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I N D E X

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COLLOQUY BETWEEN COURT AND COUNSEL

Jury not Present

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1 September 12, 2012

2 (Trial resumes - Jury not present.)

3 THE COURT: Good morning, everyone.

4 Are you all set?

5 Okay. Then we'll bring out the jury. Thanks.

6 (Please rise for the Jury.

7 (Jury present.)

8 THE COURT: Welcome back and good morning. Everyone
9 is here on time so we'll get started.

10 As I indicated, we're at that point in the trial where
11 the attorneys have a chance to give what they call their
12 summations or closings remarks. Okay? Again, what they say is
13 not evidence. However, it's important because it's their
14 account as to what they believe the evidence demonstrates or
15 has proven or not proven.

16 So we begin with Mr. Wallach, please.

17 MR. WALLACH: Thank you, your Honor.

18 And also let me thank all of you for serving on the
19 jury. Monday seems a long time ago, Monday doesn't seem that
20 long ago. But we did tell you we would make every effort to
21 expedite the matter, which we have. And we also ask,
22 particularly I ask that you focus on some key considerations as
23 you hear the evidence and think about what it all means.

24 After I speak and counsel speak you will retire to the
25 jury room. And as the Judge instructed you, it's not what any

1 of the lawyers say that matters, it's what you determine that
2 matters. And I'd ask you to focus, again, as I did in my
3 opening, on the following items: You've heard from a few
4 witnesses, you've heard reference to exhibits that you'll be
5 able to look at in the jury room. And my client's position
6 remains the same: Yes, there were some problems with some
7 amount of the Fruit Nibbles out of the 230,000 cases. We've
8 always acknowledged that. I feel it important to say it again
9 right now.

10 But Beech-Nut has not proven its right to terminate
11 the contract here. Beech-Nut has not proven its right to more
12 than \$2 million in damages.

13 And what I'm going to do -- and fortunately, my
14 closing is not going to be anywhere near as long as the
15 trial -- but what I want to do in the next few minutes is talk
16 about that conclusion and also talk a little bit about the
17 damage numbers that Beech-Nut presented to you, because I have
18 to do that. As much as I would want you to retire to the jury
19 room and say: Beech-Nut has failed to meet by a preponderance
20 of the evidence its obligations, I have to talk about the chart
21 that was shown to you and the fatal flaws that appear in that
22 document.

23 Judge Martini is going to instruct you on the law.
24 What I will say is this, and as you've heard during the course
25 of the trial: There are really two key phrases to focus upon

1 and that we ask you ask yourselves and discuss among yourself
2 the following: Did Beech-Nut show a substantial impairment of
3 the entire contract? Not, did Beech-Nut show that some of the
4 bags out of 230,000 cases had a problem. It's the totality of
5 the circumstance. Did Beech-Nut meet its burden?

6 We submit it did not.

7 You will also hear as part of the Court's instructions
8 there's more to the inquiry, and the remainder, the other word,
9 the term of art that lawyers use here is whether or not there
10 was the ability of Promotion In Motion to "cure" the problem.
11 Meaning, once an issue was brought to Promotion In Motion's
12 attention, did Promotion In Motion sit back? Did it do
13 nothing? Or did it try to resolve the problem? And not only
14 try to resolve the problem; did it demonstrate that the product
15 would be good and would continue to be good so the contract
16 could continue to go forward?

17 We maintain the answer to that is "yes." To the
18 extent there was a problem with some of the product, Promotion
19 In Motion fixed the problem and was prepared to supply the
20 remaining Fruit Nibbles on a going forward basis, and there
21 would be no need for this dispute, no need for this lawsuit.

22 To reach the conclusions that I ask you to obtain,
23 please focus on some items you did not hear, not just what you
24 heard from Tim Kennedy or from Dr. Dwivedi or from Diane
25 Bianchini. Let me take a moment and talk about what you did

1 not hear.

2 You did not hear from Beech-Nut, from their Dr. Chang,
3 their scientist. Not a marketing guy, all due respect to
4 marketing people, not a chief financial officer, all due
5 respect to chief financial officers. He did not hear from Dr.
6 Chang, an employee of Beech-Nut, a scientist; a scientist who
7 we know in November of 2008 wrote an e-mail indicating that
8 some of the Fruit Nibbles that were at Safeway were still good
9 and did not need to be pulled off the shelf.

10 In October of 2008, Dr. Chang was one of the people
11 involved in the head of purchasing, Bob Turner's decision to
12 pretty much beg Promotion In Motion to send four truckloads --
13 not four FedEx trucks, not four U-Hauls -- four semi-trailers
14 of 10,000 cases of Fruit Nibbles because Beech-Nut thought the
15 product overall was good.

16 In the middle of October, in the middle of November,
17 if this baby food company really thought the product was not
18 safe, if it really thought the product was harmful it would not
19 have been on the shelf. If Beech-Nut truly had a basis for
20 believing at that point in time there was a material problem
21 affecting the totality of the contract, why would they say to
22 Promotion In Motion: Send us 10,000 cases and we're releasing
23 you from any potential liability or any risk?

24 That's what Beech-Nut did. And Dr. Chang was not here
25 to explain his company's actions.

1 What else did you not hear?

2 You did not hear a single retailer: A Walmart, a
3 Bons. I always get "Koger" and "Kroger" confused. I
4 apologize. The "K" company. You didn't hear any of the
5 retailers that Beech-Nut sold the Fruit Nibbles to come and
6 testify saying: We told Beech-Nut you have to take the product
7 off the shelf, not only because we're concerned about you,
8 Beach-Nut, but us, Walmart. We don't want our consumers coming
9 in and buying a bad product and affecting our reputation.

10 Not a single retailer was in that witness box. Not a
11 single letter, not a single e-mail, nothing from a retailer.
12 Mr. Kennedy didn't talk about a single retailer contacting him
13 or anyone else at Beech-Nut, because there's no proof of it.
14 There's no evidence of it.

15 There's no government corrective. The FDA, no other
16 federal or state agency said: You have to take the product off
17 the shelf.

18 You didn't read about this in the newspaper. It
19 didn't make the newspapers because it was not a large or a wide
20 scale problem.

21 Look, it may be easy for Beech-Nut to say, sure, you
22 didn't read about it because we took action and we prevented
23 that from having to be on the news, on the radio, in the
24 papers. But timing doesn't add up.

25 You heard how the first shipments of Fruit Nibbles

1 were delivered to Beech-Nut middle of August. You never heard
2 from Beech-Nut exactly when they first made their way to the
3 shelves of any of the retailers. But let's presume that's not
4 even until October. All of October, all of November, part of
5 December the product is sitting on the shelves. Beech-Nut
6 heard of some complaints. Beech-Nut never thought the
7 magnitude of the complaints were such that it had to institute
8 a withdrawal in October or November. And I'll talk about their
9 actions in December, or we'll try to understand their actions
10 in a moment. But the existence of some problems with some of
11 the products was not a basis for terminating the entire
12 contract.

13 If receiving complaints is the standard that a company
14 like Beech-Nut, or Gerbers, or anyone else goes by, then
15 there's going to be lawsuits filling this courtroom and
16 courtrooms across the country every day. This is not the only
17 product that Beech-Nut had to take off the shelves, this is not
18 the only product where there was an issue. You heard the
19 testimony from Mr. Kennedy which confirmed, which you probably
20 knew ahead of time already -- long ago Beech-Nut set up a 1-800
21 number, it had a website. And you probably have all seen this
22 on food packages, in fact, on most products that you buy, where
23 people can contact the company if they have questions or if
24 they have complaints, and there were complaints about other
25 products. Not only were there complaints about other products,

1 but Beech-Nut, as Mr. Kennedy acknowledged, provided to us in
2 the discovery phase of this lawsuit two large binders of
3 documents showing other product that was taken off the shelves
4 of supermarkets and retailers. It's not just Fruit Nibbles.

5 It is, whether it's unfortunate or not, it is a fact
6 of life that when we go to the supermarket and buy a bunch of
7 grapes, some of those grapes may not be good, some may be
8 shriveled, some may be tart. When you go either to buy apples
9 in the supermarket, or even this time of year, or soon, in a
10 week or so when we all go apple-picking, not every apple has
11 the taste you think it's going to have. That's an aspect of a
12 natural food product. That happens, and that's why there's no
13 one hundred percent guarantee. There's no one hundred percent
14 guarantee from nature, there's no one hundred percent guarantee
15 from Beech-Nut when you buy their product, there was no 100
16 percent guarantee from my client when it shipped the product to
17 Beech-Nut. They haven't shown you such a guarantee. It
18 doesn't exist. It's not the legal standard.

19 So if 100 percent isn't the standard -- and it
20 certainly isn't -- well, let me come back to the question,
21 really the primary question I asked you to focus on during this
22 trial. You heard reference to customer complaints coming in
23 through a telephone log, and I think there was also a website
24 where some of the customer complaints were either cut and
25 pasted in or moved in, I don't know the technology behind it.

1 But that was done on Beech-Nut's website.

2 When you look at the exhibit you'll see there's
3 approximately maybe 350 of those complaints that were made.

4 Yes, we've always acknowledged that. And you may be
5 getting tired of me saying that, but it's important, Promotion
6 In Motion has acknowledged those issues.

7 But now let's do some math. 350 complaints. 230,000
8 cases. Multiple bags in the cases. I don't know if we're
9 talking 1 percent here, 2 percent, and I'm not going to guess.
10 And the problem is, I can't tell you the percentage of the
11 nonconforming product because they never found out.

