

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE TO

Tender Offer Statement Under Section 14(d)(1) or 13(e)(1)
of the Securities Exchange Act of 1934
(Amendment No. 8)

GOLD KIST INC.

(Name of Subject Company)

PROTEIN ACQUISITION CORPORATION
PILGRIM'S PRIDE CORPORATION

(Names of Filing Persons—Offerors)

Common Stock, Par Value \$0.01 Per Share
(Title of Class of Securities)

380614107

(CUSIP Number of Class of Securities)

Richard A. Cogdill
Pilgrim's Pride Corporation
4845 US Highway 271 North
Pittsburg TX 75686-0093
(903) 434-1000

(Name, Address and Telephone Number of Persons Authorized to Receive Notices and Communications on Behalf of Filing Persons)

Copy to:

Alan G. Harvey
Baker & McKenzie LLP
2300 Trammell Crow Center
2001 Ross Avenue
Dallas TX 75201

CALCULATION OF FILING FEE

Transaction Valuation*

\$1,060,016,120

Amount of Filing Fee**

\$113,422.00

* Estimated for purposes of calculating the amount of the filing fee only. Calculated by multiplying \$20.00, the per share tender offer price, by the sum of (i) the 51,036,806 outstanding shares of Common Stock as of August 9, 2006 (according to the Quarterly Report on Form 10-Q for the period ended July 1, 2006 filed by Gold Kist Inc.), and (ii) the 1,964,000 shares of Common Stock subject to outstanding grants and awards under Gold Kist Inc. share-based compensation plans (according to the Report on Form 10-Q for the period ended July 1, 2006 filed by Gold Kist Inc.).

** Calculated as 0.0107% of the transaction value.

Check the box if any part of the fee is offset as provided by Rule 0-11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid: _____

Filing Party: _____

Form or Registration No.: _____

Date Filed: _____

Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes to designate any transactions to which the statement relates:

third-party tender offer subject to Rule 14d-1.

issuer tender offer subject to Rule 13e-4.

going-private transaction subject to Rule 13e-3.

amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer:

This Amendment No. 7 (this "Amendment") amends and supplements the Tender Offer Statement on Schedule TO filed on September 29, 2006 and amended by Amendment No. 1 filed September 29, 2006, Amendment No. 2 filed October 12, 2006, Amendment No. 3 filed October 16, 2006, Amendment No. 4 filed October 17, 2006, Amendment No. 5 filed October 23, 2006, Amendment No. 6 filed October 24, 2006 and Amendment No. 7 filed October 30, 2006 (as so amended, the "Schedule TO") by Protein Acquisition Corporation, a Delaware corporation ("Purchaser") and Pilgrim's Pride Corporation, a Delaware Corporation ("Parent") and owner of all of the outstanding common stock of Purchaser. The Schedule TO relates to the offer by Purchaser to purchase all the issued and outstanding shares of common stock, par value \$0.01 per share (the "Common Stock"), of Gold Kist Inc., a Delaware corporation (the "Company"), and the associated common stock and Series A Junior Participating Preferred Stock purchase rights (the "Rights," and together with the Common Stock, the "Shares") issued pursuant to the Stockholder Protection Rights Agreement, dated as of July 9, 2004, between the Company and Sun Trust Bank, as Rights Agent (the "Rights Agreement"), for \$20.00 per Share, net to the seller in cash (subject to applicable withholding taxes), without interest, upon the terms and subject to the conditions set forth in the Offer to Purchase dated September 29, 2006, as amended. Except as specifically provided herein, this Amendment does not modify any of the information previously reported on the Schedule TO.

Item 6. Purposes of the Transaction and Plans or Proposals

Item 6 of the Schedule TO is hereby amended and supplemented as follows:

Section 11, "Purpose of the Offer; Plans for the Company after the Offer and the Merger," of the Offer to Purchase is hereby amended and supplemented as follows:

The discussion under the caption "Debt Tender Offer" in Section 11 of the Offer to Purchase is amended by the addition of the following paragraph at the end thereof:

"On November 13, 2006, Parent issued a press release announcing the revised purchase price for the Gold Kist Notes as required by the terms of the offer to purchase such Notes, based on an assumed purchase date of November __, 2006.

Item 11. Additional Information

Item 11 of the Schedule TO is hereby amended and supplemented as follows:

Section 15, "Certain Legal Matters and Regulatory Approvals," of the Offer to Purchase is hereby amended and supplemented as follows:

The discussion in this Section under the caption "Certain Legal Proceedings" is hereby amended by deleting the last sentence of such discussion and replacing it with the following:

On November 2, 2006, the Court issued an Order denying the Company's motion for an expedited hearing on its request for a preliminary injunction and granting Parent's motion to modify the Court's Scheduling Order issued on October 25, 2006. In addition to denying the Company's motion, the November 2, 2006 Order also (i) ordered the Defendants to file their answer, motion, objection or other response to the Company's complaint by November 10, 2006, (ii) granted Parent's request to conduct discovery, prior to the Court's hearing on the Company's preliminary injunction motion, as necessary to present argument and evidence on the Company's motion for a preliminary injunction and fixed November 10, 2006 through December 15, 2006 as the period in which to conduct such discovery, (iii) ordered the Defendants to file their brief in opposition to the Company's motion for a preliminary injunction by December 22, 2006, (iv) ordered the Company to file its reply brief in support of its motion by January 5, 2007, and (v) scheduled an evidentiary hearing on the Company's motion for a preliminary injunction on January 16, 2007, at 10:30 a.m. As a result of the Court's November 2 Order, no action will be taken by the Court on the Company's motion for preliminary injunction prior to the scheduled hearing on January 16, 2007.

On November 10, 2006 the Defendants moved to dismiss the Company's federal securities law claims for failure to state a claim upon which relief can be granted under the Securities Exchange Act and the Commission's proxy rules and tender offer rules. In their memorandum in support of their motion to dismiss the Company's Securities Exchange Act claims, the Defendants reiterate their statement in the Offer to Purchase that they do not believe that the Offer violates the antitrust laws and assert that the stockholder proposals submitted to the Company on August 18 would not violate Section 8 of the Clayton Act (a position which Defendants assert is supported by precedent) and that neither Section 14(a) nor Section 14(e) of the Securities and Exchange Act requires that Defendants make any disclosure they believe to be false. The Defendants further assert that because Defendants dispute the Company's Clayton Act claims, Sections 14(a) and 14(e) require only that Defendants disclose to the Company's stockholders the existence of the litigation and the Company's allegations, and that the Defendants have provided adequate and timely disclosure of such information.

In addition to moving to dismiss the Company's federal securities law claims, Parent and Purchaser also believe that they have meritorious defenses to the Company's Clayton Act claims and have informed the Court that they intend to respond to the Company's motion for a temporary injunction by asserting, among other matters, that the Company lacks standing to assert its Clayton Act claims due to the absence of antitrust injury, and that the Company is not likely to succeed on the merits of its Clayton Act claims. Defendants expect to file such response on or about December 22, 2006, the date fixed by the Court for Parent to file its response to the Company's motion for a temporary injunction.

Also on November 10, 2006, the Parent Nominees (other than Joseph C. Moran and Michael A. Pruitt) filed a motion to dismiss the complaint against them for lack of personal jurisdiction over such Defendants.

The foregoing descriptions of the Court's November 2, 2006 Order, the Defendants motion to dismiss the Company's federal securities law claims and the Parent Nominees' (other than Joseph C. Moran and Michael A. Pruitt) motion to dismiss the complaint against them are qualified in their entirety by the full text of such documents, which have been filed as exhibits to the Schedule TO filed by Parent and Purchaser.

Item 12. Material to Be Filed as Exhibits.

Item 12 of the Schedule TO is hereby amended and supplemented by the addition of Exhibits (a)(30) through (a)(35) and, as so amended, is restated as follows:

- (a)(1) Offer to Purchase dated September 29, 2006.
- (a)(2) Form of Letter of Transmittal.
- (a)(3) Form of Notice of Guaranteed Delivery.
- (a)(4) Form of Letter to Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.
- (a)(5) Form of Letter to Clients.
- (a)(6) Form of Guidelines for Certification of Taxpayer Identification Number on Substitute Form W-9.
- (a)(7) Summary Advertisement as published in The Wall Street Journal on September 29, 2006.
- (a)(8) Press Release announcing Parent's intention to commence the Offer issued by Parent on September 28, 2006 (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)(9) Letter dated September 28, 2006 from Parent to the Board of Directors of the Company (included in Exhibit (a)(8)).

- (a)
(10) Letter dated September 28, 2006 to employees of Parent (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)
(11) Letter dated September 28, 2006 to customers of Parent (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)
(12) Letter dated September 28, 2006 to Parent growers (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)
(13) Tender Offer FAQs (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)
(14) Frequently Asked Questions for Pilgrim's Pride Employees (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)
(15) Press release issued by Parent on September 28, 2006 announcing Parent's intention to commence the Offer to Purchase Gold Kist 10¹/₄% Senior Notes due March 15, 2014 and related Consent Solicitation (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)
(16) Press release issued by Parent on August 18, 2006 (previously filed on August 18, 2006 pursuant to Rule 14a-12 under the Securities Exchange Act of 1934 (the "Exchange Act") and refiled on August 24, 2006 pursuant to Rule 425 under the Securities Act of 1933 (the "Securities Act") and deemed filed pursuant to Rule 14a-12 and Rule 14d-2 under the Exchange Act).
- (a)
(17) Pilgrim's Pride Corporation's Proposal for Gold Kist Inc. Frequently Asked Questions (FAQs) dated August 21, 2006 (previously filed on August 21, 2006 pursuant to Rule 425 under the Securities Act and deemed filed pursuant to Rule 14a-12 and Rule 14d-2 under the Exchange Act).
- (a)
(18) Investor Presentation dated August 21, 2006 (previously filed on August 21, 2006 pursuant to Rule 425 under the Securities Act and deemed filed pursuant to Rule 14a-12 and Rule 14d-2 under the Exchange Act).
- (a)
(19) Letter dated August 18, 2006 from Parent to the Company regarding the stockholder proposal provided by O.B. Goolsby, Jr., to the Company (previously filed on August 22, 2006 pursuant to Rule 425 under the Securities Act and deemed filed pursuant to Rule 14a-12 and Rule 14d-2 under the Exchange Act).
- (a)
(20) Letter dated August 30, 2006 from Parent to the Company.
- (a)
(21) Letter dated September 20, 2006 from Parent to the Company.
- (a)
(22) Press Release issued by Parent on September 29, 2006 announcing commencement of the Offer to Purchase the Company's 10¹/₄% Senior Notes due March 15, 2014 and related Consent Solicitation.
- (a)
(23) Press Release issued by Parent on October 12, 2006 responding to the Schedule 14D-9 filed by the Company.
- (a)
(24) Press Release issued by Parent on October 12, 2006 announcing the purchase price for the Gold Kist Notes and receipt of tenders and related consents from holders of 73.2% of the outstanding Gold Kist Notes.
- (a)
(25) Press Release issued by Parent on October 16, 2006 announcing receipt of tenders of Gold Kist Notes and related consents sufficient to approve proposed amendments to the Gold Kist Indenture.
- (a)
(26) Press Release issued by Parent on October 17, 2006 announcing early termination of the waiting period under the HSR Act.
- (a)
(27) Press Release issued by Parent on October 23, 2006 with open letter to the Company's stockholders.
- (a)
(28) Press Release issued by Parent on October 29, 2006 announcing reduction in weekly chicken processing.
- (a)
(29) Press Release issued by Parent on October 30, 2006 announcing extension of the Offer and extension of Parent's offer to purchase and consent solicitation with respect to the Gold Kist Notes.

