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Promotion In Motion, Inc. and PIM Brands, LLC

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC. and PIM BRANDS, LLC,	:	Circuit Court Docket No:
Plaintiffs,	:	On appeal from:
v.	:	Civil Action No. 09-1228 (WJM) (MF)
BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY,	:	(Filed Electronically)
Defendant.	:	

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiffs Promotion In Motion, Inc. and PIM Brands, LLC ("Plaintiffs" or "Appellants"), by and through their undersigned attorneys, hereby appeal to the United States Court of Appeals for the Third Circuit from (a) the Judgment entered by the Honorable William J. Martini, U.S.D.J. in this action on October 17, 2012, awarding Defendant Beech-Nut Nutrition Corporation, a Hero Group Company ("Defendant" or "Appellee"), the sum of $2,511,955.18, following a jury trial [District Court Docket Numbers 55 and 56], copies of which are collectively attached hereto as Exhibit A; (b) the Order entered by the Honorable William J.

Martini, U.S.D.J. on December 20, 2011, granting the Defendant's Motion for Summary Judgment Dismissing the Complaint [District Court Docket Numbers 34 and 35], copies of which are collectively attached hereto as Exhibit B; and (c) the Order entered by the Honorable William J. Martini, U.S.D.J., dated March 5, 2012, denying the Plaintiffs' Motion for Reconsideration of the December 20, 2011 Order [District Court Docket Numbers 38 and 39], copies of which are collectively attached hereto as Exhibit C.

The parties to the Orders and Judgment appealed from, and the names and addresses of their respective attorneys, are as follows:

Appellants:

Promotion In Motion, Inc., and
PIM Brands, LLC

McCarter English, LLP
William D. Wallach, Esq.
100 Mulberry Street
Newark, New Jersey 07102

Appellee:

Beech-Nut Nutrition Corporation, a Hero Group Company

King & Spalding LLP
Karen R. Kowalski, Esq.
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New York, New York 10036

&

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Paul J. Dillon, Esq.
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Pursuant to Third Circuit Local Appellate Rule 3.1, a copy of this Notice is being provided to the Honorable William J. Martini, United States District Court.

McCARTER & ENGLISH, LLP
Attorneys for Plaintiffs

By: /s/ William D. Wallach
WILLIAM D. WALLACH
A Member of the Firm
wwallach@mccarter.com
100 Mulberry Street
Newark, New Jersey 07102

Dated: November 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party via ECF.

/s/ William D. Wallach

Dated: November 14, 2012
Newark, New Jersey

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC., PIM BRANDS, LLC, **Plaintiffs,** **v.** **BEECH-NUT NUTRITION CORPORATION, *a HERO GROUP CORPORATION*,** **Defendant.**	Civil No. 09-1228 **JUDGMENT**

This matter comes before the Court on Beech-Nut Nutrition Corporation's ("Beech-Nut's") application for an award of pre-judgment interest; for the reasons set forth in the accompanying Opinion, and good cause shown,

IT IS on this 17th day of October, 2012,

ORDERED that Beech-Nut's application is **GRANTED IN PART** and **DENIED IN PART**; and it is further

ORDERED that pursuant to the jury's September 12, 2012 verdict, Beech-Nut is awarded $2,222,000.00 in damages and $289,955.18 in prejudgment interest for a total award of $2,511,955.18.

/s/William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC., PIM BRANDS, LLC, **Plaintiffs,** **v.** **BEECH-NUT NUTRITION CORPORATION, *a HERO GROUP CORPORATION*,** **Defendant.**	Civil No. 09-1228 **OPINION**

This matter comes before the Court on Defendant/Counterclaimant Beech-Nut Nutrition's ("Beech-Nut's") application for an award of pre-judgment interest. Plaintiffs/Counterdefendants Promotion in Motion, Inc. and PIM Brands, LLC (collectively, "PIM") dispute the amount sought by Beech-Nut. For the reasons set forth below, the Court will grant Beech-Nut's application and award it prejudgment interest in the amount of $289,955.18.

I. BACKGROUND[1]

This matter concerned a dispute between PIM and Beech-Nut over who was financially responsible for approximately 230,000 cases of unsold Fruit Nibbles, a brand of gummy fruit snacks manufactured by PIM to be sold under the Beech-Nut brand.

For purposes of this motion, it is sufficient to note the following: Beech-Nut paid PIM for those Fruit Nibbles and began selling them at retail under the Beech-Nut brand in the Fall of 2008. After receiving a number of serious complaints from consumers and retailers, Beech-Nut withdrew all PIM-produced Fruit Nibbles from the market. Although Beech-Nut advised PIM of its decision to do so on

[1] A more complete history of the facts leading up to that award is set forth in the Court's December 20, 2011 Letter Opinion. (ECF No. 34.)

December 2, 2008, it is unclear when Beech-Nut formally requested reimbursement from PIM.

Through at least mid-January 2009, the parties continued to discuss who was financially responsible for the unsold Fruit Nibbles, as well Beech-Nut's desire to re-launch Fruit Nibbles with PIM, which was contingent on resolution of that issue. Thereafter, on February 23, 2009, Beech-Nut told PIM that it was going to re-launch Fruit Nibbles without PIM.

In response, on February 27, 2009, PIM commenced a breach of contract action against Beech-Nut in New Jersey Superior Court. On March 18, 2009, Beech-Nut removed this matter to federal court on the basis of diversity jurisdiction and asserted its own counterclaims against PIM for breach of contract.

The case was tried before a jury beginning on September 10, 2012. Prior to trial, the Court ruled that the terms set forth in four purchase orders governed the rights and liabilities of the parties for the unsold Fruit Nibbles. Those purchase orders contained language stating that they would "be construed in accordance with the laws of the state of New York." (Purchase Orders, ¶ 17.)

