UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PROMOTION IN MOTION, INC. and PIM BRANDS, LLC,	:	Civil Action No. 09-1228 (WJM) (MF)
Plaintiffs,	:	
v.	:	Oral Argument Requested
BEECH-NUT NUTRITION CORPORATION, a HERO GROUP COMPANY,	:	
Defendant.	:	

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Court is well versed with the standards to apply in considering a party's motion for summary judgment and the Defendant's request in this case should be denied in its entirety. In an attempt to suggest to the Court that there are no material questions of fact in dispute and the governing law that applies is clear on its face, Defendant Beech Nut Nutrition Corp. ("Beech Nut") offered a severely truncated overview of both. As the accompanying Certification of Basant Dwivedi, the documents attached to the accompanying Certification of Counsel, and the Plaintiffs' Supplemental Local Rule 56.1 Statement of Material Facts demonstrates, this case is not ripe for summary judgment.

Summary judgment is wholly unsustainable because material questions of fact exist with regard to the following primary issues:

1. what was the impact of the changes and modifications that Beech Nut insisted upon to PIM's base product with regard to its claim that the product, or some portion of it, was not merchantable?

2. what was the impact of Beech Nut's knowledge that the sample product it approved for production contained some degree of starch coating, even with the original ingredients?

3. what was the impact of Beech Nut's knowledge and acquiescence to the fact that PIM did not have time to conduct a shelf life study for the product due to the ongoing changes Beech Nut insisted upon?

4. what was the impact of PIM's refusal to sign the draft Quality Agreement and Co-Pack Agreement, with their various proposed representations and warranties, on Beech Nut's allegation that PIM is bound by the terms of purchase orders rejected previously?

Each of these subjects is discussed below and show why summary judgment should be denied.

STATEMENT OF FACTS

In its Brief, Beech Nut presented a limited summary of the background facts that led up to the dispute before the Court. Beech Nut's recitation of those facts was incomplete and incredibly one-sided. While counsel is certainly free to shape their arguments in the best light possible for their client, the full version of the information ascertained through discovery yields a broader and more complete picture. By viewing this expanded discussion of the events leading up to the various claims being filed, the Court will hopefully also see why summary judgment is not appropriate and should be denied in its entirety.

During the development of the product known as Fruit Nibbles, the primary communications between the parties took place between Mary Cool of Beech Nut and Basant Dwivedi of PIM. Cool Dep. 28:6-10 [Exhibit N]. PIM and Beech Nut collaborated with one another over an extended period of time to jointly create the product. Fruit Nibbles began as a concept that Beech Nut wanted to take further and then there was a joint effort to accomplish that goal. McSorley Dep. 82:4-22 [Exhibit L].

In the course of these communications, PIM repeatedly sent samples to Beech Nut for comment and approval. Upon arrival at Beech Nut, the samples were considered by its new product development team. The samples were evaluated for texture, bite, flavor, and color. Based on these observations, and those from Beech Nut's marketing department, comments were then transmitted back to PIM. Cool Dep. 29:5-25; 32:11-23 [Exhibit N]; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24 [Exhibit R]; Chang Dep. 31:2-12 [Exhibit O]. Beech Nut did not rely upon PIM's expertise in the creation of the Fruit Nibbles. Dwivedi Dep. 93:18-21 [Exhibit P]. It was fully involved in the development process and dictated much of it.

Beech Nut was not controlling the formulation of the product being developed, but it did control the development process. Dwivedi Dep. 44:9-25; 91:6-20; 92:17-25 [Exhibit L]. PIM followed the instructions of its client as they were continuously transmitted and received. Dwivedi Dep. 45:17-25 [Exhibit P].

Not only did Beech Nut transmit its required changes to PIM, but Beech Nut employees visited PIM to provide input on the development of the product as well. By way of example, Mary Cool visited PIM on numerous occasions and worked with PIM personnel on the product's flavor and color. Cool Dep. 34:2-20 [Exhibit N]; Wallach Cert., Exhibit E. Mary Cool was present at PIM on more than a dozen occasions for production runs and to work with PIM on developing the product and telling it what Beech Nut wanted. McSorley Dep. 20:5-25 [Exhibit L]. Mary Cool was present for these production runs through late September of 2008. McSorley Dep. 21:1-14 [Exhibit L].

This constant back and forth between Beech Nut and PIM was necessitated by the fact that while Beech Nut told PIM it wanted an all natural product, it offered almost no initial guidance as to the parameters of the result it wanted. Chang Dep. 57:2-13 [Exhibit O]. One of the reasons Beech Nut made so many changes to the product during its development stage was that its personnel lacked prior experience in manufacturing an all natural fruit product outside of a jar, including the head of its team, Mary Cool. Cool Dep. 19:12-17 [Exhibit N]. This lack of experience delayed the development and approval of the Fruit Nibbles. Beech Nut was not able to give PIM clear direction on how it wanted to proceed in developing the product. Dwivedi Dep. 46:17-20 [Exhibit P]; Wallach Cert., Exhibit G.

While PIM had prior manufacturing experience with a similar, but not all natural fruit product, Beech Nut was telling it what the product should be, what it should taste like, what it

should look like, and what the texture should be. All these criteria were in the control of Beech Nut. Dwivedi Dep. 47:1-4 [Exhibit P]. Beech Nut provided no written guidelines for the product's key criteria -- color, taste, and texture -- and PIM was not always sure what exact product parameters were sought by Beech Nut. Dwivedi Dep. 47:5-16 [Exhibit P].