- (a)(30) Order of the U.S. District Court issued November 2, 2006 denying the Company's Motion for Expedited Hearing and granting Parent's Motion to Modify Scheduling Order.
- (a)(31) Defendants' Motion to Dismiss the Company's Exchange Act Claims.
- (a)(32) Defendants' Memorandum in Support of Motion to Dismiss the Company's Exchange Act Claims.
- (a)(33) Motion by the Parent Nominees (other than Joseph C. Moran and Michael A. Pruitt) to Dismiss the Company's Complaint for lack of personal jurisdiction over such Defendants.
- (a)(34) Memorandum in Support of Motion by the Parent Nominees (other than Joseph C. Moran and Michael A. Pruitt) to Dismiss the Company's Complaint for lack of personal jurisdiction over such Defendants.
- (a)(35) Press Release issued by Parent on November 13, 2006 announcing the revised purchase price for the Gold Kist Notes.
- (b)(1) Credit Agreement by and among CoBank ACB, Agriland FCS and the Company dated as of September 21, 2006 (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (b)(2) Pilgrim's Pride Corporation \$450,000,000 Senior Unsecured Increasing Rate Bridge Facility Commitment Letter from Lehman Brothers to the Company dated September 27, 2006 (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (b)(3) Supplemental Commitment Letter from Lehman Brothers and Credit Suisse to Parent dated October 20, 2006.
- (d) None.
- (g) None.
- (h) None.

EXHIBIT INDEX

Exhibit No.

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- (a)(3) Form of Notice of Guaranteed Delivery.
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- (a)(5) Form of Letter to Clients.
- (a)(6) Form of Guidelines for Certification of Taxpayer Identification Number on Substitute Form W-9.
- (a)(7) Summary Advertisement as published in The Wall Street Journal on September 29, 2006.
- (a)(8) Press Release announcing Parent's intention to commence the Offer issued by Parent on September 28, 2006 (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)(9) Letter dated September 28, 2006 from Parent to the Board of Directors of the Company (included in Exhibit (a)(8)).
- (a)(10) Letter dated September 28, 2006 to employees of Parent (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
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- (a)(13) Tender Offer FAQs (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)(14) Frequently Asked Questions for Pilgrim's Pride Employees (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
- (a)(15) Press release issued by Parent on September 28, 2006 announcing Parent's intention to commence the Offer to Purchase Gold Kist 10¹/₄% Senior Notes due March 15, 2014 and related Consent Solicitation (incorporated by reference to the Current Report on Form 8-K filed by Parent on September 28, 2006).
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- (a)(18) Investor Presentation dated August 21, 2006 (previously filed on August 21, 2006 pursuant to Rule 425 under the Securities Act and deemed filed pursuant to Rule 14a-12 and Rule 14d-2 under the Exchange Act).
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- (a)(20) Letter dated August 30, 2006 from Parent to the Company.
- (a)(21) Letter dated September 20, 2006 from Parent to the Company.

Exhibit No.

- (a)(22) Press Release issued by Parent on September 29, 2006 announcing commencement of the Offer to Purchase the Company's 10¼% Senior Notes due March 15, 2014 and related Consent Solicitation.
- (a)(23) Press Release issued by Parent on October 12, 2006 responding to the Schedule 14D-9 filed by the Company.
- (a)(24) Press Release issued by Parent on October 12, 2006 announcing the purchase price for the Gold Kist Notes and receipt of tenders and related consents from holders of 73.2% of the outstanding Gold Kist Notes.
- (a)(25) Press Release issued by Parent on October 16, 2006 announcing receipt of tenders of Gold Kist Notes and related consents sufficient to approve proposed amendments to the Gold Kist Indenture.
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- (a)(30) Order of the U.S. District Court issued November 2, 2006 denying the Company's Motion for Expedited Hearing and granting Parent's Motion to Modify Scheduling Order.
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- (a)(32) Defendants' Memorandum in Support of Motion to Dismiss the Company's Exchange Act Claims.
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- (b)(3) Supplemental Commitment Letter from Lehman Brothers and Credit Suisse to Parent dated October 20, 2006.
- (d) None.
- (g) None.
- (h) None.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GOLD KIST INC.,

Plaintiff,

vs.

PILGRIM'S PRIDE CORPORATION;
PROTEIN ACQUISITION
CORPORATION; O.B. GOOLSBY, JR.;
ARY D. TUCKER; ROBERT L.
HENDRIX; JOSEPH C. MORAN;
WALTER F. SHAFER, III; TIM
THOMAS; MICHAEL A. PRUITT;
ROBERT A. WRIGHT; JANE T.
BROOKSHIRE; and J. CLINTON
RIVERS,

Defendants.

CIVIL ACTION NO.

1:06-CV-2441-CC

ORDER

The above-styled action is before the Court on Plaintiff Gold Kist, Inc.'s Motion for Expedited Hearing [Doc. No. 15] and Defendant Pilgrim's Pride Corporation's Motion to Modify October 25, 2006 Scheduling Order [Doc. No. 16].

In the Motion for Expedited Hearing, Plaintiff Gold Kist, Inc. ("Gold Kist") moves the Court to hold an expedited hearing on its Motion for Preliminary Injunction, which Gold Kist filed on October 23, 2006. Gold Kist urges that good cause exists in this case to grant an immediate hearing on the Motion for Preliminary Injunction. Specifically, Gold Kist contends that it is presently suffering irreparable injury as a result of Defendant Pilgrim's Pride Corporation's ("Pilgrim's") efforts to have nine of Pilgrim's alleged officers elected to Gold Kist's board of directors, a "scheme" that Gold Kist argues violates Section 8 of the Clayton Act and the federal securities laws. (Pl.'s Mot. for Expedited Hearing ¶¶ 2, 3.) Gold Kist maintains that an expedited hearing is necessary to prevent Gold Kist from being "forced to incur significant and unnecessary expense in a

costly proxy solicitation battle...” (Id. ¶ 3.) Gold Kist also argues that “Gold Kist, its stockholders, and the investing public are being misled, are suffering immediate injury to their corporate suffrage rights, and are facing impending irreparable harm as a result of Defendants’ ongoing unlawful conduct.” (Id. ¶ 4.) For these reasons, Gold Kist requests that the Court set a hearing date on Gold Kist’s Motion for Preliminary Injunction during the week of November 13, 2006.

In the Motion to Modify October 25, 2006 Scheduling Order, Pilgrim’s moves the Court to modify an Order entered by the Honorable Julie E. Carnes, prior to her recusal from the case, which requires Pilgrim’s to file a response to Gold Kist’s Motion for Preliminary Injunction within ten (10) days of service of the Motion. Pilgrim’s urges that the Court should permit limited discovery as to such issues as antitrust harm before additional briefs are filed with respect to the Motion for Preliminary Injunction and before the Court holds an evidentiary hearing on the Motion. Pilgrim’s maintains that an expedited hearing is not necessary at this time because, among other reasons, the board election that is central to the dispute between the parties will not take place until February 2007.

Not surprisingly, Gold Kist opposes Pilgrim’s Motion to Modify October 25, 2006 Scheduling Order, although Gold Kist does not refute that the board election at issue will not take place prior to February 2007. Gold Kist continues to maintain that its Motion for Expedited Hearing should be granted, and Gold Kist reiterates its position that Pilgrim’s proposed slate of officers for Gold Kist’s board runs afoul of Section 8 of the Clayton Act and federal securities laws. Gold Kist also argues that there is no need for factual discovery regarding any harm to Gold Kist, as a per se violation of Section 8 threatens injury both to competition and to Gold Kist. Gold Kist, however, cites no law directly supporting the latter proposition. Further, even if a per se violation of Section 8 automatically threatens Gold Kist with loss or damage, to obtain the injunctive relief Gold Kist requests, Gold Kist still must show that the threatened loss or damage to Gold Kist outweighs the harm Pilgrim’s would suffer if an injunction issues. See BellSouth

Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC, 425 F.3d 964, 968 (11th Cir. 2005) (setting forth standard for preliminary injunction). Thus, the nature and extent of the threatened loss or damage to Gold Kist remains a subject proper for limited discovery, and the Court is of the opinion that limited discovery regarding the potential harms to Gold Kist, Pilgrim's, and the public would aid the Court in reaching an informed decision on Gold Kist's Motion for Preliminary Injunction.

Therefore, having considered the briefs and arguments of the parties, as well as the applicable law, the Court hereby **ORDERS** that Plaintiff Gold Kist, Inc.'s Motion for Expedited Hearing [Doc. No. 15] is **DENIED** and Defendant Pilgrim's Pride Corporation's Motion to Modify October 25, 2006 Scheduling Order [Doc. No. 16] is **GRANTED**. The Court further **ORDERS** that the Order of October 25, 2006 be **MODIFIED** as follows:

1. Pilgrim's Pride Corporation, Protein Acquisition Corporation, O.B. Goolsby, Jr., Gary D. Tucker, Robert L. Hendrix, Joseph C. Moran, Walter F. Shafer, III, Tim Thomas, Michael A. Pruitt, Robert A. Wright, Jane T. Brookshire, and J. Clinton Rivers (referred to collectively as "Defendants") shall file any answer, motion, objection, or other response to the complaint of Gold Kist, Inc. by November 10, 2006;

2. The parties shall conduct limited discovery during the period between November 10, 2006, and December 15, 2006, as necessary to present argument and evidence on Gold Kist's Motion for Preliminary Injunction;

3. Defendants shall file their brief in response to Gold Kist's Motion for Preliminary Injunction by December 22, 2006;

4. Gold Kist shall file its reply brief in support of its Motion for Preliminary Injunction by January 5, 2007; and

5. The Court will hold an evidentiary hearing on Gold Kist's Motion for Preliminary Injunction on **January 16, 2007, at 10:30 a.m.**

SO ORDERED this 2nd day of November, 2006.

s/ CLARENCE COOPER

CLARENCE COOPER

UNITED STATES DISTRICT JUDGE

1. On October 12, 2006, Gold Kist, Inc. (“Plaintiff” or “Gold Kist”) filed its Complaint against Defendants alleging claims for: (1) violation of Section 8 of the Clayton Act; (2) violation of Section 14(a) of the Securities Exchange Act of 1934, as amended (“Exchange Act”); and (3) violation of Section 14(e) of the Exchange Act.

2. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants request that this Court dismiss Gold Kist’s claims under Section 14 of the Exchange Act (Counts Two and Three) because Gold Kist failed to state a claim upon which relief can be granted

3. Specifically, Gold Kist asserts that Defendants made false and misleading disclosures in certain SEC filings by omitting to state that the election of the proposed slate of Gold Kist Board nominees would constitute a violation of the Clayton Act. Gold Kist’s claims fails as a matter of law because neither Section 14(a) nor Section 14(e) require that Defendants make a disclosure that they believe to be false.

4. Because Gold Kist’s Clayton Act claims are disputed, Section 14(a) and Section 14(e) require only a disclosure that advises Gold Kist’s shareholders of

12(b)(2), wherein they object to personal jurisdiction. The current Motion is filed subject to their 12(b)(2) Motion.

the existence of this lawsuit. Defendants adequately and timely disclosed the filing of this lawsuit and the claims asserted herein.

5. Accordingly, Gold Kist failed to state a claim under Section 14(a) or 14(e) of the Exchange Act, and, therefore, Defendants request that the Court dismiss the groundless claims asserted against them.

WHEREFORE, for the foregoing reasons and the reasons stated in Defendants' Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint, Defendants respectfully request that the Court grant their Motion to Dismiss Counts Two and Three pursuant to Federal Rule of Civil Procedure 12(b) (6), and grant them all other relief to which they are entitled at law and in equity.

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(D) of the Local Rules of the Northern District of Georgia, counsel for Defendants hereby certifies that this Motion was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1B.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the foregoing defendants' **MOTION TO DISMISS PLAINTIFF'S EXCHANGE ACT CLAIMS** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

Peter Kontio
Kevin E. Grady
Jay D. Bennett
Theodore J. Sawicki
Kristine McAlister Brown
Valarie C. Williams
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424

This 10th day of November, 2006.

/s/Michael J. Cates
Michael J. Cates

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TABLE OF AUTHORITIES

Cases

<i>Amalgamated Clothing and Textile Workers Union v. J.P. Stevens & Co., Inc.</i> , 475 F. Supp. 328 (S.D.N.Y. 1979)	14-15
<i>Amalgamated Clothing and Textile Workers Union v. Seafarers Int’l Union of N. Am.</i> , 475 F. Supp. 318 (S.D.N.Y. 1979), vacated as moot, 638 F.2d 7 (2d. Cir. 1980)	16
<i>Avnet, Inc. v. Scope Ind.</i> , 499 F. Supp. 1121 (S.D.N.Y. 1980)	13, 17
<i>Bryant v. Avado Brands, Inc.</i> , 187 F.3d 1271 (11th Cir. 1999)	10
<i>Copperweld Corp. v. Imetal</i> , 403 F. Supp. 579 (W.D. Penn. 1975)	17
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FEDERAL REGULATIONS

Defendants Pilgrim's Pride Corporation ("Pilgrim's"), O.B. Goolsby ("Goolsby"), Protein Acquisition Corporation ("PAC"), Gary D. Tucker ("Tucker"), Robert L. Hendrix ("Hendrix"), Joseph C. Moran ("Moran"), Walter F. Schafer, III ("Schafer"), Tim Thomas ("Thomas"), Michael A. Pruitt ("Pruitt"), Robert A. Wright ("Wright"), Jane T. Brookshire ("Brookshire"), and J. Clinton Rivers ("Rivers") (collectively, "Defendants") file this their Memorandum in Support of Motion to Dismiss Plaintiff's Exchange Act Claims (Counts Two and Three) pursuant to Federal Rule of Civil Procedure 12(b)(6), and respectfully state as follows:¹

I. Preliminary Statement

Gold Kist Inc. ("Plaintiff" or "Gold Kist") asserts that Defendants violated Sections 14(a) and 14(e) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), by failing to disclose, as Gold Kist alleges, that the nomination and proposed election of certain individuals to Gold Kist's Board of Directors would cause a violation of Section 8 of the Clayton Act. Gold Kist's assertion fails to state a claim upon which relief can be granted.

¹ Defendants Tucker, Hendrix, Schafer, Thomas, Wright, Brookshire, and Rivers also have filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), wherein they object to personal jurisdiction. The current Motion is filed subject to their Rule 12(b)(2) motion.

Defendants dispute that the nomination and proposed election would cause a violation of Section 8 of the Clayton Act to occur. For this reason, Defendants have affirmatively disclosed in their SEC filings that they intend to vigorously defend against Gold Kist's claims in this lawsuit. Neither Section 14(a) nor Section 14(e) require that Defendants make a disclosure that they believe to be false, which is exactly what Gold Kist would have them do. To the contrary, because Gold Kist's Clayton Act claims are disputed, Defendants are only required to disclose the existence of this lawsuit. Defendants adequately and timely disclosed the filing of this lawsuit and the claims asserted herein.

Accordingly, Gold Kist fails to state a claim under Section 14(a) or 14(e) of the Exchange Act, and the Court should dismiss Counts Two and Three of Plaintiff's Complaint.

II. Plaintiff's Allegations

In early 2006, Pilgrim's approached Gold Kist regarding its interest in acquiring 100% of Gold Kist's common stock. *See* Compl., ¶ 36. This led Pilgrim's and Gold Kist to enter discussions regarding "a potential merger of the two companies." *See id.*

On or about August 18, 2006, Pilgrim's forwarded a letter from Lonnie Pilgrim, its Chairman, to Gold Kist's Board of Directors "with respect to the

proposed combination” of both companies. *See* Compl., ¶ 38, Compl. Ex. E. The letter reiterated Pilgrim’s intention “to acquire 100% of the outstanding common stock of Gold Kist for an aggregate cash consideration of \$20.00 per share,” which “represents approximately a 57% premium over Gold Kist’s closing price of \$12.78 on August 17, 2006.” Compl. Ex. E. The letter confirmed that Pilgrim’s believed “that a combination of Pilgrim’s Pride and Gold Kist will result in substantial value creation for [Pilgrim’s and Gold Kist’s] shareholders, employees, business partners and other constituencies.” *See id.*

In the August 18, 2006 letter, Pilgrim’s also informed Gold Kist that to preserve its flexibility in case a negotiated transaction was not possible with respect to the proposed combination of Pilgrim’s and Gold Kist, Pilgrim’s was giving notice, in accordance with Gold Kist’s bylaws, that Pilgrim’s was submitting: (i) a proposal to adjust the number of directors on Gold Kist’s Board, and (ii) a slate of nine nominees for election by Gold Kist’s shareholders to Gold Kist’s Board at the upcoming annual meeting of shareholders. *See id.* According to Plaintiff’s Complaint, the annual meeting will “be held in January or February of 2007.” *See* Compl., ¶ 37. Pilgrim’s continued that “[w]hile our goal remains to work together with Gold Kist to agree to a negotiated transaction, the lack of progress in our discussions to date has caused us to make our appeal directly to

your shareholders.” *See id.* Pilgrim’s closed the letter by expressing Pilgrim’s sincere “wish to move forward with Gold Kist to finalize a definitive agreement to combine Pilgrim’s and Gold Kist.” *See id.*

On August 18, 2006, Pilgrim’s issued a press release announcing that Pilgrim’s had submitted to the Gold Kist Board its proposal to acquire Gold Kist for \$20.00 per share in cash. The press release included the full text of Pilgrim’s August 18, 2006 letter. Also on August 18, 2006, Pilgrim’s filed its press release with the Securities and Exchange Commission (“SEC”) under cover of a Schedule 14A pursuant to Section 14(a) of the Exchange Act and Rule 14a-12 thereunder. *See* Compl., ¶¶ 3 and 38; *see also* Pilgrim’s Schedule 14A filed on August 18, 2006 at 3 of 6, a true and correct copy of which is attached hereto as Exhibit “1.”

On August 24, 2006, Pilgrim’s filed a copy of its August 18, 2006 press release with the SEC pursuant to Rule 425 under the Securities Exchange Act of 1933, as amended (“Securities Act”), under which the press release is also deemed filed pursuant to Rule 14a-12 and Rule 14d-2 under the Exchange Act. *See* Pilgrim’s Rule 425 Filing dated August 24, 2006, a true and correct copy of which is attached hereto as Exhibit “2.” Pilgrim’s Rule 425 filing identified Mr. Goolsby’s proposed nominees to the Gold Kist Board: Brookshire; Hendrix; Moran; Pruitt; Rivers; Shafer; Thomas; Tucker; and Wright (the “Nominees”). *See*

id. at 5 of 5. It also disclosed the Nominees' respective positions with Pilgrim's and certain information with respect to the directors and officers of Pilgrim's. *See id.*

On or about September 29, 2006, Pilgrim's filed its Tender Offer Statement with the SEC under Section 14(d)(1) of the Exchange Act. *See* Compl., ¶¶ 4 and 40, Ex. A-B.110. Attached to the Tender Offer Statement at Ex. (A)(1) is Pilgrim's Offer to Purchase for Cash All Outstanding Shares of Common Stock (including the Associated Common Stock and Series A Junior Participating Preferred Stock Purchase Rights) of Gold Kist at \$20.00 Net Per Share ("Offer to Purchase"). *See* Compl., ¶¶ 4 and 40, Ex. B. The Offer to Purchase stated that Pilgrim's formed PAC, a wholly owned subsidiary of Pilgrim's, "with the intent of acquiring Gold Kist and making Gold Kist a subsidiary of Pilgrim." *See* Compl., ¶ 40, Ex. B. The Offer to Purchase disclosed that Pilgrim's seeks to: (1) designate Goolsby as the presiding officer at Gold Kist's 2007 annual meeting, (2) increase the number of directors constituting Gold Kist's entire Board of Directors to 15, and (3) fill the newly created directorships and three positions on Gold Kist's Board scheduled to expire at Gold Kist's 2007 Annual Meeting with the Nominees, who are specifically named. *See* Compl., ¶¶ 4 and 40, Ex. B. The Offer to Purchase further states that the avowed purpose of the Nominees seeking election

to Gold Kist's Board is, subject to fulfillment of their fiduciary duties that they would have as directors of Gild Kist, to remove certain obstacles designed to frustrate Pilgrim's tender offer and to "take any other action that may be desirable or necessary to expedite prompt consummation of the Offer and the Merger." *See Id.*

On October 12, 2006, Gold Kist filed this lawsuit. On the same date, Pilgrim's filed Amendment No. 2 to its Tender Offer Statement, which disclosed the following:

On October 12, 2006, [Gold Kist] announced that it had filed a complaint in federal court for the Northern District of Georgia against [Pilgrim's], [PAC], and the Nominees. The complaint alleges that the election of the Nominees to the Board would violate Section 8 of the Clayton Act and seeks to enjoin [Pilgrim's] solicitation of [Gold Kist's] stockholders to elect such persons to the Board. The complaint also alleges that [Pilgrim's] violated the Commission's proxy and tender offer rules by failing to disclose such alleged violation of the Clayton Act. [Pilgrim's] intends to vigorously defend the lawsuit.

