

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)

**SINGLE JOINT STATEMENT OF
MATERIAL FACTS PURSUANT TO RULE 56.1**

Pursuant to Rule 56.1 of the Local Rules of the District of New Jersey, and with reference to *Milligan v. Sentry Exteriors*, 2005 WL 1229791 (D.N.J. 2005) (Martini, J.), Defendant-Counterclaimant, Beech-Nut Nutrition Corp. ("Beech-Nut"), hereby submits this single joint

Statement of Material Facts and responds to the Plaintiffs' Additional Statement of Material Facts.

I. DEFENDANT/COUNTER-CLAIMANT BEECH-NUT'S INITIAL RULE 56.1 STATEMENT OF UNDISPUTED AND MATERIAL FACTS IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' RESPONSES

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 3¹; PIM Reply at ¶ 4, Dkt. 7.

PLAINTIFFS' RESPONSE: Admitted.

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.

PLAINTIFFS' RESPONSE: Admitted.

3. Before the Fruit Nibbles events, Beech-Nut had never distributed a product like Fruit Nibbles. Stipulated Fact 8; Kowalski Decl. Ex. 4² at 35-36; Ex. 5 at 18-19; *see also* Ex. 2 at 71.

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Ex. 2 at 27-29, 71.

PLAINTIFFS' RESPONSE: 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 [Wallach Cert. Ex. P].

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

² 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 ("Kowalski Decl." or William D. Wallach's Certification in Opposition to Motion for Summary Judgment dated March 3, 2011 ("Wallach Cert.")).

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

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Exs. 9, 10.

PLAINTIFFS' RESPONSE: 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 [Wallach Cert. Ex. O]; Dwivedi Dep. 46:17-20; 47:5-16; 48:2-25 [Wallach Cert. Ex. P].

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; Kowalski Decl. Ex. 11 at BN2392 (Draft Co-Packing Agm't ¶ 18.2).

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Ex. 2 at 90-91; Ex. 12 (Oct. 6, 2008 e-mail from PIM refusing to execute agreement).

PLAINTIFFS' RESPONSE: Admitted.

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

PLAINTIFFS' RESPONSE: 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. 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.

Kowalski Decl. Ex. 76 at ¶ 6 (PIM's Int. Ans. 6).

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Ex. 13; Ex. 76 at ¶ 6.

PLAINTIFFS' RESPONSE: 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. 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.

Kowalski Decl. Ex. 13.

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

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

PLAINTIFFS' RESPONSE: Admitted.

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

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

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

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

DEFENDANT/COUNTERCLAIMANT'S REPLY: Plaintiffs' response directly contradicts the uncontested facts stipulated by the parties in the Final Pretrial Order. Stipulated Fact 30.

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; Kowalski Decl. Exs. 15-19.

PLAINTIFFS' RESPONSE: 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 [Wallach Cert. Ex. O]; Dwivedi Dep. 46:17-20; 47:5-16; 48:2-25 [Wallach Cert. Ex. 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 [Wallach Cert. Ex. M]; McSorley Dep. 64:1-7 [Wallach Cert. Ex. L]; Dwivedi Dep. 64:23-25; 65:1-4 [Wallach Cert. Ex. P].

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; Kowalski Decl. Exs. 9, 10, 16-19.

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

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; Kowalski Decl. 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.

PLAINTIFFS' RESPONSE: Denied. Beech-Nut's development team did not discuss with PIM any shelf life requirement for the evolving product. Cool Dep. 36:4-10 [Wallach Cert. Ex. N]; Hungsberg Dep. 76:13-17 [Wallach Cert. Ex. R]. Mary Cool did not know what, if any, shelf life requirement may have existed for the product. Cool Dep. 36:11-13 [Wallach Cert. Ex. 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 [Wallach Cert. Ex. O]; Dwivedi Dep. 63:21-25. [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S REPLY: Plaintiffs' response directly contradict the previous admission by PIM's 30(b)(6) witness that the twelve-month shelf-life was always a part of the agreed upon specifications. Kowalski Decl. Ex. 3 at 24-25. The response also directly contradicts the uncontested facts stipulated by the parties in the Final Pretrial Order. The parties have stipulated 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.” Stipulated Fact 15.

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; Kowalski Decl. Ex. 2 at 34-35.

PLAINTIFFS’ RESPONSE: Admitted.

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; Kowalski Decl. Ex. 1 at 76-80; Ex. 2 at 34-36; Ex. 3 at 72-73.

