UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC. and PIM BRANDS, LLC, Plaintiffs, vs. BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY, Defendant.	Civil Action No. 2:09-cv-1228 (WJM) **Motion Returnable: Mar. 21, 2011** **Oral Argument Requested**

BEECH-NUT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

BLOOM KARINJA & DILLON, P.C.
Paul J. Dillon
70 South Orange Avenue, Suite 240
Livingston, NJ 07039
Telephone: (973) 758-0900

KING & SPALDING LLP
Richard A. Cirillo
Karen R. Kowalski
1185 Avenue of the Americas
New York, NY 10036
Telephone: (212) 556-2100

Attorneys for Defendant
Beech-Nut Nutrition Corporation

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PRELIMINARY STATEMENT

The claims and counterclaims in this case arise from commercial parties' commercial dealings over the plaintiffs' ("PIM's") manufacture and sale of a new fruit snack product for toddlers called Fruit Nibbles, which Beech-Nut distributed to retailers and consumers after buying it from PIM. PIM sued Beech-Nut for breach of contract, breach of implied covenant of good faith and fair dealing, and contract by estoppel. Beech-Nut denied those claims and counterclaimed for PIM's breaches of express and implied warranties in the purchase orders that governed their relationship and for negligence.

PIM's claims must be dismissed. There is no genuine dispute that no contract ever existed between PIM and Beech-Nut, except for four purchase orders, which PIM does not claim Beech-Nut breached. On the other hand, Beech-Nut is entitled to judgment against PIM for breaching its warranties in those purchase orders and for its negligence that deprived Beech-Nut of lost future profits. Therefore, judgment should be entered for Beech-Nut dismissing PIM's claims and awarding Beech-Nut damages for PIM's breaches of warranty and negligence.

THE RELEVANT FACTS

In 2007-08, PIM was and represented itself to Beech-Nut to be "among North America's most prominent and rapidly growing manufacturers and marketers of popular brand name confections, fruit snacks, fruit rolls, snack and specialty foods."

Stipulated Fact 3[1]; PIM Reply at ¶ 4, Dkt. 7. Beech-Nut distributed infant, toddler, and children's food products under its nationally recognized brand. Stipulated Fact 5.[2]

Before the Fruit Nibbles events, Beech-Nut had never distributed a product like Fruit Nibbles. Stipulated Fact 8; Ex. 4[3] at 35-36; Ex. 5 at 18-19; *see also* Ex. 2 at 71. However, PIM had done so. PIM had long manufactured similar products called "Welch's Fruit Snack" and "Welch's Fruit and Yogurt." PIM's Reply at ¶ 5, Dkt. 7; Ex. 2 at 27-29, 71. Beech-Nut was seeking a new all natural fruit product to differentiate its product from others on the market. Stipulated Fact 15; Ex. 2 at 30-32; Ex. 4 at 45-46. PIM told Beech-Nut in their early discussions that it could produce a Fruit Nibbles product satisfying Beech-Nut's "No Junk Promise" and meeting agreed product specifications. Stipulated Fact 9; Kennedy Aff. at ¶ 4; Ex. 2 at 30-32; Exs. 9, 10.

PIM and Beech-Nut negotiated over what they anticipated would be at least a two-year contact, called a co-packing agreement, to govern their relationship. Stipulated Fact 25; Kennedy Aff. ¶ 5; Ex. 11 at BN2392 (Draft Co-Packing Agm't ¶ 18.2). However, the terms of the agreement were never finalized and the proposed

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[1] Citations to Stipulated Facts ("Stipulated Fact") refer to the stipulated uncontested facts in the Final Pretrial Order signed by counsel and filed on October 18, 2010, Dkt. 23.

[2] *Accord* Affidavit of Tim Kennedy In Support of Beech-Nut's Motion for Summary Judgment ("Kennedy Aff.") sworn to on January 26, 2011, ¶ 2.

[3] Citations to Exhibits ("Ex.") refer to the Exhibits attached to Karen R. Kowalski's Declaration in Support of Beech-Nut's Motion for Summary Judgment, dated January 26, 2011 (submitted herewith).

contract, multiple drafts of which were exchanged, was never signed by either party. Stipulated Fact 25; Kennedy Aff. ¶ 5; Ex. 2 at 90-91; Ex. 12 (Oct. 6, 2008 e-mail from PIM refusing to execute agreement). In fact, PIM's Chief Operating Officer admitted that PIM rejected the contract so it would not be bound to an extended contractual relationship with Beech-Nut. Ex. 2 at 95-96.

Without a co-packing agreement, the parties proceeded solely by individual purchase orders. PIM admits in its interrogatory answers that

> [t]he parties never executed the draft contract they were negotiating. Instead, through their course of conduct, dealings, and performance, it was agreed by the parties that [Beech-Nut] would submit purchase orders, at agreed upon pricing, as needed.

Ex. 76 at ¶ 6 (PIM's Int. Ans. 6). The only contracts between the parties were a series of four purchase orders dated between April and October 2008. Stipulated Fact 19; Kennedy Aff. ¶ 6; Ex. 13. The purchase orders designate New York law as the governing law, including its version of the Uniform Commercial Code. *Id.*.

Key to, and dispositive of this dispute, are the following terms, which are identical in each purchase order:

> 1. *Entire Agreement*: The terms and conditions set forth in this order constitute the entire agreement between the parties hereto and supersede any and all previous verbal or written representations, agreements and conditions. No agreement or other understanding in any way modifying or rescinding this order will be binding unless made in writing signed by a duly authorized representative of each party. No waiver of any provision hereof shall occur by operation of law. [Beech-Nut's] waiver of any breach or failure to exercise any right hereunder, or failure to enforce any of the terms and conditions hereof, shall not in any way affect, limit or waive [Beech-Nut's] right thereafter to require strict compliance with every term and condition hereof.

3. *Delivery*: Time is of the essence of this contract and this order is subject to cancellation free of any claim or liability, for failure to deliver on schedule except for causes beyond [PIM's] control....

4. *Quality and Inspection*: [PIM] warrants that the goods, materials and/or Services furnished under the Order will comply with the Specifications, are fit for the purpose intended, merchantable and free from defects of material and workmanship...[PIM] acknowledges and agrees that [Beech-Nut] shall be entitled to all warranties and remedies as provided by the Uniform Commercial Code.

6. *Indemnification*: [PIM] agrees to indemnify and hold [Beech-Nut] harmless against all damages, costs, expenses and charges and against all loss or liability, including claims of third parties, by reason of the breach of any warranties provided herein, and with respect to the purchase hereunder of foodstuffs...said indemnification and hold harmless shall apply in the event of [Beech-Nut's] rejection or revocation of acceptance of any or all portion of the same,...whether or not said items have been shipped for marketing.

11. [Beech-Nut] may vary or suspend the shipping schedule as it deems necessary.

14. [Beech-Nut] objects to the inclusion of any different or additional terms proposed by [PIM] in [PIM's] acceptance of this offer, and if they are included in seller's acceptance a contract for sale will result upon [Beech-Nut's] terms herein. Each shipment received by [Beech-Nut] shall be deemed to be only upon the terms and conditions contained herein notwithstanding [Beech-Nut's] acceptance of or payment for any shipment.

15. *Extra Charges*: No additional charges of any kind...will be allowed unless specifically agreed to in writing in advance by [Beech-Nut].

17. This purchase order shall be construed in accordance with the laws of the State of New York as such laws are applied to contracts made to be fully performed in New York.

Ex. 13. PIM accepted the purchase orders and issued invoices and bills of lading.

See e.g. Ex. 14. PIM added no terms and the purchase orders were not modified "in

writing signed by duly authorized representative of each party." Stipulated Fact 30;[4] Kennedy Aff. ¶ 6; Ex. 76 at ¶ 6.

By early August 2008, PIM and Beech-Nut agreed on the Fruit Nibbles product specifications and Beech-Nut approved a production sample of the Fruit Nibbles product provided by PIM in late July, which established the product that PIM would manufacture. Kennedy Aff. ¶ 7; Exs. 15-19. The specifications called for an all natural product that contained natural colors and flavors, no starch or corn syrup, and was soft enough for a toddler to eat. Stipulated Fact 15; Exs. 9, 10, 16-19. They also called for a twelve-month shelf-life, and PIM printed the twelve-month shelf-life expiration date on each package of Fruit Nibbles it produced. Stipulated Fact 15; Ex. 16; Ex. 3 at 24-25 (PIM's 30(b)(6) witness identifying Ex. 16 as the July 2008 specifications, which never changed); *see also* Exs. 17-19.

