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Promotion In Motion, Inc. and PIM Brands, LLC

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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PROMOTION IN MOTION, INC.	:	
and PIM BRANDS, LLC,	:	Civil Action No. 09-1228 (WJM) (MF)
Plaintiffs,	:	
v.	:	<b>PLAINTIFFS' RESPONSE TO</b>
BEECH-NUT NUTRITION	:	<b>DEFENDANT'S RULE 56.1</b>
CORPORATION, a HERO	:	<b>STATEMENT OF MATERIAL FACTS</b>
GROUP COMPANY,	:	
Defendant.	:	

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In accordance with Local Rule 56.1 of the United States District Court for the District of New Jersey, the Plaintiffs hereby respond to the Defendant's Material Statement of Facts as follows. The exhibit references that follow correspond to the accompanying Certification of Counsel, except as noted.

1. Admitted.
2. Admitted.
3. Admitted.

4. Admitted, except to note that while PIM had produced similar products to Fruit Nibbles, it had not previously created all natural products. Dwivedi Dep. 71:14-16 [Exhibit P].

5. Admitted.

6. Admitted that PIM told Beech Nut in their early discussions that it could produce a Fruit Nibbles product satisfying Beech-Nut's "No Junk Promise", but denied that PIM agreed at the outset to any set of product specifications. Chang Dep. 57:2-13 [Exhibit O]; Dwivedi Dep. 46:17-20; 47:5-16; 48:2-25 [Exhibit P].

7. Admitted.

8. Admitted.

9. Admitted that PIM refused to execute the draft agreements between the parties, but deny that this was because PIM did not want to be bound to an extended contractual relationship with Beech Nut. Rather, PIM refused to execute the draft agreements because of all of the changes to the Fruit Nibbles product being made by Beech Nut. Dwivedi Cert. at ¶ 4.

10. Admitted.

11. Denied in part. The purchase orders between the parties, as modified by their course of dealings, extended until at least November 2008. Stipulated Facts at ¶19; Dwivedi Cert. at ¶ 4.

12. Denied in part because the purchase orders were modified by the parties' course of dealings to exclude warranties. Dwivedi Cert. at ¶ 4.

13. Admitted.

14. Denied in part because the purchase orders were modified by the parties' course of dealings to exclude warranties. Dwivedi Cert. at ¶ 4.

15. Denied in part because the purchase orders were modified by the parties' course of dealings to exclude warranties. Dwivedi Cert. at ¶ 4.

16. Admitted that Beech-Nut approved a production sample of the Fruit Nibbles product provided by PIM in late July 2008, but denied as to the rest of the factual assertions. In fact, the parties never agreed to a final set of specifications for the Fruit Nibbles product. Chang Dep. 57:2-13 [Exhibit O]; Dwivedi Dep. 46:17-20; 47:5-16; 48:2-25 [Exhibit P]. In fact, there were still further changes to the product made after July 2008. Bianchini Dep. 72:19-25; 73:19-24; 74:7-12 [Exhibit M]; McSorley Dep. 64:1-7 [Exhibit L]; Dwivedi Dep. 64:23-25; 65:1-4 [Exhibit P].

17. Admitted except denied that the parties ever agreed to a final set of specifications. Chang Dep. 57:2-13 [Exhibit O]; Dwivedi Dep. 46:17-20; 47:5-16; 48:2-25 [Exhibit P].

18. Denied. Beech-Nut's development team did not discuss with PIM any shelf life requirement for the evolving product. Cool Dep. 36:4-10 [Exhibit N]; Hungsberg Dep. 76:13-17 [Exhibit R]. Mary Cool did not know what, if any, shelf life requirement may have existed for the product. Cool Dep. 36:11-13 [Exhibit N]. Beech Nut's general belief, through Dr. Chang, that Basant Dwivedi agreed to a 12 month shelf life at the parties' first meeting finds no written confirmation and is expressly disputed by Mr. Dwivedi. Chang Dep. 20:4-8; 21:7-10; 23:10-16 [Exhibit O]; Dwivedi Dep. 63:21-25. [Exhibit P].

19. Admitted.

20. Admitted.

21. Admitted.

22. Admitted to the extent that Beech-Nut observed PIM's production line for Fruit Nibbles, and that there were certain aspects relating to the production of Fruit Nibbles which

Beech-Nut did not know about. However, denied to the extent that this statement suggests that Beech-Nut was not thoroughly involved in the manufacturing, design, and ingredients of Fruit Nibbles. Cool Dep. 29:5-25; 32:11-23 [Exhibit N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Exhibit R]; Chang Dep. 31:2-12 [Exhibit O].

