UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE	PROOF OF CLAIM
In re FLEMING COMPANIES, INC , et al	Case Number 03-10945 (MFW)

Bar Date Ref #

NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case A "request" for payment of an administrative expense may be filed pursuant to 11 U S C § 503

Name of Creditor and Address

0354653000000

Dave s IGA LLC
2525 W College
Springfield MO 65082

Creditor Telephone Number (417) 862-0243

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim Attach copy of statement giving particulars

☐ Check box if you have never received any notices from the bankruptcy court in this case

☐ Check box if this address differs from the address on the envelope sent to you by the court

If you have already filed a proof of claim with the Bankruptcy Court or BMC you do not need to file again

CREDITOR TAX I D #	ACCOUNT OR OTHER NUMBER BY WHICH CREDITOR IDENTIFIES DEBTOR	Check here if this claim ☐ replaces or ☐ amends a previously filed claim dated __
17009421		

1 BASIS FOR CLAIM

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
X Other (describe briefly)
Breach of Facilities Standby Agreement
☐ Retiree benefits as defined in 11 U S C § 1114(a)
☐ Wages salaries and compensation (Fill out below)
Your social security number _____
Unpaid compensation for services performed from _____ (date) to _____ (date)

2 DATE DEBT WAS INCURRED | **3 IF COURT JUDGMENT, DATE OBTAINED**

4 TOTAL AMOUNT OF CLAIM AS OF PETITION DATE

$ 49,999 99	$	$	$ 49,999 99
(unsecured)	(secured)	(unsecured priority)	(total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim Attach itemized statement of all interest or additional charges

5 SECURED CLAIM

☐ Check this box if your claim is secured by collateral (including a right of setoff)

Brief description of collateral

☐ Real Estate
☐ Motor Vehicle
☐ Other

Value of collateral $

Amount of arrearage and other charges at time case filed included in secured claim above, if any $ _____

6 UNSECURED PRIORITY CLAIM

☐ Check this box if you have an unsecured priority claim

Specify the priority of the claim

☐ Wages salaries or commissions (up to $4 650*) earned within 90 days before filing of the bankruptcy petition or cessation of the Debtor s business whichever is earlier 11 U S C § 507(a)(3)

☐ Contributions to an employee benefit plan 11 U S C § 507(a)(4)

☐ Up to $2 100* of deposits toward purchase lease or rental of property or services for personal family or household use 11 U S C § 507(a)(6)

☐ Alimony maintenance or support owed to a spouse former spouse or child 11 U S C § 507(a)(7)

Taxes or penalties owed to governmental units 11 U S C § 507(a)(8)

☐ Other Specify applicable paragraph of 11 U S C § 507(a)

Amounts are subject to adjustment on 4/1/01 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment

7 CREDITS The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim

8 SUPPORTING DOCUMENTS *Attach copies of supporting documents,* such as promissory notes purchase orders invoices itemized statements of running accounts contracts court judgments mortgages security agreements and evidence of perfection of lien DO NOT SEND ORIGINAL DOCUMENTS If the documents are not available explain If the documents are voluminous attach a summary

9 DATE-STAMPED COPY To receive an acknowledgment of your claim, please enclose a self addressed stamped envelope and an additional copy of this proof of claim

The original of this completed proof of claim form must be sent by mail or hand delivered (FAXES NOT ACCEPTED) so that it is received on or before 4 00 p m , September 15, 2003, Pacific Daylight Time

BY MAIL TO
Bankruptcy Management Corporation
P O BOX 900
El Segundo CA 90245-0900

BY HAND OR OVERNIGHT DELIVERY TO
Bankruptcy Management Corporation
1330 East Franklin Avenue
El Segundo, CA 90245

THIS SPACE FOR COURT USE ONLY

FILED
AUG 19 2003
BMC

Fleming Companies Claim
05311

DATE SIGNED	SIGN and print the name and title if any of the creditor or other person authorized to file this claim (attach copy of power of attorney if any)
8-13-03	

Penalty for presenting fraudulent claim is a fine of up to $500 000 or imprisonment for up to 5 years or both 18 U S C §§ 152 AND 3571

See Other Side For Instructions

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	)	**Chapter 11**
	)	
FLEMING COMPANIES, INC , et al	)	**Case No 03-10945 (MFW)**
	)	
Debtors	)	**Jointly Administered**

PROOF OF CLAIM

Dave's IGA, L L C , is and at all times pertinent to this filing has been the owner and operator of a retail grocery store in Springfield, Missouri On June 17, 1999, Debtor Fleming Companies, Inc , entered into a Facilities Standby Agreement with Dave's IGA, L L C On or about November 23, 2002, Fleming repudiated and breached the Agreement (See Exhibits 1 and 2 attached hereto)

Injunctive relief was sought in both State and Federal Court On December 6 2002, Dave's IGA filed a Petition in State Court against Fleming On December 9, 2002 a Circuit Judge ordered Fleming to appear on December 18, 2002 and show cause why temporary or preliminary injunctive relief should not be granted On December 17, 2002, Fleming removed suit to Federal Court On February 12, 2003, a hearing was held in Federal Court The Federal Court Judge held that the issue of injunctive relief and damages was for the arbitrator since there was a binding arbitration agreement between the parties On February 26, 2003 Dave's IGA dismissed the Federal suit in order to pursue Arbitration On March 4, 2003 Dave's IGA filed a Demand for Arbitration and Memorandum in Support thereof with the American Arbitration Association (attached hereto as Exhibits 1 and 2) On April 1, 2003 Fleming filed a voluntary petition fo bankruptcy The Arbitration proceeding has been stayed pending the conclusion of the bankruptcy proceedings

Dave's IGA has been damaged in the amount of at least $49,999 99 as a result of Fleming's repudiation and breach of the Agreement and seeks relief for that sum

COMPUTATION OF DAMAGES

ESTIMATED LOSS OF PROFITS DURING NOVEMBER 2002 THRU JULY 2003

Department	Lost Profit
Dairy	$17,867
Frozen	$16,393
Grocery	$73,436
Meat	$23,450
Non Food	$10,307
Produce	$15,749
TOTALS	$157,202

(A further breakdown is attached hereto as Exhibit 3)

* Due to the large filing fees with AAA, Dave's IGA reduced its request for damages to $49,999 99 in order to avoid having to employ at least two or more arbitrators to Arbitrate this matter Dave's IGA L L C hereby reserves, and has previously reserved its right to amend its request if it is later determined that a waiver of fees can be agreed to between the American Arbitration Association and Dave's IGA or is stated otherwise by Dave's IGA

Dave Wingerter, Owner
Dave's IGA, L L C
2525 W College St
Springfield, Missouri 65802

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

MEDIATION is a nonbinding process The mediator assists the parties in working out a solution that is acceptable to them. If you would like the AAA to contact the other parties to determine whether they wish to mediate this matter please check this box ☐
There is no additional administrative fee for this service

TO Name	Name of Representative (if known)	Name of Firm (if applicable)
Fleming Companies, Inc.	Jason R.. Brown	Lathrop & Gage

Address	Representative's Address
C.T.Corp.Systems,120 S.Central Ave.	1845 S. National, P.O. Box 4288

City	State	Zip Code	City	State	Zip Code
Clayton	MO	63105	Springfield	MO	65808-4288

Phone No	Fax No	Phone No	Fax No
		417-886-2000	417-886-9126

The named claimant, a party to an arbitration agreement contained in a written contract, dated 6/17/1999 providing for arbitration under the Commercial Arbitration Rules of the American Arbitration Association, hereby demands arbitration thereunder

IS THIS A DISPUTE BETWEEN A BUSINESS AND A CONSUMER? Yes ☐ No ☒

THE NATURE OF THE DISPUTE

Breach of Contract
(See Attached Memorandum)

THE CLAIM OR RELIEF SOUGHT (the Amount, if Any)

Injunction ordering specific performance, damages in the amount of $49,999.99.
(See Attached Memorandum)

DOES THIS DISPUTE ARISE OUT OF AN EMPLOYMENT RELATIONSHIP? Yes ☐ No ☒

IF THIS DISPUTE ARISES OUT OF AN EMPLOYMENT RELATIONSHIP, WHAT WAS/IS THE EMPLOYEE'S ANNUAL WAGE RANGE? Note this question is required by California law

☐ Less Than $100,000 ☐ $100,000 - $250,000 ☐ Over $250,000

TYPES OF BUSINESS

Claimant Retailer-Grocer Respondent Seller-grocery distributor.

HEARING LOCALE REQUESTED

You are hereby notified that copies of our arbitration agreement and this demand are being filed with the American Arbitration Association at its Kansas City office, with a request that it commence administration of the arbitration Under the rules, you may file an answering statement within fifteen days after notice from the AAA

Signature (may be signed by a representative)	Title	Date
Donald W Jones	Attorney	March 4, 2003

Name of Claimant	Name of Representative	Name of Firm (if Applicable)
Dave's IGA, L.L.C.	Donald W. Jones	Hulston,Jones,Marsh,Shaffer

Address (to Be Used in Connection with This Case)	Representative s Address
2525 W. College St.	2060 E. Sunshine

City	State	Zip Code	City	State	Zip Code
Springfield	MO	65802	Springfield	MO	65804

Phone No	Fax No	Phone No	Fax No
417-862-0243	417-874-1814	417-887-1858	417-887-3029

TO BEGIN PROCEEDINGS, PLEASE SEND TWO COPIES OF THIS DEMAND AND THE ARBITRATION AGREEMENT, WITH THE FILING FEE AS PROVIDED FOR IN THE RULES, TO THE AAA SEND THE ORIGINAL DE
RESPONDENT

EXHIBIT
1

BEFORE THE AMERICAN ARBITRATION ASSOCIATION TRIBUNAL

DAVE'S IGA, L.L C ,	)
	)
Grievant,	)
	)
vs	)
	)
FLEMING COMPANIES, INC	)
	)
Respondent	)

MEMORANDUM IN SUPPORT OF DEMAND FOR ARBITRATION

I.

REQUEST FOR PRELIMINARY INJUNCTION ORDERING SPECIFIC PERFORMANCE FOR BREACH OF CONTRACT

This memorandum is to be incorporated into the Demand for Arbitration submitted by Grievant, Dave's IGA This is a summary of the relevant issues involved in this dispute Outlined below is Dave's IGA's request for (1) injunctive relief ordering specific performance, and (2) breach of contract damages in the amount of $49,999 99

Prior to the filing of this demand, the issue of injunctive relief was brought in both State and Federal Court [1] On December 6, 2002, Dave's IGA, L L C , filed a Petition in State Court against Fleming Companies, Inc On December 9, 2002, Circuit Judge J Miles Sweeney ordered Fleming to appear on December 18, 2002 and show cause why temporary or preliminary injunctive relief should not be granted On December 17, 2002, Fleming removed the suit into Federal Court On

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[1] As the plain language of the arbitration provision provides, "either party shall be entitled to pursue remedies for emergency or preliminary injunctive relief in any court of competent jurisdiction " [emphasis added]

EXHIBIT 2

February 12, 2002 a hearing was held in Federal Court, Honorable Richard E Dorr presiding Judge Dorr ruled that the issue of injunctive relief was for the arbitrator since there was a binding arbitration agreement between the parties With that said, Judge Dorr refused to hear evidence on the merits of the dispute, holding that only the arbitrator could take up the injunction request On February 26, 2003, Dave's IGA dismissed the Federal suit, in order to pursue arbitration

A UNDER THE PARTIES FACILITY STANDBY AGREEMENT AND SECTION 36 & 43 OF THE AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES, AN ARBITRATOR MAY GRANT SPECIFIC PERFORMANCE IN CONTRACT ACTIONS

Respondent Fleming Companies, Inc as Seller, and Grievant, Dave's IGA, L L C , as the Buyer or "Retailer", entered into the Facility Standby Agreement on or about June 17, 1999 as shown by Grievant's Exhibit "1" Paragraph 6 of the Facilities Standby Agreement contains the parties Arbitration Agreement which states that arbitration shall be conducted in Springfield, Missouri, pursuant to the Commercial Arbitration Rules of the American Arbitration Association (Exhibit 1)

Under the arbitration provision of the agreement, "arbitrators may award the equitable relief of specific performance to either party, if applicable and requested" Furthermore, under Rule 43 of the American Arbitration Association Commercial Arbitration Rules, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract *See* United Paperworkers International Union v Misco , Inc , 484 U S 29, 98 L Ed 2d 286 (1987), City of Lawrence v Falzarano, 402 N E 2d 1017 (1980), Island Creek Coal Sales Co v City of Gainsville, 729 F 2d 1046, 1049 (6th Cir 1984)(in interpreting Section 43 of the American Arbitration Association Commercial Arbitration Rules, the court upheld arbitrator's interim award directing the

City of Gainsville to continue performance of the contract until completion of the arbitration) Likewise, under Rule 36 of the AAA Rules of Procedure, the Arbitrator is granted power to take any interim measures he or she deems necessary, including injunctive relief

An injunction ordering specific performance is critical in this case and Dave's IGA will suffer irreparable harm if such relief is not so granted As will be shown below, Fleming has and continues to breach the parties agreement by implementing unilateral changes in their credit terms making it impossible for Dave's IGA to operate profitably and as will be shown below, the changes made by Fleming to their credit policy were not a basis of the bargain Dave's IGA has been damaged, and is under a continuing threat of harm due to "new" policies, such as "clean invoicing", Fleming claims Dave's IGA is bound by which were never agreed to or presented to Dave's IGA

B RESPONDENT FLEMING COMPANIES, INC., BREACHED SEVERAL PROVISIONS OF THE AGREEMENT THAT WAS THE BASIS OF THE BARGAIN

Under the Facilities Standby Agreement (Exhibit 1), Fleming Companies, Inc made certain promises to Dave's IGA as shown by that Agreement, including promises as follows

