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1 September 11, 2012

2 (Trial resumes - Jury not present.)

3 THE COURT: Be seated. Good morning, everyone.

4 MR. DILLON: Good morning, your Honor.

5 THE COURT: Mr. Wallach, I understand you had
6 something you wanted to address before we bring the jury out?

7 MR. WALLACH: Yes, your Honor, if I might. A
8 housekeeping item. Today I conferred with Beech-Nut's counsel
9 this morning about moving into evidence the two exhibits that
10 were shown to Mr. Kennedy yesterday. We do not have agreement
11 on that request. And I thought it appropriate, if acceptable
12 to your Honor, to raise that now.

13 THE COURT: Were those the one that had the very good;
14 very bad; very good; very bad, whatever?

15 MR. WALLACH: One more "very good," yes, and one more
16 "very bad."

17 It was that. And there was an e-mail of November --

18 THE COURT: Which exhibit number was that again?

19 MR. WALLACH: They were not marked, your Honor. I can
20 show you the copies if that assists.

21 THE COURT: Yeah. No, I had them.

22 MR. WALLACH: They were not marked.

23 THE COURT: Yeah, Fruit Nibbles withdrew -- they were
24 part of the evaluation or the Fruit Nibbles Withdrawal
25 confidential report or something?

1 MR. WALLACH: Exactly, your Honor.

2 THE COURT: This was a document prepared by
3 Beech-Nut?

4 MR. DILLON: Yes. It was not --

5 THE COURT: Correct?

6 MR. DILLON: Yes, your Honor. It was not listed in
7 the Pretrial Order.

8 THE COURT: Was it presented by way of discovery? Was
9 it --

10 MR. DILLON: Oh, sure. We produced it in discovery.

11 THE COURT: Okay. Was it referred to at all in the
12 Pretrial Order?

13 MR. DILLON: No. The Pretrial Order just says:
14 "Except for exhibits the need for which could not reasonably
15 have been foreseen or which are used solely for impeachment
16 purposes, only the following exhibits..." And I don't think
17 that that was impeachment in any sense.

18 THE COURT: No. Let me hear you, Mr. Wallach.

19 MR. WALLACH: I would disagree, your Honor. We
20 maintain it was impeachment because Mr. Kennedy testified that
21 all of the product was bad. And the purpose of these two
22 documents was to show that contrary to his testimony, Beech-Nut
23 did not determine all of the product was bad. That's the
24 reason for our request, your Honor.

25 MR. DILLON: It has never been the position of

1 Beech-Nut and wasn't Mr. Kennedy's testimony that all the
2 product was bad.

3 THE COURT: I don't think Mr. Kennedy testified that
4 it was all bad. First of all, I don't think this thing is
5 terribly damaging to Beech-Nut. I mean, you would expect that
6 a manufacturer of a product is going to manufacture all good
7 product. You know, I mean, this shows a mixed bag. This shows
8 it goes from very bad to very good.

9 Well, if that's the standard of putting a product on
10 the market, if the jury wants to buy that, they'll buy that,
11 you know? So I don't see this -- if you want to use it, quite
12 frankly, if he wants -- if he thinks this impeached Mr.
13 Kennedy, I'll allow it in. It's something that was produced by
14 Beech-Nut. But from Beech-Nut's point of view, from counsel's
15 point of view I almost was going to ask that question:

16 So you got some stuff that's very good and you got a
17 lot of stuff that's very bad. What are we supposed to do; put
18 out stuff that's very bad on the market and let it be out
19 there?

20 I mean, if the jury wants to accept that, they will;
21 and if they don't, they won't. If that's the standard of
22 marketing today, we're in deep trouble.

23 MR. WALLACH: Respectfully, your Honor, but that's not
24 the standard or the purpose. Because when we tie this in with
25 the legal standard under the Uniform Commercial Code my

1 client's right to cure any problem, it's important that the
2 jury see the status of the later manufactured product.

3 THE COURT: Well, that may be an issue and I don't
4 know what the evidence is going to show as far as if -- one,
5 your testimony so far has been: We didn't believe we could
6 cure this. It would be impractical, too expensive to repackage
7 it. I think I heard something from Mr. Kennedy along that
8 line.

9 MR. DILLON: And also Mr. Hungsberg's --

10 THE COURT: By the way, Gail, where is John?

11 THE DEPUTY CLERK: I forgot to tell him to come out
12 here. It's my fault.

13 THE COURT: Because this goes to possibly the charge.
14 Go ahead.

15 MR. DILLON: And, Judge, I think Mr. Hungsberg's
16 deposition testimony is he couldn't figure out which stuff was
17 bad and which stuff was good. So I would just --

18 THE COURT: The issue of curing, do you agree, the
19 issue of whether or not it can be cured might be an issue in
20 this case? Under the -- well, the statute says "and could not
21 be cured."

22 MR. DILLON: Right.

23 THE COURT: So I have to charge that, by the way. I
24 looked at the charge last night and I'm going to have to
25 include it because that's the language of the statute. And the

1 question becomes: If the nonconformity substantially impairs
2 the value of that installment and cannot be cured.

3 Well, there is an issue as: Could it be cured or not
4 be cured?

5 And your position is, it was so substantially rancid
6 in the bag that we commercially could not cure this.

7 I don't know what his position is going to be. I
8 don't know if he's going to have from the discovery -- I don't
9 know. Does he have evidence to show, well, if we had the
10 opportunity, we would have cured it?

11 MR. DILLON: Your Honor, I don't know what Mr. Wallach
12 intends to do. Focusing on these two documents, we object to
13 them going into evidence. They weren't listed in the Pretrial
14 Order, they weren't used as impeachment.

15 THE COURT: Do we have a copy of the Pretrial Order?

16 THE LAW CLERK: I'll get it for you.

17 THE COURT: Yeah. But if the language there -- and I
18 don't want to spend too much time on this right now -- but if
19 the language in the Pretrial Order says "except for use but for
20 impeachment," I mean, that's exactly what he was using it for.

21 MR. DILLON: If that's your ruling, that's your
22 ruling.

23 THE COURT: I'm talking it out.

24 MR. DILLON: Okay.

25 THE COURT: But I think that's what his presentation

1 is, that I used it to show that there was some product lots
2 that were very good. I mean, he has a right to show that. As
3 part of the issue as to whether or not there was substantial
4 impairment here he would have the right to show.

5 Our argument is, it wasn't all bad. Our argument is,
6 it wasn't substantially impaired.

7 MR. DILLON: Your Honor --

8 THE COURT: Your argument is -- well, wait, Mr.
9 Dillon. I'm just talking -- your argument is it was
10 substantially impaired. When you get complaints like rancid,
11 looks like this, smells, can't eat it, can't chew it, and we
12 waited a while, we didn't precipitously just pull it right
13 away, we waited a while as some of the evidence showed, in
14 fact, even thought, well, maybe in a few weeks things will --
15 and it got worse, and at some point you had to make a
16 determination for the health and well-being of children to pull
17 this stuff because you made a judgment call.

18 His argument is, it wasn't all bad. Although this
19 document -- if he thinks it impeaches Mr. Kennedy, fine.
20 Because as I indicated, it could easily be argued: What are we
21 supposed to do, put out product that is very bad, mixed in with
22 very good and let it be on the market?

23 So I don't see it -- but go ahead.

24 MR. DILLON: Your Honor, I would say to you that if it
25 becomes part of Mr. Wallach's case and he introduces this

1 document as part of his case, I'm going to object to it in that
2 context because it's not in the Pretrial Order. So I don't see
3 why he can get the document in through the back door by doing
4 the cross of my witness.

5 THE COURT: If the Pretrial Order -- do you have a
6 reference in the Pretrial Order and page, please?

7 MR. DILLON: Sure, 1530.

8 THE COURT: Do you have it?

9 Did you pull the page?

10 THE LAW CLERK: I haven't pulled it yet.

11 (The Court and the Law Clerk confer off the record.)

12 THE COURT: But if --

13 MR. DILLON: What you're telling me, Judge, is no
14 harm, no foul.

15 THE COURT: No, I'm not telling you that. I'm telling
16 you that if the language of the Pretrial Order said --

17 MR. WALLACH: The sub-heading (e), as in Edward, your
18 Honor.

19 THE COURT: Okay. You read something about
20 impeachment, Mr. Dillon. It's not in that language, but that's
21 what the -- I think that's what it can be reasonably understood
22 to be in paragraph (e) --

23 MR. WALLACH: Your Honor, the Court's portion, the
24 typed portion of the Pretrial Order refers to impeachment right
25 at the beginning.

1 THE COURT: Yes.

2 MR. WALLACH: What I was directing the Court -- and I
3 didn't want to interrupt while you were reading -- was what the
4 parties added under sub-heading (e) that refers to introducing
5 other documents.

6 THE COURT: Yeah.

7 MR. WALLACH: And it continues.

8 THE COURT: Mr. Wallach, I'm going to allow you to
9 move it in. Move it in on your case. You used it on cross of
10 Mr. Kennedy. But those two pages is what you're referring to,
11 right, Bates Number 5846 and 5847. Correct?

12 MR. WALLACH: Yes, your Honor.

13 MR. DILLON: Well, your Honor, then under 106 I want
14 the whole document in. We'll get to it when we get to his case
15 I guess.

16 THE COURT: All right.

17 We'll see about that when he gets to that point,
18 whether or not the whole document should come in. Okay? I'll
19 reserve on that, that's all.

20 MR. DILLON: All right.

21 THE COURT: No, I think under the Pretrial Order, you
22 did use him to cross-examine him on it, and your position is
23 that some of the items that they produced and manufactured were
24 very good, a lot of them were very bad. But if that's the
25 standard of the world where you can put on the market very good

1 and very bad food, the jury will have to consider that, that's
2 all.

3 MR. WALLACH: In the context of the other evidence,
4 yes, your Honor.

5 THE COURT: I know, okay.

6 All right. Anything else?

7 MR. WALLACH: No, your Honor.

8 THE COURT: We're preparing a verdict sheet because I
9 understand -- do you have that, John?

10 (The Court and the Law Clerk confer off the record.)

11 THE COURT: We'll make a copy and we'll give it to you
12 on the next break. Okay?

13 THE COURT: Shall we bring out the jury?

14 THE DEPUTY CLERK: Okay.

15 THE COURT: Mr. Kennedy, you're on the stand still.
16 Why don't you step forward, we'll save time.

17

18 T I M K E N N E D Y, recalled as a witness, having been
19 previously sworn, is examined and testifies further as
20 follows:

21

22 DEPUTY CLERK: Please rise for the Jury.

23 (Jury present.)

24 THE COURT: Good morning, everyone. Welcome back.
25 Please be seated and we'll get started. Thanks.

1 Mr. Wallach, you're still on cross-examination.

2 MR. WALLACH: Thank you, your Honor.

3 THE COURT: All right.

4 CROSS-EXAMINATION CONTINUES

5 BY MR. WALLACH:

6 Q Good morning, Mr. Kennedy.

7 A Good morning.

8 Q Would you tell the jury, please, who Lisa Lewis at
9 Beech-Nut is?

10 A Ms. Lewis was the manager of our consumer hot line.

11 Q Was she the manager of the consumer hot line in the time
12 period we're talking about here, the fall and winter of 2008?

13 A Yes, she was.

14 Q Do you know if Ms. Lewis is still employed by Beech-Nut?

15 A She is not.

16 Q When did she cease being employed, if you know?

17 A I don't recall the exact date.

18 Q Did Ms. Lewis play any role, if you know, in ordering
19 product from Promotion In Motion to provide to Beech-Nut's
20 customers?

21 A Not that I know of.

22 Q Do you know whether Lisa Lewis played any role in approving
23 Beech-Nut's purchase of product from Promotion In Motion?

24 A She should not have.

25 Q All right. Last question on this topic then I'll move on.

1 Do you know whether in October or November of 2008
2 Lisa Lewis voiced an opinion as to whether or not Beech-Nut
3 should continue purchasing product from my client?

4 A I do not, no.

5 Q Yesterday on your direct examination I believe you were
6 talking a little bit about the process whereby product that was
7 on the shelves of Beech-Nut's customers was taken off and
8 withdrawn. Do you recall that testimony?

9 A Yes, I do.

10 Q I don't know if the term "reclamation centers" came out in
11 your testimony. If it did not, would you please tell the jury
12 what a reclamation center is?

13 A A reclamation center is a third party organization,
14 sometimes owned by the retailer, sometimes operated
15 independently. But basically it's a place where whenever you
16 go in a grocery store, a can falls off the shelf, a box gets
17 damaged, all they do is put it into a box and send it back to
18 this reclamation center, and they basically have scanners much
19 like the exit area for a grocery store where they just scan
20 this product. And basically the UPC is linked to the
21 manufacturer, and then it also -- it basically processes that,
22 saying -- and bills back the manufacturer for the cost of that
23 product, and they're scanned in individual boxes because that's
24 the way it comes back from the grocery store.

25 Q Am I correct that the product withdrawn from the retailers'

1 shelves, the Fruit Nibbles we're talking about here, was sent
2 to reclamation centers?

3 A That's correct.

4 Q How much of the product that was sent to reclamation
5 centers was opened up and inspected?

6 A I could not tell you because most -- we don't have access
7 to the reclamation centers nor the product afterwards.

8 Q Do you know if anyone at the reclamation center opened up
9 any case of Fruit Nibbles and inspected it?

10 A I have no idea.

11 Q Fruit nibbles are not the only product sold by Beech-Nut
12 which were sent to reclamation centers in 2008, was it?

13 A That's correct. That's the industry standard for all
14 damages no matter what they are, they go through the
15 reclamation center.

16 Q When you say "damages," does that also include
17 nonconforming product, meaning appearance, smell or taste?

18 A It could, but as a general rule it's damage that's occur at
19 retail.

20 Q Well, was there a damage to the Fruit Nibbles that occurred
21 at retail?

22 A Not that I'm aware of.

23 Q Are you aware of the volume of Beech-Nut product that was
24 taken off shelves and sent to reclamation centers in 2008,
25 other than Fruit Nibbles?

1 A I know we have it. I don't know the volume.

2 Q Did you play any role in assembling the documents that
3 Beech-Nut provided to my client during the discovery aspect of
4 this lawsuit?

5 A Yes.

6 Q You had your deposition taken earlier in this case, did you
7 not?

8 A Yes, I did.

9 Q Do you recall either assembling or directing that two
10 volumes of documents which were previously marked by your
11 client as Exhibit 40 were produced showing product that went to
12 reclamation centers was taken off the shelf?

13 A Yes.

14 Q Have you looked at those documents in advance of this
15 trial?

16 A Not really, no.

17 Q Can you tell the jury whether all of the product that was
18 pulled off the shelf, all the Beech-Nut product that was pulled
19 off the shelf was solely because it was damaged in some way?

20 A What comes off the shelf is directed by the retailer. If
21 you have a withdrawal or a product discontinuance, it also goes
22 to the reclamation center. But the majority of the products
23 coming off the retail shelves are not directed by the
24 manufacturer.

25 Q In this instance, referring to Fruit Nibbles, did Beech-Nut

1 direct the withdrawal or did individual retailers direct the
2 withdrawal?

3 A We -- that was a withdrawal that we directed.

4 Q Were there any other products that Beech-Nut directed there
5 be a withdrawal of in 2008?

6 A A withdrawal or discontinuance?

7 Q Let's start with withdrawal.

8 A Not that I'm aware of, no.

9 Q What's the discontinuance? I'm not familiar with that
10 term.

11 A You launch a new product. It goes out in the marketplace
12 for a period of time, months, years, and after awhile it gets
13 old and stale, so you have to discontinue it and you introduce
14 something else new in its place. It could be in addition to
15 it, but you're also rotating through to see different flavors,
16 different products, and that becomes a discontinuance.

17 Q Are you in a position to tell the jury when -- strike that.

18 Are you in a position to tell this jury what
19 percentage of Beech-Nut product that was taken off a retailer's
20 shelf and sent to a reclamation center in 2008 was either
21 damaged or there was an issue with the product itself?

22 A Well, I guess I'm not following you. If it goes to
23 reclamation, it was either damaged or -- it doesn't come off
24 the shelf because it's good.

25 Q I want to be very clear on what you and I are talking about

1 when we say "damaged."

2 Are you talking about the packaging is broken, the can
3 is dented? What do you mean by "damaged"?

4 A And I apologize, because this is kind of an industry lingo.
5 But "damage" as a retailer is any reason they want to send it
6 back. If it's dusty; if they don't like the color of it. I
7 mean a true statement is, if we change packaging and we change
8 it from a blue box to a red box they will go in and sweep all
9 the blue boxes off and order in all new red boxes because they
10 like it to look better. So "damage" is a word they use for
11 anything being returned, but it may not be damaged.

12 MR. WALLACH: Your Honor, may I approach? I just have
13 one exhibit.

14 THE COURT: Sure you can.

15 MR. DILLON: Your Honor, just for clarity sake, if Mr.
16 Wallach is going to show the witness documents, maybe we should
17 have them marked for identification.

18 THE COURT: Is it marked?

19 MR. WALLACH: I have taken approximately 20 pages out
20 of these two binders produced by Beech-Nut of what they had
21 marked in the Pretrial Order as Exhibit 40 to show to the
22 witness as opposed to going through two binders with him.

23 THE COURT: Just refer to it, that's all, like you
24 just did now, that's all. You referred to it now.

25 Are they individual pages you're going to be asking

1 questions about or are they one document you're going to ask
2 him a question about?

3 MR. WALLACH: It's one document, and I'm going to ask
4 him about one page, as an example.

5 THE COURT: Just mark it for identification, that's
6 all, so we have a record.

7 Ms. Hansen will give you a sticker if you need one.

8 MR. WALLACH: I have a sticker, your Honor.

9 THE COURT: All right.

10 (Counsel confer off the record.)

11 MR. WALLACH: I have marked for identification as
12 PIM-1 a series of documents that were produced by Beech-Nut and
13 marked in the Pretrial Order as Exhibit 40, your Honor. May I
14 hand it to the witness? And I have a copy for the Court.

15 THE COURT: That is the way you're supposed to do it,
16 Mr. Wallach.

17 MR. WALLACH: I was attempting to do it.

18 THE COURT: I don't know why you're asking me in such
19 a way, but that's the way it's supposed to be done.

20 MR. WALLACH: I had an attorney whispering in my ear,
21 your Honor. I'm trying to move this along.

22 THE COURT: Okay.

23 BY MR. WALLACH:

24 Q Mr. Kennedy, you finally have in front of you what we've
25 marked for identification as Promotion In Motion's Exhibit 1,

1 it's a series of reclamation invoices. Do you see this?

2 A Yes.

3 Q Are you familiar with reclamation invoices generally, given
4 your position at Beech-Nut?

5 A Yes, I am.

6 Q If you would turn specifically -- I'm going to refer to the
7 Bates stamp number on the bottom of the page --

8 A Okay.

9 Q -- to BN62678, please. Do you have that in front of you?

10 A Yes, I do.

11 Q This page out of the two binders is an invoice for a return
12 of Beech-Nut goods from Bons, B-o-n-s, Companies. Is that
13 correct?

14 A Yes.

15 Q Is Bons a supermarket?

16 A It's a supermarket chain, yes.

17 Q And do you see -- let's just use one example. Under
18 "Description," it says, Hero preserved apricot.

19 Hero is the parent company of Beech-Nut. Is that
20 correct?

21 A Yes.

22 Q And it indicates 181 units of the apricot preserves were
23 being sent to a reclamation center. Is that correct?

24 A Yes.

25 Q Do you know why the 181 -- I don't know if these are

1 bottles or cans --

2 A They're jars of preserves.

3 Q Do you know if there was a specific problem with these jars
4 that they were taken off the shelf and sent to a reclamation
5 center?

6 A No, I do not, but given the magnitude of it I would
7 probably think it was a discontinuance potentially or a product
8 relaunch; I don't know.

9 Q Is that the same case for the strawberry, raspberry and
10 black cherry product that was also withdrawn?

11 A More -- I didn't say withdrawn.

12 Q I'm sorry, that was my word.

13 With respect to the strawberry, Raspberry and black
14 cherry product that was also taken off the shelf and sent to a
15 reclamation center, do you know if there was a specific issue
16 with those products?

17 A No, I do not.

18 THE COURT: What's the total quantity of those
19 products? Is it 569?

20 MR. WALLACH: On this one page, your Honor, it's 569.

21 THE COURT: The total value is \$1,463. Is that how I
22 read this?

23 MR. WALLACH: That is correct --

24 THE WITNESS: Yes, sir.

25 MR. WALLACH: -- for this page, your Honor.

1 THE COURT: Okay.

2 BY MR. WALLACH:

3 Q Mr. Kennedy, do you know the total dollar amount of product
4 that was sent to reclamation centers in 2008, leaving aside the
5 Fruit Nibbles?

6 A For the entire U.S. or for whom?

7 Q Let's start with the United States.

8 A I do not.

9 Q It's not just this one thousand dollar amount that I was
10 showing you on one page, is it? It's much greater than that,
11 wasn't it?

12 A I'm not -- what is greater than this?

13 Q The Judge asked you a question about the total amount of
14 the product involved on this one sheet of paper, and it's
15 approximately \$1400. Correct?

16 A Correct.

17 Q My question to you is: Beech-Nut had more than \$1400 worth
18 of product taken off the shelves and sent to reclamation
19 centers, did it not?

20 A Absolutely.

21 Q Do you know the total dollar amount?

22 A I do not.

23 Q Do you know of any other contract, other than the one
24 between Beech-Nut and Promotion In Motion, that was terminated
25 in 2008 or 2009 because product was taken off the shelf?

1 A I'm not aware of any, no.

2 Q Did Beech-Nut file an insurance claim as a result of the
3 dispute with Promotion In Motion and the Fruit Nibbles product?

4 MR. DILLON: Objection, your Honor.

5 THE COURT: Sustained.

6 MR. WALLACH: Your Honor, may I approach on this?

7 THE COURT: Go ahead. Let's go.

8 (At the sidebar.)

9 THE COURT: Did they file anything?

10 MR. WALLACH: They did.

11 THE COURT: They filed a claim for what, for the loss
12 sustained with the PIM recall?

13 MR. WALLACH: Yes, correct.

14 MR. WALLACH: And when I deposed Mr. Kennedy several
15 years ago, that claim was still pending. And, your Honor, I
16 submit I'm entitled to find out if the claim has been resolved,
17 if Beech-Nut received any money or not.

18 THE COURT: Okay, okay.

19 MR. WALLACH: That's the reason for the question.

20 THE COURT: What's the objection then?

21 MR. DILLON: Judge, the jury doesn't need to know
22 about the insurance that Beech-Nut has.

23 THE COURT: Well,

24 MR. DILLON: That's a curve ball that's going --

25 THE COURT: What if they came back with an award, and

1 let's say you recovered through insurance a million dollars.

2 MR. DILLON: Then this insurance company is
3 subrogated.

4 THE COURT: What's that?

5 MR. DILLON: The insurance company is subrogated.

6 It's prejudicial for this jury to find out about our
7 insurance situation. I agree it's subject to discovery, but
8 don't tell the jury about it.

