

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

	§	
	§	
<b>In re</b>	§	<b>Chapter 11</b>
	§	
<b>PILGRIM’S PRIDE CORPORATION, <i>et al.</i>,</b>	§	<b>Case No. 08-45664 (DML)</b>
	§	
<b>Debtors.</b>	§	<b>JOINTLY ADMINISTERED</b>
	§	
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<b>PILGRIM’S PRIDE CORPORATION</b>	§	
	§	
<b>Plaintiff</b>	§	
	§	
<b>v.</b>	§	<b>Adv. Proc. No. 09-_____</b>
	§	
<b>OLD REPUBLIC RISK MANAGEMENT, INC.</b>	§	
	§	
<b>Defendant.</b>	§	
	§	
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**COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES**

Pilgrim’s Pride Corporation (“PPC”) and its affiliated debtors in the above-referenced chapter 11 cases, as debtors and debtors in possession (collectively, the “Debtors”),<sup>1</sup> for their complaint for declaratory relief and damages, allege as follows:

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<sup>1</sup> The Debtors in these cases are PPC; PFS Distribution Company; PPC Transportation Company; To-Ricos, Ltd.; To-Ricos Distribution, Ltd.; Pilgrim’s Pride Corporation of West Virginia, Inc.; and PPC Marketing, Ltd.

**I.**  
**PRELIMINARY STATEMENT**

1. PPC has provided a letter of credit (the “Letter of Credit”) to Old Republic Risk Management, Inc. (“ORRM,” or, the “Defendant”) to secure PPC’s deductible and other obligations in connection with “tail loss” under certain expired Insurance Policies (as defined below) provided by the Defendant to Gold Kist (as defined below). The Letter of Credit, which is currently in the amount of \$41.3 million, far exceeds the amount of security needed to cover PPC’s outstanding obligations under the Insurance Policies. The Debtors have requested since October 2008, that the Defendant reevaluate the Letter of Credit. Since that time, the Debtors estimate that they have paid almost \$500,000 in interest on that portion of the Letter of Credit that was in excess of the Debtors’ actuary’s contemporaneous estimate of PPC’s outstanding obligations under the Insurance Policies. Although the Defendant finally provided a new estimate of the Debtors’ future obligations under the Insurance Policies on September 8, 2009, such estimate continues to exceed the amount of security needed to cover the Debtors’ outstanding obligations under the Insurance Policies by nearly \$10 million. Moreover, although the Defendant has conceded that it holds excessive security, the Defendant has failed to execute the necessary documents to reduce the amount of the Letter of Credit as it is required to do under its agreement with PPC.

2. The Letter of Credit will expire on November 2, 2009. Upon information and belief, the Defendant intends to draw on the Letter of Credit in an amount that far exceeds the amount of security needed to cover PPC’s outstanding obligations under the Insurance Policies. Moreover, the Defendant has rejected PPC’s last offer—that in exchange for an agreement by the Defendant to limit its draw on the Letter of Credit to an amount that does not

exceed the Defendant's alleged estimate of expected loss, as well as an agreement by the Defendant to cooperate with PPC with regard to determining the amount of collateral required in the future, PPC would agree to provide new security to the Defendant upon emergence from bankruptcy in an amount that reasonably estimates the expected loss applicable to PPC's deductible obligations (at which time, the Defendant would return to PPC any funds drawn on the Letter of Credit).

3. Drawing on the existing Letter of Credit in an amount that far exceeds any good faith estimate of PPC's future obligations under the Insurance Policies implicates the resources of the Debtors' bankruptcy estates. If the Defendant were to consummate its intended course of action, it would wrongfully increase the amount of the Debtors' indebtedness to their prepetition lenders (and thus the amount the Debtors will be required to pay on the effective date of the Proposed Plan (as defined below) if such plan is confirmed in its present form) by up to \$30 million. The Debtors respectfully seek declaratory relief and damages.

### **III.** **THE PARTIES**

4. Plaintiff, PPC, is a Delaware corporation headquartered in Pittsburg, Texas, and a debtor in possession in the above-referenced cases.

5. Upon information and belief, the Defendant, ORRM, is a Delaware corporation with its principal place of business in Chicago, Illinois.

6. Upon information and belief, Mike Weber is a President of ORRM and has offices at 445 South Moorland Rd., Suite 300, Brookfield, WI 53205.

