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Clifford Chanler, State Bar No. 135534
Rachel S. Doughty, State Bar No. 255904
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
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Attorneys for Plaintiff
RUSSELL BRIMER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,

v.

W. W. GRAINGER, INC.; and DOES 1-150,
inclusive,
Defendants.

Case No. RG12646649

ASSIGNED FOR ALL PURPOSES TO
JUDGE LAWRENCE JOHN APPEL
DEPARTMENT 16

[PROPOSED] CONSENT JUDGMENT

(Cal. Health & Safety Code § 25249.6 et seq.)

1 **1. INTRODUCTION**

2 **1.1. Russell Brimer and W. W. Grainger, Inc.**

3 This Consent Judgment is entered into by and between Russell Brimer (“Brimer” or
4 “Plaintiff”) and W. W. Grainger, Inc. (“Grainger” or “Defendant”), with Brimer and Grainger
5 collectively referred to as the “Parties.”

6 **1.2. Plaintiff**

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

10 **1.3. Defendant**

11 Grainger employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4. General Allegations**

15 Brimer alleges that Grainger has imported, manufactured, distributed, sold, and/or offered
16 for sale in California without the requisite Proposition 65 health hazard warnings: (1) tools with
17 grips containing di(2-ethylhexyl)phthalate (“DEHP”) and lead; and (2) PVC/vinyl rainwear
18 containing DEHP. DEHP and lead are listed pursuant to Proposition 65 as chemicals known to the
19 State of California to cause birth defects and other reproductive harm.

20 **1.5. Notice of Violation**

21 On or about January 19, 2012, Brimer served Grainger and various public enforcement
22 agencies with a document entitled 60-Day Notice of Violation (“Notice”) that provided the
23 recipients with notice that alleged that Grainger was in violation of Proposition 65 for failing to
24 warn its direct customers and end users that its hand tool grips exposed users in California to both
25 DEHP and lead.

26 On or about August 31, 2012, Brimer served Grainger and various public enforcement
27 agencies with a document entitled Supplemental 60-Day Notice of Violation (“Supplemental
28 Notice”), reasserting the allegations of the Notice and alleging that in addition Grainger is or was

1 in violation of Proposition 65 for failing to warn its direct customers and end users that its
2 PVC/vinyl rainwear exposed users in California to DEHP.

3 **1.6. Complaint**

4 On August 6, 2012, Brimer filed a complaint in the Alameda County Superior Court
5 against Grainger (“Complaint” or “Action”), alleging violations of Proposition 65, based on the
6 alleged exposures to DEHP and lead contained in certain hand tool grips sold by Grainger.

7 On November 20, 2012, Brimer filed a second complaint in the Alameda County Superior
8 Court against Grainger (“Second Complaint”), alleging violations of Proposition 65, based on the
9 alleged exposures to DEHP and lead contained in certain hand tool grips sold by Grainger and
10 DEHP in PVC/vinyl rainwear sold by Grainger.

11 **1.7. No Admission**

12 Grainger denies the material factual and legal allegations contained in the Notice, the
13 Supplemental Notice, the Complaint and the Second Complaint. Nothing in this Consent
14 Judgment shall be construed as an admission by Grainger of any fact, finding, conclusion of law,
15 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
16 construed as an admission by Grainger of any fact, finding, conclusion of law, issue of law, or
17 violation of law, such being specifically denied by Grainger. However, this Section shall not
18 diminish or otherwise affect Grainger’s obligations, responsibilities and duties under this Consent
19 Judgment.

20 **1.8. Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Grainger as to the allegations contained in the Complaint and the Second
23 Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
24 enter and enforce the provisions of this Consent Judgment, pursuant to California Code of Civil
25 Procedure section 664.6, as a full and binding resolution of all claims that were or could have been
26 raised in the Complaint and the Second Complaint against Grainger based on the facts alleged
27 therein and in the Notice and Supplemental Notice.

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1 **2. DEFINITIONS**

2 **2.1. Effective Date**

3 For purposes of this Consent Judgment, the term “Effective Date” shall mean December
4 20, 2012.

5 **2.2. Product**

6 “Product” means the following: (1) any hand tool sold or offered for sale by Grainger in
7 California, which is designed to be held and used in one hand and that has soft or rubberized grips,
8 including by way of example only, and without limitation, screwdrivers, pliers, and wrenches; (2)
9 any PVC/vinyl rainwear sold or offered for sale by Grainger in California; and (3) certain clamp-
10 on lighting sold or offered for sale in California by Grainger under the LumaPro brand name.