(a) In Section 1, Fleming made a commitment, throughout the term of Exhibit 1 to maintain capital, employees, inventory, equipment and facilities sufficient to supply Products as defined in that Agreement to Retailer in quantities sufficient to allow Retailer to purchase the Estimated Purchase Level described in Section 3

(b) Under Section 2 Fleming promised that said Products would be sold and delivered to Retailer at its location stated in paragraph 1 hereof, and that the prices and other terms of sale "shall be established, generally in accordance with the 'Selling Plan'" attached as Exhibit A to that Agreement (Exhibit 1)

(c) Fleming promised in said Section 2 that if amendments were made to the Selling Plan, those amendments would be applicable to all customers of Fleming who are situated similarly to Retailer in Retailer's trade area and who are purchasing Products pursuant to the "Selling Plan," which means Retailer would have at least three to seven days to pay for Products

(d) Under Section 3(a) Fleming promised to supply the Product to Retailer "with the quantity of Products necessary for Retailer" to purchase the amount of inventory and Products required under Section 3(b) for the term of the Agreement

Under law, based on the contractual relationship of the parties, Defendant Fleming is obligated to cooperate fully with Plaintiff Retailer to enable Retailer to comply with all of its obligations and to operate successfully, and Fleming has breached that constructive duty of cooperation by changing the terms of credit and sales and payment terms as stated herein, all without any justification or reasonable basis and reasoning

The Sell Plan which is attached in pertinent parts as Exhibit "A" to Grievant's Exhibit "1" includes further promises by Respondent Fleming *See* Exhibits "B", "C", "D", "E" and "F" attached to Grievant's Exhibit "1"

At the time of entering into the Agreement which is Grievant's Exhibit "1", in June of 1999 up until November of 2002, Fleming supplied Dave's IGA Products based on credit terms provided in those Agreements (Exhibits "A" through "F") which allowed Grievant Retailer to have at least three to seven days after receiving the Product to pay Fleming Prior to May 4, 2002 Grievant Retailer had six to nine days to pay, but the time was unilaterally reduced by Fleming to three to six days as explained by accountant Jerry Sutherland's affidavit, paragraph 11

a **Fleming Repudiated its Obligations Established Under the Above Referenced Promises and Under the Course of Dealing by Placing Dave's IGA on C B D. (Cash before delivery) Status**

A course of dealing under RSMo §400 1-205(1) may fairly be regarded as establishing a common basis of understanding or interpreting the contracts involved in this case Under that course of dealing when shipments were made by Fleming to Grievant on a Tuesday, Fleming would send the EFT charge directly to Grievant's bank on the following Monday, and the bank would pay by wire transfer If a shipment had been made on Saturday, the wire transfer that went in on the Monday would be for the Saturday of the week preceding the Tuesday and Saturday deliveries This resulted in Grievant being allowed to have nine days from the Saturday shipment to pay for same and six days from the Tuesday shipment That course of dealing was modified in May, 2002, when Fleming changed to shipments on Tuesday and Friday, which resulted in Grievant having six days from Tuesday to make payment and three days from Friday to make payment, when the EFT charge would be sent in to Grievant's bank the Monday following the Tuesday and Friday shipments

Commencing on or about November 23, 2002, Fleming repudiated its obligations established under the above-referenced promises and under the course of dealing by requiring Grievant Retailer to pay for all Product on or before the date of shipment in order for Fleming to deliver such Product to Grievant Furthermore, since September, 2002, Respondent Fleming has failed to deliver all Product ordered by Grievant for other unjustified reasons, by shipping only certain Product and showing other Product as being out or not available under Respondent Fleming's inventory so that Product was not shipped at all or was shipped at a later time At no time has Respondent Fleming sent any notice as required under the Agreement of the parties to claim a breach or repudiation by Grievant Retailer of its obligations under the Agreements On December 4, 2002, Respondent

Fleming failed and refused to supply Grievant Retailer any Product at all and did so without any advanced notice and without any proper and lawful basis for said refusal

The failure and refusal of Fleming to supply Product as described and promised in the Agreements of the parties and in the course of dealing and the refusal to supply Products in accordance with the promises of the Sell Plan as required by Exhibits "A", "B", "C", "D"and "F" to Grievant's Exhibit "1" to allow the Grievant Retailer to have at least three to seven days to pay for Product after delivery, constitutes a repudiation by Fleming of its obligations under said Agreements and a breach of the obligations of Fleming regarding the promises stated therein each of which breaches by Fleming constitutes a material breach of contract

Grievant Retailer, having promised to obtain the major portion of its supplies from Respondent Fleming, and being excluded from having other major sources of supplies, relied heavily on the Agreement of Fleming to supply said Products in the manner indicated and in accordance with the course of dealing and the contract provisions referred to, and that Fleming's failure to provide that Product in a timely manner and to allow Grievant Retailer to pay for same within three to seven days in accordance with the course of dealing that had been established, and the terms of said Agreements of the parties, is causing and has caused Grievant Retailer irreparable damages The damages are irreparable because they are difficult or impossible to compute with certainty, because the nature of Grievant's business requires inventory to be on hand to be sold to customers, and when that inventory is not on hand, Grievant suffers loss of business not only that day but potentially continuing losses by virtue of unsatisfied customers who are unable to fulfill their shopping demands and requirements because of the shortage or lack of Product on the shelf *See* Barker Affidavit The nature of the contractual arrangements between Grievant Retailer and Respondent Fleming was such

that the Products are unique to Grievant's business by virtue of the Agreement by Respondent Fleming to supply Products on a virtually exclusive basis to Grievant and by virtue of the fact that Grievant had relied on Respondent Fleming to be its major supplier of such Products to supply the Products needed for its daily sales requirements in its retail business

Grievant Retailer has not been insolvent and no notice of any claim of insolvency has been sent by Respondent Fleming to Grievant Retailer and that at all times Grievant has continued to pay its debts in the ordinary course of business and was not unable to pay its debts as they become due and therefore Grievant has not been and is not insolvent as meant under RSMo §400 1-201(23) Therefore, Seller was not justified in refusing to deliver Product to Grievant in accordance with the Agreements of the parties and the course of dealing established between them as stated above, and was not justified in imposing a cash before delivery ("C B D ") requirement, under RSMo §400 2-702(1) The only basis stated by Respondent Fleming for changing the arrangement of the parties and repudiating its obligation to sell to Grievant based on the course of dealing that had been established which provided Grievant three to seven days to pay for said Product after delivery, was the claim that Grievant had refused to honor EFT charges on three occasions although Grievant had paid those amounts within three or four days of the date of the EFT being returned On each occasion the EFT was returned, Grievant informed Respondent the prior week of the request that it be allowed to return or refuse the EFT charge and pay within three or four days The first two times, Respondent agreed to the request The third time was not as clearly agreed to, but even then Respondent did not timely reject the request by Grievant Grievant had not been forewarned of a prohibition of rejecting EFT charges and paying later The document attached as Exhibit A1 to the Headlee affidavit had not been provided by Fleming to Grievant Retailer However, even that

document shows that a Retailer like Grievant is not breaching any duty to Fleming by taking a few extra days to pay, and returning the EFT Fleming, having unilaterally reduced the time from shipment to the date of the EFT from six to nine days to three to six days cannot in good faith object to the three times that Grievant Retailer rejected the EFT and requested a few extra days to pay Fleming was not damaged, and did not treat Grievant fairly by placing Grievant on a C B D ("cash before delivery") basis without warning and without any justification

If Grievant had committed a monetary default, the Agreement clearly required Respondent to give Grievant a five-day notice and opportunity to cure That was not done Respondent's claim that it was justified in putting Grievant on C B D ("cash before delivery") basis is not supported by the record, as ruled in F H Smith Co v Louisville & N Ry Co , 145 Mo App 394, 122 S W 342 (1909)

b. Dave's IGA had a Unique Requirement for the Goods and Product to be Provided by Fleming and Fleming Repudiated and Breached its Obligations Requiring a Grant of Specific Performance Pending Resolution of the Dispute Through Arbitration

Because the Grievant Retailer as Buyer had a unique requirement for the goods and Product to be provided by Respondent Fleming, and the evidence shows that Respondent Fleming has repudiated and breached its obligations to supply said Product in accordance with the course of dealing established between the parties and the Agreements of the parties which allows Grievant to have three to seven days to pay for said Product after delivery, the Grievant has established the requirements for an order of specific performance under RSMo §400 2-716(1) Under paragraph (2) thereof, the decree of specific performance may include such terms and conditions as to payment of the price, damages or other relief as the Arbitrator may deem just and proper There is no adequate

remedy at law and an order of specific performance is the only effective remedy which the Grievant has to protect its rights and to require performance by Respondent Fleming of its obligations under the said Agreements and the course of dealing established between the parties

C. ISSUANCE OF INJUNCTIVE RELIEF ORDERING SPECIFIC PERFORMANCE IS ESSENTIAL FOR THE SURVIVAL OF DAVE'S IGA

Grievant has shown that Respondent's action of placing Grievant on C B D ("cash before delivery") status represents a threat of irreparable harm if the preliminary injunction does not issue Sigma Chemical Co v Harris, 586 F Supp 704 (E D Mo 1984) Loss of business, the monetary value of which could not be precisely calculated, shows a threat of irreparable harm Amigo Gift Assoc v Executive Properties Ltd , 588 F Supp 654 (W D Mo 1984) Injury to the Grievant's reputation as a merchant, resulting from inadequately stocked shelves due to the Respondent's inefficient C B D ("cash before delivery") requirements shows irreparable harm and damages which cannot be fully calculated as an appropriate remedy Paschall v Kansas City Star Co , 441 F Supp 349, 357 (W D Mo 1977), *quoting* Wright & Miller, Federal Practice and Procedure Civil §2948, pp 439-440 (1973) See attached affidavit of Janice Elaine Banker

Under the circumstances of this and similar cases, the loss of business which is threatened and which threatens the existence of Grievant's business as a successful enterprise constitutes irreparable injury sufficient to justify a preliminary injunction Associated Producers Co v City of Independence, MO, 648 F Supp 1255 (W D Mo 1986) Where such potential economic loss threatens the existence of Grievant's business, an injunction is particularly appropriate Paschall v Kansas City Star Co , *supra*, Semmes Motors Inc v Ford Motor Co , 429 F 2d 1197, 1205 (2nd Cir 1970)

The primary test is the "balance of hardships" test explained in Paschall v Kansas City Star Co., supra, 441 F Supp at 357[4] The Respondent has not shown that it would be damaged by returning to the course of dealing which it and Grievant had commencing in June of 1999 Respondent has not shown that it has lost any money as a result of the three EFT returns, since the evidence is undisputed that Grievant paid the proper amounts within three or four days thereafter on each occasion The affidavit of Jerry Sutherland shows that Grievant has inventory that is more than adequate to secure Respondent, over and beyond the lien of the bank on such inventory should Respondent desire to have a security agreement to collateralize Grievant's orders Grievant has agreed to allow such collateralization if Respondent desires Therefore the balance of hardships weighs heavily in favor of Grievant and shows that an injunction is called for in this case to preserve the course of dealing status quo pending final determination of this case in Arbitration

Since the preliminary injunction will only require Respondent Fleming to ship grocery products to Grievant on the same basis which was followed during the parties course of dealing pursuant to the contract which Grievant and Respondent signed in 1999, there is no need to require Grievant to post a substantial injunction bond in this case Where, as here, the risk of harm to Respondent is remote, the amount of preliminary injunction bond can be fixed accordingly Hoechst Diafoil Co v Nan Ya Plastics Corp., 174 F 3d 411, 422 (5th Cir 1999), International Control v Vesco, 490 F 2d 1334, 1356 (2nd Cir 1974) Grievant would request that this Arbitrator, after balancing the hardships, hold that a substantial injunction bond is not warranted *See* Randolph *supra* at 1013 The record clearly establishes that Grievant has always paid Respondent Fleming within at least four days of the EFT charge This is represented by the parties established course of dealing, and thereby, the risk of harm to Respondent in this case is remote justifying an Arbitral finding that

a substantial bond is not required

D NECESSITY OF IMMEDIACY OF INJUNCTIVE RELIEF

For the above mentioned reasons, emergency injunctive relief is crucial Fleming has clearly breached the parties agreement and continues to produce and create new policies in which they claim Dave's IGA is subject to *See* "New Retail Account Package" attached to the Wingerter Affidavit as Exhibit E-1 For example, on or about February 10, 2003, Sharon Johnson, an Agent of Fleming, contacted Dave Wingerter of Dave's IGA and informed him that Fleming had implemented a "clean invoice" policy which had gone into effect immediately This "clean invoice" policy was yet again another change created by Fleming in their billing policy which on February 10, 2003, Dave Wingerter of Dave's IGA was informed applied to Dave's IGA Dave's IGA is in a vulnerable position, because as the situation currently stands, Fleming is constantly making unilateral changes to the Agreement entered into in June of 1999 at the mercy of Dave's IGA This constant state of unilateral changes in Fleming's credit policies requires this Arbitrator to take immediate action and grant injunctive relief ordering

specific performance on the contract pending resolution of the arbitration procedure

Now, therefore, Grievant requests, that under the facts and the law, that a preliminary injunction ordering of specific performance be and granted in favor of Grievant and against Respondent

II

DAMAGES

1 <u>The Limitation of Damages in the Agreements Arbitration Provision are Unconscionable Under the Missouri Uniform Commercial Code</u>

The very essence of a sale contract of the type here requires at minimum adequate remedies

lost a large sum of money, has endured great expenses, and has lost and in the future, unless injunctive relief is granted, will lose great sums of money which it would otherwise have obtained as earnings and profits

Therefore, at this time, due to the large filing fees and the financial situation of Grievant, Dave's IGA, L L C , Dave's IGA hereby requests an award of damages in the amount of $49,999 99 Dave's IGA, L L C , hereby reserves its right to amend its request if it is later determined that a waiver of fees can be agreed to between the America Arbitration Association and Dave's IGA or is stated otherwise by Dave's IGA, L L C

