

1 **HUNTON & WILLIAMS LLP**  
Phillip J. Eskenazi (SBN 158976)  
2 peskenazi@hunton.com  
Neil K. Gilman (admitted pro hac vice)  
3 ngilman@hunton.com  
550 South Hope Street, Suite 2000  
4 Los Angeles, California 90071-2627  
Telephone: (213) 532-2000  
5 Facsimile: (213) 532-2020

6 Attorneys for Defendants  
LOWE'S HOME CENTERS, LLC

7  
8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**

10  
11 GLENN McMILLAN, individually, and  
on behalf of all others similarly situated,

12 Plaintiff,

13  
14 v.

15  
16 LOWE'S HOME CENTERS, LLC,  
a North Carolina limited liability  
17 company, and  
18 GRO-WELL BRANDS, INC.,  
a Delaware corporation,

19 Defendants.  
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CASE NO.: 1:15-CV-00695-DAD-SKO

**PROTECTIVE ORDER AND  
CONFIDENTIALITY AGREEMENT**

1 Plaintiff Glenn McMillan (“Plaintiff”) and Defendants Lowe’s Home Centers,  
2 LLC (“Lowe’s”) and Gro-Well Brands, Inc. (“Gro-Well Brands”) (collectively,  
3 “Defendants”), by their respective counsel, hereby stipulate for the purpose of jointly  
4 requesting that the Court enter a protective order regarding the following terms of  
5 confidentiality (the “Order”), which shall govern all discovery taken in connection  
6 with the above-referenced case (the “Case”).

7 **GOOD CAUSE STATEMENT**

8 The parties believe that they may be required to produce or disclose in the Case,  
9 and that non-parties may produce or disclose, information that one or more of them  
10 contend contains information of a confidential, commercially sensitive, and/or  
11 proprietary nature and that, if disclosed in this action without restriction on its use or  
12 further disclosure, it may cause disadvantage, harm, damage and/or loss to the  
13 disclosing party or non-parties. Among other things, as part of this action, Plaintiff  
14 has requested the production of documents and information regarding customers’  
15 personal information, including names and addresses, and Defendants’ business  
16 operations, agreements, and strategies, the public disclosure of which could have an  
17 adverse competitive impact on Defendants. The parties further anticipate the  
18 possibility that non-party competitor information may be produced or disclosed in the  
19 Case.

20 The documents that are the subject of the Order include the following  
21 categories:

22 (a) Confidential business or commercial information as referenced in Federal  
23 Rule of Civil Procedure 26(c)(1)(G)<sup>1</sup>, including without limitation information  
24 relating to specific customer information, financial information, sales records, mulch  
25 vendor quotes, proposals or agreements, customer lists, terms of payment, pricing,  
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27 <sup>1</sup> See FED. R. CIV. P. 26(c)(1)(G) (allowing the Court to issue a protective order, for  
28 good cause, “requiring that a trade secret or other confidential research, development,  
or commercial information not be revealed or be revealed only in a specified way”).

1 costs, profits, or other sales information for specific equipment, products, or parts,  
2 including mulch products. There is a need to protect confidential business or  
3 commercial information because it could be abused if not limited to this litigation,  
4 including potential use by third party competitors. There is also the risk of violation  
5 of privacy or consumer protection laws.

6 (b) Confidential commercial research or development as referenced in  
7 Federal Rule of Civil Procedure 26(c)(1)(G), including without limitation production  
8 summaries, process development and troubleshooting, complaint handling, field  
9 reports, or other technical development data or information. Such confidential  
10 commercial research or development information should be protected because it could  
11 be abused by third-party competitor retailers or manufacturers, and may reveal  
12 Defendants' past and future confidential business and sourcing strategies. Such  
13 material may also contain private contact information of individual purchasers who  
14 participated in Defendants' commercial research or development.

15 (c) Personnel files and other private or confidential employment records or  
16 information. *See Board of Trustees v. Superior Court*, 119 Cal. App. 3d 516, 526  
17 (1981) (stating it is "manifest" that the personnel, tenure, and promotion files of a  
18 professor are private and maintained in confidence). There is a need to protect such  
19 information because employee records are maintained in confidence by Defendants.  
20 Public dissemination of Defendants' employee information would undermine the  
21 privacy rights of Defendants' employees and potentially reveal to competitors  
22 Defendants' confidential business strategies regarding management of personnel and  
23 employee promotions.