On September 12, 2012, a jury awarded $2,222,000.00 in damages to Beech-Nut.[2] In addition to its damages award, Beech-Nut is now seeking an award of pre-judgment interest. There are three points of contention between the parties regarding that request.

1. Whether New York or New Jersey law governs Beech-Nut's application for pre-judgment interest.
2. The relevant time period for which the Court should award prejudgment interest.
3. Whether the Court should compound any pre-judgment interest it awards.

II. DISCUSSION

1. New Jersey Law Governs Beech-Nut's Application for Pre-Judgment Interest

The parties dispute which state's pre-judgment interest law controls. Beech-Nut asserts that based on the terms of the purchase orders, New York's prejudgment interest law, which awards a higher interest rate and affords the Court less equitable discretion, controls. PIM, on the other hand, argues that because this matter was brought in New Jersey, New Jersey's prejudgment interest law governs.

[2] PIM does not challenge that validity of that amount.

A federal district court sitting in diversity applies the forum state's law with respect to prejudgment interest, even when the parties agreed to be bound by the laws of another state. *Gleason v. Norwest Mortg., Inc.*, 253 Fed. Appx. 198, 203-04 (3d Cir. 2007). *See also, De Puy v. Biomedical Engineering Trust*, 216 F.Supp. 358, 382 (D.N.J. 2001), *aff'd sub. Nom., Pappas v. De Puy Orthopaedics, Inc.*, 33 Fed.Appx. 35 (3d Cir. 2002). Thus, although the four purchase orders include language stating that are to be construed under New York law, New Jersey law governs Beech-Nut's application for an award of pre-judgment interest.

Under New Jersey law, this Court "has discretion [in a contract action] to award prejudgment interest in accordance with equitable principles." *Gleason v. Norwest Mortg., Inc.*, 253 Fed.Appx. 198, 203–04 (3d Cir.2007) at 204 (*citing County of Essex v. First Union National Bank*, 186 N.J. 46, 891 A.2d 600, 608 (2006)). As explained by the New Jersey Supreme Court in *Litton Industries, Inc. v. IMO Industries, Inc.*, 200 N.J. 372 (2009):

> "the award of prejudgment interest in a contract case is within the sound discretion of the trial court. Similarly, the rate at which prejudgment interest is calculated is within the discretion of the court. We have explained that the primary consideration in awarding prejudgment interest is that the defendant has had the use, and the plaintiff has not, of the amount in question; and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled."
>
> *Id.* at 390 (quoting *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 N.J. 474, 506 (1974)) (internal citations omitted).

Prejudgment interest should neither be imposed as a punitive measure, *New Jersey Mfrs. Ins. Co. v. Nat'l Cas. Co.*, 393 N.J.Super. 340, 354 (App. Div. 2007), nor should it be withheld due to the unsuccessful party's "honest disputation over legal liability," *Rova Farms*, 65 N.J. at 506. *See also Unihealth v. U.S. Healthcare, Inc.*, 14 F.Supp.2d 623, 642 (D.N.J. 1998) ("The purpose of awarding prejudgment interest is to compensate the claimant for the loss of income the money owed would have earned if payment had not been delayed.").

Bearing the above considerations in mind, the Court finds that Beech-Nut is entitled to an award of pre-judgment interest in this contract action. And while equitable principles ultimately govern this Court's determination on the amount of pre-judgment interest to award, this Court looks to New Jersey Court Rule 4:42–11, which sets forth the manner for calculating awards of pre-judgment interest in tort actions and post-judgment interest generally, as a guide for calculating that amount. *Litton* at 390–91.

2. Beech-Nut is Entitled to Pre-Judgment Interest Beginning on February 27, 2009, the Date the PIM Filed Suit Against Beech-Nut

The parties disagree on the appropriate pre-judgment interest accrual date. Beech-Nut asserts that the accrual date is December 2, 2008, the date it notified PIM that it was withdrawing Fruit Nibbles from the market. PIM asserts that the accrual date is February 27, 2009, when PIM commenced suit against Beech-Nut.

Generally, the law imposes a duty to pay interest from the time payment of principal is due. *Munich Reinsurance America, Inc. v. Tower Ins. Co. of New York*, No. 09-2598, 2012 WL 1018799 (D.N.J. Mar. 26, 2012) (citing cases). However, in choosing the prejudgment interest accrual date in this matter, the Court must also be guided by equitable principles. Pressler & Verniero, Current N.J. Court Rules, comment 3.1 on R. 4:42–11 (2012) (*citing County of Essex v. First Union*, 186 N.J. 46, 61-62 (2006).

On the undisputed record before the Court, Beech-Nut informed PIM that it was withdrawing all Fruit Nibbles from the market on December 2, 2008. However, the facts do not show that Beech-Nut demanded, much less expected, full compensation on that date. Tellingly, through at least January, 2009, Beech-Nut and PIM continued to discuss working together on a Fruit Nibbles re-launch, which was contingent upon, among other things, resolving who was financially responsible for the 230,000 cases of unsold Fruit Nibbles. Furthermore, it was PIM – not Beech-Nut – who first commenced litigation when it filed its breach of contract action after Beech-Nut informed PIM that it was terminating their business relationship.

On these facts, the Court finds that February 23, 2009, the date PIM commenced suit against Beech-Nut is the appropriate accrual date. *See Munich Reinsurance*, 2012 WL 1018799 (D.N.J. Mar. 26, 2012) (accrual date was date breach of contract action was commenced in light of the following considerations: under Rule 4:42–11(iii)(b) the accrual date begins on latter of: (1) the date of suit is commenced or (2) six months after the date the cause of action arises; the goal of awarding prejudgment interest is to ensure plaintiff receives payment for money it would presumably have earned if the payment had not been delayed; and that defendant disputed the amount owed until certain questions were answered during account reconciliation process).