See Pilgrim's Amendment No. 2 to Tender Offer filed on October 12, 2006 at 3-4 of 8, a true and correct copy of which is attached hereto as Exhibit "3."

On October 24, 2006, Pilgrim's filed Amendment No. 6 to its Tender Offer Statement and disclosed:

On October 23, 2006, [Gold Kist] moved for a preliminary injunction in its pending action against [Pilgrim's], [PAC] and the [Nominees] in the United States District Court for the Northern District of Georgia.

[Gold Kist's] motion reiterates its claims in the Complaint that the election of the [Nominees] to [Gold Kist's] Board would violate prohibitions on interlocking directorates under Section 8 of the Clayton Act and that [Pilgrim's] omission of such alleged violations from its proxy materials and the Offer to Purchase constitute material omissions from such documents in alleged violation of the Exchange Act and the Commission's proxy and tender offer rules. [Gold Kist] requests that the Court enjoin [Pilgrim's] from pursuing the election of the [Nominees] to the Board unless and until [Pilgrim's] first acquires [Gold Kist]. [Gold Kist] also seeks an order requiring [Pilgrim's] and [PAC] to withdraw the Offer "permanently" or, at a minimum, until "corrective disclosure" is made regarding the allegations in [Gold Kist's] Complaint. [Gold Kist] further asks the Court to grant the other injunctive relief requested in the Complaint, which includes a request that [PAC] immediately withdraw its Notice of Stockholder Proposals and Director Nominations of August 18, 2006 (the "Notice"), the proposals contained with the Notice, and the proxy materials. The defendants' Answer to [Gold Kist's] Complaint is due November 10, 2006, and the Court has not yet fixed a briefing schedule or a hearing date for [Gold Kist's] preliminary injunction motion. [Pilgrim's] intends to vigorously defend against the motion and lawsuit.

See Pilgrim's Amendment No. 6 to Tender Offer filed on October 24, 2006 at 3 of 8, a true and correct copy of which is attached hereto as Exhibit "4."

Gold Kist's Section 14 allegations fail to state claims upon which relief can be granted as a matter of law because (1) neither Section 14(a) nor Section 14(e) require that Defendants make a disclosure that they believe to be false, and (2) Pilgrim's adequately, timely and publicly disclosed in SEC filings Gold Kist's

III. Argument and Authorities

A. Standard for Motion to Dismiss

Under Rule 12(b)(6), all facts set forth in a plaintiff's complaint are accepted as true. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). A motion to dismiss will be granted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Interland, Inc. v. Bunting*, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112, *5-6 (N.D. Ga. Mar. 31, 2005) (citation omitted). However,

² Gold Kist's claim under Section 8 of the Clayton Act ("Section 8") (Count One) also fails as a matter of law. Gold Kist does not have standing to bring a claim against Defendants for violation of Section 8. Moreover, even if Gold Kist were deemed to have standing, its claims would fail on the merits because all of the elements cannot be proved and because Section 8 does not apply in the context of an acquisition of Gold Kist by Pilgrim's. Pilgrim's intends to address fully the legal, and factual, deficiencies of Gold Kist's Section 8 claim in connection on or about December 22, 2006, the date currently set by this Court for Pilgrim's to file its response to Gold Kist's Motion for Preliminary Injunction. Defendants also intend to file their Answer to the Complaint within ten days after notice of the Court's action on Defendants' Motion to Dismiss Plaintiff's Exchange Act Claims and the Motion to Dismiss for Lack of Personal Jurisdiction. *See* Fed. R. Civ. P. 12(a)(4)(A); *see also Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247, 249 (W.D.N.Y. 1998) (to avoid duplicative sets of pleadings in the event that a 12(b) motion is denied, the weight of case authority holds that the filing of a motion that only addresses part of a complaint suspends the time to respond to the entire complaint).

the allegations in a plaintiff's complaint are not necessarily "facts." For instance, "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Id.* The "duty to liberally construe a plaintiff's complaint in the face of a motion to dismiss is not the equivalent of a duty to re-write it." *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 912 (11th Cir. 1993). And although Rule 8(a) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," a complaint must still contain either direct or inferential allegations respecting all material elements of a cause of action. *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001). "Thus, at a minimum, notice pleading requires that a complaint contain inferential allegations from which we can identify each of the material elements necessary to sustain a recovery under some viable legal theory." *Id.*

While matters outside of the pleadings generally cannot be considered when ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), documents attached to the complaint may be considered without converting the motion to one for summary judgment. Fed. R. Civ. P. 10(c); *Solis-Ramirez v. U.S. Dept. of Justice*, 758 F.2d 1426, 1429-30 (11th Cir. 1985); see also *Gold Kist, Inc. v. Land O'Lakes, Inc.*, No. 1:06-CV-0189-CC, Docket Entry No. 22, Order on

Motion to Dismiss (August 1, 2006). Likewise, a court may take judicial notice of documents in the public record, including documents filed with the SEC, and may consider such documents in determining a motion to dismiss without converting it into a motion for summary judgment. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1277-78 (11th Cir. 1999).

B. As a Matter of Law, Pilgrim's Timely Disclosed Gold Kist's Allegation that It Believes Pilgrim's Violated the Clayton Act.

Section 14(a) and Rule 14a-9 prohibit the making of statements that are:

false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

See 78 U.S.C. 78n(a) (1997); 17 C.F.R. 240.14a-9 (1979).

Section 14(e) makes it unlawful to:

make an untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading

See 89 U.S.C. 78n(e).

Gold Kist fails to state a claim upon which relief can be granted under either Section 14(a) or 14(e) because Pilgrim's timely disclosed the identities of its slate of Nominees, its intention to combine Pilgrim's and Gold Kist and, immediately

following the filing of this lawsuit, Gold Kist's claim that Pilgrim's proposal would violate Section 8:

- On August 18, 2006, Pilgrim's publicly disclosed in an SEC filing its proposal to acquire Gold Kist, its proposal to adjust the number of Directors on the Gold Kist Board, and its slate of nine nominees for election to Gold Kist's Board. *See* Compl., ¶¶ 3 and 38; *see also* Ex. 1 at 4 of 6, Pilgrim's Schedule 14A filed on August 18, 2006.
- On August 24, 2006, Pilgrim's further publicly disclosed in an SEC filing the names and titles of the Nominees. *See id.*
- On September 29, 2006, Pilgrim's filed a Tender Offer Statement, including as an exhibit thereto the Offer to Purchase. In addition to setting forth the Offer, the Tender Offer Statement disclosed Pilgrim's intention to: (1) propose the designation of Goolsby as the presiding officer at Gold Kist's 2007 annual meeting; (2) propose an increase in the number of directors constituting Gold Kist's entire Board of Directors; and (3) solicit proxies to elect the Nominees, who were specifically named to fill both the (i) directorships created by the Board increase and (ii) three positions on the Gold Kist Board that are scheduled to expire at Gold Kist's 2007 Annual Meeting. *See*

Compl., ¶¶ 4 and 40, Ex. B. The Offer to Purchase again disclosed that the avowed purpose of the Nominees' seeking election to Gold Kist's Board was, subject to fulfillment of their fiduciary duties that they would have as directors of Gold Kist, to remove certain obstacles designed to frustrate Pilgrim's tender offer and to "take any other action that may be desirable or necessary to expedite prompt consummation of the Offer and the Merger." See Compl., ¶¶ 4, 40 and 44, Ex. B.

- On October 12, 2006 and October 24, 2006, Pilgrim's disclosed in its SEC filings that Gold Kist commenced this litigation and that Gold Kist alleged, among other things, that the election of the Nominees to the Board would violate Section 8 of the Clayton Act. See Ex. 3 at 3-4 of 8, Pilgrim's Amendment No. 2 to Tender Offer filed on October 12, 2006; see also Ex. 4 at 3 of 8, Pilgrim's Amendment No. 6 to Tender Offer filed on October 24, 2006.

Notwithstanding the foregoing disclosures, Gold Kist alleges that Pilgrim's violated Section 14(a) and Section 14(e) of the Exchange Act by failing to "disclose that their proxy solicitation and proposed [election of the slate] of directors violates Section 8 of the Clayton Act. . . ." See Compl., ¶¶ 67, 74. Gold

Kist's claims under Section 14 are based on the false premise that because Gold Kist believes that the election of the slate of Nominees would violate the Clayton Act (a position that is and disputed by Pilgrim's as reflected in its SEC filings, see Ex. 3 at 3-4 of 8, Pilgrim's Amendment No. 2 to Tender Offer filed on October 12, 2006; see also Ex. 4 at 3 of 8, Pilgrim's Amendment No. 6 to Tender Offer filed on October 24, 2006), Pilgrim's is obligated to make an unqualified disclosure that would concede defeat to Gold Kist's Clayton Act claims. In other words, Gold Kist's claims are premised on the notion that federal securities laws require Pilgrim's to confess judgment. This is simply wrong. "Where there is a genuine and vigorous dispute as to the fact that illegal conduct occurred, only a good faith disclosure of the issue and the possible liability of the offeror is required by the Williams Act." See *Reylon, Inc. v. Pantry Pride, Inc.*, 621 F. Supp. 804, 812 (D. Del. 1985) (citing *Avnet, Inc. v. Scope Ind.*, 499 F. Supp. 1121, 1124-26 (S.D.N.Y. 1980)).³

³ Even Gold Kist has not declared guaranteed victory in its SEC filings. Rather, Gold Kist has made the **qualified** disclosure in its SEC filings that it "**alleges** that Pilgrim's attempt to add nine of its own officers to the Board of Directors of Gold Kist would, if successful, violate Section 8 of the Clayton Act." Gold Kist, therefore, has not made an **unqualified** disclosure that the Pilgrim's proposal **is** illegal. See Gold Kist's Schedule 14D-9 filed on October 12, 2006 at 9 of 22 (emphasis added), a true and correct copy of which is attached hereto as Exhibit "5." Gold Kist asserts, nevertheless, that Pilgrim's is required to make such an **unqualified** disclosure. If Gold Kist has determined for its own SEC filings that it is not obligated to state, as unqualified fact, that Pilgrim's proposal is illegal (even though it makes that claim in this lawsuit), Gold Kist should be precluded from asserting that Pilgrim's is required by law to make such unqualified disclosures in its SEC filings.

In *Missouri Portland Cement Co. v. Cargill, Inc.*, the Second Circuit rejected the notion that an offeror in the context of a tender offer is obligated to disclose under Section 14 that its tender offer will embroil the target company in an antitrust violation. *Missouri Portland Cement Co. v. Cargill Inc.*, 498 F.2d 851, 872 (2d. Cir. 1974). As the court eloquently stated, “[c]ourts should tread lightly in imposing a duty of self-flagellation on offerors with respect to matters that are known as well, or almost as well, to the target company; some issues concerning a contested tender offer can safely be left for the latter’s riposte.” The court also noted that the possibility that an acquisition may result in antitrust violations is a possibility that exists with every merger, and, therefore, it need not be disclosed to the shareholders of the target company. *Id.* at 873 n.44.

