

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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

Plaintiffs-Counter-Defendants,

v.

BEECHNUT NUTRITION  
CORPORATION, a HERO GROUP  
COMPANY,

Defendant-Counterclaimant.

CIVIL ACTION NO. 09-1228  
(WJM-MF)

Hon. William Martini, U.S.D.J.

**FINAL PRETRIAL ORDER**

A pretrial conference\* having been held before the Honorable Mark Falk, U.S.M.J., on March 30, 2012, and April \_\_, 2012, at which William D. Wallach, Esq. of McCarter & English, LLP, appeared for Promotion In Motion, Inc., ("Promotion In Motion") and PIM Brands, LLC ("PIM Brands") (collectively, "PIM") and Paul J. Dillon of Bloom & Dillon, P.C., and Richard A. Cirillo, Esq., and Karen Kowalski, Esq., of King & Spalding LLP appeared for Beech-Nut Nutrition Corporation ("Beech-Nut"), and the Court entered this Final Pretrial Order.

**Prior Proceedings:** The Court's decision dated December 20, 2011 (Dkt. No. 34)\* granted partial summary judgment to defendant-counterclaimant Beech-Nut with respect to issues of liability for breach of warranty by plaintiffs-counterclaim-defendants PIM, dismissed PIM's complaint in its entirety and Beech-Nut's counterclaim for negligent design and manufacture, and ordered a trial on two issues: (1) whether there was substantial impairment to "the value of the entire shipment to Beech-Nut such that it was entitled to revoke its acceptance of all Fruit Nibbles," and (2) whether Beech-Nut is entitled to damages. Dec. 20, 2011 Dec. at 6. For purposes of the trial of these remaining two issues, Beech-Nut is the plaintiff and PIM is the defendant.

\*Time Incurred: \_\_\_\_\_

\* Motion for reconsideration denied March 5, 2012 (Dkt. No. 38).

**1. JURISDICTION**

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) based on the diversity of citizenship of the parties and the amount in controversy exceeding \$75,000 exclusive of interest and costs. Beech-Nut is a Nevada corporation licensed to do business in New York State with its principal place of business in Amsterdam, New York. Promotion In Motion is a Delaware Corporation whose principal place of business is located in Allendale, New Jersey; PIM Brands is a wholly owned subsidiary of Promotion In Motion, with its principal place of business in Somerset, New Jersey.

This action was commenced in the State Court of New Jersey, Bergen County, Docket No. L-1890-09, and was removed to this Court by Beech-Nut.

**2. PENDING/CONTEMPLATED MOTIONS:** (Set forth all pending or contemplated motions, whether dispositive or addressed to discovery or the calendar. Also set forth the nature of the motion. If the Court indicated that it would rule on any matter at pretrial, summarize that matter and each party's position. Contemplated in limine motions should also be set forth.)

There are no pending motions.

**A. Beech-Nut:** Beech-Nut will make the following Motions in Limine:

(a) to exclude PIM's contested facts and exhibits D1 - D10, D19, D23, and D29 from being presented at trial, as such contested facts are outside the scope of trial pursuant to the Court's December 20, 2011 decision (Docket no. 34); and

(b) to exclude PIM's legal issues one (1), three (3), and four (4) from being presented at trial, as they are not appropriate given the scope of the trial set forth in the Court's December 20, 2011 decision (Docket no. 34)\*.

Beech-Nut reserves all rights to file additional motions in limine or objections as to particular evidence or issues that arise at trial.

**B. PIM:** PIM will make the following Motions in Limine to exclude Beech-Nut's exhibits 28, 32, 36 and 38 as unsupported by the testimony, and exhibits 7, 11, 15, 16, 42, 44, 45, 79, 81, and 82 as outside the scope of trial pursuant to the Court's December 20, 2011 decision.

PIM reserves all rights to file additional motions in limine or objections as to particular evidence or issues that arise at trial.

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\* Depending on the Court's ruling on Beech-Nut's and PIM's *in limine* motions, this Pre-Trial Order shall be deemed to include the following portions of the Pre-Trial Order filed on October 18, 2010 (Docket no. 23): Stipulated Facts ¶¶ 20-21, 23 and 36; Contested Facts ¶¶ B(II)1-3, and 5-6(a); Contested Legal Issues ¶¶ 18-22, which are set out at pages 5, 7, 11-13, 15-16, and 34 thereof, and may need to supplement them.

**3. STIPULATION OF FACTS: (Set forth in numbered paragraphs all uncontested facts, including all answers to interrogatories and admissions to which the parties agree.)**

1. Promotion In Motion, is a Delaware Corporation whose principal place of business is located in Allendale, New Jersey. Promotion In Motion, is a promoter and marketer of popular brand name confections, fruit snacks, fruit rolls, snack, and specialty foods.
2. PIM Brands is a wholly owned subsidiary of Promotion In Motion, based in Somerset, New Jersey, where it operates a state of the art manufacturing facility.
3. In 2007-2008, PIM was 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.
4. Beech-Nut is a Nevada corporation and maintains an office in Amsterdam, New York. Beech-Nut sells consumer food products under its brand name across the United States.
5. Beech-Nut sold infant, toddler, and children's food products.
6. In late 2007, Beech-Nut contacted PIM about whether PIM would be willing to contract to "co-pack" a potential new toddlers' all-natural gummy fruit snack product that it wanted to develop for retail distribution in Fall 2008.
7. The product, to be known as Fruit Nibbles, was to be part of a larger Beech-Nut product launch that was a corporate priority to Beech-Nut under its "Let's Grow" line of foods for toddlers.
8. PIM told Beech-Nut that it was producing a product for Welch's similar to the new product that Beech-Nut wanted to develop, called "Welch's Fruit Snack."
9. In February 2008, PIM stated to Beech-Nut that it could produce Fruit Nibbles in accordance with Beech-Nut's No Junk Promise<sup>TM</sup>, meaning the ingredients, among other criteria, had to be 100% natural.
10. PIM also stated to Beech-Nut that it had sufficient production capacity to meet Beech-Nut's expected needs.
11. A product development timeline with the product launch set for August 2008 was discussed by PIM and Beech-Nut.
12. Beech-Nut and PIM collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted (color, texture and "bite") and PIM determined the ingredients, formula, and process to produce the product.
13. Promotion In Motion created sample products that it sent to Beech-Nut for review, feedback, and approval prior to the commencement of manufacturing.

