

ATTACHMENT 10
Class Action Complaint

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOSH GLASS, JUDY J. CLARK, LYDIA
SCHARF, GENE DUBRETSKOY, FERN
FINER, CHERYL STUBBS, WAYNE
AMEDURE, ROBERT MAGOON, MARK
JUDSON AND ANTHONY COTELLESE,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

-v-

S&M NUTEC, LLC

Defendant.

CASE NO.: 06 cv ____ ()

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs, Josh Glass, Judy J. Clark, Lydia Scharf, Gene Dubretskoy, Fern Finer, Cheryl Stubbs, Wayne Amedure, Robert Magoon, Mark Judson and Anthony Cotellese (“Plaintiffs”) by and through their undersigned attorneys, hereby complain against S&M NuTec LLC (“NuTec” or “Defendant”) on behalf of themselves and all others similarly situated as follows. Plaintiffs’ allegations are based upon information and belief, except as to their own actions, which are based on knowledge. Plaintiffs’ information and belief are based on the investigation of their counsel, as follows:

OVERVIEW

1. Plaintiffs have filed this class action, on behalf of themselves and all others similarly situated to obtain damages, restitution, and injunctive relief for the Class (as defined below) from Defendant NuTec.

2. As alleged more fully herein, NuTec, engaged in deceptive acts and practices, breached its implied warranty of merchantability, failed to disclose the defect inherent in Greenies (as defined herein), and consequently was unjustly enriched by selling the Greenies.

3. Though faced with mounting consumer complaints concerning Greenies, NuTec has failed and refused to remedy the defect inherent in the Greenies. Instead, NuTec continues to remain silent, while consumers unknowingly continue to purchase defective Greenies.

4. Despite NuTec's knowledge of the defective nature of the Greenies, NuTec has refused to recall the defective Greenies.

5. Plaintiffs seek actual damages and equitable relief, including the recall of the Greenies, civil penalties, costs and expenses of litigation, including attorneys' fees, and all other relief the Court deems appropriate.

THE PARTIES

6. Plaintiff Josh Glass is a citizen and resident of the State of California. Plaintiff Glass purchased and used Greenies during the class period and has suffered damages as a result of Defendant's wrongful conduct alleged herein. Plaintiff Glass's pet dog died as a result of intestinal blockage caused by Greenies.

7. Plaintiff Judy J. Clark is a citizen and resident of the State of Kentucky. Plaintiff Clark purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein.

8. Plaintiff Lydia Scharf is a citizen and resident of the State of Ohio. Plaintiff Scharf purchased and used Greenies during the Class period and has suffered damages as a

result of the wrongful conduct of Defendant alleged herein. Her pet dog was injured as a result of an esophageal blockage caused by the ingestion of a Greenies.

9. Plaintiff Gene Dubretskoy is a citizen and resident of the State of Maryland. Plaintiff Clark purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein.

10. Plaintiff Fern Finer is a citizen and resident of the State of California. Plaintiff Finer purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein.

11. Plaintiff Cheryl Stubbs is a citizen and resident of the State of Mississippi. Plaintiff Stubbs purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein.

12. Plaintiff Wayne Amedure is a citizen and resident of the State of Michigan. Plaintiff Amedure purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein.

13. Plaintiff Robert Magoon is a citizen and resident of the State of Colorado. Plaintiff Magoon purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein.

14. Plaintiff Mark Judson is a citizen and resident of the State of Massachusetts. Plaintiff Judson purchased and used Greenies during the Class period and has suffered damages as a result of the wrongful conduct of Defendant alleged herein. Plaintiff Judson's pet dog was injured and had to undergo surgery as a result of the ingestion of Greenies.

15. Plaintiff Anthony Cotellese is a citizen and resident of the State of Maryland. Plaintiff Clark purchased and used Greenies during the Class period and has suffered damages

as a result of the wrongful conduct of Defendant alleged herein. Plaintiff Cotellese's pet dog died as a result of an intestinal blockage after eating Greenies.

16. Defendant S&M NuTec, LLC is a Missouri Limited Liability Corporation with its principal place of business located at 1 Design Drive, North Kansas City, Missouri. Defendant NuTec is engaged primarily in the business of manufacturing, marketing and selling an oral hygiene dog treat intended to aid in the cleaning of teeth and reduction of dental plaque and breath odor in canine pets (the "Greenie."). The Greenie is a green colored dog treat designed to look roughly like a toothbrush. It is manufactures and sold in several sizes intended to be fed to different sized dogs. Although NuTec manufactures and sells other pet treat products, Greenies represent by far the largest and most successful segment of the Company's business.