This conclusion is not altered by the fact that in July of 2008, Beech Nut approved a sample product supplied by PIM. This is because Beech Nut, even at that point and afterwards, did not provide detailed specifications beyond stating they liked the sample's color, texture, and flavor. Dwivedi Dep. 48:2-25 [Exhibit P]. As late as September of 2008, Susan Allen of Beech Nut first began interacting with PIM's personnel and conveying a list of requirements from her point of view that were not previously important to Beech Nut or conveyed to PIM. These changes concerned the product's characteristics -- color, flavor, and texture. Dwivedi Dep. 88:2-15 [Exhibit P]. As a result of these late changes subsequent to the approval of a prototype in July of 2008, PIM's perception was that Beech Nut had changed the product by specifically wanting it to be softer. Dwivedi Dep. 100:3-10; 103:3-6 [Exhibit P].

The Beech Nut team was deficient in communicating information to PIM. Another example of this concerned Beech Nut's failure to clearly communicate to PIM when the Fruit Nibbles needed to be ready for sale. Beech Nut was not able to state if the launch date was specifically communicated to PIM or identify who would have made such communication. Cool Dep. 22:9-12 [Exhibit N]; Hungsberg Dep. 59:1-25 [Exhibit R]; Chang Dep. 18:10-19 [Exhibit O]. Beech Nut produced no evidence of any communication to PIM in this regard. In fact, discovery revealed the fact that the extensive involvement of Mary Cool's development team in revising the originally presented formulation and working to obtain the results Beech Nut wanted

was not known by Beech Nut's marketing team. Cool Dep. 49:19-25; 50:1-25; 51:1-24 [Exhibit N]; Wallach Cert. at Exhibit F.

While Beech Nut directed that PIM make changes to the samples it was receiving and testing, its development team did not discuss with PIM any shelf life requirement for the evolving product. Cool Dep. 36:4-10 [Exhibit N]; Hungsberg Dep. 76:13-17 [Exhibit R]. Mary Cool did not know what, if any, shelf life requirement may have existed for the product. Cool Dep. 36:11-13 [Exhibit N]. Beech Nut's general belief, through Dr. Chang, that Basant Dwivedi agreed to a 12 month shelf life at the parties' first meeting finds no written confirmation and is expressly disputed by Mr. Dwivedi. Chang Dep. 20:4-8; 21:7-10; 23:10-16 [Exhibit O]; Dwivedi Dep. 63:21-25. [Exhibit P]. Beech Nut was specifically advised by PIM that there had been no shelf life study performed. Chang Dep. 63:19-23 [Exhibit O].

PIM refused to execute the draft agreements exchanged between the parties, which included proposed warranties and product representations, because of all the changes to the product being made by Beech Nut. Dwivedi Cert. at ¶ 4, Exhibit A at p. 9; Kowalski Decl., Exhibit 11 at BN2387. Unlike other products manufactured by PIM, the Fruit Nibbles were not subjected to a shelf life study. In this instance, the study could not be performed because Beech Nut kept changing the product and there was no time to do such a study. Bianchini Dep., 113:8-24 [Exhibit M]; Dwivedi Dep. 64:17-25 [Exhibit P]. As a large and sophisticated consumer food company, Beech Nut knew the steps involved in developing and testing a product, and that under the particular time frames associated with Fruit Nibbles, there was no time for a shelf life study to be performed. Dwivedi Dep. 71:2-13 [Exhibit P].

PIM was also concerned that Beech Nut was insisting upon too large a volume of production in too short a time frame. McSorley Dep. 17:2-19 [Exhibit L]; Wallach Cert.,

Exhibits H and I. This became a particular issue after Beech Nut approved sample product in July of 2008, which was manufactured with pineapple juice. PIM did not have sufficient quantities of pineapple juice available to make product meeting the volume demands of Beech Nut. PIM therefore told Beech Nut of the situation and its plan to utilize white grape juice as a substitute. Beech Nut agreed to this. Dwivedi Dep. 50:1-15 [Exhibit P].

Senior officers of PIM then went on a special trip to Indonesia in an effort to source additional pineapple juice. Dwivedi Dep. 59:13-25 [Exhibit P]. Even with the commitment obtained, there was still going to be a lead time of two months for delivery. Dwivedi Dep. 62:21-25; 63:1-3 [Exhibit P]. The other option presented to Beech Nut, and rejected by them, was to stop production until more pineapple juice was obtained. Dwivedi Dep. 51:1-12 [Exhibit P]. PIM understood that Beech Nut consulted with its own scientists in Europe before making its decision to proceed with white grape juice. Dwivedi Dep. 51:13-25 [Exhibit P]. PIM itself had prior successful experience in utilizing white grape juice in fruit products and did not anticipate problems arising. Dwivedi Dep. 53:3-25 [Exhibit P].

Even with the changes made to the product during its development by Beech Nut, PIM was eventually able to product and package a viable product. Bianchini Dep. 62:23-25; 63:1-3 [Exhibit M]. The product manufactured by PIM met Beech Nut's specifications. Bianchini Dep. 64:3-9 [Exhibit M]; McSorley Dep. 55:5-25 [Exhibit L]. While Diane Bianchini expressed concern in one email as to the quality of some of the product she saw, as director of quality control, she had the authority to stop production, but never did. McSorley Dep. 111:13-25 [Exhibit L].

Prior to the Summer of 2008, and approval by Beech Nut of a prototype sample, Beech Nut was made aware of the fact that the surface of some product had crystallized, but there was a

constant push by Beech Nut to keep moving forward and produce the product. McSorley Dep. 54:6-24 [Exhibit L]; Wallach Cert., Exhibit A; Kowalski Decl., Exh. 15. Potentially due to the change to white grape juice, though never determined, Beech Nut noticed that the product did not look as nice as earlier product had. Some of the product had an increased starchy coating compared with the product tested with pineapple juice. Wallach Cert., Exhibits C and D. PIM advised Beech Nut that this appearance could be changed by increasing the amount of capol. Bianchini Dep. 72:19-25; 73:19-24 [Exhibit M]. PIM then increased the amount of capol in the manufacturing process and believed that cured the starchy coating. PIM was of the opinion the product was good when it went out its doors for delivery. Bianchini Dep. 74:7-12 [Exhibit M]; McSorley Dep. 64:1-7 [Exhibit L]; Dwivedi Dep. 64:23-25; 65:1-4 [Exhibit P].