Accordingly, the Court will award pre-judgment interest for the period beginning on February 27, 2009 and ending on October 17, 2012, the date of entry of judgment. Pressler & Verniero, Current N.J. Court Rules, comment 1.2.2 on R. 4:42–11 (2012) (post-judgment period runs from date judgment is entered).

3. Compound Interest is Not Appropriate

Finally, the parties disagree on the whether Beech-Nut is entitled to earn compound interest on its prejudgment interest award. Beech-Nut asserts that it is entitled to compound interest; PIM asserts that Beech-Nut is only entitled to earn simple interest.

Generally, in New Jersey, absent unusual circumstances, an award of prejudgment interest "shall bear simple interest." Pressler & Verniero, Current N.J. Court Rules, comment 3.1 on R. 4:42–11 (2012). *See also Johnson v. Johnson*, 390 N.J. Super. 269, 276 (App. Div. 2007) ("Rule 4:42-11(a) prescribes that any order to pay money bears simple interest. Admittedly, the same rule allows a judge to depart from this rule; however, compound interest is clearly the exception rather than the rule.").

Here, although Beech-Nut asserts that it is entitled to earn compound interest, it has failed to point to any unusual circumstances in this litigation which support a basis to grant such an award. Accordingly, Beech-Nut's award of prejudgment interest will be calculated without compounding the interest.

4. Calculating the Amount of Pre-Judgment Interest Owed

The parties agree on the pre-judgment interest rates for 2009, 2010, 2011, 2012.[3] Based on those rates, the Court finds that Beech-Nut is entitled to pre-judgment interest ("PJI") in the following amounts:

Year	Interest Rate x $2,222,000	= Annual PJI	Per Diem Rate
2009	6.0% x $2,222,000	=$133,320	$365.26
2010	3.5% x $2,222,000	=$77,770	$213.06
2011	2.5% x $2,222,000	=$55,550	$152.19
2012	2.5% x $2,222,000	=$55,550	$152.19

Year	Per Diem x Days	= PJI Owed By Year
2009	$365.26 x 308 days	= $112,500.08
2010	$213.06 x 365 days	=$77,770.00
2011	$152.19 x 365 days	=$55,550.00
2012	$152.19 x 290 days	=$44,135.10

[3] Those rates are consistent with New Jersey Court Rule 4:42-11(a)(iii).

Total PJI Owed

=$289,955.18

III. CONCLUSION

For the foregoing reasons, the Court will enter Judgment against PIM and in favor of Beech-Nut in the amount of $2,511,955.18, comprised of the following: $2,222,000.00 in damages and $289,955.18 in prejudgment interest.

/s/William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: October 17, 2012

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC., and PIM BRANDS, LLC, **Plaintiffs,** **v.** **BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY,** **Defendant.**	09-CV-1228 (WJM) **ORDER**

THIS MATTER comes before the Court on the motion for summary judgment filed by Defendant Beech-Nut Nutrition Corporation; and for the reasons stated in the accompanying Letter Opinion; and for good cause appearing,

IT IS on this 20th day of December, 2011, hereby,

ORDERED that Defendant's motion to dismiss Counts One through Six of Plaintiffs' Complaint is **GRANTED**;

FURTHER ORDERED that Plaintiffs' Complaint is **DISMISSED**;

FURTHER ORDERED that Defendant's motion for an award of $3,454,140.45 for breach of warranty damages is **DENIED** pending the factual determination whether PIM's breaches constituted "substantial impairment";

FURTHER ORDERED that Defendant's motion for an award of $1,659,601.00 for lost profits on future sales caused by PIM"s negligence is **DENIED**;

FURTHER ORDERED that Defendant's Fourth Counterclaim is **DISMISSED** .

FURTHER ORDERED that Defendant's First, Second, and Third Counterclaims remain open.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARTIN LUTHER KING JR. FEDERAL BLDG. & U.S. COURTHOUSE
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WILLIAM J. MARTINI
JUDGE

LETTER OPINION

December 20, 2011

William D. Wallach
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(*Attorney for Plaintiffs Promotion in Motion, Inc. and PIM Brands, LLC*)

Paul J. Dillon
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(*Attorney for Defendant Beech-Nut Nutrition Corporation*)

RE: Promotion in Motion, Inc. v. Beech-Nut Nutrition Corporation
Civ. No. 09-1228 (WJM)

Dear Counsel:

This matter comes before the Court on Defendant/Counter-Claimant Beech-Nut Nutrition Corporation's ("Beech-Nut's") motion for summary judgment. Plaintiffs Promotion in Motion, Inc. and PIM Brands LLC's (hereinafter, collectively "PIM") oppose the motion. For the reasons stated below, Defendant's motion is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

PIM is a manufacturer of popular snack foods. Defendant sells Beech-Nut branded foods to third parties. In late 2007, the parties began discussions about producing a toddlers' all natural gummy fruit snack called Fruit Nibbles for retail under the Beech-Nut brand.[1] Throughout the course of their dealings, the parties anticipated signing a two-year "Co-Pack" contract to govern their relationship. However, the parties were unable to agree to certain terms, and no long-term agreement was signed.

Despite having no long-term contract in place, PIM produced a sample batch of Fruit Nibbles which met Beech-Nut's color, texture and "bite" specifications. Based on approval of that sample, PIM began mass producing Fruit Nibbles in August 2008. PIM continued production until at least November 11, 2008. Through four signed Purchase Orders dated May 9, August 5, September 8, and October 13, 2008 (the "Purchase Orders"), Beech-Nut accepted and paid for approximately 230,000 cases of Fruit Nibbles.

