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14
15 **UNITED STATES DISTRICT COURT**
16 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

17 ARMANDO ZAVALA, individually and on
18 behalf of all others similarly situated,

19 Plaintiff,

20 v.

21 GREATBANC TRUST COMPANY, KEVIN
22 KRUSE, THE KRUSE-WESTERN, INC.
23 BOARD OF DIRECTORS, THE
24 ADMINISTRATION COMMITTEE, and JOHN
25 AND JANE DOES 1-30,

26 Defendants.

Case No. 1:19-cv-00239-DAD-SKO

**AMENDED CLASS ACTION
COMPLAINT**

I. INTRODUCTION

1
2 1. This is a civil enforcement action brought pursuant to Sections 502(a)(2) and 502
3 (a)(3) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C.
4 § 1132(a)(2) and (a)(3), by Plaintiff, on behalf of himself and other participants and beneficiaries in
5 the Western Milling (“Western Milling”) Employee Stock Ownership Plan (“ESOP” or “Plan”)
6 arising out of the sale of Kruse-Western, Inc. (“Kruse-Western” or “Company”) stock to the ESOP
7 for an inflated value and the resulting loss of tens of millions of dollars to the ESOP.

8 2. The Western Milling ESOP is a pension plan under ERISA that is designed to be and
9 is primarily invested in the stock of the Company.

10 3. The claims in this action stem from the creation of the ESOP in November 2015. On
11 November 4, 2015, Kevin Kruse and John and Jane Does 21-30 (the “Selling Shareholders”) sold
12 100% of outstanding Kruse-Western stock to the newly created Western Milling ESOP for
13 \$244,130,400 (the “2015 ESOP Transaction”).

14 4. In contravention of their fiduciary duties and ERISA’s prohibited transaction rules,
15 the ESOP trustee, GreatBanc Trust Company (“GreatBanc”); Kevin Kruse and the other members
16 of the Board of Directors; and the Selling Shareholders, orchestrated the sale of the Company to the
17 ESOP for greater than fair market value.

18 5. Specifically, the Selling Shareholders negotiated an inflated sale price with
19 GreatBanc, which unjustly enriched the Selling Shareholders, and caused harm to the ESOP
20 participants, who are current and former employees of the Company. As a result of ERISA
21 violations by the fiduciaries entrusted with their Plan, Plaintiff and the Class have not received all
22 of the hard-earned retirement benefits or the loyal and prudent management of the ESOP to which
23 they are entitled.

24 6. As alleged below, the sale price for the 2015 ESOP Transaction failed to adequately
25 account for liabilities associated with the recurrent contamination of animal feed produced by
26 Western Milling.

27 7. Just two months after the 2015 ESOP Transaction, the Kruse-Western stock
28 purchased by the Company’s employees was worth almost 90% less than they had paid for it.

1 8. ERISA Sections 409(a), 502(a)(2) & (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) & (a)(3),
2 authorize participants such as Plaintiff to sue in a representative capacity for losses suffered by the
3 ESOP. Pursuant to that authority, Plaintiff brings this action on behalf of all participants in the
4 Western Milling ESOP and their beneficiaries for violations of ERISA §§ 404 and 406, 29 U.S.C.
5 §§ 1104, 1106.

6 9. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this
7 action pursuant to 28 U.S.C. § 1331 and ERISA § 502(a), 29 U.S.C. § 1132(a).

8 10. **Personal Jurisdiction.** This Court has personal jurisdiction over Defendants
9 because they transact business in, and have significant contacts with, this District, and because
10 ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) provides for nationwide service of process.

11 11. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. §
12 1132(e)(2), for at least the following reasons:

- 13 (a) Defendants may be found in this District, as they transact business in, and/or
14 have significant contacts with this District;
15 (b) Some Defendants reside in this District; and/or
16 (c) Some of the alleged breaches took place in this District.

17 II. PARTIES

18 **Plaintiff**

19 12. Plaintiff Armando Zavala is a former employee of the Company and a current
20 participant in the ESOP within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). Plaintiff Zavala
21 worked at Western Milling between 2015 and May of 2018, as a trailer mechanic and a truck
22 loader. At the time he left the Company, Plaintiff Zavala was vested in the ESOP. He currently
23 resides in Porterville, California.

24 **Defendants**

25 13. **Defendant GreatBanc Trust Company** is the Trustee of the Western Milling
26 ESOP within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A). GreatBanc holds,
27 manages and controls the ESOP's assets. GreatBanc is a fiduciary of the Plan within the meaning of
28 ERISA § 3(21), 29 U.S.C. § 1002(21) because it exercises discretionary authority or discretionary

1 control respecting management of the ESOP, exercises authority and control respecting
2 management or disposition of the ESOP's assets, and/or have discretionary authority or
3 discretionary responsibility in the administration of the ESOP. On information and belief,
4 Defendant GreatBanc authorized the ESOP's purchase of Kruse-Western stock from the Selling
5 Shareholders.

6 14. **Defendant Kevin Kruse** is and at all relevant times was the President of Kruse-
7 Western. On information and belief, Defendant Kruse is also a member of the Kruse-Western Board
8 of Directors. According to the ESOP Plan Document, the Board of Directors, acting for the
9 Company, appoints the Trustee of the ESOP and the Administration Committee of the ESOP. As a
10 result of his membership on the Board of Directors, Mr. Kruse is and has been at all relevant times
11 a fiduciary of the ESOP within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21), and a
12 "party in interest" as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14).

13 15. **Defendant Kruse-Western Board of Directors**, according to the ESOP Plan
14 Document, appoints the Trustee of the ESOP and the Administration Committee of the ESOP,
15 acting for the Company. The Board of Directors is a fiduciary of the ESOP within the meaning of
16 ERISA § 3(21)(A), 29 U.S.C. § 1002(21), and a "party in interest" as to the ESOP as defined in
17 ERISA § 3(14), 29 U.S.C. § 1002(14).

18 16. **Defendants John and Jane Does 1-10** are the other individual members of the
19 Board of Directors of Kruse-Western from 2014 until the present. Together with Defendant Kruse
20 and the Board of Directors itself, John and Jane Does 1-10 are referred to collectively herein as the
21 "**Board Defendants.**" The names of the Board members other than Kevin Kruse are unknown to
22 Plaintiff. Once their identities are ascertained, Plaintiff will substitute their names.

23 17. On August 5, 2019, Plaintiff's counsel requested that Defendants' counsel provide
24 the names of the members of the Board of Directors in advance of Plaintiff's amended complaint
25 deadline so that Plaintiff could name these individuals as defendants in the amended complaint, but
26 on August 7, 2019, Defendants' counsel refused to provide these names. Each member of the Board
27 of Directors is a "party in interest" as to the ESOP as defined in ERISA § 3(14), 29 U.S.C. §
28 1002(14).

