

UCS
M. OLAVART

1 Josh Voorhees, State Bar No. 241436
2 Harris A. Weinstein, State Bar No. 282166
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 RUSSELL BRIMER

FILED
DEC 24 2014
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of Santa Clara County of Santa Clara
BY WJ DEPUTY

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION
15

16 RUSSELL BRIMER,
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18 Plaintiff,
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20 v.
21 SEASONAL SPECIALTIES LLC, *et al.*,
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23 Defendants.
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Case No.: 114CV267502
~~PROPOSED~~ JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT AND
CONSENT JUDGMENT
Date: December 23, 2014
Time: 9:00 a.m.
Dept.: 2
Judge: Hon. Patricia M. Lucas

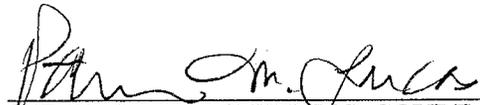
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In the above-entitled action, plaintiff Russell Brimer and defendant Seasonal Specialties LLC, having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and following this Court's issuance of an Order approving this Proposition 65 settlement and Consent Judgment on November 18, 2014:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to California Health & Safety Code § 25249.7(f)(4) and California Code of Civil Procedure § 664.6, Judgment is entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit A**. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

IT IS SO ORDERED.

Dated: 12/23/14



JUDGE OF THE SUPERIOR COURT
Patricia Lucas

1 Clifford A. Chanler, State Bar No. 135534
Harris A. Weinstein, State Bar No. 282166
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 RUSSELL BRIMER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER)	Case No. 114CV267502
)	
Plaintiff)	[PROPOSED] CONSENT
v.)	JUDGMENT
)	
SEASONAL SPECIALTIES LLC,)	Action Filed: July 3, 2014
)	
Defendant.)	
)	
)	
)	

1 **1. INTRODUCTION**

2 **1.1 Russell Brimer and Seasonal Specialties LLC**

3 This [Proposed] Consent Judgment (“Consent Judgment”) is entered into by and between
4 plaintiff, Russell Brimer (“Plaintiff” or “Brimer”), and defendant, Seasonal Specialties LLC
5 (“Defendant” or “Seasonal”). Plaintiff and Defendant are each individually referred to as a
6 “Party” and collectively referred to as the “Parties.”

7 **1.2 Russell Brimer**

8 Brimer is an individual residing in the State of California who seeks to promote
9 awareness of exposure to toxic chemicals and improve human health by reducing or eliminating
10 hazardous substances contained in consumer and commercial products.

11 **1.3 Seasonal Specialties LLC**

12 Seasonal employs ten or more persons and is a “person in the course of doing business”
13 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
14 and Safety Code Section 25249.5 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Brimer alleges that Seasonal manufactured, imported and/or distributed for sale in the
17 State of California LED lights and other string lights with vinyl/poly vinyl chloride (“PVC”)
18 cables that may be touched and handled by consumers and workers containing di(2-
19 ethylhexyl)phthalate (“DEHP”) without first providing the exposure warning required by
20 Proposition 65.

21 **1.5 Listed Chemicals**

22 DEHP is a phthalate chemical listed under Proposition 65 as a chemical known to the
23 State of California to cause birth defects or other reproductive harm. Other phthalate chemicals
24 listed under Proposition 65 as chemicals known to the State of California to cause birth defects
25 or other reproductive harm include, but are not limited to, butyl benzyl phthalate (“BBP”) and
26 di-n-butyl phthalate (“DBP”). DEHP, BBP, and DBP are collectively referred to herein as the
27 “Listed Chemicals.”

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1.6 Product Description

The products that are covered by this Consent Judgment are: (a) LED lights and other string lights with vinyl/PVC cables, whether freestanding or serving as a component of another product manufactured imported, sold, offered for sale and/or distributed by Seasonal (the "Covered Products"), and (b) other products with vinyl/PVC components which are manufactured by or for Seasonal and sold by Seasonal in California including: (1) greenery made from PVC/vinyl, including but not limited to, trees and wreaths; (2) holiday ornaments and decorations made of soft plastic/PVC-containing components, surface coatings, or decals; and (3) larger ornamental or decorative holiday-oriented products made of or with vinyl/PVC components or surface coatings including, but not limited to, sculptures and figurines to which string lights may be, but are not necessarily, attached (collectively the "Additional Products").