14. In 2008, PIM provided a sample product, which Beech-Nut approved as the sample for the product PIM was to produce.
15. Prior to production, the parties also agreed that the product would meet the specifications 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 and had a twelve-month shelf life, the expiration date of which PIM was to stamp on each package of the product.
16. Beech-Nut representatives visited the PIM facility on a number of occasions.
17. During 2008, there were communications between the parties concerning the development of the product to satisfy Beech-Nut's demands, including on August 1, 2008 (BN000533-36).
18. Beech-Nut submitted and PIM accepted four written orders for Fruit Nibbles: (a) the first dated May 9, 2008 for 85,000 cases of Fruit Nibbles required by August 1, 2008 for \$984,300 (No. AHG1923); (b) the second dated August 5, 2008 for 80,000 cases of Fruit Nibbles for \$926,400 required by October 1, 2008 (No. AHG1994); (c) the third dated September 8, 2008 for 50,000 cases of Fruit Nibbles for \$579,000 required by November 8, 2008 for (No. AHG2017); and (e) the fourth dated October 13, 2008 in two parts, one for 100,000 cases for of Fruit Nibbles for \$1,318,000 and the other for 14,400 cases of Fruit Nibbles for \$189,792 (No. AHG2048).
19. Pursuant to these Purchase Orders, PIM expressly warranted that all shipped Fruit Nibbles would comply with the specifications described above in paragraphs 14 and 15, be fit for their intended purpose, merchantable, and free from defects of material and workmanship.
20. There were no signed, written modifications of any of the four written Purchase Orders.
21. The Purchase Orders constituted the only contracts between the parties, and their express terms governed the parties' financial responsibilities for any defective Fruit Nibbles.
22. Through the Purchase Orders, Beech-Nut purchased 230,000 cases of Fruit Nibbles from PIM.
23. Beech-Nut had knowledge of the ingredients that were used in the formula for Fruit Nibbles and the general process used to make the product, but it did not know the exact formula or the particular details of the manufacturing process.
24. PIM owned the formula for the Fruit Nibbles product and did not provide it to Beech-Nut.
25. PIM told Beech-Nut what ingredients were used to make the Fruit Nibbles, which were listed on the product packages. PIM did not tell Beech-Nut the manner or order in which

the ingredients were combined or the cooking temperatures, durations, or other details for making Fruit Nibbles products, which PIM considered proprietary information.

26. Fruit Nibbles were brought to the market without extended shelf-life testing having been performed by PIM.
27. PIM's initial sales and delivery of Fruit Nibbles were made to Beech-Nut in September 2008.
28. Beech-Nut received a number of Fruit Nibbles shipments from PIM between August 22, 2008 and November 25, 2008, as reflected in the table bates stamped BN0011333-334. The last shipment of Fruit Nibbles was received from PIM by Beech-Nut on November 25, 2008.
29. Beech-Nut discovered that PIM delivered a number of underweight and improperly packed cases of Fruit Nibbles.
30. In and after September 2008, Beech-Nut advised PIM of problems it encountered with mislabeled and short-weight product.
31. Beech-Nut received in October and November 2008 reports from consumers and retail customers of problems with the Fruit Nibbles. These problems included the color, texture, flavor, bite, and appearance of the product which differed from the product sample prototype and specifications.
32. In Fall 2008, Beech-Nut began receiving hundreds of written complaints about the Fruit Nibbles product from consumers and retail customers, returns of the product, and demands for refunds and compensation.
33. The complaints included mislabeling and short weights in the packages, and that the Fruit Nibbles products had a powdery coating, was dried out, shriveled appearance, moldy and wilted in appearance, had a fermented odor, terrible smell, hard texture, was a choking hazard, had a funny taste, sour odor, was wrinkled, raisin-like in appearance, had a bitter taste, bad smell, was covered with mold, had a horrible smell, had a green, white, or grey coating, looked like dead toes, was old, nasty, discolored, crusty, gross, rotten, stale, dry, difficult to chew, spoiled smell, horrid smell, disgusting, waxy taste, and caused stomach aches.
34. Beech-Nut received dozens of reports of children's illness after consuming the Fruit Nibbles product.
35. The Fruit Nibbles product complained of as described above did not satisfy the warranties in the purchase orders.
36. Beech-Nut accepted returns of products from retail customers and consumers and incurred costs in doing so.

37. PIM declined to accept returns of products from Beech-Nut or pay for costs of the product launch, which Beech-Nut requested.
38. On December 2, 2008, Beech-Nut sent an email to PIM concerning these complaints and advising of its decision to withdraw Fruit Nibbles from the market.
39. Beech-Nut attempted to revoke its acceptance of the previously received Fruit Nibbles and offered to return the goods to PIM.
40. PIM declined to compensate Beech-Nut for the rejected product and costs of withdrawal of the Fruit Nibbles product from the market.
41. Beech-Nut incurred costs in withdrawing the Fruit Nibbles product, resolving retail customers' and consumers' complaints, and checking and correcting misweighed and labeled product packages.
42. In mid-January 2009, the parties discussed both the problems with the prior Fruit Nibbles products, the financial responsibility for those problems, and Beech-Nut's desire to re-launch Fruit Nibbles in Spring 2009.
43. In February 2009, the PIM expressed its concerns about Beech-Nut's continued desire to hold PIM responsible for all expenses associated with the problems with and withdrawal of Fruit Nibbles.
44. The parties did not reach agreement on a resolution of the problems with the Fruit Nibbles products or financial responsibility for the problems and withdrawal.
45. On February 23, 2009, Beech-Nut advised PIM that Beech-Nut had decided to pursue alternate suppliers for Fruit Nibbles.
46. Beech-Nut had no Fruit Nibbles products to sell to retail customers and consumers until Spring 2010.
47. Beech-Nut re-launched Fruit Nibbles produced by a different manufacturer in Spring 2010.