Several provisions of those Purchase Orders bear on this matter:

> 1. Entire Agreement. The terms and conditions set forth in [these orders] constitute the entire agreement between the parties . . . and supersede . . . all previous verbal or written representations, agreements and conditions [unless modified in writing and signed by all parties].
> . . . .
> 4. Quality and Inspection. [PIM] warrants that the goods . . . furnished under the order will comply with the specifications, are fit for the purpose intended, merchantable and free from defects of material and workmanship and . . . [and upon] discovery of any defect, all rejections will be returned at [PIM's] risk and expense . . . [PIM] acknowledges and agrees that [Beech-Nut] shall be entitled to all warranties and remedies as provided by the Uniform Commercial Code ("U.C.C.").
> . . . .
> 17. This purchase order shall be construed in accordance with the laws of the State of New York as such laws are applied to contracts made to be fully performed in New York.
>
> (Kowalski Declar., Ex. 13.)

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[1] PIM had experience manufacturing a similar product under the Welch's "Fruit Snack" brand.

In September 2008, Beech-Nut received its first delivery of Fruit Nibbles, which it sold to third parties. Shortly thereafter, Beech-Nut began receiving hundreds of complaints about Fruit Nibbles.[2] Although it is unclear exactly how widespread the problems with the shipped Fruit Nibbles were, on December 5, 2008, Beech-Nut instituted a national product withdrawal of all PIM-manufactured Fruit Nibbles.[3]

From mid-January through February 2009, the parties discussed issues related to the product recall. Beech-Nut maintained that these problems were PIM's responsibility; PIM, in turn, denied responsibility and declined to accept Fruit Nibbles returns from Beech-Nut.[4] The parties also discussed relaunching Fruit Nibbles in Spring 2009, but understood that any future business relationship was predicated on resolving issues related to the recall. Ultimately, the parties did not resolve those issues and failed to "reach a co-packing or other contract relating to the prospective re-launch." (56.1 Statement ¶ 42.) On February 23, 2009, Beech-Nut advised PIM that it was going to use alternate suppliers for Fruit Nibbles.

On February 27, 2009, PIM sued Beech-Nut in Superior Court, asserting claims against Beech-Nut for breach of contract, breach of the implied covenant of good faith and fair dealing, and contract by estoppel.[5] On March 21, 2011, Beech-Nut removed this action to District Court, where it asserted counterclaims against PIM for negligence and for breaches of express and implied warranties under the U.C.C.

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[2] A sampling of the complaints includes: "powdery coating, dried out product, shriveled appearance, moldy and wilted appearance, fermented odor, terrible smell, hard texture, choking hazard, funny taste, sour odor, wrinkled, raisin-like appearance, bitter taste, bad smell, covered with mold, horrible smell, green white, and grey coating, looks like dead toes, old, nasty, discolored, crusty, gross, rotten, stale, dry, difficult to chew, spoiled smell, horrid smell, disgusting, waxy taste, caused stomach ache, vomiting, and diarrhea, etc." (Stipulated Fact 34.)

[3] From the recall in December 2008, until Spring 2009, Beech-Nut had no Fruit Nibbles product to sell.

[4] In U.C.C. terms, Beech-Nut attempted to revoke its acceptance of the goods. *See* U.C.C. § 608(1) ("The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it.")

[5] Counts One, Two, and Three assert the three respective claims by Promotion in Motion, Inc. against Beech-Nut; in Counts Four, Five, and Six, PIM Brands LLC reasserts the same claims.

Presently, Beech-Nut moves for summary judgment dismissing all of PIM's claims and granting all of its counterclaims. Additionally, Beech-Nut now moves for an award of $3,454,140.45 for breach of warranty damages recoverable under the U.C.C., and for an award of $1,659,601.00 for lost profits on future sales caused by PIM's negligent manufacture of Fruit Nibbles.[6]

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper where the materials of record show "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Beyer v. County of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008). In the present motion, the Court must consider all facts and their reasonable inferences in the light most favorable to PIM, the non-moving party. Summary judgment will be improper if "the evidence is such that a reasonable jury could return a verdict for [PIM]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. The Terms of the Purchase Orders Govern the Rights and Liabilities of the Parties for All Fruit Nibbles PIM Shipped to Beech-Nut

Beech-Nut purchased approximately 230,000 cases of Fruit Nibbles from PIM, as memorialized by the signed Purchase Orders. As a matter of law, the Court finds that the Purchase Orders are valid and enforceable contracts.[7] U.C.C. § 2-201; *Kay-Bee Toys Corp. v. Winston Sports Corp.*, 214 A.D. 2d 457, 458 (N.Y. App. Div. 1995) ("purchase orders may create a binding contract").

Pursuant to the Purchase Orders' express terms, they "constitute the entire agreement between the parties . . . and supersede . . . all previous verbal or written representations, agreements and conditions [unless modified in writing and signed by all parties]." (¶ 1.) *See, e.g. Montefiore Medical Center v. Crest Plaza LLC*, 2009 WL 1675994, at *12 (N.Y. Sup. Ct. 2009) (noting that New York courts strictly enforce merger clauses and denying admission of contradictory evidence where merger clause stated that lease alone fully expressed the parties' agreement, and could not be modified without a signed writing).

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[6] Recovery of lost profits on future sales are not recoverable under the U.C.C.

[7] The last purchase order was signed on October 4, 2008. No PIM-manufactured Fruit Nibbles were ordered by Beech-Nut after that date.