9 THE COURT: Well, if they did recover funds, okay,
10 wouldn't the verdict here be molded to give a credit?

11 MR. DILLON: No. The insurance company steps into our
12 shoes.

13 THE COURT: Right.

14 MR. DILLON: They get the money.

15 THE COURT: Okay.

16 MR. DILLON: It's not a credit situation, and that's
17 why I don't want the jury to hear about it.

18 MR. WALLACH: I don't know what the insurance contract
19 says. I will accept counsel's representation, but I don't know
20 the details of the subrogation.

21 THE COURT: Well, if they -- I'm going to reserve on
22 it, but I'm going to sustain the objection now.

23 There was a claim made and moneys were recovered.
24 Correct?

25 MS. KOWALSKI: No.

1 MR. DILLON: No. Still pending.

2 THE COURT: Still pending?

3 MR. DILLON: Because what the insurance does is it
4 sits there and --

5 THE COURT: Relax, Mr. Dillon.

6 MR. DILLON: It sits there and lets you go and spend
7 all the time in getting the money from the defendant, and then
8 they stick in and say okay, you got the money from the
9 defendant, you don't need the money from us.

10 THE COURT: All right. Okay.

11 MR. DILLON: And vice-versa.

12 THE COURT: And if you don't get the money, then you
13 have the claim against the insurance company.

14 All right. I'm going to sustain the objection.

15 (In open court.)

16 THE COURT: Proceed. The objection is sustained.

17 MR. WALLACH: Thank you, your Honor.

18 BY MR. WALLACH:

19 Q Let's focus on Beech-Nut's damage claim here, if we could.

20 As I understand your testimony yesterday -- and I'm
21 going to round off as well so if I have it wrong in any way,
22 please correct me -- Beech-Nut is seeking \$615,000 for product
23 it purchased from Promotion In Motion and paid for. Is that
24 correct?

25 A Correct.

1 Q Originally when you were deposed in this lawsuit, Beech-Nut
2 was seeking more money than that, was it not?

3 A That's correct.

4 Q The difference -- please tell us what the difference is,
5 why that number went down.

6 A Basically because of the -- I'm assuming it's the -- the
7 difference between the two is because the inventory that we had
8 received but not paid for yet.

9 Q Okay. You're referring to the approximately \$132,000 worth
10 of inventory in the four truckloads, or is this a different
11 calculation?

12 A \$350,000. Because it was -- the original request was
13 \$966,000 I believe, less the \$350,000 approximately.

14 Q Well --

15 A I'm doing this from memory, so I'll be...

16 Q I'm trying not to interrupt you. I did that yesterday and
17 I apologize for that.

18 You're correct. So let me ask this question: Does
19 the \$615,000 that Beech-Nut is asking be awarded to it from
20 this jury also include the \$132,000 in the four truckloads that
21 was discussed yesterday where Beech-Nut agreed to assume all
22 liability?

23 A Potentially, yes, you could take that number -- because we
24 took that number --if you remember the chart, we took the
25 number off the bottom, we did not take it off a specific

1 category. So if you want to assign it to there, that's fine.

2 Q So it's out of there at least. Correct? The 130,000 is
3 not being sought from my client regardless of which line item
4 that would be attributed to. Is that a fair statement?

5 A Yes. That was the number at the bottom.

6 Q You also talked about lost products, and I believe the
7 final number you came up with was \$938,000.

8 A That's correct.

9 Q Where in your testimony does Beech-Nut take out the lost
10 profits on the \$132,000 worth of cases that I keep referring to
11 were represented by the four truckloads?

12 A Off the top of my head, potentially we may have missed
13 that.

14 Q If I understood your testimony correctly, was Beech-Nut
15 projecting a 40 percent profit margin on each case of Fruit
16 Nibbles?

17 A Based -- well, I don't know about the percentages. \$4.60,
18 yes.

19 Q Let's say approximately 40 percent profit margin. Is that
20 a fair statement or is there a different number you want to
21 use?

22 A I can't speak off the top of my head, I don't recall the --
23 if you're talking about percentages, it has to be based upon
24 your sales number.

25 Q Were the \$132,000 worth of Fruit Nibbles that Beech-Nut

1 took from my client in October of 2008 sold to third parties?

2 A I have no idea.

3 Q But you can't tell the jury whether whatever the profit
4 margin may have been on those four truckloads, that it was
5 taken out of the money being sought here today. Correct?

6 A Correct.

7 Q Did Beech-Nut pay my client for all the product it
8 received?

9 A That would be no, because that's the \$350,000 we took off
10 the 966.

11 Q So for the product that Beech-Nut received from my client
12 but did not pay, are you or are you not seeking lost profits on
13 that 300 some odd thousand dollar amount?

14 A We are seeking profits.

15 Q Even though you didn't pay the cost of the product.
16 Correct?

17 A That wouldn't have mattered, because had it been good
18 product and we sold it, we would have collected that money from
19 the customers, including profit, and that money would have been
20 remitted back to pay off those invoices. So at the end of the
21 day, whether we paid you or not makes no difference on whether
22 we should be entitled to the profit from it.

23 Q Does Beech-Nut sell every unit of product it puts out on
24 the shelf?

25 A I hope it does.

1 Q Well, what about the returns that we were talking about
2 earlier?

3 A The cost of doing business.

4 Q The cost of doing business reduces your profit margin as
5 well, does it?

6 A But that's built into it. That is built into the equation
7 we put together in the \$4.60 per unit.

8 Q The four -- I'm sorry -- \$4.67?

9 A Six zero; \$4.60.

10 Q The \$4.60 per unit profit margin that you're testifying
11 about, is that based upon looking back at actual sales and
12 figuring out a net amount after costs are taken out, or is that
13 based upon a projection?

14 A It was based upon a projection which tracked fairly
15 accurately to what little performance we did have. Because of
16 it being -- the difference between a plan that doesn't have
17 manufactured goods versus purchase goods, the purchase price is
18 set. The biggest variable you have is the cost of goods you're
19 selling. And that was a purchase price coming from PIM, so the
20 performance of the product was pretty much in line with that.

21 Q 100 percent or pretty much in line?

22 A Nothing is 100 percent.

23 Q How much was the deviation off a hundred percent?

24 A I don't recall.

25 Q Did you ever calculate that deviation?

1 A I'm sure we have. We track things like this regularly.
2 The difference here is normally we track them a lot longer and
3 have a better reading of it, but it was such a short period of
4 time we never got an accurate read on the final version of it.
5 Most of the information coming back was clouded with
6 reclamation charges and everything else going on that were not
7 considered normal.

8 Q Another category of damages that's being requested is for
9 marketing support. This is approximately \$17,000.

10 A Yes.

11 Q You're familiar with that. Correct?

12 A Yes.

13 Q You didn't create this calculation, someone else did. Is
14 that correct?

15 A That's correct.

16 Q Do you know whether any aspect of the \$17,000 in marketing
17 support acknowledges that \$132,000 worth of product was
18 accepted by Beech-Nut and my client was held harmless for it?

19 A I'm not sure I follow that logic.

20 Q Well, as I follow your testimony, Beech-Nut is saying,
21 we're entitled to this -- and I know you rounded it off --
22 Beech-Nut is entitled to the entire \$17,000 in damages from
23 Promotion In Motion because we were not able to sell the
24 product, and this was our pro rata cost for marketing support.

25 Is that a fair summary of your testimony?

1 A That's correct.

2 Q But you took \$132,000 worth of my client's product and
3 said, we hold you harmless, we make no claim against it.

4 So wasn't there a benefit to Beech-Nut in those 10,000
5 cases?

6 A No, because with marketing, like a lot of these expenses,
7 it's kind of an on/off switch. Either you use it or you don't
8 use it. If you use it for more than one, two, it works. But
9 this one doesn't because pro rata sharing makes no sense.

10 If you run an advertisement out there and the product
11 is not on the shelf -- because you have to book this stuff way
12 in advance. So basically when you run this ad and your ad
13 shows a picture of your Fruit Nibbles and there's nothing on
14 the shelves six months later, what do you do with it? It
15 doesn't matter if I'm short 10,000 cases or not.

16 Q At least 10,000 cases were on the shelves. Correct?

17 A No. I mean, I don't know when these ads were run but the
18 ads could have been run back in June, July the following year.
19 when -- you know, you don't run the ads when you do your
20 initial launch, you run them subsequently.

21 So basically there's a very good chance that by the
22 time that ad runs or that marketing was utilized there was
23 nothing on the shelf and it could potentially have even had a
24 picture of the product there.

25 Q I'm trying to follow this.

1 You're saying that Beech-Nut pays for marketing that
2 runs months after the product is launched. Is that what you
3 said when you were referring to June of the following year?

4 A You traditionally do not run your marketing initially when
5 you're shipping it because it takes time to get -- I want to
6 get what they call all commodities value, ACV. You want to get
7 distribution throughout the company.

8 I mean, there's nothing worse than getting a coupon or
9 seeing an ad for a new product and you go to your store and you
10 go, well, it's not here. And you go to the manager and the
11 manager says, I don't know what's going on. Corporate didn't
12 send it down.

13 Q So the marketing expense that you're referring to may have
14 been incurred at some point in 2008, but consumers weren't
15 seeing --

16 A No, it was incurred probably subsequent to the Fruit
17 Nibbles coming back.

18 Q Okay. So it's incurred subsequent to the Fruit Nibbles
19 coming back. So that's the end of 2008 and into 2009.
20 Correct?

21 A No. It -- I don't know specifically when it was, but based
22 upon the way we generally do things, we probably would have run
23 advertising on the launch in Q1, Q2 of 2009. Because that's
24 when -- by that point you've got distribution on all your
25 products, it's out there at retail and you're not going to make

1 the consumers unhappy by not having it on the shelves.

2 Q You've told us that the 17,000 is a pro rata figure.

3 A Correct.

4 Q The calculator doesn't get you to an exact number on this
5 one, does it?

6 A Well, actually I believe, if memory serves me on this one,
7 it was done -- there were 19 products in the launch, we took
8 two 19s on it if I believe I'm correct.

9 Q The other products were still being sold first quarter,
10 second quarter of 2009, were they not?

11 A Correct.

12 Q The first and second quarter of 2009 is when this marketing
13 is being presented to consumers, is it not?

14 A Correct.

15 Q The marketing for the 17 other products would have been an
16 expense incurred by Beech-Nut whether or not Fruit Nibbles was
17 launched in August of 2008. Correct?

18 A Correct. But more than likely that cost would have been
19 less.

20 Q How much less?

21 A Probably a pro rata share, two 19ths less, in my opinion.

22 Q Do you have specific experience with how a company
23 allocates marketing costs when 19 products are being launched?

24 A For the company, yes, I have specific -- that's the way we
25 do it, based upon units or sales. There's always an allocation

1 method. So, yes, I do.

2 Q I'm asking a different question. I'm not asking about the
3 math of how you divide 19 products into the total marketing
4 cost. Can you tell the jury how much of the marketing was
5 specific to Fruit Nibbles?

6 A No, I cannot.

7 Q The other products benefited from this marketing expense,
8 did they not?

9 A They did, but we paid for it, too.

10 Q I asked you earlier about lost profits, and I want to come
11 back to that.

12 Beech-Nut is seeking lost profits here. But isn't
13 marketing cost an aspect of what goes into your profits?

14 A Yes, sir, it is.

15 Q So you're asking for both the lost profits and this cost as
16 well. Shouldn't you be taking out the marketing cost to
17 calculate lost profits?

18 A Potentially there could be a little bit of an overlap,
19 you're correct, because this was specific marketing rates
20 versus a generic average.

21 Q If my notes are correct, approximately \$591,000 is being
22 sought for the return cost, taking the product off the shelf
23 and sending it to the reclamation center as we've been talking
24 about. Is that correct?

25 A Yes, sir.

1 Q Do you know whether any aspect of the 10,000 cases is
2 included in this damage component?

3 A I'm not sure I follow. Because it shouldn't be because I
4 believe we took it off the inventory. So you can only take the
5 cost away once.

6 Q Is there a document that you can direct me to that shows
7 that the \$136,000 in cases we're talking about was taken off an
8 inventory list and therefore it's not included in the \$591,000
9 being sought for these damages?

10 A No, we just did the math on that large chart at the bottom
11 of it. You're talking about the 10,000 cases from the -- we
12 took the liability for?

13 Q Well, you told the jury earlier this morning that you
14 believe the bottom of the chart, the hundred -- I think we were
15 using --

16 A 132.

17 Q 132,000, thank you. That the \$132,000 comes off the bottom
18 figure. Correct?

19 A Correct.

20 Q I'm asking a slightly different question. Whether the
21 \$132,000 and the 10,000 cases that represents was also backed
22 out of the \$591,000, the cost of removing product.

23 A You would not -- you can only take it off of one location.
24 So either you make a broad assumption it's in inventory, you
25 make a broad assumption it went out and then you -- so you take

1 it away from one but you don't take it away from both.

2 So to answer your question, no, we did not take it
3 away from that piece of it because we took it away from the
4 inventory.

5 Q I'll come back to my question.

6 Apart from the summary document, are you aware of any
7 specific document that confirms the \$132,000 was taken off an
8 inventory sheet?

9 A No.

10 Q Who actually calculated the return policy in taking product
11 off the shelf and sending it to the reclamation centers?

12 A We had our finance team, it's a group of people, and we
13 gave the direction to various individuals to go through the
14 reclamation charges, sift through I guess it would be thousands
15 of pages looking for anywhere that we had Fruit Nibbles.

16 Q When Fruit Nibbles were sent to a reclamation center, do
17 you know if they were the only item in the truck, or were there
18 other products as well?

19 A I'm sure there were other products.

20 Q Do you know whether there's an allocation of the shipping
21 cost done in the situation where it may be Fruit Nibbles,
22 apricots, strawberries, or any of the other items that were
23 taken off the shelf and sent to a reclamation center?

24 A I don't believe they charged us back the shipping charges.
25 As far as I recall, when it comes back from the retailer to the

1 reclamation center, that's done on trucks usually dead-heading
2 back, they're coming back empty. So, and I look at an invoice,
3 I don't see that. But I'm sure there's a methodology how they
4 get recouped for it.

5 Q Do you know what that methodology is?

6 A I do not.

7 Q Rather than talking about shipping charges, let me ask
8 about handling charges.

9 Are those typically standard in dealing with
10 reclamation centers?

11 A The reclamation centers traditionally charge a fee based
12 upon -- each retailer does it differently. It's either a
13 percentage or a flat fee by case, or something specifically,
14 yes.

15 Q So focusing on handling charges, do you know whether
16 handling charges were allocated specifically to Fruit Nibbles
17 cases as opposed to any other case that was sent to a
18 reclamation center?

19 A The general assumption would be that we would go through an
20 allocation. So if they were charging X percent of the dollars
21 on the invoice, then we would take that pro rata share of the
22 Fruit Nibbles portion of it, if we did it. Probably -- I think
23 there's probably a couple of times they probably forget to do
24 that part.

25 I mean, in this whole thing we're trying to be as fair

1 as possible for what we're doing here, because it's just trying
2 to get back our money.

3 Q Mr. Kennedy, I'm trying to ask how complete the process
4 was, not whether or not it was fair. Do you understand that?

5 A Yes, sir.

6 Q Another category of damages, I'm going to refer to it as
7 the cost for shelf space. I believe you referred to this as
8 "slotting." That's the industry term?

9 A Yes, sir.

10 Q And Beech-Nut is seeking approximately \$78,000 in that
11 respect. Correct?

12 A Yes, sir.

13 Q Do you know whether any sales of Fruit Nibbles were made by
14 Beech-Nut's retailers at the Walmarts, the Bobs, to actual
15 consumers?

16 A Specifically I don't know but I think I know Walmart is
17 probably one of our customers, yes.

18 Q So you believe that Walmart -- I'll ask it this way: Is it
19 your belief that consumers went into Walmarts, purchased the
20 Fruit Nibbles, gave Walmart the money, and then went home?

21 A I would hope they did, yes.

22 Q I'm sure everyone would hope they paid Walmart. But that
23 must have happened in order for consumers to have voiced their
24 complaints. Correct?

25 A I'm not -- the customers went to a retail grocer and bought

1 the products, yes.

2 Q How much money (sic) was purchased by consumers at retail
3 centers?

4 A I do not know.

5 Q In order for a consumer -- and I'm going stay with Wallach
6 as an example. In order for a consumer to buy Fruit Nibbles at
7 Walmart, they had to be on the shelf. Correct?

8 A That's correct.

9 Q So there was some benefit to Beech-Nut in paying this
10 slotting charge, was there not?

11 A Yes, but that charge is for a period of time.

12 Q Have you calculated how many bags or cases of Fruit Nibbles
13 were purchased by consumers and over what period of time?

14 A No.

15 Q Let's stay with the time, because I understand your
16 testimony, companies such as Beech-Nut have to pay the
17 supermarkets -- I don't believe it's Walmart -- but
18 supermarkets the slotting fee in order to have the right to
19 sell their product. Correct?

20 A Yes.

21 Q This is an expense that Beech-Nut incurred for all 19 of
22 the "Let's Grow" products. Correct?

23 A That's correct.

24 Q What Beech-Nut has done here, as I understand your
25 testimony, is calculate the pro rata cost of this slotting for

1 Fruit Nibbles and that's how it's arrived at its damage claim.

2 Is that correct?

3 A That's correct.

4 Q You haven't calculated how much product was sold to
5 consumers. We just established that. Correct?

6 A Correct.

7 Q You don't know over what time period the product was on the
8 shelf and sold to consumers, do you?

9 A I do not.

10 Q Once the Fruit Nibbles were removed from the shelves in
11 December of 2008, how much more time, if you know, did this
12 slotting contract exist for?

13 A I don't know. Most retailers, once the space is empty for
14 a brief period of time, they will then close it up.

15 Q I'm not following you. When you say "close it up" --

16 A There's literally -- or figuratively -- or literally a
17 space on the shelf for the product. And if that -- and if you
18 go into a grocery retailer and you see empty spots as a
19 consumer, you wonder what's going on. They don't last too long
20 because retailers don't like to have that empty space.

21 Q I'm not familiar with seeing empty spaces in supermarkets.

22 Did anyone at Beech-Nut ask Kroger, one of your third
23 parties here, can we use the space that had been allocated for
24 Fruit Nibbles to sell and supply any of our other "Let's Grow"
25 products?

1 A I don't know if they specifically asked Kroger, but we ask
2 that all the time and retailers will not. That's how they make
3 money.

4 Q I'm going to broaden it past Kroger.

5 Please tell us which retailers that had been
6 displaying Fruit Nibbles in 2008 Beech-Nut asked, after
7 December of 2008, to use that now vacated space to sell other
8 Beech-Nut product.

9 A I have no specific knowledge of that.

10 Q Do you know if any effort was even made?

11 A I don't know.

12 Q I think one of the final components of the damage claimed
13 here is approximately \$88,000 for returned and unshipped
14 product that was stored either at a Beech-Nut warehouse or a
15 third party warehouse.

16 Do you need some water, sir?

17 A No, I'm fine.

18 Q Do you want me to repeat the question?

19 A Please. I'm sorry.

20 Q All right. I understand that another component of
21 Beech-Nut's damage claim here is approximately \$88,000 for
22 storing returned or unshipped product that was either stored in
23 a Beech-Nut warehouse or a third party warehouse at Beech-Nut's
24 direction. Is that correct?

25 A Yes.

1 Q And this is storage cost for the product that Beech-Nut
2 maintains could not be sold to consumers. Correct?

3 A Correct.

4 Q You testified that the product has been held for
5 approximately four years now?

6 A That's correct.

7 Q Who determined how much of the product had to be retained?

8 A Well, I mean we basically had asked PIM if they would like
9 it back or want it destroyed, and they declined to answer.
10 There was no answer concerning that. And we -- we thought that
11 it would be important to have it. I mean, it was basically not
12 ours to throw away.

13 Q Let me ask you to limit this question to a "yes" or "no" if
14 you would, please. Does Beech-Nut have an opinion from legal
15 counsel as to how long the product had to be retained?

16 A Yes.

17 Q When did Beech-Nut receive this legal opinion?

18 A Each time we asked if PIM would like -- if we could get
19 permission to destroy it from PIM.

20 Q Are you aware of any request or application made by
21 Beech-Nut to the Court seeking guidance as to how much product
22 had to be retained or how long it had to be retained?

23 A I'm not aware of anything.

24 Q The product that has been held for the last four years has
25 never been inspected by Beech-Nut, has it?

1 A No, it has not.

2 Q Is any of that product here in the courtroom today?

3 A Not that I'm aware of, no.

4 MR. WALLACH: Your Honor, could I just have one
5 moment, please?

6 THE COURT: Sure.

7 (There is a pause for Mr. Wallach.)

8 MR. WALLACH: Thank you, Mr. Kennedy.

9 Your Honor, I have no further questions.

10 THE COURT: Okay. Redirect?

11 MR. DILLON: Just a little, your Honor.

12 REDIRECT EXAMINATION

13 BY MR. DILLON:

14 Q Mr. Kennedy, you were asked about the 10,000 cases and
15 whether you had included an adjustment for the lost profit
16 attributable to the 10,000 cases, and you said "no" I believe.

17 That was your testimony. That you had not included a
18 lost profit component on the 10,000 cases.

19 A Okay.

20 Q All right. Using the figure of \$4.60 per case, what was
21 the lost profit attributable to the 10,000 cases?

22 A (Utilizing calculator) Let me just double-check.

23 \$46,000.

24 Q Is it fair to subtract -- you said you wanted to do the
25 fair thing -- is it fair to subtract that amount from the total

1 claim made by Beech-Nut?

2 A Yes, it is.

3 Q And how much was that?

4 A 46,000.

5 Q So subtracting 46,000 from 2,222,000 leaves us with a new
6 net claim number of, what?

7 A 2,222,000.

8 MR. DILLON: Your Honor, as I've asked the witness for
9 the numbers, I've acted as a scribe and written the numbers
10 onto Beech-Nut Exhibit 13.

11 THE COURT: All right. The record will so reflect
12 that.

13 MR. DILLON: No further questions.

14 THE COURT: Thank you.

15 Any --

16 MR. WALLACH: No, your Honor.

17 THE COURT: Okay. You can step down, Mr. Kennedy.
18 Thank you.

19 (Witness excused.)

20 THE WITNESS: Thank you.

21 THE COURT: Mr. Dillon.

22 MS. KOWALSKI: I would like to call our next witness,
23 Diane Bianchini.

24 THE COURT: Okay.

25

1 D I A N E B I A N C H I N I, called as a witness, having been
2 first duly sworn, is examined and testifies as follows:

3

4 THE DEPUTY CLERK: Please state and spell your name
5 for the record.

6 THE WITNESS: Diane Bianchini. D-i-a-n-e;
7 B-i-a-n-c-h-i-n-i.

8 THE DEPUTY CLERK: Thank you. You may be seated,
9 ma'am.

10 THE COURT: You can proceed.

11 MS. KOWALSKI: Thank you, your Honor.

12 DIRECT EXAMINATION

13 BY MS. KOWALSKI:

14 Q Good morning, Ms. Bianchini.

15 Just as preliminary matter: You are here today
16 because Beech-Nut served you a subpoena?

17 A That's correct.

18 Q Ms. Bianchini, would you please summarize for the jury your
19 educational background?

20 A I have an engineering degree from Purdue University and a
21 Masters in Fruit Science from Washington State University.

22 Q What year did you receive your BS in engineering from
23 Purdue?

24 A 1981.

25 Q What year did you receive your masters in fruit science

1 from Washington University?

