

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

GREGORY MARONEY AND HENRY H.
HEUMANN, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

WOODSTREAM CORPORATION,

Defendant.

Civil No. 7:19-cv-08294-KMK

**SECOND AMENDED CLASS ACTION
COMPLAINT**

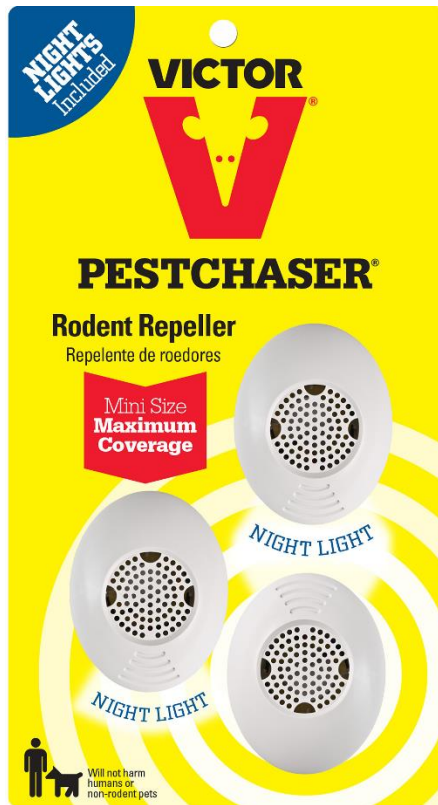
District Judge Kenneth M. Karas
Courtroom 521

Plaintiffs Gregory Maroney and Henry H. Heumann (“Plaintiffs”), by and through their attorneys, make the following allegations pursuant to the investigation of their counsel and based upon information and belief, except as to allegations specifically pertaining to themselves and their counsel, which are based on personal knowledge, against Defendant Woodstream Corporation (“Defendant”).

NATURE OF THE ACTION

1. This is a class action lawsuit on behalf of purchasers of Victor PestChaser Rodent Repellers (the “Repellers”) in the United States.

2. The Repellers purport to repel rodents through “ultrasound” technology. The packaging states that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” that the Repellers provide “Maximum Coverage,” and that “each unit lasts 3 to 5 years:”



VICTOR® MINI PESTCHASER® WITH NIGHTLIGHT - 3 UNITS	
Model #	M753SN
Power Source	Wall Outlet (110-volt)
For Use In	Average-sized rooms, including kitchens, dining rooms, bedrooms, bathrooms, basements and living rooms
Number of devices	3
Features	<ul style="list-style-type: none"> • Mini size, discreet design, maximized coverage • Technology prevents rodents from becoming accustomed to the ultrasound • No chemicals or poisons • Cannot be heard by humans and non-rodent pets • Use anywhere indoors • Rodent activity can be reduced in 6 to 10 days • Each unit lasts 3 to 5 years
Usage Notes	<ul style="list-style-type: none"> • Clear all surrounding objects away from the device. The ultrasound emitted by it does not travel through walls, furniture, cabinets or any other object. • Uses less than a penny a day in energy costs.

Unfortunately for consumers, however, the Repellers are a sham. Decades of studies and dozens of peer-reviewed tests have repeatedly shown that ultrasound does not repel rodents. The Repellers are ineffective and worthless. In fact, video footage shows that mice are unfazed by the Repellers.

3. Ultrasonic sound waves cannot penetrate solid objects and are readily absorbed by soft objects. Thus, even if the technology was effective in theory, it would not work in practice because furniture, carpeting, cabinets, bedding, and the like readily absorb ultrasonic sound waves. Therefore, Defendant's promise that the Repellers will work in "kitchens, dining rooms, bedrooms, bathrooms, basements and living rooms" are false, deceptive, and likely to mislead a reasonable consumer.

4. It gets worse. Ultrasonic sound waves cannot penetrate solid objects, so they do not reach the areas where rodents live and nest. Rodents do not reside in the open. They nest and seek harborage in hidden spots. Yet these spots are precisely the places where ultrasonic sound

waves cannot reach. Thus, even if the technology worked (and it does not), the Repellers would cause rodents to relocate to other parts of people's homes. As Michael F. Potter, a professor of entomology at the University of Kentucky, has explained regarding ultrasonic devices, "[i]f ... rodents did happen to avoid the device, control of infestations still would be unlikely since they would simply relocate elsewhere in the building. Using repellents indoors often make pest problems worse since the displaced individuals often repopulate in harder to reach locations (behind and between walls, floors, and ceilings; deep within clutter and storage; hidden voids of cabinets, appliances and furniture; etc.)."¹

5. As a result, it is unsurprising that consumer complaints regarding the ineffectiveness of Defendant's Repellers are manifest.

