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Counter Claimant

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,

Defendant.

HON. WILLIAM J. MARTINI, U.S.D.J.

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

**ANSWER AND COUNTERCLAIMS**

Defendant Beech-Nut Nutrition Corporation ("Beech-Nut"), by and through its undersigned attorneys King & Spalding LLP and Bloom, Karinja & Dillon, P.C., answers the Complaint of Plaintiffs Promotion In Motion, Inc. ("Promotion In Motion"), and PIM Brands, LLC ("PIM") (collectively the "Plaintiffs"), dated February 27, 2009, as follows:

1. Beech-Nut is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Complaint.
2. Beech-Nut is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 2 of the Complaint.

3. Beech-Nut admits that it is a corporation registered in New York State and maintains an office at 13 British American Boulevard, Latham, New York; and otherwise denies the allegations of paragraph 3 of the Complaint.

4. Beech-Nut states that paragraph 4 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

5. Beech-Nut admits that Promotion In Motion agreed to develop for Beech-Nut a fruit snack that came to be called Fruit Nibbles; and otherwise denies allegations of paragraph 5 of the Complaint.

6. Beech-Nut admits that it wanted to launch the Fruit Nibbles product in August 2008 and otherwise denies the allegations of the first sentence of paragraph 6 of the Complaint; and states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of sentences 2, 3, and 4 of paragraph 6 of the Complaint.

7. Beech-Nut admits that it complained to PIM that the product was not meeting its expectations and specifications; admits that in December 2008, it decided to withdraw the product from the market following a discussion with Plaintiffs regarding a prospective withdrawal; and otherwise denies the remaining allegations of sentence 1 of paragraph 7 of the Complaint; admits that it wanted to re-launch the Fruit Nibbles product; denies the remaining allegations of sentence 2 of paragraph 7 of the Complaint; and denies the allegations of sentence 3 of paragraph 7 of the Complaint.

8. Beech-Nut denies the allegations of sentence 1 of paragraph 8 of the Complaint; and states that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 8.

9. Beech-Nut admits that it contacted Promotion In Motion to determine if Promotion In Motion could develop its Fruit Nibbles product; and denies the remaining allegations of paragraph 9.

10. Beech-Nut admits that Promotion In Motion and Beech-Nut did not enter into a written agreement; denies that Promotion In Motion and Beechnut worked together jointly to develop the Fruit Nibbles product and that it spent substantive time working on product formulation or actual production of the product, which was the responsibilities of the Plaintiffs; admits the Fruit Nibbles product was to be part of a larger product launch that was a corporate priority to Beech-Nut under its "Let's Grow" line of foods for toddlers to be launched into the market in August 2008; and states it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 10.

11. Beech-Nut states it is without knowledge or information sufficient to form a belief as to the truth of the allegations of sentence 1 of paragraph 11 of the Complaint; and denies the remaining allegations of paragraph 11 of the Complaint.

12. Beech-Nut admits that it made initial purchases of the Fruit Nibbles product in August 2008; denies that the product had been developed by Beechnut and Promotion In Motion jointly; admits that the product was manufactured by PIM; and denies the remaining allegations of paragraph 12 of the Complaint.

13. Beech-Nut admits that the allegations of paragraph 13 of the Complaint are approximately correct.

14. Beech-Nut states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 14 of the Complaint.

15. Beech-Nut states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 15 of the Complaint.

16. Beech-Nut denies the allegations of paragraph 16 of the Complaint.

17. Beech-Nut admits the allegations of sentence 1 of paragraph 17 are approximately correct; and states that it denies knowledge or information sufficient to form a belief as to the truth of the allegations of sentence 2 of paragraph 17 of the Complaint.

18. Beech-Nut admits that forecasts were occasionally given; and otherwise denies the remaining allegations of sentence 1 of paragraph 18; states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of sentence 2 of paragraph 18 of the Complaint; and admits that it did not purchase any Fruit Nibbles product in November 2008.