PIM disclosed to Beech-Nut the ingredients used to manufacture Fruit Nibbles, which had to be listed on the product packages. Ex. 2 at 34-35. PIM did not disclose to Beech-Nut either the formula (amounts or proportions of ingredients) or the process (the methods or order of combining ingredients, cooking times and temperatures, and other manufacturing and processing steps) PIM used to manufacture Fruit Nibbles. Stipulated Facts 22, 24; Kennedy Aff. ¶ 8; Ex. 1 at 76-80;

[4] Beech-Nut granted PIM a limited release on liability as to four loads in October 2008. On PIM's guarantee that the product may develop only a thin layer of sugar crystal on the surface during the product's twelve month shelf-life, Beech-Nut agreed to accept the product. PIM could not even meet this standard and Beech-Nut rejected the product.

Ex. 2 at 34-36; Ex. 3 at 72-73. PIM considered the formula and process information to be proprietary to PIM, and it applied for a patent on the formula and process. Stipulated Fact 23; Ex. 1 at 76-80; Ex. 2 at 34, 141-42. Beech-Nut observed PIM's production line on occasional visits to PIM's facilities, but it did not know, or need to know, the details of how PIM manufactured Fruit Nibbles. Stipulated Facts 22, 24; Ex. 1 at 77-78; Ex 2. at 34-36. Beech-Nut needed to know only that PIM promised its product would meet the agreed specifications and sample and would satisfy PIM's express and implied warranties.

By August 1, 2008, PIM represented and warranted to Beech-Nut that it "had created a stable formula for the Fruit Nibbles product and did not need to make any further adjustments," and it "began commercial production on August 4, 2008." PIM's Reply at ¶ 7, Dkt. 7. PIM began shipping Fruit Nibbles to Beech-Nut under the purchase orders in August 2008. Stipulated Fact 27; Complaint ¶ 12, Dkt 1, Ex. A. Beech-Nut approved some shipments based on non-random, non-statistically significant samples provided by PIM.

Within weeks after the shipments began, Beech-Nut discovered problems with PIM's Fruit Nibbles product by randomly inspecting product received from PIM. Stipulated Fact. 32; Kennedy Aff. ¶ 9; Exs. 17, 20-24; *see also* Exs. 25-29. In September, October, and November of 2008, Beech-Nut received hundreds of written complaints about the product from toddlers' parents and many of Beech-Nut's

important retail customers (*e.g.*, Wal-Mart, Pathmark, Safeway, Shop Rite, Price Chopper, and Target). Stipulated Facts 31, 33-35; Kennedy Aff. ¶ 9; Exs. 30, 31.

Beech-Nut's retail customers and consumers complained about the deficient nature and quality of the Fruit Nibbles product, and also deficient quantities in the packages. Stipulated Facts 31-35; Kennedy Aff. ¶ 10; Exs. 30-32 (retail customer recall and refund demands); Ex. 33 (Wal-Mart pulled Fruit Nibbles from shelves and demanded compensation for costs because "all packages look moldy"), Ex. 34 (log including more than sixty complaints received in first two days of December); Ex. 35 (list reporting child illnesses). The hundreds of complaints Beech-Nut received identified serious discrepancies from the product sample and specifications: *e.g.*, powdery coating, dried out product, shriveled appearance, moldy and wilted appearance, fermented odor, terrible smell, hard texture, choking hazard, funny taste, sour odor, wrinkled, raisin-like appearance, bitter taste, bad smell, covered with mold, horrible smell, green, white, and grey coating, looks like dead toes, old, nasty, discolored, crusty, gross, rotten, stale, dry, difficult to chew, spoiled smell, horrid smell, disgusting, waxy taste, caused stomach ache, vomiting, and diarrhea, etc. Stipulated Fact 34; Kennedy Aff. ¶ 11; Exs. 30, 34, 35. The pervasiveness, nature, and volume of the complaints evidenced serious problems.

Beech-Nut notified PIM of the complaints, and Beech-Nut and PIM verified them to be accurate. Ex. 1 at 91-93 (PIM's Research & Development and Quality Assurance Manager found complaints accurate); Ex. 3 at 49-51 (PIM's Plant

Manager (and 30(b)(6) witness) admitted that samples retained by PIM confirmed the complaints); Exs. 17, 20-29, 36, 43. They discussed possible causes of and solutions for the deficiencies in PIM's product. Ex. 1 at 94-98; Exs. 36, 43. PIM said it modified its formula and process in an effort to correct what its Chief Operating Officer, Basant Dwivedi, and its Manager of Research and Development and Quality Assurance, Diane Bianchini, described as "problems." Exs. 36, 43. In fact, both Ms. Bianchini and PIM's Plant Manager, Frank McSorley, conceded that these problems rendered the Fruit Nibbles products unsaleable, and Ms. Bianchini, the Quality Control Manager. testified that she would not feed the product to her own children. Ex. 1 at 166-68; Ex. 3 at 60-61 (testimony that crystallized and mummified products were not within the product specifications or saleable); *see also* Ex. 2 at 79-80 (PIM's COO admitted that photographs Beech-Nut sent PIM showed unacceptable retained product samples).

Beech-Nut could not distribute deficient Fruit Nibbles toddler snacks to retailers, nor expect parents to feed them to toddlers. Kennedy Aff. ¶ 14. It could not distribute Fruit Nibbles that did not meet the agreed twelve-month shelf-life. Ex. 3 at 24-25 (twelve-month shelf-life always part of specifications); Ex. 4 at 74-75; Ex. 6 at 22-23; Ex. 18 (Prod. Devel. Spec's dated Feb. 22, 2008); Ex. 16 (Oper. Spec's dated July 29, 2008).

After the four purchase orders, Ex. 13, Beech-Nut did not submit further purchase orders to PIM. Without a co-packing agreement, Beech-Nut had no

obligation to submit further purchase orders to PIM. Equally, PIM had no obligation to accept and fill any purchase orders submitted by Beech-Nut.

To preserve its brand reputation in the market and respond to its customers' and consumers' complaints, Beech-Nut withdrew the Fruit Nibbles product from the market in early December 2008 and accepted customers' returns of previously shipped products. Stipulated Facts 38-40; Exs. 38-41; Kennedy Aff. ¶ 13. PIM did not object to the withdrawal. Beech-Nut also notified PIM that PIM was legally responsible for the failed product under the terms of the purchase orders, including §§ 4 and 6 quoted at page 4. Kennedy Aff. ¶ 14; Ex. 41. PIM refused to accept returns of previously shipped defective product, cancel unpaid invoices, or refund Beech-Nut's previously paid purchase price. Stipulated Fact. 38; Kennedy. Aff. ¶ 15. Beech-Nut incurred costs for the product withdrawal and storing unsaleable products PIM refused to accept as returns. Stipulated Fact 37-40; Kennedy Aff. ¶ 15.

Despite the failed product launch, Beech-Nut continued to believe that its Fruit Nibbles concept had commercial merit, and PIM continued to state that it could cure the defects and meet the agreed specifications and sample. Exs. 36, 42, 43; Kennedy Aff. ¶ 16. October and April are times for launches and re-launches of new products because that is when retail customers make their allocations of their available retail shelf space for existing and new products. Ex. 4 at 45-46. In mid-January 2009, PIM and Beech-Nut discussed both PIM's financial responsibility for the failed product launch and whether PIM could produce a stable, merchantable product meeting the

specifications and sample in time to re-launch the product in April 2009. Stipulated Fact 41-43; Ex. 3 at 156-57; Ex. 4 at 92-93; Exs. 41, 42, 44; Kennedy Aff. ¶ 17.

