Charles W. Hill (chill@glankler.com)(#5452)
GLANKLER BROWN
6000 Poplar Avenue
Suite 400
Memphis, TN 38119
(901) 576-1846

JURY TRIAL DEMANDED

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PINNACLE FOODS INC. Plaintiff v. LLOYD'S SYNDICATE XLC 2003 (aka CATLIN UNDERWRITING AGENCIES LIMITED) LLOYD'S SYNDICATE HSX3624 (aka HISCOX SYNDICATES LIMITED) Defendants.	No. _____ COMPLAINT FOR DECLARATORY JUDGMENT AND DAMAGES

COMPLAINT

Plaintiff Pinnacle Foods Inc. ("Pinnacle") alleges:

1. This action is for breach of contract and declaratory judgment concerning a claim made by Pinnacle under an insurance policy issued to Pinnacle by Defendant Insurers for coverage of losses resulting from a finding of Listeria monocytogenes contamination ("L.

mono") in Pinnacle's Jackson, Tennessee plant and frozen "Aunt Jemima" food products and a resulting nationwide recall of those products in May 2017.

PARTIES

2. Pinnacle is a corporation organized under the laws of Delaware, with its principal place of business in Parsippany, New Jersey. Pinnacle manufactures, markets, and distributes branded convenience food products in North America, including in Tennessee.

3. Upon information and belief, Defendant Lloyd's Syndicate XLC 2003, also known as Catlin Underwriting Agencies Ltd. ("XL Catlin"), is an insurance syndicate registered and authorized in England, with its principal place of business in London. XL Catlin is listed on the NAIC Quarterly Listing of Alien Insurers and thus is an eligible surplus lines insurer in Tennessee. XL Catlin is engaged in the business of insurance on a surplus lines basis in Tennessee and subscribed to Policy No. FINSR1600111, described below.

4. Upon information and belief, Defendant Lloyd's Syndicate HSX3624, also known as Hiscox Syndicates Ltd. ("Hiscox"), is an insurance syndicate registered and authorized in England, with its principal place of business in London. Hiscox is listed on the NAIC Quarterly Listing of Alien Insurers and thus is an eligible surplus lines insurer in Tennessee. Hiscox is engaged in the business of insurance on a surplus lines basis in Tennessee and subscribed to Policy No. FINSR1600111, described below. The Complaint sometimes refers to Catlin and Hiscox collectively as "Defendant Insurers."

JURISDICTION AND VENUE

5. Jurisdiction in this action is predicated on 28 U.S.C. § 1332. Diversity of citizenship exists between Plaintiff and Defendant Insurers, and the amount in controversy exceeds $75,000 exclusive of interests and costs.

6. The Court has personal jurisdiction over Defendant Insurers pursuant to Tennessee's long-arm statute, Tenn. Code Ann. § 20-2-214, because Defendant Insurers have transacted and continue to transact business in Tennessee and have insured risks within Tennessee, including with respect to Pinnacle.

7. Venue in this judicial district is proper under 28 U.S.C. § 1391: (i) the events giving rise to Pinnacle's claim occurred in this district, including but not limited to the contamination for which insurance coverage is sought; (ii) part of the risk insured under the insurance contract that is the subject of this action is situated in this district; and (iii) Defendant Insurers are otherwise subject to personal jurisdiction in this district.

FACTUAL BACKGROUND

A. The Insurance Policy

8. Defendant Insurers subscribed to and sold a "Product Contamination Insurance" policy, Policy No. FINSR1600111, to Pinnacle insuring against losses and liabilities caused by "Accidental Contamination" discovered and reported during the period July 1, 2016 to July 1, 2017 (the "Policy"). Exhibit 1 is a true and correct copy of the Policy.

9. Pinnacle fully and timely paid Defendant Insurers a premium of $550,000 for the Policy.

10. The Policy provides limits totaling $20 million, in excess of a $2.5 million self-insured retention.

11. The Policy obligates Defendant Insurers to reimburse Pinnacle for losses caused by or resulting from an Insured Event. An Insured Event includes Accidental Contamination, which the Policy defines as:

> Any accidental or unintentional contamination, impairment or mislabeling of an Insured Product(s), which occurs during or as a result of its production, preparation, manufacture, packing or distribution, provided that:
>
> (i) the use or consumption of such Insured Product(s) has resulted in or would result in clearly identifiable internal or external physical symptoms of bodily injury, sickness, disease or death of any person(s) within three hundred and sixty five days (365) following such consumption or use....

