

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

|                          |   |                         |
|--------------------------|---|-------------------------|
| In re:                   | ) |                         |
|                          | ) |                         |
| FLEMING COMPANIES, INC., | ) |                         |
| et al., <sup>1</sup>     | ) | Chapter 11              |
|                          | ) |                         |
| Debtors.                 | ) | Case No. 03-10945 (MFW) |
|                          | ) |                         |
|                          | ) | Jointly Administered    |
|                          | ) |                         |

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**SETTLEMENT AGREEMENT**

**BACKGROUND**

WHEREAS, on or about April 1, 2003, Fleming Companies, Inc. (“Fleming”), et al., the Debtors herein, filed petitions under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. § 101, et seq., as amended (the “Bankruptcy Code”); and

WHEREAS, on or about July 27, 2004, the Bankruptcy Court entered an Order confirming the Debtors’ plan of reorganization (“the Plan”) as a liquidating plan; and

WHEREAS, the Plan created the Fleming Post Confirmation Trust (“the PCT”) to administer certain of the Debtors’ responsibilities under the Plan; and

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<sup>1</sup> The term Debtors, as used herein, means the following entities: Core-Mark International, Inc.; Fleming Companies, Inc.; ABCO Food Group, Inc.; ABCO Markets, Inc.; ABCO Realty Corp.; ASI Office Automation, Inc.; C/M Products, Inc.; Core-Mark Interrelated Companies, Inc.; Core-Mark Mid Continent, Inc.; Dunigan Fuels, Inc.; Favar Concepts, Ltd.; Fleming Foods Management Co., L.L.C.; Fleming Foods of Texas, L.P.; Fleming International, Ltd.; Fleming Supermarkets of Florida, Inc.; Fleming Transportation Service, Inc.; Food 4 Less Beverage Company, Inc.; Fuelserv, Inc.; General Acceptance Corporation; Head Distributing Company; Marquise Ventures Company, Inc.; Minter-Weisman Co.; Piggly Wiggly Company; Progressive Realty, Inc.; Rainbow Food Group, Inc.; Retail Investments, Inc.; Retail Supermarkets, Inc.; RFS Marketing Services, Inc.; and Richmar Foods, Inc. Other than the bankruptcy case of Fleming Companies, Inc., and Core-Mark International, Inc., all of the bankruptcy cases of the foregoing debtors have now been closed.

WHEREAS, in or about September 1994, Fleming entered into a lease agreement (the “Property Lease”) for a retail grocery store facility located at 240 W. Warner Road, Chandler, Arizona (“the Facility”); and

WHEREAS, at or about the same time Fleming entered into a sublease with an operator (the “Operator”) pursuant to which the Operator would operate a retail grocery store at the Facility; and

WHEREAS, in or about March 2001, Fleming entered into a fuel facility lease (the “Fuel Facility Lease”) at the Facility and in or about October 2001, installed and began operating two underground storage tanks at the Facility (“the USTs”); and

WHEREAS, in or about May 2003, Fleming placed the two USTs into temporary closure with approximately 750 gallons of product remaining in each tank; and

WHEREAS, on or about September 30, 2003, Fleming rejected the Property Lease and the Fuel Facility Lease in the Bankruptcy Case; and

WHEREAS, in or about April 2004, the Arizona Department of Environmental Quality (“ADEQ”) inspected the Facility and notified Fleming of its requirements under temporary closure to perform release detection and demonstrate financial responsibility requirements; and

WHEREAS, in or about May 2008, the U.S. Environmental Protection Agency (“EPA”), upon referral of the matter from ADEQ, contacted the PCT regarding the status of the USTs; and

WHEREAS, EPA contends that Fleming is in violation of Subtitle I of the Resource Conservation and Recovery Act (“RCRA”) and, specifically, contends that Fleming is in violation of the temporary closure requirements of 40 C.F.R. 280.70(a), (b), and (c) and the financial responsibility requirements of 40 C.F.R. 280.93(a); and

WHEREAS, Fleming and the PCT deny any liability under RCRA and contend that any obligations of Fleming have been discharged in the Bankruptcy Case, pursuant to 11 U.S.C.