2 A 1983.

3 Q Would you please summarize your work experience for the
4 jury after you graduated from Washington State University in
5 1983, telling the jury what companies you worked for, what
6 years you worked for each company, and the titles you held, and
7 your principal responsibilities?

8 A Immediately I worked for Ramsey Labs. So that would be '83
9 to 1985, I was manager of technical services; then I went to
10 Beatrice Hunt Wesson where I was a senior scientist, and I was
11 there until 1988. And then I took some time off. I worked for
12 Colgate Palmolive in -- I forget when; and then I went to WA
13 Cleary, and I was -- I forget when I started there; and then
14 '08, in 2008 I went to PIM Brands, and I left there in 2009.

15 Q And what titles in running through list of companies that
16 you worked for, what titles did you hold?

17 A I was manager of technical services at Ramsey Labs, senior
18 scientist at Beatrice Hunt Wesson; scientist at Colgate
19 Palmolive; with WA Cleary it was a small business, there was no
20 titles, I was -- I ran the QC and R&D department, and I was QC
21 and R&D manager at PIM Brands.

22 Q For the jury, can you tell me -- tell us what QC and R&D
23 stands for?

24 A QC stand for quality control, R&D stands for research and
25 development.

1 Q And what were your principal responsibilities as you served
2 as the QC and R&D managers for the companies prior PIM?

3 A As a QC manager you're in charge of the quality of the
4 product. As the ingredients comes in, you inspect them and
5 make sure that they're good, the quality of the production, the
6 cleanliness of the plant, and the quality of the product as it
7 leaves the door.

8 Research and development, it depends a little bit on
9 how the company works, but the customer or internally, they
10 decide they want a new product, so you come up with a new
11 product, or you take an existing product and change it
12 slightly.

13 Q Ms. Bianchini, are you currently employed?

14 A No.

15 Q Are you retired?

16 A Yes.

17 Q I believe you mentioned that you were employed by PIM from
18 2008 to 2009. Correct?

19 A Yes.

20 Q When did you start your employment with PIM?

21 A In June of 2008.

22 Q And what month in 2009 did you leave PIM?

23 A I think it was June.

24 Q And what was your title at PIM?

25 A I think it was QC and R&D manager.

1 Q And you've previously just described the responsibilities
2 that you had as a QC and R&D manager. Could you describe what
3 your principal responsibilities were as that manager for PIM?

4 A Quality control.

5 Q And what were your specific responsibilities? For example,
6 what did you do on a daily basis?

7 A I was in charge of the quality control department. So when
8 ingredients came in, the people that worked for me inspected
9 them and approved them, or not approved them as the case may
10 be. We were in charge of the production, the quality of the
11 production, making sure that it met our standards, the
12 cleanliness of the plants, and then the cleanliness of the
13 trucks that took the product away.

14 Q And were there other responsibilities as far as research
15 and development manager that were under your title?

16 A I could tweak product formulations and stuff like that.

17 Q How qualified were you to be a QC and R&D manager at PIM?

18 A I think very good.

19 Q Why do you say that?

20 A I'm good at it.

21 Q What products were you responsible for while you were
22 working at PIM?

23 A We made Welch's Fruit Snacks, produced them at the plant,
24 and Beech-Nut Fruit Nibbles, and then we packaged some products
25 that were produced at another plant and packaged those for

1 sale. And those were very numerous.

2 Q What were your responsibilities with respect to the Fruit
3 Nibbles product?

4 A The same as with Welch's.

5 Q And what do you for Welch's?

6 A I was the head of the quality department.

7 Q Who did you report to while you worked at PIM?

8 A Bassant Dwivedi.

9 Q And who is Basant Dwivedi?

10 A He was -- is the COO.

11 Q And for the jury, do you recall what "COO" stood for?

12 A Chief Operating Officer.

13 Q Did Beech-Nut ever call or reach out to PIM to discuss the
14 problems with the Fruit Nibbles fruit product that it was
15 receiving from PIM?

16 A Yes.

17 Q Were you one of the people at PIM who Beech-Nut contacted
18 about the type of product they were receiving?

19 A Yes.

20 Q And do you recall who at Beech-Nut reached out to you?

21 A I don't know if I remember everyone.

22 Q Do any names as you're sitting here today come to mind?

23 A Marybeth Cool, and I think there was an Allen.

24 Q How many times do you recall that perhaps Ms. Cool or Ms.
25 Allen reached out to you to discuss problems with the Fruit

1 Nibbles product that Beech-Nut was receiving from PIM?

2 A Please repeat that.

3 Q Sure. How many times did Ms. Cool or Ms. Allen reach out
4 to you to discuss the problems with the Fruit Nibbles product
5 that Beech-Nut was receiving from PIM?

6 A I don't remember.

7 Q Was it more than once?

8 A Yes.

9 Q While you were employed by PIM, did PIM retain samples of
10 the product that it sold to its customers?

11 A Yes.

12 Q Why did PIM retain sample product?

13 A That's standard operating procedure, that you always in a
14 food plant retain samples of lots, batches, so that if there's
15 a problem we can go back and check.

16 Q Did PIM retain samples of the Fruit Nibbles product that it
17 sold to Beech-Nut?

18 A Yes.

19 Q I believe you have an exhibit book in front of you --

20 A Okay.

21 Q -- on the stand. Would you please turn to the document in
22 the exhibit book marked Beech-Nut Exhibit 2 for identification.

23 Do you have that document in front of you now?

24 A Yes.

25 Q What is it?

1 A It's an e-mail from Susan Allen to me.

2 Q And what date is on that e-mail?

3 A September 23rd, 2008.

4 Q Who does Susan Allen work for?

5 A I beg your pardon?

6 Q Who does Susan Allen work for?

7 A Beech-Nut.

8 MS. KOWALSKI: I'd now like to offer into evidence
9 Beech-Nut Exhibit 2, your Honor.

10 MR. WALLACH: No objection, your Honor.

11 THE COURT: All right. It's in evidence then.

12 (Beech-Nut Exhibit 2 is received in evidence.)

13 Q Ms. Bianchini, can you please summarize for the jury what
14 Susan Allen is telling you in this e-mail?

15 A She said that one product is more tough and chewy. She was
16 wondering if we measured texture. Then there was another
17 product code that only had five pouches as opposed to six.

18 Q Do you see in the document under the number 1 the third
19 sentence, it starts with the word "seems"?

20 A Yes.

21 Q Can you please read that to the jury, or read it out loud,
22 please.

23 A (Reading) Seems like it would be more difficult for a
24 toddler, perhaps some to the point of choking hazard.

25 Q Do you recall receiving this e-mail and that statement?

1 A Do I recall it? Do I remember --

2 Q Yes, do you remember --

3 A That -- no.

4 Q Did you do anything in regards to --

5 THE COURT: Does seeing this now refresh your
6 recollection that you received it?

7 THE WITNESS: Oh, yeah. Okay.

8 THE COURT: Okay.

9 Q Do you recall after receiving this e-mail if you had done
10 anything in particular?

11 A What we would typically do is then pull our samples that
12 matched those codes and review them to whether we got the same
13 results.

14 Q Did Susan Allen identify particular lot codes in this
15 e-mail?

16 A If I remember right, yes.

17 Q And what are the particular lot codes she's identifying
18 here?

19 A Well, the 8917 and 8918 would tell you -- and I forget how
20 to read them. The code dates, but it's telling you a code
21 date.

22 Q And did you pull the samples retained by PIM from the
23 product identified by Ms. Allen?

24 A Yes, I'm sure we did.

25 Q What did you find when you pulled the same Fruit Nibbles

1 product that PIM's own -- from PIM's own retained samples?

2 A I think we found the same results.

3 Q I'd just like to --

4 (Ms. Kowalski confers with Mr. Dillon off the record.)

5 Q PIM's control samples that had never left PIM's premises
6 had the same problems that Beech-Nut was reporting with Fruit
7 Nibbles products sold to PIM. Is that correct?

8 A I think so, yes.

9 Q Is Exhibit 2 that you have before you, the e-mail from Ms.
10 Allen, is that an example of the type of feedback PIM was
11 getting from Beech-Nut regarding the Fruit Nibbles product?

12 A Yes.

13 Q Who did you speak to, if anyone, at PIM internally about
14 the quality problems Beech-Nut was reporting with the Fruit
15 Nibbles product?

16 A Basant and Frank.

17 Q And that would have been Basant Dwivedi that you had
18 mentioned earlier?

19 A Yes.

20 Q The COO.

21 How many times did you talk or e-mail with Mr. Dwivedi
22 discussing quality problems with the Fruit Nibbles product that
23 PIM was producing?

24 A I don't remember how many.

25 Q More than once?

1 A Yes.

2 Q Ms. Bianchini, can you please turn in the exhibit book to
3 the document marked Beech-Nut Exhibit 4. Do you recognize this
4 document?

5 A Yes.

6 Q What is this document?

7 A It's an e-mail from me to Basant.

8 Q What date is on the document?

9 A October 4th.

10 Q And does it include a chain of correspondence?

11 A Yes.

12 Q Who sent the first e-mail?

13 A I did.

14 Q And who did you send it to?

15 A Basant.

16 Q Anyone else?

17 A No. Oh, I guess I did. Wait a minute. I did. Frank --

18 THE COURT: Just a moment. Am I reading this correct?
19 Exhibit 4, there's an e-mail from Basant to Ms. Bianchini.
20 Right?

21 MS. KOWALSKI: Correct, your Honor.

22 THE COURT: There's two e-mails.

23 MS. KOWALSKI: There's two e-mails on the same page.

24 THE COURT: So which one are you referring to?

25 MS. KOWALSKI: I'm referring to the first one in the

1 chain which would be the e-mail on the bottom half of the
2 document.

3 THE COURT: And you're not referring to the first one,
4 the top one?

5 MS. KOWALSKI: I was going to get to that one.

6 THE COURT: Okay. All right.

7 BY MS. KOWALSKI:

8 Q As I believe you said, you sent the first e-mail. Is that
9 correct?

10 A Yes.

11 Q And what date did you send that e-mail?

12 A Saturday, October 4th.

13 Q Why did you write this e-mail to your boss?

14 A I was concerned about the product.

15 Q Can you please read the e-mail in full to the jury that you
16 wrote?

17 A (Reading) I believe we are making a serious mistake
18 continuing to ship Beech-Nut product produced with white grape
19 juice concentrate. We all know the only reason the product in
20 our warehouse had an acceptable appearance is that it's less
21 than two weeks old. The flavor and smell were already not to
22 standard. In a very short time that product will taste and
23 smell bad and appear ugly.

24 In my opinion, if that product reaches the marketplace
25 the complaints will be astronomical. I feel we should recall

1 all product produced with white grape juice concentrate before
2 it destroys ours and Beech-Nut's reputations. Should we
3 discuss this with Michael in our meetings on Tuesday?

4 Q Thank you.

5 What was Mr. Dwivedi's response to your e-mail? Can
6 you please read that in full to the jury?

7 A (Reading) It may sound simple, but it is not. Our failure
8 to detect the problem sooner may end up costing us over a
9 million dollars. I wish we had a million dollars to give
10 Beech-Nut for recalling the product, but we don't. Michael is
11 aware of the situation. By bringing it up again will only
12 anger him about our incompetence.

13 MS. KOWALSKI: Your Honor, I'd now like to offer
14 Exhibit 4 into evidence.

15 THE COURT: All right. It's in evidence.

16 (Beech-Nut Exhibit 4 is received in evidence.)

17 MS. KOWALSKI: Thank you.

18 (Ms. Kowalski confers with Mr. Dillon off the record.)

19 Q Ms. Bianchini, you refer to a Michael -- I'm sorry --
20 actually Mr. Basant refers to a Michael in his response to you.
21 Do you see that?

22 A Yes.

23 Q Who is Michael?

24 A Michael Rosenberg, the president of the company.

25 Q He was the president of the company in 2008?

1 A Yes.

2 Q Is he still -- do you know if he's still the president of
3 the company?

4 A I don't know.

5 Q Did PIM ever correct the problems with the Fruit Nibbles
6 product?

7 A Not while I was there.

8 Q As the manager for QC and R&D in 2008, what was your
9 opinion about whether PIM made a product that met continuously
10 with Beech-Nut's specifications?

11 A Say that again, please.

12 Q As the manager for QC and R&D in 2008 for PIM, what was
13 your opinion about whether PIM made a product that met
14 continuously with Beech-Nut's specifications?

15 A I -- I -- I don't think we did.

16 Q While you worked in the food industry, did you refer to
17 products -- do you refer to products as "stable"?

18 A Yes.

19 Q What does it mean to say that a product is "stable"?

20 A It does not change within a period of time.

21 Q As the manager of QC and R&D in 2008 for PIM, was it your
22 opinion -- what was your opinion about whether PIM ever
23 produced a stable product, a stable Fruit Nibbles product?

24 A I don't think it was stable.

25 Q Did you become aware that Beech-Nut withdrew the Fruit

1 Nibbles product from the market?

2 A Yes.

3 Q What was your reaction to Beech-Nut's decision to withdraw
4 the Fruit Nibbles product from the market?

5 A I wasn't surprised.

6 Q Did you agree with Beech-Nut's decision to pull the Fruit
7 Nibbles product from the market?

8 A Yes.

9 Q Why did you have that reaction?

10 A I don't think the product was stable, and it wasn't -- I
11 didn't feel what the customer bought was what we made.

12 MS. KOWALSKI: I'd like to approach the witness, your
13 Honor, with her deposition transcript.

14 THE COURT: You may.

15 (There is a pause for Ms. Kowalski.)

16 (Counsel confer off the record.)

17 Q Ms. Bianchini, can you please turn to page 166 of your
18 deposition.

19 MR. WALLACH: Your Honor, may I respectfully interrupt
20 and object for a moment. I'm not sure the purpose of showing
21 the deposition transcript. It's not a matter of refreshing
22 recollection.

23 THE COURT: Let's see what the question is.

24 Let me hear the question and -- you're referring to
25 page 166?

1 MS. KOWALSKI: Yes, your Honor.

2 THE COURT: Hold on a second.

3 BY MR. KOWALSKI:

4 Q If you look at line -- page 166, line 17.

5 THE COURT: Go ahead.

6 Q The question:

7 (Reading) Were you aware of the decision by Beech-Nut
8 to pull Fruit Nibbles from the market.

9 You had answered "yes."

10 And I asked you in line 21: (Reading) When did you
11 become aware that decision had been made?

12 And you said, "I don't remember."

13 "QUESTION: Did you agree with the Beech-Nut's
14 decision to pull the Fruit Nibbles?

15 "Yes.

16 "QUESTION: Why did you agree --

17 MR. WALLACH: Your Honor, this is where I renew my
18 objection.

19 THE COURT: The objection is sustained. She's
20 consistent.

21 What are you offering this for? She testified that
22 she agreed with that decision. Correct?

23 MS. KOWALSKI: The question I'm asking her, your
24 Honor, is why she agreed with that.

25 THE COURT: Then ask her the question. What do you

1 need the deposition for?

2 BY MS. KOWALSKI

3 Q Why did you agree with the decision for Beech-Nut to pull
4 the product --

5 THE COURT: I'll allow it, overruled.

6 MR. WALLACH: Your Honor, the witness has now had the
7 benefit of reading a deposition transcript.

8 THE COURT: It's all right, Mr. Wallach. I think she
9 already testified she agreed with the decision to withdraw. I
10 think she's already testified to that.

11 Now you're asking her why did she agree?

12 MS. KOWALSKI: Yes.

13 Q Why did you agree --

14 THE COURT: I'll allow it.

15 Q Why did you agree, Ms. Bianchini, to have the Beech-Nut
16 product pulled from the market?

17 A I didn't think the product was good.

18 Q Would you have fed the product to your own children?

19 A No.

20 Q What is meant with the weight problem -- what is meant with
21 the weight problem with the product?

22 A Each pouch has and standard weight, and it's plus or minus
23 a little bit because you cannot get 25 grams exactly in each
24 pouch. And then each case is supposed to contain the six
25 pouches with that, plus or minus. That's the weight of the

1 case. You can have problems two ways: One is, each pouch is
2 off which throws the weight of the case off; or you only have
3 five pouches in the case, or seven pouches in a case.

4 Q Was there also a weight problem with the Fruit Nibbles
5 product?

6 A Yes.

7 Q What was the weight problem?

8 A Not six cases -- not six pouches in a case.

9 Q Can you please turn to Beech-Nut Exhibit 5.

10 What is this document?

11 A An e-mail from me to Basant and copied Frank and Margarita
12 and Charles.

13 Q And do Margarita and Charles also work for PIM?

14 A They did then.

15 Q And what is the date of this e-mail?

16 A November 13th.

17 Q Of 2008?

18 A Yes.

19 Q What do you say in this e-mail? Can you please read it for
20 the jury?

21 A (Reading) Basant, it looks like we may have a problem with
22 the texture of Beech-Nut. The samples packaged at the end of
23 October are already showing signs of shriveling up and
24 appearing dry. This product was produced looking oily with
25 Capol. The Capol appears to be soaking into the piece and

1 leaving the piece dry. We will continue to monitor this. We
2 are producing Welch's at this time.

3 Q So you're still reporting quality problems to Mr. Dwivedi
4 on Fruit Nibbles being produced at the end of October?

5 A Yes.

6 MS. KOWALSKI: Your Honor, I request that Beech-Nut's
7 Exhibit 5 be admitted into evidence.

8 THE COURT: It's in evidence.

9 (Beech-Nut Exhibit 5 is received in evidence.)

10 Q Ms. Bianchini, I believe you testified earlier that you
11 left PIM in June 2009. Is that correct?

12 A Yes.

13 Q What was the reason for leaving PIM?

14 MR. WALLACH: Objection, your Honor. May we approach,
15 please?

16 THE COURT: All right.

17 (At the sidebar.)

18 THE COURT: What's the objection?

19 MR. WALLACH: During the course of discovery
20 magistrate Judge Falk sustained our objection to any testimony
21 or discovery with respect to why she left the company because
22 there was a separation agreement that was shown to the
23 magistrate Judge. This has been ruled upon previously, your
24 Honor.

25 THE COURT: What's the ruling? Go ahead.

1 MR. DILLON: Your Honor, here's the point. We just
2 want to make it clear that she didn't leave there for reasons
3 of problems with her quality of work, that's all. And I think
4 that's stipulated, that she didn't leave because of work
5 problems.

6 MR. WALLACH: I have no objection to a stipulation
7 that when she left in June of 2009 it had nothing to do with
8 the quality of her work.

9 MR. DILLON: That's it.

10 MR. WALLACH: But the question was: "Why did you
11 leave?"

12 MR. DILLON: We'll take that stipulation and put it on
13 the record and that will finish it.

14 THE COURT: All right. Then why don't you do this:
15 I'll sustain the objection. When she's complete with her -- or
16 you can ask her the question. You have no problem with --
17 you're afraid, you don't what she's going to answer?

18 MR. WALLACH: I don't want her blurting something out.

19 THE COURT: All right. So the stipulation is that
20 when she left PIM it had nothing to do with the quality of her
21 work?

22 MR. WALLACH: Correct.

23 THE COURT: She retired.

24 MR. WALLACH: Yes.

25 MS. KOWALSKI: That's right.

1 THE COURT: Okay. Why don't you do a leading
2 question. The leading question is: "When you left PIM in June
3 of 2009, isn't it true you retired and it had nothing to do
4 with the quality of your work?"

5 MS. KOWALSKI: Okay.

6 MR. WALLACH: Okay. Thank you.

7 (In open court.)

8 THE COURT: All right. You can proceed, I'll allow
9 the question. Rephrase the question.

10 MS. KOWALSKI: Thank you.

11 BY MS. KOWALSKI:

12 Q Ms. Bianchini, I believe you testified that you're now
13 retired, and that you had left the company in June of 2009.
14 Correct?

15 A Yes.

16 Q Did your reason for leaving having anything to do with the
17 quality of your work?

18 A No.

19 MS. KOWALSKI: Thank you.

20 I have no further questions at this time.

21 THE COURT: Thank you.

22 Go ahead, Mr. Wallach. Any questions?

23 CROSS-EXAMINATION

24 BY MR. WALLACH:

25 Q I don't want to mispronounce your name. Is it "Biancheeni"

1 or "Biankeeni"?

2 A Bianchini.

3 Q You are a former -- I'm just going to grab my pen.

4 You are a former employee of Promotion In Motion.

5 Correct?

6 A I was with PIM Brands.

7 Q All right. PIM Brands is a subsidiary of Promotion In
8 Motion?

9 A Yes.

10 Q And you worked there for just about one year. Correct?

11 A Yes.

12 Q In the time period of June 2008 through June of 2009?

13 A Yes.

14 Q You played no role in any development efforts for the Fruit
15 Nibbles prior to June of 2008, did you?

16 A That's correct.

17 Q Fruit Nibbles was already being developed when you started
18 at the company?

19 A Yes.

20 Q Do you know how much time and effort had been expended
21 prior to your becoming involved with the Fruit Nibbles?

22 A No.

23 Q Do you know who was working on the Fruit Nibbles at
24 Promotion In Motion?

25 A I don't know if I know everybody.

1 Q Was Mr. Dwivedi one of the persons?

2 A Yes.

3 Q Was he the, what I would say, the lead person, if you agree
4 with that?

5 A Yes.

6 Q Did you have any prior experience in the various jobs that
7 you had in the development of an all natural fruit product?

8 A Yogurt fruits.

9 Q And what company did you work for when yogurt fruits were
10 being developed?

11 A It was Ramsey Labs.

12 Q What was your specific involvement in the development of
13 that all natural product?

14 A Getting the strawberries and the flavors, the color,
15 running a pilot lab, running it in the plant, giving it --
16 shipping it to the customer for approval.

17 Q So when you joined -- I'm going to refer to it as "PIM" but
18 I know you indicated it's "PIM Brands" -- when you joined PIM,
19 it sounds like you had approximately 20 years of experience in
20 the food industry, and specifically working in the area of
21 quality assurance. Is that a fair statement?

22 A Some -- it was quality, sometimes R&D sometimes.

23 Q And you told the jury in response to a question by counsel
24 that -- what were your job qualifications, and you think you
25 did a good job, and you said "yes." Correct?

1 A Yes.

2 Q One of your important functions at PIM was to sign off on
3 the Fruit Nibbles before they left PIM's factory for shipment
4 to Beech-Nut. Correct?

5 A Yes.

6 Q All right. Am I correct that this signing off as I just
7 referred to was done by you actually signing a document
8 entitled a "Certificate of Analysis"?

9 A Yes.

10 Q And would you tell the jury what information was on the
11 Certificate of Analysis?

12 A I'm not sure if I remember everything, but it was the
13 bricks, pH. pH? I don't know if pH was in there or not.
14 Bricks, color, flavor, texture.

15 Q Would you tell us, please, what "bricks" is or what
16 "bricks" are?

17 A It has to do with the sugar content. It's not a literal
18 thing but it's how the water is bound up in the product.

19 Q While you were the head of quality assurance at PIM, did
20 you sign any Certificate of Analysis --

21 A Yes.

22 Q -- for --

23 A Oh, I'm sorry.

24 Q I know you want to be done but please let me finish.

25 Did you sign any Certificate of Analysis for Fruit

1 Nibbles that did not meet the quality standards?

2 A When I signed them, they were with a -- that's what it was.

3 Q So when the product left PIM's door, it met the
4 specifications and standards you understood it was supposed to
5 meet?