PIM and Beech-Nut did not reach a co-packing or other contract relating to the prospective re-launch. Ex. 44 (Feb. 3, 2009 e-mail discussing lack of progress in moving toward a re-launch). PIM did not resolve its responsibility for the failed launch of defective products. Stipulated Fact 43; Kennedy Aff. ¶ 18. Beech-Nut did not submit any purchase orders to PIM for a re-launched Fruit Nibbles product. *Id.* In February 2009, Beech-Nut decided, and advised PIM that it had decided, to place its Fruit Nibbles business elsewhere. Stipulated Fact 44; Ex. 45.

Days later, apparently believing its best defense to be an offense, PIM sued. It accepted no responsibility for its failed Fruit Nibbles product and instead alleged that Beech-Nut had breached an unspecified contract. However, its complaint did not specify, and its discovery responses have not identified, the supposed contract terms, who agreed to them and when, the contract's duration, prices, or quantities, or any other particulars. PIM alleged only that some general form of contract arose expressly, impliedly, or by estoppel. Complaint ¶¶ 31, 34-35, 38-40, 43, 48-49, 52-54, 57, Dkt. 1, Ex. A. Beech-Nut counterclaimed for its damages caused by PIM's breaches of its express and implied warranties and PIM's negligent development and manufacture of the Fruit Nibbles product. Counterclaim ¶¶ 20-33, Dkt. 4.

ARGUMENT

THE LEGAL STANDARD FOR RELIEF

Summary judgment is appropriate under Fed. R. Civ. P. 56(c)(2) when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Once the movant has made a prima facie case for relief, the burden shifts to the other party to show by admissible facts that there is a genuine factual dispute material to the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Here, the material facts are not genuinely in dispute. PIM has admitted them in its complaint, its reply to Beech-Nut's counterclaims, its interrogatory answers, deposition testimony, and internal documents, and its stipulation of uncontested facts in the pre-trial order. What is in dispute are three controlling questions:

1. Was there any contract between PIM and Beech-Nut except for the four purchase orders? The answer is "no."

2. Did the Fruit Nibbles products that PIM manufactured and sold to Beech-Nut breach PIM's express and implied warranties causing Beech-Nut damages? The answer is "yes."

3. Did PIM negligently develop and manufacture the Fruit Nibbles products causing Beech-Nut damages? The answer is "yes."

I. PIM'S CONTRACT CLAIMS AGAINST BEECH-NUT FAIL FOR LACK OF A CONTRACT

A. THERE IS NO CONTRACT EXCEPT FOR THE FOUR PURCHASE ORDERS (PIM's First and Fourth Claims)

Beech-Nut and PIM were arm's-length commercial parties engaged in arm's-length commercial transactions: Beech-Nut was a buyer of goods and PIM was the seller. PIM's complaint refers vaguely to an agreement or arrangement. Complaint

¶¶ 31, 34-35, 38-40, 43, 48-49, 52-54, 57, Dkt. 1, Ex. A. But neither the complaint nor any facts PIM disclosed in discovery identifies any contract by date, duration, time and place of agreement or, most importantly, terms and conditions.

PIM cannot claim that Beech-Nut was bound by the draft co-packing agreement, which PIM itself rejected to avoid a long-term agreement. Ex. 2 at 95-96; Exs. 12, 46. In fact, PIM admits that the relationship was governed by the purchase orders. Ex. 76 ¶ 6 (quoted at page 3). Therefore, other than the purchase orders, there is no contact. PIM does not allege that Beech-Nut breached the purchase orders, although PIM did breach them as explained in Point II below.

For a contract to arise, it is basic that there must be a "meeting of the minds" on the "essential terms and conditions" of the agreement. *E.g., State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 612 (App. Div. 2006) ("In order for a contract to form...there must be a 'meeting of the minds,' as evidenced by each side's express agreement to every term of the contract.") (citations omitted); *Knight v. New England Mut. Life Ins. Co.,* 220 N.J. Super. 560, 565 (App. Div. 1987), *cert. denied*, 110 N.J. 184 (1988) ("A meeting of the minds occurs when there has been a common understanding and mutual assent of all the terms of a contract."). The absence of essential terms and conditions leaves a purported contract void and unenforceable.[5]

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[5] *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 538 (1953) ("A contract does not come into being unless there [is] a manifestation of mutual assent by the parties to the same terms."); *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce,* 894 N.Y.S.2d 47, 50 (1st Dep't 2010) ("In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether

These legal principles are the same in New York and New Jersey[6] and bar PIM's contract claims.

Here, there were no "terms and conditions." There was no "meeting of the minds" on any terms and conditions other than the four written purchase orders, which PIM does not allege Beech-Nut breached. Therefore, PIM's claims for breach of contract, its first and fourth claims, fail as a matter of law.

B. WITHOUT A CONTRACT, THERE IS NO IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (PIM'S Second and Fifth Claims)

Axiomatically, without an express contract there cannot be implied covenants, whether for good faith and fair dealing or otherwise. *Noye v. Hoffmann-La Roche Inc.*, 238 N.J. Super. 430, 432 (App. Div. 1990) ("In the absence of a contract, there can be no breach of an implied covenant of good faith and fair dealing."). For PIM to prove breach of an implied covenant of good faith and fair dealing, it must establish (1) an express contract, (2) Beech-Nut's bad faith conduct to deprive PIM of the bargained for fruits of the contract, and (3) injury. *Wade v. Kessler Inst.*, 172 N.J.

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there was a 'meeting of the minds' regarding material terms of the transactions.") (citations omitted); *Malakar Corp. Stockholders Protective Comm. v. First Jersey Nat'l Bk.*, 163 N.J. Super. 463, 474 (App. Div. 1978) ("An agreement so deficient in the specification of its essential terms that the performance by each party cannot be ascertained with reasonable certainty is not a contract, and clearly is not an enforceable one.") (citations omitted).

[6] *Princeton Ins. Co. v. Converium Reinsurance (N.A.) Inc.*, 344 Fed. Appx. 759, 761 (3d Cir. 2009) ("Both New York and New Jersey apply the same principles of contract law."); *Tappan Properties, Inc. v. Pak*, 609 N.Y.S.2d 636, 637 (2d Dep't 1994) ("New Jersey courts apply principles similar to those applied by New York courts when interpreting contract provisions").

327, 345 (2002); *Am.-Euro. Art Assocs. v. Trend Galleries*, 641 N.Y.S.2d 835, 836 (1st Dep't 1996). None of these elements can be satisfied.

First, there was no express contract except the four purchase orders, and PIM does not argue that there was an implied covenant in the purchase orders.

Second, Beech-Nut did not act in "bad faith" to defeat any of PIM's contractual expectations. *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001) ("Without bad motive or intention, discretionary decisions that happen to result in economic disadvantage to the other party are of no legal significance."). In fact, it is undisputed that Beech-Nut worked with PIM to find a remedy for PIM's defective products when the problems arose and discussed with PIM the possibility of additional contractual relations in a re-launch if the problems could be reliably solved. Stipulated Fact 41; Kennedy Aff. ¶17; Ex. 3 at 132-34; Ex. 4 at 92-93, 105.

Moreover, PIM has never specified in its pleadings or discovery responses exactly how Beech-Nut acted in "bad faith" to breach an implied covenant other than to imply that Beech-Nut had a duty to buy more product from PIM. But PIM had no contractual expectation that Beech-Nut would submit additional orders, any more than Beech-Nut had a contractual expectation that PIM would accept and fill orders. Neither party's hope of future dealings was a contractual promise or obligation, and the fact that further business dealings did not occur was not a breach of a contractual covenant, whether express or implied. *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 246 F. Supp.2d 231, 241 (S.D.N.Y. 2002) ("the implied covenant

of good faith and fair dealing applies to the performance and execution of an existing contract"); *Bank of New York v. Sasson*, 786 F. Supp. 349, 354 (S.D.N.Y. 1992) ("the implied covenant of good faith and fair dealing is limited to performance under a contract and does not encompass future dealings or negotiations between the parties"); *GFS/Morristown Ltd. Partnership v. Vector Whippan Assocs.*, 2009 WL 857002, at *16-17 (N.J. Super. App. Div. Apr. 2, 2009) (finding no breach of the covenant of good faith and fair dealing when "[t]he parties merely engaged in negotiations that never bore fruit").