During the product sampling undertaken by Beech Nut in late September/early October of 2008, it noticed the surface crystals referenced previously. When Beech Nut brought to PIM's attention surface coating appearing on some product, another option suggested by PIM was to return to pineapple juice, which would have delayed production. Dwivedi Dep. 57:9-25 [Exhibit P]. On October 4, Mary Cool sent an email within Beech Nut stating that an inspection of product cartons in its possessions did not reveal a widespread texture/appearance problem. Wallach Cert. at Exhibit D. Her email also expressly stated that "PIM cannot guarantee that the product without any surface crystals would not change with time." Mary Cool did not recall any one within Beech Nut responding to these facts. Cool Dep. 63:10-25 [Exhibit N]. Beech Nut did not tell PIM to stop production.

PIM disputes responsibility for the legal consequences of the starchy coating on an unquantified amount of the product it manufactured. One reason for this is what might have happened once the product left PIM's control. Beech Nut employees advised PIM at a meeting

held between the parties towards the end of 2008, that there may have been incidents in which the product was not properly handled once it left PIM's control. In particular, the product might not have been stored at the proper temperature. McSorley Dep. 75:2-22 [Exhibit L]; Dwivedi Dep. 79:3-16 [Exhibit P].

While Mary Cool did not know what percentage of the product delivered by PIM to Beech Nut was the subject of consumer or customer complaint, Beech Nut stopped accepting any product from PIM and has sought damages for all of the product it received and paid for. Cool Dep. 45:9-13 [Exhibit N]. It bears emphasizing that no Beech Nut employee has been able to answer the question as to the scope of the alleged problem. In PIM's opinion, even after Beech Nut stopped receiving product from PIM, there was still good product that did not show signs of crystallization. McSorley Dep. 56:2-7 [Exhibit L]; Wallach Cert., Exhibit K. This lawsuit followed.

LEGAL ARGUMENT

I.

BEECH NUT IS BARRED AS A MATTER OF LAW FROM RECOVERY IN TORT AGAINST THE PLAINTIFFS

Beech Nut incorrectly argues that they were owed an independent tort duty because PIM allegedly had superior knowledge and skill in manufacturing a product like Fruit Nibbles. To the contrary, no such independent tort duty exists. Under certain circumstances not present in this case, a party with superior skill and knowledge may be held to a heightened standard in a negligence claim. Second Restatement of Torts §289, Comment M. That standard is not applicable here because Beech Nut has argued that the purchase orders between Beech Nut and PIM established the parties' sales contracts, which, under the economic loss doctrine, do not provide a proper basis for relief in tort.

The economic loss doctrine prevents a party from collecting in negligence for pecuniary harm that is unaccompanied by personal injury or consequential damages to property. Consult Urban Renewal Dev. Corp. v. T.R. Arnold & Assoc., 2009 U.S. Dist. LEXIS 56194 *8 (D. N.J. July 1, 2009). When the harm suffered is to the product itself, courts have concluded that principles of contract, rather than of tort law, are better suited to resolve the purchaser's claim. See, e.g., Alloway v. General Marine Indus., L.P., 149 N.J. 620, 632 (1997). In fact, most jurisdictions hold that a contractor's liability for economic loss is limited to the terms of the contract. Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 310 (2002). A buyer's desire to enjoy the benefit of his bargain is not generally protected by tort law. Id. at 210-11.

By arguing that PIM owed them an independent duty, Beech Nut is attempting to fabricate tort liability when none exists. In this case, to the extent there was any physical harm stemming from the consumption of Fruit Nibbles, it was certainly not felt by Beech Nut, but

rather by its consumers. Accordingly, Beech Nut's reliance on Kramer v. Showa Denko K.K., 929 F. Supp. 733 (S.D.N.Y. 1996) to suggest that PIM, as manufacturer, owed Beech Nut a duty to inspect and test their products, is misplaced. In Kramer, an action was brought by the consumers who were allegedly injured by a drug company's product. Id. at 738-39.

Similarly, Beech Nut's reliance on People Express Airlines v. Consol. Rail Corp., 100 N.J. 246, 249 (1985) is equally unavailing. In People Express, an airline-plaintiff successfully stated a tort claim for purely economic loss against a party that released a chemical into the air, causing a fire, and forcing the airline to shut down for a number of hours. Id. at 248-251. Although the damages were purely economic in nature, People Express is distinguishable from this case because there was no sales contract governing the relationship between the parties, as there is here. Further, the loss to the plaintiff was not caused by an allegedly defective product, but rather by an independent tortious activity.

Conversely, in this case, any alleged damages suffered by Beech Nut in connection with the Fruit Nibbles arose from the parties' pre-existing relationship as governed, in part, by the purchase orders. While People Express does articulate an exception to the economic loss doctrine, it is not one that is applicable in this case. Rather, to the extent any party can state a claim in tort, be it negligence or otherwise, and assert that a defendant in such a claim should be held to a higher standard due to superior knowledge and skill, it is the consumers of Fruit Nibbles, and not Beech Nut, who have standing to do so.

Beech Nut next argued that PIM should be liable to them in tort because Beech-Nut's revenue's and profits were put at risk by "PIM's lack of care" and that "Beech-Nut's ability to take advantage of the new market and strong retailer and consumer demand…was destroyed

when PIM failed to manufacture and develop a saleable product." Even if these were true, they are precisely the types of damages that are not permissible due to the economic loss doctrine.

