipes in metro Detroit* (Apr. 16, 2017), available at: <http://www.freep.com/story/news/local/michigan/macomb/2017/04/16/flushable-wipes-sewer-sinkhole-fraser-candice-miller/100368830/> (last visited Oct. 29, 2020).

<sup>6</sup> truTV, *Adam Ruins Everything – Why Flushable Wipes Aren’t Flushable*, YOUTUBE (Nov. 2, 2015), available at: <https://www.youtube.com/watch?v=TgHVO-RZ8c4> (last visited Nov. 10, 2020).

12. Defendant Nice-Pak, headquartered in Orangeburg, New York, together with its subsidiaries and affiliates, designs, manufactures, markets, and distributes branded and private label pre-moistened wipes products. Nice-Pak has manufactured the CVS Flushable Wipes, and upon information and belief, continues to do so. Nice-Pak also manufactures Flushable Wipes under its Nice 'n Clean brand, as well as similar products for private-label retailers including CVS. Nice-Pak is a private company with production facilities located throughout the country.

13. Defendants, through their manufacture, distribution, advertising, marketing, and sale of flushable wipes, knew or should have known that their representations regarding Flushable Wipes were false and misleading.

#### **JURISDICTION AND VENUE**

14. This Court has original jurisdiction over this matter, pursuant to 28 U.S.C. §1332(d), because the matter in controversy exceeds \$5 million, exclusive of interest and costs, and is a class action of more than 100 potential Class members in which Plaintiff is a citizen of New York. Defendant CVS is incorporated in Delaware with its principal place of business in Rhode Island, and Defendant Nice-Pak has its principal place of business in New York.

15. Venue properly lies in the Eastern District of New York because Plaintiff resides and purchased the products at issue within the District. Additionally, the facts and claims at issue are substantially related to *Kurtz v. Kimberly-Clark Corp., et al.*, No. 1:14-cv-1142-JBW-RML (E.D.N.Y.), which is currently pending in this District and *Belfiore v. The Procter & Gamble Co.*, No. 14-cv-4090-JBW-RML (E.D.N.Y.), which was litigated and settled in this District.

## SUBSTANTIVE ALLEGATIONS

16. The Flushable Wipes industry accounted for \$2.1 billion in sales in 2018, and sales are projected to reach \$3.5 billion by 2023.<sup>7</sup> The market has continued to grow steadily in 2020.

17. There are no enforceable requirements that a product must meet in order to claim that it is “flushable.” At most, there are voluntary industry guidelines that *may* be followed at the discretion of manufacturers.

18. Defendant CVS states, on its product labeling, marketing materials and in the respective product overview sections on its website, that the CVS Flushable Wipes are “flushable” and are “safe” for “sewer and septic systems.”<sup>8</sup>

19. A fundamental product flaw has been, and continues to be, that Flushable Wipes are not in fact flushable under any relevant definition or standard. As stated by industry officials, “[f]lushable wipes are not truly flushable. . . They might go down the drain, but they do not break up like regular toilet paper.”<sup>9</sup>

20. The word “flushable” has long been understood to mean suitable for disposal by flushing down a toilet, meaning that it would not only clear the user’s home plumbing system, but that it would not harm the downstream sewer system – whether municipal, septic or otherwise.

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<sup>7</sup> Joy Steed, *Flushable wipes market to reach \$3.5 billion by 2023* (Aug. 22, 2018), available at: <https://www.bxpmagazine.com/article/flushable-wipes-market-reach-35-billion-2023> (last visited Oct. 29, 2020).

<sup>8</sup> CVS, [https://www.cvs.com/shop/content/flushable-wipes/q/CVS\\_Health/br](https://www.cvs.com/shop/content/flushable-wipes/q/CVS_Health/br) (last visited Oct. 25, 2020).

<sup>9</sup> New York Times, *Americans Coping with the Coronavirus are Clogging Toilets* (Mar. 21, 2020), available at: <https://www.nytimes.com/2020/03/21/us/flushable-wipes-clog.html> (last visited Oct. 25, 2020).

21. Many items have been shown to clear a toilet, and perhaps even a home's plumbing system, that are not and should not be labeled as flushable (*e.g.*, golf balls).<sup>10</sup> Those items are not flushable, because, despite the fact that they might clear a toilet, they will not break down in the toilet, in the plumbing system, or at any point in the sewer system. They routinely arrive intact at pump stations and/or downstream treatment facilities. A product labeled as "flushable" must break apart or disperse in a reasonable period of time. CVS Flushable Wipes do not.

22. The definition for the term "flushable" has been considered and discussed by courts, including the Eastern District of New York,<sup>11</sup> in connection with challenges against manufacturers, retailers, advertisers or marketers of Flushable Wipes, including:

(a) the second edition of the Association of the Nonwoven Fabrics Industry ("INDA") "flushability" guidelines, stated that in addition to clearing toilets and drainage pipe systems, Flushable Wipes needed to be compatible with existing wastewater conveyance, treatment, reuse and disposal systems and become unrecognizable in a reasonable period of time and be safe in the natural receiving environments;

(b) the third edition of the INDA guidelines stated that for a product to be "operationally defined as flushable," it must: (1) clear toilets and properly maintained drainage pipe systems when the supplier's recommended usage instructions are correctly followed; (2) pass through wastewater conveyance systems and be compatible with wastewater treatment, reuse and

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<sup>10</sup> PlumbersSurplus, American Standard Chamipon4 Flushing Demo, YOUTUBE, available at: <https://www.youtube.com/watch?v=gaWDH16SqVs> (last visited Oct. 1, 2020) (demonstrating an American Standard toilet's ability to clear 18 golf balls, at 0:45); MetcraftHET, Flushing 40 Golf Balls, YOUTUBE, available at: <https://www.youtube.com/watch?v=6Tk1I0u0SVs> (last visited Oct. 1, 2020) (demonstrating an Metcraft HET toilet's ability to clear 40 golf balls); 105.7 the Point, Will it Flush – Matchbox Cars, YOUTUBE, available at: [https://www.youtube.com/watch?v=xV\\_1K\\_znAoE](https://www.youtube.com/watch?v=xV_1K_znAoE) (last visited Oct. 1, 2020) (demonstrating Kohler toilet's ability to flush matchbox cars, at 1:58).

<sup>11</sup> See *Kurtz v. Kimberly-Clark Corp., et al.*, No. 1:14-cv-01142-JBW-RML (E.D.N.Y.).

disposal systems without causing system blockage, clogging or other operational problems; and (3) is unrecognizable in onsite effluent disposal and municipal wastewater treatment systems and in digested sludge from wastewater treatment plants that are applied to soil;<sup>12</sup>

(c) in open and public testimony on July 21, 2015, Robert Villée, the Executive Director of the Plainfield Area Regional Sewerage Authority (“PARSA) and former chair of the Water Environment Federation (“WEF”), stated that for a product to be labeled “flushable,” the “product should clear the homeowner’s toilet and piping without causing problems and quickly begin to lose strength and/or disperse so it doesn’t cause problems for either the homeowner []or the municipal sewer system;”<sup>13</sup>

(d) the FTC, as part of its Final Consent Order with Nice-Pak Products Inc. (“Nice-Pak”) in October 2015, provided guidance that “flushable” means a product must “disperse[] in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment.”<sup>14</sup>

23. WEF, an international nonprofit association of approximately 35,000 water quality professionals worldwide, has also explained that in order for a product to be truly “flushable,” it must be dispersible:

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<sup>12</sup> INDA, Edition Three of the Guidelines (Complete Archives), available at: <https://www.inda.org/issues-advocacy/flushability/edition-three-of-the-guidelines-complete-archives/> (last visited Nov. 11, 2020).