6. There is only one reason a reasonable consumer would purchase a Repeller – for the advertised purpose of repelling rodents to eliminate or reduce an infestation. But the Repellers will not accomplish this because they do not do that which Defendant promises.

PARTIES

7. Plaintiff Gregory Maroney is a citizen of New York who resides in Wurtsboro, New York. Mr. Maroney purchased a Victor 3-pack Mini PestChaser Rodent Repeller with Nightlight from Walmart in Middletown, New York, in or about September 2018 for approximately \$20. Prior to purchase, Mr. Maroney carefully read the Repellers' labeling, including the representations that it was a "Rodent Repeller" that would repel rodents through "ultrasound" technology, that "[r]odent activity can be reduced in 6 to 10 days" that the Repellers are for "use anywhere indoors," and that "each unit lasts 3 to 5 years." Mr. Maroney understood these statements to mean that the Repellers would effectively repel rodents and reduce rodent activity in

¹ See *Hart v. BHH, LLC*, No. 135-9 at ¶ 91 (S.D.N.Y. Mar. 9, 2018).

his house for 3-5 years, and relied on them in that he would not have purchased the Repellers at all, or would have only been willing to pay a substantially reduced price for the Repellers had he known that these representations were false and misleading. Mr. Maroney used the Repellers for several months but observed no reduction in rodent activity. However, Mr. Maroney did not learn that this lack of reduction in rodent activity was due to a defect in the product until August 2019. Mr. Maroney sent a demand letter informing Defendant that its Repellers were ineffective and did not work as advertised on August 19, 2019, a true and correct copy of which is included in the collection of correspondences attached as Exhibit B.

8. Plaintiff Henry Heumann is a citizen of the State of Florida, but maintains a vacation home in Herkimer County, New York. Over a period of several years, Mr. Heumann purchased 59 Repellers in New York State. Relying on Woodstream's representations, Plaintiff purchased the product for approximately \$14.99 for the Classic Pestchaser and \$19.99 for a three-pack of the Victor Pestchaser Mini. By purchasing the falsely advertised product, Plaintiff suffered injury-in-fact and lost money.

9. In October 2017, Mr. Heumann mailed 10 Repellers to Defendant and informed it that the units "failed to operate as advertised," a true and correct copy of which is included in the collection of correspondences attached as Exhibit A. Defendant informed Mr. Heumann that the Repellers he sent back functioned properly and recommended using the Repellers in conjunction with other means of rodent control. Soon thereafter, Mr. Heumann purchased additional Repellers based on Defendant's assurances that the Repellers were effective. However, months later, Mr. Heumann found his property damaged by rodents, a true and correct copy of which is included in the collection of correspondences attached as Exhibit A. On May 9, 2018, Mr. Heumann again informed Defendant that its Repellers had not accomplished their advertised function of repelling

rodents, specifically mice, and that mice had destroyed his personal property, a true and correct copy of which is included in the collection of correspondences attached as Exhibit A. On May 29, 2018, after not receiving a response from Defendant, Mr. Heumann again informed Defendant that he had spoken with other users of Repellers who reported that their Repellers also did not work as advertised and did not repel any rodents, a true and correct copy of which is included in the collection of correspondences attached as Exhibit A. On July 26, 2018, after Defendant still had not responded to Mr. Heumann's May 2018 letters, Mr. Heumann wrote again to remind Defendant that its Repellers had not accomplished their advertised function of repelling rodents, and that mice had destroyed his property, a true and correct copy of which is included in the collection of correspondences attached as Exhibit A.

10. Defendant Woodstream Corporation is a Pennsylvania corporation with its principal place of business in Lititz, Pennsylvania. Defendant manufactures, advertises, markets, distributes, and sells the Repellers throughout the United States.

11. As the manufacturer and distributor of the Repellers, Defendant possesses specialized knowledge regarding the content and effects of the Repellers, and Defendant is in a superior position to know whether Repellers work as advertised.