1.7 Notice of Violation

On or about March 26, 2014, Brimer served Seasonal, others and certain requisite public enforcement agencies with a document entitled "60-Day Notice of Violation" ("Notice") under Proposition 65 that provided the recipients with notice that Seasonal was in violation of Proposition 65 for failing to warn customers and consumers in California that the Covered Products expose users to DEHP.

1.8 Complaint

As no authorized public prosecutor of Proposition 65 filed a claim against Seasonal based on the allegations set forth in the Notice prior to the expiration of the 60 day notice period, Brimer filed a complaint on July 3, 2014, in the Superior Court of California for the County of Santa Clara (the "Court"), *Brimer v. Seasonal Specialties LLC, et al.*, Case No. 114CV267502, naming Seasonal as a defendant and alleging claims for violations of Health and Safety Code section 25249.6, based on the alleged exposures to DEHP in certain LED lights and other string lights with vinyl/PVC cables sold by Seasonal in the State of California (hereinafter "Action" or "Complaint").

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
3 subject matter jurisdiction over the allegations in the Complaint and personal jurisdiction over
4 Seasonal as to the allegations in the Complaint, that venue is proper in the County of Santa
5 Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
6 Judgment.

7 **1.10 No Admission**

8 Seasonal denies the material, factual and legal allegations contained in Brimer's Notice
9 and Complaint and maintains that all products that it has sold, manufactured, imported and/or
10 distributed in California, including the Covered Products, have been and are in compliance with
11 all laws. Nothing in this Consent Judgment is or shall be construed as an admission by the
12 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
13 the Consent Judgment constitute or be construed as an admission by Seasonal of any fact,
14 conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or
15 otherwise affect Seasonal's obligations, responsibilities, and duties under this Consent
16 Judgment.

17 **1.11 Effective Date**

18 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
19 which this Consent Judgment is approved by the Court, including any tentative ruling that is
20 unopposed.

21 **2. INJUNCTIVE RELIEF: REFORMULATION**

22 **2.1 Reformulation Obligation**

23 As of the Effective Date, Seasonal shall not cause to be manufactured, imported, or
24 distributed for sale in the State of California any Covered Products unless they are "Phthalate
25 Free." For purposes of this Consent Judgment, "Phthalate Free" shall mean that all Covered
26 Products contain less than or equal to 1,000 parts per million ("ppm") of each of the Listed
27 Chemicals when analyzed pursuant to EPA testing methodologies 3580A and 8270C or
28

1 equivalent methodologies utilized by federal or state agencies for the purpose of determining the
2 DEHP content in a solid substance.

3 **2.2 Representation Regarding Prior Reformulation Efforts and 2014 Holiday**
4 **Season Production**

5 Following its receipt of Brimer's Notice, Seasonal represents that it: (a) immediately
6 conducted an investigation concerning the potential presence of Listed Chemicals in the Covered
7 Products; (b) reviewed its records concerning its prior efforts to ensure that Covered Products to
8 be manufactured for it for the upcoming 2014 holiday season were Phthalate Free; and (c)
9 reiterated these Phthalate Free requirements to its Covered Product manufacturers.

10 **2.3 Reformulation Requirements for Additional Products**

11 Within sixty days following the Effective Date, to the extent it already has not, Seasonal
12 shall require manufacturers of the Additional Products (as delineated in Section 1.6 above) to
13 address the same Phthalate Free requirements it has imposed on manufacturers of the Covered
14 Products and, to the extent not previously obtained, obtain written confirmation from such
15 manufacturers within an additional sixty days that they will thereafter not manufacture Additional
16 Products to be offered by Seasonal for sale in the State of California unless they are "Phthalate
17 Free." Seasonal shall not thereafter import, distribute, or offer Additional Products for sale in
18 California unless they are Phthalate Free.

19 **3. MONETARY PAYMENTS**

20 **3.1 Civil Penalties Pursuant To Health & Safety Code § 25249.7(b)**

21 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to
22 in this Consent Judgment, Seasonal shall pay civil penalties totaling \$67,000 in two separate
23 installments. Each civil penalty payment Seasonal makes shall be allocated according to Health
24 & Safety Code § 25249.12(c)(1) and (d) with 75% of the penalty amount paid to the California
25 Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25% of the
26 penalty paid to Brimer.