1129, through the confirmation of the Plan or, in any event, are not obligations of the PCT; and

WHEREAS, the Debtors, the PCT, the United States, and ADEQ wish to resolve their differences regarding the alleged liability of Fleming or the PCT relating to the USTs at the Facility; and

WHEREAS, in consideration of, and in exchange for, the promises and covenants herein, including, without limitation, the covenants not to sue set forth below, intending to be legally bound hereby, the Debtors, the PCT, the United States, and ADEQ hereby agree to the terms and provisions of this Settlement Agreement; and

WHEREAS, settlement of the matter governed by this Settlement Agreement is in the public interest and an appropriate means of resolving these matters;

NOW, THEREFORE, without the admission of liability or any adjudication on any issue of fact or law, and upon the consent and agreement of the parties to this Settlement Agreement by their attorneys and authorized officials, it is hereby stipulated and agreed as follows:

## **I. DEFINITIONS**

1. Unless otherwise expressly provided herein, terms used in this Settlement Agreement that are defined in RCRA or its regulations or in the Bankruptcy Code shall have the meaning assigned to them in RCRA, its regulations, or the Bankruptcy Code. Whenever terms listed below are used in this Settlement Agreement, the following definitions shall apply:

(a) "ADEQ" shall mean the Arizona Department of Environmental Quality or any legal successor thereto.

(b) “Bankruptcy Case” shall mean the Chapter 11 bankruptcy cases captioned In re Fleming Companies, Inc., et al., Case No. 03-10945 (MFW) (Jointly Administered).

(c) “Bankruptcy Court” refers to the United States Bankruptcy Court for the District of Delaware, where the Bankruptcy Case is currently pending.

(d) “Cap” or “\$150,000 Cap” shall mean the \$150,000 maximum extent of the PCT’s and the Debtors’ obligations under this Settlement Agreement, as described further in Section III below.

(e) “Closure Work Plan” shall mean the document relating to closure of the USTs, developed pursuant to Paragraph 5.b. of this Settlement Agreement and approved by EPA, and any amendments thereto.

(f) “Corrective Action Work Plan” shall mean the document relating to the performance of corrective action at the Facility (in the event such corrective action is required), developed pursuant to Paragraph 5.g. of this Settlement Agreement and approved by EPA, and any amendments thereto.

(g) “Court” refers to the United States Bankruptcy Court for the District of Delaware or, if a motion to withdraw the reference has been granted, the United States District Court for the District of Delaware.

(h) “Day” shall mean a calendar day unless expressly stated to be a working day. “Working Day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

(i) “Debtors” shall mean Fleming Companies, Inc., and those of its subsidiaries and related companies that filed voluntary petitions for relief on April 1, 2003, both as debtors, debtors-in-possession and in any new or reorganized form resulting from the Bankruptcy Case.

(j) “District Court” refers to the United States District Court for the District of Delaware.

(k) “EPA” shall mean the United States Environmental Protection Agency or any legal successor thereto.

(l) “Effective Date” shall mean the date on which this Settlement Agreement becomes effective as set forth in Section XVI.

(m) “Facility” shall mean the retail and fuel facility located at 240 W. Warner Road, Chandler, Arizona.

(n) “Paragraph” shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

(o) “Parties” shall mean the United States, the Arizona Department of Environmental Quality, the Fleming Post Confirmation Trust, and the Debtors.

(p) “Plan of Reorganization” or “Plan” means the plan of reorganization that was confirmed in the Bankruptcy Case on July 27, 2004.

(q) “PCT” shall mean the Fleming Post Confirmation Trust, created by the Plan to administer certain of the Debtors’ responsibilities under the Plan.

(r) “RCRA” refers to the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq.

(s) “Section” shall mean a portion of this Settlement Agreement identified by a Roman numeral.

(t) “State” shall mean the State of Arizona and all of its agencies, departments and instrumentalities.

(u) “United States” shall mean the United States of America, including all of its agencies, departments and instrumentalities.

(v) “UST” shall mean underground storage tank.

(w) “Work” shall mean all activities, submittals, and certifications the PCT is required to perform under this Settlement Agreement, including without limitation all activities relating to the closure of the USTs and all corrective action, in the event such corrective action is required.

## **II. JURISDICTION**

2. The Parties agree that the Bankruptcy Court shall have jurisdiction over the subject matter hereof pursuant to 28 U.S.C. §§ 157, 1331, and 1334.

## **III. WORK TO BE PERFORMED**

### **3. \$150,000 Cap on Work Obligations**

(a) The Work obligations under this Settlement Agreement shall not exceed \$150,000. Anything to the contrary contained herein notwithstanding, if total expenditures on Work reach \$150,000 or the PCT makes the payment to ADEQ contemplated in Paragraph 4(a), the PCT and the Debtors shall have no obligation to perform further activities relating to the Facility.