PLAINTIFFS’ RESPONSE: Admitted.

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; Kowalski Decl. Ex. 1 at 76-80; Ex. 2 at 34, 141-42.

PLAINTIFFS’ RESPONSE: Admitted.

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; Kowalski Decl. Ex. 1 at 77-78; Ex. 2. at 34-36.

PLAINTIFFS’ RESPONSE: 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 [Wallach Cert. Ex. N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Wallach Cert. Ex. R]; Chang Dep. 31:2-12 [Wallach Cert. Ex. O].

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.

PLAINTIFFS’ RESPONSE: Admitted, except to deny the allegation that the formula for Fruit Nibbles was created solely by PIM. *Id.*; Cool Dep. 34:2-20 [Wallach Cert. Ex. N].

DEFENDANT/COUNTERCLAIMANT'S REPLY: The parties have stipulated that "Beech-Nut and Promotion In Motion 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." Stipulated Fact 12 (emphasis added).

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.

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Exs. 17, 20-24; *see also* Exs. 25-29.

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Exs. 30, 31.

PLAINTIFFS' RESPONSE: Admitted.

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.*, Kowalski Decl. 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).

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Exs. 30, 34-35.

PLAINTIFFS' RESPONSE: Admitted.

29. Beech-Nut notified PIM of the product defects referred to in the complaints, and Beech-Nut and PIM verified them to be accurate. Kowalski Decl. 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.

PLAINTIFFS' RESPONSE: Admitted.

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

PLAINTIFFS' RESPONSE: Admitted, except to deny that the majority of the product was "deficient". Cool Dep. 45:9-13 [Wallach Cert. Ex. N].

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." Kowalski Decl. Exs. 36, 43.

PLAINTIFFS' RESPONSE: Admitted.

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. Kowalski Decl. 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).

PLAINTIFFS' RESPONSE: Admitted.

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

PLAINTIFFS' RESPONSE: Admitted, except to deny that the majority of the product was "deficient". Cool Dep. 45:9-13 [Wallach Cert. Ex. N].

34. Beech-Nut could not distribute Fruit Nibbles that did not meet the agreed twelve-month shelf-life. Kowalski Decl. 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).

PLAINTIFFS' RESPONSE: Denied. Chang Dep. 20:4-8; 21:7-10; 23:10-16 [Wallach Cert. Ex. O]; Dwivedi Dep. 63:21- 25 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S REPLY: To the extent Plaintiffs' response is intended to deny the parties' agreement on a twelve-month shelf-life requirement, the response directly contradicts the testimony of PIM's 30(b)(6) witness (Kowalski Decl. Ex. 3 at 24-25) and the stipulated uncontested facts of the Final Pretrial Order. Stipulated Fact 15.

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; Kowalski Decl. Exs. 38-41; Kennedy Aff. ¶ 13. PIM never objected to the withdrawal. *Id.*

PLAINTIFFS' RESPONSE: Admitted.

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

PLAINTIFFS' RESPONSE: Admitted as an accurate statement, however, PIM denies any legal responsibility for Fruit Nibbles.

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.

PLAINTIFFS' RESPONSE: Admitted, except to deny the "deficient" allegation.

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.

PLAINTIFFS' RESPONSE: Admitted.

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. Kowalski Decl. Exs. 36, 42-43; Kennedy Aff. ¶ 16.

PLAINTIFFS' RESPONSE: Admitted.

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. Kowalski Decl. Ex. 4 at 45-46.

PLAINTIFFS' RESPONSE: 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. 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; Kowalski Decl. Ex. 3 at 156-57; Ex. 4 at 92-93; Ex. 41-42, 44.

PLAINTIFFS' RESPONSE: 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 [Wallach Cert. Ex. N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Wallach Cert. Ex. R]; Chang Dep. 31:2-12 [Wallach Cert. Ex. 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. PIM and Beech-Nut did not reach a co-packing or other contract relating to the prospective re-launch. Kowalski Decl. Ex. 44 (Feb. 3, 2009 e-mail discussing lack of progress in moving toward a re-launch); Kennedy Aff. ¶ 18.

PLAINTIFFS' RESPONSE: Admitted.

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

PLAINTIFFS' RESPONSE: Admitted.

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

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Ex. 45.

PLAINTIFFS' RESPONSE: Admitted.

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; Kowalski Decl. Ex. 7 at 21-28, 45-52, 55.

PLAINTIFFS' RESPONSE: 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. 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; Kowalski Decl. Ex. 7 at 58-61.

