

**ATTACHMENT 9**

Michael Eastwood and Jennifer Reiff Complaint against S&M NuTec LLC

NEW YORK  
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

NOV 30 2005

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Jennifer Reiff and  
Michael Eastwood,

Plaintiffs,

- against -

S&M NuTec, L.L.C.,

Defendant.

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NOT COMPARED  
Index No.: WITH COPY FILED  
116598/05  
Date Purchased: Nov. 30, 2005

Plaintiff designates New York  
County as the place of trial.

The basis of venue is  
plaintiffs' place of business.

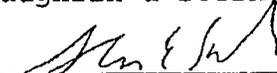
SUMMONS

To the above named defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this  
action and to serve a copy of your answer on the plaintiffs'  
attorneys within twenty (20) days after the service of this  
summons, exclusive of the day of service (or within 30 days  
after the service is complete if this summons is not personally  
delivered to you within the State of New York); and in case of  
your failure to appear or answer, judgment will be taken against  
you by default for the relief demanded in the complaint.

Dated: New York, New York  
November 30, 2005

McLaughlin & Stern, LLP

By:   
Alan E. Sash  
Attorneys for Plaintiffs  
260 Madison Avenue  
New York, NY 10016  
(212) 448-1100

Defendant's Address:  
S&M NuTec, L.L.C.  
1 Design Drive  
North Kansas City, MO 64116

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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Jennifer Reiff and  
Michael Eastwood,

Plaintiffs,

-against-

S&M NuTec, L.L.C.,

Defendant.

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Plaintiffs, by and through their attorneys, McLaughlin & Stern, LLP, as and for its Complaint against Defendant, allege:

**PARTIES**

1. Plaintiffs Jennifer Reiff and Michael Eastwood ("Ms. Reiff" and "Mr. Eastwood", respectively, or collectively "Plaintiffs") were the lawful owners of a 12 ½ pound black and tan Miniature Dachshund commonly known as Burt.

2. Burt was born in or about January 2001 in Brooklyn, New York. He became part of Plaintiffs' family on July 25, 2002 at the age of approximately 1 ½.

3. Defendant S&M NuTec, L.L.C. (hereinafter referred to as "Defendant") is a Missouri corporation that maintains its

principal office and place of business at 1 Design Drive, North Kansas City, Missouri.

#### **JURISDICTION AND VENUE**

4. This Court has jurisdiction over the Defendant pursuant to CPLR §301, CPLR §302(a)(1), CPLR §302(a)(2), CPLR §302(a)(3)(i) and CPLR §302(a)(3)(ii).

5. At all relevant times herein, Defendant transacted business within the State of New York and contracted to supply goods and services within the State of New York.

6. At all relevant times herein, Defendant committed a tortious act within the State of New York.

7. At all relevant times herein, while regularly soliciting business, engaging in persistent commerce, and deriving substantial revenue from goods used or consumed in the State of New York, Defendant committed a tortious act outside the State of New York that caused injury to Plaintiffs and Burt within the State of New York.

8. At all relevant times herein, while expecting or reasonably expecting the act to have consequences in the State of New York and deriving substantial revenue from interstate

commerce, Defendant committed a tortious act outside the State of New York that caused injury to Plaintiffs and Burt within the State of New York.

9. At all times relevant herein, Defendant designed, developed, marketed, manufactured and distributed dog treats called Greenies, including but not limited to "petite-size" Greenies, in the State of New York as well as throughout the United States.

10. Defendant placed Greenies in the stream of commerce by distributing and marketing Greenies to retail stores and online retailers including but not limited to Walgreens, Target, Petco, PetSmart and Pet Stop. Defendant would either sell Greenies to retailers in sealed packages of various quantities and sizes or individually unwrapped units. Retailers would then, in turn, sell Greenies to the general public including, *inter alia*, Plaintiffs.

11. Venue properly lies in the County of New York in that the Plaintiffs are located therein and its their place of business.

**STATEMENT OF FACTS COMMON TO ALL CAUSES OF ACTION**

12. Beginning in or about November 2000, Greenies came in various sizes including but not limited to a "petite-size". Greenies are shaped like the head of a toothbrush on one end and the knuckle of a bone on the other end.