(b) The \$150,000 Cap shall include all necessary and appropriate expenditures, including reasonable attorney's fees, relating to the performance of the Work and incurred on or after January 8, 2009.

(c) Upon request by EPA or ADEQ, the PCT shall provide copies of all invoices and cancelled checks, or other form of payment, relating to the performance of the Work.

(d) If EPA determines that an expenditure is not necessary and appropriate, it will notify the PCT in writing that the expenditure will not be counted towards the Cap provided for in Paragraph 3.a. If the PCT disagrees with EPA's determination, it may invoke the dispute resolution procedures provided for in Section X of this Settlement Agreement.

4. Alternative Payment to ADEQ

(a) No later than October 31, 2009 ("the Outside Date"), EPA, after consultation with ADEQ, shall either (i) send written notice to the PCT that the PCT has completed all of the Work required under this Settlement Agreement or (ii), if all of the Work has not been completed, provide a written estimate to the PCT of the cost of performing the remainder of the Work, not to exceed the balance remaining under the Cap, and request that the PCT, instead of performing the remainder of the Work, make a payment to ADEQ in the amount of the estimate, to be dedicated to the completion of the Work. The PCT shall pay the amount of the estimate subject to the following proviso: If the PCT's estimate of the amount necessary to perform the remainder of the Work differs from the estimate provided by EPA by more than \$20,000, the PCT may invoke dispute resolution in accordance with the provisions of Section X of this Settlement Agreement. If the PCT invokes dispute resolution relating to the amount of

the estimate, it shall pay to ADEQ the amount determined to be owing pursuant to the final decision in the dispute resolution process.

(b) Any payment to ADEQ under this Paragraph shall be made in accordance with instructions to be provided by ADEQ prior to the time of payment.

5. Performance of Work

(a) The PCT shall perform all of the Work following the procedures described in the ADEQ UST Permanent Closure Guidance (“Closure Guidance”), annexed hereto as Attachment A, and ADEQ’s UST Release Reporting and Corrective Action Guidance (“Corrective Action Guidance”), annexed hereto as Attachment B, both of which are incorporated herein by reference, with the exception that where the Closure Guidance and the Corrective Action Guidance reference ADEQ as the point of contact regarding field decisions, approvals, and submittals not related to notification, EPA will be the point of contact and ADEQ will be copied on all correspondence utilizing the information provided in Section V., as set forth below, within the time schedules specified.

(b) Within ten (10) days of the effective date of this Settlement Agreement, the PCT shall submit to EPA and ADEQ for EPA’s approval, an “intent to close” letter and a “Closure Work Plan”, as described below:

- i. The PCT shall submit an “intent to close” letter with the information required by Paragraph 2, pages 2 and 3 of the Closure Guidance. For purposes of this “intent to close” letter only, the PCT will list itself as the UST owner. Additionally, the “intent to close” letter shall include the name and Arizona Department of Health Services (ADHS) license number of the laboratory that will be performing the analytical testing and that will



be licensed to perform analytical test methods approved in accordance with Arizona Administrative Code (“A.A.C.”) Title 9, Chapter 14, Article 6. EPA’s approval of the PCT’s “intent to close” letter shall functionally constitute the PCT’s “receipt of the ADEQ closure number” pursuant to the Closure Guidance, Paragraph 3, page 3.

- ii. The PCT shall submit a “Closure Work Plan” describing the activities required by the Closure Guidance, paragraphs 3, 4 and 5 and consistent with all sampling and analysis requirements and recommendations contained therein, for EPA’s review and approval. Additionally, the Closure Work Plan will contemplate that, in the event that contamination is discovered or a release is evident during the UST removal, PCT shall over-excavate the impacted area to the largest extent practicable to minimize the need for future remedial action. Any material excavated from such impacted area shall be sampled and handled in a manner consistent with the procedures set forth on page 4 of the Closure Guidance and the Arizona regulations cited therein. The Closure Work Plan shall require utilization of a contractor currently certified to perform such work as demonstrated by their inclusion on the ADEQ UST Service Provider Certification List.

(c) Within thirty (30) days of the approval of the Closure Work Plan or the receipt of the ADEQ closure number, whichever is later, the PCT shall commence performance of the approved Closure Work Plan. All field Work shall be completed within

twenty-one (21) days after the commencement of performance of the approved Closure Work Plan.