12 I asked Mr. Kennedy the question, their numbers guy, a
13 very intelligent and senior person at Beech-Nut: How much of
14 the product wasn't good?

15 "I can't tell you," was his answer.

16 Why couldn't he tell us?

17 He doesn't have to tell me, he needed to tell all of
18 you, and he could not tell you because Beech-Nut made the
19 affirmative decision not to inspect any of the cases in its
20 warehouse. Zero. Beech-Nut made the affirmative decision not
21 to have any of the cases taken off the grocers' and the
22 retailers' shelves inspected. Zero.

23 I stayed on that line of questioning with Mr. Kennedy
24 trying to understand why Beech-Nut would not do that. I asked
25 Mr. Kennedy: Was it a cost factor? Was it a concern about the

1 expense of doing it?

2 You may remember his answer was: We never determined
3 what that expense would be.

4 So let me tell you what this trial is not about. This
5 trial is not about Beech-Nut telling you that it would have
6 cost them -- and I'm making up this number -- a dollar, or
7 three dollars per cases to open up a case and look at bags. I
8 can't tell you. You don't know. They didn't even go through
9 the analysis to see what it would cost. They just decided to
10 keep the boxes sealed and for some reason cancel this contract.
11 Canceled this contract, without knowing the magnitude.

12 And that's what you're going to focus on, whether or
13 not there was a substantial impairment of the entire contract.

14 The numbers aren't there for you to do it.

15 Mr. Kennedy I think also said that if, if they had
16 opened up the product to look at it, then they have open bags.

17 But you heard Dr. Dwivedi testify without any
18 challenge, without any rebuttal that Promotion In Motion could
19 have resealed those bags, reused product and that product could
20 have been sold.

21 So please do not think that if Beech-Nut had even
22 looked into the cost of opening up packages to inspect them, if
23 Beech-Nut had even inspected the packages, that doing so would
24 have resulted in wasted product. That's not the case and the
25 testimony shows otherwise.

1 And the testimony also showed otherwise, that there
2 was no confusion in understanding when different bags in the
3 cases were manufactured. If Beech-Nut had that question, pick
4 up the phone or send an e-mail to my client and ask. They
5 didn't do it.

6 There is no excuse, there is no justification and
7 there was nothing presented to you explaining why Beech-Nut did
8 not do what all of us would have done: Tried to find out:
9 What is the magnitude of the problem before cancelling a
10 multi-million dollar contract and then asking my client to pay
11 multi million dollars.

12 So that's what you don't know, and you don't know
13 because Beach-Nut did not come forward with the evidence it
14 should have come forward with.

15 The evidence you did hear is that the product was good
16 when it left Promotion In Motion. Beech-Nut called my client's
17 former head of quality assurance, Diane Bianchini. Diane
18 Bianchini told you, based upon her 20 plus years of experience
19 in quality assurance and research and development -- and just
20 an aside, I don't think she's a shrinking violate. Diane
21 Bianchini said if the product wasn't up to standard, it did not
22 go out. And I asked her: Does that mean that every batch of
23 Fruit Nibbles that came off the manufacturing process was put
24 in bags, put in cases and shipped to Beech-Nut?

25 And the answer was no. She told you that she would

1 not approve every product. She told you that's not unique to
2 Fruit Nibbles. That's why you have quality assurance people.

3 So when the product did not meet internal standards
4 for shipping, it was put to the side and it wasn't used.

5 Please don't think this is a situation where the 500
6 employees of my client in Somerset County are just standing on
7 an assembly line, sort of like in Willie Wonka land, and
8 they're just running the product through, and it goes through
9 the drums and all the other aspects you heard about, it gets
10 into the bags and off it goes into trucks. That's not the
11 case.

12 We made sure the product was good before it left.
13 Diane Bianchini testified to that. Dr. Dwivedi testified to
14 that. Mr. Kennedy acknowledged that when the product arrived
15 at Beech-Nut it was good.

16 What happened to the product in Beech-Nut's control?
17 We do not know. But we do know it was good when it left my
18 client.

19 When you look at all of this, when you think about it
20 as everyday people and use your common sense, as I know you
21 will, I truly ask that you say to yourself: Okay. Is this
22 something that rises to the level cancelling an entire
23 contract? And I submit the answer is no.

24 Now, the other aspect of liability that I need to
25 touch upon is reference to the phrase "cure" which Judge

1 Martini will instruct you on when he reads the jury
2 instructions to you. As I'm sure you already know, "cure"
3 means to fix.

4 So what happened here?

5 You heard testimony that Beech-Nut, after receiving
6 complaints from consumers on the Fruit Nibbles, contacted
7 Promotion In Motion. You heard Dr. Dwivedi indicate that, yes,
8 he was concerned for Beech-Nut's reputation and for my client's
9 reputation. What you didn't hear is: Not our problem.
10 Everything is fine with us. Must be something you did. You go
11 fix it. We delivered our end of the bargain. No.

12 What you heard was Dr. Dwivedi say that he looked into
13 the issue. He tried to see what the problem may be and what
14 changes might need to be made. And there was a change of
15 ingredient. Pineapple juice was reintroduced as the primary
16 juice in this all natural fruit product.

17 And what was the result of that?

18 Well, I can answer that question in a few ways. You
19 heard Dr. Dwivedi indicate that once pineapple juice became
20 available and was used at the end of October and in the
21 November production runs, there was no issue going forward with
22 the product. And the issue is this term "crystallization" that
23 we talked about, this sugary coating appearing on the product,
24 the sugar migrating out of the fruit center of the product.

25 You heard Dr. Dwivedi, a scientist, indicate with the

1 pineapple juice, that issue did not exist.

2 You will see in one of the exhibits that you'll have
3 in the jury room, Beech-Nut's own document, there's two pages
4 of charts, and I ask you to look at the entire chart because
5 it's interesting. In September-October you will see on this
6 chart Beech-Nut indicating that product, not all of it, some
7 amount of the product delivered by Promotion In Motion to
8 Beech-Nut was bad or very bad. Okay?

9 Please remember, I'm the one who introduced this
10 document. I'm the one bringing it forward to you because we're
11 not disputing the fact that some product was bad. Some product
12 was very bad. But that's not the end of it. I don't sit down.
13 That's not the end of your task, it's not the end of this
14 trial. What matters is what's on the rest of the document.
15 Beech-Nut's document. Beech-Nut's own document indicates that
16 the product the end of October, the November product was good,
17 very good.

18 This is a document -- and I apologize for not
19 recalling it exactly -- but I believe it's November 27th.
20 There is nothing, nothing that Beech-Nut showed you after
21 November 27th that counters Beech-Nut's own words about the
22 product was good and very good.

23 Mr. Kennedy didn't testify to that because he doesn't
24 know. Dr. Chang they didn't call as a witness, so you didn't
25 hear it from him. You didn't hear it from anyone at Beech-Nut,

1 that the product at the end of -- in fact, let's just call it
2 November -- the product at the beginning of November forward,
3 you heard no issues with it because there were no issues with
4 it. And that's the point. That's what "cure" is. A problem,
5 we don't know the magnitude, but a problem brought to our
6 attention. Adjustments are made, reformulation, revised
7 product. No issue. That's what "cure" is.

8 I'll say this as well: Could Beech-Nut have told you
9 whether or not there was an issue with the November product?

10 Of course they could. But you know what I'm going to
11 say: They never opened up the cases from November. They
12 didn't do it.

13 Now, that's going to be interesting in about one
14 minute when I talk about their damage claim and that fact they
15 want my client to pay about \$130,000 for their storing the
16 product. I don't know why, they didn't do anything with it.
17 They didn't show it to you. But on the issue of cure, the
18 evidence, Beech-Nut's evidence shows the product was good and
19 was staying good and we could have gone forward with the
20 contract.

21 Beech-Nut has failed, failed to establish liability
22 here and it's failed to establish its right to terminate the
23 entire contract, as opposed to seeking compensation for the
24 isolated and specific bags where there may have been an issue.

25 There's a big difference between seeking a few hundred

1 dollars and several million dollars.

2 As I said at the beginning, I'm obligated to talk
3 about Beech-Nut's damage claim, but please do not think that in
4 doing so we're in any way conceding liability. But there's
5 certain aspects of Mr. Kennedy's testimony that I truly ask you
6 to focus on, and perhaps you can answer the questions that I'm
7 going to raise, because I can't.

8 When this trial began, Beech-Nut knew about the four
9 truckloads, the \$132,000 worth of product it asked my client
10 for in October in which it told my client, I'll hold you
11 harmless for it. But it was in the trial that they had to
12 acknowledge that their damage claim was seeking that money, so
13 to their credit they took out the \$132,000.

14 All right. They forgot to take out the \$46,000 in
15 lost profits on those four truckloads. We had to bring that to
16 their attention as well. So when you look at -- I'm sure
17 you're going to see that large exhibit with the handwriting on
18 it -- please keep in mind the numbers that have to come out and
19 the numbers we had to bring out as incorrect so that Beech-Nut,
20 under no circumstance, received more than it was entitled to.

21 Let me talk about some specifics. You heard about
22 shelf slot. \$22,000 is being sought by Beech-Nut for shelf
23 slotting just for the Fruit Nibbles. That's a pro rata figure.
24 It was either one 19ths or two 19ths of the total that was paid
25 to these retailers.

