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I N D E X

Court's preliminary remarks to Jury.....page 3

Opening Statement by Ms. Kowalski.....page 10

Opening Statement by Mr. Wallach.....page 18/34

Reading of deposition of Steve Hungsberg...pages 50 - 60  
(date of deposition not mentioned  
on the record)

WITNESS	DIRECT	CROSS
TIM KENNEDY		
By Mr. Dillon	61	
By Mr. Wallach		96

E X H I B I T S

EXHIBIT	IN EVID.
BEECH-NUT-6	72
BEECH-NUT-7	76
BEECH-NUT-8	81
BEECH-NUT-10	88
BEECH-NUT-11	90
BEECH-NUT-12	91
BEECH-NUT-9	93
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SIDEBAR DISCUSSIONS

Jury not Present	
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23	32
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1 September 10, 2012

2 (Voir dire of the Jury not transcribed.)

3 (The Jury is duly impaneled and sworn.)

4 THE DEPUTY CLERK: Thank you.

5 THE COURT: All right. Thank you very much. Please  
6 be seated.

7 Ladies and gentlemen that are remaining in the  
8 courtroom, let me express my thanks on behalf of the parties  
9 and myself. I am confident that if you were called you would  
10 have also been able to serve in all likelihood anyhow, and the  
11 fact that you're here is an indication that you recognize the  
12 importance of jury service. So we want to thank you. You are  
13 excused, but report back downstairs to the jury room before you  
14 leave the courthouse.

15 Thank you very much.

16 (The Jury Panel leaves the courtroom.)

17 THE COURT: Good morning. You are now our jury. And  
18 what I'd like to do -- and then we'll have a recess -- but what  
19 I'd like to do is explain to you how a trial proceeds and a  
20 little bit in a summary form of what's expected, and then we'll  
21 recess. This should only take about ten minutes or so, and  
22 then we'll recess for our morning break. Okay?

23 These are just some preliminary comments and  
24 instructions. At the end of the trial after you've heard the  
25 evidence I will give you a much more detailed instruction on

1 the law, but let me explain to you how a trial begins and  
2 proceeds, and what your obligations are, and what my  
3 responsibility is -- and I've touched on this already I  
4 think -- and what the lawyers' obligations are.

5           The first step in a trial would be, after our break,  
6 what's called the opening statements of the attorneys. Each of  
7 the attorneys will have an opportunity to address you and tell  
8 you an outline of what they expect the evidence will prove or  
9 not prove, depending on their respective positions. Again,  
10 what you should understand about comments or opening addresses  
11 by attorneys, that's not evidence, the same way summations are  
12 not evidence. The evidence is what's here under oath or in a  
13 document that's admitted into evidence. However, what they  
14 have to say is important because usually it gives you a  
15 framework of what they expect to prove or not prove, and then  
16 at the end, the summations are a summary of what they contend  
17 the evidence does prove. But the comments of counsel are not  
18 evidence.

19           Also, questions of counsel are not evidence. So if an  
20 attorney asked a question of a witness, what the attorney asks  
21 is not the evidence; it's what the witness answers. Because  
22 sometimes an attorney will ask a question and there might be an  
23 objection. I may sustain it. You will have heard the  
24 question, but the question is not the evidence.

25           Now, what is evidence?

1           Again, this will consist of, as I told you, the  
2       testimony of witnesses from the witness stand; any  
3       depositions -- and depositions are when witnesses who may not  
4       come to court in a civil case have already been asked questions  
5       under oath, and those depositions will be read into evidence.  
6       Interrogatories are questions that witnesses answer. They may  
7       be read into evidence; and also stipulations, as I indicated,  
8       which are agreements between the parties, they can be read into  
9       evidence; and also any documents.

10           Now, you must consider all the evidence in the case.  
11       However, you may draw such reasonable inferences from the  
12       testimony and exhibits as you feel are justified in the light  
13       of your common experience. You may make deductions and reach  
14       conclusions that reason and common sense lead you to make from  
15       the testimony and evidence. The testimony of a single witness  
16       may be sufficient to prove any fact even if a greater number of  
17       witnesses have testified to the contrary if, after considering  
18       all the other evidence, you believe that single witness.

19           Now, there are two types of evidence you may consider:  
20       One is direct evidence, such as testimony of an eyewitness or  
21       someone who has direct knowledge of the fact; the other is  
22       indirect or circumstantial evidence, which is the proof of  
23       circumstances that tend to prove or disprove the existence or  
24       nonexistence of certain facts. The law makes no distinction  
25       between direct and circumstantial evidence but simply requires

1       that you find the facts from a preponderance of all the  
2       evidence, both direct and circumstantial. And I'll give you  
3       much more detail on that at the end of the trial.

4               Again, I've explained to you, that the burden of proof  
5       of each party who is asserting a claim or a defense is by a  
6       preponderance of the evidence. A preponderance of evidence  
7       means evidence that persuades you that plaintiff's claim is  
8       more likely true than not true.

9               In deciding whether any fact has been proven by a  
10       preponderance of the evidence, you may, unless otherwise  
11       instructed, consider the testimony of all witnesses regardless  
12       of who may have called them, and all exhibits received in  
13       evidence, regardless of who may have produced them, and all  
14       depositions read into the record. If the proof fails to  
15       establish an essential part of a claim or contention by a  
16       preponderance of the evidence, you should find against the  
17       party making that claim or contention.

18               Now, in determining the facts of this case, it is  
19       basic that you evaluate what is called the credibility and  
20       reliability of the testimony or depositions of the various  
21       witnesses. It's uniquely your function as jurors to make this  
22       evaluation. This is nothing new nor is there anything strange  
23       about it as it is a process in which all of us are involved  
24       every day of our lives, although you as jurors are called upon  
25       to make this determination in a very conscious fashion.

1           Among the many questions which go into the overall  
2       evaluation of believability and reliability are the demeanor of  
3       the witness on the witness stand; was the witness  
4       straightforward and forthright; was the witness fair and  
5       candid? You may consider any possible interest that the  
6       witness may have indicated or motive for testifying as the  
7       witness did. You may question the inherent believability of  
8       the witness' testimony; the witness' closeness of attention;  
9       the probability or logic of the testimony; and any consistency  
10      or contradictions in the testimony; the opportunity or capacity  
11      of the witness to be familiar with and to remember those things  
12      to which the witness testified. Further, did what the witness  
13      say accord with common sense and experience? If there were  
14      inconsistencies in the testimony of any of the witnesses, were  
15      these of a substantial nature or a trivial nature?

16           You must weigh the credibility of each and every  
17      witness and determine for yourself what weight, if any, you  
18      will give to his or her testimony.

19           You must come to your own honest, conscientious  
20      conclusion as to the weight of evidence as it impressed you.  
21      Your task is to resolve the credibility or reliability of the  
22      witnesses who have been produced before you. There will be a  
23      number of witnesses produced in this matter, but you are  
24      cautioned that the number of witnesses produced on one side or  
25      the other is not the determining factor; it is the quality of

1 the testimony rather than the quantity that counts.

2 Now, during the course of the trial attorneys may make  
3 objections as evidence is offered or they may address motions  
4 to the Court. They have the right and, in fact, they have the  
5 duty to do so. Again, when they do that, it's nothing to be  
6 held against either of the attorneys for objecting or making a  
7 motion to the Court. If I sustain the objection, you're not to  
8 consider the question that is asked; and, of course, if I  
9 overrule it, it means the evidence is allowed in.

10 Now, I explained to you already that as jurors you're  
11 the judges of the facts. And, of course, you base it on  
12 everything you hear and, of course, then you are to apply it to  
13 the law that I give to you at the end of the case.

14 You're not to take any notes. It's a short trial. I  
15 prefer that you listen. So if any of you were inclined to take  
16 some notes, I'm directing that you're not to. It is a short  
17 trial, and again, it's more important in my opinion that you  
18 listen closely than if you get distracted by taking some notes.

19 Now, also in course of the trial you may be coming and  
20 going from the courtroom to lunch or in the morning coming in.  
21 If you do see any of the lawyers or any of the parties, I've  
22 directed -- and I'm directing them now -- they're not to engage  
23 with you. And you're not to engage with them by saying "good  
24 morning," or "how are you" or anything like that. You know, so  
25 they're not being rude, it's just part of our procedure. So



1 again, if they avoid you, it's not because they're being rude  
2 or anything like that. Okay?

3 And again, I remind you not to discuss this case  
4 amongst yourselves from this point on, even when you're waiting  
5 for us in the morning or coming back from lunch. You may have  
6 heard something you find interesting at that time, but you're  
7 not to discuss that with anyone else. It wouldn't be fair to  
8 the parties to begin your discussions until all of the evidence  
9 is in and you've heard the comments and arguments of the  
10 attorneys at the end and, of course, the law that I give to  
11 you. Okay?

12 I don't expect they'll be too many delays in this  
13 trial, but occasionally something comes up where there is a  
14 delay and you might be sitting in the jury room wondering.

15 We didn't forget you there. We know you're waiting,  
16 and we'll do our best to minimize the delays or breaks' that we  
17 have. Okay?

18 All right. Those are just some preliminary comments  
19 that I had to make. We'll recess and then we'll commence.  
20 We'll recess for about 15 minutes. Okay?

21 Ms. Hansen may have some further instructions to give  
22 you, and then we'll come back out and the parties will begin  
23 their case. Okay?

24 Thank you.

25 THE DEPUTY CLERK: Please rise.

1 (The Jury leaves the courtroom.)

2 THE COURT: All right. Quarter of we'll resume. And  
3 then you'll read the stip --

4 MR. DILLON: We'll start with the openings?

5 THE COURT: Yeah, okay. Then we'll -- sorry -- then  
6 we'll probably break for lunch after the openings. Okay?

7 MR. WALLACH: Thank you, your Honor.

8 THE COURT: All right. See you then. Thanks.

9 (A recess is taken.)

10 (Proceedings resume - Jury not present.)

11 THE COURT: Are we all set?

12 Okay. Thank you.

13 THE DEPUTY CLERK: Please rise for the Jury.

14 (Jury present.)

15 THE COURT: Be seated, everyone. Welcome back. At  
16 this point the attorneys will have a chance to address you in  
17 what's called their opening statements. Okay?

18 For the Plaintiff, Ms. Kowalski.

19 Please go ahead.

20 MS. KOWALSKI: Good morning. We've already had a  
21 chance to spend a brief moment together while the jury process  
22 selection was going forward, but I wanted to take this  
23 opportunity to reintroduce myself. My name is Karen Kowalski,  
24 and counsel sitting next to me is Paul Dillon. We represent  
25 Beech-Nut.

1           As you may know, Beech-Nut sells infant and toddler  
2 food. And if you have children, as I do, little girls, you  
3 know that aisle in the grocery store well. And for those of  
4 you who don't have kids yet, you will probably will get to know  
5 that aisle well.

6           What happened in this case is very straightforward.  
7 In fact, I bet it has happened to all of us at some point.  
8 This case is about buying a product thinking you were getting  
9 something that you paid for but ending up with something broken  
10 and you just want your money back so you can go someplace else  
11 and get the product that you wanted from the very beginning.

12           That's exactly what we have here.

13           As I mentioned, Beech-Nut sells infant and toddler  
14 foods. It produces some of its own food and sells it. And  
15 then there are other products that it has manufactured and  
16 packaged by outside vendors, such as PIM.

17           Beech-Nut resells these products into the market to  
18 its customers, such as Walmart, Kroger's and other grocery  
19 stores.

20           In this case, Beech-Nut placed four orders with PIM  
21 for an all natural child's gummy fruit snack called Fruit  
22 Nibbles. Beech-Nut was putting Fruit Nibbles into the  
23 supermarkets for the very first time. PIM manufactured and  
24 packaged the Fruit Nibbles product and sold it to Beech-Nut.

25           Beech-Nut submitted four purchase orders for a total

1 of 230,000 cases. Not long after the PIM product hit the  
2 grocery shelves, Beech-Nut began noticing serious problems with  
3 the product. More importantly, it started getting complaints  
4 from its customers, such as Walmart, and perhaps more  
5 importantly, the consumers, you and me, who bought the all  
6 natural fruit product and fed it to our children, who then  
7 complained.

8 None of what I told you is in dispute. In other  
9 words, PIM has given a formal agreement, a stipulation. These  
10 facts are correct. Let me go through them very carefully.

11 First, Beech-Nut discovered that PIM had delivered  
12 underweight and improperly packaged cases of Fruit Nibbles.  
13 Cases contain the boxes. The boxes are what are sold on the  
14 grocery market shelves, and in those boxes contained six  
15 individual pouches of the Fruit Nibbles product.

16 But then Beech-Nut discovered something that was far  
17 worse than the improperly weighted package: It discovered  
18 problems with quality. Let me show you what PIM has formally  
19 agreed to and stipulated.

20 Just one moment.

21 THE COURT: You might want to bring that closer to the  
22 jury.

23 That's okay. I have it. So it's more important the  
24 jury see it.

25 (An easel is positioned in front of the jury.)

1 THE DEPUTY CLERK: Do you need a pointer?

2 MS. KOWALSKI: Actually, no, I'm good.

3 THE DEPUTY CLERK: Okay.

4 MS. KOWALSKI: Thank you.

5 THE COURT: Can all of you read that?

6 MS. KOWALSKI: The parties have agreed to the  
7 following facts as true:

8 Beech-Nut received in October and November 2008  
9 reports from consumers and retail customers of problems with  
10 Fruit Nibbles;

11 These problems included the color, texture, flavor,  
12 bite, and appearance of the product which differed from the  
13 product sample prototype and specifications;

14 In fall 2008, Beech-Nut began receiving hundreds of  
15 written complaints about the Fruit Nibbles product from  
16 consumers and retail customers, returns of the product, and  
17 demands for refunds and compensation;

18 The complaints included mislabeling and short weights  
19 in the packages, and that the Fruit Nibbles product had a  
20 powdery coating, was dried out, shriveled appearance, moldy I  
21 and wilted in appearance, had a fermented odor, terrible smell,  
22 hard texture, was a choking hazard, had a funny taste, sour  
23 odor, was wrinkled, raisin-like in appearance, had a bitter  
24 taste, bad smell, was covered with mold, had a horrible smell,  
25 had a green, white, or gray coating, looked like dead toes, was

1 old, nasty, discolored, crusty, gross, rotten, stale, dry,  
2 difficult to chew, spoiled smell, horrid smell, disgusting,  
3 waxy taste, and caused stomach aches;

4 Beech-Nut received dozens of reports of children's  
5 illnesses after consuming the Fruit Nibbles product.

6 These four photographs that I've shown you are facts  
7 that PIM admits. These facts are part of the stipulated facts.  
8 There are 47 stipulated facts between the parties.

9 After Mr. Wallach and I have had an opportunity to  
10 speak with you this morning, we'll read you the other 43 so  
11 you'll have them all.

12 As you will hear in greater detail from the witnesses,  
13 Beech-Nut had faced a steadily mounting avalanche of  
14 complaints. Beech-Nut concluded that the problems could not be  
15 isolated between one particular lot or shipment. So the  
16 evidence will show that Beech-Nut was left with no choice but  
17 to withdraw the product from the market and revoke its  
18 acceptance of the product from PIM. Beech-Nut allowed its  
19 retailers to cancel orders, it refunded them payments, and it  
20 paid additional fees to those retailers to take those products  
21 off the shelf.

22 As a result, Beech-Nut suffered significant financial  
23 losses; lost revenues, profits, out-of-pocket costs, and  
24 suffered a "black eye" in the market.

25 Beech-Nut is entitled to recover the damages for its

1 losses.

2 Based on the stipulations of fact, the Court has  
3 already held that at least some of the shipped product, shipped  
4 Fruit Nibbles product breached PIM's warranties.

5 And where does that leave us?

6 Well, there are two remaining issues for you to  
7 decide: First, whether PIM's breaches of warranties  
8 substantially impaired the value to Beech-Nut.

9 This is important, and I want to repeat this:

10 Whether PIM's breaches of warranties substantially  
11 impaired the value to Beech-Nut of all the Fruit Nibbles  
12 product that PIM sold to Beech-Nut.

13 The second issue that you will decide is what damages  
14 should be awarded to Beech-Nut if you agree that the value to  
15 Beech-Nut was substantially impaired.

16 At the close of the case you will hear the Judge tell  
17 you about what it means for the shipments to be -- shipments of  
18 products to be substantially impaired. That it means that a  
19 reasonable person standing in the shoes of the buyer would  
20 consider the value of the entire shipment to be impaired under  
21 those particular circumstances.

22 And the Court will instruct you on what items of  
23 damages a buyer may properly claim for a breach of warranty.

24 I'm going to change gears on you for a moment.

25 Besides the 47 stipulated facts that you will hear



1 after Mr. Wallach and I sit down, you'll also hear the  
2 testimony of several witnesses. You're going to hear the  
3 deposition testimony of Steve Hungsberg. He is the former  
4 Associate Director of Marketing for Beech-Nut. His testimony  
5 will establish that PIM's breaches of warranties was not an  
6 isolated issue and could not be narrowed down between one  
7 specific production or one specific shipment of Fruit Nibbles  
8 from PIM. He will testify that the quality defects -- the dry,  
9 the wrinkled, the dry toes -- I'm sorry -- dead toes, existed  
10 throughout the entire Fruit Nibbles product. He will testify  
11 that it was unpredictable whether one box to the next was of  
12 salable quality, not to mention whether the product would keep  
13 for the 12-month shelf life that was stamped on each and every  
14 box.

15 Next, you'll hear from Tim Kennedy. He was  
16 Beech-Nut's Chief Financial Officer, and he's going to tell you  
17 how the company reacted to the hundreds of complaints that it  
18 received and why it withdrew the product from the market. He's  
19 going to walk you through the damages that Beech-Nut suffered  
20 as a result of PIM's breaches.

21 He will testify, to leave the product on the market  
22 that was causing children's illnesses and was a choking hazard  
23 would have been irresponsible. That Beech-Nut could not assume  
24 that the only defect of Fruit Nibbles were the hundreds of  
25 complaints it received. That it was common sense that if some



1 of the consumers took the time to write in and complain, that  
2 there were many others who simply threw out the product and  
3 never bought Beech-Nut again. And, that it was reasonable to  
4 assume that over the years -- over the year shelf life, the  
5 12-months that was stamped on each and every box, that more  
6 product would turn into the smelly, rotten, dead toes.

7 Last, you're going to hear testimony from Mrs. Diane  
8 Bianchini. Ms. Bianchini is the former Quality Assurance and  
9 Research Development Manager for PIM. She will testify and  
10 tell you that PIM never produced a consistent salable product;  
11 that it was never able to fix the defects. And remember that  
12 Ms. Bianchini was PIM's Quality Assurance and Research  
13 Development Manager, not Beech-Nut's.

14 Mr. Wallach is going to speak to you after I sit down,  
15 and he may tell you, well, Beech-Nut may not be able to prove  
16 that all of the product was bad.

17 Well, of course we can't prove that every product --  
18 every package was bad, but that's not the standard. That's not  
19 substantial impairment.

20 Mr. Wallach may also get up here and tell that you  
21 Beech-Nut agreed to accept liability, in particular, for four  
22 truckloads of product.

23 Beech-Nut agrees that it did accept liability for  
24 those four truckloads, roughly \$130,000; approximately 10,000  
25 cases of product, but nothing more. And it was only the 10,000

1 cases out of 230,000 cases that Beech-Nut contracted with PIM.