Section 14 does not require that parties disclose “self-accusation of illegal intentions.” See *Amalgamated Clothing and Textile Workers Union v. J.P. Stevens & Co., Inc.*, 475 F. Supp. 328, 332 (S.D.N.Y. 1979). In *Amalgamated Clothing and Textile Workers Union*, the court rejected on a motion to dismiss the target company’s claim that the offeror violated Section 14 by failing to disclose that its

slate of nominees for election to the target company's board intended to violate the labor laws. *Id.*

No matter how the proxy rule is construed, indeed even if it explicitly stated such a duty, corporate management would not announce in proxy literature an intention to violate laws. It is simply contrary to human nature. The rule, if it were construed to require this, would never succeed in its purpose of bringing such disclosure to shareholders. It would do nothing more than license retrospective litigation, casting doubts on the results of shareholder elections and the legitimacy of management. Such an interpretation would not enhance the accomplishment of the purposes of the proxy rules, but would only create litigation and insecurity in the tenure of management.

Id. (internal quotations omitted). The court concluded that a finding that the proxy rules require disclosure of illegal intentions "would miss the forest for the trees" and "would make a silly, unworkable rule." *Id.* Rather than promote increased disclosure, such a rule would "serve only to support vexatious litigation and abusive discovery." *Id.*; see also *West Point-Pepperell, Inc. v. Farley, Inc.*, 711 F. Supp. 1088, 1094 (N.D. Ga. 1988) ("[w]here a good faith dispute exists as to facts or an alleged legal violation, the law only requires disclosure of the dispute").

Gold Kist's interpretation of Section 14(a) and 14(e) is also contrary to the purpose of Section 14. See *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) (pursuant to the Williams Act, "[b]y requiring disclosure of information to the target corporation as well as the Securities and Exchange Commission,

Congress intended to do no more than give incumbent management an opportunity to express and explain its position. Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids. . . .”); see also *Amalgamated Clothing and Textile Workers Union v. Seafarers Int’l Union of N. Am.*, 475 F. Supp. 318, 321-322 (S.D.N.Y. 1979), *vacated as moot*, 638 F.2d 7 (2d. Cir. 1980). When Congress enacted Section 14, it was convinced that “takeover bids should not be discouraged because they serve the useful purpose in providing a check on entrenched but inefficient management.” *Edgar v. Mite Corp.*, 457 U.S. 624, 633 (1982) (quoting S. Rep. No. 550, 90th Cong., 1st Sess., 3 n.9 (1967) (Senate Report)). Section 14 is not intended “to be utilized solely for the benefit of incumbent management or control groups ‘jockeying’ for corporate power.” *Ronson Corp. v. Liquifin Aktiengesellschaft*, 370 F. Supp. 597, 601 (D.N.J. 1974). To allow Gold Kist to use Section 14 as a defensive weapon against Pilgrim’s tender offer would defeat the purpose of Section 14.

Finally, Section 14 does not require a company to disclose information that is contrary to the company’s belief. The rationale behind this principle is clear – a requirement that the company disclose what it believes to be false and misleading information would itself result in a violation of Section 14, which was enacted to prevent such false and misleading statements. This proverbial “Catch-22” is not

supported, or required, by Section 14. Nevertheless, this is exactly Gold Kist's position. If Pilgrim's were obligated to state in a public filing that it intended by the election of its slate of Nominees to violate the Clayton Act—a statement that Pilgrim's does not believe as reflected in its SEC filings—its SEC filing would contain false and misleading representations in violation of Section 14(e). *Avnet, Inc.* 499 F. Supp. at 1126 (S.D.N.Y. 1980) (holding that defendant is not required to state that it is an unregistered investment company, as alleged by plaintiff, because the contents of the statement would be contrary to the defendant's belief and, therefore, may render its SEC filing false and misleading).

At most, Pilgrim's only was required to disclose the *possibility* of an antitrust violation (which its disclosure of this litigation on October 12 and October 24, 2006 accomplished); it was not required to admit guilt. See *Copperweld Corp. v. Metal*, 403 F. Supp. 579, 606 (W.D. Penn. 1975). Pilgrim's SEC filings between August and October 2006 adequately disclosed all of the material facts that a reasonable shareholder would consider important in deciding how to vote. *TSC Ind., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *United States v. Ginsburg*, 362 F.3d 1292, 1302 (11th Cir. 2004). As such, Pilgrim's has complied fully with its SEC disclosure obligations. Gold Kist's claims under Section 14(a) or Section 14(e) are meritless and should be dismissed as a matter of law.

IV. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion to Dismiss Counts Two and Three pursuant to Federal Rule of Civil Procedure 12(b)(6), and grant them all other relief to which they are entitled at law and in equity.

Respectfully submitted, this 10th day of November, 2006.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(D) of the Local Rules of the Northern District of Georgia, counsel for Defendants hereby certifies that this Memorandum was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1B.

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2006, I presented **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S EXCHANGE ACT CLAIMS** to the Clerk of the Court for filing and uploading to the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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/s/ Michael J. Cates
Michael J. Cates

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GOLD KIST INC.,
Plaintiff,

v.

PILGRIM'S PRIDE CORPORATION, et
al.,

Defendants.

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CIVIL ACTION FILE
NO. 1:06-CV-2441

DEFENDANTS' MOTION TO DISMISS
FOR LACK OF PERSONAL JURISDICTION

Pursuant to Federal Rule of Civil Procedure 12(b)(2), Defendants Gary D. Tucker, Robert L. Hendrix, Walter F. Shafer, III, Tim Thomas, Robert A. Wright, Jane T. Brookshire, and J. Clinton Rivers (collectively "Individual Defendants") hereby move to dismiss Plaintiff's Complaint for lack of personal jurisdiction.

As set forth more fully in the accompanying brief, this Court does not have personal jurisdiction over the Individual Defendants. The Complaint does not allege that the Individual Defendants had any contacts with this forum, much less any specific contacts that purportedly would give rise to Plaintiff's suit. As a result, there is no basis upon which this Court can exercise jurisdiction over the

Individual Defendants without violating the due process clause of the Fourteenth Amendment.

WHEREFORE, Defendants Gary D. Tucker, Robert L. Hendrix, Walter F. Shafer, III, Tim Thomas, Robert A. Wright, Jane T. Brookshire, and J. Clinton Rivers respectfully request that this Court grant their motion to dismiss.

Respectfully submitted, this 10th day of November, 2006.

Of Counsel:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(D) of the Local Rules of the Northern District of Georgia, counsel for Defendants hereby certifies that this Motion was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1B.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 10th day of November, 2006.

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Michael J. Cates

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GOLD KIST INC.,
Plaintiff,

v.

PILGRIM'S PRIDE CORPORATION, et
al.,

Defendants.

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CIVIL ACTION FILE
NO. 1:06-CV-2441

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**

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Defendants Gary D. Tucker (“Tucker”), Robert L. Hendrix (“Hendrix”), Walter F. Shafer, III (“Shafer”), Tim Thomas (“Thomas”), Robert A. Wright (“Wright”), Jane T. Brookshire (“Brookshire”), and J. Clinton Rivers (“Rivers,” collectively the “Individual Defendants”)¹ file this memorandum of points and authorities in support of their motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2) and show as follows.

I. PRELIMINARY STATEMENT

In an effort to further entrench corporate management and dodge marketplace forces, Plaintiff filed the instant lawsuit against Pilgrim’s Pride Corporation (“Pilgrim’s”), Protein Acquisition Corporation, Inc. (“PAC”), Goolsby, Moran, Pruitt and the Individual Defendants. The Individual Defendants consist of employees of Pilgrim’s who were named as defendants (in their individual capacity) in the action in blatant disregard of the fundamental requirements of personal jurisdiction. Plaintiff’s claims against the Individual

¹ Defendants O.B. Goolsby (“Goolsby”), Joseph Moran (“Moran”) and Michael Pruitt (“Pruitt”) were individually named as Defendants in this lawsuit but are not joining in the instant motion to dismiss for lack of personal jurisdiction. Defendants Goolsby, Moran and Pruitt are expressly not included in the definition of “Individual Defendants,” as used herein.

Defendants are based on the single allegation that they consented to have their names listed on a proposed slate of nominees to the Gold Kist Board.²

Plaintiff's Complaint fails to allege sufficient facts to support a finding of personal jurisdiction over the Individual Defendants. The Individual Defendants work and reside in Texas and do not have – and have not had – the requisite minimum contacts with Georgia as required under both the United States Constitution and the Georgia Long-Arm Statute. The dearth of jurisdictional allegations alone support dismissal of the claims against the Individual Defendants. Moreover, as detailed in the attached declarations of the Individual Defendants, the Individual Defendants do not maintain the requisite minimum contacts with Georgia to support an exercise of personal jurisdiction over them. Maintenance of this suit in Georgia would offend traditional notions of fair play and substantial justice. Therefore, the Individual Defendants respectfully submit that Plaintiff's claims against the Individual Defendants should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

² Additional relevant factual background is set forth more fully in Defendants' Motion to Dismiss Plaintiff's Exchange Act Claims, filed concurrently herewith. For purposes of brevity and judicial efficiency, Defendants incorporate by reference the entirety of Section II of Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss Exchange Act Claims.

II. FACTS

Individual Defendants are not Georgia residents and do not have sufficient contacts with Georgia to be subject to personal jurisdiction in Georgia.

A. **Walter F. Shafer, III**

As detailed in the attached declaration of Shafer, *see* Ex. 1, Declaration of Walter Shafer, III (“Shafer Decl.”), he has been an employee of Pilgrim’s for 15 years and his current title is Executive Vice President Prepared Foods. Shafer’s office is in Pittsburg, Texas, where the corporate headquarters of Pilgrim’s is located. He also resides in Pittsburg, Texas. Shafer does not maintain an office in Georgia, has never worked in Georgia, has never had a mailing address, post office box or telephone listing in Georgia, has never owned or rented real property in Georgia, has never had any personal bank accounts in Georgia, and has never paid any taxes in Georgia. Within the scope of his employment with Pilgrim’s and in a corporate capacity, he has traveled to Georgia for business purposes related to the Pilgrim’s’ Prepared Food plants. None of these travels to Georgia relate to the potential acquisition of Gold Kist or the underlying claims in the pending lawsuit. In his individual capacity, he has never traveled to Georgia for personal reasons with the exception of one football game last year and has never been involved in a lawsuit in Georgia, as a plaintiff or defendant. In his individual capacity, he has

never purposefully or intentionally directed any activities or conduct toward Georgia. Nor, in his individual capacity, has Shafer ever engaged in any regular, continuous or ongoing relationships with Georgia.

