Consolidated Amended Class Action Complaint

Lead Plaintiff Jackson Capital Management, LLC, individually and on behalf of all others similarly situated, by its attorneys, alleges the following based upon the investigation of its counsel, except as to allegations specifically pertaining to plaintiff and its counsel, which are based on personal knowledge. The investigation of counsel is based upon, among other things, a review of Fleming Companies, Inc.’s (“Fleming” or the “Company”) public filings with the United States Securities and Exchange Commission (“SEC”), press releases issued by the Company, transcripts of the Company’s investor conference calls, media reports about the Company, publicly available trading data relating to the price and volume of Fleming’s common stock, a review of reports issued by analysts who follow Fleming, and interviews with a former employee of Fleming.

I. Nature of the Action

1. Plaintiff brings this action as a class action on behalf of itself and all other persons or entities who purchased Fleming common stock (other than defendants and certain related persons and entities) during the period beginning on May 9, 2001 through September 5, 2002, inclusive (the
“Class” and “Class Period,” respectively), to recover damages caused to the Class by defendants’ violations of the federal securities laws.

2. This case involves a public company’s scheme to falsely inflate its stock price by means of accounting fraud and false public statements about its business, operations, and profit. The fraud is so egregious that Fleming has been referred to in the food industry as “Flem-ron.” (Albuquerque Journal, 11/15/2002).

3. Fleming operates a wholesale and retail grocery business. In 1998, after several years of poor performance and declining stock values, Fleming appointed a new CEO—Mark Hansen—and announced a “strategic plan” to improve earnings and increase its stock price. The plan targeted both wholesale and retail earnings.

4. Under the strategic plan, Fleming’s retail segment exited the “conventional” grocery stores business. “Conventional” grocery stores are grocery stores that come with amenities, such as deli counters, bakeries, pharmacies, and other services designed to attract customers. Fleming moved all of its retail focus to “price impact” or “value retailing” grocery stores. These stores feature few amenities and services and often are constructed out of cinder block with concrete floors. They compete on only one basis—price. Fleming announced aggressive plans to increase its ownership of price-impact stores, and Fleming suggested to the investing public that as a wholesaler, it could reduce supply-chain inefficiencies and therefore lower prices at its own retail stores.

5. Analysts and the investing public responded favorably to the Fleming strategic plan. For three and a half years after the plan was announced, earnings improved. Fleming’s stock price, which had dipped as low as $8 a share in late 1998, rebounded. Then, on July 30, 2002, after more than two years of touting the growth potential for price-impact stores, Fleming suddenly announced
that it was considering selling all of its retail stores, and that retail earnings had fallen dramatically from 2001 to 2002. This sudden announcement caused Fleming’s stock price to plummet 33.5% from $16.18 on July 29, 2002 to $10.76 on August 2, 2002.

6. Fleming’s July 30, 2002 disclosures punished its stock price, but revealed only a portion of Fleming’s problems. In fact, Fleming’s retail segment already was awash in operating losses, and its finances were deteriorating. Fleming had known since the first half of 2001 that the price impact format was not working. The format did not increase revenues and earnings. Instead, the price-impact stores were rejected by customers, at least in part because they did not really offer cost savings.

7. Only five weeks after the July 30, 2002 disclosures, investors learned that Fleming’s wholesale segment, like the retail segment, was facing serious problems. On September 4, 2002, an article on Dow Jones Newswire revealed that Fleming appeared to be using its retail stores as a dumping ground for excess wholesale inventory, and that Fleming had been using unauthorized vendor deductions to improve its cash flow. The next day, an article in the Wall Street Journal revealed that Fleming had had over $100 million in disputes with vendors over deductions that Fleming unilaterally took from vendors’ invoices. For example, in August 2001, Fleming had retroactively deducted three percent from amounts owed vendors for the prior twelve weeks, in a program that it called “shared savings,” without any agreement from vendors. Similarly, in the Spring of 2001, Fleming implemented an “off-shore funding equalization” deduction, again not approved by vendors, because, Fleming claimed, vendors had not offered sufficient discounts to Hawaiian and Caribbean stores.
8. The effect of Fleming’s unauthorized, improper, and unsustainable deductions was to inflate Fleming’s earnings. The September 4 and 5, 2002 disclosures thus revealed that Fleming’s earnings statements for its wholesale segment had been improperly inflated for over a year.

9. On the same day as the Wall Street Journal article—September 5, 2002—Fleming announced that there was no evidence that retail earnings were going to recover in 2002. Fleming’s stock sunk even lower. The stock, which had traded at $9.31 on September 3, 2002, fell to $6.51 a share at close of business on September 9, 2002, a decline of 30%.

10. On September 24, 2002, Fleming announced that it was selling its retail stores.

11. In a press release dated January 14, 2003, Fleming announced that it was marking down the “realizable value” of its retail stores by $116 million. This contributed to a year-end retail loss of $190 million.

12. For the period of nearly a year and half preceding September 5, 2002, Fleming’s financial statements were consistently false. Fleming’s retail president—defendant Tom Dahlen—and retail CFOs—first, John Simrell, then Tim Otte—used a variety of techniques to inflate earnings in violation of accepted accounting practices. They accrued unauthorized, improper, and unsustainable deductions from accounts payable due to vendors. Moreover, they manipulated “same store” sales figures used by analysts and investors to judge the improvement or deterioration of a retail business from year to year.

13. Dahlen’s, Simrell’s, and Otte’s manipulations were known to defendant Mark Hansen, the corporate CEO, and defendant Neal Rider, the corporate CFO. These manipulations alone allowed Fleming to present a materially misleading picture of its business to the market. However, these manipulations were not alone. They were compounded by the manipulations in the
wholesale segment, and by Hansen’s and Rider’s false public statements about, among other things, the health of the retail segment and the viability of the price-impact format.

14. Fleming’s common stock prices were artificially inflated for the May 9, 2001 through September 5, 2002 class period by the false and misleading financial statements and other statements as will be set forth in detail herein. The stock price, which traded between $20 and $35 a share for most of the class period, fell to approximately $6 a share after the revelations on September 4-5, 2002, and has not recovered since.

II. Jurisdiction and Venue

15. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §78aa and 28 U.S.C. §1331. The claims asserted herein arise under Sections 10(b) and 20(a) of the Exchange Act, as amended, 15 U.S.C. §78j(b) and 15 U.S.C. §78t(a), and Rule 10b-5, 17 C.F.R. §240.10b-5, promulgated thereunder by the SEC.

16. Venue is proper in this District pursuant to Section 27 of the Exchange Act and 28 U.S.C. §1391(b). Fleming maintains its principal executive offices within this District and many of the acts and transactions giving rise to the violations of law complained of herein, including the preparation and dissemination to the investing public of false and misleading information, occurred in this District.

17. In connection with the acts, conduct, and other wrongs alleged in this Complaint, the defendants, directly and indirectly, used the means and instrumentalities of interstate commerce, including the mails, telephone communications, and the facilities of a national securities exchange.

III. The Parties
18. Lead Plaintiff Jackson Capital Management, LLC purchased the common stock of Fleming during the Class Period at artificially inflated prices and was damaged thereby.

19. Defendant Fleming is an Oklahoma corporation with its principal executive offices located within this District at 1945 Lakepointe Drive, Lewisville, Texas, 75029. At all relevant times, Fleming's common stock actively traded on the New York Stock Exchange under the symbol “FLM.” As of June 13, 2002, 53,805,000 shares of Fleming common stock were outstanding.

20. Defendant Mark Hansen (“Hansen”) is and has been Fleming’s Chief Executive Officer and the Chairman of the Board of Directors since November 1998.

21. Defendant Neal J. Rider (“Rider”) is and has been Fleming’s Chief Financial Officer since January 2000.

22. Defendant Thomas Dahlen (“Dahlen”) became Fleming’s Executive Vice President and President, Retail and Marketing in April 2001. As of November 2002, he was still employed by Fleming Companies.

23. Defendants Hansen, Rider, and Dahlen are collectively referred to herein as the “Individual Defendants.”

24. As described below in more detail, the Individual Defendants regularly received reports showing adverse and undisclosed information about the financial results and performance of the Company. The defendants directly participated in the management of Fleming, were directly involved in the operations of Fleming at the highest levels, knew information concerning the financial results and performance of the Company, and were involved in the dissemination of the materially false and misleading statements and information alleged herein.
25. By reason of their positions as executive officers and directors of Fleming, the Individual Defendants were at all relevant times controlling persons within the meaning of Section 20 of the Exchange Act. Because of their executive and directorial positions at Fleming, each of the Individual Defendants received adverse, non-public, and specific information about the Company's true financial results and performance. Furthermore, as particularized herein, the Individual Defendants were able to and did control the contents of various reports and public statements regarding Fleming and its financial results and performance. Any acts attributed to Fleming were caused and/or influenced by the Individual Defendants by virtue of their controlling-person positions at the Company.

26. As the senior officers and directors of a publicly-held company whose common stock was, at all relevant times, registered with the SEC pursuant to the Exchange Act, traded on the New York Stock Exchange, and governed by the provisions of the federal securities laws, the Individual Defendants had a duty to promptly disseminate accurate and truthful information about Fleming's financial results and performance, so that the market price of Fleming's publicly-traded securities would be based upon truthful and accurate information. The Individual Defendants' misrepresentations and omissions during the Class Period violated these specific requirements and obligations. Accordingly, the Individual Defendants were responsible for the accuracy of the public statements and releases detailed herein and are primarily liable for the misrepresentations contained therein.

IV. Class Action Allegations

27. Lead Plaintiff brings this case as a class action pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, on behalf of itself and all other persons who purchased or
otherwise acquired Fleming common stock between May 9, 2001 and September 5, 2002, inclusive (the “Class”). Excluded from the Class are Fleming, its subsidiaries and affiliates, the defendants, members of the immediate families of each of the defendants, any entities in which any of the defendants has a controlling interest, and the legal representatives, heirs, successors, affiliates or assigns of any of the foregoing excluded persons and entities.

28. This action is properly maintainable as a class action because:

a. The members of the Class are so numerous that joinder of all members is impracticable. During the Class Period, in excess of 25 million shares of Fleming common stock were outstanding and actively traded on the New York Stock Exchange. Upon information and belief, plaintiff believes that there are more than 1,000 members of the class;

b. Lead Plaintiff’s claims are typical of the claims of the other members of the class, as Lead Plaintiff and the members of the Class purchased Fleming stock and sustained damages as a result of defendants’ wrongful conduct complained of herein;

c. Lead Plaintiff is a representative party who will fairly and adequately protect the interests of the other members of the Class and has retained counsel competent and experienced in class action securities litigation. Lead Plaintiff has no interests antagonistic to, or in conflict with, the Class it seeks to represent;

d. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein. As the damages suffered by the
individual Class members may be relatively small, the expense and burden of individual litigation make it virtually impossible for the Class members individually to redress the wrongs done to them. The likelihood of individual Class members prosecuting separate claims is remote;
e. The questions of law and fact common to the members of the Class predominate over any questions affecting individual members of the Class. The questions of law and fact which are common to Lead Plaintiff and the Class include, among others:

1. whether the federal securities laws were violated by defendants' acts as alleged herein;

2. whether statements disseminated to the investing public and to Fleming’s common stock holders during the Class Period misrepresented material facts about the financial results and performance of the Company;

3. whether defendants acted with knowledge or with reckless disregard for the truth in misrepresenting and/or omitting to state material facts;

4. whether, during the Class Period, the market price of Fleming common stock was artificially inflated due to the material misrepresentations and/or non-disclosures complained of herein;

5. whether the defendants participated in and pursued the common course of conduct complained of herein; and
V. Factual Background

A. Fleming struggles in the 1990s.

29. Fleming is a wholesale distributor of groceries. In other words, Fleming buys groceries from vendors and sells them to grocery stores. Fleming also operates its own retail grocery stores.

30. Fleming struggled in the 1990s. A March 8, 1999 article in *Supermarket News* said that starting in the mid-1990s, “Fleming’s image took a pounding that’s virtually without precedent in the annals of food distribution.” Over that time, Fleming was hit by numerous lawsuits involving overcharging customers, leaving a “persistent negative image.” In addition to the lawsuits, Fleming experienced declining revenues. Earnings declined 25 percent in 1995, 36 percent in 1996 and 4.8 percent in 1997. In 1998, earnings plummeted to a loss of $510.6 million, or $13.48 a share.

31. Fleming’s problems led to the termination of CEO Robert Stauth in July 1998. Following that termination, Fleming’s stock, which in the late 1980s and early 1990s had consistently traded between $30 and $40 a share, dropped as low as $8 a share.

32. On November 30, 1998, Fleming announced the appointment of Mark Hansen as CEO and Chairman of the Board.

B. Fleming announces a “Strategic Plan.”
33. One week after Hansen was appointed, Fleming announced a “Strategic Plan to Improve Performance”:

Fleming . . . announced today the company is fundamentally shifting its business to focus on core strategic assets in its wholesale and retail operations.

This comprehensive plan is designed to improve the competitiveness of the retailers Fleming serves and the company’s performance by building stronger operations that can better support long-term growth.

34. Fleming’s strategic plan had four elements:

- “Wholesale Consolidations to Improve Efficiency.” Fleming planned to reduce the number of supply centers for its wholesale customers.

- “Strategic Wholesale Growth Plans.” Fleming planned to increase wholesale earnings by, among other things, targeting new markets such as convenience stores.

- “More Focused Retail Operations.” Fleming would concentrate on developing its top-performing retail chains and divest the chains that were not performing as well.

- “Reducing Overhead Expenses.” Fleming instituted a “low cost pursuit program,” which involved reductions in workforce, centralizing administrative functions, and other cost-saving measures.

35. Fleming outlined in the press release the financial objectives of the strategic plan:

- earn a return on capital which exceeds the cost of capital,

- produce net earnings which approach 1% of net sales, and

- achieve more than $3.00 in earnings per share by the year 2003.

36. The strategic plan involved a focus on Fleming’s retail operations. Supermarket News reported on May 24, 1999 that Hansen told shareholders at an annual meeting that Fleming “will make a stronger and more focused push on retailing than ever before.” Part of this push, Hansen
said, involved “concentrating on chains with a high market share and good future growth potential,” including “price impact” stores.

