

BLOOM KARINJA & DILLON, P.C.

Paul J. Dillon

70 South Orange Avenue

Suite 240

Livingston, NJ 07039

Telephone: (973) 758-0900

KING & SPALDING LLP

Richard A. Cirillo

Karen R. Kowalski

1185 Avenue of the Americas

New York, NY 10036

Telephone: (212) 556-2100

*Attorneys for Defendant*

*Beech-Nut Nutrition Corporation*

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC. and  
PIM BRANDS, LLC,

Plaintiffs,

vs.

BEECH-NUT NUTRITION  
CORPORATION, a HERO GROUP  
COMPANY,

Defendants.

Civil Action No. 2:09-cv-1228  
(WJM)

**STATEMENT OF UNDISPUTED AND  
MATERIAL FACTS PURSUANT TO RULE 56.1 IN SUPPORT  
OF BEECH-NUT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56.1 of the Local Rules of the District of New Jersey York, Defendant, Counterclaimant, Beech-Nut Nutrition Corp. (Beech-Nut), contends there is no issue to be tried with respect to the following material facts:

1. In 2007-08, PIM was and represented itself to Beech-Nut to be “among North America’s most prominent and rapidly growing manufacturers and marketers of popular brand name confections, fruit snacks, fruit rolls, snack and specialty foods.” Stipulated Fact 3<sup>1</sup>; PIM Reply at ¶4, Dkt. 7.

2. Beech-Nut distributed infant, toddler, and children’s food products under its nationally recognized brand. Stipulated Fact 5; Affidavit of Tim Kennedy In Support of Beech-Nut’s Motion for Summary Judgment (“Kennedy Aff.”) sworn to on January 26, 2011, ¶2.

3. Before the Fruit Nibbles events, Beech-Nut had never distributed a product like Fruit Nibbles. Stipulated Fact 8; Ex. 4<sup>2</sup> at 35-36; Ex. 5 at 18-19; *see also* Ex. 2 at 71.

---

<sup>1</sup> Citations to Stipulated Facts (“Stipulated Fact”) refer to the stipulated uncontested facts in the Final Pretrial Order signed and filed on October 18, 2010, Dkt. 23.

<sup>2</sup> Citations to Exhibits (“Ex.”) refer to the Exhibits attached to Karen R. Kowalski’s Declaration in Support of Beech-Nut’s Motion for Summary Judgment, dated January 26, 2011 (submitted herewith).

4. PIM had long manufactured similar products called “Welch’s Fruit Snack” and “Welch’s Fruit and Yogurt.” PIM’s Reply at ¶5, Dkt. 7; Ex. 2 at 27-29, 71.

5. Beech-Nut was seeking a new all natural fruit product to differentiate its product from others on the market. Stipulated Fact 15; Ex. 2 at 30-32; Ex. 4 at 45-46.

6. PIM told Beech-Nut in their early discussions that it could produce a Fruit Nibbles product satisfying Beech-Nut’s “No Junk Promise” and meeting agreed product specifications. Stipulated Fact 9; Kennedy Aff. ¶ 4; Ex. 2 at 30-32; Exs. 9, 10.

7. PIM and Beech-Nut negotiated over what they anticipated would be at least a two-year contact, called a co-packing agreement, to govern their relationship. Stipulated Fact 25; Kennedy Aff. ¶ 5; Ex. 11 at BN2392 (Draft Co-Packing Agm’t ¶18.2).

8. The terms of the agreement were never finalized and the proposed contract, multiple drafts of which were exchanged, was never signed by either party. Stipulated Fact 25; Kennedy Aff. ¶ 5; Ex. 2 at 90-91; Ex. 12 (Oct. 6, 2008 e-mail from PIM refusing to execute agreement).

9. PIM rejected the contract so it would not be bound to an extended contractual relationship with Beech-Nut. Ex. 2 at 95-96; Exs. 12, 46.

10. The parties proceeded solely by individual purchase orders. PIM admits in its interrogatory answers that

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

Ex. 76 at ¶ 6 (PIM's Int. Ans. 6).

11. The only contracts between the parties were a series of purchase orders dated between April and October 2008. Stipulated Fact 19; Kennedy Aff. ¶ 6; Ex. 13; Ex. 76 at ¶ 6.

12. The purchase orders contained the following provisions, among others:

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

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

4. *Quality and Inspection:* [PIM] warrants that the goods, materials and/or Services furnished under the Order will comply with the Specifications, are fit for the purpose intended, merchantable and

free from defects of material and workmanship...[PIM] acknowledges and agrees that [Beech-Nut] shall be entitled to all warranties and remedies as provided by the Uniform Commercial Code.

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

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

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

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

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

Ex. 13.

13. The purchase orders designate New York law as the governing law, including its version of the Uniform Commercial Code. Ex. 13.

14. PIM accepted the purchase orders and issued invoices and bills of lading. Ex. 14.

15. The purchase orders were not modified “in writing signed by duly authorized representative of each party.” Stipulated Fact 30; Kennedy Aff. ¶ 6; Ex. 76 at ¶ 6.