PLAINTIFFS' RESPONSE: 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.

III. PLAINTIFFS' ADDITIONAL STATEMENT OF MATERIAL FACTS AND DEFENDANT/COUNTER-CLAIMANT'S RESPONSES

* 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.

Many of the alleged facts set forth in paragraphs 48-88 of Plaintiff's Additional Statement of Material Facts Pursuant to Rule 56.1 contradict the parties' Stipulated Facts in the Pre Trial Order jointly filed by the parties with this Court on October 18, 2010, and are irrelevant and immaterial to Beech-Nut's motion for summary judgment. Further, many statements are argumentative, misstate the evidence, and are unsupported by the record. Beech-Nut has nevertheless endeavored to respond to them and hereby incorporates this general objection into each and every response as if fully stated therein.

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 [Wallach Cert. Ex. N].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "[d]uring 2008, there were communications between the parties concerning the development of the product to satisfy Beech-Nut's demands." Stipulated Fact 17. Beech-Nut disputes the remaining allegations in paragraph 48.

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 [Wallach Cert. Ex. L].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut and Promotion in Motion collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted and PIM determined the ingredients, formula, and process to produce the product." Stipulated Fact 12. Beech-Nut disputes the remaining allegations in paragraph 49.

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 [Wallach Cert. Ex. N]; Hungsberg Dep. 68:23- 25; 69:1-3; 71:9-24 [Wallach Cert. Ex. R]; Chang Dep. 31:2-12 [Wallach Cert. Ex. O].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Promotion In Motion created sample products that it sent to Beech-Nut for review, feedback, and approval prior to the commencement of manufacturing." Stipulated Fact 13. Beech-Nut disputes the remaining allegations in paragraph 50.

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

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Beech-Nut disputes the allegations in paragraph 51. The statement asserts a legal conclusion. Beech-Nut admits that Beech-Nut personnel lacked prior experience in manufacturing all natural fruit product like Fruit Nibbles. See Cool Dep. 19:12-17 [Wallach Cert. Ex. N].

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 [Wallach Cert. Ex. P]. PIM followed the instructions of its client. Dwivedi Dep. 45:17-25 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut and Promotion in Motion collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted and PIM determined the ingredients, formula, and process to produce the product." Stipulated Fact 12. Beech-Nut disputes the remaining allegations in paragraph 52.

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 [Wallach Cert. Ex. N]; Wallach Cert. Ex. E.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut representatives visited the Plaintiffs' facility on a number of occasions" (Stipulated Fact 16) and "Beech-Nut and Promotion in Motion collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted and PIM determined the ingredients, formula, and process to produce the product." Stipulated Fact 12. Beech-Nut disputes the remaining allegations in paragraph 53.

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 [Wallach Cert. Ex. L].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut representatives visited the Plaintiffs' facility on a number of occasions" (Stipulated Fact 16). Beech-Nut disputes the allegations in paragraph 54, insofar as Beech-Nut lacks

sufficient knowledge to confirm or deny the number or specific purpose of visits by Mary Cool to PIM.

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

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut representatives visited the Plaintiffs' facility on a number of occasions[.]" Stipulated Fact 16. Beech-Nut disputes the allegations in paragraph 55, insofar as Beech-Nut lacks sufficient knowledge to confirm or deny the number or specific purpose of visits by Mary Cool to PIM.

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 [Wallach Cert. Ex. O].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: The statement is not supported by the cited evidence. As the parties stipulated, "Beech-Nut and Promotion in Motion collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted and PIM determined the ingredients, formula, and process to produce the product." Stipulated Fact 12. The parties further stipulated, "In July 2008, PIM provided a sample product, which Beech-Nut approved as the sample for the product PIM was to produce." (Stipulated Fact 14) and "[p]rior 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." Stipulated Fact 15. Beech-Nut disputes the remaining allegations in paragraph 56.