Therefore, PIM's claims for breach of the implied covenant of good faith and fair dealing, its second and fifth claims, fail as a matter of law.

C. THERE IS NO CONTRACT BY ESTOPPEL (PIM'S Third and Sixth Claims)

For a contract to arise by estoppel, there must be a clear and definite promise, a change of position in reasonable reliance on that clear and definite promise, and injury. *Kaye v. Grossman,* 202 F.3d 611, 615 (2d Cir. 2000); *Aircraft Inventory Corp. v. Falcon Jet Corp.*, 18 F. Supp.2d 409, 416 (D.N.J. 1998) ("The elements of promissory estoppel are as follows: (1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise; and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise."). A hope that discussions will eventuate in profitable dealings does not establish a basis for a contract by estoppel. *Lobiondo v. O'Callaghan,* 357 N.J.

Super. 488, 500 (App. Div. 2003); *Tribune Printing Co., Inc. v. 263 Ninth Avenue Realty, Inc.*, 452 N.Y.S.2d 590, 592-593 (1st Dep't 1982) ("[T]here was nothing more than a promise by defendant to come to a future agreement on the terms and conditions of a new lease....Thus, the agreement, if any, was simply an 'agreement to agree' in the future and hence is unenforceable."); *Malakar*, 163 N.J. Super. at 479-80; *Gellerman v. Oleet*, 625 N.Y.S.2d 831, 833 (Civ. Ct. 1995) (agreement to continue negotiations not enforceable).

PIM points to the parties' discussions in January 2009 over the question whether PIM could provide a product suitable for re-launch in the April re-launch window. It is true the parties had those discussions in January 2009, five weeks after the withdrawal of Fruit Nibbles from the market, but they do not establish a contract by estoppel.

First, PIM has not identified a promise by Beech-Nut that it would do business with or submit purchase orders to PIM, let alone a "clear and definite" one. PIM admits that, from the inception of the discussions over a possible re-launch Beech-Nut made clear that a new relationship depended on resolving not only the product deficiencies but also PIM's liability for the defective products it had previously supplied. Ex. 3 at 156-57 (PIM acknowledged that Beech-Nut would not proceed with re-launch until the financial issues were resolved). PIM admits it rejected any liability for its defective products, and PIM's ability to produce a suitable product for a re-launch was never resolved. Stipulated Facts 38, 43; Exs. 44, 47.

Second, without a clear and definite promise, PIM cannot show reasonable reliance that Beech-Nut would submit purchase orders necessary to create a contract by estoppel. *G&F Assocs. Co. v. Brookhaven Beach Health Related Facility*, 671 N.Y.S.2d 510, 511 (2d Dep't 1998) (granting summary judgment on plaintiff's promissory estoppel claim because the alleged oral promise was conditional and plaintiff's reliance on it was not reasonable); *Trick v. County of Westchester,* 628 N.Y.S.2d 759, 759 (2d Dep't 1995) ("because the alleged oral agreement was conditional, any reliance thereon by the plaintiff was not reasonable.").[7] Here, Beech-Nut made no promise, and PIM's hope to resume business was not reasonable reliance on a promise. Beech-Nut's decision not to engage in further relations or order additional products was entirely consistent with the lack of any agreement and its having been badly burned by its prior dealing with PIM. PIM's actions to prepare for the possibility of supplying products to Beech-Nut if further dealings ever ensued were not in reliance on Beech-Nut's promise. They were a matter of its own efforts to secure new business and are not legally recognized harm.

PIM has not shown "clear and definite" terms and conditions of the contract it wishes to establish by estoppel; the nature and duration of the agreement are unstated; the amount of sales and purchases are unstated; prices are unstated; whether sales and

[7] *Accord Aircraft Inventory, Corp.*, 18 F. Supp.2d at 416 (granting summary judgment because the promise plaintiff allegedly relied on was not clear and definite and included unmet contingencies and conditions); *Watson v. City of Salem*, 934 F. Supp. 643, 661 (D.N.J. 1995) (granting summary judgment because the promise made to plaintiff was "clearly conditional and contingent, as opposed to clear and definite.").

purchases would have been profitable for PIM or Beech-Nut is unstated. PIM has shown no basis for reasonable reliance. Therefore, PIM has shown no basis for the court to find a contractual promise that can be enforced by estoppel, and its third and sixth claims FOR contract by estoppel fail as a matter of law.

II. PIM IS LIABLE TO BEECH-NUT FOR BREACH OF WARRANTY

PIM is liable to Beech-Nut, even though Beech-Nut is not liable to PIM. PIM's liability results from §§ 4 and 6 of the purchase orders and the NY UCC, which is incorporated into the purchase orders by the choice of law provision in § 16:

> 4. *Quality and Inspection*: [PIM] warrants that the goods, materials and/or Services furnished under the Order will comply with the Specifications, are fit for the purpose intended, merchantable and free from defects of material and workmanship....[PIM] acknowledges and agrees that [Beech-Nut] shall be entitled to all warranties and remedies as provided by the Uniform Commercial Code.
>
> 6. *Indemnification:* [PIM] agrees to indemnify and hold [Beech-Nut] harmless against all damages, costs, expenses and charges and against all loss or liability, including claims of third parties, by reason of the breach of any warranties provided herein, and with respect to the purchase hereunder of foodstuffs...said indemnification and hold harmless shall apply in the event of [Beech-Nut's] rejection or revocation of acceptance of any or all portion of the same..., whether or not said items have been shipped for marketing. Ex. 13 (emphasis added).

Thus, PIM agreed that its liability extends to "all damages, costs, expenses,...and loss or liability" that Beech-Nut suffered from PIM's "breach of any warranties."

A. PIM BREACHED ITS EXPRESS WARRANTIES

PIM admits that it agreed to specifications for the Fruit Nibbles product to be an all natural product that contained natural colors and flavors, no starch or corn

syrup, and was soft enough for a toddler to eat. Stipulated Fact 15; Exs. 9, 10, 16-19. PIM also admits that the Fruit Nibbles product was to be manufactured to the sample PIM provided and Beech-Nut accepted in July 2008. Stipulated Fact 14; Ex. 2 at 77; Ex. 3 at 27-28. PIM's Chief Operating Officer testified that these specifications and sample were all PIM needed to produce the Fruit Nibbles that Beech-Nut ordered. Ex. 2 at 32, 77. And PIM admits that the products were to have a twelve-month shelf-life, the expiration date of which PIM imprinted on each Fruit Nibbles package it produced. Stipulated Fact 15; Ex. 16; Ex. 3 at 24-25; *see* Exs. 17-19.

These admitted facts create an express warranty under NY UCC § 2-313:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty....

The agreed specifications and the sample were a basis of the bargain. *Rite Fabrics, Inc. v. Stafford-Higgins Co., Inc.*, 366 F. Supp. 1, 10-11 (S.D.N.Y. 1973); *Oscar Mayer Corp. v. Mincing Trading Corp*, No. 88-3469, 1991 U.S. Dist. LEXIS,

at *16-19 (D.N.J. 1991).[8] PIM admits that the specifications and sample defined what PIM agreed to produce. Stipulated Fact 14; Ex. 2 at 77; Ex. 3 at 27-28.

There is no genuine question that the Fruit Nibbles products PIM developed, manufactured, and delivered failed to meet the specifications and sample. In August 2008, PIM described its Fruit Nibbles production runs in its internal communications as "not acceptable" and "substandard." Ex. 48; Ex. 3 at 49-51. At around the same time, PIM's internal documents show that the product did not conform to the approved July 2008 sample and specifications. Ex. 50 (Aug. 28, 2008 PIM Plant Manager e-mail stating "Beechnut still presents hurdles to overcome, the white grape concentrate is better but the product is still different from when we used pineapple."). The samples PIM retained of its production runs turned bad within weeks of manufacture. Ex. 1 at 91-93; Ex. 2 at 77-78; Ex. 3 at 49-51.