III

REMEDIES SOUGHT

(1) **Injunctive Relief**

Grievant requests that Respondent Fleming Companies, Inc , and its officers and agents be ordered as follows

(A) To immediately resume shipment of goods and Product to Dave's IGA, L L C , hereafter referred to as Grievant Retailer, pursuant to the contracts and Agreements between the parties, and the course of dealing established prior to November, 2002, on the terms as provided therein and in accordance with said course of dealing (which requires Fleming to give Grievant Retailer no less than three to six days to pay for shipments, and when necessary to give Retailer three to four additional days) and to cease immediately the violations of the Agreement, until and unless Respondent Fleming gives proper notice with good cause as required under said Agreements and under the law and consistent with (B) hereof

(B) Respondent Fleming is prohibited from conditioning its deliveries upon payment in advance, and from stopping deliveries or refusing to deliver Product to Grievant Retailer until prepaid, unless Respondent Fleming has a reasonable basis for claiming that Grievant Retailer is insolvent as provided under RSMo §400 2-702(1)

(C) That it is not possible to determine the amount of damages that have been caused to Grievant by Respondent Fleming's repudiation as of this date However, it is obvious that Grievant has suffered substantial damages and in lieu of ordering any temporary

damages to be paid by Respondent Fleming to Grievant Retailer, therefore, it is appropriate to enter this injunctive order in the nature of a preliminary injunction ordering specific performance as aforesaid, and to waive the requirement of any substantial bond by Grievant

(D) Respondent Fleming is further ordered to fulfill its obligations to supply Product to Grievant in good faith compliance with its Agreements with Grievant, as required under RSMo §400 1-203

(2) Actual Damages

Grievant, Dave's IGA, L L C , requests that the Arbitrator grant Dave's IGA, $49,999 99 in actual damages at this time, for Breach of Contract by Fleming, subject to an amendment of this amount if Dave's IGA's fee waiver request is later granted by America Arbitration Association or is stated otherwise by Dave's IGA, L L C

Respectfully submitted,

HULSTON, JONES, MARSH & SHAFFER

Donald W Jones, Mo Bar No 18744
Christi D Sewell, Mo Bar No 53819
2060 E Sunshine
Springfield, Missouri 65804
Telephone (417) 887-1858
Facsimile (417) 887-3029
ATTORNEYS FOR DAVE'S IGA

CERTIFICATE OF SERVICE

COMES NOW the Grievant, by and through its counsel of record, hereby certifies to the Court, that on this 4th day of March, 2003, a copy of the forgoing documents were mailed to

Jason R Brown
Lathrop & Gage, L C
1845 S National
P O Box 4288
Springfield, MO 65808-4288

Attorney for Grievant

to be available in the case of a supplier's breach as is involved here *See* Missouri Public Service Co v Peabody Coal Co , 583 S W 2d 721, 724 [1](Mo App 1979) If parties intend to conclude a contract for the sale of goods within the scope of the Uniform Commercial Code, they must accept that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in their contract Frank's Maintenance, Etc v C A Roberts Co , 408 N E 2d 403, 410 (Ill App 1980) The UCC specifically provides that the remedies provided by it shall be liberally construed to the end that the aggrieved party may be put in as good as position as if they other party had fully performed Id The agreement excludes for recovery of consequential, punitive and indirect damages Such a limitation of damages is unconscionable under the Missouri Uniform Commercial Code

2 At this Time, Dave's IGA Seeks Damages in the Amount of $49,999 99 Breach of the Facilities Standby Agreement by Fleming

Fleming Companies Inc , arbitrarily, capriciously, wrongfully, and without legal justification ceased to perform under this Agreement as promised in June 1999 Fleming violated its duty owed to Dave's IGA by committing the above mentioned breaches In sum, Fleming failed and refused to honor the agreed to credit terms that were the basis of the bargain by placing Dave's IGA on C B D ("cash before delivery") status, and Fleming continues to unilaterally alter the terms of the agreement Such behavior has placed Dave's IGA untenable position

Dave's IGA has been at all times ready, willing, and able to perform all of the duties, obligations, and responsibilities contained in the Agreement entered into in June of 1999 and as shown by the parties course of dealing The acts of Fleming Companies, Inc , described above constitute a breach of the Facilities Standby Agreement between the parties As a direct result of Flemings arbitrary and capricious decision to unilaterally change the credit terms agreed to by the parties and its subsequent arbitrary, capricious, threatening, and intimidating actions, Dave's IGA has

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AFFIDAVIT TO IDENTIFY DOCUMENTS

Christi D Sewell, being sworn, states that the documents attached hereto are the documents described in the Table of Contents above

Christi D Sewell

Subscribed and sworn to before me this 4thrd day of March 2003

Notary Public
my commission expires

STEVEN E. MARSH
Greene County
My Commission Expires
July 21, 2006

FACILITY STANDBY AGREEMENT

THIS FACILITY STANDBY AGREEMENT (the "Agreement"), dated this 17 day of June, 1999, is made as of May 18, 1999 (the "Effective Date"), by FLEMING COMPANIES, INC , an Oklahoma corporation ("Fleming"), and DAVE'S IGA, L L C , a Missouri limited liability company ("Retailer"), with reference to the following circumstances

(i) Fleming is a full-line wholesale supplier of food, grocery, and related products through its product supply center in Kansas City, Missouri and other locations, and

(ii) Retailer is a retailer of food, grocery, and related products and operates a retail grocery store located at 2525 West College, Springfield, Missouri 65802 (the "Store"); and

(iii) By a concurrent transaction, Fleming and Retailer have entered into a Store Asset Purchase Agreement dated as of May 18, 1999 (the "Purchase Agreement")

(iv) Retailer presently subleases from Fleming the premises at which the Store is located and in the future may sublease from Fleming other premises at which Stores may be located (in either case, the subleases shall be referred to in this Agreement as the "Sublease"), and

(v) Retailer has requested that Fleming be prepared to supply to Retailer a certain amount of food, grocery, and related products, and to be able to do so Fleming will have to commit certain resources, including capital, employees, inventory, equipment, and facilities

(vi) Retailer acknowledges that but for Retailer's covenants and agreements in this Agreement, Fleming would not have agreed to commit its resources for the benefit of Retailer, entered into this Agreement, and/or entered into the Sublease

NOW, THEREFORE, in consideration of the foregoing and of the mutual covenants stated below, the parties agree as follows

1 Fleming's Commitment to Supply Throughout the term of this Agreement, Fleming will maintain capital, employees, inventory, equipment, and facilities sufficient to supply Products to Retailer in quantities sufficient to allow Retailer to purchase the Estimated Purchase Level described in Section 3 of this Agreement

2 Price and Other Terms of Sale The Products sold to Retailer pursuant to this Agreement shall be priced, and other terms of sale shall be established, generally in accordance with Fleming Flex/Pro Flex/Store Marketing Plan dated June 8, 1998, which Retailer has reviewed and which is attached hereto as Exhibit A, as amended from time to time by Fleming in its discretion upon 30 days notice (the "Selling Plan") Although Fleming has the ability to

EXHIBIT 1

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amend the Selling Plan in any respect, any amendments will be applicable to all customers of Fleming who are situated similarly to Retailer in Retailer's trade area and who are purchasing Products pursuant to the Selling Plan

3 Facility Standby Fee

(a) Amount By entering into this Agreement, Fleming has committed to devote such capital, employees, inventory, equipment, and facilities as are required to supply Retailer with the quantity of Products necessary for Retailer to purchase the Estimated Purchase Level described in Section 3(b) for the term of this Agreement Fleming is willing to so commit such resources because of the return it will realize from sale of Products in the quantities necessary for Retailer to purchase the Estimated Purchase Level during the term of this Agreement If Retailer does not purchase Products in such quantities, Retailer agrees to pay Fleming a Facility Standby Fee The amount of the Facility Standby Fee shall be equal to three percent (3%) of the amount by which Retailer's purchases during each 12-month period during the term of this Agreement are less than the Estimated Purchase Level For example, if the Estimated Purchase Level is $2 3 million per year and at the first anniversary of this Agreement Retailer has purchased $2 million of Products, Retailer will owe a Facility Standby Fee of $9,000 Retailer shall pay the Facility Standby Fee by wire transfer of readily available funds within thirty (30) days after each anniversary of this Agreement

(b) Estimated Purchase Level Retailer has agreed that its annual purchases will be not less than Fifty percent (50%) of all annual retail sales by the Store and has estimated that its purchases of Products for delivery to the Store during each 12-month period during the term of this Agreement will be not less that $2 3 million (the "Estimated Purchase Level") Fleming will commit its resources, including capital, employees, inventory, equipment, and facilities, in order to be prepared to supply the Estimated Purchase Level of Products to Retailer

(c) Additional Stores The Estimated Purchase Level will be increased from time to time upon the addition of each Additional Store or upon the expansion of any of the Stores (the "Expanded Stores") The Estimated Purchase Level will be increased by dividing the Estimated Purchase Level by the total square feet of the Stores (plus the square feet of Additional Stores or Expanded Stores that at the time of the calculation have already been made subject to this Agreement) and multiplying the quotient obtained by the square feet of such Additional Stores or the expansion area in an Expanded Store

(d) No Other Retailer Obligations Except as otherwise provided in Section 14 of this Agreement, Retailer shall have no obligation to purchase any specific quantity or type of Products from Fleming

4 Term Unless terminated sooner in accordance with this Agreement, the term of this Agreement will commence on the Effective Date and extend until the date that is contemporaneous with the expiration of the Lease (as defined in the Purchase Agreement) (the

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"Initial Term") At the end of the Initial Term, this Agreement will automatically be extended for additional one (1) year terms until terminated on an anniversary date by either party with at least six (6) months prior written notice In no event will the term of this Agreement extend beyond twenty (20) years from the date hereof

5 Default

(a) Default by Retailer If Retailer fails to perform in any material respect any of its obligations under this Agreement, then Retailer shall be in default and Fleming shall have all rights and remedies available under law, including, without limitation, the right to immediately stop shipment of Products, the right to immediately terminate this Agreement by written notice, and the right of specific enforcement of the obligations of Retailer All such remedies shall be cumulative, and the resort to one remedy shall not be deemed an election of remedies However, in the event of a monetary default, Retailer shall have five (5) days from receipt of the notice of termination from Fleming within which to cure the monetary default Fleming shall not be obligated to ship any Products to Retailer during such five (5) days With respect to money damages, Fleming shall have no right to recover additional damages (whether characterized as consequential, punitive, indirect, or otherwise)

(b) Default by Fleming If Fleming fails to perform in any material respect any of its obligations under this Agreement, then Fleming shall be in default and Retailer shall have the right to immediately terminate this Agreement by written notice and pursue all remedies available under this Agreement or law by reason of such default, including, without limitation, specific enforcement of the obligations of Fleming All such remedies shall be cumulative, and the resort to one remedy shall not be deemed an election of remedies However, in the event of a monetary default, Fleming shall have five (5) days from receipt of the notice of termination from Retailer within which to cure the monetary default With respect to money damages, Retailer shall have no right to recover additional damages (whether characterized as consequential, punitive, indirect, or otherwise)

6 Disputes, Arbitration All disputes between Fleming and Retailer relating to this Agreement will be resolved by arbitration as provided in this Agreement. This agreement to arbitrate shall survive the rescission or termination of this Agreement All arbitration shall be conducted in Springfield, Missouri pursuant to the Commercial Arbitration Rules of the American Arbitration Association except as may be otherwise provided in this Agreement The panel used will be selected from, if available, the "Food Industry Panel" employed by the American Arbitration Association, and the decision of the arbitrators will be final and binding on all parties All arbitration will be undertaken pursuant to the Federal Arbitration Act, and the decision of the arbitrators will be enforceable in any court of competent jurisdiction

In any dispute where a party seeks $50,000 or more in damages, three arbitrators will be employed All costs attendant to the arbitration, excluding attorney's and expert's fees, will be borne equally by the parties Each party will bear its own attorney's and expert's fees The arbitrators will not award punitive, consequential, or indirect damages Each party hereby

waives the right to such damages and agrees to receive only those actual damages directly resulting from the claim asserted However, the arbitrators may award the equitable relief of specific performance to either party, if applicable and if requested In resolving all disputes between the parties, the arbitrators will apply the law of the State of Missouri, except as may be modified by this Agreement The arbitrators are by this Agreement directed to conduct the arbitration hearing no later than three months from the service of the statement of claim and demand for arbitration unless good cause is shown establishing that the hearing cannot fairly and practically be so convened

Except as needed for presentation in lieu of a live appearance, depositions will not be taken (unless both parties shall agree) Parties will be entitled to conduct document discovery by requesting production of documents Responses or objections will be served twenty days after receipt of a request The arbitrators will resolve any discovery disputes by such prehearing conferences as may be needed The arbitrators and any counsel of record to the proceeding will have the power of subpoena process as provided by law

The relationship created by this Agreement could give rise to the need by one or both of the parties for emergency judicial relief Either party shall be entitled to pursue remedies for emergency or preliminary injunctive relief in any court of competent jurisdiction, but immediately following the issuance of any such emergency or injunctive relief the party obtaining such relief will consent to the stay of such judicial proceedings on the merits of both this Agreement and the related transactions pending arbitration of all underlying claims between the parties

7 Change of Control If Fleming does not elect to exercise its right of first refusal provided in Section 8 below and there has been a Change of Control, upon thirty (30) days written notice to Retailer Fleming may terminate this Agreement, provided, however, if Sublandlord should terminate this Agreement by reason of a Change of Control or if Retailer's rights under the Sublease are terminated without fault of the Retailer, Retailer shall have the right to terminate this Agreement

