

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

**SECURITIES ACT OF 1933**  
**Release No. 8487 / September 14, 2004**

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 50370 / September 14, 2004**

**ACCOUNTING AND AUDITING ENFORCEMENT**  
**Release No. 2102 / September 14, 2004**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-11658**

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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>Bruce Keith Jensen,</b>	:	<b>ACT OF 1933 AND SECTION 21C OF</b>
	:	<b>THE SECURITIES EXCHANGE ACT</b>
<b>Respondent.</b>	:	<b>OF 1934, MAKING FINDINGS AND</b>
<hr/>	:	<b>IMPOSING A CEASE-AND-DESIST</b>
	:	<b>ORDER</b>

**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 Bruce Keith Jensen (“Jensen” or “Respondent”).

**II.**

In anticipation of the institution of these proceedings, Jensen has submitted an Offer of Settlement (“Offer”) that the Commission has determined to accept.<sup>1</sup> Solely for the 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 Jensen admits the Commission’s jurisdiction over him and over the subject matter of these proceedings, Jensen consents to the entry of this Order Instituting Proceedings

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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 Kemps LLC f/k/a Marigold Foods, LLC, James Green and Christopher Thorpe, Exch. Act Rel. No. 34-50369; 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.

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 Respondent's Offer, the Commission finds that:<sup>2</sup>

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

##### **1. Respondent**

Bruce Keith Jensen of Valrico, Florida, was Director of National Accounts at Frito Lay, Inc. ("Frito Lay") during the relevant periods. During this time, Fleming was one of Frito Lay's largest customers and Jensen was principally responsible for the Fleming account.

##### **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 relatively were much smaller, with only a \$23.3 million profit and an \$84 million loss, respectively, in those years.

#### **B. Facts**

##### **1. Fleming used 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, justified and maximized an immediate increase in 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 compensation for some past event, such as a rebate or expense item. Fleming then used these letters to justify recognizing 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.

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

## **2. Jensen caused Fleming's inflation of earnings in violation of GAAP.**

In December 2001, Fleming and Frito Lay negotiated an agreement that would pay Fleming for achieving certain sales targets during 2002. Jensen was principally responsible for negotiating the agreement for Frito Lay. The agreement included a \$400,000 incentive for Fleming to set up certain new product store displays by February 2002.

As the 2001 fiscal year was ending, Fleming sought ways to meet an impending earnings shortfall. Fleming wanted to recognize the \$400,000 incentive immediately to help meet its numbers. Fleming therefore asked Jensen to execute a side letter mischaracterizing the \$400,000 payment as "non-refundable" compensation. Jensen knew that Fleming had not earned the \$400,000 during 2001 and, in fact, never earned it. Jensen nevertheless signed the Fleming-prepared letter, which Fleming used to justify recording the entire \$400,000 million as an offset to expenses in the fourth quarter of 2001. This overstated Fleming's earnings for the quarter by approximately 3%. 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.

### **C. Conclusion**

As a result of the foregoing, the Commission finds that Jensen caused 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 Respondent Jensen 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> Jensen has agreed to pay a \$25,000 civil penalty in connection with a parallel civil action.