(d) To facilitate EPA's and ADEQ's ability to be present to observe field activities required by the Closure Work Plan, EPA and ADEQ shall be given at least fifteen (15) days notice prior to the date of commencement of the work referenced in Paragraph c above.

(e) Within thirty (30) days of completion of the activities required under the Closure Work Plan, the PCT will submit to EPA an UST Permanent Closure Assessment Report Form consistent with the Closure Guidance, Paragraph 5, and all the requirements and recommendations therein ("Closure Documents") to EPA for its review and approval. If EPA does not approve the Closure Documents, EPA will provide written comments to the PCT and may require the PCT to perform additional Work consistent with the Closure Guidance, subject to the Cap. The PCT's obligations under this subparagraph shall continue, subject to the Cap and to the Alternate Payment provisions of Paragraph 4, until the earlier of EPA's approval of the Closure Documents or the Outside Date.

(f) If, during the performance of the Closure Work Plan, the PCT encounters a release that is not addressed by the over-excavation required by the Closure Work Plan, the PCT shall notify EPA and ADEQ within 24 hours of discovery pursuant to the Closure Guidance and the Corrective Action Guidance following the notification procedures provided by Section V herein.

(g) If after receiving PCT's notice of a release, EPA determines that it will require corrective action, the PCT shall commence the appropriate measures to achieve corrective action in accordance with ADEQ's Corrective Action Guidance. Within one hundred and twenty (120) days after PCT's receipt of EPA's written notification to the PCT that

corrective action is required, the PCT shall submit a Corrective Action Plan pursuant to ADEQ's Corrective Action Guidance. The PCT shall commence implementation of the Corrective Action Plan within thirty (30) days after receiving EPA approval of the Corrective Action Plan and corrective action shall continue consistent with the Corrective Action Guidance until EPA determines that the remediation goals identified in the Corrective Action Plan have been achieved or until the Cap has been reached. Within thirty (30) days after achieving the remediation goals identified in the Corrective Action Plan, the PCT shall draft a Corrective Action Completion Report pursuant to the Corrective Action Guidance for review and approval by EPA. If EPA does not approve the Corrective Action Completion Report, EPA will provide written comments to the PCT and may require the PCT to perform further Work consistent with the Corrective Action Guidance, subject to the Cap. The PCT's obligations under this subparagraph shall continue, subject to the Cap and to the Alternate Payment provisions of Paragraph 4, until the earlier of EPA's approval of the Corrective Action Completion Report or the Outside Date.

#### **IV. EPA ACCESS TO LABORATORY DATA AND PRIOR NOTICE OF FIELD ACTIVITIES.**

6. The PCT shall ensure that EPA and ADEQ personnel and EPA's and ADEQ's authorized representatives are allowed access to the laboratory and personnel utilized by the PCT for analyses.

7. Following notice provided pursuant to paragraph 5(d), and at the request of EPA, the PCT shall provide or allow EPA and ADEQ, and their authorized representatives to draw split or duplicate samples of all samples collected by the PCT with regard to the Facility or pursuant to this Agreement. Nothing in this Agreement shall limit or otherwise affect EPA's or

ADEQ's authority to draw samples pursuant to applicable law, including but not limited to, RCRA.

8. The PCT shall provide all data and reports to EPA and ADEQ as completed and provided to the PCT by its contractors pursuant to applicable ADEQ guidance. Given that raw laboratory data, field notes and other detailed information is not typically included in environmental reports, EPA and ADEQ may specifically request detailed data from the PCT after reviewing the PCT's initial submittals. Upon receiving written notice of a specific data request, the PCT will in turn, request this information from its contractors and within fifteen (15) days of the PCT's receipt of the information from its contractors, transmit the information to EPA and ADEQ.

#### **V. NOTICE AND SUBMISSIONS**

9. Method of Notice and Submittals: Any notice required under this Settlement Agreement shall be provided either via Federal Express overnight delivery (or equivalent overnight delivery service with equivalent tracking capability) using the mailing information provided in this section, or via e-mail using the e-mail addresses provided in this section. Any submittal required under this Settlement Agreement shall be provided via Federal Express overnight delivery (or equivalent overnight delivery service with equivalent tracking capability) using the mailing information provided in this section. An additional copy of any submittal may also be transmitted via e-mail using the e-mail addresses provided in this section.

