

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES ACT OF 1933**  
**Release No. 8485 / September 14, 2004**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 50369 / September 14, 2004**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 2101 / September 14, 2004**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-11656**

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<b>In the Matter of</b>	:	<b>ORDER INSTITUTING</b>
	:	<b>PROCEEDINGS PURSUANT TO</b>
	:	<b>SECTION 8A OF THE SECURITIES</b>
<b>Kemps LLC, f/k/a Marigold Foods,</b>	:	<b>ACT OF 1933 AND SECTION 21C OF</b>
<b>LLC, James Green and</b>	:	<b>THE SECURITIES EXCHANGE ACT</b>
<b>Christopher Thorpe,</b>	:	<b>OF 1934, MAKING FINDINGS AND</b>
	:	<b>IMPOSING A CEASE-AND-DESIST</b>
<b>Respondents.</b>	:	<b>ORDER</b>
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**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate to institute cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 (the “Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (the “Exchange Act”) against Kemp’s LLC, f/k/a Marigold Foods, LLC (“Marigold”), James Green (“Green”) and Christopher Thorpe (“Thorpe”) (collectively “Respondents”).

**II.**

In anticipation of the institution of these proceedings, Respondents have submitted an Offer of Settlement (“Offer”) that the Commission has determined to accept.<sup>1</sup> Solely for the

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<sup>1</sup> Simultaneously with this proceeding, the Commission has filed the following settled actions: In re Fleming Companies, Inc., Exch. Act Rel. No. 34-50365; In re Dean Foods Company and John D. Robinson, Exch. Act Rel. No. 34-50368; In re Digital Exchange Systems, Inc., Rosario Coniglio and Steven Schmidt, Exch. Act Rel. No. 34-50366; In re John K. Adams, Exch. Act Rel. No. 34-50367; and In re Bruce Keith Jensen, Exch. Act Rel. No. 34-50370.

purpose of these proceedings or any other proceeding brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings contained herein, except that Respondents admit the Commission's jurisdiction over them and over the subject matter of these proceedings, Respondents consent to the entry of this Order Instituting Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings and Imposing a Cease-and-Desist Order.

### **III.**

On the basis of this Order and Respondents' Offer, the Commission finds that:<sup>2</sup>

#### **A. Respondents and Fleming Companies, Inc. ("Fleming")**

##### **1. Respondents**

Marigold is a Delaware limited liability company headquartered in Minneapolis that produces and supplies dairy products.

James Green of Chanhassen, Minnesota, is Marigold's President and Chief Executive Officer. Christopher Thorpe of Eden Prairie, Minnesota, is Marigold's Vice President of Financial Services.

##### **2. Fleming**

Fleming is an Oklahoma corporation headquartered in Lewisville, Texas that currently is in Chapter 11 bankruptcy. Before its April 2003 bankruptcy filing, Fleming's stock traded on the New York Stock Exchange. At one time, Fleming was the nation's largest grocery wholesaler, with about 50 major distribution centers across the country, and a sizable retail grocery operator as well, with more than 100 stores throughout the Midwest and West. Fleming's 2001 and 2002 reported revenues were approximately \$15.6 billion and \$15.5 billion, respectively. But its earnings were much smaller, with only a \$23.3 million profit and an \$84 million loss, respectively, in those years.

#### **B. Facts**

##### **1. Fleming uses fraudulent "initiatives" to meet earnings expectations.**

During 2001 and the first half of 2002, Fleming improperly executed a series of transactions, called "initiatives," to fabricate earnings to "bridge the gap" between actual operating results and Wall Street expectations. In these initiatives, Fleming fraudulently structured otherwise ordinary transactions in forms that, on paper, would justify and maximize an immediate increase in

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<sup>2</sup> The findings herein are made pursuant to Respondents' Offer and are not binding on any other person or entity in these or any other proceedings.

earnings. One type of initiative that Fleming used frequently during this period was accelerating recognition of up-front payments received under forward-looking vendor agreements. On multiple occasions, Fleming persuaded vendors to provide side letters that described up-front payments - which Fleming and the vendors plainly intended to secure future rights and services - as compensating some form of past performance, such as a rebate or expense item. Fleming then used these letters to justify booking the entire up-front payment as an offset to expenses immediately, rather than over time as generally accepted accounting principles (“GAAP”) required. These illicit bookings enabled Fleming to meet securities analysts’ earnings expectations. Marigold, Green and Thorpe did not know of Fleming’s initiatives.