7. Upon information and belief, the Defendant ORRM is represented by Margaret M. Anderson, an attorney with the law firm Fox, Hefter, Swibel, Levin & Carroll, LLP, with offices at 200 W. Madison Street, Suite 3000, Chicago, IL 60606.

## **II.** **JURISDICTION AND VENUE**

8. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 because this is a civil proceeding arising in or relating to PPC's case under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code").

9. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b).

10. Venue is proper before this Court pursuant to 28 U.S.C. § 1409 because (a) the above-captioned chapter 11 case to which this case is related is pending in this district before this Court and (b) none of the exceptions set forth in 28 U.S.C. § 1409 applies to this action.

## **IV.** **FACTUAL BACKGROUND**

### **A. Chapter 11 Cases**

11. On December 1, 2008 (the "Commencement Date"), the Debtors each commenced with this Court a voluntary case under the Bankruptcy Code. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

12. The Debtors' chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

13. On October 22, 2009, the Court approved the Debtors' proposed disclosure statement (the "Disclosure Statement") with respect to the Debtors' amended joint chapter 11 plan of reorganization (the "Proposed Plan"). The hearing to confirm the Proposed Plan is scheduled for December 8, 2009.

**B. The Program Agreement**

14. PPC purchased Gold Kist, Inc. ("Gold Kist") in December 2006. Upon information and belief, Gold Kist is party to that certain Program Agreement between Gold Kist and ORRM dated July 1, 1998 (the "Program Agreement") providing, *inter alia*, certain workers compensation and commercial automobile insurance policies for policy periods from July 1, 1998 to September 30, 2007 (such policies, the "Insurance Policies").<sup>2</sup> A copy of the Program Agreement is annexed hereto as Exhibit A.

15. The Program Agreement requires PPC to provide the Defendant collateral securing PPC's obligations under the Program Agreement.

16. Specifically, clause 4(e) of the Program Agreement defines "Collateral Requirement" as no more than the aggregate sum of unpaid loss and allocated loss adjustment expenses within PPC's deductible. That clause states that the "Collateral Requirement" means:

the sum of estimated incurred losses less loss amounts paid and allocated loss adjustment expenses applicable to the Insured's Retention, determined from time to time by Old Republic, which will include Old Republic's estimates of case reserves for such losses and expenses outstanding as of the date of such estimate or calculation, and reserves for such losses incurred but not reported, together with an estimate of future allocated loss adjustment expenses applicable thereto.

Program Agreement ¶ 4(e).

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<sup>2</sup> ORRM also provided certain general commercial liability policies to Gold Kist. The Program Agreement does not require collateral with respect to such policies because Gold Kist was self-insured for the first \$250K of every loss.

17. Clause 9.1 of the Program Agreement provides that PPC must provide the Defendant a letter of credit in an amount equal to the amount of the Collateral Requirement. *Id.* ¶ 9.1. Clause 9.2 of the Program Agreement, however, provides that the Defendant must adjust the amount of such letter of credit to an amount equal to 70% of the Collateral Requirement in each instance in which the Defendant provides PPC a “Statement of Collateral Requirement” and the amount of the letter of credit then held by the Defendant exceeds the amount equal to 70% of the Collateral Requirement as stated in such statement. Clause 9.2 states as follows:

At such times as Old Republic deems it appropriate or necessary . . . Old Republic will prepare a statement (hereinafter “Statement of Collateral Requirements”) indicating the Estimated Ultimate Incurred Loss and Allocated Loss Adjustment Expense amounts outstanding under the Policies, within the Insured’s Retention for each policy term under this Agreement. From the amounts indicated, all sums drawn by Old Republic under the Letter(s) of Credit and not returned to the Insured will be subtracted. With each Statement of Collateral Requirements, the amount of credit then remaining available to Old Republic under the Letter(s) of Credit provided to it hereunder will be adjusted, as necessary to equal 70% of the amounts indicated on the statement. . . . If the result of the above calculation is less than the remaining credit available to Old Republic under the Letter(s) of Credit it then holds, the total amount of such credit will be reduced by the amount of such difference, and Old Republic will execute any document necessary in order to reduce the amount of such credits in accordance with this section.

*Id.* ¶ 9.2.