19. Beech-Nut admits that Mr. Warner sent an email on December 2, 2008 to Promotion-In-Motion and respectfully refers to that written document for its complete contents.

20. Beech-Nut is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 20 of the Complaint.

21. Beech-Nut admits that in or about December 2008, representatives of Plaintiffs and of Beech-Nut held a conference call at which time Beech-Nut indicated that it was going to undertake a market withdrawal of the non-marketable Fruit Nibbles product; and denies the remaining allegations of paragraph 21 of the Complaint.

22. Beech-Nut admits that in or about January 2009, representatives of Plaintiffs met with representatives of Beech-Nut, at which time Beech-Nut stated that Plaintiffs are responsible for Beech-Nut's expenses incurred as a result of the defective and deficient Fruit Nibbles product they manufactured and sold; admits that Beech-Nut asked if Plaintiffs had liability insurance to

cover their responsibility; admits that Beech-Nut at the time intended to move forward to re-launch the Fruit Nibbles product in or around April 2009; denies the remaining allegations of sentences 1, 2, 3, and 4 of paragraph 22 of the Complaint; denies the allegations of sentence 5 of paragraph 22 of the Complaint; and admits conference calls were scheduled subsequent to the January 2009 in-person meeting; and denies the remaining allegations of sentence 6 of paragraph 22 of the Complaint.

23. Beech-Nut admits that a conference call was held on or about January 14, 2009; and denies the remaining allegations of paragraph 23 of the Complaint.

24. Beech-Nut admits that a conference call was held on or about January 20, 2009; and denies the remaining allegations of paragraph 24 of the Complaint.

25. Beech-Nut denies the allegations of paragraph 25 of the Complaint.

26. Beech-Nut denies the allegations of paragraph 26 of the Complaint.

27. Beech-Nut admits that a discussion between the parties took place on or about February 4, 2009 and that the parties discussed Plaintiffs' responsibility for all expenses associated with the withdrawal of the Fruit Nibbles product from the market; and denies the remaining allegations of paragraph 27 of the Complaint.

28. Beech-Nut is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28, except admits Mr. Hungsberg discussed certain matters with Promotion In Motion.

29. Beech-Nut states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 29 of the Complaint, except denies that Mr. Hungsberg never proactively contacted Promotion In Motion.

30. Beech-Nut admits that Mr. Hungsberg sent an email to Jeff Brown on or about February 23, 2009 and respectfully refers to that written document for its complete contents; and otherwise denies the allegations of paragraph 30 of the Complaint.

31. Beech-Nut states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 31 of the Complaint.

32. Beech-Nut denies the allegations of paragraph 32 of the Complaint.

**RESPONSE TO FIRST COUNT  
(BREACH OF CONTRACT - PROMOTION IN MOTION)**

33. Beech-Nut incorporates by reference, as if set forth fully herein, its responses to the previous paragraphs of this Answer.

34. Beech-Nut states that paragraph 34 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

35. Beech-Nut states that paragraph 35 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

36. Beech-Nut states that paragraph 36 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

**RESPONSE TO THE "WHEREFORE" PARAGRAPH IN  
FIRST COUNT (BREACH OF CONTRACT - PROMOTION IN MOTION)**

In response to the unnumbered WHEREFORE paragraph in First Count (Breach of Contract - Promotion In Motion), Beech-Nut denies that Promotion In Motion is entitled to any relief.

**RESPONSE TO THE SECOND COUNT  
(BREACH OF IMPLIED COVENANT OF GOOD FAITH - PROMOTION IN MOTION)**

37. Beech-Nut incorporates by reference, as if set forth fully herein, its responses to the previous paragraphs of this Answer.