Jurisdiction And Venue

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(d) because there are more than 100 class members and the aggregate amount in controversy exceeds \$5,000,000.00, exclusive of interest, fees, and costs, and at least one Class member is a citizen of a state different from Defendant.

13. This Court has personal jurisdiction over Defendant because Defendant conducts business in New York. Defendant has marketed, promoted, distributed, and sold the Victor Repellers in New York, rendering exercise of jurisdiction by New York courts permissible.

14. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Plaintiff Maroney resides in this District and Defendant does business throughout this District.

15. All conditions precedent necessary for filing this Complaint have been satisfied and/or such conditions have been waived by the conduct of the Defendant.

FACTS COMMON TO ALL CAUSES OF ACTION

A. Video Evidence Shows that Defendant's Repellers Do Not Work

16. Multiple videos accessible on the Internet show that Defendant's Repellers simply do not work.² In one, a simple "mouse feeding station" was constructed. The station consisted of a wooden box with a clear lid. The box contained a small hole for rodents to enter and exit the box:



² See, e.g., https://www.youtube.com/watch?time_continue=10&v=yZLy0lRxxvPY (last accessed Oct. 7, 2019).

17. Sunflower seeds were added to the station, which was left in a barn. First, the station was tested without the repeller for several nights. As expected, each night, rodents entered to eat the sunflower seeds:



18. Next, after it was confirmed to be operational, a Victor PestChaser Rodent Repeller was plugged into an extension cord and placed in the station (under the lid) for a night. The mice were undeterred by the Repeller and continued to enter the station as they had on the previous nights:



Mice

Defendant's "Repeller"

19. Based on this, the experiment found:

“Last night we set up the test station in the barn with sunflower seeds and the rodent repeller, and as you can see, all the bait is gone. Even though we placed seeds only a few inches away from the device, mice had no problem coming in, eating the food. They didn't seem too bothered by the sound. This claims to be 'rodent repeller,' but after seeing it in action, I don't think I can recommend this device.”

B. **Decades Of Study And Dozens Of Peer Reviewed Experiments Show That Ultrasonic Technology Does Not Work**

20. Entomologists have been examining the efficacy of ultrasonic devices for repelling and controlling rodents, as well as a host of other pests, for decades. These tests uniformly show

the same thing: ultrasonic repellers do not work. To date, no peer-reviewed or otherwise credible tests have found the devices to be effective.

21. After reviewing the data, one textbook summarized that: “[t]here are no indications that ultrasonic devices, as a single or long method, will control rodents, and regardless of the desire for a ‘magic bullet,’ ultrasonic devices are useless for the control of insect pests.”³

22. Often called the “bible of pest control,” the *Mallis Handbook of Pest Control* states: “Despite a history of 35 years of availability and use, the overwhelming majority of the professionals in the pest management industry on a global scale have failed to embrace ultrasonic devices, even as a supplement to conventional rodent control programs. Certainly, this reluctance cannot be written off as an oversight by on-the-job professionals.”⁴

23. To be sure, it is easy to understand why scientists held hope for ultrasound, which would have been a non-toxic form of pest control. Rodents can hear ultrasound and very briefly may be briefly disturbed by the soundwaves. Unfortunately, they very quickly become habituated to ultrasound and disregard it within hours of activating a device.

24. That is why one peer reviewed article concluded:

“It is well established that such (ultrasonic) devices will not exterminate, kill, or drive rodents out of a favorable habitat. At best, they may temporarily discourage rodents from visiting areas in buildings that have little cover available... most rats and other rodents quickly become accustomed to any new sound, especially after it has been repeated long enough.”⁵

³ Wood, F.E. 1986. Nonpesticidal components essential to pest management. pp.129-162. In *Advances in Urban Pest Management*. (G.W. Bennett and J.M. Owns ed.). New York, NY.

⁴ Corrigan, R.C. 2011. Rats and Mice. pp. 11-149. In *Handbook of Pest Control* (10th edition). (S.A. Hedges ed.). Franzak & Foster, Cleveland, OH.

⁵ Howard, W.E. and R.E. Marsh. 1985. Ultrasonics and electromagnetic control of rodents. *Acta Zool. Fennica* 173: 187-189.