1 18. The Board Defendants appointed GreatBanc to be the Trustee of the ESOP in 2015
2 and appointed the members of the Administration Committee of the ESOP from 2015 to the
3 present. The Board Defendants had an ongoing obligation to monitor GreatBanc and the
4 Administration Committee to ensure they were acting prudently, loyally and in conformance with
5 ERISA's fiduciary requirements and to ensure that the ESOP did not engage in a prohibited
6 transaction when purchasing the Company stock.

7 19. Under California Corporations Code § 5210, the activities and affairs of the
8 Company must be managed and all corporate powers must be exercised by or under the ultimate
9 direction of the Board Defendants.

10 20. As part of their corporate oversight responsibilities, the Board Defendants were
11 involved in the preparation, review and/or approval of the Company's financial statements and
12 projections.

13 21. **Defendant Administration Committee** is a designated Plan Administrator of the
14 ESOP within the meaning of ERISA § 3(16)(A), § 1002(16)(A), and a named fiduciary of the
15 ESOP within the meaning of ERISA § 402, 29 U.S.C. § 1102. The Administration Committee is
16 and was a fiduciary of the ESOP under ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), by virtue of
17 its position as Plan Administrator and because it exercised discretionary authority or discretionary
18 control respecting the management of the ESOP, and/or had discretionary authority or discretionary
19 responsibility in the administration of the ESOP.

20 22. **Defendants John and Jane Does 11-20** are the persons serving on the
21 Administration Committee of the ESOP from before the 2015 ESOP Transaction to the present. The
22 identities of the members of the Administration Committee are currently are unknown to Plaintiff.
23 Once their identities are ascertained, Plaintiff will substitute their names.

24 23. On August 5, 2019, Plaintiff's counsel requested that Defendants' counsel provide
25 the names of the Administration Committee members in advance of Plaintiff's amended complaint
26 deadline so that Plaintiff could name these individuals as defendants in the amended complaint, but
27 on August 7, 2019, Defendants' counsel refused to provide these names. The Administration
28

1 Committee, along with the individual members of the Committee, are collectively referred to herein
2 as the “**Administrator.**”

3 24. **John and Jane Does 21-30** are the other selling shareholders who sold their stock in
4 the Company to the ESOP in the 2015 ESOP Transaction, the identities of whom are unknown to
5 Plaintiff at this time. Together with Mr. Kruse, John and Jane Does 21-30 are referred to
6 collectively herein as the “**Selling Shareholders.**” The names of the Selling Shareholders other
7 than Mr. Kruse are unknown to Plaintiff.

8 25. On August 5, 2019, Plaintiff’s counsel requested that Defendants’ counsel provide
9 the names of the Selling Shareholders in advance of Plaintiff’s amended complaint deadline to
10 allow Plaintiff to name these individuals as defendants in the amended complaint. On August 7,
11 2019, Defendants’ counsel refused to provide these names. Once their identities are ascertained,
12 Plaintiff will substitute their names. Each of the Selling Shareholders is a “party in interest” as to
13 the ESOP as defined in ERISA § 3(14), 29 U.S.C. § 1002(14).

14 **III. FACTUAL ALLEGATIONS**

15 **Western Milling’s History of Monensin Poisoning Issues**

16 26. Kruse-Western, Inc. operates various companies in California, including Western
17 Milling, LLC, OHK Transport LLC, OHK Logistics, LLC, and Winema Elevators, LLC.

18 27. Western Milling, LLC manufactures a variety of animal feeds.

19 28. According to its website, Western Milling aspires “to be the leading and most
20 diverse agriculturally based, nutrient solutions business in the Western United States.”

21 29. At all relevant times, Western Milling manufactured Western Blend Horse Feed and
22 other animal feeds. Manufacturing animal feed for different species requires a high level of care to
23 avoid cross-contamination. For example, monensin is an ionophore antibiotic that is added to some
24 cattle and poultry feeds. Monensin, however, is highly poisonous to horses.

25 30. Between December 2009 and July 2010, the United States Food and Drug
26 Administration found “impermissibly high” samples of monensin in feed samples produced by the
27 Company. Western Milling recalled horse feed in 2011 and turkey feed in 2010 and 2011 due to
28 monensin contamination.

1 31. In September 2015, 21 horses died and 28 other horses were severely sickened at a
2 horse ranch in Clovis, California, due to monensin poisoning caused by Western Blend Horse Feed.
3 Many of the horses suffered a slow and painful death with symptoms including foaming at the
4 mouth, muscle wasting, damage to the heart, colic, sweating, kidney failure, respiratory distress,
5 and the inability to stand. Some of the horses had to be euthanized.

6 32. In September 2015, Western Milling issued a recall for Western Blend Horse Feed
7 due to possible monensin contamination.

8 33. In 2016, the same facility improperly mixed the same livestock drug into medicated
9 cattle feed, which contributed to the deaths of several dairy calves.

10 34. A lawsuit was filed against Western Milling in Fresno Superior Court in February
11 2016, and Western Milling agreed in 2018 to pay \$2.4 million to plaintiffs to settle claims arising
12 from the monensin poisoning caused by its horse feed.

13 35. In addition to the lawsuit, the California Department of Food and Agriculture fined
14 Western Milling \$726,000 and revoked their commercial feed license “for repeated and multiple
15 violations.” Western Milling agreed to stop production of all horse feed at its Goshen, California
16 plant by April 15, 2017.

17 36. Western Milling also paid over \$2 million to settle claims of the owners of cattle that
18 consumed excessively high levels of monensin in August 2014. More than 850 cattle died as a
19 result of consuming feed produced by Western Milling.

20 37. Western Milling continued to be plagued by monensin contamination problems after
21 the 2015 ESOP Transaction. In September 2016, 87 calves died and 46 other calves were severely
22 sickened after consuming Western Milling-produced feed that contained excessive levels of
23 monensin.

24 38. Upon information and belief, Kevin Kruse and other members of the Board of
25 Directors were aware of contamination in the Company’s feed products prior to the 2015 ESOP
26 Transaction because they were privy to and had responsibilities over the Company’s financials,
27 which were affected by the contamination issues and associated liability.
28

1 39. As a result of repeated monensin contamination incidents, Western Milling
2 discontinued the manufacturing of horse and other specialty feeds at its Goshen mill, exited the
3 horse feed business for about a year, and started contracting-out the manufacture of horse feed.
4 Western Milling spent approximately \$5.5 million to construct a new dedicated horse feed mill
5 separate from its cattle feed mill.

6 40. Upon information and belief, the feed mill industry recognized the need for
7 dedicated production lines prior to 2015. Major producers of animal feed had “dedicated lines” in
8 their mills, meaning that only horse feed was produced in that section of the mill, and other areas of
9 the mill were used to produce other products, such as those that include monensin or other
10 ionophores.

