

South Carolina Department of Health and Environmental Control (“SCDHEC”) isolated *Listeria* bacteria in a routine sampling of Blue Bell products. The Food and Drug Administration (“FDA”) and multiple state health agencies [REDACTED]

[REDACTED]

[REDACTED] In

addition, human cases of listeriosis were connected to Blue Bell products. The catastrophic consequences of the Company-wide *Listeria* contamination injured the Company and its stockholders in the amount of at least [REDACTED]

[REDACTED]

[REDACTED]

As alleged herein, the Company’s senior management responsible for the Company’s operations, the Chairman, Chief Executive Officer and President, Paul W. Kruse (“Paul Kruse”), and the Vice President of Operations, Greg Bridges (“Bridges”), knowingly disregarded *Listeria* contamination risk and continued the Company’s production and distribution of ice cream, in breach of their fiduciary duties of care and loyalty to the Company. Further, the Board of Directors willfully failed to exercise its fundamental authority and duty to govern Company management and establish standards and controls for Company compliance, in breach of the directors’ fiduciary duty of loyalty to the Company. The Board of Directors’ willful failure to govern management was the product of [REDACTED]

[REDACTED] which has dominated and controlled the business of Blue Bell for generations.

As a result of the breaches of fiduciary duty alleged herein, the Company and its stockholders suffered injury in the amount of at least hundreds of millions of dollars. Defendants are personally liable for those damages. Pre-suit demand was not made, because, as alleged herein, a demand would be futile. The facts alleged herein create a reasonable doubt that the Board could disinterestedly and independently consider the Company's claims asserted herein. The Board of Directors [REDACTED] and the majority of directors themselves face a substantial likelihood of personal monetary and other liability for their breaches of fiduciary duty and violations of law as officers of the Company and/or their disloyal, willful failure to govern, monitor and oversee management and the Company's legal compliance, as alleged more particularly herein.

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 10 *Del. C.* § 341.
2. On September 2, 2016, Blue Bell adopted an amendment to its bylaws to require derivative actions premised upon fiduciary duty breaches, like this one, to be brought in Delaware.

3. As directors of a Delaware corporation, members of the Board have consented to the jurisdiction of this Court pursuant to 10 *Del. C.* § 3114(a).

4. Moreover, as CEO and President of the Company, Defendant Paul Kruse has consented to jurisdiction pursuant to 10 *Del. C.* §3114(b).

5. This Court has jurisdiction over nominal defendant Blue Bell pursuant to 10 *Del. C.* § 3111.

PARTIES

6. Plaintiff is a record stockholder of twenty-nine shares of Blue Bell common stock and has been a stockholder at all times relevant to the claims asserted herein. Like other stockholders of Blue Bell, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. Nominal Defendant Blue Bell is a Delaware corporation with its principal executive offices located in Brenham, Texas at 1101 South Blue Bell Road. Blue Bell's registered agent in Delaware is Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. [REDACTED]

[REDACTED]

[REDACTED]

8. [REDACTED]

9. Defendant John W. Barnhill, Jr. ("Barnhill") is the former executive vice president of Blue Bell and has served as a director since 1974. Barnhill grew up in Brenham and began working at Blue Bell during the summers when he was in high school beginning in 1954. According to Defendant MacInerney, as stated in her book *Ed F. Kruse of Blue Bell Creameries*, during that time, Ed F. Kruse discovered that Barnhill was clever with words and could draw cartoons so he put Barnhill in sales. Ed Kruse kept up with Barnhill during high school and college, during which time Barnhill continued to work at Blue Bell during the summers. While he was at college, Ed Kruse called him frequently to report on local news. Barnhill officially joined Blue Bell in 1960 when Ed Kruse recruited him to be Blue Bell's sole Houston salesman. Barnhill worked his way up to vice president

in 1986, retiring as an officer in 2000. While at Blue Bell, Barnhill was responsible for developing and implementing the annual sales, advertising and public relations programs. Upon his retirement, Barnhill was elected to the position of vice president, inactive, by the Board. He is currently the President of the John Barnhill Company LP, which operates two bed and breakfast inns in Brenham and several rental properties in Brenham and Atlanta. Barnhill helped found two local banks in Brenham and is currently the Chairman of the Bank of Brenham. Barnhill also served on the University of Texas Board of Regents. He has been employed by or otherwise affiliated with Blue Bell for nearly sixty years.

[REDACTED]

[REDACTED]

[REDACTED]

10. Defendant Bridges is the Vice President of Operations of Blue Bell. He is the son of Howard and Ed Kruse's sister, Mildred. Bridges joined Blue Bell full-time in 1985 and worked in the plant under Howard Kruse. Bridges has served as a director since 2011. Ed Kruse, who passed away in 2015, said of Bridges: "I'd be proud to have Greg as a son." Bridges is "in charge of all aspects of plant operations." Bridges reported to Paul Kruse as Vice President of Operations.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. Defendant Richard Dickson (“Dickson”) is currently the President of Blue Bell. He has worked for Blue Bell since 1981. Before being named President in February 2017, he served as general sales manager, plant manager of the Broken Arrow, Oklahoma plant and then as the VP of sales and marketing of the Company, a position he was appointed to in 2010. He has been a director since 2010. Dickson, prior to becoming President in 2017 was “in charge of all areas of sale and promotion.” [REDACTED]

[REDACTED]

12. Defendant Paul A. Ehlert (“Ehlert”) has served as a member of the Board since 2002. He is President of Germania Insurance Company in Brenham, Texas. Ehlert was a Director of First Federal Savings Bank and of First Savings Association in Brenham. [REDACTED]

[REDACTED] Paul Ehlert’s uncle, Melvin H. Ehlert, was an old friend of E.F. Kruse and served as a pallbearer at his funeral. [REDACTED]

[REDACTED]

[REDACTED]

13. Defendant Jim E. Kruse (“Jim Kruse”) was appointed Chairman of the Board in 2017 and has been on the Board since 2004. Jim. E. Kruse is the son of Howard W. Kruse. He previously served as the Vice President of Information Technology of Blue Bell, including during 2013-2015. Jim Kruse first served as a controller and became secretary of Blue Bell in 2004. Jim Kruse is now President of the Bank of Brenham (of which Barnhill is Chairman). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. Defendant Paul Kruse was the third-generation of his family to run the Company. His father is Ed Kruse and his uncle is Howard Kruse. Paul Kruse began working at the Company in 1986 as legal counsel and was named corporate secretary that same year. He was named vice president of the Company in 1991 and took over from Howard Kruse as President and CEO in 2004. He became Chairman in 2014. He retired as President of Blue Bell and Chairman of the Board in 2017. Paul W. Kruse continues to serve as a director as he has since 1983. Paul Kruse has been Chairman of the Trinity Medical Center, the Blinn College Foundation, and the Dairy Products Institute of Texas and is a member and past president of the Brenham Rotary Club. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