By October 2008, PIM still had not resolved the product issues. Ex. 51. In internal communications, Ms. Bianchini, PIM's Research and Quality Assurance Manager, wrote that PIM should stop shipping the Fruit Nibbles product:

> I believe we are making a serious mistake continuing to ship Beech-Nut product produced with white grape juice....The flavor and smell were already not to standard. In a very short time, that product will taste and smell bad and appear ugly....If that product reaches the marketplace the complaint will be astronomical....[W]e should recall all product

[8] *Accord A&S Henry & Co. v. Talcott*, 175 N.Y. 385, 389 (1903) ("Upon a sale by sample there is an express warranty that the goods are equal in quality to the sample furnished."); *Antonucci v. Stevens Dodge, Inc.*, 340 N.Y.S.2d 979, 983 (Civ. Ct. 1973) ("When goods are sold by description or sample, the goods delivered must conform to the description or sample. Failure to do so is a breach of the seller's express warranty.").

> produced with white grape juice conc[entrate] before it destroys ours and Beech-Nuts reputations. Ex. 51.

PIM's Chief Operating Officer replied to Ms. Bianchini's comments, admitting that

> [PIM's] failure to detect the problem sooner may end up costing [PIM] a million dollars. I wish I had a million dollars to give Beech-Nut for recalling the product. *Id.*

Hundreds of written customer and retailer complaints showed the widespread rejection of the product for pervasive, serious quality problems, including reported health issues. Stipulated Facts 33-35. PIM's Research and Quality Assurance Manager testified that she would not feed the product to her own children. Ex. 1 at 99-101, 166-68. PIM's Plant Manager admitted the product did not meet the specifications and sample when it began to harden and develop white crystals on the surface. Ex. 3 at 60-61 (once crystallized or mummified, no longer within specifications or saleable quality). PIM's Chief Operating Officer testified that the product Beech-Nut received from PIM was not acceptable. Ex. 2 at 79-80.

The Fruit Nibbles product failed not only the specifications and sample but also the required twelve-month shelf-life and product counts and weights that PIM imprinted on each package. These quantity and labeling problems also breached PIM's express warranty. Beech-Nut discovered that a substantial portion of the product had been improperly packaged and a substantial number of cartons contained only four or five of the required six pouches of Fruit Nibbles. Ex. 52. Beech-Nut also found that *most* of the cases packaged by PIM in September fell below minimum acceptable weights, (Ex. 58), and a later inspection revealed seven percent of one

October shipment to be underweight. Ex. 53. Although it was PIM's job to package and label correctly, Beech-Nut was forced to place all products on hold until every case was rechecked and all underweights identified, and it had to assign its personnel to re-sort and re-work every carton to assure the weight specification PIM had printed on the packages was met. Ex. 54-61.

PIM realized these material errors were its fault, as its internal e-mails show:

- PIM's President and Chief Executive Officer wrote, "As has been said over and again, there is just a total lack of proper oversight at the Plant and obviously a major issue with controls." Ex. 52. "This kind of sloppiness is just killing us....I want to identify the people in the factory who allowed this product out the door underweight AGAIN and permitted this to happen at the plant (supervisors and all) and deduct that amount from their paychecks." Ex. 61.

- PIM's Chief Operating Officer wrote: "Our inability to box the Fruit Nibbles correctly makes us look really bad." Ex. 62

- PIM's Chief Operating Officer acknowledged that PIM "fully understand[s] the problem that [PIM] created for [Beech-Nut]" by failing to make delivery for resale to large companies like Wal-Mart, with which PIM had other business. Ex. 63

PIM's evident, admitted failure to provide a product that met the agreed specifications and sample and the specified packaging, weight, and labeling requirements breached PIM's express warranty and entitle Beech-Nut to judgment.

B. PIM BREACHED ITS IMPLIED WARRANTY OF MERCHANTABILITY

The UCC provides that "[w]arranties whether express or implied shall be construed as cumulative ...." NY UCC § 2-317. Beech-Nut is therefore entitled to recover for PIM's breach of its implied warranties as well as its express warranties.

NY UCC § 2-314(1) provides an implied warranty that goods shall be "merchantable" if the seller is "a merchant with respect to goods of that kind." A merchant that holds itself out as having knowledge or skill relating to goods gives the buyer an implied warranty of merchantability. *Simmons v. Washing Equipment Technologies,* 857 N.Y.S.2d 412, 414 (4th Dep't 2008). To establish PIM's breach of its warranty of merchantability, Beech-Nut must show that (1) PIM was a "merchant" in goods of the kind; (2) PIM's product was not "fit for the ordinary purposes for which such goods are used;" and (3) damages. *Bradley v. Earl B. Feiden, Inc.*, 8 N.Y.3d 265, 273 (2007); *Wojcik v. Empire Forklift, Inc.*, 783 N.Y.S.2d 698 (3d Dep't 2004).

As to the first element, PIM unquestionably was a "merchant with respect to goods of" the kind. PIM held itself out as an expert in the fruit gummy business. Stipulated Facts 1-3, 7-10; Ex. 2 at 71-72, 93; PIM's Reply at ¶ 4, Dkt. 7. PIM said it already was making similar all natural fruit products, Ex. 2 at 32-33 ("This was a fruit product that essentially was used at the center for our fruit and yogurt products."), and that it could make the Fruit Nibbles product to meet Beech-Nut's needs. Ex. 2 at 32; PIM's Reply at ¶5, Dkt. 7; Ex. 2 at 32; Ex. 36 (Sept. 23, 2008 PIM e-mails assuring Beech-Nut that quality/variability issues were resolved and product would meet the July 24, 2008 approved sample). Thus, PIM was a "merchant with respect to goods" of the kind. NY UCC § 2-104(1); *Saratoga Spa & Bath, Inc. v. Beech Systems Corp.*, 656 N.Y.S.2d 787, 790 (3d Dep't 1997).

As to the second element, the products PIM sold to Beech-Nut did not meet any of the six criteria set out in NY UCC § 2-314(2)(a)-(f):

> (2) Goods to be merchantable must be at least such as
> (a) pass without objection in the trade under the contract description;
> (b) in the case of fungible goods, are of fair average quality within the description;
> (c) are fit for the ordinary purposes for which such goods are used;
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label, if any....

PIM was required to produce a chewy fruit toddlers' snack. Instead, it shipped starchy, hard, shriveled bits potentially hazardous to children with bad appearance, and odor and inaccurate package weights and labeling. *E.g.*, Exs. 17, 22-35, 59-72.

PIM's product, therefore, (a) did not pass without objection in the trade under the contract description; (b) was not of fair average quality within the description; (c) was not fit for the ordinary purposes for such goods; (d) did not run of even kind, quality and quantity within each unit and among all units; (e) was not packaged, and labeled as required; and (f) did not conform to the affirmations of fact on the container or label. PIM managed to breach all six categories of implied warranty of merchantability, although breach of only one results in its liability.

If further evidence were needed that PIM's Fruit Nibbles product was not merchantable, the hundreds of complaints provide it. Stipulated Facts 31-35. Merchants and parents emphatically rejected the hard, crusty, foul smelling,

shriveled, coated, spotted snack food for toddlers' consumption, and children reportedly fell ill after eating the product. Parents posted complaints on Beech-Nut's website. For example:

- [I p]urchased [a] box of Let's Grow Fruit Nibbles. They were shriveled and tasted waxy. [My c]hild ate some and developed a stomach ache. I opened rest of packets and they were all shriveled. Should I be concerned for my child's health from consuming one packet of obviously a bad product. Ex. 30 at BN 7151.

- [I j]ust bought some Fruit Nibbles, exp date on box says Aug 2009. I handed the package to my 3 1/2 year old son--who, thank goodness, was having trouble opening the package. When I opened it, I noticed this horrid smell. The "gummies" were coated in a greenish powder that I can only assume was mold? Disgusting! My concern is that my son usually gets these out of the pantry for himself (without supervision) and I have to question what could have happened if he had eaten them! WalMart will not return food items, my only recourse is to contact you for a refund AND to warn you of this dangerous situation. *Id.* at BN 7154.

- I am a little upset. I purchased fruit nibbles in mixed fruit today for only the second time from walmart and they were rotten!!.... [E]ach bag is filled with brownish white pieces. I was disgusted by what I found and will never buy this product again. *Id.*

The merchant and consumer complaints, order cancellations, and product returns are also objective evidence that PIM's product was "unmerchantable." *E.g.*, Ex. 32 (retail customer demanded recall and refund); Ex. 33 (Wal-Mart pulled Fruit Nibbles from shelves and demanded compensation).