6 A To the best of my knowledge, yes.

7 Q If product manufactured by PIM, and specifically Fruit
8 Nibbles, did not meet the specifications you understood they
9 were supposed to, would you sign the Certificate of Analysis?

10 A No.

11 Q Did you have the power to -- I'm not imagining you pull a
12 Cord and stop the production line -- but did you have the
13 power to prevent product from not going out the door?

14 A Yes.

15 Q Was there ever a time when you were the head of quality
16 assurance at PIM that you did not approve manufactured Fruit
17 Nibbles to be shipped --

18 A Yes.

19 Q -- out the door to Beech-Nut?

20 A Yes.

21 Q Did anyone tell you you can't do that?

22 A No.

23 Q I've been asking about Fruit Nibbles, and you were good
24 enough to tell the jury earlier about some of the other
25 products PIM manufactured, such as the Welch's product. What's

1 that called again, please?

2 A Welch's Fruit Snacks.

3 Q Were there in the August, September 2008 time period any
4 productions by PIM of Welch's Fruit Snack that you did not sign
5 off on and that you did not allow to be shipped out the door?

6 A I don't remember.

7 Q Was Fruit Nibbles the first product in your experience
8 where you said, I'm not signing the certificate, I'm not
9 allowing it to be shipped out the door?

10 A We didn't send Certificates of Analysis to Welch's with
11 their product, but we did hold any inferior Welch's products.

12 Is that what you --

13 Q It is, and I appreciate the clarification.

14 A Okay.

15 Q Let's leave aside the Certificate of Analysis form. It
16 sounds like that was specific to Beech-Nut.

17 A Correct.

18 Q You've just indicated, if I heard you correctly, that with
19 regard to the Welch's product that PIM manufactured, there were
20 instances where you did not approve of the quality and
21 therefore you would not approve of it being shipped. Is that
22 correct?

23 A Yes.

24 Q In the instances where the Fruit Nibbles come off the
25 manufacturing line and you don't approve it, would you tell the

1 jury your understanding of what happens next to that product?

2 A After PIM is aware it's bad, if it's after the -- before
3 packaging, then we take it immediately, put "hold" stickers on
4 it and it gets removed to a second part -- or a separate part
5 of the plant.

6 Q And what becomes of it in this separate part of the plant?

7 A It is destined to be reworked or -- it depends on why it
8 went bad.

9 Q So let's use an example. There's an imaginary bag of Fruit
10 Nibbles that you do not approve to go out. You indicated it
11 goes to a different part of the plant to be reworked. Correct?

12 A Yes.

13 Q Were there instances where that reworked product was still
14 not up to your standards and was not approved for shipping?

15 A Say that again, please.

16 Q Let me slow it down.

17 The reworked -- I'm sorry. The product that had been
18 put off to the side --

19 A Yes.

20 Q -- as I understand your testimony, an attempt would be made
21 to melt it down and then reproduce the product. Is that
22 correct? Or better yet, would you tell us, please, what
23 happened?

24 A At that point we did not melt the Welch's -- or the
25 Beech-Nut product down to rework it into Beech-Nut. We didn't

1 do that.

2 Q It was just kept off on the side?

3 A Yes.

4 Q It was not reused or attempted to be reworked?

5 A It was not reused in Beech-Nut.

6 Q Do you know the date when Beech-Nut approved the prototype
7 of Fruit Nibbles for mass manufacturing?

8 A I don't remember that.

9 Q Do you remember the time of year; summer or fall, if that
10 helps?

11 A June, July?

12 Q I apologize, I can't answer the question for you.

13 But let me ask you a different one then.

14 Do you know what the primary juice ingredient was in
15 the prototype --

16 A Pineapple. Pineapple juice.

17 Q Pineapple juice was the primary ingredient. Okay.

18 Did there come a time when pineapple juice was not the
19 primary ingredient in the Fruit Nibbles being manufactured by
20 PIM?

21 A Yes.

22 Q What juice was substituted?

23 A White grape juice.

24 Q Did you personally have any prior experience working with
25 white grape juice in manufacturing a fruit product?

1 A No.

2 Q Do you know if anyone else at PIM had prior experience in
3 doing so?

4 MS. KOWALSKI: Objection, your Honor. This is the
5 subject of --

6 MR. DILLON: We'll have a sidebar.

7 MR. DILLON: Your Honor, could we be heard at sidebar?

8 THE COURT: Go ahead.

9 Ladies and gentlemen, why don't we take a recess for
10 the morning and we'll see you in about 15 minutes. Please
11 don't discuss anything about the case.

12 THE WITNESS: May I be excused, too?

13 THE DEPUTY CLERK: Please rise for the Jury.

14 (The Jury leaves the courtroom.)

15 THE COURT: Can you wait one moment?

16 THE WITNESS: Oh, sure.

17 THE COURT: If you don't mind, let me just hear what
18 the objection is.

19 Okay. Go ahead, what was the objection?

20 MS. KOWALSKI: Your Honor, Mr. Wallach is getting into
21 the differences between the using of white grape juice versus
22 pineapple juice, and the stipulations stipulated to not only
23 the specs of the product as Numbers 14 and 15, but also the
24 warrantees in the purchase orders expressly warranted the
25 products. Those warrantees never changed.

1 Furthermore, the purchase orders were never modified,
2 that's also a stipulation, and the warrantees didn't change
3 throughout. So whether or not the pineapple juice versus the
4 white grape juice is used is irrelevant, because the purchase
5 orders were ordered, those never changed and the warrantees
6 stayed the same.

7 THE COURT: Go ahead, Mr. Wallach.

8 MR. WALLACH: Over my objection, your Honor, Plaintiff
9 Beech-Nut relied upon the witness' deposition testimony, and
10 what they did not do --

11 THE COURT: What do you mean, "they relied on the
12 witness' deposition"?

13 MR. WALLACH: Your Honor, they showed her the
14 deposition transcript --

15 THE COURT: What page?

16 MR. WALLACH: Page -- your Honor, the witness had
17 answered the question. Beech-Nut did not like the answer.
18 They wanted more out of it, so they presented the witness with
19 her deposition transcript, particularly page 167, lines 3
20 through 5, and then they were able to have the witness state
21 what she didn't remember saying, that she would not feed the
22 products to my child.

23 Your Honor, the next question and answer that was not
24 presented to the jury was: "And is it still your position
25 today that Beech-Nut was correct in pulling Fruit Nibbles from

1 the market"?

2 And the witness answered: "At least at that point in
3 time."

4 I'm entitled, your Honor, to show that there were
5 changes in the product over time. And in order for that to be
6 shown to the jury, they're entitled to know what the change
7 was, which was the change of the juice ingredient. That's the
8 reason for the questioning.

9 THE COURT: The objection is sustained. We're not
10 getting into the change from grapefruit to -- from pineapple
11 juice to grapefruit juice. We're not getting into that. You
12 stipulated to what the specs were. If they chose for whatever
13 reason to substituting grapefruit juice for pineapple juice,
14 we're not getting into all of that, Mr. Wallach.

15 MR. WALLACH: Your Honor, we stipulated that there
16 were specifications. They were not static over time. Your
17 Honor indicated earlier today that we have the right to cure
18 under the statute. This goes to the right to cure, and the
19 cure was done by changing the ingredient.

20 THE COURT: No. They changed the ingredient. The
21 ingredient changed from pineapple juice to grapefruit juice.

22 MR. WALLACH: And then back to pineapple juice.

23 THE COURT: Then back to pineapple juice at some
24 future time?

25 MR. WALLACH: Yes, your Honor.

1 THE COURT: Mr. Dillon or Ms. Kowalski, do you have
2 anything further?

3 MS. KOWALSKI: Regardless of whether or not the
4 product -- the use of one juice versus another over the course
5 of the period of time is -- doesn't -- has no relevance with
6 respect to the warranty of the product. If Mr. Wallach wants
7 to show that they had attempted to cure, it's not a matter of
8 whether the juice content is right, it's whether or not the
9 product was good. The warranty stands with respect to the
10 specifications regardless of whether or not what juice was
11 used. That warranty never changed as the purchase orders were
12 never amended.

13 So the difference between the white grape juice, the
14 pineapple juice and back to pineapple juice or vice-versa is
15 irrelevant for the purposes of cure. It has to deal with the
16 warranty issue, and they warranted the product. If they want
17 to say that the product got better, we don't need to get into
18 the differences between what juice was used at what time.

19 THE COURT: Just a moment.

20 (There is a pause for the Court.)

21 MS. KOWALSKI: Your Honor -- sorry.

22 THE COURT: No, go ahead.

23 MS. KOWALSKI: No, no, my fault. I'm okay.

24 THE COURT: If you have something you want to add, go
25 ahead.

1 MS. KOWALSKI: No.

2 (There is a pause for the Court.)

3 THE COURT: As far as -- you know, Ms. Bianchini, when
4 the product was first launched when the Fruit Nibbles were
5 first launched, did it include pineapple juice? Is that part
6 of what was included when it was first launched?

7 THE WITNESS: When it was first launched it was
8 pineapple juice.

9 THE COURT: Then at some subsequent time, do you know
10 when it was changed and grapefruit -- grape juice was
11 substituted in for pineapple juice?

12 THE WITNESS: I don't remember when.

13 THE COURT: You don't remember when? Okay.

14 And do you know personally if at some future time
15 after, that pineapple juice was placed back into the formula?

16 THE WITNESS: Yes, it was.

17 THE COURT: Do you know when that occurred?

18 THE WITNESS: No.

19 THE COURT: Okay. Do you know personally -- not from
20 hearsay -- who made the decision to change from pineapple juice
21 to grapefruit juice?

22 THE WITNESS: To white grape juice?

23 THE COURT: What's that?

24 THE WITNESS: White grape juice.

25 THE COURT: yeah, okay, white grape juice.

1 THE WITNESS: That was Basant.

2 THE COURT: That was Basant?

3 THE WITNESS: Yeah.

4 THE COURT: And do you know who made the decision to
5 replace the white grape juice and go back to pineapple juice?

6 THE WITNESS: That was Basant.

7 THE COURT: That was Basant?

8 Do you know why he made that decision when he did?

9 THE WITNESS: When he did, I don't know. But we were
10 able to obtain pineapple juice.

11 THE COURT: Okay. So when you went from pineapple
12 juice to grapefruit juice it was because PIM did not have
13 access to enough pineapple juice, is that what happened?

14 THE WITNESS: To my understanding, yes.

15 THE COURT: Okay. And then there came a point where
16 pineapple juice was more accessible and then they started using
17 pineapple juice again. Is that your understanding?

18 THE WITNESS: Yes.

19 THE COURT: Okay. Do you know when all of this
20 occurred, which months in 2008? It was in 2008 I guess. Is
21 that correct? It was in 2008?

22 THE WITNESS: I don't remember when.

23 THE COURT: Okay. And do you know if after you
24 relaunched with pineapple juice again, do you know if that --
25 what the market reaction was to that? Do you recall?

1 THE WITNESS: No.

2 THE COURT: When you first launched Fruit Nibbles
3 which included pineapple juice, were you receiving any
4 complaints from Beech-Nut regarding the product shortly
5 thereafter?

6 THE WITNESS: I don't remember.

7 THE COURT: Okay. Does everybody agree when it was
8 first put on the market, the approximate date?

9 MR. WALLACH: I think the first shipments, your Honor,
10 from PIM to Beech-Nut were the beginning of the second week of
11 August. Presumably it was at least another week before it then
12 made it to retailers' shelves --

13 (Counsel confer off the record.)

14 MR. WALLACH: I said at least a week.

15 THE COURT: Do you have any idea when the formula
16 changed from pineapple juice to grapefruit juice?

17 THE WITNESS: I don't remember.

18 THE COURT: All right. Go ahead, Mr. Wallach. I
19 don't know how -- you can step down, Ms. Bianchini.

20 (Witness temporarily excused.)

21 THE COURT: Thank you. And if you want, you can take
22 a break. And if you would like to --

23 THE WITNESS: I would like to. Thank you.

24 THE COURT: You're saying that this is relevant to the
25 issue of curing. I don't see through this witness how that's

1 relevant.

2 MR. WALLACH: Your Honor, Mr. Dwivedi will testify at
3 greater length as to it, but to go back to your Honor's
4 question, because the next question and answer in the
5 deposition testimony was: "Not at that time."

6 THE COURT: So. But she doesn't know the reason
7 why -- she's not suggesting that the change was made -- she
8 doesn't know when the change was made, and so she doesn't -- I
9 asked her. She doesn't know what the reason was for the
10 change. It sounds as if the reason for the change was, they
11 couldn't get pineapple juice so PIM took it on their own to use
12 grapefruit juice, or they did, and it didn't work, and maybe at
13 some time they went back to pineapple juice when they got it
14 again when it was more accessible. So, I mean, that's not an
15 indication through her anyhow that they attempted to cure the
16 problem.

17 MR. WALLACH: Your Honor, I understand. The only
18 reason --

19 THE COURT: Nor does it suggest that the problem was
20 cured through her.

21 Now maybe you have another witness.

22 MR. WALLACH: Nor am I attempting that through her.

23 THE COURT: Then the next question is of no real
24 consequence. Her answer was: "I wouldn't want to feed that to
25 my child." And then the next question is:

1 "QUESTION: And is it still your position today that
2 Beech-Nut was correct in pulling Fruit Nibbles from the
3 market?"

4 And the answer was: "At least at that point in time."

5 MR. WALLACH: Correct.

6 THE COURT: Okay. So what's the next the -- is that
7 all -- I mean --

8 MR. WALLACH: That was all I was trying to establish,
9 your Honor, in response to what she was asked on direct
10 examination.

11 THE COURT: No. You mentioned pineapple juice and
12 grapefruit juice through her.

13 MR. WALLACH: Because, your Honor, in order for there
14 to be a change in her view, the jury I maintain is entitled to
15 know that something changed in the product. It's not just that
16 she was flippant and had expressed a different view, but that
17 there was a change in the product.

18 MS. KOWALSKI: Your Honor, her testimony is that the
19 product was not fixed at the time of the withdrawal.

20 THE COURT: All right. I'm going to sustain the
21 objection, Mr. Wallach. If you have another witness that's
22 going to talk more specifically about what efforts PIM made to
23 cure whatever the problem was, then you should dot it through
24 that other witness. This is too speculative and it doesn't
25 really suggest or help enlighten the jury as to the issue of

1 whether or not this was cured and for what reasons or how it
2 was cured, or efforts were made to cure it.

3 MR. WALLACH: I will present that through another
4 witness, your Honor.

5 THE COURT: Thank you, Mr. Wallach.

6 We'll take a few minute break, okay, because it's
7 already been 15 minutes. Try to get back in ten minutes, no
8 more, please.

9 How much longer do you have with Ms. Bianchini?

10 MR. WALLACH: Less than ten minutes.

11 THE COURT: Okay. All right. Thank you.

12 (A recess is taken.)

13 THE COURT: Before we bring out the jury, Mr. Dillon,
14 who is your next witness after this? Is that it? You'll be
15 resting?

16 Okay. Then let's go.

17 MR. WALLACH: On that note, your Honor, I intend to
18 make the rules-required motion. Is there a manner in which
19 your Honor prefers that be done?

20 THE COURT: We'll finish up with the witness and then
21 we'll excuse the jury and we'll hear your motion.

22 MR. WALLACH: Okay.

23 THE DEPUTY CLERK: Where is Ms. Kowalski, Judge? Do
24 we need her?

25 MR. WALLACH: She was out in the hallway.

1 THE COURT: Do you have witnesses?

2 MR. WALLACH: I have a witness.

3 THE COURT: This afternoon?

4 MR. WALLACH: Yes.

5 THE COURT: All right. How many witnesses do you have
6 in your case?

7 MR. WALLACH: One witness, your Honor.

8 THE COURT: Okay.

9 MR. WALLACH: I think we can finish it today.

10 THE COURT: All right.

11 MR. DILLON: Could we just take a minute, your Honor?
12 I have to get Ms. Kowalski.

13 THE COURT: Sure.

14 (There is a pause in the proceedings.)

15 (Ms. Kowalski enters the courtroom.)

16

17 D I A N E B I A N C H I N I, resumes, testifies further as
18 follows:

19

20 THE COURT: Bring out the jury, please.

21 THE DEPUTY CLERK: Please rise for the Jury.

22 (Jury present.)

23 THE COURT: All right. Welcome back again. Please be
24 seated.

25 Go ahead, Mr. Wallach.

1 MR. WALLACH: Thank you, your Honor.

2 CROSS-EXAMINATION CONTINUES

3 BY MR. WALLACH:

4 Q On your questioning by Beech-Nut's counsel you were asked a
5 series of questions concerning problems with underweight
6 packages, improperly packaged product. Do you remember that?

7 A Yes.

8 Q Was ensuring the proper weight of packages part of your job
9 responsibility as in quality control?

10 A Yes.

11 Q Let's try to be specific here, if we can. Can you tell the
12 jury when the packaging issue arose and then if it was ever
13 resolved?

14 A I don't remember when it started, but if I remember
15 correctly, we purchased a check-weigher for that line.

16 Q Would you be good enough just to let -- you're the expert
17 on this -- but can you let the jury know what check-weigher is,
18 please?

19 A It's a scale that the product -- let's say the boxes come
20 through in an assembly line, and if they're the correct weight
21 they keep going, and if it's without -- or not the correct
22 weight it kicks that's product off. It just checks the weight.

23 Q Do you know if that resolved the problem on underweight
24 packages?

25 A I don't know for sure.

1 Q Does anything stand out in your mind whether it's Mary Cool
2 or anyone else from Beech-Nut calling you in October or
3 November saying there's still a problem with underweight
4 packages?

5 A Yeah, I think so.

6 Q How often were they calling? Was this a major problem or a
7 minor problem?

8 A It's a major problem. If you buy a box and there's only --
9 people complain about that.

10 Q How much did this check-ware product that you talked about
11 cost?

12 A I have no idea.

13 Q Do you know who at PIM authorized its purchase?

14 A It would probably be Basant, but I'm not sure.

15 Q And once the product, this machine was purchased, are you
16 aware of any issues with underweight packages?

17 A I think we still had some.

18 Q Okay. I'm trying to see how much, what the magnitude was,
19 if you know?

20 A I don't remember that.

21 Q You were shown in one question by Beech-Nut's counsel a
22 September 23, 2008 e-mail from Susan Allen. Do you still have
23 the binder in front of you?

24 A Yes.

25 Q Would you turn to Exhibit 2, please: Do you have it there?

1 A Yes.

2 Q You were already asked about the e-mail, I'm not going to
3 question you about that. But within Beech-Nut's exhibit, if
4 you turn to the next page, there are a series of documents on
5 Beech-Nut's, whether you call them letterhead or stationary,
6 where it says, Hero, Beech-Nut, QMS Specifications. Do you see
7 that?

8 A Yes.

9 Q Have you seen these pages prior to today that I'm pointing
10 out to you?

11 A Yes.

12 Q Were they part of another document that you're aware of?

13 A They're part of a -- for lack of a better word, a quality
14 manual that we were given by Beech-Nut.

15 Q Okay. Do you know whether that quality manual was
16 finalized and executed by Promotion In Motion?

17 A What do you mean by "finalized"?

18 Q Signed.

19 A I think so.

20 Q Did you sign it?

21 A Probably.

22 Q Okay. Do you have a clear recollection of doing that?

23 A No, I don't remember doing it, but that was my job.

24 Q Staying with your job: When you were performing the
25 quality assurance, how would you do that? Would you open up

1 bags of the Fruit Nibbles and take them out? Can you tell us
2 how you would actually do that before approving product for
3 shipment?

4 A The plant was so big that I didn't do it all the time
5 myself, very little of it I did myself. The people that worked
6 for me would -- there would be a person in the kitchen, they
7 called the kitchen, testing the product as it's being cooked.
8 There would be another person testing it as it came out of the
9 line getting ready to go into the packaging room. There would
10 be people in the packaging room and -- testing it and looking
11 at it, and there's people in the lab that re-looked at the
12 product.

13 So what I did is take everybody's reports. If it was
14 good, then I signed the thing, signed the C of A.

15 Q Certificate of Analysis?

16 A Yeah.

17 Q Did you ever actually look at product or --

18 A Oh, yes. Yes.

19 Q All right. And did you look at the Fruit Nibbles at
20 various stages in the manufacturing process, or only --

21 A All over.

22 Q In the course of looking at the in-process Fruit Nibbles
23 while they were being manufactured, did you ever notice starch
24 on the outside of them?

25 A There's always a little bit of starch on any incoming

1 because they're molded in starch.

2 Q There's starch also appearing on the Welch's product
3 manufactured by Promotion In Motion?

4 A At times, yes. I mean, because you make an indent in the
5 starch, and then you fill that with the product. And then you
6 dump the starch and it goes through a drum and the starch falls
7 away and you end up with the gummy. At that point there's
8 starch on everything.

9 Q Is starch unhealthy if eaten?

10 A No, not at all.

11 Q Is starch naturally occurring?

12 A Well, this was cornstarch, yes.

13 Q Is there a way of -- let me ask you differently. How does
14 one remove a starchy coating from a product such as Fruit
15 Nibbles?

16 A They tumble it in a drum, and then some of the starch falls
17 off, and they blow air and it blows it off, and the rest it is
18 left.

19 Q Are you familiar with an ingredient Capol, C-a-p-o-l?

20 A Yes.

21 Q Have I pronounced it correctly?

22 A Yes.

23 Q Would you tell the jury what Capol is, please?

24 A Capol is a fine oil that's used after they blow all the
25 starch off. They coat the gummies with a Capol and it gives it

1 the shine. Before that it's kind of a dull product, and that
2 gives it the nice shiny prettiness to it.

3 Q While you were working for PIM, did it use Capol on any
4 other product in addition to the Fruit Nibbles?

5 A Oh, yes, on Welch's.

6 Q In any of your previous employments, did those companies
7 utilize Capol --

8 A No.

9 Q -- in the manufacturing of product?

10 A No.

11 Q Was there anything that you thought improper in the use of
12 Capol on either the Welch's product or the Fruit Nibbles
13 product?

14 A No.

15 Q Did you have a view as to whether or not the use of Capol
16 would resolve any issues of a starchy appearance to the Fruit
17 Nibbles.

18 A Say that again.

19 Q Let me ask it differently. I apologize.

20 At the end of the manufacturing process, do you recall
21 if any of the Fruit Nibbles had a starchy appearance to them?

22 A "At the end of the manufacturing process."

23 Initially, no.

24 Q At any point in time do you recall there being a starchy
25 appearance in the manufacturing process, or was that corrected

1 through use of the of the drum and the use of the Capol?

2 A I guess I don't understand. What are you asking?

3 Q I'll ask it very differently.

4 Did you approve any product for shipment from PIM to
5 Beech-Nut that had an unacceptable starchy appearance on it?

6 A I was not aware of approving anything as it left the door
7 that was unacceptable.

8 Q It would have been unacceptable if that was the case.
9 Correct?

10 A If what was the case, if it was still cloudy?

11 Yes.

12 Q And did that ever occur?

13 A I don't think so.

14 MR. WALLACH: I have no further questions, your Honor.

15 MR. DILLON: One minute.

16 THE COURT: Redirect?

17 Go ahead.

18 (Ms. Kowalski confers with Mr. Dillon off the record.)