16. By early August 2008, PIM and Beech-Nut agreed on the Fruit Nibbles product specifications and Beech-Nut approved a production sample of the Fruit Nibbles product provided by PIM in late July, which established the product that PIM would manufacture. Stipulated Fact 14; Kennedy Aff. ¶ 7; Exs. 15-19.

17. The specifications for the Fruit Nibbles product called for an all natural product that contained natural colors and flavors, no starch or corn syrup, and was soft enough for a toddler to eat. Stipulated Fact 15; Exs. 9, 10, 16-19.

18. The specifications also called for a twelve-month shelf-life, and PIM printed the twelve-month shelf-life expiration date on each package of Fruit Nibbles it produced. Stipulated Fact 15; Ex. 16; Ex. 3 at 24-25 (PIM’s 30(b)(6) witness identifying Ex. 16 as the July 2008 specifications, which never changed); *see also* Exs. 17-19.

19. PIM disclosed to Beech-Nut the ingredients used to manufacture Fruit Nibbles, which had to be listed on the product packages. Stipulated Facts 22, 24; Kennedy Aff. ¶ 8; Ex. 2 at 34-35.

20. PIM did not disclose to Beech-Nut either the formula (amounts or proportions of ingredients) or the process details (the methods or order of

combining ingredients, cooking times and temperatures, and other manufacturing and processing steps) PIM used to manufacture Fruit Nibbles. Stipulated Facts 22, 24; Kennedy Aff. ¶ 8; Ex. 1 at 76-80; Ex. 2 at 34-36; Ex. 3 at 72-73.

21. PIM considered the formula and process information to be proprietary to PIM, and it applied for a patent on the formula and process. Stipulated Fact 23; Ex. 1 at 76-80; Ex. 2 at 34, 141-42.

22. Beech-Nut observed PIM's production line on occasional visits to PIM's facilities; Beech-Nut did not know, or need to know, the details of how PIM manufactured Fruit Nibbles. Stipulated Facts 22, 24; Ex. 1 at 77-78; Ex 2. at 34-36.

23. By August 1, 2008, PIM represented and warranted to Beech-Nut that it "had created a stable formula for the Fruit Nibbles product and did not need to make any further adjustments," and it "began commercial production on August 4, 2008." PIM's Reply at ¶ 7, Dkt. 7.

24. PIM began shipping Fruit Nibbles to Beech-Nut under the purchase orders in August 2008. Stipulated Fact 27; Complaint ¶ 12, Dkt 1 Ex. A.

25. Within weeks after the shipments began, Beech-Nut discovered problems with PIM's Fruit Nibbles product by randomly inspecting product received from PIM. Stipulated Fact 32; Kennedy Aff. ¶ 9; Exs. 17, 20-24; *see also* Exs. 25-29.

26. In September, October, and November of 2008, Beech-Nut received hundreds of written complaints about the product from toddlers' parents and Beech-Nut's important retail customers (*e.g.*, Wal-Mart, Pathmark, Safeway, Shop Rite, Price Chopper, and Target). Stipulated Facts 31, 33-35; Kennedy Aff. ¶ 9; Exs. 30, 31.

27. Beech-Nut's retail customers and consumers complained about the deficient nature and quality of the Fruit Nibbles product, and also deficient quantities in the packages. Stipulated Facts 31-35; Kennedy Aff. ¶ 10; *see, e.g.*, Exs. 30-32 (retail customer recall and refund demands); Ex. 33 (Wal-Mart pulled Fruit Nibbles from shelves and demanded compensation for costs because "all packages look moldy"), Ex. 34 (log including more than sixty complaints in two days); Ex. 35 (list reporting child illnesses).

28. The hundreds of complaints Beech-Nut received identified serious discrepancies from the product sample and specifications: *e.g.*, powdery coating, dried out product, shriveled appearance, moldy and wilted appearance, fermented odor, terrible smell, hard texture, choking hazard, funny taste, sour odor, wrinkled, raisin-like appearance, bitter taste, bad smell, covered with mold, horrible smell, green, white, and grey coating, looks like dead toes, old, nasty, discolored, crusty, gross, rotten, stale, dry, difficult to chew, spoiled smell, horrid smell, disgusting,

waxy taste, caused stomach ache, vomiting, and diarrhea, etc. Stipulated Fact 34; Kennedy Aff. ¶ 11; Exs. 30, 34-35.

29. Beech-Nut notified PIM of the product defects referred to in the complaints, and Beech-Nut and PIM verified them to be accurate. Ex. 1 at 91-93 (PIM's Research & Development and Quality Assurance Manager found complaints accurate); Ex. 3 at 49-51 (PIM's Plant Manager (and 30(b)(6) witness) admitted that samples retained by PIM confirmed the complaints); Exs. 17, 20-29, 36, 43.

30. Beech-Nut and PIM discussed possible causes of and solutions for the deficiencies in PIM's product. Ex. 1 at 94-98; Exs. 36, 43.

31. PIM said it modified its formula and process in an effort to correct what its Manager of Research and Development and Quality Assurance, Diane Bianchini, found to be "problems." Exs. 36, 43.