15. Defendant W.J. Rankin (“Rankin”) joined Blue Bell as administrative assistant to Ed Kruse in 1981. He saw his administrative responsibilities increase until he became the Chief Financial Officer (“CFO”) and Treasurer of the Company. Rankin served as CFO from 1986-2014. He was elected to be an associate director in 1993 and has served as a director of the Company since 2004. Rankin’s brother-in-law is director Bill Reimann. In June 2010, Rankin joined with Ed Kruse and Friends to present a \$450,000 check to the Blinn College Foundation for the newly constructed agricultural facility on the Brenham campus. The facility was named the W.J. “Bill” Rankin Agricultural Complex in honor of Rankin. In 2011, both Rankin and Ed Kruse were selected for induction into the Blinn College Hall of Honor. [REDACTED]

[REDACTED]

[REDACTED]

16. Defendant Howard W. Kruse (“Howard Kruse”) began working at Blue Bell when he was 11 years old. In 1954, he officially joined Blue Bell as assistant general manager. He became Company President in 1986 and CEO in 1993. He served in those roles until 2004 when, after 50 years of full-time work

with the Company, he was named President Emeritus. He has been a director since 1985. He has served as past president of the Brenham Rotary Club, the Washington County Chamber of Commerce, the Dairy Products Institute of Texas, and St. Paul's Evangelical Lutheran Church Council of Brenham. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. Defendant Patricia I. Ryan ("Ryan") has been a director since 1997. According to Defendant MacInerney, Ryan begged Ed Kruse to write his memoir for years. [REDACTED]

18. Defendant Dorothy McLeod MacInerney ("MacInerney") has been a director since 1994. She literally wrote the book on Blue Bell. She is author of 2006's *Blue Bell Ice Cream: A Century at the Little Creamery in Brenham, Texas 1907-2007*. In the acknowledgement section of the book, MacInerney said of Paul Kruse "He envisioned the book and provided the moving force behind it with his time, enthusiasm, and total support." In the foreword, Paul W. Kruse wrote "[a]nd a sincere word of appreciation goes to Dorothy McLeod MacInerney for contributing her unending work in putting this story together so that it might be shared." MacInerney also wrote a biography entitled *Ed F. Kruse of Blue Bell*

Creameries. In the acknowledgement section of that book she thanks Ed and Paul Kruse for “giving [her] the honor and privilege to learn more about Blue Bell Creameries and the Kruse family.” She also stated she was “grateful for their support, time, and encouragement in the process of writing down this inspiring and worthwhile story.” In the acknowledgment section, she wrote of Paul Kruse: “Paul understands completely - and emulates faithfully- his father’s business philosophy. Paul has clear recollections of business transactions, family legends, and other matters presented in this account.” [REDACTED]

19. Bill Reimann (“Reimann”) is employed by the Bass family of investors. Reimann serves as the Vice President of Moo Partners, L.P. (“Moo”).

[REDACTED] described below. Reimann’s brother-in-law is Defendant Rankin. Reimann is a director of the Company [REDACTED]

[REDACTED] Reimann is not named as a Defendant herein.

SUBSTANTIVE ALLEGATIONS

A. Background

20. The Company's predecessor was the Brenham Creamery Company, which opened in 1907 in Brenham, Texas to purchase excess cream from local dairy farmers and to sell butter. In 1911, Brenham Creamery Company began to produce small quantities of ice cream.

21. By 1919 Brenham Creamery Company was struggling financially. The Board of Directors hired E.F. Kruse to take over the Company on April 1, 1919. Under E.F. Kruse the Company expanded to the surrounding area and became profitable. The Company changed its name to Blue Bell Creamery in 1930.

22. E.F. Kruse unexpectedly died in 1951, and his sons, Ed F. Kruse and Defendant Howard Kruse, took over the Company. By the 1960s, the Company had stopped selling butter and sold only ice cream. The Company continued to expand throughout Texas. By the 1970s, sales had quadrupled, and by the 1980s Blue Bell was producing over 10 million gallons of ice cream per year, earning \$30 million annually.

23. In the early 1990s Blue Bell expanded throughout the southern United States. In 1992, Blue Bell built a second manufacturing plant in Broken Arrow, Oklahoma. In 1996, Blue Bell built a third manufacturing plant in Sylacauga, Alabama.

24. In 2014, Blue Bell had revenues in excess of [REDACTED] per share. In 2014, Blue Bell was the best-selling ice cream brand in the United States based on its comparative sales area.

25. By 2015, the Company operated the three manufacturing plants in: 1) Brenham, Texas; 2) Broken Arrow, Oklahoma; and 3) Sylacauga, Alabama. There were 50 sales and distribution centers in 23 states. The Company employed a combined 2,800 employees, with 850 of the employees working out of Brenham. All production and packaging occurred at Blue Bell facilities, which were able to produce over 100 pints per minute.

B. The Company Is Regulated For Health Safety By the FDA and State Health Agencies

26. As a food product manufacturer and distributor, Blue Bell has been and is subject to the legal and regulatory authority of the Food and Drug Administration (“FDA”). The FDA possesses broad legal and regulatory authority. The FDA’s authority is established by the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301, *et. seq.* (the “Act”). 21 U.S.C. §393, established the FDA within the Department of Health and Human Services. The FDA’s mission includes to protect public health by ensuring foods are “safe, wholesome and sanitary.” The

FDA, under 21 *U.S.C.* §341, and upon the judgment of the Secretary of Health and Human Services, may set standards of quality for most foods.

27. 21 *U.S.C.* §350d, requires that any facility engaged in manufacturing, processing, packaging or holding food for consumption be registered. It is prohibited under 21 *U.S.C.* §331, for a regulated entity such as Blue Bell, to introduce or deliver for introduction into interstate commerce any adulterated food product. Under 21 *U.S.C.* §342, foods are deemed to be adulterated if they bear or contain “any poisonous or deleterious substance which may render it injurious to health.”

28. Under 21 *U.S.C.* §333, persons responsible for introduction of adulterated food products into interstate commerce are subject to civil penalties from the Department of Health and Human Services and the FDA.

29. 21 *U.S.C.* §333 also sets forth criminal penalties for violations. Violations can subject individuals to prosecution for a misdemeanor punishable by up to one year imprisonment and/or a fine. It is a strict liability misdemeanor because criminal liability can result from the mere act of introducing adulterated products into commerce. In recent years, misdemeanor charges have increased including notably against two individuals who were the principals at Jensen Farms which was the source of a deadly *Listeria* outbreak in 2011. The Jensen individuals criminal Defendants were charged in 2013 and sentenced in 2014 to six

months of home confinement, a fine and probation. Felony criminal liability, punishable by up to three year imprisonment is possible for repeat convictions or violations with intent to mislead or defraud.

30. The FDA also develops regulations based on the Act or other laws under which the FDA operates. “Regulations” or “rules” imposed by the FDA have the force and effect of law. Once a regulation is completed and published as a final rule, it is codified when added to the Code of Federal Regulations (“CFR”). The FDA regulations appear primarily in Title 21 of the CFR. A violation of a validly adopted FDA regulation can result in a sanction just as severe as one received for violating a law adopted by Congress.

31. In addition to the regulations codified by the CFR, the FDA also publishes “guidance” -- statements of policy or interpretations of regulations. Guidance documents are provided to establish clarity and consistency within the FDA’s enforcement responsibilities. Guidance documents also provide specific advice on how to comply with regulations.