Accordingly, Beech Nut's tort claims fail as a matter of law and the Court should deny this aspect of its Motion for Summary Judgment.

II.

THE PLAINTIFFS BREACHED NO WARRANTIES TO BEECH NUT

Reduced to its core, Beech Nut argued that PIM is liable to it for breach of both express and implied warranties arising under Article 2 of the Uniform Commercial Code (the "UCC"). PIM agrees that the UCC is the controlling body of law that should be considered by the Court, however, the focus needs to be on sections that Beech Nut chose not to discuss because they defeat any grounds for obtaining summary judgment.

A. The Parties' Course of Dealings Negated Any Warranty Claim

Well prior to the issuance of the purchase orders that Beech Nut asserts represent the entirety of the parties' contractual arrangement, the parties exchanged and negotiated drafts of both a Quality Agreement and Co-Pack Agreement. Kowalski Decl., Exhibits 11 and 12; Dwivedi Cert. at Exhibits A and B. The history of those negotiations bears directly on the warranties Beech Nut attempts to create through the purchase orders and shows why they are of no force and effect.

The document identified within Exhibit 11 as BN 2387 is PIM's marked-up version of the draft Co-Pack Agreement's proposed warranty provisions. In Section 11.1.2, PIM deleted the proposed warranty language that the product would be "fit for the purposes intended by the Buyer [Beech Nut], merchantable and free from defects in material and workmanship." In

Section 11.1.3, PIM deleted the proposed warranty that the product would "be of satisfactory quality according to the Specifications in the Quality Agreement, free from defect and shall be safe. . . ." The Co-Pack Agreement and the Quality Agreement were never finalized and never executed by the parties. PIM refused to enter into those agreements, in part, because of all the changes to the original product that were made to it at the direction of Beech Nut. Dwivedi Cert. at ¶ 4. The base product that PIM originally had was modified and materially changed at the directive of Beech Not to the point that it was no longer a PIM product and one which PIM therefore would not provide warranties for.

Through its dealings with Beech Nut in negotiating the terms of the draft documents, PIM made it clear to Beech Nut that it was providing no warranties other than conformance with the agreed upon Specifications, which are discussed below. The significance of PIM's clearly stated position can be found in UCC Section 2-316, Exclusion or Modification of Warranties. In pertinent part, it provides as follows:

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention mechantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. . . .
>
> (3) Notwithstanding subsection (2)
>
> (a) . . . .
>
> (b) when the buyer before entering into the contract has examined the goods or the sample or the model as fully as he desired or has refused to examine the goods there is no implied

> warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and
>
> (c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.
>
> (4) ....

There are several aspects of Section 2-316 that bear on the issues before the Court and why summary judgment should not be granted.

In subsection (3), the UCC states that an implied warranty can be excluded by "course of dealing or course of performance", and both scenarios exist here. See Herbstman v. Eastman-Kodak Company, 68 N.J. 1 (1975) (recognizing UCC allows for exclusion of warranties); Willis Mining v. Noggle, 509 S.E.2d 731, 733 (Ga. Ct. of Appeals 1998) (it is a question of fact whether the parties' course of dealing and performance operates to exclude or modify a warranty). In the current matter, the record unequivocally shows that PIM refused to provide warranties to Beech Nut. PIM's position was expressed to Beech Nut in August, September, and October of 2008, yet Beech Nut wants the Court to ignore all of this and believe the purchase orders should be construed as if they existed in a vacuum. PIM maintains such a myopic constraint is not appropriate because it would ignore the parties' intentions.

In support of its position that summary judgment is inappropriate in this context and the parties' dealings need to be considered as a whole, PIM directs the Court to a series of informative decisions. The first is Rite Fabrics, Inc. v. Stafford-Higgins Co., Inc., 366 F. Supp. 1 (S.D.N.Y. 1973), wherein a trial had to be conducted because "[s]ubstantial issues of fact and law were involved" in order to determine claims arising out of an alleged breach of sales warranty. Id. at 3. One of these factual questions was whether or not the seller excluded any

warranties. While the Court ultimately determined there was no such exclusion, it did so only after evaluating at trial all of the evidence. Id. at 10.

Former Judge Wolin also presided over a similar dispute in the matter entitled Oscar Mayer Corporation v. Mincing Trading Corp., 1991 U.S. Dist. LEXIS 6650 (D.N.J. 1991). In the context of a trial, not a dispositive motion, the court considered and weighed the contradictory evidence as to whether or not an implied warranty arose "from the parties' course of dealing." Id. at 19 (citation omitted). Although the case did not present the question that exists here -- whether a course of performance can exclude warranties -- Oscar Mayer should be read for the proposition that the impact of a course of performance on an asserted warranty claim is a question of fact, not resolvable by summary judgment.

The final case that ties together the teachings of Rite Fabrics and Oscar Mayer is Alan Wood Steel Company v. Capital Equipment Enterprises, Inc., 349 N.E.2d 627 (Ill. App Div. 1976). The Illinois appellate court was required to review determinations made by the trial court at the close of the plaintiff's case regarding what representations, if any, comprised the seller's express warranties to the buyer. In language that fully applies here, the court held that "we must give effect to the terms of the contract as formed by the parties." Id. at 636 (citation omitted).

Taking these decisions together, two controlling principles emerge that are beyond challenge. First, the existence or nonexistence of warranties is a question of fact. It is not a question to be answered as a matter of law. Second, a court should fully consider all of the circumstances associated with the parties' conduct in order to give effect to their intentions.