23. Admitted, except to deny the allegation that the formula for Fruit Nibbles was created solely by PIM. Id.; Cool Dep. 34:2-20 [Exhibit N].

24. Admitted.

25. Admitted.

26. Admitted.

27. Admitted.

28. Admitted.

29. Admitted.

30. Admitted to the extent that PIM and Beech-Nut discussed deficiencies in Fruit Nibbles, but deny the statement that the product was "PIM's". Rather, the design and production of Fruit Nibbles was undertaken by both PIM and Beech-Nut, but under Beech-Nut's direction. Cool Dep. 29:5-25; 32:11-23 [Exhibit N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Exhibit R]; Chang Dep. 31:2-12 [Exhibit O]; Cool Dep. 34:2-20 [Exhibit N].

31. Admitted.

32. Admitted.

33. Admitted, except to deny that the majority of the product was "deficient". Cool Dep. 45:9-13 [Exhibit N].

34. Denied. Chang Dep. 20:4-8; 21:7-10; 23:10-16 [Exhibit O]; Dwivedi Dep. 63:21-25 [Exhibit P].

35. Admitted.

36. Admitted as an accurate statement, however, PIM denies any legal responsibility for Fruit Nibbles.

37. Admitted, except to deny the “deficient” allegation.

38. Admitted.

39. Admitted.

40. Admitted that launches and re-launches of new products occur when retail customers make allocations of their available retail shelf space for existing and new products. However, there does not appear to be evidence in the record demonstrating those two times a year are October and April.

41. Admitted that in January 2009, PIM and Beech-Nut had discussions about whether Fruit Nibbles could be re-launched. Denied that PIM and Beech-Nut ever reached an agreement about a specific set of specifications for the production. Cool Dep. 29:5-25; 32:11-23 [Exhibit N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Exhibit R]; Chang Dep. 31:2-12 [Exhibit O]. Denied that PIM has any financial responsibility for the failure of Fruit Nibbles, which is a question which must be determined at trial.

42. Admitted.

43. Admitted.

44. Admitted.

45. Admitted.

46. Denied because PIM believes that Beech-Nut is not entitled to any damages for the failure of Fruit Nibbles. In any event, matters pertaining to express and implied warranties are issues of fact, which, along with any computation of damages, must be determined at trial.

47. Denied because PIM believes that Beech-Nut is not entitled to damages for the failure of Fruit Nibbles. In any event, whichever parties negligence contributed to the failure of Fruit Nibbles is a question of fact, which along with any computation of damages, must be determined at trial.

#### **PLAINTIFFS' ADDITIONAL STATEMENT OF MATERIAL FACTS**

48. During the development of the product known as Fruit Nibbles, the primary communications between the parties took place between Mary Cool of Beech Nut and Basant Dwivedi of PIM. Cool Dep. 28:6-10 [Exhibit N].

49. PIM and Beech Nut collaborated with one another over an extended period of time to jointly create the product. Fruit Nibbles began as a concept that Beech Nut wanted to take further and then there was a joint effort to accomplish that goal. McSorley Dep. 82:4-22 [Exhibit L].

50. In the course of these communications, PIM repeatedly sent samples to Beech Nut for comment and approval. Upon arrival at Beech Nut, the samples were considered by its new product development team. The samples were evaluated for texture, bite, flavor, and color. Based on these observations, and those from Beech Nut's marketing department, comments were then transmitted back to PIM. Cool Dep. 29:5-25; 32:11-23 [Exhibit N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Exhibit R]; Chang Dep. 31:2-12 [Exhibit O].

51. Beech Nut did not rely upon PIM's expertise in the creation of the Fruit Nibbles. Dwivedi Dep. 93:18-21 [Exhibit P].

52. Beech Nut was not controlling the formulation of the product being developed, but it did control the development process. Dwivedi Dep. 44:9-25; 91:6-20; 92:17-25 [Exhibit P]. PIM followed the instructions of its client. Dwivedi Dep. 45:17-25 [Exhibit P].

53. Not only did Beech Nut transmit its required changes to PIM, but Beech Nut employees visited PIM to provide input on the development of the product as well. By way of example, Mary Cool visited PIM on numerous occasions and worked with PIM personnel on the product's flavor and color. Cool Dep. 34:2-20 [Exhibit N]; Wallach Cert., Exhibit E.

54. Mary Cool was present at PIM on more than a dozen occasions for production runs and to work with PIM on developing the product and telling it what Beech Nut wanted. McSorley Dep. 20:5-25 [Exhibit L].

55. Mary Cool was present for these production runs through late September of 2008. McSorley Dep. 21:1-14 [Exhibit L].

56. This constant back and forth between Beech Nut and PIM was necessitated by the fact that while Beech Nut told PIM it wanted an all natural product, it offered almost no initial specifications as to the parameters of the result it wanted. Chang Dep. 57:2-13 [Exhibit O].