8 Grant of Right of First Refusal

(a) Right of First Refusal Retailer shall not sell, assign, or otherwise transfer any part of its Assets, other than in the ordinary course of its business, and Retailer and its owners of Equity Interests shall not sell, assign or otherwise transfer any Equity Interest, unless such transfer is carried out in accordance with the terms of this Agreement, provided, however, nothing herein contained shall prohibit Retailer or its owners of Equity Interests from selling Equity Interests as long as David Wingerter retains a majority of the Equity Interest of Retailer Subject to the immediately preceding sentence, if Retailer or any of Retailer's owners of Equity Interests receives an Offer that Retailer or any owner of an Equity Interest desires to accept, or Retailer elects to issue any Equity Interest, or Retailer's shareholders elect to sell, assign, or otherwise transfer any Equity Interest other than to an Affiliate, Retailer or such owners of Equity Interests shall, before accepting such Offer, promptly send a written notice to

Fleming offering the Assets or Equity Interest in question at the same price and upon substantially similar terms and conditions as are contained in the Offer Such notice shall contain a true and complete copy of the Offer and shall set forth the price and all of the terms and conditions thereof, including, without limitation, the names, addresses, and businesses or other occupations of the offeror or offerors, and any and all such information to which Retailer has access regarding the ability, financial or otherwise, of such offeror or offerors to carry out the terms of such offer At any time within thirty (30) days after receipt of the notice, Fleming may elect to purchase the Assets or Equity Interest so offered on substantially similar terms, conditions, and provisions of the Offer by giving written notice to the Retailer If Fleming exercises such option, Retailer or, as applicable, the owners of the subject Equity Interests and Fleming shall promptly execute an agreement for Fleming's acquisition of the Assets or Equity Interest covered by such Offer on substantially similar terms set forth in such Offer If Fleming does not exercise such Option, Retailer and/or the owners of Equity Interests may accept the Offer and sell the Assets or Equity Interest on the terms and conditions and for the price set forth in the Offer, but only if the sale is fully consummated within one hundred twenty (120) days after the notice to Fleming of such Offer If the sale is not fully consummated within such period, the provisions of this Section 8 must again be complied with by Retailer and/or the owners of Equity Interests before Retailer and/or the owners of Equity Interests may sell all or any part of the Assets or Equity Interest other than in the ordinary course of business

(b) Notices All notices, requests, demands, instructions, and other communications called for under this Section 8 or contemplated hereby shall be in writing and shall be given in accordance with Section 13 of this Agreement

(c) Consents If Fleming elects to exercise its right of first refusal, Retailer shall use its best efforts to obtain, on terms and conditions reasonably acceptable to Fleming, all estoppel certificates, subordinations, attornments, and consents that Fleming reasonably deems necessary in connection with the exercise of the right of first refusal and the consummation of the transactions contemplated thereby

(d) Assignment Fleming may assign this right of first refusal under this Section 8 to any person or entity independent of or with any assignment of this Agreement

9 Amendment or Waiver This Agreement may not be amended, nor any of its terms waived, unless such amendment or waiver is in writing and signed by the parties hereto

10 Governing Law This Agreement will be governed by and construed in accordance with the laws of the State of Missouri

11 Counterparts This Agreement may be executed in multiple counterparts, all of which taken together will constitute one instrument and each of which will be considered an original for all purposes

R-C

12 Time is of the Essence Time is of the essence of this Agreement

13 Notices Whenever any notice is required to be given under this Agreement, then such notice shall be written and shall be given or sent, and the other party shall be deemed to have received it, if delivered personally or by national overnight courier, on the date such notice is delivered personally or by the national overnight courier, or if mailed, on the third business day after mailing, if sent by first-class certified mail, postage prepaid, return receipt requested, and addressed as follows

(a) Notices to Fleming

Fleming Companies, Inc
3400 N W. 74th Avenue
Miami, Florida 33122
Attn S Scott Nicholson
Director - Customer Services and Distribution

With copies to

Fleming Companies, Inc
6301 Waterford Boulevard
Oklahoma City, Oklahoma 73118
Attn Assistant General Counsel

and

McAfee & Taft
A Professional Corporation
Tenth Floor, Two Leadership Square
211 North Robinson
Oklahoma City, Oklahoma 73102-7101
Attn John M Mee, Esq.
J Michael Nordin, Esq

(b) Notices to Retailer

Dave's IGA, L L C
2525 West College
Springfield, Missouri 65802
Attn David Wingerter

Copy to

Donald W Jones, Esq
Hulston, Jones, Gammon & Marsh
2060 East Sunshine
Springfield, Missouri 68504

or to such other address as may be designated on ten days prior notice in writing by such party All such notices and communications shall be in writing and signed by the party giving such notice

14 Purchase of Store Supplies and Control Label Products Upon the termination of this Agreement, Retailer will purchase from Fleming (i) all store supplies that Fleming has purchased or obtained as supplies for Retailer, and (ii) private label or label designated products, each group of which, because of any special design, label, logo, quantity, or other feature cannot be sold promptly by Fleming to other retailers being served by the product supply center servicing Retailer under this Agreement at the same price being paid for such supplies and control label products by Retailer Retailer will pay to Fleming the then current price for such supplies and control label products being charged by Fleming to Retailer Such amount will be paid and such supplies and products will be delivered by Fleming to Retailer within twenty (20) days after termination of this Agreement

15 Miscellaneous

(a) Authorization Retailer or Fleming will execute and deliver any and all documents that may reasonably be requested by the other in order to properly document this Agreement, including, but not limited to, certified resolutions of the owners of Equity Interests in Retailer authorizing the undersigned to enter into this Agreement

(b) Binding Effect This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective successors and assigns Except as expressly provided herein, neither this Agreement nor the rights and obligations of Retailer hereunder shall be assignable by Retailer, and any purported assignment in contravention hereof shall be void without the consent of Fleming However, if Fleming should consent to an assignment or if without Fleming's consent the rights and obligations of Retailer are transferred by operation of law or otherwise, Retailer shall require that such rights and obligations be assumed by the transferee

(c) Exhibits Any Exhibit attached to this Agreement is made a part hereof and is fully incorporated herein by reference

(d) Entire Agreement This Agreement is the final expression of the agreement of the parties regarding the purchase of Products by Retailer from Fleming and supersedes any prior or contemporaneous agreement between the parties pertaining to the matters covered by this Agreement There are no representations, promises, warranties, understandings, or agreements, express or implied, oral or otherwise, except those expressly referred to or set

forth in this Agreement Retailer acknowledges that the execution and delivery of this Agreement is its free and voluntary act and deed and that Retailer's execution and delivery have not been induced by or done in reliance upon any representations, promises, warranties, understandings, or agreements made by Fleming or its agents, officers, employees, or representatives that are not expressly stated in this Agreement No promise, representation, warranty, or agreement made subsequent to the execution and delivery of this Agreement by either party, and no revocation, partial or otherwise, or change, amendment, addition, alteration, waiver or modification of this Agreement or any of the terms hereof will be enforceable, unless it is in writing and signed by Fleming and Retailer

(e) Headings Headings or captions of the sections in this Agreement are for convenience of reference only and in no way define or limit or describe the intent of this Agreement or any provision hereof

(f) Inconsistency with Selling Plan If any of the provisions of this Agreement are inconsistent with the provisions of the Selling Plan, the provisions of this Agreement will govern

(g) No Effect The length of the term of this Agreement may not correspond with the terms of other agreements between Fleming and Retailer, and nothing shall be implied therefrom Furthermore, this Agreement shall have no relevance or effect in determining whether or not a loan, mortgage, sublease, license, franchise, or other agreement, if any, between Fleming and Retailer will be extended or renewed

(h) Limitation of Actions An action for breach of this Agreement must be commenced within two (2) years after the cause of action has accrued by sending the other party a statement of claim and demand for arbitration A cause of action is accrued when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach

(i) Cross Default Any material breach of this Agreement by Retailer or by Fleming will be deemed to be a breach of any and all other agreements by and between Retailer and Fleming and their respective affiliates, whether now in existence or hereafter entered into, including, with limitation, any and all lease agreements, franchises, licenses, sublease agreements, promissory notes, loan agreements, security agreements, deeds of trust, leasehold deeds of trust, and pledge agreements Upon breach of any of the agreements referenced in the preceding sentence, Fleming or Retailer, as the case may be, may pursue all remedies legally available to it under those other agreements, including, without limitation, terminating those agreements, accelerating Retailer's or Fleming's, as the case may be, obligations pursuant to those agreements, seeking monetary damages, and seeking equitable relief

(j) Force Majeure. Neither Retailer nor Fleming shall be deemed in default of this Agreement if Retailer's or Fleming's, as the case may be, non-performance is the result of a condition beyond the control of such party, including, but not limited to, labor

strikes, government rationing or other regulations, flood, fuel shortages, earthquake, acts of God, drought, and other weather conditions

(k) State and Local Taxes Retailer represents and warrants that all Products purchased from Fleming that are tangible personal property shall be purchased for resale in the ordinary course of Retailer's business, and that Retailer shall comply with pertinent state and local laws regarding the collection and payment of sales, use, and other taxes applicable to all such resale transactions and furnish evidence thereof to Fleming If any such tangible personal property is put to a taxable use by Retailer or is purchased by Retailer other than for resale, Retailer shall make timely return and payment to the proper taxing authority of all sales, use, and like taxes applicable thereto, and shall indemnify Fleming against such taxes and all penalties and interest related thereto

16 Definitions Capitalized terms used in this Agreement shall have the following meanings

"Additional Stores" means additional retail grocery stores acquired or developed by Retailer during the term of this Agreement

"Affiliate" means any Person that directly, or indirectly through one or more intermediaries, Controls Retailer (a "Controlling Person") or any Person that is Controlled by or is under common Control with a Controlling Person

"Assets" means any of the Stores or any substantial asset or assets in any Store, including, without limitation the land and building where an owned Store is located and the leasehold interest in a leased Store, together with substantially all furniture, fixtures, equipment, inventory, accounts, general intangibles, and other personal property of any kind or character that is used in connection with any Store

"Change of Control" means the acquisition by any Person of the sufficient Equity Interest in Retailer such that the Person has the power to Control Retailer.

"Control" means possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ownership of equity, by contract, or otherwise

"Effective Date" shall have the meaning stated in the first paragraph of this Agreement

"Equity Interest" means, in the case of a corporation, the voting capital preferred or common stock or other voting security of the corporation, and in the case of a limited liability company or partnership, any membership, partnership, or other economic interest in the entity

0 A

"Estimated Purchase Level" shall have the meaning described in Section 3(b) of this Agreement

"Expanded Stores" shall have the meaning stated in Section 3(c) of this Agreement

"Facility Standby Fee" shall have the meaning described in Section 3(a) of this Agreement

"Fleming" shall have the meaning stated in the first paragraph of this Agreement

"Initial Term" shall have the meaning stated in Section 4 of this Agreement.

"Offer" means any proposal or offer for the acquisition of any of the Assets, other than in the ordinary course of Retailer's business, or any Equity Interest made by or on behalf of any Person

"Period" means any of the 13 four-week periods into which Fleming divides each calendar year for Fleming's internal accounting purposes

"Person" means any individual, a partnership, a corporation, an association, a limited liability company, a joint stock company, a trust, a joint venture, an unincorporated organization, or a governmental entity (or any department agency or political subdivision thereof)

"Products" means food, grocery, meat, perishables, and other related products, supplies, and merchandise described in the Selling Plan that Fleming offers for sale to its other retail customers.

"Retailer" means the person identified in the first paragraph of this Agreement and any successors thereof

"Selling Plan" shall have the meaning described in Section 2 of this Agreement

"Store" means the retail grocery store operated by Retailer at the locations described in Exhibit A of this Agreement, as well as any Additional Stores

"Sublease" shall have the meaning described in the recitals of this Agreement

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written

FLEMING COMPANIES, INC , an Oklahoma corporation

By _____
David R Almond, Senior Vice President

"FLEMING"

DAVE'S IGA, L.L C , a Missouri limited liability company

By _____
David Wingerter, Manager

"RETAILER"

EXHIBIT A

The Sell Plan

/mee/flm/dave_spa_d

EXHIBIT
A

FLEMING COMPANIES, INC.

FLEMING FLEXPRO/FLEXSTAR MARKETING PLANS

The Plans

The FlexPro Marketing Plan and the FlexStar Marketing Plan ("FlexPro/FlexStar") apply to all (i) ware (excluding cigarettes, tobacco and consumes), (ii) Dairy (excluding eggs and fluid milk), (iii) Frozen food products, and Dairy and Frozen warehouse supplies (collectively, the "Plan Products"). Plan Products are sold F O B at the Product Supp "PSC") loading dock at established Weekly Sell Price (as herein defined) plus a Product Storage Charge (as herein define Handling Charge (as herein defined) and a Product Delivery Charge (as herein defined), if Retailer elects Fleming s deli (collectively herein sometimes referred to as the "Charges") as set forth on Attachment A

Customer Qualifications

FlexPro/FlexStar applies to customers (the "Retailer" or "Retailers") for whom Fleming acts as the primar In addition, to qualify Retailer must comply with all of the following except for Visionet® which is optional but recommend

(1) Payment. Make payment for products and services electronically within established credit terms

(2) Orders Electronically order Plan Products through an approved electronic ordering system.

(3) VISIONET® Subscribe to Fleming's electronic retailer communications platform - VISIONET®

(4) Ad Features and Promoted Items Agree to provide binding pre-booked order quantities for major ad featur promotion items

(5) Arbitration Agree that all disputes between Retailer and Fleming arising out of or related to sales of Plan Pr hereunder (except for disputes relating to indebtedness) shall be resolved by final binding arbitration in accordance with the Am Arbitration Association and agree that any action subject to arbitration must be commenced within two (2) years after the cause of has accrued by sending the other party a statement of claim and demand for arbitration. A cause of action is accrued when the occurs, regardless of the aggrieved party's lack of knowledge of the breach.

Weekly Sell Price

Weekly Sell Prices will be established each week for all Plan Products

(1) Weekly Sell Price - Non Fleming Store Brand Plan Products

(a) Weekly Sell Price - Acquisition Value Weekly Sell Prices for Non Fleming Store Brand Plan Produc determined each week based upon the Acquisition Value of the product lots on a first-in, first-out basis Acquisition Value for such Products is the actual net price (after deducting vendor cash discounts and all per case off-invoice allowances) paid to the vendor plu inbound freight, unloading charges and charges for staging the Non Fleming Store Brand Plan Products at the PSC.