32. Ms. Bianchini and PIM's Plant Manager conceded that the problems with the Fruit Nibbles products rendered the product unsaleable, (Ex. 3 at 60-61), and Ms. Bianchini, the Quality Control Manager, testified that she would not feed the product to her own children. Ex. 1 at 166-68; Ex. 3 at 60-61 (testimony that crystallized and mummified products were not within the product specifications or saleable); *see also* Ex. 2 at 79-80 (PIM's COO admitted that photographs Beech-Nut sent PIM showed unacceptable retained product samples).

33. Beech-Nut could not distribute deficient Fruit Nibbles toddler snacks to retailers, nor expect parents to feed them to toddlers. Kennedy Aff. ¶ 14.

34. Beech-Nut could not distribute Fruit Nibbles that did not meet the agreed twelve-month shelf-life. Ex. 3 at 24-25 (twelve-month shelf-life always part of specifications); Ex. 4 at 74-75; Ex. 5 at 22-23; Ex. 18 (Prod. Devel. Spec's dated Feb. 22, 2008); Ex. 16 (Oper. Spec's dated July 29, 2008).

35. Beech-Nut withdrew the Fruit Nibbles product from the market in early December 2008 and accepted customers' returns of previously shipped products to preserve its brand reputation in the market and respond to its customers' and consumers' complaints. Stipulated Facts 38-40; Exs. 38-41; Kennedy Aff. ¶ 13. PIM never objected to the withdrawal. *Id.*

36. Beech-Nut notified PIM that PIM was legally responsible for the failed product under the terms of the purchase orders. Ex. 41; Kennedy Aff. ¶ 14.

37. PIM refused to accept returns of previously shipped defective product, cancel unpaid invoices, or refund Beech-Nut's previously paid purchase price. Stipulated Fact 38; Kennedy. Aff. ¶ 15.

38. Beech-Nut incurred costs for the product withdrawal and storing unsaleable products PIM refused to accept as returns. Stipulated Facts 37-40; Kennedy Aff. ¶ 15.

39. Despite the failed product launch, Beech-Nut continued to believe that its Fruit Nibbles concept had commercial merit, and PIM continued to state that it could cure the defects and meet the agreed specifications and sample. Exs. 36, 42-43; Kennedy Aff. ¶ 16.

40. October and April are times for launches and re-launches of new products because that is when retail customers make their allocations of their available retail shelf space for existing and new products. Ex. 4 at 45-46.

41. In mid-January 2009, PIM and Beech-Nut discussed both PIM's financial responsibility for the failed product launch and whether PIM could produce a stable, merchantable product meeting the specifications and sample in time to re-launch the product in April 2009 subject to PIM's resolving its financial responsibility for the failed product. Stipulated Facts 41-43; Kennedy Aff. ¶ 17; Ex. 3 at 156-57; Ex. 4 at 92-93; Ex. 41-42, 44.

42. PIM and Beech-Nut did not reach a co-packing or other contract relating to the prospective re-launch. Ex. 44 (Feb. 3, 2009 e-mail discussing lack of progress in moving toward a re-launch); Kennedy Aff. ¶ 18.

43. PIM and Beech-Nut did not resolve responsibility for the failed launch of defective products. Stipulated Fact 43; Kennedy Aff. ¶ 18.

44. Beech-Nut did not submit any purchase orders to PIM for a re-launched Fruit Nibbles product. Kennedy Aff. ¶ 18.

45. In February 2009, Beech-Nut advised PIM that it had decided, to place its Fruit Nibbles business elsewhere. Stipulated Fact 44; Kennedy Aff. ¶ 18; Ex. 45.

46. Beech-Nut suffered damages caused by PIM's breaches of its express and implied warranties totaling \$3,454,140.45 as follows:

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

Kennedy Aff. ¶ 19; Ex. 7 at 21-28, 45-52, 55.

47. Beech-Nut suffered damages caused by PIM's negligent development and manufacture of the Fruit Nibbles product of \$1,659,601.00 of lost profits on lost planned retail merchant orders for 262,850 cases of Fruit Nibbles, Kennedy Aff. ¶ 20; Ex. 7 at 58-61.

---

\* Lost resale profits are easily calculated. *S&K Sales Co. v. Nike, Inc.*, 816 F.2d 843, 851 (2d Cir. 1987); *Lee v. Joseph E. Seagram & Sons, Inc.*, 552 F.2d 447, 455 (2d Cir. 1977); *Paper Corp. of U.S. v. Schoeller Technical Papers, Inc.*, 807 F. Supp. 337 (S.D.N.Y. 1992). Here, they are Beech-Nut's projected profits based on its business planning and experience. Ex. 7 at 24-31.

Dated: January 28, 2011



Paul J. Dillon  
BLOOM, KARINJA & DILLON,  
P.C.

70 South Orange Avenue--Suite 240  
Livingston, NJ 07039  
Telephone: 973-758-0900  
Telecopier: 973-758-0901

and

Richard A. Cirillo  
Karen R. Kowalski  
KING & SPALDING LLP  
1185 Avenue of the Americas  
New York, NY 10036-4003  
Telephone: 212-556-2100  
Telecopier: 212-556-2222

*Attorneys for Beech-Nut Nutrition  
Corporation*