<sup>13</sup> The testimony was provided in two related cases against flushable wipes manufacturers pending in the Eastern District of New York: *Kurtz v. Kimberly-Clark Corp., et al.*, No. 1:14-cv-01142-JBW-RML (E.D.N.Y.) and *Belfiore v. Procter & Gamble Co.*, No. 2:14-cv-04090-JBW-RML (E.D.N.Y.).

<sup>14</sup> *In the Matter of Nice-Pak Products, Inc.*, No. C-4556, (F.T.C. Oct. 30, 2015) Decision and Order at 3 (the “Consent Order”), available at: <https://www.ftc.gov/enforcement/cases-proceedings/132-3272/nice-pak-products-inc-matter> (last visited Oct. 29, 2020).



*The industry reference for dispersability is two-ply toilet paper . . . [which] starts to break apart when the toilet is flushed and is indistinguishable in the wastewater system in a matter of seconds. . . . Anything labeled as flushable should start to break apart during the flush and completely disperse within 5 minutes. . . . Our mantra is, “It’s not flushable if it’s not dispersible.”*<sup>15</sup>

24. Mr. Villée further attested, publicly at a hearing in the Eastern District of New York on July 21, 2015, and as recently as January 2017, that *there is no non-woven wipe product in the United States market, labeled as flushable, that meets any of the definitions of the word flushable.*

25. More than 25 countries and several hundred organizations and municipalities have joined together to support an international position statement regarding so-called flushable wipes products,<sup>16</sup> concluding that: (1) only human waste and toilet paper should be flushed; (2) “[w]ipes labeled ‘Flushable’ based on passing a manufacturers’ trade association guidance document should be labelled [sic] ‘**Do Not Flush**’ until there is a standard agreed to by the water and wastewater industry”; (3) any product that might be labeled in the future as “flushable” should “pass a technical standard which has been developed and agreed by the water and wastewater industry . . . [p]referably . . . under the banner of the International Standards Organization (ISO)”; and (4) “[k]ey requirements for any standard include that the product:

- (a) breaks into small pieces quickly;
- (b) must not be buoyant; and

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<sup>15</sup> Water Environment Federation, *Stop, Don’t Flush That* (June 12, 2013), available at: <http://news.wef.org/stop-dont-flush-that/> (last visited Oct. 29, 2020).

<sup>16</sup> See Water Environment Federation, International water industry position statement on non-flushable and ‘flushable’ labeled products, available at: <https://www.wef.org/globalassets/assets-wef/5---advocacy/policy-statements/position-statements/international-flushability-statement-jan-2017.pdf> (last visited Oct. 1, 2020).

(c) does not contain plastic or regenerated cellulose and only contains materials which will readily degrade in a range of natural environments.”<sup>17</sup>

26. Regardless of which precise definition is used, which are all synonymous from the perspective of a reasonable consumer, CVS Flushable Products do not meet the definition and their products should not be labeled as flushable.

27. To support their flushable claims, Defendants rely on the fact that their products meet INDA guidelines. The INDA guidelines, however, do not support the flushable claims on the CVS Flushable Products. What is worse, INDA was created and is funded by the manufacturers and retailers of “flushable” products, and its guidelines are fundamentally flawed. Most notably, they do not address dispersibility. The INDA guidelines also fail to replicate real world conditions, exclude independent input from members of the wastewater community or any independent industry personnel, and allow the “flushable” products to fail one or more tests without repercussions.

28. Studies highlight the mislabeling of Flushable Wipes. For example, the National Association of Clean Water Agencies (“NACWA”) participated in a nationwide study on the cost of wipes, working closely with other national and state organizations.<sup>18</sup> The study was designed to provide estimates of the costs of wipes in the United States at both the national and state levels, and is based on data collected from 25 utilities in 19 states, broadly representative of the population of utilities in the United States. NACWA estimated that wipes cause approximately \$441 million per year in additional operating costs in the collection systems of clean water utilities in the U.S. and impose over \$30,000 in additional collection system operating costs on the average utility per year.

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<sup>17</sup> *Id.*

<sup>18</sup> NACWA, *The Cost of Wipes on America’s Clean Water Utilities* (Sept. 2020), available at: [https://www.nacwa.org/docs/default-source/resources---public/executive-summary\\_cost\\_of\\_wipes.pdf?sfvrsn=c235fe61\\_2](https://www.nacwa.org/docs/default-source/resources---public/executive-summary_cost_of_wipes.pdf?sfvrsn=c235fe61_2) (last visited Oct. 29, 2020).

### Testing for Flushability

29. Numerous tests demonstrate and confirm that wipes labeled and sold as being “flushable” and/or “safe for sewer and septic systems” will not actually break down or dissolve in any sewer system.

30. In a study conducted at Ryerson University in Toronto in 2019, researchers examined 101 single-use wipes products, including 23 wipes products labeled as “flushable” by the manufacturer, and found that none of the products fell apart or dispersed enough to safely pass through an average home’s plumbing system to the public sewer, or through the sewer system for 30 minutes” without a risk of clogging or causing damage to infrastructure.<sup>19</sup> The research team followed the specifications set out by the International Water Services Flushability Group (“IWSFG”). Ultimately, they concluded that “it is evident that none of the products other than bathroom tissue are ‘flushable.’”<sup>20</sup>

31. Consumer Reports performed independent disintegration tests on Flushable Wipes that simulated toilet flushing conditions. A video clip depicting the tests shows that toilet paper broke down in about eight seconds, but after ten minutes, the Flushable Wipes did not break down,

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<sup>19</sup> See Defining “Flushability” for Sewer Use, Ryerson University, Final Report, prepared for the Municipal Enforcement Sewer Use Group of Canada by Anum Khan, Barry Orr, and Darko Joksimovic (Mar. 31, 2019), available at [https://cwwa.ca/wp-content/uploads/2020/04/Ryerson\\_flushable\\_report2019.pdf](https://cwwa.ca/wp-content/uploads/2020/04/Ryerson_flushable_report2019.pdf) (last visited Nov. 10, 2020).

<sup>20</sup> *Id.* at 16.

and still did not break down after being placed in a Kitchen Aid mixer for another ten minutes.<sup>21</sup> The video concludes: “Our advice: If you use these products, don’t flush them down the toilet.”<sup>22</sup>

32. CBS4 Miami, after investigating damage caused by Flushable Wipes, hired I-P-S testing, the only independent testing facility in the country, to conduct a slosh box test. I-P-S put toilet paper, Flushable Wipes and non-flushable wipes through the same slosh box test. After one hour, the toilet paper was barely visible, but the Flushable Wipes and non-flushable wipes were fully intact. After two hours, the toilet paper had dispersed completely, the Flushable had “shredded some, but visible chunks still remain[ed]” and the non-flushable wipes had not changed at all. After three hours, there was “a trace amount” left of the Flushable Wipes and the non-flushable wipes remained “pretty intact.”<sup>23</sup>

33. In 2016, the City of Vancouver, Washington conducted a series of “in-sewer” tests of allegedly “flushable” wipes, dropping them into a manhole and observing their conditions at a downstream collection point. The study concluded that *nearly all flushable wipes currently on the market in the United States “cannot be considered safe to flush since they travel through real*

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<sup>21</sup> Consumer Reports, *Think twice about flushing wet wipes* (Dec. 27, 2013), available at: <https://www.consumerreports.org/cro/news/2013/12/think-twice-about-flushing-wet-wipes/index.htm> (last visited Oct. 29, 2020).