When these principles are applied to Beech Nut's summary judgment motion the Court should conclude that through its "words and conduct", PIM acted in accordance with UCC Section 2-316 and effectively disclaimed any express or implied warranties to Beech Nut. By

striking the proposed warranty language from the draft agreements, PIM expressly refused to provide Beech Nut with warranties. Dwivedi Cert. at Exhibit B [BN2387]. As discussed later in the Brief, PIM similary made clear to Beech Nut that it was not agreeing to a proposed 12 month shelf life period, as Beech Nut sought to obtain through the draft Quality Agreement. Dwivedi Cert. at Exhibit A [p. 13 of 16].

There is no acknowledgement of these dispositive facts in Beech Nut's moving papers or discussion of their significance. Instead, Beech Nut did little more than direct the Court to preprinted language on the back of the purchase orders, from the same time period when the parties were going back and forth on the draft agreements, and claim they were nonetheless controlling. Beech Nut ignored any discussion as to the necessary interrelationship between those forms and PIM's contemporaneous rejection of any warranties. This contemporaneous conduct by PIM is a material question of fact fatal to Beech Nut's application. See Tolmie Farms, Inc. v. Stauffer Chemical Company, Inc., 862 P.2d 299, 303 (Idaho 1993) (genuine questions of fact existed as to whether warranties were made); Royal Business Machines, Inc. v. Lorraine Corp., 633 F.2d 34, 44 (7th Cir. 1980) (question of fact as to what terms became the basis of the parties' bargain); Bimini Boat Sales, Inc. v. Luhrs Corporation, 892 N.Y.S.2d 548, 550 (N.Y. App. Div. 2010) (summary judgment on disclaimer of warranty defense appropriate only when no triable issues of fact exist). In the context of a motion for summary judgment, Beech Nut has failed to carry its burden of proof here to show the absence of any material question of fact surrounding the scope and implications of PIM's clearly stated disclaimer of warranties.

B. PIM Did Not Breach any Specifications Agreed to with Beech Nut

The sole warranty PIM was willing to provide to Beech Nut was that the finished product met the parties' Specifications. The Court will search Beech Nut's submissions and still not be able to locate a document, or series of documents, however, that establish agreed upon Specifications. There is no document that shows PIM accepting any specifications desired by Beech Nut. The evidence is actually to the contrary and this is demonstrated by reviewing the issue of product shelf life.

Mr. Dwivedi expressly rejected any suggestion that PIM agreed to any shelf life standard. Dwivedi Dep. 63:21-25. His assertion is backed up by Dr. Chang's concession that Beech Nut was specifically advised by PIM that there had been no shelf life studies performed and PIM's refusal to execute the Quality Agreement, which proposed a 12 month period. Chang Dep. 63:19-23; Dwivedi Cert. at Exhibit A. Mr. Dwivedi's testimony further explained that with all of the changes Beech Nut was insisting upon during the parties' development of the product, there was not even time to conduct a study. Dwivedi Dep. 64:17-25. Given Beech Nut's direct knowledge that no shelf life study had been undertaken, they should not be heard in a summary judgment motion to argue PIM had warranted the life of the product for 12 months. The Specifications Beech Nut seeks to enforce now do not include a shelf life standard. Nor did Beech Nut present any evidence of industry shelf life standards for a substantially similar product. Without these facts, Beech Nut has not established any breach by PIM in this regard or with respect to any other attribute of the Fruit Nibbles.

Dr. Chang of Beech Nut admitted that it did not provide initial specifications as to the parameters of the product it wanted. Chang Dep. 57:2-13. In fact, at no point in time did Beech Nut provide such parameters. Mr. Dwivedi testified that Beech Nut was not able to give clear

directions on how it wanted to proceed in developing the Fruit Nibbles. Dwivedi Dep. 46:17-20. As the detailed discussion in the Statement of Facts concerning the development of Fruit Nibbles demonstrated, it was a collaborative endeavor between PIM and Beech Nut. Throughout, Beech Nut controlled the development process. Dwivedi Dep. 44:9-25; 91:6-20; 92:17-25. Beech Nut employees regularly visited PIM's facility to provide input on the development and testing of the product. In particular, Beech Nut worked on its flavor and color. Cool Dep. 34:2-20. And yet, Beech Nut never provided PIM with written guidelines for the product's key criteria -- color, taste, and texture. Dwivedi Dep. 47:5-16. Without such guidelines as a measuring point, the Court is not in a position on summary judgment to determine whether PIM complied with them or not.

Even when PIM thought the parties had developed the product Beech Nut wanted, Beech Nut changed its standards. As late as September of 2008, Beech Nut was conveying new and different requirements to PIM. Dwivedi Dep. 88:2-15. These changes by Beech Nut were being demanded one month after the time it wants the Court to understand was the previously agreed upon launch date for Fruit Nibbles. The unquantifiable standards Beech Nut seeks to hold against PIM have never been established.

Though it was forced to meet evolving and nonspecific demands, the head of Quality Assurance for PIM testified that she thought the product manufactured by PIM met Beech Nut's requirements. Bianchini Dep. 64:3-9. Similarly, PIM's Plant Manager held the same view. McSorley Dep. 55:5-25. There is no denying the fact that third party customers raised complaints about some of the product sold by Beech Nut, but that is not dispositive of Beech Nut's burden to demonstrate exactly how these complaints tied in directly with some breach by PIM. As stated earlier, there is nothing Beech Nut can point to that establishes standards for

PIM to comply with. Color, taste, and texture are all subjective, especially when they are not subject to any defined standards, as was the case here. This leaves the Court with nothing to measure Beech Nut's allegations against and even if the Court could glean those standards, there is a material question of fact as to whether or not they were breached.

