

BLOOM KARINJA & DILLON, P.C.

Paul J. Dillon

70 South Orange Avenue

Suite 240

Livingston, NJ 07039

Telephone: (973) 758-0900

KING & SPALDING LLP

Richard A. Cirillo

Karen R. Kowalski

1185 Avenue of the Americas

New York, NY 10036

Telephone: (212) 556-2100

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

-----X	
PROMOTION IN MOTION, INC.	:
and PIM BRANDS, LLC,	: HON. _____, U.S.D.J.
	:
Plaintiffs,	: CIVIL ACTION NO. _____
	:
vs.	:
	:
BEECH-NUT NUTRITION CORPORATION,	: (Removal from Superior Court of New
a HERO GROUP COMPANY,	: Jersey, County of Bergen,
	: Docket No. BER-L-1890-09)
	:
Defendant.	:
-----X	

**NOTICE OF REMOVAL**

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1441 and 1446, the Defendant, Beech-Nut Nutrition Corporation (“Beech-Nut” or the “Defendant”), hereby removes this action to the United States District Court for the District of New Jersey, Newark Division, upon the following grounds:

1. On or about February 27, 2009, Plaintiffs Promotion in Motion, Inc. (“Promotion in Motion”) and PIM Brands, LLC (“PIM” (collectively, the “Plaintiffs”)), commenced an action

against Beech-Nut in the Superior Court of New Jersey, Law Division, Bergen County, entitled PROMOTION IN MOTION, INC. and PIM BRANDS, LLC v. BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY, by filing a complaint asserting various causes of action arising out of the parties' alleged contractual agreement. A true and correct copy of the Complaint is attached hereto as Exhibit A.

2. Beech-Nut first received notice of the Complaint on February 28, 2009.

**This Court Has Diversity Jurisdiction**

3. Complete diversity exists between the parties to this action and this Court has jurisdiction under 28 U.S.C. § 1332.

4. Promotion In Motion alleges in the Complaint that it is a company formed under the laws of the State of Delaware, with its principal place of business in Bergen County, New Jersey. Complaint ¶1

5. PIM alleges in the Complaint that it is a New Jersey limited liability company, with its principal place of business in Somerset, New Jersey. Id. at ¶2.

6. Beech-Nut is a company formed under the laws of the State of Nevada, with its principal place of business in Latham, New York.

7. Beech-Nut is a citizen of a state diverse to that of Plaintiffs.

8. Based upon the allegations in the Complaint, it is clear that the amount in controversy in this action exceeds \$75,000 exclusive of interest and costs. Although the Complaint does not specify a monetary demand, Promotion In Motion sets forth its alleged losses in paragraph 8 of the Complaint, which exceed \$75,000. Id. at ¶8.

**Removal Of This Action Is Proper**

9. This Notice of Removal is timely under 28 U.S.C. § 1446(b) as it is being filed within thirty (30) days after receipt by Beech-Nut of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.

10. Removal therefore is proper under 28 U.S.C. § 1441 because original jurisdiction would exist under 28 U.S.C. § 1332, and this Court has jurisdiction of the action under 28 U.S.C. § 1332.

11. In compliance with 28 U.S.C. §§ 1446(a) and (d), a copy of all process, pleadings, and orders served upon Beech-Nut are contained in the attachments accompanying this Notice of Removal; and Beech-Nut shall give written notice of the filing of this Notice of Removal to Promotion in Motion, PIM, and their respective attorneys and shall file a copy of this Notice with the Clerk of the Superior Court of the State of New Jersey, Law Division, Bergen County, where the removed action was commenced, promptly after the filing of this Notice with this Court.

WHEREFORE, the Defendant prays that the above-referenced action now pending in the Superior Court of New Jersey, Law Division--Bergen County be removed to the United States District Court for the District of New Jersey, Newark Division.

Dated: March 18, 2009

Respectfully submitted,

BLOOM KARINJA & DILLON, P.C.