B. Tim Thomas

As detailed in the attached declaration of Thomas, *see* Ex. 2, Declaration of Tim Thomas (“Thomas Decl.”), he has been an employee of Pilgrim’s for 20 years and his current title is Senior Vice President Procurement. Thomas’s office is in Pittsburg and he resides in Mount Pleasant, Texas. He does not maintain an office in Georgia, has never worked in Georgia, has never had a mailing address, post office box or telephone listing in Georgia, has never owned or rented real property in Georgia, has never maintained any personal bank accounts in Georgia and has never paid any taxes in Georgia. Within the scope of his employment with Pilgrim’s and in a corporate capacity, Thomas has traveled to Georgia for business purposes and to attend industry conventions and meetings. None of these travels to Georgia relate to the potential acquisition of Gold Kist or the underlying claims in the pending lawsuit. In his individual capacity, he has never traveled to Georgia for personal reasons and has never been involved in a lawsuit in Georgia, as a plaintiff or defendant. In his individual capacity, he has never purposefully or intentionally directed any activities or conduct toward Georgia. Nor, in his

individual capacity, has Thomas ever engaged in any regular, continuous or ongoing relationships with Georgia.

C. Jane Brookshire

As detailed in the attached declaration of Brookshire, *see* Ex. 3, Declaration of Jane Brookshire (“Brookshire Decl.”), she has been an employee of Pilgrim’s since January 2001 and her current title is Executive Vice President Human Resources. Brookshire’s office is in Pittsburg, Texas; she does not maintain an office in Georgia. Brookshire currently resides in Mount Pleasant, Texas, but briefly lived in Georgia from the summer of 1972 to the summer of 1973 while her Marine Corps husband was stationed at Fort Benning. Other than her brief residence and employment in Georgia during that one year time period, Brookshire has not worked in Georgia, and has not had a mailing address, post office box or telephone listing in Georgia. Brookshire has never owned or rented real property in Georgia, has never maintained any personal bank accounts in Georgia and has never paid any taxes in Georgia. Within the scope of her employment with Pilgrim’s and in a corporate capacity, Brookshire has traveled to Georgia for business purposes and to attend industry conventions and meetings. None of these travels to Georgia relate to the potential acquisition of Gold Kist or the underlying claims in the pending lawsuit. In her individual capacity, she has made a few

personal trips to Georgia to visit friends of her husband. Brookshire has never been involved in a lawsuit in Georgia, as a plaintiff or defendant. In her individual capacity, she has not purposefully or intentionally directed activities or conduct toward Georgia since 1973. Nor, in her individual capacity, has Brookshire engaged in any regular, continuous or ongoing relationships with Georgia since 1973.

D. Robert Wright

As detailed in the attached declaration of Wright, *see* Ex. 4, Declaration of Robert Wright (“Wright Decl.”), he has been an employee of Pilgrim’s for three years and his current title is Executive Vice President Turkey and Sales and Marketing. Wright’s office is in Pittsburg, Texas; he does not maintain an office in Georgia. Wright resides in Longview, Texas, but briefly lived in Albany, Georgia from 1993 to 1995. Other than his brief residence and employment in Georgia during that time period, Wright has not worked in Georgia, and has not had a mailing address, post office box or telephone listing in Georgia. In the last ten years, Wright has not owned or rented real property in Georgia, maintained any personal bank accounts in Georgia and has never paid any taxes in Georgia. Within the scope of his employment with Pilgrim’s and in a corporate capacity, he has traveled to Georgia for business purposes and to attend business meetings.

None of these travels to Georgia relate to the potential acquisition of Gold Kist or the underlying claims in the pending lawsuit. In his individual capacity, Wright has not traveled to Georgia for personal reasons. In his individual capacity, he has not purposefully or intentionally directed activities or conduct toward Georgia in the last ten years. Nor, in his individual capacity, has Wright engaged in any regular, continuous or ongoing relationships with Georgia in the last ten years.

E. Gary Tucker

As detailed in the attached declaration of Tucker, *see* Ex. 5, Declaration of Gary Tucker (“Tucker Decl.”), he has been an employee of Pilgrim’s since June 2003 and his current title is Senior Vice President, Corporate Controller. Tucker’s office is in Pittsburg, Texas and he resides in Pittsburg, Texas. He also maintains a residence in Oklahoma City, Oklahoma. He does not maintain an office in Georgia, has never worked in Georgia, has never had a mailing address, post office box or telephone listing in Georgia, has never owned or rented real property in Georgia, has never maintained any personal bank accounts in Georgia and has never paid any taxes in Georgia. Within the scope of his employment with Pilgrim’s and in a corporate capacity, Tucker has traveled to Georgia for business purposes related to the operations of Pilgrim’s in Georgia and to attend industry meetings and seminars. None of these travels to Georgia relate to the potential

acquisition of Gold Kist or the underlying claims in the pending lawsuit. In his individual capacity, Tucker has never traveled to Georgia for personal reasons, with the exception of two short trips to Georgia earlier this year. Tucker has never been involved in a lawsuit in Georgia, as a plaintiff or defendant. In his individual capacity, he has never purposefully or intentionally directed any activities or conduct toward Georgia. Nor, in his individual capacity, has Tucker ever engaged in any regular, continuous or ongoing relationships with Georgia.

F. Robert Hendrix

As detailed in the attached declaration of Hendrix, *see* Ex. 6, Declaration of Robert Hendrix (“Hendrix Decl.”), he has been an employee of Pilgrim’s for 32 years and his current title is Executive Vice President Tray Pack. Hendrix’s office is in Pittsburg, Texas and he also resides in Pittsburg, Texas. Hendrix does not maintain an office in Georgia, has never worked in Georgia, has never had a mailing address, post office box or telephone listing in Georgia, has never owned or rented real property in Georgia, has never had any personal bank accounts in Georgia, nor has he ever paid any taxes in Georgia. Within the scope of his employment with Pilgrim’s and in a corporate capacity, Hendrix has traveled to Georgia for business purposes related to Pilgrim’s Pride’s plants in Georgia one time in the last five years and has had communications with other Pilgrim’s Pride

employees regarding business matters. None of these travels or communications to Georgia relate to the potential acquisition of Gold Kist or the underlying claims in the pending lawsuit. In his individual capacity, he has never traveled to Georgia for personal reasons (with the exception of attending the Southeastern Conference basketball tournament for four days) and has never been involved in a lawsuit in Georgia, as a plaintiff or defendant. In his individual capacity, he has never purposefully or intentionally directed any activities or conduct toward Georgia. Nor, in his individual capacity, has Hendrix ever engaged in any regular, continuous or ongoing relationships with Georgia.

G. J. Clinton Rivers

As detailed in the attached declaration of Rivers, *see* Ex. 7, Declaration of Clinton Rivers (“Rivers Decl.”), he has been an employee of Pilgrim’s for 17 years and his current title is Chief Operating Officer. Rivers’ office is in Pittsburg, Texas and he resides in Mount Pleasant, Texas. Rivers does not maintain an office in Georgia, and has never worked in Georgia. Rivers was born in Georgia, however, he moved to Virginia approximately thirty-five (35) years ago and has not lived in Georgia since that move. Rivers has not had a mailing address, post office box or telephone listing in Georgia since he left Georgia approximately thirty-five (35) years ago. Rivers has never owned or rented real property in

Georgia, has never had any personal bank accounts in Georgia, nor has he ever paid any taxes in Georgia. Within the scope of his employment with Pilgrim's and in a corporate capacity, Rivers has traveled to Georgia for business purposes related to Pilgrim's Pride's plants in Georgia and has had communications with other Pilgrim's Pride employees regarding business matters. None of these travels or communications to Georgia relate to the potential acquisition of Gold Kist or the underlying claims in the pending lawsuit. In his individual capacity, he briefly visits Georgia several times a year (usually for two or four days) to visit family. In his individual capacity, he has never purposefully or intentionally directed any activities or conduct toward Georgia. Nor, in his individual capacity, has Rivers ever engaged in any regular, continuous or ongoing relationships with Georgia.

III. ARGUMENT AND ANALYSIS

A. Plaintiff Cannot Meet Its Burden of Establishing Personal Jurisdiction Over the Individual Defendants.

On a motion to dismiss for lack of personal jurisdiction, the party attempting to invoke federal court jurisdiction over a non-resident defendant bears the burden of establishing the Court's jurisdiction. *Payne v. Kristofferson*, 631 F. Supp. 39, 41 (N.D. Ga. 1985). The plaintiff must allege sufficient facts to establish the basis for the exercise of personal jurisdiction. *Commercial Cas. Ins. Co. v. BSE Mgmt., Inc.*, 734 F. Supp. 511, 514 (N.D. Ga. 1990). "When a defendant raises through

affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents.” *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 627 (11th Cir. 1996).

As detailed herein, the Individual Defendants have more than satisfied their burden of establishing the lack of personal jurisdiction and, accordingly, the burden shifts. Plaintiff is required to prove the existence of statutory and constitutional support for the exercise of personal jurisdiction over the Individual Defendants. This, Plaintiff cannot do.

Plaintiff’s Complaint fails to assert sufficient facts to establish the basis for personal jurisdiction over the Individual Defendants. Plaintiff fails to even specify whether any alleged personal jurisdiction is general or specific. Moreover, Plaintiff fails to allege the nature or regularity of any contacts between the Individual Defendants and the State of Georgia. Plaintiff simply fails to satisfy its burden of establishing a basis for finding personal jurisdiction over any of the Individual Defendants.

B. Georgia’s Long-Arm Statute Does Not Extend To The Individual Defendants.

A federal court’s jurisdiction over a non-resident defendant is controlled by the laws of the forum state. Fed. R. Civ. P. 4(e). The reach of the Georgia long-

arm statute is a question of Georgia law. Therefore, federal courts are required to construe it as would the Georgia Supreme Court. *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). Georgia's long-arm statute provides:

A court of this state may exercise personal jurisdiction over any non-resident . . . as to a cause of action arising from any acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

- (1) Transacts any business within this state;
- (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act; or
- (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state. . . .

O.C.G.A. § 9-10-91.

Subsection 1 of the state's long-arm statute has been interpreted broadly by the Georgia Supreme Court. In *Innovative Clinical and Consulting Services v. First National Bank of Ames*, the Georgia Supreme Court "granted Georgia courts the unlimited authority to exercise personal jurisdiction over any non-resident who transacts any business in this State." *Innovative Clinical*, 279 Ga. 672, 673 (2005). However, this broad exercise of jurisdiction is limited to the extent required by procedural due process. *Id.* Even a broad interpretation of Subsection 1 does not support jurisdiction over the Individual Defendants in this case because none of the Individual Defendants "transact business" in Georgia in their individual capacities.