In Tuck v. Reichhold Chemicals, Inc., 542 N.Y.S.2d 676, 678 (N.Y. App. Div. 1989), the appellate court affirmed the denial of a motion for summary judgment because the opposition papers raised "an issue of fact as to whether the Firestone-Tylac blend of latex, claimed by Reichhold to conform to the specifications, did so conform." The decision in Pronti v. DML of Elmira, Inc., 478 N.Y.S.2d 156 (N.Y. App. Div. 1984) further bolsters the conclusion that compliance or noncompliance with standards is not appropriate in summary judgment. Therein, the court reviewed a jury no cause verdict against the defendant on a breach of warranty claim and held "[w]hether there was a breach is a factual question for jury determination." Id. at 158 (citations omitted). In reaching this conclusion, it noted that the "goods did not have to be perfect." Id. (citation omitted).

PIM absolutely rejects the attempt by Beech Nut to make the Court believe that the crystallization that appeared on some of the product either constitutes a breach of some undefined warranty or that the condition came as a surprise to Beech Nut. The evidence shows that Beech Nut was aware of crystallization at the time it directed PIM to move forward with production. Kowalski Decl., Exh. 15. Beech Nut's knowledge of this condition from the samples it reviewed and approved has significant implications for its express warranty claim.

Section 2-313, Express Warranties, provides in relevant part as follows:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of

> the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

As detailed above, Beech Nut accepted the sample with full knowledge that there was crystallization. It still decided to proceed with full scale manufacture of the product and its action has consequences. Beech Nut has introduced no evidence demonstrating any difference between the samples it approved and the product it later complained of. In accordance with UCC Section 2-313(1)(c), the sample Beech Nut approved created the standard for PIM to comply with and Beech Nut has not shown its failure to do so. See Rite Fabrics, Inc. v. Stafford-Higgins Co., Inc., 366 F. Supp. 1, 23-24 (S.D.N.Y. 1973).

Section 2-513 of the UCC, Buyer's Right to Inspection of Goods, states in relevant part that "where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them . . . ." Beech Nut was afforded that right, it did not reject the shipments, and therefore is deemed to have accepted the product from PIM. See Sam's Marine Park Enterprises, Inc. v. Admar Bar & Kitchen Equipment Corporation, 425 N.Y.S.2d 743, 745 (N.Y. 1980) (buyer had ability to inspect and seller disputed allegation of breach of warranty, in the context of a trial resulting in judgment for seller).

Not only did Beech Nut accept the product, but it has failed to quantify the extent of the crystallization problem it wants the Court to believe compels the grant of summary judgment. Beech Nut's internal emails showed that on November 13, 2009, its personnel were not noticing

widespread problems with the product. Kowalski Decl., Exh. 28. Without expressly showing the Court if 10% of the product was not saleable, or 15%, or any other specific number, the Court is not in a position to determine any warranty (the scope and specifics of which are unknown) was breached by PIM. Reference is again made to the Pronti decision, where the court held the "goods did not have to be perfect." 478 N.Y.S.2d at 158 (citation omitted). This point is expanded upon below in response to Beech Nut's claim for damages.

There is one final reason why the Court should not make a factual determination that PIM's product breached some warranty to Beech Nut and that is because it would be erroneous to describe the Fruit Nibbles as PIM's product. The factual record that exists shows that what began as a PIM base product ended up as a joint PIM/Beech Nut product.

PIM and Beech Nut collaborated with one another over an extended period of time to jointly create the product. Fruit Nibbles began as a concept that Beech Nut wanted to take further and then there was a joint effort to accomplish that goal. McSorley Dep. 82:4-22. In the course of these communications, PIM repeatedly sent samples to Beech Nut for comment and approval. Upon arrival at Beech Nut, the samples were considered by its new product development team. The samples were evaluated for texture, bite, flavor, and color. Based on these observations, and those from Beech Nut's marketing department, comments were then transmitted back to PIM. Cool Dep. 29:5-25; 32:11-23; Hungsberg Dep. 68:23-25; 69:1-3; 71:9-24; Chang Dep. 31:2-12.

Beech Nut did not rely upon PIM's expertise in the creation of the Fruit Nibbles. Dwivedi Dep. 93:18-21. And while Beech Nut was not controlling the formulation of the product being developed, it did control the development process. Dwivedi Dep. 44:9-25; 91:6-20; 92:17-25. PIM followed the instructions of its client. Dwivedi Dep. 45:17-25. Not only did

Beech Nut transmit its required changes to PIM, but Beech Nut employees visited PIM to provide input on the development of the product as well. By way of example, Mary Cool visited PIM on numerous occasions and worked with PIM personnel on the product's flavor and color. Cool Dep. 34:2-20; Wallach Cert., Exhibit E. Mary Cool was present at PIM on more than a dozen occasions for production runs and to work with PIM on developing the product and telling it what Beech Nut wanted. McSorley Dep. 20:5-25. Mary Cool was present for these production runs through late September of 2008. McSorley Dep. 21:1-14. Even after that date, Beech Nut was still transmitting change requests to PIM. Dwivedi Dep. 88:2-15. Given these facts, PIM cannot be said to have made any representations or warranties to Beech Nut because PIM manufactured the product Beech Nut substantially designed.

In Nielsen Media Research, Inc. v. Microsystems Software, Inc., 2002 US Dist. LEXIS 18261 (S.D.N.Y. 2002), the court was presented with a motion for summary judgment on the buyer's breach of warranty claims by the seller. In ultimately concluding a material question of fact existed as to whether or not there was a breach, the court observed that the parties "vigorously dispute the amount of" the buyer's involvement in the development of the software at issue. *30. The buyer maintained it only "tested" the product. Due to this unsettled factual question, the motion for summary judgment was denied.