**4. CONTESTED FACTS: (Proofs shall be limited at trial to the contested facts set forth. Failure to set forth any contested facts shall be deemed a waiver thereof.)**

**A. BEECH-NUT:**

1. PIM's delivery to Beech-Nut of substantial numbers of short-weighted, under-counted, mislabeled, and improperly packed packages and cases of Fruit Nibbles breached its express warranty and substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
2. The Fruit Nibble product failed to conform to PIM express and implied warranties. (Beech-Nut considers this issue resolved by the Court's summary judgment decision.)
3. The defects in the Fruit Nibbles product identified by Beech-Nut, its consumers, and its retailers substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
4. The Beech-Nut product manufactured and sold by PIM to Beech-Nut did not conform to the product samples, product specifications, or shelf-life stamped by PIM on each package of Fruit Nibbles it manufactured and sold to Beech-Nut.
5. The consumer and retailer complaints and reports Beech-Nut received in October and November 2008 of problems with the Fruit Nibbles, including the color, texture, flavor, bite, and appearance of the product which differed from the product sample prototype and specifications substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
6. The hundreds of written consumer and retailer complaints and reports Beech-Nut received in Fall 2008 about the Fruit Nibbles product demanding returns of the product, refunds, and compensation substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
7. The consumer and retailer complaints and reports received by Beech-Nut about mislabeled, short-weighted, and under-counted packages, powdery coating, dried-out, shriveled appearance, moldy and wilted appearance, fermented odor, terrible smell, hard texture, choking hazard, funny taste, sour odor, wrinkling, raisin-like appearance, bitter taste, bad smell, mold covering, horrible smell, green, white, or grey coating, looking like dead toes, old, nasty, discolored, crusty, gross, rotten, stale, dry, difficult to chew, spoiled smell, horrid smell, disgusting, waxy taste, and stomach-ache- characteristics of the Fruit Nibbles products substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
8. The consumer and retailer complaints and reports Beech-Nut received about the defective Fruit Nibbles product destroyed Beech-Nut's ability to sell the product manufactured and sold by PIM to retailers or consumers thereby substantially impairing the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.

9. The consumer and retailer complaints and reports Beech-Nut received about the defective Fruit Nibbles product substantially impaired the acceptability to the retail and consumer markets of the product manufactured and sold by PIM, thereby substantially impairing the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
10. The consumer and retailer complaints and reports Beech-Nut received about the Fruit Nibbles product made it necessary and unavoidable for Beech-Nut to accept returns and cancel sales of the Fruit Nibbles product manufactured and sold by PIM to Beech-Nut and substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
11. The consumer and retailer complaints and reports Beech-Nut received about the Fruit Nibbles product made it necessary and unavoidable for Beech-Nut to withdraw all the Fruit Nibbles products manufactured and sold by PIM from the market and substantially impaired the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
12. A sufficiently large proportion of the Fruit Nibbles product manufactured and sold by PIM to Beech-Nut did not conform to the sample or specifications so as to substantially impair the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
13. A sufficiently large proportion of the Fruit Nibbles product manufactured and sold by PIM to Beech-Nut breached PIM's express and implied warranties so as to substantially impair the value of all Fruit Nibbles product manufactured and sold by PIM to Beech-Nut.
14. PIM's breaches of its express and implied warranties caused Beech-Nut to incur the costs, expenses, and losses for
  - (a) purchase price Beech-Nut paid PIM for Fruit Nibbles product of \$966,651.40;
  - (b) profits Beech-Nut lost on sales to retailers under the four orders of \$1,685,045.50;
  - (c) out-of-pocket costs Beech-Nut paid for marketing support for the Fruit Nibbles product launch of \$16,529.44;
  - (d) out-of-pocket costs Beech-Nut incurred for the withdrawal of the Fruit Nibbles product from the market of \$591,219.26;
  - (e) payments Beech-Nut made to retailers for unused retail shelf space of \$77,310.77;
  - (f) out-of-pocket costs Beech-Nut incurred in reworking underweight packages: \$29,969.35;

(g) out-of-pocket costs Beech-Nut has incurred to store returned and unshipped product of \$87,414.77 through October 18, 2010, plus additional storage charges since that date; and

(h) Beech-Nut's time value on its lost use of the foregoing amounts.

**B. PIM:**

1. PIM maintains that after continued changes to the Fruit Nibbles product as required by Beech-Nut, Beech-Nut was pleased with the quality of the product in August of 2008, and their demand almost immediately exceeded forecasts.
2. Beech-Nut demanded additional product in amounts that exceeded PIM's (and Beech-Nut's) ability to obtain the key ingredient – pineapple juice concentrate.
3. As a result, PIM suggested to Beech-Nut that it delay the launch of Fruit Nibbles until sufficient quantities of pineapple juice concentrate could be reacquired. Beech-Nut rejected PIM's suggestion.
4. In accordance with Beech-Nut's demands, PIM produced product whose main ingredient was white grape juice concentrate even though they recommended switching back to pineapple juice concentrate.
5. PIM maintains that Beech-Nut, unwilling to wait for PIM to obtain the pineapple juice concentrate, agreed to the substitution of untested white grape juice concentrate as an alternative ingredient after Beech-Nut's own internal laboratories and scientific staff validated the ingredient substitution they were requesting.
6. There was no time allowed for PIM to conduct extended shelf life testing of the product being made with white grape juice concentrate. Beech-Nut did not provide PIM of a specific product launch date.
7. At no time did Beech-Nut specify a shelf life standard or ask for test results from PIM. Beech-Nut knew such testing could not be done under the circumstances.
8. The product shipped by the Plaintiffs to Beech-Nut in September of 2008, met the Parties' specifications.
9. At no time did PIM guarantee any shelf life standard to Beech-Nut.
10. PIM maintains that the inability of the parties to reach agreement on such representations and warranties was the primary reason a contract was never executed between them. The representations and warranties that Beech-Nut demanded were not ones that PIM was willing to make at that point in time and this is why the draft Quality Agreement was not

finalized.