24 (d) Information subject to a separate protective order or confidentiality  
25 agreement. There is a need for protection of material relevant to this case that is  
26 subject to other confidentiality agreements to which Defendants are parties, and which  
27 mandate that Defendants make efforts to ensure that the material be disclosed only  
28 under conditions in which the confidentiality can be maintained. Furthermore,

1 discovery in this Case is likely to overlap with the substantially similar matter, *Joseph*  
2 *v. Lowe's Home Centers, LLC, et al.*, N.D. Ill. Case No. 1:14-cv-03866, and a  
3 protective order governing discovery in this Case would facilitate agreements among  
4 the parties in both matters to allow them to limit the dissemination of their respective  
5 sensitive business and personal information.

6 The parties further believe that the need for protection should be addressed by a  
7 Court order, as opposed to a private agreement between and among the parties, to  
8 facilitate the orderly and efficient discovery of relevant information while minimizing  
9 the potential for unauthorized disclosure or use of confidential, commercially  
10 sensitive, and/or proprietary information. The parties also believe that a Court order,  
11 as opposed to a private agreement, would facilitate the proper enforcement of the  
12 stipulated protective order and confidentiality agreement entered in the substantially  
13 similar litigation *Joseph v. Lowe's Home Centers, LLC, et al.*, currently pending in the  
14 Northern District of Illinois, Case No. 14-cv-3866 (Dkt. 129). In addition, the parties  
15 would like the ability to request that the Court rule on challenges to a party's  
16 confidentiality designation. The proposed protective order provides mechanisms for  
17 resolution of disputes and handling of designated evidence that involve the Court.  
18 Finally, in the parties' experience, a court-sanctioned protective order provides  
19 additional comfort and protections to third parties that may be asked to produce  
20 sensitive information in the Case.

21 **1. Purposes and Limitations**

22 1.1. Disclosure and discovery activity in this action are likely to involve  
23 production of confidential, proprietary, or private information for which special  
24 protection from public disclosure and from use for any purpose other than prosecuting  
25 this litigation would be warranted. The parties acknowledge that this Stipulation and  
26 Order does not confer blanket protections on all disclosures or responses to discovery  
27 and that the protection it affords extends only to the limited information or items that  
28 are entitled, under the applicable legal principles, to treatment as confidential. The

1 parties further acknowledge, as set forth in Section 4.7, below, that this Stipulated  
2 Protective Order does not entitle them to file confidential information under seal; Civil  
3 Local Rule 141 sets forth the procedures that must be followed and the standards that  
4 will be applied when a party seeks privacy and permission from the court to file  
5 material under seal.

6 **2. Confidential Information and Attorney's Eyes Only Information**

7 2.1. For purposes of this Order, "Confidential Information" means the  
8 specified categories of information listed above under (a)-(d) that qualify for  
9 protection under Federal Rule of Civil Procedure 26(c), including non-public,  
10 confidential or proprietary financial, technical, commercial, or personal information  
11 that is contained or disclosed in any materials governed by this Order and designated  
12 by a producing party or person in accordance with the procedures set forth in Section  
13 3 of this Order.

14 2.2. For purposes of this Order, "Attorney's Eyes Only Information" means  
15 Confidential Information as defined in Section 2.1 above, the disclosure of which to  
16 any party or that party's personnel, other than the party or the personnel of the party  
17 producing or designating it, is likely to cause substantial and irreparable injury to the  
18 business of the producing or designating party or person. Attorney's Eyes Only  
19 Information may include sensitive trade secrets, marketing plans, financial data,  
20 strategic plans, market analysis, product information, product development data,  
21 customer information, technical data, and/or other information contained or disclosed  
22 in any materials governed by this Order and designated in good faith by a producing  
23 party or person in accordance with the procedures set forth in Section 3 of this Order.

24 2.3. When used in this Order, the word "document" encompasses all written  
25 material, video, audio or other data record, deposition testimony, written discovery  
26 responses, and all other information and tangible items, whether produced as hard  
27 copy, electronic document, computer diskette, CD-ROM or otherwise.

28 **3. Designation of Confidential Information or Attorney's Eyes Only**

1           **Information**

2           3.1. Any document, including any part thereof, a producing party (hereinafter  
3 “Producing Party,” which term shall include third parties producing a document for  
4 purposes of this Case) reasonably believes falls within the definition set forth in  
5 paragraph(s) 2.1 and/or 2.2 above may be designated by Counsel for a Producing  
6 Party as Confidential Information by marking “CONFIDENTIAL,” or as Attorney’s  
7 Eyes Only Information by marking “ATTORNEY’S EYES ONLY,” on the face of  
8 every page of the document or, if not feasible, in a conspicuous location in the name  
9 of the electronic file. A Producing Party that so designates a document is referred to  
10 below as the “Designating Party” for such.