2 At the end of the day, PIM is stuck with the  
3 consequences of making a bad product. PIM promised a product  
4 it did not deliver. PIM must accept its responsibility.

5 You will see now that most of these facts are very  
6 straightforward and show that PIM sold Beech-Nut a broken  
7 product; a product it could not sell to the parents of  
8 toddlers. The evidence will show that Beech-Nut had no  
9 reasonable choice other than to withdraw the product, start  
10 over with a brand new launch.

11 The value to Beech-Nut of all of PIM's production was  
12 substantially impaired. Beech-Nut simply just wants to be made  
13 whole.

14 I know you will listen carefully to the testimony. I  
15 know you will look at the exhibits that are put before you. I  
16 know you will decide the issues as they come. I believe and  
17 expect that you will find in favor of Beech-Nut and award it  
18 the monetary damages that it is asking for.

19 Thank you.

20 THE COURT: All right. Thank you, Ms. Kowalski.

21 Mr. Wallach, on behalf of your client.

22 MR. WALLACH: Thank you, your Honor.

23 Let me begin -- and I promise you I'm going to  
24 introduce the woman who's been sitting with me who you've seen  
25 for the last 30 minutes, I'll give you her name in about two

1 minutes -- but I want to do something even more important  
2 first. I want to thank you for what you're doing. The Judge  
3 said in his introductory remarks when everyone came into the  
4 courtroom how important it is serving on a jury.

5 It is. Several of you have served previously. You  
6 can see from the boxes in the courtroom, you can see from the  
7 preparation that went into counsel's opening statement, the  
8 lawyers have worked very hard on this case. We've prepared  
9 this case, and we will make every effort to expedite it, and  
10 you will be out of here this week. We will do everything we  
11 can to provide the evidence in a concise and understandable  
12 manner. And at the end of the day, the eight of you will make  
13 a very important decision that affects Beech-Nut Corporation  
14 and my client, Promotion In Motion.

15 So for the service you are going to render to us, we  
16 thank you in advance.

17 Now as I said, and before I forget my manners, seated  
18 at counsel table with me is Helen Horowitz Dale. She is a  
19 senior officer of Promotion In Motion and its General Counsel.

20 In the courtroom you will see Basant Dwivedi who is  
21 the Chief Operating Officer at Promotion In Motion. He will be  
22 one of the witnesses you will hear from in this trial. He is a  
23 person who lived through the process that led to the creation  
24 of Fruit Nibbles, the production of Fruit Nibbles, and the  
25 shipping of Fruit Nibbles.

1           You see, the lawyers keep talking about Fruit Nibbles  
2 because we've lived with this dispute for some time. As I  
3 recall all of your answers to the question, I don't think any  
4 of you have heard of Fruit Nibbles before, so it's our job to  
5 let you know what happened; why it is the eight of you are  
6 sitting in the jury box today and for a few more days.

7           Now, I have to tell you, I've been litigating this  
8 case since it began, but I was a little surprised by the  
9 opening statement given on behalf of Beech-Nut.

10           The parties agreed to the 47 stipulations of fact.  
11 There's no doubt about that. We know most of the facts here.  
12 You will interpret them; you will then apply those facts to the  
13 law given to you by the Judge. But I'm a little amazed at how  
14 differently the parties see this case. This is not a personal  
15 injury case, fortunately. No one was hurt.

16           This is a commercial breach of contract dispute  
17 between large corporations: A billion dollar corporation, and  
18 a multi-million dollar corporation. Let's not think this is a  
19 mom-and-pop dispute or it's a dispute between a big guy and a  
20 little guy. It isn't. It's a commercial breach of contract  
21 dispute.

22           We'll try to make it interesting for you, but it's not  
23 a headline type of case. It's a breach of contract where a  
24 legal standard will be applied to the facts as you hear it.

25           And we're hopeful that as you listen to the witnesses,

1 as you hear the exhibits that are referred to, you will come to  
2 the conclusion that, yes, some of the product may have had  
3 issues with it. We have never denied that.

4 I'll say that again. Promotion In Motion has never  
5 denied the fact that some of the product had issues with it.  
6 But that's not the question. The question is: Of the 230,000  
7 cases that were shipped to Beech-Nut, can Beech-Nut meet its  
8 burden of proof and show that there's a material breach that  
9 substantially all of the product was nonconforming and was of  
10 no value to them, and therefore they had a right to terminate  
11 the contract?

12 We maintain they didn't.

13 In tennis there's an expression: Foot fault. A foot  
14 fault isn't the end of the day.

15 There's no one hundred percent guarantee in life.  
16 There's no one hundred percent guarantee in the four purchase  
17 orders that counsel referred you to and that I'm going to talk  
18 about in a moment. "Some problems" does not equate with  
19 liability to my client. That's not the issue here.

20 The issue is: What is my client's obligation under  
21 these purchase orders?

22 And you will hear, maybe even this afternoon, more  
23 specifically about the purchase orders, but I just want to  
24 start with them right now. There are no other contracts  
25 between the parties. All of you in your various walks of life,

1 I'm sure you've been exposed to contracts, whether they're five  
2 pages, 20 pages or longer. I know IT contracts can be hundreds  
3 of pages. That's not what we have here.

4 We have purchase orders that state an amount on the  
5 front side and have certain standards and conditions on the  
6 back side. And I want to focus on that. Because even among  
7 the purchase orders there's really one paragraph that matters  
8 the most here. It's paragraph 4, and you'll hear about it  
9 during this trial. Paragraph 4 states that the product  
10 manufactured by my client will comply with the specifications.  
11 Okay? That makes sense, doesn't it?

12 But the question that I want you to think about during  
13 the trial -- because I'm not going to tell you what conclusions  
14 to draw, I'm not going to tell you whether you should believe a  
15 certain witness. What I want to do is highlight what's already  
16 going through your minds. What I want to highlight and ask you  
17 to focus on is, all right, Promotion In Motion is bound to  
18 follow the specifications.

19 Can someone tell me what those specifications are?

20 MS. KOWALSKI: Objection, your Honor. That's subject  
21 to a motion in limine, also part of the summary judgment  
22 decision that was rendered.

23 THE COURT: I'm going to sustain that objection, Mr.  
24 Wallach, right now.

25 MR. WALLACH: Your Honor, may we have a sidebar on

1       this for a moment, please?

2               THE COURT: All right. I'll see you at sidebar.

3               (At the sidebar.)

4               THE COURT: What is it?

5               MS. KOWALSKI: Your Honor, the motion in limine  
6       says -- what Mr. Wallach is talking about with respect to the  
7       specifications has already been decided by your decision on  
8       summary judgment. It has also been stipulated in Stipulations  
9       14 and 15 which we've determined has been warranted by 14 and  
10      15.

11              THE COURT: Go ahead. I'm sorry.

12              MR. DILLON: 14 and 15.

13              MS. KOWALSKI: 14 and 15, your Honor, set forth the  
14       specifications. In addition, on page 5 and 6 of your decision,  
15       the summary judgment decision refers to the specifications --

16              THE COURT: I'm sorry, you'll have to speak louder,  
17       and go slower. Go ahead.

18              MR. DILLON: This is -- yes, go slower.

19              MS. KOWALSKI: So in addition to the parties having  
20       stipulated that 14 and 15 are the specifications, paragraph 19  
21       also states that PIM had warranted those products under the  
22       four purchase orders as per the specifications in 14 and 15,  
23       and that those specifications have never changed.

24              The decision on summary judgment has already decided  
25       that there was, in fact, a breach of warranty as to the



1 specifications that didn't change. Hence, the only decision  
2 that is before -- or the only issues before the Court are  
3 whether or not those breaches themselves were substantially  
4 impaired.

5 THE COURT: Mr. Wallach. I mean, you did stipulate to  
6 this.

7 MR. WALLACH: I did.

8 THE COURT: That's why I sustained the objection.

9 MR. WALLACH: Your Honor, I'm entitled -- in order to  
10 respond to their claim that there's substantial impairment,  
11 they have to show the majority of the product did not meet the  
12 specifications. How is the jury going to make that conclusion  
13 without knowing what the specifications are? Otherwise, it's  
14 just Beech-Nut saying the product wasn't any good.

15 THE COURT: But you stipulated --

16 MR. WALLACH: I've read -- I'm sorry. But I read 14,  
17 15 and 19. There's no reference to what the exact  
18 specifications are.

19 THE COURT: There is. 15 reads as follows: (Reading)  
20 Prior to production, the product would meet the specifications  
21 for an all natural product that contained natural colors and  
22 flavor, no starch or corn syrup, and was soft enough for the  
23 toddler to eat and had a 12-month shelf life, the expiration  
24 date of which PIM was to stamp on each package of the product.

25 So, it has at least a good number of the



1 specifications that you've stipulated to.

2 MR. DILLON: And 19.

3 THE COURT: And then 19. (Reading) PIM expressly  
4 warranted that all shipped Fruit Nibbles would comply with the  
5 specifications described above in paragraphs 14 and 15, be fit  
6 for their intend purpose, merchantable, and free from defects  
7 of material and workmanship.

8 MR. WALLACH: Your Honor, as I focused on the  
9 specifications, there is nothing that talks about the intensity  
10 of the color. That's an item they complain about. There is no  
11 way a jury can determine the color was not good enough, the  
12 taste was too soft based upon anything that's here.

13 We agreed, yes, the specifications would be the  
14 product that was approved the end of July. The product then  
15 changed. But, your Honor, there's nothing that limits either  
16 in these stipulations or your ruling my saying to the jury:  
17 Please give thought to what are the specifications Beech-Nut  
18 claims were not satisfied.

19 If I breach add warranty, it's because the  
20 specification that they establish wasn't met.

21 MS. KOWALSKI: Your Honor --

22 THE COURT: Go ahead. No, go ahead.

23 I had thoughts on this beforehand, but I'll tell you,  
24 we're going to have to excuse this jury and interrupt your  
25 opening and bring them bank after lunch.

1           Go ahead.

2           MS. KOWALSKI: I was simply going to add that the  
3 decision on summary judgment that specifically cites to the  
4 fact that the specifications as outlined and as the prototype  
5 had established, that the parties had approved the prototype  
6 and that the product had not changed, and that's what had been  
7 warranted. And the defects that are complained of as  
8 stipulated in these facts are evidence of those breaches. The  
9 only purpose is to determine if that was throughout --

10          THE COURT: Well, the way I read your stipulation,  
11 you're not stipulating that the parties agreed that the product  
12 would meet the following specifications, among others. You're  
13 not stipulating to that.

14          MR. WALLACH: Correct.

15          THE COURT: But now you're trying to argue that there  
16 were other specifications beyond what's been stipulated to in  
17 paragraph 15. The plain reading of the language in 15 is --  
18 these are from the specifications -- that the product would  
19 meet the specifications.

20          Your proofs are that they're not meeting "all  
21 natural," that they were soft enough for a toddler to chew, and  
22 its shelf life issue, and the coloring and the flavors. That  
23 they would contain natural colors and flavors, no starch or  
24 corn syrup.

25          Now, if you can prove that it met all of these --

1 right? I mean, that's -- but you can't bring in new  
2 specifications if you stipulated these are the specifications.

3 MR. WALLACH: Understood, your Honor. And I'm not  
4 trying to bring in new specifications. What I'm saying is, to  
5 indicate as is in paragraph 15, that its, quote, soft enough,  
6 what's a jury supposed to do with that? How is the jury to  
7 understand what is soft enough?

8 THE COURT: Well, that's going to be -- they're going  
9 to have to --

10 MR. WALLACH: I apologize for interrupting. That's  
11 all I want to say to the jury: Please listen to the evidence  
12 as to what exactly these standards mean.

13 THE COURT: Well, if your comments are that we've  
14 stipulated as to what the specs are and now it's going to be up  
15 to you to determine whether or not they have substantially  
16 breached those specifications -- not just that they breached  
17 them, because I concluded that they breached them.

18 MR. WALLACH: Some of them, yes.

19 THE COURT: Some of them. But if your comments are  
20 not misleading and they go to -- the question you're going to  
21 have to decide, among others, is: Did they substantially  
22 breach these specifications which we've stipulated to?

23 Now, the Court has found that as to some of these  
24 items, they did. Okay? But your comments seemed to be going  
25 beyond the substantiality issue and more towards the

1 specifications themselves, what are they and whether they were  
2 breached. There's a difference.

3 MR. WALLACH: I still am of the view -- and I  
4 recognize repeating myself isn't going to change the argument  
5 so it's the last time I'll say it --

6 THE COURT: Let me hear it.

7 MR. WALLACH: Then I'll say it anyway. But I think  
8 the jurors are allowed to hear testimony as to what are the  
9 specifications in order to see if there is a substantial  
10 breach.

11 THE COURT: You've stipulated to what the  
12 specifications are.

13 MR. WALLACH: All due respect, your Honor, as lawyers  
14 say, I don't think a juror can take away the specification as  
15 to what the color is.

16 Your Honor, here's an example. Is your tie navy blue,  
17 is it dark blue?

18 THE COURT: Okay. Wait a minute.

19 MR. WALLACH: That's the point I'm making.

20 THE COURT: The specification is for an all natural  
21 product --

22 MR. WALLACH: Agreed. I'm not talking about --

23 THE COURT: -- that contained natural colors --

24 MR. WALLACH: I'm not talking about that.

25 THE COURT: -- and flavors.

1           MR. WALLACH: I'm talking about the degree of the  
2 color. One of the complaints is the reds weren't always red  
3 enough. One of the complaints is the soft wasn't always soft  
4 enough.

5           MR. DILLON: To me, if we're talking about complaints  
6 that it looked like dead toes, it ain't about nuances.

7           MR. WALLACH: I'm not talking about that.

8           MR. DILLON: But the specifications are stipulated to,  
9 Bill. And you can make an argument that Beech-Nut has to prove  
10 that there was a substantial deviation from the specifications,  
11 but that's different.

12          THE COURT: You're permitted to argue: We did not  
13 breach the specifications we stipulated to.

14          The way this is written, there's no -- there's no door  
15 to open to suggest there's new specifications.

16          MR. WALLACH: Nor am I trying to do that.

17          THE COURT: Well, the implication -- I'm not saying  
18 you were doing it -- you know, but the -- but you can argue the  
19 evidence will show that we did not breach the specifications  
20 substantially.

21          MR. DILLON: Substantially.

22          THE COURT: You know? That while -- or I'll correct  
23 the law, you know, and I'll say: Ladies and gentlemen, I found  
24 that they did breach the specifications as indicated here, at  
25 least as to some of the items. Okay?

1 MR. WALLACH: Okay.

2 THE COURT: But you cannot -- I mean, you can say, you  
3 know, we'll prove that they were natural colors substantially;  
4 we'll prove substantially that the flavors were all natural  
5 flavors substantially.

6 But if you were to try to say, we didn't breach the  
7 specifications, period, that's contrary to my ruling and so I'm  
8 not going to allow that.

9 MR. WALLACH: All right.

10 THE COURT: And if do you that, then I'll instruct  
11 them.

12 The question before them as I said, the -- you  
13 agreed -- the question before them is the substantiality of the  
14 breach.

15 MR. WALLACH: Understood, your Honor.

16 As I understand your ruling, I will not continue on  
17 that line but I will say: The evidence will show there was not  
18 a substantial breach of these specifications.

19 THE COURT: You still have your other two claims: The  
20 breach of the warranty, merchantability, period, which doesn't  
21 get into any --

22 MR. DILLON: We have 19, that they warranted, yes,  
23 that they warranted the merchantability.

24 MR. WALLACH: But will comply with the specifications.

25 THE COURT: But beyond that, beyond that, even if

1       there was nothing about "specification" there, you would have  
2       your claim for intended breach, the breach of the warranty of  
3       intended purpose.

4               MR. DILLON: Right.

5               THE COURT: And you would have your warranty for  
6       defects of material and workmanship. You wouldn't even have to  
7       get into specs if you were pursuing those two claims.

8               MR. DILLON: Right.

9               THE COURT: In other words, if you simply pursued  
10      Claim 2 and 3, what the specs are wouldn't matter if you could  
11      prove this stuff was uneatable, inedible.

12              MR. WALLACH: I think it becomes interrelated that a  
13      warranty is breached if it's not meeting the specification.

14              THE COURT: I don't think so. That's their decision.  
15      I don't think so.

16              MR. WALLACH: All right.

17              THE COURT: I think it's an alternative argument.

18              If a -- a product could meet all the specs, but if the  
19      person manufactures it and it's unsafe or it's inedible, then  
20      they produced a product that's in breach of the warranty for  
21      merchantability, and then you breach a warranty for  
22      merchantability for a specific purpose. Quite frankly, I  
23      didn't know why you were pursuing your claim on specs, because  
24      the specs aren't that specific.

25              MR. WALLACH: Right.

1           THE COURT: But I don't think you even have to under  
2 the law, but that's your decision.

3           Put in you're going to talk about breach of specs,  
4 you're going to talk about it in the context of substantial.

5           MR. WALLACH: Okay.

6           THE COURT: Not just -- because otherwise I'll have to  
7 correct you, because it would be contrary to my ruling.

8           MR. WALLACH: All right.

9           THE COURT: I did find some of these Fruit Nibbles  
10 didn't meet the specs and weren't merchantable. I mean, I made  
11 those findings.

12          MR. WALLACH: Understood.

13          THE COURT: Okay.

14          MR. WALLACH: So my only question, then we'll go back  
15 to the fun --

16          THE COURT: What fun?

17          Go ahead.

18          MR. WALLACH: Well, I enjoy it and Karen enjoyed it.

19          Are you going to say anything, or do I just resume my  
20 opening?

21          THE COURT: I'll say I sustain the objection.

22          MR. WALLACH: Okay.

23          THE COURT: All right. Go ahead.

24          MR. WALLACH: Thank you.

25          (In open court.)



1 THE DEPUTY CLERK: Are you ready, Judge?

2 THE COURT: Just a moment.

3 I sustained the objection, ladies and gentlemen. If  
4 you'll recall, I read to you at the beginning of the trial what  
5 the case was all about. And I'm going to read that to you once  
6 more. Okay?

7 It says: As I indicated, some of the rulings made  
8 previously by the Court -- and this was a description of the  
9 case prepared by both counsel. Correct?

10 It says, (Reading) Based upon certain rulings that  
11 this Court made previously, some of the claims in this case  
12 have already been resolved. So the only remaining claim that  
13 you'll be asked to decide is whether Beech-Nut is entitled to  
14 an award of damages from PIM on Beech-Nut's claim for breach of  
15 contract warranties that arose from four purchase orders.  
16 Okay?

17 Now this case involves a situation where PIM  
18 manufactured and sold 230,000 cases of a toddlers' gummy all  
19 natural fruit snack called Fruit Nibbles to Beech-Nut, the  
20 reseller of that product, which was to launch them as part of a  
21 new Beech-Nut product line called "Let's Grow."

22 After PIM's shipment of Fruit Nibbles, Beech-Nut began  
23 receiving hundreds of complaints from consumers and retailers  
24 from across the country about the PIM-manufactured and packaged  
25 Fruit Nibbles and withdrew the new product from the market.

1           Now, the Court, myself, previously ruled that at least  
2       some of the shipped Fruit Nibbles breached PIM's express  
3       warrantees to Beech-Nut concerning the Fruit Nibbles.