1 We don't know if Fruit Nibbles took up one 19th or two
2 19ths for the shelf space, so that may be easy math for
3 Beech-Nut to perform. But what they should have told you is
4 how much shelf space was actually used, because round numbers
5 are not always accurate numbers. Give them the benefit of the
6 doubt that all of their products were of equal size on the
7 shelf -- I don't know if it's the case -- give them the benefit
8 of the doubt. Don't give them the benefit of the doubt for not
9 recognizing 10,000 cases were placed on shelves. These are the
10 10,000 cases I keep referring to.

11 Has my client receives a credit for those 10,000 cases
12 being on the shelf?

13 No.

14 Has my client received a credit for the product that
15 was on the shelves October and November and part of December?

16 No. They have not.

17 Beech-Nut was using shelf space at least in those ten
18 weeks and isn't giving us any credit for it.

19 There's an expression about wanting your cake and
20 eating it too. If I could apply that to fruit it would really
21 work well here. That's what they're doing. They're looking
22 for every cost and expense and asking you to stick it to my
23 client when it's not my client's responsibility.

24 Let me bring up a larger point here on shelf space.
25 And again, I know we're in a federal courthouse, but just drop

1 back for a moment into your everyday existence. How many times
2 do you remember being in a supermarket, walking by and just
3 seeing this large open area of shelf space? I mean, do you
4 remember walking by and seeing, here are the Cheerios, here are
5 the Rice Krispies, here's a big wide area, here's the Raisin
6 Bran?

7 I don't remember seeing that. I don't know why and
8 you don't know why Beech-Nut can tell you that's what happened
9 here, because I asked Mr. Kennedy: Who at Beech-Nut spoke to
10 any of these retailers and said, can we put some of our other
11 products in this shelf space?

12 He doesn't know if that happened.

13 It should have happened if it was required. They did
14 not prove what they should have, that an effort was made and it
15 was rejected.

16 There is no basis for awarding \$22,000. And there's
17 no basis for awarding it if they're also asking for lost
18 profits.

19 Now, this also applies to the marketing costs I'm
20 going to talk about. But how can Beech-Nut say, we're entitled
21 to hundreds of thousands of dollars in lost profits but not
22 include the cost for those products?

23 There is zero that should be awarded for the shelving.
24 There is zero that should be awarded on the \$16,000 claim for
25 marketing.

1 You heard me talk about my client not receiving credit
2 for the 10,000 cases that benefited from the market. But you
3 know what, that wouldn't be accurate for me to say that, would
4 it? Because Mr. Kennedy told you the marketing didn't start
5 until the following spring. There was no marketing incurred
6 with respect to Fruit Nibbles in August, September, October,
7 November or December. In fact, I think he said June is when
8 the marketing took place, because Beech-Nut doesn't want to
9 start handing out coupons and having consumer interest until
10 the product is out there and known.

11 There is no reason to award a penny for marketing.
12 There is no reason to award a penny for marketing for another
13 reason: 19 products were launched. Did Beech-Nut tell you
14 what the cost for the marketing would have been if Fruit
15 Nibbles was not part of it? In other words, of this \$16,000,
16 let's presume -- and that's 16,000 times 19. And I assure you,
17 I cannot do that math. But if Fruit Nibbles was not part of
18 the launch, would the total marketing cost had been different
19 for Beech-Nut? They didn't tell you how it would have been
20 different. All you've done is tried to allocate one large
21 number over multiple product lines without telling you why that
22 was necessary.

23 Zero is what they should be given for their marketing
24 cost.

25 And zero is what they should be given for their

1 warehousing charge of \$133,000.

2 For four years Beech-Nut kept product in storage.
3 That was their decision.

4 But let's look at their decision. How much of that
5 product did you see in this trial? Did you see a single bag, a
6 single case? Did you see photographs of what was in the
7 warehouse?

8 No, you didn't.

9 Did Mr. Kennedy talk about any specific aspect of
10 those cases that Beech-Nut decided to store for four years?

11 No. The only thing he said is, we didn't look at it.

12 So they want my client to pay for something they never
13 looked at and never presented to you and did not use in this
14 trial. I don't know why they held onto it.

15 So I asked Mr. Kennedy, and he said, it was based upon
16 his reaching out to counsel.

17 Beech-Nut's counsel may have said, hold on to the
18 product. I don't know how much they said needed to be held
19 onto, I don't know how old it needed to be held onto, but it
20 really doesn't matter. All due respect to counsel, it's the
21 court that determines for purposes of the trial and this
22 lawsuit how much needs to be held onto and for how long. And
23 Beech-Nut never made that inquiry to the court. Beech-Nut on
24 its own decided to hold onto product for four years, but that's
25 not my client's responsibility. My client should not have to

1 pay \$133,000 for Beech-Nut's failure to obtain a ruling from
2 the court on what was needed and what should have been done
3 and for cases that played no role in this trial.

4 I'm just about done.

5 You heard about underweight packaging, and that's
6 roughly \$30,000.

7 No dispute. Let me say that again. We had no dispute
8 at the beginning of the trial. We're not challenging that
9 number now. There certainly was an issue at the outset with
10 mispackaging, underweights in some of the packages. Okay. To
11 Beech-Nut's benefit, some of the packages, some of the cases
12 were overpacked, but we're acknowledging the underweight issue.
13 You heard the testimony of how my client spent \$30,000 on new
14 machinery to correct the problem. The problem was corrected.
15 It's conceded. It's conceded.

16 But what we don't concede is \$591,000 to remove
17 product and give credit to retailers. The only evidence you
18 have supporting that number is a spreadsheet. No backup. Mr.
19 Kennedy didn't give you detailed information on how those
20 numbers were assembled. I don't think he could have. Because
21 when you are in the jury room and you're looking at the
22 exhibits, it's Exhibit Number 10, please look at Exhibit Number
23 10 and you will see that Beech-Nut is asking for \$13,000 in
24 this regard for product, credit and withdrawals in 2010. You
25 heard me correctly. Beech-Nut is looking for money for 2010

1 for a recall that took place at the end of 2008.

2 And we all know that refunds and the credits may not
3 have been processed immediately, but they would have been
4 processed in 2009. There is no explanation given, there was no
5 explanation given as to how Beech-Nut can seek \$13,000 for 2010
6 expenses.

7 On a bigger picture, please ask yourself this as well:
8 They're asking for \$591,000 in these expenses for product that
9 they paid approximately \$615,000 for?

10 The numbers don't add up. They don't add up if they
11 were earning \$4.00 a case on the product, which Mr. Kennedy
12 told you was the situation here. You were given numbers, you
13 were not given analysis, you were not given explanations, and
14 as jurors you have the right to reject numbers that do not add
15 up and do not make sense. And the \$591,000 does not make sense
16 here. The numbers do not compute and it should be rejected.

17 Under all the circumstances, the totality of the
18 evidence, Beech-Nut was not justified in terminating the
19 contract.

20 Was Beech-Nut entitled to withdraw some of the product
21 from the market?

22 Yes.

23 Could it have done that on a temporary basis?

24 Yes.

25 And sought compensation from my client for those

1 specific costs?

2 Yes.

3 But is Beech-Nut entitled to reject and repudiate a
4 multi-million dollar contract?

5 The answer is no, because they have failed to show you
6 substantial impairment of the entire contract. They have
7 failed to show you that my client's cure of the problem and the
8 fact on a going forward basis the Fruit Nibbles had no issue
9 and would have been sold and continued to be sold and they
10 would have made their profit. They didn't refute that.

11 But Beech-Nut didn't give time for that to pan out. I
12 wish I knew the answer as to why they terminated the contract.
13 But you didn't hear that from Mr. Kennedy. No one else from
14 Beech-Nut testified. But you didn't hear the answer as to why
15 they thought at the beginning of December the contract had to
16 be terminated, not suspended, terminated when their own people
17 were telling them, the new product is good and it's very good.

18 And there's consequences to Beech-Nut acting the way
19 it did, and the consequence should be that you find they are
20 entitled to no damages from my client.

21 Thank you.

22 THE COURT: Thank you, Mr. Wallach.

23 Who is going to be presenting the -- okay, Ms.
24 Kowalski, please.

25 MS. KOWALSKI: Good morning.

1 Mr. Dillon and I would like to thank you for your
2 service as jurors over the last two days. We appreciate your
3 time and attention to the issues that have been presented to
4 you.

5 In his opening, Mr. Wallach said this was just another
6 contract case. Well, I submit that it -- well, whether it's
7 just another contract case or not is not for me to say. But
8 the fact is, it should not diminish the importance of your role
9 as jurors during the deliberation over the issues as they've
10 been presented.

11 Where do we begin?

12 In the past two days you've listened to the attorneys
13 read the stipulations and mark into evidence a number of
14 exhibits. You've heard the testimony on those exhibits but you
15 haven't yet seen those. Well, you'll have both the
16 stipulations and the exhibits in the jury room during your
17 deliberations. So I think it's best at this moment to recap
18 and let's go through those exhibits that you heard about but
19 have not yet seen.

20 I'll go through them in the order that they were
21 admitted into evidence, and I will admit that they didn't go in
22 in numerical order, so we'll start with Beech-Nut Exhibit 6.

23 This exhibit was identified by Mr. Kennedy as two
24 different types of consumer complaint logs that were attached
25 to an internal Beech-Nut e-mail dated December 4th, 2008. And

1 you'll remember that Mr. Kennedy was the CFO and senior vice
2 president for Beech-Nut.

