

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 **Karen Calacin and Fromm International, Inc.**

This Settlement Agreement is entered into by and between Karen Calacin (“Calacin”) and Fromm International, Inc. (“Fromm”). Together, Calacin and Fromm are collectively referred to as the “Parties.” Calacin is an individual who resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Fromm is considered a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section 25249.6, *et seq.* (“Proposition 65”).

1.2 **General Allegations**

Calacin alleges that Fromm has imported, distributed, and/or sold in the State of California shower caps (the “Products”), including but not limited to a shower cap marketed under the Andre brand as UPC No. 0 23508 00680 0, without requisite Proposition 65 warnings. Calacin further alleges that such warnings are required because the Products contain the chemical Diisononyl phthalate (DINP). On December 20, 2013, the State of California listed DINP under Proposition 65 as a chemical known to the State to cause cancer.

1.3 **Notice of Violation**

On or about August 2, 2016, Calacin served Fromm, as well as Sally Beauty Supply, LLC and Sally Beauty Distribution, LLC (collectively, “Sally Beauty”), and various public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*” (“Notice”). The Notice provided Fromm and others, including public enforcers, with notice that alleged that sale of the Products was in violation of California

Health & Safety Code § 25249.6 for failing to provide Proposition 65 warnings that they exposed consumers in California to DINP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.4 No Admission

Fromm denies the material factual and legal allegations contained in the Notice and avers that all of its products that are or have been sold and distributed in California, including the Products, have been and are in compliance with all laws, including Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Fromm of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Fromm of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Fromm under this Settlement Agreement.

1.5 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date that this Settlement Agreement is signed by both Parties.

2. INJUNCTIVE RELIEF

2.1 Reformulation of the Products

Commencing on the Effective Date, and continuing thereafter, Fromm shall only manufacture, import, or otherwise source for authorized sale in California, Reformulated Products as defined pursuant to Section 2.2 below or Products that are labeled with a clear and reasonable Proposition 65 warning pursuant to Section 2.3 below. Products acquired by Fromm prior to the Effective Date are exempted from the foregoing obligation and may be offered for

sale in California and sold through downstream distributors, dealers, and retailers, including Sally Beauty, as previously packaged and received by Fromm.

2.2 Reformulation Standard

“Reformulated Products” shall mean Products that contain less than or equal to 1,000 parts per million (“ppm”) each of DINP, Di(2 ethylhexyl) phthalate (DEHP), Di-n-butyl Phthalate (“DBP”), Butyl benzyl phthalate (“BBP”), Di-n-hexyl Phthalate (“DnHP”), di-isodecyl phthalate (“DIDP”), when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent testing methodologies authorized by government agencies for the detection of phthalate chemicals in consumer products.¹

2.3 Clear and Reasonable Warnings

Commencing on the Effective Date, Fromm shall, for all Products it distributes and that are authorized by it for sale in California that are not Reformulated Products, affix a warning to the consumer-facing packaging or directly on each Product that states:

WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

or

WARNING: This product contains phthalate chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

or

WARNING: This product can expose you to chemicals, including DINP, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

Regardless of which warning statement is utilized, it shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it

¹ Collectively, DINP, BBP, DBP, DIDP, DEHP, and DnHP are referred to herein as “Listed Phthalates.”

likely to be read and understood by an ordinary individual under customary conditions prior to purchase or use.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

3.1 In settlement of all the claims referred to in this Settlement Agreement, Fromm shall pay a total of \$2,000.00 in civil penalties pursuant to California Health & Safety Code § 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(l) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Calacin. More specifically, within fourteen (14) business days of the Effective Date, Fromm shall issue two separate checks for the civil penalty payment to (a) “OEHHA” in the amount of \$1,500.00 and with the memo line on the check indicating “Prop 65 Penalties-Calacin v. Fromm/DINP” (Fromm may reference OEHHA’s Tax Identification Number of 68-0284486 for this check); and (b) “Brodsky & Smith, LLC in Trust for Calacin” in the amount of \$500.00 (for which Calacin shall provide Fromm a completed IRS Form W-9 with a tax identification number within two days following the Effective Date, if not beforehand). These checks shall be delivered as follows:

- (i) The check to Calacin shall be delivered to the following address:

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

- (ii) The check for OEHHA shall be delivered to one of the following addresses:

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief

Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

OR

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Fromm agrees to provide Calacin's counsel with a copy of its check payable to OEHHA upon request.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that Calacin and her counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of this Settlement Agreement had been mutually agreed upon. Calacin then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties reached an accord on the compensation due to Calacin and her counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this Settlement Agreement. Under these legal principles, Fromm shall reimburse Calacin's counsel for fees and costs incurred as a result of investigating and bringing this matter to Fromm's attention, and negotiating a settlement thereof. Within fourteen (14) business days of the Effective Date, Fromm shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$21,000.00 for delivery to the following address:

Evan Smith, Esquire
Brodsky & Smith, LLC
Two Bala Plaza, Ste. 510
Bala Cynwyd, PA 19004

To facilitate timely payment, within two days following the Effective Date, if not beforehand, Brodsky & Smith LLC shall provide Fromm with a completed IRS Form W-9 with its tax identification number.

5. RELEASE OF ALL CLAIMS

5.1 Release of Fromm and Downstream Retailers and Entities

Calacin, acting on her own behalf, releases Fromm, its parent and affiliates, and their respective directors, officers, agents, employees, and attorneys, and each entity to whom Fromm directly or indirectly distributes or sells, or for which it otherwise fulfills orders for, the Products, including, but not limited to, downstream distributors, wholesalers, customers, marketplace hosts and retailers (including, but not limited to, Sally Beauty) and their respective parents, affiliates, and subsidiaries, franchisees, cooperative members, and licensees (collectively, all of the preceding shall be referred to as the "Releasees"), from all claims for violations of Proposition 65 based on the failure to warn about alleged exposures to Listed Phthalates in the Products as acquired by Fromm prior to the Effective Date. As between Calacin and Fromm and the Releasees, compliance with the terms of this Settlement Agreement shall be deemed to constitute compliance with Proposition 65 relative to Listed Phthalates in the Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section(s) 3 and 4 above, Calacin, on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities,

and demands against Fromm or its affiliated companies of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising up to the Effective Date, whether based on Proposition 65 or otherwise. In this regard, Calacin acknowledges that she is familiar with Section 1542 of the California Civil Code; which provides as follows:

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

Calacin is, in this regard, therefore expressly waiving and relinquishing any and all rights and benefits that she may have under, or that may be conferred on her by the provisions of, California Civil Code § 1542, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.

5.2 Fromm's Release of Calacin

Fromm, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Calacin, her attorneys, and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Calacin and/or her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to DINP or the Products, Fromm shall provide written notice to Calacin of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

8. NOTICES

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

For Fromm:

William Kelly
Chief Financial Officer
Fromm International
BKelly@FrommBeauty.com
603 Dempster Street
Mt. Prospect, IL 60056

With a copy to:

Michael Steel
MSteel@mof.com
Morrison & Foerster LLP
425 Market Street, 32nd Floor
San Francisco, CA 94105

For Calacin:

Evan J. Smith
Brodsky & Smith, LLC
Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

9. COUNTERPARTS; SIGNATURES

This Settlement Agreement 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.

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Calacin agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

11. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained in this Settlement Agreement.


AGREED TO:

Date: 3/21/17

By: 
Karen Calacin

AGREED TO:

Date: 2/21/2017

By: 
Fromm International, Inc.