10. Computation of Time: Both parties agree that for purposes of compliance with milestones and deadlines, a notice or submission postmarked or transmitted on or before the date constituting the required milestone or deadline constitutes timely compliance with the

applicable milestone or deadline. The time calculation for a specific milestone or deadline shall begin the date following receipt of the notice or submittal triggering the milestone or deadline.

11. All oral and written communications between the parties shall be provided respectively, to the following individuals using the following contact information:

As to EPA:

Eric Magnan (WST-8)  
U.S. EPA Region IX  
75 Hawthorne Street  
San Francisco, CA 94105  
Magnan.Eric@epa.gov  
(415) 947-4179

As to ADEQ:

Ronald Kern, Manager  
UST and Division Support Section  
Arizona Department of Environmental Quality  
1110 West Washington Street  
Phoenix, Arizona 85007  
Kern.Ronald@azdeq.gov  
(602) 771-4242

As to the PCT:

Robert A. Kors  
PCT Representative  
232 Quadro Vecchio Dr.  
Pacific Palisades, California 90272

With copies to:

Louis Price, Esq.  
McAfee & Taft, A Professional Corporation  
211 North Robinson Ave., 10<sup>th</sup> Floor  
Oklahoma City, Oklahoma 73102  
Louis.Price@mcafeetaft.com(405) 235-9621

and

Mary Ellen Ternes  
McAfee & Taft, A Professional Corporation  
211 North Robinson Ave., 10<sup>th</sup> Floor  
Oklahoma City, Oklahoma 73102  
Maryellen.Ternes@mcafeetaft.com  
(405) 235-9621

## **VI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

12. After review of any deliverable, plan, report, or other item which is required to be submitted for review and approval pursuant to this Settlement Agreement, EPA may: (a) approve the submission; (b) approve the submission with modifications; or (c) disapprove the submission. As used in this Agreement, the terms “approval by EPA”, “EPA approval” or a similar term means the actions described in clauses (a) or (b) above.

13. In the event of approval or approval with modifications by EPA, subject to the Cap, the PCT shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA.

14. Upon receipt of a notice of disapproval or a request for a modification, the PCT shall, within fifteen (15) calendar days or such longer time as specified by EPA in its notice of disapproval or request for modification, correct the deficiencies and resubmit the plan, report, or other item for approval. Notwithstanding the notice of disapproval or approval with modifications, the PCT shall proceed, subject to the Cap, at the direction of EPA, to take any action required by any non-deficient portion of the submission.

15. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the PCT to correct deficiencies in accordance with the preceding paragraphs. EPA also retains the right to develop the plan, report

or other item. Subject to the Cap, the PCT shall implement any such plan, report or item as amended or developed by EPA.

16. If any submission is not approved by EPA after resubmission in accordance with the immediately preceding paragraph, EPA may determine that the PCT is in violation of the provision of this Agreement requiring the PCT to submit such plan, report or item. The PCT may invoke dispute resolution, pursuant to Section X of this Settlement Agreement, with respect to any such determination by EPA.

17. Any deliverables, plans, reports or other item required to be submitted for EPA review and approval by this Agreement are, upon approval of EPA, incorporated into this Agreement and enforceable hereunder.

#### **VII. ACCESS TO FACILITY**

18. The PCT shall obtain access to the Facility prior to the filing of the Notice of Settlement Agreement described in Section XV with the Bankruptcy Court.

19. Any site access agreement entered into pursuant to this Agreement shall provide access to EPA and its contractors and authorized representatives, ADEQ and its contractors and authorized representatives, and the PCT and its contractors and authorized representatives.

#### **VIII. STIPULATED PENALTIES**

20. The PCT shall pay stipulated penalties in the amounts specified in the following Paragraph for failure to comply with the requirements of this Settlement Agreement specified below, unless excused under Section IX (Force Majeure). "Compliance" by the PCT shall mean meeting the milestones set forth below within the specified time schedules established by this Settlement Agreement and any work plan approved by EPA.

21. The following stipulated penalties shall accrue per violation per day for noncompliance with any milestone identified in subparagraph 21.b:

(a) Stipulated Penalty Amounts

Stipulated penalties shall accrue in the amount of \$300 per day for the first through the thirtieth day of noncompliance and in the amount of \$500 per day for each day of noncompliance beyond thirty days.

(b) Milestones

- (1) Submittal of Closure Work Plan
- (2) Commencement of Closure Work Pursuant to Approved Work Plan
- (3) Submittal of UST Closure Documents
- (4) Corrective Action Plan (if required)
- (5) Commencement of Corrective Action (if required)
- (6) Completion of Corrective Action (if required)
- (7) Corrective Action Completion Report (if required), consistent with the ADEQ UST Release Reporting and Corrective Action Guidance.

