


ORIGINAL

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

SEP 14 2004

DAVID J. MALAND, CLERK
BY DEPUTY 

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

- 1) **KEMPS LLC, f/k/a MARIGOLD FOODS LLC,**
- 2) **JAMES GREEN, and**
- 3) **CHRISTOPHER THORPE,**

Defendants.

COMPLAINT 4.04cv323

Plaintiff, the United States Securities and Exchange Commission files this Complaint against Defendants Kemps LLC, f/k/a/ Marigold Foods LLC ("Marigold"), James Green ("Green") and Christopher Thorpe ("Thorpe") (collectively, "Defendants"), and would respectfully show the Court as follows:

SUMMARY

1. This case concerns Defendants' involvement in an illicit income recognition scheme perpetrated by Fleming Companies, Inc. ("Fleming").

2. Starting in late 2001, Fleming implemented a plan to improperly recognize material amounts of income to compensate for forecasted earnings shortfalls. Marigold, one of Fleming's vendors, aided Fleming's scheme by yielding to Fleming's demand to provide a side letter, drafted by Fleming, that falsely described a \$2 million payment to Fleming. After Fleming's external auditor sent Marigold a letter requesting confirmation of the side letter, Marigold signed and returned the letter to the auditor. James Green, the

President and CEO of Marigold, and Christopher Thorpe, VP of Financial Services, were the Marigold officers responsible for dealing with Fleming.

3. Based on the conduct alleged herein, Marigold, Green and Thorpe aided and abetted Fleming's violations of Sections 17(a) (2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)] and Sections 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)(A)], and Rules 12b-20, 13a-1 and 13b2-1, thereunder, [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13b2-1].

JURISDICTION AND VENUE

~~4. The Commission brings this action pursuant to the authority conferred upon it by Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)], and Sections 21(d)(3) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(3) and 78aa].~~

5. This Court has jurisdiction over this action, and venue is proper, pursuant to Sections 20(d) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(d) and 77v(a)], and Sections 21(d)(3) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d)(3) and 78aa].

6. Defendants, directly or indirectly, have made use of the means and instrumentalities of interstate commerce, or of the mails, or of the facilities of a national exchange in connection with the acts, practices, and courses of action alleged herein.

7. Venue is proper because Fleming is headquartered in Lewisville, Texas, and certain of the acts and transactions described herein took place in the Eastern District of Texas.

DEFENDANTS

8. **Marigold**, which recently changed its name to Kemps LLC, is a Delaware limited liability company headquartered in Minneapolis, Minnesota, that produces and supplies dairy products.

9. **Green** of Chanhassen, Minnesota, is Marigold's President and Chief Executive Officer.

10. **Thorpe** of Eden Prairie, Minnesota, is Marigold's Vice President of Financial Services.

OTHER RELEVANT ENTITY

11. **Fleming** is an Oklahoma corporation headquartered in Lewisville, Texas. Fleming's stock is registered pursuant to Section 12 of the Exchange Act and, prior to filing for Chapter 11 bankruptcy protection in April 2003, its stock traded on the New York Stock Exchange. Before bankruptcy, Fleming was the nation's largest grocery wholesaler and a retail grocery operator with approximately 50 distribution centers nationwide and more than 100 retail stores throughout the Midwestern and Western United States. In 2001, Fleming reported approximately \$15.6 billion in revenues and \$23.3 million in profits. In 2002, the company reported \$15.5 billion in revenues and a net loss of \$84 million.

FACTS

Fleming's improper initiatives to meet earnings expectations

12. During 2001 and the first half of 2002, and following a period of poor financial performance, Fleming improperly executed a series of transactions, called "initiatives," to fabricate earnings and "bridge the gap" between actual operating results and Wall Street expectations. In these initiatives, Fleming improperly structured otherwise

ordinary transactions in forms that, on paper, would justify and maximize an immediate increase in earnings.

13. One of Fleming's frequently used initiatives was accelerating recognition of up-front payments received under forward-looking vendor agreements. Specifically, Fleming persuaded vendors to provide side letters that described up-front payments—that Fleming and the vendors plainly intended to secure future rights and services—as compensating some form of past performance, such as rebates or expenses. Fleming then used these letters to immediately book the entire up-front payment as an offset to ~~expenses, rather than over time as generally accepted accounting principles (“GAAP”)~~ required.

14. As designed, the illicit reduction in expenses booked by Fleming significantly inflated the company's earnings in the fourth quarter of 2001 and the first two quarters of 2002 and allowed Fleming to meet securities analysts' earnings expectations.

Marigold's participation in Fleming's inflated earnings

15. Marigold supplied Fleming's retail stores with ice cream and other dairy products. Fleming was Marigold's largest customer. Marigold, Green, and Thorpe did not know of Fleming's initiatives.

16. In the fourth quarter of 2001, Fleming and Marigold negotiated a “Supply Agreement.” Under the agreement, Marigold would supply ice cream and dairy products to Fleming for three years starting in March of 2002.

17. Marigold also agreed to make an up-front payment of \$2 million to Fleming, although it was, at first, extremely reluctant to do so. After negotiations, Marigold agreed,

viewing the payment as an “ante” or necessary step to retaining and expanding business with its largest customer.

18. While the parties finalized the Supply Agreement, Fleming, at the 11th hour of negotiations, demanded a side letter describing the up-front payment as a “non-refundable” “rebate” for “2001 purchases.” Fleming provided Marigold the precise language it demanded.

19. Green and Thorpe knew the existing contracts between Marigold and Fleming, did not require Marigold to pay Fleming a rebate, and that a \$2 million rebate represented a significant percentage of Marigold’s margin from its total 2001 ice cream sales to Fleming. Green and Thorpe were hesitant to describe the payment as a “rebate” because, after consulting with Marigold’s auditors, they knew a “rebate” would have to be fully expensed on Marigold’s 2001 books.