11 41. In addition, Western Milling and its operating companies faced significant liability at
12 the time of the 2015 ESOP Transaction due to wage and hour violations at its California facilities.

13 **The Western Milling ESOP**

14 42. According to the Articles of Incorporation obtained from the California Secretary of
15 State, Kruse-Western, Inc. was incorporated on September 11, 2015.

16 43. Prior to January 1, 2016, Kruse-Western, Inc. was a “C corporation.” On and after
17 January 1, 2016, the Company converted to a “S corporation.”

18 44. The ESOP was created on November 4, 2015, to purchase 100% of the Company
19 Stock from the Selling Shareholders.

20 45. Prior to the 2015 ESOP Transaction, all or nearly all of the Company Stock was
21 owned by the Selling Shareholders.

22 46. The ESOP covers employees of Western Milling, LLC, OHK Transport LLC, OHK
23 Logistics, LLC, and Winema Elevators, LLC.

24 47. As required by 29 U.S.C. § 1102, the ESOP was established and is currently
25 maintained pursuant to a written instrument, entitled the Western Milling Employee Stock
26 Ownership Plan (the “Plan Document”).

1 48. The Plan Document states that the Board of Directors appointed and appoints
2 members of the Administration Committee, which is the plan administrator for the ESOP and
3 referred to as the “Administrator” in the Plan Document.

4 49. According to the ESOP Plan Document, the Board of Directors, acting for the
5 Company, appoints the Trustee of the ESOP.

6 50. Section 13(b) of the Plan Document provides that, “Generally, the Trustee will vote
7 shares of the Company Stock at the written direction of the Administrator.”

8 51. Section 4.3 of the Plan Document provides that “the Trustee shall invest the
9 contributions made for such Accounting Period as directed by the Administrator, in accordance
10 with the provisions of Section 6.”

11 52. Section 6.1, in turn, provides that the Administrator may direct the Trustee to invest
12 the Employer Contributions in Company Stock.

13 53. Section 7.5(b) provides that “Dividends credited to the Participants' ESOP Cash
14 Accounts may, to the extent permitted by law, be applied to the repayment of the Acquisition Loan
15 incurred in connection with the acquisition of such shares, or, as determined in the discretion of the
16 Administrator, be used to purchase shares of Company Stock, or be paid to the Participants as
17 described in Section 7.6(c).”

18 54. Under Section 17.2(h), for the Trustee to act without direction from the
19 Administrator, it must be authorized to do so by the Administrator in advance and the Trustee must
20 provide written acceptance of such responsibility.

21 55. The terms of the Plan Document establish that the Administrator had and has
22 discretionary authority and control over the management of the ESOP at all times since the ESOP’s
23 creation in November of 2015.

24 56. On information and belief, the members of the Administration Committee held
25 management positions at Western Milling and/or Kruse-Western and thus knew of the Company’s
26 ongoing and persistent troubles with monensin contamination in feed products prior to and after
27 September 2015.
28

1 57. On November 4, 2015, GreatBanc, acting as Trustee of the ESOP, caused the ESOP
2 to purchase 100% of Kruse-Western stock from the Selling Shareholders for \$244,130,400. The
3 ESOP borrowed the entire \$244,130,400 to fund the purchase price paid to the Selling
4 Shareholders.

5 58. On information and belief, the ESOP borrowed the purchase price of \$244,130,400
6 from the Company which, in turn, borrowed that amount from the Selling Shareholders.

7 59. On information and belief, each of the Selling Shareholders deposited his/her share
8 of the proceeds from the ESOP Transaction in his/her personal account and each such account
9 continues to exist in the possession of the Selling Shareholders.

10 60. On information and belief, the balance of each of the personal accounts into which
11 the ESOP Transaction proceeds were deposited have remained above the amount of the total
12 proceeds deposited therein.

13 61. The Plan Document contemplates that some or all of the Selling Shareholders would
14 invest the proceeds of the ESOP Transaction in “qualified replacement property” pursuant to
15 Section 1042 of the Internal Revenue Code, in order to avoid capital gains tax on the sale of their
16 Kruse-Western stock to the ESOP. Under I.R.C. § 1042, the gains on the sale of stock to the ESOP
17 are taxed when the qualified replacement property is sold, and capital gains taxes can be entirely
18 eliminated if the qualified replacement property is held by the Selling Shareholders until death.
19 Thus, on information and belief, any Selling Shareholders who invested the proceeds in qualified
20 replacement property continue to hold such property to avoid the adverse tax consequences.

21 62. Each Selling Shareholder who sought deferral of capital gains pursuant to I.R.C. §
22 1042 was required to complete a signed Statement of Purchase that identified and declared the
23 specific securities that represent the qualified replacement property that was purchased to avoid
24 taxes on the receipt of proceeds from the ESOP Transaction. The Statement of Purchase for each
25 Selling Shareholder who elected I.R.C. § 1042 deferral would be filed with his/her tax return.

26 63. Less than two months after the ESOP purchased Kruse-Western stock from the
27 Selling Shareholders, on December 31, 2015, the value of the Company was just \$26,600,000,
28 which meant that the Company stock lost almost 90% of its value in less than 2 months.

1 64. One year later, the Company had further dropped in value and was worth just
2 \$24,800,000.

3 65. By December 31, 2017, the Company had not materially regained the value paid by
4 ESOP participants. The value of the Company was just \$27,400,000 at the end of 2017, which
5 represents a decline of 86% from the value at the time of the ESOP Transaction.

6 66. The ESOP paid more than fair market value in the 2015 ESOP Transaction. On
7 information and belief, the purchase price was based in part on a valuation report that was
8 unreliable.

9 67. As reported in the ESOP's governmental filings, since the inception of the ESOP in
10 2015, the valuation of Kruse-Western common stock is based on a combination of two primary
11 valuation techniques:

- 12 • "Income (Discounted Cash Flows)" which determines the Company's value based on
13 the discounted cash flows generated by the Company in the future using projections
14 of the Company's future EBITDA (earnings before income tax, depreciation and
15 amortization) and Net Income; and
- 16 • "Market (Guideline Public Company)" which determines the Company's value based
17 on applying revenue and EBITDA multiples from comparable companies to the
18 Company's projected revenue and EBITDA.

19 68. Accordingly, if the financial projections (including EBITDA and Net Income)
20 obtained from the Company's management are inflated, then the value of the Company is inflated.

21 69. On information and belief, the 2015 ESOP Transaction price was based on
22 unrealistic financial projections and did not adequately reflect future revenue and earnings given the
23 recurring monensin contamination in Western Milling's animal feed.

