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11 Attorneys for Defendant
12 ANACONDA SPORTS, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 CITY AND COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION
16

17 ANTHONY E. HELD, Ph.D., P.E.,
18 Plaintiff,
19 v.
20 ASCENDIA BRANDS CO., INC., *et al.*,
21 Defendants.

Case No. CGC-08-481439

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code §25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Anaconda Sports, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter “Dr. Held”) and Anaconda Sports, Inc. (hereinafter “Anaconda”), with Dr. Held and
5 Anaconda collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendants**

11 Anaconda 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, California Health & Safety
13 Code §25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Dr. Held alleges that Anaconda has manufactured, distributed and/or sold in the State of
16 California sport-related keepsake/collectible items containing di(2-ethylhexyl)phthalate (“DEHP”).
17 DEHP is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California
18 Health & Safety Code §§25249.5 *et seq.* (“Proposition 65”), as a chemical known to the State of
19 California to cause birth defects and other reproductive harm. DEHP is referred to herein as the
20 “Listed Chemical.”

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as follows:
23 keepsake/collectible sport related items containing the Listed Chemical, including, but not limited to,
24 *Special Day It’s a Boy Mini Football, Item # SDFB-BOY (#7 15896 12101 1)* and *It’s a Boy Mini*
25 *Soccerball*. All such items shall be referred to herein as the “Products.”
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1.6 Notice of Violation

On July 10, 2008, Dr. Held served Anaconda and various public enforcement agencies with a document entitled “60-Day Notice of Violation” that provided Anaconda and such public enforcers with notice that alleged that Anaconda was in violation of California Health & Safety Code §25249.6 for failing to warn consumers and customers that the Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in either of the 60-Day Notices of Violation (“Notices”).

1.7 Complaint

On February 25, 2009, Dr. Held, who was and is acting in the interest of the general public in California, filed a first amended complaint in the case of *Held v. Ascendia Brands, et al.*, adding Anaconda as a defendant and alleging violations of Health & Safety Code § 25249.6 based on the alleged exposures to DEHP contained in what was described as “sporting toys . . . including, but not limited to, *Special Day It’s a Boy Mini Football, Item # SDFB-BOY (#7 15896 12101 1)*” manufactured, distributed and/or sold by Anaconda (“Complaint”).

1.8 No Admission

Anaconda denies the material, factual, and legal allegations contained in Dr. Held’s Notice and Complaint and maintains that all products that it has manufactured, distributed and/or sold in California, including the Products, have been, and are, in compliance with all laws, including Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Anaconda of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Anaconda of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Anaconda. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of Anaconda under this Consent Judgment.

1.9 Consent to Jurisdiction

For purposes of this Consent Judgment only, the parties stipulate that this Court has

1 jurisdiction over Anaconda as to the allegations contained in the Complaint, that venue is proper in
2 the County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions
3 of this Consent Judgment.

4 **1.10 Effective Date**

5 For purposes of this Consent Judgment, the term "Effective Date" shall mean May 29, 2009.

6 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

7 **2.1 Product Warnings**

8 After the Effective Date, Anaconda shall not sell, ship, or offer to be shipped for sale in
9 California, Products containing the Listed Chemical unless such Products are shipped with one of the
10 clear and reasonable warnings set out in Section 2.2 and 2.3 or comply with the reformulation
11 requirements of Phthalate-Free Products set out in Section 2.5.

12 Any warning issued for Products pursuant to Section 2.2 and 2.3 below shall be prominently
13 placed with such conspicuousness as compared with other words, statements, designs or devices as to
14 render it likely to be read and understood by an ordinary individual under customary conditions
15 before purchase, for Products shipped directly to an individual in California, or before use.

16 **2.2 Warnings For Retail Store Sales**

17 **(a) Product Labeling.** Anaconda may perform its warning obligation by
18 affixing a warning to the packaging of, labeling to, or, if no label exists, directly on each Product sold
19 in retail outlets in California by Anaconda or its agents, that states:

20 **WARNING:** This product contains DEHP, a phthalate
21 chemical known to the State of California to
22 cause birth defects and other reproductive harm.

23 **(b) Point-of-Sale Warnings.** Anaconda may perform its warning
24 obligations by ensuring that signs are posted at retail outlets in the State of California where the
25 Products are sold. Point-of-sale warnings shall be provided through one or more signs posted in close
26 proximity to the point of display of the Products that states:

1 **WARNING:** This product contains DEHP, a phthalate
2 chemical known to the State of California to
 cause birth defects and other reproductive harm.

