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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE CITY AND COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
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17 RUSSELL BRIMER,
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19 Plaintiff,
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21 v.
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23 AUSTRAM, INC.; ARMSTRONG GARDEN
24 CENTERS INC.; and DOES 1 through 150,
25 inclusive,
26
27 Defendants.
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Case No. CGC-06-455487

**STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Plaintiff.** Russell Brimer (hereinafter "plaintiff" or "Brimer") is an individual
3 residing in California who seeks to promote awareness of exposures to toxic chemicals and
4 improve human health by reducing or eliminating hazardous substances contained in consumer
5 and industrial products.

6 **1.2 General Allegations.** Brimer alleges that Austram, Inc. ("Austram") and
7 Armstrong Garden Centers, Inc. ("Armstrong") (hereinafter collectively referred to as
8 "defendants") manufactured, distributed and/or sold (without warnings) in the State of California
9 certain Decorative Stained Glass Extension/Garden Hooks which contain lead (hereinafter "Listed
10 Chemical"), a substance which is listed pursuant to the Safe Drinking Water and Toxic
11 Enforcement Act of 1986, California Health & Safety Code §25249.5 *et seq.*, also known as
12 Proposition 65, to cause birth defects and other reproductive harm.

13 **1.3 Product Descriptions.** The products covered by this Consent Judgment are
14 defined as follows: Decorative Stained Glass Extension/Garden Hooks manufactured, sold and/or
15 distributed by defendants, including, but not limited to, the specific products listed in Exhibit A.
16 All such products identified in Section 1.3 of this Consent Judgment shall hereinafter be referred
17 to as the "Products."

18 **1.4 Notices of Violation.** Beginning on September 2, 2005, Brimer served defendants
19 and various public enforcement agencies with documents, entitled "60 Day Notice of Violation"
20 (hereinafter the "Notice") that provided defendants and such public enforcers with notice that
21 defendants were in violation of Health & Safety Code §25249.6 for failing to warn purchasers that
22 certain Products that they sold exposed users in California to the Listed Chemical.

23 **1.5 Complaint.** On August 23, 2006, Brimer, acting in the interest of the general
24 public in California, filed a complaint (hereinafter the "Complaint") in the Superior Court in and
25 for the City and County of San Francisco against defendants (*Russell Brimer v. Austram, Inc.;*
26 *Arstrong Garden Centers, Inc.*, case no. CGC-06-455487) alleging violations of Health & Safety
27 Code §25249.6 based on the alleged exposures to the Listed Chemical contained in the Products
28 sold by defendants.

1 **1.6 No Admission.** Defendants deny the material factual and legal allegations
2 contained in Brimer's Notice and Complaint, and maintain that all products that they have
3 manufactured, sold, and/or distributed in California, including the Products, have been and are in
4 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission
5 by defendants of any fact, finding, issue of law, or violation of law, nor shall compliance with this
6 Consent Judgment constitute or be construed as an admission by defendants of any fact, finding,
7 conclusion, issue of law or violation of law. However, this section shall not diminish or otherwise
8 affect the obligations, responsibilities and duties of defendants under this Consent Judgment.

9 **1.7 Consent to Jurisdiction.** For purposes of this Consent Judgment only, plaintiff
10 and defendants stipulate that the California Courts have jurisdiction over the allegations of
11 violations contained in the Notice and Complaint and personal jurisdiction over defendants as to
12 the acts alleged in the same, that venue is proper in the County of San Francisco, and that the
13 California Courts have jurisdiction to enforce the provisions of this Consent Judgment.

14 **1.8 Effective Date.** For purposes of this Consent Judgment, the "Effective Date" shall
15 mean September 5, 2006.

16 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

17 **2.1 Warning Obligations for Products**

18 (a) **Required Warnings.** After the Effective Date, defendants shall not
19 transmit to any entity to sell or otherwise offer for sale in California any Products containing the
20 Listed Chemical, unless warnings are given in accordance with one or more provisions in
21 subsection 2.2

22 (b) **Exceptions.** The warning requirements set forth in subsections 2.1(a) and
23 2.2 below shall not apply to Reformulated Products as defined in Section 2.4 below.