<sup>22</sup> Eyewitness News, Consumer Reports: *Flushable Wipes*, available at: <https://abc7ny.com/consumer-reports-plumbing-flushable-wipes-eyewitness-news/29868/> (last visited Oct. 29, 2020).

<sup>23</sup> CBS 4 Miami, *The Trouble With Wipes In Your Pipes* (Feb. 4, 2014), available at: <http://miami.cbslocal.com/2014/02/04/the-trouble-with-wipes-in-your-pipes/> (last visited Oct. 25, 2020).

*sewers intact, with no dispersion.*”<sup>24</sup> The test found Flushable Wipes completely or nearly completely intact.<sup>25</sup>

34. In a video posted by the WEF, pretreatment technician Tracy Stevens performed a “spin test” on multiple household products, including: one ply tissue, three ply tissue, regular toilet paper, plush toilet paper and multiple brands of Flushable Wipes.<sup>26</sup> The products were placed in beakers filled with water and a spinning blade to simulate flushing, and only toilet paper dispersed almost immediately.<sup>27</sup> After a few minutes, the Flushable Wipes were still completely intact, with some cloudiness in the beaker that was attributed to lotion on the wipe.<sup>28</sup> According to Stevens:

If you define flushable as yes it will go down the toilet, then [ ] everything [tested] here is flushable. If you define it as whether it will make it to the treatment plant, then [ ] all of these things could eventually make it to the treatment plant and maybe one time out of ten, or one time out of twenty they don’t, and with hundreds of thousands of people out there flushing these things down one out of ten, one out of a hundred, one out of a thousand, they are going to cause trouble.<sup>29</sup>

35. The Orange County Sanitation District also conducted its own test to evaluate the dispersibility of Flushable Wipes. According to a Staff Report, one sheet of Costco Wholesale Corporation’s (“Costco’s”) Kirkland Signature Moist Flushable Wipes was placed in a one liter sized beaker filled with tap water and containing a stir bar, stirring at a speed of 120 rotations per

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<sup>24</sup> See Testimony of Cynthia A. Finley, Ph.D., Summary of Field Dispersion Tests, Attachment B at 9 (Mar. 15, 2017), available at: <https://www.nacwa.org/docs/default-source/resources---public/2017-03-15mdemtest.pdf?sfvrsn=4> (last visited Nov. 10, 2020).

<sup>25</sup> *Id.* at 11-12.

<sup>26</sup> Water Environment Federation, *Will it Flush? Video*, YOUTUBE (Jan. 4, 2012), available at: <http://www.youtube.com/watch?v=SLTVqkXVvNk&feature=youtu.be> (last visited Oct. 29, 2020).

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* (at 5:32).

minute.<sup>30</sup> The Orange County Sanitation District found that the wipe did not break down after a full 24 hours, had remained intact with no change in the wipe's initial dimensions, and was still recognizable after such time. The Orange County Sanitation District also evaluated toilet paper using the same test and found that the toilet paper rapidly dispersed after about 20 seconds. The Orange County Sanitation District concluded that because wipes are not able to disperse, they adversely affect sewer systems, lift stations and wastewater treatment plants.<sup>31</sup>

### **Flushable Wipes Cause Massive Damage Across the Country and Abroad**

#### **Private Property Damage**

36. In 2016, the public works director of Ansonia, Connecticut, Michael D'Alessio, described costly clogs caused by Flushable Wipes and the numerous instances of damage to individual homeowners in the area. He described a particular incident where wipes bound together by cooking grease and had wrapped themselves around a pump station's impellers, stating: "We had four to five blocks of human waste spilling out of the homeowner's basement sink and washing machine. . . . Once these catch on the impellers, they stay there. They don't tear or disintegrate. We had to bring in a crane, pull out the pump, clean it by hand and reinstall it."<sup>32</sup> Individual homeowner damages were not disclosed, but the incident cost municipal officials at least \$20,000 in overtime, pump repairs, and cleanup.

37. In March 2020, an anonymous individual, "Ed P.," from Hendersonville, South Carolina, wrote to the Washington Post, stating:

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<sup>30</sup> Nick Arhontes, P.E., Update on "Flushable but not dispersible," (Mar. 17, 2011), available at: <https://www.ocsd.com/Home/ShowDocument?id=12438> (last visited Oct. 25, 2020).

<sup>31</sup> *Id.*

<sup>32</sup> Michael P. Mayko, *Wipes blamed for big clogging problems* (Apr. 17, 2016), available at: <https://www.ctpost.com/local/article/Wipes-blames-for-big-glogging-problems-7252105.php> (last visited Nov. 6, 2020).

I'm really upset. I'm retired and have limited resources. I just had to spend \$3,300 on a new sewage pump that was ruined by flushable wipes. What can you tell me about these flushable wipes? The label says they're 'sewer and septic safe,' whatever that means. Would you use them at your home? Other neighbors are complaining of more frequent clogs at their homes. What's the best way to protect a home's sewer pipes so there's no damage or expensive surprises like I had happen to me?<sup>33</sup>

In response, the author of the article, Tim Carter, stated:

They make it through the curved colon in your toilet and enter the three-inch drainpipe in your home. You can also flush plastic army men, plastic dinosaurs, golf balls, keys, sand, gravel, cellphones, underwear, cosmetic bottles, pill bottles, etc., down toilets. The question is: Are the wipes truly sewer and septic safe, and is it a good idea to flush all those things above down a toilet? In my opinion, absolutely, positively NO! I've been a master plumber since age 29, and I can tell you the only thing that should go down a toilet is liquid and solid waste from your body and toilet paper.<sup>34</sup>

38. Another consumer, Nicole Slaughter Graham of St. Petersburg, Florida, detailed her experience with flushing baby wipes labeled as "flushable." Byron Graham, her husband and a plumber, had to climb the roof of their house to use a long cable, called a sewer snake, to clear a blockage caused by Flushable Wipes. He opined that: "Most of these companies don't do a lot of research and when they do, it's usually in a laboratory or a controlled environment. . . These [wipes] will flush, but it's what happens when it gets to your sewer line, that's the issue."<sup>35</sup>

39. In Tacoma, Washington, a plumber and co-owner of a local plumbing company stated in 2019 that he sends his crews to about twenty clogged sewer lines a day, and that "[u]sually they have a flat sewer line, so it's not pitched a whole lot, and they're using flushable wipes and they

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<sup>33</sup> Tim Carter, *Flushable wipes are terrible for plumbing* (Mar. 26, 2020), available at: <https://www.washingtonpost.com/business/2019/05/21/flushable-wipes-are-terrible-plumbing/> (last visited Nov. 6, 2020).

<sup>34</sup> *Id.*

<sup>35</sup> Erin Heger, *Flushing baby wipes down the toilet could cost you \$10,000 in plumbing repairs, even if the packaging says 'flushable'* (Dec. 20, 2019), available at: <https://www.insider.com/why-you-should-never-flush-baby-wipe-down-the-toilet-2019-12> (last visited Nov. 6, 2020).

aren't moving."<sup>36</sup> One of his customers was a commercial mall with a Flushable Wipes problem so large that it plugged 200 feet of sewer line.