Pursuant to the Purchase Orders, PIM warranted that all shipped Fruit Nibbles would "comply with the specifications, [be] fit for the purpose intended, merchantable and free from defects of material and workmanship." (¶ 4.) Because the Purchase Orders were never modified by a subsequent signed writing, the terms therein govern the rights and obligations of PIM and Beech-Nut with respect to the 230,000 cases of Fruit Nibbles purchased by Beech-Nut.[8] Accordingly, the Court finds that PIM bears the "risk and expense" for any defective Fruit Nibbles purchased by Beech-Nut. (¶ 4.)

C. Whether PIM's Breaches Constituted "Substantial Impairment" is a Disputed Factual Issue Which Precludes Awarding Beech-Nut Breach of Warranty Damages on Summary Judgment

It is undisputed that shortly after placing Fruit Nibbles on the market, Beech-Nut began receiving hundreds of complaints about the quality of the product. Thereafter, Beech-Nut determined that all shipped Fruit Nibbles were unsaleable and instituted a national recall of the product. After the recall, Beech-Nut attempted to revoke its acceptance of all Fruit Nibbles by returning them to PIM. However, PIM declined to accept their return.

Under the U.C.C., Beech-Nut may have been within its rights to revoke its acceptance of all shipped Fruit Nibbles. However, this right only arises when a products' non-conformity substantially impairs the value of the whole shipment. U.C.C. § 2-608(1). Substantial impairment is a factual issue. *SCD RMA, LLC v. Farsighted Enterprises, Inc.*, 591 F. Supp. 2d 1131, 1138 (D. Hi. 2008) (*citing* 3 Williston on Sales § 25-15); *Hubbard v. UTZ Quality Foods, Inc.*, 903 F. Supp. 444, 451-52 (W.D.N.Y. 1995) (noting that "whether goods conform to contract terms is a question of fact" and holding a trial to decide if potatoes failed to meet buyer's contracted-for color specifications and whether such failure constituted a substantial impairment of the installments); *Glennville Elevators , Inc. v. Beard*, 384 S.C. 335, 338 (S.C. Ct. App. 1985) (whether delivery of

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[8] In spite of unequivocal warranty language in ¶ 4, PIM now wishes to introduce extrinsic evidence demonstrating that they did not provide any warranties to Beech-Nut for the shipped Fruit Nibbles. (Pl.'s Br. in Opp. to Def.'s Mot. for Summ. J. 28, ECF No. 31-1.) Admission of such evidence, which seeks to directly contradict the warranty language in the Purchase Orders, is barred by the Parole Evidence Rule. U.C.C. § 2-202; *Sinstershoe, Inc. v. Banker Trust Company*, 569 N.Y.S. 2d 333, 336 (N.Y. 1991) (holding that confirmation slip sent by bank to manufacturer, which signed and returned it, was intended to be final expression of parties' agreement as to terms stated and thus, U.C.C. § 2-202 precluded manufacturer from producing parole evidence of contradictory terms).

under-weight and under-moist corn bushels substantially impaired value of whole contract is a question of fact); *RIJ Pharmaceuticals v. IVAX Pharmaceuticals, Inc.*, 322 F.Supp.2d. 406, 416 (S.D.N.Y. 2004) (declining to determine on summary judgment that shipments of medication were non-conforming as a question of fact).

Turning to the facts in this case, it is clear that at least some of the shipped Fruit Nibbles breached PIM's express warranties.[9] However, there is also evidence suggesting that a sizeable portion of the Fruit Nibbles conformed with Beech-Nut's specifications. (Wallach Cert. Ex. J, (Nov. 21, 2008 e-mail from Shen-Young Chang stating that "products [shipped to Safeway] very good at this stage."); Wallach Cert., Ex. L. (Dep. of Frank McSorley at 56:4-7 stating that "there was many product even up until the last case that I produced for them that . . . was very good.").) Moreover, the record lacks evidence unequivocally quantifying the percentage of the product that was defective. Nor does it show just how substantial the variance was between the shipped Fruit Nibbles and the sample produced in August 2008.

On these facts, and affording all favorable inferences to PIM, the Court finds that a reasonable jury could conclude that hundreds of complaints about non-conforming Fruit Nibbles in 230,000 cases did not substantially impair the value of the entire shipment to Beech-Nut such that it was entitled to revoke acceptance of all Fruit Nibbles. *See Urquhart v. Philbor Motors, Inc.*, 780 N.Y.S.2d 176, 178 (N.Y. App. Div. 2004) (summary judgment that vehicle conformed with terms of sales contract was improper where plaintiff raised triable issue that vehicle designation substantially impaired its value to plaintiff). Accordingly, Beech-Nut's motion for summary judgment that it be awarded $3,454,140.45 in U.C.C. damages arising from PIM's contractual breaches - implicitly predicated on the Court making a factual determination that those breaches substantially impaired the value of the whole shipment - will be **DENIED**.

D. Beech-Nut's Claim for Monetary Recovery of Non-U.C.C. Damages Premised on a Separate Negligence Theory is Barred by the Economic Loss Rule

Beech-Nut additionally moves for a declaration that PIM negligently manufactured Fruit Nibbles.[10] Beech-Nut further moves for an award of $1,659,601.00, which

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[9] Because breaches are cumulative, at this time, the Court will not address Beech-Nut's assertions that PIM breached agreed-upon packaging specifications.