(b) Acquisition Value - Reconciliation Differences between the established Weekly Sell Price and the Acquisition Value for the lots will be added to or subtracted from the Retailer's Product Cost Reduction Account ("PCRA"). See "Product Cost Reduction Account."

(c) Customer Specific Lots. Weekly Sell Prices for Non Fleming Store Brand Products purchased from a Cust Specific Lot ("CSL", as herein described) is the Acquisition Value of the lot from which the product was purchased.

(d) Vendor Price Decline Adjustments If a vendor announces a general price decline and provides protection," the Acquisition Value of the lots on hand will be reduced accordingly If the vendor does not provide "floor stock the Acquisition Value of such lots will remain unchanged.

(e) Vendor Allowances Certain vendor off-invoice allowances as described below flow directly to in terms of lower product pricing. To credit these vendor allowances, the following procedures will be used

- Off-Invoice, Per-Case Allowances. Vendor off-invoice per-case allowances that are non-pe or merchandising/advertising related flow directly to the Retailer and normally will be shown as a "Vendor Allowance" on Reta Product invoice during the established normal deal period. The length of the deal period will correspond with the length of th deal period but the start date of the deal may not be the same. After the expiration of the normal deal period any remaining Pla will continue to be sold at its deal price until the supply is exhausted.

- Forward Buy Any "Forward Buy" positions taken by Fleming at its discretion will also lower of Plan Products to the Retailer after payment of the Product Storage Charges described below The quantities procured as "Forwa inventory are based upon the specifics of the vendors' program and an economic evaluation of the program, Product Storage Char The "Forward Buy" tables used in making procurement decisions may be periodically adjusted for change in interest rates, Product Charges, etc

- Deal Pricing - Start Date. To accommodate the need for Retailers to have a predictable start d deal pricing, the PSC will establish the Weekly Sell Price to reflect the deal price even if it has not opened a lot of the Plan P procured at the deal price. If the established Weekly Sell Price for a deal price is less than its Acquisition Value, Fleming will re the difference by either (i) where possible, billing back the vendor or (ii) where a bill back is not possible the amount will be dec from the Retailer's PCRA determined as a ratio based upon the Retailer's share of PSC's volume

- Per-Case Bill Back Allowances. Per-case bill back allowances that are performance merchandising/advertising related will be shown as a "Price Reduction" on Retailer's Plan Product invoice Fleming will invoic vendor for the amount of the vendor's allowance that is passed on to the Retailer plus an administrative fee for managing the program the vendor

- Lump Sum Funds Lump sum vendor promotion funds provided by the vendor for the suppor promotion and/or advertising programs managed by Fleming for its customers (where the terms of the trade agreement have been m after the deduction of an administrative fee by Fleming, will be either traced (based on actual product movement) or allocated (based the Retailer's share of volume) and paid to the Retailer either as (i) an off-invoice per-case allowance, or (ii) an offset to charges advertising services, or (iii) a direct payment, or (iv) an addition to the Retailer's PCRA.

For vendor funds that are paid in a lump sum for specific purposes (such as sums directed to new items and placem allowances, performance related programs, etc) only those Retailers who participate in the program will share in such funds.

- Other Vendor Funds Unless specifically identified as vendor advertising/promotional funds requi to be passed through to the retailer in connection with the resale of product, any other vendor funds recovered by Fleming outside normal business cycle as a result of audits directed by Fleming will be retained by Fleming

(2) Weekly Sell Price - Fleming Store Brand Plan Products Fleming Store Brand Plan Products are products Fleming s under one of its controlled or franchised brands such as BestYet®, Rainbow®, TV®, Sentry®, IGA®, Piggly Wiggly®, etc

(a) General Turn Inventory For Fleming'Store Brand Plan Products sold from general turn inventory, the Wee Sell Prices are the prices established by Fleming each week.

(b) Customer Specific Lot ("CSL") For CSL inventory of Fleming Store Brand Plan Products, the Weekly S Price is the Fleming established price for the specifically procured CSL product.

Customer Specific Lots (Ad Features and Promotion Items)

(1) Customer Specific Lot Offers Firm, pre-booked order of quantities of Plan Products meeting the minimum order a scheduling requirements for items shown on the "Customer Specific Lot Offer" list will be eligible for reduced Product Storage Charg

and, if applicable, reduced duct Handling Charges. The Retailer may receive certain economic savings if any prebooking The Customer Specific Lot Offers are scheduled for the Retailer's major ad features and promotions

- Product pricing for product purchased from a Customer Specific Lot (CSL) (as herein des Acquisition Value of the specifically procured lot.

- When prebooking Plan Product, the Retailer may provide instructions for delivery of specific specific stores. The Retailer may also order an aggregate total quantity of product for later store specific orders

(2) Customer Specific Lots For each prebooked order, a separate Customer Specific Lot ("CSL") is establishe ordering Retailer is required to accept. Each CSL will receive a "designated available date," and no product will be sold out c before such date even though it is in storage at the PSC.

Plan Products designated in a CSL will be sold to the Retailer ordering such product until the CSL has been c Product Storage Charges will be charged based upon the length of time the CSL has been stored in the PSC.

A Retailer who terminates its primary supplier relationship with Fleming for any reason shall remain respor the purchase of any CSL it has ordered and must take delivery of all remaining CSL product within three (3) weeks of the termir service, paying all assessed Product Storage, Product Handling and Product Delivery Charges.

(3) PSC Responsibility Fleming will be responsible for the timely availability of all prebooked ordered CSL pro

(4) Charges for CSL Only the quantity of Plan Products that are prebooked as a CSL will be eligible for the re Product Storage Charges and the special Product Handling Charges (if applicable) The PSC will provide the charges upon requ

(5) Changing Customer Specific Lot Offers. The Customer Specific Lot Offers will be made up of a continually chan selection of items that are available from vendors in varying shipping configurations, shipping quantities and prices that can be effect handled as pre-booked items Fleming will work with vendors to qualify items for including in the list of Customer Specific Lot Of A Retailer may qualify additional items that meet Fleming's criteria on a prebooked basis through negotiations directly with the ven

Product Storage Charges

Product Storage Charges by department are based on the activities Fleming performs to acquire and store products and on behalf of the Retailer Product Storage Charges for any Plan Product are based upon two (2) components, (i) the value of investment in an item (the "Inventory Investment Component") and (ii) the item's physical characteristics (the "Physical Characteris Component")

(1) The Inventory Investment Component. The Inventory Investment Component for an item is the item's Acquisition Va times the Inventory Investment charge (as set forth on Attachment A - Summary of Basic Supply Charges attached hereto) times number of days the item is in inventory minus the vendor's announced cash discount payment days)

(2) The Physical Characteristics Component The Physical Characteristics Component for an item is the item's cubic (as measured in cubic feet by Fleming) times the item's Physical Storage Charge (as set forth on Attachment A - Summary of Basic Sup Charges attached hereto) times the number of days the item is in inventory

The total Product Storage Charge for each item is the sum of the Inventory Investment Component and the Phys Characteristic Component.

(3) Number of Days in Inventory The FlexPro Marketing Plan offers two alternatives to those Retailers choosing such p for determining the number of days in inventory used in calculating the Product Storage Charges. These alternatives are (i) the Weigh Average Storage Days Alternative and (ii) the Standard Storage Days Alternative Except for inventory designated for CSL purcha Retailers choosing the FlexStar Marketing Plan are required to use the Standard Storage Days Alternative in the calculation of their Prod Storage Charges.

- Weighted Average Storage Days Alternative (FlexPro Only) This alternative is calculated item of Plan Product based upon the length of time each lot has been in inventory and the quantity remaining in each alternative used for all CSL's.

- Standard Storage Days Alternative (Optional For FlexPro, Mandatory For FlexStar) The Stan Days for each item within each department under the FlexPro Marketing Plan and the FlexStar Marketing Plan are se reflecting "reasonable" inventory management performance based upon the PSC's historical operating characteristics Th generally results in more consistent Product Storage Charges week to week for similar items

Product Handling Charges.

Product Handling Charges are based on the activities Fleming performs on behalf of the Retailer from produ and vendor ordering through receiving, put-away (if required), let-down (if required), retrieval (if required), retail order p selection (by case or pallet), staging, loading and customer service to provide the Retailer with Plan Products The Product Charge for any item includes two (2) components, (i) a per-case component (the "Base Case Component") and (ii) a product component (the "Product Selection Component")

(1) The Base Case Component. The Base Case Component is a charge (the "Base Case Charge") assessed on Products on a per-case basis by department as shown on Attachment A - Summary of Basic Product Supply Charges attached

- If the item is handled as a case item, the Base Case Component is the Base Case Charge set forth on Att A.

- If the item is handled as a pallet item, the Base Case Component would be the Base Case Charge tim number of cases on the pallet, provided, however, Retailer shall not be charged in excess of 40 cases per pallet regardless of the n of cases on a pallet.

(2) The Product Selection Component. The Product Selection Component is a charge (the "Product Selection Charge Retailer and is dependent upon the item's department and method of selection for shipment from the PSC

The Product Selection Charge by department, selection method and case cube are set forth on Attachment Summary of Basic Product Supply Charges attached hereto

(3) The Product Handling Charge The sum of the Base Case Component and the Selection Component constitutes Product Handling Charge The Product Handling Charges are presented to the Retailer as an aggregate amount on a separate invoice each order

A minimum total Product Handling Charge per invoice has been established for each department and is set f on Attachment A - Summary of Basic Product Supply Charges attached hereto

Product Delivery Charges

All Plan Products are sold F O.B the PSC's loading dock The Retailer is responsible for all costs for product pick and delivery Fleming will deliver products on its own trucks, or, where not prohibited by union contracts, allow Retailer to pick product or use a third party carrier. The choice of delivery method is at the option of Retailer in the absence of a union contract prohibi self pick-up or third party delivery The following charges will be made for transportation services

(1) Charges if Fleming Delivers. The Product Delivery Charges are based on the one-way miles from the PSC to Retail stores and the cubic volume of the product delivered on each individual delivery and are set forth on Attachment A - Summary of Ba Product Supply Charges. These charges assume the timely unloading and if deliveries require excess unload time or special servi additional charges may be required.

A special multi-store Delivery Charge is provided to Retailers with two or more stores under comm ownership and who wish to assume greater responsibility for the efficient utilization of delivery space

(7) [illegible] Retailer Picks-up Products or Uses Third Party Carrier Retailer must have or provide suf equipment to pick up product to allow efficient loading at the PSC Retailer pays for delivery charges directly Retailer any additional charges related to customer pickup as set forth on Attachment A.

FlexPro Marketing Plan Option

The FlexPro Marketing Plan provides the Retailer with separate calculations of its Product Storage Cha either Lot Based Storage Days or Standard Storage Days), the Product Handling Charges and the Product Delivery Charges collectively, the "Charges," for each order based upon the charges set forth on Attachment A - Summary of Base Product St hereto attached. Retailers using FlexPro have a choice of how the charges are presented by either (i) having the Charges p separate invoice for each order or (ii) using the prospective charge feature which applies a prospective percentage charge in the line-billed invoice amount which is reconciled to the actual Charges. Any difference will be charged or credited to the will appear on its weekly statement.

FlexStar Marketing Plan Option

The FlexStar Marketing Plan provides that the Retailer is charged a percentage rate weekly for each departm at the line item level.

The FlexStar Marketing Plan is designed to generate the same charges that would have been generated had th been using the FlexPro Marketing Plan and the Standard Storage Days Alternative.

The FlexStar percentage rate is determined by department for each store (or group of stores under common ow and is reviewed and adjusted (if required) each period. It is based upon the charges set forth on Attachment A - Summary of Basic Supply Charges.

Each period, total Charges by Department are calculated as if the store (or group of stores under common owne were using the FlexPro Marketing Plan and the Standard Storage Days Alternative as set forth on Attachment A - Summary of Product Supply Charges. The Charges will also reflect any savings realized by Retailer's use of CSL's. To determine the Fle Marketing Plan rate, each period total of charges for the previous three periods is divided by the Weekly Sell Price (minus any appli price reductions) for the same three periods to establish the FlexStar target rate If there is a change in the charge rates or the Re makes changes in the store's delivery schedule, the FlexStar rate may be immediately adjusted to the new established target FlexStar provided, however, adjustments of 15% or less will be ignored.

Other Services and Charges

From time to time there may be requirements from Retailer for services outside the normal FlexPro Marketing Plan the FlexStar Marketing Plan. Examples of services and charges include (i) printed mail out (to be supplied by the PSC), (ii) add-on delivery charge, (iii) non-pallet deliveries charge, (iv) product returns, and (v) pallet charges, tote charges and wooden watermelon as set forth on Attachment A.

Services and Programs Not Identified in the FlexPro and FlexStar Marketing Plans

All extra services and programs ordered by Retailer will be billed at rates established by Fleming from time to Retailer will also be charged for the development of customized software, special computer reports or system interfaces.Before any sup activity is undertaken that would require the imposition of an additional charge, the retailer will be notified of the estimated charg

Product Freshness -

To provide retailers with the maximum possible retail shelf life for perishable products the PSC has e following minimum dating criteria for product that it ships

Cheeses	14 days before expiration
Margarine	14 days before expiration
Cultured Products	7 days before expiration
Chilled Juices	7 days before expiration
Dough Products	7 days before expiration

Marketing Support Services

Fleming offers a complete array of value-added Marketing Support Services (the "Services") These Services separately from the prices of Plan Products to allow retailers to more effectively pick and choose only those services that t Detailed information on each of the Services and their price is available from the Fleming Marketing Director located at the F

Changes to the Basic Product Supply Charges and Annual Volume Incentive Payments.