11           3.2. Counsel for a Producing Party may designate any or all of a deponent’s  
12 deposition testimony as Confidential Information or Attorney’s Eyes Only  
13 Information by making a statement to that effect on the record while the deposition is  
14 being taken. Alternatively, counsel for a Producing Party may designate the transcript  
15 of a deposition as containing Confidential Information or Attorney’s Eyes Only  
16 Information by notifying counsel for all parties in writing, within thirty (30) business  
17 days of receipt of the transcript, of the specific pages and lines of the transcript that  
18 contain Confidential Information or Attorney’s Eyes Only Information. All deposition  
19 transcripts shall be treated as Attorney’s Eyes Only Information and subject to this  
20 Order until thirty (30) business days after a transcript of the deposition is received.  
21 Any portion of any deposition testimony that is not designated as containing  
22 Confidential Information or Attorney’s Eyes Only Information in accordance with this  
23 Section 3.2 shall not be entitled to the protection afforded under this Order.

24           3.3. When Confidential Information or Attorney’s Eyes Only Information is  
25 designated during a deposition, the designating party shall instruct the court reporter  
26 to make the following notations in the deposition transcript:

- 27                   (a) on the first page of the transcript, “This transcript contains  
28                   CONFIDENTIAL [and/or ATTORNEY’S EYES ONLY]

1 Information”; and

2 (b) on each page containing Confidential Information or Attorney’s  
3 Eyes Only Information, the notation “CONFIDENTIAL” (for  
4 Confidential Information) or “ATTORNEY’S EYES ONLY” (for  
5 Attorney’s Eyes Only Information).

6 3.4. There shall be no obligation to challenge a designation of a document as  
7 Confidential Information or Attorney’s Eyes Only Information contemporaneous to  
8 such designation being made, and failure to do so shall not preclude a subsequent  
9 challenge.

10 3.5. A party opposing the designation of a document as Confidential  
11 Information or Attorney’s Eyes Only Information shall state the objections, including  
12 the grounds for the objection, in a letter to the designating party, within a reasonable  
13 time after receiving the document. The Designating Party shall have ten (10) business  
14 days following the receipt of the objection to withdraw its Confidential Information or  
15 Attorney’s Eyes Only Information designation. If the Confidential Information or  
16 Attorney’s Eyes Only Information designation is not withdrawn, the opposing party  
17 may thereafter apply to this Court for a ruling that the information or materials shall  
18 not be so designated. The burden shall be on the party designating the information as  
19 Confidential Information or Attorney’s Eyes Only Information to establish, based  
20 upon a showing of good cause, that the material reasonably meets the criteria set forth  
21 in Section(s) 2.1 and/or 2.2 of this Order. If the Court determines that the designating  
22 party has not made such a showing, the information shall no longer be treated as  
23 Confidential Information or Attorney’s Eyes Only Information unless such Order of  
24 the Court is stayed pending appeal.

25 3.6. An interested member of the public has the right to challenge the sealing  
26 of particular documents that have been filed under seal, and the party asserting  
27 confidentiality will have the burden of demonstrating the propriety of filing under  
28 seal.

1 **4. Restricted Use of Confidential Information and Attorney's Eyes Only**  
2 **Information**

3 4.1. Except upon the prior written consent of counsel for the Designating  
4 Party, each document designated as Confidential Information and Attorney's Eyes  
5 Only Information must be treated strictly in accordance with this Order, may be used  
6 or disclosed only as specified in this Order, shall not be disclosed or revealed to  
7 anyone not authorized by this Order to receive it, and shall be used only for the  
8 litigation of the Case. Any document so designated shall not be used for any other  
9 purpose, including in connection with the investigation, instigation, or prosecution of  
10 any other unrelated litigation.