As to the third element, Beech-Nut suffered damages. See Point V below.

Therefore, Beech-Nut is entitled to judgment against PIM for breach of its implied warranty of merchantability. *Rite Fabrics, Inc.*, 366 F. Supp. at 11-14.

C. PIM BREACHED ITS IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE

PIM also breached a second implied warranty. NY UCC § 2-315 provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Long before Beech-Nut submitted and PIM accepted the four purchase orders, PIM knew from its discussions with Beech-Nut that the particular purpose of the Fruit Nibbles products was toddlers' consumption, whose health- and safety-conscious parents would be attracted by Beech-Nut's "No Junk Promise." Ex. 2 at 26-28. PIM held itself out as having produced products like Fruit Nibbles, capable of developing and manufacturing a product meeting Beech-Nut's needs, and having "the skill and judgment to...furnish suitable goods...fit for such purpose." PIM also knew that Beech-Nut had no experience developing or manufacturing a product like Fruit Nibbles and was relying on PIM to do so. Ex. 2 at 71-72 (PIM's Chief Operating Officer testifying that PIM had and Beech-Nut lacked experience in product).

The Fruit Nibbles that PIM sold Beech-Nut were unsuitable for human consumption and, especially, for toddlers' consumption. That was the particular purpose of the product. The hard, dried, shriveled bits were a potential chocking hazard for small children, Ex. 17, and the other quality deficiencies also made them unfit for children's consumption. See pages 6-8. Beech-Nut's retail customers and consumer-parents emphatically rejected the product as unsuitable for children. And

PIM's own Manager of Research and Development and Quality Assurance would not feed the product to her own children. Ex. 1 at 166-68. Therefore, PIM's product was not fit for its particular purpose. *Rite Fabrics, Inc.*, 366 F. Supp. at 13 (seller breached warranty of fitness for particular purpose when it knew buyer required fade-resistant fabric for swimsuits and assured buyer fabric was suitable for that purpose); *Bimini Boat Sales, Inc. v. Luhrs Corp.*, 892 N.Y.S.2d 548, 550 (2d Dep't 2010) (summary judgment on implied warranty of fitness for particular purpose where there were "fundamental" "structural deficiencies" and "design flaws" making the product it unfit for its particular purpose).

Finally, as discussed in Point V below, Beech-Nut suffered damages as a result of PIM's breach. Accordingly, Beech-Nut is entitled to judgment against PIM for breach of PIM's implied warranty of fitness for a particular purpose.

III. PIM ALSO IS LIABLE TO BEECH-NUT FOR ITS NEGLIGENT DEVELOPMENT AND MANUFACTURE OF THE FRUIT NIBBLES PRODUCT

Beech-Nut's negligence claim is based on a different wrong and a different harm than its breach of warranty claims. The negligence claim is directed at Beech-Nut's lost sales and profits caused by PIM's negligence in developing and manufacturing Fruit Nibbles. Whereas the warranty claims remedy the contract harm from PIM's breach of the purchase orders, the negligence claim remedies the separate harm from PIM's breach of its separate and independent tort duty. That breach prevented Beech-Nut from realizing the benefits of the retail and consumer demand

that Beech-Nut's advertising, marketing, and promotion of Fruit Nibbles had created. Without a saleable product, Beech-Nut lost substantial sales and profits.

It is important to make clear at the outset that the "economic loss rule," dealing with intangible economic harm without physical injury or property damage, does not bar Beech-Nut's negligence claim. This is so for at least three reasons. First, PIM rejected a contract beyond the terms and conditions of individual purchase orders. The parties could have but did not negotiate an allocation of risks for intangible economic harms. Therefore, unlike situations in which the economic loss rule has barred tort claims, Beech-Nut is not making "negligent performance allegations that are merely a form of breach of contract action." *Saltiel v. GSI Consultants, Inc.*, 170 N.J. 297, 309 (2002) *citing Walker Rogge, Inc. v. Chelsea Title & Guar. Co.*, 116 N.J. 517 (1989). In *Saltiel*, for example, the plaintiff's negligence claims all fell within the four corners of a contract. *Accord Shinn v. Champion Mortgage Co.*, 2010 WL 500410 at *4 (D.N.J. Feb. 5, 2010) (Martini, J.). Beech-Nut's do not.

Second, even if a contract did govern the breach addressed by Beech-Nut's negligence claim, the negligence claim would still lie because "the plaintiff [can] establish that the alleged breach of duty constituted a 'separate and independent tort.'" *Saltiel*, 170 N.J. at 309 (citation omitted); *Consult Urban Renewal Dev. Corp. v. T.R. Arnold & Assoc.*, 2009 WL 1969083 at *3 (D.N.J. July 1, 2009) (Martini, J.). Section 402(a)(3) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342(a)(3), imposed on PIM as a manufacturer of interstate food products the statutory

duty not to develop or produce a product that was "unfit for food." The FDA has repeatedly found products to be "unfit for food" within the meaning of § 402(a)(3) when, for example, "by virtue of their size and consistency, [they] posed a choking hazard;" or because of their "size and shape...tended to increase the likelihood of... [their] lodging in the upper airway and producing partial or complete obstruction;" or they were "excessively tough [and] rubbery;" or when they "were characterized by an abnormal order, taste or color" or were "fibrous and woody."[9] The retail customers' and consumers' complaints about Fruit Nibbles described above and confirmed by Beech-Nut and PIM establish that the Fruit Nibbles product withdrawn from the market was "unfit for food" in violation of PIM's duties under the FDC Act.

Third, the law recognizes a separate and independent tort duty when one party's knowledge and skill is superior to the other party's. W. Page Keeton, et al., *Prosser and Keeton on Torts*, §32 (5th ed. 1984) ("Prosser"); Second Restatement Torts §289, comment M. In this case, PIM not only possessed but promoted its special knowledge and skill in developing and manufacturing toddler-appropriate, all-natural, gummy fruit products and it knew Beech-Nut had no such knowledge or skill. See pages 22-27. This disparity imposed a separate and independent tort duty

[9] FDA Import Alert 33-15 (Oct. 2001) (http://www.accessdata.fda.gov/cmsia/importalert_105.html); FDA Import Alert 33 04 (10/2/2009) (http://www.accessdata.fda.gov/cmsia/importalert_101.html); *U.S. v. 298 Cases, Etc., Ski Slide Brand Asparagus*, 88 F. Supp. 450, 451 (D. Ore. 1949); *U.S. v. 24 Cases, More or Less,* 87 F. Supp 826 (D. Me. 1949).

on PIM, apart from any contractual obligation, to apply its superior knowledge and skill in developing and manufacturing Fruit Nibbles.[10]

The elements of negligence under New York and New Jersey law are a duty of care, breach of that duty, and causation of a foreseeable injury. *Ocampo v. FAMCO, LLC, et al.*, No. A-2001-09T3, 2010 WL 3932797, at *2 (N.J. Super. App. Div. Oct. 8, 2010); *Salvador v. New York Botanical Garden,* 71 A.D.3d 422, 423 (1st Dep't 2010). All are met in this case.

PIM had the duty to develop and manufacture saleable goods for Beech-Nut to sell to its retailer customers for resale to toddlers' parents and not have them rejected as unfit. *See Kramer v. Showa Denko K.K.*, 929 F. Supp. 733, 747 (S.D.N.Y. 1996) ("manufacturers owe a basic duty to inspect and test their products to ensure [they] are reasonably safe for consumption."). As the buyer and reseller of PIM's products, Beech-Nut was in the "zone of harm" of PIM's breach of duty. *People Express Airlines v. Consol. Rail Corp.,* 100 N.J. 246, 263-64 (1985) (airline permitted to recover in negligence theory for economic loss); *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 352 (1983) (auditor's negligence answerable for shareholder's economic);

[10] Cases recognizing negligence liability by commercial parties and tradesmen who fail to use their special skills and superior knowledge in business dealings with customers include *Consult Urban Renewal Dev. Corp. v. T.R. Arnold & Assoc.*, 2009 WL 1969083 at *4 (D.N.J. July 1, 2009); *Jewell v. Beckstine,* 386 A.2d 597 (Pa. Super. Ct. 1978) (milk handlers); *Everett v. Bucky Warren, Inc.*, 380 N.E.2d 653 (Mass. 1978) (hockey coaches); *LaVine v. Clear Creek Skinning Corp.*, 557 F.2d 730 (10th Cir. 1977) (expert skiers); and *Fisher v. U.S.*, 299 F. Supp. 1 (E.D. Pa. 1969), *rev'd on other grounds*, 441 F.2d 1388 (3d Cir. 1971) (construction inspectors).