40. Rex Kinney, a master plumber in Basking Ridge, New Jersey, similarly told TODAY News, that while "so-called 'flushable' wipes might flush easily, they can still cause issues down the line." "People flush them down the toilet and they go down the drain no problem, but usually when they hit . . . a 45-degree elbow within the homeowner's plumbing pipes going out to the street, that's when they just start congregating . . . And then over months, over time, they're not being drawn out into the street, and eventually, boom, they shut the sewer. They completely block the sewer and then people get a backup and they call a plumber."<sup>37</sup>

41. Plumbers have also described a general increase in clogs caused by Flushable Wipes during the COVID-19 pandemic. In Norflok, Virginia, a service manager stated that Flushable Wipes have been keeping his plumbers busy during the pandemic, practically doubling their amount of calls. Specifically, he stated that a customer "had 20 feet of pipe that was backed up with wet wipes. . . . We ended up with a multiple-thousand-dollar job replacing their entire sewer line."<sup>38</sup> In addition to the costs of replacing a sewer line and pipe, if the line backs up, property owners could also suffer flooding damage.

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<sup>36</sup> Craig Sailor, *Those 'flushable' wipes aren't good for your pipes or the city's* (Jan. 1, 2019), available at: <https://www.kiro7.com/news/south-sound-news/those-flushable-wipes-arent-good-for-your-pipes-or-the-citys/897454149/> (last visited Nov. 6, 2020).

<sup>37</sup> Lindsay Lowe, *Are flushable wipes really flushable?* (Apr. 23, 2019), available at: <https://www.today.com/series/one-small-thing/are-flushable-wipes-really-flushable-t151945> (last visited Oct. 29, 2020).

<sup>38</sup> Chris Horne, *'Flushable' wipes causing major plumbing problems during COVID-19 crisis* (Mar. 25, 2020), available at: <https://www.wavy.com/news/health/coronavirus/flushable-wipes-causing-major-plumbing-problems-during-covid-19-crisis/> (last visited Nov. 9, 2020).



### **Damage to Public Sewer and Water Systems**

42. Even when Flushable Wipes somehow make it through home plumbing systems and are not fully disintegrated when they leave individual homeowners' pipes, they wreak havoc on city sewer systems. Cities across the country have suffered thousands, if not millions, of dollars in damage to city sewer and water systems due to flushable wipes. Additionally, spills caused by clogged sewer lines can flow into lakes, rivers, and oceans, where they can harm public health and the environment.<sup>39</sup> Across the country – in Charleston, South Carolina; northeastern Ohio; Lexington, Kentucky; Austin Texas; and Spokane, Washington, for example – “wastewater treatment officials have beseeched residents not to flush wipes down the toilet.”<sup>40</sup>

43. The Operations Manager of the Charleston Sanitary Board, Tim Haapala, recently opined on the flushability of Flushable Wipes: “They don’t disintegrate like toilet paper, which is designed to quickly degrade, so we have to spend a lot of time pulling the wipes out of pumps and off screens and hauling them to the landfill.”<sup>41</sup> He also described their costly impact: “The wipes clog the pumps at our pumping stations. Plugged pumps do not convey waste water. They have to be removed from service and the wipes manually removed before they can return to service. This costs the Charleston Sanitary Board time and money.”<sup>42</sup>

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<sup>39</sup> Americans Coping with the Coronavirus are Clogging Toilets (Mar. 21, 2020), available at: <https://www.nytimes.com/2020/03/21/us/flushable-wipes-clog.html> (last visited Oct. 25, 2020).

<sup>40</sup> *Id.*

<sup>41</sup> Charleston Gazette-Mail, Rick Steelhammer, *Widespread flushing of toilet paper ‘alternatives’ raises fears of a sewer-nami* (Mar. 26, 2020), available at: [https://www.wvgazettemail.com/coronavirus/widespread-flushing-of-toilet-paper-alternatives-raises-fears-of-a-sewer-nami/article\\_d5afd136-1c36-50a9-bf91-d80fd8a8cd1a.html](https://www.wvgazettemail.com/coronavirus/widespread-flushing-of-toilet-paper-alternatives-raises-fears-of-a-sewer-nami/article_d5afd136-1c36-50a9-bf91-d80fd8a8cd1a.html) (last visited Nov. 11, 2020).

<sup>42</sup> *Id.*

44. The problem has impacted homeowners and wastewater districts throughout the country – and continues to do so – according to Cynthia Finley, Director of Regulatory Affairs for the National Association of Clean Water Agencies (“NACWA”).<sup>43</sup> In fact, the problem is not even limited to the continental United States.

45. According to Finley, “[c]onsumers are being told by the packaging that these things are flushable” and “[a]lthough the material might make it through the toilet and the pipes leading away from the house, they tend to clog up once in the sewer system . . . That can cause huge headaches for the utilities.”<sup>44</sup>

46. Jesse Broder Van Dyke, a spokesperson for Honolulu, Hawaii Mayor Kirk Caldwell, stated: “The wipes clog sewer lines, pump stations and treatments plants.”<sup>45</sup> Markus Owens, a Honolulu Department of Environmental Services spokesperson, stated: “These wipes contribute to recurring problems at our pumping stations; they do not break down, and create additional work for our crews who have to repeatedly remove them on a monthly or weekly basis.”<sup>46</sup>

47. In London, perhaps the most dramatic example of the effects Flushable Wipes can have on sewer systems came to light in the summer of 2013 in the form of a “fatberg.” The fatberg

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<sup>43</sup> USA Today, Kirsti Marohn, *Wipes in the pipes snarling sewers* (July 16, 2013), available at: <http://www.usatoday.com/story/news/nation/2013/07/16/wipes-pollution/2522919/> (last visited Oct. 29, 2020).

<sup>44</sup> *Id.*

<sup>45</sup> Manjari Fergusson, *New Age Toilet Paper Clogging Honolulu’s Sewer Pipes, Causing Headaches* (Oct. 1, 2013), available at: <https://www.civilbeat.org/2013/10/20030-new-age-toilet-paper-clogging-honolulus-sewer-pipes-causing-headaches/> (last visited Oct. 25, 2020).

<sup>46</sup> *Id.*

was a 15-ton, bus-size clog in London's sewer system that took three weeks to dislodge.<sup>47</sup> It was made up of wipes and coagulated fat, which built up to the point where it blocked a sewer main. Gail Hailwood of Thames Water stated: "The sewer was almost completely clogged. If we hadn't discovered it in time, raw sewage could have started spurting out of manholes across the whole of Kingston. It was so big it damaged the sewer and repairs will take up to six weeks."<sup>48</sup>

48. The blockages caused by Flushable Wipes are becoming increasingly costly for municipalities. For example, in Michigan, Macomb County said in May 2020 that it had been removing 4,000 pounds of wipes a week at one pump station. Candice Miller, the Public Works Commissioner, blamed the problem on so-called flushable wipes failing to break down.<sup>49</sup>

49. Carter Strickland, commissioner of the New York City Department of Environmental Protection, when interviewed about the problem flushable wipes are causing, told *New York Magazine*: "You can safely say [it's costing us] millions of dollars."<sup>50</sup> One of Strickland's aide's provided *New York Magazine* with an estimate that the cost caused by flushable wipes is "about \$18

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<sup>47</sup> John Vidal, *Fatberg ahead! How London was saved from a 15-tonne ball of grease* (Aug. 6, 2013), available at: <http://www.theguardian.com/environment/2013/aug/06/fatberg-london-sewer-grease-blockage> (last visited Oct. 25, 2020).