11 4.2. Attorney's Eyes Only Information, and any analysis or report containing  
12 Attorney's Eyes Only Information, may be disclosed only to: (a) the Court and its  
13 personnel; (b) a mediator, and paralegal, secretarial, and clerical personnel who are  
14 employed by the mediator to assist in such proceeding, who have executed a  
15 Confidentiality Undertaking in the form attached as Exhibit A (a "Confidentiality  
16 Undertaking"); (c) counsel of record in the Case, as well as their paralegal,  
17 investigative, secretarial and clerical personnel who are employed by and engaged in  
18 assisting such counsel in this proceeding; (d) court reporters and videographers  
19 retained in connection with depositions; (e) other non-party support service including,  
20 but not limited to, professional jury or trial consultants, and professional vendors  
21 providing litigation support services, copy services, document processing, and trial  
22 graphics services, who have executed a Confidentiality Undertaking; (f) independent  
23 testifying or non-testifying experts and their support staff retained to furnish expert or  
24 technical services or to give expert testimony in connection with the Case, who are not  
25 otherwise affiliated with a party and who have executed a Confidentiality  
26 Undertaking; (g) non-independent experts and their support staff retained to furnish  
27 expert or technical services or to give expert testimony in connection with the Case,  
28 who have executed a Confidentiality Undertaking; and (h) such other persons as the

1 parties may designate in writing by stipulation between the parties, provided,  
2 however, that before such person is shown or receives any information or document  
3 designated as confidential, they agree to be subject to the terms of this Stipulated  
4 Protective Order in writing by signing the Confidentiality Undertaking.

5 4.3. Confidential Information and any analysis or report containing  
6 Confidential Information may be disclosed only to: (a) the persons entitled to receive  
7 Attorney's Eyes Only Information; (b) in-house counsel for any Party; (c) Plaintiff  
8 and the corporate representatives (officers, directors or management) of Lowe's and  
9 Gro-Well Brands with responsibility for making business decisions dealing with  
10 litigation of the Case, who have executed a Confidentiality Undertaking; and (d) fact  
11 witnesses and their counsel during the course of and in preparation for a deposition  
12 and/or testimony in the Case, but only if counsel who discloses Confidential  
13 Information to the witness determines, in good faith, that such disclosure is reasonably  
14 necessary and appropriate to assist in preparation for and conduct of the Case and the  
15 witness to whom disclosure is made executes the Confidentiality Undertaking.

16 4.4. Counsel for each party shall maintain copies of Confidentiality  
17 Undertakings signed by those people to whom Confidential Information is disclosed  
18 in whole or in part. The signed Confidentiality Undertakings shall be available for  
19 inspection by counsel for each Producing Party upon reasonable notice, except that no  
20 party shall be required to disclose the name of any retained expert or consultant except  
21 as required by Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure. Any  
22 individual to whom counsel for the parties makes a disclosure, pursuant to this Order,  
23 of Confidential Information or Attorney's Eyes Only Information must be advised of,  
24 and become subject to, the provisions of this Order requiring that the documents and  
25 information be held in confidence.

26 4.5. A party may disclose Attorney's Eyes Only Information to any person  
27 not permitted to receive it under Section 4.2, or any Confidential Information to any  
28 person not permitted to receive it under Section 4.3, only as set forth in this paragraph.

1 The attorney for the party wishing to disclose the Attorney's Eyes Only Information  
2 or the Confidential Information shall notify counsel for the Producing Party in writing  
3 and prior to any such disclosure of: (a) the specific information, documents and/or  
4 testimony proposed to be disclosed and (b) the person(s) to whom such disclosure is  
5 proposed to be made. The parties then shall negotiate, in good faith, to reach an  
6 agreement regarding such disclosure. If such an agreement cannot be reached on the  
7 proposed disclosure, the party seeking to disclose Confidential Information or  
8 Attorney's Eyes Only Information shall make an appropriate motion to the Court. The  
9 party seeking to disclose the Attorney's Eyes Only Information or the Confidential  
10 Information shall bear the burden of showing that the proposed disclosure is  
11 necessary. The Court will rule as to whether the proposed disclosure may be made  
12 and whether any restrictions or limitations should be placed on such disclosure.  
13 Unless or until the Court rules otherwise, such information may not be disclosed,  
14 except as set forth in paragraphs 4.2 and 4.3.

15 4.6. The inadvertent failure by the Producing Party or person to designate a  
16 document as Confidential Information or Attorney's Eyes Only Information shall not  
17 be deemed a waiver in whole or in part of the Producing Party's claims of  
18 confidentiality, either as to the material produced or as to the information it contains.  
19 Promptly upon discovering its inadvertent error, the Producing Party or person shall  
20 notify the receiving party in writing of the error, and within ten (10) days of receipt of  
21 notice the receiving party shall either (a) mark all copies of the specified materials  
22 with the appropriate legend, (b) destroy the unmarked copies, or (c) return the  
23 unmarked copies to the Producing Party or person for marking. If returned to the  
24 Producing Party for marking, the Producing Party shall return the marked copies to  
25 the receiving party within five (5) business days. The production or conspicuous use,  
26 in a deposition or otherwise in the presence of counsel for a Producing Party, of a  
27 document inadvertently not designated under section 2.1 or 2.2 above shall not  
28 constitute discovery or notice of such inadvertent failure to so designate or otherwise

1 prejudice the Producing Party's ability to so designate at that time.