24 70. On information and belief, because Defendant Kevin Kruse and the
25 Administrator held management positions at the Company, they knew of the monensin
26 contamination in Western Milling's feed prior to the 2015 ESOP Transaction as well as the
27 Company's potential liability for wage and hour violations, and they knew that the financial
28 projections provided to the valuation firm for the ESOP Transaction did not adequately reflect

1 the Company's future revenues, cash flows and earnings because they did not adequately reflect
2 these problems.

3 71. Because California law requires the affairs and activities of the Company to be
4 conducted by or at the direction and supervision of the Board, the Board Defendants also knew
5 of the Company's problems with monensin contamination and its potential liability for wage and
6 hour violations prior to the 2015 ESOP Transaction.

7 72. Because the Board Defendants were involved in the preparation, review and
8 approval of the Company's financial statements and projections as part of their corporate oversight,
9 they also knew that the financial projections management provided to the valuation firm for
10 the ESOP Transaction did not adequately reflect the Company's future revenues, cash flows
11 and earnings because they did not adequately reflect the potential liability from monensin
12 contamination and wage and hour violations.

13 73. In addition, the Board Defendants selected the management and executives of the
14 Company and were responsible for monitoring, evaluating and deciding their annual compensation
15 and bonuses. As such, the Board Defendants knew that the Company's long-standing and persistent
16 problems with monensin contamination, affecting the Company's future revenues, earnings and
17 cash flow, would impact their compensation decisions for the Company's management and
18 executives.

19 74. Thus, Defendant Kevin Kruse, the Board Defendants, and the Administrator
20 knew that ESOP overpaid for the Company stock in the ESOP Transaction.

21 75. Kruse-Western took on excessive debt as part of the 2015 ESOP Transaction which
22 has impaired the value of the ESOP's Company stock.

23 76. Because the Board Defendants' responsibilities include strategic planning and
24 capital management for the Company, they knew that the ESOP Transaction required the Company
25 to take on excessive debt.

26 77. On information and belief, because Defendant Kevin Kruse and the
27 Administrator held management positions at the Company, they also knew that that the ESOP
28 Transaction required the Company to take on excessive debt.

1 78. Thus, Defendant Kevin Kruse, the Administrator and the Board Defendants knew
2 that the ESOP Transaction was imprudent in that it required the Company to take on excessive debt,
3 which left the Company over-leveraged and in a precarious financial position.

4 79. A prudent fiduciary who had conducted a prudent investigation would have
5 concluded that the ESOP was paying more than fair market value for the Kruse-Western stock
6 and/or the debt incurred in connection with the Transaction was excessive.

7 80. The valuation report and fairness opinion obtained by GreatBanc for the 2015 ESOP
8 Transaction was not provided to Plaintiff or other the participants of the Western Milling ESOP.

9 81. The extreme decline in value of the Company stock owned by the ESOP following
10 the 2015 ESOP Transaction should have caused GreatBanc as well as Defendant Kruse, the Board
11 Defendants and/or the Administrator, at a minimum, to investigate whether the ESOP had paid
12 more than fair market value in the 2015 ESOP Transaction. To the extent that any of the Defendants
13 had conducted such an investigation, that investigation as well as any corrective measures would
14 have been reported in one of the Form 5500s filed with the Department of Labor. As none of the
15 Form 5500s report any such investigation or corrective actions, none of the Defendants investigated
16 whether fiduciary violations had occurred in the 2015 Transaction despite numerous red flags that
17 should have raised concerns.

18 82. As a direct and proximate result of the actions of the Defendants related to the 2015
19 ESOP Transaction, the ESOP and its participants have suffered at least tens of millions of losses in
20 retirement assets, for which all Defendants are jointly and severally liable.

21 **IV. CLASS ACTION ALLEGATIONS**

22 83. Plaintiff brings these claims as a class action pursuant to Fed. R. Civ. P. 23 (a) and
23 (b), on behalf of all participants in the Western Milling ESOP from November 4, 2015 or any time
24 thereafter who vested under the terms of the Plan and those participants' beneficiaries. Excluded
25 from the Class are Defendants and their immediate family, any fiduciary of the Plan; the officers
26 and directors of Kruse-Western (including any of its subsidiaries or affiliates), or of any entity in
27 which a Defendant has a controlling interest; and legal representatives, successors, and assigns of
28 any such excluded persons.

1 84. **Numerosity.** The members of the Class are so numerous that joinder of all members
2 is impracticable. According to the 2017 Form 5500 filed with the Department of Labor, which is the
3 most recent available Form 5500, as of December 31, 2017, there were 393 participants, within the
4 meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the ESOP.

5 85. **Commonality.** The issues of liability are common to all members of the Class and
6 are capable of common answers as those issues primarily focus on Defendants' acts (or failure to
7 act). Questions of law and fact common to the Class as a whole include, but are not limited to, the
8 following:

9 a. Whether Defendants engaged in a prohibited transaction under ERISA by permitting
10 the ESOP to purchase Kruse-Western stock from the Selling Shareholders for more than adequate
11 consideration in the 2015 ESOP Transaction;

12 b. Whether GreatBanc engaged in a prudent investigation of the proposed purchase of
13 Kruse-Western stock by the ESOP in the 2015 ESOP Transaction;

14 c. Whether GreatBanc breached a fiduciary duty to ESOP participants by causing the
15 ESOP to purchase Kruse-Western stock in 2015 for more than fair market value;

16 d. Whether the Board Defendants breached their fiduciary duties by failing to
17 adequately monitor GreatBanc and the Administrator;

18 e. The amount of losses suffered by the ESOP as a result of Defendants' fiduciary
19 violations and/or other appropriate remedial and equitable relief.

20 86. **Typicality.** Plaintiff's claims are typical of those of the Class because their claims
21 arise from the same event, the sale of the Company to the Western Milling ESOP. Specifically,
22 Plaintiff challenges the legality of a plan-wide transaction, whereby stock is allocated to all
23 participants' accounts based on the same valuation of the Company. As a result, Plaintiff, like other
24 ESOP participants in the Class, has received less in his ESOP account based on the same purchase
25 price of Kruse-Western stock, and continues to suffer such losses because Defendants have failed to
26 correct the overpayment by the ESOP and the ESOP and the Company are burdened with excessive
27 debt.
28

1 87. Because Plaintiff seeks relief on behalf of the Western Milling ESOP pursuant to §
2 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), his claims are not only typical of, but the same as, a
3 claim under § 502(a)(2) brought by any other Class member.

4 88. **Adequacy.** Plaintiff will fairly and adequately represent and protect the interests of
5 the Class. Plaintiff does not have any interests antagonistic to or in conflict with those of the Class.
6 He understands that this matter cannot be settled without the Court's approval.

7 89. Defendants do not have any unique defenses that would interfere with Plaintiff's
8 representation of the Class.

9 90. Plaintiff has retained counsel competent and experienced in complex class actions,
10 ERISA and employee benefits litigation, and with particular experience and expertise in ESOP
11 litigation.