<sup>48</sup> *Id.*

<sup>49</sup> The Detroit News, *Not-so-flushable wipes cause big spill in northern Michigan town* (Oct. 17, 2020), available at: <https://www.detroitnews.com/story/news/local/michigan/2020/10/17/baby-wipes-sewage-spill-beulah/114428928/> (last visited Oct. 29, 2020).

<sup>50</sup> New York Magazine, Christopher Bonanos, *Public Enemy No. 2* (Oct. 4, 2013), available at: <http://nymag.com/news/intelligencer/flushable-wipes-2013-10/> (last visited Oct. 29, 2020); *see also* *Trash it. Don't Flush it.*, available at: [https://www1.nyc.gov/site/dep/whats-new/trash-it-dont-flush-it.page?utm\\_source=FB&fbclid=IwAR39RXn1VE6ku-dzLbfdqZXa0uE5scaO\\_-CIZrPR-PETTvxw5ffpw8kEcyA](https://www1.nyc.gov/site/dep/whats-new/trash-it-dont-flush-it.page?utm_source=FB&fbclid=IwAR39RXn1VE6ku-dzLbfdqZXa0uE5scaO_-CIZrPR-PETTvxw5ffpw8kEcyA) (last visited Oct. 29, 2020).

million per year for extra disposal, and that doesn't include staff overtime and damaged equipment.”<sup>51</sup>

50. Although screens have been used to filter Flushable Wipes out, “[t]he Wards Island treatment plant seems to be getting the worst of it, but all around the city, huge gray-black masses of synthetic fiber, steeped in every foul fluid that’s gone down the drain, are regularly being extracted, by hand, from pipes and pumps. Jammed, snarled equipment frequently breaks down, causing ‘a lot of downtime.’”<sup>52</sup>

51. According to Strickland, the problem is that Flushable Wipes, unlike toilet paper, are meant to hold up under soaking a scrubbing, and are “very, very strong, pound for pound, like [a] spiderweb.”<sup>53</sup>

52. The City of Delaware, Ohio is pleading with the community not to flush Flushable Wipes. Community Affairs Coordinator Lee Yoakum “Unfortunately, the way they are marketed is that they are flushable. . . Well, sure they are flushable. They go down the drain and you don’t see them anymore . . . flushable means they are flushable, supposedly, through a house’s inner plumbing. But they aren’t flushable once they get into the next step of the process, which is in our (sewer) lines, pumps, and lift stations. That’s where (the wipes) become damaging.”<sup>54</sup> In spring 2019, the city had to repair one of its four 3,000-pound pumps due to a backup caused in large part by Flushable Wipes. The repairs left the city footing a bill of approximately \$30,000 worth of repairs.

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Dillon Davis, *Think twice before flushing* (Mar. 24, 2020), available at: <https://www.delgazette.com/news/82732/think-twice-before-flushing> (last visited Oct. 29, 2020).

53. The Pennsylvania Department of Environmental Protection has also warned recently that Flushable Wipes should not be flushed as instructed, and stated that there has been an increase in reports of sewage treatment facilities dealing with clogs since the beginning of the COVID-19 stay-at-home orders in March, 2020. The Lower Bucks County Joint Municipal Authority said that they recently “experienced a sanitary sewer main blocked entirely by ‘flushable’ wipes.”<sup>55</sup>

54. In Raleigh, North Carolina, costly sewer overflows and backups are predominately caused by Flushable Wipes, according to the city’s environmental coordinator for wastewater, Marti Gibson.<sup>56</sup> As a result, Raleigh now has an ordinance prohibiting the flushing of anything except human waste, toilet paper and water.<sup>57</sup>

55. According to Orlandos Spencer, a station operator with the City of Lufkin, Texas, Flushable Wipes are “technically not flushable. But, I mean, people flush them anyway. The reason *they’re not flush-able is because they don’t dissolve.*”<sup>58</sup> In Rockwall, Texas, officials have stated that clogs caused by Flushable Wipes: “require the City’s wastewater crews to shut down the pumps and manually remove the blockages in order to prevent wastewater from backing up into houses,

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<sup>55</sup> Increase In Sewer Blockages Reported Since Stay-At-Home Order Started (May 3, 2020), available at: <http://levittownnow.com/2020/05/03/increase-in-sewer-blockages-reported-since-stay-at-home-order-started/> (last visited Nov. 9, 2020).

<sup>56</sup> USA Today, Kirsti Marohn, Wipes in the pipes snarling sewers (July 16, 2013), available at: <http://www.usatoday.com/story/news/nation/2013/07/16/wipes-pollution/2522919/> (last visited Oct. 29, 2020).

<sup>57</sup> *Id.*

<sup>58</sup> ABC 9 KTRE, Khyati Patel, *Using ‘flushable’ wipes? Reconsider what clogs up the sewer* (Jan. 17, 2017), available at: <https://www.ktre.com/story/34282102/using-flushable-wipes-reconsider-what-clogs-up-the-sewer/> (last visited Nov. 10, 2020).

businesses, and the environment. Removing these blockages can be not only time consuming, but costly to the City.”<sup>59</sup>

56. In San Antonio, Texas, where there is over 9,000 miles of sewer line to keep clog-free, San Antonio Water System (“SAWS”) Communications Director Anne Hayden stated: “Ignore the flushable label, because it’s not . . . It adds additional layers of cleanup we already have to do to our pipes. People have to go out in the summer heat and manually extract the buildup and it’s not pleasant.”<sup>60</sup> SAWS crews remove three to five tons of debris, enough to fill a 15-foot-long dump truck with debris, per day. Joshua Trent, a member of a four-person SAWS crew, explained that when Flushable Wipes get stuck in the sewer system, they “make it easier for items as small as plastic bags and prophylactics to items as large as car tires, engine blocks and even live animals like turtles, snakes and birds to become lodged in siphon boxes.”<sup>61</sup>

57. Some cities, like Grand Rapids, Michigan, are trying to deal with the problem by educating their citizens and asking them not to flush wipes down the toilet. Grand Rapids officials have sent out a mass mailing to homeowners reminding them “no wipes in the pipes.”<sup>62</sup> Waukesha,

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<sup>59</sup> CBS Local News, *Texans Reminded Flushable Wipes Are Not Really Flushable And Shown The Consequences* (Mar. 17, 2020), available at: <https://dfw.cbslocal.com/2020/03/17/texas-flushable-wipes-not-really-flushable-sewer-systems/> (last visited Oct. 29, 2020).

<sup>60</sup> San Antonio Express News, Sam Peshek, *‘Flushable’ wipes clean everything but sewers* (Aug. 11, 2013), available at: <http://www.expressnews.com/news/local/article/Flushable-wipes-clean-everything-but-sewers-4724397.php#/6> (last visited Oct. 29, 2020).

<sup>61</sup> *Id.*

<sup>62</sup> USA Today, Kirsti Marohn, *Wipes in the pipes snarling sewers* (July 16, 2013), available at: <http://www.usatoday.com/story/news/nation/2013/07/16/wipes-pollution/2522919/> (last visited Oct. 29, 2020).