18. Although the Program Agreement states that “Old Republic’s willingness to accept less than 100% security from Gold Kist is dependent on no material adverse changes in the net equity shown on Gold Kist’s audited year end financial statements, no material adverse changes to the ownership position and no voluntary or involuntary filing of bankruptcy by Gold Kist,” PPC submits that section 365(e)(1) of the Bankruptcy Code prevents the Defendant from modifying PPC’s obligations under the Program Agreement solely because of a provision therein

that is conditioned on the Debtors' financial condition or the commencement of these chapter 11 cases. *See* 11 U.S.C. § 365(e)(1).

19. Accordingly, although the Defendant is entitled to determine the amount of the Collateral Requirement "from time to time," the Program Agreement requires that the Collateral Requirement be equal to the Defendant's estimate of the unpaid incurred losses and allocated loss adjustment expenses applicable to PPC's deductibles under the Insurance Policies. In addition, the Debtors submit that such a determination must be made in good faith. Moreover, once the Collateral Requirement has been calculated by the Defendant, the Defendant is required to reduce the amount of the Letter of Credit to an amount that is equal to 70% of the Collateral Requirement.

**C. The Controversy**

20. Approximately one year ago, in October 2008, PPC requested that the Defendant reevaluate the amount of the Collateral Requirement. In addition, on or around November 7, 2008, PPC notified the Defendant that PPC's actuary had performed an analysis of the expected unpaid loss and allocated loss adjustment expense reserves under the Insurance Policies applicable to PPC's deductible obligations (the "Unpaid Expected Loss") as of September 30, 2008 and had estimated that, at that time, Unpaid Expected Loss was less than \$18.5 million. PPC thus requested that the Defendant reduce the Letter of Credit (which was in the amount of \$41.3 million) to \$18.5 million. PPC repeated this request numerous times over the next few months. The Defendant ignored these requests and failed to reevaluate the Letter of Credit until September 2009. Indeed, the Defendant continues to hold the Letter of Credit in the amount of \$41.3 million. Since October 2008, PPC estimates that it has paid over \$500,000 in

interest on that portion of the Letter of Credit that was in excess of the Debtors' actuary's contemporaneous estimate of PPC's outstanding obligations under the Insurance Policies.

21. Moreover, even though the Defendant finally provided PPC a new Statement of Collateral Requirement, dated September 8, 2009 (the "September 8 Statement of Collateral Requirement"), the Defendant has as of yet failed to reduce the amount of the Letter of Credit as required by the Program Agreement. Specifically, the Defendant stated in the September 8 Statement of Collateral Requirement that it estimates Unpaid Expected Loss, as of June 30, 2009, to be \$20.4 million. As it is defined in the Program Agreement, the Collateral Requirement should be equal to the Defendant's estimate of Unpaid Expected Loss. Yet the Defendant delivered a memorandum to the Debtors, dated September 10, 2009, stating that it requires a new letter of credit from PPC in the amount of \$22.8 million to replace the existing Letter of Credit (which will soon expire, on or around November 2, 2009). The Defendant is not authorized under the Program Agreement to request security in excess of the Collateral Requirement, which should be equal to the Defendant's estimate of Unpaid Expected Loss, or \$20.4 million. The Defendant's request is particularly egregious in light of the fact that the Program Agreement requires that the Defendant reduce the amount of the Letter of Credit to 70% of the Collateral Requirement upon issuing a Statement of Collateral Requirement. As the Defendant has stated that the Collateral Requirement is \$20.4 million, the Defendant is required by the Program Agreement to reduce the amount of the Letter of Credit to 70% thereof, or to \$14.28 million.

22. Furthermore, the Defendant has stated that it intends to draw on the Letter of Credit in an amount that *exceeds* even \$22.8 million if the Debtors fail to provide a new letter of credit prior to the expiration of the existing Letter of Credit and the Defendant is required to

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draw. Under the Program Agreement, the Debtors must provide the Defendant new security in a form acceptable to the Defendant to replace the expiring Letter of Credit. Program Agreement ¶ 9.1. After considering various alternatives, the Debtors have determined to allow the Letter of Credit to expire so that the Defendant may draw down certain funds from such Letter of Credit. *Id.* ¶ 9.3(b). The Debtors and the Defendant have attempted to negotiate the amount by which the Defendant may draw on the Letter of Credit. Unfortunately, the parties have come to an impasse in their negotiations.