By:   
Paul J. Dillon

70 South Orange Avenue  
Suite 240  
Livingston, NJ 07039  
Telephone: (973) 758-0900

*Attorneys for Beech-Nut  
Nutrition Corporation*

Of Counsel:

KING & SPALDING LLP  
Richard A. Cirillo, Esq.  
Karen R. Kowalski, Esq.  
1185 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 556-2100  
Facsimile: (212) 556-2222

## **EXHIBIT A**

McCARTER & ENGLISH, LLP  
Four Gateway Center  
100 Mulberry Street  
Newark, New Jersey 07102  
(973) 622-4444  
Attorneys for Plaintiffs  
Promotion In Motion, Inc. and PIM Brands, LLC

	:	SUPERIOR COURT OF NEW JERSEY
PROMOTION IN MOTION, INC.	:	LAW DIVISION - BERGEN COUNTY
and PIM BRANDS, LLC,	:	DOCKET NO.
 Plaintiffs,	 :	 Civil Action
 v.	 :	 <b>COMPLAINT</b>
 BEECH-NUT NUTRITION	 :	 <b>(JURY DEMAND)</b>
CORPORATION, a HERO	:	
GROUP COMPANY,	:	
 Defendant	 :	

RECEIVED  
09 FEB 27 PM 2:27  
CIVIL DIVISION  
CASE PROCESSING

Plaintiffs Promotion In Motion, Inc. and PIM Brands, LLC, by way of Complaint against Defendant Beech-Nut Nutrition Corporation, a Hero Group company, in order to recover the damages sustained as a result of the Defendant's breach of the parties' agreement, state as follows:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff Promotion In Motion, Inc. ("Promotion In Motion") is a Delaware corporation whose principal place of business is located within Bergen County, New Jersey, at 3 Reuten Drive, Closter, New Jersey. It is a marketer of popular brand name confections, fruit snacks, fruit rolls, and snack and specialty foods.

2. Plaintiff PIM Brands, LLC ("PIM LLC") is a New Jersey limited liability company. It is based in Somerset, New Jersey, where it operates a state of the art manufacturing facility producing products under the company's brands and under private labels and contract manufactures for leading retail chains, food, and confection companies.

3. Defendant Beech-Nut Nutrition Corporation ("Beechnut"), a Hero Group company, upon information and belief, is registered in New York State and maintains offices at 13 British American Boulevard, Latham, New York. Beechnut has had both general and systematic contacts with the State of New Jersey.

4. Pursuant to New Jersey Court Rule 4:3-2, venue is appropriate in Bergen County, New Jersey because Plaintiff Promotion In Motion is headquartered in Bergen County, conducts business in Bergen County, and the causes of action set forth in this Complaint arose in Bergen County.

#### BACKGROUND FACTS

5. Beechnut and Promotion In Motion collaborated to develop a product that Beechnut wanted to market. The product came to be known as Fruit Nibbles based on a trademark filing initiated by Beechnut, which later proved to be problematic. From the outset, Beechnut was heavily involved in the development and production of this product, with extensive involvement by their Technical (R&D) team in specifying ingredients and materials, as well as in developing the processes and criteria needed to create the exact product that Beechnut was looking for.

6. A very aggressive product development timeline was necessitated by Beechnut's insistence on a product launch in August of 2008. As a result, the product was introduced to the market without extended shelf-life testing. A shortage of one of the key ingredients needed to

produce the product then led to a joint decision by Beechnut and Promotion In Motion to replace that ingredient with a different one in order to meet the deadlines demanded by Beechnut. PIM LLC continued to manufacture product for Beechnut and eventually contracted for a substantial supply of the key ingredient in order to ensure availability in the future.

7. After several weeks in the market, Beechnut complained to PIM LLC that the “replacement” ingredient was not meeting its desired shelf-life and/or visual appearance criteria and Beechnut decided to withdraw it from the market. Beechnut, however, advised Promotion In Motion that it wanted to continue moving forward with a re-launch of the product and asked Promotion In Motion to work towards such a goal, which it did. Unbeknownst to Promotion In Motion, Beechnut was at the same time making alternative arrangements for the manufacture of the product.

8. On February 23, 2009, Beechnut informed Promotion In Motion that they were electing to “pursue alternate suppliers for this project”. As a result, Promotion In Motion has been left with:

- A substantial shortfall in sales and profits, as a result of having no business on the Beechnut project, despite having invested substantial time, resources, energy, and money developing the product.
- Over \$750,000 in accounts receivable, packaging, finished goods, etc. attributable exclusively to this project.
- Over \$1 million in contractual obligations to purchase the key ingredient, also attributable exclusively to this project.

#### History of the Beechnut – Promotion In Motion relationship

9. In late 2007, Beechnut contacted Promotion In Motion to determine if Promotion In Motion would be willing to contract pack for Beechnut a new product concept that Beechnut wanted to bring to market.