32. Further, in 2002, Congress enacted the Public Health, Security and Bioterrorism Preparedness and Response Act (“Bioterrorism Act”). The Bioterrorism Act gave the FDA enhanced authority to prevent and respond to emergencies. It also required the FDA to issue regulations to have controls over imported and domestically produced commodities.

33. Blue Bell is a registered firm under the Bioterrorism Act. The Bioterrorism Act requires registered manufactures to maintain records regarding foods and manufactured and packaged persons with access in the production chain and the manner of manufacturing and packaging. The Act gives the FDA authority to detain products if there is a credible basis to suspect a threat upon consumption.

34. Similarly, the states in which Blue Bell operates have their own statutory and regulatory enforcement requirements. For example, the Texas Health and Safety Code, Chapter 431 and related rules govern the manufacturing and distribution of products, including ice cream, at the Brenham plant. In Oklahoma, where Broken Arrow is located, the Food Safety Rules under Title 35, chapter 37 control. Alabama, where the Sylacauga plant is located, is governed by Rule 420-3-22 of the State Board of Health Bureau of Environmental Services for food Establishment Sanitation.

35. In 2008, the FDA brought new focus on the threat of *Listeria* contamination in ready-to-eat foods. Included within the definition of ready-to-eat foods are packaged ice cream products. The FDA divides ready-to-eat foods into two categories: (1) those that support *Listeria* growth; and (2) those that generally do not support *Listeria* growth. Ice cream falls into the second category, but is still susceptible to outbreaks and growth if not handled correctly. According to the

FDA, the presence of *Listeria* in ready-to-eat foods presents a significant public health problem. Illnesses can and do result from consumption of foods that do not generally support its growth.

36. In a notice published in the *Federal Register* on February 7, 2008, the FDA issued for public comment a draft Compliance Policy Guide that, if finalized, would establish an enforcement policy for *Listeria* in ready-to-eat foods. For ready-to-eat foods that generally do not support the growth of *Listeria*, the 2008 draft Compliance Policy Guide states that the FDA may regard the food as adulterated when *Listeria* is present at or above 100 colony-forming-units per gram of food.

37. In 2008, FDA issued draft guidance for industry (the “2008 draft GFI”) entitled “Guidance for Industry: Control of *Listeria monocytogenes* in Refrigerated or Frozen Ready-To-Eat Foods; Draft Guidance). The FDA’s 2008 guidance provided that any time a food is exposed to the environment during a manufacturing, processing, packing, or holding activity, there is the potential for the food to be contaminated with pathogenic microorganisms. *Listeria* is considered to be an “environmental pathogen” because it is capable of surviving and persisting within the manufacturing, processing, packing, or holding environment such that food may be contaminated and this contamination may

result in foodborne illness if the food is consumed without treatment to minimize significantly *Listeria* after the food has been contaminated.

38. Further, the FDA stated appropriate sanitation controls can minimize the presence of environmental pathogens such as *Listeria* in the plant and the transfer of environmental pathogens to food-contact surfaces and to food. Monitoring the food production environment for the presence of *Listeria* or the indicator organism *Listeria* in facilities where food is manufactured, processed, packed or held can verify the effectiveness of sanitation controls. To do so, environmental monitoring must be designed to find sources of *Listeria* that remain in the facility in spite of routine cleaning and sanitizing (particularly strains that may have become established in the facility as resident strains, *i.e.*, become established in a harborage site) so that the *Listeria* in those sites can be eliminated by appropriate corrective actions (*e.g.*, intensified cleaning and sanitizing, sometimes involving equipment disassembly, and repairs to equipment or the facility to improve sanitary design). A robust environmental monitoring program for *Listeria* can detect the pathogen and enable the facility to eliminate it from the food production environment (including from harborage sites), thereby preventing contamination of food with these pathogens and consequently, preventing foodborne illnesses.

39. In sum, Blue Bell is a company subject to heavy regulations at a federal and state level as a producer and distributor of food. The Company management and the members of a Board of a Delaware corporation operating in this industry and exercising their fiduciary obligations loyally and in good faith were required to comply with regulations and establish controls to monitor for, avoid and remediate contamination and conditions that expose the Company and its products to the risk of contamination. In addition to subjecting the public to health danger and the Company to catastrophic consequences, Defendants' wrongdoing alleged herein in violation of FDA and state health standards, subjects the Company and Defendants to penalties imposed by the federal government.

C. The Kruse Family Has Dominated and Controlled the Business of the Company and the Board of Directors

40. The Kruse family has [REDACTED] [REDACTED] for over ninety-five years. As alleged above, E.F. Kruse passed operational control to his sons, Ed Kruse and Howard Kruse, upon his unexpected death in 1951. Ed Kruse held the titles of Chairman, director, CEO, President, Secretary, Treasurer and a host of operational titles.

41. Howard Kruse became President in 1986 and CEO in 1993. In 2004, Paul Kruse, the son of Ed Kruse, succeeded Howard Kruse as President and CEO, and Howard Kruse was named and elected by the Board as an officer of the

Company in the position of President Emeritus. In 2014, Paul Kruse also succeeded Ed Kruse as Chairman, thus holding the titles of President, CEO and Chairman from 2014 until 2017. The Board elected Ed Kruse as an officer of the Company in the position of Chairman Emeritus.

42. The Kruse family also has [REDACTED]

[REDACTED] The Blue Bell directors have been [REDACTED]

[REDACTED] The directors have consisted of [REDACTED]

[REDACTED] Further, until his death in 2015, Ed Kruse was a member of the Nominating Committee, and Howard Kruse was, until mid-2014, Chairman of the Nominating Committee and has been and remains a member of the Compensation Committee.

43. As alleged more particularly above, during the period of the wrongdoing alleged herein, the Board consisted of:

- Barnhill -- employed by Blue Bell beginning in 1954 until his retirement in 2000;
- Bridges -- nephew of Howard Kruse and Ed Kruse, employed by Blue Bell since 1985 and reported to Paul Kruse during the period of wrongdoing;
- Dickson -- an employee of Blue Bell since 1981;

- Ehlert -- an old family friend of the Kruses;
- Jim Kruse -- son of Howard Kruse, and former Company Vice President and current Chairman;
- Paul Kruse -- son of Ed Kruse and former CEO, President and Chairman;
- Howard Kruse -- President emeritus of the Company and former CEO;
- Ryan -- director for twenty years who begged to write Ed Kruse's memoir;
- Rankin -- Blue Bell Employee beginning in 1981 and CFO from 1986-2014; and
- MacInerney -- director since 1994 and author of a Blue Bell history book and Ed Kruse's biography.