(1) Product Storage Charges and Product Handling Charges. The method and manner of calculating the Product Charges, the Product Handling Charges and Product Delivery Charges and the Charges themselves set forth on Attachment A - Su of Basic Product Supply Charges attached hereto and the Annual Volume Incentive as shown on Attachment A are subject to chang thirty (30) days written notice from Fleming.

Credit and Payment Terms

(1) Payment Terms. All Plan Products statements must be paid electronically in the full amount shown on Retailer's per summary statements. This is accomplished by the Retailer's execution of an authorization for Electronic Funds Transfer ("EFT") ar Fleming initiating an EFT transaction that will result in Fleming receiving the amount of the statement in full on the first business day the statement is prepared.

Retailers who make this payment for Plan Products based upon individual invoices, as opposed to a summary statem will also need to provide for a timely electronic transmission in an acceptable EDI format that will allow automatic application of payment to Retailer's specific outstanding invoices.

All payments must be for the exact amount of the statement or invoice Fleming will respond promptly to Retail request for credit for adjustments and when credit is authorized, it will be promptly shown on the Retailer's statement (failure to apply approved credit to Retailer's statement within fourteen (14) business days after Fleming's approval and receipt of the product (if requi will entitle Retailer to a $50 payment from Fleming).

(2) Credit Terms Retailers who can satisfy Fleming's basic credit extension standards may apply for seven (7) calen days of credit. If approved, Retailer will have the option of paying in full with good funds available on the seventh (7th) calendar after the statement is prepared. Fleming will charge its credit extension rate which currently is four-tenths of one percent (40%) of statement amount (not to exceed applicable usury law limitations) Any extension of credit beyond this seven (7) day credit exten standard must be pre-approved by Fleming and is subject to Fleming's credit policy

Retailers who cannot satisfy Fleming's credit policy may apply to (i) make a non interest-bearing deposit with Flem (assigned to Fleming) equal to the Retailer's maximum outstanding-open account balance, or (ii) prepay before product shipment or bef product selection.

If a payment in full is late for any reason, and a deposit of the full statement amount is not received by the due date late payment charge equal to the then current daily rate for late payments as established by Fleming will be made It will be charged ea day on the past-due balance until the account is made current, including late payment charges

Retailers that are delinquent under established terms may be denied any further products until they have ma satisfactory arrangements with Fleming for the correction of their past-due status

Product Cost Redi[illegible]m A[illegible]unt (the "PCRA").

The PCRA provides each Retailer with a method to manage its cost of product. A separate PCRA wi for each qualifying Retailer for discretionary use to, in effect, lower cost of product on any item through a special off in Retailer may never take its PCRA balance negative and it must remain associated with the business. If a Retailer discon of product from Fleming (and no successor is properly substituted) the PCRA balance (except for direct contributions fror be forfeited to Fleming. No interest is paid on the PCRA.

(1) Additions to Retailer's PCRA. Additions to a retailer's PCRA may come from

- Differences between an item's Acquisition Value and its established Weekly Sell Price
- The dollar value of the differences between an item's Weekly Storage Days and the Lot Based St
- Retailer designated additions. (To accomplish their own merchandising objectives, Retailers ma make additions to their account from their own funds.)
- Additions made by Fleming from vendor funds (net after a Fleming administrative charge), e.g., all lump-sum payments, volume incentive payments and bill back payments.

(2) Uses of a Retailer's PCRA. The Retailer's PCRA may be used:

- To reduce the net invoice amount of any Plan Product item designated by the Retailer. This is accom by the Retailer specifying the item, the per-case amount of reduction and the number of cases to which it applies. The amoun reduction is deducted from the Retailer's PCRA balance. At the end of the price reduction period, any unused amount of th reduction is returned to the Retailer's available PCRA balance. Contributions made by Fleming are always used first, thereafter Re contributions will be used.
- To make up the negative differences between an item's Acquisition Value and its established Weekly Sell
- To apply a portion of Fleming contributions to Retailer's PCRA to Retailer's accounts receivable balance Fleming, provided that a statement credit will be calculated and posted once per period and will be calculated as a percent of the Reta current unallocated PCRA balance generated from Fleming contributions up to a maximum of one hundred percent (100%).
- To pay Retailer by check that portion of Retailer's PCRA that reflects unallocated direct additions made b Retailer (without interest).

(3) PCRA Reports. Retailers will be provided periodic reports reflecting the Retailer's PCRA balance and all recent act Fleming has the right to require Retailers to grant a security interest in Retailer's PCRA and may decline to permit a requested usa Retailer is not current within its established credit terms.

(4) PCRA Balance. Any balance in a Retailer's PCRA may be applied to offset any outstanding past due obligation is owed to Fleming by the Retailer.

Annual Volume Incentive

The annual volume incentive program as set forth on Attachment A shares the benefits Fleming receives fror efficiencies created by high volume Retailers.

Growth Incentive

Depending upon the PSC serving this FlexPro/FlexStar Marketing Plan, Fleming may offer a Growth Incentive Progra accordance with the terms set forth on Attachment A.

Pallet Accountability

All Pallets delivered and/or returned will be charged for or credited on each delivery See "Other Services ar above

Only standard entry 48" by 40" GMA grocery pallets in good condition or qualified third-party pallets will b delivery Only pallets of the type used for that store's delivery and that are in good condition will be accepted for return and giv The PSC driver will issue a credit request form to the Retailer showing the net charge or credit for pallets on that delivery

Credits will be issued only up to the amount of pallet charges. At the end of each four (4) week accounting peri returns will be reviewed. Retailer will be notified of its pallet balance. Retailers with a pallet balance in excess of plus or minus 5 will be asked to correct the imbalance in one of the following ways. (i) the return of pallets to bring the outstanding balance to l 50, (ii) by paying for any negative balance greater than 50 pallets or (iii) by reducing any positive pallet balance to a maximum c accepting the return (and paying for) any positive balances in excess of 50 pallets.

Retail Store Credit Memo Policy - Pallet Delivery

(1) Policy This policy has been developed with a view to (i) help Retailers reduce labor cost associated with the de of Plan Product and (ii) to ultimately improve both Retailer's and the PSC's operations. Credits from the PSC will be for the item s inv value plus Product Storage and Product Handling Charges less return charges assessed. No merchandise is sold to the Retailer guaranteed retail sales basis unless it is specifically noted on the booking sheet or announcement bulletin.

(2) Adjustments. In the event of a selection error (mispull or mislabel), and the product is carried by the Retailer Retailer will keep the product and a credit will be issued to adjust any price difference. If the product is not carried by the Retailer, Retailer may either call customer service before the next delivery to request a pickup or have the driver write a request for credit on next delivery After the product is received and verified (including the intact, original picking label) at the PSC, credit will be issued the amount of the invoice price shown on the product invoice plus the Product Storage and Product Handling Charges.

If the Retailer believes that product is missing from the delivery (truck short), the Retailer must call Customer Servi at the PSC within 24 hours and identify the specific items that are missing For cigarettes and repack items any claim for shortage mu be made at the time of delivery after the count has been checked by the Retailer and the driver

If the product is damaged (truck damaged) at the time of delivery, the driver will write a request for credit. In the eve of concealed damage, the Retailer may either call Customer Service at the PSC before the next delivery to request a pick-up or have t driver write a request for credit on the next delivery Credit will be issued for individual units up to 25% of the case. If more than 25 of the case is damaged, the full case must be returned.

If a store order mistake is detected at time of delivery, the driver may write a request for credit (subject to the approv of the PSC Customer Service Manager). If found after the delivery is complete, the Retailer may call Customer Service before the ne delivery to request a pickup. If the request is approved, the product will be credited (less the product return charge as detailed in the "Oth Charges" above) after the product is received and verified at the PSC

Prebooked merchandise and/or product not regularly stocked by the PSC cannot be returned

Scope of Credits

PSC credits are written only for Warehouse credits, Delivery credits, Truck shortage, Overages, Truck damage, Pick-up originated by PSC, Mispulls or Concealed damage, Selection errors, Returns due to store-order mistakes initiated as a request from th Retailer after approval of the PSC and Time-Saver Coupons. (The warehouse time-saver is prepared by the PSC's Salvage Departmen to account for damaged units removed from a case. It is important that each receiving clerk or stocker secure these cards and accurately complete Retailer information. The Retailer will retain the stubs and send the large portion of the card to the Credit Memo Clerk in the PSC (Accounting) All credits will be at the retail price. Time-savers will be issued only when less than 25% of the case has bee removed).

Delivery

On each delivery the driver will have a delivery recap. The recap is checked for the number of p cigarettes, weighted meat and repack must be checked in at the time of delivery and any adjustments made at the time identifiable shortages, overages and/or label errors should be handled at the time of delivery; credit for damaged merchan concealed damage) will only be issued at the time of delivery; and after the completion of steps above, delivery recap is timed and signed.

Follow-Up Procedures

During the next 24 hours after the delivery, if a shortage, label error and/or overage is discovered the PS Service must be notified. Customer Service will issue the Retailer a reference number to verify the call. This number is to i the request for invoice adjustment. The credit cannot be processed without the reference number.

- All shortages and/or overages must be specifically identified by item.
- A request for invoice adjustment must be completed and received by the PSC within five (5) days afte contact.
  - Overage - Will keep
  - Overage - Please pick up
  - Misselection - Will keep
  - Misselection - Please pick up
  - Shortage identified
  - Shortage unidentified

Issuing of Credit

Credit will be issued no later than two (2) weeks from the date of the request for invoice adjustment and receip returned product (if required). It will appear on the next regularly scheduled statement.

When credit has not been received within 15 days of the date of the request, please call the Customer S Department.

Perishable Quality Credits

Credit requests on all perishables due to quality must be called in to the respective merchandising department 24 hours of delivery or credit will not be issued.

Vendor-to-Store Delivery Credits

Any shortages or quality problems on vendor-to-store product must be identified and communicated to the resp merchandising department before the signing of bills of lading (or delivery receipts) at store level. The truck must not be release the respective merchandising department has approved any invoice adjustments. Credit on vendor-to-store product will not be unless the respective merchandising department has been notified prior to the signing of the bills of lading (or delivery receipts) a level.

TOBACCO AND CIGARETTES SELL PLAN

The Plan

The Fleming Tobacco and Cigarettes Sell Plan (the "Plan") applies to all tobacco and cigarette products ("Plan Products") as classified by Fleming. Plan Products are sold on a delivered basis at Fleming's Quoted Sell Pr (as herein defined).

Customer Qualifications

This Plan applies to customers (the "Retailer" or "Retailers") for whom Fleming acts as their primary supplie of grocery, frozen and dairy products. To qualify, Retailer must comply with all of the following:

(1) Orders. Electronically order Plan Products (Fleming approved electronic ordering system).

(2) Minimum Purchases. Submit weekly individual store orders of a minimum of Plan Products as set forth on Attachment A.

Fleming's Quoted Sell Price for Plan Products

Plan Products are priced at the Fleming Quoted Sell Price (the "Quoted Sell Price") on a delivered basis determined in Fleming's sole judgment and discretion. Retailers will be advised of normal changes to an item's Quoted Sell Price through the Product Supply Center (the "PSC") periodic price announcement bulletin. In states with restrictions on the minimum price at which product may be sold, the Quoted Sell Price will be at least equal to the required state minimum.

Payment Terms

All payment terms, credit procedures, deposit requirements, etc., are the same as those established under the product supply center's current grocery, frozen and dairy sell plan or marketing plan or those required under the FMP marketing plan.

Supersedes Current Sell Plans

This Tobacco and Cigarette Sell Plan supersedes and replaces any existing oral or written tobacco and cigarettes Sell Plan(s) that may be in use at the PSC.

Changes to the Plan

While the Fleming Quoted Sell Price may be changed at any time, any other part of this Plan may be changed at Fleming's sole discretion with thirty (30) days notice to the Retailer

EXHIBIT C

Dispute Resolution

By becoming a Fleming retail customer, a Retailer agrees that all disputes between Fleming and the Ret arising out of the purchase and sale of Plan Products under the Plan (except for disputes relating to indebtedness) cannot be mutually resolved directly by the parties shall be resolved by final, binding arbitration in accordance with procedures of the American Arbitration Association. Any action subject to arbitration must be commenced within t (2) years after the cause of action has accrued by sending the other party a statement of claim and demand arbitration. A cause of action is accrued when the breach occurs regardless of the aggrieved party's lack of knowled of the breach.

Cigarette Rebates

In states where rebates are permitted, volume based purchase rebates may be available and if so, will be pai as set forth on Attachment A.

FLEMING COMPANIES, INC.

PRODUCE SELL PLAN

The Plan

The Fleming Produce Plan (the "Plan") applies to all warehouse Produce as classified by Fleming (the "Pl Products"). Plan Products are sold F.O.B. the Product Supply Center's (the "PSC") loading dock at Fleming's Quot Sell Price (as herein defined) plus a distribution fee as set forth on Attachment A. If Fleming provides the delive service, it will be priced separately

Customer Qualifications

This Plan applies to customers (the "Retailer" or "Retailers") for whom Fleming acts as their primary supplier of grocery, frozen and dairy products. To qualify, Retailer must comply with all of the following:

(1) Orders. Electronically order Plan Products (Fleming approved electronic ordering system).

(2) Minimum Purchases. Submit weekly individual store orders of a minimum of Plan Products as set forth on Attachment A.

(3) Prebooked Orders. Provide prebooked order quantities for major ad features and promotion items.

Flemmg's Quoted Sell Price for Plan Products

Plan Products are priced at the Fleming Quoted Sell Price (the "Quoted Sell Price") before a distribution fee and, if applicable, freight for each Plan Product determined in Flemmg's sole judgment and discretion. Retailers will be advised of normal changes to an item's Quoted Sell Price through the PSC's periodic price announcement bulletins, provided, Flemmg retains the right to change the Quoted Sell Price at any time.

Payment Terms

All payment terms, credit procedures, deposit requirements, etc., are the same as those established under the product supply center's current grocery, frozen and dairy sell plan or marketing plan or those required under the FMP marketing plan.

