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6 RUSSELL BRIMER

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF MARIN

10  
11 RUSSELL BRIMER,

12 Plaintiff,

13 vs.

14 CENTRAL GARDEN and PET  
COMPANY; MATTHEWS REDWOOD  
15 and NURSERY SUPPLY, INC.; and  
DOES 1-150, inclusive,

16 Defendants.  
17

Case No. CIV 10000831

**AMENDED CONSENT JUDGMENT**

18  
19 **1. INTRODUCTION**

20 **1.1 The Parties**

21 This Consent Judgment is entered into by and between Plaintiff Russell Brimer (“Brimer”  
22 or “Plaintiff”) and Defendants Central Garden and Pet Company and Matthews Redwood and  
23 Nursery Supply, Inc. (collectively referred to as “Central” or “Defendant”), with Plaintiff and  
24 Defendant collectively referred to as the “Parties.”

25 **1.2 Plaintiff**

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

1           **1.3     Central**

2           Central employs 10 or more persons and is a person in the course of doing business for  
3 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &  
4 Safety Code § 25249.6 et seq. (Proposition 65).

5           **1.4     General Allegations**

6           Brimer alleges that Central has manufactured, distributed and/or sold, in the State of  
7 California, vinyl coated twist ties used for plants that expose users to lead, without first providing  
8 “clear and reasonable warning” under Proposition 65. Lead is listed as a reproductive and  
9 developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as the “Listed  
10 Chemical.” Central denies Brimer’s allegations. Vinyl coated twist ties used for plants that  
11 exposes users to Lead are referred to herein as the “Products”.

12           **1.5     Notices of Violation**

13           On December 15, 2009, Brimer served Central and various public enforcement agencies  
14 with a document entitled “60-Day Notice of Violation” that provided public enforcers and Central  
15 with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn  
16 consumers that vinyl coated twist ties used for plants that Central manufactured, distributed  
17 and/or sold exposed users in California to lead.

18           **1.6     Complaint**

19           On February 19, 2010 Brimer, acting, in the interest of the general public in California,  
20 filed a complaint in the Superior Court for the County of Marin, alleging violations of Health &  
21 Safety Code § 25249.6 based on the alleged exposures to lead contained in vinyl coated twist ties  
22 used for plants manufactured, distributed and/or sold by Central. This action shall hereinafter be  
23 referred to as the “Action”

24           **1.7     No Admission**

25           This Consent Judgment resolves claims that are denied and disputed by Central. The  
26 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all  
27 claims between the Parties for the purpose of avoiding prolonged litigation. Central denies the  
28 material factual and legal allegations contained in the Notice and Complaint and maintains that all

1 Products it has manufactured, distributed and/or sold in California have been and are in  
2 compliance with all applicable laws. Nothing in this Consent Judgment shall be construed as an  
3 admission by Central of any fact, finding, issue of law, or violation of law, nor shall compliance  
4 with this Consent Judgment constitute or be construed as an admission by Central of any fact,  
5 finding, conclusion, issue of law, or violation of law, such being specifically denied by Central.  
6 However, this Section shall not diminish or otherwise affect Central' obligations, responsibilities,  
7 and duties under this Consent Judgment.

8 **1.8 Consent to Jurisdiction**

9 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
10 jurisdiction over Central as to the allegations contained in the Complaint, that venue is proper in  
11 the County of Marin, and that this Court has jurisdiction to enter and enforce the provisions of  
12 this Consent Judgment.

13 **2. INJUNCTIVE RELIEF: REFORMULATION**

14 **2.1 Vinyl Coated Twist Ties.** Upon mutual execution of this agreement, Central shall  
15 not sell, ship, or offer to be shipped for sale in California any vinyl coated twist ties used for  
16 plants with a vinyl coating that contains more than 300 parts per million ("ppm") of lead.

17 **3. MONETARY PAYMENTS**

18 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

19 3.1.1 In settlement of all claims related to the Covered Products and Listed  
20 Chemical referred to in the Complaint, and this Consent Judgment, pursuant to Health & Safety  
21 Code § 25249.7(b), Central shall pay \$1,000.00 in civil penalties.

22 3.1.2 Civil penalties are to be apportioned in accordance with California Health &  
23 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of  
24 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty  
25 remitted to Brimer as provided by California Health & Safety Code §25249.12(d). Central shall  
26 issue two separate checks for the penalty payment: (a) one check made payable to "Chanler Law  
27 Group in Trust for OEHHA" in an amount representing 75% of the total penalty; and (b) one  
28

1 check to “Chanler Law Group in Trust for Brimer” in an amount representing 25% of the total  
2 penalty.