4           PIM denies that any breaches by it were substantial in  
5       viewing the entirety of the four purchase orders.

6           And again, so the issues that are before you are  
7       whether PIM's breaches, which I concluded were as to at least  
8       some of the items, whether or not PIM's breaches substantially  
9       impaired the value of the entire contract between the parties;  
10      and if so, for how much.

11          In other words, the question before you is: Was there  
12      a substantial breach of this understanding?

13          I ruled already that there was a breach of warranty as  
14      to some of the products that were complained about, and then  
15      the balance is what's in issue before you. Okay?

16          All right. Now with that understanding, again, Mr.  
17      Wallach, proceed.

18          MR. WALLACH: Thank you, your Honor.

19          I have to tell you I actually went to law school  
20      because I'm not good at math. I hear a lot of lawyers say  
21      that. But this case is going to turn on math. And as the  
22      Judge just indicated, "substantial nonconformance." I think  
23      that's the phrase you're going to be hearing over the next  
24      couple of days. That's the question you're going to have to  
25      give thought to.

1           As I said before we took our little break, and I'll  
2       say it again now: There is no doubt that some of the product  
3       had issues with it. And you'll hear about product that's  
4       manufactured in August and September of 2008, and we're going  
5       to compare that and contrast it with product that was  
6       manufactured October, November of 2008 so that you can draw the  
7       conclusion as to whether or not there was substantial  
8       impairment of the four purchase orders.

9           Now, here's the math I was talking about: One of the  
10      stipulated facts is that 230,000 cases of Fruit Nibbles were  
11      manufactured. That's a lot of cases. The question I want you  
12      to focus on when you hear evidence from Beech-Nut, or even when  
13      you hear my clients speak, is, how many of those 230,000  
14      cases -- I'll speak in English -- were defective, had problems,  
15      or which you wouldn't give to your kid or your grandchildren  
16      or, you know, put out for Halloween for trick-or-treat? I  
17      mean, that's really the question.

18           I'll stop being a lawyer for a second and let me be  
19      more of a human. Without fancy phrases, that's the question.  
20      That's the math that I'm going to ask you to focus on.

21           Can Beech-Nut tell you that 5 percent of the 230,000  
22      cases had a problem? Can they tell you that 10 percent? Other  
23      numbers I'm sure you can presume what they are. That's the  
24      question.

25           And let me suggest an answer: They can't, because

1       they haven't been able to do it up to date as we've asked them  
2       that question. No one from Beech-Nut has been able to say:  
3       Here is the total number of cases of Fruit Nibbles where there  
4       was a problem, or here's a percentage in which there's a  
5       problem.

6               So what did you hear? What did we all hear?

7               Well, we heard today in counsel's opening statement is  
8       that -- and this is an assumption, I don't think it's a fact --  
9       but that they had no way of going through the cases to see,  
10      where is there a problem or where is there not a problem?

11              Now, if I'm in Beech-Nut's shoes and I'm at trial I  
12      would say the same thing. But that's not the reality. The  
13      reality -- and you'll hear this in from Kennedy, one of their  
14      senior officers when he testifies -- is that Beech-Nut did not  
15      examine the product when my client shipped it to them. They  
16      didn't take out the knife and open up the cases and they didn't  
17      pull random samples. Beech-Nut did not examine the product  
18      when it came off the shelves, Kroger, Walmart, and some of the  
19      other retailers that it sold it to.

20              So, yes, Beech-Nut can tell you 230,000 cases. This  
21      is a product for toddlers. We had no choice.

22              I disagree. And I hope you do also. The choice was  
23      for them, before they ask you to award a lot of money -- and  
24      that's what they're asking for, you'll hear that, they're  
25      asking for a lot of money here -- the choice was for Beech-Nut

1 to take out one of those carton knives, open up the boxes and  
2 start looking at samples to see, what is the problem? How  
3 widespread is the problem? Is there a problem?

4 So as the Judge has instructed you, think about  
5 whether or not the substantial nonconformance can be  
6 established. "Some problems" is not the standard. That's not  
7 the payday for Beech-Nut. It's the substantial nonconformance  
8 standard.

9 Now, I have two boys. Karen has three girls, I have  
10 two boys, now you know all about our families. My two boys are  
11 very good at saying, all right, dad, that's what you think.  
12 Let's hear what mom has to say. I'm learning to live with  
13 that. But let me apply that to this case as well. I just ask  
14 you to focus on some math and whether or not Beech-Nut can  
15 prove something, which I don't think they can.

16 But you'll hear that from their own witnesses as well.  
17 And I think even more importantly -- and let me conclude with  
18 this observation -- you are going to hear testimony from  
19 Beech-Nut's own people, from their marketing people and their  
20 scientist, Dr. Chang, that in October of 2008, amidst this time  
21 when Beech-Nut wants you to believe this product is a hazard,  
22 it is no good, it's got to come off the shelves, you know, we  
23 need to burn it, in the same time period Beech-Nut's people,  
24 its salespeople, its marketing people are scrambling and  
25 demanding more product be delivered so it can be sold.

1           Not only are they scrambling and almost begging,  
2           particularly the salespeople, so they can earn commissions, but  
3           Dr. Chang, their scientist -- not a salesperson, not a  
4           marketing person -- their scientist writes in an e-mail in  
5           November of 2008 the product is still good. And because their  
6           scientist says the product is still good, Beech-Nut agrees and  
7           says, Promotion In Motion, send us four more truckloads --  
8           those big semi-trailers we see on the road -- send us for more  
9           trailers of product. We will hold you harmless from any issue.

10           Now, what doesn't make sense to me and what I ask you  
11           to think about is: What story is Beech-Nut really telling  
12           here? Was there a problem with the product in October,  
13           November of 2008 such that it canceled the contract for the  
14           reasons they want you to believe? Is that the story? Because  
15           if that's the story, why are they taking \$136,000 worth of  
16           product, four truckloads, and begging that we send it out as  
17           soon as possible so they can sell it and make money?

18           Those are the questions. And as you listen to all  
19           this evidence and think about the questions, we're confident  
20           that you'll reach the conclusion that the fact that there is a  
21           problem with some of their product -- we admit that and always  
22           have -- is not the answer to what this jury has to focus on,  
23           but that the answer is, there was not substantial impairment of  
24           the entire contract.

25           Thank you.

1 THE COURT: Thank you, Mr. Wallach.

2 All right. Ladies and gentlemen, we'll recess for  
3 lunch. Again now, please don't discuss anything about the  
4 case, and we'll see you back here at 1:30 and we'll continue at  
5 that time with the trial.

6 Thank you very much.

7 THE DEPUTY CLERK: Please rise for the Jury.

8 (The Jury leaves the courtroom.)

9 THE COURT: All right. Be seated for a second.

10 All right. We'll see you at 1:30 then. Okay. Thank  
11 you.

12 MR. DILLON: Thank you, your Honor.

13 (A luncheon recess is taken.)

14

15 A F T E R N O O N S E S S I O N

16

17 THE DEPUTY CLERK: Please remain seated.

18 THE COURT: We're all set? How are you going to  
19 proceed? Are you going to read the stipulation? Is that it?

20 MR. DILLON: Judge, what we're going to do first --  
21 let me ask if I could just hand up a book of Beech-Nut trial  
22 exhibits. These are the premarked exhibits and it's a copy for  
23 your Honor.

24 THE COURT: Thank you.

25 MR. DILLON: What we're going to do is read the



1 stipulations of fact into the record. I'll read the first 15,  
2 Ms. Kowalski will read the next 15, I'll get back up and finish  
3 them off. And I also have a hard copy of the stipulations.

4 THE COURT: You don't want to read any?

5 MR. DILLON: He'll get his chance to read.

6 MR. WALLACH: You don't like to hear my voice so I  
7 thought I would be quiet for a minute.

8 THE COURT: I didn't that.

9 MR. DILLON: We also have hard copies to give to the  
10 jurors and I'll collect it back from them when we finish.

11 THE DEPUTY CLERK: Do you want to give them to me so I  
12 can hand them to them as they are being seated? Why don't you  
13 hand it to me and I'll hand them to them.?

14 MR. DILLON: Okay.

15 THE DEPUTY CLERK: Please rise for the Jury.

16 (Jury present.)

17 THE COURT: Okay. Welcome back.

18 You've just been handed what's called a stipulation.  
19 This is a -- a stipulation is an agreement between the parties  
20 as to the matters that are set forth -- you can be seated,  
21 everyone -- as to the matters that are set forth in the writing  
22 itself. Okay? So the parties agree on these statements.  
23 Okay? And findings.

24 At this point, just as an aid to you, you have a copy  
25 of it before you, and the plaintiff will read these and you can



1 read along with him as he reads these stipulations into the  
2 record. Okay.

3 Mr. Dillon.

4 MR. DILLON: Thank you, Judge.

5 Stipulations of fact:

6 1. Promotion In Motion is a Delaware corporation  
7 whose principal place of business is located in Allendale, New  
8 Jersey. Promotion In Motion is a promoter and marketer of  
9 popular brand number confections, fruit snacks, fruit roles,  
10 snack, and specialty foods.

11 2. PIM Brands is a wholly owned subsidiary of  
12 Promotion In Motion based in Somerset, New Jersey, where it  
13 operates a state of the art manufacturing facility.

14 3. In 2007-2008, PIM was among North America's most  
15 prominent and rapidly growing manufacturers and markers of  
16 popular brand name confections, fruit snacks, fruit rolls,  
17 snack and specialty foods.

18 4. Beech-Nut is a Nevada corporation and maintains an  
19 office in Amsterdam, New York. Beech-Nut sells consumer food  
20 products under its brand name across the United States.

21 5. Beech-Nut sold infant, toddler, and children's  
22 food products.

23 6. In late 2007, Beech-Nut contacted PIM about  
24 whether PIM would be willing to contract to "co-pack" a  
25 potential new toddlers's all natural gummy fruit snack product

1 that it wanted to develop for retail distribution in fall 2008.

2 7. The product, to be known as fruit Nibbles, was to  
3 be part of a larger Beech-Nut product launch that was a  
4 corporate priority to Beech-Nut under its "Let's Grow" line of  
5 foods for toddlers.

6 8. PIM told Beech-Nut that it was producing a product  
7 for Welch's similar to the new product that Beech-Nut wanted to  
8 develop called, "Welch's Fruit Snack."

9 9. In February 2008, PIM stated to Beech-Nut that it  
10 could produce Fruit Nibbles in accordance with Beech-Nut's "No  
11 Junk Promise," meaning the ingredients, among other criteria,  
12 had to be 100 percent natural.

13 10. PIM also stated to Beech-Nut that it had  
14 sufficient production capacity to meet Beech-Nut's expected  
15 needs.

16 11. A product development time line with the product  
17 launch set for August 2008 was discussed by PIM and Beech-Nut.

18 12. Beech-Nut and PIM collaborated to develop Fruit  
19 Nibbles in that Beech-Nut identified to PIM the characteristics  
20 of the product it wanted (color, texture and "bite") and PIM  
21 determined the ingredients, formula, and process to produce the  
22 product.

23 13. Promotion In Motion created sample products that  
24 it sent to Beech-Nut for review, feedback, and approval prior  
25 to the commencement of manufacturing.

1           14. In 2008, PIM provided a sample product which  
2 Beech-Nut approved as the sample for the product PIM was to  
3 produce.

4           15. Prior to production, the parties also agreed that  
5 the product would meet the specifications for an all natural  
6 product that contained natural colors and favors, no starch or  
7 corn syrup, and was soft enough for a toddler to eat and had a  
8 12-month shelf life, the expiration date of which PIM was to  
9 stamp on each package of the product.

10           MS. KOWALSKI: 16. Beech-Nut representatives visited  
11 the PIM facility on a number of occasions.

12           17. During 2008, there were communications between  
13 the parties concerning the development of the product to  
14 satisfy Beech-Nut's demands, including on August 1st, 2008  
15 (BN000533-36)

16           Beech-Nut submitted and PIM accepted four written  
17 orders for Fruit Nibbles: (a) The first dated May 9th, 2008  
18 for 85,000 cases of Fruit Nibbles required by August 1st, 2008  
19 for \$984,300 (No. AHGI923); (b) The second dated August 5th,  
20 2008 for 80,000 cases of Fruit Nibbles for \$926,400 required by  
21 October 1st, 2008 (No. AHGI994); (c) The third dated September  
22 8, 2008, for 50,000 cases of Fruit Nibbles for \$579,000  
23 required by November 8, 2008, for -- (No. AGH2017); and (e) The  
24 fourth dated October 13th, 2008 in two parts: One for 100,000  
25 cases for -- of Fruit Nibbles for \$1,318,000 and the other for

1 14,400 cases of Fruit Nibbles for \$189,792 (No. AHG2048).

2 19. Pursuant to these purchase orders, PIM expressly  
3 warranted that all shipped Fruit Nibbles would comply with the  
4 specifications described above in paragraphs 14 and 15, be fit  
5 for their intended purpose, merchantable, and free from defects  
6 of material and workmanship.

7 20. There were no signed, written modifications of  
8 any of the four written purchase orders.

9 21. The purchase orders constituted the only  
10 contracts between the parties, and their express terms governed  
11 the parties' financial responsibilities for any defective Fruit  
12 Nibbles.

13 22. Through the purchase orders, Beech-Nut purchased  
14 230,000 cases of Fruit Nibbles from PIM.

15 23. Beech-Nut had knowledge of the ingredients that  
16 were used in the formula for Fruit Nibbles and the general  
17 process used to make the product, but it did not know the exact  
18 formula or the particular details of the manufacturing process.

19 24. PIM owned the formula for the Fruit Nibbles  
20 product and did not provide it to Beech-Nut.

21 25. PIM told Beech-Nut what ingredients were used to  
22 make the Fruit Nibbles, which were listed on the product  
23 packages. PIM did not tell Beech-Nut the manner or order in  
24 which the ingredients were combined or the cook temperatures,  
25 durations, or other details for making Fruit Nibbles products,

1 which PIM considered proprietary information.

2 26. Fruit Nibbles were brought to the market without  
3 extended shelf life testing having been performed by PIM.

4 27. PIM's initial sales and delivery of Fruit Nibbles  
5 were made to Beech-Nut in September 2008.

6 28. Beech-Nut received a number of Fruit Nibbles  
7 shipments from PIM between August 22nd, 2008 and November 25th,  
8 2008, as reflected in the table Bates stamped BNOOI1333-334.  
9 The last shipment of Fruit Nibbles was received from PIM by  
10 Beech-Nut on November 25th, 2008.

11 29. Beech-Nut discovered that PIM delivered a number  
12 of underweight and improperly packaged cases of Fruit Nibbles.

13 30. In and after September 2008, Beech-Nut advised  
14 PIM of problems it encountered with mislabeled and short-weight  
15 product.

16 MR. DILLON: 31. Beech-Nut received in October and  
17 November 2008, reports from consumers and retail customers of  
18 problems with the Fruit Nibbles. These problems included the  
19 color, texture, flavor, bite and appearance of the product  
20 which differed from the product sample prototype and  
21 specifications.

22 32. In fall of 2008, Beech-Nut began receiving  
23 hundreds of written complaints about the Fruit Nibbles  
24 products -- product from consumers and retail customers,  
25 returns of the product, and demands for refunds and

1 compensation.

2           33. The complaints included mislabeling and short  
3 weights in the packages, and that the Fruit Nibbles products  
4 had a powdery coating, was dried out, shriveled appearance,  
5 moldy and wilted in appearance, had a fermented odor, terrible  
6 smell, hard texture, was a choking hazard, had a funny taste,  
7 sour odor, was wrinkled, raisin-like in appearance, had a  
8 bitter test, bad smell, was covered with mold, had a horrible  
9 smell, had a green, white or gray coating, looked like dead  
10 toes, was old, nasty, discolored, crusty, gross, rotten, stale,  
11 dry, difficult to chew, spoiled smell, horrid smell,  
12 disgusting, waxy taste, and caused stomach aches.

13           34. Beech-Nut received dozens of reports of  
14 children's illness after consuming the Fruit Nibbles product.

15           35. The Fruit Nibbles product complained of as  
16 described above did not satisfy the warranties in the purchase  
17 orders.

18           36. Beech-Nut accepted returns of products from  
19 retail customers and consumers and incurred costs in doing so.

20           37. PIM declined to accept returns of products from  
21 Beech-Nut or pay for costs of the product launch which  
22 Beech-Nut requested.

23           38. On December 2, 2008, Beech-Nut sent an e-mail to  
24 PIM concerning these complaints and advising of its decision to  
25 withdraw Fruit Nibbles from the market.

1           39. Beech-Nut attempted to revoke its acceptance of  
2 the previously received Fruit Nibbles and offered to return the  
3 goods the PIM.

4           40. PIM declined to compensate Beech-Nut for the  
5 rejected product and costs of withdrawal of the Fruit Nibbles  
6 product from the market.

7           41. Beech-Nut incurred costs in withdrawing the Fruit  
8 Nibbles product, resolving retail customers' and consumers'  
9 complaints, and checking and correcting misweighed and labeled  
10 product packages.

11           42. In mid January 2009, the parties discussed both  
12 the problems with the prior Fruit Nibbles products, the  
13 financial responsibility for those problems, and Beech-Nut's  
14 desire to relaunch Fruit Nibbles in spring of 2009.

15           43. In February 2009, the PIM expressed its concerns  
16 about Beech-Nut's continued desire to hold PIM responsible for  
17 all expenses associated with the problems with and withdrawal  
18 of Fruit Nibbles.

19           44. The parties did not reach agreement on a  
20 resolution of the problems with the Fruit Nibbles products or  
21 financial responsibility for the problems and withdrawal.

22           45. On February 23, 2009, Beech-Nut advised PIM that  
23 Beech-Nut had decided to pursue alternate suppliers for Fruit  
24 Nibbles.

25           46. Beech-Nut had no Fruit Nibbles products to sell



1 to retail customers and consumers until spring 2010.

2 47. Beech-Nut relaunched Fruit Nibbles produced by a  
3 different manufacturer in spring 2010.

4 THE COURT: That concludes the reading of the  
5 stipulations. Is that correct?

6 MR. DILLON: That's correct.

7 THE COURT: Mr. Dillon, would you just collect those  
8 stipulations?

9 MR. DILLON: Yes, I will.

10 THE COURT: All right. You can call your first  
11 witness, please.

12 MS. KOWALSKI: Yes, your Honor.

13 We'd like to call Steve Hungsberg to the stand by  
14 deposition.

15 MR. DILLON: Your Honor, I will be testifying in the  
16 place of Mr. Hungsberg.

17 THE COURT: You'll be reading his deposition?

18 All right. Ladies and gentlemen -- who is this, Mr.  
19 Hungsberg?

20 MS. KOWALSKI: Mr. Hungsberg, Steve Hungsberg.

21 THE DEPUTY CLERK: Would you spell his name for the  
22 record?

23 THE COURT: Let me explain to you what a deposition  
24 is. Okay?

25 As I will indicated briefly this morning, a deposition

1 is a process by which the attorneys can subpoena a possible  
2 witness to a trial to come to one of their offices, and they'll  
3 have a court reporter just like Mr. Perelli there, and they  
4 have an opportunity to ask him questions, he gives answers and  
5 they both have an opportunity to do that. Then a record is  
6 prepared, a transcript is prepared of that. And the law allows  
7 the reading of such a transcript -- that testimony was under  
8 oath, of course -- the law allows the reading of such a  
9 transcript for a variety of different reasons, if the witness  
10 isn't here, if the parties agree, whatever -- and you can  
11 consider this evidence just like you would if he were  
12 testifying here. Okay?