## **2. Respondents are a cause of Fleming’s inflated earnings in violation of GAAP.**

Marigold provided Fleming with such a side letter in the fourth quarter of 2001, in connection with an agreement to supply ice cream to Fleming’s wholesale business for three years beginning March 2002 (the “Supply Agreement”). Marigold and Fleming negotiated the Supply Agreement during 2001. Fleming was willing to grant the Supply Agreement in return for an up-front payment of \$2 million. Though it was extremely reluctant to make any such payment to Fleming, Marigold eventually viewed it as the “ante” or necessary first step to retaining and expanding the Fleming business. Indeed, Fleming was Marigold’s largest customer. Marigold would not have agreed to such payment but for Fleming’s willingness to continue the existing business between the two companies and to consider entering into a new Supply Agreement that would expand that business.

While the parties were finalizing the Supply Agreements, Fleming, at the 11th hour of negotiations, demanded a side letter describing the payment as a “non-refundable” “rebate” for “2001 purchases.” Fleming provided Marigold the precise language it needed in the letter. As Green and Thorpe understood the existing contracts between Marigold and Fleming, they knew Marigold did not owe Fleming any such rebate; indeed, a \$2 million rebate represented a significant percentage of Marigold’s margin from its total 2001 ice cream sales to Fleming. Marigold was hesitant to pay that amount as a “rebate” because doing so would require Marigold to currently expense the entire amount. Marigold consulted with its accountants in this regard and was advised that the entire amount, if characterized as a “rebate,” would have to be fully expensed in 2001 on Marigold’s books.

Hesitant to provide the side letter because of the impact on its own books, yet still desiring to maintain and expand the lucrative Fleming business, Marigold acquiesced to Fleming’s demand. As a condition to Marigold’s providing the letter, however, Marigold required a penalty provision in the Supply Agreement that obligated Fleming to pay \$2 million, which included Marigold’s other investment costs incurred in performing the contract, on a *pro rata* basis, if Fleming failed to buy a certain volume of products during the agreement’s term. The penalty provision therefore allowed Marigold to recoup the \$2 million payment Marigold agreed was a “non-refundable” “rebate” for “2001 purchases.” Satisfied that this penalty provision protected a large portion of Marigold’s “ante,” Green signed and returned Fleming’s desired side letter.

Fleming accounting personnel accepted the letter and booked the entire payment as an offset to expenses in the fourth quarter of 2001. However, under GAAP, Fleming was required to

recognize the up-front payment ratably over the Supply Agreement's term. See Statement of Financial Accounting Concepts No. 5, ¶¶ 83-84; Staff Accounting Bulletin No. 101, *Revenue Recognition in Financial Statements*, Question 5. This improper recognition materially overstated Fleming's fourth quarter 2001 reported earnings, providing approximately \$.02, or over 15%, of the \$.12 per share earnings Fleming reported for that quarter. Fleming included these misstated earnings in its 2001 Form 10-K, and in publicly disseminated press releases. Fleming further incorporated the misstated Form 10-K into registration statements on Forms S-3, S-8 and S-4 filed during the summer of 2002.

### **3. Marigold provides Fleming's auditor with a confirmation letter.**

As part of its audit of Fleming's 2001 financial statements, Fleming's external auditor sent Marigold a letter requesting confirmation that the \$2 million payment was a "rebate" for Fleming's "actual 2001 purchases," was "not connected to any future commitments" and was "not refundable." Green signed and returned the letter without qualification.

### **C. Conclusion**

As a result of the foregoing, the Commission finds that Marigold, Green and Thorpe each were a cause of Fleming's violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act and Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1 and 13b2-1 thereunder.

## **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in the Offer.<sup>3</sup>

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, that Respondents Marigold, Green and Thorpe cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) and 17(a)(3) of the Securities Act, and causing any violations and any future violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1 and 13b2-1 thereunder.

By the Commission.

Jonathan G. Katz  
Secretary

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<sup>3</sup> Marigold has agreed to pay a \$150,000 civil penalty, and Green and Thorpe have each agreed to pay \$50,000 civil penalties in connection with a parallel civil action.