[10] To the extent Beech-Nut asserts that PIM's negligence falls outside the scope of their contractual relationship, the law of the forum where the act was committed governs. In this

represents the profits Beech-Nut lost when it had no Fruit Nibbles to sell for five months after it stopped buying them from PIM. Such recovery is not available to Beech-Nut under the U.C.C. As such, the Economic Loss Rule, ("E.L.R."), which limits a commercial buyer's recovery for foreseeable damages at the core of a commercial contract[11] to those remedies available under the U.C.C., bars Beech-Nut from receiving additional recovery for its separate tort claim. *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555, 561 (1985); *Paramount Aviation Corp v. Agusta*, 288 F.3d 67 (3d Cir. 2002); *Travelers Indemnity Company v. Damman & Co., Inc.*, 592 F.Supp.2d 752, 762 (D.N.J. 2008); (E.L.R. barred buyer's separate tort claim against the seller of defective vanilla beans). Accordingly, Beech-Nut's counterclaim seeking recovery for future lost profits caused by PIM's negligent manufacture of Fruit Nibbles will be **DENIED**.[12]

E. Dismissal of PIM's Complaint is Proper Because the Undisputed Facts Show PIM Cannot Establish a *Prima Facie* Case for Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing, or Contract by Estoppel

As explained *supra*, the rights and obligations of Beech-Nut and PIM for all shipped Fruit Nibbles are governed by the terms of the Purchase Orders. There is no

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case, the alleged negligent manufacturing occurred at PIM's New Jersey facilities. Accordingly, the Court relies on New Jersey law. *Nubenco Enterprises v. Inversiones Barberena*, S.A., 963 F. Supp. 353, 373-74 (D.N.J. 1997). The parties briefs on the issues, which fail to cite to New York cases when discussing the Economic Loss Rule appear to implicitly recognize this. Nonetheless, the Economic Loss Rule is similarly applied under New York law. *See, e.g., Manhattan Motorcars, Inc. v. Automobili Lamborghini, S.p.A.* 244 F.R.D. 204, 220 (S.D.N.Y. 2007).

[11] Clearly, the parties understood there were risks that bad Fruit Nibbles would be produced. This is exactly the type of foreseeable damage at the core of the commercial contract whose recovery is limited by the E.L.R.

[12] Beech-Nut's attempts to show that the E.L.R. does not apply to this case prove unconvincing. It first argues that the Rule is inapplicable because the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 342(a), creates a separate and independent tort duty. The Court is at pains to see why that is so as § 342(a) defines "adulterated food." Beech-Nut further asserts that PIM's superior knowledge and skill created an independent tort duty precluding use of the E.L.R. That argument also fails. *See Ferrell v. America's Dream Homes, Inc.*, 2010 WL 3075578, at *11 (N.J. Sup. Ct. App. Div. 2010) (trial court properly applied E.L.R. on summary judgment to dismiss Plaintiff's negligence claim rooted in theory that builder's experience created an independent tort duty.)

other signed agreement between the parties. It is undisputed that PIM produced and shipped Fruit Nibbles to Beech-Nut despite having no long-term agreement in place. Moreover, the parties agree that they never entered into a contract after the product recall. Based on these facts, the Court finds that, excluding the Purchase Orders, there was no "meeting of the minds" sufficient to create an enforceable sales contract governing additional transactions between the parties.[13] *AMCAN Holdings v. Canadian Imperial Bank of* Commerce, 894 N.Y.S.2d 47, 50 (N.Y. Sup. Ct. App. Div 2010); *see also RIJ Pharmaceuticals v. IVAX Pharmaceuticals, Inc.*, 322 F.Supp.2d 406, 416 (S.D.N.Y. 2004) (merchants' unwritten arrangement that seller would keep additional inventory to fill buyer's orders on a timely basis did not constitute sales agreement for continuing purchase of products).

Because PIM does not allege that Beech-Nut breached the terms of the Purchase Orders, and those are the only enforceable contracts between the parties, Counts One and Four of PIM's complaint alleging breach of an express contract must be dismissed. Similarly, because a *prima facie* claim of breach of the implied covenant of good fair and fair dealing is predicated upon the existence of such a contract, Counts Two and Five of PIM's complaint must similarly be dismissed. *American-European Art Assoc. v. The Trend Gallaries, Inc.*, 641 N.Y.S.2d 835, 836 (N.Y. App. Div. 1996).

Finally, PIM's claims alleging contract by estoppel will also be dismissed. To establish a *prima facie* claim of contract by estoppel, PIM must show a clear and definite promise by Beech-Nut, made with the expectation that PIM would rely on that promise, and that PIM relied on that promise to its detriment. *Kaye v. Grossman*, 202 F.3d 611, 615 (2d Cir. 2000). The record fails to show an enforceable promise by Beech-Nut to purchase additional Fruit Nibbles beyond those in the Purchase Orders. Even assuming such a promise existed, it is undisputed that the parties understood numerous issues needed to be resolved regarding the shipped Fruit Nibbles prior to the parties engaging in further commercial dealings. Thus, any reliance by PIM on such a statement would be unreasonable. *See G & F Assoc. Co. v Brookhaven Beach Health Related Facility*, 671 N.Y.S.2d 510, 511 (N.Y. S. Ct. App. Div. 1998) (granting summary judgment on plaintiff's promissory estoppel claim because the alleged oral promise was conditional, and thus any reliance by plaintiff was therefore unreasonable.) As such, Counts Three and Six of PIM's, complaint will also be dismissed. Accordingly, Beech-Nut's motion seeking dismissal of PIM's complaint in its entirety will be **GRANTED**.

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[13] Although not singularly dispositive of this issue, New York's Statute of Frauds generally requires any contract for the sale of goods over $500.00 to be in writing to be enforceable. U.C.C. § 2-201(1).