11 **2.3. Noncompliant Product**

12 “Noncompliant Product” shall mean any Product that is not in compliance with both the
13 Lead Standard and the DEHP Standard (together, the “Reformulation Standards”) and that is sold
14 or offered for sale in California by Grainger.

15 **2.4. Discontinued Product**

16 “Discontinued Product” shall mean any Product for which California sales (by any method,
17 including catalog and internet) have been discontinued, and no new orders have been placed for
18 sale in California by Grainger by the Effective Date, or by the later reformulation date, established
19 by operation of the first or second elections described in Section 3.2.

20 **2.5. Accessible Component**

21 “Accessible Component” means any component of a product that can be touched, handled,
22 or mouthed by a person during reasonably foreseeable use.

23 **2.6. Lead Standard**

24 Lead Standard means each Accessible Component of a product contains lead in
25 concentration less than 100 parts per million when analyzed pursuant to U.S. Environmental
26 Protection Agency (“EPA”) testing methodologies 3050B and/or 6010B, *and* 1.0 microgram when
27 analyzed pursuant to the NIOSH 9100 testing protocol.

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1 **2.7. DEHP Standard**

2 DEHP Standard means each Accessible Component of a product contains DEHP in
3 concentration less than 1,000 parts per million when analyzed pursuant to EPA sample preparation
4 and test methodologies 3580A and 8270C.

5 **2.8. Warning**

6 “Warning” shall mean placement of the Warning Language or Warning Signal and Signal
7 Warning Language, as defined in Sections 2.9, 2.10 and 2.11, respectively, (a) with such
8 prominence and conspicuousness as compared with other words, statements, designs, or devices
9 associated with the product to which it pertains so as to render it likely to be viewed, read and
10 understood by an ordinary individual under customary conditions before purchase or use of that
11 product, and (b) in such a manner that the consumer or user understands to which *specific* product
12 the Warning Language or Warning Signal applies, minimizing the risk of confusion.

13 **2.9. Warning Language**

14 “Warning Language” means the following:

15 **WARNING:** This product contains one or more
16 chemicals known to the State of California
17 to cause birth defects and other
 reproductive harm.

18 **2.10. Warning Signal**

19 “Warning Signal” means a designated symbol (▼ or other symbol) used to reference the
20 Signal Warning Language.

21 **2.11. Signal Warning Language**

22 “Signal Warning Language” means the following:

23 **WARNING:** Certain products identified with this symbol
24 ▼ and offered for sale [in this catalog or on
25 this website] contain one or more chemicals
 known to the State of California to cause
 birth defects and other reproductive harm.

26 **2.12. Vendor**

27 “Vendor” means a person or entity that manufactures, imports, distributes or otherwise
28 supplies Products to Grainger.

1 **2.13. Grainger Branch Store**

2 “Grainger Branch Store” means any retail or wholesale location where Grainger sells
3 Products or offers Products for sale or shipment.

4 **2.14. Payment Address**

5 “Payment Address” means:

6 The Chanler Group
7 Attn: Proposition 65 Controller
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

11 Payments also may be made by wire transfer, instructions for which will be provided upon
12 request.

13 **3. INJUNCTIVE RELIEF**

14 **3.1. Vendor Notification**

15 On or before January 31, 2013, Grainger shall provide the Reformulation Standards to its
16 then-current Vendors of Products and shall request in writing each Vendor to use reasonable
17 efforts to supply expeditiously Products that comply with the Reformulation Standards. In
18 addressing the obligation set forth in this section, Grainger shall not in any way encourage a
19 Vendor to delay compliance with the Reformulation Standards.

20 On or before February 15, 2013, Grainger shall provide Brimer with a copy of the
21 notification(s) sent to its Vendors. Grainger may redact the name and address of the Vendor(s)
22 prior to providing the notification(s) to Brimer.

23 **3.2. Reformulation**

24 Grainger agrees that by September 1, 2013, it will sell Products in California, other than
25 PVC/vinyl rainwear (which shall, from the Effective Date, be accompanied by a Warning), only if
26 in compliance with the Reformulation Standards, or if they are part of the sell-through (as defined
27 below) of the then-existing inventory of Discontinued Products, and that an officer or director of
28 Grainger shall so certify, no later than September 15, 2013, except as otherwise provided in this
Consent Judgment.

1 The list shall state for each Product whether it is a Noncompliant Product or a Discontinued
2 Product, and whether the Product is accompanied by a Warning consistent with the requirements
3 of Section 3.4. An officer or director of Grainger shall certify the accuracy of the Product
4 Accounting in writing.