37. “Price impact” or “value retail” and related “limited assortment” stores are touted as offering lower prices to consumers than conventional grocery stores. In its 2000 10-K, filed with the SEC on March 23, 2001, Fleming describes the difference between price-impact and conventional grocery stores and the growth opportunities for price-impact stores that Fleming portrayed to the market:

Our price impact supermarkets offer name-brand food and consumable goods at significantly lower prices than conventional format retail store operators because of the many low-cost features of our stores. These features include: offering a reduced number of product selections, focusing on popular, name-brand products and product categories; employing flow-through distribution methods which reduce product storage and handling expense; and minimizing store operating costs by presenting a warehouse-style operation.

These stores do not cost as much as conventional stores to construct and maintain, as price impact stores typically feature cement floors, cinder block walls, exposed ceilings and walk-in freezers and coolers which combine the typically separate storage and display areas. In addition, price impact stores produce lower operating expenses, primarily as a result of less labor content due to pallet or case-loading display racks, fewer product categories offered due to focusing on the more popular items, self bagging, and elimination of on-site service departments such as a bakery or butcher shop.

C. Fleming sells its strategic plan to the market.

38. Throughout 1999, 2000, and 2001, Fleming sold its strategic plan to analysts and investors. Fleming claimed that the plan would increase earnings, and pointed to its improving financial results as evidence of the plan’s success. Fleming portrayed the conversion to price-impact stores as integral to the strategic plan, and aggressively pursued a strategy of acquiring and opening
price-impact stores and either selling conventional stores or converting them to the price-impact format.

39. In a press release dated January 20, 2000, Fleming attributed a growth in revenues in part to its emphasis on Food4Less price-impact stores, and stated an expectation of future retail growth, especially on a “same store” basis:

“This is the first time in over four years that our quarterly sales have increased over the prior year. The increase was driven by new wholesale business, sales in the 8 Food4Less retail stores the company acquired earlier in 1999, and 21 stores added in the company’s other chains during the year. While our retail food segment experienced a 1.4% decrease in same-store sales in the 1999 fourth quarter, this represents a significant improvement over the 4.3% decrease in same-store sales experienced in the 1999 third quarter.”

... . .

In addition, the company expects its retail food segment to begin experiencing positive same store sales growth by mid-2000 compared to 1999 due to actions taken to improve store-level marketing efforts. Hansen said: “We also expect to see improved operating earnings in our retail food segment based on changes Denny Lucas, our new Executive Vice President and President of Retail, and his team have made, the benefits of the wholesale cost reductions for our conventional retail stores, and the growing profitability of our value-oriented, price impact retail stores.”

40. Early in 2000, Fleming made clear that its focus on price-impact stores would mean the divestment of conventional stores. In a press release dated April 25, 2000, Fleming announced that it had engaged Morgan Stanley Dean Witter “to assist in exploring strategic alternatives for Fleming’s conventional supermarket chains, including the potential sale of these operations.” In the press release, Fleming and defendant Hansen portrayed price-impact stores as a growth area, distinct from the stagnant economics of conventional stores:

The company intends to focus greater management and financial resources on Fleming’s growth areas, including value retailing.
"The conventional supermarket segment offers local-market growth potential for independents and national growth potential for consolidators, and these are strong operations," said Fleming CEO and Chairman Mark Hansen. "But the middle ground potential does not meet our aggressive targets for shareholder value, and the company-owned conventional supermarket format does not fit our growth strategy."

"We are focusing our financial and management resources on Fleming’s very best growth prospects and continued improvement of our cost structure. This allows Fleming to strengthen its value proposition and service to the independent retailers, chain retailers, e-tailers and other customers of our distribution segment. It also enhances our opportunities to accelerate our growth commitment to value retailing, including our Food4Less warehouse concept."

"The value retail format is distinct and consumers have demonstrated a demand for deep price impact operation. We believe Fleming’s distribution system is well suited to serve this format. Fleming can become a major player in a very short time, providing our shareholders with superior returns and growing our company to exciting levels in this retail area," said Hansen.

41. Hansen portrayed the price-impact format as a model that presented an opportunity for explosive sales growth and dramatic expense reductions. The Milwaukee Journal Sentinel reported on April 26, 2000 that "Hansen told industry analysts earlier this year that the typical Food 4 Less store costs up to 25% less to build than a conventional supermarket. The Food 4 Less segment’s sales are expected to grow by about 30% in 2000, compared to expected sales growth of just 5% for Fleming’s conventional supermarkets."

42. On May 8, 2000, Supermarket News reported that Fleming planned to open up to 100 Food4Less price-impact grocery stores over the next two years. The article quoted Hansen: "We see substantial nationwide growth potential for the warehouse format, with up to 25% of consumers in many markets saying they want a price-impact store."

43. Fleming and Hansen told shareholders that the conversion to price-impact stores would enhance shareholder returns. For example, in an article dated May 8, 2000, DSN Supercenter
& Club Business reported that "Fleming, said Hansen, is focusing on the company’s ‘very best growth prospects.’ Hansen feels a bigger move into value retailing will permit Fleming to become a major player in a very short time, offering enhanced shareholder returns.”

44. By May 2000, Fleming had begun the process of selling a large number of conventional stores. The Food Institute Report reported on May 15, 2000 the complete shift of Fleming to “value retailing”: “The decision by Fleming to concentrate exclusively on a single value-oriented retail format came on the heels of the distributor’s decision to sell 161 conventional stores operated by five corporate owned-chains.”

45. Fleming’s shift to the price-impact format came in the context of Fleming’s broader implementation of its strategic plan. Fleming credited positive financial results to the strategic plan. For example, Fleming’s July 26, 2000 press release states:

The distribution [i.e. wholesale] sales growth, the highest gain since second quarter 1995, resulted from strong new customer growth. “This is high quality and sustainable growth,” said Hansen. “The tremendous turnaround in our distribution sales growth and the improvement in both retail and distribution operating performance reaffirms the power of our strategic growth strategies.”

Implementation of the strategic plan continues to lower distribution operating costs and improve retail expense controls and margins generated from the Low Cost Pursuit program; increase efficiency and productivity as a result of the distribution center consolidations; and decrease cost of goods resulting from the centralized procurement of products.

46. Fleming’s conversion to price-impact stores was widely reported in 2000. A July 31, 2000 article in Supermarket News stated that “one of the most dramatic moves undertaken by Hansen during his brief tenure” was “the decision to sell most of Fleming’s conventional supermarket assets, and to roll out hundreds of Food 4 Less price-impact warehouse stores.” The article quotes Hansen touting Food4Less stores: “Food 4 Less is a price-impact, food-warehouse shopping experience. It’s
not a grocery store, not a supermarket. It’s a highly differentiated format. We like Food 4 Less for a lot of reasons: It’s a high-volume store; it can be franchised extremely well; in fact, half the [26] Food 4 Less stores in our system are franchised. It’s a highly differentiated store, which draws from a large trade area by focusing on consumers who look at price as being the most important aspect of shopping.”

47. Fleming told the public that it intended to aggressively expand its price-impact stores as a long-term strategy. For example, in the July 31, 2000 Supermarket News article, Fleming’s executive in charge of Food4Less development, Dennis C. Lucas, made strong claims about Fleming’s future retail plans:

Lucas asserted that Food 4 Less “is a very exciting proposition, which represents an exciting future.”

“We’re literally restructuring our past focus on conventional retail. We think the future is in price-impact retail. So we’re moving to that. We’re going to take our small group of 26 stores we have currently and will build that to a chain of in excess of 500 stores in about 10 years.

“We’ve put the business model together and we’re in process of starting the rollout. We’re concentrating on leveraging the core competency we have of good case pick, good piece pick and delivering the goods. This gets back to our strength with the center of the store.”

48. On October 2, 2000, The Food Institute Report reported that Fleming announced it had decided to sell or close all but 50 of its conventional stores.

49. On October 18, 2000, Fleming announced its third quarter 2000 earnings in a press release titled “7.7 Percent Increase in Distribution Sales; Repositioning Retail Operations into Growth Formats.” In the press release, Fleming attributed its claimed third-quarter success in part to its value retail business: “We are pleased with our performance in the third quarter and credit our
differentiated strategic plan which builds competitive distribution advantage and grows our value retail business,' said Mark Hansen, chairman and CEO of Fleming.” Fleming continued to tout its strategic plan:

The company continues to improve operating margins with the ongoing implementation of its strategic plan including cost-reduction initiatives. “We have exceeded our previous earnings guidance and, given the tight market conditions, that’s quite an accomplishment.” said Hansen.

Finally, in the press release, Fleming announced the conclusion of its review of alternatives for conventional stores:

The review of strategic alternatives for the conventional retail business was substantially completed in the third quarter with the decision to reposition certain retail operations into the Food 4 Less type value retail format. The Rainbow Foods division has shown significant improvements in sales and earnings. Consequently, 38 of these stores will be retained with two converted to the value retail format and three closed. Fleming is in discussions to sell 53 ABCO stores to other retailers and three will be converted to the value retail format. Ten Sentry stores will be converted to the value retail format and steps are being taken to sell the remaining 24 to existing and new distribution customers. The company is continuing to explore alternatives for the 16 Baker’s Supermarkets.

50. Within two months of the October 18, 2000 press release, Fleming announced the sale of its 16 remaining conventional Baker’s Supermarkets. Fleming later would begin classifying all of its Rainbow Foods stores as price-impact stores.

51. In a press release dated December 14, 2000, Fleming characterized its sale of the 16 conventional Baker’s Supermarkets “as part of Fleming’s previously announced strategic plan that focuses on its growth areas. ‘We are pleased that the execution of our strategic plan is progressing,’ said Mark Hansen. ‘This transaction underscores our belief that the conventional supermarket segment offers local-market growth potential for independents and national growth potential for
consolidators. We continue to focus our financial and management resources on growing value retailing and improving distribution operations."

52. On February 14, 2001, Fleming reported a 36% increase in fourth quarter net earnings. The press release quoted Hansen: "We are very pleased with our fourth quarter results because they validate our strategic initiatives. . . . Our focus on the distribution and price impact retail business, paired with the benefits of our central procurement and low-cost pursuit initiatives, are proving to be the key drivers of Fleming's earnings momentum." The release emphasized Fleming's "accelerating" foray into price-impact retail operations:

Fleming is accelerating the growth of its price impact operations. Up to 25 price impact stores will be opened in 2001. Up to 100 price impact stores will be opened over the coming three years. The new price impact store openings will result from a combination of new building, conversions of existing retail stores, and acquisitions.

53. In a May 7, 2002 press release, Fleming stated that it had sold all of its conventional stores by the end of the second quarter 2001. In press releases dated May 9, 2001 and August 1, 2001, Hansen stated that Fleming now had a "laser-like focus on price-impact retail."

54. Fleming's 2000 10-K, which was filed with the SEC on March 23, 2001, promoted the price-impact strategy:

We believe price-sensitive consumers are underserved on a nationwide basis. We believe we have a substantial opportunity to grow our retail segment's price impact supermarket operations. Our national distribution presence can adequately support the continued growth of our price impact retail operations. Because price impact stores cost less to build and maintain than conventional supermarkets, we expect to be able to grow our price impact supermarket operations while incurring fewer capital expenditures. The success of our price impact stores is based on an underserved trade area and does not require significant market share. Consequently, we believe the typical advertising and marketing expenditure requirements do not apply.
D. Analysts and investors viewed Fleming’s retail price-impact plan as crucial to Fleming’s overall performance.

55. According to Fleming’s 2000 10-K, Fleming’s retail business accounted for 22.7% of Fleming’s net sales and 38.3% of Fleming’s operating earnings. Although the retail segment had smaller net sales and operating earnings than the wholesale segment, stock analysts and the investing public viewed the “price impact” plan as crucial to Fleming’s growth and stock valuation, based on Fleming’s statements that price-impact stores were a “key driver[] of Fleming’s earnings momentum,” and offered “substantial nationwide growth potential,” “very superior economics,” and “superior returns” for shareholders.

56. Analysts believed that Fleming’s strategic plan, including the conversion to price impact operations, presented an opportunity for growth justifying a higher stock price. In a report dated January 8, 2001, Bear, Stearns & Co. expressed optimism about the strategic plan:

In our view, the company is in a ‘new and improved’ incarnation and, as a consequence, its shares represent compelling value (although not without an element of turnaround-related risk) at current levels.

* A PROMISING RESTRUCTURING. Fleming has undertaken an ambitious plan to restructure many of its business and strategic practices. We view the plan very positively and are confident that its new management team, under the dynamic leadership of Mark Hansen, who joined Fleming from Wal-Mart in 1998, has the operational and strategic expertise to carry it to fruition.

....

.... Indeed, the combination of revenue growth from new customers, the shift to value retail, and sizable cost savings related to the strategic plan are already creating the momentum that we believe can propel Fleming’s EPS to $3.00 or higher by 2003.

In our view, Fleming is executing a significant turnaround in its core wholesale operations that we expect will lead to increasing revenue and improved margins. The shift in its retail operations’ focus, from conventional stores
toward the Food4Less value model, should be another major growth driver as older, largely unprofitable stores are either sold or converted to the new model. Thus, from this combination of a return to distribution revenue growth, significant cost savings from the Low Cost Pursuit program, and the shift in focus of the retail operations, we believe Fleming’s earnings are on track for sustained superior growth and the shares represent compelling value at current levels.

... We think the company’s shift in strategy for its retail business presents another superb opportunity to turn an underperforming business into an outperformer. As Fleming divests many of its conventional retail operations and converts others to the higher-margin Food4Less value model, while stepping up the rate of openings for the value retail stores, we expect the retail division to become a significant driver of Fleming’s incremental profitability.

57. On April 19, 2001, Deutsche Banc Alex. Brown issued a “buy” rating for Fleming. Its “positive investment thesis” was based on several factors, including the belief that “[t]he company has focused its retail efforts on the rapidly growing price-impact format, where stores are less expensive to build and operate and generally are cash flow positive within a year.”