23. PPC's actuary performed a second detailed and in-depth analysis of Unpaid Expected Loss and estimated that, as of June 30, 2009, Unpaid Expected Loss was approximately \$12.6 million (or \$11.3 million when discounted to present value). The Defendant's determination that Unpaid Expected Loss is equal to \$20.4 million thus exceeds PPC's estimate by approximately \$9 million. Upon information and belief, the Defendant relies heavily in its estimation of the amount of Unpaid Expected Loss on state-weighted industry averages (adjusted for the Gold Kist retention levels) and disregards the historical development of Gold Kist's actual losses. As a result, the Defendant's estimate of Unpaid Expected Loss is high in relation to Gold Kist's historical loss development. As is reflected in PPC's latest estimate of Unpaid Expected Loss, which was provided to the Defendant and which did account for Gold Kist's historical loss development, Gold Kist has experienced less loss than the industry averages. The Defendant's precise methods of arriving at its estimation of the Unpaid Expected Loss are unknown, however, as the Defendant has refused to share its actuary's report with PPC for the purposes of comparison. Despite repeated requests, the Defendant has refused to provide sufficient detail for the Debtors to determine the precise analysis used by the Defendant in arriving at its estimate of Unpaid Expected Loss.

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24. PPC submits that the Defendant's failure to reduce the Letter of Credit despite its acknowledgement that the current amount of the Letter of Credit far exceeds the amount of Unpaid Expected Loss constitutes a breach of the express terms of the Program Agreement. In addition, PPC submits that the Defendant's conduct over the course of the past year, including the Defendant's failure to reevaluate and to reduce the Letter of Credit within a reasonable period of time of receipt of notice that the Letter of Credit was excessive in the magnitude of tens of millions of dollars, has been unreasonable and unjustified and constitutes a breach of the Debtors' implied duty of good faith and fair dealing. The Defendant's actions have and will continue to harm the Debtors and their estates. In particular, PPC has continued to make interest payments on an extremely excessive Letter of Credit. In addition, any draw on the Letter of Credit will increase the amount of the Debtors' prepetition debt (and thus the amount of distributions the Debtors must make on the effective date of the Proposed Plan). Accordingly, to the extent that the Defendant draws on the Letter of Credit in excess of that amount which reasonably and in good faith estimates PPC's outstanding obligations in connection with the Unpaid Expected Loss under the Program Agreement, the Defendant will harm the Debtors and their estates, and will be unjustly enriched at their expense.

**D. The Debtors' Offer to Compromise**

25. In an attempt to come to a consensual resolution of this issue, the Debtors made the following offer to the Defendant (the "Offer"):

- (1) The Defendant would agree to draw no more than \$20.4 million from the Letter of Credit (the "Drawn Funds") and the remainder of the Letter of Credit would be cancelled and returned to the issuing bank;
- (2) The Defendant would agree to deposit such funds in a segregated account (the "Segregated Account"), and to hold the Drawn Funds as collateral to

secure PPC's obligations under the Program Agreement. PPC would continue to pay its obligations under the Program Agreement;

- (3) PPC would agree that, within 30 days of the effective date of the Debtors' plan of reorganization, PPC would execute a trust agreement wherein PPC would agree to deposit cash to be held in trust for the Defendant securing PPC's obligations under the Program Agreement and pursuant to which the Defendant would be entitled to draw on the funds held in such trust account if and when PPC failed to timely cure any default under the Program Agreement (the "Trust Account"). The Defendant, for its part, would agree to (i) transfer \$11.3 million of the Drawn Funds into the Trust Account within 10 days of receipt of notice from PPC that PPC had created the Trust Account, and (ii) remit the balance of the Drawn Funds to PPC;
- (4) The parties would agree that the funds deposited in the Trust Account should be equal to 70% of the unpaid estimated loss and allocated loss adjustment expense reserves under the Insurance Policies. The Defendant would agree (a) to recalculate its estimate of unpaid loss and allocated loss adjustment expense reserves every six (6) months, and (b) that PPC would be entitled to an adjustment of the amount of the funds deposited in the Trust Account so that the amount of such funds would be equal to 70% of the unpaid estimated loss and allocated loss adjustment expense reserves under the Insurance Policies. The Defendant would agree to promptly execute any documents necessary to so-adjust the amount of the funds deposited in the Trust Account;
- (5) The Defendant would be responsible for performing the biannual estimations of unpaid loss and allocated loss adjustment expenses. However, the Defendant would agree that if PPC and the Defendant are unable to agree as to the correct amount of estimated unpaid loss and allocated loss adjustment expenses, the parties would use the estimate of a neutral, third-party actuary, to be agreed upon by the parties, to determine the amount of security required;
- (6) PPC would agree that upon execution of an agreement memorializing this Offer, PPC would include the Program Agreement, as modified by the Offer, on the schedule of contracts to be assumed pursuant to the Debtors' plan of reorganization; and
- (7) PPC would pay the Defendant any past due loss based assessments.