11. PIM have never concluded or accepted the conclusion that the change in ingredients was the cause of the appearance problems later raised by Beech-Nut.
12. PIM maintains that Beech-Nut unilaterally withdrew the Fruit Nibbles product from the market on or about December 8, 2008, only notifying PIM of their intentions to do so on December 5, 2008.
13. PIM maintains that Beech-Nut has failed to substantiate its claim of nonconforming product and entitlement to the damages sought.
14. PIM maintains that Beech-Nut has failed to demonstrate that it breached the terms and conditions governing the parties' relationship.
15. Beech-Nut is not able to identify specifications for the product it alleges was nonconforming.
16. Beech-Nut was aware that PIM modified the product without shelf life study support.
17. PIM advised Beech-Nut of a concern that the dextrose in the product may migrate to the surface and form a thin layer on the surface.
18. PIM advised Beech-Nut the product may continue to have a starch coating, appearing whitish.
19. PIM advised Beech-Nut that the samples it liked were made under laboratory conditions and mass production would be made in the plant where they may be excessive starch accumulation on the surface.
20. Beech-Nut agreed to accept certain shipments of product from PIM with knowledge of these potential problems.
21. Beech-Nut knew that color uniformity is extremely difficult in mass production.
22. Beech-Nut accepted the modified product (due to ingredient change) knowing that corrections would have to be made in production.
23. Beech-Nut accepted product without color standards through the end of September 2008; the variation in color was not a big issue for Beech-Nut.
24. Beech-Nut accepted liability on certain product shipments and cannot now challenge them.

**5. FACT WITNESSES:** (Aside from those called for impeachment purpose, only the fact witnesses set forth by name and address may testify at trial. No summary of testimony is necessary.)

**A. Beech-Nut:**

Beech-Nut reserves the right to call additional witnesses only insofar as their testimony may be necessary to resolve issues of authentication of such documentary evidence.

1. Mary Cool, c/o King & Spalding LLP
2. Susan Allen, c/o King & Spalding LLP
3. Don Andrejewski, c/o McCarter & English, LLP
4. Diane Bianchini, 3 Flagg Way, Hillsborough, NJ 08844
5. Dr. Shen Chang c/o King & Spalding LLP
6. Steve Hungsberg c/o King & Spalding LLP
7. Tim Kennedy c/o King & Spalding LLP\*

**B. PIM:**

1. Basant Dwivedi, c/o McCarter & English, LLP
2. Frank McSorley, c/o McCarter & English, LLP

**C. BOTH PARTIES:**

Each party reserves the right to call and examine any of the witnesses listed by the other party, and to call rebuttal witnesses.

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\* PIM has objected to Beech-Nut's exhibits P-28, P-32, P-36, and P-38, on grounds of authenticity. The parties hope to resolve PIM's objections by agreement. If they cannot do so, Beech-Nut will call the following witnesses to authenticate those documents as needed: Dennis Warner c/o King & Spalding LLP; Kevin Vining c/o King & Spalding LLP; Robert Turner c/o King & Spalding LLP; Gary Stenzel c/o King & Spalding LLP; Lisa Lewis c/o King & Spalding LLP; Mary Sola c/o King & Spalding LLP; Anna Rosier c/o King & Spalding LLP; Edward Marianopolis c/o King & Spalding LLP; Joe Gordon c/o King & Spalding; Andrew Padilla c/o King & Spalding; and/or Helena Soedjak c/o King & Spalding LLP.

**6. EXPERT WITNESSES:** (No expert shall be permitted to testify at trial unless identified below by name and address and unless the expert's curriculum vitae and report are attached hereto. An expert's qualifications may not be questioned unless the basis therefore is set forth herein.)\*

There are no expert witnesses for either side.

**7. DEPOSITION:**

Not later than \_\_\_\_\_, any party seeking to offer evidence by deposition shall so advise the opposing parties. Within 14 days thereof, all parties are directed to prepare a joint agreed statement, in narrative form, of the testimony which would be given by the deponent if called under oath. No colloquy between counsel shall be included. The agreed statement is not a concession of the factual accuracy of the deponent's testimony. Absent prior leave of Court, no deposition testimony may be offered except as provided herein.

Within 14 days of the first date above, the parties shall simultaneously exchange and submit to the Court any objections to the deposition testimony proposed above. The objections shall note, separately as to each such challenged portion of the deposition, applicable cases or rules which underlie the objection. If a party fails to comply with this paragraph, the challenged deposition testimony shall be deemed admitted.

8. **EXHIBITS:** (Except for exhibits the need for which could not reasonably have been foreseen or which are used solely for impeachment purposes, only the exhibits set forth on the exhibit list attached hereto may be introduced at trial. Objections to authenticity are deemed waived unless such objections are set forth).\*

**A. Beech-Nut's Exhibits:**

Beech-Nut's Exhibit list is at pages 17-24 hereof.

**B. PIM's' objections to authenticity and permissible scope of Beech-Nut's Exhibits:**

PIM objects to the admissibility of Beech-Nut's exhibits 28, 32, 36 and 38 without supporting testimony and the opportunity to cross-examine on their creation and the information on which they are based, and exhibits 7, 11, 15, 16, 42, 44, 45, 79, 81, and 82 as being outside the scope of the trial. PIM reserves all other permissible objections.

**C. PIM's Exhibits:**

PIM's Exhibit list is at pages 25-26 hereof.

**D. Beech-Nut's objections to authenticity of PIM's Exhibits:**

Beech-Nut does not object to the authenticity of PIM's exhibits numbered 1-30, but reserves all other permissible objections, including completeness, materiality, and relevance.

**E. BOTH PARTIES:**

Both parties reserve the right to offer introduce any of the documents listed by either party herein, and to use and offer as evidence other documents that relate to testimonial assertions for purposes of its case in chief or for cross-examination or rebuttal.

Each party also reserves the right to offer into evidence the other party's discovery responses and, subject to Part 7 above, the pre-trial deposition testimony of any witness as part of its case in chief or for cross-examination or rebuttal.

\*The exhibit lists should follow this page.