2 4.7. Documents containing Confidential Information or Attorney's Eyes Only  
3 Information need not be filed with the Clerk except when required in connection with  
4 Motions under Federal Rules of Civil Procedure 12 or 56 or other matters pending  
5 before the Court, as set forth in this paragraph. Without written permission from the  
6 Designating Party or a court order secured after appropriate notice to all interested  
7 persons, a Party may not file in the public record in this action any Confidential  
8 Information or Attorney's Eyes Only Information. A Party that seeks to file under  
9 seal any Confidential Information or Attorney's Eyes Only Information must comply  
10 with Civil Local Rule 141. Confidential Information or Attorney's Eyes Only  
11 Information may only be filed under seal pursuant to a court order authorizing the  
12 sealing of the specific Confidential Information or Attorney's Eyes Only Information  
13 at issue. Pursuant to Civil Local Rule 141, a sealing order will issue only upon a  
14 request establishing that the Confidential Information or Attorney's Eyes Only  
15 Information at issue is privileged, protectable as a trade secret, or otherwise entitled to  
16 protection under the law.

17 4.8. Any party wishing to use Confidential Information and Attorney's Eyes  
18 Only Information in the trial or in any hearing in the Case shall notify the other parties  
19 of its desire to do so reasonably in advance of the trial or hearing at which the party  
20 wishes to use the information. For trial, this notification must occur no later than the  
21 date the pre-trial order is due or one-month prior to trial, whichever period is longer.  
22 For a hearing, this notification must occur not later than two-weeks before the hearing.  
23 The parties shall negotiate, in good faith, to reach an agreement on the use of such  
24 Confidential Information or Attorney's Eyes Only Information, including restrictions  
25 on the manner in which such information may be used, as necessary to protect the  
26 confidentiality of the information. If the parties cannot reach an agreement on the use  
27 of the information, the party seeking to use the information must notify the Court of  
28 its desire to use the information. The information may be used only in the discretion

1 of the Court, subject to restrictions imposed by the Court to protect confidentiality of  
2 the information.

3 4.9. In the event that a party is ordered or requested to produce or disclose  
4 any document(s) designated as Confidential Information or Attorney's Eyes Only  
5 Information, through a subpoena in another action, a demand in another action to  
6 which it is a party, or any other legal process served by a person not a party to the  
7 Case, the party served with the subpoena, demand, or other legal process shall object  
8 to production of the Confidential Information or Attorney's Eyes Only Information  
9 and shall give prompt written notice to the Producing Party within five (5) days of  
10 receiving the request or order. If the non-party seeking access to the Confidential  
11 Information or Attorney's Eyes Only Information takes action against the party to  
12 enforce such a subpoena, demand, or other legal process, the party shall respond by  
13 noting the existence of this Order. Nothing in this Order requires a party to challenge  
14 or appeal any order requiring production of Confidential Information or Attorney's  
15 Eyes Only Information; to subject itself to any penalties for noncompliance with any  
16 subpoena, demand, legal process, or order; or to seek any relief from this Court.

17 **5. Third-Party Materials**

18 5.1. Non-parties from whom documents and testimony are sought shall be  
19 entitled to designate materials as Confidential Information or Attorney's Eyes Only  
20 Information in accordance with this Order. Furthermore, in order to give the parties to  
21 the Case adequate opportunity to designate the parties' respective Confidential  
22 Information or Attorney's Eyes Only Information contained within materials received  
23 from the non-parties, all documents and materials produced by a non-party shall be  
24 treated as follows:

25 5.2. All materials produced by the non-party shall be treated as Attorney's  
26 Eyes Only Information material for a period of thirty (30) business days from the  
27 receipt by all parties of the production;

28 5.3. At any time on or before the thirtieth business day from receipt of the

1 production, any party to the Case may specifically designate materials produced by  
2 the non-party as the party deems appropriate pursuant to this Order (namely as  
3 Confidential Information or Attorney's Eyes Only Information). A party who  
4 designates the non-party materials must promptly notify in writing all other parties to  
5 the Case of such designation and must promptly include a copy of the non-party  
6 materials, properly marked with such notification. Once non-party materials have been  
7 specifically designated as Confidential Information or Attorney's Eyes Only  
8 Information pursuant to this Section, the remaining provisions of this Order  
9 concerning use and restrictions on such Confidential Information or Attorney's Eyes  
10 Only Information shall apply;

11 5.4. Any materials produced by a non-party that have not been specifically  
12 designated as Confidential Information or Attorney's Eyes Only Information by the  
13 non-party itself or by a party within the thirty-day period will lose their temporary  
14 status as Attorney's Eyes Only Information and will have no designation, subject to  
15 the provisions of Section 4.6 of this Order.