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 [Wallach Cert. Ex. N]. This lack of experience delayed the development and approval of the Fruit Nibbles.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Beech-Nut admits Beech-Nut personnel lacked prior experience in manufacturing all natural fruit product like Fruit Nibbles. Cool Dep. 19:12-17 [Wallach Cert. Ex. N]. Beech-Nut disputes the remaining allegations in paragraph 57.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut and Promotion in Motion collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted and PIM determined the ingredients, formula, and process to produce the product." Stipulated Fact 12. Further, "[i]n July 2008, PIM provided a sample product, which Beech-Nut approved as the sample for the product PIM was to produce" (Stipulated Fact 14) and that "[p]rior 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." Stipulated Fact 15. These specifications and the approved sample were all PIM needed to produce the Fruit Nibbles that Beech-Nut ordered. Kowalski Decl. Ex. 2 at 77 ("Q: So the specifications I think we've had some testimony that the specifications that were reached there was an approved prototype. PIM knew what Beech-Nut wanted? A: Yes. Q. And it's PIM's understanding that anything less than that was not meeting Beech-Nut's specifications? A. I'll accept that."). In addition, PIM's 30(b)(6) witness identified the precise written specifications PIM claims never existed, which were in fact created by PIM, and confirmed that they had never changed. Kowalski Decl. Ex. 3 at 24-25 ("Q: And this specification as it was drafted was this sufficient for you to move forward and create the product as Beech-Nut requested? A: We could create the product to these specifications at this time, yes."). Beech-Nut disputes the remaining allegations in paragraph 58.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "Beech-Nut and Promotion in Motion collaborated to develop Fruit Nibbles in that Beech-Nut identified to PIM the characteristics of the product it wanted and PIM determined the ingredients, formula, and process to produce the product." Stipulated Fact 12. The parties further stipulated, "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." Stipulated Fact 24. Beech-Nut disputes the remaining allegations in paragraph 59.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties have stipulated, "[i]n July 2008, PIM provided a sample product, which Beech-Nut approved as the sample for the product PIM was to produce" (Stipulated Fact 14), and that "[p]rior 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.” Stipulated Fact 15. These specifications and the approved sample were all PIM needed to produce the Fruit Nibbles that Beech-Nut ordered. Kowalski Decl. Ex. 2 at 77 (“Q: So the specifications I think we’ve had some testimony that the specifications that were reached there was an approved prototype. PIM knew what Beech-Nut wanted? A: Yes. Q. And it’s PIM’s understanding that anything less than that was not meeting Beech-Nut’s specifications? A. I’ll accept that.”). In addition, PIM’s 30(b)(6) witness identified the precise written specifications PIM claims never existed, which were in fact created by PIM, and confirmed that they had never changed. Kowalski Decl. Ex. 3 at 24-25 (“Q: And this specification as it was drafted was this sufficient for you to move forward and create the product as Beech-Nut requested? A: We could create the product to these specifications at this time, yes.”). Beech-Nut disputes the remaining allegations in paragraph 60.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT’S RESPONSE: As the parties have stipulated, “[i]n July 2008, PIM provided a sample product, which Beech-Nut approved as the sample for the product PIM was to produce” (Stipulated Fact 14), and that “[p]rior 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.” Stipulated Fact 15. These specifications and the approved sample were all PIM needed to produce the Fruit Nibbles that Beech-Nut ordered. Kowalski Decl. Ex. 2 at 77 (“Q: So the specifications I think we’ve had some testimony that the specifications that were reached there was an approved prototype. PIM knew what Beech-Nut wanted? A: Yes. Q. And it’s PIM’s understanding that anything less than that was not meeting Beech-Nut’s specifications? A. I’ll accept that.”). In addition, PIM’s 30(b)(6) witness identified the precise written specifications PIM claims never existed, which were in fact created by PIM, and confirmed that they had never changed. Kowalski Decl. Ex. 3 at 24-25 (“Q: And this specification as it was drafted was this sufficient for you to move forward and create the product as Beech-Nut requested? A: We could create the product to these specifications at this time, yes.”). Beech-Nut disputes the remaining allegations in paragraph 61.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. An accurate reading of the testimony immediately before and after the section cited by Plaintiffs reveals that the witness conceded that Susan Allen was not conveying new requirements, but was referring to defective product returned to PIM in late September. Dwivedi Dep. 85:4-89:13 [Wallach Cert. Ex. 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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. Beech-Nut restates its response to PIM's statement 62 as if fully stated herein.

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 [Wallach Cert. Ex. N]; Hungsberg Dep. 59:1-25 [Wallach Cert. Ex. R]; Chang Dep. 18:10-19 [Wallach Cert. Ex. O]. Beech Nut produced no evidence of any communication to PIM in this regard.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "[d]uring 2008, there were communications between the parties concerning the development of the product to satisfy Beech-Nut's demands." Stipulated Fact 17. The parties further stipulated that "[a] product development timeline with the product launch set for August 2008 was discussed by PIM and Beech-Nut." Stipulated Fact 11; *see also* Kowalski Decl. Ex 9..