Another peer-reviewed study found that:

“None of the units produced anything more than a partial repellency for a day or so which was overcome, regardless of whether the frequency was variable, random, or intermittent.”⁶

Another found that:

“In our experiments, ultrasonics did not repel rats and mice from any of the tested areas... Eight years of evaluation of basic principles inherent to the use of acoustical frightening devices produced only negative results. None of the combinations tested will effectively extirpate rodents from a storage building by stimulating their receptors.”⁷

Another found that:

“Despite the wide range of decibel levels and frequencies evaluated, strong, sustained repellent effects were never detected...the six devices had insufficient repellency to merit any usefulness in rodent pest control applications, preventive or corrective”⁸

Another found that:

“There have been so many failures reported with high-frequency sound that little can be said in favor of such devices.”⁹

25. An October 2015 paper from the University of Arizona’s College of Agriculture & Life Sciences concluded that “Commercially available sonic pest devices for use in residential

⁶ Meehan, A.P. 1984. *Rats and Mice: Their Biology and Control*. Rentokil Library Series. 383pp

⁷ Sprock, W.L., W.E. Howard, and F.C. Jacob. 1967. Sounds as a deterrent to rats and mice. *Journal of Wildlife Management*. 31: 729-741.

⁸ Shumake, S.A. 1995. Electronic rodent repellent devices: a review of efficacy test protocols and regulatory actions. In *Repellents in Wildlife Management*. pp 253-270. USDA. Ft. Collins, CO.

⁹ Koehler, A.E., R.E. Marsh, and T.P. Salmon. 1990. Frightening methods and devices/stimuli to prevent mammal damage – a review. In *Proceedings of the 14th Vertebrate Pest Conference*. 168-173. Lincoln, NE.

applications have not been shown to be effective in scientific studies.”¹⁰ According to the researchers, “track-record of sonic pest devices has been questionable” since the 1960’s and 1970’s.¹¹ The authors explained that rodents’ “dislike [of the ultrasonic sounds] diminished over time, especially after a reliable food source was discovered near the sonic device. Even after the food source was removed the rats and mice continued to explore the room with ultrasonic sound, expressing habituation to the sound.”¹²

26. A study published by University of Nebraska in 1990, concluded that “frightening techniques,” including use of ultrasonic devices, “rarely have any appreciable effects on small rodents.”¹³ Echoing similar findings from earlier studies, the authors again concluded that “rodents habituate to [ultrasonic noise] and will feed or nest alongside the operating devices.”¹⁴ The authors also observed that “[t]here have been so many failures reported with high-frequency sound that little can be said in favor of such devices.”¹⁵

27. A 1998 study published by Utah State University also concluded that mice and rats “become accustomed to new sounds and thus tend to ignore them,” rendering ultrasonic repellents

¹⁰ Nicholas Aflitto and Tom DeGomez, *Sonic Pest Repellents*, Univ. of Arizona – Cooperative Extension, College of Agriculture & Life Sciences, AZ1639 (Oct. 2015), available at <https://extension.arizona.edu/sites/extension.arizona.edu/files/pubs/AZ1639-2015.pdf>

¹¹ *Id.*

¹² *Id.*

¹³ Ann E. Koehler, Rex E. Marsh, Terrell P. Salmon, *Frightening Methods and Devices/Stimuli to Prevent Mammal Damage – A Review*, University of Nebraska – Lincoln, at 171 (Mar. 1990), available at <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1049&context=vpc14>

¹⁴ *Id.*

¹⁵ *Id.*

ineffective.¹⁶ Due to the rodents' adaptability to sound, the study reiterated, "scientific evidence clearly shows that these devices are not useful in repelling rats or mice."¹⁷

28. In November 2017, the Office for Science and Society at McGill University published an article summarizing decades of research into efficacy of ultrasonic soundwave emitting devices to control rodent infestations. The conclusion? "[T]hese devices have never been proven to actually work."¹⁸

29. There is no room for dispute on this issue. Entomologists and other pest control experts have reached a consensus: Ultrasonic devices simply do not work.

C. **Even If Rodents Were Affected By Ultrasound, The Repellers Would Not Work in the Field**

30. From flat-earthers to alchemy enthusiasts, even debunked scientific theories can still have proponents. However, even those who "believe" in the efficacy of ultrasonic devices would readily admit that, purely as a matter of physics, they cannot work in any residence or other real-world environment.