12. The Policy covers "Loss" resulting from an Insured Event. "Loss" is defined to include, among other things, pre-recall expenses, recall costs, business interruption losses (including gross revenue and extra expense), and fees and costs of crisis consultants.

13. Pinnacle purchased the Policy to provide, among other things, prompt payment of covered Loss incurred due to an Insured Event.

14. This coverage dispute arises out of Defendant Insurers' refusal to provide coverage for the Loss suffered by Pinnacle resulting from the accidental contamination of its products described below, an Insured Event under the Policy.

B. Pinnacle's Operations, Regulatory Guidance, and The Insured Event

15. Pinnacle manufactures, markets, and distributes branded convenience food products in North America.

16. The products at issue were frozen Aunt Jemima brand pancakes, waffles, and French toast manufactured at Pinnacle's Jackson, Tennessee plant.

17. Pinnacle produces these Aunt Jemima products at the plant and freezes them immediately after cooking. The products are to remain frozen (and are labeled accordingly) until

used by consumers, who typically reheat or toast them. For regulatory purposes, these products are known as "ready to eat" ("RTE").

18. Listeria *monocytogenes*, or "*L. mono*," is a bacterium known to cause bodily injury, disease, or death, particularly in vulnerable populations like pregnant women. Ingestion of foods containing L. *mono* can cause fever, diarrhea, and other flu-like symptoms and can lead to miscarriage and stillbirth.

19. Of the six species of Listeria, only *L. mono* causes sickness or disease in humans.

20. The United States Food and Drug Administration ("FDA") in 2008 issued a draft guidance ("2008 Draft Guidance") concerning control of Listeria in RTE foods that, along with its corresponding Compliance Policy Guide ("CPG") section 555.320, reflects longstanding scientific understanding that frozen foods do not support Listeria growth. This understanding is also set forth in a 2003 quantitative risk assessment jointly issued by FDA and the United States Department of Agriculture ("USDA"), which concludes that it is "well established that *L. monocytogenes* does not grow when . . . the food is frozen."

21. FDA's 2008 Draft Guidance and CPG also reflected the understanding of regulatory agencies, scientists, and the food industry that low levels of *L. mono* in foods -- *e.g.* below 100 cfu/g (colony forming units/gram) -- particularly foods that do not support growth, present low to near zero risk to consumers. These conclusions also were based on the 2003 risk assessment, which has not been withdrawn or replaced.

22. In early 2017, FDA issued a new draft guidance concerning *L. mono* in RTE foods. This draft guidance indicated a shift to a "zero tolerance" approach concerning control of *L. mono* in RTE foods. Industry organizations have requested changes to the draft guidance, which has not been finalized.

23. Consistent with federal food safety regulations and guidance, Pinnacle has maintained a microbial control program and environmental testing processes designed to minimize risk to consumers from pathogens, including *L. mono.* The testing encompasses all Listeria subspecies (Listeria "spp.") and therefore identifies not only L. *mono,* but also non-pathogenic organisms such as Listeria innocua that are not harmful to humans but which might signal potential for Listeria (including L. *mono*) to be present in the plant environment.

24. Third-party auditors regularly reviewed the Jackson plant and its food safety programs before the Insured Event.

25. No Aunt Jemima or other Pinnacle product made at the Jackson plant has ever been implicated in a validated case of listeriosis or other illness caused by a foodborne pathogen.

26. Beginning on April 3, 2017 and continuing into early May 2017, FDA conducted an inspection of Pinnacle's Jackson plant pursuant to September 2016 regulations promulgated following the Food Safety Modernization Act. During the FDA inspection, as is customary in the industry, Pinnacle withheld from distribution all finished Aunt Jemima product in the plant or in process as of the FDA inspection; none of that product was released into commerce.

27. Pinnacle also conducted tests of its own at the Jackson plant around this time.

28. FDA and Pinnacle's tests showed results "presumptively positive" (although not yet in fact confirmed positive) for *L. mono*.

29. On May 4, after receiving and analyzing both sets of results, Pinnacle contacted the Acheson Group, the crisis management group identified in the Policy, and provided a notice of incident as provided in the Policy.

30. The next day, May 5, Pinnacle found additional presumptively positive results (but, again, not confirmed positive) for *L. mono* in swabs from a freezer on the production line, which indicated potential contamination of finished product in the freezer.