44. The succession of operational control of the Company [REDACTED]

[REDACTED] has been the established culture of the

Company. [REDACTED]

[REDACTED]

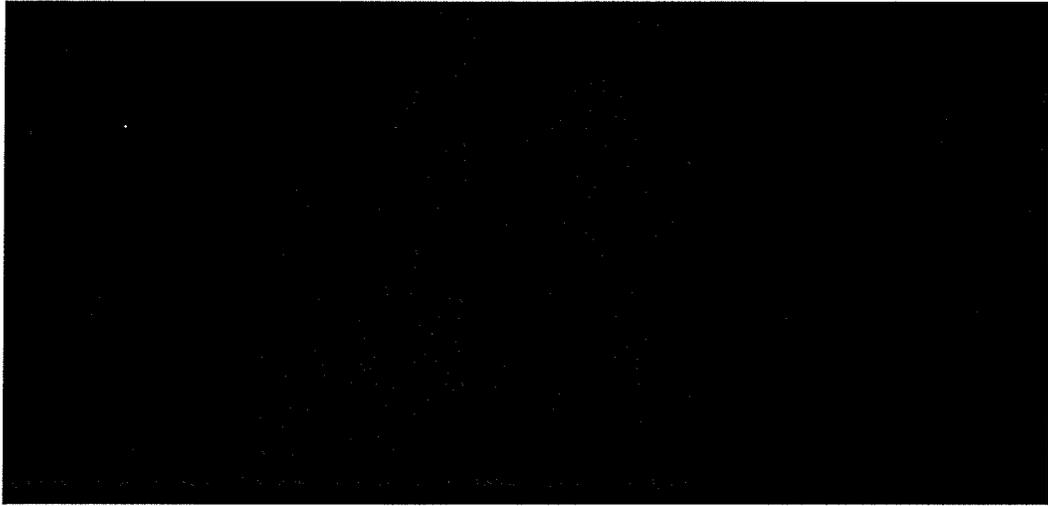
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



45.



46.



[REDACTED]

[REDACTED] has been employed by the Company since the early 1970s.

47. In addition, the Vice President of Plant Operations is Bridges, who is the son of Howard Kruse's and Ed Kruse's sister. As alleged above, during the relevant times of the wrongdoing, Bridges was responsible for all Company operations and was also an officer and director of the Company. Bridges represented to the FDA that he was most responsible person for operations under Paul Kruse. Facility managers reported to Bridges. Bridges reported directly to Paul Kruse. Paul Kruse and Bridges are responsible for operation of the Company's manufacturing facilities. Both are identified by the FDA as the responsible Company officers in a March 30, 2011 Establishment Inspection Report for the Broken Arrow facility.

D. The Company's History of Failing To Maintain Safe and Legally Compliant Operations

48. The Company inspection reports evidence a history of repeated findings of unsafe conditions, particularly condensation issues, Company-wide. In particular, the reports reflect multiple findings of unsafe condensation. [REDACTED]

[REDACTED]

[REDACTED]

49. A July 24, 2009 FDA inspection at the Brenham plant found two instances of condensation, one from a pipe carrying liquid caramel was dripping into three gallon cartons waiting to be filled, and one dripping into ice cream sandwich wafers. These observations were delivered directly to Paul Kruse. The FDA report stated:

Mr. Kruse identified himself as the most responsible person at the firm. Mr. Kruse is normally present on a day-to-day basis, oversees management of production, manufacturing, and quality control unit and has overall authority to detect, prevent and correct problems at the facility.

The report observed: “[a]ll reasonable precautions are not taken to ensure that production procedures do not contribute contamination from any source.” [REDACTED]

[REDACTED]

[REDACTED]

50. A March 29, 2010 inspection of the Sylacauga plant by the Alabama Department of Health found equipment left on the floor and a ceiling in disrepair in the container forming room.

51. In May 2010, the FDA returned to Brenham and observed ten violations that were cited to Paul Kruse including, again, a condensation drip. In

addition, the FDA found ripped and open containers of ingredients, inconsistent hand-washing and glove use and a spider and its web near the ingredients.

52. A July 11, 2011 inspection of the Sylacauga plant by the Alabama Department of Public Health cited drips from a ceiling unit and pipelines, standing water, open tank lids and unprotected measuring cups.

53. On March 28, 2012 an inspection of the Broken Arrow plant resulted in observations of “[f]ailure to manufacture foods under conditions and controls necessary to minimize contamination” and “[f]ailure to handle and maintain equipment, containers and utensils used to hold food in manner that protects against contamination.”

54. The Alabama Department of Public Health required five changes during its March 14, 2012 inspection of the Sylacauga plant including instructions to clean various rooms and items, make repairs and after fruit processing to prevent contamination. Again in March 2013, the Alabama Department of Public Health again ordered cleaning and repairs and observed an uncapped fruit tank. Similar findings were made during the July 24, 2014 inspection.

E. Employee Accounts of Unsanitary Operating Conditions Were Ignored

55. The Company-wide failure of safety and compliance is further evidenced by published employee accounts regarding Company operations which emerged after the *Listeria* contamination outbreak.

56. In October 2015, CBS News report on the Blue Bell *Listeria* outbreak in a three-part series. On October 12-13, 2015, CBS reported former Blue Bell employees claimed that Company management ignored complaints about factory conditions in Brenham. Former employee Terry Schultz told CBS:

a lot of times I walked in and there was just ice cream all over the floor ... sometimes the machines would just go haywire, the product would just continually run through the conveyor belt and just drop right onto the floor.

57. Schultz reported the spilled ice cream was left to pool on the floor, “creating an environment where bacteria could flourish.” According to Schultz, his complaints about conditions were met with the response: “is that all you’re going to do is come here and bitch every afternoon?” According to Schultz, the Company would cut corners by re-using damp cardboard containers to ship incoming ingredients.

58. Another Blue Bell employee at the Brenham plant, “Gerald Bland, who worked on the fruit feeder reported that he was instructed to pour ice cream and fruit that dripped off his machine into mix to be used later. Bland also

reported that the facility in which he worked -- one of only three -- was plagued by leaky roofs and flooding. The facility would “fog up to the point where you couldn’t see anything” from the outside.

F. All Three Blue Bell Production Facilities Were Found to Be Contaminated With *Listeria*

59. In February 2015, Blue Bell received notification that the Texas Department of State Health Services also had positive tests for *Listeria* in Blue Bell samples. [REDACTED]

[REDACTED]

[REDACTED]

60. Nevertheless, [REDACTED]

[REDACTED] On March 9, 2015, *Listeria* was again found present at the Brenham plant.

61. In early March 2015, health authorities reported that they suspected a connection between human *Listeria* infections in Kansas and products made by Blue Bell’s Brenham facility. On March 13, 2015, Blue Bell began removing ice cream products from the market. The outbreak was initially discovered through condition testing by the SCDHEC on products in the consumer chain and all tested positive. According to CBS News, the germs found in South Carolina matched the killer strain in Kansas. CBS further reported that testing determined the *Listeria*

strain matched with Blue Bell was consistent with five other cases in Kansas dating back to 2010.

62. On March 23, 2015, Blue Bell recalled certain products and expanded that recall on April 7, 2015. By April 20, 2015, Blue Bell instituted a recall of all products. The *Listeria* was found in two cartons of the ice cream that tested positive for the *Listeria monocytogenes* on March 17, 2015 and March 25, 2015. Blue Bell disposed of all 8 million gallons of ice cream that had been subject to the recall.

63. In April 2015, the Center for Disease Controls and Prevention (“CDC”) stated that tests indicated Blue Bell products from the manufacturing plants in Texas and Oklahoma were the source of a *Listeria* outbreak that had infected five adults in Kansas, three of whom had died. The CDC also stated that three adults in Texas had been sickened by the *Listeria*.