Subsection 2 is not applicable because the Individual Defendants did not conduct any act or omission, in their individual capacities, in Georgia. *See* Shafer Decl., ¶¶ 7-10; Thomas Decl., ¶¶ 7-10; Brookshire Decl., ¶¶ 7-10; Wright Decl., ¶¶ 8,-10; Tucker Decl., ¶¶ 7-10; Hendrix Decl., ¶¶ 7-10; Rivers Decl., ¶¶ 7-10. Equally inapplicable, Subsection 3 requires “regular,” “persistent” or “substantial” contact with this State in order for Georgia courts to exercise personal jurisdiction over non-resident tortfeasors. *See id.* None of the Individual Defendants have regular, persistent, substantial or continuous contacts with Georgia in their individual capacities. *See id.*

For these reasons, the Individual Defendants are not subject to Georgia’s long-arm jurisdiction pursuant to O.C.G.A. § 9-10-91 and, therefore, this Court lacks personal jurisdiction over the Individual Defendants.

C. NONE OF THE INDIVIDUAL DEFENDANTS HAVE THE REQUISITE MINIMUM CONTACTS WITH GEORGIA TO SUPPORT PERSONAL JURISDICTION.

Assuming *arguendo* that the reach of the Georgia long-arm statute extends to each Individual Defendant, this Court must next engage in a two-part inquiry to determine whether that reach comports with due process. *Sculptchair*, 94 F.3d at 630. First, each Individual Defendant must have established “minimum contacts” with Georgia. *Id.* Second, the exercise of personal jurisdiction over each Individual Defendant must not offend traditional notions of fair play and

substantial justice. *Id.*; *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994).

“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a non-resident defendant,” *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 1088 (1987), by protecting “an individual’s liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful ‘contacts, ties or relations.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (citations omitted). Thus, the constitutional touchstone in the determination of whether the exercise of personal jurisdiction is proper “remains whether the defendant purposefully established ‘minimum contacts’ in the forum state.” *Id.* at 474. The United States Supreme Court requires that a non-resident defendant must have “purposefully availed” himself of the “privilege of conducting activities within the forum state” before personal jurisdiction may be properly exercised. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *see also Burger King*, 471 U.S. at 474-75. “This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts or of the unilateral activity of another party or a third person.” *Burger King*, 471 U.S. at 475 (internal quotation omitted).

Importantly, even if the court determines that a defendant has purposefully established minimum contacts with the forum state, the exercise of jurisdiction over that defendant is only proper if it would otherwise comport with “fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

Judged by these standards, personal jurisdiction is unquestionably lacking over the Individual Defendants. There are no requisite minimum contacts with Georgia on the part of the Individual Defendants. Exercising jurisdiction over these Defendants would violate the due process clause, in light of the lack of contacts with Georgia as the forum state, and maintaining suit would offend traditional notions of fair play and substantial justice.

1. Actions taken by the Individual Defendants in their corporate capacities are irrelevant to the personal jurisdiction analysis.

Each defendant’s contact with the forum state must be assessed individually. *Asahi*, 480 U.S. at 109 (personal jurisdiction “must be based on an act of the defendant”). Thus, this Court must judge the contacts of a corporation’s officers or directors separately from those of the corporation. *Calder v. Jones*, 465 U.S. 783, 790 (1984).

The only allegations made against the Individual Defendants in this lawsuit are: (1) that they consented to being named as nominees to serve on the Gold Kist

Board, *see* Compl, ¶ 29; and (2) that they are “the nominees for whose election as directors of Gold Kist proxies are being solicited.” *Id.*, ¶ 68. These are actions taken by the Individual Defendants in their corporate capacities. Thus, the Individual Defendants are not subject to personal jurisdiction in Georgia as there are no requisite minimum contacts with Georgia on the part of the Individual Defendants in their individual capacities.

2. Plaintiff cannot establish specific jurisdiction over the Individual Defendants.

Minimum contacts are not established unless a court finds it has either specific or general jurisdiction over the defendant. Plaintiff’s Complaint fails to specify whether it alleges specific or general jurisdiction and, thus, the Individual Defendants address the lack of both specific and general jurisdiction.

A court cannot exercise specific jurisdiction over a non-resident defendant unless the defendant’s activities were “purposefully directed” to the forum state and the litigation resulted from alleged injuries that “arise out of” or “relate to” those activities. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). The Eleventh Circuit defined three criteria that must be satisfied in order to find sufficient minimum contacts for purposes of specific jurisdiction: (1) the contacts must be related to the plaintiff’s cause of action or have given rise to it; (2) the contacts must involve some act by which the defendant purposefully avails

itself of the privilege of conducting activities within the forum thereby invoking the benefits and protection of its laws; and (3) the defendant's contacts with the forum must be such that the defendant should reasonably anticipate being haled into court there. *Sculptchair*, 94 F.3d at 630; *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993). Plaintiff's Complaint fails to establish the basis for finding that the three requirements are satisfied. Moreover, the declarations of the Individual Defendants preclude any finding that the Individual Defendants maintained sufficient minimum contacts to justify the exercise of personal jurisdiction over them. *See* Exs. 1-7. The undisputed facts establish the utter lack of any contacts with Georgia, much less purposeful availment or direction within the state.

In addition, minimum contacts may not be the result of the unilateral activity of a third party. *Madara*, 916 F.2d at 1516. "Jurisdiction is proper where the defendant's contacts with the forum proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state." *Id.* (quoting *Burger King*, 471 U.S. at 475) (emphasis in original). Thus, actions taken by Defendants Pilgrim's or Goolsby are not imparted to the Individual Defendants for purposes of personal jurisdiction.

This Court does not have specific jurisdiction over the Individual Defendants because the Individual Defendants did not purposefully direct their activities to Georgia and Plaintiff's causes of action do not arise from or relate to Defendants' contacts – or lack thereof – with Georgia.

3. Plaintiff cannot establish general jurisdiction over the Individual Defendants.

General jurisdiction need not arise out of defendant's activities in the forum. However, a court cannot exercise general jurisdiction over a non-resident defendant unless there are continuous and systematic contacts between the non-resident defendant and the forum state. *See Helicopteros*, 466 U.S. at 416. This Court does not have general jurisdiction over the Individual Defendants because the Individual Defendants do not have and have not had continuous or systematic contacts with Georgia. *See* Exs. 1-7.

The Individual Defendants have not had contacts with Georgia arising from or directly relating to Plaintiff's causes of action. *Id.* The foregoing clearly demonstrates that general jurisdiction does not and cannot exist over the Individual Defendants.

4. Exercising personal jurisdiction over the Individual Defendants would offend traditional notions of fair play and substantial justice.

Assuming *arguendo* that a determination is made that either or both general or specific jurisdiction exists over the Individual Defendants, the final prong of the jurisdictional analysis, “fair play and substantial justice,” prevents the exercise of personal jurisdiction over the Individual Defendants. The court must consider the Individual Defendants’ contacts in light of additional factors to determine whether the assertion of personal jurisdiction comports with fair play and substantial justice. *Madara*, 916 F.2d at 1517.

The requirement of fair play informs the court’s analysis of what constitutes minimum contacts sufficient to confer jurisdiction. Where factors supporting fair play are absent, a court may not assert personal jurisdiction even if the defendant’s contacts with the forum are several. *Id.* Moreover, even if a defendant has purposefully engaged in activities in the forum, minimum requirements of fair play and substantial justice may defeat the reasonableness of asserting personal jurisdiction. *Allegiant Physicians Servs. v. Sturdy Mem’l Hosp.*, 926 F. Supp. 1106, 1114 (N.D. Ga. 1996).

In order to make this determination, this Court must consider relevant factors including “the burden on the defendant in defending the lawsuit, the forum

state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the states in furthering fundamental substantial social policies." *Madara*, 916 F.2d at 1517 (citing *Burger King*, 471 U.S. at 477). An examination of these factors leads to the conclusion that an assumption of jurisdiction in this case would offend traditional notions of fair play and substantial justice.

The Court should decline to exercise jurisdiction over these non-resident Individual Defendants because a significant and extreme burden would be imposed – and is being imposed – if the Individual Defendants are required to defend themselves in Georgia. None of the Individual Defendants live or work in Georgia. The costs, time and effort associated with each of the seven Individual Defendants defending a lawsuit in another state are significant. The undue burdens the Individual Defendants will face if forced to litigate in Georgia include duplicate legal counsel (local counsel in addition to regular outside counsel) and extensive travel for trial and possibly depositions.

Georgia has little discernable interest in adjudicating these claims against the Individual Defendants. None of the Defendants, including the Individual Defendants, are residents of Georgia. Nowhere in the Complaint does Plaintiff

enumerate any specific conduct on the part of the Individual Defendants occurring or directed toward Georgia – they simply consented to be nominated by other parties. In addition, the Complaint does not allege that any of the Individual Defendants' specific conduct in Georgia caused Plaintiff's claimed injury.

Moreover, it would be in violation of the spirit of fair play and substantial justice to require that the Individual Defendants suffer the burden of defending themselves against Plaintiff's claims in Georgia because Plaintiff is not seeking a form of relief from the Individual Defendants in this lawsuit. The only form of relief prayed for by Plaintiff in the Complaint is an injunction that would prohibit Pilgrim's, Goolsby, and PAC from: (1) taking action in furtherance of their effort to elect the slate of nominees; (2) violating securities laws; and (3) making future proposals to Gold Kist or its shareholders. *See* Compl. at 30-31. Assuming that this Court dismisses the Individual Defendants from this lawsuit, if Plaintiff is successful on the merits of its claims, Plaintiff will obtain an injunction that will prohibit the Individual Defendants from taking all of the actions that it seeks to enjoin because an injunction against Pilgrim's would be binding on Pilgrim's, as well as its "officers, agents, servants, employees, attorneys, and upon those persons in active concert or in participation with them." *See* Fed. R. Civ. P. 65(d). Therefore, because Plaintiff does not seek damages or injunctive relief against the

Individual Defendants in their individual capacities, the Individual Defendants are not necessary parties to this litigation and Plaintiff gains nothing by requiring that they defend themselves in this inconvenient forum.

Furthermore, even if Plaintiff believed that it was entitled to some form of relief from the Individual Defendants, which does not appear to be the case based upon the allegations as pled in the Complaint, Plaintiff does not need this court to obtain convenient and effective relief. Plaintiff can pursue its claims against the Individual Defendants (and all other Defendants) in another appropriate forum – Texas. The Court’s assumption of jurisdiction over the Individual Defendants in this matter would allow Plaintiff to prosecute its suit in its choice of forum, even though Plaintiff can obtain the same or similar relief in Texas without imposing the same burdens upon the Individual Defendants.

The interest of the interstate judicial system in obtaining the most efficient resolution of the dispute weighs in favor of dismissing the Individual Defendants. Dismissal of the Individual Defendants with no contacts with Georgia will not hinder the efficient resolution of the issues between the remaining parties.

Likewise, the shared interest of the states in furthering fundamental substantive social policies weighs in favor of dismissing the Individual Defendants. Exercising personal jurisdiction over non-resident individuals with no regular or

systematic personal contacts with the forum negatively impacts each state's protection of its residents. The Court's assumption of jurisdiction would offend traditional notions of fair play and substantial justice.