38. Beech-Nut states that paragraph 38 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

39. Beech-Nut states that paragraph 39 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

40. Beech-Nut states that paragraph 40 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

41. Beech-Nut states that paragraph 41 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

**RESPONSE TO THE "WHEREFORE" PARAGRAPH IN SECOND COUNT  
(BREACH OF IMPLIED COVENANT OF GOOD FAITH - PROMOTION IN MOTION)**

In response to the unnumbered WHEREFORE paragraph in Second Count (Breach of Implied Covenant of Good Faith - Promotion In Motion), Beech-Nut denies that Promotion In Motion is entitled to any relief.

**RESPONSE TO THIRD COUNT (ESTOPPEL - PROMOTION IN MOTION)**

42. Beech-Nut incorporates by reference, as if set forth fully herein, its responses to the previous paragraphs of this Answer.

43. Beech-Nut states that paragraph 43 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

44. Beech-Nut denies the allegations of paragraph 44 of the Complaint.

45. Beech-Nut denies the allegations of paragraph 45 of the Complaint.

46. Beech-Nut denies the allegations of paragraph 46 of the Complaint.

**RESPONSE TO THE "WHEREFORE" PARAGRAPH IN  
THIRD COUNT (ESTOPPEL - PROMOTION IN MOTION)**

In response to the unnumbered WHEREFORE paragraph in Third Count (Estoppel - Promotion In Motion), Beech-Nut denies that Promotion In Motion is entitled to any relief.

**RESPONSE TO FOURTH COUNT (BREACH OF CONTRACT - PIM LLC)**

47. Beech-Nut incorporates by reference, as if set forth fully herein, its responses to the previous paragraphs of this Answer.

48. Beech-Nut states that paragraph 48 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

49. Beech-Nut states that paragraph 49 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

50. Beech-Nut states that paragraph 50 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

**RESPONSE TO THE "WHEREFORE" PARAGRAPH IN  
FOURTH COUNT (BREACH OF CONTRACT - PIM LLC)**

In response to the unnumbered WHEREFORE paragraph in Fourth Count (Breach of Contract - PIM LLC), Beech-Nut denies that PIM LLC is entitled to any relief.

**RESPONSE TO FIFTH COUNT  
(BREACH OF IMPLIED COVENANT OF GOOD FAITH - PIM LLC)**

51. Beech-Nut incorporates by reference, as if set forth fully herein, its responses to the previous paragraphs of this Answer.

52. Beech-Nut states that paragraph 52 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

53. Beech-Nut states that paragraph 53 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

54. Beech-Nut states that paragraph 54 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

55. Beech-Nut states that paragraph 55 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

**RESPONSE TO THE "WHEREFORE" PARAGRAPH IN FIFTH COUNT  
(BREACH OF IMPLIED COVENANT OF GOOD FAITH - PIM LLC)**

In response to the unnumbered WHEREFORE paragraph in Fifth Count (Breach of Implied Covenant of Good Faith - PIM LLC), Beech-Nut denies that PIM LLC is entitled to any relief.

**RESPONSE TO SIXTH COUNT (ESTOPPEL - PIM LLC)**

56. Beech-Nut incorporates by reference, as if set forth fully herein, its responses to the previous paragraphs of this Answer.

57. Beech-Nut states that paragraph 57 of the Complaint is a legal conclusion to which no response is appropriate or required but, to the extent any response is required, denies it.

58. Beech-Nut denies the allegations of paragraph 58 of the Complaint.

59. Beech-Nut denies the allegations of paragraph 59 of the Complaint.

60. Beech-Nut denies the allegations of paragraph 60 of the Complaint.

**RESPONSE TO THE "WHEREFORE" PARAGRAPH IN  
SIXTH COUNT (ESTOPPEL - PIM LLC)**

In response to the unnumbered WHEREFORE paragraph in Sixth Count (Estoppel - PIM LLC), Beech-Nut denies that PIM LLC is entitled to any relief.