22. All penalties shall begin to accrue on the day after compliance with one of the above milestones is due and shall continue to accrue through the final day of the correction of the noncompliance. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission or deliverable during the period, if any, beginning on the 31<sup>st</sup> day after EPA's receipt of such submission or deliverable until the date that EPA notifies the PCT of any deficiency; (2) with respect to a decision by the Director of the Waste Management Division, EPA Region 9, under Paragraph 29 of Section X (Dispute Resolution) below, during the period, if any, beginning on the 21<sup>st</sup> day after the date the PCT's reply to EPA's Statement of Position is received until the date that the Director issues a decision regarding such dispute; or (3) with respect to judicial review by the Bankruptcy Court (or, if a motion to withdraw the Court's reference is granted, the District Court) of any dispute under Section X (Dispute Resolution),



during the period, if any, beginning on the 31st day after the Court's receipt of the final decision regarding the dispute until the date that the Court issues a final decision regarding such dispute.

23. Penalties accruing under this Section shall be due and payable to the United States within 30 days of the PCT's receipt from EPA of a written demand for payment of the penalties, unless the PCT invokes the dispute resolution procedures under Section X below. If the PCT invokes dispute resolution, the penalties shall be paid within 30 days of a final decision by the Director of the Waste Management Division, EPA Region 9, unless judicial review of the decision is sought, in which case the penalties shall be paid within 30 days of a final decision by the Bankruptcy Court or, in the event the reference is withdrawn, a final decision by the District Court.

24. Any stipulated penalties due and owing under this Section shall be paid by one of the following methods.

**CHECK PAYMENTS:**

If payment is made by check, the payment must be made by certified or cashier's check payable to the "**Treasurer, United States of America**" and sent to:

US Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
PO Box 979077  
St. Louis, MO 63197-9000

**WIRE TRANSFERS:**

Wire transfers should be directed to the **Federal Reserve Bank of New York**  
Federal Reserve Bank of New York  
ABA = 021030004  
Account = 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York NY 10045  
Field Tag 4200 of the Fedwire message should read " D 68010727 Environmental  
Protection Agency "

**OVERNIGHT MAIL:**

U.S. Bank  
1005 Convention Plaza  
Mail Station SL-MO-C2GL  
St. Louis, MO 63101  
Contact: Natalie Pearson, 314-418-4087

**ACH (also known as REX, or Remittance Express):**  
Automated Clearinghouse (ACH) for receiving US currency  
PNC Bank  
808 17th Street, NW  
Washington, DC 20074  
Contact – Jesse White 301-887-6548  
ABA = 051036706  
Transaction Code 22 - checking  
Environmental Protection Agency  
Account 310006  
CTX Format

**ON LINE PAYMENT:**

There is now an On Line Payment Option, available through the Dept. of Treasury. This payment option can be accessed from the information below:

WWW.PAY.GOV  
Enter sfo 1.1 in the search field

Open form and complete required fields.

**PROOF OF PAYMENT:**

At the time payment is so made, a copy of the check or other proof of payment shall be sent to the following Region IX address:

Eric Magnan (WST-8)  
Waste Management Division  
U.S. Environmental Protection Agency - Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

25. Any payments required under this Section shall indicate the name of the Facility, the PCT's name and address, and the Bankruptcy Case Number. If payment instructions change, EPA will provide the PCT written notice of the change.

#### **IX. FORCE MAJEURE**

26. "Force Majeure," for purposes of this Settlement Agreement, is defined as any event arising from causes beyond the control of the PCT, of any entity controlled by the PCT, or of the PCT's contractors, that delays or prevents the performance of any obligation under this Settlement Agreement despite the PCT's best efforts to fulfill the obligation; provided, however, that nothing in this Section shall be construed to require expenditures in excess of the Cap. The requirement that the PCT exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work.

27. If any event occurs or has occurred that may delay the performance of any obligation under this Agreement, whether or not caused by a force majeure event, the PCT shall notify EPA and ADEQ in writing within five (5) days of when the PCT first knew that the event might cause a delay. Within five (5) days thereafter, the PCT shall provide in writing to EPA and ADEQ an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and the PCT's rationale for attributing such delay to a force majeure event if it intends to assert such a claim.