64. The CDC issued a subsequent warning, stating: “Consumers should not eat any recalled Blue Bell brand products, and institutions and retailers should not serve or sell them. This is especially important for people at higher risk for listeriosis. These products are frozen, so consumers, institutions, and retailers should check their freezers.”

65. The FDA issued a May 1, 2015 report regarding Brenham. The report is attached hereto as Exhibit A. The report found:

- Failure to manufacture foods under conditions and controls necessary to minimize the potential for growth of microorganisms.
- The procedure used for cleaning and sanitizing of equipment has not been shown to provide adequate cleaning and sanitizing.
- The plant is not constructed in such a manner as to prevent condensate from contaminating food and food-contact surfaces.
- Failure to clean food-contact surfaces as frequently as necessary to protect against contamination of food.
- Failure to wear beard covers in an effective manner.
- Failure to maintain buildings in repair sufficient to prevent food from coming adulterated.

(Ex. A, at 1-4).

66. The Broken Arrow facility was also identified as a *Listeria* source. In its April 23, 2015 report, the FDA noted that the Kansas Department of Health and Environment found a Blue Bell product produced at Broken Arrow on April 15, 2014 to be *Listeria*-contaminated. The FDA issued a report on April 23, 2015. The report is attached hereto as Exhibit B. The FDA found that the Company had been receiving increasingly frequent positive *Listeria* tests at Broken Arrow for over three years (including in excess of the levels identified by the FDA's 2008 draft GFI), as well as test results evidencing the inadequacy of their remedial procedures to eliminate the contamination. (*Id.* at 3-4). The FDA findings

regarding the Broken Arrow facility observed twelve operational faults leading to unsafe conditions:

- Failure to manufacture and package foods under conditions and controls necessary to minimize the potential growth of microorganisms and contamination.
- Failure to perform microbial testing where necessary to identify sanitation failures and possible food contamination.
- The procedure uses for cleaning and sanitizing of equipment and utensils has not been shown to provide adequate cleaning and sanitizing treatment.
- Failure to provide running water at a suitable temperature for cleaning of equipment, utensils and food-packaging materials.
- The plant is not constructed in such a manner as to prevent drip and condensate from contaminating food, food-contact surfaces, and food packaging materials.
- Employees did not wash and sanitize hands thoroughly in an adequate hand-washing facility after each absence from the work station and at any time their hands may have become soiled or contaminated.
- Failure to store cleaned and sanitized portable equipment in a location and manner which protects food-contact surfaces from contamination.
- All reasonable precautions are not taken to ensure that production procedures do not contribute contamination from any source.
- The design of equipment does not allow proper cleaning and maintenance.

- Failure to hold foods which can support the rapid growth of undesirable microorganisms at a temperature that prevents the food from becoming adulterated.
- Failure to have smoothly bonded or well maintained seams on food contact surfaces, to minimize accumulation of food particles and organic matter and the opportunity for growth of microorganisms.
- Failure to take apart equipment as necessary to ensure thorough cleaning.

(Ex. B, at 1-10).

67. [REDACTED] The

FDA issued a report on April 30, 2015. The report is attached hereto as Exhibit C.

The FDA found:

- Failure to perform microbial testing where necessary to identify possible food contamination.
- Suitable outer garments were not worn that protect against contamination of food and contact surfaces.
- Failure to maintain food contact surfaces to protect food from contamination by any source, including unlawful indirect food additives.
- The design and materials of equipment and utensils does not allow proper cleaning.
- All reasonable precautions are not taken to ensure that production procedure do not contribute contamination from any source.

- Employees did not wash and sanitize hands thoroughly in an adequate hand-washing facility at any time their hands may have become soiled or contaminated.
- The plant is not constructed in such a manner as to prevent condensate from contaminating food-contact surfaces.
- Nonfood-contact equipment in manufacturing areas is not constructed so that it can be kept in clean condition.

(Ex. C, at 1-3).

68. The [REDACTED]

[REDACTED]
[REDACTED] evidence a Company-wide failure to institute controls and maintain safe and legally compliant operations.

G. Decimation Caused By the Company-Wide Contamination

69. The harm suffered by Blue Bell and its stockholders was catastrophic.

70. In May 2015 Blue Bell [REDACTED]

71. In addition, the [REDACTED]

[REDACTED] With operations shut down, the Company [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

72.

[REDACTED]

[REDACTED]

73.

[REDACTED]

[REDACTED]

74.

[REDACTED]

[REDACTED]

75.

[REDACTED]

[REDACTED]

[REDACTED]

76.

[REDACTED]

[REDACTED]

77.

[REDACTED]

[REDACTED]

78.

[REDACTED]

[REDACTED]

79.

[REDACTED]

[REDACTED]

[REDACTED]

80.

[REDACTED]

[REDACTED]

81.

[REDACTED]

[REDACTED]

82.

[REDACTED]

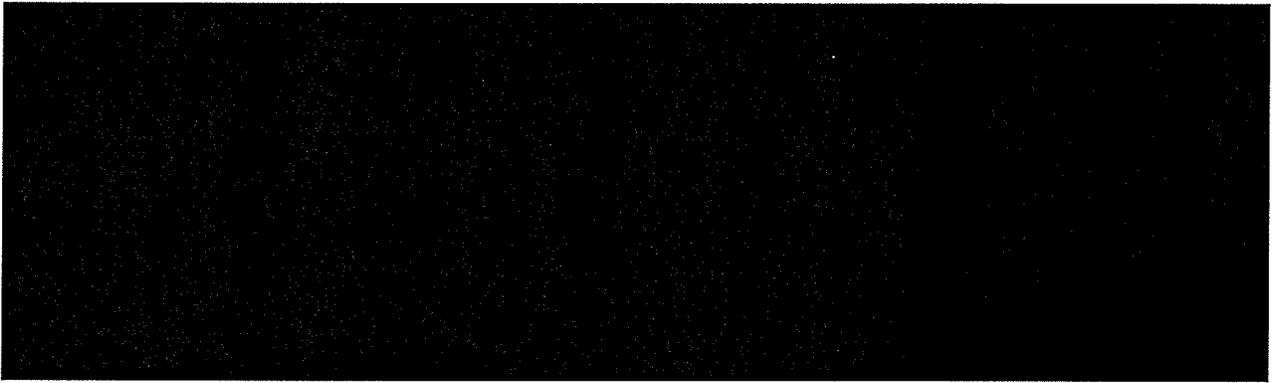
[REDACTED]



83.



84.



85.



[REDACTED]

86. [REDACTED]

[REDACTED]

H. Lawsuits Against The Company

87. As a result of Defendants' conduct, Blue Bell has been exposed to numerous lawsuits brought by injured parties.

88. In May 2015, David Shockley filed a lawsuit in the United States District Court for the Western District of Texas, Austin Division, C.A. No. 1:15-cv-425. That lawsuit alleged that Shockley had suffered brain damage from *Listeria*-related meningitis after eating Blue Bell ice cream. The case settled for an undisclosed sum in September 2016.

89. A federal class action seeking refunds for customers throughout the state of Louisiana was filed in Louisiana in 2015. The primary plaintiff, Steven Leon, argued Blue Bell hadn't provided adequate notice to those eligible for reimbursement. The federal class action was ultimately dismissed.