3 The first log in Exhibit 6 is the telephone complaint
4 log that contained the consumer complaints but stated, November
5 21st at 9:47 a.m. And you'll have a chance to review it.
6 You'll be able to read the complaints that were taken down
7 verbatim from customers calling in and complaining.

8 You will see that customers were calling in in October
9 and November of 2008 from all over the United States from
10 various different retailers regarding the quality of the Fruit
11 Nibbles products.

12 The second log that's part of Exhibit 6 contains
13 complaints submitted through Beech-Nut's website. Now, these
14 were undoctored complaints that were typed by the consumers
15 themselves. And you'll get to read these complaints. And as
16 you read them, you'll read the firsthand accounts of the
17 descriptions of the bad Fruit Nibbles product that you heard
18 that were summarized in the stipulations of fact.

19 Beech-Nut Exhibit 7, it's the e-mail from Bob Turner,
20 the Beech-Nut employee who accepted liability on the \$10,000 of
21 Fruit Nibbles. That e-mail says: "This is a go for Monday
22 with the formula we reviewed and texture approved on Friday."

23 Beech-Nut does not deny this. This is about -- this
24 was \$178,000 that Mr. Kennedy deducted from the damages claims.
25 It was \$132,000 for the cost of the product and \$46,000 in

1 profit.

2 The next set of exhibits that was gone through with
3 Mr. Kennedy on his direct were the exhibits that established
4 Beech-Nut's damages. Beech-Nut Exhibit 8 is the schedule of
5 the blocked inventory, the retained inventory that Mr. Kennedy
6 explained shows the value of the product that Beech-Nut
7 received from PIM but it never went out to his customers. It
8 is that product that still remains in storage. The value of
9 this product was approximately \$966,000. And in fairness, Mr.
10 Kennedy made an adjustment to that number by adjusting it by
11 \$350,000 down to the amount that the product -- because of the
12 amount that Beech-Nut had not paid for.

13 Beech-Nut Exhibit 9 shows the marketing costs that's
14 spent on the overall "Let's Grow" line, and that allocation to
15 the Fruit Nibbles product was done on a pro rata basis, and
16 that amount is approximately \$16,000.

17 Beech-Nut 10 is the summary of the costs of the
18 product for withdrawal that contained the consumer refunds and
19 reclamation costs, and this amount was approximately \$591,000.

20 Beech-Nut Exhibit 11 identifies the expenses paid for
21 slotting on shelves, or the shelving costs. Remember that
22 Beech-Nut had to either use this space for Fruit Nibbles or
23 it -- it was lost, without reimbursement, and that was by
24 standard practice in the industry. As Mr. Kennedy said, that's
25 how the retailers make their money.

1 Beech-Nut Exhibit 12 identifies the reworking expense.
2 Mr. Kennedy testified that some of the product needed to be
3 reworked because PIM had sold it to Beech-Nut underweight. And
4 you heard Steve Hungberg's testimony as well as Ms. Bianchini's
5 live testimony confirming the underweight problem.

6 Beech-Nut Exhibit 13 is the poster board that you saw
7 that my colleague, Mr. Dillon, acting as Mr. Kennedy's scribe,
8 filled in, summarizing the items included in Beech-Nut's
9 damages, plus the adjustments.

10 You'll have this chart to look at in the jury room
11 during your deliberations so you can see the amount of damages
12 incurred and the deductions that were taken.

13 Next, during Ms. Bianchini's testimony you heard about
14 Beech-Nut Exhibit 2. Beech-Nut Exhibit 2 is the e-mail from
15 Susan Allen to Diane Bianchini identifying by way of feedback
16 various problems that Beech-Nut was seeing in the product. And
17 Mrs. Bianchini testified that when she pulled the sample
18 product that she had retained of the same lot number, that it
19 was -- they were noticing the same issues with their own. And
20 remember that Mrs. Bianchini was the quality control manager
21 for PIM.

22 Next, you heard Mrs. Bianchini testify about Beech-Nut
23 Exhibit 4. That's the exchange of e-mails between Mr. Dwivedi
24 and herself on Saturday, October 4th. And you heard Mrs.
25 Bianchini read those two e-mails into the record. We'll talk

1 about that exchange in a few minutes.

2 Next is Beech-Nut Exhibit 5. Again, this is an e-mail
3 from Mrs. Bianchini to Mr. Dwivedi and others at PIM dated
4 November 13th, 2008 in which Mrs. Bianchini states they were
5 seeing quality problems with the samples packaged as late as
6 the end of October.

7 PIM introduced two documents: PIM Exhibit 2 is a
8 two-page internal Beech-Nut document reporting the current
9 deterioration status of Fruit Nibbles over time. I'm going to
10 come back to Exhibit 2 in a minute.

11 PIM Exhibit 3 is an e-mail dated November 21st, 2008.
12 It's an internal Beech-Nut e-mail which states that Fruit
13 Nibbles product produced in October of 2008 shows signs of
14 mummification and was put on hold for three weeks to watch
15 while the November product still looked very good.

16 These are the exhibits that have been entered into
17 evidence. Besides these exhibits, you have the stipulations.
18 And the last piece of evidence that was submitted to you was
19 the testimony that you heard over the last two days. You heard
20 the deposition testimony read into the record of Mr. Steve
21 hundred Hungsberg, you heard the live testimony of Tim Kennedy,
22 Mrs. Bianchini and Mr. Bassant Dwivedi. That's the evidence.

23 Now, boiled down, what's Beech-Nut's case?

24 Well, it starts with the hundreds of consumer
25 complaints, including complaints of illness from all over the

1 country from different retailers.

2 You read and heard stipulations. Stipulation Number
3 33. And you have the two logs, exhibit -- Beech-Nut Exhibit 6
4 of the complaints, and I ask that you consider those.

5 You heard Steve Hungsberg's deposition testimony.
6 Quality problems could not be limited to one shipment or even
7 one production.

8 Beech-Nut wished had that been true so it could take
9 the bad product from the good, sell the good to the retailers
10 and let the retailers know that everything could be okay. But
11 it was impossible to do. Good product was mixed with bad
12 product. And I ask you to look at the consumer logs. You'll
13 see that they are consistent with Mr. Hungsberg's testimony.
14 Good and bad mixed together, or good product bought one day,
15 bad product the next.

16 You heard Tim Kennedy's testimony why the decision to
17 withdraw was made and that the product was effectively
18 worthless to Beech-Nut. Mr. Kennedy also took you through the
19 damages, including adjustments or deductions that he made in
20 fairness to avoid double-dipping or overstating the claim.

21 And you heard Mrs. Bianchini who came here to testify
22 in response to Beech-Nut's subpoena. Mrs. Bianchini, who was
23 PIM's quality control manager in 2008, told you that PIM never
24 got the Fruit Nibbles product right, PIM never provided a
25 reliable, stable, consistent product. Mrs. Bianchini's

1 testimony is consistent with Mr. Hungsberg's deposition
2 testimony that bad product could not be identified as coming
3 from a single production lot. She was an insider, she saw what
4 was happening at PIM during the production.

5 She testified -- and she agreed that the Beech-Nut
6 decision to withdraw the product that Beech-Nut as the buyer
7 was not getting the product it had ordered. And I read to you
8 her deposition testimony that she wouldn't feed the product to
9 her own children.

10 The consumer complaints derailed Beech-Nut's ability
11 to launch a successful nationwide launch of the Fruit Nibbles
12 product. Hundreds of complaints simply spoiled all of PIM's
13 shipments because they branded the product as unhealthy,
14 unsafe, and unappetizing; precisely what parents are not going
15 to feed their children.

16 In any event, Beech-Nut's case, together with the
17 exhibits and stipulations that you will have in the jury room
18 with you when you deliberate -- remember, when you deliberate,
19 what the lawyers told you is not evidence. The evidence is the
20 testimony, the exhibits and the stipulations.

21 When you consider those three items, I think you'll
22 find that Beech-Nut did the responsible thing, the right thing
23 in withdrawing the product from the market, and that the
24 product was effectively worthless to Beech-Nut, the buyer.

25 In other words, the product shipped by PIM breached

1 all three warranties stated in the stipulations of fact.

2 That's paragraph -- that's Stipulation Number 19.

3 It breached the product specifications stated in
4 Stipulation 14 and 15, because among other defects, it didn't
5 have a 12-month shelf life. But it also breached the
6 warranties of merchantability, and being fit for its intended
7 purpose; the purpose of being fed to toddlers.

8 If you look at Stipulations 19 and 35, you will see
9 that PIM made exactly those warranties: That the product was
10 merchantable and fit for its intended purpose. Those
11 warranties were breached, and the breaches of those warranties
12 substantially impaired the value of Beech-Nut's entire purchase
13 of Fruit Nibbles.

14 How could the Fruit Nibbles product be deemed fit for
15 its intended purpose or merchantable when it was going bad so
16 fast? How could anyone say that the value of the fruit product
17 intended for toddlers with the number of serious problems, with
18 the hundreds of consumer complaints was not substantially
19 impaired?

20 Accordingly, Beech-Nut did the right thing, to revoke
21 its acceptance of the whole product and hold PIM to account.

22 What is PIM's case?

23 Well, Mr. Wallach in his opening said that Beech-Nut
24 wasn't inspecting the product, and he said it again here this
25 morning after it arrived from PIM. But it turns out that's not

1 true. Mr. Kennedy testified that Beech-Nut as part of its
2 regular practice was to pull samples from any product from
3 deliveries and inspect them. Of course it was.