## **DEFENSES**

Without intending to shift from Plaintiffs or to accept for itself a burden of proof otherwise resting on Plaintiffs, Beech-Nut gives notice of the following defenses:

### **FIRST DEFENSE**

Each of Plaintiffs' causes of action fails to state a claim upon which relief can be granted.

### **SECOND DEFENSE**

Each of Plaintiffs' causes of action is barred, in whole or in part, by their failure to mitigate damages.

### **THIRD DEFENSE**

Each of Plaintiffs' causes of action is barred, in whole or in part, by the equitable doctrines of estoppel and waiver.

### **FOURTH DEFENSE**

Each of Plaintiffs' causes of action is barred, in whole or in party, by the Statute of Frauds.

### **FIFTH DEFENSE**

Beech-Nut hereby gives notice that it intends to rely upon such other defenses as may become available or appear during discovery in this case or otherwise, and hereby reserves the right to amend this Answer to assert any such defenses.

**COUNTERCLAIMS OF BEECH-NUT  
AGAINST PROMOTION IN MOTION AND PIM LLC**

Beech-Nut, by its attorneys, alleges upon personal knowledge as to its own acts, and upon information and belief as to all other matters, as follows:

**BACKGROUND**

1. Beech-Nut began its discussions with Promotion In Motion in or about late 2007 regarding the creation of a new line of toddler snack food to be called Fruit Nibbles.
2. Beech-Nut wanted its Fruit Nibbles product to comply with its No Junk Promise<sup>TM</sup> guidelines: no artificial colors, flavors, MSG or preservatives; all natural ingredients, plus vitamins and minerals, without unnecessary salt, added refined sugar, high-fructose corn syrup or trans fats; and a good source of vitamins and minerals for a child's healthy development.
3. During the parties' initial meeting, Plaintiffs informed Beech-Nut that they were the only companies that would be able to make such a product for Beech-Nut using their proprietary formula. Plaintiffs touted their ability to create the precise product that Beech-Nut wanted to take to market.
4. Plaintiffs are 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.
5. In or about February 2008, Promotion In Motion represented and warranted that its manufacturing subsidiary, PIM, could produce Beech-Nut's Fruit Nibbles product satisfying Beech-Nut's No Junk Promise<sup>TM</sup>.
6. At every stage of the process, Promotion In Motion represented and warranted that PIM possessed and owned the fruit re-engineering technology and formulas that would be

used to produce the Fruit Nibbles product. Beech-Nut provided guidance on only the flavor, color, texture, and size. Beech-Nut never gained access to or knowledge of the formula or process employed by PIM to produce the Fruit Nibbles product. When decisions needed to be made concerning modifications to the Fruit Nibbles' formula, Beech-Nut relied exclusively on Promotion In Motion and PIM to make them.

7. By on or about August 1, 2008, Promotion In Motion represented and warranted that PIM had created a stable formula for the Fruit Nibbles product and did not need to make any further adjustments. PIM started commercial production on August 4, 2008.

8. Relying on Plaintiffs' representations and warranties, Beech-Nut purchased the Fruit Nibbles product pursuant to purchase orders directed to and accepted by Promotion In Motion and PIM in August 2008, and made subsequent purchases in September and October 2008.

9. In late August 2008, Promotion In Motion advised Beech-Nut that PIM intended to alter the Fruit Nibbles formula. Beech-Nut relied exclusively on Promotion In Motion and PIM to determine product formulation, and PIM represented and warranted that the change would not impact the product quality or the terms of the purchase, including compliance with Beech-Nut's No Junk Promise<sup>TM</sup>.

10. The product failed to meet the agreed upon specifications for flavor, texture and size. PIM never informed Beech-Nut that the product failed to meet these specifications until Beech-Nut conducted a random sample check in late September 2008 during which Beech-Nut discovered defects and deficiencies with the finished product. Beech-Nut found that product quality differed within the same product run and observed among other product defects and deficiencies sugar crystallization, heavy starch coating, and hardness in texture. Beech-Nut also

found different pouch dates in the same shipping unit, pouch weights not controlled, and varying numbers of Fruit Nibbles in each pouch. The product breached the Plaintiffs' express warranties and was of unmerchantable quality and unfit for its intended purpose. Beech-Nut immediately notified Promotion In Motion and PIM of the defects and deficiencies, which breached the terms of Beech-Nut's purchases.