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 [Wallach Cert. Ex. N]; Wallach Cert. Ex. F.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. An accurate reading of Ms. Cool's testimony establishes that she is discussing an email dated May 8, 2008, three months before the sample product was approved and four months before the product launched, in which she testified that marketing wanted to know the status of the product development, as the launch date was approaching. She further testified that PIM needed to modify its Welch formula in May 2008, four months before the launch date because PIM's then current formula for its Welch product was not made from all natural materials.

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 [Wallach Cert. Ex. N]; Hungsberg Dep. 76:13-17 [Wallach Cert. Ex. R]. Mary Cool did not know what, if any, shelf life requirement may have existed for the product. Cool Dep. 36:11-13 [Wallach Cert. Ex. N].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "[p]rior 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." Further, PIM's 30(b)(6) witness has testified that twelve-month shelf-life was always a part of the agreed upon specifications. Kowalski Decl. Ex. 3 at 23-25 (identifying product specifications created in conjunction with Beech-Nut that included 12-month shelf-life). Plaintiffs also mischaracterize the testimony of Steve Hungsberg, who testified that the shelf-life would have been a part of the general guidelines that he prepared for PIM. Kowalski Decl. Ex. 4 at 75 -76. Beech-Nut disputes the remaining allegations in paragraph 66.

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 [Wallach Cert. Ex. O]; Dwivedi Dep. 63:21-25 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "[p]rior 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." Stipulated Fact 15. In addition, PIM's 30(b)(6) witness admitted in deposition testimony that 12-month shelf-life was always part of the agreed upon specifications. Kowalski Decl. Ex. 3 at 23-25 (identifying product specifications created in conjunction with Beech-Nut that included 12-month shelf-life). Beech-Nut disputes the remaining allegations in paragraph 67.

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

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Admitted.

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, Ex. A at p. 9; Kowalski Decl., Ex. 11 at BN 2387.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. PIM rejected the contract so it would not be bound to an extended contractual relationship with Beech-Nut. Kowalski Decl. Ex. 2 at 95-96; Exs. 12, 46.

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 [Wallach Cert. Ex. M]; Dwivedi Dep. 64:17-25 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. Beech-Nut restates its response to PIM's statement 62 as if fully stated herein.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "[p]rior to production, the parties also agreed that the product would meet the specifications for an all natural product that contained natural color 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.*" Stipulated Fact 15 (emphasis added). Further, the parties stipulated that it was well aware of the launch date. Stipulated Fact 11. Beech-Nut disputes the remaining allegations in paragraph 71.

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 [Wallach Cert. Ex. L]; Wallach Cert., Exs. H and I.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "PIM also stated to Beech-Nut that it had sufficient production capacity to meet Beech-Nut's expected needs." Stipulated Fact 10. Beech-Nut disputes the remaining allegations in paragraph 72.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: As the parties stipulated, "[t]he Plaintiffs experienced a shortage of one of the ingredients they had been using for samples, specifically pineapple juice concentrate" (Stipulated Fact 20) and "[t]he Plaintiffs

substituted white grape juice concentrate for the pineapple juice concentrate, and advised Beech-Nut of this fact.” Stipulated Fact 21. Further admitted insofar as Beech-Nut agreed to the substitution, but only on the express condition that the texture and bite of the product would be comparable to the approved samples and that any problems with starch coating would be corrected in production. [Wallach Cert. Ex. C]. Beech-Nut disputes the remaining allegations in paragraph 73.

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 [Wallach Cert. Ex. 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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT’S RESPONSE: Beech-Nut does not have knowledge of or information regarding the “special trip to Indonesia”, as Plaintiffs have not provided Beech-Nut with any business records regarding such trip, although requested in discovery. Beech-Nut is also unaware of any “lead time”, as this information has not been provided to Beech-Nut. Beech-Nut disputes the remaining allegations in paragraph 74.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT’S RESPONSE: Beech-Nut does not have knowledge of or information regarding an “other option” as none was provided to it by PIM. Beech-Nut further states, there is no evidence in the record remotely suggesting that an other option was provided to Beech-Nut other than hearsay testimony provided by PIM’s Chief Financial Officer. Beech-Nut disputes the remaining allegations in paragraph 75.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT’S RESPONSE: Beech-Nut does not have knowledge of or information regarding its alleged consultation with “its own scientists in Europe” as there is no evidence of such a discussion in the record other than the hearsay testimony provide by PIM’s Chief Operation Officer. Beech-Nut disputes the remaining allegations in paragraph 76.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT’S RESPONSE: Admitted.

