

COPY OCT 25 2018



20906812

FILED
ALAMEDA COUNTY

DEC 13 2018

CLERK OF THE SUPERIOR COURT
by  Deputy

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ESTATE OF KAREN CHARLENE CALACIN,

12 Plaintiff,

13 v.

14 FRIDABABY, LLC,

15 Defendant.

Case No.: RG18890996

CONSENT JUDGMENT

Judge: Paul D. Herbert

Dept.: 20

Hearing Date: December 13, 2018

Hearing Time: 3:00 PM

Reservation #: R - 2002700

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between the Estate of
3 Karen Charlene Calacin acting on behalf of the public interest (hereinafter “Plaintiff”) and
4 Fridababy, LLC (“Fridababy” or “Defendant”) with Plaintiff and Defendant collectively referred
5 to as the “Parties” and each of them as a “Party.” Karen Calacin was a California citizen that sought
6 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Fridababy is alleged to be a
8 person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code
9 §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Plaintiff alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from Fridababy Bitty Bundles of Joy without
12 providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition
13 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

14 1.3 **Notice of Violation/Complaints.** On or about November 9, 2017, Karen Calacin
15 served Fridababy and various public enforcement agencies with documents entitled “60-Day Notice
16 of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
17 Defendant had violated Proposition 65 for failing to warn consumers and customers that use of
18 Fridababy Bitty Bundles of Joy exposed users in California to DEHP. No public enforcer has
19 brought and is diligently prosecuting the claims alleged in the Notice. On January 29, 2018, Calacin
20 filed a complaint (the “Complaint”) in the matter. On July 25, 2018, the Parties stipulated and
21 agreed to the filing of the First Amended Complaint (the “Amended Complaint”)¹ in order to
22 substitute the Estate of Karen Charlene Calacin as the plaintiff in the Action.

23 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
25 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
26

27 ¹ The Complaint and Amended Complaint are collectively referred to herein as, the
28 “Action.”

1 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
2 claims which were or could have been raised in the Action based on the facts alleged therein and/or
3 in the Notice.

4 1.5 Defendant denies the material allegations contained in the Notice and Action and
5 maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
6 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
7 shall compliance with this Consent Judgment constitute or be construed as an admission by
8 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
9 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
10 responsibilities, and duties of Defendant under this Consent Judgment.

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term “Covered Products” means Fridababy Bitty Bundles
13 of Joy that are manufactured, distributed and/or offered for sale in California by Fridababy.

14 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
15 entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 As of the date this Consent Judgment is signed by both Parties, Fridababy shall not
18 manufacture or order from any supplier any Covered Products intended for retail sale in California
19 with plastic cases that contain DEHP in excess of 0.1% (1,000 ppm) (hereinafter “Reformulated
20 Products”)

21 **4. MONETARY TERMS**

22 4.1 **Civil Penalty.** Fridababy shall pay \$4,000.00 as a Civil Penalty pursuant to Health
23 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
24 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
25 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
26 remitted to Calacin, as provided by California Health & Safety Code § 25249.12(d).
27
28

1 4.1.1 Within ten (10) days of the Effective Date, Fridababy shall issue two
2 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$3,000.00; and
3 (b) "Brodsky & Smith, LLC in Trust for Estate of Karen Charlene Calacin" in the amount of
4 \$1,000.00. Payment owed to Calacin pursuant to this Section shall be delivered to the following
5 payment address:

6 Evan J. Smith, Esquire
7 Brodsky & Smith, LLC
8 Two Bala Plaza, Suite 510
9 Bala Cynwyd, PA 19004

10 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
11 to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

12 For United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 P.O. Box 4010
17 Sacramento, CA 95812-4010

18 For Non-United States Postal Service Delivery:

19 Mike Gyurics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 1001 I Street
23 Sacramento, CA 95814

24 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the address
25 set forth above as proof of payment to OEHHA.

26 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Fridababy shall pay
27 \$31,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff's
28 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Fridababy's
attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
interest, pursuant to Code of Civil Procedure section 1021.5.