57. One of the reasons Beech Nut made so many changes to the product during its development stage was that its personnel lacked prior experience in manufacturing an all natural fruit product outside of a jar, including the head of its team, Mary Cool. Cool Dep. 19:12-17 [Exhibit N]. This lack of experience delayed the development and approval of the Fruit Nibbles.

58. Beech Nut was not able to give PIM clear direction on how it wanted to proceed in developing the product. Dwivedi Dep. 46:17-20 [Exhibit P].

59. While PIM had prior manufacturing experience with a similar, but not all natural fruit product, Beech Nut was telling it what the product should be, what it should taste like, what

it should look like, and what the texture should be. All these criteria were in the control of Beech Nut. Dwivedi Dep. 47:1-4 [Exhibit P].

60. Beech Nut provided no written guidelines for the product's key criteria -- color, taste, and texture -- and PIM was not always sure what exact product parameters were sought by Beech Nut. Dwivedi Dep. 47:5-16 [Exhibit P].

61. This conclusion is not altered by the fact that in July of 2008, Beech Nut approved a sample product supplied by PIM. This is because Beech Nut, even at that point and afterwards, did not provide detailed specifications beyond stating they liked the sample's color, texture, and flavor. Dwivedi Dep. 48:2-25 [Exhibit P].

62. As late as September of 2008, Susan Allen of Beech Nut first began interacting with PIM's personnel and conveying a list of requirements from her point of view that were not previously important to Beech Nut or conveyed to PIM. These changes concerned the product's characteristics -- color, flavor, and texture. Dwivedi Dep. 88:2-15 [Exhibit P].

63. As a result of these late changes subsequent to the approval of a prototype in July of 2008, PIM's perception was that Beech Nut had changed the product by specifically wanting it to be softer. Dwivedi Dep. 100:3-10; 103:3-6 [Exhibit P].

64. The Beech Nut team was deficient in communicating information to PIM. Another example of this concerned Beech Nut's failure to clearly communicate to PIM when exactly the Fruit Nibbles needed to be ready for sale. Beech Nut was not able to state if the launch date was specifically communicated to PIM or identify who would have made such communication. Cool Dep. 22:9-12 [Exhibit N]; Hungsberg Dep. 59:1-25 [Exhibit R]; Chang Dep. 18:10-19 [Exhibit O]. Beech Nut produced no evidence of any communication to PIM in this regard.

65. Discovery in this lawsuit revealed the fact that the extensive involvement of Mary Cool's development team in revising the originally presented formulation and working to obtain the results Beech Nut wanted was not known by Beech Nut's marketing team. Cool Dep. 49:19-25; 50:1-25; 51:1-24 [Exhibit N]; Wallach Cert., Exhibit F.

66. While Beech Nut directed that PIM make changes to the samples it was receiving and testing, its development team did not discuss with PIM any shelf life requirement for the evolving product. Cool Dep. 36:4-10 [Exhibit N]; Hungsberg Dep. 76:13-17 [Exhibit R]. Mary Cool did not know what, if any, shelf life requirement may have existed for the product. Cool Dep. 36:11-13 [Exhibit N].

67. Beech Nut's general belief, through Dr. Chang, that Basant Dwivedi agreed to a 12 month shelf life at the parties' first meeting finds no written confirmation and is expressly disputed by Mr. Dwivedi. Chang Dep. 20:4-8; 21:7-10; 23:10-16 [Exhibit O]; Dwivedi Dep. 63:21-25 [Exhibit P].

68. Beech Nut was specifically advised by PIM that there had been no shelf life study performed. Chang Dep. 63:19-23 [Exhibit O].

69. PIM refused to execute the draft agreements exchanged between the parties, which included proposed warranties and product representations and shelf life guaranties, because of all the changes to the product being made by Beech Nut. Dwivedi Cert. at ¶ 4, Exhibit A at p. 9; Kowalski Decl., Exh. 11 at BN 2387.

70. Unlike other products manufactured by PIM, the Fruit Nibbles were not subjected to a shelf life study. In this instance, the study could not be performed because Beech Nut kept changing the product and there was no time to do such a study. Bianchini Dep., 113:8-24 [Exhibit M]; Dwivedi Dep. 64:17-25 [Exhibit P].

71. As a large and sophisticated consumer food company, Beech Nut knew the steps involved in developing and testing a product, and that under the particular time frames associated with Fruit Nibbles, there was no time for a shelf life study to be performed. Dwivedi Dep. 71:2-13 [Exhibit P].