31. As Dr. Potter has explained: "Ultrasonic sound waves are highly directional, and are unable to penetrate or bend around solid objects such as cabinets, doors, furniture, appliances, walls, floors or ceilings. The waves are also rapidly absorbed by soft-textured materials such as cloth, paper, cardboard, and insulation. Consequently, they cannot reach cracks, crevices, voids,

¹⁶ Ben C. West and Terry A. Messmer, *Commensal Rodents*, Utah State University Extension, NR/WD/010, available at https://digitalcommons.usu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1995&context=extension_histall

¹⁷ *Id.*

¹⁸ Cassandra Lee, *Are ultrasonic pest repellers effective?* McGill University Office of Science and Society, Nov. 17, 2017, available at <https://www.mcgill.ca/oss/article/technology-you-asked/are-ultrasonic-pest-repellers-effective> (last visited July 19, 2019).

corners, and other protected places where most pests live (Koehler et. al 1986; Bomford and O'Brien 1990; Shumake 1995).”¹⁹

32. Defendant agrees, as indicated in its attempted disclaimer on the back of the Repeller packaging, which states: “the ultrasound emitted does not travel through walls, furniture, cabinets, or any other object.” Defendant nonetheless markets the Repellers for these very uses.

D. **Defendant Continues to Market the Ultrasonic Pest Repellers Despite FTC Warnings**

33. In May of 2001, the FTC sent warning letters to over 60 manufacturers and retailers of ultrasonic pest-control devices. After investigation, the FTC found that many of the advertisements make explicit false claims about the products’ ability to eliminate rodents or repel insects. According to FTC staff, these types of claims may not be in compliance with the FTC Act, which prohibits false and deceptive advertising.

34. From 1985 to 1997, the FTC brought actions against six companies that made false claims about the effectiveness of ultrasonic devices in controlling rodent and insect infestations.

35. The types of claims challenged by the FTC included representations that ultrasonic devices can eliminate rodent infestations, repel insects, and serve as an effective alternative to conventional pest-control products, among others.

36. Despite this regulatory enforcement action, Defendant continues to sell the Repellers.

CLASS REPRESENTATION ALLEGATIONS

37. Plaintiffs seek to represent a class defined as all persons in the United States who purchased the Repellers (the “Class”). Excluded from the Class are persons who made such purchase for purpose of resale.

¹⁹ See *Hart v. BHH, LLC*, No. 135-9 at ¶ 16.

38. Plaintiffs also seek to represent a subclass defined as all Class members who purchased the Repellers in New York (the “New York Subclass”).

39. Members of the Class and New York Subclass are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class and New York Subclass number in the millions. The precise number of Class members and their identities are unknown to Plaintiffs at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant and third-party retailers and vendors.

40. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to whether Defendant’s labeling, marketing and promotion of the Repellers is false and misleading.

41. The claims of the named Plaintiffs are typical of the claims of the Class in that the named Plaintiffs were exposed to Defendant’s false and misleading marketing and promotional materials and representations, purchased the Repellers, and suffered a loss as a result of that purchase.

42. Plaintiffs are adequate representatives of the Class and New York Subclass because their interests do not conflict with the interests of the Class members they seek to represent, they have retained competent counsel experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiffs and their counsel.

43. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class members. Each individual Class member may lack the

resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I

DECEPTIVE ACTS OR PRACTICES, NEW YORK GEN. BUS. LAW § 349

44. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

45. Plaintiffs bring this claim individually and on behalf of members of the New York Subclass against Defendant.

46. By the acts and conduct alleged herein, Defendant committed unfair or deceptive acts and practices by making false representations on the label of the Repellers.

47. The foregoing deceptive acts and practices were directed at consumers.

48. The foregoing deceptive acts and practices are misleading in a material way because they fundamentally misrepresent the ability of the Repellers to repel rodents.

49. Plaintiffs and members of the New York Subclass were injured as a result because (a) they would not have purchased the Repellers if they had known that the Repellers were ineffective to repel rodents, and (b) they overpaid for the Repellers on account of the

misrepresentations that it is a “Rodent Repeller” that repels rodents through “ultrasound” technology, that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” and that “each unit lasts 3 to 5 years.”

50. On behalf of themselves and other members of the New York Subclass, Plaintiffs seek to enjoin the unlawful acts and practices described herein, to recover their actual damages or fifty dollars for each Repeller purchase, whichever is greater, three times actual damages, punitive damages, reasonable attorneys’ fees and costs, and an order enjoining Defendant’s deceptive conduct, and any other just and proper relief available under Section 349 of the New York General Business Law.