58. On July 25, 2001, UBS Warburg initiated coverage of Fleming with a “buy” rating and a target share price of $40:

Fleming is near completion of a major re-structuring of its distribution and retailing operations, a process which began in early 1998. The re-positioning of the distribution segment has resulted in the rationalization or consolidation of 12 of Fleming’s full-line distribution centers, generating significant productivity gains and cost savings. We believe that Fleming’s decision to focus on the higher growth price impact format is consistent with food retail industry trends and will allow the company to achieve greater operational efficiencies and profitability while serving the needs of the rapidly growing price sensitive customer segment. We believe that Fleming’s bold initiatives will yield continued earnings growth and improve the company’s overall competitive position. We estimate that Fleming can achieve $1.97 in EPS for 2001 and $2.57 in 2002, based on continued margin expansion, new customer acquisitions in the distribution segment, and continued growth of the price impact retailing format. ...
59. On October 22, 2001, Morgan Stanley issued a report rating Fleming “outperform” with a stock price target of $38, based in part on the conversion of Fleming’s retail stores to a “price impact” format:

- **Fleming has a clearly focused retail business, in our view**
  FLM is aggressively growing its retail business, which is exclusively value oriented, an area where it has expertise. We see strong growth opportunities to grow “Food4Less” and “Yes!Less” formats.

- **We see a strong, 25% long-term EPS growth rate.**
  We expect FLM to benefit from recent alliances, efficiency initiatives, opportunistic acquisitions, and a growing retail segment.

60. On February 19, 2002, Deutsche Banc Alex. Brown issued a report rating Fleming a “strong buy.” Among the reasons forming Deutsche Banc’s “investment thesis” was that “[t]he company has focused its retail efforts on the rapidly growing price-impact format that caters to consumers who are more price sensitive. These stores are less expensive to build and operate and generally are cash flow positive within a year.”

61. On April 25, 2002, Wachovia Securities issued a report with a “buy” rating for Fleming. This rating was based in part on Wachovia’s “view that the company is poised to expand its price-impact retail grocery business, further leveraging the company’s supply-chain efficiencies.” Wachovia’s positive assessment of Fleming’s earnings prospects were based in part on Fleming’s retail plans: “We think anticipated EPS growth should be driven primarily by actions management has taken to position the company for distribution growth in multiple retail channels and by retail expansion.”
On June 19, 2002, with Fleming trading at $20.46 a share, Morgan Stanley, Dean Witter issued a report targeting Fleming for $27.00 a share. This target was based on Morgan Stanley, Dean Witter's positive assessment of the accomplishments of Fleming's strategic plan, including the retail strategy:

**The New Fleming Is Better Positioned for Growth**

At the end of 1998, Fleming set out on a new strategic path. Management laid out a four-point plan to 1) consolidate distribution operations, 2) grow distribution sales, 3) improve retail grocery performance, and 4) reduce overhead and operating expenses.

The company's restructuring efforts are now complete, and we believe the company is now better positioned for long-term growth. The company closed 12 distribution centers between 1998 and 2000, boosting sales per distribution center from $389 million in 1998 to $640 million in 2001.

It has diversified its distribution business by focusing on new growth-oriented channels: supercenters, ethnic stores, convenience centers, etc. In its retail grocery segment, it has closed 238 conventional grocery stores, focusing on more profitable and faster-growing price-impact stores.

These changes have shifted Fleming from a business in decline to one of growth...


1. **Defendants deliberately misstated Fleming's retail earnings.**

   Beginning in the first quarter of 2001, Fleming grossly overstated its earnings and margins in the retail segment, according to a former financial analyst manager in Fleming's retail segment. This employee, who was employed as a Fleming financial analyst manager from October 2001 to late July 2002, was interviewed in connection with these allegations.

   The interviewed employee was central to Fleming retail's financial analysis. Along with two other financial analyst managers, he received detailed reports, sometimes on a daily basis,
from Fleming’s retail stores and Fleming’s “product category managers,” who managed Fleming’s sales of various product categories among the different stores. These reports provided detailed information on Fleming’s sales, expenses, margins, and earnings. Fleming’s financial analyst managers used this data to compile Fleming’s actual revenue, cost numbers, and margin. The interviewed employee issued weekly, monthly, and quarterly reports showing the revenue, cost, and margin numbers. These reports were circulated to all of Fleming’s top management, including defendants Hansen, Rider, and Dahlen.

65. Although the former financial analyst manager worked in the retail segment, he knew that detailed financial analyses for the wholesale segment were provided, like the retail analyses, on a weekly basis to Hansen, Rider, and other top Fleming executives.

66. The retail financial analyst managers reported directly to the CFO of Fleming’s retail segment, although they also received direction from defendant Tom Dahlen, the retail president. The retail CFO was John Simrell until June 2002, when he was replaced by Tim Otte. After the interviewed manager circulated his periodic reports, Simrell and Otte often required him to alter his report. Sometimes Simrell and Otte directed that a new revenue or margin number, which they supplied, be substituted for the original number, while providing no basis or back-up documentation for the change. It often was impossible to trace the new number to the original number.

67. At other times, Simrell and Otte required the financial analyst managers to reduce accounts payable by a specified amount in order to “account” for “deductions” that Fleming planned to claim from as-yet-unidentified vendors, for as-yet-unidentified products. In the grocery industry, purchasers, including wholesalers and retailers, sometimes inform vendors that they are making “deductions” from invoices, usually to account for some special circumstance warranting a price
reduction. However, the deductions used by Simrell and Otte to reduce accounts were not authorized by the affected vendors. Moreover, there was no basis for concluding that the vendors would accept the deductions. In fact, vendors did not accept them, and indeed often threatened to cut off the product supply for Fleming retail due to inappropriate deductions.

68. The deductions often had already been accrued by Fleming’s accounting department by the time the financial analyst manager was told to change his report, even though the vendor, the product, and the basis for the deduction had not yet been identified. The accrual of these unauthorized, improper, and unsustainable deductions was directed by defendant Tom Dahlen, the president of Fleming’s retail segment, as well as Simrell and Otte. In fact, Simrell and Otte often accrued deductions, and then asked the financial analyst managers and product category managers to determine if the vendors would accept the deductions. Each financial analyst manager had a deduction worksheet, which was reviewed by higher-level executives. Even after a deduction was rejected by a vendor and removed by the financial analyst manager from the worksheet, the retail executives often reinstated the deduction. This sometimes prompted vendors to stop shipping product.

69. Defendant Hansen sometimes personally directed unauthorized, improper, and unsustainable deductions. For example, defendants Hansen and Dahlen directed the former financial analyst manager to deduct from vendors’ invoices a “two case” deduction, based on the concept that vendors should provide new retail stores with two free cases of product. The former financial analyst manager notified 150 vendors of $3.5 million in “two case” deductions. At the time he left Fleming in July 2002, around 125 vendors had responded and only $78,000 of the “two case” deductions had
been accepted by the vendors. In short, the “two case” deduction directed by defendants Hansen and Dahlen was overwhelming rejected by vendors.

70. According to the former financial analyst manager, Fleming’s retail segment used deductions to understate accounts payable and therefore to overstate earnings and margins. Simrell and Otte never manipulated the reported margins to lower them, only to raise them.

71. Dahlen, Simrell, and Otte manipulated margins during the entire time that the former financial analyst manager worked at Fleming. Moreover, the former financial analyst manager believed, from his review of Fleming’s financial documents, that the manipulation was occurring before he began work in October 2001.

72. According to the former financial analyst manager, defendant Hansen often participated in Monday meetings where the finances would be reviewed. At these meetings, the handling of deductions would be discussed. Margins were always discussed. At these meetings, there were indications that sales in Fleming’s retail segment were flat or declining, and that there was a difference between reported margins and internally calculated margins. On more than one occasion when these topics were discussed, Hansen was present.

73. According to the former financial analyst manager, defendant Dahlen was involved in the margin manipulations and always received from the financial analyst manager the same information that Simrell and Otte received. Dahlen, like Hansen, attended the Monday meetings concerning finances, margins, and the handling of deductions.

74. When Fleming made public disclosures, Fleming’s financial analyst managers saw that the margins reported for Fleming retail were not the true margins for Fleming retail. The reported retail margins were higher than the internal analysis of Fleming’s financial analyst
managers. This discrepancy was due to manipulations made by Simrell and Otte and directed by defendant Tom Dahlen.

75. According to the former financial analyst manager, the effect of reversing the accrual of the unauthorized, improper, and unsustainable deductions would have been devastating to Fleming retail’s profit and loss statement. Such a change would have caused Fleming retail to go from positive earnings to substantial negative earnings.

76. The push for unauthorized, improper, and unsustainable deductions in Fleming’s retail segment reflected serious company-wide problems. In February 2001, Fleming’s wholesale group announced that it had entered into a contract to supply all of Kmart’s grocery needs. This contract comprised a substantial portion of Fleming’s wholesale revenue. However, according to the former financial analyst manager, in order to obtain the Kmart contract, Fleming had to cut its margins to the bone. In fact, Kmart received lower prices from Fleming’s wholesale segment than Fleming’s retail segment did. As a result of declining margins due to the Kmart contract, Fleming required the retail segment to book more deductions in order to prop up company-wide margins. The push for deductions was so intense that Fleming’s retail segment even accrued large disputed deductions on its purchases from Fleming’s wholesale segment.

77. According to the former financial analyst manager, Fleming’s manipulations of its retail earnings and margins disguised a downward trend in “same store” sales. “Same store” or “comparable store” sales are sales at stores that were open during two reporting periods that are being compared. Analysts and investors look at “same store” sales trends to get a true picture of whether a retailer’s business is improving.
78. The determination of which stores to include in “same-store sales” numbers typically is dictated by industry standards. For example, stores are not included in “same-stores sales” numbers until they have been open from twelve months, because first-year store revenues can be inflated by volume generated by store-opening promotions.

79. Fleming’s financial analyst managers used industry standards to keep track of same-store sales data based on industry standards, and this data consistently showed large declines in same-store sales. It was apparent that customers were reacting negatively to the price-impact format of Fleming’s stores. Every time a store was converted to the price-impact format, it eventually fell into a loss, while the full-service stores were still doing comparatively well. Sometimes sales would fall after a store’s conversion to a price-impact format to less than half what they had been prior to the conversion. One major problem was that the price-impact stores often had higher prices than conventional grocery stores, thus obviating their sole competitive advantage.

80. Information about the poor performance of the price-impact stores was reported in weekly, monthly, and quarterly reports provided to defendants Hansen, Rider, and Dahlen. In fact, the interviewed former financial analyst manager circulated by e-mail and hard copy a daily report of same store, new store, and closed store sales to Hansen, Dahlen, and other Fleming executives. These reports showed on a daily basis the decreasing sales at the price-impact stores.

81. According to the former financial analyst manager, defendant Dahlen, Simrell, and Otte on numerous occasions manipulated the same-store numbers in order to hide the downward trend in revenues and earnings. They made these manipulations by, among other things, their selection of stores to include in same-store sales figures. They rejected the analysis of the financial analyst managers, and instead chose stores based on their methodology. For example, Dahlen,
Simrell, and Otte often counted new stores’ revenue and earnings toward current-year “same store” revenues, in order to inflate current-year same-store revenues and earnings and create the false impression of revenue and earnings growth. As a result, Fleming’s same-store revenue and earnings reports did not truly reflect a “same store” comparison as is commonly understood in the retail industry.

82. In November 2001, Fleming’s retail financial analyst managers expressed concern to John Simrell that Fleming’s retail segment was overreporting the strength of its sales, especially its “comparable store” sales. Simrell told the financial analyst managers not to raise concerns, or they would lose their jobs.

83. Beginning in 2001 and continuing into 2002, Fleming also inflated its same store and/or comparable store sales figures by including certain sales, referred to internally as "red tag" sales. These were one-time transactions in which Fleming purchased and immediately sold large lots of a commodity, such as video cassette recorders or television sets, which had been located for Fleming by a broker. Even though red tag sales were not made through any Fleming retail store, Fleming would falsely attribute the revenue from these sales to the retail stores included in its same store and/or comparable store analyses, thereby inflating the total amount of same store and/or comparable store sales. In addition, in at least one instance in late 2001 or early 2002, Fleming — at the direction of either Dahlen or another Fleming employee — reduced the same store sales for the year 2000 by subtracting $1.3 million in red tag sales while at the same time inflating the 2001 figure for same store or comparable store sales by $4.7 million in red tag sales. In this way, the total same store and/or comparable store figure for 2001 was falsely inflated, and the growth for the same
store or comparable store figure was also falsely inflated. As a result, the market was misled about growth in same store sales.

84. In addition to declining sales, the financial analyst managers saw from data provided by category managers that expenses remained very high at the price-impact stores, despite public statements about reduced expenses resulting from conversion to the price-impact formats.

85. Fleming’s manipulations were not limited to unauthorized, improper, and unsustainable deductions and falsified same-store sales data. According to the former financial analyst manager, Fleming sometimes booked expenses as “strategic plan charges” or other one-time charges even when the expenses were not related to Fleming’s strategic plan. By booking recurring expenses as one-time charges, Fleming was able to increase its reported margins and falsely suggest to analysts and investors that the expenses would not recur in future reporting periods. This practice occurred even though Fleming’s retail financial analyst managers stated in meetings with management that the charges in question were recurring.

2. **Defendants deliberately misstated Fleming’s wholesale earnings.**

86. Fleming’s improper “earnings management” was not confined to its wholesale segment. On September 5, 2002, *The Wall Street Journal* published an exposé revealing Fleming’s wholesale practices of taking unauthorized, and improper deductions from vendors:

   Early this year, Oil-Dri Corp. of America drew the line with its longtime grocery distributor: It refused to ship any more cat litter.

   Oil-Dri complained that when the distributor, Fleming Cos., paid its bills, it arbitrarily deducted large sums for things such as product placement or early bill payment, even if it was actually paying late. “There are hundreds of thousands of dollars of erroneous deductions that need to be cleared off our account,” the company wrote to Fleming.
The article revealed that Fleming’s practices were so egregious that Fleming had become notorious among vendors:

Some suppliers temporarily stopped shipping to the distributor this year until a deduction dispute was resolved. In other cases, when they complained, Fleming threatened to halt or reduce its purchases from them. Fleming’s “relationship, with vendors is ugly,” say Richard Kochersperger, a food-industry consultant who has worked for Fleming and for a competitor. “They deduct and deduct until a vendor cuts them off, then they pay. Then they start deducting again.”