## BEECH-NUT'S EXHIBIT LIST

Ex. No.	Dep. Ex. No.	Bates No.	Date	Description
P1(a)-(i)		BN0000051-059	11/26/2008	Email from Chang to Stenzel, Taylor, and Cool w/ attached photos
P2	D.Ex.6	BN0000109-114	9/23/2008	Email from Allen to Bianchini w/ attached QA doc
P3(a)-(f)	D.Ex.9	BN0000135-140	9/30/2008	Email from Allen to Bianchini w/ attached photos
P4		BN0000173-175	10/10/2008	Email chain w/ email from Maryanopolis to Stenzel re: reworking under-count/under-weight cartons of product; w/ attached inventory data
P5(a)-(g)		BN0000258-264	11/7/2008	Email from Cool to Gifford, Turner, Chang, Harvey, Soedjak, and Allen w/ attached photos
P6(a)-(b)		BN0000306-307	11/19/2008	Email from Hungsberg to Warner, Stenzel, Turner, Chang, and Allen w/ attached photos
P7		BN0000392-408	6/18/2008	Email from Taylor to Dwivedi, Allen, and Gifford w/ attached graphics, copacking procedures, packaging and handling specifications, and new product development specifications
P8	D.Ex.3	BN0000533-536	8/1/2008	Email chain w/ email from Sola to Dwivedi re: production samples
P9		BN0000622-623	8/27/2008	Email chain w/ email from Turner to McSorley and Dwivedi re: packaging and product issues
P10		BN0000823-824	11/20/2008	Email exchange b/w Turner and Dwivedi setting meeting re: product quality and production
P11		BN0001007-008	7/22/2008	Email from Cool to Hungsberg and forwarded to Rudolf re: production samples
P12		BN0001056	10/6/2008	Email from Vining to Hungsberg, Warner, and Chang re: quality of production samples
P13		BN0001097-099	11/11/2008	Email chain w/ email from Lewis to Sola, Hungsberg and Warner re: consumer complaints
P14(a)-(c)		BN0001220-223	10/13/2008	Email chain w/ email from Hungsberg to Allen w/ attached photos

P15		BN0001437-438	11/21/2008	Email chain w/ email from Cool to Pelli and Hungsberg re: PIM
P16		BN0001440-442	2/1/2008	Email chain w/ email from Cool to Hungsberg, Justice, and Warner re: ingredients
P17		BN0002029-031	8/29/2008	Email exchange b/w Dwivedi and Turner re: packaging materials
P18		BN0002124-125	11/21/2008	Email chain w/ email from Dwivedi to Turner, Bianchini, and McSorley re: product issues
P19		BN0002419-421	9/3/2008	Email chain w/ email from Dwivedi to Turner re: ingredient issues, packaging materials, and scheduled deliveries
P20(a)-(c)		BN0002451-253	9/29/2008	Email from Hungsberg to Gifford and Cool w/ attached photos
P21(a)-(f)		BN0002454-459	9/30/2008	Email from Allen to Bianchini and Dwivedi w/ attached photos
P22(a)-(d)		BN0002466-474	10/6/2008	Email from Hungsberg to Gifford and Cool w/ attached photos
P23		BN0002609-610	12/5/2008	Email exchange b/w Rosenberg, Warner, and Brown re: product withdrawal
P24		BN0002663-664	2/23/2009	Email exchange between Hungsberg and Brown re: Beech-Nut suppliers
P25(a)-(c)		BN0003808-810	10/20/2008	Email from Rosier to Warner w/ attached photos
P26		BN0003879-880	11/18/2008	Email chain w/ email from Lewis to Warner, Sola, and Hungsberg re: product quality
P27		BN0003929-933	1/16/2008	Email chain w/ email from Hungsberg to Warner and Kennedy w/ attached inventory data
P28(a)-(b)		BN0003977-979	10/10/2008	Email chain w/ email from Warner to Hungsberg re: product issues; w/ attached photo
P29(a)-(c)		BN0004466-485	11/27/2008	Email chain w/ email from Chang to Hungsberg, Warner, Schneider, Stenzel, Vining, Heiser, and Turner w/ attached power point presentation
P30		BN0004760-763	1/17/2008	Email from Rosenberg to Cool w/ attached magazine article
P31		BN0005783-835	11/26/2008	Email chain from Gifford to Stenzel and Kennedy with attached inventory data
P32		BN0007133-163	11/26/2008	Email chain w/ email from Lewis to Stenzel w/ attached consumer comment logs

P33		BN0007288-289	12/1/2008	Email chain w/ email from Stenzel to Lewis re: Wal-Mart
P34		BN0007297-305	12/1/2008	Email chain w/ email from Guina to Vining and Warner re: AWG; w/ attached recall form from customer
P35		BN0007333-335	12/1/2008	Email chain w/ email from Guina to Warner, Vining, and Schneider re: AWG; w/ attached withdrawal notice from customer
P36		BN0007336-359	12/2/2008	Email from Lewis to Rudolf, Warner, Hungsberg, Chang, Schneider, and Stenzel w/ attached consumer comment logs
P37		BN0007362-397	12/4/2008	Email chain w/ email from Lewis to Chang, Soedjak, and Warner re: consumer complaint logs
P38		BN0007488-494	1/27/2009	Email from Lewis to Kennedy w/ attached illness consumer reports
P39		BN0011327-355	11/26/2008	Email chain w/ email from Gifford to Hungsberg re: inventory; w/ attached inventory and sales data
P40		BN0062600-3732	00/00/0000	Damage Documents produced on 10/12/2010
P41	D.Ex.22	P000115-116	5/19/2008	Email chain w/ email from Dwivedi to Hungsberg and Cool re: formula changes
P42		P000209	5/23/2008	Email from Dwivedi to Cool and Hungsberg re: product issues
P43		P000311-313	5/31/2008	Email from Rosenberg to McSorley, Dwivedi, Purcell, Andrejewski, and Monaco re: quality issues
P44	D.Ex.23	P000320	6/2/2008	Email exchange b/w Taylor, Dwivedi, and Rosenberg re: volume forecasts and production capacity
P45		P000575	7/6/2008	Email exchange b/w Dwivedi and Bianchini re: issues with formula and timing
P46		P000907-909	8/1/2008	Email chain w/ email from Sola to Dwivedi re: production samples and approving 7/24/2008 sample for full production
P47		P001140	5/9/2008	Purchase order AHG1923
P48		P001141	8/5/2008	Purchase order AHG1994
P49	D.Ex.32	P001190	8/21/2008	Email from McSorley to Rosenberg, Dwivedi, and Purcell re: white grape juice concentrate
P50	D.Ex.33	P001198-199	8/22/2008	Email from McSorley to Rosenberg, Dwivedi, and Purcell re: white grape juice concentrate