Wisconsin; Ocean City, Maryland; and Sitka, Alaska are additional examples of cities who have publically asked residents not to flush Flushable Wipes.<sup>63</sup>

58. In Lynnwood, Washington, the city's wastewater treatment plant operators are required to take apart their pump to remove clogs about once a month. A spokesperson for the city warned that in addition to causing problems at the city's treatment plant and lift stations, that Flushable Wipes can also get clogged in a resident's portion of the sewer line, which could potentially cost them thousands of dollars.<sup>64</sup>

59. Municipalities and homeowners share in the frustration that Flushable Wipes continue to be sold and advertised as such. *The New York Post* has observed that NACWA has been receiving complaints that flushable wipes were causing clogging and backups in sewer systems for the last 4 years. The newspaper also noted that these complaints "roughly coincide[] with the ramped-up marketing of the 'flushable cleansing cloths' as a cleaner, fresher option than dry toilet paper alone."<sup>65</sup> In addition, *New York Magazine*,<sup>66</sup> *USA Today*,<sup>67</sup> and numerous local news outlets have all reported on plumbing and sewer problems caused by Flushable Wipes.

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<sup>63</sup> The Washington Post, Max Ehrenfreund, *Increasingly clogged sewers attributed to popular 'flushable' wipes* (Sept. 23, 2013), available at: [http://www.washingtonpost.com/local/increasingly-clogged-sewers-attributed-to-popular-flushable-wipes/2013/09/23/d29bdab6-2451-11e3-ad0d-b7c8d2a594b9\\_story.html](http://www.washingtonpost.com/local/increasingly-clogged-sewers-attributed-to-popular-flushable-wipes/2013/09/23/d29bdab6-2451-11e3-ad0d-b7c8d2a594b9_story.html) (last visited Oct. 29, 2020).

<sup>64</sup> My Edmonds News, *Cities encourage residents not to flush disposable wipes* (Mar. 31, 2020), available at: <https://myedmondsnews.com/2020/03/cities-encourage-residents-not-to-flush-disposable-wipes/> (last visited Oct. 29, 2020).

<sup>65</sup> New York Post, *"Flushable wipes blamed for sewer clogs* (Sept. 23, 2013), available at: <http://nypost.com/2013/09/23/flushable-bathroom-wipes-blamed-for-massive-sewer-clogs/> (last visited Oct. 25, 2020).

<sup>66</sup> New York Magazine, Christopher Bonanos, *Public Enemy No. 2* (Oct. 4, 2013), available at: <http://nymag.com/news/intelligencer/flushable-wipes-2013-10/> (last visited Oct. 29, 2020).

### The FTC's Enforcement Action Against Nice-Pak

60. On May 18, 2015, the Federal Trade Commission (the "FTC") announced that it entered into a consent order with Nice-Pak in connection with Nice-Pak's labeling of its Flushable Wipes.

61. The consent order stemmed from allegations that defendant Nice-Pak made misleading representations in its advertising and marketing of its Flushable Wipes, including CVS Flushable Wipes. According to the consent order and associated documents, Nice-Pak lacked adequate substantiation for the claim that its Flushable Wipes are safe for household plumbing, household septic systems, and public sewer systems. According to the FTC's complaint, Nice-Pak violated the FTC Act by misrepresenting that its Flushable Wipes: (1) are safe for sewer systems, (2) are safe for septic systems; (3) break apart shortly after being flushed, and (4) are safe to flush.

62. Specifically, the FTC's complaint alleges that "[b]ecause of their composition, non-woven fabrics do not break down in water in a reasonably short amount of time. As a result, products made from them can clog household plumbing systems, household septic systems, public sewer systems, and sewage treatment plant systems after being flushed."<sup>68</sup> The complaint also charges that the materials Nice-Pak disseminated to its customers "did not accurately reflect real-world conditions Nice-Pak Wipes would encounter after being flushed (i.e., conditions that exist in

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<sup>67</sup> USA Today, Kirsti Marohn, *Wipes in the pipes snarling sewers* (July 16, 2013), available at: <http://www.usatoday.com/story/news/nation/2013/07/16/wipes-pollution/2522919/> (last visited Oct. 29, 2020).

<sup>68</sup> *In the Matter of Nice-Pak Products, Inc.*, File No. 132-3272, at 1, available at <https://www.ftc.gov/system/files/documents/cases/150518nice-pakcmpt.pdf> (last visited Oct. 25, 2020).



household toilets, plumbing, or septic systems, or in public sewer systems or public wastewater treatment facilities).”<sup>69</sup> The complaint further asserts that Nice-Pak:

alone or in concert with others [Nice-Pak] developed unsubstantiated flushability claims for use by its trade customers based on this purported substantiation. Through these means, [Nice-Pak] provided trade customers with the means and instrumentalities to deceive consumers by disseminating these unsubstantiated flushability claims in marketing . . . Nice-Pak Wipes under private labels, such as . . . CVS’s Flushable Cleansings Wipes.<sup>70</sup>

63. The proposed consent order prohibited Nice-Pak from making any representation that its Flushable Wipes: (1) are safe for sewer systems, (2) are safe for septic systems, (3) break apart shortly after flushing, (4) will not clog household plumbing systems, (4) will not clog household septic systems, (5) are safe for plumbing, (6) are safe to flush, (7) dissolve or disperse when interacting with water, or (8) are flushable, unless the representation is based on “competent and reliable evidence,” including “tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by qualified persons, using procedures generally accepted in the profession to yield accurate and reliable results.”<sup>71</sup>

64. The consent order required Nice-Pak to demonstrate that its Flushable Wipes “disperse[] in a sufficiently short amount of time after flushing to avoid clogging, or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment.” The term “flushable,” according to the consent order, means that the flushable product “dispersed in a sufficiently short amount of time after flushing to avoid clogging,

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<sup>69</sup> *Id.* at 2.

<sup>70</sup> *Id.*

<sup>71</sup> Agreement Containing Consent Order, *In the Matter of Nice-Pak Products, Inc.*, File No. 132-3272, at 3, available at <https://www.ftc.gov/system/files/documents/cases/150518nice-pakorder.pdf> (last visited Oct. 25, 2020).

or other operational problems in, household and municipal sewage lines, septic systems, and other standard wastewater equipment” and that testing to substantiate the use of the term flushable on a products must “substantially replicate the physical conditions of the environment in which the Covered Product is claimed, directly or indirectly, expressly or by implication, to be properly disposed of; or, if no specific environment is claimed, then in all environments in which the product will likely be disposed of.”<sup>72</sup>

#### **FACTUAL ALLEGATIONS RELATED TO THE PLAINTIFF**

65. Plaintiff purchased CVS Flushable Wipes in and around Jericho, New York, beginning in at least 2012, if not earlier. He made the majority of his purchases at a CVS Pharmacy location in Jericho.

66. Plaintiff sustained monetary damages associated with paying more money per wipe for CVS Flushable Wipes.

67. Plaintiff also sustained damages resulting from a clog in his home caused by the directed use of CVS Flushable Wipes.