JURISDICTION AND VENUE

17. This action is within the original jurisdiction of this Court by virtue of 28 U.S.C. § 1332(d)(2). The matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs and some members of the proposed Class are citizens of a state different from that of Defendant NuTec.

18. Venue is proper in this District under 28 U.S.C. § 1391. NuTec conducts substantial business activity, including advertising, marketing, distribution, and the sale of Greenies, at locations throughout this District.

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this class action pursuant to Federal Rule of Civil Procedure 23 on behalf of themselves and all others similarly situated who purchased Greenies during the

period February 25, 2000, through February 24, 2006 (the “Class” and the “Class Period” respectively).

20. The members of the Class are so numerous that joinder of all members would be impracticable. Plaintiffs estimate that there are at least tens hundreds of thousands of purchasers of Greenies in the Class.

21. There are questions of law and fact common to the members of the Class that predominate over any questions affecting only individual members, including:

- a. Whether the Greenies were of merchantable quality at the times they were sold;
- b. Whether the defect inherent in the Greenies caused the Greenies to be non-merchantable at the times they were sold;
- c. Whether NuTec breached its implied warranty to the Class by selling non-merchantable Greenies;
- d. Whether NuTec was unjustly enriched by its sales of defective Greenies;
- e. Whether, as a result of NuTec’s misconduct, Plaintiffs and members of the Class are entitled to damages, equitable relief and/or other relief, and the amount and nature of such relief;
- f. Whether the NuTec Greenies are defective;
- g. Whether NuTec was aware of the defect inherent in Greenies; and
- h. Whether NuTec was unjustly enriched by its sales of defective Greenies;

22. The claims of Plaintiffs are typical of the claims of the Class because Plaintiffs, like all members of the Class, unknowingly purchased defective Greenies. Plaintiffs have no

interests antagonistic to those of the Class, and NuTec has no defenses unique to Plaintiffs or any of them.

23. Plaintiffs will fairly and adequately protect the interests of the Class and have retained attorneys experienced in class and complex litigation.

24. A class action is superior to other available methods for the fair and efficient adjudication of this controversy for the following reasons:

- a. It is economically impractical for members of the Class to prosecute individual actions because the damages suffered by each Class member may be relatively small, thus the expense and burden of individual litigation would make it very difficult or impossible for individual Class members to redress the wrongs done to each of them individually and the burden imposed on the judicial system would be enormous;
- b. The Class is readily ascertainable and definable; and
- c. Prosecution as a class action will eliminate the possibility of repetitious litigation.

25. Plaintiffs do not anticipate any difficulty in the management of this litigation.

SUBSTANTIVE ALLEGATIONS

26. Greenies were developed by Dr. Joe and Judy Roetheli and were introduced by their company, Defendant NuTec, in 1998. Greenies are sold individually and in packages at prices equivalent to up to \$16 a pound. Last year, hundreds of millions of individual Greenies were sold around the world, generating revenues of \$340 million. This was nearly three times the sales of Greenies nearest competitor, Milk Bone, according to the marketing company Euromonitor International.

27. Greenies have been criticized by consumers and some veterinarians, many of whom say they have performed surgery on pet dogs, including some dogs that did not survive, to remove chunks of the Greenies product from the dog's esophagus or digestive tract.

28. The problem arises because Greenies can become lodged in a dog's esophagus or intestine and then swell and/or fail to break down. "I know they are marketed in saying that they do digest. Certainly the ones that we've taken out, esophageal or intestinal, that have been in for days are still very hard," Brendan McKiernan, a board-certified veterinary internal medicine specialist from Denver, Colorado, told CNN in a recent interview concerning Greenies. McKiernan said his Denver clinic has seen at least seven such cases in the past five years, which he said is an unusually high number.