13 So to make it more interesting so you're not just  
14 reading a transcript, he'll be asked a question that was asked  
15 at the deposition by Ms. Kowalski, and Mr. Dillon is going to  
16 read the transcript of Mr. Hungsberg.

17 MS. KOWALSKI: Hungsberg.

18 THE COURT: Hungsberg. His answers. Okay?

19 Okay. You can proceed, please.

20 (Excerpts of the deposition of Mr. Steve Hungsberg are  
21 read as follows:

22 Q Mr. Hungsberg, would you please turn to page 15.

23 Let's just go back a little bit, if we could.

24 Will you tell me your education --

25 THE COURT: Do I have a copy of that?

1 MR. DILLON: You should.

2 THE COURT: Do I have a copy of the deposition?

3 THE DEPUTY CLERK: I don't.

4 THE COURT: It's not in the binder, is it, Mr. Dillon?  
5 No.

6 MR. DILLON: I'll give you one, your Honor.

7 THE COURT: Okay. Thanks.

8 All right. You can proceed. Thanks.

9 (Deposition reading commences.)

10 QUESTIONS READ BY MS. KOWALSKI:

11 Q Let's just go back a little bit, if we could. Will you  
12 tell me your educational background?

13 A Sure. I went to undergrad at the University of Illinois  
14 and got a BS in advertising, and then went to the University of  
15 Chicago for my MBA.

16 MS. KOWALSKI: Please turn to page 16.

17 Q Did you take any time off, or did you go right to the  
18 University of Chicago for the MBA program?

19 A I had some time between those programs, where I worked.

20 Q After graduating in 1991, what did you do next?

21 A After that, I went to work for Sound Warehouse, which was a  
22 Midwest regional music chain, which became Blockbuster Music.  
23 Then after that I went to work for Hundai. Did marketing for  
24 them.

25 Q Sorry. For who?

1 A Hundai. And after that, went into the University of  
2 Chicago's program in 2001.

3 Q At Sound Warehouse which later became Blockbuster, were you  
4 also doing marketing?

5 A Yes.

6 Q Did you complete the MBA program in two years?

7 A Yes.

8 Q What year did you get your degree?

9 A 2001.

10 Q If you'd walk me forward from 2001, what was your first  
11 employment after getting the MBA?

12 A At General Mills in Minneapolis.

13 Q What were the dates of your employment with General Mills?

14 A It was I think June 2001 through September 2004.

15 Q And were you in Minneapolis the whole time?

16 A Yes.

17 Q Did you have a total?

18 A Associate Marketing Manager.

19 Q Did that title change at any point in the approximately  
20 three years you were with General Mills?

21 A No.

22 Q I realize this is going to be a little informal, but  
23 English, what did it mean to be an associate marketing manager?  
24 What were your responsibilities?

25 A It was helping guide the brand team to reach the sales

1 figures and profit goals for the year. So I was working with  
2 all of the different functions to help make a brand work;  
3 operations, finance.

4 Q What did you -- why did you leave General Mills?

5 A I was laid off.

6 Q Were there other people in the group or department laid off  
7 as well at that time?

8 A Yes.

9 Q What was your next employment?

10 A ConAgra in Chicago. And that was from October 2004 through  
11 June 2007.

12 Q What title did you have at ConAgra?

13 A I started with Assistant Marketing Manager.

14 Q And did your title change?

15 A Yes. I was promoted to Marketing Manager after about a  
16 year.

17 Q Was that the final position or title you had while at  
18 ConAgra?

19 A Yes.

20 Q Was there any specific aspects of ConAgra's line of  
21 business that you focused on while you were an assistant  
22 marketing manager or marketing manager?

23 A There were specific lines of business, but those changed  
24 throughout my time there.

25 Q What were -- pardon me -- what were lines of business were

1       you involved in?

2       A     Table spreads, like margarine; sausage; different kinds of  
3       meats; and there are also a few brands that included Butterball  
4       and Hebrew National, things like that.

5       Q     As assistant marketing manager, how would you define what  
6       your responsibilities were?

7       A     The same as General Mills, where you help coordinate a team  
8       to reach their goals.

9       Q     How many assistant marketing managers were there at  
10      ConAgra, if you know?

11      A     I'm not too sure. There's the ConAgra in Chicago, and then  
12      there are several other locations that have assistant marketing  
13      managers as well.

14      Q     Were you the only assistant marketing manager in Chicago?

15      A     No, there were probably, I would guess -- 20.

16      Q     There was only one marketing manager. Correct?

17      A     No, there was a marketing manager for -- sometimes you have  
18      a marketing manager for just one brand, sometimes you'd have a  
19      marketing manager cover several brands.

20      Q     That is the question I meant to ask when I was talking  
21      about product line earlier -- product lines earlier. When you  
22      were the marketing manager, was it for one product line, or one  
23      brand?

24      A     It was for table spreads, so it covered several lines.

25      About three or four.

1 Q Were you in Chicago the whole time you were with ConAgra?

2 A Yes.

3 Q What were the circumstances behind you leaving ConAgra, I  
4 believe in June of 2007?

5 A The Beech-Nut opportunity.

6 MS. KOWALSKI: Please turn to page 29.

7 QUESTIONS READ BY MS. KOWALSKI:

8 Q Let me focus on your employment at Beech-Nut, same as did I  
9 with General Mills and ConAgra.

10 When you began on June 11, 2007, what was your title?

11 A Associate Director of Marketing.

12 MS. KOWALSKI: Page 31, please.

13 Q What were your responsibilities as associate director of  
14 marketing?

15 A The specifics changed over the time, but generally speaking  
16 it was leading a team to achieve the goals of the company. So  
17 it was managing the brand and working with operations and R&D,  
18 and finance.

19 MS. KOWALSKI: Please turn to page 57.

20 Q What was your understanding as how -- as to how Fruit  
21 Nibbles would differ from the Welch's product Promotion In  
22 Motion was also manufacturing?

23 A I think that they used high fructose corn syrup, which we  
24 wouldn't use. I thought that theirs was all natural other than  
25 that, but I don't remember.



1 MS. KOWALSKI: Page 62, please.

2 Q You've indicated, with respect to the "Let's Grow" launch  
3 in the fall of 2008, I believe there were 17 different groups  
4 of product line that were being launched.

5 A Seven different categories, and 19 different units within  
6 those categories.

7 Q I knew I had it wrong. Let's stay with the 19 figure.

8 There were -- were all of these 19 completely new  
9 products that were being formulated just for the launch, if you  
10 know?

11 A No.

12 Q Some had been existing products that were being modified.  
13 Is that a fair statement?

14 A Yes, and some were previously existing. That didn't change  
15 at all.

16 Q Were you involved in any of the other products -- my words  
17 here -- that had been created from scratch as part of the  
18 product launch?

19 A In the same manner as Fruit Nibbles, yes.

20 MS. KOWALSKI: Page 73, please.

21 MR. WALLACH: Excuse me. Your Honor, just -- I don't  
22 have page 73 listed.

23 MR. DILLON: No, I don't -- no.

24 MR. WALLACH: It next goes to page I believe 81.

25 MR. DILLON: Yes, I believe that's correct.

1 MS. KOWALSKI: Oh.

2 THE COURT: All right. Proceed.

3 MS. KOWALSKI: 81.

4 Q Maybe you can start generally, we'll try to get a little  
5 bit specific.

6 What was the marketing effort undertaken by Beech-Nut  
7 in anticipation of the launch of its fruit products?

8 A There were two types, two categories of marketing: One is  
9 to the customers or the retail outlets, and the other one was  
10 to the consumers, to people who had purchased the product in  
11 the grocery stores.

12 Though for the marketing to the customers we put  
13 together a PowerPoint presentation which our sales reps would  
14 then tailor for their specific customers. And that would  
15 include factual information about the different products,  
16 including Fruit Nibbles. And then we produced a video that  
17 would be shared only with buyers, customers. That was  
18 primarily how we spoke with the customers in terms of  
19 marketing. Oh, and then samples would be given to them for the  
20 consumers.

21 Q Can I just jump in.

22 Everything you just talked about, was that specific to  
23 Fruit Nibbles or was that the overall launch?

24 A Both. It was the overall launch, but it included specific  
25 Fruit Nibbles information.

1 Q So when you talked about a PowerPoint presentation or the  
2 video presentation, was that a PowerPoint that had all of the  
3 products, or was it a PowerPoint that only spoke to Fruit  
4 Nibbles?

5 A All of the products.

6 Q Similarly for the video?

7 A Yes.

8 Q It addressed all of the products, and part of the video  
9 dealt with Fruit Nibbles. Is that correct?

10 A Yes.

11 Q I interrupted you. You were starting to talk about  
12 consumers now?

13 A For the consumers, we developed print advertising, a  
14 magazine ad that included a look at the whole line but had a  
15 specific callout for Fruit Nibbles.

16 Q And were those variations that had specific callouts for  
17 the other products depending on how much you wanted to  
18 highlight them?

19 A No, it was -- so "Let's Grow" was envisioned as a world,  
20 and so the faces of each of our packages was an illustration  
21 that included images of the product itself, and so we combined  
22 all those images into a "Let's Grow" landscape. So that's what  
23 that consisted of. So it should have -- it should have  
24 representations of each of the "Let's Grow" items. Oh, and our  
25 website.

1 MS. KOWALSKI: Page 85, please.

2 Q There came a time when complaints arose concerning Fruit  
3 Nibbles products. Is that correct?

4 A Yes.

5 Q Do you recall when you first learned of such complaints?

6 A I think it was our Hyvee customer, the retail chain out in  
7 Iowa that had gotten complaints about either one of their  
8 employees or one of their consumers that brought it back saying  
9 that the product was moldy.

10 Q Do you recall when that happened?

11 A It would have been within a month of it going out there.

12 MS. KOWALSKI: Page 87, please.

13 Q Generally speaking, when a consumer or vendor raises a  
14 complaint about a Beech-Nut product, did Beech-Nut have  
15 procedures to follow?

16 A Yes. It would go through customer service, and they would  
17 field the call. And if it seemed like it was an unusual issue  
18 or any -- or say unusual in terms of severity or number of  
19 complaints, it would be elevated as soon as possible and  
20 brought to the attention of both marketing and R&D so that they  
21 can be alerted to the fact that there's an issue.

22 MS. KOWALSKI: Page 90, please.

23 Q Can you tell me what specific production runs of the Fruit  
24 Nibbles product were not satisfactory to Beech-Nut?

25 A What I remembered is that we tried to identify that, and

1 due to how it's manufactured, it was impossible to isolate. We  
2 thought we could first address the problem by pulling specific  
3 lots, but then found out that they were mixed so much that  
4 without breaking open the carton itself, we couldn't do that.

5 Q Well, tell me, with exact problem existed? What did you  
6 mean by "they were mixed"?

7 A So when the complaints primarily centered around the  
8 product looking moldy or dry and shriveled up and when it  
9 became clear that it was not just this one specific incident  
10 but it started popping up with different customers across the  
11 country, we realized that we needed to do something a little  
12 more serious about approaching the product, which included  
13 pulling it.

14 Now, to pull everything would be crazy expensive. We  
15 wanted to find out if there was a way we could isolate the lot  
16 code so that we could talk to the retailer and say, all right,  
17 you just pull XYZ from it and we'll be okay, everything else is  
18 good.

19 But as we went further and further into it, we found  
20 out that you couldn't just rely on the carton code. When you'd  
21 open it, up you'd find -- actually not just this transformed  
22 product issue but sometimes there would be varying levels of  
23 pouches within the carton, so it could be anywhere from three  
24 to nine. Some of them had nine in there when it was supposed  
25 to have six. So that was one part. The other part was, we

1 would -- in the case where there's just six pouches, for  
2 example, we'd pull out four pouches that were good and two that  
3 were lousy, and sometimes they'd have the same numbers on them.  
4 So it was just too -- it was impossible to separate those.

5 (Reading of deposition concludes.)

6 MS. KOWALSKI: No further questions.

7 THE COURT: All right. Thank you. That completes  
8 your reading of the deposition? It does. Right?

9 MR. WALLACH: There's additional designations, I  
10 believe you're not going to use them?

11 THE COURT: No, that completes them.

12 MR. WALLACH: Okay.

13 THE COURT: Thank you, Mr. Dillon, thank you, Ms.  
14 Kowalski.

15 All right. Proceed, please.

16 MR. DILLON: I call our first witness, Tim Kennedy.

17

18 T I M K E N N E D Y, called as a witness, having been first  
19 duly sworn, is examined and testifies as follows:

20

21 THE DEPUTY CLERK: Please state and spell your name  
22 for the record.

23 THE WITNESS: Tim Kennedy.

24 MR. DILLON: Your Honor, I'm going to give Mr. Kennedy  
25 a book of the trial exhibits for Beech-Nut.

1 THE COURT: That's fine. Hand it up to him.

2 DIRECT EXAMINATION

3 BY MR. DILLON:

4 Q Mr. Kennedy, in 2008, what was your position at Beech-Nut?

5 A I was Senior Vice President and Chief Financial Officer.

6 Q Tell the jury briefly about your education.

7 A I graduated from Florida Southern College in Lakeland,  
8 Florida with a BS in accounting; went into public accounting  
9 after that for about three years; and got my CPA; and then  
10 after three years got into manufacturing and the private world.

11 Q Can you summarize your work experience briefly for the jury  
12 before you began working for Beech-Nut?

13 A Sure. Basically spent three years working for public  
14 accounting. After that, I got into manufacturing. Most  
15 previously was with Certified Grocers of Florida, which is a  
16 wholesale distributor of grocery products. After that I went  
17 to work for a sister company of Beech-Nut in Florida called  
18 Signature Brands. Signature Brands is a wholly owned  
19 subsidiary of a Swiss-based parent, the same that owns  
20 Beech-Nut. I started with them in 1993. And then in 2008 I  
21 went up to Beech-Nut and had joint responsibility for the  
22 company in Florida and through New York.

23 Q When did you become Senior Vice President and Chief  
24 Financial Officer for Beach-Nut?

25 A Effective July of 2008, and I started in August of 2008.



1 Q What were your responsibilities as Senior Vice President  
2 and Chief Financial Officer for Beech-Nut?

3 A Basically my -- I was responsible for all the financial  
4 aspects of the company, number one. We had a staff and team  
5 that did all the accounting work, all the financial work;  
6 banking, risk management, insurance, somewhat of property  
7 management. And at the time Beech-Nut was in the process of  
8 changing manufacturing plants so I was involved in a lot of  
9 that process also from a real estate standpoint.

10 Q In your capacity as Senior Vice President and CFO of  
11 Beech-Nut, were you familiar with the normal business  
12 operations of the company?

13 A Yes, I was.

14 Q Would that include the records and record keeping  
15 procedures employed by Beech-Nut regarding its financial  
16 matters?

17 A Yes, I was.

18 Q Do you recall in 2008, what was Beech-Nut's intended launch  
19 date for the "Let's Grow" line of products?

20 A Fall of 2008.

21 Q And how many products were involved in the "Let's Grow"  
22 product line?

23 A I believe it was 19.

24 Q With Fruit Nibbles being one of those products?

25 A Yes, sir.

1 Q What role, if any, did you play in the development of the  
2 Fruit Nibbles product?

3 A Because of my transition from the sister company, I started  
4 actually getting involved in Beech-Nut in August of 2008, but I  
5 really was not on board with much of that process until  
6 approximately October when the issue started to arise.

7 Q What was your reason for assuming a role at that point?

8 A At that point it had been elevated to a status that  
9 required a senior manager, and basically was more to assess the  
10 risk; the risk to our product launch, the risk to the company,  
11 the risk to the consumers and customers.

12 Q What were the problems that were reported to you?

13 A Initially it was just consumer complaints.

14 MR. WALLACH: Objection, your Honor, that calls for  
15 hearsay, what someone else may have told this witness.

16 MR. DILLON: Well, I'm not --

17 THE COURT: Go ahead.

18 MR. DILLON: I'm not introducing it for the truth. He  
19 said he became involved because of problems or issues beginning  
20 to arise, and I'm asking what was told to him.

21 THE COURT: Not what was told, but the objection will  
22 be sustained as to, what -- why did he get involved.

23 MR. DILLON: Right.

24 Q Why did you get involved?

25 A I got involved because we had received consumer complaints

1 through our hot line, and they had been serious enough that  
2 they were elevated through a normal protocol to senior  
3 management to decide next steps, what we needed to do and where  
4 to go from there.

5 Q Would you turn to Exhibit 6, Beech-Nut Exhibit 6, please.

6 What is this?

7 A This is a printout of an e-mail that was sent from Lisa  
8 Lewis, who was the manager of our consumer hot line. It's a  
9 series of e-mails and the trail of it, that basically also had  
10 a file attached to it that had the -- both telephone  
11 communication consumer complaints as well as the e-mail  
12 consumer complaints from the customers on the Fruit Nibbles  
13 products.

14 Q If you would turn to the telephone log portion.

15 Just going across the top of the first page, can you  
16 tell us what information is contained there?

17 A Basically it's a report showing the call date; a unique  
18 incident number that was assigned to the call; the product  
19 code; the reason for the call, because this is -- this is a  
20 report that comes out of our normal protocol. Because  
21 consumers will call in for inquiries concerning coupons, where  
22 to buy the product, just any general question, also about  
23 complaints. So the reason for their call; the store name where  
24 they bought it from; if it was applicable for what they were  
25 buying; the state; and then basically a synopsis of the

1 conversation.

2 Q What does the caption for that column say?

3 A "Verbatim."

4 Q Was it part of the regular duties of the operator to record  
5 the complaints into the computer system?

6 A Yes, it was.

7 Q When would the complaints be recorded into the computer  
8 system?

9 A As reasonably as possibly after the call, anywhere from  
10 hours to minutes.

11 Q Is the person recording the complaint the same as the  
12 person who received the complaint?

13 A Normally it would be. Maybe not all the time, but  
14 basically, yes.

15 Q Was it the regular practice of Beech-Nut to make a record  
16 of all telephone complaints in the manner you described?

17 A Yes, it was.

18 Q How regularly is this method of keeping a log with a  
19 reporter of telephone complaints used by Beech-Nut in the  
20 course of its business?

21 A It's used always for all consumer inquiries.

22 Q What reliance, if any, does Beech-Nut put on this type of  
23 log for complaints in the transaction of its business  
24 generally?

25 A It puts a very serious responsibility on it because it's

1 used for more than just complaints. It's also feedback from  
2 consumers on positive things also.

3 Q Was it part of the regular course of the work of the  
4 Consumer Services Group to transmit these types of logs and  
5 complaints to others in the company?

6 A Yes. Because depending upon the reason for them calling  
7 in, it may go to marketing if they're suggesting a new product;  
8 it may go to operations, a better way to make the product; and  
9 if complaints were negative enough or at risk enough, they  
10 would be elevated up to senior management.