20. Reluctant 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. But as a condition to providing the letter, Marigold required a penalty provision in the Supply Agreement obligating Fleming to repay \$2 million, on a *pro rata* basis, if Fleming failed to buy a certain volume of Marigold products during the agreement’s term. Satisfied that this penalty provision protected Marigold’s ante, Green signed and returned Fleming’s desired side letter.

21. Contrary to GAAP, which requires recognizing the up-front payment ratably over the Supply Agreement’s term, Fleming accounting personnel accepted Marigold’s letter and booked the payment as an offset to expenses in the fourth quarter of 2001. The

reduction in expenses from the Marigold payment increased Fleming's fourth quarter 2001 earnings by approximately 15%.

Marigold provides Fleming's auditor with a confirmation letter

22. 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.

FIRST CLAIM

**Aiding and Abetting Fleming's Violations
of Sections 17(a)(2) and 17(a)(3) of the Securities Act**

(Against Marigold, Green, and Thorpe)

23. Paragraphs 1 through 22 are realleged and incorporated by reference.

24. Based on the conduct alleged herein, Fleming violated Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)].

25. Defendants Marigold, Green, and Thorpe, acting alone or in concert with others, in the manner set forth above, provided substantial assistance to Fleming in connection with its violations of Sections 17(a)(2) and 17(a)(3) as alleged herein.

26. By reason of the foregoing, Marigold, Green, and Thorpe aided and abetted Fleming's violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)]

SECOND CLAIM

Aiding and Abetting Fleming's Violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act and Rules 12b-20, 13a-1 and 13b2-1 Thereunder

(Against Marigold, Green, and Thorpe)

27. Paragraphs 1 through 22 are realleged and incorporated by reference.

28. Based on the conduct alleged herein, Fleming violated Sections 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§ 78m(a) and 78m(b)(2)(A)] and Rules 12b-20, 13a-1, and 13b2-1 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13b2-1].

~~29. Defendants Marigold, Green, and Thorpe, acting alone or in concert with others, in the manner set forth above, aided and abetted Fleming, as an issuer of a security registered pursuant to Section 12 of the Exchange Act, in its failing to file with the Commission, in accordance with rules and regulations the Commission has prescribed, information and documents required by the Commission to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to Section 12 of the Exchange Act and annual reports and quarterly reports as the Commission has prescribed.~~

30. Defendants Marigold, Green, and Thorpe, acting alone or in concert with others, in the manner set forth above, provided substantial assistance to Fleming, who, directly or indirectly, failed to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflected Fleming's transactions and dispositions of its assets.

31. By reason of the foregoing, Marigold, Green, and Thorpe aided and abetted Fleming's violations of Sections 13(a) and 13(b)(2)(A) of the Exchange Act [15 U.S.C. §§

78m(a) and 78m(b)(2)(A)] and Rules 12b-20, 13a-1 and 13b2-1 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13b2-1].

PRAYER FOR RELIEF

The Commission respectfully requests that the Court:

I.

Enter an order directing Marigold to pay a \$150,000 civil money penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)].

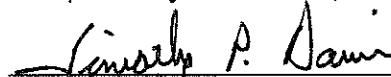
II.

Enter an order directing Green and Thorpe to each pay a \$50,000 civil money penalty pursuant to Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)].

III.

Grant such further relief as the Court deems just and proper.

Respectfully submitted,



TIMOTHY R. DAVIS

(Attorney in charge)

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JS 44 (Rev. 3/99)

ORIGINAL

CIVIL COVER SHEET

Original
4:04 CV 323

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I.(a) PLAINTIFF

SECURITIES AND EXCHANGE COMMISSION

DEFENDANTS

KEMPS LLC, f/k/a MARIGOLD FOODS LLC, JAMES GREEN, and CHRISTOPHER THORPE

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF _____
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant: **HENNEPIN, MN**
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEY (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Timothy P. Davis, Esq.
SECURITIES & EXCHANGE COMMISSION
Burnett Plaza, Suite 1900
801 Cherry Street, Unit #18
Fort Worth, TX 76102-6882
817/978-6438

ATTORNEYS (IF KNOWN)
See attached listing

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (For Diversity Cases Only)

	PTF	PTD		PTF	PTD
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery OF Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 156 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copy rights <input type="checkbox"/> 830 Patient <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395FF) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input checked="" type="checkbox"/> 850 Securities Commodities/ Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights		

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (Specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judge

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.) Sections 17(a)(2) & (3) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77q(a)(2) & (3)]; Sections 13(a) & 13(b)(2)(A) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78j(m)(a) & (b)(2)(A)]; and Rules 12b-20, 13a-1 and 13b2-1 thereunder [17 C.F.R. §§ 240.12b-20, 240.13a-1 & 240.13b2-1].

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 **DEMAND \$** _____ **CHECK YES only if demanded in complaint: JURY DEMAND** YES NO

VIII. RELATED CASE(S) (See Instructions): 4 other related cases simultaneously filed: see attached listing
IF ANY JUDGE _____ DOCKET NUMBER _____

DATE 09/14/2004
SIGNATURE OF ATTORNEY OF RECORD *Timothy P. Davis*

FOR OFFICE USE ONLY
Receipt # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

I.(c) - COUNSEL FOR DEFENDANTS

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Counsel for Defendant James Green

VIII. – RELATED CASES

SEC v. John K. Adams
SEC v. Bruce Keith Jensen
SEC v. Dean Foods Company and John D. Robinson
SEC v. Digital Exchange Systems, Inc., Rosario Coniglio & Steven Schmidt