3 Where more than one Product is sold in proximity to other like items or to those that do not
4 require a warning (*e.g.*, Phthalate Free as defined in Section 2.5), the following statement must be
5 used:¹

6 **WARNING:** The following products contain DEHP, a
7 phthalate chemical known to the State of
8 California to cause birth defects and other
 reproductive harm:

9 *[list products for which warning is required]*

10 **2.3 Warnings For Mail Order Catalog and Internet Sales.**

11 Anaconda shall satisfy its warning obligations for Products sold by Anaconda via mail order
12 catalog or the Internet to California residents by providing a warning: (i) in the mail order catalog; or
13 (ii) on the website. Warnings given in the mail order catalog or on the website shall identify the
14 specific Product to which the warning applies as further specified in subsections (a) and (b) below.

15 **(a) Mail Order Catalog Warning.** Any warning provided in a mail order catalog
16 must be in the same type size or larger than the Product description text within the catalog. The
17 following warning shall be provided on the same page and in the same location as each display of the
18 Product:

19 **WARNING:** This product contains DEHP, a phthalate
20 chemical known to the State of California to
21 cause birth defects and other reproductive harm.

22 Where it is impracticable to provide the warning on the same page and in the same location as
23 the display of the Product, Anaconda may utilize a designated symbol (▲) to cross reference the
24 applicable warning and shall define the term “designated symbol” with the following language on the

25 _____
26 ¹ For purposes of this Consent Judgment, “sold in proximity to other like items” shall mean that the Product and
27 another product are offered for sale close enough to each other so that the consumer, under customary conditions of
28 purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 inside of the front cover of the catalog and on the same page as any order form for the Product(s):

2 **WARNING:** Certain products identified with this symbol ▲
3 and offered for sale in this catalog contain
4 DEHP, a phthalate chemical known to the State
5 of California to cause birth defects and other
6 reproductive harm.

7 The designated symbol must appear on the same page and in close proximity to the display or
8 description of the Product. On each page where the designated symbol appears, Anaconda must
9 provide a reference directing the consumer to the warning language and definition of the designated
10 symbol.

11 If Anaconda elects to sell one or more Products to consumers via mail order catalog after the
12 Effective Date, then the warnings must be included in all catalogs containing the Products which are
13 printed after the entry of this Consent Judgment for distribution in California.

14 **(b) Internet Website Warning.** A warning may be given in conjunction with the
15 sale of the Product to a California consumer via the Internet, provided it appears either: (i) on the
16 same web page on which the Product is displayed; (ii) on the same web page as the order form for the
17 Product; (iii) on the same page as the price for any Product; or (iv) on one or more web pages
18 displayed to a purchaser during the checkout process. The following warning statement shall be used
19 and shall appear in any of the above instances adjacent to or immediately following the display,
20 description, or price of the Product for which it is given in the same type size or larger than the
21 Product description text:

22 **WARNING:** This product contains DEHP, a phthalate
23 chemical known to the State of California to
24 cause birth defects and other reproductive harm.

25 Alternatively, the designated symbol may appear adjacent to or immediately following the
26 display, description, or price of the Product for which a warning is being given, provided that the
27 following warning statement also appears elsewhere on the same web page, as follows:
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1 **WARNING:** Products identified on this page with the
2 following symbol ▲ contain DEHP, a phthalate
3 chemical known to the State of California to
4 cause birth defects and other reproductive harm.

5 **2.4 Exceptions To Warning Requirements**

6 The warning requirements set forth in Sections 2.1 through 2.3 shall not apply to:

- 7 (i) any Products received by Anaconda prior to receipt of the Notices, provided
8 that Anaconda does not have actual knowledge, or reason from communications with
9 its suppliers of the Products to believe, that DEHP is present in such Products in
10 concentrations exceeding 1,000 ppm each;
- 11 (ii) any Products shipped by Anaconda to its California customers before the
12 Effective Date; or
- 13 (iii) Phthalate-Free Products (as defined in Section 2.5).

14 **2.5 Reformulation Commitment**

15 Except as provided for in this Agreement, as of the Effective Date, Anaconda commits that it
16 shall only manufacture, distribute or caused to be manufactured or distributed, Products in California
17 that are Phthalate Free as set forth below. For purposes of this Consent Judgment, “Phthalate Free”
18 Products shall mean Products containing less than or equal to 1,000 parts per million (“ppm”) of
19 DEHP when analyzed pursuant to Environmental Protection Agency (“EPA”) testing methodologies
20 3580A and 8270C, or equivalent methods as may be allowed under Proposition 65.