68. Specifically, after flushing CVS Flushable Wipes down his home toilets as directed by the products’ packaging, Plaintiff experienced plumbing issues, including the clogging of his home plumbing. In particular, Plaintiff’s home plumbing system backed up in March 2020, and Plaintiff had to employ the help of professional plumbers to remove the clog, who confirmed that CVS Flushable Wipes caused the damage. At no point did Plaintiff flush any products down his toilets other than human waste, toilet paper, and the CVS Flushable Wipes.

69. In addition to the costs of removing the clog caused by CVS Flushable Wipes, Plaintiff also sustained damage from the resulting flooding, which necessitated significant additional

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<sup>72</sup> *Id.*

construction work to repair and required Plaintiff to hire contractors to remove the flooring of multiple rooms that had been damaged by the flooding.

70. This experience indicated to Plaintiff that Flushable Wipes were not in fact flushable.

71. Plaintiff stopped purchasing the CVS Flushable Wipes.

72. Prior to purchasing CVS Flushable Wipes, Plaintiff saw the label on the products, which represented that the wipes were “flushable.”

73. Plaintiff purchased the CVS Flushable Wipes because they were labeled as “flushable” and were advertised as safe to flush down toilets. Plaintiff would not have purchased the wipes had they not been labeled as such.

74. Plaintiff paid more for the CVS Flushable Wipes than he would have absent the false and misleading information. Plaintiff and members of the Class paid more for Defendants’ flushable wipes than they otherwise would have had they not been misled by the false and misleading labeling and advertisements and misrepresentations complained of herein.

75. Plaintiff was unaware that Defendants’ flushable wipe products would cause harm to their home plumbing when flushed.

76. Plaintiff and members of the Class would not have purchased Defendants’ Flushable Wipes at the prices they did, or would not have purchased Flushable Wipes at all, absent Defendants’ false and misleading misrepresentations.

77. For these reasons, Defendants’ Flushable Wipes were and are worth less than what Plaintiff and members of the Class paid for them.

78. Plaintiff and members of the Class were induced to, and did, purchase CVS Flushable Wipes based on the false statements and misrepresentations described herein.

79. Plaintiff and members of the Class lost money as a result of Defendants' deception in that they did not receive what they paid for.

**PLAINTIFF'S EXPERIENCE IS REPRESENTATIVE  
OF THE EXPERIENCE OF THE CLASS**

80. Plaintiff and members of the Class experienced plumbing and sewer problems after flushing Flushable Wipes down home toilets. Because of these issues, Plaintiff and members of the Class could not flush Flushable Wipes down toilets as directed by their packaging without suffering harm to their property.

81. Defendant CVS denies that Flushable Wipes cause any harm to plumbing or sewer or septic systems and continue to represent that Flushable Wipes are able to be flushed without any adverse consequences.

82. The aforementioned problems described by the public evince prevalent and ongoing problems experienced by purchasers of Flushable Wipes, including Plaintiff and the Class members. CVS's misleading marketing and advertising of CVS Flushable Wipes cause similar problems, which, upon information and belief, were apparent and are known to CVS.

83. The additional product attribute of "flushability" sets the product apart from non-flushable wipes and has its own inherent value. Additionally, although Flushable Wipes may be used and disposed of in the garbage, like non-flushable wipes, Defendants market and sell flushable wipes at a higher cost than comparable, non-flushable wipes. For example, a CVS/pharmacy® Brand Flushable Moist Wipes Refill costs \$0.71 per wipe, whereas comparable CVS/pharmacy® brand wipes products that are not labeled as flushable sell in the range of \$0.04 to \$0.05 per wipe. Because the CVS Flushable Wipes are not actually flushable, consumers are overcharged for the product.

84. Rather than properly labeling or including a sufficient warning on flushable wipes packaging, Defendant CVS has ignored complaints surrounding Flushable Wipes, thereby causing injury or damage to Plaintiff and members of the Class while providing themselves with additional and unjust financial gain.

### CLASS ACTION ALLEGATIONS

85. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure 23(a), (b)(2), and (b)(3) individually and as a class action on behalf of the following proposed classes:

***New York CVS Class: All persons and entities who purchased CVS Flushable Wipes in the State of New York from 2012 to the present.***

***National CVS Class: All persons and entities who purchased CVS Flushable Wipes in the United States from 2012 to the present.***

86. Upon completion of discovery with respect to the scope of the Class, Plaintiff reserves the right to amend the Class definition. Excluded from the Class are Defendants, their parents, subsidiaries, and affiliates, directors and officers, and members of their immediate families. Also excluded from the Class are the Court, the Court's spouse, all persons within the third degree of relationship to the Court and its spouse, and the spouses of all such persons.

87. Numerosity: The Class is so numerous that joinder of all individual members is impracticable. While the exact number and identities of members of the Class are unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, upon information and belief, Plaintiff alleges that the Class is comprised of thousands of individual members geographically disbursed throughout the United States. The number of Class members and their geographical disbursement renders joinder of all individual members impracticable if not impossible.

88. Commonality: There are questions of fact and law common to members of the Class that predominate over any questions affecting solely individual members including, *inter alia*, the following:

- (a) whether Defendants' Flushable Wipes are flushable;
- (b) whether Defendants' Flushable Wipes are safe for sewer and septic systems;
- (c) what "flushable" means to the reasonable consumer;
- (d) whether Defendants misrepresented the effect of flushing Flushable Wipes on plumbing and sewers, and otherwise mislabeled Flushable Wipes so as to have the consumer believe that the flushable wipes would not cause harm to home plumbing and sewers;
- (e) whether the actions and activities of Defendants violated provisions of New York General Business Law §§349 and 350;
- (f) whether Defendants' business practices violate New York law, for which Plaintiff and members of the Class may recover damages;
- (g) whether Defendants knew or should have known that the labeling on flushable wipes was false when issued;
- (h) whether Defendants misled consumers into believing that the flushable wipes were able to be flushed without adverse effects on plumbing and sewer systems;
- (i) whether Defendants breached their warranties to consumers concerning the flushable wipes;
- (j) whether Plaintiff and members of the Class are entitled to statutory relief;
- (k) whether Plaintiff and members of the Class are entitled to punitive relief;
- (l) whether Plaintiff and members of the Class are entitled to compensatory relief; and
- (m) whether Plaintiff and members of the Class have sustained damages, and, if so, what is the proper measure of damages.

89. Typicality: Plaintiff's claims are typical of the members of the Class they seek to represent. Plaintiff and all other members of the Class sustained damages arising out of Defendants' common course of conduct as complained herein. The losses of each member of the Class were caused directly by Defendants' wrongful conduct alleged herein. The amount of money at issue is such that proceeding by way of class action is the only economical and sensible manner in which to vindicate the injuries sustained by Plaintiff and members of the Class.

90. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff's claims are coextensive with, and not antagonistic to, the claims of the other members of the Class. Plaintiff is willing and able to vigorously prosecute this action on behalf of the Class, and Plaintiff has retained competent counsel experienced in litigation of this nature.

91. Plaintiff brings this action under Rule 23(b)(3) because common questions of law and fact predominate over questions of law and fact affecting individual members of the Class. Indeed, the predominant issue in this action is whether Defendants mislabeled and falsely advertised their Flushable Wipes and whether that mislabeling and false advertising caused damages to Plaintiff and the members of the Class. In addition, the expense of litigating each Class member's claim individually would be so cost prohibitive as to deny Class members a viable remedy. Certification under Rule 23(b)(3) is appropriate because a class action is superior to the other available methods for the fair and efficient adjudication of this action, and Plaintiff envisions no unusual difficulty in the management of this action as a class action.