5 Upon each election by Grainger to continue providing a Warning for any Product or
6 Products rather than reformulating such Products, described in Sections 4.1.2, 4.1.3, and 4.1.4,
7 Grainger shall provide an updated Product Accounting, current through one month prior to the
8 date that the notification of each election is due. An officer or director of Grainger shall certify the
9 accuracy of each updated Product Accounting in writing.

10 **4. MONETARY PAYMENTS**

11 Payments by Grainger under this Consent Judgment shall be by checks or wire transfers
12 delivered to the Payment Address on or before the date due. The Chanler Group shall hold all
13 payments made under this Consent Judgment in trust until the Court approves the Consent
14 Judgment.

15 **4.1. Penalties**

16 As set forth below, Grainger is subject to penalties of up to \$110,000, with further penalties
17 for noncompliance of up to \$200,000 due in July 2014 if Grainger fails to reformulate or
18 discontinue Products, or if there is substantial noncompliance with the Warning requirements of
19 this Agreement.

20 Payments of all penalties by Grainger under this Consent Judgment shall be apportioned in
21 accordance with Health & Safety Code section 25249.12(c)(1) and (d). In each instance,
22 payments equal to 75% of the civil penalty shall be earmarked for the State of California's Office
23 of Environmental Health Hazard Assessment ("OEHHA") with a check made payable to "The
24 Chanler Group in Trust for OEHHA," and the remaining 25% of the penalty monies earmarked for
25 Brimer with a check made payable to "The Chanler Group in Trust for Russell Brimer."

26 Upon payment of each penalty, Grainger shall issue two 1099 forms, one to the Office of
27 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95812 (EIN: 68-

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1 0284486) for the civil penalties payable to OEHHA and a second to Brimer, whose address and
2 tax identification number shall be furnished upon request, for the civil penalties payable to Brimer.

3 **4.1.1. Initial Civil Penalty**

4 Grainger will pay an initial civil penalty due on the Effective Date, in the amount of
5 \$10,000.

6 **4.1.2. Civil Penalty upon Election of First Reformulation Delay**

7 Grainger shall pay a civil penalty due on or before September 15, 2013, of \$30,000, unless
8 an officer or director of Grainger provides certification to Brimer, in writing on or before
9 September 15, 2013, that all Products are (1) reformulated Products (achieving both of the
10 Reformulation Standards), (2) Discontinued Products in the sell-through phase accompanied by a
11 Warning, or (3) Pre-Reformulation Inventory accompanied by a Warning.

12 **4.1.3. Civil Penalty upon Election of Second Reformulation Delay**

13 Grainger shall pay a civil penalty due on or before January 15, 2014, of \$70,000, unless an
14 officer or director of Grainger provides certification to Brimer, in writing on or before January 15,
15 2014, that all Products are (1) reformulated Products (achieving both of the Reformulation
16 Standards), (2) Discontinued Products in the sell-through phase accompanied by a Warning, or (3)
17 Pre-Reformulation Inventory accompanied by a Warning.

18 **4.1.4. Civil Penalty upon Election to Continue Warning for Select
19 Products Indefinitely**

20 Grainger will pay a final penalty in the amount of \$200,000 on July 15, 2014, if any of the
21 Products remain Noncompliant Products as of July 15, 2014, but shall be allowed to continue
22 selling such products when accompanied by a Warning. Such amount shall be reduced by the
23 percentage of units of all Products sold between June 1, 2013, and June 1, 2014, which were in
24 compliance with both of the Reformulation Standards, provided each remaining Noncompliant
25 Product is accompanied by a Warning consistent with Section 3.4, and an officer or director of
26 Grainger so certifies on or by July 15, 2014. Notwithstanding the foregoing, sales of (1)
27 PVC/vinyl rainwear, (2) Discontinued Product in the sell-through phase, and (3) Pre-
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1 Reformulation Inventory shall not be included in the calculation of such additional penalty
2 amounts, if accompanied by a Warning.

3 By way of example, if the universe of Products sold by Grainger between June 1, 2013,
4 and June 1, 2014, was 1,000 units, with 900 of those either reformulated (achieving the
5 Reformulation Standards) or Discontinued Products and the remaining 100 consisting in half of
6 Pre-Reformulation Inventory accompanied by a Warning and in half of Noncompliant Products
7 sold with a Warning, Grainger would pay a penalty of \$10,000. If no Noncompliant Products
8 were sold between June 1, 2013, and June 1, 2014, other than Pre-Reformulation Inventory
9 accompanied with a Warning, then no penalty payment would be due.