26. The Debtors believe that the Offer is fair and that the Defendant would be sufficiently secured against loss were the Defendant to accept the Offer. Under the terms of the

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Offer, the Defendant would be entitled to draw on the Letter of Credit in an amount equal to the Defendant's stated estimate of unpaid loss and allocated loss adjustment expenses. In addition, PPC would agree to provide the Defendant, upon emergence from bankruptcy, new security in an amount that reasonably estimates the amount of unpaid loss and allocated loss adjustment expenses applicable to PPC's deductible obligations. In addition, the amount of the security held in the Trust Account on behalf of the Defendant would be adjusted every six months to be equal to the amount equal to 70% of unpaid expected loss and allocated loss adjustment expenses, as determined by either the Defendant or, if PPC believes the Defendant's estimate to be unreasonable, by a neutral third-party actuary. Currently, the Defendant is not entitled to any more security than 70% of the Collateral Requirement. Nonetheless, the Defendant has refused to accept the Debtors' Offer or even propose a viable counteroffer. On October 23, 2009, the Debtors' counsel received a letter from the Defendant's counsel rejecting the Offer.

27. Accordingly, the Debtors respectfully seek declaratory relief and damages.

**V.**  
**CAUSES OF ACTION**

**FIRST CLAIM**

*(For a Declaration that the Defendant Has Breached the Program Agreement by Failing to Reduce the Amount of the Letter of Credit)*

28. PPC repeats and realleges the allegations set forth in Paragraphs 1 through 27 above and incorporates them in this Count as though fully set forth herein.

29. The Program Agreement is a valid, binding, and enforceable contract between PPC and the Defendant. Pursuant to the Program Agreement, the Defendant provides insurance coverage to PPC and its affiliates as set forth in the Program Agreement. PPC

accepted insurance coverage from the Defendant and agreed to pay premium payments in exchange therefor as set forth in the Program Agreement.

30. The Program Agreement provides that each time the Defendant issues a Statement of Collateral Requirement, the Defendant must reduce the amount of the Letter of Credit to be equal to 70% of the Collateral Requirement stated therein.

31. Upon information and belief, Kevin Dickson is the Assistant Vice President of Actuarial Services for the Defendant.

32. Upon information and belief, on September 8, 2009, Kevin Dickson issued a new Statement of Collateral Requirement (the "September 8 Statement of Collateral Requirement").

33. The September 8 Statement of Collateral Requirement states that the Defendant estimated the Collateral Requirement, as of June 30, 2009, to be \$20.4 million in total. Specifically, the September 8 Statement of Collateral Requirement states as follows:

The Old Republic actuarial department was asked to estimate unpaid loss and allocated loss adjustment expense (ALAE) for Gold Kist, Inc. from July 1, 1998 to September 30, 2007 for their Workers' Compensation and Auto Liability lines based on data as of June 30, 2009. Our estimates are \$19.2 million and \$1.2 million, respectively.

34. The Defendant provided the September 8 Statement of Collateral Requirement to the Debtors on or around September 10, 2009.

35. In direct dereliction of its obligation under the Program Agreement to reduce the amount of the Letter of Credit from its current \$41.3 million to the amount equal to 70% of the amount of the Collateral Requirement set forth in the September 8 Statement of Collateral Requirement (70% of the \$20.4 million Collateral Requirement set forth in the September 8 Statement of Collateral Requirement is \$14.28 million), and to "execute any

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document necessary in order to reduce the amount of such credits,” the Defendant has not reduced the amount of the Letter of Credit.

36. The Defendant breached the Program Agreement by failing to reduce the amount of the Letter of Credit to the amount equal to 70% of the Collateral Requirement set forth in the September 8 Statement of Collateral Requirement after it prepared and provided the Debtors the September 8 Statement of Collateral Requirement.