16 **6. Conclusion of the Case**

17 6.1. Upon final conclusion of the Case, all persons to whom Confidential  
18 Information or Attorney's Eyes Only Information has been disclosed shall, without  
19 demand, either destroy or return to the party that produced it all such Confidential  
20 Information and Attorney's Eyes Only Information (and all copies thereof), except  
21 that the party's outside counsel identified in Section 4.2(b) may retain copies of  
22 pleadings, briefs, motions and the like that include Confidential Information or  
23 Attorney's Eyes Only Information. All recipients of Confidential Information and  
24 Attorney's Eyes Only Information shall certify in writing that they have complied  
25 with the provisions of this Section 6.1.

26 6.2. Upon final conclusion of the Case, (a) any Confidential Information and  
27 Attorney's Eyes Only Information that has been submitted for identification or into  
28 evidence in the trial or in any hearing in the Case may be retrieved by counsel for the

1 Producing Party or the party that submitted it for identification or into evidence; (b)  
2 the Clerk is authorized to deliver said Confidential Information or Attorney's Eyes  
3 Only Information to that counsel; and (c) any such Confidential Information or  
4 Attorney's Eyes Only Information not returned to counsel for the Producing Party  
5 shall be destroyed.

6 6.3. This Order shall survive the final conclusion of the Case and continue in  
7 full force and effect. The Court shall retain jurisdiction to enforce this Order.

8 6.4. Under no circumstances shall a party be required to produce documents  
9 or reveal information that it considers Confidential Information or Attorney's Eyes  
10 Only Information until any disputes about such documents or information have been  
11 resolved.

12 6.5. Compliance with the terms of this Order shall not be deemed an  
13 admission that any documents or information are admissible in evidence and shall not  
14 constitute a waiver of any evidentiary or other objections. Entering into, agreeing to,  
15 and/or complying with the terms of this Order shall not (a) operate as an admission by  
16 any party that any document or material designated by any other party as Confidential  
17 Information or Attorney's Eyes Only Information contains or reflects proprietary,  
18 Confidential Information, or Attorney's Eyes Only Information, (b) constitute or be  
19 deemed to constitute a waiver of the attorney-client privilege, the attorney work  
20 product doctrine, or any other applicable privilege or protection, or (c) prejudice in  
21 any way the right of any party (i) to seek determination by the Court as to whether any  
22 particular document or material is Confidential Information or Attorney's Eyes Only  
23 Information or (ii) to seek relief from any provision of this Order, either generally or  
24 with respect to any particular Confidential Information or Attorneys' Eyes Only  
25 Information.

## 26 **7. Enforcement**

27 7.1. If any person bound by this Order violates its terms or threatens to violate  
28 its terms, the Producing Party shall apply to the Court to obtain relief against such

1 person. If the Producing Party seeks injunctive relief, it must petition the Court for  
2 such relief, which may be granted in the discretion of the Court.

3 7.2. This Court shall retain jurisdiction over this Order and the parties to this  
4 Order, including any person who agrees to be bound by this Order by executing  
5 Exhibit A, for purposes of enforcing this Order.

6 **8. Privilege**

7 8.1. If, in connection with the Case, a party produces information that the  
8 party thereafter claims to be privileged or protected by the attorney-client privilege or  
9 attorney work product protection (“Disclosed Protected Information”), the producing  
10 party shall promptly notify the receiving party, in writing, of the producing party’s  
11 claim of attorney-client privilege or work product protection with respect to such  
12 Disclosed Protected Information. If this notice is provided (1) at least 60-days prior to  
13 the parties’ submission of final pretrial memoranda, or (2) within 14-days of the  
14 production of the Disclosed Protected Information, then, pursuant to Fed. R. Evid.  
15 502(d), the disclosure of the Disclosed Protected Information shall not constitute or be  
16 deemed a waiver or forfeiture of any claim of privilege or work product protection  
17 that the producing party would otherwise be entitled to assert with respect to the  
18 Disclosed Protected Information and its subject matter. Otherwise, the disclosure of  
19 the Disclosed Protected Information shall be governed by Fed. R. Evid. 502(b).