19 REDIRECT EXAMINATION

20 BY MS. KOWALSKI:

21 Q Ms. Bianchini, can I please ask you to turn to Exhibit 95
22 in your binder.

23 Can you tell me what Exhibit 5 is again just for the
24 jury?

25 A An e-mail from me to Basant, copying Frank, Margarita and

1 Charles.

2 Q And the date on the e-mail is?

3 A November 13th, 2008.

4 Q And can I ask you just to read the first two lines of that
5 e-mail.

6 A (Reading) It looks like we may have a problem with the
7 texture of Beech-Nut. The samples packaged at the end of
8 October are showing signs of shriveling up and turning dry.

9 Q I want to make sure I hear that correctly.

10 That the product that was made at the end of October
11 was showing signs of shriveling and drying. Is that correct?

12 A Yes.

13 MS. KOWALSKI: Thank you, your Honor.

14 THE COURT: All right. Thank you very much. You can
15 step down. Ms. Bianchini.

16 (Witness excused.)

17 THE COURT: Mr. Dillon or Mr. Kowalski, anything else?

18 MS. KOWALSKI: No, your Honor. Beech-Nut rests.

19 THE COURT: All right.

20 Ladies and gentlemen, the Plaintiff is resting their
21 case. What we'll do now is we'll take a break for lunch, we'll
22 take a longer break, until 1:30. Okay? And we'll see you back
23 here at 1:30.

24 Please don't discuss anything about the case. Okay?

25 Thank you.

1 THE DEPUTY CLERK: Please rise for the Jury.

2 (The Jury leaves the courtroom.)

3 THE COURT: All right. Thank you. You can be seated
4 everyone.

5 Mr. Wallach, you said you had a motion to make.

6 MR. WALLACH: Thank you, your Honor. At this stage,
7 Promotion In Motion and PIM Brands make the following motion:
8 Firstly, your Honor, as Beech-Nut has indicated throughout the
9 trial, their claims are brought pursuant to the four purchase
10 orders and nothing else. The purchase orders are between
11 Beech-Nut and Promotion In Motion. PIM Brands, LLC is not a
12 party to the purchase orders.

13 Your Honor, admittedly this is a pretrial motion for
14 something that should have been raised by me in the Pretrial
15 Order. But PIM Brands has no privity to Beech-Nut and there's
16 no basis on Beech-Nut's remaining claims for PIM Brands, LLC to
17 be a party, therefore we submit it should be dismissed.

18 With respect to Promotion In Motion, your Honor, we
19 ask that a directed verdict be entered and that the
20 counterclaim be dismissed. Beech-Nut has failed to meet the
21 standard that has been briefed to the Court under the Uniform
22 Commercial Code. They have not and cannot demonstrate that
23 there has been a substantial impairment of the entire value of
24 the contract; namely, the four purchase orders between the
25 parties. The witnesses are not able to identify the extent of

1 the problem; the witnesses are not able to indicate why they
2 withdrew the product. And for those reasons, your Honor, it's
3 just speculation at this point as to any damage they suffered
4 that's cognizable under the Uniform Commercial Code. And for
5 those reasons and those that are in our brief, your Honor, we
6 make our motion.

7 THE COURT: All right. With respect to the latter
8 part of your motion, there's certainly more than enough
9 evidence from which this jury could reasonably infer that there
10 was a substantial impairment.

11 I don't know if counsel wants to address this at all.
12 No?

13 There's more than enough evidence from which this jury
14 could reasonably infer that there was a substantial enough
15 impairment of this product to warrant their revoking the
16 contract.

17 We have Ms. Bianchini herself who was right there
18 working for the defendant indicating that this was unacceptable
19 product. And so that combined with the multitude of complaints
20 that the plaintiff received, which was out of the ordinary, I
21 think the jury could reasonably conclude that those type of
22 complaints and the kind of language used by complaining
23 purchasers of this product is not customary and would be of
24 such a nature that the plaintiff would be able to conclude that
25 this was a substantial impairment of the product manufactured

1 by the defendant to warrant revoking the contract. And there's
2 testimony also that it wasn't in their opinion curable, either
3 feasible, commercially or practically curable. So there's more
4 than enough evidence from which this jury could reasonably
5 conclude that the plaintiff made a determination that this was
6 a product that was substantially impaired and therefore took it
7 off the market.

8 And as far as the first part of your motion, that will
9 be denied. There's evidence here that the Promotion In Motion,
10 Inc. and PIP Brands are both defendants in this case and both
11 responsible parties and one and the same, it would appear,
12 practically speaking, if not legally.

13 So I'll hear plaintiff on that if there's any argument
14 to be made on that.

15 MS. KOWALSKI: No, your Honor.

16 THE COURT: All right. Your motions are denied, Mr.
17 Wallach.

18 What we'll do is we'll reconvene at 1:30.

19 You'll have one witness. How long do you expect he'll
20 be or she'll be?

21 MR. WALLACH: Mr. Dwivedi, perhaps an hour and a half,
22 your Honor.

23 THE COURT: On direct?

24 MR. WALLACH: Yes.

25 THE COURT: Okay. So we should conclude this

1 afternoon probably.

2 MR. WALLACH: I apologize for interrupting.

3 THE COURT: No. Go ahead.

4 MR. WALLACH: We have some deposition read-ins, part
5 of which were subject to objection, and at an appropriate time
6 it would seem to make sense to resolve that so we're not taking
7 up jury time.

8 THE COURT: Okay. Well, what are the objections?
9 What parts of the deposition?

10 Do you have the deposition reading; and do you have
11 the areas of objection?

12 MR. WALLACH: Certainly I'll let counsel speak for
13 themselves, but it's my understanding counsel objects pretty
14 much in the entirety to the read-ins from Mary Cool and Dr.
15 Chang.

16 THE COURT: Okay. Go ahead, let me hear them.

17 MS. KOWALSKI: Sure. Your Honor, counsel has
18 designated deposition testimony for Ms. Cool and Mr. Chang, all
19 of which their testimony has been stipulated to in one form or
20 another. For example, Mr. Chang's testimony he is putting
21 forward regarding the development of the Fruit Nibbles process
22 and the role that Beech-Nut played with respect to that
23 development.

24 We are so far beyond that role, and we've stipulated
25 to the fact that the specifications have already been agreed

1 to. So the development and the process and the role that
2 Beech-Nut played is irrelevant for those purposes.

3 He also introduced testimony regarding certain
4 specifications which have already been stipulated to in Numbers
5 14 and 15 of the Pretrial Order.

6 THE COURT: All right. Let me read it over lunch and
7 then we'll take this up at 1:15. Okay?

8 MS. KOWALSKI: Okay. In addition, your Honor, I just
9 raise the point that this also includes not only Mr. Chang, but
10 Ms. Cool and Mr. Hungsberg testimony that counsel has already
11 designated.

12 THE COURT: Okay. I have your summary here. Let me
13 read it. Okay?

14 MS. KOWALSKI: Yes, your Honor.

15 THE COURT: Again.

16 Thanks. I'll see you back here at 1:15. Thank you.

17 MR. DILLON: Thank you.

18 (A luncheon recess is taken.)

19

20 A F T E R N O O N S E S S I O N

21

22 (Proceedings resume - Jury not present.)

23 THE COURT: Mr. Wallach, I guess you indicated before
24 we broke for lunch that you were seeking to introduce certain
25 depositions, to read certain portions of depositions of Mr.

1 Chang and Ms. Cool. Correct?

2 MR. WALLACH: Yes. And Mr. Hungsberg, who I do not
3 believe there's objection to.

4 THE COURT: Hungsberg you already read a significant
5 portion. You would like to add to that?

6 MS. KOWALSKI: No. Actually we --

7 MR. WALLACH: They cross-designated but they didn't
8 object blanketly to the introduction that I designated for Mr.
9 Hungsberg.

10 MR. DILLON: Actually I don't think that's correct,
11 counsel. But --

12 MR. WALLACH: That's how I read it.

13 MR. DILLON: But regardless, I think --

14 THE COURT: But in your direct case you read a portion
15 of it.

16 MR. DILLON: Yes.

17 THE COURT: Okay.

18 MR. DILLON: But, Judge, I would say to you, during
19 the break we went over the narrative statements for these three
20 witnesses, and there are several portions of their testimony we
21 have no objection to.

22 THE COURT: All right. You're talking about Cool and
23 Chang?

24 MS. KOWALSKI: Chang, and Hungsberg, your Honor.

25 THE COURT: Well, does that mean you have no

1 objection, or do you object to certain portions of it?

2 MR. DILLON: To portions.

3 THE COURT: Let me ask you this: What is the
4 relevance of either Chang or Cool? I read the summaries or
5 whatever you submitted to me. I went over the stipulation
6 again. Paragraph 35, you're stipulating that the Fruit Nibbles
7 product complained of as described above did not satisfy the
8 warrantees and the purchase orders.

9 So what is any of this relevant to?

10 MR. WALLACH: As I've indicated throughout the trial,
11 your Honor, there is nothing in the purchase orders, there's
12 nothing by way of an express warranty as to how long this
13 product was going to last. We warranted that the product was
14 good at the time it was shipped. The testimony has
15 demonstrated the product was good at the time it was shipped.
16 And it's important because Ms. Cool, Mr. Chang both testified
17 to this in deposition, that they were not involved in any
18 aspect of shelf life testing or shelf life discussions with my
19 client.

20 THE COURT: Wait. Am I reading this wrong? Why did
21 you stipulate to this?

22 You stipulated that the Fruit Nibbles product
23 complained of as described above did not satisfy the warrantees
24 in the purchase orders. And the warrantees in the purchase
25 order -- hold on...

1 MS. KOWALSKI: Your Honor, I would like to draw your
2 attention to Stipulated Fact Number 15, which actually
3 stipulates that the product will have a 12-month shelf life.

4 THE COURT: Yeah. Well, you stipulated to that as
5 well, and the purchase orders state: (Reading) Quality and
6 inspection -- PIM warrants that the goods furnished under the
7 order will comply with the specifications, are fit for the
8 purpose intended, merchantable, and free from defects in
9 material and workmanship. And you stipulated that would it
10 have a 12-month shelf life.

11 You've basically stipulated that there's been a breach
12 of the warranties.

13 So now the question is substantiality. And you're
14 trying to go back in to discuss things like pineapple juice and
15 grapefruit juice and testing and everything else.

16 You stipulated there was a breach. And then you've
17 stipulated in paragraph 15 that the product would meet the
18 specifications for an all natural product that contained
19 natural colors and flavors, no starch or corn syrup and was
20 soft enough for a toddler to eat and had a 12-month shelf life.

21 And you also went on and stipulated other things; that
22 Beech-Nut received dozens of reports of children's illnesses
23 after consuming the Fruit Nibbles product, paragraph 34. But
24 most significantly you stipulated that it did not satisfy the
25 warranties, and then you stipulated paragraph 15 what the specs

1 were even.

2 And you know, am I making -- I see a distinction
3 between a breach of the specs and a breach of the warranty for
4 merchantability which might not have anything to do with specs
5 and a breach of the warrant of merchantability for a specific
6 purpose. I mean, in one respect, even if there were no breach
7 of the specs, if they somehow -- let's say the specs say
8 product, A, B and C to be done this way but their vats were
9 dirty and so it was contaminated, but the specs might have been
10 met -- I'm not talking about this case -- in a hypothetical
11 case -- but the specs might have been met but the product still
12 came out as unmerchantable or not suitable for a particular
13 purpose because it's contaminated, but the product was
14 manufactured pursuant to specs except hygienically they messed
15 up or something. This is not this case. But I'm saying
16 hypothetically, the plaintiffs would still have a claim for not
17 breach of specs, but this product just didn't come out right.
18 Even though the manufacturer followed the specs, in the process
19 they did something to contaminate it and the product didn't
20 come out right. Or as in this case, only PIM knew what the
21 formula was, because that was proprietary information, and you
22 stipulate to that. You stipulate to that as well.

23 MR. WALLACH: I don't disagree with that, your Honor.

24 THE COURT: I know. So --

25 MR. WALLACHI: I disagree with your interpretation of

1 paragraph 15.

2 THE COURT: What's that?

3 MR. WALLACH: I disagree, your Honor, with paragraph
4 15.

5 THE COURT: Why?

6 MR. WALLACH: Because the first words are "prior to
7 production." The jury is entitled, your Honor, to know what
8 happens between the prototype being approved and then
9 production.

10 Your Honor, I have tried, and you've sustained
11 objections, to get into evidence the fact, there are no
12 specifications here. There's nothing that anyone can look at
13 to understand what the color should be. There is nothing by
14 way of specification as to what the texture should be. The
15 shelf life goes towards your point of a warranty. And with
16 respect to the shelf life, your Honor, yes, prior to production
17 we agreed it would last for 12 months. The jury should be
18 entitled to hear what Beech-Nut did that prevented us from
19 testing for shelf life and why the product, some of the product
20 did not last for 12-months.

21 THE COURT: You still have the duty to put out a
22 product that's merchantable and a product that is suitable for
23 the particular purposes intended to. So you still have that
24 duty. So even if for some reason -- what you're suggesting is,
25 things were changed and they were changed maybe with the

1 consent of Beech-Nut. I think that's what you're suggesting.

2 MR. WALLACH: Absolutely.

3 THE COURT: Or with the knowledge of Beech-Nut.

4 Well, then I don't know why you stipulated to there
5 was a breach of warranties. I mean, did you that. I didn't do
6 it. Paragraph 35 says, you know, that the product did not
7 satisfy the warranties in the purchase orders. And the
8 warranties in the purchase order sincere just as I read them.
9 And two of the warranties are: A warranty for merchantability
10 ability and a warranty for a particular purpose, and meet
11 specifications.

12 But you do specify in 15 -- now you want to mince
13 words and say "prior to production they agreed."

14 Of course they agreed prior to production. Of course
15 you agreed that this is what -- you know, these are the
16 agreements you reach as to the specs prior to production and
17 you went ahead pursuant to that. There was nothing -- there
18 was no written change order, there was nothing in the
19 warranties that said specifically what the specs were.

20 Quite frankly, to be very --

21 MR. WALLACH: Your Honor, that's not accurate.

22 THE COURT: Well, where is it?

23 MR. WALLACH: Your Honor, there was a draft quality
24 agreement that the parties never signed --

25 THE COURT: Okay.

1 MR. WALLACH: -- that laid out the specifications. My
2 client would not sign it because of all the changes constantly
3 being made by Beech-Nut.

4 THE COURT: And your client did it at his own risk,
5 because the warrantees say: The terms and conditions set forth
6 in these constitute the entire agreement between the parties
7 and supersede all previous verbal or written representations,
8 agreements and conditions unless modified in writing and signed
9 by all parties.

10 MR. WALLACH: Yes. And the purchase order says
11 nothing about a 12-month shelf life, your Honor. It uses
12 words -- it doesn't have any specifics --

13 THE COURT: You know what, Mr. Wallach, I'm going to
14 say, if you had not stipulated to paragraph 15, quite frankly,
15 I was going to ask the plaintiffs: What are the specifications
16 in this case?

17 I was going to ask you that. And I was going to ask
18 you: Why are you pursuing this breach of specifications case?
19 Because you have a case for a breach of the warranty and
20 merchantability and specific purpose which you would never have
21 to get into any of this for. You wouldn't even have to be
22 bothered with shelf life or anything. If the product is so
23 egregious that you got so many complaints and it's so unlike
24 prior products that were out there that you had to take action
25 because kids were getting sick, they had a case, if the jury

1 buys it.

2 I don't know what -- I asked my law clerk. One of the
3 reasons I brought you in last week was to get an understanding
4 as to why the plaintiffs were still pursuing this breach of
5 specifications. But when I saw you agreed in paragraph 15 to a
6 certain number of specifications, I said, well now I know why
7 they're pursuing it.

8 MR. WALLACH: And we agreed because there was an
9 original prototype, that's why we agreed as we had to.

10 THE COURT: Mr. Wallach, the purchase orders govern
11 this case as I previously ruled. Any changes that you felt --
12 your client felt were necessary should have been in writing.
13 The fact that he wouldn't sign a particular document because he
14 couldn't live by it, that's his problem. He's a businessman,
15 he's been in business a long time. Nobody spun his arm around
16 him or twisted his arm. You know, he did that at his own risk.

17 I mean, you know, he's a successful businessman.
18 We're not talking about somebody who's like just getting into
19 the marketplace here. And he chose not to. And these purchase
20 orders govern. So, you know, it's pretty straightforward now.

21 I'm not going to allow any of this testimony in
22 because, frankly, it's irrelevant. You stipulated that there
23 was a breach and you've stipulated as to a certain number of
24 specifications, and that's the only ones that I've heard about
25 in this case. I have no specification here that it's required

1 to use a certain type of ingredient or anything like that, so
2 we're getting into far afield from everything now, you know.

3 By the way, from the plaintiffs' point of view -- you
4 stipulated to this so now there are specifications. But until
5 I saw paragraph 15 I would have agreed with you. I wouldn't
6 have known what the specifications were in this case, and I
7 would have probably then been in a different position to allow
8 everybody to talk about specifications. But I would have
9 suggested the plaintiffs abandon that whole thing because
10 you're wasting a lot of time, just prove that it's not
11 merchantable, it's not merchantable through PIM's own witness,
12 Dr. -- you know, Dr. Bianchini who says this stuff was bad, you
13 know? This stuff was bad.

14 So, no, I'm not going to allow it in. It's not
15 relevant to the issues that' are pending before this Court
16 based on the stipulation and the Court's prior ruling and my
17 opinion of December 20, 2011.

18 Okay.

19 MR. WALLACH: If I may make --

20 THE COURT: Go ahead.

21 MR. WALLACH: Not to reargue, your Honor, I assure you
22 that.

23 THE COURT: No, it's okay. Go ahead.

24 MR. WALLACH: Please don't take it that way. It's not
25 offered this way.

1 THE COURT: What?

2 MR. WALLACH: Please don't take it as reargument.

3 THE COURT: It's okay if you do. I'll allow a little
4 bit more.

5 MR. WALLACH: Paragraph 35 relating to the specific
6 complaints in paragraph 33, just to put it in context, but a
7 different point, your Honor. In Mr. Hungberg's deposition we
8 designated portions of testimony separate and apart from this
9 issue of specifications, taste and texture, and specifically,
10 your Honor, it's the last reference that we ask for. Mr.
11 Hungsberg testified -- I'm reading off a narrative that was
12 submitted.

13 THE COURT: Hold on. Let me get it in front of me.
14 What page are you reading from, page 2 of his
15 narrative?

16 MR. WALLACH: Yes. In fact, it's the last paragraph,
17 your Honor.

18 THE COURT: Which says what?

19 MR. WALLACH: Mr. Hungsberg testified that during --

20 THE COURT: I'm not reading that. I don't see that.
21 It starts with "Mr. Hungsberg testified"?

22 MR. WALLACH: That's one we submitted. I don't know
23 if you have Beech-Nut's designations in front of you, your
24 Honor. I can hand you mine.

25 (Counsel confer off the record.)

1 THE COURT: Okay. Go ahead. This is Beech-Nut's.
2 Right?

3 MR. WALLACH: This is my designation. Mr. Hungsberg
4 testified that during his time with Beech-Nut --

5 THE COURT: No, I don't -- I don't have that. If I
6 do -- I don't have that, not in the summaries that I have in
7 front of me. I have Hungsberg's deposition transcript
8 designations on behalf of Beech-Nut.

9 MR. WALLACH: We also submitted -- I can hand to your
10 Honor's law clerk ours. I assure you it was submitted and
11 Beech-Nut has it as well.

12 THE COURT: Okay. Let me see it then.

13 Wait. Wait. Here I have it -- no.

14 I have yours but it's not -- it doesn't read like
15 that. Hungberg's deposition designations on behalf of PIM?

16 MR. WALLACH: Yes.

17 THE COURT: It doesn't read the same way I don't
18 think.

19 (The Court and the Law Clerk confer off the record.)

20 THE COURT: Go ahead, read the portion that you want
21 to refer to.

22 MR. WALLACH: With your Honor's permission, if I could
23 read the actual testimony.

24 THE COURT: Just read the summary.

25 MR. WALLACH: (Reading) Mr. Hungsberg testified that

1 consumers complaining about product was a regular, in fact, a
2 frequent occurrence involving Beech-Nut products.

3 That was part of our submission, your Honor. And I'd
4 ask that that be considered by the jury. That's separate from
5 shelf life testing it's separate from specifications.

6 It's on page 88, line 19 through page 89, line 2.

7 THE COURT: Can I see it? Do you have a copy of that?

8 MR. WALLACH: Yes, I do, your Honor.

9 (The Court and the Law Clerk confer off the record.)

10 THE COURT: Where does it end?

11 MR. WALLACH: Line 2 on the top of page 89, your
12 Honor. I believe the last word is "frequently."

13 THE COURT: What's your position? Let's hear it.
14 Come on.

15 MS. KOWALSKI: Your Honor, we'd argue that the section
16 that Mr. Wallach has designated is simply irrelevant. It's
17 talking here about his experience with complaints in general of
18 Beech-Nut products, it has nothing to do with Fruit Nibbles.
19 It talks nothing about the complaints that were received.

20 THE COURT: All right. It's too general and too vague
21 to be relevant to this case.

22 The question is: (Reading) In your time with
23 Beech-Nut, 2007 forward, have you any other experience with
24 consumer or vendors' complaints regarding a Beech-Nut product?

25 And his answer is: Oh, sure, you have it all the

1 time, sometimes for new issues, sometimes for something that
2 consumers thought was an issue but wasn't -- so it would happen
3 pretty frequently.

4 That's what you're seeking to have read it?

5 MR. WALLACH: Yes, your Honor, it relates to the
6 portion of Exhibit 40 I showed Mr. Kennedy, which from the two
7 volumes of Beech-Nut's materials showed extensive product
8 returns taking place in 2008.

9 THE COURT: No, it's not sufficiently relevant to the
10 issues before this jury. It's too vague, too general. If you
11 had evidence that they had done revocations of contracts to
12 other manufacturers over a period of time to show that they
13 were perhaps acting precipitously in revoking contracts and
14 this was another instance in which they, Beech-Nut, acts in bad
15 faith with manufacturers, then I'd say it might be relevant.
16 But this kind of a general statement, of course a company like
17 Beech-Nut is going to have complaints by consumers for a
18 variety of different reasons, but it doesn't go to
19 substantiality. It doesn't suggest that these were
20 substantial. If anything, he's saying, of course we get them,
21 they could be -- we get complaints.

22 It's not admissible.

23 Okay. Is there anything else?

24 MR. WALLACH: The easiest item, your Honor, is if I
25 can take my papers back to get them out of your way.

1 THE COURT: Here you go. Thank you.

2 Are you ready to proceed?

3 MR. WALLACH: I didn't mean to turn my back on you,
4 Judge.

5 THE COURT: It's all right. Go ahead.

6 MR. WALLACH: What I think may make sense, if I could
7 have a few minutes, because if I don't make some adjustments to
8 my proposed questioning of Mr. Dwivedi --

9 THE COURT: Go ahead. We'll take a five-minute
10 recess. Is that enough?

11 MR. WALLACH: Yes.

12 THE COURT: In the meantime, I redrafted a portion of
13 the charge that -- John, get a copy and give them a copy so
14 they can look at it.