37. Upon information and belief, the Defendant intends to draw on the Letter of Credit far in excess of \$14.28 million.

38. The Defendant’s breach of the Program Agreement has harmed the Debtors and their estates by causing them to, among other things, (i) pay excess interest on the Letter of Credit, (ii) to suffer, in the event that the Defendant draws on the Letter of Credit in an amount that exceeds the amount of security it is entitled to, a wrongful increase the amount of the Debtors’ prepetition debt, and (iii) to expend time and resources, including costs, attorneys’ fees, and expenses, to attempt to negotiate with the Defendant regarding a reduction of the Letter of Credit and, ultimately, in filing this complaint.

39. Pursuant to 28 U.S.C. § 2201, *et seq.*, the Federal Declaratory Judgment Act, PPC respectfully seeks a judgment from the Court (i) declaring that the Defendant has breached the Program Agreement by failing to reduce the Letter of Credit, (ii) declaring that the Defendant is not entitled to draw on the Letter of Credit in an amount that exceeds 70% of the Collateral Requirement (\$14.28 million), and (iii) directing the Defendant to pay PPC’s costs, attorneys’ fees, and expenses.

**SECOND CLAIM**

***(For a Declaration that the Defendant Has Breached the  
Implied Covenant of Good Faith and Fair Dealing)***

40. PPC repeats and realleges the allegations set forth in Paragraphs 1 through 39 above and incorporates them in this Count as though fully set forth herein.

41. The Program Agreement provides that the Defendant shall determine the Collateral Requirement “from time to time” and shall base its determination of the amount of the Collateral Requirement on the Defendant’s estimate of Unpaid Expected Loss under the Insurance Policies.

42. The Program Agreement is governed by Illinois law.

43. Under Illinois law there is an implied covenant of good faith and fair dealing in every contract which “requires a party vested with contractual discretion to exercise it reasonably, and he or she may not do so arbitrarily, capriciously, or in a manner inconsistent with reasonable expectations of parties.” 12A Ill. Law and Prac. Contracts § 153 (citing *Kirkpatrick v. Strosberg*, 894 N.E.2d 781 (Ill. App. Ct. 2d Dist. 2008)).

44. PPC began contacting the Defendant in October 2008, if not earlier, to request that the Defendant reevaluate the Collateral Requirement and the amount of the Letter of Credit. On November 7, 2008, PPC’s Director of Insurance and Risk Control, Patrick J. McDonough (“Mr. McDonough”), informed the Defendant’s President, Mike Weber (“Mr. Weber”), that PPC estimated the Unpaid Expected Loss, at that time, to be \$18,480,756 (the “November 7 Letter”). See Exhibit B. Mr. McDonough enclosed PPC’s actuarial analysis in the November 7 Letter for the Defendant’s review. See *id.* In addition, Mr. McDonough requested that the Defendant reduce the Letter of Credit to \$18.5 million in light of the fact that PPC’s

estimate of Unpaid Expected Loss was significantly less than the amount of the Letter of Credit.

*See id.*

45. Mr. Weber emailed PPC's Vice President of Risk Management, Mark Lawrence, on November 13, 2008 and stated therein that the Defendant had received PPC's request that the Defendant review the amount of the Letter of Credit. *See id.* Upon information and belief, however, the Defendant did not provide the Debtors with a reevaluation of the amount of Letter of Credit at that time. *See id.* Indeed, PPC repeated its request that the Defendant reevaluate the amount of the Letter of Credit in multiple emails and letters, including those dated November 10, 2008, November 12, 2008, November 13, 2008, November 17, 2008, November 28, 2008, December 24, 2008, and January 21, 2009. *Id.* Upon information and belief, the Defendant ignored PPC's repeated requests and failed to reevaluate the Letter of Credit until September 2009.

46. Moreover, although the Defendant has determined that the amount of the Collateral Requirement was \$20.4 million as of June 30, 2009, the Defendant has still not reduced the Letter of Credit. The Debtors have paid interest on the full amount of the Letter of Credit (\$41.3 million) at all relevant times. The Debtors estimate that had the Letter of Credit been reduced to \$20 million in October 2008, and again to \$11.3 million in June 2009, the Debtors would have paid approximately \$491,914.58 less in interest on the Letter of Credit. The Debtors reserve the right to revise their damage allegations after discovery in this matter.