90. Brent McRae, a Florida resident, was admitted to a hospital in April 2015 and now suffers from brain swelling, with speech and mobility issues. A half-gallon tub of Blue Bell ice cream in his freezer tested positive for *Listeria*.

While McRae never filed a lawsuit, he and his lawyer reportedly were in talks with Blue Bell in 2015.

91. In April 2017 Missouri City residents George and Sharon Pearson filed a lawsuit in Fort Bend County alleging that George Pearson ingested *Listeria monocytogenes* while eating Blue Bell ice cream in 2015. The lawsuit alleges that George Pearson became violently ill after eating the ice cream and that his illness was a “direct and proximate” result of Blue Bell’s negligence, as demonstrated by its failure to ensure the cleanliness of its facilities and the safety of its products.

92. In April 2017 Ursula Burton brought suit claiming her daughter suffered injuries after eating Blue Bell ice cream contaminated with *Listeria*.

93. In May 2015, a former Houston resident sued Blue Bell for negligence in U.S. District Court in Austin, Texas, claiming a severe *Listeria* infection caused by Blue Bell ice cream left him with permanent brain damage and unable to work.

I. Paul Kruse and Bridges Knowingly Disregarded Contamination Risk and Safety Compliance And Continued To Produce and Distribute Ice Cream

94. Paul Kruse became the President and CEO of the Company in 2004. On February 20, 2014, Paul Kruse became Chairman of the Board. Paul Kruse resigned the title of Chairman and President in 2017. Under the Company’s bylaws, the CEO is the most senior officer of the Company. The President is the second most senior officer. During the relevant period, Paul Kruse represented

himself to the FDA as the person most responsible at the Company and who oversees management of production, manufacturing, and quality control with overall authority to detect, prevent and correct problems.

95. Bridges is Vice President of Company operations. He began employment at Blue Bell in 1985. During the relevant period, Bridges was “in charge of all aspects” of Company operations and reported directly to Paul Kruse. In addition, Bridges represented himself to the FDA as the person most responsible in the absence of Paul Kruse. The facility managers reported to Bridges.

96. Paul Kruse and Bridges knowingly disregarded contamination risk and safety compliance and continued the Company’s production and distribution of ice cream. In addition to the condensation and hygiene problems found by inspectors and alleged by employees, as alleged above, beginning in early 2013 and continuing into early 2015 and up to through notification regarding the South Carolina contamination, Company management received increasingly frequent and continuing positive presumptive test results for *Listeria spp* and elevated total coliform results at the Broken Arrow facility. In addition, second test results evidenced that the Company’s remedial actions were ineffective to eliminate the contamination. Yet Paul Kruse and Bridges continued the Company’s production and distribution of ice cream. The April 23, 2015 FDA inspection report for Broken Arrow is attached hereto as Exhibit B. As found by the FDA, the

Company had five positive tests in 2013, 10 positive tests in 2014 and two positive tests in the first two months of 2015, prior to the finding by the SCDHEC of product contamination. (Ex. B, at 3-4) The positive tests also included repeated positive results from the Company's third party laboratory in 2014, on consecutive samples, evidencing the inadequacy of the Company's remedial methods to eliminate the contamination. (Ex. B, at 3-4) The Company also had positive coliform tests far above the known legal regulatory limit three times in April 2014, and once in January 2015 and once in February 2015, prior to the notification from Texas Department of State Health Services regarding the South Carolina contamination. (Ex. A at 2). The Kansas Department of Health and Environment tested a Company product positive for *Listeria monocytogenes* on March 22, 2015. The product was produced at Broken Arrow on April 15, 2014. As alleged above, management had positive tests at Broken Arrow on April 15 and April 22, 2014, as well as before and after these test results.

97. Further, following the finding of the [REDACTED]

[REDACTED] starkly evidencing a Company-wide failure to maintain health safety standards. The FDA reports for the Brenham and Sylacauga facilities are attached hereto as Exhibits A, and C.

J. The Board Willfully Failed to Govern Management

98. Blue Bell is a Delaware corporation. Under Delaware law, “[t]he business and affairs of every corporation...shall be managed by or under the direction of a board of directors, except as may be otherwise provided in [the DGCL] or its certificate of incorporation.” 8 *Del. C.* § 141(a). The Company’s certificate of incorporation includes no exception. The Company’s Re-Statemented Bylaws provide: “Management. The business and affairs of the corporation shall be managed by the board of directors who may exercise all such powers of the corporation and do all such lawful acts and things as are not (by statute or the certificate of incorporation or by these bylaws) directed or required to be exercised or done by the stockholders.” Art III § 3.1.

99. As a result of the [REDACTED] [REDACTED] and the [REDACTED] of the business, the Company’s Board of Directors willfully failed to exercise its fundamental authority to govern management and to institute a system of controls for legal compliance and safe operations of the Company. [REDACTED] [REDACTED] Such a Company-wide coincidence can be explained only by a pervasive Company-wide failure of controls and operations management.

100. As alleged above, by the end of 2014, the Broken Arrow facility had an escalating pattern of positive *Listeria* tests, confirmation of positive tests from the Company's third party laboratory and a demonstrated inadequacy of procedures to eliminate the potentially deadly and illegal contamination.

101. 



102. 



[Redacted]

103. [Redacted]

[Redacted]

104. [Redacted]

[Redacted]

105. [Redacted]

[Redacted]

106. The Company received a positive *Listeria* test on [Redacted]

[Redacted]

[REDACTED]

107. By the end of 2014, the Company

[REDACTED]

[REDACTED]

[REDACTED] regarding operations at

[REDACTED]

[REDACTED]

108.

[REDACTED]

[REDACTED]

109. On February 13, 2015, the Company was notified by the Texas Department of Health that Blue Bell products in the public domain had tested positive for *Listeria* by the State of South Carolina, as alleged above. Following the notification, the Company's swabs at Brenham tested positive for *Listeria* on February 19 and 21, 2015. [REDACTED]

[REDACTED]

110. [REDACTED]

[REDACTED]



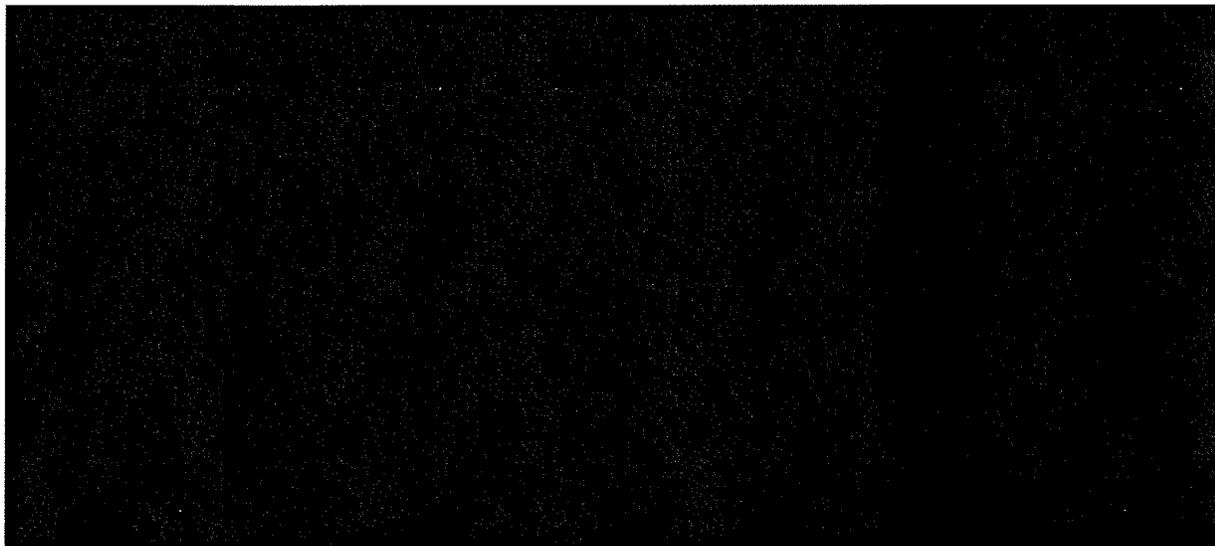
111.