29. The packaging, promotional and advertising materials for Greenies state that the product is digestible and edible. Product packages state that the product is "100% edible." While this may be true in a strictly chemical and nutritional sense, in fact Greenies' composition is such that pieces are inherently dangerous and in many instances have injured dogs that have ingested them because (a) the manner of forming the Greenie from its component ingredients, primarily wheat gluten and fiber, results in a very hard product which can break apart in large pieces and (b) the combination of component ingredients in Greenies will swell to a greater than normal size when exposed to fluids in the dog's digestive tract. A dog which has ingested a sufficiently large piece of a Greenie which becomes stuck in the esophagus or intestine, unless the piece is dislodged, will be injured because digestion of the Greenie is much too slow and incomplete to dissolve the piece and indeed the moisture present can cause the piece of Greenie to expand, aggravating the obstruction. This combination makes Greenies more dangerous than other dog treat products and has resulted and continues to result in injuries and death to

Greenies users' pets in numbers that are greater than is the case with other such dog treats.

30. Dr. Jayne Jensen is a veterinarian in the Seattle area, interviewed by KIRO television, who last year performed an operation on a client's dog and removed a large green lump from the dog's intestine. Dr. Jensen stated in the interview that the chunk of Greenie which she removed and which Defendant NuTec, on its packaging, said was 100% edible and "85% digestible," was in fact not digestible. Dr. Jensen further noted that, although the packaging advises that the dog should be "monitored" to assure that the Greenie is properly chewed, dogs, unlike humans, do not chew and in fact do not have the muscles that permit chewing.

31. Dr. Jennifer McBride is also a veterinarian who has operated on dogs suffering internal blockages after eating teeth cleaning products, mostly Greenies. In an interview with KIRO, Dr. McBride stated, "We will see things in abdomens that will dissolve like bones and over time, they will dissolve and go away. But these are mostly undissolvable, so they tend to get stuck more often."

32. On or about February 23, 2006, Defendant NuTec publicly stated that company regularly investigates consumer complaints about Greenies and sometimes reimburses pet owners for veterinary expenses or even to replace a dog that died. NuTec Founder and Chief Executive Joe Roetheli estimated the number of times NuTec has reimbursed owners since it began selling Greenies in 1998 at several dozen. The Company further said it *may* remove a claim that Greenies are fully edible, saying its own study shows a dog can only digest up to 85 percent of the bone-shaped treat.

Plaintiffs And Members Of The Class Have Been Damaged By NuTec's Sale Of Defective Greenies

33. As a result of the defective nature of the Greenies, members of the Class have been damaged.

34. NuTec had direct knowledge of the defect in the Greenies during the Class Period, based on, at the very least, the complaints NuTec has received concerning Greenies since 1998.

35. Despite NuTec's knowledge, NuTec failed to disclose to Plaintiffs and members of the Class that the Greenies are defective as discussed above.

36. NuTec's failure to disclose the fact that Greenies are defective is an omission of material fact in that Plaintiffs would not have purchased Greenies had they known of the defect.

37. Furthermore, Despite NuTec's knowledge of the defect inherent in the Greenies, NuTec continues to sell Greenies.

COUNT I

(By Plaintiffs Josh Glass, Fern Finer, Cheryl Stubbs, Wayne Amedure and Robert Magoon, individually, and on behalf of all similarly situated residents of Arkansas; California; Colorado; Connecticut; Hawaii; Indiana; Iowa; Michigan; Mississippi; Missouri; Nebraska; New Hampshire; New Jersey; New York; Oklahoma; Vermont; and West Virginia For Unjust Enrichment).

38. Plaintiffs reallege and reassert each and every allegation contained in the above paragraphs of this Complaint as if fully set forth herein.

39. During the Class Period, NuTec designed and manufactured Greenies, which are defective as a result of the combination of the constituent wheat gluten, fiber and other products contained in Greenies and the molding process, which result in a product which is dangerously hard and dense, slow to dissolve, slow to digest and prone to break into large chunks or pieces when eaten by the dogs for which the product is intended.

40. As a result of the defect, members of the Class have experienced injury to their pet dogs and/or have purchased a product that they would not have purchased had they known of the defect and the danger associated with the product and have thereby been damaged.

41. NuTec had knowledge of the design defect in the Greenies prior to the time Plaintiffs purchased their Greenies as a result of the numerous complaints that it has received from its customers.

42. Despite NuTec's knowledge of the design defect in the Greenies, NuTec has refused to inform consumers of the design defect -- a material fact-- and/or issue a recall of the Greenies.

43. During the Class Period, Plaintiffs and members of the Class conferred upon NuTec, without knowledge of the design defect, payment for their Greenies, benefits which were non-gratuitous.