24 **2.2 Clear and Reasonable Warnings**

25 (a) **Product Labeling.** A warning may be given by affixing the following
26 language to the labeling or other packaging for the Products by defendants, their agents, or the
27 manufacturer, importer, distributor or retailer of the Products that states:

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WARNING: The materials used in this product contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

Warnings issued for Products pursuant to this subsection shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render them likely to be read and understood by an ordinary individual under customary conditions prior to purchase. For purposes of this subsection, a warning placed on the bottom of the Products or the Products' packaging is deemed not to be an adequate warning. Any changes to the language or format of the warning required by this subsection shall only be made following approval from the California Attorney General's Office, provided that written notice of at least fifteen (15) days is given to Brimer for the opportunity to comment.

(b) **Point-of-Sale Warnings.** Defendants may also satisfy their warning obligations by arranging for the posting of signs at retail outlets in the State of California at which the Products are sold, in accordance with the terms specified in subsections 2.2(b)(i), 2.2(b)(ii) and 2.2(b)(iii).

(i) Point of Sale warnings shall be provided through one or more signs posted at each point of sale or display of the Products that state:

WARNING: The materials used in this product contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

When more than one Product is sold in proximity to other items that do not require a warning (e.g., Reformulated Products as defined in Section 2.4 of this Consent Judgment) the following warning statement must be used:

WARNING: The materials used in the following glass and metal products contain lead, a chemical known to the State of California to cause birth defects or other reproductive harm:

[List Each Product by Brand Name and Description]

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1 (ii) A point of sale warning provided pursuant to subsection 2.2(b)(i)
2 shall be prominently placed with such conspicuousness as compared with other words, statements,
3 designs, or devices as to render it likely to be read and understood by an ordinary individual under
4 customary conditions prior to purchase and shall be placed or written in a manner such that the
5 consumer understands to which specific Products the warnings apply so as to minimize, if not
6 eliminate, the chances that an over-warning situation will arise. Any changes to the language or
7 format of the warning required for Products by this subsection shall only be made following
8 approval from the California Attorney General's Office, provided that written notice of at least
9 fifteen (15) days is given to plaintiff for the opportunity to comment.

10 (iii) If defendants intend to utilize point of sale warnings to comply with
11 this Consent Judgment, they must provide notice as required by this Consent Judgment to each
12 retailer to whom they ship the Products for sale in California and obtain the written consent of such
13 retailer that it will comply with the warning requirements contained in this Consent Judgment
14 before shipping the Products. Such notice shall include any required warning materials (including,
15 as appropriate, signs and/or stickers). If defendants obtained the written consent of a retailer to
16 provide the warnings required by this Consent Judgment, defendants shall not be found to have
17 violated this Consent Judgment if they have complied with the terms of this Consent Judgment and
18 have proof that they transmitted the requisite warnings and received the retailer's written consent in
19 the manner provided herein.

20 **2.3 Mail Order and Internet Sales.** Subject to Section 2.4, after the Effective Date
21 defendants shall not sell or distribute the Products by mail order catalog or the Internet to
22 California residents, unless warnings are provided as set forth below.

23 For the Products that require a warning pursuant to this Consent Judgment that are sold by
24 defendants by mail order or through the Internet to California residents, a warning containing the
25 language in subsection 2.2(a) shall be included, in the mail order catalog (if any) or on the website
26 (if any) pursuant to subsections 2.3(a) or 2.3(b). Any warnings given in the mail order catalogs or
27 on the website shall identify the specific Products to which the warnings apply so as to minimize, if
28 not eliminate, the chances that an over-warning situation will arise. If defendants elect to provide

1 warnings in the mail order catalog, then such warnings (at a location designated in subsection
2 2.3(a)) shall be included in any new galley prints of such catalogs sent to the printer after the
3 Effective Date for all first, subsequent or additional printings.

4 (a) **Mail Order Catalog.** The second warning message in subsection 2.2(b)
5 shall be stated on the inside front cover of any catalog. In addition, the first warning message in
6 subsection 2.2(b) shall be placed either: (a) on the same page as any order form for the Products;
7 or (b) on the same page as the price of the Products, in the same type size as the surrounding,
8 non-heading text.

9 (b) **Internet Web Sites.** The first warning message in subsection 2.2(a) shall be
10 displayed either: (a) on the same web page on which the Products are displayed; (b) on the same
11 web page as any order form for the Products; (c) on the same web page as the price for the
12 Products; or (d) on one or more web pages displayed to a purchaser over the Internet or via
13 electronic mail during the checkout and order confirmation process prior to the sale of the
14 Products.