47. There is a significant disparity between PPC's estimate of Unpaid Expected Loss and the Defendant's estimate of the same. In light of this disparity, PPC made numerous requests to review the Defendant's actuarial report so that it could better understand the Defendant's analysis. In each instance, the Defendant refused or ignored these requests, and

provided only a cursory summary of the Defendant's analysis and the differences between such analysis and that of PPC's actuary. Accordingly, PPC is unable to determine the precise basis for the Defendant's estimate of Unpaid Expected Loss for purposes of comparison with PPC's estimate.

48. The Debtors submit that the Defendant's course of conduct over the past year, described herein, constitutes a breach of the implied covenant of good faith and fair dealing under the Program Agreement. The Defendant's breach has harmed the Debtors and their estates by causing the Debtors, among other things, (i) to pay excess interest on the Letter of Credit, (ii) to suffer, in the event that the Defendant draws on the Letter of Credit in an amount that exceeds the amount of security it is entitled to, a wrongful increase the amount of the Debtors' prepetition debt, and (iii) to expend time and resources, including costs, attorneys' fees, and expenses, to attempt to negotiate with the Defendant regarding a reduction of the Letter of Credit and, ultimately, in filing this complaint.

49. Pursuant to 28 U.S.C. § 2201, *et seq.*, the Federal Declaratory Judgment Act, PPC respectfully seeks a judgment from the Court (i) declaring that the Defendant has breached the implied covenant of good faith and fair dealing, and (iii) directing the Defendant to pay PPC's costs, attorneys' fees, and expenses.

### **THIRD CLAIM**

#### ***(Damages for Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing)***

50. PPC repeats and realleges the allegations set forth in Paragraphs 1 through 49 above and incorporates them in this Count as though fully set forth herein.

51. As a result of the Defendant's breach of the Program Agreement and of the implied covenant of good faith and fair dealing, the Debtors are entitled to recover economic damages in an amount to be proven at trial, attorneys' fees, expenses, and pre- and post-judgment interest.

#### **FOURTH CLAIM**

##### ***(Declaratory Judgment Regarding the Amount of the Collateral Requirement and the Amount of Collateral the Defendant is Entitled to Retain Under the Program Agreement)***

52. PPC repeats and realleges the allegations set forth in Paragraphs 1 through 51 above and incorporates them in this Count as though fully set forth herein.

53. As is reflected in PPC's latest estimate of Unpaid Expected Loss, estimating that Unpaid Expected Loss is \$12.6 million (or \$11.3 million when discounted to present value), which was provided to the Defendant and which accounted for Gold Kist's historical loss development, Gold Kist has experienced less loss than the industry averages.

54. The Defendant's determination that Unpaid Expected Loss is equal to \$20.4 million exceeds PPC's estimate by approximately \$9 million. Upon information and belief, the Defendant relies heavily in its estimation of the amount of Unpaid Expected Loss on state-weighted industry averages (adjusted for the Gold Kist retention levels) and disregards the historical development of Gold Kist's actual losses. Specifically, the September 8 Statement of Collateral Requirement states that the Defendant's actuary stated that "we assume the development for this account is similar to that of the industry." As a result, the Defendant's estimate of Unpaid Expected Loss is high in relation to Gold Kist's historical loss development.

55. The Defendant's precise methods of arriving at its estimation of the Unpaid Expected Loss are unknown, however, as the Defendant has refused to share its actuary's report with PPC for the purposes of comparison.

56. Upon information and belief, the Defendant is relying on its alleged estimate of Unpaid Expected Loss, \$20.4 million, to determine (i) the amount of new security it would deem acceptable, and (ii) how much money it will draw from the Letter of Credit if it does not receive new security. Indeed, upon information and belief, the Defendant intends to take a more conservative draw than \$20.4 million if it does not receive new security to replace the expiring Letter of Credit. Upon information and belief, the Defendant intends to draw on the Letter of Credit far in excess of \$20.4 million.

57. To the extent that the Letter of Credit has exceeded and continues to exceed the amount of security that the Defendant is entitled to hold under the Program Agreement, the Debtors and their estates have been harmed by, among other things, paying excess interest on the Letter of Credit. In addition, in the event that the Defendant draws on the Letter of Credit in an amount that exceeds the amount of security it is entitled to hold under the Program Agreement, the Debtors and their estates will be harmed by a wrongful increase the amount of the Debtors' prepetition debt. Finally, the Debtors have expended time and resources, including costs, attorneys' fees, and expenses, to attempt to negotiate with the Defendant regarding a reduction of the Letter of Credit and, ultimately, in filing this complaint.