31. Based on the FDA and Pinnacle test results, Pinnacle initiated the product recall on May 5.

32. On May 8, as provided in the Policy, Pinnacle provided written notice of the claim to Defendant Insurers, stating that there was "potential listeria contamination at our Jackson, TN plant which manufactures Aunt Jemima frozen waffles, frozen pancakes, and frozen French toast."

33. In June 2017, FDA classified the recall as Class II, meaning that there was a possibility of medically reversible health consequences or a remote probability of serious adverse health consequences. Because of the potential for bodily injury to consumers resulting from a recalled product, a Class II recall requires the recalling company to notify retailers (not just distributors) of the recall and requires the company to confirm that all the recalled product has been retrieved from the point of sale.

34. Pinnacle subsequently tested product that had been manufactured on April 20, during the inspection process, but which had not yet left the plant.

35. On June 10, Pinnacle received results showing eight confirmed positives for *L. mono* among the 26 product samples tested.

36. Contamination of the product manufactured on April 20, which was still at the plant when inspected and tested, occurred during or as a result of its production, preparation, manufacture, or packing.

C. The Coverage Dispute

37. Defendant Insurers have refused to provide coverage for Pinnacle's losses resulting from the Insured Event.

38. The Policy has been in full force and effect at all pertinent times.

39. Pinnacle provided timely notice to Defendant Insurers of its claim for coverage for Loss resulting from the Insured Event.

40. Pinnacle seeks coverage from Defendant Insurers for the Loss it has sustained in excess of Pinnacle's $2.5 million self-insured retention under Policy.

41. Pinnacle reasonably expected the Policy to cover its Loss resulting from an Insured Event and reasonably relied on the Policy for protection against such Loss.

42. Pinnacle has supplied Defendant Insurers with substantiation of the types and amounts of Loss.

43. Pinnacle timely paid all premiums due under the Policy.

44. Pinnacle has satisfied all conditions imposed by the Policy on Pinnacle or those conditions have been waived by or are subject to an estoppel against Defendant Insurers.

45. No policy exclusions apply to preclude or limit coverage under the Policy.

46. As of inception of the Policy, Pinnacle was not aware, and could not reasonably have been aware, of circumstances that could produce Loss under the Policy.

47. Before inception of the Policy, no officer or director of Pinnacle had actual or constructive knowledge of any events or circumstance that gave rise to the Insured Event.

48. By letter dated October 27, 2017, Defendant Insurers denied Pinnacle's claim for coverage of Loss resulting from the Insured Event and also reserved the right to deny coverage on additional grounds. A true and correct copy of the letter is attached as Exhibit 2.

49. Defendant Insurers have no valid basis for denying coverage for the Insured Event.

D. Defendant Insurers' Threat to Revoke Pinnacle's Coverage

50. In addition to denying coverage, Defendant Insurers have threatened to void or rescind the Policy on the asserted basis that answers Pinnacle provided in its application for the Policy contained material misrepresentations of fact.

51. Pinnacle answered the insurance application questions accurately and otherwise provided all requested material information and support.

52. None of the statements or information provided by Pinnacle in the application constituted or contained material misrepresentations of fact.

53. Had they known facts allegedly misrepresented by Pinnacle, Defendant Insurers would still have issued the Policy.

COUNT ONE – BREACH OF CONTRACT

54. Paragraphs 1 through 53 are incorporated herein.

55. Pinnacle has incurred financial losses as a result of the Insured Event. The losses include pre-recall expenses, recall costs, business interruption losses (including gross revenue and extra expense), and fees and costs of crisis consultants.

56. Pinnacle has substantiated its losses to Defendant Insurers.

57. Pinnacle's Loss resulting from the Insured Event is in the millions of dollars and is covered under the Policy, subject to the Policy's underlying self-insured retention ($2.5

million) and applicable limit of liability ($20 million).

58. Defendant Insurers refuse to satisfy their obligations under the Policy to reimburse Pinnacle for its Loss, including Pre-Recall Expenses, Recall Expenses, and Business Interruption Loss, as those terms are defined in the Policy, sustained as a result of the Insured Event..

59. Defendant Insurers have thereby materially breached their contractual obligations to Pinnacle.

60. As a direct and proximate result of Defendant Insurers' breach of contract, Pinnacle has been deprived of the benefits of product contamination insurance coverage for which it paid premiums.

61. By depriving Pinnacle of its insurance coverage and forcing it to make expenditures and to incur losses that should be borne by Defendant Insurers, Defendant Insurers have damaged Pinnacle.