COUNT II

FALSE ADVERTISING, NEW YORK GEN. BUS. LAW § 350

51. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

52. Plaintiffs bring this claim individually and on behalf of members of the New York Subclass against Defendant.

53. Based on the foregoing, Defendant has engaged in consumer-oriented conduct that is deceptive or misleading in a material way which constitutes false advertising in violation of Section 350 of the New York General Business Law by misrepresenting that the Repellers are effective in repelling rodents.

54. The foregoing advertising was directed at consumers and was likely to mislead a reasonable consumer acting reasonably under the circumstances.

55. This misrepresentation has resulted in consumer injury or harm to the public interest.

56. As a result of this misrepresentation, Plaintiffs and members of the New York Subclass have suffered economic injury because (a) they would not have purchased the Repellers if they had known that the Repellers were ineffective to repel rodents, and (b) they overpaid for the Repellers on account of the misrepresentation that it is a “Rodent Repeller” that repels rodents through “ultrasound” technology, that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” and that “each unit lasts 3 to 5 years.”

57. On behalf of themselves and other members of the New York Subclass, Plaintiffs seek to enjoin the unlawful acts and practices described herein, to recover their actual damages or five hundred dollars for each Repeller purchase, whichever is greater, three times actual damages, punitive damages, and reasonable attorneys’ fees and costs, and an order enjoining Defendant’s deceptive conduct, and any other just and proper relief available under Section 350 of the New York General Business Law.

COUNT III

UNJUST ENRICHMENT

58. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

59. Plaintiffs bring this claim individually and on behalf of members of the Class and New York Subclass against Defendant.

60. Plaintiffs and Class members conferred benefits on Defendant by purchasing the Repellers.

61. Defendant has knowledge of such benefits.

62. Defendant has been unjustly enriched in retaining the revenues derived from Plaintiffs’ and members of the proposed Class and the New York subclass’ purchases of the

Repellers. Retention of those monies under these circumstances is unjust and inequitable because Defendant misrepresented that the Repellers are a “Rodent Repeller” that repel rodents through “ultrasound” technology, that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” and that “each unit lasts 3 to 5 years.”

63. Because Defendant’s retention of the non-gratuitous benefits conferred on it by Plaintiffs and members of the proposed Class and the New York Subclass is unjust and inequitable, Defendant must pay restitution to Plaintiffs and the members of the proposed Class and the New York subclass for their unjust enrichment, as ordered by the Court.

COUNT IV

Breach of Express Warranty

64. Plaintiffs incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

65. Plaintiffs bring this claim individually and on behalf of members of the Class and New York Subclass against Defendant.

66. In connection with the sale of the Repellers, Defendant, as the designer, manufacturer, marketer, distributor, and/or seller issued written warranties, which became the basis of the bargain, by representing that the Repellers are a “Rodent Repeller” that repel rodents through “ultrasound” technology, that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” and that “each unit lasts 3 to 5 years.”

67. In fact, the Repellers do not conform to the above-referenced representations because the Repellers are ineffective. Accordingly, Defendant breached the terms of the warranty between the Parties including the express warranties on the Repellers labeling by not providing the Repellers in a manner that conformed to the affirmations and promises.

68. Plaintiffs and the members of the proposed Class and the New York Subclass were injured as a direct and proximate result of Defendant's breach because (a) they would not have purchased the Repellers if they had known that the Repellers were ineffective to repel rodents, and (b) they overpaid for the Repellers on account of the misrepresentation that it is a "Rodent Repeller" that repels rodents through "ultrasound" technology, that "[r]odent activity can be reduced in 6 to 10 days," that the Repellers are for "use anywhere indoors," and that "each unit lasts 3 to 5 years."

69. Plaintiffs and the members of the Class and the New York Subclass performed all conditions precedent under the contract between the Parties.

70. Within a reasonable time of discovering the breach of express warranty by Defendant, Plaintiffs notified Defendant of the breach of warranty (*see* ¶¶ 7, 9 above and Exhibit A and B attached). The notice was sufficient to let Defendant know the nature of the breach (*see* ¶¶ 7, 9 above and Exhibit A and B attached).

COUNT V

Fraud

71. Plaintiffs hereby incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

72. Plaintiffs bring this claim individually and on behalf of the members of the proposed Class and New York Subclass against Defendant.