1 **5. RELEASE OF ALL CLAIMS**

2 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiff
3 acting on its own behalf, and on behalf of the public interest, and Fridababy, and its parents,
4 shareholders, members, directors, officers, managers, employees, representatives, agents,
5 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
6 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they
7 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
8 not limited to Buy Buy Baby, Inc., manufacturers, suppliers, distributors, wholesalers, customers,
9 licensors, licensees retailers, franchisees, and cooperative members (“Downstream Releasees”), of
10 all claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as
11 set forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
12 Fridababy prior to the Effective Date. This Consent Judgment shall have preclusive effect such
13 that no other person or entity, whether purporting to act in his, her, or its interests or the public
14 interest shall be permitted to pursue and/or take any action with respect to any violation of
15 Proposition 65 that was alleged in the Action, or that could have been brought pursuant to the
16 Notice against Fridababy or its Downstream Releasees of the Product including but not limited to
17 (“Proposition 65 Claims”). Compliance with the terms of this consent judgment constitutes
18 compliance with Proposition 65 with regard to the Covered Products.

19 5.2 In addition to the foregoing, Plaintiff, on behalf of itself, its past and current agents,
20 representatives, attorneys, and successors and/or assignees, and *not* in its representative capacity,
21 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
22 and releases Fridababy, Defendant Releasees, and Downstream Releasees from any and all manner
23 of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
24 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of any nature
25 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
26 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
27 manufactured, distributed, or sold by Fridababy, Defendant Releasees or Downstream Releasees.
28

1 With respect to the foregoing waivers and releases in this paragraph, Plaintiff hereby specifically
2 waives any and all rights and benefits which it now has, or in the future may have, conferred by
3 virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:
4

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

10 5.3 Fridababy waives any and all claims against Plaintiff, its attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Plaintiff and its attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
14 and/or with respect to Covered Products.

15 **6. INTEGRATION**

16 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
17 any and all prior negotiations and understandings related hereto shall be deemed to have been
18 merged within it. No representations or terms of agreement other than those contained herein exist
19 or have been made by any Party with respect to the other Party or the subject matter hereof.

20 **7. GOVERNING LAW**

21 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California and apply within the State of California. In the event that Proposition 65 is repealed or
23 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
24 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
25 to the extent that, Covered Products are so affected.

26 **8. NOTICES**

27 8.1 Unless specified herein, all correspondence and notices required to be provided
28 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
by the other party at the following addresses:

1 For Defendant:

2 Nick Pierce
3 Fridababy, LLC
4 82 NE 26th St, Suite 101
Miami, Florida 33137

5 With a copy to:

6 Jeffrey Margulies
7 Norton Rose Fulbright US LLP
8 555 South Flower Street, Forty-First Floor
Los Angeles, California 90071

9 And

10 For Plaintiff:

11 Evan Smith
12 Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

16 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
17 which shall be deemed an original, and all of which, when taken together, shall constitute one and
18 the same document.

19 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
20 **APPROVAL**

21 10.1 Plaintiff agrees to comply with the requirements set forth in California Health &
22 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
23 Defendant agrees it shall support approval of such Motion.

24 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
25 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
26 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
27 30 days, the case shall proceed on its normal course.

1 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
2 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
3 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
4 its normal course on the trial court's calendar.

5 **11. MODIFICATION**

6 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
7 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

8 **12. ATTORNEY'S FEES**

9 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
10 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

11 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
12 pursuant to law.

13 **13. RETENTION OF JURISDICTION**

14 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent Judgment.

16 **14. AUTHORIZATION**

17 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
18 respective Parties and have read, understood and agree to all of the terms and conditions of this
19 document and certify that he or she is fully authorized by the Party he or she represents to execute
20 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
21 explicitly provided herein each Party is to bear its own fees and costs.
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

AGREED TO:

Date: 8/17/18

Date: _____

By: Hector Velarde

By: _____

HECTOR VELARDE, Administrator of
the ESTATE OF KAREN CHARLENE
CALACIN

FRIDABABY, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 12/13/2018

Paul D. Herbert
Judge of Superior Court

PAUL D. HERBERT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

AGREED TO:

Date: _____

Date: 2/22/18

By: _____

By: 

HECTOR VELARDE, Administrator of
the ESTATE OF KAREN CHARLENE
CALACIN

FRIDABABY, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 12/13/2018


Judge of Superior Court

PAUL D. HERBERT