IV. CONCLUSION

The case law is clear—because the Individual Defendants lack sufficient contacts with Georgia and because the Court's assumption of jurisdiction would offend traditional notions of fair play and substantial justice, no personal jurisdiction exists over the Individual Defendants in Georgia. Therefore, the Fourteenth Amendment to the United States Constitution, as well as the Georgia Long-Arm Statute, mandate the claims against the Individual Defendants be dismissed.

WHEREFORE, Defendants Gary D. Tucker, Robert L. Hendrix, Walter F. Shafer, III, Tim Thomas, Robert A. Wright, Jane T. Brookshire, and J. Clinton Rivers respectfully request that this Court grant their motion to dismiss.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 7.1(D) of the Local Rules of the Northern District of Georgia, counsel for Defendants hereby certifies that this Memorandum was prepared in a font and point selection approved by this Court and authorized in Local Rule 5.1B.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 10th day of November, 2006.

/s/Michael J. Cates
Michael J. Cates



FOR IMMEDIATE RELEASE

Pilgrim's Pride Announces New Pricing for Gold Kist's Outstanding 10¹/₄% Senior Notes due March 15, 2014

Tender Offer Received Approximately 99% Favorable Tender Response

Pittsburg, TX. November 13, 2006 — Pilgrim's Pride Corporation (NYSE: PPC) announced new pricing in its previously announced cash tender offer for, and consent solicitation with respect to, any and all of Gold Kist Inc.'s outstanding 10¹/₄% Senior Notes due March 15, 2014 (CUSIP No. 380616AB8, ISIN US380616AB82) (the "Notes"). The tender offer and consent solicitation are being made in connection with Pilgrim's Pride's previously announced proposed acquisition of all of the outstanding common shares of Gold Kist. Pilgrim's Pride's obligation to accept for purchase and to pay for Notes properly tendered and not withdrawn is subject to the satisfaction of certain conditions which are described in the Offer to Purchase and Consent Solicitation Statement Dated September 29, 2006 (the "Offer to Purchase"), including the satisfaction or waiver of all conditions to the tender offer for Gold Kist's common shares.

On October 30, 2006, Pilgrim's Pride announced that it was extending the tender offer expiration date to November 29, 2006, unless further extended (the "Expiration Date"). Pilgrim's Pride also announced that it had received the requisite consents to the proposed amendments to the Notes and the indenture under which the Notes were issued from holders of approximately 99% of the aggregate principal amount of the outstanding Notes. Pursuant to the terms of the offer, as a result of the extension of the Expiration Date, the consideration payable to holders of Gold Kist Notes has been calculated using a new Price Determination Date of November 13, 2006, which is the eleventh business day preceding the scheduled Expiration Date.

Based on an assumed payment date of December 2, 2006, holders who validly tendered Notes with consents at or prior to 5:00 p.m., New York City time, on October 13, 2006 (the "Consent Date") are eligible to receive \$1,153.29 for each \$1,000 principal amount of the Notes (the "Total Consideration"). The Total Consideration includes a consent payment equal to \$30 in cash per \$1,000 principal amount of the Notes (the "Consent Payment"). The Consent Payment is payable only to holders of Notes validly tendered with consents and not validly withdrawn on or prior to the Consent Date. Holders who validly tendered Notes with consents after the Consent Date but at or prior to 5:00 p.m. New York City time, on the Expiration Date are eligible to receive \$1,123.29 for each \$1,000 principal amount of the Notes (the "Tender Offer Consideration"). In addition to the Total Consideration or the Tender Offer Consideration payable in respect of Notes purchased in the offer, Pilgrim's Pride will pay accrued and unpaid interest from the last interest payment date to, but not including, the Payment Date. The "Payment Date" is expected to be promptly after the Expiration Date and immediately prior to the closing of the transactions contemplated by the tender offer for Gold Kist's common shares.

The Total Consideration and the Tender Offer Consideration were determined as of 10:00 a.m., New York City time on November 13, 2006, based on the Reference Yield (as described in the Offer to Purchase) of 4.686% for the Notes, and a Fixed Spread (as described in the Offer to Purchase) of 50 basis points for the Notes, using an assumed December 2, 2006, Payment Date for calculation purposes. The offer is currently scheduled to expire at 5:00 p.m. New York City Time on November 29, 2006. If the Expiration Date is extended for more than 10 business days following the Expiration Date, a new price determination date will be established (to be 10:00

a.m. New York City time on the eleventh business day immediately preceding the new Expiration Date) and the Tender Offer Consideration and the Total Consideration will be redetermined as of such new price determination date. Information regarding the pricing, tender and delivery procedures, the conditions to the tender offer and consent solicitation relating to the Notes and the proposed amendments to the Notes and Gold Kist indenture are contained in the Offer to Purchase.

Pilgrim's Pride has engaged Lehman Brothers Inc. to serve as the Dealer Manager for the tender offer and the Solicitation Agent for the consent solicitation. Mellon Investor Services LLC has been retained to serve as the Depository and Innisfree M&A Incorporated has been retained to serve as the Information Agent for the tender offer and consent solicitation. Requests for documents may be directed to Innisfree M&A Incorporated by telephone at (877) 687-1874 (toll free in the U.S. and Canada) or (212) 750-5833 (call collect) or in writing at 501 Madison Avenue, 20th Floor, New York, NY 10022. Questions regarding the tender offer and consent solicitation may be directed to Lehman Brothers Inc. by telephone at (800) 438-3242 (toll free in the U.S.) or (212) 528-7581 (call collect).

This press release is for informational purposes only and does not constitute an offer to purchase or a solicitation of consents, which may be made only pursuant to the terms of the Offer to Purchase and related documents. The tender offer and consent solicitation are not being made in any jurisdiction in which, or to or from any person to or from whom, it is unlawful to make such offer or solicitation under applicable securities or blue sky laws. In any jurisdiction where the laws require the tender offer or consent solicitation to be made by a licensed broker or dealer, the tender offer or consent solicitation shall be deemed made on behalf of Pilgrim's Pride by Lehman Brothers Inc. or one or more registered brokers or dealers under the laws of such jurisdiction.

Pilgrim's Pride Corporation

Pilgrim's Pride Corporation is the second-largest chicken producer in the United States and Mexico and the largest chicken producer in Puerto Rico. Pilgrim's Pride employs approximately 40,000 people and has major operations in Texas, Alabama, Arkansas, Georgia, Kentucky, Louisiana, North Carolina, Pennsylvania, Tennessee, Virginia, West Virginia, Mexico and Puerto Rico, with other facilities in Arizona, Florida, Iowa, Mississippi and Utah.

Pilgrim's Pride products are sold to foodservice, retail and frozen entree customers. Pilgrim's Pride's primary distribution is through retailers, foodservice distributors and restaurants throughout the United States and Puerto Rico and in the Northern and Central regions of Mexico. For more information, please visit <http://www.pilgrimspride.com>.

Forward-Looking Statements:

Statements contained in this press release that state the intentions, plans, hopes, beliefs, anticipations, expectations or predictions of the future of Pilgrim's Pride Corporation and its management, including as to the expected benefits of the proposed transaction with Gold Kist, are forward-looking statements. It is important to note that the actual results could differ materially from those projected in such forward-looking statements. Factors that could cause actual results to differ materially from those projected in such forward-looking statements include: matters affecting the poultry industry generally, including fluctuations in the commodity prices of feed ingredients, chicken and turkey; additional outbreaks of avian influenza or other diseases, either in our own flocks or elsewhere, affecting our ability to conduct our operations and/or demand for our poultry products; contamination of our products, which has recently and can in the future lead to product liability claims and product recalls; exposure to risks related to product liability, product recalls, property damage and injuries to persons, for which insurance coverage is expensive, limited and potentially inadequate; changes in laws or regulations affecting our operations or the application thereof; competitive factors and pricing pressures or the loss of one or more of our largest customers; currency

exchange rate fluctuations, trade barriers, exchange controls, expropriation and other risks associated with foreign operations; management of our cash resources, particularly in light of our leverage, and restrictions imposed by and as a result of, our leverage; inability to complete the proposed acquisition or effectively integrate Gold Kist's business or realize the associated cost savings and operating synergies currently anticipated; and the impact of uncertainties of litigation as well as other risks described under "Risk Factors" in our Annual Report on Form 10-K and subsequent filings with the Securities and Exchange Commission. Pilgrim's Pride Corporation undertakes no obligation to update or revise publicly any forward-looking statements, whether as a result of new information, future events or otherwise.

Important Legal Information

This press release is provided for informational purposes only and is neither an offer to purchase nor a solicitation of an offer to sell any securities of Gold Kist. Any offers to purchase or solicitation of offers to sell Gold Kist notes will be made only pursuant to the Offer to Purchase. Gold Kist noteholders are advised to read these documents and any other documents relating to the tender offer and consent solicitation in their entirety because they contain important information. Gold Kist noteholders may obtain copies of these documents for free by calling Innisfree M&A Incorporated, the Information Agent for the offer, at 877-687-1874 (toll free from the U.S. and Canada).

This press release is provided for informational purposes only and is neither an offer to purchase nor a solicitation of an offer to sell any securities of Gold Kist. Any offers to purchase or solicitation of offers to sell Gold Kist shares will be made only pursuant to the tender offer statement (including the offer to purchase, the letter of transmittal and other offer documents) filed with the Securities and Exchange Commission ("SEC") on September 29, 2006. Gold Kist stockholders are advised to read these documents and any other documents relating to the tender offer that are filed with the SEC carefully and in their entirety because they contain important information. Gold Kist stockholders may obtain copies of these documents for free at the SEC's website at www.sec.gov or by calling Innisfree M&A Incorporated, the Information Agent for the offer, at 877-687-1874 (toll free from the U.S. and Canada).

Pilgrim's Pride currently intends to solicit proxies for use at Gold Kist's 2007 Annual Meeting of Stockholders, or at any adjournment or postponement thereof, to vote to increase the number of directors constituting Gold Kist's entire board to 15 and fill nine positions on the expanded board with nominees of the president and chief executive officer of Pilgrim's Pride. Investors and security holders are urged to read the proxy statement and other disclosure documents regarding the proposed transaction, when they are filed, because they will contain important information. These disclosure documents will be filed with the Securities and Exchange Commission by Pilgrim's Pride Corporation and security holders may obtain a free copy of these disclosure documents (when they become available) and other documents filed with the SEC by Pilgrim's Pride Corporation at the SEC's web site at www.sec.gov. The disclosure documents filed with the SEC by Pilgrim's Pride Corporation may also be obtained for free by directing a request to Pilgrim's Pride Corporation at 4845 U.S. Highway 271 N, Pittsburg, Texas, 75686 Attn. Secretary. The identity of people who, under SEC rules, may be considered "participants in a solicitation" of proxies from Gold Kist stockholders for use at its 2007 Annual Meeting of Stockholders and a description of their direct and indirect interest in the solicitation, by security holdings or otherwise, is contained in the Form 425 filed by Pilgrim's Pride with the SEC on August 24, 2006.

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