72. PIM was also concerned that Beech Nut was insisting upon too large a volume of production in too short a time frame. McSorley Dep. 17:2-19 [Exhibit L]; Wallach Cert., Exhibits H and I.

73. This became a particular issue after Beech Nut approved sample product in July of 2008, which was manufactured with pineapple juice. PIM did not have sufficient quantities of pineapple juice available to make product meeting the volume demands of Beech Nut. PIM therefore told Beech Nut of the situation and its plan to utilize white grape juice as a substitute. Beech Nut agreed to this. Dwivedi Dep. 50:1-15 [Exhibit P].

74. Senior officers of PIM then went on a special trip to Indonesia in an effort to source additional pineapple juice. Dwivedi Dep. 59:13-25 [Exhibit P]. Even with the commitment obtained, there was still going to be a lead time of two months for delivery. Dwivedi Dep. 62:21-25; 63:1-3 [Exhibit P].

75. The other option presented to Beech Nut, and rejected by them, was to stop production until more pineapple juice was obtained. Dwivedi Dep. 51:1-12 [Exhibit P].

76. PIM understood that Beech Nut consulted with its own scientists in Europe before making its decision to proceed with white grape juice. Dwivedi Dep. 51:13-25 [Exhibit P].

77. PIM itself had prior successful experience in utilizing white grape juice in fruit products and did not anticipate problems arising. Dwivedi Dep. 53:3-25 [Exhibit P].

78. Even with the changes made to the product during its development by Beech Nut, PIM was eventually able to product and package a viable product. Bianchini Dep. 62:23-25; 63:1-3 [Exhibit M].

79. The product manufactured by PIM met Beech Nut's specifications. Bianchini Dep. 64:3-9 [Exhibit M]; McSorley Dep. 55:5-25 [Exhibit L].

80. While Diane Bianchini expressed concern in one email as to the quality of some of the product she saw, as director of quality control, she had the authority to stop production, but never did. McSorley Dep. 111:13-25 [Exhibit L].

81. Prior to the Summer of 2008, and approval by Beech Nut of a prototype sample, Beech Nut was made aware of the fact that the surface of some product had crystallized, but there was a constant push by Beech Nut to keep moving forward and produce the product. McSorley Dep. 54:6-24 [Exhibit L]; Wallach Cert., Exhibit A; Kowalski Decl., Exh. 15.

82. Potentially due to the change to white grape juice, though never determined, Beech Nut noticed that the product did not look as nice as earlier product had. Some of the product had a starchy coating. PIM advised Beech Nut that this appearance could be changed by increasing the amount of capol. Bianchini Dep. 72:19-25; 73:19-24 [Exhibit M].

83. PIM then increased the amount of capol in the manufacturing process and believed that cured the starchy coating. PIM was of the opinion the product was good when it went out its doors for delivery. Bianchini Dep. 74:7-12 [Exhibit M]; McSorley Dep. 64:1-7 [Exhibit L]; Dwivedi Dep. 64:23-25; 65:1-4 [Exhibit P].

84. When Beech Nut brought to PIM's attention surface coating appearing on some product, another option suggested by PIM was to return to pineapple juice, which would have delayed production. Dwivedi Dep. 57:9-25 [Exhibit P].

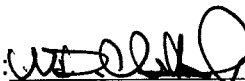
85. During the product sampling undertaken by Beech Nut in late September/early October of 2008, it noticed the surface crystals referenced previously. On October 4, Mary Cool sent an email within Beech Nut stating that an inspection of product cartons in its possessions did not reveal a widespread texture/appearance problem. Wallach Cert. at Exhibit D. Her email also expressly stated that "PIM cannot guarantee that the product without any surface crystals would not change with time." Mary Cool did not recall any one within Beech Nut responding to these facts. Cool Dep. 63:10-25 [Exhibit N].

86. PIM disputes responsibility for the starchy coating on an unquantified amount of the product it manufactured. Beech Nut employees advised PIM at a meeting held between the parties towards the end of 2008, that there may have been incidents in which the product was not properly handled once it left PIM's control. In particular, the product might not have been stored at the proper temperature. McSorley Dep. 75:2-22 [Exhibit L]; Dwivedi Dep. 79:3-16 [Exhibit P].

87. Mary Cool did not know what percentage of the product delivered by PIM to Beech Nut was the subject of consumer or customer complaint. Cool Dep. 45:9-13 [Exhibit N]. No Beech Nut employee has been able to answer this question so as to quantify the extent of the problem.

88. Even after Beech Nut stopped receiving product from PIM, there was still good product that did not show signs of crystallization. McSorley Dep. 56:2-7 [Exhibit L]; Wallach Cert., Exhibit K.

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