3 3.1.3 Payment shall be delivered to Brimer’s counsel on or before March 15, 2010,  
4 at the following address:

5 Chanler Law Group  
6 Attn: Proposition 65 Controller 2560 Ninth Street  
7 Parker Plaza, Suite 214  
8 Berkeley, CA 94710-2565

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

9 **4.1 Attorney Fees and Costs**

10 4.1.1 The parties reached an accord on the compensation due to Brimer and his  
11 counsel under general contract principles and the private attorney general doctrine codified at  
12 California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the mutual  
13 execution of this agreement and approval by the trial court, excluding any fees on appeal. Central  
14 shall pay Brimer and his counsel a total of \$20,500.00 for fees and costs incurred as a result of  
15 investigating, bringing this matter to Central’ attention, and litigating and negotiating a settlement  
16 in the public interest. These fees and costs include those that will be reasonably incurred in the  
17 future to support entry of this agreement.

18 4.1.2 Payment shall be delivered to Brimer’s counsel on or before March 15, 2010,  
19 at the following address:

20 Chanler Law Group  
21 Attn: Proposition 65 Controller  
22 2560 Ninth Street  
23 Parker Plaza, Suite 214  
24 Berkeley, CA 94710-2565

23 **5. CLAIMS COVERED AND RELEASE**

24 **5.1 Brimer’s Release of Central and its Chain of Distribution**

25 5.1.1 This Consent Judgment is a full, final, and binding resolution between  
26 Brimer and Central, and its owners, subsidiaries, affiliates, sister and related companies,  
27 employees, shareholders, directors, insurers, attorneys, successors, and assigns (“Defendant  
28 Releasees”), and all entities to whom they directly or indirectly distribute or sell Products,

1 including but not limited to distributors, wholesalers, customers, retailers, franchisees,  
2 cooperative members, and licensees (“Downstream Defendant Releasees”) of any violation of  
3 Proposition 65 that has been or could have been asserted against Defendant Releasees and  
4 Downstream Defendant Releasees regarding the failure to warn about exposure to the Listed  
5 Chemical arising in connection with Products manufactured, sourced, distributed, or sold by  
6 Defendant Releasees prior to execution of this agreement. Defendant Releasees’ compliance with  
7 this Consent Judgment shall constitute compliance with Proposition 65 with respect to the Listed  
8 Chemical in Products after execution of this agreement.

9           5.1.2 Brimer on behalf of himself, his past and current agents, representatives,  
10 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives  
11 with respect to Products all rights to institute or participate in, directly or indirectly, any form of  
12 legal action and releases all claims, including, without limitation, all actions, and causes of action,  
13 in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,  
14 or expenses (including, but not limited to, investigation fees, expert fees, and attorneys’ fees) of  
15 any nature whatsoever, whether known or unknown, fixed or contingent (collectively “claims”),  
16 against Defendant Releasees and Downstream Defendant Releasees that arise under Proposition  
17 65 or any other statutory or common law claims that were or could have been asserted in the  
18 public interest, as such claims relate to Defendant Releasees’ and Downstream Defendant  
19 Releasees’ alleged failure to warn about exposures to the Listed Chemical contained in the  
20 Products.

21           5.1.3 Brimer also, on behalf of himself, his past and current agents,  
22 representatives, attorneys, successors, and/or assignees and not in his representative capacity,  
23 provides a general release herein which shall be effective as a full and final accord and  
24 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,  
25 damages, losses, claims, liabilities and demands of any nature, character or kind, known or  
26 unknown, suspected or unsuspected, against Defendant Releasees and Downstream Defendant  
27 Releasees arising under Proposition 65, as such claims relate to Defendant Releasees’ alleged  
28 failure to warn about exposures to or identification of any chemicals listed under Proposition 65

1 contained in any products sold by Defendant Releasees. Brimer acknowledges that he is familiar  
2 with Section 1542 of the California Civil Code, which provides as follows:

3 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
4 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO  
5 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE  
6 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE  
7 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE  
8 DEBTOR.

9 Brimer, in his individual capacity only and not in his representative capacity, and on behalf of  
10 himself, his past and current agents, representatives, attorneys, successors, and/or assignees  
11 expressly waives and relinquishes any and all rights and benefits which he may have under, or  
12 which may be conferred on him by the provisions of Section 1542 of the California Civil Code as  
13 well as under any other state or federal statute or common law principle of similar effect, to the  
14 fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.  
15 In furtherance of such intention, the release hereby given shall be and remain in effect as a full  
16 and complete release notwithstanding the discovery or existence of any such additional or  
17 different claims or facts arising out of the released matters.

18 5.1.4 Upon court approval of the Consent Judgment, the Parties waive their  
19 respective rights to a hearing or trial on the allegations of the Complaints.

20 5.1.5 The Parties further understand and agree that, except as provided for above,  
21 this release shall not extend upstream to any third parties that manufactured the Products or any  
22 component parts thereof, or any distributors or suppliers who sold the Products or any component  
23 parts thereof to Central.