28. If EPA, after a reasonable opportunity for review and comment by ADEQ, agrees that the delay or anticipated delay is attributable to a force majeure event, EPA will notify the PCT in writing of its decision and will extend the time for performance of the obligations under this Agreement that are affected by the force majeure event for such time as is necessary to complete those obligations. If EPA, after a reasonable opportunity for review and comment by ADEQ, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the PCT in writing of its decision and the basis for its decision.

29. If the PCT disagrees with EPA's decision regarding force majeure and elects to invoke the dispute resolution procedures set forth in Section X, the PCT shall do so no later than 15 days after the receipt of EPA's notice. In any such proceeding, the PCT shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, and that best efforts were exercised to avoid and mitigate the effects of the delay. If the PCT carries this burden, the delay at issue shall be deemed not to be a violation by the PCT of the affected obligation of this Settlement Agreement.

## **X. DISPUTE RESOLUTION**

30. Any dispute that arises under or with respect to this Settlement Agreement shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless the parties agree in writing to extend the 20-day period. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

31. In the event the parties cannot resolve a dispute by informal negotiations under the preceding paragraph, then the position advanced by EPA shall be considered binding unless within 20 days after the conclusion of the informal negotiation period, the PCT invokes the formal dispute resolution procedures of this Section by sending the United States and ADEQ a written Statement of Position on the matter in dispute. Within 20 days after receipt of the PCT's Statement of Position, EPA will send the PCT its Statement of Position. Within 10 days after receipt of EPA's Statement of Position, the PCT may submit a reply.

32. Following exchange of the Statements of Position, the Director of the Waste Management Division, EPA Region 9, will issue a decision resolving the dispute. The Waste Management Division Director's decision shall be binding on the PCT unless within 20 days of receipt of the decision, a party files with the Bankruptcy Court (or, if a motion to withdraw the Court's reference is granted, the District Court) a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Settlement Agreement. The United States may file a response to the PCT's motion. Judicial review of any dispute under this Settlement agreement shall be governed by applicable principles of law.

33. The Bankruptcy Court's order (or the District Court's order if the reference has been withdrawn) regarding the dispute shall be binding on all parties unless the order is appealed within 30 days of the entry of the order.

34. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the PCT under this Settlement Agreement, not directly in dispute, unless EPA agrees, or the Court determines, otherwise.

Stipulated penalties with respect to the disputed matter shall accrue during the pendency of the dispute in the manner provided in Paragraph 21, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 22.

## **XI. COVENANTS NOT TO SUE AND RESERVATION OF RIGHTS**

35. In consideration of the actions that will be performed by the PCT under this Settlement Agreement, the United States and the State covenant not to sue, or to take an administrative action against, the PCT and the Debtors under RCRA with respect to the Facility. These covenants not to sue shall also apply to the Debtors' and the PCT's successors and assigns, officers, directors, employees, and trustees, but only to the extent that the alleged liability of the successor, assign, officer, director, employee or trustee of any Debtor or the PCT is based solely on its status as and in its capacity as a successor, assign, officer, director, employee, or trustee of any Debtor or the PCT. These covenants not to sue are conditioned upon the satisfactory performance by the PCT of its obligations under this Settlement Agreement.

36. The covenants not to sue contained in the preceding Paragraph extend only to the entities and persons described in that Paragraph and do not extend to any other person. The United States and the State expressly reserve all claims, demands and causes of action, either judicial or administrative, past, present, or future, in law or equity, which the United States or the State may have against any person or entity that is not a party to this Settlement Agreement.

37. Notwithstanding the foregoing, the covenants not to sue contained in this Settlement Agreement shall not apply to nor affect any action based on (i) a failure to meet a requirement of this Settlement Agreement; or (ii) criminal liability.

38. The PCT and the Debtors covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Facility, including but not limited to: any direct or indirect claim for reimbursement from the United States, its departments, agencies, or instrumentalities; and any claims arising out of the Work to be performed under this Settlement Agreement. The PCT and the Debtors covenant not to sue and agree not to assert any claims or causes of action against the State with the respect to the Facility, including but not limited to: any direct or indirect claim for reimbursement from the State, its departments, agencies, or instrumentalities; and any claims arising out of the Work to be performed under this Settlement Agreement.

39. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Settlement Agreement.