15 That deals with substantiality, point 10 and 11.

16 So copy both 10 and 11.

17 Do they have copies of damages, too?

18 THE LAW CLERK: They submitted damages together.
19 That's a joint submission.

20 THE COURT: 10 and 11 are the only areas we might have
21 had a little different -- I've actually incorporated yours into
22 theirs because I do think the language of "cannot be you cured"
23 should be part of the charge. Okay?

24 MR. WALLACH: Very well, your Honor.

25 THE COURT: And I think you'll look at it and we'll

1 see from there.

2 But go ahead. I'm going to stay here for five
3 minutes, you can use your time.

4 (A recess is taken.)

5 (Proceedings resume - Jury not present.)

6 THE COURT: Are we all set?

7 MR. WALLACH: Yes, your Honor.

8 THE COURT: Thank you.

9 DEPUTY Clerk: Please rise for the Jury.

10 (Jury present.)

11 THE COURT: Welcome back. Thank you.

12 Mr. Wallach, proceed with your case, please.

13 MR. WALLACH: Thank you, your Honor.

14 At this time my client would call Dr. Bassant Dwivedi
15 to the witness stand.

16

17 B A S S A N T D W I V E D I, called as a witness, having
18 been first duly sworn, is examined and testifies as
19 follows:

20 THE DEPUTY CLERK: Would you please state and spell
21 your name for the record.

22 THE WITNESS: Bassant Dwivedi.

23 THE DEPUTY CLERK: Could you spell your name for the
24 court reporter?

25 THE WITNESS: B-a-s-s-a-n-t; D-w-i-v-e-d-i.

1 THE WITNESS: Thank you.

2 THE DEPUTY CLERK: Thank you, sir, you may be seated.

3 DIRECT EXAMINATION

4 BY MR. WALLACH:

5 Q Good afternoon. Am I correct that you are a doctor?

6 A Yes, I have a Ph.D.

7 Q All right. Would you be good enough to tell the jury a
8 little bit about your educational background?

9 A I have a BS degree in dairy engineering from India; a
10 masters degree in food technology, and microbiology from
11 Canada, the Univeristy of Suscatchuan; and my doctorate Ph.D is
12 in food technology and human nutrition from the University of
13 Nebraska.

14 Q When did you obtain the last of these degrees, which I
15 believe is the Ph.D?

16 A Yeah. Ph.D was -- I got that in 1972.

17 Q Where have you worked for last 10 years?

18 A For the last 10 years I have been with Promotion In Motion.

19 Q In fact, when did you begin your employment? I'll refer to
20 it either as "PIM" or "Promotion In Motion." When did that
21 employment begin?

22 A I believe it was the middle of 1998.

23 Q I'm going to focus today on certain months in 2008, so if
24 we could fast forward to that point in time.

25 In February of 2008, what position did you hold at

1 PIM?

2 A Chief operating officer.

3 Q And that's the COO position Diane Bianchini referred to
4 earlier?

5 A Yes.

6 Q And for how long before 2008 have you been the COO?

7 A I would say for seven, eight years.

8 Q Okay. Are you still the COO?

9 A Yes.

10 Q Very briefly, in 2008, what were your responsibilities as
11 the chief operating officer at PIM?

12 A At that point in time I oversaw various functions at
13 Promotion In Motion, including manufacturing, research and
14 development, quality control, logistics, and I'm not sure if
15 finance department was under my control or not at that point in
16 time.

17 Q There are two PIM entities in this lawsuit, Promotion In
18 Motion Inc., and PIM Brands, LLC. Would you tell the jury --
19 you can combine it -- how many employees both companies have?

20 A Altogether there are roughly 500-plus workers. Some are on
21 Promotion In Motion and PIM Brands's payroll, other employees,
22 roughly 450 or so, they are leased employees from a staffing
23 company.

24 Q And do PIM and PIM Brands, LLC maintain offices in New
25 Jersey?

1 A Yes.

2 Q Would you tell us where -- there's already been testimony
3 about manufacturing, so let's begin with that -- where is the
4 plant?

5 A The plant is located in Somerset, New Jersey.

6 Q And are there what I'll call corporate offices or back
7 offices as well?

8 A You talking about Promotion In Motion or PIM Brands?

9 Q Both, please.

10 A Okay. The corporate offices are located in Allendale, New
11 Jersey.

12 Q The Fruit Nibbles that brings us here, where were they
13 manufactured in 2008?

14 A At the plant in Somerset.

15 Q When do you first recall speaking with anyone at Beech-Nut
16 about a potential relationship between the companies that
17 ultimately led to the manufacturing of the Fruit Nibbles?

18 A I believe it may have been either late in 1997 or beginning
19 of 1998 -- sorry, 2007, or 2008.

20 Q What do you recall Beech-Nut was looking for?

21 A Beech-Nut saw Welch's product we were making, and they
22 liked the product, they liked the texture of the product, they
23 liked the looks of the product. And at that point in time it
24 is my understanding that they were launching a major initiative
25 to introduce a whole bunch of different products and thought it

1 was a good idea to have a product somewhat similar to what we
2 manufacture.

3 Q Could I just take a quick detour. You referred to the
4 Welch's product, and there's been testimony in this trial about
5 it. Would you tell the jury what product PIM was manufacturing
6 under the Welch's name, please?

7 A These are Fruit Snacks that contain a major portion of
8 fruit juices and fruit purees and several other ingredients,
9 including the starches and gelatin in the smaller quantities.

10 Q Was Beech-Nut asking Promotion In Motion to manufacture the
11 same product for it, or a different product?

12 A They did want a somewhat different product. However, some
13 of those things were not clarified to any extent until we got
14 into --

15 MS. KOWALSKI: Objection, your Honor.

16 A -- discussions.

17 Q Just listen to my question, please.

18 THE COURT: Sustained, and strike the answer. That's
19 not relevant to the case.

20 Q The question was a little different, so please listen.

21 Was the product going to be the same? Yes or no.

22 A No.

23 Q In what ways did you understand Beech-Nut wanted a
24 different product?

25 A My understanding was that they wanted to have an all

1 natural product.

2 Q Who at PIM then went about developing this all natural
3 product sought by Beech-Nut?

4 MS. KOWALSKI: Objection, your Honor.

5 Sidebar?

6 THE COURT: No, he can answer that question.

7 Just answer that question, the specific question: Who
8 at PIM then went about developing this all natural product
9 sought by Beech-Nut?

10 THE WITNESS: I did.

11 BY MR. WALLACH:

12 Q Did you select the ingredients?

13 A Yes.

14 Q Okay. Were you working with other people at PIM in doing
15 this?

16 A I had the research and development staff, so some of those
17 people did the bench work.

18 Q "R&D" stands for research and development?

19 A Yes.

20 Q Prior to Fruit Nibbles, had you developed any other product
21 either for PIM or any other company?

22 A I developed many, many different products. As a matter of
23 fact, if you go to any supermarket in the country, you will
24 find probably 200 different items that I developed.

25 Q Were the Welch's product that you talked about earlier a

1 product you had developed?

2 A Yes.

3 Q How long did it take PIM to develop a prototype of the
4 Fruit Nibbles?

5 MS. KOWALSKI: Objection, your Honor. It's been
6 stipulated -- do you want a sidebar?

7 MR. WALLACH: No, I just don't want to block you.

8 THE COURT: I'll allow it. Go ahead.

9 Just go ahead. Overruled.

10 Q The question was: How long did it take for PIM to develop
11 the prototype of the Fruit Nibbles?

12 A Approximately four to five weeks.

13 Q Did Beech-Nut approve this prototype at the time it was
14 provided to them by PIM?

15 A No.

16 Q Were additional changes made to the prototype after sending
17 it to Beech-Nut?

18 A Yes.

19 Q Do you recall the entire amount of time that elapsed
20 between PIM originally seeking to develop the prototype and
21 obtaining final approval from Beech-Nut?

22 A It was several months.

23 Q Do you recall the date when Beech-Nut advised PIM that it
24 approved of a final prototype for manufacturing?

25 MS. KOWALSKI: Objection, your Honor.

1 A I believe it was around August 1,

2 Q Hold it. I think there's an objection.

3 THE COURT: What's the objection?

4 MS. KOWALSKI: It's been stipulated, your Honor, as to
5 the date that the prototype was approved.

6 THE COURT: Okay. Which paragraph in the stipulation?

7 MS. KOWALSKI: Paragraph 14.

8 THE COURT: Okay. It is. It's stipulated, Mr.
9 Wallach.

10 MR. WALLACH: Your Honor, I --

11 THE COURT: Paragraph 14 in the stipulation reads:
12 "In 2008, PIM provided a sample product which Beech-Nut
13 approved as a sample for the product PIM was to produce."

14 MR. WALLACH: Your Honor, I'm trying to get a more
15 specific date than just 2008. That was the reason for the
16 question.

17 THE COURT: All right. Do you have a more specific
18 date and that, Doctor?

19 THE WITNESS: August 1. That's what I just mentioned.

20 THE COURT: All right.

21 BY MR. WALLACH:

22 Q Were you here when Ms. or Mrs. -- I'm sorry -- Bianchini
23 testified?

24 A Yes.

25 Q She was the head of quality assurance and research and

1 development at PIM in 2008 through June of 2009?

2 A Yes.

3 Q Do you recall hearing me ask her a question about a draft
4 agreement that was attached to Beech-Nut's Exhibit 2 in this
5 case?

6 A Yes.

7 Q Are you familiar with that agreement?

8 A Yes.

9 Q Ms. Bianchini testified -- I'm sorry -- Mrs. Bianchini
10 testified it was executed. Do you know if it was executed or
11 not?

12 A No.

13 Q You don't know; or it wasn't executed?

14 A It was not executed.

15 Q Who at Beech-Nut, if you remember, advised PIM that the
16 prototype was acceptable and full scale manufacturing could
17 begin?

18 A I believe it was Mr. Hungsberg, although we at times had
19 difficulty knowing who was the primary contact. It could have
20 been Ms. Cool also.

21 Q Mary Cool?

22 A Mary Cool, right.

23 Q How much time elapsed, if you know, between Beech-Nut
24 advising on August 1, 2008 that PIM should start production of
25 the Fruit Nibbles and the production actually beginning?

1 A I believe it began almost immediately after that.

2 Q Now, you've been in the courtroom for this trial
3 throughout, have you not?

4 A Yes.

5 Q And you've heard reference through questioning about
6 purchase orders?

7 A Yeah.

8 Q Between Beech-Nut and Promotion In Motion?

9 A Yes.

10 Q Are you familiar with those purchase orders?

11 A Yes.

12 Q Do you know when the first purchase order between the
13 companies called for delivery by PIM to Beech-Nut of the Fruit
14 Nibbles?

15 A I believe it was some time in March of '08.

16 Q I'm not asking -- not the date of the purchase order. Let
17 me be a little clearer.

18 Do you know when the first purchase order required PIM
19 to deliver Fruit Nibbles to Beech-Nut?

20 A I believe August 1.

21 Q August 1 is the same day that Beech-Nut gave approval for
22 you to manufacture. Correct?

23 A Yes.

24 Q Do you recall how many cases of Fruit Nibbles Beech-Nut
25 listed in the purchase order that PIM was to deliver on August

1 1?

2 A I believe it was 85,000 cases.

3 Q How long does it take, or did it take for PIM to
4 manufacture 85,000 cases of Fruit Nibbles in 2008?

5 A I'm really not precise. It did take several weeks.

6 Q Did you play any role in overseeing the manufacturing of
7 the Fruit Nibbles once the prototype was approved?

8 A Yes, I did.

9 Q Please tell the jury what role you played at that point.

10 A It was an oversight. So I would go to the factory, I would
11 take a look at what was being done, how the ingredients were
12 mixed, how they were processed, and the following steps,
13 including how they were deposited in the starch molds, et
14 cetera, et cetera.

15 Q Well I'll come back to your "et cetera, et cetera" in a
16 moment. Let me ask you this: Did you have any role in
17 approving or disapproving for quality control reasons product
18 manufactured by PIM and whether or not it would be shipped out
19 the door to Beech-Nut?

20 A No, that was done by the QC manager.

21 Q Diane Bianchini?

22 A Yes.

23 Q Was there ever a time where Diane Bianchini advised you
24 product was not up to quality, should not be shipped, and you
25 overruled her?

1 A No.

2 Q Were there times when PIM would manufacture Fruit Nibbles
3 that did not meet its quality standards?

4 A Yes.

5 Q What happened to that product?

6 A That product was put on hold and never shipped.

7 Q In the course of producing the Fruit Nibbles for Beech-Nut,
8 did Promotion In Motion run into any supply issues?

9 A Yes.

10 Q Tell the jury, please, what supply issues Promotion In
11 Motion ran into.

12 MS. KOWALSKI: Objection, your Honor.

13 THE COURT: Yeah.

14 MR. WALLACH: Your Honor, can I approach the sidebar?

15 I am --

16 THE COURT: Yeah, you can. Go ahead.

17 MR. WALLACH: There's a response to this.

18 (At the sidebar.)

19 THE COURT: Based on my prior rulings, how is this
20 relevant, Mr. Wallach?

21 MR. WALLACH: If I'm allowed, as I understand I am, to
22 introduce evidence of PIM's attempt to cure, I need to tell the
23 jury that there was a change in the product. I'm not ascribing
24 blame to anybody, but I have to somehow be able to let them
25 know something was altered, something changed.

1 THE COURT: Well --

2 MR. WALLACH: And that's the reason for this.

3 THE COURT: But I don't think -- there's no evidence
4 so far that at this point, that there was a request to cure the
5 problem or that PIM said, we've got a problem, we've got to
6 cure it. That's not part of the testimony here so far.

7 MR. WALLACH: No, it isn't.

8 THE COURT: Okay. So the fact is that if they had a
9 problem getting pineapple juice and they chose, well, we'll try
10 grapefruit juice just to get the problem going and out, that's
11 not a cure. That was a change in product that they took upon
12 themselves, or even if they did it with the agreement of
13 Beech-Nut. They still had a duty to make a product that's
14 merchantable.

15 MR. DILLON: I think I may be able to solve Mr.
16 Wallach's problem.

17 THE COURT: Go ahead.

18 MR. DILLON: If Mr. Wallach will question the witness,
19 "Once he heard that there were problems --

20 MR. WALLACH: Yes.

21 MR. DILLON: "Once he knew there were problems, what
22 steps did he take to cure the problems."

23 MR. WALLACH: Yes.

24 MR. DILLON: I don't so how we could object to that.

25 THE COURT: No, but that wasn't the question. You

1 just said: "Was there a supply issue?"

2 And I don't know what -- in context what the supply
3 issue was about.

4 MR. WALLACH: Because I wanted to lay the foundation
5 to explain it. But I'll proceed along the way of counsel's
6 helpful suggestion to that.

7 MR. DILLON: Get him to testify that when he knew that
8 there were problems, say, "What steps did you take to try to
9 fix it."

10 MR. WALLACH: That's fine.

11 THE COURT: Okay. All right. Thanks.

12 MR. WALLACH: Very helpful.

13 (In open court.)

14 THE COURT: All right. I sustained that objection.
15 But you can ask the question a different way.

16 MR. WALLACH: I'll approach it this way. Thank you,
17 your Honor.

18 BY MR. WALLACH:

19 Q At some point in time, Dr. Dwivedi, did you learn that
20 Beech-Nut had complaints or persons were complaining to
21 Beech-Nut about some of the Fruit Nibbles product?

22 A Yes, I did.

23 Q Do you recall when you first heard of any of these
24 complaints from Beech-Nut?

25 A I believe in October, maybe tail end of October of '08.

1 Q When you heard of these complaints, what was your reaction?
2 And I mean you personally.

3 A Naturally it was my obligation to look into it, investigate
4 it and come up with a game plan to address that.

5 Q How did Promotion In Motion address this issue?

6 A During the manufacture of product we realized that because
7 we did not have a single contact at Beech-Nut, and Beech-Nut
8 had completely failed to give us any specifications with
9 respect to what the color should be, what the flavor should be,
10 et cetera --

11 MS. KOWALSKI: Objection.

12 THE COURT: Sustained. And let's limit -- he's not
13 here just to talk.

14 Q Please answer the very specific question that was asked.

15 THE COURT: By the way, ladies and gentlemen, that
16 entire answer should be stricken. You shouldn't consider that
17 answer as part of your deliberations.

18 Go ahead.

19 Q The question I was asking is: What steps did Promotion In
20 Motion undertake in response to hearing about these issues
21 concerning some of the Fruit Nibbles?

22 A To address the concerns?

23 Q Yes. What did PIM do?

24 A To look at the formulation, look at the processing steps
25 and make adjustments as needed.

1 Q All right. Were any changes to the formulation made, to
2 the processing steps? What exactly did PIM do, if anything?

3 A Well, we came to a conclusion that replacement of pineapple
4 juice concentrate where the white grape juice concentrate in
5 the product had caused some processing issues, and that may --
6 I'm saying may have something to do with some of the
7 complaints. And as a consequence, we went back to pineapple
8 juice concentrate.

9 Q Do you recall when the change in this ingredient was made
10 by PIM?

11 A Ingredient was received at the end of October, so I would
12 imagine that the change was implemented around the 1st of
13 November.

14 Q Upon the change in the ingredients, are you aware of any
15 issues being presented concerning the quality of the Fruit
16 Nibbles product?

17 A No.

18 Q From the end of October, beginning of November forward, was
19 PIM producing Fruit Nibbles using this pineapple juice you just
20 referred to?

21 A Yes.

22 Q Was it PIM's intent to continue manufacturing the Fruit
23 Nibbles with the pineapple juice?

24 A Yes.

25 Q As part of PIM's manufacturing processes, did it retain

1 samples of product that it would ship, whether to Beech-Nut or
2 to any other company?

3 A Yes.

4 Q Are you aware of any -- strike that. I apologize.

5 Did Promotion In Motion test any of the samples,
6 specifically the Fruit Nibbles samples that were manufactured
7 at the end of October, beginning of November?

8 A You mean during the storage, or stored samples? That's
9 what you're talking about?

10 Q What I'm asking is after it was shipped. You've already
11 testified about the quality procedures before it was shipped.

12 After it was shipped, was any testing done to see the
13 quality of the product?

14 A We typically, as a procedure, look at the product that may
15 have been in storage for a week, two weeks, three weeks, four
16 weeks, whatever the time frame was. So I believe we did.

17 Q Are you aware of any issue concerning the appearance, the
18 texture or the aroma of the product that was manufactured the
19 end of October, beginning of November 2008?

20 A No.

21 Q Were you aware of Beech-Nut voicing any objection or
22 forwarding notice of any complaint concerning product that was
23 manufactured the end of October and November forward in 2008?

24 A No.

25 Q The initial product, the initial production runs were done

1 in August of 2008. Correct?

2 A Yes.

3 Q Do you know where the product was shipped after it left
4 PIM's facility?

5 A It was shipped to the Beech-Nut warehouse in Upstate New
6 York.

7 Q Fruit Nibbles was an all natural fruit product, was it not?

8 A Yes.

9 Q Were there any specific warehousing or storage requirements
10 associated with this product?

11 A It should be kept in an air-conditioned space which is
12 roughly, give or take, 70 degrees Fahrenheit.

13 Q Is this something you ever communicated to Beech-Nut?

14 A I believe so.

15 Q Do you know whether Beech-Nut stored the Fruit Nibbles in
16 its warehouse or its third party warehouse in an
17 air-conditioned facility?

18 A No, I don't.

19 Q There was testimony read into the record yesterday from Mr.
20 Hungsberg's deposition. You're familiar with that gentleman.
21 Correct?

22 A Yes.

23 Q Mr. Hungsberg's deposition summary spoke to issues
24 Beech-Nut thought existed in identifying what lots or what
25 production runs of the Fruit Nibbles may have a problem. Did

1 you hear that testimony being read into the record?

2 A Yes.

3 Q Before I ask the next question, would you tell the jury,
4 please, just some background here: How are different lots or
5 production runs of Fruit Nibbles labeled so that they could be
6 identified later on, if need be?

7 A Each and every production is given a code, and that code
8 must follow it from the beginning to the end. So once the
9 product is made and when it is approved by quality control, it
10 is put in pouches. And on those pouches we imprint a code that
11 corresponds to our internal code.

12 Q Is there ever overlap in the days, meaning -- I'm just
13 using this as an example -- something manufactured on September
14 6th, 2008 is placed in a bag with other Fruit Nibbles
15 manufactured on September 7th, 2008?

16 A Say that again.

17 Q Going back to the lot information that you referred to
18 being stamped on the bags, were production runs of different
19 days mixed into a single bag of Fruit Nibbles?

20 A No.

21 Q Do you have an understanding as to what Mr. Hungsberg's
22 difficulty was in identifying specific lot productions for bags
23 that may have been inspected by Beech-Nut?

24 MS. KOWALSKI: Objection, your Honor.

25 MR. WALLACH: Your Honor, the question was "if he had

1 an understanding."

2 THE COURT: What's the objection? Go ahead.

3 MS. KOWALSKI: He's asking the witness whether or not
4 he understood, what he understood with respect to Mr.
5 Hungsberg's testimony. I don't understand the relevance of it.

6 THE COURT: Hold on a second.

7 I sustain the objection.

8 Q Did anyone from Beech-Nut ask you to help identify specific
9 production runs in any bags of Fruit Nibbles or cases of Fruit
10 Nibbles?

11 A I don't remember.

12 Q Would that have been a difficult task for you or someone
13 else at PIM to perform, if asked?

14 A Yes.

15 Q Why would it have been difficult?

16 A Say that again.

17 Q My question to you is: Would that have been a difficult
18 task for someone at PIM to perform?

19 A No.

20 Q Why would it not have been difficult?

21 A Because, again, at each step we must follow these codes.
22 And it is a matter of literally a minute or two to identify
23 which particular code belongs to which particular lot which was
24 produced in the factory.

25 Q Let's stay with that. I asked Mr. Kennedy a question about

1 Beech-Nut deciding not opening up cases and bags of Fruit
2 Nibbles. He talked about the cost.

3 My question to you is this: Once a bag of Fruit
4 Nibbles is opened up, and presuming there was no issue with
5 that Fruit Nibbles, could the product still be used?

6 A Yes.

7 Q It didn't have to be thrown out?

8 A No.

9 Q Please tell us why, in your opinion, the product still
10 could have been used. What would have had to have been done?

11 A The product is stable, and as long as that after opening
12 the pouches is done under proper quality control, there is no
13 issue with that at all.

14 Q Did Beech-Nut ever ask Promotion In Motion to repackage
15 product that had been opened and inspected so it could be sold
16 to third parties?

17 A No.

18 Can I say something here to clarify now?

19 THE COURT: No, there's no question.

20 Q No, you may not.

21 There was testimony earlier today from Mrs.
22 Bianchini -- I've learned to pronounce it -- concerning
23 underweight or short weight product. Are you familiar with
24 that?

25 A Yes.

1 Q When did that occur?

2 A The pouched product -- again, these pouch product, they're
3 packed on a very high speed machine. You produce about a
4 hundred pouches per minute. And these pouches, they are
5 accumulated, and then you go to a different machine where
6 they're boxed. So these pouches would then go -- they went to
7 the other machine to -- to box them.