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3.1.1 Initial Civil Penalty

On or before five (5) days following the mutual execution of this Consent Judgment by the Parties, Seasonal shall deposit an initial civil penalty amount of \$17,000 with a third-party escrow agent mutually agreed upon by the parties, which the trustee shall be instructed to hold pending the Court's approval of this Consent Judgment. Seasonal or its counsel shall provide The Chanler Group with written confirmation within five days of the funds being deposited into the agreed upon escrow account. Within five days of the Effective Date, Brimer or his counsel shall provide notice and documentation to the trustee of the Court's approval of the Consent Judgment, whereupon the trustee shall be instructed to release and send, within 5 calendar days, funds held in escrow in two separate checks, pursuant to Section 3.3.1 below, to: (a) "OEHHA" in the amount of \$12,750; and (b) "Russell Brimer, Client Trust Account" in the amount of \$4,250. In the event that the Parties have not agreed upon a third-party escrow at the time that this Consent Judgment is mutually executed by the Parties, then on or before five (5) days following the mutual execution of this Consent Judgment by the Parties, Seasonal shall issue a check for its initial civil penalty payment in the amount of \$17,000 to the "Morrison Foerster LLP Client Trust". Counsel to Seasonal shall provide The Chanler Group with written confirmation within five days of receipt that the funds have been deposited into said trust account. Within five days of the date that this Consent Judgment is approved by the Court, counsel for Seasonal shall direct the trustee of said account to issue two separate checks for the initial civil penalty payment to: (a) "OEHHA" in the amount of \$12,750; and (b) Russell Brimer, Client Trust Account" in the amount of \$4,250.

3.1.2 Final Civil Penalty

Provided that this Consent Judgment has been approved by the Court and entered, on or before December 31, 2014, Seasonal will make a final civil penalty payment of \$50,000. Pursuant to title 11 California Code of Regulations, section 3203(c), fifty percent (50%) of the final civil penalty payment shall be waived, however, if by no later than December 1, 2014, a duly authorized official of Seasonal certifies in writing to Plaintiff that it has implemented the Phthalate Free requirements for the Additional Products set forth in Section 2.3 above. An

1 additional fifty percent (50%) of the final civil penalty payment shall be also waived if a duly
2 authorized official of Seasonal further certifies in writing to Plaintiff by December 1, 2014 that all
3 Covered Products and Additional Products thereafter manufactured or distributed for sale in
4 California by Seasonal shall also be reformulated to achieve a maximum concentration, by
5 weight, of 1,000 parts per million or less for Di-isodecyl phthalate ("DIDP") and Diisononyl
6 phthalate ("DINP") when analyzed pursuant to EPA testing methodologies 3580A and 8270C or
7 equivalent methodologies utilized by federal or state agencies for the purpose of determining
8 phthalate content in a solid substance. The options to provide certifications to additional
9 reformulation in lieu of making all or a pro-rata portion of the final civil penalty payment under
10 this Section are material terms, and time, relative to the identified date for receipt of each such
11 certification, is of the essence. Unless waived entirely, all penalty payments shall be allocated
12 according to Health & Safety Code § 25249.12(c)(1) and (d) with 75% of the penalty amount paid
13 to OEHHA, and the remaining 25% of the penalty paid to Brimer, and shall be delivered to the
14 addresses listed in Section 3.3 below.

15 **3.2 Reimbursement of Plaintiff's Fees and Costs**

16 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
17 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
18 leaving the issue to be resolved after the material terms of the agreement had been settled.
19 Shortly after all other settlement terms had been finalized, Seasonal expressed a desire to
20 resolve the fees and costs. The Parties then attempted to (and did) reach an accord on the
21 compensation due to Brimer and his counsel under general contract principles and the private
22 attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work
23 performed in this matter through the mutual execution of this agreement, including the time and
24 expense of utilization of the third party escrow, but exclusive of fees and costs incurred on
25 appeal, if any. Under these legal principles, on or before five (5) days following the mutual
26 execution of this Consent Judgment by the Parties, Seasonal shall issue a check to the agreed
27 upon third-party escrow agent referenced in Section 3.1.1 above in the amount of \$43,000.
28 Seasonal or its counsel shall provide The Chanler Group with written confirmation within five