III. CONCLUSION

Based on the foregoing, Beech-Nut's motion for summary judgment will be **GRANTED in PART** and **DENIED in PART**. Specifically, those portions of Beech-Nut's motion seeking dismissal of all counts in PIM's complaint will be **GRANTED**. Furthermore, because factual issues remain as to whether PIM's breaches constitute substantial impairment, those portions of Beech-Nut's motion seeking recovery of damages from those breaches will be **DENIED**. Finally, those portions of Beech-Nut's motion seeking additional recovery for future lost profits caused by PIM's negligent manufacture of Fruit Nibbles will be **DENIED** and Beech-Nut's Fourth Counterclaim will be dismissed.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC., and PIM BRANDS, LLC, **Plaintiffs,** **v.** **BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY,** **Defendant.**	09-CV-1228 (WJM) **ORDER**

THIS MATTER comes before the Court on the Motion for Reconsideration filed by Plaintiffs Promotion in Motion, Inc. and PIM Brands, LLC (collectively "PIM"); and for the reasons stated in the accompanying Opinion; and for good cause appearing,

IT IS on this 5th day of March, 2012, hereby,

ORDERED that PIM's motion for reconsideration is **DENIED**;

s/William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC., and PIM BRANDS, LLC, **Plaintiffs,** **v.** **BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY,** **Defendant.**	**Civ. No. 09-1228** **OPINION** **HON. WILLIAM J. MARTINI**

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

This matter comes before the Court on Plaintiffs Promotion in Motion, Inc. and PIM Brands, LLC's (collectively, "PIM's") motion for reconsideration of the Court's December 20, 2011 Letter Opinion and Order (ECF Nos. 34, 35) pursuant to Local Civil Rule 7.1(i). For the reasons stated below, PIM's motion for reconsideration is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

This matter concerns a dispute between PIM and Defendant/Counterclaimant Beech-Nut Corporation, Inc. ("Beech-Nut") over who is financially responsible for the roughly 230,000 cases of unsold Fruit Nibbles, a brand of gummy fruit snacks manufactured by PIM to be sold under the Beech-Nut brand. The Court refers to its December 20, 2011 Letter Opinion for the relevant factual background:

PIM is a manufacturer of popular snack foods. Defendant sells Beech-Nut branded foods to third parties. In late 2007, the parties began discussions about producing a toddlers' all natural gummy fruit snack called Fruit Nibbles for retail under the Beech-Nut brand. Throughout the course of their dealings, the parties anticipated signing a two-year "Co-Pack" contract to govern their relationship. However, the parties were unable to agree to certain terms, and no long-term agreement was signed.

Despite having no long-term contract in place, PIM produced a sample batch of Fruit Nibbles which met Beech-Nut's color, texture and "bite" specifications. Based on approval of that sample, PIM began mass producing Fruit Nibbles in August 2008. PIM continued production until at least November 11, 2008. Through four signed Purchase Orders dated May 9, August 5, September 8, and October 13, 2008 (the "Purchase Orders"), Beech-Nut accepted and paid for approximately 230,000 cases of Fruit Nibbles.

Several provisions of those Purchase Orders bear on this matter:

1. Entire Agreement. The terms and conditions set forth in [these orders] constitute the entire agreement between the parties . . . and supersede . . . all previous verbal or written representations, agreements and conditions [unless modified in writing and signed by all parties].

. . . .

4. Quality and Inspection. [PIM] warrants that the goods . . . furnished under the order will comply with the specifications, are fit for the purpose intended, merchantable and free from defects of material and workmanship and . . . [and upon] discovery of any defect, all rejections will be returned at [PIM's] risk and expense . . . [PIM] acknowledges and agrees that [Beech-Nut] shall be entitled to all warranties and remedies as provided by the Uniform Commercial Code ("U.C.C.").

. . . .

In September 2008, Beech-Nut received its first delivery of Fruit Nibbles, which it sold to third parties. Shortly thereafter, Beech-Nut began receiving hundreds of complaints about Fruit Nibbles.

> Although it is unclear exactly how widespread the problems with the shipped Fruit Nibbles were, on December 5, 2008, Beech-Nut instituted a national product withdrawal of all PIM-manufactured Fruit Nibbles.
>
> From mid-January through February 2009, the parties discussed issues related to the product recall. Beech-Nut maintained that these problems were PIM's responsibility; PIM, in turn, denied responsibility and declined to accept Fruit Nibbles returns from Beech-Nut. The parties also discussed relaunching Fruit Nibbles in Spring 2009, but understood that any future business relationship was predicated on resolving issues related to the recall. Ultimately, the parties did not resolve those issues and failed to "reach a co-packing or other contract relating to the prospective re-launch." (56.1 Statement ¶ 42.) On February 23, 2009, Beech-Nut advised PIM that it was going to use alternate suppliers for Fruit Nibbles.
>
> On February 27, 2009, PIM sued Beech-Nut in Superior Court, asserting claims against Beech-Nut for breach of contract, breach of the implied covenant of good faith and fair dealing, and contract by estoppel. On March 21, 2011, Beech-Nut removed this action to District Court, where it asserted counterclaims against PIM for negligence and for breaches of express and implied warranties under the U.C.C.

(Dec. 20, 2011 Op. at 2-4, ECF No. 34) (footnotes omitted).

On the basis of these undisputed facts, the Court granted in part and denied in part Beech-Nut's motion for summary judgment, which sought dismissal of all of PIM's claims and the granting of all of Beech-Nut's counterclaims. Pertinently, the Court ruled that the Purchase Orders constituted the only enforceable contracts between the parties, and that their express terms governed the parties' financial responsibilities for any defective Fruit Nibbles. In making this determination, the Court ruled that PIM's assertion that it did not provide any warranties about the shipped Fruit Nibbles was in

direct contradiction to the express language set forth in ¶ 4 of the Purchase Orders, and was barred by the Parole Evidence Rule, U.C.C. § 2-202, because the Purchase Orders were intended as a complete and exclusive statement of the terms of the parties' agreement, and were never modified by a subsequent signed writing.