13. Greenies are dog treats that are used to reduce bad breath and to improve oral health in dogs. Regardless of their size, Greenies' ingredients are identical and include, among other things, processed wheat gluten, glycerin, natural flavor, powdered cellulose, monosodium phosphate, monoglycerides of edible fatty acids, magnesium stearate and chlorophyll.

14. Prior to July 22, 2005, Ms. Reiff purchased a bag of "petite-size" Greenies in Manhattan for Burt. Defendant's placed this bag of Greenies in the stream of commerce. The bag of Greenies purchased by Ms. Reiff was ordinary in that it was in its original packaging without alteration and identical in nature to other bags of "petite-size" Greenies on the market.

15. In or about the early afternoon of July 22, 2005, Ms. Reiff gave Burt a piece of a "petite-size" Greenie.

16. Under the supervision of Ms. Reiff, Burt adequately and properly chewed the piece of Greenie to the best of his ability and then swallowed it. Prior to eating the Greenie, Burt was in good health.

17. Thereafter, Ms. Reiff took Burt to Central Park for a walk. At which point Burt began to vomit slightly. Plaintiffs monitored Burt for the remainder of the evening.

18. The next day, July 23, 2005, Burt appeared to be uncomfortable and restless. As a result, Plaintiffs took him to a local veterinarian.

19. While at the veterinarian's office, Burt began to experience excruciating pain, was very lethargic and vomited blood. The veterinarian administered a dose of antibiotic and recommended that Plaintiffs transport Burt to the local emergency veterinarian clinic for advanced treatment.

20. Upon arriving at the clinic, the veterinarian there informed Plaintiffs that Burt went into shock and that he needed to be stabilized. He suspected intestinal blockage, but recommended that emergency x-rays be taken to definitively locate the cause of Burt's illness. After reviewing the x-rays,

the veterinarian further recommended exploratory surgery.

Without the surgery, Burt would most likely die.

21. Plaintiffs consented to the exploratory surgery.

22. The surgeon removed what was described as a green and rubbery eraser-like object that was lodged in Burt's small intestine. The object was the "toothbrush" end of a chewed Greenie that had increased in size by approximately 25% because it had absorbed gastrointestinal fluids while lodged in Burt's body.

23. As a result of the Greenie obstruction, 3 ½ feet of Burt's intestine had decayed and needed to be surgically removed.

24. Although the veterinarian successfully removed the Greenie from Burt's small intestine, the Greenie had already caused severe damage to Burt.

25. Burt remained at the clinic for the next forty-eight hours, where he was suffering tremendously. He was bleeding internally and was urinating and vomiting blood. He also developed, among other things, pneumonia and septicemia.

26. Throughout his hospital stay he was crying and vocalizing his pain and discomfort. Burt was unable to control his bowels and, on more than one occasion, defecated a bloody soft stool on himself.

27. In the evening of Monday, July 25, 2005, Burt's condition worsened. He was slipping in and out of consciousness and suffered through three cardiac failures as a result of the Greenie. At 9:09 p.m., Burt died in front of the Plaintiffs - exactly three years after joining their family.

28. Thereafter, Plaintiffs informed Defendant's technical services veterinarian, Dr. Brad Quest ("Dr. Quest"), of the circumstances surrounding Burt's death. As part of his review and investigation, Dr. Quest reviewed Burt's medical records and spoke with Burt's veterinarian and Mr. Eastwood via telephone.

29. After reviewing the pertinent documents and discussing the matter with eyewitnesses, Dr. Quest stated that nothing could have been done differently to improve the outcome. In response, Mr. Eastwood requested that Greenies be recalled and reformulated.

30. Defendant has, to date, failed to respond to this request.

**AS AND FOR A FIRST CAUSE OF ACTION  
(Strict Products Liability- Design Defect)**

31. Plaintiffs repeat and reallege each and every allegation as if fully set forth herein.

32. Defendant maintained a duty to design, manufacture, distribute and market a reasonably safe product.

33. Defendant breached this duty by designing, manufacturing, distributing and marketing Greenies that were not reasonably safe and then placing them in the stream of commerce in this condition.