8 Q What caused the problem?

9 A The problem simply was that the box that Beech-Nut designed
10 was too narrow, and again, the second machine that does the
11 boxing is a high speed machine. So the pouches must travel to
12 what we call the scale system, and then they are dropped into
13 these boxes. Now, if the pouch is too -- if the box is too
14 narrow on the top, some of the -- some of those pouches will
15 not go in the box, they will fall on the ground, and that will
16 create a shortage there, a short -- a fewer number of pouches
17 in the box.

18 Q Has Promotion In Motion ever denied that there was an issue
19 at some point with short weight or underweight packages?

20 A No, not at all.

21 Q What steps did Promotion In Motion take to correct this
22 problem when it was brought to its attention?

23 A Basically what we ended up doing was to make sure that once
24 these boxes were packed, they will go through a weight checker,
25 it's a machine, and as they go through that, any box that is

1 underweight -- and by that, I mean it has fewer number of
2 pouches -- it will be thrown out automatically.

3 Q Did Promotion In Motion have to purchase this scale you're
4 referring to?

5 A Yes.

6 Q Do you recall how much the scale cost?

7 A I would say roughly \$30,000.

8 Q When did that take place, if you remember the purchase of
9 this scale?

10 A I would estimate some time in September.

11 Q After the purchase of this scale, were there any further
12 issues with underweight packaging that you're aware of?

13 A I'm not aware of that.

14 Q Do you know who Dr. Chang of Beech-Nut is?

15 A Yes.

16 Q Do you know what his position or title was in the fall of
17 2008?

18 A I believe at that time he was VP of research and
19 development.

20 Q Did there come a time when Dr. Chang contacted you in
21 obtaining additional shipments of Fruit Nibbles product?

22 A I believe, yes, he did.

23 Q Do you remember eventually how many cases or truckloads of
24 Fruit Nibbles Dr. Chang requested be shipped by PIM to
25 Beech-Nut?

1 A I don't remember that.

2 Q There's been testimony by Mr. Kennedy and others concerning
3 four truckloads and 10,000 cases. Does that refresh your
4 recollection as to whether those are the same amounts you
5 discussed with Dr. Chang, or were there different amounts?

6 A I believe that request came from Bob Turner, with the
7 approval of Dr. Chang.

8 Q Bob Turner was who, please?

9 A He was the presiding purchasing director at Beech-Nut.

10 Q Excuse me. Purchasing director?

11 A Yeah.

12 Q At the time that Beech-Nut's purchasing director is asking
13 that 10,000 cases be sent by PIM to Beech-Nut and indicating
14 that Beech-Nut will hold PIM harmless from any responsibility,
15 had there been any complaints yet about the product that you're
16 aware of?

17 A I'm not sure.

18 Q After shipping in October of 2008 the four truckloads, did
19 you hear any -- sorry -- did you hear of any issue with those
20 Fruit Nibbles, either from Beech-Nut or any other third party?

21 A No, I did not.

22 Q When product, specifically Fruit Nibbles, left PIM's
23 facility for shipment to Beech-Nut, in your opinion, did it
24 meet the specifications of the parties' agreement?

25 A Yes, it did.

1 Q And do you have an opinion as to the quality of the product
2 that was manufactured the end of October, beginning of November
3 onwards by Promotion In Motion for Beech-Nut?

4 A It met the specifications.

5 MR. WALLACH: No further questions, your Honor.

6 THE COURT: All right. Cross-examination.

7 MR. DILLON: Your Honor, may we just have one minute?

8 THE COURT: Sure, go ahead.

9 (There is a pause for Beech-Nut's counsel.)

10 CROSS-EXAMINATION

11 BY MS. KOWALSKI:

12 Q Mr. Dwivedi, do you have a copy of the trial exhibit binder
13 on your desk?

14 A No, I don't see it here.

15 MS. KOWALSKI: May he approach, your Honor?

16 THE COURT: Sure.

17 Q Good afternoon.

18 I believe you testified that you are the CE -- I'm
19 sorry -- COO of PIM. Correct?

20 A Yes.

21 Q Who is your boss?

22 A Michael Rosenberg, who's the president.

23 Q And what was -- what was his title in 2008?

24 A President.

25 Q As the COO, you oversee manufacturing, research and

1 development and quality control, among other things. Correct?

2 A Yes.

3 Q You were overseeing those functions during the time that
4 PIM manufactured Fruit Nibbles. Is that correct?

5 A Yes.

6 Q In addition to being an officer of PIM, you were also an
7 investor in the business. Correct?

8 A At PIM Brands, yes.

9 Q Sir, if you would please turn to Beech-Nut Trial Exhibit 4
10 in the binder in front of you. This is an e-mail exchange on
11 Saturday, October 4th, 2008 between you and Mrs. Bianchini,
12 correct?

13 A Yes.

14 Q You were her boss. Right?

15 A Yes.

16 Q She was in charge of quality control. Right?

17 A Yes.

18 Q And she reported to you?

19 A Yes.

20 Q And she says: (Reading) I believe we are making a serious
21 mistake continuing to ship Beech-Nut product produced with
22 white grape juice concentrate. We all know the only reason the
23 product in our warehouse had an acceptable appearance is that
24 it is less than two weeks old. The flavor and the smell were
25 already not to standard. In a very short time the product will

1 taste and smell bad and appear ugly.

2 In my opinion, if that product reaches the marketplace
3 the complaints will be astronomical. I still feel we should
4 recall all product produced with white grape juice concentrate
5 before it destroys ours and Beech-Nut's reputations. Should we
6 discuss this with Michael in our meetings on Tuesday?

7 Did I read that correctly?

8 A Yes.

9 Q She's asking you, her boss, whether this should be
10 discussed with the president of the company. Right?

11 A Yes.

12 Q She's saying: Should we discuss the fact that the flavor
13 and the smell of the product in your own warehouse, the product
14 that you had not yet shipped to Beech-Nut, is already not to
15 standard. Right?

16 A That's what she is saying, yes.

17 Q And that in this very short time the product will taste and
18 smell bad and appear ugly. Right?

19 A That's what she's saying.

20 Q Right. And that if the product reaches the marketplace the
21 complaints will be astronomical. Right?

22 A Well, that's her statement.

23 Q And in the context, she's asking whether this should be
24 discussed with Michael Rosenberg, the company president, at a
25 meeting scheduled for Tuesday. Correct?

1 A Yes.

2 Q And you, her boss, are responding that it should not be
3 discussed with Mr. Rosenberg. Right?

4 MR. WALLACH: Objection now. That's not what the
5 e-mail said in the same way that I had to read the entirety --

6 THE COURT: No, go ahead, read the e-mail, his
7 response to Diane Bianchini. Go ahead, read it.

8 Q (Reading) It may sound simple, but it is not. Our failure
9 to detect the problem sooner may end up costing us over a
10 million dollars. I wish we had a million dollars to bring to
11 Beech-Nut for recalling the product, but we don't. Michael is
12 aware of the situation. By bringing it up again will only
13 anger him about our incompetence.

14 Did I read that correctly?

15 A Yes.

16 Q So I ask the question again: You, her boss, was responding
17 that she should not discuss this with Mr. Rosenberg, the
18 president. Correct?

19 A Well, I stated in the e-mail that Michael was aware of that
20 fact.

21 Q Can you please read the last line of your e-mail.

22 THE COURT: Okay, go ahead.

23 Was that the end of your answer to that?

24 Q Is that your answer, sir?

25 A Well, that's what I said, yes.

1 THE COURT: But you also went on to say: "By bringing
2 it up again will only anger him about our incompetence."

3 You were concerned about angering your boss. Correct?
4 Isn't that what you wrote?

5 THE WITNESS: That's what I wrote, yes.

6 THE COURT: Yeah, okay.

7 Go ahead.

8 BY MS. KOWALSKI:

9 Q And by writing that, you were telling Ms. Bianchini that
10 she should keep quiet. Correct?

11 A That's really not what I meant.

12 Q That she should not speak up?

13 A No. I said, Michael was aware of the situation, so why
14 bring it up -- bring it up again.

15 Q You were her boss. Correct?

16 A Yes.

17 Q And you just testified today that you never overruled her.

18 Isn't this an instance where you, as Mrs. Bianchini's
19 boss, would overrule her?

20 A I don't think it's overruling her, it's just a question of,
21 she is saying, we should bring it up with Michael. And I said,
22 Michael is aware of the fact.

23 So it's not a question of overruling it. Her point
24 was to bring it to Michael's attention.

25 Q And the reason stated in the e-mail that you, her boss, are

1 telling her that she should not bring it up at the Tuesday
2 meeting --

3 MR. WALLACH: Objection, your Honor.

4 THE COURT: No.

5 MR. WALLACH: Counsel keeps arguing that the e-mail
6 says she should not bring it up. That's an interpretation.

7 THE COURT: No, that's not -- okay.

8 Why don't you just stick to the words of the e-mail.
9 They speak clearly.

10 MS. KOWALSKI: Okay.

11 THE COURT: I mean, didn't you answer: "Michael is
12 aware of the situation. By bringing it up again will only
13 anger him about our incompetence."

14 Weren't you worried about what he might have perceive
15 to be your incompetence? Isn't that -- why else would you
16 write that?

17 THE WITNESS: No. The real issue here is that he was
18 informed, he knew about that. It was my responsibility, it was
19 Mrs. Bianchini's responsibility to address the issue and fix
20 it. He was the president. So --

21 THE COURT: My question is: Why would you use the
22 term "about our incompetence." Those are your words.

23 THE WITNESS: Okay.

24 THE COURT: Why would you use the word "incompetence"?

25 THE WITNESS: I'm a very, very hard taskmaster, Diane

1 was an alarmist. And it is my responsibility to make sure --
2 and I did not mind that. It was my responsibility to make sure
3 that the people who worked under me, they were doing everything
4 humanly possible to address any and all issues, particularly in
5 this particular case, and a quality issue that may have come
6 up.

7 MS. KOWALSKI: Your Honor, I move to strike for
8 failure to respond to your question.

9 THE COURT: No.

10 I guess -- never mind.

11 Go ahead. If you have any more questions, go ahead.

12 BY MS. KOWALSKI:

13 Q Could you please turn to Exhibit 5 in the book before you.

14 Mrs. Bianchini testified that PIM never got the
15 product right, that PIM never did produce a consistent reliable
16 product. Did you agree with that?

17 A No, not at all.

18 Q Mrs. Bianchini as part of her job retained samples from the
19 production runs. Isn't that correct?

20 A Yes.

21 Q Please look to Exhibit 5.

22 So Mrs. Bianchini sent you an e-mail as late as
23 November 13th, which is reflected in Beech-Nut 5, saying that
24 the Fruit Nibbles produced at the end of October was shriveling
25 up and appearing dry. Right?

1 A Yes.

2 Q And she was talking about the samples that she had retained
3 at PIM. Right?

4 A Yes.

5 Q So she was telling you that the product being produced as
6 late as the end of October still had quality problems. Right?

7 A We had in our investigation determined that the product
8 that was made with white grape juice concentrate had an issue,
9 and this particular product that she is talking about was
10 indeed made with white grape juice concentrate. So there is no
11 contradiction there.

12 Q The e-mail says: (Reading) It looks like we may have a
13 problem with the texture of B-N. The samples packaged at the
14 end of October are showing signs of shriveling up and appearing
15 dry. This product was produced looking oily with Capol. The
16 Capol appears to soak into the piece leaving the piece. We
17 will continue to monitor this. We are producing Welch's at
18 this time. Diane.

19 Did I read that correctly, sir?

20 A Yes.

21 Q Mr. Dwivedi, did you understand that this product was going
22 to be consumed by toddlers? Right?

23 A Yes.

24 MS. KOWALSKI: One moment.

25 (Ms. Kowalski and Mr. Dillon confer off the record.)

1 MS. KOWALSKI: I have no further questions at this
2 time.

3 Thank you, Mr. Dwivedi.

4 THE COURT: Okay. Any redirect, Mr. Wallach?

5 MR. WALLACH: No. No need for questions, your Honor.
6 Thank you.

7 THE COURT: You can step down, Doctor. Thank you.

8 (Witness excused.)

9 THE COURT: Mr. Wallach?

10 MR. WALLACH: At this point, your Honor, that is it
11 for Promotion In Motion. Thank you.

12 THE COURT: All right. You rest then. Right?

13 MR. WALLACH: Yes, your Honor.

14 THE COURT: Okay. Ladies and gentlemen, if you would
15 please step into the jury room, give us a few minutes, we may
16 excuse you for the day, and tomorrow we probably will schedule
17 tomorrow to have the closing arguments of counsel and then I'll
18 give you the instructions on the law. But give me five minutes
19 to discuss that with the lawyers.

20 So please be patient, and we'll be with you in a few
21 minutes. Don't discuss anything about the case. Okay?

22 THE DEPUTY CLERK: Please rise for the Jury.

23 (The Jury leaves the courtroom.)

24 THE COURT: All right. I just wanted to give you a
25 chance before we excuse the jury for the night, because after

1 that we'll schedule I guess the closings. How long would your
2 closing arguments be?

3 MS. KOWALSKI: No longer than the opening I think,
4 your Honor.

5 THE COURT: I'm sorry, I couldn't hear you. I'm
6 sorry.

7 MS. KOWALSKI: No Longer than opening I think, your
8 Honor.

9 THE COURT: Really? Okay.

10 THE COURT: And yours? No longer than the opening?

11 MR. WALLACH: I'm not sure what answer you want based
12 upon that reaction, your Honor. Do you want it longer or
13 shorter because I can modify my answer accordingly.

14 THE COURT: I couldn't care less either way, but I
15 can't imagine you're only going to be 10 or 15 minutes, but if
16 you are, that's great.

17 MS. KOWALSKI: I do have the evening so that I may
18 modify my answer tomorrow morning.

19 THE COURT: Mr. Wallach -- no, I can't imagine -- you
20 both will probably be 20 minutes to a half hour, I would think,
21 by the time you get started. I'm not encouraging you, but you
22 know, there is some advocacy here, there is some advocacy here.

23 MR. WALLACH: Agreed.

24 THE COURT: Unless you just want to submit, I'll
25 charge them right now and they can start deliberating right

1 now. Do you want to submit?

2 MR. WALLACH: No, I would like to argue tomorrow
3 morning, your Honor.

4 THE COURT: All right.

5 Go ahead. Anything else?

6 MR. WALLACH: Yes, your Honor.

7 You had held off, you said you wanted to hold off
8 until we presented our case on issuing a final ruling on the
9 two exhibits we had presented, what I call rebuttal to Mr.
10 Kennedy. We talked about them. I apologize, your Honor, I
11 think we talked about them this morning. The Fruit Nibbles
12 withdrawal confidential document, and then the November 21,
13 2008 e-mail. I don't believe there was a final ruling.

14 THE COURT: I'm sorry, I didn't hear you, I wasn't
15 paying attention. Repeat yourself again, Mr. Wallach.

16 Go ahead. You were offering --

17 MR. WALLACH: Yes. The first one is a document
18 entitled "Fruit Nibbles Withdrawal, Updated 12/01/08,
19 Confidential."

20 It was shown to Mr. Kennedy, specifically --

21 THE COURT: Okay.

22 MR. WALLACH: There were two pages.

23 THE COURT: The two pages, which are 846 and 847?

24 MR. WALLACH: Exactly correct, your Honor.

25 THE COURT: Okay.

1 MR. WALLACH: And the other exhibit that was shown to
2 Mr. Kennedy was a November 21, 2008 e-mail from Dr. Chang to
3 Mr. Rudolf at the parent corporation. We had presented an
4 argument on this. My notes indicated, your Honor, you had said
5 you were not going to issue a final ruling until we had
6 presented our case.

7 THE COURT: Can I see the exhibit, the last one you
8 were just referring to?

9 MR. DILLON: Your Honor, I think I can make it easy.
10 We won't object to their admission.

11 THE COURT: Okay. Which one was that though? I don't
12 recall that one, the November 21st e-mail.

13 MR. WALLACH: If I can show it to your Honor.

14 THE COURT: Was it marked as an exhibit?

15 MR. DILLON: We will do that now.

16 MR. WALLACH: We will take care of that.

17 THE COURT: All right. Because it wasn't marked.

18 MR. WALLACH: It wasn't marked, your Honor.

19 THE DEPUTY CLERK: You haven't given me any numbers.

20 MR. WALLACH: That's correct.

21 THE COURT: Okay. So you have no objection to that.
22 Right?

23 MR. DILLON: No objection to those --

24 THE COURT: Exhibit Number 4?

25 MR. WALLACH: I think it would end up being Number 2.

1 THE COURT: What's that?

2 MR. DILLON: 2?

3 Oh I see what you're doing, I see what you're doing.
4 You're saying that the two pages would be PIM-2 and 3 and the
5 e-mail would be PIM-4?

6 THE COURT: Well, if that's how you wanted to mark
7 them. They're not marked. You should mark your exhibits when
8 you make your offer to put them in evidence so the record has
9 some indication. I know which why ones you're referring to.

10 So what do you want to mark those, Mr. Wallach?

11 MR. WALLACH: What I would like to do is mark "Fruit
12 Nibbles Withdrawal Confidential" as PIM-1.

13 THE COURT: 846?

14 MR. WALLACH: Those two pages.

15 THE COURT: That's going to be -- why don't you mark
16 them separately?

17 MR. DILLON: Wait. Excuse me, your Honor.

18 Mr. Wallach -- let me assist Mr. Wallach here.

19 MR. WALLACH: That's fine with me.

20 MR. DILLON: PIM-1 has already been marked for
21 identification.

22 THE DEPUTY CLERK: Right.

23 THE COURT: Yeah.

24 MR. DILLON: So what Mr. Wallach is suggesting is --

25 THE COURT: Which one is PIM-1?

1 MR. DILLON: PIM-1 was that group of excerpts.

2 MR. WALLACH: That's right.

3 THE COURT: Right, okay.

4 MR. DILLON: That was PIM-1. That's not admitted into
5 evidence.

6 PIM-2 for identification is the two-page excerpt. So
7 if Mr. --

8 THE COURT: The two-page, meaning Bates Number 846 and
9 847?

10 MR. DILLON: Correct. If Mr. --

11 THE COURT: That's PIM-2?

12 MR. DILLON: That's PIM-2.

13 So if Mr. Wallach would take those two pages and put a
14 sticker on them saying "PIM-2" --

15 THE COURT: All right.

16 MR. DILLON: -- and then last is the e-mail that we
17 just talked about, BN8552, and similarly --

18 THE COURT: 8552?

19 MR. DILLON: 8552.

20 THE COURT: Right.

21 MR. DILLON: If he takes a sticker and puts it on that
22 and says PIM Number 3, then we'll --

23 THE COURT: You have no objection to PIM-3, PIM-2 --

24 MR. DILLON: Correct.

25 THE COURT: -- and PIM-1?

1 MR. DILLON: PIM-1 I object to.

2 THE COURT: Which one was PIM-1 again?

3 MR. DILLON: That's the excerpt from the damage
4 support documents. I don't think that Mr. Wallach even asked
5 that that go into evidence.

6 MR. WALLACH: I marked it for identification.

7 THE COURT: Let me see it again, please.

8 (Counsel confer off the record.)

9 THE COURT: PIM-2 and PIM-3 are in evidence. Right?
10 Okay.

11 MR. WALLACH: There are two exhibits going in, your
12 Honor, PIM-2 and PIM-3.

13 THE COURT: PIM-2 and 3 are in evidence. Right?

14 MR. WALLACH: Yes.

15 THE COURT: Without objection they're both in evidence
16 then.

17 (PIM Exhibits 2 and 3 are received in evidence.)

18 THE COURT: PIM-1 you're not offering. Correct?

19 MR. WALLACH: Correct, your Honor.

20 THE COURT: Okay. All right. With those offers, are
21 you resting?

22 MR. WALLACH: Yes, your Honor.

23 THE COURT: Okay. Did you get a chance -- we don't
24 need the jury any more today. Right?

25 MR. WALLACH: Correct, your Honor.

1 THE COURT: Right?

2 MR. DILLON: Right.

3 THE COURT: We don't need the jury. Okay. We'll
4 excuse them.

5 Gail, why don't you just go in and tell them to be
6 back tomorrow morning at 9 o'clock.

7 We'll start at nine. That way they'll get the case
8 early in the day. Okay?

9 So we'll begin at 9 o'clock, everybody.

10 Tell them to be here promptly, we're going to begin at
11 nine.

12 THE DEPUTY CLERK: Okay.

13 THE COURT: Why don't you take five minutes and read
14 the "substantial impairment" instruction and the jury verdict
15 form. Do you have a copy of the jury verdict form?

16 MR. WALLACH: Yes, your Honor.

17 MR. DILLON: Yes.

18 THE COURT: You do? Okay. I'll come back out in five
19 minutes. Okay? Then we'll just go over that.

20 Other than that, I think the charge, you have a copy
21 of all right. Correct?

22 MR. DILLON: I believe, your Honor, we had basically
23 agreed on virtually all the charge.

24 THE COURT: Everything except 10 and 11 you had a
25 little differences. So look at 10 and 11 and then we'll go

1 over that.

2 MR. DILLON: Right.

3 Yes, your Honor.

4 THE COURT: And I'll be back out in a couple of
5 minutes.

6 (A recess is taken.)

7 (Proceedings resume - Jury not present.)

8 THE DEPUTY CLERK: Please remain seated.

9 THE COURT: All right. Mr. Dillon, what's going on?

10 MR. DILLON: So I saw on the -- on the instruction on
11 substantial impairment --

12 THE COURT: Right.

13 MR. DILLON: -- your Honor references 2-612 for the
14 Uniform Commercial Code.

15 THE COURT: Right.

16 MR. DILLON: In your decision you had referenced a
17 different section of the code, 2-608, which is what Beech-Nut
18 had relied upon in filing the motion. Now, it could be, your
19 Honor, that it's six of one and half dozen of the other. It
20 could be that there's no material difference. But as I stand
21 here, I have to admit, I don't know the answer, and I
22 respectfully request that I be given an opportunity with Ms.
23 Kowalski to just go back and look and see if it does make a
24 difference. Maybe it doesn't, and so then there's no problem
25 from our end. But my guess is it might make a difference and

1 I'd like to be able to speak to that.

2 THE COURT: All right. I see what you're saying,
3 Footnote Number 4, right. I don't think it's going to make any
4 difference. But go ahead.

5 MR. DILLON: So if we could, your Honor, what we'd
6 like to do -- and I know it's a little bit of a imposition --
7 is come in early tomorrow morning and do this before the jury
8 gets here at 9 o'clock. Would that be possible?

9 THE COURT: Well, I'm here usually early anyhow so
10 it's only my staff. Get here by quarter to nine.

11 Okay?

12 MR. DILLON: Yeah.

13 THE COURT: If you know something tonight -- we're
14 going to double-check it. You know what, why don't we...

15 (The Court and the Law Clerk confer off the record.)

16 MR. DILLON: You remember, your Honor, when you
17 decided the motion.

18 MR. WALLACH: I have a copy of the statute if it helps
19 the Court now.

20 THE COURT: Hand it up, if you could. Because it may
21 not -- go ahead.

22 MR. DILLON: Your Honor, I was going to say, you
23 recall that one of the issues that was presented to your Honor
24 on the summary judgment motion was whether the parties had
25 entered into a contract, an overall contract. And your Honor

1 had said no, that they never entered into an overall contract.