58. Thus, there is a justiciable controversy between PPC and the Defendant regarding the amount of the Collateral Requirement and the amount of collateral the Defendant is entitled to retain under the Program Agreement.

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59. Pursuant to 28 U.S.C. § 2201, *et seq.*, the Federal Declaratory Judgment Act, PPC respectfully seeks a judgment from the Court (i) declaring the amount of the Collateral Requirement, (ii) declaring that the Defendant is entitled only to 70% of such Collateral Requirement as security for PPC's obligations under the Program Agreement, and (iii) directing the Defendant to pay PPC's costs, attorneys' fees, and expenses.

### **FIFTH CLAIM**

#### ***(Unjust Enrichment)***

60. PPC repeats and realleges the allegations set forth in Paragraphs 1 through 59 above and incorporates them in this Count as though fully set forth herein.

61. PPC estimates the amount of Unpaid Expected Loss to be approximately \$12.6 million (or \$11.3 million when discounted to present value). Even the Defendant estimates Unpaid Expected Loss to be \$20.4 million.

62. The Program Agreement provides that the Collateral Requirement shall be equal to the amount of Unpaid Expected Loss.

63. Because of the implied covenant of good faith and fair dealing, the Defendant is required under the Program Agreement to determine the amount of the Collateral Requirement in good faith.

64. In addition, the Defendant is required under the Program Agreement to reduce the amount of the Letter of Credit to an amount that is equal to 70% of the Collateral Requirement.

65. The Defendant has wrongfully failed to reduce the amount of the Letter of Credit to an amount that is equal to 70% of the Collateral Requirement, and continues to hold a Letter of Credit in the amount of \$41.3 million.

### **PILGRIM'S PRIDE CORPORATION'S COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES**

66. To the extent that the Defendant draws on the Letter of Credit in an amount that is in excess of that security to which it is entitled under the Program Agreement, the Defendant will be unjustly enriched.

67. As a result, the Debtors respectfully request that the Court direct the Defendant to (i) disgorge any funds it draws on the Letter of Credit in excess of the amount of security to which the Defendant is entitled under the Program Agreement, as well as any profits or other economic damages to be proved at trial, and (ii) pay the Debtors pre- and post-judgment interest, attorneys' fees, and expenses. These remedies are sought as an alternative to the Debtors' claims for damages for breach of contract and breach of implied duty of good faith and fair dealing.

**VI.**  
**CONDITIONS PRECEDENT**

68. All conditions precedent to PPC's right to recover the relief sought herein have occurred, are excused, or have been waived.

**VII.**  
**CONCLUSION AND REQUESTED RELIEF**

**WHEREFORE**, Plaintiff PPC respectfully prays for judgment as follows:

- (a) for a declaration (i) as to the amount of the Collateral Requirement, (ii) that the Defendant is not entitled under the Program Agreement to hold security in excess of 70% of the Collateral Requirement, (iii) that the Defendant has breached the Program Agreement by failing to reduce the Letter of Credit, and (iv) that the Defendant's conduct has breached the implied covenant of good faith and fair dealing;
- (b) for damages for breach of contract in the amount of the sum of (i) all interest and other fees the Debtors wrongfully paid on the Letter of Credit, (ii) the amount of any draw the Defendant makes on the Letter of Credit in excess of \$11.3 million, (iii) the pre- and post-judgment interest, attorneys' fees, and expenses, and (iv) any other economic damages to be

proved at trial;

- (c) for damages for breach of the implied covenant of good faith and fair dealing in the amount of the sum of (i) all interest and other fees the Debtors wrongfully paid on the Letter of Credit, (ii) the amount of any draw the Defendant makes on the Letter of Credit in excess of \$11.3 million, (iii) the pre- and post-judgment interest, attorneys' fees, and expenses, and (iv) any other economic damages to be proved at trial;
- (d) for disgorgement, to the extent that the Defendant draws on the Letter of Credit in an amount that exceeds \$11.3 million; and
- (e) for such other and further relief as the Court deems equitable, proper, and just under the circumstances.

Dated: October 27, 2009  
Fort Worth, Texas

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