34. Greenies are not reasonably safe because they are insoluble and indigestible.

35. The insolubility and indigestibility of Greenies caused an obstruction to and hindered Burt's digestive process which led to his death and damage to Plaintiffs.

36. The design of Greenies is defective in that they are processed in a manner that makes them indigestible and insoluble, and thus, an unreasonably dangerous dog treat.

37. The purported benefit of Greenies, to reduce bad breath and improve oral health in dogs, does not outweigh its risk, death and serious injury.

38. A reasonable designer, manufacturer, distributor and marketer of dog treats would have concluded that, at the time that Greenies entered the market place, the inherent risk of death or serious injury to dogs that eat Greenies and the corresponding damages sustained by their owners, outweigh any purported benefit derived from placing Greenies in the stream of commerce.

39. At the time that Greenies left the Defendant's possession, custody and control, the Plaintiffs did not and could not have reasonably contemplated that the Greenies were indigestible or insoluble and could obstruct or hinder Burt's digestive process causing his death.

40. Had Defendant designed Greenies in a safe manner, they would be digestible and soluble and Burt would be alive.

41. Plaintiffs and Burt used the Greenie as directed and intended but its unknown indigestibility and insolubility made it unreasonably dangerous for the intended use.

42. Due to Defendant's failure to safely design Greenies in a manner in which they would be fully digestible and soluble, a Greenie became lodged in Burt's small intestine causing his death and damage to Plaintiffs.

**AS AND FOR A SECOND CAUSE OF ACTION  
(Strict Products Liability- Failure to Warn)**

43. Plaintiffs repeat and reallege each and every allegation as if fully set forth herein.

44. Defendant maintained a duty to adequately warn Plaintiffs and other purchasers of the risks associated with the consumption of Greenies.

45. Defendants were aware, or should have been aware, that Greenies were not digestible or soluble and that eating them could cause serious injury or death to dogs and damages to their owners.

46. Defendant breached its duty by distributing, marketing and manufacturing Greenies without an adequate warning concerning the indigestibility and insolubility of Greenies and the risks associated therewith.

47. Had Defendant adequately warned Plaintiffs of the indigestibility and insolubility of Greenies, Plaintiffs would

not have purchased Greenies or given them to Burt thereby avoiding Burt's death and Plaintiffs' corresponding damages.

48. The failure to warn of the risks associated with the consumption of Greenies made them unreasonably dangerous and defective.

49. The indigestibility and insolubility of Greenies is a latent defect and was neither obvious nor apparent. Plaintiffs were unaware of the defective nature of Greenies.

50. Due to the lack of an adequate warning, Ms. Reiff gave Burt a Greenie that became lodged in his small intestine causing his death and damage to Plaintiffs.

**AS AND FOR A THIRD CAUSE OF ACTION  
(Breach of Express Warranty)**

51. Plaintiffs repeat and reallege each and every allegation as if fully set forth herein.

52. Prior to Burt's death, Defendant made certain warranties about Greenies on its packaging and website. Defendant made an affirmation of fact and promised to purchasers, including but not limited to Plaintiffs, that Greenies were "highly digestible". Defendant further claimed that "[a] leading nationally-know [sic], highly respected

independent third-party testing research kennel documented that Greenies are not only highly digestible and nutritious, but Greenies also increased the digestibility of other dog food in the intestine with Greenies."

53. Defendant also warranted that "petite-size" Greenies were "for dogs weighing 10-20 pounds".

54. Burt was 12 ½ pounds at the time that he ate the "petite-size" Greenie that caused his death. After Burt's death, Defendant changed its warranty by removing the "digestibility" statement from its website and increased the minimum weight requirement for "petite-size" Greenies from 10 to 15 pounds.

55. Plaintiffs purchased Greenies, in large part, due to Defendant's aforementioned express warranties.

56. In violation of the New York State Uniform Commercial Code §2-313, Greenies did not conform to these representations.

57. Greenies are not digestible or soluble and do not "increase[] the digestibility of other dog food in the intestine".

58. Had Plaintiffs known the falsity of the express warranties, they would not have purchased Greenies or given them to Burt.