## 24 **5.2 Central's Release of Brimer**

25 5.2.1 Central waives any and all claims against Brimer, his attorneys, and other  
26 representatives for any and all actions taken or statements made (or those that could have been  
27 taken or made) by Brimer and his attorneys and other representatives, whether in the course of  
28 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this  
matter, and/or with respect to the Products.

5.2.2 Central also provides a general release herein which shall be effective as a

1 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,  
2 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Central of any  
3 nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject  
4 matter of the Action. Central acknowledges that it is familiar with Section 1542 of the California  
5 Civil Code, which provides as follows:

6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
7 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO  
8 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE  
9 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE  
10 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE  
11 DEBTOR.

12 Central expressly waives and relinquishes any and all rights and benefits which it may  
13 have under, or which may be conferred on it by the provisions of Section 1542 of the California  
14 Civil Code as well as under any other state or federal statute or common law principle of similar  
15 effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the  
16 released matters. In furtherance of such intention, the release hereby given shall be and remain in  
17 effect as a full and complete release notwithstanding the discovery or existence of any such  
18 additional or different claims or facts arising out of the released matters.

#### 17 **6 SEVERABILITY**

18 If, subsequent to court approval of this Consent Judgment, any of the provisions of this  
19 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable  
20 provisions remaining shall not be adversely affected, unless the Court finds that any  
21 unenforceable provision is not severable from the remainder of the Consent Judgment.

#### 22 **7. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and  
24 shall be null and void if, for any reason, it is not approved and entered by the Court within nine  
25 months after it has been fully executed by all Parties. If the Superior Court does not approve the  
26 motion to approve this Consent Judgment, all payments made by Defendant shall be immediately  
27 returned to counsel for Defendant. Should the Superior Court approve this Consent Judgment and  
28 any person successfully appeals that approval, upon remittitur, all payments made pursuant to this

1 Consent Judgment will be returned to counsel for Defendant.

2 **8. GOVERNING LAW**

3 The terms of this Consent Judgment shall be governed by the laws of the State of  
4 California.

5 **9. NOTICES**

6 When any Party is entitled to receive any notice under this Consent Judgment, the notice  
7 shall be sent by certified mail and electronic mail to the person(s) identified below:

8 To Central:

9 Daniel Rapaport, Esq.  
10 Wendel, Rosen, Black and Dean, LLP  
11 1111 Broadway, 24th Floor  
Oakland, CA 94607

12 To Brimer:

13 Chanler Law Group  
14 Attn: Proposition 65 Controller 2560 Ninth Street  
15 Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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

18 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

19 Brimer agrees to comply with the reporting form requirements referenced, in California  
20 Health & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

21 **11. MODIFICATION**

22 This Consent Judgment may be modified only: (1) by written agreement of the Parties; or  
23 (2) upon a successful motion of any party and entry of a modified Consent Judgment by the  
24 Court.

25 **12. ADDITIONAL POST-EXECUTION ACTIVITIES**

26 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed  
27 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of  
28 obtaining such approval, Brimer and Central and their respective counsel agree to mutually

1 employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain  
2 approval of the Consent Judgment by the Court in a timely manner.

3 **13. ENTIRE AGREEMENT**

4 This Consent Judgment contains the sole and entire agreement and understanding of the  
5 Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
6 negotiations, commitments, and understandings related hereto. No representations, oral or  
7 otherwise, express or implied, other than those contained herein have been made by any party  
8 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
9 to exist or to bind any of the parties.

10 **14. ATTORNEY'S FEES**

11 14.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
12 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs  
13 unless the unsuccessful Party has acted with substantial justification. For purposes of this Consent  
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil  
15 Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

16 14.2 Except as specifically provided in the above paragraph and in Section 4.1, each  
17 Party shall bear its own costs and attorney's fees in connection with this action.

18 **15. COUNTERPARTS, FACSIMILE SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile or portable  
20 document format (PDF), each of which shall be deemed an original, and all of which, when taken  
21 together, shall constitute one and the same documents.

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**16. AUTHORIZATION**

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

**AGREED TO:**

**AGREED TO:**

Dated: March \_\_, 2010

Dated: March 29, 2010

By: \_\_\_\_\_  
Plaintiff Russell Brimer

By: Stanley L. Bulger  
Stanley L. Bulger, Senior Director  
Central Garden and Pet Company and  
Matthews Redwood and Nursery  
Supply, Inc.

**IT IS SO ORDERED.**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Judge of the Superior Court

1 **16. 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.

5 **AGREED TO:**

6 **AGREED TO:**

7 Dated: March 31, 2010

8 Dated: March 29, 2010

9 By:   
10 Plaintiff Russell Briner

11 By:   
12 Stanley L. Bulger, Senior Director  
13 Central Garden and Pet Company and  
14 Matthews Redwood and Nursery  
15 Supply, Inc.

16 **IT IS SO ORDERED.**

17 Dated: \_\_\_\_\_

18 By: \_\_\_\_\_  
19 Judge of the Superior Court