10 If any substantial noncompliance with the Warning requirement is found, then the full
11 \$200,000 penalty would be due. Substantial noncompliance shall mean the sale of Noncompliant
12 Products, in more than *de minimis* amounts, without a Warning, whether or not consisting of Pre-
13 Reformulation Inventory.

14 **4.1.5. Payment in Lieu of Civil Penalty**

15 Grainger shall pay the sum \$10,000 to Silent Spring Institute (“Silent Spring”), a not-for-
16 profit institution, in lieu of further civil fines pursuant to California Health & Safety Code section
17 25249.7(b), and California Code of Regulations, Title 11, section 3202(b). Silent Spring will use
18 such funds in one or more of the following ways: (a) to continue its work identifying the links
19 between exposure to environmental chemicals including lead, DEHP and other phthalates such as
20 di-n-butyl (“DBP”) and butyl benzyl phthalate (“BBP”) and reproductive and developmental harm,
21 as well as educating the public about such potential exposures; (b) to conduct exposure- and risk-
22 based prioritization of chemicals listed under Proposition 65, or chemicals OEHHA has identified
23 as candidates for listing, in order to identify exposures of potential public health significance; (c)
24 to monitor compliance with the reformulation requirements of this and other similar Consent
25 Judgments addressing Proposition 65-listed chemical exposures; or (d) to conduct additional
26 exposure measurements that evaluate the levels of chemical exposures to users of products that
27 contain lead, DEHP, DBP and BBP.
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1 Payment to Silent Spring shall be made by check to “The Chanler Group in Trust for
2 Silent Spring Institute.” Upon issuance of this check, Grainger shall issue a 1099 form for “Silent
3 Spring Institute,” 29 Crafts Street, Newton, Massachusetts 02458, (EIN: 04-3237106).

4 **4.2. Reimbursement of Plaintiff’s Fees and Costs**

5 The Parties acknowledge that Brimer and his counsel offered to resolve this dispute
6 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
7 the issue to be resolved after the material terms of the agreement had been settled. Grainger then
8 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
9 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
10 to Brimer and his counsel under general contract principles and the private attorney general
11 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed in
12 this matter, as is set forth below. All such payments shall be sent to The Chanler Group at the
13 Payment Address, in a check made payable to “The Chanler Group in Trust.” Upon payment of
14 fees and costs, Grainger shall issue a 1099 form to The Chanler Group (EIN: 94-3171522) for the
15 amount paid.

16 **4.2.1. On Effective Date**

17 On or before the Effective Date, Grainger shall pay \$80,000 to The Chanler Group for its
18 fees and costs incurred investigating, litigating, and enforcing this matter until the Effective Date
19 on Brimer’s behalf.

20 **4.2.2. Upon Court Approval of Consent Judgment**

21 Grainger will reimburse Brimer and his counsel for their reasonable fees and costs incurred
22 in seeking judicial approval of this settlement and completing other necessary tasks after the
23 execution of the Consent Judgment, in an amount not to exceed \$18,000. Such additional fees and
24 costs include, but are not limited to, drafting and filing of the motion to approve papers, fulfilling
25 the reporting requirements referenced in Health & Safety Code section 25249.7(f), responding to
26 any third party objections, filing of the notice of entry of the Consent Judgment, corresponding
27 with opposing counsel and appearances before the Court related to the approval process. Grainger
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1 will remit payment to The Chanler Group, at the Payment Address within ten days after its receipt
2 of an invoice from Brimer's counsel for work performed under this Section.

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1. Plaintiff's Public Release**

5 Brimer, acting on his own behalf and in the public interest, and on behalf of each of his
6 predecessors, successors, partners, partnerships, agents, representatives, insurers, attorneys, heirs,
7 assignors and assignees, accountants and all persons and entities acting or claiming by, through,
8 under or in concert with any of them, hereby irrevocably releases and forever discharges Grainger
9 along with Grainger's past and present shareholders, members, officers, directors, employees,
10 agents, insurers, attorneys, bankers, accountants, predecessors, successors, assignors and
11 assignees, and other representatives acting or claiming by, through, under or in concert with any of
12 them, from all claims, demands, suits, liabilities, causes of action or actions, now or in the future,
13 for violations of Proposition 65 based on exposures to DEHP and/or lead from the hand tools, and
14 to DEHP from the PVC/vinyl rainwear sold by Grainger. Compliance with the terms of this
15 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP
16 and/or lead from the hand tools and to DEHP from the PVC/vinyl rainwear.

