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7 Attorneys for Plaintiff
8 Kim Embry

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

11 KIM EMBRY, an individual

12 Plaintiff,

13 v.

14 Bonide Products, Inc., a New York
15 Corporation and DOES 1 through 100,
16 inclusive

17 Defendants.

18 Case No. CGC-17-561521

19 **[PROPOSED] CONSENT JUDGMENT**

20 (Health & Safety Code § 25249.6 *et seq.* and
21 Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry”) on one hand,
4 and PBI-Gordon Corporation and Tractor Supply Company (“Defendants”) on the other hand
5 (collectively the “Parties”). Defendants sell products under the brand name Gordon’s, among others.

6 **1.2 Plaintiff**

7 Embry is an individual residing in California and acting in the interest of the general public.
8 She seeks to promote awareness of exposures to toxic chemicals and to improve human health by
9 reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendants**

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

14 **1.4 General Allegations**

15 Embry alleges that Defendants manufacture, import, sell, and distribute for sale in California
16 Gordon’s Malathion 50% Spray that contains Malathion. Embry further alleges that Defendants have
17 done so without providing a sufficient health hazard warning as required by Proposition 65 and
18 related regulations. Pursuant to Proposition 65, Malathion is listed as a chemical known to cause
19 cancer.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, the “Product” or “Products” are defined as Gordon’s
22 Malathion 50% Spray that contains Malathion that is manufactured, imported, sold, or distributed for
23 sale in California by Defendants and Releasees, defined *infra*. Such Products include but are not
24 limited to insect control products that contain the chemical Malathion.

25 **1.6 Notices of Violation**

26 On May 20, 2017, Embry served Defendants, the California Attorney General, and all other
27 required public enforcement agencies with a 60-Day Notice of Violation of California Health and
28 Safety Code section 25249.6 *et seq.* (“Notice”). The Notice alleged that Defendants violated

1 Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
2 associated with exposures to Malathion contained in the Products.

3 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
4 violations alleged in the Notice.

5 **1.7 Complaint**

6 On September 25, 2017, Embry filed a Complaint against Defendants for the alleged
7 violations of Health and Safety Code section 25249.6 that are the subject of the Notice
8 (“Complaint”).

9 **1.8 No Admission**

10 Defendants deny the material, factual, and legal allegations in the Notices and Complaint, and
11 maintains that all of the products they have manufactured, imported, sold, and/or distributed for sale
12 in California, including the Products, have been, and are, in compliance with all laws. Nothing in this
13 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
14 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
15 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
16 not, however, diminish or otherwise affect Defendants’ obligations, responsibilities, and duties under
17 this Consent Judgment.

18 **1.9 Jurisdiction**

19 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
20 Court has jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in
21 the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
22 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
25 the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

26 **2. INJUNCTIVE RELIEF**

27 **2.1 Warnings**

28

1 Commencing ninety (90) days after the Effective Date, and continuing thereafter, Defendants
2 agree to manufacture or distribute for sale in California only Products that are labeled with a clear
3 and reasonable warning pursuant to Section 2.2. Defendants and their downstream retailers shall
4 have no obligation to label Products that have been manufactured, distributed, offered for sale, or
5 have otherwise entered the stream of commerce prior to the Effective Date.

6 **2.2 Clear and Reasonable Warnings**

7 Commencing ninety (90) days after the Effective Date, Defendants shall provide a clear and
8 reasonable warning for any Products that it manufactures, distributes, or offers for sale in California
9 that is not a Reformulated Product. Defendants shall provide the warning affixed to the packaging or
10 labeling using language similar to the warning(s) below:



13 **NOTICE:** This product can expose you to malathion, which is known to
14 the State of California to cause cancer. For more information go to
15 www.P65Warnings.ca.gov/product.