Palsgraf v. Long Island R.R., 248 N.Y. 339, 346 (1928) (Cardozo, J.) (negligence entails liability for any and all consequences, no matter how novel or extraordinary).

Further, Beech-Nut's revenues and profits were foreseeably at risk by PIM's lack of care in developing and making the product. Ex. 5 at 18-19, 36; Ex. 6 at 13-14, 58; Ex 2. at 71-72, 93; Ex. 36; Ex. 51 (Oct. 4, 2008 e-mail from PIM's Research and Quality Assurance Manager urging PIM's Chief Operating Officer to recall Fruit Nibbles product "before it destroys ours and Beech-Nut's reputations."); Ex. 1 at 116-17 (PIM testimony that its Chief Operating Officer was concerned that product quality issues were affecting Beech-Nut's and PIM's reputations). Beech-Nut's ability to take advantage of the new market and strong retailer and consumer demand for its new Fruit Nibbles line that its advertising and promotional actions had created was destroyed when PIM failed to develop and manufacture a saleable product. Ex. 4 at 92-93 (PIM admitting that, "retailers would kill us" if Beech-Nut re-launched a product with similar problems. "And not only the Fruit Nibbles product, but potentially the other new categories we were trying to introduce as well.").

PIM cannot genuinely dispute its breach of its duty or the harm to Beech-Nut that resulted directly and proximately from its negligence. PIM's negligence is both self-evident and it is confirmed by the hundreds of consumer and retailer complaints about the product and the ensuing market withdrawal. Ex. 1 at 166-67; Ex. 3 at 60-61; Exs. 23-24, 30-35, 61-62. They were, as PIM's personnel testified, "unsaleable," and resulted from what PIM's Chief Operating Officer called PIM's "incompetence."

Ex. 51 (Oct. 4, 2008 e-mail from PIM's Chief Operating Officer stating PIM's "failure to detect problem sooner may end up costing us over million dollars....Michael [Rosenberg, PIM's President/CEO] is aware of the situation. By bringing it up again will only anger him about our incompetence.").

Finally, Beech-Nut suffered damages. PIM's negligence in developing and manufacturing the product was the sole and direct cause of Beech-Nut loss of expected sales. Beech-Nut had nothing to fill orders after it created the demand for Fruit Nibbles and its loss of expected, planned sales and profits was the foreseeable and direct result of PIM's negligence. *See* Point V below.

IV. PIM'S DEFENSES ARE NOT MATERIAL OR RELEVANT AND DO NOT ABSOLVE IT OF LIABILITY TO BEECH-NUT

PIM has raised several arguments to avoid liability for its breach of contract and negligence. None of them defeats Beech-Nut's claims.

A. PIM's Decision Not to Do Shelf-Life Studies Is Not a Defense

PIM has argued that Beech-Nut "insisted" on adhering to its product launch schedule, leaving PIM insufficient time to perform a "shelf-life" study to assure that its products would meet the agreed twelve-month shelf-life specification. That does not afford PIM a defense. Shelf-life testing was not pre-requisite for PIM to warrant its own products. If PIM thought testing was appropriate, it should have declined the purchase orders or refused to ship and warrant its products until it had done a study. Instead, it accepted the orders, which made "time of the essence," and imprinted twelve-month shelf-life dates on each package. By accepting the orders and

warranting its products, PIM accepted the risk that it would not satisfy its contract obligations. *Texaco Inc. v. A.A. Gold Inc.*, 357 N.Y.S.2d 951, 956 (NY Sup. Ct. 1974).

B. Beech-Nut's "Involvement" and Its Acquiescence in PIM's Substitution of Ingredients Are Not a Defense

PIM has asserted that Beech-Nut's peripheral "involvement" in PIM's development and manufacture of the Fruit Nibbles product, and particularly its acquiescence in PIM's substitution of grape for pineapple juice as an ingredient, eliminates PIM's liability for warranting its defective, unmerchantable product. This is not so for several reasons.

First, it would stand UCC Article 2 on its head if merchants could avoid their warranties by claiming that buyers' acquiescence in constituent ingredients vitiated their seller's warranties. PIM was a merchant in goods of the kind and it held itself out as having the experience and expertise to make the Fruit Nibbles products to the agreed specifications. Beech-Nut did know the ingredients (as did all the consumers and retailers who read the package label), but Beech-Nut did not know, or have involvement in determining, the formula or manufacturing processes for making the product. Buyers like Beech-Nut do business with manufacturers like PIM precisely because the manufacturer has the expertise that the buyer lacks and, as Beech-Nut did here, the buyers protect themselves with contractual and statutory warranties.[11]

[11] In fact, as the documents show, PIM actually assured Beech-Nut that its substitution of white grape juice concentrate for pineapple juice concentrate as an

development or manufacture. It had no role, and PIM knew Beech-Nut had no background or expertise to occupy a role, in the product's development or production.

The undisputed and stipulated facts establish that Beech-Nut relied on PIM to produce the product. It gave specifications only for what the end product should be, it only taste-tested a limited sampling of the end product, and it had no knowledge of PIM's undisclosed, proprietary manufacturing formula and processes for the product. PIM's job was to deliver products consistent with the agreed sample and end-product specifications, merchantable, and fit for their particular purpose. Beech-Nut did not displace PIM's role or judgment, assume PIM's duties, or waive its warranties.

C. The Extent of the Product Defects Sustains Beech-Nut's Claims

PIM has contended that it has no liability because Beech-Nut has not shown that all packages and cartons of Fruit Nibbles were non-compliant. Its argument is wrong because all the products breached the shelf-life specification. It also is immaterial because Beech-Nut is not required to prove that all packages contained defective products and was mislabeled.

The NY UCC provides that, if a non-conformity impairs the value of the whole contract, the buyer's rights and remedies extend to the whole contract. UCC § 2-711(1); *Hubbard v. UTZ Quality Foods, Inc.*, 903 F. Supp. 444, 450 (W.D.N.Y. 1995); *Rite Fabrics, Inc.*, 366 F. Supp. at 11. The hundreds of instances of quality and quantity defects found immediately after PIM's shipments demonstrate the pervasiveness of the deficiencies. PIM confirmed and sought to remedy the defects.

Second, no case holds that a buyer's acquiescence in an ingredient change or knowledge about the seller's process vitiates the seller's warranties. The only decisions Beech-Nut has found indicate that only a buyer's substitution of its judgment for the seller's in a way that shows the buyer is not relying on the seller's expertise could undermine the strength of a seller's implied warranty, and no case suggests that, even in that case, a seller's express warranty would be affected. In *Leahy v. Mid-West Conveyor Co., Inc.,* 507 N.Y.S.2d 514 (3d Dep't 1986), the court held that a buyer could not assert a seller's implied warranty when the product, a conveyor belt, was manufactured to the buyer's exact and specific design and manufacturing specifications. In *Icelandic Airlines, Inc. v. Canadair, Ltd.*, 428 N.Y.S.2d 393 (NY. Sup. Ct. N.Y. County 1980), the court said in dicta that a buyer who "not only...provide[d] the [manufacturing] specifications [but also] supervised the tests conducted upon the [manufactured] valve" could not assert an implied warranty.[12] Beech-Nut's specifications and sampling ran to the end result, not to

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ingredient would produce a similar, if not better, result. Ex. 2 at 52-53. Beech-Nut's acquiescence was expressly conditioned on the resulting product conforming to the agreed prototype sample, which it did not. Ex. 74; Ex. 2 at 54-56.