12 91. **Rule 23(b)(1)(A).** Class certification is appropriate pursuant to Fed. R. Civ. P.
13 23(b)(1)(A). Fiduciaries of ERISA-covered plans have a legal obligation to act consistently with
14 respect to all similarly situated participants and to act in the best interests of the ESOP and their
15 participants. This action challenges whether Defendants acted consistently with their fiduciary
16 duties or otherwise violated ERISA as to the ESOP as a whole. As a result, prosecution of separate
17 actions by individual members would create the risk of inconsistent or varying adjudications that
18 would establish incompatible standards of conduct relating to the ESOP.

19 92. **Rule 23(b)(1)(B).** Class certification is also appropriate pursuant to Fed. R. Civ. P.
20 23(b)(1)(B). Administration of an ERISA-covered plan requires that all similarly situated
21 participants be treated the same. Resolving whether Defendants fulfilled their fiduciary obligations
22 to the ESOP, engaged in prohibited transactions with respect to the Plan would, as a practical
23 matter, be dispositive of the interests of the other participants in the ESOP even if they are not
24 parties to this litigation and would substantially impair or impede their ability to protect their
25 interests if they are not made parties to this litigation by being included in the Class.

26 93. **Rule 23(b)(2).** Class certification is appropriate pursuant to Fed. R. Civ. P. 23(b)(2)
27 because Defendants have acted or refused to act on grounds generally applicable to the Class,
28 making appropriate declaratory and injunctive relief with respect to Plaintiff and the Class as a

1 whole. This action challenges whether Defendants acted consistently with their fiduciary duties or
2 otherwise violated ERISA as to the ESOP as a whole. The members of the Class are entitled to
3 declaratory and injunctive relief to remedy Defendants' fiduciary violations. As ERISA is based on
4 trust law, any monetary relief consists of equitable monetary relief and is either provided directly by
5 the declaratory or injunctive relief or flows as a necessary consequence of that relief.

6 94. **Rule 23(b)(3).** Additionally, and alternatively, class certification is appropriate
7 pursuant to Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to all Class
8 members predominate over any questions affecting individual members of the Class, and because a
9 class action is superior to other available methods for the fair and efficient adjudication of this
10 action. Common questions related to liability will necessarily predominate over any individual
11 questions precisely because Defendants' duties and obligations were uniform to all participants and
12 therefore all members of the Class. Plaintiff and all Class members have been harmed by the ESOP
13 paying more than fair market value for Kruse-Western stock in the 2015 ESOP Transaction. As
14 relief and any recovery will be on behalf of the Plan, common questions as to remedies will
15 likewise predominate over any individual issues.

16 95. A class action is a superior method to other available methods for the fair and
17 efficient adjudication of this action. As the claims are brought on behalf of the ESOP, resolution of
18 the issues in this litigation will be efficiently resolved in a single proceeding rather than multiple
19 proceedings and each of those individual proceedings could seek recovery for the entire ESOP. The
20 losses suffered by individual Class members are small compared to the expense and burden of
21 individual prosecution of this action. In addition, class certification is superior because it will
22 obviate the need for unduly duplicative litigation which might result in inconsistent judgments
23 about Defendants' duties with regard to the ESOP.

24 96. The following factors set forth in Rule 23(b)(3) also favor certification of this case as
25 a class action:

26 a) The members of the Class have an interest in a unitary adjudication of the issues
27 presented in this action for the reasons that this case should be certified under Rule 23(b)(1).
28

1 b) No other litigation concerning this controversy has been filed by any other members
2 of the Class.

3 c) This District is the most desirable location for concentrating the litigation for reasons
4 that include (but are not limited to) the following: (i) the ESOP is administered in part in this
5 District, (ii) certain Defendants can be found in this District, and (iii) certain non-party witnesses
6 are located in this District.

7 97. The names and addresses of the Class are available from the ESOP. Notice will be
8 provided to all members of the Plaintiff Class to the extent required by Rule 23.

9 **COUNT I**

10 **Prohibited Transaction in Violation of ERISA § 406(a), 29 U.S.C. § 1106(a)**

11 (Against Kevin Kruse, Does 21-30, and GreatBanc)

12 98. Plaintiff incorporates the preceding paragraphs as though set forth herein.

13 99. ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), requires that a plan fiduciary “shall not
14 cause the plan to engage in a transaction, if he knows or should know that such transaction
15 constitutes a direct or indirect (A) sale or exchange, or leasing of any property between the plan and
16 a party in interest,” or a “(D) transfer to, or use by or for the benefit of, a party in interest, of any
17 assets of the plan.”

18 100. ERISA § 3(14), 29 U.S.C. § 1002(14), defines a “party in interest” to include any
19 fiduciary ... of such employee benefit plan”, and “an employee, officer or director or a 10 percent
20 or more shareholder” of an employer covered by the Plan. 29 U.S.C. § 1002(14)(A), (H).

21 101. Each of the Selling Shareholders were employees, officers or directors of the
22 Company, or shareholders with a 10% or more interest in the Company, or relatives of such persons
23 at the time of the Sale of their stock to the ESOP. As such, Defendant Kevin Kruse and the other
24 Selling Shareholders are “parties in interest” within the meaning of ERISA § 3(14).

25 102. ERISA § 408(e), 29 U.S.C. § 1108(e), provides a conditional exemption from the
26 prohibited transaction rules for sale of employer securities to or from a plan if a sale is made for
27 adequate consideration. The burden is on the fiduciary and the parties-in-interest to demonstrate
28 that conditions for the exemption are met.

1 103. ERISA § 3(18)(B) defines adequate consideration as “the fair market of the asset as
2 determined in good faith by the trustee or named fiduciary.” 29 U.S.C. § 1002(18)(B). ERISA §
3 3(18)(B) requires that the fiduciary or party-in-interest show that the price paid reflected the fair
4 market value of the asset at the time of the transaction, and that the fiduciary conducted a prudent
5 investigation to determine the fair market value of the asset.

6 104. As Trustee, GreatBanc caused the Western Milling ESOP to engage in a prohibited
7 transaction in violation of ERISA §§ 406(a)(1)(A) and (D), 29 U.S.C. §§ 1106(a)(1)(A) and (D), by
8 approving the transaction for more than fair market value and for failing to ensure that the ESOP
9 paid no more than fair market value for the Western-Kruse stock purchased in the 2015 ESOP
10 Transaction. Specifically, the ESOP paid more than fair market value for shares sold by the Selling
11 Shareholders.

12 105. Kevin Kruse as President of the Company knew that the valuation was based on
13 inflated revenue, earnings and cash flow projections that did not adequately take into consideration
14 the Company’s monensin contamination problems and potential wage and hour liability.