Fleming’s deduction practices had been ongoing for well over a year resulting in over $10 million in authorized deductions by May or June 2001:

...One former senior-level Fleming executive says he started hearing complaints from suppliers about nuisance deductions 2 1/2 years ago. He says he shrugged them off until the complaints grew more vociferous and began involving large sums from prominent companies.

The [former Fleming] executive says he had his staff do an informal tally. It found that at that time, about 15 months ago, suppliers were disputing $100 million of deductions Fleming had taken from their bills. The executive says he resigned after disagreeing with Fleming about its practices.

The unilateral nature of Fleming’s deduction was illustrated by Fleming’s “Shared Savings” program:

The executive’s tally came before Fleming imposed a novel deduction called “Shared Savings.” The distributor invited food suppliers to become “Preferred Vendors,” promising that it would then “eliminate nonproductive activities such as deductions” and provide quick resolution “on any deduction, invoice and or administrative errors.” Fleming asked suppliers to pay a $75,000 fee for this status, a fee it said it deserved because it was saving suppliers money through a new central procurement system.

When most suppliers balked, Fleming told them in August 2001 it was taking automatic 3% deductions from what it owed them... The new deduction, retroactive for 12 weeks, surprised and irritated some suppliers. Agrilink Foods Inc., maker of Bird’s Eye frozen vegetables, faced $278,000 in deductions it didn’t consider justified. An Agrilink official told Fleming he wasn’t
seeing any “shared savings” at all. “Frankly, the cost of doing business with Fleming has gone up as our representatives seem to need to spend more time chasing unauthorized deductions than building our mutual business,” said a letter from Ben Frega, executive vice president of the Green Bay, Wis.-based supplier. Fleming says the dispute has been resolved.

90. However, the “Shared Savings” program was only one part of a whole series of unauthorized deduction programs:

... there are other deductions, some of them associated with Fleming’s big March 2001 contract to supply Kmart stores that sell groceries. Unilever PLC, the supplier of Dove soap, Lipton tea and many other consumer products, got a $6.8 million bill in May 2001 for what Fleming called Kmart “transition and introduction” costs. Fleming expected suppliers to help it defray costs it incurred in taking on the Kmart business, such as two new warehouses, because the contract means extra business for suppliers.

Unilever rejected the demand. A Unilever executive says the matter remains unresolved. ...

Former Fleming executives say smaller suppliers with less clout paid these Kmart-related deductions for fear of losing business. Most supermarkets use only one distributor, so a supplier is excluded from them if it can’t get along with the distributor.

The Kmart contract prompted another new category of deductions as well. These were deductions for making goods that had been slated for Kmart available to other retailers.

Some suppliers told Fleming they didn’t want these products made available to other retailers. Fleming took the deductions anyway, according to correspondence between Fleming and several suppliers. **Fleming managers sometimes said they were taking the deductions at the direction of upper management, according to a supplier and to an employee who recently left Fleming.**

91. Fleming’s efforts to improve its earnings at the expense of its vendors rose to the level of outright fraud:

**Several former Fleming employees say Fleming has also played games with “slotting allowances.” These are deductions taken for the trouble of adding new products to inventory. Two former high Fleming executives claim the**
distributor sometimes charged slotting fees for items it never actually put into distribution.

Oil-Dri, the cat litter maker, says that too. The Chicago company objected to $55,000 in slotting deductions Fleming took for products that Oil-Dri said were never "slotted," either in Fleming’s warehouse or on Kmart shelves. These were part of several hundred thousand dollars in various charges that Oil-Dri disputed in a breach-of-contract lawsuit against Fleming. The suit, in federal court in the Northern District of Illinois in February, was settled two months later on undisclosed terms.

Solo Cup Co. says Fleming took a slotting deduction on paper products that Kmart ordered but canceled before Solo ever shipped them. Solo, of Highland Park, Ill., denied credit to Fleming off and on last year, complaining to Fleming that it had failed to pay bills and taken unjustified deductions. Fleming, in turn, stopped buying private-label products through Solo.

92. Another major program of unauthorized deductions was called “off-shore funding equalization.”

In the weeks before the April 20 close of Fleming’s fiscal first quarter, Fleming's suppliers received letters informing them of a slew of new deductions, Kellogg Co. found that the total amount it considered unjustified had jumped to more than $500,000, even though Kellogg had paid to become a “preferred vendor.” The main reason for the jump: a new Fleming concept called an “off-shore funding equalization” deduction.

It was related to the sales-promotion discounts that suppliers often provide to food retailers, which use them to mark down prices during sales. In a peculiarity of the business, the promotional discounts frequently pass to retailers by way of the distributor. Suppliers gave the distributor a discount, and the distributor is supposed to pass it on to the retailer.

A Kellogg executive, Kristin Schweitzer, wrote to Fleming that this was unjustified and violated the preferred-vendor agreement. Kellogg and some others hit with the new deduction contended that promotional discounts were already available to Hawaiian and Caribbean retailers on the same basis as for everybody else.

F. The False and Misleading Statements of Defendants During the Class Period.

1. Announcement of first-quarter 2001 results.
93. On May 9, 2001, Fleming issued a press release reporting its earnings for the first quarter of 2001:

Fleming Companies, Inc. today reported a 44.2 percent increase in first quarter 2001 net earnings to $17.2 million, or $0.41 per share after adjustments to exclude strategic plan charges and one-time items, compared to $11.9 million, or $0.30 per share, in the first quarter of 2000. First quarter adjusted operating earnings of $76.5 million, or 1.84 percent of sales, increased 15.9 percent from $66.0 million or 1.52 percent of sales.

“We are off to an outstanding start for 2001,” said Mark Hansen, chairman of the board and chief executive officer of Fleming. “Our first quarter 2001 results are particularly satisfying because our 44 percent improvement comes on top of a 56 percent increase in the prior year’s first quarter. We continue to successfully execute on our core strategies of high volume, low-cost operations backed up with the scale and efficiencies generated by our central procurement program.”

As expected, retail segment sales declined to $842.6 million from $1.06 billion in the prior year’s first quarter as the company continued to dispose of conventional retail stores in favor of its price-impact retail operations. In the course of implementing its strategic initiatives, the company has sold or closed 207 conventional supermarkets since the beginning of 1999, with only 31 stores remaining to be sold or closed at the end of the first quarter. Most of these stores are currently under contract to be sold. Comparable store sales for the Food4Less and Rainbow Foods stores were up 1.1 percent.

Gross margins increased in the distribution and retail segments by 34 basis points and 76 basis points, respectively.

Selling and administrative expenses in the retail segment were also substantially improved as higher-cost retail operations were disposed and the results principally reflected the lower cost structure of the company’s continuing retail operations. “Our retail operating results demonstrate the advantage of our laser-like focus on the price-impact retail proposition,” said Mr. Hansen. “Positive comparable sales in both the Food4Less and Rainbow Foods operations, backed up by the operating efficiencies of these low-cost formats, confirm our decision to focus on price-impact retail. What is perhaps most important is that our low-cost distribution operations are a perfect match for our price-impact stores. The same warehouses that
serve the company's wholesale distribution customers are capable of serving Food4Less, Rainbow, and Yes!Less at the low costs mandated by these formats. This is unique in the industry." . . .

94. The May 9, 2001 press release was false in several respects:

- The former Fleming retail financial analyst manager stated, from his review of internal financial reports predating his employment at Fleming, that Fleming's retail stores did not have increasing margins in the first quarter of 2001. Therefore, it was false for Fleming to state that "[g]ross margins increased in the . . . retail segment[] by . . . 76 basis points." In fact, the true data showed a decrease in margins for Fleming's retail stores in 2001.

- As a result of the falsified reporting of margins for Fleming's retail segment, the earnings numbers for the entire company also were false.

- The reported 1.1% increase in "comparable store sales" for Food4Less and Rainbow Foods stores also was false. The former Fleming retail financial analyst manager stated that sales typically plummeted after stores were converted to Food4Less and Rainbow stores, and these declines were apparent in early 2001. Given the true sales history of Fleming's price-impact stores, there was no basis for defendant Hansen to state that "[p]ositive comparable sales in both the Food4Less and Rainbow Foods operations, backed up by the operating efficiencies of these low-cost formats, confirm our decision to focus on price-impact retail."

- According to the September 5, 2002 Wall Street Journal article, Fleming's wholesale segment had engaged in a pervasive pattern of taking unauthorized, improper, and unsustainable deductions from vendors. The article reported that a former Fleming executive "had his staff do an informal tally," which "found that at that time, about 15 months ago [i.e., prior to the publication of the article], suppliers were disputing $100 million of deductions Fleming had taken from their bills." The former Fleming retail financial analyst manager stated that he believed this statement was "very accurate" for total Fleming wholesale and retail. Therefore, the earnings figures in the May 9, 2001 press release were materially inflated by unauthorized, improper, and unsustainable deductions in both the wholesale and retail segments.
95. Fleming's false first-quarter 2001 financial numbers were included in a 10-Q report filed with the SEC on May 29, 2001.


96. On August 1, 2001, Fleming reported second-quarter 2001 results in a press release:

Fleming Companies, Inc. today reported a 59.7 percent increase in second quarter 2001 net earnings to $22.4 million, or $0.46 per share, after adjustments to exclude strategic plan charges and one-time items, compared to $14.0 million, or $0.35 per share, in the second quarter of 2000. Second quarter adjusted operating earnings of $66.1 million increased 20.5 percent from $54.9 million in the prior year.

"Fleming's strategy of high volume, low-cost operations supported with the scale and efficiencies generated by central procurement and Fleming's low-cost pursuit programs — a strategy that is unique among our peers — is producing outstanding and sustainable growth," said Mark S. Hansen, chairman of the board and chief executive officer of Fleming. "What makes this quarter particularly impressive is that we achieved a 31 percent increase in quarterly earnings per share even as our diluted share count increased by more than 25 percent over last year. On a comparable share count basis, our earnings per share would have jumped 60 percent from $0.35 per share last year to $0.56 per share in 2001's second quarter."

Fleming completed the planned strategic divestiture of the last of its conventional retail stores during the quarter, positioning the company entirely in price-impact food stores (Food4Less and Rainbow Foods) and limited assortment opening-price-point stores (Yes!Less). In total, 237 conventional retail stores have been sold or closed since the first quarter of 1999. **Comparable store sales for continuing operations were up 1.3 percent for the quarter.**

As noted above, consolidated second quarter adjusted operating earnings increased in excess of 20 percent. Adjusted distribution earnings increased 36.6 percent to $102.3 million (3.47 percent of sales) from $74.9 million (2.96 percent of sales). **Adjusted retail earnings improved 3.7 percent to $21.6 million (4.23 percent of sales) from $20.8 million (2.73 percent of sales).**

**Retail segment adjusted results reflected the company's move to its successful price-impact operations.** With fewer stores in operation, total sales declined to $510.2 million from $761.1 million. Gross margins declined to 22.29 percent.
percent of sales from 23.33 percent of sales, mirroring the lower overall pricing position of the company's Food4Less and Rainbow Foods stores. More than offsetting the lower gross margins, however, were significantly reduced selling and administrative expenses, which declined to 19.94 percent of sales from 22.49 percent of sales in the prior year's second quarter. The EBITDA margin increased to 6.53 percent of sales from 5.08 percent of sales in the previous year. Commenting on the retail segment results, Mr. Hansen said, “We have a laser-like focus on price-impact retail. We are solely committed to stores with high volumes and low costs, a strategy that fits hand-in-glove with our supply chain operations. Importantly, because our distribution centers have a national footprint, it gives us a nationwide opportunity to grow this very successful retail concept.” Fleming reaffirmed its stated growth plan of operating 130 price-impact stores by the end of 2003.

97. The August 1, 2001 press release was false in several respects:

- It reported earnings that were artificially inflated by means of unauthorized, improper, and unsustainable deductions.
- It reported a falsified increase in comparable-store sales.
- Hansen falsely states that price-impact retail is a “very successful retail concept.” In fact, according to the former Fleming retail financial analyst manager, defendants already knew that the price-impact stores were suffering from declining earnings and margins.
- It falsely states that Fleming had not changed “its stated growth plan” for price-impact stores. In fact, according to the former Fleming financial analyst manager, Fleming already was searching for buyers for 44 Rainbow Foods stores in Minnesota which were experiencing severely declining earnings and margins.

98. Fleming’s false second-quarter 2001 financial numbers were included in a 10-Q form filed with the SEC on August 24, 2001.


99. On August 1, 2001, Fleming’s stock closed at $36.98 a share, representing a 400% appreciation in value since Mark Hansen’s appointment as CEO two and a half years previously. However, in August 2001, Fleming’s stock began to decline due to news that Fleming was settling
a lawsuit for overcharging filed by Don’s United SuperMarkets. Defendants sought to halt this
decline. Thus, on August 20, 2001, Fleming issued a release affirming its earnings guidance:

Fleming today announced that the company is affirming its previously announced guidance for 2001 adjusted earnings of $1.96 per share, as well as its 2002 and 2003 guidance of $2.50 per share and $3.30 per share, respectively. This represents the continuation of a five-year 30% compounded growth rate for adjusted earnings (fiscal years 1999-2003).

“Our $1.96 guidance for 2001 is especially noteworthy because of the concurrent 22% increase in fully diluted shares during our second quarter this year,” said Fleming Chairman and Chief Executive Officer Mark Hansen. During the latest quarter, Fleming’s fully diluted shares grew from 42 million to 51 million shares, and adjusted earnings were up 60% over the second quarter of 2000. Hansen continued, “The solid, ongoing improvement in our retail business and a 16% year-over-year improvement in distribution sales drove blockbuster results for the latest quarter. As we look ahead, the company expects to benefit from improvements derived from our central procurement initiatives, sales growth, expense management and productivity enhancements.”

100. This press release stated false earnings inflated by unauthorized, improper, and unsustainable deductions. Moreover, Hansen falsely stated that there was “solid, ongoing improvement in our retail business.”

4. **September 2001 press releases.**

101. Defendants falsely stated in press releases dated September 21, 2001 and September 25, 2001 that Fleming’s price impact stores “generally have exceptionally high volume and low costs with their trademark no-frills format.” In fact, defendants knew in September 2001 that Fleming’s price impact stores suffered from declining volumes.