11 Q As part of your job, would you review logs of this type in  
12 the normal course of your work?

13 A Yes, I would.

14 Q Now, turning to the next portion, the second log, the  
15 second type of log --

16 THE COURT: Exhibit 6?

17 MR. DILLON: We're still on Exhibit 6, your Honor.  
18 You'll see that the first log is sideways to the margin, and  
19 the second log is normally laid up -- it's the last, say, ten  
20 pages or so.

21 THE COURT: Okay.

22 BY MR. DILLON:

23 Q Can you tell us how this type of log is created?

24 A This is basically a recap of the e-mail transactions, when  
25 people write in and post their information onto our websites

1 and to our system. It's a direct link to what the people are  
2 doing.

3 Q So this is what people are typing on to the website?

4 A That's correct.

5 Q Okay. And are your answers with respect to this type of  
6 log the same as your answers with respect to the other type of  
7 log in terms of its usefulness and ordinary course usage by the  
8 company?

9 A Yes, it is.

10 MR. DILLON: Your Honor, at this point I offer this  
11 document into evidence.

12 THE COURT: All right. When you say "this document,"  
13 you're referring to the entire Exhibit 6?

14 MR. DILLON: Yes.

15 THE COURT: All right. Without objection -- what?

16 MR. WALLACH: I would like to approach and discuss  
17 this, your Honor, I do have an objection.

18 THE COURT: All right. Come on.

19 (At the sidebar.)

20 THE COURT: Okay, Mr. Wallach.

21 MR. WALLACH: The objection is this, your Honor: The  
22 witness may have familiarity with general procedures, but he  
23 doesn't know if this is full and complete. And I'm referring  
24 initially to the initial -- the beginning of the exhibit which  
25 was referred to as the telephone log. It's approximately ten

1 pages in.

2 THE COURT: This one?

3 MR. WALLACH: Yes, your Honor.

4 THE COURT: Go ahead.

5 MR. WALLACH: I can't cross-examine some unknown  
6 Beech-Nut employee who I understand is the person who put the  
7 comment in under "Verbatim" or how complete it is. Similarly,  
8 your Honor, while the witness may be familiar with a website,  
9 we don't know and this witness doesn't know if the e-mail  
10 comments in the second portion of this exhibit are complete in  
11 what was submitted, if they're complete in what was received on  
12 the website. So that's my objection.

13 THE COURT: All right. Go ahead.

14 MR. DILLON: He didn't object to it in the Pretrial  
15 Order.

16 MR. WALLACH: Your Honor, before counsel changed the  
17 exhibit numbers, I objected, and you indicated that Lisa Lewis  
18 was going to authenticate the documents.

19 MR. DILLON: No, actually when I talked about Lisa  
20 Lewis, what I had in mind was the illness log.

21 THE COURT: Well, beyond -- okay. Beyond that for a  
22 moment, the beginning part of 6, are you offering that as well?

23 MR. DILLON: To me that's not material, it's obviously  
24 the two logs that are material.

25 THE COURT: Okay. As far as the first log, which is



1 the listing, he established it as a business record, it's kept  
2 in the normal course of the business. So on that basis I'll  
3 allow it.

4 I mean, I'm not sure you asked enough questions about  
5 the second part.

6 MR. DILLON: I was maybe going too fast.

7 THE COURT: So right now I'm going to sustain the  
8 objection as to the second part, the last part of 6, Exhibit 6,  
9 which appears to be an account of -- I'm not sure. So I'll  
10 allow you to go back and ask him further questions on that.

11 MR. DILLON: Thank you.

12 THE COURT: I wish there was a different way -- 6A or  
13 B or something you should have characterized them as, but that  
14 portion of 6 that lists the date, product code, reason, store  
15 name, and then a brief one-line description of whatever, I'll  
16 allow that as a business record under the hearsay exception.

17 MR. DILLON: Thank you.

18 THE COURT: And depending on the foundation you lay  
19 for the last ten pages or so of 6, I'll make that ruling  
20 without a sidebar.

21 MR. DILLON: Thank you, your Honor.

22 MR. WALLACH: For completeness, the -- what I will  
23 refer to as the e-mail traffic at the beginning is being  
24 excluded, your Honor? I think that's how you started your  
25 ruling.

1 THE COURT: You're not offering that. Right?

2 MR. DILLON: It's not material.

3 THE COURT: So he's not offering it.

4 MR. WALLACH: Very well. That resolves that. Thank  
5 you.

6 (In open court.)

7 THE COURT: The objection is sustained partially and  
8 overruled partially. But I'll allow you, Mr. Dillon, to go  
9 ahead and ask some additional questions.

10 MR. DILLON: Thank you, your Honor.

11 DIRECT EXAMINATION CONTINUES.

12 BY MR. DILLON:

13 Q Just, Mr. Kennedy, would you look at the last, I'll call  
14 it, third of Exhibit 6 which is the second log. I believe you  
15 had testified that this was material from the website. Would  
16 you just tell us what the information is at the head of each  
17 entry in the log?

18 A Okay. Basically at the beginning of it there's four items  
19 here. One is -- the first item is Incident Number, and this is  
20 my understanding a unique number that's assigned to each claim;  
21 the next is a reason code, it's R code, and this one says  
22 "mold"; the next one is "R Segment," which equals plant, that's  
23 a manufacturing facility. And the UPC, which is the uniform  
24 product code off the item.

25 Q In other words, this is the item's code that is actually on

1 the item?

2 A Correct.

3 Q And would you tell us again about how these entries are  
4 created?

5 A Well, I mean, as far as I can from a technical standpoint,  
6 basically these are inquiries that come in through the internet  
7 to us, they're processed by the system and then accumulated as  
8 a different set of records than they are, whereas the other log  
9 had to do with phone calls.

10 Q And I believe you used the word "automatically"?

11 A As far as I know, yes.

12 THE COURT: Are they kept in the regular course of  
13 business, not just for Fruit Nibbles, but for any product?

14 THE WITNESS: No, sir. We have an 800 help line and  
15 website, and people, they'll write in for coupons, they'll come  
16 in making compliments, suggesting flavors, where can I buy  
17 this, all these type of things, in addition to problems,  
18 concerns, how do I feed my baby, these type of things.

19 THE COURT: No, my question is, the entries that  
20 you're referring to hear that you were just asked about, are  
21 they kept in the regular course of the business of Beech-Nut?

22 THE WITNESS: Yes, they are.

23 THE COURT: In other words, there are people that are  
24 employed that take care of the recording and printing out this  
25 information. Is that correct?

1 THE WITNESS: Yes, sir.

2 THE COURT: And then is that information relied upon  
3 by people at Beech-Nut the make whatever corporate decisions  
4 need to be made?

5 THE WITNESS: Absolutely.

6 THE COURT: All right. Go ahead, Mr. Dillon.

7 MR. DILLON: Your Honor, I'll offer it again at this  
8 point.

9 THE COURT: All right. If there is an objection, it's  
10 overruled. I'll allow that.

11 MR. DILLON: Thank you, your Honor.

12 (Beech-Nut Exhibit 6 is received in evidence.)

13 Q Mr. Kennedy, who made a decision to withdraw Fruit Nibbles  
14 from the marketplace?

15 A It was a joint decision made by various disciplines in our  
16 organization.

17 Q Can you name the individuals?

18 A I was one of them; it would have been the president of the  
19 company at the time; senior marketing persons; senior  
20 salesperson; senior manufacturing people.

21 Q Was there any disagreement among the group?

22 A A lot of concern. The biggest one was that -- I mean, when  
23 you do a launch, a new product launch you invest a lot of time  
24 and effort in advance. An average launch takes about 18 months  
25 to prepare for. You have a lot of resources dedicated to it,

1     you do research and development, you do a lot of investment on  
2     the front end to do this. And Fruit Nibbles was one big launch  
3     we had, probably one of the biggest launches in Beech-Nut's  
4     history. And as a result of that we were very concerned about  
5     how this would impact that launch. So obviously the marketing  
6     people were very cautious about pulling this before they did  
7     that.

8     Q     But -- I'm sorry. But I'm just focusing on the question,  
9     which is: Did the group agree unanimously?

10    A     Absolutely. They agreed. It was a unanimous decision.

11    Q     And I think you described some of the factors weighing  
12    against doing the withdrawal. But what were the factors that  
13    overruled that and caused the withdrawal decision to be made?

14    A     The first big risk was the fact that we had had health  
15    claims, problems. We had -- basically we have infants and  
16    toddlers who were getting sick and went to the doctors, and the  
17    doctors -- one comment said that it was a result of that.

18                 MR. WALLACH: Excuse me again, your Honor. The  
19    witness is testifying as to what other people are saying, and I  
20    object on hearsay and ask that he not do that in his testimony.

21                 THE COURT: Sustained.

22    Q     Proceed with telling us what the concerns were that led the  
23    group to decide to withdraw the product.

24    A     Basically it was a risk assessment that the product was not  
25    stable enough for us to continue shipping it. We had no

1 comfort that we could continue doing that. Besides the health  
2 risks, the consumer complaints, that was a bigger part. And  
3 the biggest thing was that we had no comfort that we would be  
4 there -- we would be able to continue shipping it and have a  
5 good product out of retail.

6 Q And what was reported to you about the breadth of the  
7 complaints from consumers?

8 A One of the biggest concerns was that it was coming from all  
9 geographical regions of the United States, it was not one  
10 pocket or one area by itself. We really could not determine  
11 what the reason for the problem was, but we had the product out  
12 there and were getting complaints. As much as we tried to  
13 assess what was going on and maybe cure it in one element or  
14 another so we didn't have to stop the launch completely, we  
15 were -- we were not able to do it. We just could not have the  
16 confidence that we could continue shipping it.

17 Q Among the group that made this decision, was there any  
18 discussion about the relative number of complaints actually  
19 received versus the amount of bad product that was out in the  
20 marketplace?

21 A One dilemma that we face is that as an infant nutrition  
22 company we have a higher standard we have to be accountable  
23 for. What would be considered normal for an adult is not the  
24 same for an infant. As a result of that, I don't know what  
25 percentage; when do you decide not to ship something that may

1 create problems or illness? And so we did not really get  
2 concerned about that. Once we had enough incidents that we  
3 felt were relevant, we had no choice but to not continue  
4 shipping the product.

5 Q What discussion, if any, was there among the group about  
6 whether everyone who got a bad product would complain?

7 A I'm sure there were some who did not complain because it  
8 wasn't worthwhile. But I think that was at a minimum.

9 Q What discussion in the group, if any, was had about how  
10 variable the product was on a case-to-case basis?

11 A We had quite a bit of conversation on that, because we  
12 tried to isolate the problem and see if there was some way to  
13 be able to continue shipping it because it was an integral part  
14 of our launch. We talked about trying to solve this problem,  
15 figure out what the common ailment was. But between  
16 geographical problems and where it was at and things, we just  
17 could not isolate it, so as a result we talked a lot about it  
18 but nothing came from it.

19 Q Do you know of any other problems with the Fruit Nibbles  
20 product besides strictly quality problems?

21 A Well, the other part was the underweight. As we started  
22 receiving product in, we found out that there were  
23 underweights. Each box contained six pouches, supposed to.  
24 Some had three, four, five, less than what was supposed to be  
25 in there.



1 Q You weren't here for the openings, Mr. Kennedy, but there  
2 was some discussion about four truckloads at the openings.  
3 Would you please turn to Beech-Nut's Exhibit 7 for  
4 identification.

5 A Yes. Okay.

6 Q Do you see that? What is it?

7 A It's an e-mail with a series of e-mails attached to it.

8 Q What's the date of the most recent?

9 A The top of it is November 26th, from Robert Turner to Gary  
10 Stenzel and myself.

11 Q And would you agree that Beech-Nut accepted liability on  
12 these four truckloads if the product went bad after it arrived  
13 at Beech-Nut?

14 A Yes, I agree.

15 MR. DILLON: Now I'll offer Beech-Nut Number 7 into  
16 evidence.

17 THE COURT: All right. Number 7 is in evidence.

18 (Beech-Nut Exhibit 7 is received in evidence.)

19 THE COURT: No objection.

20 Q What was the purchase price of these four truckloads?

21 A I believe it was \$13.18 a case.

22 Q I'll direct your attention to the bottom of the first page.

23 A Approximately 136,000. At \$13.18 it would be 131,800. So  
24 it's approximate, 136.

25 Q And about how many cases would that be?

1 A 10,000 cases.

2 Q 10,000 cases?

3 A Right.

4 Q And how many cases were ordered in total by Beech-Nut in  
5 the four purchase orders?

6 A 230,000.

7 Q Let's change gears.

8 What is the total amount of damages that you claim for  
9 Beech-Nut based on the breach of warranty claims for the  
10 230,000 cases of Fruit Nibbles?

11 A 2.4 million.

12 Q Say that again, please.

13 A Two million four hundred thousand.

14 Q How is that figure broken down, if at all?

15 A There's basically seven elements we're looking for. One,  
16 obviously, is the lost profits on the cases that we had ordered  
17 from PIM;

18 The second one is for the refunds we had to give our  
19 customers for the products that they no longer could sell;

20 The third one is for the inventory that we had already  
21 purchased and was in our warehouse but had not been shipped out  
22 yet;

23 Then the fourth one was, we had to do some -- a little  
24 bit of rework on the underweight products, then we had -- when  
25 you introduce new products you have to pay a charge to get the

1 product on the shelf, shelf space or "slotting" as we call it.  
2 Then we also had storage of that. It was quite a bit of  
3 inventory we stored for almost four years. And there was one  
4 more. I don't recall the last one.

5 Q Let me ask you this question: Were there marketing  
6 costs --

7 A Oh.

8 Q -- in connection with the "Let's Grow" launch?

9 A Yes, there were, there were some marketing costs.

10 Q So that would be the seventh?

11 A That's correct.

12 MR. DILLON: Your Honor, I think I should mark this  
13 just for identification purposes.

14 THE COURT: All right. "This" being a chart that  
15 you're --

16 MR. DILLON: A chart of the seven --

17 THE COURT: That you explained in front of the jury?

18 MR. DILLON: Yes. This being a chart of the seven  
19 items just testified to, as an aid to the jury.

20 THE COURT: All right.

21 MR. WALLACH: Your Honor, I have no objection because  
22 counsel was good enough to show it to me earlier. On a  
23 practical level, I'm not good at -- I can't see the witness if  
24 it's here. I don't know if we could perhaps move it closer to  
25 counsel table.

1           THE COURT: Why don't you sit over here, Mr. Wallach,  
2           if you don't mind, for this period of time. Just have a seat  
3           over on that side.

4           MR. WALLACH: Thank you, your Honor.

5           THE COURT: And you can move that closer, Mr. Dillon,  
6           that way.

7           MR. DILLON: I'm trying not to block your --

8           THE COURT: No, that's all right.

9           THE DEPUTY CLERK: What's the number?

10          MR. DILLON: 14. Oh, excuse me.

11          13.

12          THE COURT: Marked for identification as 13?

13          MR. DILLON: Yes. Beech-Nut 13.

14          BY MR. DILLON:

15          Q All right. Let's take the items of damage one-by-one.  
16          Let's start with the purchase price item.

17                 This is the purchase price with respect to what group  
18          of product?

19          A Are you referring to the first item on there?

20          Q Yes.

21          A That's for the -- the amount that was in inventory at  
22          Beech-Nut. Is that correct?

23          Q So this would be inventory retained in your warehouses?

24          A Correct. Basically, once we had received approximately  
25          \$900,000 worth of product that was in our warehouse at the time

1 we decided to pull the product off the shelves.

2 Q Would you turn to the document marked as Beech-Nut's Number  
3 8 for identification:

4 A Okay.

5 Q Do you recognize it?

6 A Yes.

7 Q What is it?

8 A It's a printout of what we call our blocked inventory, but  
9 it's a printout of our inventory system that shows the  
10 material, description, the item numbers. Description being  
11 Fruit Nibbles; the plant location and the finished products of  
12 it, which shows the number of cases we have on hand, multiplied  
13 by the cost and inventory on a per item basis, and then adds  
14 down to \$966,651.40.

15 Q All right. Just to make it simple, let's call it \$965,000.

16 A Okay.

17 Q Is the information on this document taken from Beech-Nut's  
18 computer system used in the ordinary course of Beech-Nut's  
19 business to keep track of inventory?

20 A Yes, sir.

21 MR. DILLON: I now offer the inventory sheet marked as  
22 Beech-Nut's Exhibit 8 into evidence.

23 THE COURT: Without objection?

24 MR. WALLACH: No objection, your Honor.

25 THE COURT: All right. Exhibit 8 is in evidence.

1 (Beech-Nut Exhibit 8 is received in evidence.)

2 Q Now, this 965,000 dollar number we just discussed, is that  
3 the amount you claim, or are there any adjustments?

4 A There is an adjustment to it. There were some -- there was  
5 inventories that we had not paid for yet when we stopped the  
6 shipments, and that's approximately \$350,000.

7 Q So what is the net amount that you claim for purchase price  
8 in connection with the product retained in inventory?

9 A It would be the 965 minus the 350, which according to my  
10 math is 615 I believe.

11 MR. DILLON: Your Honor, if I may act as a scribe for  
12 the witness and just write that number in that he's --

13 THE COURT: Go ahead, you can add those.

14 There's no objection to adding those figures on there?

15 MR. WALLACH: No objection, your Honor.

16 MR. DILLON: I want to make sure I get the right  
17 number.

18 (Mr. Dillon writes on Exhibit 13 for identification.)

19 MR. DILLON: I don't have the best handwriting.

20 Q Incidentally, does that product that's in the warehouse  
21 have any scrap value?

22 A No, it does not. In fact, it's going to cost me to get rid  
23 of it. I have to pay someone to haul it to the dump, I have to  
24 pay the dump to dump it, so it's actually going to cost more  
25 money.

1 Q Okay. Now, let's look at the next item, which is Lost  
2 Expected Profits.

3 How do you calculate the lost profit amount for Fruit  
4 Nibbles on the 230,000 cases?

5 A Basically whenever you do a new product launch you have a  
6 business plan which is a pretty integral part of the process,  
7 something you track against and normally they're pretty, pretty  
8 reasonable accurate. What we did is we took the 230,000 cases  
9 that we had committed to Promotion In Motion with, and the  
10 average profit margin for that was \$4.60 a case. So we took  
11 the 230,000 cases times the \$4.60 a case.

12 Q And what's the total number that that came out to?

13 A I believe it's 938,000, if I was correct.

14 Q Do you have a calculator?

15 A I left it back there.

16 Q I'll hand up a calculator.

17 A Thank you.

18 Q If I may, your Honor.

19 So 230,000 cases times \$4.60?

20 A It's a million and fifty-eight. \$1,058,000.. And thank  
21 you for the calculator.

22 Q Now, in terms again, in terms of the amount that you're  
23 actually claiming from PIM on lost profit, is there an  
24 adjustment to that amount?

25 A Yes, there is. One of the other elements of our damages is



1 the refunds to the customers. So when we refund the money to  
2 the customer, much like when you get a refund from Walmart,  
3 we're refunding them the full purchase price. That purchase  
4 price included profit for us. So we're seeking the full amount  
5 we refunded the customers from PIM, that also includes the  
6 profit. That was --

7 Q So this is an adjustment to avoid double-dipping?

8 A That's correct.

9 Q And the item you're talking about is the cost of  
10 withdrawing defective Fruit Nibbles from market?

11 A That's correct.

12 Q All right. So how many cases were involved in that?

13 A Approximately 26,000 cases.

14 Q And doing the arithmetic of \$4.60 per case, what's the  
15 total amount of the adjustment?

16 A \$119,600 -- 120,000?

17 Q No, I --

18 A Is that right?

19 Q 120,000, that sounds better.

20 A 120,000.

21 Q All right. So what's the net amount that you're claiming  
22 for lost profit?

23 A It's \$938,00, which is the million fifty-eight, less the  
24 120.

25 Q I'm going to write that on 13.

1           The next item you talked about was the cost of  
2     withdrawing the Fruit Nibbles from market, and you talked about  
3     refunds. Wait, before I do that, let me back up a little bit.