20 8.2. The receiving party must—unless it contests the claim of attorney-client  
21 privilege or work product protection in accordance with paragraph 8.3—within five  
22 (5) business days of receipt of that writing, (i) return or destroy all copies of the  
23 Disclosed Protected Information, and (ii) provide a certification of counsel that all of  
24 the Disclosed Protected Information has been returned or destroyed.

25 8.3. If the receiving party contests the claim of attorney-client privilege or  
26 work product protection, the receiving party must—within fifteen (15) days of receipt  
27 of the claim of disclosure—move the Court for an Order compelling disclosure of the  
28 Disclosed Protected Information (a “Disclosure Motion”). The Disclosure Motion

1 must be filed under seal and must not assert as a ground for compelling disclosure the  
2 fact or circumstances of the disclosure. Pending resolution of the Disclosure Motion,  
3 the receiving party must not use the Disclosed Protected Information or disclose it to  
4 any person other than those required by law to be served with a copy of the sealed  
5 Disclosure Motion.

6 8.4. The parties may stipulate to extend the time periods set forth in  
7 paragraphs (8.2) and (8.3).

8 8.5. Disclosed Protected Information that is sought to be reclaimed by the  
9 parties to this case pursuant to this Order shall not be used as grounds by any third  
10 party to argue that any waiver of privilege or protection has occurred by virtue of any  
11 production in this case. Nothing in this Order overrides any attorney's ethical  
12 responsibilities to refrain from examining or disclosing materials that appear on their  
13 face to be privileged and to disclose to the Disclosing Party that such materials have  
14 been produced.

15 8.6. The Disclosing Party retains the burden of establishing the privileged or  
16 protected nature of the Disclosed Protected Information. Nothing in this paragraph  
17 shall limit the right of any party to petition the Court for an *in camera* review of the  
18 Disclosed Protected Information.

19 **9. Miscellaneous**

20 9.1. Nothing herein shall be construed to prevent any party from using or  
21 continuing to use any information that is in the public domain or that subsequently  
22 becomes a part of the public domain other than as a result of any act of such party or  
23 of disclosure in violation of this Order. Nothing herein shall be construed to prevent a  
24 party from using or continuing to use any documents or information known to it or  
25 used by it prior to the filing of this Order or that has come or shall come into a party's  
26 possession independently of disclosure and/or discovery in this Case, except in  
27 accordance with any pre-existing limits attached to those documents or information.

28 9.2. Nothing contained in this Order shall be construed to limit any party's

1 rights (a) to use, in taking depositions of a party, its employees, former employees or  
2 its experts or in briefs or at trial or in any proceeding in this litigation, any information  
3 designated Confidential or Attorney's Eyes Only Information of that party, or (b) to  
4 disclose Confidential or Attorney's Eyes Only Information to any witness at a  
5 deposition or at trial who either wrote (in whole or in part), received, or lawfully has  
6 or had rightful access to such information, except that such witness must execute the  
7 Confidentiality Undertaking. In addition, a witness may be shown any document that  
8 contains or reveals Confidential or Attorney's Eyes Only Information if the witness  
9 (a) is a 30(b)(6) witness testifying on behalf of the Producing Party, (b) is a present  
10 officer, director or employee of the Producing Party, (c) was an officer or director of  
11 the Producing Party at the time the document was sent and/or created, had access to  
12 the document while an officer or director, and who has executed a Confidentiality  
13 Undertaking, (d) was an employee of the Producing Party at the time the document  
14 was sent and/or created and is not then-employed by a competitor of the Producing  
15 Party, or (e) was an employee of the Producing Party at the time the document was  
16 sent and/or created whose duties or position while with the Producing Party would  
17 have provided access to the type of Confidential or Attorney's Eyes Only Information  
18 at issue. Before any person listed in this section may be shown any document that  
19 contains or reveals Confidential or Attorney's Eyes Only Information, the witness  
20 must execute the Confidentiality Undertaking.

21 9.3. Nothing in this Order shall prevent a party from attempting to examine as  
22 witnesses, during depositions or at trial, persons not authorized to receive documents  
23 designated as Confidential or Attorney's Eyes Only Information, as identified herein,  
24 if the examination concerns a document that the witness previously had actual lawful  
25 access to or prior knowledge of as demonstrated by the document itself or by  
26 foundation testimony, so long as the witness executes the Confidentiality  
27 Undertaking. Nor shall this Order prevent counsel from examining a witness to  
28 determine whether he or she has prior knowledge of Confidential or Attorney's Eyes

1 Only Information, so long as such examination shall be in a manner that does not  
2 disclose the details of the designated documents. Any Confidential or Attorney's  
3 Eyes Only Information so used shall not lose its confidential status through such use  
4 and its confidentiality shall be protected in conformance with this Order.