The rejection of a breach of warranty claim was similarly reached in Leahy v. Mid-West Conveyor Company, Inc., 507 N.Y.S.2d 514, 516 (N.Y. App. Div. 1986), because the "sellers, built the conveyors according to the exact specifications of [ ] the buyer. . . ." (citation omitted). The same analysis and result were applied in J.P. Anderson Co. v. Gold Medal Candy Corp., 93 F. Supp. 909 (E.D.N.Y. 1950). Although a pre-UCC decision, the rejection of the buyer's breach of warranty claim because "the buyer is shown not to have relief upon anything but the

seller's undertaking to turn out a machine according to the buyer's specifications" [Id. at 912-13], should be considered and applied in this case as well. As Mr. Dwivedi testified, Beech Nut told PIM what the product should be (taste, color, and appearance) and that is what PIM manufactured. Dwivedi Dep. 47:1-4.

Accordingly, Beech Nut's warranty claims are not properly determined in this context and the Court should deny this aspect of its Motion for Summary Judgment.

III.

BEECH NUT HAS FAILED TO SATISFY ITS BURDEN WITH RESPECT TO ITS DAMAGE CLAIM

There are two separate components to the damages sought by Beech Nut: (a) negligence damages, and (b) UCC damages. The legal analysis in Point I above demonstrated why the economic loss doctrine does not allow for such relief in the circumstances of this lawsuit. The discussion that follows explains why the UCC damage claim should also be rejected on the present record. Several sections of the UCC need to be considered and they are Sections 2-711 and 2-612.

In pertinent part, Section 2-711 allows a buyer to seek damages "if the breach goes to the whole contract". Other than offering a self-serving conclusion that a total breach existed here, Beech Nut made no showing to support the claim. Nor did it discuss Section 2-612, which would apply here given the four separate purchase orders sued on by Beech Nut.

Section 2-612(3) directs that a buyer can reject goods whenever "non-conformity or default with respect to one or more installment substantially impairs the value of the whole contract". There was no proof introduced by Beech Nut that all of the goods under all of the

purchase orders had to be rejected and even if such an effort had been made, summary judgment is not the forum for determining the issue. This is the conclusion reached in Extrusion Painting, Inc. v. Awnings Unlimited, Inc., 37 F. Supp.2d 985 (E.D. Mich. 1999).

The Extrusion Painting court was presented with the parties' cross-motions for summary judgment on several questions, including whether or not the buyer rightfully rejected goods as nonconforming. 37 F. Supp.2d at 995. The court ultimately ruled "these disputes involve strictly factual questions and thus must be resolved by the trier of fact and may not be decided by the Court at this point in the litigation." Id. The "issues" in dispute concerned the quantity, color, tensile strength, and dimensions of the product involved, and the parties disputed three of the four criteria. Id. According to the court, it could not resolve the color issue "because there exists a question of material fact as to which shade of 'white' was denoted"; there was a material question of fact as what "tensile strength" had been agreed upon; and there were material questions as the governing dimensions that arose from conflicting testimony about what discussions or representations had been made. Id. at 996.

Building upon its identified list of material questions of fact as to whether or not there was a breach by the seller, the court also analyzed the issue of how to label the contract; should it be considered an installment contract or a series of separate contracts? Id. at 996. It concluded that the parties "tacitly authorized delivery in installments, and thus [it] may be characterized as an installment contract." Id. at 997. The court then held that determining whether "the alleged breach constituted a 'substantial impairment' of the entire contract" needed "to be decided at trial by the fact-finder." Id.

All of these factual considerations are equally found in the present lawsuit and the same conclusions reached in Extrusion Painting should apply here. Summary judgment is not

warranted and therefore no damage award should be allowed before all of the evidence is heard and evaluated at trial. Unable to demonstrate its right to summary judgment, Beech Nut's conclusory statement of damages should not occupy much of the Court's time, nor does its summary listing of its alleged damages withstand scrutiny.

Beech Nut's claim of $966,651.40 for the purchase orders it paid PIM and $1,685,046.50 in alleged lost profits when it recalled this product from its customers, suffers from several points that should defeat summary judgment. Beech Nut offered the testimony of Tim Kennedy in support of the damages prayed for, to the extent he had knowledge of the claims and how they were calculated. While he maintained that 100% of the product was unsaleable by Beech Nut, he did not offer any proof or basis for saying so. The more telling testimony he offered was that no examination of the product was made when it came back from the distribution center or stores. Kennedy Dep. 17:1-10 [Exhibit Q]. Along with Mary Cool's admission that Beech Nut could not quantify the extent of the alleged problem with the Fruit Nibbles, the Court should take note of the fact that without such quantification, Beech Nut's damage claim is deficient.

If 10% of the product was allegedly nonconforming, would Beech Nut be able to declare the entire contract in breach? Under that example, Beech Nut should have been required to mitigate its damages by removing the allegedly nonconforming product in order to sell the good product. As of November 21, Beech Nut's Dr. Chang was writing that only some product showed signs of mummification and even that degree was "acceptable". Wallach Cert., Exhibit J. Given these circumstances and Beech Nut's admission on November 21, it cannot be said in the context of summary judgment that all the product was unsaleable or that the whole value of the contract was impaired. Nor it can be concluded that Beech Nut is entitled to all of its money back along with lost profits, particularly when sales could have been made.

One further point needs to be made with respect to the claim for monies paid and lost profits, and it is a point that applies to all of Beech Nut's claimed damages. Beech Nut did not produce in discovery the underlying documents that Tim Kennedy testified may have existed and were utilized in computing its claim. Kennedy Dep. 27:14-20 [Exhibit Q]. While we know how much Beech Nut paid PIM for the 4 purchase orders, neither the Court nor PIM knows how lost profits were calculated. Mr. Kennedy testified in his deposition about calculating the claim based upon a pre-launch business plan that contained projections, but none of those documents was produced. Nor did Beech Nut perform any analysis to see if there was deviation from the business plan documents and what actual sales prices to customers were once the product launched. Kennedy Dep. 34:8-17 [Exhibit Q]. Nor did Beech Nut supply PIM with profit margin information for the relaunched Fruit Nibbles it brought to market through a different manufacturer in order to compare those figures with what is claimed against PIM. Kennedy Dep. 87:5-23 [Exhibit Q].