4 Just look at Beech-Nut's Exhibit 2. For example, on
5 the inspecting that Beach-Nut was doing and the feedback that
6 it was giving Mrs. Bianchini at PIM, Mr. Wallach himself asked
7 Mr. Kennedy to read a list of adjectives for Fruit Nibbles
8 ranging from "very good" to "very bad." This was because he
9 was testing the product. That's in PIM Exhibit 2. Of course
10 Beech-Nut was inspecting the samples of product.

11 Mr. Wallach talked about Dr. Chang, too. He could
12 have subpoenaed Dr. Chang but he chose not to. I suggest to
13 you that Mr. Wallach would have subpoenaed Dr. Chang if Dr.
14 Chang would have helped his case.

15 And we consider Mr. Dwivedi's testimony, the sole
16 witness for PIM. Who is he?

17 Well, he's the man that told Mrs. Bianchini not to
18 talk to the president of the company about the product she said
19 was going bad in a very short period of time, that it would
20 taste and smell bad and appear ugly. He's the man that wished
21 that PIM had a million dollars to give to Beech-Nut for the
22 recall. But he didn't want to deal with it, he just wanted to
23 keep it quiet so that the president would not get angry about
24 our, quote/unquote, incompetence.

25 So he knew the product was going bad in a very short

1 period of time and he just wanted to keep it quiet. To heck
2 with Beech-Nut, to heck with its reputation. To heck with the
3 consumers who might feed the product to their toddlers.

4 Well, that's a great attitude for the COO of a food
5 manufacturing company.

6 In other words, PIM was saying that when the product
7 was first manufactured, just as it was being packaged, it was
8 okay. But the underlying reality was that PIM knew that it had
9 thousands of cases of finished packaged products sitting in its
10 warehouse that were rapidly going bad and still went ahead and
11 shipped those finished products to Beech-Nut. That's the only
12 reasonable way to interpret the e-mail exchange in Beech-Nut
13 Exhibit 4. When you think about it, it's simply outrageous.
14 This was a food product for kids, for toddlers. And yet, Mr.
15 Dwivedi had the absolute gall yesterday to tell you that Mrs.
16 Bianchini was an alarmist.

17 Guess what, Mr. Dwivedi: She's not an alarmist, she
18 was exactly right. And you didn't do -- and he didn't do
19 anything about it. He let deteriorating product hit the
20 marketplace and be purchased by consumers because he was afraid
21 that his boss would be angry about his incompetence.

22 That's outrageous.

23 Note, too, that Mr. Dwivedi's testimony is directly
24 contradicted by Mrs. Bianchini's testimony. She said the
25 product was never consistently stable. He testified that the

1 problems were solved by October and November.

2 Who are you going to believe?

3 On one hand, she has no interest in the outcome of
4 this case. On the other hand, he is an officer and an investor
5 in PIM.

6 You heard Mr. Dwivedi tell you that the product was
7 good when it left PIM. What is Mr. Dwivedi suggesting, that
8 perhaps Beech-Nut stored the product incorrectly?

9 That's a ridiculous notion. First, Mrs. Bianchini
10 testified that PIM's own samples that PIM retained of product
11 it had shipped to Beech-Nut was turning bad.

12 Secondly, you did not hear one, one piece, one iota of
13 evidence suggesting that there was a storage issue problem.
14 Mr. Dwivedi said he didn't know.

15 Third, if this was a storage issue, why would PIM
16 allegedly be working so hard to fix the problem?

17 And lastly, why would Mr. Dwivedi himself be wishing
18 he could give Beech-Nut a million dollars for a recall if it
19 was just a storage issue?

20 Consider all this when you assess the credibility of
21 Mr. Dwivedi's testimony.

22 Mr. Wallach said in his opening that you should -- two
23 days ago that you should assess the quality of the product that
24 PIM produced during August and September versus the quality of
25 product it produced in October and November.

1 I guess the argument that PIM is making is that at
2 some point it fixed the problem, so-called "cured" it. In this
3 connection, Mr. Wallach may in -- as he said, look at Exhibit
4 2. He talked about Exhibit 2, and he said at November that
5 product was still marked "very good."

6 Well, I ask you when you go back into the jury room to
7 look at Exhibit 2 and look at the dates next to where it says
8 the product was very good, and you'll see the dates as they go
9 out, and the dates as they expand out and you see the hundred
10 days, the 90 days. That product was all bad. Mr. Wallach is
11 talking about the product that was 14 days, 15 days, still
12 looked -- still looked very good, they were still waiting on
13 it, and they were still waiting on that product at the time
14 that they had made the decision to withdraw.

15 In addition, the problem with Mr. Wallach's argument
16 is that the last deliveries of product were only a few weeks
17 old. So how could Beech-Nut with all the health and safety
18 reasons who had to make a decision about withdrawing the
19 product from the marketplace take the chance that that product
20 contained in the last deliveries would remain stable?

21 But really in any event, the argument about the
22 supposed cure, it's contradicted by Steve Hungsberg and Mrs.
23 Bianchini's testimony and Mrs. Bianchini's November 13th
24 e-mail, Beech-Nut Exhibit 5, which talks about PIM still
25 manufacturing bad quality product at the end of October.

1 Now, Mr. Wallach submits that at the end of October
2 the product was good. But this is refuted by Ms. Bianchini's
3 testimony and her November 13 e-mail. Product in November was
4 going bad and it was showing signs of deterioration in just a
5 few weeks.

6 Steve Hungsberg's testimony said that the product was
7 good and bad and mixed together. And Mrs. Bianchini testified
8 without any qualifications that PIM never solved the stability
9 problem on a consistent basis. In addition, as a practical
10 matter you heard testimony from Mr. Kennedy that it was just
11 not feasible to cure the bad product already out in the
12 marketplace, that it would cost as much as the product was
13 worth in the first place. By the way, Mr. Dwivedi testified
14 that if the product is stable, then it could be repackaged.
15 But Ms. Bianchini testified that it was never stable, it was
16 never consistently a stable product. So trying to identify and
17 cure the bad product already out in the marketplace is just
18 simply a non starter.

19 Finally, even if that were true, that PIM had finally
20 fixed the problems and at the very end the last shipments were
21 allegedly good, I'm sorry, the bell had already rung, you can't
22 unring it.

23 Mr. Wallach talked about the warrantees by PIM, that
24 there was no guarantee. Well, the warrantees by PIM are the
25 guarantee, and it's the guarantee by PIM that the product is

1 good. And that's in Stipulation Number 19.

2 And this is not about tart grapes, this is about a
3 manufactured product, an all natural manufactured product for
4 toddlers.

5 Mr. Wallach said that he was surprised by my opening
6 when he was delivering his opening a couple of days ago.

7 Well, frankly, I was surprised by Mr. Wallach's
8 opening and, frankly, surprised about PIM's position in this
9 case. They just simply don't seem to get it. This case is not
10 about arithmetic. Arithmetic might be used when you're dealing
11 with defective sneakers. But this case is about a food product
12 designed for toddlers. It was supposed to be a healthy
13 alternative for parents to buy with a no junk promise.

14 Read the consumer complaints. They tell you that some
15 complaining consumers were making that exact point. Remember
16 when Mr. Wallach questioned Mr. Kennedy -- and he talked about
17 it again this morning -- when he was trying to that find the
18 magnitude of the problem, and he was asking, oh, is it 5
19 percent, is it 10 percent of the bad product?

20 Well, Mr. Kennedy was totally on point in responding
21 that Beech-Nut received hundreds of serious complaints,
22 complaints regarding the health of toddlers. Beech-Nut had no
23 responsible alternative but to withdraw the product from the
24 market. Mr. Kennedy said, what were we supposed to do, wait
25 for the toddler to show up in the hospital?

1 Remember in my opening remarks I stated that the Judge
2 will instruct you on what "substantial impairment" means, and
3 that a reasonable person standing in the shoes of the buyer
4 would consider the value of the entire shipment to be impaired
5 under the particular circumstances?

6 "Substantial impairment" is not a matter of numbers or
7 percentages, as Mr. Wallach would like you to believe, it is a
8 matter of the impact of the value to Beech-Nut as the buyer of
9 PIM's shipments. The value was to sell the product that would
10 be appetizing and healthy and safe for toddlers to eat. But
11 what parent would buy and feed their toddlers a product that
12 was described as dry, moldy, difficult to chew, and could cause
13 stomach aches?

14 Once Beech-Nut received these hundreds of complaints,
15 serious complaints like the product was rancid and looked like
16 dead toes -- and I know you've heard that a dozen times, if
17 not, more -- but once parents hear that and reported their
18 children were getting sick, that was it for the product. This
19 product was done, it was finished. And I'm surprised that PIM
20 doesn't understand that. But I guess if they had understood
21 that we might otherwise might not be here today.

22 Now, Mr. Wallach was talking this morning about the
23 marketing and that that amount should be excluded because that
24 marketing cost happened after the fact.

25 Well, Tim Kennedy said and testified that the

1 marketing was actually paid and incurred up front. And
2 Hungsberg testified that that marketing specifically included
3 aspects of the Fruit Nibbles product.

4 Mr. Wallach also talked about this morning that the
5 storage of PIM's product -- the storage of the product and that
6 there should be no cost incurred in that. But that was PIM's
7 product, and we were storing PIM's product.