4           How did you determine -- I mean, what factors went  
5     into the determination of a profit per case of \$4.60?

6     A     Basically in the business plan we look at the purchase --  
7     the cost of the product you're selling, which was the price we  
8     paid PIM for the product, then we had to subtract out of it  
9     additional costs for freight to get it to the customer, for  
10    brokerage because we have a third party sales force who help  
11    sell it, we have warehouse storage costs, and some other  
12    ancillary costs.

13    Q     Okay. So, in other words, these other items would come off  
14    the gross profit to give you a net profit. Is that what you're  
15    saying?

16    A     That's correct.

17    Q     Okay. And the \$4.60 was a net profit?

18    A     Net profit.

19    Q     All right. So moving on to the third category, would you  
20    please turn to the document marked as Exhibit 10 for  
21    identification.

22    A     Okay.

23    Q     What is the amount that you claim for out of pocket  
24    withdrawal costs?

25    A     \$591,219.26.

1 Q How was this figure calculated?

2 A Basically this is figured by -- in the grocery industry,  
3 what you do, when a product is destroyed at shelf or pulled  
4 off, it's sent to a third party center, unsalable reclamation.  
5 What this third party does is they scan the products, reads the  
6 UPC off the item and links it up with the manufacturer, and  
7 then bills them back for the cost of the product, plus a  
8 service fee.

9 So each retailer does this a little differently than  
10 others. And this report basically shows the deductions that  
11 were taken or the payments made to those customers for the sum  
12 of those invoices that they sent us for the returned products.

13 Q And this number would include the refund amount to the  
14 customers?

15 A That's correct.

16 MR. DILLON: At this point I offer Beech-Nut's Exhibit  
17 10 into evidence.

18 THE COURT: Without objection?

19 MR. WALLACH: I have an objection to this one, your  
20 Honor?

21 THE COURT: You do, all right. I'll hear you.

22 MR. DILLON: At sidebar, your Honor?

23 THE COURT: Yes, please.

24 (At the sidebar.)

25 THE COURT: This is an objection to Number 10 Mr.

1 Wallach?

2 THE COURT: Yes, your Honor.

3 Unlike, by way of example, Exhibit 8, which is a  
4 computer printout, we have no way of knowing how this document  
5 was assembled and how it was put together. The witness did not  
6 indicate that he's the one who did it. I don't know what  
7 numbers were looked at to arrive at the totals --

8 THE COURT: All right. Hold it.

9 MR. WALLACH: -- for the particular items.

10 THE COURT: In the Pretrial Order did you note this  
11 objection?

12 MR. WALLACH: This was not listed as an exhibit.

13 MR. DILLON: Yes, it was. 40. Damage documents  
14 produced on 10/12.

15 MR. WALLACH: You included the raw documents?

16 MR. DILLON: No, actually this was included in that  
17 production.

18 THE COURT: How was this produced, Mr. Dillon.

19 MR. DILLON: It was produced by a CD that contained  
20 copies of the documents, and this -- as a matter of fact, if  
21 you look, you'll see the Bates number at the bottom, and if you  
22 look --

23 MR. WALLACH: It was produced in discovery. I'm not  
24 disputing that. You're referring to Exhibit 40 in the  
25 Plaintiff's original exhibits before they pared it down.

1 MR. DILLON: Yes. I'll show you.

2 MR. WALLACH: Please do, because --

3 THE COURT: Okay.

4 MR. DILLON: 40, 3732 is the last name. What have you  
5 got there? 3729?

6 THE COURT: 3729.

7 MR. DILLON: It was within that group of documents.

8 MR. WALLACH: Wait a second.

9 MR. DILLON: 3732 is the last one. If you go through  
10 you'll see others that came after it. It was the fourth from  
11 the last page is what it was. That was 3729 --

12 THE COURT: In the Pretrial Order?

13 MR. DILLON: This Pretrial Order, Judge. The last  
14 page is 3732. This was the fourth from the last page in that  
15 group. That group started at 600. There you go.

16 THE COURT: Okay. 2600. I thought you said 32.

17 Thank you.

18 MR. WALLACH: All right.

19 (In open court.)

20 THE COURT: The objection is overruled.

21 Proceed. You're offering it into evidence, 10?

22 MR. DILLON: I'm offering 10 into evidence, yes, sir.

23 THE COURT: It's in evidence then.

24 (Beech-Nut Exhibit 10 is received in evidence.)

25 BY MR. DILLON:

1 Q Let's round down on this one to the nearest thousand. How  
2 much is it?

3 A 591,000 -- 590.

4 Q 591,000 did you say?

5 A (No response).

6 Q All right. Now there's an item -- I'm going to skip in  
7 next item. We'll go down to the fourth item -- fifth item.  
8 "Lost value of payments to retailers for Fruit Nibbles shelf  
9 space."

10 Would you tell the jury what this item of damage  
11 refers to.

12 A Whenever you launch a new product into the marketplace, the  
13 retailer charges you a fee for the shelf space. It's a one  
14 time fee that you pay depending upon how many items you're  
15 launching. And the idea is it holds you -- it's for your shelf  
16 space. Once you vacate that shelf space, then you have to pay  
17 that again for somebody else that wants to take it. But it's a  
18 one time fee that you pay every time you launch a new product.

19 Q Why do you claim this item of damage?

20 A Because what we did, obviously we did a full-blown launch,  
21 so we're able to get -- it's a little more efficient when you  
22 do lesser, but we had 19 items in. We had to pay the slotting  
23 fee to get the product on the shelf. Then all of a sudden we  
24 had a hole in the shelf which we couldn't place something else  
25 back in that hole for and they then obviously gave it to

1 somebody else.

2 Q How was this amount that's claimed calculated?

3 A Basically each retailer charges an amount. It could be by  
4 item, it could be by time, it varies by customer. But what you  
5 do is -- that's for the entire thing. So what we did is we  
6 accumulated all the total costs of our launch, and then  
7 basically did an allocation between the Fruit Nibbles portion  
8 and the rest of them. And I believe because there was 19 items  
9 and these were two out of 19, we basically took two 19ths of  
10 that amount.

11 Q Okay. Would you turn to Beech-Nut Exhibit 11.

12 Do you recognize this document?

13 A Yes.

14 Q What is it?

15 A This is the accumulation of all the customer -- by customer  
16 the amount of slotting or shelf space costs we had, and then  
17 the allocation to the Fruit Nibbles portion of it.

18 Q And how was this generated?

19 A It was generated through the normal course of our business  
20 of pulling out what the customers charged us. We accumulated  
21 it and tallied it up.

22 MR. DILLON: I offer exhibit, Beech-Nut's Exhibit 11  
23 into evidence.

24 MR. WALLACH: No objection.

25 THE COURT: No objection?



1                   It's in evidence.

2                   (Beech-Nut Exhibit 11 is received in evidence.)

3       Q     And what's the damage amount that you claim for payments to  
4     retailers for shelf space?

5                   Or if you would, rather, lower it down to the nearest  
6     thousand.

7     A     \$77,000.

8                   MR. DILLON:  Oops.  I filled it in on the wrong line.

9       Q     All right.  Now you had mentioned I believe a cost for  
10    reworking underweight packages, which would be the last item on  
11    the list.

12    A     Yes, sir.

13    Q     Would you turn to Beech-Nut's Exhibit 12.

14    A     Okay.

15    Q     Do you recognize the document?

16    A     Yes, I do.

17    Q     What is it?

18    A     It's a recap of the expenses that were incurred in the  
19    reworking of the underweight product.

20    Q     And what information does it contain?

21    A     It basically contains, when we rework the products, we had  
22    to basically bring the finished goods into one of our plants,  
23    open up the boxes, reweigh them, and anything that was  
24    underweight, handle accordingly.  To do this we used internal  
25    labor and external labor.  This report basically recaps the

1 hours that were clocked by the employees by work order  
2 internally, as well as the temporary employees that we hired  
3 from a third party.

4 Q And what is the figure that you claim for reworking  
5 underweight packages? And please round to the nearest  
6 thousand.

7 A \$30,000.

8 MR. DILLON: Your Honor, I offer Beech-Nut's Exhibit  
9 12 into evidence.

10 MR. WALLACH: No objection.

11 THE COURT: 12 is in evidence as well.

12 (Beech-Nut Exhibit 12 is received in evidence.)

13 Q Now, both Mr. Hungsberg and yourself talk about marketing  
14 efforts for the launch, including Fruit Nibbles. Would you  
15 please turn to page -- excuse me -- Exhibit Beech-Nut's 9 for  
16 identification.

17 A Okay.

18 Q What is this document?

19 A This is a recap of the cost for introducing the "Let's  
20 Grow" line, and basically these are two third party vendors who  
21 do marketing, different marketing products for us, and this is  
22 the pro rata share for the Fruit Nibbles portion of it.

23 Q Well, let's just break it down a little bit.

24 A Okay.

25 Q Who were the entities named on the left-hand side?

1 A They're different marketing agencies that would be used for  
2 different purposes. They could be for media insertion costs,  
3 they could be for digital media. Unfortunately, I don't know  
4 exactly who these were at the time, but they were for our  
5 marketing efforts on the "Let's Grow" launch.

6 Q And what was the amount expended in total for the "Let's  
7 Grow" launch?

8 A \$157,000.

9 Q And according to this document, what portion is attributed  
10 to Fruit Nibbles?

11 A \$16,000.

12 Q And how was that allocation made?

13 A Normally in this type of situation we do an allocation  
14 based upon -- it could be based upon the number of skews as a  
15 percentage of Fruit Nibbles, it could be based upon projected  
16 sales dollars, or some other methodology that depend on  
17 marketing. I don't know specifically on this one how it was  
18 worked out though.

19 Q But your understanding, it was a percentage of the whole  
20 "Let's Grow" marketing cost?

21 A Correct, yes.

22 MR. DILLON: And at this point I ask that Beech-Nut  
23 Exhibit 9 be admitted into evidence.

24 THE COURT: All right.

25 MR. WALLACH: No objection.

1 THE COURT: It's in evidence.

2 (Beech-Nut Exhibit 9 is received in evidence.)

3 MR. DILLON: I will put that 16,000 dollar number  
4 here.

5 Q All right. Now, do you have an amount that you're claiming  
6 or Beech-Nut is claiming that relates to out of pocket storage  
7 costs?

8 A Correct. 133,000.

9 Q And how is that figure calculated?

10 A For -- it's been basically four years we've been storing  
11 this product. For about half of that period of time it was an  
12 internal storage. So it was based upon an opportunity cost of  
13 what we had to take and store outside of our own products.  
14 Then at about the midpoint, like I referred to earlier,  
15 Beech-Nut moved to a new manufacturing facility that had no  
16 storage space, so we took the products to an outside warehouse.  
17 And for the second half of that period it was an outside  
18 warehouse storing it, and it's still today.

19 Q And this amount for storing the unsalable Fruit Nibbles,  
20 how does that relate to the first item? Is that the same  
21 collection of material?

22 A The same material, yes.

23 Q Okay. So it's storing the material that's referenced in  
24 the first item?

25 A That's correct.

1 Q Why didn't Beech-Nut destroy the product?

2 A We inquired numerous times about destroying it because no  
3 one wanted to store it, but we received no word about doing  
4 anything with it.

5 Q Did you ever receive authorization from PIM to destroy it?

6 A No, we did not.

7 Q And how much did you say you were claiming for storage?

8 A 133,000.

9 MR. DILLON: Sorry, your Honor, about my handwriting.

10 Q All right. Would you take your calculator and add these  
11 six -- seven numbers.

12 (Witness complies.)

13 A 2.4 million.

14 Q Now, are there any adjustments to this amount?

15 A Yes.

16 Q What?

17 A I believe there was an e-mail that we had referred to  
18 earlier today concerning where Beech-Nut had taken liability  
19 for 10,000 cases of product.

20 Q Okay. And what was the amount of that adjustment?

21 A If you have 10,000 cases at 13.18 a case, 131,800 or  
22 \$132,000.

23 Q Okay. So tell me what the total was first.

24 A Two million four hundred thousand.

25 Q Obviously you've been doing some rounding up there?

1 A Well, actually that adds down to 2.4 exactly.

2 Q Okay.

3 And what was the adjustment amount did you say?

4 A 132,000.

5 Q So what is the net amount that --

6 A Two million two hundred sixty-eight thousand.

7 Q I've just written that on Beech-Nut's Number 13 for  
8 identification.

9 MR. DILLON: Your Honor, at this time I ask that  
10 Beech-Nut's 13 be admitted into evidence.

11 THE COURT: All right. That's the chart.  
12 There's no objection. The chart is in evidence.  
13 (Beech-Nut Exhibit 13 is received in evidence.)

14 MR. DILLON: No further questions, your Honor.

15 THE COURT: All right. Mr. Wallach, any cross?

16 MR. WALLACH: May I just have a -- is now a good time  
17 to take a quick break just while I set up, your Honor?

18 THE COURT: Ladies and gentlemen, we'll take a  
19 15-minute recess for the afternoon, and 3:15 we'll be back for  
20 cross-examination. Thank you.

21 Please don't discuss anything about the case. Okay.

22 THE DEPUTY CLERK: Please rise for the Jury.

23 (The Jury leaves the courtroom.)

24 THE COURT: We'll see you at 3:15. Okay?

25 Mr. Kennedy, you can step down. Thanks.

1 (Witness temporarily excused.)

2 (A recess is taken.)

3 (Proceedings resume - Jury not present.)

4 THE DEPUTY CLERK: Please remain seated.

5 Could I have the witness back on the stand, please?

6

7 T I M K E N N E D Y, resumes, testifies further as follows:

8

9 THE DEPUTY CLERK: Please rise for the Jury.

10 (Jury present.)

11

12 THE COURT: Welcome pack, everyone. Be seated,  
13 please.

14 Mr. Wallach, cross-examination.

15 MR. WALLACH: Thank you, your Honor.

16 CROSS-EXAMINATION

17 BY MR. WALLACH:

18 Q Good afternoon, Mr. Kennedy.

19 A Hi. How are you today?

20 Q You indicated on direct examination -- I think I got my  
21 notes right here -- that the average product launch at  
22 Beech-Nut took about 18 months. Did I hear you correctly?

23 A Correct.

24 Q Would you tell the jury how long the launch of Fruit  
25 Nibbles took in 2008?



1 A I do not know. I wasn't there until -- I didn't start  
2 until August of 2008.

3 Q Do you have any knowledge of Beech-Nut and Promotion In  
4 Motion first speaking to one another or how that even came  
5 about?

6 A I do not.

7 Q Do you have any knowledge of the interactions between  
8 Beech-Nut and Promotion In Motion leading up to the launch of  
9 the product in August of 2008?

10 A No, I don't.

11 Q It sounds as if I think it wasn't really until October of  
12 2008 that Fruit Nibbles even came across your desk. Is that a  
13 fair summary?

14 A That is a fair statement.

15 Q To finish this off. You played no role in the development  
16 of Fruit Nibbles. Right?

17 A Correct.

18 Q You played no role in the sampling of various prototypes  
19 sent by Promotion In Motion to Beech-Nut during that  
20 development process. Correct?

21 A Correct.

22 Q And you played no role in the final approval, which I'll  
23 represent to you came on August 1, 2008, of a prototype for  
24 Promotion In Motion to then manufacture. Correct?

25 A I played no role in approving the quality, no.

1 Q All right. Give or take -- and I don't mean to minimize  
2 this -- but give or take some dollars here, Beech-Nut is  
3 looking for about 2.2, \$2.3 million from my client, isn't it?

4 A Correct.

5 Q Would you tell the jury, please -- and let's focus first on  
6 the color of the Fruit Nibbles -- what percentage of the Fruit  
7 Nibbles delivered by my client to Beech-Nut was not  
8 substantially conforming with the purchase orders?

9 A I don't know.

10 MS. KOWALSKI: Objection, your Honor. This goes to  
11 the motion in limine that we've previously discussed this  
12 morning, as well as to summary judgment.

13 THE COURT: Just a moment.

14 I'll sustain the objection, but I'll allow you to  
15 ask -- let me see. I'll sustain that objection to that  
16 question the way it was phrased.

17 Go ahead, Mr. Wallach.

18 BY MR. WALLACH:

19 Q Mr. Kennedy, are you able to tell the jury what percentage  
20 of the product, the 230,000 cases shipped by Promotion In  
21 Motion to Beech-Nut, was nonconforming?

22 A No.

23 Q Is there anyone at Beech-Nut who can answer that question,  
24 if you know?

25 A No.

1 Q There was talk in your testimony about some of the product  
2 being underweight. Do you recall that?

3 A I know the basics of what it was about, yes.

4 Q Now, I take it given your position, you weren't involved in  
5 the analysis of whether or not something met the weight  
6 requirement or not. That's information that was passed on to  
7 you. Is that correct?

8 A That's correct.

9 Q And while -- I'm not complaining -- but while the chart is  
10 gone, I think it was about \$36,000 is what Beech-Nut was  
11 looking for for reworking the product that was underweight?

12 A Correct.

13 Q Is that accurate?

14 All right.

15 Can you tell the jury what it would have cost  
16 Beech-Nut to open up cases of product Promotion In Motion sent  
17 to it to examine it in order to see what percentage may not  
18 have been conforming?

19 A I'm not sure I follow, because to open up the product and  
20 examine it you have to open up the foil pouches, which makes  
21 the product non-salable.

22 Q Let me start this way. Again, using the number 230,000  
23 cases. How many of the 230,000 cases themselves were opened up  
24 by Beech-Nut? And then we'll talk about --

25 A I don't know.

1 Q Do you have any reason to believe that Beech-Nut opened up  
2 a single case of product when it was received by Promotion In  
3 Motion and examined it?

4 A Well, it's not reasonable to assume we didn't do any.

5 Q I'm asking you in a trial where your company is looking for  
6 \$2.3 million if you can tell this jury whether or not Beech-Nut  
7 opened up a single case and examined the product before it was  
8 sent off to retailers?

9 A I don't know.

10 Q Do you know what it would have cost for Beech-Nut to open  
11 up sample cases --

12 A No, sir.

13 Q -- and inspect the product?

14 A No, sir, I do not know.

15 Q Are you aware of whether that was even considered by  
16 Beech-Nut prior to deciding to recall the product and cancel  
17 the contract?

18 A I was not aware of the conversations between PIM and  
19 Beech-Nut on what should be taken -- taken further, no.

20 Q I'm not asking about conversations between the companies.  
21 I'm asking within Beech-Nut: Are you aware of any  
22 consideration as to what it might cost for Beech-Nut to open up  
23 product received from Promotion In Motion and inspect it before  
24 it was shipped to retailers?