62. Further, as a result of such breach of contract, Pinnacle has been forced to incur additional, reasonably foreseeable consequential damages, including but not limited to attorneys' fees and other expenses in prosecuting this action, lost executive time, and lost earnings on amounts wrongfully withheld by Defendant Insurers. These damages are not subject to limits of liability stated in the Policy.

63. Defendant Insurers' failure to acknowledge their coverage obligations and their refusal to pay Pinnacle for its losses is unreasonable and without justification.

COUNT TWO – DECLARATORY RELIEF

64. Paragraphs 1 through 63 are incorporated herein.

65. Pinnacle requests declaratory relief pursuant to the Declaratory Judgment Act, 28

U.S.C. §§ 2201 and 2202.

66. An actual, live controversy exists between Pinnacle and Defendant Insurers concerning their respective rights and obligations under the Policy, and such controversy is ripe for adjudication, warranting declaratory relief.

67. Defendant Insurers are obligated to provide coverage to Pinnacle for its losses arising out of the Insured Event pursuant to the Policy.

68. Defendant Insurers have failed to accept their obligations to provide coverage for Pinnacle's Loss resulting from the Insured Event.

69. Defendant Insurers have no valid bases to avoid or rescind the Policy.

70. Pinnacle has incurred and will continue to incur Loss in connection with the Insured Event.

71. Pinnacle has been forced to incur and will continue to incur additional, reasonably foreseeable consequential damages, including but not limited to attorneys' fees and other expenses in prosecuting this action, lost executive time, and lost earnings on amounts wrongfully withheld by Defendant Insurers. These damages are not subject to limits of liability stated in the Policy.

72. The declarations by this Court, as prayed for below, will terminate the controversy and remove uncertainty as to the rights and obligations of the parties.

REQUEST FOR RELIEF

WHEREFORE, on Count One, Pinnacle prays for an award of:

(a) actual compensatory and consequential damages sustained by Pinnacle as a result of Defendant Insurers' breach of the Policy, plus pre- and post-judgment interest, in amounts to be established through proof at trial;

(b) reasonable attorneys' fees and other costs incurred by Pinnacle in prosecuting this action against Defendant Insurers; and

(c) such other and further relief to which it shows itself entitled.

WHEREFORE, on Count Two, Pinnacle prays for relief as follows:

(a) a declaration that each Defendant Insurer must provide coverage to Pinnacle for its losses arising out of the Insured Event;

(b) a declaration that Defendant Insurers have no basis to avoid or rescind the Policy;

(c) a declaration that Defendant Insurers must reimburse Pinnacle for its additional, reasonably foreseeable consequential damages, including reasonable attorneys' fees and other costs incurred and to be incurred by Pinnacle in prosecuting this action; and

(d) such other and further relief to which it shows itself entitled.

Respectfully submitted,

December 22, 2017

s/Charles W. Hill

Charles W. Hill (#5452)
GLANKLER BROWN
6000 Poplar Avenue
Suite 400
Memphis, TN 38119
(901) 576-1846 - phone
(901) 525-2389 – fax
(chill@glankler.com)

Counsel for Pinnacle Foods Inc.

Neil K. Roman (NY Bar No. 2033884)
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000 – phone
(212) 841-1010 – fax
(nroman@cov.com)

Marialuisa S. Gallozzi (DC Bar No. 413874)
Suzan F. Charlton (DC Bar No. 43387)
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000 – phone
(202) 778-6000 – fax
(mgallozzi@cov.com)
(scharlton@cov.com)

Of Counsel for Plaintiff Pinnacle Foods Inc.

JURY DEMAND

Pinnacle hereby demands a trial by jury.

December 22, 2017

s/Charles W. Hill

Charles W. Hill (#5452)
GLANKLER BROWN
6000 Poplar Avenue
Suite 400
Memphis, TN 38119
(901) 576-1846 – phone
(901) 525-2389 – fax
(chill@glankler.com)

Counsel for Pinnacle Foods, Inc.

Neil K. Roman (NY Bar No. 2033884)
COVINGTON & BURLING LLP
The New York Times Building
620 Eighth Avenue
New York, NY 10018-1405
(212) 841-1000 – phone
(212) 841-1010 – fax
(nroman@cov.com)

Marialuisa Gallozzi (DC Bar No. 413874)
Suzan F. Charlton (DC Bar No. 43387)
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-6000 – phone
(202) 778-6000 – fax
(mgallozzi@cov.com)
(scharlton@cov.com)

Of Counsel for Pinnacle Foods, Inc.