8 Mr. Wallach brought out the document that discusses
9 the reclamation costs and suggests that there's no way of
10 knowing.

11 Well, that document was in evidence, and he didn't
12 cross Mr. Kennedy on it and he didn't have any questions about
13 that document. He could have asked him questions about that
14 document. He chose not to.

15 On behalf of Beech-Nut, I ask that you find that PIM's
16 breaches substantially impaired the value of the Fruit Nibbles
17 product as a whole and award the damages that were identified
18 by Mr. Kennedy.

19 Thank you.

20 THE COURT: All right. Thank you.

21 Ladies and gentlemen, we'll just take a very short
22 break and then when we come back I'll instruct you on the law
23 and then you'll begin your deliberations.

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

1 THE DEPUTY CLERK: Please rise for the Jury.

2 (The Jury leaves the courtroom.)

3 THE COURT: Be seated, everyone.

4 You were e-mailed a copy of the final charge last
5 night. Correct?

6 MR. WALLACH: Yes, your Honor.

7 MS. KOWALSKI: Yes, your Honor.

8 THE COURT: No objections or anything?

9 MR. DILLON: No objection, your Honor.

10 MR. WALLACH: I have the same objections, your Honor.

11 THE COURT: Okay.

12 MR. WALLACH: They're not going to be different from
13 what we discussed yesterday, but I do want the record to
14 reflect the objection.

15 THE COURT: You mentioned them yesterday. Correct?
16 In other words, I'm saying they're on the record from
17 yesterday.

18 MR. WALLACH: Yes, your Honor. Absolutely. Thank
19 you.

20 THE COURT: All right. Just about ten minutes. Okay?

21 MR. DILLON: Thank you.

22 MR. WALLACH: Thank you, your Honor.

23 (A recess is taken.)

24 (Proceedings resume - Jury not present.)

25 THE COURT: All right. Everyone, be seated, please.

1 Ladies and gentlemen, you've heard the summations and
2 you've heard, of course, you've heard the evidence and now it's
3 time for me to instruct you as to the applicable law in this
4 case, and then you will retire and can begin your
5 deliberations.

6 You've heard all the evidence, again, and the
7 arguments of counsel. It's your duty to accept these
8 instructions of law and apply them to the facts as you
9 determine those facts to be. Again, on legal matters you must
10 take the law as I give it to you. If any attorney has stated a
11 principle of law that's contrary to what my instructions are,
12 it's these instructions that are binding and you must adhere to
13 my instructions.

14 You should not single out any instruction as alone
15 stating the law. You shall consider my instructions as a whole
16 and not pick out any particular instruction and place undue
17 emphasis on it.

18 Can everyone hear me? Okay.

19 The order in which these instructions are given has no
20 significance and is no indication of their relative importance.
21 You must accept and apply the law of the case as I give it to
22 you again.

23 Now, you should not be concerned about the wisdom of
24 any rule that I may instruct you on. Regardless of any opinion
25 you may have as to what the law may be or ought to be, it would

1 violate your sworn duty to base a verdict on any other view of
2 the law than that which I give to you.

3 Now, whatever your verdict, it will have to be
4 unanimous. That means all of you would have to agree on it or
5 there will be no verdict.

6 In the jury room you will discuss the case amongst
7 yourselves, but ultimately each of you will have to make up his
8 or her own mind, and this is a responsibility that each of you
9 has and that you cannot avoid.

10 Now, the evidence in this case consists of testimony
11 of the witnesses, the exhibits received into evidence, and
12 stipulations of the parties and, of course, the depositions
13 that were referred to or read to you during the course of the
14 trial. As members of the jury, you are the sole and exclusive
15 judges of the evidence and of the credibility of the witnesses.
16 You also determine the weight to be attached to the testimony
17 of each witness. Regardless of what counsel have said or what
18 I may have said in recalling the facts in this case, it is your
19 recollection of the facts that must guide you in judging the
20 facts, and not the opening statements, closing arguments,
21 questions posed to the witnesses or any objections made during
22 the trial and anything you may have seen or heard about this
23 case outside of the courtroom. You must make your decision in
24 this case based solely on the evidence that you saw and heard
25 in the courtroom. Do not let rumors, suspicions, or anything

1 else that you may have seen or heard outside of court influence
2 your decision in any way.

3 I also ask you to draw no inference to the fact that
4 on occasion I ruled on the admissibility of certain evidence.
5 The rulings I have made during the trial are not any indication
6 of my view as to what your decision should be as to the facts
7 of this case. You are to draw no inferences from any
8 objections made by counsel or from my rulings on those
9 objections, and on some occasions during the trial I may have
10 struck certain evidence or remarks from the record and
11 instructed you to disregard them. You must adhere to those
12 instructions and disregard any such item. Just as you are not
13 to draw any inferences from or speculate about objections made
14 by counsel to testimony or exhibits, you should not speculate
15 as to why objections were not made in certain instances, or why
16 an attorney may object to some items but not others that you
17 may consider. Pay no attention to that even if you happened to
18 observe it. Your focus should be on the evidence that was
19 ultimately presented for your consideration and not whether it
20 came before you with or without objection from any party.

21 Now, if during the course of this trial I asked -- and
22 I did, I asked a few questions of a witness -- it was solely
23 for the purpose of making clear whatever the testimony was from
24 a witness or perhaps clarifying a question for the witness'
25 benefit. You are not to infer from the fact that I asked a few

1 questions here and there that I hold any opinion whatsoever
2 regarding the result of this trial; in fact, I do not. Nor
3 should you consider it any more or any less important because a
4 question happened to be asked by me rather than someone else.

5 Now, you must put aside any personal feelings about
6 the parties in this case. You are to perform your duties
7 without bias, sympathy or prejudice as to any party. Do not
8 allow sympathy, prejudice, fear or public opinion to influence
9 you. You should also not be influenced by any person's race,
10 color, religion, national ancestry, gender, profession,
11 occupation, celebrity, economic circumstances, mental illness
12 or position in life or in the community. Moreover, whether you
13 like or dislike a defendant, a particular witness, a particular
14 attorney, or even the Court, should not be a factor that you
15 consider.

16 I remind you again, everyone is entitled to a fair and
17 equal treatment. Our system of law does not permit a jury to
18 be governed or affected by bias or sympathy or by prejudice.
19 You must reach your verdict in this case based only on the
20 evidence, on facts as you determine them based on the law as
21 I'm presenting it to you now without concern for anything else
22 outside of this case. That is what the law requires of you.

23 Both the parties and the public expect that you will
24 carefully and impartially consider all the evidence, follow the
25 law as stated by myself and reach a just verdict. Indeed, to

1 base a verdict upon anything other than the evidence in the
2 case would be a violation of your sworn duty as judges of the
3 facts.

4 Now, this is a civil case, and Beech-Nut is the party
5 whose claims must be decided. PIM is the party against which
6 the claims have been made. Beech-Nut has the burden of proving
7 its case by what is called the preponderance of the evidence.
8 That means Beech-Nut has to prove to you, in light of all the
9 evidence, that what it claims is more likely so than not so.
10 To say it differently, if you were to put the evidence
11 favorable to Beach-Nut and the evidence favorable to PIM on
12 opposite sides of the scales, Beech-Nut would have to make the
13 scales tip somewhat on its side. If Beech-Nut fails to meet
14 this burden, your verdict must be for PIM. If you find, after
15 considering all the evidence, that a claim or fact is more
16 likely so than not so, then the claim or fact has been proved
17 by a preponderance of the evidence.

18 In determining whether any fact has been proved by a
19 preponderance of evidence in a case, you may, unless otherwise
20 instructed, consider the testimony of all witnesses, regardless
21 of who may have called them, and all the exhibits received in
22 evidence, regardless of who may have produced them.

23 Now, I mentioned this to you earlier when you were
24 being selected as jurors. You may have heard the term "proof
25 beyond a reasonable doubt." That is a stricter standard of

1 proof and it applies only in criminal cases. It does not apply
2 in civil cases such as this, and you should put that out of
3 your mind. Again, the standard of proof here is by a
4 preponderance of the evidence.

5 Now again, the evidence from which you are to find the
6 facts consists of the following:

7 The testimony of witnesses; documents, of course, in
8 evidence; any facts that are stipulated to; the depositions
9 that have been read to you.

10 And again, what is not evidence is the closing and
11 opening arguments of counsel and their questions.

12 You must make your decision based again only on that
13 evidence. Do not let rumors, again, suspicions or anything
14 else that you may have heard influence you.

15 You should use your common sense in weighing the
16 evidence. Consider it in light of your everyday experience
17 with people and events and give it whatever weight you believe
18 it deserves. If your experience tells you that certain
19 evidence reasonably leads to a conclusion, you are free to
20 reach that conclusion. There are rules that control what can
21 be received in evidence. Again, I've explained that to you.
22 And what this gets to is, what is asked in a question is not
23 evidence.

24 Again, during the trial you saw us confer, the lawyers
25 and myself confer at what we call sidebar, out of your hearing.

1 Again, you're not to speculate about what those conversations
2 were about. They're usually regarding some legal issue that
3 the Court has to address. And, again, you're not to speculate
4 about any of that.

5 Now, there are two types of evidence that you may use
6 in reaching your verdict: One type of evidence is called
7 direct evidence. An example of direct evidence is when a
8 witness testifies about something that witness knows through
9 his own senses; something the witness has seen, felt, touched
10 or heard or did. If a witness testified that he saw it raining
11 outside and you believed him, that would be direct evidence
12 that it was raining. Another form of direct evidence is an
13 exhibit where the facts to be proved is its existence or
14 current condition.