2 THE COURT: Right.

3 MR. DILLON: My understanding of how installment
4 contracts work is, if they had entered into an overall
5 contract, then that would definitely be an installment
6 contract. Because then what would happen is, you have an
7 overall contract and you would have installments represented by
8 purchase orders. So in that case, 2-612 definitely would
9 apply.

10 Now, what I'm saying to your Honor is, we didn't think
11 in terms of 2-612 because you had ruled there was no overall
12 contract. You know, overall contract might last for, like, say
13 a three-year period. All purchase orders issued that are
14 governed by the overall contract, and that's what 2-612 is
15 talking about.

16 So, we hadn't been thinking about it that way, we had
17 been thinking about 608. But what I'm saying to your Honor is
18 I'd like to go back and do a little research and see if it make
19 as practical difference.

20 THE COURT: What's the difference? If you look at 608
21 it still talks about the curing. So, in other words, the issue
22 before this jury right now is whether it's substantially
23 impaired and whether there was any opportunity to cure it. And
24 608 has the same language. So whether it's 608 or 612 -- I
25 mean, 608 reads as follows: (Reading) Revocation of acceptance

1 in whole or in part. The buyer may revoke his acceptance of a
2 lot or commercial unit whose nonconformity substantially
3 impairs its value to him if he has accepted it (a) on the
4 reasonable assumption that its nonconformity would be cured,
5 and it has not been reasonably cured.

6 So it's very similar language. It talks about curing.

7 MR. DILLON: Judge, I respectfully would like the
8 opportunity to look at the statute, think about it a bit, maybe
9 do a little research for the reasons I've stated.

10 THE COURT: I know. But I'm just asking you, I think
11 that's what you were thinking, that maybe under 612, 612 has
12 the language of curing and you were maybe thinking 608 didn't.
13 But I just read 608 and it also gives the other party, the
14 alleged breaching party an opportunity to cure.

15 MR. DILLON: Well, I think it might be a little bit
16 different, that's why I want to take a look at it tonight.

17 THE COURT: Well --

18 MR. DILLON: Because as you just read to me 608, it
19 sounds like it's talking about when you accept things that you
20 know are defective. In other words, the buyer takes a product,
21 he's accepting it believing in advance the seller has said to
22 him, look, I know it's not quite right but I'm going to come
23 there and fix it, so the buyer says okay, I'll take it. And
24 then the seller doesn't come and fix it, then the buyer gets
25 the chance to revoke the acceptance. Whereas, I think 612 is a

1 little different. 612 is saying that you accept the goods.
2 There's no discussion beforehand that the goods might not be
3 conforming, and you then discover afterwards it's not, then you
4 want to revoke your acceptance to the whole installment
5 contract.

6 So, look, your Honor --

7 THE COURT: Look, I don't read it like that at all. I
8 think they're very comparable.

9 MR. DILLON: Okay.

10 THE COURT: If not -- you know...

11 (Reading) The buyer may revoke his acceptance of a lot
12 or commercial unit whose non-conformity substantially impairs
13 its value to him if he has accepted it on the reasonable
14 assumption that its nonconformity would be cured, and it has
15 not been reasonably cured.

16 So there again he's accepted it, it's nonconforming,
17 it's substantially impaired and it can't be cured.

18 And 12 reads the same, an installment contract. It
19 just talks about an installment contract.

20 Number 12 just simply talks about even if you have
21 separate lots, or you have a contract, even though the contract
22 contains a clause, each delivery is a separate contract

23 We don't have to get into any of that. We don't have
24 to get into whether it's under 612 or under 608, because I
25 think the charge cannot refer to the UCC specific -- it simply

1 can refer to --

2 MR. DILLON: Uniform Commercial Code?

3 THE COURT: Yeah. And it can then refer to
4 substantial impairment and curing, whether or not it could have
5 been cured.

6 You see what I'm getting at?

7 MR. DILLON: Yes, I do.

8 THE COURT: Because they're both the same. One just
9 talks in terms of a contract that says each delivery is a
10 separate contract. And it says, even in that context the buyer
11 may reject any installment. And it goes on in paragraph 3 of
12 612: Whatever nonconformity or default with respect to one or
13 more installments substantially impairs the value of the whole
14 contract, there's a breach of the whole.

15 So I mean, we don't have to get into all of that I
16 don't think.

17 MR. DILLON: Well, I mean, I voiced my concern because
18 of the finding of your Honor that there was no overall contract
19 in the summary judgment motion and the citation of the
20 different sections, but it could very well be that by editing
21 it, it removes the issue.

22 THE COURT: I think it does.

23 Let me see. Let me see.

24 I will just say, "Are governed by the Uniform
25 Commercial Code."

1 MR. DILLON: And if you delete the next sentence
2 entirely and the first phrase after that and just go from:
3 "the Uniform Commercial Code" to "Beech-Nut may not reject a
4 delivery of nonconforming goods," I think that probably is -- I
5 can't take any exception to that. And then the end of it is
6 left as is. Except you say, "the entire contract." I guess
7 you would say, "all the goods" or something of that nature.

8 Your Honor, may I try marking this up --

9 MR. WALLACH: I was wondering if -- thank you. I
10 don't have the statute memorized. Thank you, your Honor.

11 THE COURT: I'm marking it as we talk.

12 MR. DILLON: This would be what I would propose then.

13 The first sentence will say "Beech-Nut is suing under
14 four purchase orders and therefore its claims are governed by
15 the Uniform Commercial Code." Delete the next sentence and the
16 first phrase, and say: "Beech-Nut may not reject a delivery of
17 nonconforming goods unless the nonconformity substantially
18 impairs the value of that delivery, and could not be cured by
19 PIM."

20 Moreover, instead of using the "entire contract," say,
21 "the entire purchase by Beech-Nut -- the entire purchase by
22 Beech-Nut could only be repudiated if the nonconformity of the
23 Fruit Nibbles substantially impaired the value of the entire
24 purchase by Beech-Nut."

25 THE COURT: Hold on a second.

1 (There is a pause in the proceedings.)

2 MR. DILLON: And then I think the issue is resolved.

3 THE COURT: Well, my thought in the opinion was that
4 page 4: (Reading) As a matter of law, the Court finds that the
5 purchase orders are valid and enforceable contracts.

6 So -- and I do refer to 608(1). So the language of
7 608(1) is what should govern in this charge. And that states:
8 "The buyer may revoke his acceptance of a lot or commercial
9 unit."

10 So we should use the terms...

11 (There is a pause for the Court.)

12 THE COURT: Go ahead. What's your final suggestion,
13 Mr. Dillon, for now?

14 MR. DILLON: Well, I think my final suggestion is it's
15 really paragraph 3 and it's only paragraph 3, and the edits
16 that I had suggested previously, I suppose with those edits I
17 have no problem with the instruction. Maybe I would ask that
18 the footnote also include a reference to Section 608. But
19 other than that I have no problem with the instruction with
20 those edits.

21 THE COURT: The jury is not going to know the
22 difference between 608 and 612 or anything like that.

23 MR. DILLON: I know, I know.

24 THE COURT: Mr. Wallach, what is your -- I'll read it
25 to you how I've edited it preliminarily.

1 (Reading) Beech-Nut is suing under four purchase
2 orders -- that's what it is -- and therefore its claims are
3 governed by the Uniform Commercial Code. Beech-Nut may not
4 reject a delivery of nonconforming goods unless the
5 nonconformity substantially impairs the value of that lot or
6 commercial unit and cannot be cured by PIM.

7 Moreover, the entire lot or commercial units could
8 only be repudiated if the nonconformity of the Fruit Nibbles
9 substantially impaired the value of the entire lot or
10 commercial units.

11 Anybody have any comments?

12 MR. DILLON: That's acceptable to me, your Honor.

13 MR. WALLACH: I have comments, your Honor. Initially
14 in the Court's Summary Judgment decision on page 5, one of the
15 cases cited is the Hubbard vs. Utz Quality Foods case which
16 involved an installment contract for the delivery of potatoes,
17 that was the issue there.

18 I submit, your Honor, that in the Summary Judgment
19 decision the Court's ruling in part relied upon 2-612 and the
20 concept of installment contracts. I don't know that we need to
21 spend time talking about how do we interpret that decision at
22 this point, your Honor. I don't think that was before you, as
23 to how to label what took place here.

24 We did put in our trial brief, your Honor, in addition
25 to our version of the charge, analysis of 2-612 and we maintain

1 this is an installment contract scenario and why that's the
2 government standard. Your Honor -- and I tried to write this
3 down accurately -- when your Honor seeks in this third
4 paragraph to replace the word "installment" with "lot" or
5 "commercial unit," I do object, your Honor, because firstly, I
6 don't know that the jury is going to understand that in the
7 context of purchase orders where there were deliveries by
8 installment. There may be confusion within the jury as to:
9 Does that mean individual cases, or is this referring to
10 shipments pursuant to one of the four purchase orders?

11 That's the specific objection, your Honor, to using
12 the phrase "lots" or "commercial unit."

13 MR. DILLON: I think I can solve our problem. I have
14 a suggestion.

15 THE COURT: Go ahead, Mr. Dillon.

16 MR. DILLON: If what we are saying is that each
17 purchase order is an installment contract, then I'm fine. If
18 we're saying -- what I want to do, your Honor, is end up with
19 saying to the jury: Look, if you think that these breaches
20 that have been talked about impair the value of all the
21 purchases as a whole -- because I think that's really the
22 question that we were left with after your decision -- that's
23 fine with me. That's fine with me.

24 THE COURT: That's your position?

25 MR. DILLON: Yeah.

1 THE COURT: Okay, I mean -- yeah. I mean well, what I
2 concluded was that the Court finds that the purchase orders are
3 valid and enforceable contracts. I didn't say that there was
4 one contract which described the delivery of installments under
5 that contract because that's not what this is. But it doesn't
6 make any difference. You still have to prove substantial
7 impairment and you still have to prove that they couldn't be
8 cured. So we're --

9 MR. DILLON: We're dancing on the head of a pin.

10 THE COURT: We really are, and I'm trying to make it
11 clear to a jury.

12 So Beech-Nut may not reject a delivery of
13 nonconforming goods unless the nonconformance substantially
14 impairs the value of that installment and could not be cured.

15 MR. DILLON: All right, your Honor. I've heard what
16 you just said about your decision, I understand what you're
17 thinking. And so therefore I have no problem with the change
18 that you just mentioned for the sentence that you just
19 described. And I would say --

20 THE COURT: Delete the word "installment"?

21 MR. DILLON: Yes.

22 And I would say that therefore I also logically take
23 away any objection to the wording from the last sentence of the
24 paragraph.

25 THE COURT: "Moreover, the entire" --

1 MR. DILLON: Contract. I accept that wording.

2 THE COURT: Mr. Wallach, what's your position?

3 MR. WALLACH: I think I need to agree because counsel
4 is adopting the language we submitted to the Court as our
5 alternate version of this jury charge, your Honor, on that
6 paragraph. I have some comments on other aspects, but on this
7 core issue, we're in agreement.

8 THE COURT: But I think we're in agreement that the
9 one section, this section provides that a contract which
10 requires authorized delivery of goods of separate lots as
11 separately accepted is an installment contract. We're going to
12 take that out.

13 MR. WALLACH: Yes, your Honor.

14 THE COURT: Right, Mr. Dillon?

15 MR. DILLON: Yes. We're taking that out and we're
16 taking out the phrase immediately following.

17 THE COURT: Yeah. Then we'll just start with
18 "Beech-Nut may not reject," and leave everything else the same.

19 MR. DILLON: Correct.

20 THE COURT: Mr. Wallach, what other problems do you
21 have, or objections?

22 MR. WALLACH: I'll start at the beginning, your Honor.
23 These tie in with our alternate version that was submitted.

24 In the first line, your Honor, we request that it
25 read: "The Court will now instruct you on Beech-Nut's claim

1 that the defects" -- this is what I'm adding -- "in some of the
2 product substantially impaired the value." This reads as if
3 all of the product was defective, your Honor.

4 THE COURT: Well, let's see.

5 MR. DILLON: I have no objection to that modification.

6 THE COURT: You're talking about the first paragraph
7 of what you gave me in your proposal? No.

8 MR. WALLACH: No, I'm working off your -- the Court's
9 version now.

10 THE COURT: All right. Hold on a second.

11 Go ahead, Mr. Wallach. What were you saying again?

12 MR. WALLACH: I believe Mr. Dillon consents to this.
13 I'm working off the Court's version now, your Honor.

14 THE COURT: Okay.

15 MR. WALLACH: The first line would now read: "The
16 Court will now instruct you on Beech-Nut's claim that the
17 defects in some of the product substantially impaired..."

18 THE COURT: Okay. That would be consistent with 10 as
19 well. But go ahead. Anything else?

20 MR. WALLACH: Yes, your Honor.

21 Focusing on Instruction Number 11, the final paragraph
22 on the first page after Footnote 3, the text begins: "While
23 minor, especially easily correctable," and then it continues,
24 your Honor?

25 THE COURT: Yeah.

1 MR. WALLACH: That's language that was proposed by
2 Beech-Nut. As the footnote reference indicates -- and I looked
3 at this when it was received -- that's a reference to common
4 law principles, your Honor, it's not a UCC principle. This is
5 not a reference in Williston on Contracts to the Uniform
6 Commercial Code, and we maintain that's not the appropriate
7 language to be given to the jury.

8 On that same point, your Honor, Footnote 5 in the
9 following paragraph is again referenced to Williston on
10 Contracts -- well, it's a reference to Williston on Contracts
11 in a common law context, not under any provision of the Uniform
12 Commercial Code.

13 THE COURT: I don't think we were able to find
14 anything that defines what "substantial impairment" is, and
15 that's what we have to try to enlighten the jury on, what it
16 is.

17 MR. WALLACH: The beginning of the fourth paragraph:
18 "When I use the phrase 'substantial impairment,'" that sets
19 forth what the jury has to do.

20 THE COURT: Wait. The fourth paragraph of your
21 proposed charge?

22 MR. WALLACH: I'm working solely off yours, your
23 Honor.

24 THE COURT: It doesn't define "substantial
25 impairment," it simply says: Substantial impairment. When

1 there's a substantial impairment then you can reject it. But
2 that doesn't do anything to help the jury as to define what
3 "substantial impairment" is.

4 I mean, what you're proposing is: (Reading) When I
5 use the phrase "substantial impairment" in these instructions,
6 it is whether the nonconformity or default with respect to one
7 or more shipments of the Fruit Nibbles product substantially
8 impairs.

9 It's using the same term to define the same term.
10 "Substantially impaired the value of the purchase orders as a
11 whole and could not be cured, then PIM is in breach."

12 We were not able to find anything that defines
13 "substantial impairment," and that's why we may have had to
14 resort to another authority because that doesn't help the jury
15 any. What your paragraph is, "Substantial impairment. If you
16 find a substantial impairment it's a substantial impairment,"
17 but it doesn't tell the jury how to go about finding what a
18 "substantial impairment" is.

19 What I'm proposing is as follows: "When I use the
20 phrase 'substantial impairment' in these instructions, is
21 whether the nonconformity or default with respect to one or
22 more shipments of the Fruit Nibbles product substantially
23 impaired the value of the purchase orders as a whole and could
24 not be cured, then PIM is in breach of the purchase orders as a
25 whole. While minor, especially easily correctable defects

1 normally do not constitute substantial impairment, the presence
2 of numerous defects even where each one is individually minor
3 and substantial may, when viewed in the aggregate, may impair
4 the value of the entire purchase."

5 It's giving both sides of the story. If you're
6 arguing they're minor and they were curable, that's in the
7 charge;

8 And if you're arguing there's so many minor ones that
9 they result in a substantial impairment, that gives the other
10 side of the story.

11 So I'm going to leave that in.

12 MR. WALLACH: Your Honor, we had for purposes of the
13 record -- and I apologize now, I'm switching paper on you which
14 I tried not to do.

15 THE COURT: Go ahead.

16 MR. WALLACH: In our proposed charge we had included a
17 paragraph. It's very short, if I can read it: "In performing
18 this analysis, you must consider a subjective analysis in the
19 sense that the needs and circumstances of Beech-Nut must be
20 examined. This determination is not made by its personal
21 belief as to the reduced value of the goods in question, you
22 must also make an objective determination that the value of the
23 goods to Beech-Nut has, in fact, been substantially impaired."

24 And then there's a reference to -- because New York
25 law controls here -- a New York Court decision applying the

1 Uniform Commercial Code, exactly for the reasons that you
2 stated, your Honor: By itself one cannot define the term
3 "substantial impairment" by merely repeating those words.

4 That's why we propose this paragraph that talks about
5 a subjective and objective analysis.

6 (There is a pause for the Court).

7 THE COURT: Well, your language and the language -- if
8 they're coming from the same case in New York, Sepulveda vs.
9 American Motors. Your paragraph there, and then the next --
10 the third from the last paragraph in my proposed charge both
11 come from the Sepulveda case.

12 Hold on a second.

13 (There is a pause for the Court).

14 THE COURT: Mr. Wallach, I think your objection is
15 that one sentence: "While minor, especially easily correctable
16 defects normally," and otherwise everything else after that is
17 fine?

18 MR. WALLACH: Yes. The end of the paragraph you're
19 referring to where the sentence ends with the reference to
20 Footnote 4 --

21 THE COURT: Right.

22 MR. WALLACH: -- is subject to our objection. And
23 this is perhaps form over substance, the reference in Footnote
24 5 to Williston on Contracts, as I mentioned earlier, is a
25 reference to common law principles.

1 THE COURT: I'm not going to give any of these
2 references in the -- to the jury. The jury is not going have
3 any of these references. If there's references anywhere in the
4 charge I typically don't give them that.

5 MR. WALLACH: I wanted to be clear on that. There was
6 colloquy between you and counsel about whether they understand
7 a reference to the UCC earlier, so --

8 THE COURT: No, no, no.

9 MR. DILLON: We fixed that.

10 MR. WALLACH: My final point, your Honor --

11 THE COURT: I may just make that one reference to the
12 Uniform Commercial Code, but I'm not going to give any of the
13 cites here. We'll take those all out.

14 As far as that sentence, I'll think about it. But the
15 other option would be -- I want to read that case again -- but
16 the other option would be, your paragraph, the fourth one down
17 on your proposed charge, I could include that right after
18 Footnote 3 in my proposed charge and then still keep everything
19 else in after that. Because I do think the sentence "...while
20 minor, especially easily corrected defects..." I think that
21 helps them to figure out: Were these minor and could they have
22 been correctable, or were they so substantial?

23 MR. WALLACH: The nature of our objection, your Honor,
24 is the case law. Admittedly, the limited case law that exists
25 does refer to both the subjective and an objective analysis,

1 and that's why I attempted to track the language from the New
2 York case that is cited here.

3 THE COURT: I know. But I can include that paragraph
4 and also include this sentence, because this sentence may be
5 helpful. That doesn't mean -- it's not contrary to the law, it
6 simply gives them some way of assessing: Is this a substantial
7 impairment or not. You don't want them to conclude because
8 there's a few minor -- if they -- your argument is, these were
9 minor, relatively minor problems which were correctable or
10 curable.

11 MR. WALLACH: In the aggregate, yes.

12 THE COURT: And his argument is going to be, they were
13 beyond that, these were not. The cumulative effect of all this
14 was, they gave us a reasonable basis on which to withdraw.

15 So let me think about including your paragraph (a)
16 into this as well.

17 MR. WALLACH: I had one other observation on this
18 charge, your Honor.

19 THE COURT: Yeah, go ahead.

20 MR. WALLACH: The second to last paragraph that
21 begins: "Put another way" and then continues. Your Honor, I
22 don't understand the issue in the case to be whether or not the
23 Fruit Nibbles should have been withdrawn from the marketplace.
24 The question is whether or not Beech-Nut had the right to
25 terminate the contract, however that's defined through the

1 purchase orders between the parties.

2 THE COURT: They wouldn't terminate the contract if
3 they didn't have the right to decide to withdraw the Fruit
4 Nibbles from the marketplace.

5 The real -- the first step in the process is: Was it
6 commercially reasonable for them to withdraw Fruit Nibbles from
7 the marketplace? Was there a reasonable basis for them to do
8 that? And the basis would be, was there a substantial
9 impairment? And then a second set would be obviously to revoke
10 the contract for that reason.

11 No, that makes sense.

12 Is there anything else?

13 MR. WALLACH: Just to be clear, your Honor, we were
14 also handed by your law clerk the full charge, and we had
15 objected to what now appears as Instruction Number 10. Because
16 the Court had provided this previously to the jury, I wasn't
17 sure why the Court was restating what it already advised the
18 jury at the beginning of the case.

19 THE COURT: I don't follow you. Are you objecting to
20 the proposed charge?

21 MR. WALLACH: I'm objecting to the entirety of
22 Instruction Number 10 as unnecessary.

23 THE COURT: No. It sets the framework for them to
24 make -- to understand what it is they're being asked to -- no,
25 your objection is noted. But it sets the framework for them to

1 understand what exactly they're being asked to deliberate on.

2 Okay. Is there anything else?

3 MR. DILLON: No, your Honor.

4 THE COURT: Okay. We'll clean this up and we'll see
5 you in the morning. We'll see you 9 o'clock then.

6 MR. WALLACH: Thank you, your Honor.

7 THE COURT: Nobody has any objections with the verdict
8 sheet? The verdict sheet is fine?

9 MR. DILLON: That's fine.

10 MR. WALLACH: That's fine. The verdict sheet tracks
11 the instructions we've been talking about.

12 THE COURT: Well, the verdict sheet is very simple,
13 it's just two questions:

14 "Do you find from a preponderance of the evidence
15 there were defects in the Fruit Nibbles such that these defects
16 impaired the value of the Fruit Nibbles purchased by
17 Beech-Nut?" Yes or no.

18 And if your answer is "No," please hand in the verdict
19 form. If your answer is "Yes," then Question Number 2: "What
20 amount of damages do you award Beech-Nut?"

21 And it just simply has one line for the amount of
22 damages. Correct?

23 MR. DILLON: Correct.

24 THE COURT: Okay?

25 MR. WALLACH: I'm just trying to put the pages

1 together, your Honor.

2 There's no reference in that Question 1 to the right
3 of cure. Can I just look at this for one minute, your Honor,
4 before we leave?

5 (There is a pause for Mr. Wallach.)

6 MR. WALLACH: Consistent with the undisputed portion
7 of Instruction Number 11 on substantial impairment, your Honor,
8 I would ask that the verdict form be modified to read:

9 "... such that those defects substantially impaired
10 the value of all the Fruit Nibbles purchased by Beech-Nut and
11 was not cured by PIM"

12 THE COURT: Mr. Dillon, your position?

13 MR. DILLON: I guess the language is, "and could not
14 be cured by PIM."

15 I don't know if there's a difference between "was not"
16 and "could not."

17 MR. WALLACH: "Could not" is acceptable, your Honor.
18 Counsel is exactly correct.

19 THE COURT: Okay. That's what the statute reads.

20 Okay. I agree. I agree.

21 Okay. I agree. Thank you.

22 MR. WALLACH: Thank you, your Honor.

23 THE COURT: See you tomorrow morning. Thank you.

24 MR. DILLON: Thank you.

25 (At 3:40 p.m., an adjournment is taken to Wednesday,

1 September 12, 2012, at 9:00 a.m.)

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