10. Although no written agreement was executed, throughout the summer of 2008, Promotion In Motion and Beechnut worked extensively together to jointly develop the Fruit Nibbles product. The Fruit Nibbles were to be part of a larger product launch that Beechnut indicated was a "major corporate priority" under the umbrella of its "Let's Grow" line of snack foods for toddlers and that, according to Beechnut, needed to launch in Fourth Quarter of 2008. Substantial time was spent by both parties working on product formulation and later on actual production of the product to meet the goal set by Beechnut.

11. Numerous production runs were made at great expense to PIM LLC in an effort to develop and commercialize the product line. Beechnut was deeply involved in this process and fully aware of all of Promotion In Motion's efforts pursuant to the parties' discussions and agreement.

12. Initial sales of the product were made to Beechnut in August of 2008. The product had been developed by Beechnut and Promotion In Motion jointly, then manufactured by PIM LLC. Beechnut picked up the product from PIM LLC's facility in New Jersey.

13. In September of 2008, Beechnut placed additional orders, this time picking up approximately \$579,000 in product (50,000 cases) from PIM LLC's facility.

14. All of the product was produced by PIM LLC in New Jersey, and because of the volumes demanded by Beechnut, it required PIM LLC to outsource production and packing of all other items it normally produced in Somerset, to various third party co-manufacturers, at additional expense to PIM LLC. Substantial product cuts for other items were likewise sustained in September of 2008, as a result of this heavy Beechnut volume, which exceeded forecasts from Beechnut to PIM.

15. Due to the strong volume performance in September of 2008, PIM LLC was forced to substitute White Grape juice as one of the product ingredients. The specialized pineapple concentrate utilized initially and originally specified as a key ingredient to produce the product, is available from only a very limited group of suppliers in the world.

16. This substitution was made with the full knowledge and consent of Beechnut, who approved the product be made with White Grape juice, fully understanding the risks and consequences associated with doing so.

17. October of 2008, brought a further, dramatic, increase in sales, with Beechnut sales reaching \$1,318,000 and a total of 100,000 cases for the month. As in the prior month, the higher than expected sales level required PIM LLC to source production (and especially packaging) on other items from its own outside co-packers in order to meet Beechnut's ongoing business needs.

18. After two strong months of sales, Beechnut provided its forecast for November. Once again, PIM LLC ramped up production and produced the required number of cases in November to meet this projected demand. Beechnut, however, did not purchase any product in November.

19. On December 2, 2008 Dennis Warner, VP of Marketing for Beechnut, sent an e-mail to Promotion In Motion stating, in pertinent part, that "Beech-Nut has received extensive consumer complaints on the September and October Fruit Nibbles production in the marketplace and numerous retailers have demanded us to take action. To protect our brand franchise we have decided on an action plan that begins this Friday and I'd like to share that plan with you."

20. Due to Mr. Rosenberg's unavailability, Mr. Jeffrey Brown, Executive Vice-President of Promotion In Motion contacted Dennis Warner to follow up on the communication.

Upon doing so, Mr. Brown was told that because of the number of consumer complaints that had been received, Beechnut was going to stop shipments of the Fruit Nibbles product.

21. On Friday, December 5, 2008, representatives of Promotion In Motion and Beechnut held a conference call at which time Beechnut indicated that they had elected to conduct a voluntary market withdrawal of the product.

22. On Tuesday, January 13, 2009, representatives of Promotion In Motion met with Beechnut management. At this meeting, Beechnut's management indicated they assumed that Promotion In Motion would be wholly responsible for the Fruit Nibbles product not meeting shelf-life and/or visual appeal expectations. Beechnut asked if Promotion In Motion had "liability insurance that would cover this." At the same time, Beechnut indicated they had "very keen interest" in moving forward on a very aggressive timeline to be able to re-launch the product quickly, with shipments to Wal-Mart in April 2009. Based upon the discussions that then took place, both parties agreed to follow a course of action pursuant to which the financial departments in each company would address the financial issues that had arisen while at the same time the Marketing/Sales and Technical departments would collaborate to determine how best to meet the desired re-launch timing (if it were possible). A series of conference calls were scheduled to determine how to achieve this re-launch timing.

23. The first of these conference calls, held on Wednesday, January 14, 2009, was primarily focused on timelines in order to achieve Beechnut's re-launch timing.