15 **2.4 Reformulation Standards.** Products satisfying the conditions of subsections 2.4(a)
16 and 2.4(b) are referred to as "Reformulated Products." The warnings required pursuant to sections
17 2.1(a) and 2.2 above shall not be required for Reformulated Products, defined as follows:

18 (a) Any Products containing one tenth of one percent (0.1%) lead or less by
19 weight in each material used in the Products, *e.g.*, solder or came; or

20 (b) Any Products that produce a test result no higher than 5.0 micrograms ("ug")
21 of lead using a Ghost Wipe™ test applied to all portions of the exterior surface of the Products that
22 contain solder or came performed as outlined in NIOSH Method No. 9100.

23 **2.5 Reformulation Commitment.** By entering into this Consent Judgment, defendants
24 hereby commit to undertake their best efforts to ensure that all of their Products sold in California
25 as reasonably as possible shall qualify as Reformulated Products on January 1, 2007 and thereafter.

26 **3. MONETARY PAYMENTS.**

27 **3.1 Penalties.** Pursuant to Health & Safety Code §25249.7(b), defendants shall pay the
28 sum of \$3,000 in civil penalties. The payment shall be made on or before September 15, 2006, and

1 shall be payable to "Hirst & Chanler LLP in Trust for Russell Brimer" and be delivered to Brimer's
2 counsel at the following address:

3 HIRST & CHANLER LLP
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710-2565

6 **4. REIMBURSEMENT OF FEES AND COSTS**

7 4.1 Plaintiff and defendants acknowledge that Brimer and his counsel offered to resolve
8 this dispute without reaching terms on the amount of fees and costs to be reimbursed to them,
9 thereby leaving this fee issue to be resolved after the material terms of the Consent Judgment had
10 been settled. Defendants then expressed a desire to resolve the fee and cost issue shortly after the
11 other settlement terms had been finalized. Plaintiff and defendants thereafter attempted to (and
12 did) reach an accord on the compensation due to Brimer and his counsel under the private attorney
13 general doctrine codified at Code of Civil Procedure §1021.5 for all work performed through the
14 Effective Date of the Consent Judgment. Under the private attorney general doctrine codified at
15 Code of Civil Procedure §1021.5, defendants shall reimburse Brimer and his counsel for fees and
16 costs, incurred as a result of investigating, bringing this matter to defendants' attention, and
17 negotiating a settlement in the public interest. Defendants shall pay plaintiff and his counsel
18 \$19,000 for all attorneys' fees, expert and investigation fees, and litigation costs. The payment
19 shall be made payable to "Hirst & Chanler LLP" and shall be delivered to Brimer's counsel in three
20 equal installments of \$6,333.34 each; the first installment being paid on or before 40-days after the
21 effective date, that date being October 16, 2006; the second monthly installment being paid on or
22 before 10 days after the order approving this Consent Judgment is issued by the Court, that date
23 being estimated to be November 16, 2006; the final installment being paid on or before December
24 15, 2006. All installments being paid at the following address:

25 HIRST & CHANLER LLP
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

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1 Except as specifically provided in this Consent Judgment, defendants shall have no further
2 obligation with regard to reimbursement of Brimer's attorney's fees and costs with regard to the
3 Products covered in this Consent Judgment.

4 **5. RELEASE OF ALL CLAIMS**

5 **5.1 Brimer's Release of Defendants.** In further consideration of the promises and
6 agreements herein contained, and for the payments to be made pursuant to sections 3 and 4,
7 Brimer, on behalf of himself, his past and current agents, representatives, attorneys, successors
8 and/or assignees (hereinafter collectively referred to as the "Brimer Releasing Parties"), and in the
9 interest of the general public, hereby waives all rights to institute or participate in, directly or
10 indirectly, any form of legal action and release all claims, including, without limitation, all actions,
11 causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
12 penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and
13 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
14 (hereinafter collectively referred to as "Claims"), against Austram, its employees and
15 representatives and each of its distributors, wholesalers, licensors, licensees, auctioneers, retailers,
16 dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries
17 and their respective officers, directors, attorneys, representatives, shareholders, members, partners,
18 agents, and employees (hereinafter collectively referred to as "Austram's Releasees") and against
19 Armstrong, its employees and representatives and each of its distributors, wholesalers, licensors,
20 licensees, auctioneers, retailers, dealers, customers, owners, purchasers, users, parent companies,
21 corporate affiliates, subsidiaries and their respective officers, directors, attorneys, representatives,
22 shareholders, members, partners, agents, and employees (hereinafter collectively referred to as
23 "Armstrong's Releasees") arising under Proposition 65 related to Austram's or Austram's Releasees'
24 and/or Armstrong's or Armstrong's Releasees' alleged manufacture, sale and/or distribution of the
25 Products without the required warning.