[12] In *Nielsen v. Media Research, Inc.*, No. 99 Civ. 10867, 2002 WL 31175223 (S.D.N.Y. Sept. 30, 2002), the court declined, without legal analysis, to rule on summary judgment on an implied warranty issue in a dispute over a computer database software development contract. The facts showed the buyer had specified the software to be used in the database and that the buyer's technical staff had guided the seller's development of the software by reviewing and commenting on the software architecture and mathematical algorithms and formulas used in it. Apart from *Leahy*, *Icelandic Airlines*, and *Nielsen,* Beech-Nut has found no relevant cases dealing with the contention that a buyer's actions can vitiate the seller's warranty.

It did not object when Beech-Nut withdrew the products from the market. The prevalence of the deficiencies affected the whole contract and destroyed Beech-Nut's and its customers' trust in the product. The law does not require Beech-Nut to open every package to reach that evident conclusion.[13]

D. PIM's Products Were Not Compliant on the Date of Shipment

PIM argues that, as far as it knew, its products were satisfactory on the dates they were shipped and it has no responsibility after that. It is wrong for two reasons. First, as explained immediately above, PIM's product clearly was not compliant on the shipment dates. The retailers' and consumers' immediate complaints show they were not, as does PIM's internal correspondence (cited at pages 20-22). Second, PIM's obligation was to produce a product with a twelve-month shelf-life. Since the products plainly did not have a twelve-month shelf-life when shipped, they were deficient on the shipment date. *See Rite Fabrics, Inc.*, 366 F. Supp. at 14.

E. PIM's Unsold Inventory and Allegedly Unused Raw Materials Are Not a Defense

PIM complains that it was left with unused raw materials and unsold inventory when Beech-Nut did not place purchase orders beyond the four that it submitted and PIM accepted. Even if true, this is no defense. It simply is a consequence of PIM's

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[13] Notably, PIM itself has not tested all the products it delivered or a statistically-significant, random sampling of them. Neither has it disputed the pervasiveness of problems with its product turning hard and unchewable, crystallized, and covered with granular powder, and mispackaged and mislabeled. It has not disputed that that the products deteriorated and were "unsaleable" within days or weeks of their shipment or that the products would become non-conforming during the twelve-month warranted shelf-life period.

business decisions made as an arm's-length seller acting without a long-term agreement in place. It was PIM's responsibility to manage its raw material purchases and its production. Ex. 75; Ex. 3 at 41-42 (testifying to PIM's policy to have at least ten and not more than thirty-days' supply of any ingredient on hand). If PIM bought more raw materials or made more product than it had orders to fill, it mismanaged its business. *See* Ex. 75 (Jan. 16, 2009 PIM internal e-mail stating, "I believe that one of the overriding reasons for many cost overruns or the Beechnut situation is the lack of discipline in 'buttoning down' a process before we proceed. The excessive trial and error results in lost hours of production; poor product which results in re-melt and customer rejection of the product; and the 'stop and go' and revised processes lead to errors on the line and machine downtime. This all costs money.").

PIM's business decisions, not a breach of agreement by Beech-Nut, caused PIM's alleged excess production and raw materials.[14] Even if PIM had produced a well accepted, wildly successful Fruit Nibbles product, it had no contractual basis to count on orders from Beech-Nut because there was no long-term co-packing agreement of the kind PIM emphatically rejected. Beech-Nut was always free to change suppliers. PIM may not shift to Beech-Nut the consequences of its business

[14] In fact, PIM has failed to provide evidence that it had excess raw materials. Its Chief Financial Officer, testifying as its 30(b)(6) witness, admitted that he could not provide any contractual documents showing PIM's actual purchase of the largest raw material component (pineapple concentrate), the possession or disposition of any pineapple concentrate inventory, or any efforts to sell that supposedly high-demand ingredient to mitigate damages. Ex. 8 at 32-34, 37-38.

miscalculations and failure to produce a merchantable product even if they left PIM with unused raw materials or unsold inventory.

V. BEECH-NUT IS ENTITLED TO RECOVER ITS DAMAGES RESULTING FROM PIM'S BREACHES OF WARRANTY AND ITS NEGLIGENCE

A. BEECH-NUT'S BREACH OF WARRANTY DAMAGES

A buyer is entitled to "recover as damages" "[1] the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable," "[2] the difference between the value of the goods accepted and the value they would have had if they had been as warranted," and "[3] incidental and consequential damages." NY UCC §§ 2-714(1), (2), (3), 2-715, (2009); *Model Imperial Supply Co., Inc. v. Westwind Cosmetics, Inc.*, 829 F. Supp. 35, 41 (E.D.N.Y. 1993); *Rite Fabrics, Inc.,* 366 F. Supp. at 14. Beech-Nut's damages from PIM's breach of its express and implied warranties total $3,454,140.45:

purchase price for unmerchantable product	$966,651.40
lost profits on sales to retailers*	$1,685,046.50
costs incurred for the product withdrawal	$591,219.26
costs of marketing support for Fruit Nibbles launch	$16,529.44
lost payments Beech-Nut made for retailer shelf space	$77,310.77
costs to rework underweight packages	$29,969.35
storage costs for returned and unshipped product	$87,414.77

Kennedy Aff. ¶ 19; Ex. 7 at 21-38, 45-52, 55.

* Lost resale profits are easily approximated. *S&K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 851-53 (2d Cir. 1987); *Lee v. Joseph E. Seagram & Sons, Inc.,* 552 F.2d 447, 455 (2d Cir. 1977). Here, they are Beech-Nut's projected profits based on its business planning and experience. Ex. 7 at 24-31.

Beech-Nut is entitled to each of these elements and amounts under § 6 of the purchase orders and NY UCC §2-714. *Model Imperial Supply Co.*, 829 F. Supp. at 41; *Rite Fabrics, Inc.,* 366 F. Supp. at 14; *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 403 (1993); Restatement (Second) of the Law of Contracts §351. The law does not require proof with absolute certainty, only a reasonable computation based on reliable factors without undue speculation, including lost profits capable of measurement. *Ashland Mgmt. Inc.*, 82 N.Y.2d at 395; *Texpor Traders, Inc. v. Trust Co. Bank*, 720 F. Supp. 1100, 1113-14 (S.D.N.Y. 1989); Restatement (Second) of the Law of Contracts §352. PIM knew it was responsible for these damages. As the court observed in *Harbor Hill Lithographing Corp. v. Dittler Bros., Inc.*, 348 N.Y.S.2d 920, 924 (N.Y. Sup. Ct. 1973), the UCC and its officials comments have been effective "since 1964 [and] make quite clear that resale circumstances put the seller on notice of potential exposure to liability for lost resale profits.").

Beech-Nut is entitled to recover the $3,454,140.45 for the harm caused by PIM's breach of warranty.

B. BEECH-NUT'S NEGLIGENCE DAMAGES

Under New Jersey and New York law, an injured party may recover all foreseeable damages proximately caused by a party's negligence. Beech-Nut lost substantial profits because, without a saleable product, it could not fill the expected, planned demand for Fruit Nibbles products. This loss was foreseeable and was the direct result of PIM's breach of duty in failing to develop and produce a saleable

product for Beech-Nut to meet the strong demand its marketing and advertising efforts created. Beech-Nut lost retail merchant orders for 262,850 cases of Fruit Nibbles and $1,659,601.00 of profits on those orders, Kennedy Aff. ¶ 20; Ex. 7 at 58-61. Beech-Nut is entitled to recover this amount as damages.

C. BEECH-NUT IS ENTITLED TO PRE- AND POST-JUDGMENT INTEREST

Beech-Nut is entitled to pre-judgment and post-judgment interest on its breach of warranty and negligence damages. NY CPLR §§ 5001-03 (2010), N.J. Ct. Rule 4:42-11 (2010). Pre-judgment interest should be calculated from April 23, 2009.

CONCLUSION

For these reasons, PIM's claims against Beech-Nut should be dismissed and judgment should be entered in favor of Beech-Nut for the amount of its damages resulting from PIM's breach of express and implied warranties and negligence.

Dated: January 28, 2011

BLOOM, KARINJA & DILLON, P.C.

By: _____
Paul J. Dillon

and

Richard A. Cirillo
Karen R. Kowalski
Joshua Edgemon
KING & SPALDING LLP
Attorneys for Beech-Nut Nutrition Corporation