73. As discussed above, Defendant misrepresented on the Repellers' packaging that they are a "Rodent Repeller" that repels rodents through "ultrasound" technology, that "[r]odent activity can be reduced in 6 to 10 days," that the Repellers are for "use anywhere indoors," and that "each unit lasts 3 to 5 years."

74. The false and misleading representations and omissions were made with knowledge of their falsehood. Defendant is a top distributor of pest repellent products in the United States that is undoubtedly aware of the studies finding that its product does not work and of the FTC investigation referenced above. Nonetheless, Defendant continues to sell its ineffective and worthless Repellers to unsuspecting consumers.

75. The false and misleading representations and omissions were made by Defendant, upon which Plaintiffs and members of the proposed Class and New York Subclass reasonably and justifiably relied, and were intended to induce and actually induced Plaintiffs and members of the proposed Class and New York Subclass to purchase the Repellers.

76. The fraudulent actions of Defendant caused damage to Plaintiffs and members of the proposed Class and New York Subclass, who are entitled to damages and other legal and equitable relief as a result.

COUNT VI

Magnuson-Moss Warranty Act

77. Plaintiffs hereby incorporate by reference and re-allege each and every allegation set forth above as though fully set forth herein.

78. Plaintiffs bring this case individually and on behalf of the members of the proposed Class and New York Subclass against Defendant.

79. The Repellers are a consumer product as defined in 15 U.S.C. § 2301(1).

80. Plaintiffs and members of the Class and the New York Subclass are consumers as defined in 15 U.S.C. § 2301(3).

81. Defendant is a supplier and warrantor as defined in 15 U.S.C. § 2301(4) and (5).

82. In connection with the sale of the Repellers, Defendant issued written warranties as defined in 15 U.S.C. § 2301(6), which became the basis of the bargain and warranted that it is a “Rodent Repeller” that repels rodents through “ultrasound” technology, that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” and that “each unit lasts 3 to 5 years.”

83. In fact, the Repellers are ineffective for their intended purpose of repelling rodents and reducing rodent activity for 3-5 years, and do not conform to these representations. Accordingly, Defendant breached the terms of the warranty between the Parties including the warranties on the Repellers labeling by not providing the Repellers in a manner that conformed to the affirmations and promises.

84. By reason of Defendant’s breach of warranty, Defendant violated the statutory rights due to Plaintiffs and the members of the proposed Class and the New York Subclass pursuant to the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*, thereby damaging Plaintiffs and the members of the Class and the New York Subclass.

85. Plaintiffs and the members of the Class and the New York Subclass were injured as a direct and proximate result of Defendant’s violation because (a) they would not have purchased the Repellers if they had known that they were ineffective for their stated purposes, and (b) they overpaid for the Repellers on account of the misrepresentations that it is a “Rodent Repeller” that repels rodents through “ultrasound” technology, that “[r]odent activity can be reduced in 6 to 10 days,” that the Repellers are for “use anywhere indoors,” and that “each unit lasts 3 to 5 years.”

86. Plaintiffs and the members of the Class and the New York Subclass performed all conditions precedent under the contract between the Parties.

87. Within a reasonable time of discovering the breach of express warranty by Defendant, Plaintiffs notified Defendant of the breach of warranty (*see* ¶ 9 above and Exhibits A and B attached). The notice was sufficient to let Defendant know the nature of the breach.

RELIEF DEMANDED

88. WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, seek judgment against Defendant, as follows:

- a. For an order certifying the nationwide Class and the New York Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiffs as representatives of the Class and New York Subclass and Plaintiffs' attorneys as Class Counsel to represent the Class and New York Subclass members;
- b. For an order declaring that Defendant's conduct violates the statutes referenced herein;
- c. For an order finding in favor of Plaintiffs, the nationwide Class, and the New York Subclass on all causes of action asserted herein;
- d. For compensatory, statutory, treble, and punitive damages in amounts to be determined by the Court and/or jury;
- e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable monetary relief;
- g. For an order awarding Plaintiffs and the Class and New York Subclass their reasonable attorneys' fees and expenses and costs of suit.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury on all claims so triable.

Respectfully submitted,

Dated: October 25, 2022

BLOOD HURST & O'REARDON, LLP

By: *s/ Timothy G. Blood*

Timothy G. Blood

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