26 Plaintiff and defendants further agree and acknowledge that this Consent Judgment is a full,
27 final, and binding resolution of any violations of Proposition 65 that have been or could have been
28 asserted against defendants for their alleged manufacture, sale and/or distribution of the Products

1 without the required warning.

2 In addition, Brimer, on behalf of himself and the Brimer Releasing Parties, waives all rights
3 to institute or participate in, directly or indirectly, any form of legal action and releases all Claims
4 against Austram's Releasees and Armstrong's Releasees arising under Proposition 65 related to
5 each of defendants' releasees' alleged failure to warn about exposures to or identification of the
6 Listed Chemical contained in the Products, and for all actions or statements made by defendants or
7 their attorneys or representatives, in the course of responding to alleged violations of Proposition
8 65 . Provided however, Brimer shall remain free to institute any form of legal action to enforce the
9 provisions of this Consent Judgment.

10 It is specifically understood and agreed that plaintiff and defendant intend that defendants'
11 compliance with the terms of this Consent Judgment resolves all issues and liability, now and in
12 the future (so long as defendants comply with the terms of the Consent Judgment) concerning
13 defendants', Austram's Releasees' and Armstrong's Releasees' compliance with the requirements of
14 Proposition 65 as to the Products sold by defendants.

15 **5.2 Austram's and Armstrong's Release of Brimer.** Defendants, Austram's
16 Releasees and Armstrong's Releasees waive all rights to institute any form of legal action against
17 Brimer, or his attorneys or representatives, for all actions taken or statements made by Brimer and
18 his attorneys or representatives, in the course of seeking enforcement of Proposition 65 against
19 defendants pursuant to the Notice.

20 **6. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved and entered by the Court and
22 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
23 after it has been fully executed by all signing parties, in which event any monies that have been
24 provided to plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded
25 within fifteen (15) days after receiving written notice from defendants that the one-year period has
26 expired.

27 **7. SALES DATA**

28 Defendants understand that the sales data provided to counsel for Brimer was a material

1 factor upon which Brimer relied to determine the amount of civil penalties made pursuant to
2 Health & Safety Code § 25249.7(b) in this Consent Judgment. To the best of defendants'
3 knowledge, the sales data provided by defendants is a full, complete, true and accurate reflection of
4 any and all sales of the Products in California during the time period beginning September 2, 2004,
5 until the Effective Date.

6 **8. SEVERABILITY**

7 If any of the provisions of this Consent Judgment are held by a court to be unenforceable,
8 the validity of the enforceable provisions remaining shall not be adversely affected.

9 **9. ATTORNEYS' FEES**

10 In the event that a dispute arises with respect to any provision(s) of this Consent Judgment,
11 the prevailing party shall, except as otherwise provided herein, be entitled to recover reasonable
12 and necessary costs and reasonable attorneys' fees incurred from the resolution of such dispute.

13 **10. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the State of California
15 and apply within the State of California. In the event that Proposition 65 is repealed or is
16 otherwise rendered inapplicable by reason of law generally, or as to the Products specifically, then
17 defendants shall have no further obligations pursuant to this Consent Judgment with respect to, and
18 to the extent that, those Products are so affected.

19 **11. NOTICES**

20 All correspondence and notices required to be provided pursuant to this Consent Judgment
21 shall be in writing and personally delivered or sent by: (1) first-class, registered, certified mail,
22 return receipt requested or (2) overnight courier to the addresses listed below. Plaintiff and/or
23 defendant may, from time to time, specify a change of address to which all notices and other
24 communications shall be sent.

25 To Austram, Inc.:

26 Marion Waters
27 Austram, Inc.
1400 E. Greer Street
28 Durham, NC 27704

1 To Armstrong Garden Centers, Inc.:
2 Michael D. Kunce, President
3 Armstrong Garden Centers, Inc.
4 2200 E. Route 66, Suite 200
5 Glendora, CA 91740

6 To Russell Brimer:

7 HIRST & CHANLER LLP
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710-2565

12 **12. COUNTERPARTS; FACSIMILE SIGNATURES**

13 This Consent Judgment may be executed in counterparts and by facsimile, each of which
14 shall be deemed an original, and all of which, when taken together, shall constitute one and the
15 same document.