P51	D.Ex.19	P001615-616	9/23/2008	Email chain w/ email from Dwivedi to Allen and Bianchini re: variability in product
P52		P001621-623	9/24/2008	Email from Turner to Dwivedi, Bianchini, and McSorley re: under-count/under-weight cartons of product
P53		P001626	9/25/2008	Email chain w/ email from Dwivedi to McSorley re: under-count/under-weight cartons of product
P54		P001627-628	9/25/2008	Email chain w/ email from Rosenberg to Dwivedi re: under-count/under-weight cartons of product and oversight
P55	D.Ex.8	P001629	9/25/2008	Email from Cool to Bianchini and Dwivedi re: product issues
P56		P001634-639	9/28/2008	Email from Allen to Bianchini w/ attached product specifications
P57		P001663	9/30/2008	Email from Turner to Dwivedi re: under-count/under-weight cartons of product
P58	D.Ex.24	P001672-673	10/1/2008	Email exchange between Chang and Dwivedi re: product release and extent of possible quality issues
P59	D.Ex.10	P001688	10/4/2008	Email exchange b/w Dwivedi and Bianchini re: lack of confidence in product and possible need for recall
P60		P001850	10/22/2008	Email chain w/ email from Bianchini to Dwivedi re: response to under-count/under-weight cartons of product
P61		P001867	10/27/2008	Email from Turner to Dwivedi, Bianchini, and McSorley re: under-count/under-weight cartons of product
P62		P001893-894	10/29/2008	Email chain w/ from Turner to Dwivedi, Bianchini, and McSorley re: under-count/under-weight cartons of product
P63		P001900-901	10/29/2008	Email chain w/ email from Dwivedi to Turner re: under-count/under-weight cartons of product
P64		P001902-903	10/29/2008	Email chain w/ email from McSorley to Dwivedi re: under-count/underweight cartons of product and product issues
P65	D.Ex.14	P001932-933	10/29/2008	Email from Bianchini to Dwivedi re: issues at plant

P66		P001944-946	10/30/2008	Email chain w/ email from Dwivedi to Turner re: under-count/under-weight cartons of product
P67	D.Ex.27	P001996-2000	11/1/2008	Email exchange b/w Dwivedi and Rosenberg re: remelt and documentation policy
P68	D.Ex.16	P002056-057	11/10/2008	Email chain w/ email from Turner to Dwivedi, McSorley, Bianchini, and Andrejewski re: product / packaging issues
P69	D.Ex.40	P002058	11/8/2008	Email from Dwivedi to Bianchini, McSorley, and Andrejewski re: poor quality of product sent to colleague
P70		P002069-071	11/11/2008	Email chain w/ emails between Turner and McSorley re: quality issues
P71	D.Ex.25	P002105	11/13/2008	Email from Cool to Dwivedi and Bianchini re: product issues
P72	D.Ex.37	P002111-13	11/13/2008	Email chain w/ email from McSorley to Turner Andrejewski, and Dwivedi re: new product issues
P73	D.Ex.38	P002124	11/12/2008	Email from Bianchini to Dwivedi re: issues with samples
P74		P002242	12/8/2008	Email from Warner to Rosenberg, Brown, Dwivedi, Ellen, Purcell, and Kennedy re: product withdrawal
P75	D.Ex.42	P002255-257	1/8/2008	Email exchange b/w Rosenberg and Kennedy re: 1/13/2008 meeting and topics
P76		P002264-265	1/16/2008	Email from Baum to Rosenberg, Dwivedi, McSorley, Andrejewski, and Purcell re: scrap inventory, re-work, and costs
P77		P002268-269	1/24/2008	Email chain w/ email from Ellen to Rosenberg re: financial issues relating to withdrawal
P78		P002332	1/28/2009	Email from Brown to turner re: reintroduction timeline
P79	D.Ex.34	P002913	7/11/2008	Email from Rhodes to Capone and Basant re: ingredient inventories
P80		P003334	1/13/2009	Email exchange b/w Purcell, Rosenberg, Dwivedi, Brown, Ellen, and McSorley re: meeting with Beech-Nut
P81		P003536-537	2/15/2008	Email exchange b/w Cool, Rosenberg, and Dwivedi re: initial meetings, product development, and production timelines

P82		P003552-554	3/24/2008	Email exchange b/w Cool and Rosenberg re: product-development, packaging, and pricing
P83		P003898	8/28/2008	Email from Andrejewski to McSorley re: ingredient substitution
P84		P003910-911	9/9/2008	Email chain w/ email from Rosenberg to Siuta and Mannerberg re: contamination hazards
P85	D.Ex.13	P003985-986	10/29/2008	Email chain w/ email from Rosenberg to Dwivedi and Bianchini re: under-count/under-weight cartons of product
P86		P004172-173	8/26/2008	Email chain w/ email from McSorley to Dwivedi re: issues with product
P87	D.Ex.18	P004175	8/26/2008	Email from Cool to Dwivedi, McSorley, and Bianchini re: ingredient substitutions and approval
P88		P004215	8/28/2009	Email from McSorley to Rosenberg, Dwivedi, and Purcell re: white grape juice concentrate
P89		P004555	9/23/2008	Email exchange with email from Bianchini to Allen re: product variance
P90		P004556	9/23/2008	Email exchange b/w Allen, Bianchini, and Dwivedi re: product issues
P91	D.Ex.36	P004612	10/6/2008	Email exchange b/w Dwivedi and McSorley re: use of capol
P92	D.Ex.39	P004889	11/3/2008	Email from Nelson to Andrejewski re: quality of product to be shipped
P93		P005730		PIM Brands, LLC, Visitors Log
P94		P005800-806	8/19/2008	Sales orders, invoices and shipping documents
P95		P005936-937	4/7/2008	Purchase order AHG1896
P96		P005940-941	10/13/2008	Purchase order AHG2048 (amended)
P97		P006580	10/29/2008	Email exchange b/w Allen, Bianchini, Dwivedi, McSorley, Andrejewski, and Rosenberg re: under-count/under-weight cartons of product
P98		P006731	12/2/2008	Email from Warner to Rosenberg re: consumer complaints
P99		P006768-769	12/5/2008	Email exchange b/w Warner and Rosenberg re: withdrawal
P100		P007118-119	9/8/2008	Purchase order AHG2017