1 days of these funds being transferred into the escrow account. Within five business days
2 following the Effective Date, Brimer or his counsel shall provide notice and documentation to
3 the trustee of the Court's approval of the Consent Judgment, whereupon the trustee shall be
4 instructed to release and send, within 5 calendar days, the funds Seasonal has provided to the
5 escrow account under this paragraph in a check payable to "The Chanler Group" to the address
6 found in Section 3.3.1(a) below. In the event that the Parties have not agreed upon a third-party
7 escrow at the time that this Consent Judgment is mutually executed by the Parties, then on or
8 before five (5) days following the mutual execution of this Consent Judgment by the Parties,
9 Seasonal shall issue a check payable to the "Morrison Foerster Client Trust" in the amount of
10 \$43,000 to be held by said trust pending the Court's approval of this Consent Judgment.
11 Counsel for Seasonal shall provide The Chanler Group with written confirmation within five
12 days of receipt that these funds have been deposited into said trust account. Within five days of
13 the date that this Consent Judgment is approved by the Court, counsel for Seasonal shall direct
14 the trustee of said account to issue a check payable to "The Chanler Group" in the amount of
15 \$43,000 to the address found in Section 3.3.1(a) below:

16 **3.3 Payment Procedures**

17 **3.3.1 Issuance of Payments.** Payments shall be delivered as follows:

18 (a) All payments owed to Brimer or his counsel pursuant to Section 3 shall be
19 delivered to the following address:

20 The Chanler Group
21 Attn: Proposition 65 Controller
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710

25 (b) All payments owed to OEHHA pursuant to Section 3 shall be delivered
26 directly to OEHHA (Memo line "Prop. 65 Penalties") at one of the following address:

27 For United States Postal Service Delivery:

28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

7 **3.3.4 Court Approval; Reimbursement.** If the Court does not approve the
8 Consent Judgment, all funds tendered into any trust or escrow account, or otherwise received by
9 The Chanler Group from Seasonal in settlement of this Action, shall be refunded in full as
10 required by Section 6 below.

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

13 In consideration of the promises and commitments contained herein, Plaintiff on behalf of
14 himself and in the public interest, hereby releases Seasonal, its parents, subsidiaries, affiliated
15 entities that are under common ownership or control, directors, officers, employees, and attorneys
16 ("Releasees"), and each entity to whom they directly or indirectly distribute or sell Covered
17 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
18 cooperative members, licensors, and licensees ("Downstream Defendant Releasees"), from all
19 claims for violations of Proposition 65 based on unwarned exposure to DEHP from the Covered
20 Products sold by Seasonal prior to the Effective Date. Upon entry of this Consent Judgment by
21 the Court, going forward, Seasonal's compliance with the terms of Section 2.1 of this Consent
22 Judgment shall be deemed to constitute compliance with Proposition 65 with respect to DEHP in
23 the Covered Products.

24 **4.2 Plaintiff's Individual Release of Claims**

25 Plaintiff, in his individual capacity only and *not* in his representative capacity, also
26 provides a release to Seasonal, its Releasees, and its Downstream Defendant Releasees which shall
27 be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
28 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
Brimer of any nature, character or kind, whether known or unknown, suspected or unsuspected,

1 arising out of alleged or actual exposures to the Listed Chemicals in the Covered Products sold or
2 distributed for sale by Seasonal before the Effective Date. Should Seasonal qualify for the first
3 50% final penalty waiver provided for in Section 3.1.2 above, this release shall further extend to
4 cover the Listed Chemicals in the Additional Products. Should Seasonal qualify for the second
5 50% final penalty waiver provided for in Section 3.1.2 above, this release shall also further
6 extend to cover DINP and DIDP in the Covered Products and Additional Products.

7 **4.3 Seasonal's Release of Brimer**

8 Seasonal on behalf of itself, its past and current agents, representatives, attorneys,
9 successors and/or assignees, hereby waives any and all claims against Brimer, his attorneys, and
10 other representatives for any and all actions taken or statements made (or those that could have
11 been taken or made) by Brimer and his attorneys and other representatives, whether in the course
12 of investigating claims or otherwise seeking enforcement of Proposition 65 against Seasonal in
13 this matter.