44. NuTec accepted or retained the non-gratuitous benefits conferred by Plaintiffs and members of the Class despite NuTec's knowledge of the design defect in the Greenies. Retaining the non-gratuitous benefits conferred upon NuTec by Plaintiffs and the Class under these circumstances made NuTec's retention of the non-gratuitous benefits unjust and inequitable.

46. Because NuTec's retention of the non-gratuitous benefits conferred by Plaintiffs and members of the Class is unjust and inequitable, NuTec must pay restitution in a manner established by the Court.

COUNT II

(By Plaintiff Judy J. Clark, individually, and on behalf of all similarly situated residents of Alaska, District of Columbia, Georgia; Kansas, Kentucky Maine, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Virginia, Washington and Wisconsin For Unjust Enrichment)

47. Plaintiff Clark realleges and reasserts each and every allegation contained in the above paragraphs of this Complaint as if fully set forth herein.

48. During the Class Period, NuTec designed and manufactured Greenies, which are defective as a result of the combination of the constituent wheat gluten, fiber and other products contained in Greenies and the molding process, which result in a product which is dangerously hard and dense, slow to dissolve, slow to digest and prone to break into large chunks or pieces when eaten by the dogs for which the product is intended.

49. As a result of the defect, members of the Class have experienced injury to their pet dogs and/or have purchased a product that they would not have purchased had they known of the defect and the danger associated with the product and have thereby been damaged.

50. NuTec had knowledge of the design defect in Greenies prior to the time Plaintiff purchased Greenies as a result of the numerous complaints that it has received from its customers.

51. Despite NuTec's knowledge of the design defect in the Greenies, NuTec has refused to inform consumers of the design defect -- a material fact-- and/or issue a recall of the Greenies.

52. During the Class Period, Plaintiff and members of the Class conferred upon NuTec, without knowledge of the design defect, payment for their Greenies, benefits which were non-gratuitous.

53. During the Class Period, NuTec appreciated, or had knowledge of the non-gratuitous benefits conferred upon it by Plaintiff and members of the Class.

54. NuTec accepted or retained the non-gratuitous benefits conferred by Plaintiff and members of the Class despite NuTec's knowledge of the design defect in Greenies. Retaining the non-gratuitous benefits conferred upon NuTec by Plaintiff and members of the Class under these circumstances made NuTec's retention of the non-gratuitous benefits unjust and inequitable.

55. Because NuTec's retention of the non-gratuitous benefits conferred by Plaintiffs and members of the Class is unjust and inequitable, NuTec must pay restitution in a manner established by the Court.

COUNT III

(By Plaintiffs Gene Dubretskoy, Fern Finer, Cheryl Stubbs, Robert Magoon, Mark Judson and Anthony Cotellese, individually, and on behalf of all similarly situated residents of: Alaska; Arkansas; Colorado; Delaware; Hawaii; Iowa; Louisiana; Maine; Maryland; Massachusetts; Minnesota; Mississippi; Montana; Nebraska; Nevada; New Hampshire; New Jersey; North Dakota; Oklahoma; South Carolina; South Dakota; Virginia; West Virginia; Wyoming and Texas For Breach of Implied Warranty of Merchantability)

51. Plaintiffs reallege and reassert each and every allegation contained in the above paragraphs of this Complaint as if fully set forth herein.

52. At all times, there were in effect the following statutes governing the implied warranty of merchantability: Alaska Stat. § 45.02.314; Ark. Code Ann § 4-2-314; CRS § 4-2-314; 6 Del. C. § 2-314; HRS § 490:2-314; Iowa Code § 554.2314; 11 M.R.S.A. § 2-314; Md. Code Ann. Art. 95B § 2-314; Mass. Gen. Laws. Ch. 106 § 2-314; Minn. Stat. § 336.2-314; Miss. Code. Ann. § 75-2-314; MCA 30-2-314; Neb. UCC 2-314; NRS 104.2314; RSA 382-A:2-314; N.J.S.A. 12A:2-314; NDCC 2-314; O.S. 1991 § 2-314; S.C. Code Ann. § 36-2-314; SDCL 57A-

2-314; VA. Code § 8.2-314; W. VA. Code § 46-2-314; Wyo. Stat. 34.1-2-314; and Tex. Bus. & Com. Code Ann. § 2-314.

53. As a seller and manufacturer of Greenies, NuTec is a “merchant,” within the meaning of the various states’ commercial codes governing the implied warranty of merchantability.