24. A second conference call was held on January 20, 2009. In addition to discussions regarding the need to adhere to the original formula for the product, Beechnut's Dr. Chang made the following points:

- He does not doubt PIM has a "winning formula" for the product; he does have concerns about production control/batch size that he wants addressed.

- Beechnut's evaluation of PIM November product is "mostly very good" but he was not comfortable yet with how they were packed (a reference to some issues with improper pack counts on a small number of boxes).
- Production from October 28 "looks very ugly".
- Production from November 11 "looks very good".

25. During the January 20, 2009 conference call, the parties' discussion also centered on how to ensure the existing product would still be within specifications if used for the re-launch in April. No resolution was reached on this point. At all times, Beechnut was fully aware of Promotion In Motion and PIM LLC's efforts to re-launch by the date Beechnut set.

26. The next meeting between the companies was scheduled for January 27, 2009, but was cancelled due to scheduling conflicts. A subsequent meeting for February 3, 2009, was cancelled by Beechnut.

27. On Wednesday February 4, 2009, a discussion took place between the parties, at which time Promotion In Motion expressed its concerns regarding Beechnut's continuing desire to hold Promotion In Motion solely responsible for all expenses associated with the voluntary recall. Beechnut's position was in stark contrast to the spirit of partnership that had characterized the relationship prior to the voluntary market withdrawal of the product.

28. Promotion In Motion specifically requested that Steve Hungsberg, part of Beechnut's management team, get personally involved in the financial discussions to facilitate a resolution. Mr. Hungsberg indicated he would speak with his financial team, discuss the matter, and get back to Promotion In Motion.

29. Following this conversation on February 4, 2009, repeated efforts were made to contact Mr. Hungsberg in order to move the project forward as Beechnut had expressed a strong desire to meet the re-launch timing. Despite repeated attempts between February 4 and February

23, 2009, Promotion In Motion representatives were only able to reach Mr. Hungsberg once and he never proactively contacted Promotion In Motion.

30. The final communication between the parties took place on Monday, February 23 2009. In response to an earlier e-mail from Mr. Brown of Promotion In Motion, Mr. Hungsberg sent the following:

**From:** SHungsberg@herousa.com [mailto:SHungsberg@herousa.com]  
**Sent:** Monday, February 23, 2009 11:45 PM  
**To:** Brown Jeff  
**Subject:** Re: FW: Following Up - Beechnut Nibbles

Hi Jeff,

I apologize for the delay in my response. I had been out on vacation and neglected to turn on my out-of-office message. Connections had been difficult where I was at.

Regardless, I did look in to the cost issues you and I had spoken about previously. It was determined that the separate paths do need to remain separate. And because of the timing needs for our customers, we have decided to pursue alternate suppliers for this project. I hope that if the financial portion does get resolved in the near future, we can once again resume the conversation. I very much appreciate all of your efforts to get us as far as we did.

Thanks,  
Steve

Steve Hungsberg  
Associate Director of Marketing  
Beech-Nut Nutrition Corporation  
13 British-American Boulevard  
Latham, NY 12110

31. From the time of the parties' original agreement to jointly work towards the development and production of a new product line through its actual bringing to market, the Plaintiffs have expended considerable sums of monies and devoted extensive resources for hard costs such as packaging, film, inner boxes, outer cases, and production. Moreover, the Plaintiffs invested considerable amounts of time and money to the development of the parties' product, all

in reliance on the parties' agreement. Beechnut was aware of these efforts and expenditures, which were incurred at its direction.

32. Beechnut breached the parties' agreement and thereby caused damage to the Plaintiffs.

FIRST COUNT  
(Breach of Contract - Promotion In Motion)

33. The Plaintiffs repeat and incorporate by reference the prior allegations set forth above.

34. Promotion In Motion and Beechnut entered into a valid and binding contractual arrangement.

35. Beechnut breached that contractual arrangement as set forth above.

36. Beechnut's actions are the proximate cause of the damages incurred and being incurred by Promotion In Motion.

WHEREFORE, Plaintiff Promotion In Motion, Inc. seeks the entry of Judgment against the Defendant as follows:

- A. Compensatory, consequential, and incidental damages.
- B. Prejudgment interest, attorneys' fees, and costs of suit.
- C. Such other relief as the Court deems just and equitable.