Supersedes Current Produce Sell Plans

This Produce Sell Plan supersedes and replaces any existing oral or written Produce Sell Plan(s) that may be in use at the PSC

Delivery

If Flemmg delivers the Plan Products, Flemmg's normal delivery charges will apply

Operating Requirements for Shared Efficiencies

The following practices and procedures have been established to provide a complete, efficient ; distribution program.

(1) Store orders for Plan Products must be received at the PSC in accordance with the master schedule. Add on or manual orders may have an additional charge.

(2) Plan Products procured specifically for an individual retailer must be accepted when delivered t store

(3) Credit requests for shortages or damages must be approved by customer service and/or the Proc buyer in accordance with the PSC's established credit policy.

(4) The acceptance and handling of returned product is extremely expensive for the PSC. To keep th costs out of the distribution fee, there will be no product return privileges under this Plan. On product is ordered and delivered to the store in acceptable condition, it is the responsibility of t store to promptly receive and accept it.

Changes to the Plan

While the Fleming Quoted Sell Price may be changed at any time, any other part of this Plan may be changed at Flemmg's sole discretion with thirty (30) days notice to the Retailer.

Dispute Resolution

By becoming a Fleming retail customer, a Retailer agrees that all disputes between Flemmg and the Retailer arising out of the purchase and sale of Plan Products under the Plan (except for disputes relating to indebtedness) that cannot be mutually resolved directly by the parties shall be resolved by final, binding arbitration in accordance with the procedures of the American Arbitration Association. Any action subject to arbitration must be commenced within two (2) years after the cause of action has accrued by sending the other party a statement of claim and demand for arbitration. A cause of action is accrued when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach.

PSC Specific Optional Programs

Any PSC Specific Optional Programs such as ad allowances or volume based incentives are described on Attachment A.

FLEMING COMPANIES, INC.

BAKERY/DELI SELL PLAN

The Plan

The Fleming Bakery/Deli Sell Plan (the "Plan") applies to all bakery and deli products as classified by Flem (the "Plan Products") Plan Products are sold F.O.B. the Product Supply Center's (the "PSC") loading dock at Flemin Quoted Sell Price (as herein defined) plus a distribution fee as set forth on Attachment A If Fleming provides t delivery service, it is priced separately

Customer Qualifications

This Plan applies to customers (the "Retailer" or "Retailers") for whom Fleming acts as their primary supplier To qualify, Retailer must comply with all of the following:

(1) Orders. Electronically order Plan Products (Fleming approved electronic ordering system)

(2) Minimum Purchases. Submit weekly individual store orders for a minimum of bakery Plan Products and deli Plan Products as set forth on Attachment A.

(3) Prebooked Orders Provide prebooked order quantities for major ad features and promotion items.

(4) Deliveries Receive bakery/deli products (if Fleming delivers) on existing delivery runs for other departments that are already scheduled.

Fleming's Quoted Sell Price for Plan Products

Plan Products are priced at the Fleming Quoted Sell Price (the "Quoted Sell Price") before a distribution fee and, if applicable, freight for each Plan Product determined in Fleming's sole judgment and discretion. Retailers will be advised of normal changes to an item's Quoted Sell Price through the PSC's periodic price announcement bulletins, provided, Fleming retains the right to change the Quoted Sell Price at any time

Vendor Promotional Allowances for Bakery/Deli

(1) Non-performance Allowances Non-performance, off invoice allowances are passed on to the Retailer without any requirements for performance. The PSC will pass through the full amount of these allowances for a period equal to, but not necessarily concurrent with, the period the vendor offers the allowance.

(2) Performance Related Allowances Retailer allowances requiring specific performance by the Retailer to qualify (excluding advertising allowances) will be passed on to the Retailer, if the terms of the trade agreement between the vendor and the PSC have been met. The allowance will be in one of the following forms at the PSC's option.

- Reduction of the Plan Product's selling price on a bakery/deli invoice
- Check payable to the qualifying Retailer
- Credit memo

(3) Other Allowances. All other allowances are retained by the PSC

EXHIBIT E

Payment Terms

All payment terms, credit procedures, deposit requirements, etc., are the same as those established und PSC's current grocery, frozen and dairy sell plan or marketing plan.

Dispute Resolution

By becoming a Fleming retail customer, a Retailer agrees that all disputes between Fleming and the Ret arising out of the purchase and sale of Plan Products under the Plan (except for disputes relating to indebtedness) cannot be mutually resolved directly by the parties shall be resolved by final, binding arbitration in accordance with procedures of the American Arbitration Association. Any action subject to arbitration must be commenced within t (2) years after the cause of action has accrued by sending the other party a statement of claim and demand arbitration. A cause of action is accrued when the breach occurs, regardless of the aggrieved party's lack of knowled of the breach.

Changes to Sell Plan

While the Fleming Quoted Sell Price may be changed at any time, any other part of this Plan may be changed at Fleming's sole discretion with thirty (30) days notice to the Retailer.

Supersedes Current Bakery/Deli Sell Plan

This Plan supersedes and replaces any existing oral or written bakery/deli Sell Plan(s) that may be in use at the PSC

Delivery

If Fleming delivers the product, Fleming's normal delivery charges will apply.

Minimum Date Requirements for Retail Shipment

Product Description	Type of Date	Minimum Life
Deli		
Deli Meats (processed)	Open Code	14 days
Cheese	Open Code	14 days
Salads (all except coleslaw)	Open Code	7 days
Coleslaw (creamy)	Open Code	7 days
Frozen Deli	Open Code	14 days
Fresh Poultry C.V.P	Open Code	5 days
Bakery		
Raw Frozen Dough	Open Code	14 days
Raw Frozen Doughnuts	Open Code	14 days
Cookies	Open Code	14 days
Pies, Frozen	Open Code	14 days
Pie Shells, Frozen	Open Code	14 days
Thaw & Sell, Frozen	Open Code	14 days
Icing and Fillings	Open Code	14 days
Dry Mixes	Open Code	14 days

FLEMING COMPANIES, INC.

FRESH AND PROCESSED MEAT SELL PLAN

The Plan

The Fleming Fresh and Processed Meat Sell Plan (the "Plan") applies to all meat and seafood products classified by Fleming (the "Plan Products"). Plan Products are sold on a delivered basis at Fleming's Quoted Sell Pri (as herein defined)

Customer Qualifications

This Plan applies to customers (the "Retailer" or "Retailers") for whom Fleming acts as their primary supplie of grocery, frozen and dairy products. To qualify, Retailer must comply with all of the following:

(1) Orders Electronically order Plan Products (Fleming approved electronic ordering system).

(2) Minimum Purchases Submit weekly individual store orders of a minimum of Plan Products as set forth on Attachment A.

(3) Prebooked Orders. Provide prebooked order quantities for major ad features and promotion items.

Fleming's Quoted Sell Price for Plan Products

Plan Products are priced at the Fleming Quoted Sell Price (the "Quoted Sell Price") for each Plan Product determined in Fleming's sole judgment and discretion. Retailers will be advised of normal changes to an item's Quoted Sell Price through the PSC's periodic price announcement bulletins, provided, Fleming retains the right to change the Quoted Sell Price at any time.

Vendor Promotional Allowances for Processed Meats

(1) Non-performance Allowances. Non-performance, off invoice allowances are passed on to the Retailer without any requirements for performance. The PSC will pass through the full amount of these allowances for a period equal to, but not necessarily concurrent with, the period the vendor offers the allowance.

(2) Performance Related Allowances. Retailer allowances requiring specific performance by the Retailer to qualify (excluding advertising allowances) will be passed on to the Retailer, if the terms of the trade agreement between the vendor and the PSC have been met. The allowance will be in one of the following forms at the PSC's option:

- Reduction of the Plan Product's selling price on a meat invoice
- Check payable to the qualifying Retailer
- Credit memo

(3) Other Allowances. All other allowances are retained by the PSC

EXHIBIT F

Payment Terms

All payment terms, credit procedures, deposit requirements, etc., are the same as those established under PSC's current grocery, frozen and dairy sell plan or marketing plan

Dispute Resolution

By becoming a Fleming retail customer, a Retailer agrees that all disputes between Fleming and the Retail arising out of the purchase and sale of Plan Products under the Plan (except for disputes relating to indebtedness) th cannot be mutually resolved directly by the parties shall be resolved by final, binding arbitration in accordance with th procedures of the American Arbitration Association. Any action subject to arbitration must be commenced within tw (2) years after the cause of action has accrued by sending the other party a statement of claim and demand fo arbitration. A cause of action is accrued when the breach occurs regardless of the aggrieved party's lack of knowledg of the breach.

Changes to the Sell Plan

While the Fleming Quoted Sell Price may be changed at any time, any other part of this Plan may be changed at Fleming's sole discretion with thirty (30) days notice to the Retailer.

Supersedes Current Meat Sell Plan

This Plan supersedes and replaces any existing oral or written meat and/or seafood Sell Plan(s) that may be in use at the PSC

Operating Requirements for Shared Efficiencies

The following practices and procedures have been established to provide a complete, efficient meat distribution program:

(1) Retailer orders for Plan Products must be received at the PSC in accordance with the master order schedule. Add on or manual orders may have an additional charge.

(2) Plan Products procured specifically for an individual Retailer must be accepted when delivered to the store.

(3) Credit requests for shortages or damages must be approved by customer service and/or the meat buyer in accordance with the PSC's established credit policy.

(4) The acceptance and handling of returned product is extremely expensive for the PSC To keep these costs out of the distribution fee, there will be no product return privileges under this Plan. Once product is ordered and delivered to the store in acceptable condition, it is the responsibility of the Retailer to promptly receive and accept it.

(5) If specifically requested, the PSC will make reasonable efforts to assist any Retailer whose inventory is out of balance with retail sales. If the meat buyer authorizes a product's return, any credit given will be net of the PSC's cost of pickup, transportation, receiving, inspection, restocking, and salvage loss.

AFFIDAVIT OF JANICE ELAINE BANKER

State of Missouri)
) ss
County of Greene)

I, Janice Elaine Banker, state that the following facts are true of my personal knowledge

1 My husband, Rick Banker, is currently the Produce Manager at Dave's IGA

2 I have been a loyal shopper at Dave's IGA since 1999 when it opened Over the past couple of months I have had no choice but to shop elsewhere because the shelves at Dave's IGA are bare

3 I told Travis, Dave's IGA's assistant manager, that I was going to have to start shopping at another store because Dave's IGA no longer had the groceries that they had once had

4 The shelves at Dave's IGA over the past couple of months have been empty It looks like Dave's IGA is going out of business

5 I have several elderly neighbors that also have been loyal Dave's IGA customers that have asked me if Dave's IGA is going out of business They like to shop at Dave's IGA because it is close and convenient for them They have told me that they too are forced to shop elsewhere for their groceries because of the inadequacy of product on Dave's IGA's shelves

Further affiant sayeth not

Janice Elaine Banker

Janice Elaine Banker

Subscribed and sworn to before me this 10 day of February, 2003

Steven E. Marsh

STEVEN E MARSH
Greene County
My Commission Expires
July 21, 2006

Plf. Exh. 13

BEFORE THE AMERICAN ARBITRATION ASSOCIATION
TRIBUNAL

DAVE'S IGA, L L C	)
	)
Grievant,	)
	)
vs	)
	)
FLEMING COMPANIES, INC ,	)
	)
Respondent	)

AFFIDAVIT OF DAVE WINGERTER

I, David Wingerter, state that I am manager of Dave's IGA, L L C , and the chief executive and chief operating officer of said organization, and that the following facts are true, of my personal knowledge

1 The only reasons given to me orally by agents of Fleming Companies, Inc , as to why Fleming put me on cash before delivery (C B D) status and refused to supply Product to me as they had promised in their supply Agreements are as follows

(a) I was told that because some requests for electronic payment submitted by Fleming to the bank account of Grievant company had been returned and were not paid immediately was the main reason, and the other reason was that I owed some other suppliers

(b) Those amounts due Fleming from Grievant, referred to in (a) above were paid by the Grievant company within less than 72 hours thereafter *See* ¶9 below

(c) On December 4, 2002 I did not receive any delivery from Fleming and no one from Fleming notified me that a delivery would not be made I promptly wired all balances due to Fleming on behalf of Grievant company on that date requesting more Product Fleming indicated to me that they refused to ship products to me unless I put up a letter of credit of $50,000 or more At that

time, Mr Headlee stated to me that Grievant might be shipped Product without advance payment within a few weeks but Fleming refused to give any firm commitment that its refusals to deliver Product will be corrected I have been required to pay for all shipment since that date on a "cash before delivery" (C B D) basis

(d) Although the Grievant company has had some cash flow problems, its assets exceed its liabilities, and that has been true during all of the time when Fleming failed and refused to deliver Product to Grievant Therefore, Grievant is not insolvent and Defendant has no reasonable basis to claim insolvency on the part of Grievant, and I have never received any notice from Fleming claiming insolvency as a basis for their actions in stopping or delaying deliveries

(e) Grievant is incurring and will incur irreparable injury and damages if temporary orders restraining and enjoining the Defendant from further violations of the obligations Defendant has to deliver Product are not issues herein

2 The documents titled "New Retail Account Package"(Attached hereto) and "Fleming Wholesale Credit Policy" (attached hereto) were never provided to me by anyone prior to them being presented to my attorney or served on my attorney in this case They were not a part of the contract documents which were signed by me for the Grievant company and by Fleming Companies, Inc representatives in June 1999, and they were never presented to me or to the Grievant company, Dave's IGA L L C , at any time thereafter prior to the filing of that document in Federal Court I had never seen either of those document before I had never agreed to those terms on behalf of Grievant and neither had any other representative of Grievant agreed to those terms