5. **Announcement of third-quarter 2001 results**

102. On October 24, 2001, Fleming reported third-quarter 2001 earnings:

Fleming today reported a 52 percent increase in third quarter 2001 net earnings to $22.8 million, or $0.47 per share, after adjustments to exclude strategic
plan charges and one-time items, compared to $15.0 million, or $0.37 per share, in the third quarter of 2000. Analysts’ consensus estimate for the third quarter 2001 earnings was $0.44 per share. Fleming also announced that it is increasing its 2001 adjusted earnings guidance from $1.96 to a range of $1.96 to $2.00. The company’s fourth quarter guidance ranges from $0.61 to $0.65 per share on an adjusted basis.

With total sales just above $4 billion and net distribution sales of $3.5 billion for the 12-week quarter, Fleming took over the top position as the largest distributor in its industry following the successful integration and first full quarter of operations of the Kmart alliance. Third quarter adjusted operating earnings of $68.1 million increased 9.5 percent from $62.2 million in the prior year. Adjusted EBITDA increased to $110.2 million in 2001 from $106.7 million in 2000.

Third quarter 2001 retail sales of $484.4 million declined compared to the prior year’s $693.6 million. However, sales of continuing operations jumped 21 percent in the third quarter to $453.8 million compared to $375.9 million in 2000. Comparable store sales were up 1.5 percent for the quarter.

Retail segment adjusted operating earnings declined to $17.1 million from $19.4 million in the prior year's third quarter. Expressed as a percentage of sales, operating earnings increased in the current year's third quarter to 3.54 percent of sales from 2.79 percent of sales the prior year. A significant reduction in selling and administrative expense -- nearly 200 basis points -- contributed to the improved retail performance. Adjusted EBITDA improved 62 basis points to 6.14 percent of sales from 5.52 percent of sales. Commenting on the retail segment results, Hansen said, “Our price impact formats, with their high volumes and low operating costs, are a great fit with our distribution strategy. This allows us to be extremely competitive while developing a strong consumer following in this under-served niche of the retail grocery sector.”

The company added six new price-impact and four new limited assortment stores during the quarter. The company also completed the conversion of four former Sentry stores. In total, it operated 98 price impact (which includes the 44 Rainbow stores operated in the Minneapolis market and the six Sentry Stores in the Milwaukee market that are in the process of being remodeled and converted) and 16 limited assortment stores at the end of the quarter. Fleming affirmed its stated growth plan of operating 174 price impact stores by the end of 2003.

103. The October 24, 2001 press release was false in several respects:
• It reported earnings that were inflated by means of unauthorized, improper, and unsustainable deductions.

• It reported earnings that were inflated by classifying recurring expenses as "strategic plan charges and one time items."

• It reported a falsified increase in comparable-store sales.

• Hansen falsely stated that Fleming’s price-impact stores have "high volumes," are "extremely competitive," and were "developing a strong consumer following."

• It falsely affirms Fleming’s "stated growth plan" for price-impact stores.

104. On October 24, 2001, defendants Hansen and Rider gave a presentation to analysts in connection with Fleming’s reporting of third quarter earnings. Hansen’s and Rider’s statements were reported on November 5, 2001 in DSN Retailing Today.

105. At the October 24, 2001 presentation, Hansen stated:

“Our retail investment strategy has a laser-line focus on two formats [price impact and limited assortment] that have, in our minds, very superior consumer propositions and very superior economics,” Hansen said. “We believe the value retailing market is a $100 billion opportunity.”

Hansen’s statement was false. According to the former Fleming financial analyst manager, Hansen knew that Fleming’s price-impact and limited-assortment stores were not achieving consumer acceptance and were offering inferior economics.

106. The article also states that “[b]oth formats have received overwhelming customer response.” Based on the fact that the article appears merely to report what Hansen and Rider said in the October 24, 2001 meeting, on information and belief, Hansen and Rider told the analysts that the price-impact and limited-assortment stores had received overwhelming customer response. This
statement was false. Hansen and Rider knew that the formats were receiving a poor customer response.


108. On November 5, 2001, DSN Retailing Today ran an article titled “Fleming Takes Distribution Service to Next Level.” In the article, Hansen and Fleming falsely claim that Fleming’s Food4Less and Yes!Less stores offer “very superior consumer propositions and very superior economics.” In the article, Hansen and Fleming claim that the value retailing market represents an opportunity for expansion, with “significant growth potential,” even though Hansen and Fleming knew that Fleming’s value retailing format had been poorly received by consumers. The article states:

   Even though distribution makes up 83% of Fleming’s revenue, the company also sees significant growth potential for its $2.6 billion food retailing business. This year, Fleming exited the conventional supermarket business, selling off many of its stores, and has refined its price-impact food format. These stores appeal to shoppers with a median income of $45,000 whose main interest in shopping is value as opposed to service or fancy merchandising.

   “Our retail investment strategy has a laser-line focus on two formats that have, in our minds, very superior consumer propositions and very superior economics,” Hansen said. “We believe the value retailing market is a $100 billion opportunity.”

   Fleming currently operates 98 price-impact food stores under Rainbow Foods and Food4Less, and 16 limited-assortment stores called Yes!Less. By the end of 2003, the company intends to have 174 price-impact stores and believes this underdeveloped niche has potential to grow to 800 units.
The smaller Yes!Less format targets shoppers of even lower income. It has a deep value positioning of food, and general merchandise includes 4,000 skus, such as limited produce, refrigerated meat and frozen food.


On February 13, 2002, Fleming reported its fourth-quarter 2001 results in a press release which stated in part:

Fleming Companies, Inc. today announced adjusted net income for the 2001 fourth quarter grew 59.1 percent to $31.1 million, or $0.64 per share on a fully diluted basis. The fourth quarter 2001 total is adjusted to exclude strategic plan charges and a charge related to the Kmart bankruptcy reorganization. The comparison to the prior year is calculated on a comparable 12-week basis.

"Fiscal 2001 was a defining year for Fleming," said Mark Hansen, chairman of the board and chief executive officer of Fleming. "We emerged as the nation's leading distributor of consumables to the retail industry and generated total adjusted EBITDA of $475.8 million, the highest in the company's history. This strong operating cash flow facilitated our $101 million fourth quarter debt reduction. More importantly, we bring considerable momentum into 2002 with a strong base of business and substantial growth prospects."

Fleming operated 187 retail stores at the end of 2000, compared to 116 at the end of 2001. Consequently, retail sales declined 25.8 percent in the fourth quarter of 2001 compared to 2000 on a comparable 12-week basis, reflecting the disposition of non-strategic conventional supermarket assets. Fourth quarter sales in the company's price impact retail operations increased 28.4 percent over 2000 on a comparable 12-week basis.

A major program to remodel the company's existing price impact store base is currently in process and will continue throughout 2002. "We are investing in our future performance with an aggressive remodel program. These remodels are being done with a single purpose in mind: expand the departments and categories that drive sales and margins without the addition of service or labor. We believe this is consistent with our high-volume, low-cost price impact business model," said Hansen. Examples include updating bakeries and delis to accommodate more self-serve fresh offerings, adding linear feet to the higher-margin frozen foods section, and expanding the beer, wine, and liquor department. Hansen noted, however, the short-term disruption caused by the remodel process and praised the store operations...
team for their excellent performance in spite of the distraction. Of the company’s 4.44
million retail square feet operated in its price impact supermarket format, approximately 650,000 square feet, or nearly 15% of the price impact operating
space, were in the process of being remodeled during some or all of the quarter.

Excluding stores that were undergoing remodels, fourth quarter comparable store sales increased 1.8 percent. Total comparable store sales were up 0.7 percent.

Retail segment adjusted EBITDA declined 37.6 percent for the fourth quarter of 2001 compared to 2000 on a comparable 12-week basis primarily related to the
disposition of non-strategic conventional supermarket assets. However, adjusted EBITDA for the company’s price impact operations, the most significant component of its retail operations, increased 4.8 percent, based on a comparable 12-week period in 2000, to $30.0 million. “Our price impact retail operations continue to flourish. We have chosen a single niche of the retail food business that offers outstanding growth opportunities and an addressable market that we estimate to be approximately $180 billion for value retail,” said Hansen. Fleming will cycle the disposition of most of its conventional retail operations in the first quarter of 2002. The company operated 99 price impact and 17 limited assortment stores at the end of the quarter.

110. The February 13, 2002 press release is false in a number of respects:

• It reported earnings that were inflated by means of unauthorized, improper, and unsustainable deductions.

• It reported earnings that were inflated by improperly classifying recurring expenses as “strategic plan charges and one time items.”

• It reported a falsified increase in comparable-store sales.

• Hansen falsely stated that “our price impact retail operations continue to flourish,” and that price-impact stores “offer[ ] outstanding growth opportunities.”

8. 2001 10-K

111. On March 6, 2002, Fleming filed with the SEC its Form 10-K for the year ended December 29, 2001. The Form 10-K which was signed by defendants Hansen and Rider, reiterated
the results of operations previously announced by the Company in its February 13, 2002 press release. However, in the Form 10-K, Fleming stated the following about its retail segment:

Our retail segment net sales were $2.3 billion for 2001, which represented approximately 15% of total net sales. Of this amount, $1.9 billion was attributable to continuing operations, which represents a 1.1% increase over the prior period. As of December 29, 2001, we owned and operated 94 price impact supermarkets and five additional supermarkets that we are converting to the price impact format. Price impact supermarkets offer everyday low prices that are typically below the prices of market-leading conventional supermarkets. These stores typically cost less to build, maintain and operate than conventional supermarkets. In addition, we operated 17 limited assortment stores under the Yes!Less(R)banner. Limited assortment stores offer a narrow selection of low-price, private label food and other consumable goods, as well as general merchandise at deep-discount prices.

In recent years, consumers have been shifting their purchases of food and other consumable goods away from conventional full-service grocery stores toward other retail channels, such as price impact supermarkets, discount stores, supercenters, convenience stores, drug stores and ethnic food stores. Since 1998, we have repositioned our distribution segment to become a highly efficient supplier to these retail channels. As a result, our distribution segment has experienced renewed sales growth. In addition, we believe price-sensitive consumers are underserved in the retail grocery market, and we have repositioned our retail segment to expand our presence in the price impact format.

* * * * *

Our price impact supermarkets serve price-sensitive middle-income consumers who may have larger-than-average families. These stores have a wider trade area than conventional supermarkets yet are generally more convenient to shop than supercenters. **Our price impact supermarkets offer name-brand food and consumable goods at significantly lower prices than conventional format retail store operators because of the many low-cost features of our stores.** These features include: offering a reduced number of product selections, focusing on popular, name-brand products and product categories; employing flow-through distribution methods that reduce product storage and handling expense; and minimizing store operating costs.

These stores do not cost as much as conventional stores to construct and maintain, as price impact stores typically feature cement floors, cinder block walls and exposed ceilings which combine the typically separate storage and display areas. In addition, the efficiencies in the store design and operations result in lower overall
operating expenses. Because price impact stores cost less to build and maintain than conventional supermarkets, we expect to be able to grow our price impact supermarket operations while incurring lower capital expenditures.

We believe price-sensitive consumers are underserved on a nationwide basis. We believe the success of our price impact stores is based on an underserved trade area and does not require significant market share. As a result, we spend less on advertising and marketing for these stores compared to conventional format stores.

112. The 10-K was false in several respects:

- It reported earnings that were inflated by means of unauthorized, improper, and unsustainable deductions.
- It reported earnings that were inflated by improperly classifying recurring expenses as "strategic plan charges and one time items."
- It reported a falsified increase in net sales for continuing operations.
- It falsely stated that Fleming’s price-impact supermarkets offer “significantly lower prices than conventional format retail store operators.”


113. On April 1, 2002, Fleming issued a press release on the PR Newswire announcing that it would offer $260 million of senior subordinated notes due 2012 in a private placement, the proceeds of which would be used to redeem $250 million of Fleming’s then outstanding 10.5% senior subordinated notes due 2004. Defendant Rider stated: “The combined benefit of low interest rates and strength in the capital markets provide Fleming an opportunity to, essentially, extend the maturity on this debt.” These notes, which bore a reduced coupon of 9.375%, went on sale April 3, 2002, and Fleming announced the completion of the sale of these bonds on April 15, 2002. If the true facts regarding Fleming’s deteriorating business prospects were known at the time of this refinancing, the refinancing would not have been accomplished on as favorable terms or not at all.
10. **April 16, 2002 and April 22, 2002 press releases.**

114. On April 16, 2002, Fleming issued a press release announcing the opening of its 102nd price impact store. In the press release, the Company stated, that “Fleming continues to grow its price impact format that operates under the Food4Less and Rainbow Foods banners through new store construction, upgrades and acquisitions.”

115. On April 16, 2002, Fleming also issued a press release announcing that it planned to enter the Dallas market with the acquisition of seven stores. The press release stated:

> “We are very excited about building on what has already been accomplished with these successful stores,” said Tom Dahlen, executive vice president and president, Retail and Marketing. “Rainbow stores offer terrific savings on the most popular national brands, high-quality meat, produce and store brand products. The commitment to exceptionally low prices throughout the store is the hallmark of a Rainbow store.”

> “Our Rainbow Foods and Food4Less stores serve a unique -- and growing -- niche in the market, specifically serving customers who are focused on obtaining the lowest prices day in and day out. These stores do tremendous sales volumes. And, because of that, they are particularly well aligned with our distribution strategy of high volume and low costs to drive growth,” said Mark Hansen, chairman of the board and chief executive officer. . . .

116. On April 22, 2002, Fleming issued a press release announcing an agreement to acquire seven stores in Dallas from Brookshire Grocery Co. The press release quoted defendant Dahlen:

> According to Tom Dahlen, executive vice president and president, retail and marketing, “We are very excited about building on what has already been accomplished with these successful stores. The commitment to exceptionally low prices throughout the store is the hallmark of a Rainbow store.”

117. The quoted statements in the April 16 and 22, 2002 press releases were false. Fleming was considering steps to contract, not grow, its line of price-impact stores. The stores were
not successful. The statement that they “do tremendous sales volumes” was misleading because such sales were either marginally profitable or produced losses.