## **XII. RETENTION OF JURISDICTION**

40. The Parties agree that the Bankruptcy Court (or, upon withdrawal of the Court's reference, the District Court) shall have jurisdiction over the subject matter of this Settlement Agreement and the parties hereto for the duration of the performance of the terms and provisions of this Settlement Agreement for the purpose of enabling any of the parties to apply to the Court at any time for such further order, direction and relief as may be necessary or appropriate for the construction or interpretation of this Settlement Agreement or to effectuate or enforce compliance with its terms.

## **XIII. RECORDS PRESERVATION**

41. The PCT shall provide to EPA and ADEQ, upon request, copies of all records, documents and information within its possession and/or control or that of its contractors, employees, or agents, relating to the performance of its obligations under the Settlement

Agreement, including but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, invoices, attorney billing records, correspondence or other documents or information related to the obligations under the Settlement Agreement.

42. The PCT, upon completion of its obligations under this Settlement Agreement, shall mail to EPA any UST Closure Report and other site assessment records, pursuant to 40 C.F.R. Section 280.74.

#### **XIV. AMENDMENTS/INTEGRATION AND COUNTERPARTS**

43. This Settlement Agreement and any other documents to be executed in connection herewith shall constitute the sole and complete agreement of the parties hereto with respect to the matters addressed herein. This Settlement Agreement may not be amended except by a writing signed by all parties to this Settlement Agreement. However, any deadline set forth in this Settlement Agreement may be extended by mutual written agreement of the parties hereto without formally amending this Settlement Agreement.

44. This Settlement Agreement may be executed in counterparts each of which shall constitute an original and all of which shall constitute one and the same agreement.

#### **XV. OPPORTUNITY FOR PUBLIC COMMENT**

45. The United States intends to file a “Notice of Settlement Agreement” with the Bankruptcy Court advising it of this Settlement Agreement and informing it that no action by the Court is required. Following the filing of the Notice, the United States will publish notice of this Agreement in the Federal Register and the Agreement shall be subject to a public comment period of not less than 30 days. The United States may withdraw or withhold its consent to this Agreement if comments received disclose facts or considerations indicating that this Agreement is inappropriate, improper, or inadequate. If public comments do not disclose facts or



considerations which indicate that the Settlement Agreement is inappropriate, improper, or inadequate, the United States will file the Settlement Agreement with the Bankruptcy Court and send written notice to the PCT that the public comment period has closed and that comments received, if any, do not require modification or withdrawal by the United States from this Settlement Agreement.

#### **XVI. EFFECTIVE DATE**

46. The Effective Date of this Settlement Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 45 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Settlement Agreement.

Settlement Agreement, In re Fleming Companies, Inc., et al. Case No. 03-10945, regarding the Facility at 240 W. Warner Road, Chandler, Arizona.

**FOR THE UNITED STATES OF AMERICA**

6/8/2009

Date

\_\_\_\_\_  
ELLEN MAHAN  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

6/8/2009

Date

\_\_\_\_\_  
THOMAS P. CARROLL  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Telephone (202) 514-4051

Settlement Agreement, In re Fleming Companies, Inc., et al. Case No. 03-10945, regarding the Facility at 240 W. Warner Road, Chandler, Arizona.

6/12/09

\_\_\_\_\_  
Date

\_\_\_\_\_  
LAURA YOSHII  
Acting Regional Administrator  
Region 9  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94105

5/27/09

\_\_\_\_\_  
Date

\_\_\_\_\_  
LEWIS C. MALDONADO  
Assistant Regional Counsel  
Region 9  
U.S. Environmental Protection Agency  
75 Hawthorne Street  
San Francisco, CA 94705

Settlement Agreement, In re Fleming Companies, Inc., et al. Case No. 03-10945, regarding the Facility at 240 W. Warner Road, Chandler, Arizona.

**FOR THE ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY**

6/10/09

Date

Director

Tanks Program Division  
Arizona Department of Environmental Quality  
1110 West Washington Street  
Phoenix, AZ 85007

TERRY GODDARD  
Arizona Attorney General

6/13/09

Date

Louise Erickson  
Assistant Attorney General  
Office of the Attorney General  
1275 West Washington Street  
Phoenix, AZ 85007  
Telephone (602) 542-8500

Settlement Agreement, In re Fleming Companies, Inc., et al. Case No. 03-10945, regarding the Facility at 240 W. Warner Road, Chandler, Arizona.

**FLEMING POST CONFIRMATION TRUST**

5/12/09  
Date

By/\_\_\_\_\_  
Robert A. Kors  
PCT Representative  
232 Quadro Vecchio Dr.  
Pacific Palisades, California 90272