3 On several occasions prior to October 2002, I had called Bob Headlee to advise him that I needed a few more days to honor the Electronic Funds Transfer (EFT) There had never been

any problem with my taking a few extra days and the Grievant company had always paid the full amounts due within those extra three or four days That also is true of the EFTs received on October 22, 2002, October 28, 2002 and November 5, 2002 On each of those occasions, I had telephoned Bob Headlee the prior Friday to tell him that I needed a few more days and on each of those occasions, Bob Headlee merely said "Okay" or "Alright " He never mentioned any problem and there was no problem, and on each occasion the Grievant paid those within three or four days

4 In connection with the EFT that Defendant claims was dishonored by Grievant on November 19, 2002, again as was the procedure utilized earlier, I called on the prior Friday to talk to Bob Headlee on his cell phone and informed him that I had some amounts that I wanted to pay to Western Union for money orders and to McQueary Drug Company, and I would like to have a few more days to pay the EFT When I called Headlee on Friday, November 15, for the first time he raised some doubt about whether he should allow me to do that as in the past He said "I am not sure you are allowed to do that anymore, I will get back to you on that " I did not hear anything further from him on November 15 and therefore I handled the transaction as on the earlier occasions and did not hear from him until Monday, November 18 It was in the afternoon on Monday before Headlee called me on November 18 Before he called, I had already been contacted by the bank and had told them to return it and I would pay it in a few days When Headlee called me on Monday, November 18 in the afternoon, he told me that I could not reject the EFT anymore because they had a new credit manager who was imposing more strict requirements and I told him that I had already had the bank return the funds and I would be paying it in a few days He said he would get back to me

5 On Tuesday, November 19, Headlee called me again and stated that my company had been put on cash before delivery (C B D) status because I had refused an EFT more than once

in a 10-week period He did not give me any document like the "New Retail Account Package", but merely mentioned the new policy

6 The Defendant, Fleming Companies, Inc , had allowed Dave's IGA to take three to four days extra to pay the EFT requests submitted by Fleming on earlier occasions and there was no requirement or exception of the type mentioned in the document marked Exhibit A-1, paragraph D(7) That is an attempt by Fleming to impose new terms and conditions on Dave's IGA which were never agreed to and that were substantially different than the course of dealing which existed between Dave's IGA L L C and Fleming Companies, Inc during the entire history of the relationship of those parties for the last three or more years There was never any notification to me nor any agreement by Dave's IGA L L C , that the course of dealing that Grievant had with Defendant was to be changed and the new terms and conditions set forth in the "New Retail Account Package" are not reasonably practicable for Dave's IGA for several reasons

7 The new terms and conditions set forth the "New Retail Account Package", "Fleming Wholesale Credit Policy", and now possibly in the "Clean Invoicing" policy, which I have yet to see, in addition to being contrary to the course of dealing and the agreements that had existed between Grievant and Respondent, create problems for Dave's IGA because this interferes with the regular ordering of inventory from Fleming Companies, Inc For example, under the "regular terms" (which Respondent's "New Retail Account Package", paragraph D(7) refers to), Dave's IGA had an opportunity to sell the Product that had been received from Fleming and to generate revenue from sales which substantially covered the amount of the EFT request Earlier, during the first year or two, under the contracts with Fleming, Grievant would get a shipment on Saturday and would have nine days before the EFT would come in on that Saturday shipment There would also be a Tuesday

shipment and the EFT on that shipment would come in the following Monday For the Tuesday shipment then Dave's IGA would have six days and the EFT that came in for that would be combined with the EFT that came in on the Saturday shipment nine days earlier The statement that would be the basis for the EFT request that came in on Monday would be prepared by Fleming on Friday So under the course of dealing that existed during the first year or two, I had six to nine days before the EFT request came in on the shipment and this gave Dave's IGA time to sell the product and generate revenues with which to pay the EFT

8 However, Fleming then changed the arrangement somewhat by doing away with the Saturday shipment changing to shipments to Dave's IGA on Friday and Tuesday This reduced the opportunities for Dave's IGA L L C to have sales revenues with which to pay the EFT request, but even under that arrangement which commenced either late in 2001 or early in 2002, Dave's IGA L L C had three to six days after the shipment before the EFT came in (six days after the Tuesday shipment and three days after the Friday shipment) It was partly as a consequence of this change that Fleming made that caused Dave's IGA to need to reject the EFTs on the dates mentioned in the Headlee affidavit, and even after rejecting those EFTs and taking the extra three or four days, this did not jeopardize Fleming in any respect and this was necessary in order to give Dave's IGA L L C the additional time to generate sales to produce revenues to accommodate cash flow Grievant has lost customers as a result of being unable to keep its shelves stocked Grievant has received numerous complaints about the sparse selection on its shelves from its customers Grievant's Produce Manager's wife told Grievant that she was going to have to shop at another IGA because Grievant could not provide her with the Products that she needed as Grievant had once done

R-2C

9 The following facts regarding shipment and payment are true

Date of Shipments	EFT Date	Amount	Returned Wire	Wire Paid
10/15/02 10/18/02	10/21/02	$44,215 42	10/22/02	10/24/02
10/22/02 10/25/02	10/28/02	$41,650 01	10/28/02	10/31/02
10/28/02 11/01/02	11/04/02	$35,374 53	11/05/02	11/08/02
11/05/02 11/08/02	11/12/02	$38,918 77	n/a	11/12/02
11/12/02 11/15/02	11/18/02	$41,394 72	11/19/02	11/22/02

10 I have checked with another Fleming customer store operating as an IGA in the Springfield area to see if that other store owner had ever seen a document like the "New Retail Account Package" and have been informed by the other store owner that he has never seen that document either

11 It is urgently necessary for Dave's IGA L L C to obtain immediate relief and injunctive orders to require Fleming Companies, Inc to supply Product to Dave's IGA L L C in accordance with the course of dealings and the contract terms that were agreed upon between Grievant and Respondent and to cease imposing new terms and conditions on Dave's IGA L L C of the type mentioned in the "New Retail Account Package", "Fleming Wholesale Credit Policy" and the "clean invoicing" policy

12 Dave's IGA L L C , by rejecting the EFTs as alleged by Respondent herein, has not breached any contractual obligations to Fleming Companies, Inc , but even if Fleming thought that those actions by Dave's IGA L L C in returning the EFTs constituted a breach, the agreements

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between the parties require Fleming to give a 30-day notice of breach and a right to cure before imposing damages or penalties against Dave's IGA L L C , and the change of the terms of the agreement are not appropriate as a remedy for breaches without prior notice

14 When I entered into the agreements with Fleming Companies, Inc in 1999, and became owner through Dave's IGA, L L C of the store, this was the first business I had owned In the past, I had operated this same store as Store Manager for the prior owner, Consumers Markets, Inc , which had gone out of business My former employer, Consumers, had given me and other store managers who had worked for Consumers the opportunity to purchase the stores, and the supplier, Fleming Companies, Inc , was the owner of the Consumers stores, and was the party who put together the contract documents enabling my company to purchase the store assets, take over the lease of the store (a sublease from Flemings) and advised and assisted our company in getting started The language in the contract documents was pretty much insisted upon by Fleming, and my company did not have much opportunity to negotiate or change the language I had no idea that Fleming could change the agreements after they were signed, without my consent, and then refuse to allow me to enforce the agreement unless I paid several thousand dollars to the American Arbitration Association, and to three arbitrators

15 On or about February 2, 2003, Sharon Johnson, Accounts Receivable Supervisor, called me from Fleming and notified me that Fleming had started a new policy titled "clean invoicing" and that Dave's IGA was bound by that policy, effectively immediately This new policy changed the way that Fleming billed for its meat shipments Fleming presented me with no written policy describing the new changes The "clean invoicing" policy described by Sharon Johnson requires me to pay for meat products up front, which along with being placed on C B D ("cash before delivery") status

works a financial hardship upon Grievant Company Said unilateral changes were not part the agreement that was entered into in June of 1999

Further affiant sayeth not

David Wingerter

Subscribed and sworn to before me this 4th day of March, 2003

Notary Public

STEVEN E MARSH
Greene County
My Commission Expires
May 21, 2005

My commission expires

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Fleming™

New Retail Account Package

EXHIBIT A-1

Fleming Companies, Inc.
Credit and Payment Terms

he mechanics of payment, timeliness of payment and extension of credit are significant factors affecting the cost of distribution To keep Fleming's and the Retailer's costs as low as possible, the following standard payment procedures have been established

Payments must be made electronically for the full statement amount This may be accomplished through an authorization for EFT (Electronic Funds Transfer) drafting of Retailer's account or Retailer wire transfer

For those retailers that make their payment by invoice (instead of statement), they will also need to provide a timely electronic communication in an acceptable EDI format that will allow the automatic application of the payment to their specific outstanding invoices

It is critical for administrative efficiency (for both the retailer and Fleming) that all payments are for the exact statement or invoice amount. The statement must not be used for dispute reconciliation. Fleming will respond promptly to retailer requests for credit or adjustments and when credit is authorized, it will be promptly shown on the Retailer's statement

Fleming's standard credit terms, for retailers who meet Fleming's basic credit extension standards, is payment of the full statement amount, with good funds available on the first business day after the statement is prepared

Retailers who can satisfy Fleming's basic credit extension standards, and who desire longer payment terms, may apply for seven (7) calendar days of credit extension. If approved, they will have the option of paying in full, th good funds available on the seventh (7) calendar day after the statement is prepared The current charge for extension of credit is four-tenths of a percent (40%) of the statement amount

Any extension of credit beyond Fleming's basic credit extension standards must be as a part of a financing note with the associated qualifications, collateral and guarantee requirements

Retailers who cannot satisfy Fleming's credit standards, have alternative arrangements available

* Maintaining a noninterest bearing deposit with Fleming (and assigned to Fleming) equal to the customers maximum outstanding open account balance

* Prepayment before product shipment

If a payment in full is late for any reason, and a deposit of the full statement amount is not received and available by the payment due date, a late payment charge will be made The charge will be at the current daily rate for late payments, and it will be charged each day on the past-due balance, until the account is current with no past-due balances, including late payment charges

Retailers that are not current within their established terms will not receive any product shipments until they have made arrangements satisfactory to Fleming

Fleming will levy a handling charge as prescribed by FMP C' ges may be marked up to the Ret. Affiliate or charged back to the Vendo. A minimum charge of $25 00 will be levied on all DSD billings

3 Equipment - The Credit Manager can authorize the purchases through Store Development after a satisfactory source of payment has been determined A letter of commitment must be obtained for purchases being financed by a bank, finance company or leasing company All fixtures, equipment sales will be billed to the retail store immediately upon billing of the purchase of fixtures and equipment by the vendor or manufacturer

4 Other Terms - Prior to the granting thereof, any deviation from the standard terms outlined above or the establishment of a deferred receivable account shall be approved by the Credit Manager. The approval and the reason for the deviation is to be in writing and in the Customer's division credit file

5 Electronic Funds Transfer is the standard payment method Any deviation from this method must be approved in writing

D. Returned Items

1 All Depository Banks should be advising the appropriate division by telephone within 24 hours of any dishonored EFT payments Returned EFT transactions initiated through Texas Commerce Bank are available on-line by 1 00pm CDT daily.

2 Immediately upon notification of a non-payment, Central Accounts Receivable Associates will notify the assigned Credit Manager

3 Division Associates will contact the retailer and request a cashier's check or wire transfer as a replacement for the returned item The Retailer will be advised that additional shipments will not be made until the cashier's check or wire is received and retailer is reinstated to regular terms

4 The Retailer's account must be charged for the returned item plus any charges assessed by the bank. The charge must be reentered in accounts receivable with the same date as the statement for which the returned check was originally given. A late payment fee of 2% may be charged at this time and interest must be charged at the highest legal rate

5 If the retailer does not immediately submit a cashier's check or wire to replace the returned item, the Credit Manager shall advise the Division President The decision to cancel bill-through invoices for drop shipments to the retailer will be made by the Credit Manager with notification to the Division and Central Accounts Receivable

6 If it is determined that bill-through invoices for drop shipments will no longer be accepted, Division Associates will immediately notify both the retailer and all drop shipment vendors, by telephone and in writing

7 A Retailer who has an EFT dishonored for any reason more than one time in ten weeks will no longer be eligible for regular terms and will be placed on COD terms If an exception to this policy is requested, a credit exception request will be prepared by the Division and submitted to the Credit Manager for approval

EXHIBIT E-1

Fleming Wholesale Credit Policy

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Outside Collection Services 85

Credit Approval Matrix 87

7 The Central Trade Payables – Drop Ship Supervisor will administer immediate notification to all drop shipment vendors, by telephone and in writing.

8 Retailers experiencing two or more EFT and/or manual check insufficient fund returns, for any reason, within an eight week period will no longer be eligible for regular terms and will be placed on COD terms. If an exception to this policy is requested, a credit exception request will be prepared by the Division and submitted to the AR or Credit Manager for consideration as outlined in the "Credit Exceptions" policy statement.

Dave's IGA, LLC

Estimated Loss of Income
November 2002 thru July 2003

Department	Prior Yr Sales	This Yr Sales	Profit Margin	Projected Sales	Lost Sales	Lost Profits
Dairy	335,326	330,637	24 90%	402,391	71,754	17 867
Frozen	202 045	179,886	26 20%	242,454	62,568	16,393
Grocery	1 460 791	1,409,790	21 40%	1,752,949	343,159	73,436
Liquor	286 914	325,917				
Meat	461,982	452,421	23 00%	554,378	101,957	23 450
Non Food	167 384	136 036	15 90%	200 861	64,825	10 307
Pharmacy	654 741	927 557				
Produce	158,409	137,593	30 00%	190 091	52 498	15 749
TOTALS	3,727,592	3,899,837			696,761	157,202

For period November 2002 thru July 2003 pharmacy sales increased 41 7% while liquor sales increased 13 6% Using a conservative 20% increase in other departmental sales projections, the above calculations represent lost sales and gross profits for the period Liquor and pharmacy are purchased directly from vendors other than Fleming The departments showing calculations for lost sales and profits above are those departments whose sales were adversely affected by Fleming warehous out-of-stocks and Fleming actions toward and against Dave's IGA

EXHIBIT 3