17 **5.2. Plaintiff's Individual Release of Claims**

18 Brimer, in his individual capacity only and *not* in his representative capacity, and on behalf
19 of each of his predecessors, successors, partners, partnerships, agents, representatives, insurers,
20 attorneys, heirs, assignors and assignees, accountants and all persons and entities acting or
21 claiming by, through, under or in concert with any of them, also provides a release herein to
22 Grainger along with Grainger's past and present shareholders, members, officers, directors,
23 employees, agents, insurers, attorneys, bankers, accountants, predecessors, successors, assignors
24 and assignees, and other representatives acting or claiming by, through, under or in concert with
25 any of them, which release shall be effective as a full and final accord and satisfaction, as a bar to
26 all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
27 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,
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1 suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP and/or
2 lead in the Products.

3 **5.3. Defendant's Release of Plaintiff**

4 Grainger along with Grainger's past and present shareholders, members, officers, directors,
5 employees, agents, insurers, attorneys, bankers, accountants, predecessors, successors, assignors
6 and assignees, and other representatives acting or claiming by, through, under or in concert with
7 any of them, hereby waives any and all claims against Brimer and each of his predecessors,
8 successors, partners, partnerships, agents, representatives, insurers, attorneys, heirs, assignors and
9 assignees, accountants and all persons and entities acting or claiming by, through, under or in
10 concert with any of them, for any and all actions taken or statements made (or those that could
11 have been taken or made) by Brimer and his attorneys and other representatives, whether in the
12 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
13 matter.

14 **6. COURT APPROVAL**

15 This Consent Judgment is not effective until it is approved and entered by the Court and
16 shall be null and void if, for any reason, it is not approved and entered by the Court within one
17 year after it has been fully executed by the Parties, in which event any monies that have been
18 provided to Brimer or his counsel pursuant to Section 4 above shall be refunded within fifteen (15)
19 days after receiving written notice from Grainger that the one-year period has expired.

20 **7. DISMISSAL OF SECOND COMPLAINT**

21 Brimer agrees that within 5 court days of entry of this proposed consent judgment, Brimer
22 will dismiss the Second Complaint with prejudice.

23 **8. SEVERABILITY AND NON-ASSIGNMENT**

24 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
25 Judgment is held by a court to be unenforceable, the validity of the provisions remaining shall not
26 be adversely affected.

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1 In order to further the finality of this Agreement and the related Settlement Agreement,
2 Brimer acknowledges that he has not and will not assign any of the rights or obligations of this
3 agreement to any other party.

4 **9. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California and apply within the State of California.

7 **10. NOTICES**

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

12 For Grainger:

13 David Gabor, Esq.
14 Russ August & Kabat
15 12424 Wilshire Boulevard, 12th Floor
16 Los Angeles, CA 90025

17 With a copy to:

18 Legal Department
19 W.W. Grainger, Inc.
20 100 Grainger Parkway
21 Lake Forest, IL 60045-5201

22 For Brimer:

23 Proposition 65 Coordinator
24 The Chanler Group
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710

28 Any party may, from time to time, specify in writing to the other party a change of address
to which all notices and other communications shall be sent.

11. COUNTERPARTS; FACSIMILE SIGNATURES

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

1 **12. MOTION TO APPROVE CONSENT JUDGMENT**

2 Brimer agrees to comply with the reporting form requirements referenced in Health &
3 Safety Code section 25249.7(f). In addition, the Parties acknowledge that, pursuant to Health &
4 Safety Code section 25249.7, a noticed motion is required to obtain judicial approval of this
5 Consent Judgment. In furtherance of obtaining such approval, Brimer and Grainger agree to
6 mutually employ their best efforts to support the entry of this agreement as a Consent Judgment
7 and obtain approval of the Consent Judgment by the Court in a timely manner. For purposes of
8 this section, best efforts shall include, at a minimum, cooperating on the drafting and filing of any
9 papers in support of the required motion for judicial approval.

10 **13. MODIFICATION**

11 This Consent Judgment may be modified only: (i) by written agreement of the Parties and
12 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion
13 of any party and entry of a modified consent judgment by the Court.

14 **14. AUTHORIZATION**

15 The undersigned are authorized to execute this Consent Judgment and have read,
16 understood, and agree to all of the terms and conditions of this Consent Judgment.

17 **AGREED TO:**

AGREED TO:

18
19
20 By: _____

RUSSELL BRIMER

By: _____

Dale Barina, Vice President
W. W. GRAINGER, INC.

21
22
23 Date: December 18, 2012

Date: 12.20.12