11. **First Quarter 2002 earnings announcements**

118. On May 7, 2002, Fleming reported its first quarter 2002 results in a release which stated in part:

Fleming Companies, Inc. today reported net income of $24.6 million for the first quarter of 2002, or $0.52 per share on a diluted basis, on target with the range of guidance earlier provided by Fleming. The 2002 first quarter results represent a 59.1 percent increase over the first quarter of 2001, which totaled $15.5 million, or $0.37 per share (before an extraordinary charge from the early retirement of debt in 2001). Total company net sales for the 16-week first quarter were $4.69 billion, a 13.3 percent increase compared to $4.14 billion in the prior year. Based on the strength of current operations and recent significant events, Fleming is increasing guidance for its 2003 fiscal year to $3.55 to $3.65 per share, up $0.15 per share from its prior range of guidance.

“Fleming has an outstanding start to 2002,” said Mark Hansen, chairman of the board and chief executive officer. “Our strategies are keenly focused on efficient, high volume operations in growing sectors, supported by state-of-the-art technologies to lower costs, drive sales, and increase earnings. We believe it is a strategy that resonates with customers, vendors, associates, and shareholders alike.”

Fleming operated 187 retail stores at the beginning of 2001, opened six stores, disposed of 66 stores during the quarter, and ended the 2001 first quarter with 127 stores. A final group of 31 stores was disposed in the second quarter of 2001. This compared to 119 stores operated by Fleming at the end of the first quarter of 2002. Consequently, retail sales declined 20.7 percent in the first quarter of 2002 compared to 2001, reflecting the disposition of the non-strategic conventional supermarket assets. First quarter sales in the company's continuing price impact retail operations increased 24.7 percent over 2001. First quarter comparable store sales were flat. EBITDA for continuing retail operations was $32.6 million, or 4.87 percent of sales.

The press release also reported that the retail segment’s operating earnings were $15,403,000 through the sixteen weeks ending April 20, 2002.
119. The May 7, 2002 press release was false in several respects:

- It reported earnings that were inflated by means of improper deductions.
- It reported a falsified increase in sales for “continuing price-retail operations” and falsified “flat” sales for comparable stores.

120. In fact, according to the former financial analyst manager, Fleming’s retail segment experienced losses of $4 to $7 million through April 2002 – even when allowing for accrued, baseless deductions.

121. Fleming had intensified its accrual of unsupported deductions in retail. For example, according to the former financial analyst manager, at the direction of defendants Hansen and Dahlen, Fleming retail tried to obtain deductions of around $3.5 million from vendors for two cases of product per store based on classifying the stores as “new stores,” since new stores sometimes receive two cases of free product upon opening. Although these deductions were accrued, only around $80,000 of deductions actually were accepted by the vendors.

122. To make matters even worse, Fleming wholesale was by this time dumping much of its slow-moving merchandise on Fleming retail stores, according to the former financial analyst manager. Thus, Fleming’s retail stores were being packed with undesirable products in order to help Fleming wholesale improve its earnings numbers. As a result, Fleming’s retail business suffered, and Fleming’s wholesale earnings were artificially inflated.

123. Following the release of its first quarter 2002 results, Fleming hosted a conference call with analysts. Defendants made a number of false statements on the conference call:

- Hansen: “[W]e are very pleased about that and feel good about the customer acceptance. . . . I am equally pleased to tell that I am happy with the progress we are making on our Yes!Less business. . . . So,
we have made strong progress in our retail side of our business as well as we look at for the quarter.”

- Rider: “Our comp sales were flat in the quarter and it is pretty good compared to the peers in the industry.”

- Rider: “Our EBITDA, for continuing operations was 32.6 million for 4.87 percent of sales, we expect that number to continue each and every quarter as we go through the rest of this year, as we started to get the benefits of the significant remodel activity that has held back our earnings performance . . . .”

- Hansen (discussing Yes!Less): “I am almost giddy [about] the progress we are making in this arena as recent as looking at sales numbers in last week.”

124. On May 17, 2002, Fleming filed with the SEC its Form 10-Q for the quarter ended April 20, 2002. In its Form 10-Q, the Company reported results of operations consistent with those first reported in its May 7, 2002 press release. For the same reasons, these results were false.

R. June 17, 2002 prospectus

125. On May 28, 2002, Fleming issued a press release announcing an offering of 8 million shares of common stock and $200 million of senior notes and that the Company intended to use the net proceeds from both offerings and borrowings from its proposed new credit facility to fund obligations in connection with the company’s acquisition of Core-Mark International, Inc. and to repay debt. Fleming’s stock offering motivated defendants to maintain or inflate the price of Fleming’s stock.

126. On or about June 17, 2002, Fleming filed final prospectus supplements relating to the sale of 8 million shares of its common stock and $200 million of 9 ¼ senior notes due 2010. By this time, according to the former financial analyst manager, Fleming’s real loss in the retail segment was
at least $17 million, and $10 - $15 million of unauthorized, improper, and unsustainable deductions had been accrued. Nevertheless, the prospectus supplements falsely stated:

**Successful Price Impact Retail Format:**

Our price impact supermarkets offer name-brand and private label consumable goods at significantly lower prices than conventional supermarkets. We keep prices low by leveraging our existing distribution and procurement capabilities and maintaining a lower cost structure associated with operating these stores. **We believe this format is profitable** because we offer a reduced number of product selections, focus on high-turnover products and product categories, employ flow-through distribution methods that reduce product storage and handling and minimize store operating costs.

**BUSINESS STRATEGY**

Our business strategy is to use our competitive strengths to achieve sales and earnings growth in both our distribution group and retail group.

13. **June 18, 2002 press release**

127. On June 18, 2002, Fleming announced that its acquisition of Core-Mark International had been completed. The Company also announced that it had completed its offering of 8 million shares of its common stock at $19.40 per share (approximately $155 million in gross proceeds) and that underwriters had a 30 day option to purchase an additional 1.2 million shares at $19.40 to cover over-allotments, if any. The Company also announced that it had completed its offering of $200 million in senior notes. Fleming also announced that it had entered into a new $975 million bank credit facility which consisted of a $550 million revolving credit facility and a $425 million term loan. In describing the Company, the press release falsely stated that “Fleming also has a growing presence in value retailing...”
14. **July 9, 2002 press release**

128. By July 2002, one Fleming retail financial analyst manager had been assigned to find vendors to accept $10.8 million of deductions which Fleming had already accrued without the vendor’s agreements. He could not find vendors to accept the unsupported deductions. Another Fleming retail financial analyst manager at the same time could not find vendors to accept $5 million of already-accrued deductions. Fleming’s internal “retail summary book” showed that the retail segment had a $36 million loss as of July 18, 2002. This same book showed an EBITDA of negative $4.3 million. Nevertheless, in a July 9, 2002 press release announcing the hiring of Keith Durham as Senior Vice President, Fleming Retail Group, Fleming reported: “Durham said, ‘The Fleming retail team is at the very start of a tremendous opportunity for growth. There is a strong retail base in place.”

15. **Second Quarter 2002 announcements**


130. On July 30, 2002, Fleming issued a press release announcing its results of operations for the quarter ended July 13, 2002. In the press release, the Company shocked the market by announcing that it was evaluating its strategic alternatives related to its retail segment. It stated that the retail segment was suffering from declining prices in the meat category and competitive pressure. The press release stated, in part:

Hansen continued saying, “Based on the anticipated growth and higher relative returns on invested capital generated by our distribution supply chain business, **we are carefully and thoughtfully evaluating our strategic alternatives related to our price-impact retail stores. We will examine how the retail operations best fit into our overall strategy.** Our goal is to ensure that our decisions ultimately enhance shareholder value.” The company anticipates that its evaluation will conclude some time in the third quarter of 2002.
Second quarter 2002 retail sales increased 0.8 percent compared to the prior year. However, comparable store sales declined 4.7 percent. The decline in comparable store sales reflects a number of factors, including stores undergoing remodels, deflationary prices in the meat category, and heightened competition and competitive openings, factors that appear to be affecting the entire retail food industry. Due to these issues, EBITDA attributable to retail operations on a comparable basis was $22.8 million compared to $32.3 million in 2001.

131. In its July 30, 2002 press release, the Company stated the following with respect to projections for the remainder of 2002 and 2003:

Fleming is reiterating its current guidance of $2.20 to $2.30 for 2002 and $3.55 to $3.65 for 2003. Guidance for the third and fourth quarters of 2002 remains at $0.65 to $0.70 and $0.80 to $0.85 per share, respectively. This guidance assumes that the company’s retail stores’ earnings return to more normalized levels (flat to slightly up relative to last year).

132. Later that same day, Fleming held a conference call, again reiterating its earnings guidance for the second half of fiscal 2002. During the conference call, defendants stated that Fleming expected its retail segment sales to return to prior year levels with any small shortfall made up by increases in its distribution business. In this regard, defendant Rider stated:

We see significant closing of the gap and we feel we can close that gap. Strength of distribution and support services will overcome any gap that is still left over. But, right now our planning has us getting retail back to about a flat level in the third quarter.

133. Fleming also announced that it was conducting a review of its retail segment that would be completed sometime in late September or early October 2002.

134. In the July 30, 2002 press release and in the conference call, defendants overstated Fleming’s wholesale earnings in several ways:

- The wholesale earnings reflected millions of dollars of unauthorized, improper, and unsustainable deductions.
• Recurring expenses were booked as nonrecurring expenses.

• Wholesale earnings were inflated by “sales” to Fleming retail of undesirable merchandise.

135. In the July 30, 2002 press release and the conference call, defendants admitted a decline in retail earnings, but made numerous false statements about the size of the decline, the reasons for the decline, and the prospects for the reversal of the decline:

• The press release falsely stated that “[s]econd quarter 2002 retail sales increased 0.8 percent compared to the prior year. However, comparable store sales declined 4.7 percent.” In fact, according to the former financial analyst manager, second quarter retail sales had significantly declined from second quarter 2001, and comparable store sales had declined around 13%.

• The press release, and Hansen in the conference call, gave earnings guidance based on the assumption that “the company’s retail stores’ earnings return to more normalized levels (flat to slightly up relative to last year.)” However, according to Fleming’s internal documents, Fleming’s retail segment had a $36 million loss and an EBITDA of negative $4.3 million as of July 18, 2002, in comparison to $14,492,940 in earnings at the same point in 2001. According to the former financial analyst manager, defendants knew on July 18, 2002 that the retail segment’s earnings had already deteriorated since the end of the second quarter, that the losses in the retail division were accelerating, and that the retail segment was incapable of achieving sufficient earnings over the remainder of 2002 to finish “flat to slightly up relative to last year.”

• The press release, and Hansen in the conference call, attributed the poor results in the retail segment to “stores undergoing remodels, deflationary prices in the meat category, and heightened competition and competitive openings.” However, defendants knew on July 30, 2002 that Fleming’s stores were failing because of Fleming’s operational failures, including the failure to offer lower prices and the practice of using the price-impact stores as “dumping grounds” for Fleming wholesale’s unwanted inventory.

• During the conference call, defendants falsely stated that Fleming expected its retail segment sales to return to prior year levels with any
small shortfall made up by increases in its distribution business. In this regard, defendant Rider stated: “We see significant closing of the gap and we feel we can close that gap. Strength of distribution and support services will overcome any gap that is still left over. But, right now our planning has us getting retail back to about a flat level in the third quarter.”

In the conference call, an analyst asked defendant Hansen, “for the full year are you still on track with your target?” Hansen falsely answered: “[w]e believe that and we continue to confirm that periodically with Jim Adamson and Julian Dave who are the CEO and Chief Operating Officer but at this point there is almost no news that would be anything worthy to comment on.” In fact, Hansen knew that retail had deteriorated to the extent that the targets would have to be revised downward.

136. On July 31, 2002, Fleming was cut to “market underperform” from “market perform” by J.P. Morgan analyst Stephen Chick. According to a Reuters report dated August 1, 2002, “Chick said that there was significant risk to the earnings forecast provided by the [C]ompany on Tuesday.”

137. In a similar move, Neil Currie, an analyst at UBS Warburg, cut his investment rating on Fleming to “reduce” from “buy” on July 31, 2002 “as a result of our concerns related to the company’s earnings quality and the recent under-performance of its company’s [sic] retailing operations. . . . Additional comments by Fleming indicating that it is considering strategic alternatives for the price impact stores, in our view, confirm that all is not well in the company’s retailing operations even though we recognize the strategic merits of the company’s prior disposition of conventional retailing assets in order to focus on the price impact format . . . . Despite these deteriorating trends, Fleming is maintaining full year guidance . . . . The underlying assumptions for retailing division are aggressive and represent a significant source of risk, in our view. . . . In addition, we are concerned that in the event Fleming decides to dispose of its price impact format stores, that this would in all likelihood give rise to additional restructuring charges in the future and
contribute even further to deteriorating trends related to earnings quality and financial reporting.”

In response to Fleming reporting per-share earnings of $0.21 before an extraordinary charge, in line with the Thomson First Call consensus estimate, Currie wrote, “We question the quality of this number.”

138. On August 5, 2002, *Supermarkets News* released an article by David Ghitelman entitled, “Fleming Rethinks Retail Strategy,” in which it is stated that the Company’s announcement that it is exploring strategic alternatives with respect to its retail segment “appears to have taken most supermarket analysts by surprise.”

139. Fleming common stock fell significantly in the several days following the July 30, 2002 press release. It closed at $10.81 per share on August 5, 2002, down $5.37 per share, or 33%, from the closing price of $16.18 per share on July 29, 2002.

140. On August 5, 2002, the Company held an investor presentation in New York at which it reiterated its earnings guidance for the second half of fiscal 2002. On August 6, 2002, Wachovia Securities provided a summary of the meeting. The report stated:

> On Monday, August 5, management of Fleming Companies reaffirmed the company’s growth strategy and earnings outlook during an investor presentation in New York. Management reviewed the company’s Q2 earnings results (which were reported last week) and provided clarification on the quarterly performance, the company’s retail strategy, and earnings guidance for H2 2002 and full-year 2003.