92. In addition, the Class may also be certified under Rule 23(b)(2) because:

(a) the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for Defendants;

(b) the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or

(c) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final declaratory and/or injunctive relief with respect to the members of the Class as a whole.

93. The undersigned counsel for Plaintiff and the Class request that the Court appoint them to serve as Class counsel; first on an interim basis and then on a permanent basis pursuant to Federal Rule of Civil Procedure 23(g). Undersigned counsel will fairly and adequately represent the interests of the Class, have identified or investigated the Class' potential claims, are experienced in handling class actions, other complex litigation, and consumer claims of the type asserted in the action, know the applicable law, will commit sufficient resources to represent the Class, and are best able to represent the Class.

## COUNT I

### **Negligent Misrepresentation**

94. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

95. Defendants misrepresented and continue to misrepresent the effects flushing Flushable Wipes down toilets has on plumbing and sewer systems to Plaintiff and the Class.

96. Defendants misrepresented and continue to misrepresent their Flushable Wipes as “flushable” and “sewer and septic safe.”

97. Defendants omitted and continue to omit material facts regarding the effect flushing Flushable Wipes down toilets has on plumbing and sewer systems.



98. Defendants omitted and continue to omit material facts regarding their claims that Flushable Wipes are “flushable” and “sewer and septic safe.”

99. Defendants owed a duty to Plaintiff and the Class to exercise reasonable care when issuing statements or disclosures regarding the nature Flushable Wipes.

100. Upon information and belief, the statements or disclosures regarding the ability of Flushable Wipes to be flushed without having adverse effects on plumbing and sewer systems were likely to deceive or confuse Plaintiff and members of the Class.

101. In reliance upon Defendants’ representations that the CVS Flushable Wipes products were flushable, Plaintiff purchased the products and flushed them down his home toilets.

102. The referenced claims have also influenced or are likely to influence future decisions of consumers and the buying public. Plaintiff and the Class, by purchasing Flushable Wipes, reasonably acted in reliance upon the truth of the representations made by Defendants.

103. As a direct and proximate result of the Plaintiff’s and the Class’ reliance upon the representations made by Defendants, as described above, Plaintiff and the Class have sustained damages and an ascertainable loss.

## **COUNT II**

### **Breach of Express Warranty**

104. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

105. Beginning at an exact date unknown to Plaintiff, but at least since three years prior to the filing date of this action, and as set forth herein, Defendants represented to the public, including Plaintiff, on the label of their Flushable Wipes, that the product was safe to flush down the toilet. For example, Defendants represented to the public, including Plaintiff, by their advertising,

packaging and other means, that Flushable Wipes are “sewer and septic safe.” These promises became part of the basis of the bargain between the parties and thus constituted an express warranty.

106. Thereon, Defendants sold the Flushable Wipes to Plaintiff and other Class members, who bought the Flushable Wipes indirectly or directly from Defendants.

107. Defendants breached the express warranty in that the goods did not, in fact, flush without adverse consequences to home plumbing and sewer systems as set forth in detail herein. As a result of this breach, Plaintiff and other consumers in fact did not receive goods as warranted by Defendants.

108. As a proximate result of this breach of warranty by Defendants, Plaintiff and other consumers have been damaged in an amount to be determined at trial.

### **COUNT III**

#### **Violations of New York General Business Law §349**

109. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

110. Defendants have used and employed deceptive acts or practices in the conduct of business, trade, or commerce in connection with the marketing, distributing, sale, and advertisement of Flushable Wipes.

111. Plaintiff and the other members of the Class, unaware of Defendants’ deception, purchased Defendants’ Flushable Wipes. Had Plaintiff and the other members of the Class known that Defendants was deceiving them, they would not have purchased Flushable Wipes or paid the price that they did.

112. By virtue of the foregoing, Defendants has violated the New York General Business Law §349.

113. As a direct and proximate result of Defendants' actions, Plaintiff and the Class have suffered damages in an amount to be proven at trial.

**COUNT IV**

**Violations of New York General Business Law §350**

114. Plaintiff repeats and realleges the allegations contained in all preceding paragraphs as if fully set forth herein.

115. Defendants have used and employed false advertising in the conduct of business, trade, or commerce in connection with their fraudulent and misleading labeling, advertising, marketing, and sale of their Flushable Wipes.

116. By virtue of the foregoing, Defendants has violated the New York General Business Law §350.

117. As a direct and proximate result of Defendants' actions, Plaintiff and the Class have suffered damages in an amount to be proven at trial.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment against Defendants for himself and the Class as follows:

A. An Order determining that this action is a proper class action and certifying Plaintiff as a representative of the Class;

B. An Order awarding statutory, compensatory and punitive damages in favor of Plaintiff and the other Class members against Defendants' for violation of the New York General Business Law §§349 and 350 and for all damages sustained as a result of Defendants' wrongdoing, in an amount to be proven at trial, including interest thereon;

C. An Order declaring Defendants' practices to be improper, unfair, unlawful and/or deceptive;

D. An Order requiring Defendant to provide refunds to Plaintiff and the Class;

E. A temporary, preliminary or permanent injunction: (i) ordering Defendants to make disclosures, through corrective advertising, to inform the public of the true nature regarding the effect on plumbing when Flushable Wipes are flushed; (ii) enjoining Defendants from selling Flushable Wipes until the proper disclosures set forth above are issued; and (iii) ordering Defendants to waive or reimburse any fees to be incurred by consumers in connection with plumbing services needed to repair plumbing systems;

F. Disgorgement and restitution;

G. An Order awarding Plaintiff and the Class their reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

H. Such other and further relief as the Court may deem just and proper.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury.

DATED: November 11, 2020

ROBBINS GELLER RUDMAN  
& DOWD LLP  
SAMUEL H. RUDMAN  
MARK S. REICH  
VINCENT M. SERRA

*Mark S. Reich*

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*Attorneys for Plaintiff*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Scott Cholewa

(b) County of Residence of First Listed Plaintiff Nassau County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Robbins Geller Rudman & Dowd LLP, 58 S. Service Road, Suite 200, Melville, NY 11747, 631-367-7100

DEFENDANTS

CVS Health Corporation and Nice-Pak Products, Inc.

County of Residence of First Listed Defendant Providence County (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, 1 1, 2 2, 3 3, 4 4, 5 5, 6 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Table with columns: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal categories like Personal Injury, Property Damage, Labor, etc.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 28 U.S.C. §1332(d) Brief description of cause: Consumer Fraud

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Pamela K. Chen DOCKET NUMBER 1:14-cv-1142

DATE 11/11/2020 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

**CERTIFICATION OF ARBITRATION ELIGIBILITY**

Local Arbitration Rule 83.7 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

Case is Eligible for Arbitration

I, Mark S. Reich, counsel for Plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- 
- 
- 

monetary damages sought are in excess of \$150,000, exclusive of interest and costs,  
 the complaint seeks injunctive relief,  
 the matter is otherwise ineligible for the following reason

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

None.

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

**NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)**

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County?  Yes  No
- 2.) If you answered "no" above:
  - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County?  Yes  No
  - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District?  Yes  No
  - c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received:

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?  Yes  No

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes  No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain)  No

I certify the accuracy of all information provided above.

Signature: \_\_\_\_\_