16 The warning shall be prominently placed with such conspicuousness as compared with other
17 words, statements, designs, or devices as to render it likely to be read and understood by an ordinary
18 individual under customary conditions before purchase or use. Each warning shall be provided in a
19 manner such that the consumer or user is reasonably likely to understand to which specific Product
20 the warning applies, so as to minimize the risk of consumer confusion.

21 In the event that the Office of Environmental Health Hazard Assessment promulgates one or
22 more regulations requiring or permitting warning text and/or methods of transmission different than
23 those set forth above, Defendants shall be entitled to use, at their discretion, such other warning text
24 and/or method of transmission without being deemed in breach of this Agreement.

25 **3. MONETARY SETTLEMENT TERMS**

26 **3.1 Settlement Amount**

27 Defendant PBI-Gordon Corporation shall pay twenty four thousand dollars (\$24,000) in
28 settlement and total satisfaction of all the claims referred to in the Notice, the Complaint, and this

1 Consent Judgment. This includes civil penalties in the amount of two thousand dollars (\$2,000)
2 pursuant to Health and Safety Code section 25249.7(b) and attorney's fees and costs in the amount of
3 twenty-two thousand dollars (\$22,000) pursuant to Code of Civil Procedure section 1021.5 and
4 Health and Safety Code section 25249 et seq.

5 **3.2 Civil Penalty**

6 The portion of the settlement attributable to civil penalties shall be allocated according to
7 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
8 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and
9 the remaining twenty-five percent (25%) of the penalty paid to Embry.

10 All payments owed to Embry, shall be delivered to the following payment address:

11 Noam Glick
12 Glick Law Group
13 225 Broadway, Suite 2100
14 San Diego, CA 92101

15 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA
16 (Memo Line "Prop 65 Penalties") at the following addresses:

17 For United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 P.O. Box 4010
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 1001 I Street
28 Sacramento, CA 95814

Defendant PBI-Gordon Corporation agrees to provide Embry's counsel with a copy of the
check payable to OEHHA, simultaneous with its penalty payments to Embry.

The Parties, including Embry, will exchange completed IRS 1099 or other forms as required.

Relevant information for Glick Law Group, N&T, and Embry are set out below:

- 1 • “Kim Embry” whose address and tax identification number shall be provided within five
- 2 (5) days after this Settlement Agreement is fully executed by the Parties;
- 3 • “Glick Law Group” (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 4 • “Nicholas & Tomasevic” (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- 5 and
- 6 • “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA
- 7 95814.

8 **3.3 Attorney’s Fees and Costs**

9 The portion of the settlement attributable to attorney’s fees and costs shall be paid to Embry’s
10 counsel, who are entitled to attorney’s fees and costs incurred by her in this action, including but not
11 limited to investigating potential violations, bringing this matter to Defendants’ attention, as well as
12 litigating and negotiating a settlement in the public interest.

13 Defendant PBI-Gordon Corporation shall provide its payment to Embry’s counsel in two
14 checks, divided equally, payable to Glick Law Group, PC (\$11,000) and Nicholas & Tomasevic, LLP
15 (\$11,000) respectively. The addresses for these two entities are:

16 Noam Glick
17 Glick Law Group
225 Broadway, Suite 2100
18 San Diego, CA 92101

19 Craig Nicholas
20 Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

21 **3.4 Timing**

22 The above-mentioned checks will be issued within fourteen (14) days of the Effective Date.

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Embry’s Public Release of Proposition 65 Claims**

25 For any claim or violation arising under Proposition 65 alleging a failure to warn about
26 exposures to Malathion from Products manufactured, imported, sold, or distributed by Defendants
27 prior to the Effective Date, Embry, acting on her own behalf and in the public interest, releases
28 Defendants of any and all liability. This includes Defendants’ parents, subsidiaries, affiliated