SECOND COUNT  
(Breach of Implied Covenant of Good Faith - Promotion In Motion)

37. The Plaintiffs repeat and incorporate by reference the prior allegations set forth above.

38. Promotion In Motion and Beechnut entered into a valid and binding contractual arrangement.

39. The parties' contractual arrangement contained an implied covenant of good faith and fair dealing.

40. Beechnut breached the implied covenant of good faith and fair dealing as set forth above.

41. Beechnut's actions are the proximate cause of the damages incurred and being incurred by Promotion In Motion.

WHEREFORE, Plaintiff Promotion In Motion, Inc. seeks the entry of Judgment against the Defendant as follows:

- A. Compensatory, consequential, and incidental damages.
- B. Prejudgment interest, attorneys' fees, and costs of suit.
- C. Such other relief as the Court deems just and equitable.

**THIRD COUNT**  
**(Estoppel - Promotion In Motion)**

42. The Plaintiffs repeat and incorporate by reference the prior allegations set forth above.

43. Promotion In Motion and Beechnut entered into a valid and binding contractual arrangement.

44. Beechnut made a clear and definite promise to purchase product from Promotion In Motion in accordance with the terms and conditions jointly agreed to by the parties.

45. Promotion In Motion reasonably relied upon that promise to its definite and substantial detriment.

46. Beechnut made that promise with the expectation that Promotion In Motion would rely upon it.

WHEREFORE, Plaintiff Promotion In Motion, Inc. seeks the entry of Judgment against the Defendant as follows:

- A. Compensatory, consequential, and incidental damages.
- B. Prejudgment interest, attorneys' fees, and costs of suit.
- C. Such other relief as the Court deems just and equitable.

FOURTH COUNT  
(Breach of Contract - PIM LLC)

47. The Plaintiffs repeat and incorporate by reference the prior allegations set forth above.

48. Beechnut entered into a contractual arrangement with PIM LLC for the manufacture of the product jointly developed by Beechnut and Promotion In Motion.

49. Beechnut breached that contractual arrangement as set forth above.

50. Beechnut's actions are the proximate cause of the damages incurred and being incurred by PIM LLC.

WHEREFORE, Plaintiff PIM Brands, LLC seeks the entry of Judgment against the Defendant as follows:

- A. Compensatory, consequential, and incidental damages.
- B. Prejudgment interest, attorneys' fees, and costs of suit.
- C. Such other relief as the Court deems just and equitable.

FIFTH COUNT  
(Breach of Implied Covenant of Good Faith - PIM LLC)

51. The Plaintiffs repeat and incorporate by reference the prior allegations set forth above.

52.. PIM LLC and Beechnut entered into a valid and binding contractual arrangement.

53. The parties' contractual arrangement contained an implied covenant of good faith and fair dealing.

54. Beechnut breached the implied covenant of good faith and fair dealing as set forth above.

55. Beechnut's actions are the proximate cause of the damages incurred and being incurred by PIM LLC.

WHEREFORE, Plaintiff PIM Brands, LLC seeks the entry of Judgment against the Defendant as follows:

- A. Compensatory, consequential, and incidental damages.
- B. Prejudgment interest, attorneys' fees, and costs of suit.
- C. Such other relief as the Court deems just and equitable.

**SIXTH COUNT**  
**(Estoppel - PIM LLC)**

56. The Plaintiffs repeat and incorporate by reference the prior allegations set forth above.

57. PIM LLC and Beechnut entered into a valid and binding contractual arrangement.

58. Beechnut made a clear and definite promise to purchase product from PIM LLC in accordance with the terms and conditions jointly agreed to by the parties.

59. PIM LLC reasonably relied upon that promise to its definite and substantial detriment.

60. Beechnut made that promise with the expectation that PIM LLC would rely upon it.

WHEREFORE, Plaintiff PIM Brands, LLC seeks the entry of Judgment against the Defendant as follows:

- A. Compensatory, consequential, and incidental damages.
- B. Prejudgment interest, attorneys' fees, and costs of suit.
- C. Such other relief as the Court deems just and equitable.

CERTIFICATION PURSUANT TO RULE 4:5-1

I hereby certify that the matter in controversy is not the subject of any other action pending in any court or of a pending arbitration and no other action or arbitration is contemplated.

DEMAND FOR JURY TRIAL

The Plaintiffs demand trial by jury on all issues.

McCARTER & ENGLISH, LLP  
Attorneys for Plaintiffs

By: 

WILLIAM D. WALLACH  
A Member of the Firm

Dated: February 27, 2009