15 106. On information and belief, the other Selling Shareholders also held leadership and/or
16 management positions within the Company and thus likewise knew that the valuation was based on
17 inflated revenue, earnings and cash flow projections.

18 107. All the Selling Shareholders participated in the sale of the Company as they were
19 parties to the 2015 ESOP Transaction and received in total \$244 million in cash and loans from the
20 ESOP for the Company stock they sold.

21 108. As such, the Selling Shareholders (Kevin Kruse and Does 21-30) were aware of
22 sufficient facts that the 2015 ESOP Transaction constituted a prohibited transaction with parties-in-
23 interest. As parties-in-interest, the Selling Shareholders are liable for the violations of ERISA §
24 406(a)(1)(A) and (D), 29 U.S.C. § 1106(a)(1)(A) and (D).

25 109. As detailed in the allegations above, the ill-gotten proceeds received from the ESOP
26 Transaction were deposited in the personal accounts of the Selling Shareholders and remain in their
27 possession. Plaintiff seeks appropriate equitable relief from the Selling Shareholders as parties in
28

1 interest, including the disgorgement of any ill-gotten gains they received in connection with the
2 ESOP Transaction.

3 **COUNT II**

4 **Prohibited Transaction in Violation of ERISA § 406(b), 29 U.S.C. § 1106(b)**

5 (Against All Administration Committee Members Who Sold Kruse-Western Stock to the ESOP)

6 110. Plaintiff incorporates the preceding paragraphs as though set forth herein.

7 111. ERISA § 406(b), 29 U.S.C. § 1106(b), prohibits a fiduciary from “deal[ing] with the
8 assets of the plan in his own interest or for his own account[.]” 29 U.S.C. § 1106(b)(1).

9 112. As alleged above, the Plan Document establishes that the Administrator of the ESOP
10 had and has discretionary control over the management of the ESOP at all times since its inception.

11 113. As such, the Administration Committee Members were and continue to be
12 fiduciaries of the Western Milling ESOP before and after the 2015 ESOP Transaction.

13 114. Any Administration Committee Members who sold shares of Kruse-Western stock
14 to the ESOP in the 2015 ESOP Transaction (the “Selling Committee Members”) dealt with the
15 ESOP assets in their own interest within the meaning of ERISA § 406(b)(1), 29 U.S.C.
16 § 1106(b)(1).

17 115. ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2), mandates that a plan fiduciary shall not
18 “act in any transaction involving the plan on behalf of a party (or represent a party) whose interests
19 are adverse to the interests of the plan or the interests of its participants[.]” 29 U.S.C. § 1106(b)(2).

20 116. All Selling Committee Members had fiduciary control over the ESOP and acted as
21 an adverse party to the ESOP in the 2015 ESOP Transaction within the meaning of ERISA
22 § 406(b)(2), 29 U.S.C. § 1106(b)(2).

23 117. ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3), prohibits a plan fiduciary from
24 “receiv[ing] any consideration for his own personal account from any party dealing with such plan
25 in connection with a transaction involving the assets of the plan.” 29 U.S.C. § 1106(b)(3).

26 118. All Selling Committee Members received consideration for their own personal
27 accounts in the 2015 ESOP Transaction within the meaning of ERISA § 406(b)(3), 29 U.S.C.
28 § 1106(b)(3).

1 119. All Selling Committee Members continue to act in a self-dealing manner and receive
2 consideration for their own personal accounts in violation of § 406(b)(1) and (b)(3) because, on
3 information and belief, they continue to use their discretion as Plan Administrator to determine
4 what portion of the participants' stock dividends and employer contributions, held in the ESOP, are
5 used to provide accelerated loan payments to themselves given that they are also the note holders on
6 the ESOP's transaction debt.

7 120. All Selling Committee Members violated ERISA §§ 406(b)(1)-(3), 29 U.S.C. §§
8 1106(b)(1)-(3), for which they are liable as fiduciaries to restore the losses caused by these
9 prohibited transactions, to disgorge profits or other appropriate remedial and equitable relief.

10 **COUNT III**

11 **Breach of Fiduciary Duties Under ERISA §§ 404(a)(1)(A) and (B),**
12 **29 U.S.C. §§ 1104(a)(1)(A) and (B)**

13 (Against GreatBanc)

14 121. Plaintiff incorporates the preceding paragraphs as though set forth herein.

15 122. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), requires that a plan fiduciary act
16 "for the exclusive purpose of providing benefits to participants and the beneficiaries of the plan."

17 123. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) requires that a plan fiduciary act
18 with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent
19 person acting in a like capacity and familiar with such matters would use in the conduct of an
20 enterprise of a like character and with like aims.

21 124. In the context of a sale of the sponsoring company/employer to an ESOP, the duties
22 of loyalty under ERISA § 404(a)(1)(A) and prudence under ERISA § 404(a)(1)(B) require a
23 fiduciary to undertake an appropriate investigation to ensure that the ESOP and its participants pay
24 no more than adequate consideration for the ESOP's assets and the participants' account in the
25 ESOP.

26 125. Pursuant to ERISA § 3(18), adequate consideration for an asset for which there is no
27 generally recognized market means the fair market value of the asset determined in good faith by
28 the trustee or named fiduciary pursuant to the terms of the plan and in accordance with the
Department of Labor regulations.

1 126. GreatBanc was required to undertake an appropriate and independent investigation
2 of the fair market value of the Kruse-Western stock before approving the 2015 ESOP Transaction
3 in order to fulfill its fiduciary duties. Among other things, GreatBanc was required to conduct a
4 thorough and independent review of any “independent appraisal,” to make certain that reliance on
5 any and all valuation experts’ advice was reasonably justified under the circumstances of the 2015
6 ESOP Transactions; to investigate the credibility of the management assumptions and earnings
7 projections underlying the valuation, and to make an honest, objective effort to read and understand
8 the valuation reports and opinions and question the methods and assumptions that did not make
9 sense.

10 127. An appropriate investigation would have revealed that the valuation used for the
11 2015 ESOP Transaction and the \$244,130,400 price ultimately paid by the ESOP did not reflect the
12 fair market value of the Kruse Western stock purchased by the ESOP.

13 128. An appropriate investigation would have revealed that it was imprudent for the
14 ESOP to take on excessive debt.

15 129. An appropriate investigation would have revealed that purchasing the Company for
16 \$244,130,400 was not in the best interest of the ESOP participants.

17 130. After the 2015 ESOP Transaction, GreatBanc was obligated to remedy the ESOP’s
18 overpayment for Kruse-Western stock, including as necessary correcting the prohibited transaction
19 by attempting to restore the amount overpaid by the ESOP to the Selling Shareholders back to the
20 ESOP, including, if necessary, by filing a lawsuit on behalf of the ESOP.