112. The Board's expression of support for [REDACTED] management, led by Paul Kruse and Bridges, was given despite the obvious existential threat to the Company due to management's failure to operate the Company safely and the blatantly evident lack of adequate oversight and reporting of the known *Listeria* problems.

113. As discussed above, the [REDACTED]



114.

[REDACTED]

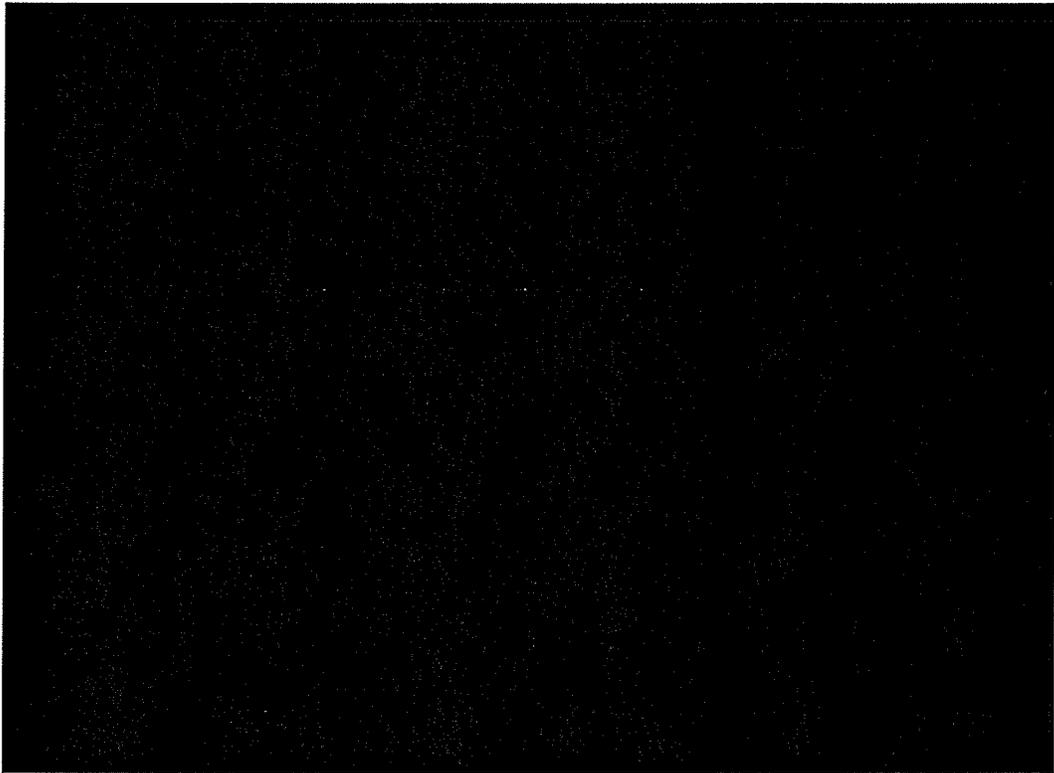
[REDACTED]

115.

[REDACTED]

[REDACTED]

[REDACTED]





116.



117.



118. [REDACTED]

119. [REDACTED]

DEMAND UPON THE BOARD IS FUTILE

120. Demand is futile with respect to the Board with the alleged facts creates a reasonable doubt that conduct that the Board could disinterestedly and independently consider a demand to bring the Company's claims associated herein. All pleaded facts regarding a director's relationship to an insider party must be considered in the full context of the allegations in determining independence and disinterest.

1. Demand Is Excused for Count I Because a Majority of the Board Is Beholden to the Kruse Family And Would Not Bring Claims Against Paul Kruse and Bridges

121. Count I is a claim against Paul Kruse and Bridges for breaches of their fiduciary duties as officers of the Company. Paul Kruse and Bridges are also directors responsible for operations at the Company's production plants and

knowingly disregarded contamination risk and legal compliance and continued the Company's production and distribution of ice cream, as alleged herein. Paul Kruse and Bridges knew that the Company had a *Listeria* problem and insufficient remedial processes to eliminate contamination, yet continued to produce and distribute ice cream. Paul Kruse and Bridges failed to provide information regarding *Listeria* testing and contamination to the other Board members and continued the Company's production and distribution of ice cream in the face of known pervasive contamination. Paul Kruse and Bridges face personal liability for their breaches of duties of care and loyalty to the Company, and violations of law.

122. A demand upon the Board of the Company to pursue claims against Paul Kruse and Bridges for breach of fiduciary duties of care and loyalty to the Company would be futile.

123. As discussed herein, [REDACTED]

[REDACTED]

124. Moreover, the other members of the Board, with the exception of Reimann, are Kruse family members, long-time employees and/or otherwise beholden and loyal to the Kruse family. There is more than a reasonable doubt that majority of the Board could independently and with disinterest consider a demand to bring the Company's claim against Paul Kruse and Bridges.

125. In addition, the allegations herein demonstrate that the other [REDACTED]

2. Demand is Excused for Count II

a. Demand Is Excused Because a Majority of the Board Is Not Independent [REDACTED]

126. Count II is a claim against all Defendants for breaches of their fiduciary duty of loyalty as directors of the Company. The facts alleged herein create a reasonable doubt that the Board could independently and disinterestedly consider a demand to bring Count II. A majority of the Board suffered and continues to suffer from conflicts of interest and loyalties that preclude them from exercising independent business judgment with respect to the Company's claim in Count II.

127. As of the date of the filing of this complaint, the Board consisted of the following directors: Barnhill, Bridges, Dickson, Ehlert, Jim E. Kruse, Paul W. Kruse, Rankin, Howard W. Kruse, Ryan, MacInerney and Reimann. Several of those directors hold executive positions at Blue Bell and many of them [REDACTED] [REDACTED] that create a reasonable doubt that they could independently and disinterestedly consider a demand.

128. Defendant Barnhill is a former executive of Blue Bell and has spent his entire life working at the Company. [REDACTED]

[REDACTED]
Barnhill also helped to found the Bank of Brenham and serves as its Chairman. Defendant Jim Kruse is currently the President of the Bank of Brenham.