59. Defendant's express warranties were patently false and deficient at the time that they were made.

60. Plaintiffs purchased and gave Greenies to Burt based upon the aforementioned warranties made by Defendant. The Plaintiffs relied upon said warranties in purchasing Greenies and giving them to Burt. Plaintiffs were unaware and had no reason to believe that Defendant's warranties were false.

61. Due to the falsity of Defendant's express warranties, Burt was given a "petite-size" Greenie that was indigestible and insoluble which obstructed and hindered his digestive process causing his death and damage to Plaintiffs.

**AS AND FOR A FOURTH CAUSE OF ACTION  
(Negligence)**

62. Plaintiffs repeat and reallege each and every allegation as if fully set forth herein.

63. Defendant had duties to reasonably design, market, manufacture and distribute Greenies in a manner which made them

digestible and soluble and, if they were not, to warn purchasers of same.

64. Defendant's breached said duties by designing, marketing, manufacturing and distributing Greenies that were indigestible and insoluble and without warning of same.

65. Defendant knew or should have known that Greenies were indigestible and insoluble and could cause injury and damages to dogs and their owners including but not limited to Burt and Plaintiffs.

66. The indigestibility and insolubility of Greenies and the Defendant's failure to warn of same caused Burt's death and damage to Plaintiffs.

**AS AND FOR A FIFTH CAUSE OF ACTION  
(Punitive Damages)**

67. Plaintiffs repeat and reallege each and every allegation as if fully set forth herein.

68. Plaintiffs are entitled to punitive damages against the Defendant on the First, Second and Third Causes of Action.

69. Defendant had actual and constructive notice that Greenies were indigestible and insoluble and could cause death and/or injury to dogs and damage to their owners.

70. Notwithstanding Defendant's knowledge, Defendant willfully placed Greenies, an unreasonably dangerous product that was not digestible or soluble, into the stream of commerce nationwide and internationally.

71. Defendant was solely motivated by profit and had gross indifference or reckless disregard for the safety of dogs or the well being of their owners.

72. Upon information and belief, since the product's introduction into the marketplace, approximately sixty to eighty dogs of various breeds have died from Greenies. In addition, upon information and belief, at least hundreds of additional dogs have become sick or injured from Greenies.

73. Upon information and belief, Defendant intentionally sought to mislead the public by knowingly making false or misleading claims about the safety, solubility and digestibility of Greenies on its packaging, website and other marketing media.

74. Defendant's conduct was aimed at the public and is reprehensible, morally culpable and wanton warranting exemplary damages in order to deter this type of conduct in the future.

WHEREFORE, plaintiffs Jennifer Reiff and Michael Eastwood demand judgment against defendant S&M NuTec, L.L.C. as follows:

(a) On the FIRST CAUSE OF ACTION damages against the defendant in an amount to be determined at trial;

(b) On the SECOND CAUSE OF ACTION damages against the defendant in an amount to be determined at trial;

(c) On the THIRD CAUSE OF ACTION damages against the defendant in an amount to be determined at trial;

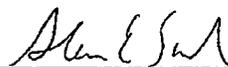
(d) On the FOURTH CAUSE OF ACTION damages against the defendant in an amount to be determined at trial;

(e) On the FIFTH CAUSE OF ACTION against defendant punitive damages in an amount to be determined at trial but no less than \$5,000,000.00; and

(f) On all causes of action, that plaintiffs have such other and further relief as this Court deems just, proper and equitable together with costs, disbursements, interest and reasonable attorneys' fees.

Dated: New York, New York  
November 30, 2005

McLAUGHLIN & STERN, LLP

By: 

Alan E. Sash  
Attorneys for Plaintiffs  
260 Madison Avenue  
New York, NY 10016  
(212) 448-1100

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Index No.

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JENNIFER REIFF and  
MICHAEL EASTWOOD,

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Defendant.

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SUMMONS & COMPLAINT

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**MCLAUGHLIN & STERN, LLP**  
260 MADISON AVENUE  
NEW YORK, NEW YORK 10016  
Attorneys for Plaintiff

Telephone (212) 448-1100  
Facsimile (212) 448-0066

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