54. The Greenies are “goods,” as defined in various states’ commercial codes governing the implied warranty of merchantability.

55. Implied in the sale of the Greenies is a warranty of merchantability that requires, among other things, that the Greenies pass without objection in the trade and are fit for the ordinary purposes for which the Greenies are used.

56. Because the Greenies are defective for the reasons alleged hereinabove, Greenies are not able to function for their ordinary purposes and, therefore, are not merchantable, as impliedly warranted by NuTec.

57. Plaintiff Fern Finer has provided NuTec with timely notice of the defect in Greenies.

58. Plaintiff Gene Dubretskoy has provided NuTec with timely notice of the defect in Greenies.

59. Plaintiff Robert Magoon has provided NuTec with timely notice of the defect in Greenies.

60. Plaintiff Mark Judson has provided NuTec with timely notice of the defect in Greenies.

61. Plaintiff Anthony Cotellese has provided NuTec with timely notice of the defect in Greenies.

62. Any purported disclaimer of the implied warranty of merchantability on the part of NuTec fails of its essential purpose.

63. The defect in the Greenies rendered the Greenies not merchantable and thereby proximately caused Plaintiffs and Class members to suffer economic damages in an amount to be ascertained at trial.

COUNT IV

(Plaintiff Lydia Scharf, individually, and on behalf of all similarly situated individuals who purchased Greenies in Ohio for violations of Ohio Rev. Code Ann. 1345.02(a))

61. Plaintiff Lydia Scharf realleges and reasserts each and every allegation of the above paragraphs of this Complaint as if fully set forth herein.

62. Plaintiff and members of the Class are "consumers" as that term is defined in Ohio Rev. Code Ann. §1345.01(D).

63. During 2005, Plaintiff Lydia Scharf purchased Greenies.

64. Plaintiff and members of the Class are "persons" as that term is used in Ohio Rev. Code Ann. §1345.01(D), and as that term is defined in Ohio Rev. Code Ann. §1345.01(B).

65. Ohio Rev. Code Ann. §1345.02 makes unlawful any unfair or deceptive act or practice in connection with a consumer transaction.

66. During the Class Period, NuTec manufactured, marketed and sold Greenies, which are inherently dangerous, for the reasons set forth hereinabove. As a result of the inherently dangerous nature of Greenies, members of the Class, including Plaintiff, have been injured.

67. NuTec had knowledge of Greenies' inherently dangerous nature prior to the time Plaintiff purchased Greenies in their purchase and use of Greenies.

68. Despite NuTec's knowledge of Greenies' inherently dangerous nature, NuTec has refused to inform consumers of Greenies' inherently dangerous nature, a material fact, in violation of Ohio Rev. Code Ann. § 1345.02.

69. Excluding or misrepresenting the safe nature of Greenies is an omission or act that has the likelihood of inducing in the mind of the consumer a belief that is not in accord with the facts.

70. Had Plaintiff and members of the Class known of Greenie's inherently dangerous nature, neither Plaintiff nor members of the Class would have purchased Greenies.

71. As a result of NuTec's violations of Ohio Rev. Code Ann. § 1345.02(a), Plaintiff and members of the Class have sustained damages.

WHEREFORE, Plaintiffs pray that the Court enter judgment and orders in their favor and against NuTec as follows:

- A. An order certifying the Class and directing that this case proceed as a class action;
- B. Judgment in favor of Plaintiffs and the members of the Class in an amount of actual damages or restitution to be determined at trial;
- C. An order enjoining Defendant from the further sale of the Greenies;
- D. An order granting reasonable attorneys' fees and costs, as well as pre- and post-judgment interest at the maximum legal rate; and
- E. Such other and further relief as this Court may deem appropriate.

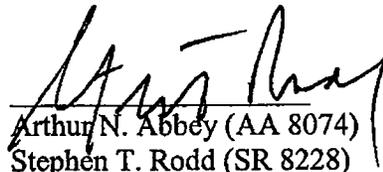
DEMAND FOR TRIAL BY JURY

The Plaintiffs demand a trial by jury on all issues so triable as a matter of right.

Respectfully submitted this 24th day of February, 2006.

Plaintiffs Josh Glass, Judy J. Clark, Lydia Scharf, Gene Dubretskoy, Fern Finer, Cheryl Stubbs, Wayne Amedure, Robert Magoon, Mark Judson and Anthony Cotellese

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