25 A Inspection was contemplated from that standpoint, yes.

1 Because to open it up and open up the foil pouches, there would  
2 be a cost, but that cost would -- wouldn't matter because the  
3 product would be unsalable then. There's no way to put it back  
4 into the packages. There's no way to repackage it even if it's  
5 good or bad, there's no way to repackage it.

6 Q And what's the basis for your position that if a package is  
7 opened -- let's use good product as an example here -- if a  
8 package is opened and there's good product in it, that it could  
9 not be repackaged and sold in the future?

10 A Because Beech-Nut doesn't do the packaging.

11 Q What would have stopped Beech-Nut from sending the package  
12 or the ten or the 20, whatever it may have been, back to  
13 Promotion In Motion and asked them to seal it up or repackage  
14 so it could be sold to a third party?

15 A The discussion I was involved with for a brief period of  
16 time, we talked about doing that. It was not feasible to go  
17 through the elements of opening up -- it's a corrugated box  
18 with inner boxes with foil pouches inside. To open up every  
19 foil pouch and inspect every one to see whether they're good or  
20 bad, which we have no idea which they would have been, then  
21 take the opened containers and somehow ship them back to PIM to  
22 put them through their process of rehandling all this food  
23 product and repackaging it all again, I mean from a financial  
24 standpoint it didn't take a lot of numbers-tumbling to say it's  
25 not reasonable because the cost of this product was not that

1 high. So that's why we -- we elected not to even consider it  
2 feasible.

3 Q What would the cost have been to do this?

4 A Do not know.

5 Q Did you ever calculate the cost?

6 A No, sir.

7 Q Did you ever ask anyone to calculate the cost?

8 A No, sir.

9 Q Were you the person who decided not to incur this cost,  
10 whatever it may have been?

11 A There was a group of us and we discussed it, but it was one  
12 of those where we determined it wouldn't be feasible.

13 Q In this conversation that took place, did you voice an  
14 opinion as to whether or not it should be explored?

15 A What should be explored?

16 Q Opening up sample packages.

17 A We discussed an inspection, yes.

18 Q And you were one of the decision-makers who decided not to  
19 open up sample packages?

20 A My opinion was it was not feasible, and at that point it  
21 was not our responsibility.

22 Q Leave aside responsibility.

23 A Well, you asked me why.

24 Q Well, yeah, I'm going to ask you why, that's correct.

25 You're talking --

1 THE COURT: All right. Let's just ask questions.

2 And please don't answer until you are asked a  
3 question.

4 Go ahead.

5 THE WITNESS: Yes.

6 Q Isn't there a cost to a feasibility analysis?

7 A I'm not sure I follow what you're saying.

8 Q Your testimony is it wasn't feasible to engage in this  
9 sampling that we've been talking about. Correct?

10 A (No verbal response).

11 Q What I'm asking is, in order to determine whether or not  
12 something is feasible, does Beech-Nut consider the cost of  
13 doing it or not doing it?

14 A Yes, we do.

15 Q As a matter of standard practice -- and I'm not limiting  
16 this question to Fruit Nibbles now -- when Beech-Nut receives  
17 product manufactured by another company for its label, does  
18 Beech-Nut inspect that product?

19 A Yes, it retains samples.

20 Q Separate from retaining samples, does Beech-Nut upon  
21 receipt of product from a -- I think the term is a  
22 co-manufacturer or co-packer as I heard the testimony  
23 earlier -- in that situation, does Beech-Nut not only retain  
24 the samples, but does it also open samples before it then ships  
25 out to Walmart or anyone else?

1 A As a standard practice, whether it's co-manufactured or raw  
2 materials coming in, there's a process we have to follow. A  
3 product comes in, samples are retained and they are inspected,  
4 and then that shipment coming inbound is accepted.

5 Q Now let's go back to Fruit Nibbles. If there is a standard  
6 practice at Beech-Nut, am I correct that samples of Fruit  
7 Nibbles were also inspected in accordance with this protocol  
8 and approved before they were shipped out to the retailers?

9 A They're approved at the time the product is received in.  
10 When -- there's no inspection prior to shipment outbound, no.

11 Q I want to make sure I understand this.

12 A truck shows up at the loading dock. Correct?

13 A Correct.

14 Q The cases are off-loaded at Beech-Nut's warehouse in  
15 Upstate New York. Correct?

16 A Correct.

17 Q At that point in time -- and I don't mean literally that  
18 second -- but at that point in time does Beech-Nut open up any  
19 of the Fruit Nibbles packages and do a random inspection?

20 A There's a standard protocol they use for all inbound  
21 shipments of products, co-manufacturer or not. I'm not  
22 intimately involved with the details of when and how they do  
23 it, but I know they document it. With fruit grade  
24 manufacturing plants you have to do this. But I don't -- I  
25 mean, how they do the sampling, whether it's random,



1 statistical, I have no idea, that's not my expertise. But we  
2 do retain samples and there is an inspection to allow it to be  
3 accepted on the front end when we receive the product.

4 Q So Beech-Nut accepted on the front end the Fruit Nibbles  
5 shipped to it by Promotion In Motion, did it not?

6 A Yes.

7 Q And then Beech-Nut made the decision to reship the Fruit  
8 Nibbles all across the country, did it not?

9 A We reshipped it, yes.

10 Q So at the time the Fruit Nibbles arrived at Beech-Nut at  
11 Upstate New York, the product was acceptable, was it not?

12 A Apparently so.

13 Q There was no issue with the color of the product, was  
14 there?

15 A I was not involved in that.

16 Q Are you aware of any issue with the product other than  
17 what's been referred to as this mummification that appeared on  
18 it later on?

19 A I mean, other than the consumer complaints that I've seen  
20 and I've read and -- no.

21 Q That's what I'm asking about. I'm trying to understand the  
22 consumer complaints here.

23 Is it your understanding the consumers were  
24 complaining about the color of the Fruit Nibbles, such as they  
25 weren't red enough or they weren't "purplely" enough?

1 A No.

2 Q I don't think "purplely" is a word, but --

3 A No.

4 Q Do understand that consumers were complaining about the  
5 shape of the Fruit Nibbles?

6 A No.

7 Q Okay. So what we're talking about here and what Beech-Nut  
8 is seeking recovery from Promotion In Motion for is this  
9 crystallization that occurred to the product later on when  
10 something appeared on its exterior. Correct?

11 A No.

12 Q Then what is Beech-Nut complaining about with respect to  
13 the product?

14 A It's a substandard product that didn't meet the  
15 specifications that were requested in the purchase orders  
16 originally, and there were complaints from the customers of  
17 rancidity, taste, smell. When they describe it as looking like  
18 dead toes, it's more than just color.

19 Q How many consumers complained that the product looked like  
20 dead toes?

21 A I don't know, I didn't add them up.

22 Q Do you know if anyone at Beech-Nut added it up?

23 A No.

24 Q We know at least one consumer said that one bag out of  
25 230,000 cases looked like dead toes. Do you know if any other

1 consumer said that?

2 A Not that exact description, but many, many just as bad.

3 Q Do consumers -- let me ask it this way: You indicated  
4 there's a website that consumers can contact Beech-Nut for, for  
5 various reasons, whether they're complaining, whether they have  
6 a question, even if they like the product. Did I hear that  
7 testimony correctly?

8 A Correct.

9 Q Was that website set up solely for Fruit Nibbles, or did it  
10 already exist?

11 A That and the 800 number both existed prior to all that.

12 Q Would I be wrong to think that Fruit Nibbles is not the  
13 first product Beech-Nut sold where a consumer had a complaint?

14 A You're correct.

15 Q Now let's go back. You were saying that consumers  
16 complained about acidity and some other factors.

17 A Rancidity. Rancidity.

18 Q I'm sorry. Rancidity, okay.

19 I'm trying to understand more plainly. What does that  
20 mean? Is that the taste?

21 A When something is rancid -- I don't have the dictionary up  
22 here, but I mean to me, if something is rancid it means it's  
23 gone beyond just an off taste or color. It has a bad smell,  
24 it's very much not good, potentially could be an  
25 illness-causing product.

1 Q How many consumers complained about rancidity?

2 A We did not tally it up by the descriptors.

3 Q So you didn't tally the number of consumers complaining  
4 about rancid -- well, let me ask this: Did you tally the  
5 nature of the complaints by any category, or did you just total  
6 the complaints as a whole?

7 A We totaled the complaints concerning the Fruit Nibbles as a  
8 whole.

9 Q And how many total complaints did Beech-Nut receive?

10 A I do not recall.

11 Q You worked for, I think you said, a sister corporation of  
12 Beech-Nut?

13 A That's correct.

14 Q Before 2008? Signature Brands. Right?

15 A Correct.

16 Q Signature Brands is a large company, is it not?

17 A It's a fair size.

18 Q There are certain products that it sells that we may know  
19 as lay people?

20 A Yes

21 Q Would you give us an example or two, please?

22 A Tubed icings, gels, sprinkles.

23 Q Did Signature Brands have its own policy separate from what  
24 Beech-Nut as the parent company may have had as to how to  
25 handle consumer complaints?

1 A The two were merged and I don't recall what was done before  
2 or after that.

3 Q Let's focus then specifically on Beech-Nut and after August  
4 of 2008 because that's when you were at Beech-Nut.

5 Was there a document contained in either a notebook or  
6 available electronically that set forth when Beech-Nut would  
7 implement the recall of one of its products?

8 A I'm sorry, could you repeat that again?

9 Q Did Beech-Nut in 2008 have a corporate document that set  
10 forth the criteria for when a product recall would take place?

11 A Are you referring to this specific one, or -- I mean,  
12 there's all kinds of guidelines for what they call recalls by  
13 Government FDA mandate.

14 Q There was no FDA here, was there?

15 A No, but you keep saying "recall."

16 We withdraw it from the market.

17 Q Let me rephrase it. I appreciate the clarification.

18 Was there a corporate document that specified when,  
19 absent Government mandate, Beech-Nut would recall product off  
20 the market?

21 A No, there's not.

22 Q No standards, no thresholds, were there?

23 A Well, there's standards and thresholds but nothing written  
24 in a corporate document to request it.

25 Q What was the threshold in December 2008, when you were part

1 of the group of people who decided to withdraw the product from  
2 the market?

3 A The threshold, as an infant nutrition corporation, we have  
4 a certain standard that we have to abide by. And basically  
5 when we had reported injuries of people who have consumed the  
6 product and there's a direct correlation in our opinion that  
7 this is a health risk, how many times does have it to happen  
8 before you make that decision? I mean, which one is the one  
9 that you decide not to do it with?

10 Q That's my question to you. How many before Beech-Nut  
11 withdraws a product from the market?

12 A There is no set number. My question is, you know, any time  
13 you've had a withdrawal from the product, I mean, you know,  
14 which one becomes the linchpin? How many -- how many -- how  
15 far do you go for health? Is it diarrhea, is it stomach?  
16 Hospitalization? Escalation? Do you escalate it? Does  
17 somebody have to die before you recall it?

18 Q No one died here, did they?

19 A No, they did not.

20 Q There weren't serious injuries here, were there?

21 A That's a matter of opinion. If my child had taken it and  
22 had gotten injuries, I'd have a big problem with it.

23 Q Did your child eat the product?

24 A No, they did not.

25 Q Are you aware of any specific instance of a serious injury?

1 A No, I'm not.

2 Q While at Beech-Nut, were you involved in any other product  
3 recalls, non-government mandated?

4 A No.

5 Q I started to ask you this a moment ago and I'll come back  
6 to it.

7 Beech-Nut primarily sells toddler baby food, does it  
8 not?

9 A Correct.

10 Q It's a competitor of Gerber's. Correct?

11 A Yes, sir.

12 Q And you told the jury a few times now that given its  
13 business line, Beech-Nut holds itself to a higher standard.  
14 Correct?

15 A Well, it is held to a higher standard also and certain  
16 requirements.

17 Q Let's focus on Beech-Nut, how it holds itself out.

18 A Okay.

19 Q Are you familiar with the purchase orders that were  
20 executed by Beech-Nut and sent to Promotion In Motion in this  
21 matter?

22 A I'm familiar with the purchase orders but not them  
23 specifically, no.

24 Q Are you familiar with any provision in the purchase order  
25 that sets forth a higher standard that Beech-Nut insists upon

1 other than what the law may require?

2 A No. But I believe they're issued based upon the criteria  
3 or the specifications set, and those normally are higher than  
4 they would be for an adult product. If you look at our  
5 products, there's no additives at all, they're all natural,  
6 there's no preservatives, it's all natural. That alone is a  
7 higher standard than anything else an adult eats.

8 Q Let's take something off the table. You're not suggesting  
9 that there was any aspect of the Fruit Nibbles --

10 A No.

11 Q -- that wasn't completely natural, are you?

12 A No. No. But you asked me to demonstrate how we hold  
13 ourselves to a higher standard.

14 Q I'm asking you a slightly different question. I'm not  
15 asking about holding yourself to a higher standard because it's  
16 an all natural product as opposed to using an artificial  
17 ingredient.

18 What I'm asking you is the following: At any point in  
19 time did Beech-Nut indicate verbally or in writing to Promotion  
20 In Motion that if the product was not 100 percent satisfactory,  
21 Beech-Nut had the right to reject the entire contract?

22 A As far as I know, no.

23 Q Here's the other question I was getting to. We know that  
24 Beech-Nut sells other products, and I think you indicated -- I  
25 know you indicated this: The 1 800 line and the website were



1 set up even before Fruit Nibbles existed. Correct? And I  
2 presume if they were set, I presume they were set up because  
3 sometimes consumers have questions and sometimes consumers have  
4 complaints. Correct?

5 A Correct.

6 Q Were there complaints with any other product sold under the  
7 Beech-Nut label in the fall, in early winter of 2008, besides  
8 Fruit Nibbles?

9 A I'm sure there were.

10 Q And the products that were sold under the Beech-Nut name in  
11 the fall and early winter of 2008 was destined for toddlers and  
12 young children as well. Correct?

13 A I'm sorry, I'm not sure I follow what you said.

14 Q It's late in the afternoon. I get wound up. Let me slow  
15 down.

16 Let's focus on August, September, October of 2008, if  
17 we could. All right?

18 In that time period, you've told us that as part of  
19 the "Let's Grow" product line, product launched, numerous  
20 products were also being introduced or reintroduced by  
21 Beech-Nut. Correct?

22 A Correct.

23 Q Approximately 19 products in total?

24 A Correct.

25 Q Those 19 products in total were designed for toddlers and

1 young children. Correct?

2 A Correct.

3 Q Was there a problem with any of those 19 products other  
4 than Fruit Nibbles?

5 A How do you describe "problems"? I mean, there were no  
6 issues --

7 Q A consumer complaint.

8 A People always have an opinion, and they may have said "I  
9 prefer this," "I prefer that," but nothing to the magnitude of  
10 what we had on Fruit Nibbles.

11 Q And I have to ask you again: What was the magnitude of the  
12 complaint with Fruit Nibbles? And then please tell us the  
13 magnitude of the complaint on any of these 19 products.

14 A Maybe I'm missing the point, but I mean, when someone says  
15 these are bland tasting or this may be too this or that  
16 compared to something that smells rancid or looks like dead  
17 toes, to me they're pretty night-and-day comparison. Because I  
18 mean, why would you want a product that was described like that  
19 as opposed to, you know, something that they're just -- more of  
20 a suggestion or a complaint. I mean, very rarely did we have  
21 complaints of that magnitude.

22 Q You don't know the magnitude, do you?

23 A As in?

24 Q The magnitude of the complaints for Fruit Nibbles.

25 A It was significantly more than the non Fruit Nibbles.

1 Q Does Beech-Nut sell bananas, apples and products like that?

2 A Yes, they do.

3 Q In the fall of 2008, any complaints that Beech-Nut received  
4 about the appearance of any of the bananas sold under its name?

5 A I don't specifically know.

6 Q Would you be surprised if there were no complaints about  
7 the appearance of any fruit product sold by Beech-Nut?

8 A No, you're probably right, there probably was some.

9 Q That's why I'm coming back and trying to find out.

10 As a decision-maker, what was the tipping point, what  
11 was the threshold, the word you used, that it's not just a  
12 matter of taking some of the product off the shelf, but it's  
13 canceling the entire contract? Can you answer that?

14 A The tipping point was twofold: One is the risk. When  
15 people are injured and there's a risk of injury, you have an  
16 obligation to act prudently. I mean, there was injury at risk  
17 and we know that. Two is, the descriptors used and the quality  
18 of the product was substandard at best. I mean, it's one of  
19 those where no one in their right mind -- I mean, truthfully I  
20 ate some of the bad product and it was not good.

21 Q When did you eat the Fruit Nibbles?

22 A Back in October of 2008.

23 Q Okay. Are you doing all right today?

24 THE COURT: All right. Come on, Mr. Wallach, that's  
25 not necessary.

1 Q You get sick from eating the Fruit Nibbles in October 2008,  
2 Mr. Kennedy?

3 A I don't recall.

4 Q The decision to recall and cancel the contract was made  
5 beginning of December 2008. Correct?

6 A That's what I understand, yes.

7 Q As of December 1, 2008, had Beech-Nut concluded that  
8 substantially all of the product manufactured and shipped by  
9 Promotion In Motion was substandard?

10 A We had no -- we had no feel of what was good or bad.

11 MR. WALLACH: Your Honor, may I approach the witness  
12 to show him an exhibit, please?

13 Would your Honor like a copy?

14 A Thank you.

15 Q Mr. Kennedy, what I've handed to you is a packet of  
16 documents that were produced in the discovery phase of this  
17 lawsuit by Beech-Nut. You'll actually see on the first page  
18 that's entitled, "Fruit Nibbles Withdrawal, Updated 12/01/08."  
19 On the right-hand side there are the numbers that attorneys use  
20 in identifying documents, BN5840.

21 Do you see that?

22 A Yes, sir.

23 Q I'll represent to you that indicates this is a document  
24 that Beech-Nut produced in the discovery phase of the lawsuit.

25 Have you seen this document prior to today?

1 A Yes.

2 Q Were you involved in its preparation, if you remember now?

3 A Sitting here today I'm sure I was involved in some way or  
4 at least participated in a meeting with it.

5 Q If you'd be good enough -- and again I'm going to refer to  
6 what's called the Bates stamp number --

7 A Okay.

8 Q It's Bates stamp BN, which is Beech-Nut, 5846.

9 I don't mean to have you multi-task, but if it helps,  
10 it's a chart that says, "R&D Feedback Mixed Fruit" on top of  
11 the page.

12 Do you see that, sir?

13 A Yes.

14 Q Do you recall seeing this chart either as part of the  
15 document or in December of 2008?

16 A I don't recall seeing it, but that was four years ago. But  
17 I'm sure it was there.

18 Q As you look at this document, do you know who produced it;  
19 and more specifically, what department within Beech-Nut, if not  
20 an actual person?

21 A I do not.

22 Q What I'd ask you to do is to begin at the left hand margin  
23 where there's a column entitled "Lot," and then there's about  
24 15 or so lot numbers that appear. Do you see that?

25 A Yes.

1 Q Do you understand what the lot number references are?

2 A Yes.

3 Q Would you tell the jury, please, what your understanding of  
4 the lot references would be?

5 A Basically whenever a product is made, a lot number is --  
6 the production run or the quantity that was received under that  
7 code.

8 Q Are you familiar with the lot code system that was utilized  
9 for Fruit Nibbles?

10 A No, I'm not.

11 Q Were you ever aware of it? Again, I realize it's four  
12 years now, but is this something that you had ever known?