15 The other type of evidence is circumstantial evidence.
16 Circumstantial evidence is proof of one or more facts from
17 which you could find another fact. For instance, if someone
18 was to walk into the courtroom wearing a raincoat covered with
19 drops of water and carrying a wet umbrella, that would be
20 circumstantial evidence from which you could conclude that it
21 was raining.

22 You should consider both kinds of evidence that were
23 presented to you. The law makes no difference distinction in
24 the weight to be given to either direct or circumstantial
25 evidence. You are to decide how much weight to give any

1 evidence.

2 Now, in deciding what the facts are, you may have to
3 decide what testimony you believe and what testimony you do not
4 believe. You are the sole judges of the credibility of the
5 witnesses. "Credibility" means whether a witness is worthy of
6 your belief. You may believe everything a witness says or only
7 a part of it, or none of it.

8 In deciding what to believe, you may consider a number
9 of factors, including the following:

- 10 1. The opportunity and ability of the witness to see
11 or hear or know the things the witness testifies to;
- 12 2. The quality of the witness' understanding and
13 memory;
- 14 3. The witness' manner while testifying;
- 15 4. Whether the witness has an interest in the outcome
16 of the case or any motive, bias or prejudice;
- 17 5. Whether the witness is contradicted by anything
18 the witness said or wrote before trial or by other evidence;
- 19 6. How reasonable the witness' testimony is when
20 considered in the light of other evidence that you believe; and
- 21 7. Any other factors that bear on believability.

22 The weight of the evidence to prove a fact does not
23 necessarily depend on the number of witnesses who testify.
24 What is more important is how believable the witnesses were and
25 how much weight you think their testimony deserves.

1 Now again, I referred to depositions. A deposition is
2 the sworn testimony of a witness taken before trial. That
3 witness is under oath during that deposition, and the
4 deposition of a witness which was previously taken before trial
5 may have been presented to you by reading the transcript, which
6 it was. And again, deposition testimony is entitled to the
7 same consideration and is to be judged, insofar as possible, in
8 the same manner as if the witness had been present to testify.

9 You should not place any significance on the behavior
10 or tone of voice of any person who was reading the deposition.

11 Now, the parties have, as you know, stipulated to a
12 number of facts in this case, and they read it to you. The
13 parties have stipulated that certain facts are true, and those
14 stipulations have been read to you during the trial. You must,
15 therefore, treat those facts as having been proved for the
16 purposes of this trial.

17 That stipulation will be marked and go into evidence.
18 Okay?

19 MR. DILLON: Yes. We marked them for identification
20 as Beech-Nut Exhibit 1.

21 THE COURT: Okay.

22 Now, the Court, as I explained to you in the beginning
23 of this trial, the Court has already made -- I've previously
24 made certain legal findings concerning the shipments of Fruit
25 Nibbles from PIM to Beech-Nut. First, I determined that PIM

1 made certain warranties to Beech-Nut. PIM warranted that the
2 shipped Fruit Nibbles would comply with the specifications, be
3 fit for the purpose intended, merchantable, and free from
4 defects of material and workmanship. By making these
5 warranties, PIM agreed to bear the risk and expense for any
6 defective products that it shipped.

7 Second, the Court determined that at least some of the
8 shipped Fruit Nibbles breached PIM's express warranties.
9 Consequently, the Court determined that you as the jury should
10 decide two issues: One, whether there was substantial
11 impairment to the value of the entire shipment to Beech-Nut
12 such that it was entitled to revoke its acceptance of all Fruit
13 Nibbles and that it could not be cured; and whether Beech-Nut
14 is entitled to damages.

15 I'll now instruct you on Beech-Nut's claims that the
16 defects in some of the product substantially impaired the value
17 of all of the Fruit Nibbles shipments.

18 You must decide the substantial impairment issue
19 according to the instructions that I give you now.

20 The parties do not contest that after Beech-Nut
21 decided to withdraw Fruit Nibbles from the market, Beech-Nut
22 offered to return the goods to PIM. Beech-Nut is suing under
23 four purchase orders and therefore its claims are governed by
24 what we refer to under the law as the Uniform Commercial Code.

25 Beech-Nut may not reject the delivery of nonconforming

1 goods unless the nonconformity substantially impairs the value
2 of that installment and could not be cured by PIM. Moreover,
3 the entire contract could only be repudiated if the
4 nonconformity of the Fruit Nibbles substantially impaired the
5 value of the entire contract.

6 When I use the phrase "substantial impairment" in
7 these instructions, it is whether the nonconformity or default
8 with respect to one or more shipments of the Fruit Nibbles
9 product substantially impaired the value of the purchase orders
10 as a whole and cannot be cured, then PIM is in breach of the
11 purchase orders as whole.

12 In performing this analysis, you must consider a
13 subjective analysis in the sense that the needs and
14 circumstances of Beech-Nut must be examined. This
15 determination is not made by its personal belief as to the
16 reduced value of the goods in question. You must also make an
17 objective determination that the value of the goods to
18 Beech-Nut has, in fact, been substantially impaired. While
19 minor, especially easily correctable, defects normally do not
20 constitute substantial impairment, the presence of numerous
21 defects, even where each one is individually minor or
22 insubstantial, may, when viewed in the aggregate, substantially
23 impair the value of the entire purchase.

24 Beech-Nut must establish that there were defects in
25 the Fruit Nibbles that substantially impaired the value of the

1 entire purchase by Beech-Nut in light of the particular
2 circumstances of the product and the buyer, and considering
3 whether a reasonable person would consider the value of the
4 whole of the Fruit Nibbles shipments to be impaired under these
5 circumstances.

6 As one court held in another case, substantial
7 impairment exists when the buyer is "reasonably convinced" or
8 has a "reasonable expectation," "that another substantial
9 problem could occur at any moment"; "in other words, no
10 assurance of conformity."

11 Put another way: Was it commercially reasonable under
12 the circumstances for Beech-Nut to decide to withdraw Fruit
13 Nibbles from the marketplace and hold PIM fully accountable?

14 If you find by a preponderance of the evidence that
15 Beech-Nut has established substantial impairment of the value
16 of the purchase of the Fruit Nibbles as a whole that cannot be
17 cured by PIM, then you must find that Beech-Nut may recover
18 damages for the shipments as a whole.

19 Now, if Beech-Nut is awarded a verdict finding that
20 the contract between PIM and Beech-Nut was substantially
21 impaired, then Beech-Nut is entitled to compensatory damages
22 for its losses as may fairly be considered to have arisen
23 naturally from PIM's breach of warranty. Compensatory damages
24 for breach of contract are designed to place an injured party
25 in as good a monetary position as it would have enjoyed if

1 there had been no breach of contract. The losses for which
2 Beech-Nut may be entitled to damages include:

3 1. The amount of money Beech-Nut spent purchasing the
4 Fruit Nibbles;

5 2. Consequential damages resulting from PIM's
6 breaches, including:

7 Lost profits within the reasonable contemplation of
8 the parties; that is to say, profits which Beech-Nut would have
9 made but for the breach of warranty by PIM. If you find that
10 Beech-Nut has, in fact, suffered loss of profits as a result of
11 PIM's breach, then the fact the precise amount may be difficult
12 to ascertain should not affect Beech-Nut's recovery. In
13 arriving at the amount of any loss of profits, you may consider
14 any comparable past earnings by Beech-Nut as well as any other
15 evidence bearing upon this issue.

16 Other consequential damages could include -- other
17 losses resulting that may include payments made by Beech-Nut
18 for retail shelf space.

19 Beech-Nut may be entitled to damages also for what's
20 called incidental damages resulting from PIM's breaches,
21 including costs incurred by Beech-Nut in connection with
22 marketing support for the Fruit Nibbles launch, product
23 withdrawal, storage of returned and unshipped product, and
24 reworking of underweight packages.

25 Now, when you retire to the jury room to deliberate,

1 you'll have with you these instructions and the exhibits that
2 the Court has admitted into evidence. You should select one
3 member of the jury as your Foreperson, and that person will
4 preside over the deliberations and speak for you here in open
5 court.

6 You have two main duties as jurors. The first one is
7 to decide what the facts are from the evidence that you saw and
8 heard here in court. Deciding what the facts are is your job,
9 not mine, and nothing that I have said or done during this
10 trial was meant to influence your decision about the facts in
11 any way. Your second duty is to take the law that I give you,
12 apply it to the facts and decide if, under the appropriate
13 burden of proof, the parties have established their claims, or
14 not. It is my job to instruct you about the law and you are
15 bound, again, by the oath that you took to follow these
16 instructions even if you don't agree with them.

17 Now, perform these duties fairly. Do not let any
18 bias, sympathy, or prejudice that you may feel towards one side
19 or the other influence your decision in any way.

20 As jurors, you have a duty to consult with each other
21 and to deliberate with the intention of reaching a verdict.
22 Each of you must decide the case for yourself, but only after a
23 full and impartial consideration of all of the evidence with
24 your fellow jurors. Listen to each other carefully. In the
25 scores of your deliberations you should feel free to reexamine

1 your own views and to change your opinion based upon the
2 evidence, but you should not give up your honest convictions
3 about the evidence just because of the opinions of your fellow
4 jurors, nor should you change your mind just for the purpose of
5 obtaining enough votes for a verdict.