Supporting documents were not produced by Beech Nut for the remaining components of its damage claim even though Mr. Kennedy testified they existed. Kennedy Dep. 36:6-23; 46:2-19; 51:12-25 [Exhibit Q]. As a result, PIM has not been able to test Beech Nut's "marketing support claim" and how it allegedly allocated certain cost of a multi-product launch specifically to Fruit Nibbles. When questioned about how this was done, Mr. Kennedy's response was "I apologize because I didn't realize we would be specific on these details." Kennedy Dep. 36:10-11 [Exhibit Q].

Beech Nut did provide documents regarding its claimed product withdrawal costs ($591,219.26), but PIM incorporates its prior argument that it should be rejected completely due

to Beech Nut's decision not to examine product still in distribution centers to determine its quality before having it sent for destruction.

With respect to Beech Nut's claim for $77,310.77 relating to retailer shelf space, it offered through deposition testimony a conclusion without documents. Mr. Kennedy's general testimony about a "budget", "business plans", "slotting taking anywhere from three months to 18 months", and "general" payments terms and procedures for the slotting, raised questions without providing definitive answers.

With respect to Beech Nut's claims for $87,414.77 relating to storage costs for finished product, PIM was not supplied with any document showing what these storage rates were, why the product had to be stored at a third party location as opposed to within a Beech Nut owned facility, or why 100% of the unshipped product had to be retained rather than some percentage of that amount. Kennedy Dep. 50:3-25; 51:1-25 [Exhibit Q]. It bears noting that while Beech Nut retained product ostensibly for use in this case, none of it was presented to the Court to support Beech Nut's arguments here.

The last component of Beech Nut's damage claim is for $30,000 to rework underweight packages. The Court is aware that no support for this sum total was provided in discovery and Mr. Kennedy did not know how it was calculated. Kennedy Dep. 55:10-19 [Exhibit Q]. A more significant fact emerges here even with Beech Nut's inability to justify this damage claim, which is that Beech Nut has shown its ability to repackage and then resell the Fruit Nibbles to correct a short weight problem. This ability could also have been employed to repackage "good" product from the allegedly "bad" product, which would have reduced the losses Beech Nut claims here. Such an effort, however, was not even attempted by Beech Nut.

Tucked in at the end of Beech Nut's Brief is a three line request for an award of interest, which cites to both a New Jersey Court Rule and New York Court Rule. But, Beech Nut offers no argument as to why it is entitled to any interest. Neither set of Rules should be considered here because Beech Nut's claims arise under the UCC, not common law contract principles, and it does not provide for such an award. Sections 2-713 and 2-714 set forth the different measure of damages available to a buyer, and none mentions interest. Even the reference in these sections to "incidental and consequential damages" is of no benefit to Beech Nut because each term is defined in Section 2-715, yet neither includes interest.

Accordingly, Beech Nut has failed to establish its right to the damages sought and the Court should deny this aspect of its Motion for Summary Judgment.

IV.

PLAINTIFFS HAVE PROPERLY PLEAD CLAIMS FOR BREACH OF CONTRACT

On August 1, 2008, Beech Nut authorized PIM to proceed with production of the product. Kowalski Decl., Exh. 15. At no time between then and Beech Nut's decision in November to stop accepting product from PIM did it tell PIM to cease production. As PIM's Plant Manager testified, "[w]e were under orders to keep sending it up unless Beech-Nut said to stop." McSorley Dep., 55:22-25; 56:1.

Beech Nut directed the Court to a series of cases reciting the hornbook proposition that contracts require mutual assent and a meeting of the minds. Brief at 11-13. PIM maintains that Frank McSorley's testimony confirms such a meeting of the minds existed as to how the parties were to proceed. Again referring to Beech Nut's Brief, "Beech-Nut was a buyer of goods and PIM was the seller." Id. at 11. In order to satisfy its obligation as the seller, PIM manufactured

Fruit Nibbles as it was directed to by Beech Nut. There is no question of fact here as to the price or shipping terms for the product or any other terms and conditions that the Court needs to fill in. Except for the exclusion of the warranties as discussed above, the purchase orders utilized for the undisputed shipments denote all of the contract terms.

Beech Nut's related discussion suggesting that PIM therefore could not establish a claim for breach of the implied covenant of good faith and fair dealings or a contract by estoppel should be disregarded as well. In particular, the decision in Holmes Protection of New York, Inc. v. Provident Loan Society of New York, 577 N.Y.S.2d 850, 851 (N.Y. App. Div. 1992) makes clear that the implied covenant claim should stand when one party prevents the other from obtaining the benefits of a contract. This is exactly what happened in this lawsuit. Beech Nut told PIM to produce product, PIM manufactured the Fruit Nibbles, and then without justification Beech Nut refused to accept this product even though it was compliant.

Beech Nut offered no challenge to the damages sought by PIM for this conduct and it had the full opportunity to examine PIM's Chief Financial Officer in that regard. Mr. Purcell capably testified as to each and every element of PIM's damages. Purcell Dep. 12:10-15; 14:15-25; 21:4-16.

Accordingly, it is respectfully submitted that the request by Beech Nut for summary judgment dismissing PIM's affirmative claims should be denied in its entirety.

CONCLUSION

For the reasons set forth above as supported by the factual information contained in the accompanying submissions, the Plaintiffs maintain that Beech Nut's Motion for Summary Judgment should be denied in its entirety.

Respectfully submitted,

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