> **Q2 Earnings.** Management reviewed the company’s Q2 earnings release on a GAAP basis (before extraordinary items) and on a comparable basis excluding several one-time items year-over-year. On a GAAP basis, the company’s EPS was $0.21 in Q2 versus a loss of $0.31 in the prior-year period. After adjusting for extraordinary items, the company’s EPS rose 16.7% to $0.63 in Q2 versus $0.54 a year ago. The company highlighted certain items on the income statement including the tax rate, which was 34.5% in Q2 down from 40.6% in the prior-year period and benefited EPS by $0.015 in Q2. However, management indicated that the prior-year tax rate had a negative $0.02 impact on EPS due to LIFO adjustments.
Earnings Guidance Reiterated. The company provided additional details supporting the basis for its earnings outlook for H2 2002 and the full-year 2003. Management reiterated EPS guidance of $2.20-2.30 for 2002 and $3.55-3.65 for 2003. We note that the achievement of the company’s earnings targets is in part dependent upon an improvement in the company’s retail performance during H2 2002 and into 2003. Management has indicated that a strong performance within the distribution segment could offset a potential shortfall in the retail segment.

On August 27, 2002, Fleming filed its Form 10-Q for the second quarter of 2002. Included therein was an item that surprised analysts, as an August 29, 2002 J.P. Morgan report indicated:

Sale-leaseback – The company received $130 million in proceeds from sale-leaseback transactions related to 5 case pick distribution facilities in Phoenix, Massillon, Salt Lake City, Miami, and Sacramento. The proceeds appear to have funded working capital needs during the quarter (which absorbed $165 million in cash during the period), as debt increases ($291 million to $2.2 billion – net of cash for refinancing) for the quarter were as expected and reflected the acquisition of Core-Mark and Head Distributing. Working capital deteriorated during the quarter, on lower accounts payable leverage, as FLM reduced terms with vendors (paid earlier) and financed a portion of inventory with sale-leaseback proceeds.

These sale-leaseback transactions resulted in an undisclosed gain that is being deferred and amortized over the remaining life of the operating leases. Proceeds from the sale-leasebacks represent approximately 14.6% of the total net PP&E balance at the end of the quarter of $892.4 million (and approximately 13.5% of our originally expected quarter-end (pro forma) PP&E balance for the quarter of $960m). We find the sale-leaseback transactions interesting at a time when FLM is also re-evaluating its retail strategy (see our note dated July 31, 2002). We also note that management neglected to mention the sale-leaseback transactions at its August 5th analyst conference (the company was asked why net PP&E had declined sequentially).

September 4, 2002 article

Flemings’ stock closed at $9.31 at close of business on September 3, 2002. Then on September 4, 2002, Dow Jones Newswire released an article by James Covert titled “Fleming’s Supermarkets Bulging With Excess Inventory.” The article reported that Fleming’s retail stores were
bulging with so much inventory that some had reached the conclusion that Fleming was using its retail stores as a warehouse:

Lately, it seems to Cathy Lindsey that Yes!Less supermarkets have more groceries than they can handle.

Since she started shopping a Dallas-area Yes!Less stores at the beginning of this year, Lindsey says she’s had an increasingly difficult time navigating them. Aisles and even entryways are cluttered by pallets towering with merchandise — often strange-looking, off-brand items that haven’t yet been removed from their crates.

The 29-year-old photo-lab technician says she has seen pallets of perishable items including meat, eggs and margarine sitting in the middle of an aisle, unrefrigerated. And she’s a little edgy about the way bug spray and other chemicals are often stacked on shelves next to food items.

“Food and chemicals shouldn’t be mixed together,” she says. “If anything’s too close to chemicals, I won’t buy it.”

Pete Sawyer, a retired tax consultant also living in Dallas, says he’s still able to find good deals on canned goods, cereal, frozen foods and pharmacy items at Yes!Less, which is owned an operated by Dallas-based Fleming Cos. (FLM), a nationwide food distributor. Prices there are lower than at stores run by Kroger Co. (KR) or Albertson’s Inc. (ABS), he says.

But Sawyer, too, says he has noticed more “odd-ball” merchandise at Yes!Less and Rainbow Stores, another regional supermarket chain owned by Fleming. On a recent shopping trip, he wondered at pallets stacked high with crates of “funny-looking green juice.”

Such scenarios were confirmed in pictures taken of Yes!Less locations last week by an investor who has shorted Fleming shares.

“A lot of the boxes you can’t see through. They were shrink-wrapped and you can’t see what was in them,” says Sawyer, 58. “It looks to me like the store is actually acting as a warehouse.”

A Big Increase in Inventory

Fleming officials declined to respond to questions about the company’s 127-store retail operation, which also includes Food 4 Less, a western U.S. supermarket chain.
But having examined Fleming’s recent financial reports, some on Wall Street say that Sawyer’s store-as-warehouse theory makes sense.

Fleming’s inventories in the quarter ended July 13 were $1.25 billion – up a whopping 25% from a year earlier. Some of that increase may have resulted from Fleming’s $330 million acquisition in June of Core-Mark International and Head Distributing, two smaller distribution companies.

143. The September 4, 2002 article thus publicly revealed the customer dissatisfaction underlying the poor performance of Fleming’s price-impact stores. It also revealed that Fleming had not integrated wholesale and retail to the benefit of retail, but instead had used retail as a dumping ground for wholesale’s excess inventory problem. Finally, the article suggested that Fleming managed inventories in order to generate temporary increases in earnings at the expense of customer satisfaction:

But the lion’s share of the increase [in inventories] likely originated elsewhere, said Gary Giblen, director of research at C.L. King & Associates, a New York investment firm. Despite an increasingly challenging and competitive environment for food sales, Fleming likely drove the number higher by making high-volume purchases to get upfront, cash rebates from vendors who were looking to unload excess inventory, Giblen said.

“It’s a way to paint your numbers to make them look better,” Giblen said. “You make a massive forward buy and lower your cost of goods. But then you have to sell the stuff.

144. Finally, the article also reported that the Company had cash flow problems which it was trying to ease by taking large unauthorized, improper, and unsustainable deductions from the payments due on invoices from vendors.

Scrambling For Cash

A sale of the retail operation would be the latest in a series of moves by Fleming this year to shore up cash flow, which was negative $83 million at the end of the second quarter versus positive $52 million a year earlier.
Gary Giblen, director of research at C.L. King & Associates, a New York investment firm, says Fleming has likely used strong-arm tactics with its vendors as one source of cash. The common practice in food retailing of partially withholding payment on deliveries from manufacturers has historically been pursued aggressively by Fleming, Giblen says.

E. Wayne Ray Jr., financial chief at Houston food distributor Riviana Foods Inc., says that his company has had occasional difficulties with Fleming in the past related to such “unauthorized deductions,” as vendors commonly call them. But Riviana, which distributes rice to Fleming, has enjoyed a strong, hassle-free relationship with the company, Ray says.

“I wouldn’t put them at the head of the list in terms of deductions,” Ray says of Fleming. “Everybody that’s in the retail food business takes deductions and says “catch us if you can.” Right now, they’re a fine customer and we have no problems.”

Other vendors who asked to not be identified, citing fear of retaliation from Fleming, disagreed, and a few said they have either stopped shipping to Fleming or are demanding cash in advance for deliveries. One such small-to-medium-sized vendor said Fleming typically alleges damaged or improperly delivered goods, or cites the costs of promoting items at retail outlets. Fleming has failed to pay almost 10% of its balance for deliveries this year, the vendor said.

“On a $10,000 invoice they’ll take a $4,000 to $5,000 deduction with no justification, an it takes us months to collect the money back,” the vendor said. “When it comes to deductions, they’re off the scale compared with other customers.”

Fleming declined to respond to what it called “vague claims from unnamed, uninformed individuals who have their own self-serving agendas.”

A Failure To Communicate

Fleming has been pursuing other creative means to preserve cash flow, says J.P. Morgan’s [Stephen] Chick. He cites Fleming’s quarterly 10-Q filing with the Securities and Exchange Commission last week, in which it revealed that it had raised $130 million in cash in the second quarter by selling and then leasing back five distribution centers.

Those transactions were “unexpected,” and the company neglected to mention them at its Aug. 5 analyst conference when asked about a change they had effected on the company’s balance sheet, J.P. Morgan’s Chick said. The proceeds were used to fund working capital needs, including paying vendors and financing inventory, Chick said.
17. **Wall Street Journal Article of September 5, 2002**


146. Later that same day, on an investor conference call, defendant Rider admitted, contrary to the July 30, 2002 press release that there was no evidence of a recovery in retail earnings:

> [O]ur earnings per share guidance for the second half of the year is, in part, dependent on retail operating earnings returning to prior year levels, We have not yet seen evidence of that recovery.

147. On September 5, 2002, Fleming common stock closed at $6.92 per share, down $2.39, or 26%, from its closing price of $9.31 per share on September 3, 2002, the day before the damaging September 4 and 5 articles were revealed. The stock has not recovered from these drops and has dropped even further.

18. **Fleming announces the divestment of its retail operations.**

148. In a press release dated September 24, 2002, Fleming announced that it had “made the decision to divest Fleming’s 110 existing price-impact stores, which operate under the Food4Less and Rainbow Foods banners.”

19. **The SEC opens an investigation of Fleming.**

149. On November 13, 2002, Fleming announced that it was under investigation by the Securities and Exchange Commission. The focus of the SEC’s investigation, according to Fleming, was “previous media speculation regarding Fleming's vendor trade practices, the presentation of second quarter 2001 adjusted earnings per share data in Fleming's second quarter 2001 and 2002
earnings press releases, the company's accounting for drop-ship sales transactions with an unaffiliated vendor in Fleming's discontinued retail operations, and the company's calculation of comparable store sales in its discontinued retail operations.” On information and belief, the SEC’s investigation is ongoing.

20. **Fleming announces a massive retail loss.**

150. In a press release dated January 14, 2003, Fleming announced that it was marking down the “realizable value” of its retail stores by $116 million. Fleming thus recognized that it could not sell the stores for the amount it carried them for.

151. On January 23, 2003, Fleming announced a $190 million loss in the retail segment in 2002. This massive loss is consistent with the information provided by the former financial analyst manager, showing that Fleming’s retail segment had a $36 million operating loss as of July 18, 2002. The massive loss is not, however, consistent with Fleming’s own public statements through July 30, 2002 about the level of earnings and prospects for Fleming’s retail segment.

VI. **Fleming’s False Financial Reporting During the Class Period**

152. During the Class Period, Fleming reported false and misleading financial results by taking hundreds of millions of dollars in unauthorized, improper, and unsustainable deductions from the amounts owned to vendors, and by failing to record adequate allowances for credit losses. As a result, Fleming’s costs were understated and its earnings were overstated.

153. Fleming’s financial results reported during the Class Period did not present fairly Fleming’s results, which results were presented in violation of GAAP and SEC rules.
154. GAAP are those principles recognized by the accounting profession as the conventions, rules and procedures necessary to define accepted accounting practice at a particular time. SEC Regulation S-X (17 C.F.R. § 210.4-01(a)(1)) states that financial statements filed with the SEC which are not prepared in compliance with GAAP are presumed to be misleading and inaccurate, despite footnote or other disclosure. Regulation S-X requires that interim financial statements must also comply with GAAP, with the exception that interim financial statements need not include disclosure which would be duplicative of disclosures accompanying annual financial statements. 17 C.F.R. § 210.10-01(a).

155. The Individual Defendants caused Fleming to falsify its reported financial results through its improper accounting for costs by recording deductions to which it was not entitled, and by improperly deferring other costs which were required by GAAP to be recorded.

A. Understatement of Liabilities

156. Fleming’s treatment of deductions violated basic accounting principles. As described by FASB Statements of Concepts 6 (“FAS Con 6”), Elements of Financial Statements, “a liability has three essential characteristics: (a) it embodies a present duty or responsibility to one or more other entities that entails settlement by probable future transfer or use of assets at a specified or determinable date, on occurrence of a specified event, or on demand, (b) the duty or responsibility obligates a particular entity, leaving it little or no discretion to avoid the future sacrifice, and (c) the transaction or other event obligating the entity has already happened” (paragraph 36). In accordance with FASB Statement of Concepts No. 5 (“FAS Con 5”), Recognition and Measurement in Financial Statements of Business Enterprises, “once an asset or liability is recognized, it continues to be measured at the amount initially recognized until an event that changes the asset or liability or its
amount occurs and meets the recognition criteria.” Events that change assets and liabilities are of two types: (a) inflows (acquisitions of assets or incurrences of liabilities) and outflows (sale or other disposal or loss of assets and settlement or cancellation of liabilities) and (b) changes of amounts of assets while held or of liabilities while owed by the entity. The latter are also of two types: (i) changes in utility or substance and (ii) changes in price (paragraphs 88 and 89). Because the liabilities were originally recognized at a higher amount and Fleming did not meet the criteria to change the amount of the liability in accordance with FAS Con 5, Fleming violated generally accepted accounting principles.

157. Because Fleming recorded substantial deductions from its vendors without their authorization, it is clear Fleming had neither earned the income nor were the deductions realizable since Fleming still owed the money.

B. Fleming’s Reduction in Credit Loss Allowance

158. GAAP, as set forth in SFAS No. 5, paragraph 8, requires an entity record a loss for uncollectible receivables, when (a) information available prior to issuance of financial statements indicates that an asset had been impaired or a liability had incurred at the date of the financial statement. It is implicit in this condition that it must be probable that one or more future events will occur confirming the fact of the loss. And (b) when the amount of the loss can be reasonably estimated.

159. Fleming inflated reported net income in 2001 through a reduction in its credit loss allowance relative to gross impaired notes receivable. Specifically, although Fleming’s gross balance of impaired notes receivable increased by $17.6 million (to $68.1 million) in 2001, the Company decreased its corresponding credit loss allowance by $1.0 million. Additionally, impaired
notes with no related allowances increased from $4.8 million in 2000 to $12.7 million in 2001. As a result, Fleming’s credit loss allowance-to-gross impaired notes receivable ratio plunged to 28% – compared with a reserve level of 40%, 41% and 47%, respectively, as of the prior three fiscal year-ends. If Fleming’s ratio had been 40%, the level as of December 2000, its 2001 reported net income would have been $4.8 million lower.