16 **13. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

17 Brimer agrees to comply with the reporting form requirements referenced in Health &
18 Safety Code §25249.7(f). Pursuant to regulations promulgated under that section, Brimer shall
19 present this Consent Judgment to the California Attorney General's Office within five (5) days after
20 receiving all of the necessary signatures.

21 **14. ADDITIONAL POST EXECUTION ACTIVITIES**

22 Brimer and defendants agree to mutually employ their best efforts to support the entry of
23 this Agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court
24 in a timely manner. Plaintiff and defendants acknowledge that, pursuant to Health & Safety Code
25 § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
26 Accordingly, plaintiff agrees to file a Motion to Approve the Agreement ("Motion"). Defendants
27 shall have no additional responsibility to plaintiff's counsel pursuant to Code of Civil Procedure
28 §1021.5 or otherwise with regard to reimbursement of any fees and costs incurred with respect to
the preparation and filing of the Motion or with regard to plaintiff's counsel appearing for a hearing
thereon.

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1 **15. MODIFICATION**

2 This Consent Judgment may be modified only: (1) by written agreement of the signing
3 parties and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a
4 successful motion of any Party and entry of a modified Consent Judgment by the Court. The
5 Attorney General shall be served with notice of any proposed modification to this Consent
6 Judgment at least fifteen (15) days in advance of its consideration by the Court.

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1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective parties and have read, understood and agree to all of the terms and conditions of this
4 Consent Judgment.

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AGREED TO: Date: _____ By: _____ Plaintiff Russell Brimer	AGREED TO: Date: _____ By: _____ Defendant Austram, Inc.
	AGREED TO: Date: <u>9-11-06</u> By: <u>[Signature]</u> PRES & C.E.O. Defendant Armstrong Garden Centers, Inc.
APPROVED AS TO FORM: Date: _____ HIRST & CHANLER LLP By: _____ Christopher L. Brooke Attorneys for Plaintiff RUSSELL BRIMER	

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective parties and have read, understood and agree to all of the terms and conditions of this
4 Consent Judgment.
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<p>6 AGREED TO:</p> <p>7 Date: <u>9-11-06</u></p> <p>8</p> <p>9 By:  10 Plaintiff Russell Brimer</p>	<p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Austram, Inc.</p>
	<p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Defendant Armstrong Garden Centers, Inc.</p>
<p>18 APPROVED AS TO FORM:</p> <p>19 Date: <u>9/11/06</u> 20 HIRST & CHANLER LLP</p> <p>21</p> <p>22 By:  23 Christopher L. Brooke 24 Attorneys for Plaintiff 25 RUSSELL BRIMER</p>	

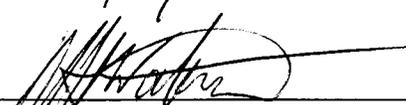
26 **IT IS SO ORDERED.**

27 Date: _____

28 _____
JUDGE OF THE SUPERIOR COURT

1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective parties and have read, understood and agree to all of the terms and conditions of this
4 Consent Judgment.

<p>6 AGREED TO:</p> <p>7 Date: _____</p> <p>8</p> <p>9 By: _____</p> <p>10 Plaintiff Russell Brimer</p>	<p>6 AGREED TO:</p> <p>7 Date: <u>9/8/06</u></p> <p>8</p> <p>9 </p> <p>10 Defendant Austram, Inc.</p>
	<p>12 AGREED TO:</p> <p>13 Date: _____</p> <p>14</p> <p>15 By: _____</p> <p>16 Defendant Armstrong Garden Centers, Inc.</p>
<p>18 APPROVED AS TO FORM:</p> <p>19 Date: _____</p> <p>20 HIRST & CHANLER LLP</p> <p>21</p> <p>22 By: _____</p> <p>23 Christopher L. Brooke</p> <p>24 Attorneys for Plaintiff</p> <p>25 RUSSELL BRIMER</p>	

26 **IT IS SO ORDERED.**

27 Date: _____

28 _____
JUDGE OF THE SUPERIOR COURT

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Exhibit A

1. 12" Extension Hook W/ Butterfly, #412629 (#0 25626 14629 1)