6 When you start deliberating, do not talk to the jury
7 officer, to me, or to anyone, but each other about the case.
8 During your deliberations you must not communicate with or
9 provide any information to anyone by any means about this case.
10 And this goes back to again what I said. You won't -- they
11 won't have their telephones, correct, Gail?

12 THE DEPUTY CLERK: No.

13 THE COURT: All right. Now, if you have any questions
14 or messages for me, you must write them down on a piece of
15 paper, have the Foreperson sign them, and then give them to the
16 jury officer who will be outside your door, and the officer
17 will give them to me and I will respond to them as soon as I
18 can. I may have to talk to the lawyers about them, so it may
19 take a few minutes. One more thing about messages. Never in
20 your message to me tell us how your vote stands. Don't tell us
21 that if you do have a message to me.

22 Your verdict must represent the considered judgment of
23 each juror. In order for you as a juror to return a verdict,
24 each juror must agree to the verdict. Again, it must be
25 unanimous.

1 A formal verdict has been prepared for you. It has a
2 series of questions, two questions for you to answer. You will
3 take this form to the jury room, and when you've reached a
4 unanimous agreement as to your verdict, you'll fill it in and
5 have your Foreperson date it and sign the form. You'll then
6 return the form to the juror officer, and then you'll return to
7 the courtroom and your Foreperson will give your verdict here
8 in open court.

9 Unless I direct you otherwise, do not reveal your
10 answers until you are discharged. After you've reached a
11 verdict you are not required to talk with anyone about the case
12 unless I -- your not allowed to talk to anyone about the case
13 unless I order you to do so.

14 Once again, I want to remind you that nothing about my
15 instructions and nothing about the form of verdict is intended
16 to suggest or convey in any way what I think the verdict should
17 be, and it is your sole and exclusive duty and responsibility
18 to determine that verdict.

19 The verdict sheet reads as follows and has two
20 questions.

21 1. Do you find from a preponderance of the evidence
22 that there were defects in the Fruit Nibbles such that those
23 defects substantially impaired the value of all of the Fruit
24 Nibbles purchased by Beech-Nut and could not be cured by PIM?

25 And then there's a box: Yes or no.

1 And if you're answer is "No," then that completes your
2 deliberations. If your answer is "Yes," proceed to the second
3 question. And that is: What amounts of damages do you award
4 Beech-Nut?

5 And there's a box to fill in the amount of damages.

6 Now, in terms of selecting a Foreperson, that's up to
7 you, however you do it. And that's the first order of duty
8 that you should take up when you begin your deliberations.
9 Again, a Foreperson has no more power or no more -- his vote or
10 her vote is no more than everyone else. It's simply, a
11 Foreperson is the person who is usually helpful in getting
12 things organized and keeping things orderly and making sure
13 everybody has a chance to express their point of view and keep
14 track of the proceedings. But they have no more power or
15 authority other than what I've explained here. Okay?

16 I'll see -- is there any need to see me?

17 Okay, counsel don't need to see me.

18 Then, ladies and gentlemen, we'll get the documents,
19 the evidence in to you in a few moments and you can begin --

20 THE DEPUTY CLERK: I'm just waiting. The attendant.
21 John --

22 THE COURT: Oh, we have to swear in the court
23 attendant.

24 (One Court Officer is duly sworn.)

25 THE DEPUTY CLERK: Please state your name, spelling it

1 for the record.

2 THE COURT OFFICER: John Honan, H-o-n-a-n.

3 THE COURT: Ladies and gentlemen, you can now begin
4 your deliberations. You can now talk about the case.

5 (At 10:54 a.m., the Jury leaves the courtroom to
6 commence deliberations.)

7 THE COURT: I would ask you all to stick around. I
8 told Gail around 11:30 she'll go in and ask them if they would
9 like lunch, and that gives them a half hour to see how they're
10 doing. But they may say yes or no. They may say they're going
11 to be -- who knows. We don't know what they're going to say
12 yet. So stick around, and if they do order lunch, then we'll
13 break for lunch. Okay.

14 MR. WALLACH: Thank you, your Honor.

15 THE COURT: Okay. We're in recess, thanks.

16 (A recess is taken while the Jury deliberates.)

17 THE DEPUTY CLERK: Please rise for the Jury.

18 (At 11:54 a.m., the proceedings resume - verdict to
19 be announced.)

20 THE COURT: Please be seated.

21 We received information that the jury has reached a
22 verdict, so we'll bring them out.

23 Thanks.

24 THE DEPUTY CLERK: Please rise for the Jury.

25 (At 11:55 a.m., the Jury enters the courtroom.)

1 THE COURT: All right, everyone, please be seated.

2 Mr. Foreman -- are you the Foreman?

3 THE FOREMAN: Yes, sir.

4 THE COURT: Number 1?

5 I understand the jury has reached a verdict. Is that
6 correct?

7 THE FOREMAN: We have, your Honor.

8 THE COURT: Okay. All right.

9 You would please rise, Mr. Foreman.

10 THE FOREMAN: Yes, your Honor.

11 THE COURT: With respect to the verdict. As to
12 Question Number 1: How do you find, from the preponderance of
13 the evidence, that there were defects in the Fruit Nibbles such
14 that those defects substantially impaired the value of all the
15 Fruit Nibbles purchased by Beech-Nut and could not be cured by
16 PIM. Yes or no?

17 THE FOREMAN: Yes, your Honor.

18 THE COURT: All right. And with respect to Question
19 Number 2: What amount of damages do you award Beech-Nut?

20 THE FOREMAN: We awarded \$2,222,000.

21 THE COURT: All right. Thank you, sir. You can be
22 seated.

23 THE FOREMAN: Thank you.

24 THE COURT: Members of the jury, you've heard your
25 Forman read the verdict. Do you agree?

1 (Chorus if "yeses.")

2 THE COURT: All right. Juror No. 2, do you agree?

3 JUROR NO. 2: Yes.

4 THE COURT: Number 3?

5 JUROR NO 3: I agree.

6 THE COURT: Number 4?

7 (No verbal response from Juror No. 4.)

8 THE COURT: Number 5?

9 JUROR NO. 5: Agree.

10 THE COURT: Number 6?

11 JUROR NO. 6: Yes.

12 THE COURT: Number 7?

13 JUROR NO. 7: Yes.

14 THE COURT: And Number 8?

15 JUROR NO. 8: Yes.

16 THE COURT: All right. Well, thank you very much,
17 ladies and gentlemen, for your service.

18 We're not always quite as on time. We told you in the
19 beginning on Monday that we would be done in a couple of days.
20 We can never predict for sure, but I'm glad we did for your
21 sake. But I want to thank you for your service. And it's
22 extremely important. Without jurors willing to serve the
23 process can't go forward, so thank you very much.

24 If you could just step into the jury room for a moment
25 and then I'll speak to you in a few minutes. Thank you.

1 THE DEPUTY CLERK: Please rise for the Jury.

2 (The Jury is excused and leaves the courtroom)

3 THE COURT: All right. Counsel, is there anything
4 else?

5 MR. DILLON: Yes, your Honor. The issue of
6 prejudgment interest, which is an equitable question charged to
7 your discretion.

8 THE COURT: You can be seated.

9 MR. DILLON: When we received the brief from PIM's
10 counsel last week we realized there is a strong disagreement
11 about that issue, and in between doing the preparation work for
12 the trial this week I've had a chance to do a little research.
13 I'm going to say to your Honor that it's a fairly complex
14 question I think raising some interesting issues under Erie vs.
15 Tomkins. And what I'd ask your Honor is --

16 THE COURT: Do you want to submit a memorandum on it?

17 MR. DILLON: Yes.

18 THE COURT: Is that what you want to do, Mr. Dillon?

19 MR. DILLON: That's what I was trying to get it.

20 THE COURT: And you would like a chance --

21 MR. WALLACH: I would like to say that this gets
22 submitted often at the end of the case after trial. And we'll
23 do it that way. If it's acceptable to your Honor, as in the
24 past, counsel will work on a schedule to do this expeditiously
25 so it's submitted to the Court.

1 THE COURT: I would like it expeditiously so it's all
2 fresh still in our office so we can get this matter resolved.

3 Today is the 12th. Can you have your memo in --

4 MR. DILLON: I can have it in in a week. I mean, your
5 Honor, could I do it in the form of a letter brief?

6 THE COURT: Yes, by all means.

7 MR. WALLACH: I don't have my calendar with me, your
8 Honor. What I might request, the week after next is Yom Kippur
9 so I know I'm missing a few days at that point. I assure your
10 Honor I will work out the schedule very quickly.

11 THE COURT: All right, all right, all right. I'll
12 give it to you, there's no problem, I'll give it to you.

13 Why don't you have your yours in -- is a week enough,
14 Mr. Dillon?

15 MR. DILLON: Yes.

16 THE COURT: Are you sure? Okay. And have yours in by
17 the 19th; and then you can have yours in by the October 2nd or
18 3rd. Is that okay?

19 MR. WALLACH: That should be, yes, your Honor. Thank
20 you.

21 THE COURT: That's fine.

22 Anything else? I think that's it then. Right?

23 MR. DILLON: That's it.

24 THE COURT: Thanks very much, counsel. You did a nice
25 job. Thank you, both of you.

1 MR. WALLACH: Thank you.

2 (The trial is concluded at 12 o'clock.)

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