11. On or about October 1, 2008, PIM represented and warranted to Beech-Nut that its formula changes had resolved the product defects and deficiencies.

12. In addition to packaging and quality variation problems, Beech-Nut continued to experience critical quality issues with the Fruit Nibbles product sold by Promotion In Motion and PIM including: (1) sugar crystallization on surface of the product; (2) heavy starch coating; (3) dehydration; (4) hard and rubbery texture; and (5) inconsistency in oil coating, all in breach of Plaintiffs' express and implied warranties and agreement.

13. PIM admitted that the product was not of acceptable quality and it accepted a return from Beech-Nut of some previously purchased product. PIM also admitted that its use of white grape juice was a mistake on its part and represented and warranted that it would use a revised formula for its October and November productions.

14. Despite PIM's promises, representations and warranties, the Fruit Nibbles product received in October 2008 continued to show unacceptable crystallization after 30 days on the shelf. After Beech-Nut raised this defect and deficiency with PIM, PIM admitted it had failed to resolve its quality control issues remained.

15. At all times thereafter, Beech-Nut has been willing and able to return the balance of the defective product, but Plaintiffs refuse to accept the return of defective product or to refund the purchase price or any part thereof.

16. In or about late October 2008, Beech-Nut began to receive customer complaints concerning the Fruit Nibbles product.

17. After discovering continued defects and deficiencies in the product and customer complaints, Beech-Nut initiated a withdrawal of all Fruit Nibbles product from the market.

18. This national product withdrawal was the direct and proximate result of Promotion In Motion's and PIM's negligence, breach of contract, misrepresentations, and breach of warranty.

19. The national product withdrawal directly and proximately caused Beech-Nut to sustain substantial damages, including the cost of the product, the cost of withdrawal, loss of market share, decrease in sales, loss of consumer loyalty, injury to reputation, and loss of retail shelf space for the product, and other related losses, amounting to more than \$3,000,000.

#### **COUNT ONE**

##### **Breach of Express Warranty Against Promotion In Motion and PIM**

20. Beech-Nut repeats and incorporates paragraphs 1-19 hereof.

21. In agreeing to sell Fruit Nibbles to Beech-Nut, Promotion In Motion and PIM, became contractually obligated to ensure that the product met the agreed specifications concerning flavor, color, texture, size, and Beech-Nut's No Junk Promise<sup>TM</sup>.

22. Promotion In Motion and PIM breached its contract with Beech-Nut by failing to supply Fruit Nibbles that met those specifications, instead supplying product that contained sugar crystallization, a heavy starch coating, and a hard texture unfit for consumption.

23. Beech-Nut repeatedly and timely informed Promotion In Motion and PIM that they were producing and supplying defective product.

24. Beech-Nut relied on Promotion In Motion and PIM to create a formula to produce Fruit Nibbles that met with its specifications.

25. As a direct and proximate result of Promotion In Motion and PIM's breach of warranty, the defective product had to be nationally withdrawn, causing Beech-Nut to sustain extensive damages, including the cost of the product, the cost of withdraw, loss of market share, decrease in sales, loss of consumer loyalty, injury to reputation, and loss of retail shelf space for the product, and other related losses, amounting to in excess of \$3,000,000.

**COUNT TWO**

**Breach of Implied Warranty of Merchantability  
Against Promotion In Motion and PIM**

26. Beech-Nut repeats and incorporates paragraphs 1-25 hereof.

27. Promotion In Motion and PIM impliedly warranted that the Fruit Nibbles product would be of merchantable quality and fit for its ordinary purpose for which it was intended.