1 entities under common ownership, its directors, officers, agents, employees, attorneys, and each
2 entity to whom Defendants directly or indirectly distribute or sell the Products, including but not
3 limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative
4 members and licensees (collectively, the "Releasees"). Releasees include PBI-Gordon Corporation
5 and Tractor Supply Company, their parents, and all subsidiaries and affiliates thereof and their
6 respective employees, agents, and assigns that sell Defendants' Products. Compliance with the
7 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the
8 alleged or actual failure to warn about exposures to Malathion from Products manufactured,
9 imported, sold, or distributed by Defendants after the Effective Date. This Consent Judgment is a
10 full, final and binding resolution of all claims that were or could have been asserted against
11 Defendants and/or Releasees for failure to provide warnings for alleged exposures to Malathion
12 contained in Products.

13 **4.2 Embry's Individual Release of Claims**

14 Embry, in her individual capacity, also provides a release to Defendants and/or Releasees,
15 which shall be a full and final accord and satisfaction of as well as a bar to all actions, causes of
16 action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands
17 by Embry of any nature, character, or kind, whether known or unknown, suspected or unsuspected,
18 arising out of alleged or actual exposures to Malathion in Products manufactured, imported, sold, or
19 distributed by Defendants before the Effective Date.

20 **4.3 Defendant's Release of Embry**

21 Defendants, on their own behalf, and on behalf of Releasees as well as its past and current
22 agents, representatives, attorneys, successors, and assignees, hereby waive any and all claims
23 against Embry and her attorneys and other representatives, for any and all actions taken or
24 statements made by Embry and her attorneys and other representatives before the Effective Date,
25 whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it,
26 in this matter or with respect to the Products.

27

28

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall
3 be null and void if it is not approved and entered by the Court within one year after it has been fully
4 executed by the Parties, or by such additional time as the Parties may agree to in writing.

5 **6. SEVERABILITY**

6 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is
7 held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely
8 affected.

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the state of California
11 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
12 rendered inapplicable for reasons, including but not limited to changes in the law, then Defendants
13 may provide written notice to Embry of any asserted change, and shall have no further injunctive
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
15 so affected.

16 **8. NOTICE**

17 Unless specified herein, all correspondence and notice required by this Consent Judgment
18 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
19 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

20 For Defendant:

21 Brian M. Ledger, Esq.
22 GORDON REES SCULLY
23 MANSUKHANI, LLP
24 101 West Broadway, Suite 2000
25 San Diego, California 92101

20 For Embry:

21 Noam Glick
22 GLICK LAW GROUP, PC
23 225 Broadway, 21st Floor
24 San Diego, CA 92101

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

27

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1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts, each of which shall be deemed an
3 original, and all of which, when taken together, shall constitute one and the same document.
4 Facsimile or electronic images of signatures shall be considered original for all purposes under this
5 Agreement.

6 **10. POST EXECUTION ACTIVITIES**

7 Embry agrees to comply with the reporting form requirements referenced in Health and Safety
8 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
9 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
10 motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to
11 mutually employ their best efforts, including those of their counsel, to support the entry of this
12 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
13 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
14 approval, responding to any objection that any third-party may make, and appearing at the hearing
15 before the Court if so requested.

16 **11. MODIFICATION**

17 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
18 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application
19 of any Party, and the entry of a modified consent judgment thereon by the Court.

20 **12. AUTHORIZATION**

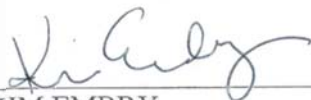
21 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
22 have read, understand, and agree to all of the terms and conditions contained herein.

23 **AGREED TO:**

AGREED TO BY PBI-Gordon Corporation:

24
25
26 Date: October 31, 2018

Date: October 29, 2018

27
28 By: 
KIM EMBRY

By: 
President & CEO

PBI-Gordon Corporation
by: Donald A. Chen [print name]
President & CEO

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AGREED TO BY Tractor Supply Company:

Dated: 10-27-18

By:

Karen S Austin [print name]
Vice President - Legal & Licensing