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

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: PIM cites Ms. Bianchini for the proposition that PIM's manufacture of the Fruit Nibbles product met Beech-Nut's requirements. Yet, if you read Ms. Bianchini's testimony, she is only talking about the *sample* made in July 2008 that Beech-Nut approved, which did meet specifications. Ms. Bianchini never testified that the product *in production* met Beech-Nut's specifications. Indeed she testified to the exact opposite. Defendant's Memorandum in Support of its Motion for Summary Judgment ("Br.") at pp. 8, 20; Kowalski Decl. Ex. 77 at 133 (testifying that PIM could not consistently produce a product that met the specifications); Kowalski Decl. Ex. 1 at 166-68 (testifying she agreed with Beech-Nut's decision to withdraw product because "I wouldn't want to feed that to my child."); *see also* Kowalski Decl. Ex. 51. Beech-Nut disputes the remaining allegations in paragraph 78.

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

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Beech-Nut restates its response to PIM's statement 78 as if fully stated herein.

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 [Wallach Cert. Ex. L].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Beech-Nut does not have knowledge of or information concerning whether Ms. Bianchini had authority to stop production.

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 [Wallach Cert. Ex. L]; Wallach Cert. Ex. A; Kowalski Decl., Ex. 15.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. As per an August 1, 2008 email in which Mr. Dwivedi states that the product "may result in excessive starch accumulation on surface of the Fruit Nibbles Pieces." Opp. Br. at 18; Kowalski Decl. Ex. 15. PIM asserts that this is evidence that Beech-Nut had knowledge of the starch issue and accepted it. The email is actually discussing PIM's modification of the laboratory formula, to a somewhat different formula used in the manufacturing process in the plant. PIM stated that this modification that caused a difference in "bite", but was necessary so as to avoid the excessive

starch or crystallization on the outside of the Fruit Nibbles product, which would have resulted from using the previous lab formula in the plant. Kowalski Decl. Ex. 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 [Wallach Cert. Ex. M].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. An accurate reading of Ms. Bianchini's testimony states that in fact the use of capol did not solve the issue with the starchy coating. Kowalski Decl. at 74-75.

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 [Wallach Cert. Ex. L]; Dwivedi Dep. 64:23-25; 65:1-4 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. Beech-Nut restates its response to PIM's statement 82 as if fully stated herein; and further three PIM witnesses testified that the sample product PIM retained from its shipment of product to Beech-Nut turned bad within weeks of production. Kowalski Decl. Ex. 1 at 91-93, Ex. 2 at 77-78, Ex. 3 at 49-51. Further, PIM's own internal correspondence confirms that the product should not have been sold in the market. Kowalski Decl. Ex. 43, 48-50, 51.

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 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Disputed. Beech-Nut restates its response to PIM's statement 75 as if fully stated herein.

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. Ex. 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 [Wallach Cert. Ex. N].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Admitted, except to state that PIM appears to attempt to downgrade the defects with the Fruit Nibbles product referring only to "surface crystals". To suggest that the Fruit Nibbles were simply coated with a dusting of starch, i.e., "surface crystals," and that PIM could not guarantee that other product would not be covered

with surface crystals is minimizing the defect in the product, as the defect was more severe. Kowalski Decl. Exs. 21-24, 30-31, 34-35, 51, 64-72.

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 [Wallach Cert. Ex. L]; Dwivedi Dep. 79:3-16 [Wallach Cert. Ex. P].

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: There is no evidentiary support for this statement other than the self serving hypothesis of a PIM employee of what could have gone wrong. Such testimony does not defeat a motion for summary judgment. Further, such testimony is plain inadmissible hearsay


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 [Wallach Cert. Ex. N]. No Beech Nut employee has been able to answer this question so as to quantify the extent of the problem.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Admitted, except to state that Mr. Tim Kennedy testified that all of the product was noncompliant.

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 [Wallach Cert. Ex. L]; Wallach Cert. Ex. K.

DEFENDANT/COUNTERCLAIMANT'S RESPONSE: Beech-Nut lacks sufficient knowledge to confirm or deny whether PIM retained product that did not show signs of crystallization. Beech-Nut is aware of the product that PIM sold and delivered to Beech-Nut, which was unmerchantable and unfit to sell for the consumption by toddlers.

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

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

***Attorneys for Beech-Nut Nutrition
Corporation***