28. Promotion In Motion and PIM breached the implied warranty of merchantability for the reasons set forth above.

29. As a direct and proximate result of Promotion In Motion's and PIM's breach of warranty, the defective product had to be nationally withdrawn, causing Beech-Nut to sustain extensive damages, including the cost of the product, the cost of withdraw, loss of market share, decrease in sales, loss of consumer loyalty, injury to reputation, and loss of retail shelf space for the product, and other related losses, amounting to in excess of \$3,000,000.

**COUNT THREE**

**Breach of Implied Warranty: Fitness for a Particular Purpose  
Against Promotion In Motion and PIM**

30. Beech-Nut repeats and incorporates paragraphs 1-29 hereof.

31. Promotion In Motion and PIM impliedly warranted that the Fruit Nibbles product in question would be of merchantable quality and fit for the particular purpose for which it was intended.

32. Defendants breached the implied warranty of fitness for a particular purpose for the reasons set forth above.

33. As a direct and proximate result of Promotion In Motion and PIM's breach of warranty, the defective product had to be nationally withdrawn, causing Beech-Nut to sustain extensive damages, including the cost of the product, the cost of withdraw, loss of market share, decrease in sales, loss of consumer loyalty, injury to reputation, and loss of retail shelf space for the product, and other related losses, amounting to in excess of \$3,000,000.

#### **COUNT IV**

##### **Negligence Against Promotion In Motion and PIM**

34. Beech-Nut repeats and incorporates paragraphs 1-32 hereof.

35. The damages sustained by Beech-Nut due to the national product withdrawal from the market place were proximately caused by the negligence of Promotion In Motion and PIM, including: (a) manufacturing, distributing, selling, and supplying Fruit Nibbles in a defective condition; (b) failing to properly and adequately inspect the product in such a manner to prevent resulting damages; (c) failing to discover the defects in the product; (d) failing to exercise the requisite degree of care and caution in the manufacture, inspection, sale and distribution of the defective product; (e) failing to warn Beech-Nut of the defects in the product when they knew or should have known of the defects and that they may have constituted a danger; (f) failing to properly select, hire, supervise and/or direct the activities of any and all employees, agents, and subcontractors involved in the manufacturing and inspection of the product; (g) misrepresenting that the product being supplied met with Beech-Nut's required specifications; and (h) otherwise failing to use due care.

36. Promotion In Motion's and PIM's actions amounted to negligence because they failed to meet the requisite standards of care by failing to insure that the product they were selling, producing, and supplying was appropriately manufactured and proper for resale.

37. As a direct and proximate result of Promotion In Motion and PIM's negligence, the defective product had to be nationally withdrawn, causing Beech-Nut to sustain extensive damages, including the cost of the product, the cost of withdraw, loss of market share, decrease in sales, loss of consumer loyalty, injury to reputation, and loss of retail shelf space for the product, and other related losses, amounting to in excess of \$3,000,000.

38. All such injuries and harms were foreseeable by Promotion In Motion and PIM.

WHEREFORE, Beech-Nut, demands judgment in its favor and against Promotion In Motion and PIM for damages together with pre- and post-judgment interest, costs of this action, and such other and further relief as this Court deems appropriate.

Dated: April 7, 2009

BLOOM KARINJA & DILLON, P.C.

By:   
PAUL J. DILLON

*Attorneys for Defendant and counter claimant  
Beech-Nut Nutrition Corporation*

Of Counsel:

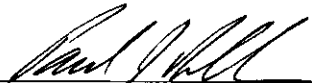
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**CERTIFICATION PURSUANT TO LOCAL CIVIL RULE 11.2**

Pursuant to Local Civil Rule 11.2, it is hereby certified that the matter in controversy is not the subject of any other action pending in any court, or any pending arbitration or administrative proceeding.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: April 7, 2009

  
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PAUL J. DILLON