The Court further held that at least some of the shipped Fruit Nibbles breached at least some of the warranties which PIM provided under the terms of the Purchase Orders. Finally, the Court dismissed PIM's Complaint in its entirety, including its breach of contract claim, "[b]ecause PIM [did] not allege that Beech-Nut breached the terms of the Purchase Orders, and those are the only enforceable contracts between the parties." (Op. at 8.)

In response to these rulings, on January 3, 2012, PIM filed the instant motion for reconsideration, asserting that Court's Letter Opinion and Order were improperly decided in two respects. First, that the Court improperly dismissed PIM's breach of contract claim; second, that the Court improperly limited the breach of warranty defenses PIM can assert at the time of trial.

II. DISCUSSION

A. Standard of Review

A motion for reconsideration under Local Civil Rule 7.1(i) may be granted only if: (1) there has been an intervening change in the controlling law; (2) evidence not available when the Court issued the subject order has become available; or (3) it is necessary to correct a clear error of law or fact to prevent manifest injustice. *Max's Seafood Café by*

Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)).

Relief by way of a motion for reconsideration is considered an "extraordinary remedy," to be granted only sparingly. *NL Indus. Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1999). A motion for reconsideration should not be treated as an appeal of a prior decision. *See Morris v. Siemens Components, Inc.*, 938 F. Supp. 277, 278 (D.N.J. 1996) ("A party's mere disagreement with a decision of the district court should be raised in the ordinary appellate process and is inappropriate on a motion for reargument." (citing *Bermingham v. Sony Corp.*, 820 F. Supp. 834, 859 n. 8 (D.N.J. 1992), aff'd, 37 F.3d 1485 (3d Cir. 1994))). It is improper for the moving party to "ask the court to rethink what it ha[s] already thought through -- rightly or wrongly." *Oritani Sav. & Loan Ass'n v. Fid. & Deposit Co.*, 744 F. Supp. 1311, 1314 (D.N.J. 1990).

B. PIM Provides No Basis for the Court to Reconsider Dismissal of PIM's Complaint in its Entirety

PIM first asserts that the Court should vacate its dismissal of PIM's breach of contract claim because "[Beech-Nut] breached [the Purchase Orders] by not making the required payments." (PIM's Recons. Br. 3, ECF No. 36.) However, PIM provides absolutely no factual support, on the record or elsewhere, to support this assertion. Because this is the first time PIM has presented this unsubstantiated allegation to the Court, it is not a proper basis for reconsideration. *P. Schoenfeld Asset Mgmt., LLC v. Cendant Corp.*, 161 F.Supp.2d 349, 352-53 (D.N.J. 2001) ("plaintiffs' motion for

reargument is nothing more than an attempt to raise a matter which could have been, but was not, raised before. Because this issue is not one that was presented to, but not considered by the Court, the Court cannot consider it now."). Accordingly, PIM's motion for reconsideration on this basis will be denied.

C. PIM Provides No Basis for the Court to Reconsider Its Rulings that Limit PIM's Breach of Warranty Defenses

PIM also moves for the Court to vacate its rulings which limit the breach of warranty defenses available to PIM at the time of trial. In support of this claim, PIM asserts that the Court: (1) improperly based its decision on certain non-U.C.C. cases, (2) failed to apply certain – and inapplicable – provisions of the U.C.C., and (3) did not base its decision on the cases cited by PIM. However, none of these assertions are a proper basis for reconsideration, nor do they affect the fundamental determinations made by the Court in this matter.

The Court wishes to be clear on what those are: The "Purchase Orders are the express contract at issue." (PIM's Recons. Br. 3.) Pursuant to ¶ 1, "[t]he terms and conditions set forth in [the Purchase Orders] constitute the entire agreement between the parties [unless modified in writing and signed by all parties]." It is undisputed that there was no signed writing which modified these agreements. Thus, pursuant to U.C.C. § 2-202, and as explained in its Letter Opinion, the Court disregarded PIM's claims that it provided no warranties about Fruit Nibbles to Beech-Nut, because that claim directly contradicted the express warranty language set forth in ¶ 4 of the Purchase Orders.

Because the language of the Purchase Orders governs PIM's obligations to Beech-Nut, the Court determined that PIM, in addition to other assurances of quality, expressly warranted that Fruit Nibbles would be "fit for the purposes intended [and] merchantable." (Purchase Orders, ¶ 4.) On the undisputed facts, at least some Fruit Nibbles breached those express warranties,[1] and any such defective Fruit Nibbles could be rejected by Beech-Nut and thereafter "returned at [PIM's] risk and expense." (*Id.*)

Notwithstanding these fundamental determinations – which were made only after thorough and thoughtful consideration of all of the issues in this case – PIM has raised the aforementioned arguments, all three of which amount to disagreements with the Court's legal rulings. Bearing in mind that it is improper for PIM to "ask the court to rethink what it ha[s] already thought through", *Oritani Sav. & Loan Ass'n*, 744 F. Supp. at 1314 (D.N.J. 1990), the Court will deny reconsideration on this point as well.

III. CONCLUSION

For the foregoing reasons, PIM's motion for reconsideration is **DENIED**. An Order follows this Opinion.

s/William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: March 5, 2012

[1] A sampling of the complaints about Fruit Nibbles include: "powdery coating, dried out product, shriveled appearance, moldy and wilted appearance, fermented odor, terrible smell, hard texture, choking hazard, funny taste, sour odor, wrinkled, raisin-like appearance, bitter taste, bad smell, covered with mold, horrible smell, green white, and grey coating, looks like dead toes, old, nasty, discolored, crusty, gross, rotten, stale, dry, difficult to chew, spoiled smell, horrid smell, disgusting, waxy taste, caused stomach ache, vomiting, and diarrhea, etc." (Stipulated Fact 34.)