13 A No, it was not.

14 Q If you go over, the second to last column, it's entitled  
15 "Current Condition." Do you see that?

16 A Yes.

17 Q It talks about the condition by each individual lot. Do  
18 you see that?

19 A Yes.

20 Q The first two entries indicate: "Current Condition very  
21 good." And the next six to eight state either "Bad" or "Very  
22 Bad."

23 Do you see that?

24 A Are you referring -- well, there's "Very Good," then "Bad  
25 Mix," then "Very Bad," then "Bad," then "Very Bad," and so

1       forth.

2       Q     Yes.

3       A     Okay.   Yes.

4       Q     Pointing out the "Bad" and "Very Bad," that's correct.

5               I'd also like you to look at the final five entrants.  
6       Would you read them to the jury beginning with the entry for  
7       Lot 81029?

8       A     (Reading) Good; very good, very good, very good, very good.

9       Q     Focusing on the lots, do you have any understanding as to  
10      where -- and I'll use the last one as an example -- 81117,  
11      that's a reference to the year 2008; 11, is the month,  
12      November; and the "17" refers to the day of the month, namely  
13      November 17th

14      A     Is that a statement or a question?

15      Q     I'm asking if you have any familiar with that?

16      A     No, I do not.

17      Q     Do you have any familiarity with whether or not  
18      Beech-Nut -- excuse me, I'll go back a second.

19               I may have asked this and I truly apologize.   Do you  
20      know the reason why this chart was prepared?

21      A     I do not.

22      Q     Is it a document that was prepared by Beech-Nut for  
23      Beech-Nut?

24      A     It was prepared by Beech-Nut, yes.

25      Q     And was it utilized by Beech-Nut in deciding, in December,

1       apparently a day or so later, whether or not to cancel the  
2       contract with Promotion In Motion?

3       A     What I do recall -- and I apologize for being four years  
4       from now -- but this is part of a presentation to assess our  
5       risk.

6       Q     Well, when the assessment as to potential risk is being  
7       undertaken by Beech-Nut, you and other executives see that  
8       there's product that is good, very good, very good, very good,  
9       very good. In fact, the next column says, "still looks very  
10      good."

11               Did I read that correctly?

12      A     I'm sorry?

13      Q     The final column that's entitled "Call."

14      A     Yes.

15      Q     For the last lot states, "Still looks very" -- it says  
16      "Food."

17               I'll move on.

18               It includes by saying "Wait two weeks." Do you know  
19      whether Beech-Nut did any subsequent analysis of the product  
20      after this, which is dated December 1, 2008?

21      A     I have no recollection.

22               THE COURT: To put it into some context though, Mr.  
23      Wallach, to be fair so the jury hears the whole context. The  
24      column before that as the age, day. Correct?

25               THE WITNESS: Yes, sir.



1 THE COURT: And that is the, how old this product is.

2 Correct?

3 THE WITNESS: That would be my assumption, yes.

4 THE COURT: Okay. So the ones that have been just  
5 referred to as good; very good; very good, very good are all  
6 under 28 days. In fact --

7 THE WITNESS: Yes.

8 THE COURT: Most of them are nine to 15 days.

9 Correct?

10 THE WITNESS: Yes, sir.

11 THE COURT: The ones that are bad, bad, very bad, very  
12 bad, bad, bad, very bad, bad mix are all between 63 and 83  
13 days. Correct?

14 THE WITNESS: Yes, sir.

15 THE COURT: And then there's a couple there that are  
16 older that are good, very good, very good. There's two that  
17 are older than 83 days that are very good. Correct?

18 THE WITNESS: Yes, sir.

19 THE COURT: Okay. So -- go ahead, Mr. Wallach.

20 MR. WALLACH: Absolutely.

21 THE COURT: You were taking some, but I think so the  
22 jury has the full picture -- and, ladies and gentlemen, because  
23 I ask the question doesn't give the answers any more weight  
24 than if the lawyers ask the question. But sometimes in order  
25 to make sure everything is in context I ask a question or two.

1 Okay.

2 Go ahead, Mr. Wallach.

3 BY MR. WALLACH:

4 Q Let me come back to the context as I was going to.

5 Do you know whether there were any changes to the  
6 product made by Promotion In Motion as production progressed  
7 after the beginning of August 2008?

8 A I have no knowledge.

9 Q Do you have any knowledge of the substitution of pineapple  
10 juice for white grape juice and then back to pineapple juice?

11 A Only things I heard.

12 Q Do you have any knowledge about further adjustments  
13 Promotion In Motion was making to the Fruit Nibbles based upon  
14 feedback it was receiving from Beech-Nut and its own testing as  
15 time continued to go on?

16 A No, sir, I do not.

17 Q Do you know whether or not the product originally  
18 manufactured the beginning of August 2008 was the same product  
19 that was manufactured in the middle of October and beginning of  
20 November 2008?

21 A No, sir, I do not.

22 Q Now, I may have started to ask this question. The Judge is  
23 correct, one of the columns indicates the number of days that  
24 the product has been examined. Do you know whether Beech-Nut  
25 continued this review of the product to see not only nine or 10

1 days later, but 60 days later is the product still good before  
2 it terminated the contract?

3 A No, I'm not aware of what they did.

4 Q Are you aware -- and I want to focus specifically on the  
5 product, it's Lot Number 81029, which I'll represent to you  
6 indicates it was manufactured October 29th, 2008, it says  
7 "Good," and that's after 28 days.

8 Do you know whether anyone at Beech-Nut looked at that  
9 product after this chart was prepared, even if it's not in the  
10 document? Did anyone ever say to you, this product is no  
11 longer good?

12 A No, sir, I have no idea.

13 Q Well, is this a document that was considered by you and  
14 others at Beech-Nut in deciding to terminate the contract?

15 A One of many I'm sure.

16 Q What other documents? The complaints from consumers.  
17 Correct?

18 A Well I mean, there's multiple pages here that were  
19 considered; conversations, documents, consumer complaints, all  
20 of the above.

21 Q If you continue to look at the rest of the document, the  
22 next page which is BN5947 has a similar analysis, this time  
23 it's for the berry medley version of the product not for the  
24 mixed fruit. And if you look at that you'll see that after 109  
25 days the product is good; after 96 days it's good. There's

1 some product manufactured beginning September that's bad or  
2 very bad. And then again, as we saw in the prior page, later  
3 manufactured product in October, November is very good and  
4 still looks very good.

5 Were you aware of this in making your determination?

6 MR. DILLON: Your Honor, I'm going to object to the  
7 manner of the cross-examination because really notwithstanding  
8 your instruction to the jury, what's happening here is Mr.  
9 Wallach is reading a document and trying to influence the  
10 jury's decision by characterizing what the document says.

11 THE COURT: Well...

12 MR. DILLON: This witness said he doesn't remember.

13 THE COURT: Not all that, Mr. Dillon, you'll have a  
14 chance the redirect on these documents.

15 You'll see a variety of different comments here going  
16 from "Very Good to "Very Bad" with "Bad" and "Good" mixed in  
17 as to certain lot types. Correct, Mr. Wallach?

18 MR. WALLACH: Yes, your Honor.

19 THE COURT: So you have a product that is being  
20 evaluated as good to very bad, from very good to very bad, and  
21 that's what these charts demonstrate, without saying anything  
22 more.

23 Go ahead, Mr. Wallach.

24 MR. WALLACH: I'll say nothing more about that chart.

25 BY MR. WALLACH:

1 Q What I would like to ask you, Mr. Kennedy, do you still  
2 have -- I think you do -- the Beech-Nut exhibit binder in front  
3 of you?

4 A Yes, I do.

5 Q If you'd be good enough to look at Exhibit Number 7,  
6 please.

7 While you're getting there, Exhibit 7 is an e-mail  
8 dated November 26th, 2008 from Robert Turner, and you're one of  
9 the people copied on it. Who is Robert Turner?

10 A Robber Turner was the marketing -- a purchasing manager.

11 Q Is he still at Beech-Nut?

12 A No, he's not.

13 Q The e-mail indicates you were one of the recipients. I  
14 know you didn't send it, but do you know why it was sent to  
15 you?

16 A It was sent to me after the fact.

17 Q The fact being what happened on October 18, 2008?

18 A Right. Well, this is an e-mail trail, and it was sent to  
19 me on November, what, 26th, but apparently the original one was  
20 dated October 18th.

21 Q That is correct.

22 A Right.

23 Q Now, on November 26th is Beech-Nut in the process of  
24 deciding whether or not to cancel the contract with Promotion  
25 In Motion?

1 A I think we were assessing our risk at that point. Because  
2 risk assessment was more than just whether we should or  
3 shouldn't cancel, it's whether we should go forward with the  
4 launch, continue. Because, I mean, we had invested a lot of  
5 money, time and effort already. The last thing we wanted to do  
6 was pull the plug on this.

7 Q Well, that's what I'm trying to get at. As of November  
8 26th, let's use that date, you've indicated that complaints had  
9 come in -- I'm going to get it wrong but I'll be corrected --  
10 "dead toe appear like" and all the other complaints that were  
11 read into the record earlier. Beech-Nut is aware of that on  
12 November 26th, aren't they?

13 A Correct.

14 Q Beech-Nut was aware of those complaints earlier in October,  
15 were they not?

16 A Yes.

17 Q If the complaints were that serious, if Beech-Nut has this  
18 higher standard, why is it that between October 18th and  
19 November 26th Beech-Nut is still engaging in this weighing of  
20 risks as you talk about? How real was the risk?

21 A The risk was very real, but it escalated during that time.  
22 because after -- when the medical problems started showing up  
23 and more consistent documented problems with it, we also were  
24 getting assurances -- or communications saying, we can fix  
25 this, we can make it work, we can make it work. That was my

1 understanding of it.

2 Q And did Promotion In Motion make it work, and did not the  
3 product get better?

4 A Apparently not.

5 Q Are you aware of any issue with Fruit Nibbles manufactured  
6 after October 15th, 2008?

7 A I couldn't tell you if I am or not because -- I mean, we  
8 haven't connected the dots between that and -- we received  
9 complaints after that point, yes.

10 Q The last document I showed you connected the dots. It had  
11 the dates of production and the quality of the product. So  
12 that is something that Beech-Nut looked at, isn't it?

13 MR. DILLON: Objection, your Honor. Again, that's a  
14 mischaracterization of the document. And the point I think  
15 that was made was that the group of lots at the end of the  
16 document had not been in the warehouse as long as the group of  
17 lots earlier in the document.

18 THE COURT: All right. I'll sustain the objection.  
19 Go ahead, Mr. Wallach.

20 MR. WALLACH: Let me ask it differently.

21 BY MR. WALLACH:

22 Q Beech-Nut is seeking as part of its damages the storage  
23 cost for product. Correct?

24 A Correct.

25 Q We'll get to that at some point.

1           You told the jury that Beech-Nut has been holding on  
2 to Fruit Nibbles samples for four years now. Correct?

3       A    Correct.

4       Q    In the four years that Fruit Nibbles have been held by  
5 Beech-Nut, did Beech-Nut look at any of the later produced  
6 product that I directed you to on that last exhibit to see how  
7 it was after 30 days, 60 days or 90 days?

8       A    From -- back in 2008 and '9 I don't recall -- I don't know  
9 what we were or weren't doing, but subsequent to that, no.

10      Q    So your answer is, you don't know from 2008 forward, not  
11 just after 2008?

12      A    Correct.

13      Q    Let me come back to Exhibit 7, the Beech-Nut exhibit you  
14 have in front of you.

15           On November 26th as this process is ongoing as you  
16 talked about, an e-mail is forwarded from October 18th. Now  
17 the October 18th e-mail -- I'm sorry.

18           On October 18th, am I correct, Beech-Nut told  
19 Promotion In Motion, we need four truckloads of Fruit Nibbles.  
20 The value is approximately \$136,000. Ship it to us. We  
21 release you from any liability. Is that a fair summary of what  
22 happened?

23      A    Yes; and it was mistake.

24      Q    It was a mistake made by whom?

25      A    I would assume Mr. Turner.



1 Q Was it Mr. Turner who did this or was it a Dr. Chang who  
2 did this?

3 A This e-mail says from R. Turner to Mr. Basant, and it  
4 says -- basically says Beech-Nut will assume all liability for  
5 this. Signed, Bob Turner, CPM.

6 Q I know who sent the e-mail.

7 A Pardon?

8 Q I know who sent the e-mail. My question is slightly  
9 different.

10 A I'm just reading from the document.

11 Q Let's just slow down tore a second.

12 Here's my question for you: Do you know whether Mr.  
13 Turner conferred with anyone at Beech-Nut before advising  
14 Promotion In Motion that Beech-Nut would accept the four  
15 truckloads, 10,000 cases of Fruit Nibbles, on October 18th,  
16 2008?

17 A No, I do not.

18 Q Do you know who -- I just referred to a second ago -- who  
19 Dr. Chang is?

20 A Yes, I do.

21 Q Would you tell the jury, please, who Dr. Chang is?

22 A He is our vice president of quality control and research  
23 and development.

24 Q Is he still employed by Beech-Nut?

25 A Yes, he is.

1 Q Do you know what role, if any, Dr. Chang played in  
2 evaluating the Fruit Nibbles in October and November of 2008?

3 A I'm sure it was a very important piece because he's  
4 responsible for all the quality.

5 Q Do you have any reason to believe that Dr. Chang was not  
6 involved in Mr. Turner's decision to accept these 10,000 cases?

7 A I have no knowledge of that.

8 MR. WALLACH: Ten seconds, your Honor.

9 (There is a pause for Mr. Wallach.)

10 Q Do you know whether Dr. Chang was examining the Fruit  
11 Nibbles in November of 2008?

12 A I'm assuming he was. I don't know though.

13 Q Do you know whether Dr. Chang voiced any opinion in  
14 November of 2008 as to the quality of the Fruit Nibbles shipped  
15 and received from Promotion In Motion?

16 A I'm sure he had an opinion on them, yes.

17 Q Do you know what that opinion was?

18 A Specifically, no.

19 MR. WALLACH: May I approach your Honor?

20 THE COURT: Yes, go ahead.

21 Q Mr. Kennedy, I've handed you a document, two pages, that  
22 was produced in discovery by Beech-Nut. It's from Dr. Chang  
23 who we've been talking about. It's dated November 21, 2008.

24 Would you tell the jury who -- looks like it's Mr. or  
25 Mrs. Rudolf -- that e-mail was sent to?

1 A Christoph Rudolf was the president of the company at the  
2 time.

3 Q Now the e-mail says Hero, USA. What is Hero's relationship  
4 to Beech-Nut?

5 A Hero is a Swiss-based company based out of Zurich or  
6 Lenzburg, Switzerland, and it has U.S. holding company called  
7 Hero, Inc. who is the U.S. owner of Beech-Nut, and we use the  
8 Hero USA domain.

9 Q Do you recall seeing this e-mail prior to today?

10 A No, I don't, but.

11 Q Within Dr. Chang's e-mail, do you see where he refers to  
12 the product shipped to Safeway? In fact, it says, "Shipped for  
13 November production which products are very good at this  
14 stage"?

15 MR. DILLON: Your Honor, objection. If counsel is  
16 going to read a portion of the document, I think he should read  
17 the entire document of the.

18 MR. WALLACH: Your Honor, they can have redirect.

19 THE COURT: Mr. Dillon, you'll have an opportunity for  
20 redirect. Okay?

21 But you should read the entire sentence at least so  
22 it's understood. Okay?

23 Q The entire sentence is as follows, Mr. Kennedy:

24 (Reading) Marketing has put a hold on all products  
25 produced in October and November except Safeway shipment.

1 (shipped from November production which products are very good  
2 at this stage). And stop all future productions at PIM for  
3 now, and then the e-mail continues.

4 Did you have -- here's the question now: Did you have  
5 any knowledge in the end of November 2008 that there was  
6 product Dr. Chang, Beech-Nut's scientist, thought was good  
7 enough to go out and stay at one of your customers?

8 A Well, maybe I'm missing the point on this, but prior to  
9 that he talks about some are sufficient but we don't know if it  
10 will continue to progress to acceptable levels.

11 So I mean, at the time this was written and all, these  
12 things were fine. That's why --

13 Q As of November 21, its all fine?

14 A That's what it appears. It appears from the e-mail yes.

15 THE COURT: That's not an accurate characterization.  
16 If you're going to refer to this e-mail then why don't you read  
17 the whole thing?

18 MR. WALLACH: Your Honor, the witness just indicated  
19 it was all fine. I will read the entire e-mail.

20 THE COURT: That was not what he said.

21 Why don't you go ahead so there's no misleading in  
22 this. Not that you're doing it.

23 MR. WALLACH: I'll read all of it.

24 THE COURT: But read the whole e-mail since you read  
25 half of it, and the witness should follow along with the

1 e-mail.

2 BY MR. WALLACH:

3 Q (Reading) Some of the product produced in October showed  
4 sign of mummification. A degree of mummification as of today  
5 is still considered acceptable but we have no sufficient  
6 "confident" to say that they will not progress to an  
7 unacceptable stage. Marketing has put a hold on all products  
8 produced in October, November except Safeway shipment (shipped  
9 from November production which products are very good at this  
10 stage) and stopped all future production of PIM for now. Other  
11 actions: Discussed with PIM, and PIM will get back to us on  
12 Monday on the results of its investigation and proposed next  
13 steps. The pre-mummified products will be observed for three  
14 more weeks. If they do not continue worsening the product will  
15 be released. Three new code packers have been identified and  
16 Elaine is working on the confidentiality agreement. Best  
17 regards, Shen.

18 THE COURT: No, go ahead and ask any questions you'd  
19 like.

20 Q Was there a problem with any of this problem three weeks  
21 later.

22 A I don't know.

23 MR. WALLACH: Your Honor, I'm not going to finish in  
24 the next few minutes the financial part of my  
25 cross-examination.

1           THE COURT: All right. How much longer do you think  
2 you have total? Just without -- I'm not holding you to it.

3           MR. WALLACH: 45 minutes tops, your Honor.

4           THE COURT: Ladies and gentlemen, we'll recess for the  
5 day and we'll resume tomorrow morning at 9:30. Please don't  
6 discuss anything about the case amongst yourselves or at home.  
7 It's tempting at times, but you're sworn to not do that. So  
8 please don't discuss anything about the case.

9           We'll see you promptly at 9:30 tomorrow morning.  
10 Please allow enough time.

11           Please let me explain another thing to you. We can't  
12 get started until everyone is here, of course: The lawyers,  
13 witnesses, myself, and jurors. So please allow for enough time  
14 tomorrow to be here so we can get started at 9:30. You don't  
15 know the traffic patterns yet, so give yourselves little bit  
16 more time than you would expect. Okay? And we'll see you  
17 tomorrow morning at 9:30.

18           Have a nice evening. We'll see you then.

19           THE DEPUTY CLERK: Please rise for the Jury.

20           (The Jury leaves the courtroom.)

21           THE COURT: Mr. Kennedy, you can step down.

22           THE WITNESS: Thank you, sir.

23           (Witness temporarily excused.)

24           THE COURT: We'll see everybody then tomorrow morning.

25           MR. WALLACH: Thank you, your Honor.

1 THE COURT: At 9:30. Okay. Thanks.

2 (An adjournment is taken to September 11, 2012, 9:30

3 a.m.)

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