P101(a)-(c)		P007124-126	9/29/2008	Email chain w/ email from Gifford to Dwivedi w/ attached photos
P102		P007130-131	10/13/2008	Purchase order AHG2048
P103	D.Ex.30	P007327-337	7/29/2008	Email from Ramani to Bianchini and Dwivedi w/ attached updated product-specifications/operational-procedures
P104				Fruit Nibbles Samples
P105		BN0000825-826	11/20/2008	Email from Turner to Chang, Cool, Gifford, and Allen re: PIM conference call
P106		BN0002585-586	10/13/2008	Email from Maryanopolis to Gifford, Heiser, Hungsberg, Warner, Turner, Stenzel, Chang, Soedjak, Allen, Harvey, Cool, and Sola re: reworking under-count/under-weight cartons of product; w/ attached inventory data
P107		BN0002589-590	10/15/2008	Email from Maryanopolis to Gifford, Heiser, Hungsberg, Warner, Turner, Stenzel, Chang, and Soedjak re: reworking under-count/under-weight cartons of product; w/ attached inventory data
P108		BN0003784-787	10/16/2008	Email chain w/ email from Hungsberg to Warner re: reworking under-count/under-weight cartons of product; w/ attached inventory data
P109		BN0006977	11/13/2008	Email from Hungsberg to Warner re: product issues
P110		BN0003788-791	10/16/2008	Email chain w/ email from Hungsberg to Warner re: product issues
P111		P000959	8/7/2008	Email exchange b/w Bianchini and Dwivedi re: weight specifications and ingredients
P112		P0002172-173	11/24/2008	Email chain w/ email from Gifford to Dwivedi re: conference call
P113		P006404	3/29/2009	Email chain w/ email from Dwivedi to Rosenberg re: Fruit Nibbles product
P114		P006622-625	10/31/2008	Email chain w/ email from Purcell to Rosenberg re: formulation records
P115		P001912	10/29/2008	Email from Allen to Bianchini and Dwivedi re: mixed packaging and under-count/under-weight cartons of product
P116		P005698	10/20/2008	Storage study

P117	D.Ex.41	P005709	9/19/2008	Storage study
P118		P001892	10/29/2008	Email chain w/ email from Dwivedi to McSorley re: under-count/under-weight cartons of product
P119		P001878	10/27/2008	Email chain w/ email from Dwivedi to Turner and Bianchini ingredient testing
P120		P001783	10/16/2008	Email from Allen to Dwivedi and Bianchini re: samples and product issues
P121		P001718-719	10/9/2008	Email from Bianchini to Dwivedi re: observations at plant
P122		P002127	11/17/2008	Email from Turner to Dwivedi, Bianchini, and McSorley re: new formula
P123		BN0002900-901	10/4/2008	Email from Cool to Chang, Soedjak, Allen, Harvey, Gifford, Mannon, and Turner re: PIM meeting
P124		BN0001214-216	10/8/2008	Email chain w/ email from Cool to Allen re: samples and product issues
P125		P001629	9/25/08	Email from Cool to Bianchini and Dwivedi re: samples and product issues

**PIM'S EXHIBITS**

NO.	DESCRIPTION OF EXHIBIT
D1	Email chain beginning with October 6, 2008 email from Stenzel to Kennedy, BN4493-99
D2	Email chain beginning with November 26, 2008 from Turner to Stenzel, BN553233
D3	Email chain beginning November 26, 2008 from Turner to Stenzel, BN8758
D4	Email chain beginning with November 30, 2008 from Turner to Kennedy, BN5681-82
D5	Email chain beginning with December 5, 2008 from Chang to Warner, BN448889
D6	Email dated January 17, 2009, from Dwivedi to Brown, P2292
D7	Email chain beginning with September 30, 2008 from Dwivedi to Turner, BN2460-63
D10	Email dated June 27, 2008, from Cool to Chang, BN0012469
D11	Email chain beginning with August 1, 2008 email from Sola to Dwivedi, BN0000533-0000536
D12	Email dated August 7, 2008, from Bianchini to Dwivedi, P000956
D13	Email dated August 21, 2008, from Dwivedi to Cool, BN0009052
D14	Email chain beginning with August 22, 2008 email from Cool to Chang, BN0000611-612
D15	Email chain beginning with August 25, 2008 email from Cool to Dwivedi, BN0000613
D16	Email chain beginning with August 26, 2008 email from Cool to Dwivedi, BN0000615
D17	Email chain beginning with September 23, 2008 email from Dwivedi to Allen, P001615-1616
D19	Email chain beginning with September 30, 2008 email from Chang to Allen, BN0000141-142
D20	Email dated October 1, 2008 from Chang to Dwivedi, BN0002061
D21	Email chain beginning with October 1, 2008 email from Turner to Dwivedi, P001672-1673
D22	Email chain beginning with October 4, 2008 email from Cool to Chang, BN0008147-8148
D23	Email dated October 6, 2008, from Dwivedi to Turner, BN0000153-155
D24	Email chain beginning with October 6, 2008 email from Rudolf to Hungsberg, BN0008160-8165
D25	Email dated October 9, 2008, from Bianchini to Dwivedi, P001718-1719
D26	Email chain beginning with October 10, 2008 email from Cool to Turner, BN0012474-12478
D27	Email chain beginning with October 27, 2008 email from Dwivedi to Turner, P001878

D28	Email dated November 14, 2008, from Turner to Hungsberg, BN0003447
D29	Email chain beginning with November 24, 2008 email from Cool to Chang, BN0012531-12532
D30	Email chain beginning with November 30, 2008 email from Turner to Kennedy, BN0008944-8945

9. **SINGLE LIST OF LEGAL ISSUES** (All issues shall be set forth below. The parties need not agree on any issue. Any issue not listed shall be deemed waived.)