C. GAAP Violations

160. Due to these accounting improprieties, the Company presented its financial results and statements in a manner which violated GAAP, including the following fundamental accounting principles:

(a) The principle that interim financial reporting should be based upon the same accounting principles and practices used to prepare annual financial statements was violated (APB No. 28, ¶ 10);

(b) The principle that financial reporting should provide information that is useful to present and potential investors and creditors and other users in making rational investment, credit and similar decisions was violated (FASB Statement of Concepts No. 1, ¶ 34);

(c) The principle that financial reporting should provide information about the economic resources of an enterprise, the claims to those resources, and effects of transactions, events and circumstances that change resources and claims to those resources was violated (FASB Statement of Concepts No. 1, ¶ 40);

(d) The principle that financial reporting should provide information about how management of an enterprise has discharged its stewardship responsibility to owners (stockholders) for the use of enterprise resources entrusted to it was violated. To the extent that management offers
securities of the enterprise to the public, it voluntarily accepts wider responsibilities for accountability to prospective investors and to the public in general (FASB Statement of Concepts No. 1, ¶ 50);

(e) The principle that financial reporting should provide information about an enterprise’s financial performance during a period was violated. Investors and creditors often use information about the past to help in assessing the prospects of an enterprise. Thus, although investment and credit decisions reflect investors’ expectations about future enterprise performance, those expectations are commonly based at least partly on evaluations of past enterprise performance (FASB Statement of Concepts No. 1, ¶ 42);

(f) The principle that financial reporting should be reliable in that it represents what it purports to represent was violated. That information should be reliable as well as relevant is a notion that is central to accounting (FASB Statement of Concepts No. 2, ¶¶ 58-59);

(g) The principle of completeness, which means that nothing is left out of the information that may be necessary to insure that it validly represents underlying events and conditions was violated (FASB Statement of Concepts No. 2, ¶ 79); and

(h) The principle that conservatism be used as a prudent reaction to uncertainty to try to ensure that uncertainties and risks inherent in business situations are adequately considered was violated. The best way to avoid injury to investors is to try to ensure that what is reported represents what it purports to represent (FASB Statement of Concepts No. 2, ¶¶ 95, 97).

161. Further, the undisclosed adverse information concealed by defendants during the Class Period is the type of information which, because of SEC regulations, regulations of the national stock exchanges and customary business practice, is expected by investors and securities
analysts to be disclosed and is known by corporate officials and their legal and financial advisors to be the type of information which is expected to be and must be disclosed.

**VII. Scienter**

162. Defendants knew throughout the class period that their statements were false, and/or they recklessly disregarded facts showing the falsity of their statements.

163. Defendants Hansen and Dahlen received daily retail store performance reports from the financial analyst managers. These reports showed that the retail segment’s sales and earnings were declining, and that the price-impact plan was not succeeding. Yet, Hansen and Dahlen made public statements claiming that Fleming’s retail segment was growing.

164. Defendants Hansen, Rider, and Dahlen received weekly, monthly, and quarterly reports showing the revenue, cost, and margin numbers for the retail segment. The reports showed that the retail segment’s sales and earnings were declining, and that the price-impact plan was not succeeding. Yet, Hansen, Rider, and Dahlen made public statements claiming that Fleming’s retail segment was growing.

165. Defendants Hansen and Dahlen attended Monday meetings where finances were reviewed and deductions were discussed, both in the wholesale and retail segments. At these meetings, there were indications that sales in Fleming’s retail segment were flat or declining, and that there was a difference between reported margins and internally calculated margins.

166. Defendants Hansen and Rider received regular reports showing the revenue, cost, and margin numbers for the wholesale segment. The massive deductions in Fleming’s wholesale segment were well-known to Fleming’s executives, as evidenced by the former senior-level
executive who performed a tally in response to complaints from suppliers, discovered $100 million of disputed deductions, and resigned after disagreeing with Fleming over its practices.

167. Defendant Dahlen personally directed the accrual of unauthorized, improper, and unsustainable deductions in the retail segment. Defendant Dahlen also personally participated in the manipulation of “same store” revenues, in order to create the false impression of revenue and earnings growth.

168. According to the former financial analyst manager, Dahlen had responsibility for approving the margin numbers in the retail segment, and he was privy to the information provided by the financial analyst managers showing declining revenues and margins.

169. According to the former financial analyst manager, defendant Hansen was involved in reviewing Fleming’s internal cost and margin numbers. As part of that review, he sometimes participated in meetings with the retail financial analyst managers, retail CFO, and defendant Dahlen. Through this review, defendant Hansen either knew or recklessly disregarded the substantial differences between Fleming’s internal reports and Fleming’s public statements.

170. Furthermore, Hansen personally directed unauthorized, improper, and unsustainable deductions within the retail segment, such as the “two case” deduction described above in paragraph 69.

171. The declining sales in retail and failure of the price-impact plan was widely known within the retail segment. For example, according to the former financial analyst manager, product category managers and financial analyst managers were well aware of the declining sales in the retail segment. Financial analyst managers and product category managers were also well aware of Fleming’s widespread use of unauthorized, improper, and unsustainable deductions.
172. The individual defendants' intent to make statements known by them to be false is evidenced by, among other things, the inclusion within the company's publicly issued statements regarding same store and comparable store sales of amounts which were in fact attributable to so-called "red tag" sales. Such intent is also evidenced by defendants' manipulation of the same store and comparable store sales figures for a given year to exclude the amounts of red tag sales for prior years, in order to inflate the rate of growth for same store and/or comparable store sales.

173. Defendants had and used their influence and control to further the scheme alleged herein. Defendants had broad responsibilities which included communicating with the financial markets and providing the markets with financial results. Defendants were privy to and directed the marking of financial projections and results. They received regular reports showing that Fleming's publicly-announced sales and earnings were inflated. By making the misleading statements contained herein, Defendants knew that they would artificially inflate the value of the Company's securities. Defendants' actions in doing so resulted in damage to Lead Plaintiff and the Class.

174. Fleming repeatedly identified its price impact plan as a crucial part of its strategic plan. The performance of Fleming's price-impact stores was central to the overall performance of Fleming's business. Moreover, retail and wholesale earnings were also central to Fleming's business and future prospects. As a result, the Individual Defendants, when making the misrepresentations identified herein, either knew of material developments affecting the price-impact stores and retail and wholesale sales, or recklessly disregarded the facts.

175. As CEO and CFO, defendants Hansen and Rider were responsible for ensuring that the Company's filings with the SEC complied fully with the requirements of the federal securities laws and that press releases announcing financial results were not materially false or misleading.
Defendants prepared and/or reviewed Fleming’s filings with the SEC and press releases, as alleged herein.

176. The Defendants were motivated to make the materially false and misleading statements alleged herein in order to facilitate Fleming’s offering of 9.2 million shares of common stock (including 1.2 million shares issued to underwriters to cover over-allotments), which according to the Company’s Form 10-Q for the quarter ended July 13, 2002 netted the Company $170 million, and $200 million in senior notes and in order to establish $975 million in new credit facilities. The Company needed to raise funds as described above to fund obligations in connection with the Company’s acquisitions of Core-Mark International, Inc. and Head Distribution, to repay debt, and for working capital purposes. According to the Company, the acquisitions were made to “further Fleming’s strategic transformation into an efficient, national, multi-tier supply chain for consumer package goods to retailers of any size, format, or location.”

177. The Individual Defendants also were motivated to manipulate Fleming’s results since their bonuses were directly tied to reporting certain targeted earnings. A Fleming Proxy Statement describes the bonus program:

**Bonus awards are based on pre-determined performance targets in relation to adjusted earnings per share, sales and adjusted earnings. In order to be entitled to a bonus, the adjusted earnings per share target must be met or exceeded . . . . Since the adjusted earnings per share for 2001 was met, all executive officers received a bonus for 2001. The bonuses were paid in March 2002.**

Bonuses are also paid to certain executives under the Key Executive Performance Plan (formerly known as the Key Executive Retention Plan) . . . .

Awards are based upon the achievement of predetermined performance targets based upon earnings per share. **In order to be entitled to an award, the earnings per share for the award year must exceed the prior year’s earnings per share by at least 5%. For fiscal 2001, the committee determined that the**
executives participating in the Performance Plan would be eligible to receive an award of 200% of base salary if the target was achieved. During its meeting on February 26, 2002, the committee determined that the awards for fiscal 2001 was achieved, all executive officers selected to participate in the Performance Plan in 2001 were determined to have earned their award and were eligible to receive one-half of their earned award. The balance of the earned award is still subject to vesting schedule as established in the participants’ agreements.

Thus, the Individual Defendants were motivated to inflate earnings in order to triple their own income. The former financial analyst manager stated that the manipulations to earnings numbers in November and December 2001 contributed to Fleming employees receiving bonuses.

**VIII. Applicability of Presumption of Reliance: Fraud-on-the-market Doctrine**

178. At all relevant times, the market for Fleming common stock was an efficient market for the following reasons, among others:

a. Fleming common stock met the requirements for listing, and was listed, on the New York Stock Exchange, an efficient and automated market;

b. During the Class Period, millions of shares of Fleming common stock were traded on the open market;

c. As a regulated issuer, Fleming filed periodic public reports with the SEC and the New York Stock Exchange; and

d. Fleming was followed by several securities analysts employed by brokerage firms who wrote reports that were distributed to the sales force and certain customers of their respective brokerage firms. These reports were publicly available and entered the public marketplace.
179. As a result, the market for Fleming common stock promptly digested current information regarding the Company from all publicly available sources and reflected such information in Fleming's common stock price. Under these circumstances, all purchasers of the Company's common shares during the Class Period suffered similar injury through their purchase of shares at artificially inflated prices and a presumption of reliance applies.

IX. Inapplicability of Statutory Safe Harbor

180. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this Complaint. The statements alleged to be false and misleading herein all relate to then-existing facts and conditions. In addition, to the extent certain of the statements alleged to be false may be characterized as forward-looking, they were not identified as "forward-looking statements" when made, there was no statements made with respect to any of those representations forming the basis of this complaint that actual results "could differ materially from those projected," and there were no meaningful cautionary statements identifying relevant important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. Alternatively, to the extent that the statutory safe harbor does apply to any forward-looking statements pleaded herein, defendants are liable for those false forward-looking statements because at the time each of those forward-looking statements was made, the defendants had actual knowledge that the particular forward-looking statements was false.

181. The statutory safe harbor provided for forward-looking statements under certain circumstances, moreover, does not apply to false statements or material omissions of existing facts.
COUNT I

VIOLATION OF SECTION 10(b) OF THE SECURITIES EXCHANGE ACT AND RULE 10b-5 PROMULGATED THEREUNDER

Plaintiff repeats and realleges each and every allegation above, as if set forth in full herein.

182. Throughout the Class Period, defendants, individually and in concert, directly or indirectly, engaged in a common plan, scheme and course of conduct described herein, pursuant to which they knowingly or recklessly engaged in acts, transactions, practices and a course of business which operated as a fraud upon plaintiff and the other members of the Class; made various false statements of material facts and omitted to state material facts to make the statements made not misleading to plaintiff and the other members of the Class; and employed manipulative or deceptive devices and contrivances in connection with the purchase and sale of Fleming stock.

183. The purpose and effect of defendants' plan, scheme and course of conduct were to artificially inflate the price of Fleming's stock and to artificially maintain the market price of Fleming securities.

184. The Individual Defendants, who are the top officers of the Company, had actual knowledge of the material omissions and/or the falsity of the material statements set forth above, and intended to deceive plaintiff and the other members of the Class, or, in the alternative, acted with reckless disregard for the truth when they failed to ascertain and disclose the true facts in the statements made by them or other Fleming personnel to members of the investing public, including plaintiff and the Class, and the securities analysts.

185. As a result of the foregoing, the market price of Fleming securities was artificially inflated during the Class Period. In ignorance of the falsity of the defendants' statements concerning
the financial results and performance of Fleming, plaintiff and the other members of the Class relied, to their detriment, on the statements described above and/or the integrity of the market price of the Fleming stock during the Class Period in purchasing Fleming common stock at prices which were artificially inflated as a result of defendants’ false and misleading statements.

186. Had plaintiff and the other members of the Class known of the material adverse information which defendants did not disclose, they would not have purchased Fleming common stock at the artificially inflated prices that they did.

187. Defendants’ concealment of this material information served only to harm plaintiff and the other members of the Class who purchased Fleming common stock in ignorance of the financial risk to them as a result of such nondisclosures.

188. As a result of the wrongful conduct alleged herein, plaintiff and other members of the Class have suffered damages in an amount to be established at trial.

189. By reason of the foregoing, defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, and are liable to the plaintiff and the other members of the Class for substantial damages which they suffered in connection with their purchase of Fleming common stock during the Class Period.

COUNT II

VIOLATION OF SECTION 20(A)
OF THE SECURITIES EXCHANGE ACT

190. Plaintiff repeats and realleges each and every allegation above, as if set forth in full herein.
191. During the Class Period, each of the Individual Defendants, by virtue of his or her offices or offices at, and directorship of Fleming and his or her specific acts, was a controlling person of Fleming within the meaning of Section 20(a) of the Exchange Act.

192. Each Individual Defendant’s positions made him or her privy to, and provided him or her with actual knowledge of, the material facts which the Individual Defendants and Fleming concealed from plaintiff and the other members of the Class during the Class Period.

193. Each of the Individual Defendants had the power and influence, and exercised same, to engage in the unlawful conduct and practices complained of herein by causing Fleming to disseminate the false and misleading information referred to above.

194. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

195. By virtue of the conduct alleged above, the Individual Defendants are liable to the plaintiff and the other members of the Class for substantial damages that they suffered in connection with their purchases of Fleming’s common stock during the Class Period.

WHEREFORE, lead plaintiff, on its own behalf and on behalf of the other members of the Class, demands judgment against the defendants as follows:

A. Determining that this action is properly maintainable as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

B. Certifying plaintiff as the Class Representative and its counsel as Class Counsel;

C. Declaring and determining that defendants violated the federal securities laws by reason of their conduct as alleged herein;
D. Awarding monetary damages against all defendants, jointly and severally, in favor of plaintiff and the other members of the Class for all losses and damages suffered as a result of the acts and transactions complained of herein, together with prejudgment interest from the date of the wrongs to the date of the judgment herein;

E. Awarding plaintiff the costs, expenses, and disbursements incurred in this action, including reasonable attorneys’ and experts’ fees; and

F. Awarding plaintiff and the other members of the Class such other and further relief as the Court may deem just and proper in light of all the circumstances of this case.

**JURY DEMAND**

Plaintiff demands a trial by jury.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 2003, a true and correct copy of the foregoing was deposited in the U.S. mail, postage prepaid to:

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