21 131. By causing the ESOP to engage in the 2015 ESOP Transaction, and failing to restore
22 the losses caused thereby, GreatBanc breached its fiduciary duties under ERISA § 404(a)(1)(A) and
23 (B), 29 U.S.C. § 1104(a)(1)(A), (B) and caused losses to the ESOP and the individual retirement
24 accounts of the participants in the ESOP.

25 **COUNT IV**

26 **Failure to Monitor in Violation of ERISA §§ 404(a)(1)(A) and (B)**
27 **29 U.S.C. §§ 1104(a)(1)(A) and (B)**

28 (Against Kevin Kruse, the Board of Directors, and Does 1-10)

132. Plaintiff incorporates the preceding paragraphs as though set forth herein.

1 133. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), requires that a plan fiduciary act
2 “for the exclusive purpose of providing benefits to participants and the beneficiaries of the plan.”

3 134. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B) requires that a plan fiduciary act
4 with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent
5 person acting in a like capacity and familiar with such matters would use in the conduct of an
6 enterprise of a like character and with like aims.

7 135. ERISA § 404(a)(1)(A) and (B) provide that any fiduciary with the power to appoint
8 and/or remove other fiduciaries has an obligation to undertake an appropriate investigation that the
9 appointed fiduciary is qualified to serve in the position as fiduciary and to monitor the appointed
10 fiduciary to ensure that he/she remains qualified to act as fiduciary and is acting in compliance with
11 the terms of the Plan and in accordance with ERISA. If the appointed fiduciary has violated or
12 continues to violate ERISA, the monitoring fiduciary must remove the appointed fiduciary and
13 attempt to restore any losses to the plan caused by the ERISA violations.

14 136. The ESOP Plan Document provides that GreatBanc was appointed by the Board of
15 Directors. Thus, the Board Defendants had a duty to monitor GreatBanc.

16 137. The ESOP Plan Document provides that the Administrator is appointed by the Board
17 of Directors. Thus, the Board Defendants also had a duty to monitor the Administrator.

18 138. The Board Defendants breached their duties under ERISA § 404(a)(1)(A) & (B), 29
19 U.S.C. § 1104(a)(1)(A) & (B) because they failed to monitor GreatBanc and the Administrator to
20 ensure that the ESOP did not engage in the 2015 ESOP Transaction given the inflated stock price,
21 and/or that the ESOP paid no more than fair market value for Company stock in the Transaction,
22 and/or that GreatBanc took remedial action after the 2015 ESOP Transaction.

23 **COUNT V**

24 **Co-Fiduciary Liability Under ERISA §§ 405(a)(1) and (a)(3),**

25 **29 U.S.C. §§ 1105(a)(1) and (a)(3)**

26 (Against Kevin Kruse, the Administration Committee, the Board of Directors, and Does 1-20)

27 139. Plaintiff incorporates the preceding paragraphs as if set forth herein.
28

1 140. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1) provides that a fiduciary “with respect to
2 a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the
3 same plan” [] “if he participates knowingly in, or knowingly undertakes to conceal, an act or
4 omission of such other fiduciary[.]”

5 141. Because Kevin Kruse and the Administration Committee (and its individual
6 members) held management and leadership positions within the Company, (i) they were involved in
7 preparing the revenue, earnings and cash flow projections underlying the valuation relied upon by
8 GreatBanc that resulted in the ESOP overpaying for the Company stock it purchased; (ii) they knew
9 about the Company’s long-standing and persistent problems related to monensin contamination in
10 its animal feed and the failure of the financial projections to adequately reflect these problems; and
11 (iii) they knew that the incorrect financial projections they prepared would be used to determine the
12 value the ESOP would pay for Company stock and thus cause the ESOP to overpay.

13 142. Thus, Kevin Kruse, the Administration Committee and its individual members
14 knowingly participated in the fiduciary violations of GreatBanc alleged above, and they knew that
15 GreatBanc’s actions violated ERISA. As such, under ERISA § 405(a)(1)), 29 U.S.C. § 1105(a)(1),
16 they are liable as co-fiduciaries for the ESOPs losses as a result of GreatBanc’s fiduciary violations.

17 143. As alleged above, the Board Defendants were involved in and/or directed the
18 preparation of the financial projections underlying the valuation relied upon by GreatBanc in
19 determining the purchase price the ESOP paid for the Company.

20 144. Thus, the Board Defendants knowingly participated in the fiduciary violations by
21 GreatBanc, which relied on those financial statements and projections in agreeing to the price the
22 ESOP paid for Kruse-Western stock, and they knew GreatBanc’s actions violated ERISA. As such,
23 under ERISA § 405(a)(1)), 29 U.S.C. § 1105(a)(1), the Board Defendants are liable as co-
24 fiduciaries for the ESOPs losses as a result of GreatBanc’s fiduciary violations.

25 145. ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3) provides that a fiduciary “with respect to
26 a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the
27 same plan” [] “if he has knowledge of a breach by such other fiduciary, unless he makes reasonable
28 efforts under the circumstances to remedy the breach.”

1 146. Because Kevin Kruse and the Administration Committee members held
2 management positions at the Company, they knew of the problems with monensin contamination of
3 Western Milling's feed prior to the 2015 ESOP Transaction as well as the Company's potential
4 liability for wage and hour violations. Given their role in the preparation of financial statements and
5 projections, they also knew that the financial projections underlying the ESOP's purchase price did
6 not adequately reflect the Company's future revenues, cash flows and earnings. Thus, Kevin Kruse
7 and the Administration Committee (and its individual members) knew that the ESOP overpaid for
8 the Company stock.

9 147. As such, Kevin Kruse and the Administration Committee (and its individual
10 members) knew that GreatBanc committed fiduciary violations in approving the ESOP Transaction.

11 148. Kevin Kruse and the Administration Committee (and its individual members) failed
12 to make reasonable efforts to remedy fiduciary violations associated with the ESOP's overpayment
13 for the Kruse-Western stock.

14 149. For example, Kevin Kruse and the Administration Committee (and its individual
15 members) could have asked GreatBanc, the Selling Shareholders or insurers to restore the amount
16 of the overpayment to ESOP participants. And because Kevin Kruse and some of the
17 Administration Committee members themselves sold Company stock to the ESOP, they could have
18 simply returned the overpayment they received.

19 150. At a bare minimum, Kevin Kruse and the Administration Committee could have
20 brought the matter to the attention of the Secretary of Labor.

21 151. Yet Kevin Kruse and the Administration Committee (and its members) took no
22 actions and made no efforts to remedy GreatBanc's fiduciary violations and thus are liable as co-
23 fiduciaries for the losses caused to the ESOP by GreatBanc's fiduciary violations pursuant to
24 ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3).

25 152. As alleged above, the Board Defendants knew of the Company's problems with
26 monensin contamination and its potential liability for wage and hour violations prior to the 2015
27 ESOP Transaction.