**BEECH-NUT:**

1. PIM breached its express and implied warranties to Beech-Nut and is liable to Beech-Nut for the damages caused by PIM's breaches. (Beech-Nut considers this issue resolved by the Court's summary judgment decision.)
2. PIM's breaches of its express and implied warranties substantially impaired the value of the Fruit Nibbles product it manufactured and sold to Beech-Nut as a whole.
3. PIM's breaches of its express and implied warranties caused Beech-Nut damages.
4. Beech-Nut is entitled to recover from PIM damages for the entirety of the Fruit Nibbles product manufactured and sold by PIM to Beech Nut.
5. Beech-Nut is entitled to recover from PIM the items and elements of its losses and damages set forth above in this Pre-Trial Order.
6. Beech-Nut's claims are governed by New York law and its entitlement to pre-judgment interest is determined under NY CPLR §§ 5001-5004.

**PIM:**

1. Whether Beech-Nut revoked acceptance of the products shipped to it by PIM?
2. Whether the non-conformity alleged by Beech-Nut substantially impaired the whole value of each shipment by PIM separately and in the aggregate?
3. Whether the product shipped by PIM conformed with the parties' specifications?
4. What was the variance, if any, between the product shipped by PIM and the sample produced in August of 2008?
5. Whether Beech-Nut is entitled to the recovery of any damages from PIM, including prejudgment interest and, if so, at what rate?

10. CONCLUSION

A. MISCELLANEOUS

(Set forth any matters which require action or should be brought to the attention of the Court.)

There are no matters of which the parties are aware that require action or should be brought to the Court's attention.

B. TRIAL COUNSEL: (List the names of trial counsel for all parties.)

Paul J. Dillon, Esq.  
Bloom & Dillon, P.C.  
and  
Richard A. Cirillo, Esq.  
Karen R. Kowalski, Esq.  
King & Spalding, LLP  
(Attorneys for Beech-Nut)

William D. Wallach, Esq.  
McCarter & English, LLP  
(Attorneys for PIM)

C. JURY TRIALS:

Not later than \_\_\_\_\_

1. Each party shall submit to the District Judge and to opposing counsel a trial brief in accordance with Local Civil Rule 7.2(b)(SEE ATTACHED "RIDER ON LENGTH OF BRIEFS") with citations to authorities cited and arguments in support of its position on all disputed issues of law. THE BRIEF SHALL ALSO ADDRESS ANY ANTICIPATED EVIDENCE DISPUTE. In the event a brief is not submitted, the delinquent party's pleading may be stricken.

2. Any hypothetical questions to be put to an expert witness on direct examination shall be submitted to the District Judge and to opposing counsel.

3. Each party shall submit to the District Judge and to opposing counsel proposed voir dire.

4. Beech-Nut shall submit to opposing counsel, in writing, proposed jury instructions. Each instruction shall be on a separate sheet of legal sized paper and shall be numbered in sequence. Each instruction shall

include citations to authorities, if any.

Within 7 days of the above, opposing counsel shall, on the face of the instructions submitted by Beech-Nut, set forth any objections to the proposed jury instructions and/or proposed counter-instructions.

C. NON-JURY TRIALS

Not applicable.

Not later than \_\_\_\_\_

1. Each party shall submit to the District Judge and to opposing counsel a trial brief in accordance with Local Civil Rule 7.2(b) (SEE ATTACHED "RIDER ON LENGTH OF BRIEFS") with citations to authorities cited and arguments in support of its position on all disputed issues of law. THE BRIEF SHALL ALSO ADDRESS ANY ANTICIPATED EVIDENCE DISPUTE. In the event a brief is not submitted, the delinquent party's pleading may be stricken.

2. Any hypothetical questions to be put to an expert witness on direct examination shall be submitted to the District Judge and to opposing counsel.

3. Proposed Findings of Fact and Conclusions of Law shall be submitted to the District Judge and to opposing counsel after the close of evidence. These shall include annotations to trial transcripts and exhibits.

E. BIFURCATION

Not applicable.

(When appropriate, liability issues shall be severed and tried to verdict. Thereafter, damage issues will be tried to the same jury.)

F. ESTIMATED LENGTH OF TRIAL:

3 to 4 trial days.

G. TRIAL DATE: To Be Determined By  
Hon. William J. Martini, U.S.D.J.

AMENDMENTS TO THIS FINAL PRETRIAL ORDER SHALL NOT BE PERMITTED UNLESS THE COURT DETERMINES THAT MANIFEST INJUSTICE WOULD RESULT IF THE AMENDMENT IS DISALLOWED. THE COURT MAY FROM TIME TO TIME SCHEDULE CONFERENCES AS MAY BE REQUIRED EITHER ON ITS OWN MOTION OR AT THE REQUEST OF COUNSEL.

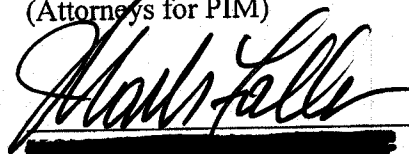


/s/

PAUL J. DILLON  
Bloom & Dillon, P.C.

RICHARD A. CIRILLO  
KAREN R. KOWALSKI  
JOSHUA T. EDGEMON  
King & Spalding LLP  
(Attorneys for Beech-Nut)

/s/

WILLIAM D. WALLACH  
McCarter & English, LLP  
(Attorneys for PIM)

#### RIDER ON LENGTH OF BRIEFS

The attention of the parties is directed to Local Civil Rule 7.2. Briefs shall not exceed 40 ordinary typed or printed pages . . . ." (emphasis added). This page limitation shall be strictly enforced.

When submitting a brief in accordance with this rule a party may request special permission to submit an additional brief on any point or points deemed to need additional pages of argument. This request must be made by letter not to exceed two ordinary typed or printed pages and must be submitted with the brief.

The Court shall, in its sole discretion, decide whether to allow additional briefing on review of the party's brief and letter.

The Court also reserves the right, in its sole discretion, to require additional briefing on any point or points after review of the written submissions of the parties or oral argument.