14 **5. SEVERABILITY**

15 If, subsequent to the Court's approval of this Consent Judgment, any of the provisions
16 contained herein are held by a court to be unenforceable, the validity of the enforceable
17 provisions remaining shall not be adversely affected unless the Court finds that any unenforceable
18 provision is not severable from the remainder of the Consent Judgment.

19 **6. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and
21 shall be null and void if, for any reason, it is not approved and entered by Court within twelve
22 months of it being fully executed by the Parties, at which time, any funds being held in Trust or in
23 escrow for purposes of this agreement shall be fully reimbursed to Seasonal.

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the State of
26 California and apply within the State of California. In the event that Proposition 65 is repealed or
27 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products or the
28 Additional Products, then Seasonal shall provide written notice to Brimer of any asserted change

1 in the law, and shall have no further obligations pursuant to this Consent Judgment with respect
2 to, and to the extent that, the Covered Products and/or Additional Products are so affected.
3 Nothing in this Consent Judgment shall be interpreted to relieve Seasonal from any obligation to
4 comply with any other state or federal law.

5 **8. ENFORCEMENT**

6 Any Party may, by motion or application for an order to show cause before this Court,
7 enforce the terms and conditions contained in this Consent Judgment.

8 **9. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided pursuant
10 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
11 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
12 other party at the following

13 To Brimer:

14 The Chanler Group
15 Attn: Proposition 65 Coordinator
16 Parker Plaza
2560 Ninth Street, Suite 214
Berkeley, CA 94710

17 To Seasonal:

18 Matt Guse
19 Seasonal Specialties, LLC
11455 Valley View Road
Eden Prairie, MN 55344

20 with a copy to

21 Robert Falk
22 Morrison & Foerster LLP
425 Market Street, 32nd Floor
23 San Francisco, CA 94105

24 Any Party may modify the person and address to whom the notice is to be sent by sending each
25 other Party notice by mail and/or other verifiable form of written communication.

26 **10. MODIFICATION**

27 Except as provided in this Section, this Consent Judgment may be modified only by a
28 written agreement of the Parties and upon entry of a modified Consent Judgment by the Court

1 thereon or by the Court upon motion for good cause shown and entry of a modified Consent
2 Judgment by the Court.

3 **11. ADDITIONAL POST-EXECUTION ACTIVITIES**

4 Brimer agrees to comply with the reporting form requirements referenced in Health and
5 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to California
6 Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval
7 of this Consent Judgment. In furtherance of obtaining such approval, the Parties and their
8 respective counsel agree to mutually employ their best efforts to support the entry of this
9 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in
10 a timely manner. For purposes of this paragraph, "best efforts" shall include, at a minimum,
11 cooperating on the drafting and filing of any papers in support of the required motion for
12 judicial approval. If any third party objection to the noticed motion is filed, Brimer and
13 Defendant shall work together to file a joint reply and appear at any hearing before the Court.
14 This provision is a material component of the Consent Judgment and shall be treated as such in
15 the event of a breach.

16 **12. ENTIRE AGREEMENT**

17 This Consent Judgment contains the sole and entire agreement and understanding of the
18 parties. No representations, oral or otherwise, express or implied, other than those contained
19 herein, have been made by any party hereto. No other agreements shall be deemed to exist or to
20 bind any of the parties.

21 **13. COUNTERPARTS, FACSIMILE SIGNATURES**

22 This Consent Judgment may be executed in counterparts and by facsimile or portable
23 document format (.pdf) signature, each of which shall be deemed an original, and all of which,
24 when taken together, shall be deemed to constitute one and the same document.

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14. AUTHORIZATION

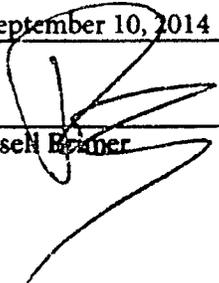
Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

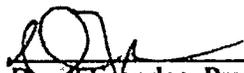
AGREED TO:

AGREED TO:

Date: September 10, 2014

Date: 8/29/14

By: 
Russell Bremer

By: 
David Fagerlee, President
Seasonal Specialties LLC