1 153. Because the Board Defendants were involved in the preparation, review and
2 approval of the Company's financial statements and projections as part of their corporate oversight,
3 they also knew that the financial projections management provided to the valuation firm for
4 the ESOP Transaction did not adequately reflect the Company's future revenues, cash flows
5 and earnings because they did not adequately reflect the potential liability from the monensin
6 contamination and the wage and hour violations.

7 154. As such, the Board Defendants knew of GreatBanc's fiduciary violations.

8 155. Despite this knowledge, the Board Defendants' failed to take reasonable steps to
9 remedy GreatBanc's fiduciary violations ERISA, including using their power to remove GreatBanc
10 as Trustee; using their power over the Company's management and executives to correct the
11 unreasonable financial projections; and using their power over GreatBanc and other Defendants to
12 restore to the ESOP the value of its overpayment for Kruse-Western stock. And because some of
13 the Board Defendants themselves sold Company stock to the ESOP, they could have simply
14 returned the overpayment they received.

15 156. At a bare minimum, the Board Defendants could have brought the matter to the
16 attention of the Secretary of Labor.

17 157. Yet the Board Defendants took no actions and made no efforts to remedy
18 GreatBanc's fiduciary violations. Accordingly, each Board Defendant is liable as a co-fiduciary for
19 the losses caused to the ESOP by GreatBanc's fiduciary violations. ERISA §§ 405(a)(3), 29 U.S.C.
20 §§ 1105(a)(3).

21 **V. PRAYER FOR RELIEF**

22 Plaintiff on behalf of himself and the Class, prays that judgment be entered against
23 Defendants on each Count and that the Class be awarded the following relief:

- 24 A. Declare that Defendants have each breached their fiduciary duties under ERISA;
25 B. Declare that Defendants GreatBanc, Kevin Kruse, and Does 21-30 have each
26 engaged in prohibited transactions in violation of ERISA §§ 406(a)-(b), 29 U.S.C. §§ 1106(a)-(b),
27 through the 2015 ESOP Transaction;

1 C. Enjoin GreatBanc, the Administrator and the Board Defendants from further
2 violations of their fiduciary responsibilities, obligations and duties;

3 D. Remove GreatBanc as the Trustee of the Western Milling ESOP and/or bar it from
4 serving as a fiduciary of the ESOP in the future;

5 E. Appoint a new independent fiduciary to manage the Western Milling ESOP and
6 order the costs of such independent fiduciary be paid for by Defendants;

7 F. Order each fiduciary found to have violated ERISA, including breaching his/her/its
8 fiduciary duties to the ESOP, to jointly and severally pay such amount to restore all the losses
9 resulting from their breaches and to disgorge all profits made through use of assets of the ESOP;

10 G. Order that Defendants provide other appropriate equitable relief to the ESOP,
11 including but not limited to forfeiting their ESOP accounts, providing an accounting for profits,
12 surcharge, or imposing a constructive trust and/or equitable lien on any funds wrongfully held by
13 any of the Defendants;

14 H. Order Defendants to provide all accountings necessary to determine the amounts
15 Defendants must remit to the ESOP to restore losses and to disgorge any profits fiduciaries
16 obtained from the use of ESOP assets or other violations of ERISA § 404 and 406, 29 U.S.C.
17 § 1104 and 1106;

18 I. To the extent necessary, issue an injunction or order creating a constructive trust
19 into which all ill-gotten gains, fees and/or profits paid to any of the Defendants in violation of
20 ERISA shall be placed for the sole benefit of the ESOP; s participants and beneficiaries. This
21 includes, but is not limited to, the ill-gotten gains, fees and/or profits paid to any of the Defendants
22 that have been wrongly obtained as a result of breaches of fiduciary duty or prohibited transactions
23 or other violations of ERISA;

24 J. Order pursuant to ERISA § 206(d)(4) that any amount to be paid to the ESOP
25 accounts of the Class can be satisfied by using or transferring any breaching fiduciary's ESOP
26 account in the Plan (or the proceeds of that account) to the extent of that fiduciary's liability.
27
28

1 K. Require Defendants to pay attorneys' fees and costs pursuant to ERISA § 502(g),
2 29 U.S.C. § 1132(g), and/or order payment of fees and expenses to Plaintiffs' counsel on the basis
3 of the common benefit or common fund doctrine out of any money recovered for the Class;

4 L. Issue a preliminary and permanent injunction barring Defendants and each of them
5 from seeking to enforce any indemnification agreement between Defendants and the ESOP or
6 Kruse-Western; and declare that any such indemnification agreement violates ERISA § 410, 29
7 U.S.C. § 1110, and is therefore null and void;

8 M. Order Defendants and each of them to reimburse the ESOP or Kruse-Western for
9 any money advanced by the ESOP or Kruse-Western, respectively, under any indemnification
10 agreement or other instrument between Defendants and the ESOP or Kruse-Western;

11 N. Order that Defendants and each of them provide other appropriate equitable relief to
12 the ESOP, including but not limited to rescission, surcharge, providing an accounting for profits,
13 and imposing a constructive trust and/or equitable lien on any funds wrongfully held by
14 Defendants;

15 O. Award pre-judgment interest and post-judgment interest; and

16 P. Award such other and further relief that the Court determines that Plaintiffs and the
17 Class are entitled to pursuant to ERISA § 502(a)(2) and/or § 502(a)(3), 29 U.S.C. § 1132(a)(2)
18 and/or 1132(a)(3) or pursuant to Rule 54(c) of the Federal Rules of Civil Procedure or that is
19 equitable and just.

20
21 DATED: August 16, 2019

Respectfully Submitted,

22
23 By: /s/ Nina Wasow
Nina Wasow

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Counsel for Plaintiff and the Proposed Class

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Armando Zavala, individually and on behalf of all others similarly situated

(b) County of Residence of First Listed Plaintiff Tulare County (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number) Daniel Feinberg and Nina Wasow Feinberg, Jackson, Worthman & Wasow LLP 2030 Addison Street, Suite 500, Berkeley CA 94704; (510) 269-7998

DEFENDANTS

GreatBanc Trust Company, Kevin Kruse, the Kruse-Western, Inc. Board of Directors, the Administration Committee, and John and Jane Does 1-30

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, PTF DEF, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions

Table with 5 main categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Each category contains a list of specific suit types with checkboxes.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District (specify), 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): ERISA 502(a)(2) and (a)(3); 29 U.S.C. § 1132(a)(2) and (a)(3)

Brief description of cause: Prohibited transaction; breach of fiduciary duty

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMANDS CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE DOCKET NUMBER

DATE 08/16/2019 SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; NOTE: federal question actions take precedence over diversity cases.)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).
- V. Origin.** Place an "X" in one of the seven boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
 Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.