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1 Dated: January 6, 2017

Respectfully submitted,

2 By: /s/ Thomas A. Zimmerman, Jr.

3  
4 ZIMMERMAN LAW OFFICES, P.C.  
5 Thomas A. Zimmerman, Jr. (*pro hac vice*)  
6 Matthew C. De Re (*pro hac vice*)  
7 77 West Washington Street, Suite 1220  
8 Chicago, Illinois 6060

9 - and -

10 LAW OFFICES OF TODD M. FRIEDMAN, P.C.  
11 Todd M. Friedman  
12 324 South Beverly Drive #725  
13 Beverly Hills, California 90211

14 *Counsel for Plaintiff*  
15 *Glenn McMillan*

16 Dated: January 6, 2017

Respectfully submitted,

17 By: /s/ Eric M. Roberts

18 DLA PIPER LLP (US)  
19 Todd M. Noonan  
20 400 Capitol Mall, Suite 400  
21 Sacramento, California 95814-4428

22 -and-

23 Raj N. Shah (*pro hac vice*)  
24 Roger L. Longtin (*pro hac vice*)  
25 Eric M. Roberts (*pro hac vice*)  
26 203 North LaSalle Street, Suite 1900  
27 Chicago, Illinois 60601-1293

28 *Counsel for Defendant*  
*Gro-Well Brands, Inc.*

1 Dated: January 6, 2017

Respectfully submitted,

2  
3 By: /s/ Phillip J. Eskenazi

4 HUNTON & WILLIAMS LLP  
5 Phillip J. Eskenazi (SBN 158976)  
6 550 S. Hope Street, Suite 2000  
Los Angeles, California 90071

7 - and -

8 Neil K. Gilman (*pro hac vice*)  
9 2200 Pennsylvania Ave NW  
10 Washington DC 20037

11 *Counsel for Defendant*  
12 *Lowe's Home Centers, LLC*

13  
14 IT IS SO ORDERED.

15 Dated: January 30, 2017

16 /s/ Sheila K. Oberto  
17 UNITED STATES MAGISTRATE JUDGE

1 **HUNTON & WILLIAMS LLP**  
Phillip J. Eskenazi (SBN 158976)  
2 peskenazi@hunton.com  
Neil K. Gilman (admitted pro hac vice)  
3 ngilman@hunton.com  
550 South Hope Street, Suite 2000  
4 Los Angeles, California 90071-2627  
Telephone: (213) 532-2000  
5 Facsimile: (213) 532-2020

6 Attorneys for Defendants  
LOWE'S HOME CENTERS, LLC  
7

8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**

10  
11 GLENN McMILLAN, individually, and  
on behalf of all others similarly situated,

12 Plaintiff,

13  
14 v.  
15

16 LOWE'S HOME CENTERS, LLC,  
a North Carolina limited liability  
17 company, and  
18 GRO-WELL BRANDS, INC.,  
a Delaware corporation,

19 Defendants.  
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CASE NO.: 1:15-CV-00695-DAD-SKO

**CONFIDENTIALITY  
UNDERTAKING**

1 I acknowledge that I have been given access to, or may be given access to,  
2 certain information, materials, documents, or testimony that a party in the above-  
3 referenced litigation (the "Case") considers Confidential Information or Attorney's  
4 Eyes Only Information. I have received a copy of the Protective Order in the Case. I  
5 have read the Protective Order, I understand the terms of the Protective Order, and I  
6 agree to be bound by the terms of the Protective Order. I understand that the  
7 Protective Order, among other things, prohibits me from disclosing any Confidential  
8 Information to any person not permitted to receive it under Section 4.3 of the  
9 Protective Order, and prohibits me from disclosing any Attorney's Eyes Only  
10 Information to any person not permitted to receive it under Section 4.2 of the  
11 Protective Order, unless the person is a member of my staff allowed to have access to  
12 the information under the Protective Order, in which case I will inform that person of  
13 the contents of the Protective Order and will take all steps necessary to ensure that that  
14 person preserves the confidentiality of the information.

15  
16 Dated: \_\_\_\_\_

Signature: \_\_\_\_\_

17 Print Name: \_\_\_\_\_

18 Address: \_\_\_\_\_

19 \_\_\_\_\_