129. Defendant Bridges is the Vice President of Operations of Blue Bell. He is also a member of the Kruse Family. His uncle, Howard Kruse, serves as a director and his cousins, Jim Kruse and Paul Kruse, also serve as directors. Bridges has been employed by Blue Bell for thirty-two years. Bridges also is personally responsible and liable for the management misconduct that resulted in the contamination and injury to the Company.

130. Defendant Dickson is the President of Blue Bell. He has been with Blue Bell for thirty-six years. [REDACTED]

[REDACTED] In May 2014, Dickson was elected to the Board.

131. Defendant Ehlert is from an old Brenham family [REDACTED]

[REDACTED] Ehlert's uncle was a close family friend of E.F. Kruse and served as a pallbearer at his funeral.

132. Defendant Jim E. Kruse is a former officer of the Company. He is a member of the Kruse Family. He is the son of Howard Kruse who also serves as a director. Additionally, his cousins Paul W. Kruse and Bridges serve as directors.

Jim E. Kruse was employed by Blue Bell for at least thirteen years. He is now the President of the Bank of Brenham where Defendant Barnhill serves as Chairman.

133. Defendant Paul W. Kruse is a former officer of the Company. He is a member of the Kruse Family. His uncle, Howard Kruse, serves as a director. Additionally, his cousins, Jim E. Kruse and Bridges, serve as directors. Paul W. Kruse was employed by the Company for thirty-one years. Paul Kruse was personally responsible and liable for day-to-day oversight and management of production, and quality control at Blue Bell throughout the relevant time period and had the overall authority to detect, prevent and correct problems at the Company's facilities.

134. Defendant Rankin is a former officer of the Company. He was employed by the Company for twenty-eight years. [REDACTED]

[REDACTED] Blinn College named an Agricultural Complex in honor of him and inducted him into its Hall of Honor.

135. Defendant Howard W. Kruse began working at Blue Bell when he was eleven years old. He is the son of the Company's founder. Defendant Howard W. Kruse was employed by the Company for at least fifty years. His son and two nephews also serve as directors.

136. Defendant Ryan has served as a director of the Company for twenty years. She [REDACTED] and reportedly begged E.F. Kruse for years to write his memoir.

137. Defendant MacInerney has served as a director of the Company for twenty-three years. She has written and published two books on the subject of the Kruse Family and the Company. The acknowledgements in her books [REDACTED]

[REDACTED]

[REDACTED]

138. The alleged facts create a reasonable doubt that a majority of the Board could independently and disinterestedly consider a demand to assert Count I herein. Demand is therefore excused.

b. A Majority of the Board Faces Personal Liability for the Willful Failure to Govern Management

139. As a result of the Defendants' bad faith and disloyal misconduct in their willful failure to govern management, as described herein, virtually all of the directors face a substantial likelihood of personal liability for the willful failure to govern management and institute controls and oversight.

140. The Defendants breached their fiduciary duties by willfully failing to govern management and to institute any system of corporate controls and reporting at the Company regarding health and safety compliance. Their failure occurred

despite the highly regulated industry in which Blue Bell operated to produce and distribute food to the public and evidence of pervasive safety issues at the Company's plants, including FDA inspection reports and employee complaints.

The Defendants' [REDACTED]

[REDACTED] as alleged herein.

141. [REDACTED]

COUNTS AGAINST DEFENDANTS

COUNT I

**DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTIES OF
LOYALTY AND CARE FOR KNOWINGLY DISREGARD OF
CONTAMINATION RISKS AND FAILURE TO OVERSEE BLUE
BELL'S OPERATION AND COMPLIANCE
(AGAINST PAUL KRUSE AND BRIDGES)**

142. Plaintiff incorporates by references and realleges each and every allegation continued above, as though fully set forth herein.

143. Defendants Paul Kruse and Bridges breached their fiduciary duties of loyalty and care including by their failure to conduct safe operations, disregard of contamination risk and failure to report material information to the Board.

144. Despite their obligations the Officer Defendants, did not take any steps to correct or control the essential issues regarding health and safety of the Company's products despite their knowledge that *Listeria* was present in Company products. Further, Paul Kruse and Bridges had knowledge in fact of the ongoing health and safety violations and the actual escalating *Listeria* contamination at Broken Arrow.

145. Moreover, the conduct of Defendants Paul Kruse and Bridges are not shielded from personal liability by 8 *Del. C.* § 102(b)(7) because each serve as officers of the Company and have violated their fiduciary duties in that capacity as alleged herein.

COUNT II

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTIES OF LOYALTY FOR WILLFULL FAILURE TO GOVERN MANAGEMENT AND INSTITUTE A SYSTEM OF CONTROLS AND REPORTING

(AGAINST ALL DEFENDANTS)

146. Plaintiff incorporates by reference and realleges each and every allegation contained above, as though fully set forth herein.

147. The Defendants owed the Company and its stockholders fiduciary obligations. By reason of their fiduciary relationships, Defendants owed and owe Blue Bell the highest obligations of loyalty and care.

148. Defendants violated and breached their fiduciary duties of loyalty by the willful failure to govern the management of the Company and to institute fundamental controls over managerial operations. [REDACTED]

[REDACTED]

[REDACTED] Defendants [REDACTED]

[REDACTED]

149. The Company and its Board members are subject to heavy regulations at the federal and state levels because Blue Bell is a producer and distributor of food products. The members of the Board, consistent with their fiduciary duties, were required to establish controls to monitor for, avoid and remediate contamination and conditions exposing the company to contamination.

150. Defendants' willful failure to govern the Company was the product of their individual failures to comply with their fiduciary duties and the Defendants'

[REDACTED]

[REDACTED]

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment as follows:

- (a) Declaring that Plaintiff may maintain this derivative action on behalf of Blue Bell and that Plaintiff is a proper and adequate representative of the Company;
- (b) Declaring that Defendants have breached their fiduciary duties to Blue Bell;
- (c) Determining and awarding to Blue Bell the damages sustained by it as a result of the breaches of fiduciary duties set forth above from each of the Defendants, jointly and severally, together with interest thereon;
- (d) Ordering disgorgement and cancellation of stock in Blue Bell owned by Defendants and their affiliates and disgorgement of dividends and other benefits received by Defendants unjustly at the expense of the Company;
- (e) Directing Blue Bell to implement policies and procedures and to maintain adequate operational controls and Board governance of management, including nomination of independent directors for the Company's next annual meeting;
- (f) Awarding to Plaintiff the costs and disbursements of the action, including reasonable attorneys' fees, costs, and expenses;
- (g) Awarding pre- and post-judgment interest; and

(h) Granting such other and further relief as this Court deems just and equitable.

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Of Counsel:

HAWASH MEADE GASTON
NEESE & CICACK, LLP
Michael Hawash
Jourdain Poupore
2218 Smith Street
Houston, Texas 77002
(713) 658-9001

CHIMICLES & TIKELLIS LLP

/s/ Robert J. Kriner, Jr.

Robert J. Kriner, Jr. (#2546)

A. Zachary Naylor (#4439)

Vera G. Belger (#5676)

222 Delaware Avenue, Suite 1100

P.O. Box 1035

Wilmington, DE 19899

(302) 656-2500

Attorneys for Plaintiff