21 **3. MONETARY PAYMENTS**

22 **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

23 In settlement of all the claims referred to in this Consent Judgment against it, Anaconda shall
24 pay \$1,000.00 in civil penalties to be apportioned in accordance with California Health & Safety
25 Code §25192, with 75% of these funds remitted to the State of California’s Office of Environmental
26 Health Hazard Assessment and the remaining 25% of these penalty monies remitted to Dr. Held as
27 provided by California Health & Safety Code §25249.12(d). Anaconda shall issue two separate
28 checks for the penalty payment: (a) one check made payable to Hirst & Chanler LLP in Trust for the

1 State of California's Office of Environmental Health Hazard Assessment ("Hirst & Chanler LLP in
2 Trust for OEHHA") in the amount of \$750.00, representing 75% of the total penalty and (b) one
3 check to "Hirst & Chanler LLP in Trust for A. Dr. Held" in the amount of \$250.00, representing 25%
4 of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall
5 be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of
6 \$750.00. The second 1099 shall be issued to Dr. Held in the amount of \$250.00, whose address and
7 tax identification number shall be furnished, upon request, at least five calendar days before payment
8 is due. The payments shall be delivered on or before ten days after the Effective Date, at the
9 following address:

10 HIRST & CHANLER LLP
11 Attn: Proposition 65 Controller
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

15 **4. REIMBURSEMENT OF FEES AND COSTS**

16 **4.1 Attorney Fees and Costs.**

17 The parties reached an accord on the compensation due to Dr. Held and his counsel under the
18 private attorney general doctrine and principles of contract law. Under these legal principles,
19 Anaconda shall reimburse Dr. Held's counsel for fees and costs, incurred as a result of investigating,
20 bringing this matter to Anaconda attention, and negotiating a settlement in the public interest.
21 Anaconda shall pay Dr. Held and his counsel \$13,000.00 for all attorneys' fees, expert and
22 investigation fees, and related costs. The payment shall be issued in a third separate check made
23 payable to "Hirst & Chanler LLP" and shall be delivered on or before ten days after the Effective
24 Date, at the following address:

25 HIRST & CHANLER LLP
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

Anaconda shall issue a separate 1099 for fees and cost paid in the amount of \$13,000.00 to Hirst &

1 Chanler LLP, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 20-
2 3929984).

3 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

4 Pursuant to CCP §§1021 and 1021.5, the Parties agree that Anaconda will reimburse Dr. Held
5 and his counsel for their reasonable fees and costs incurred in seeking judicial approval of this
6 settlement in the trial court, in an amount not to exceed \$1,000.00. Such additional fees and costs,
7 exclusive of fees and costs that may be incurred in the event of an appeal include, but are not limited
8 to, drafting and filing of the motion to approve papers, fulfilling the reporting requirements
9 referenced in Health & Safety Code §25249.7(f), responding to any third party objections,
10 corresponding with opposing counsel, and appearing before the Court related to the approval process.

11 Reimbursement of such additional fees and costs shall be due within fifteen days after receipt
12 of a billing statement from Dr. Held (“Additional Fee Claim”). Payment of the Additional Fee Claim
13 shall be made to “Hirst & Chanler LLP,” and the payment shall be delivered, at the following
14 address:

15 HIRST & CHANLER LLP
16 Attn: Proposition 65 Controller
2560 Ninth Street
17 Parker Plaza, Suite 214
Berkeley, CA 94710

18 Anaconda has the right to object to such reimbursement and may submit the resolution of this
19 issue to the American Arbitration Association (AAA) in Northern California to determine the
20 reasonableness of the additional fees and costs sought, provided that an arbitration notice, notice of
21 objection, or decision to arbitrate is received by Dr. Held by the end of the fifteen calendar days
22 provided for payment following receipt of the Additional Fee Claim. If an arbitration notice is not
23 filed with AAA in a timely manner, Dr. Held may file a motion with the Court pursuant to both CCP
24 §1021.5 and this settlement to recover additional attorney fees and costs incurred as set forth in this
25 paragraph. In the event Anaconda submits the matter to arbitration, Dr. Held may seek, pursuant to
26 CCP §1021.5, reasonable attorney fees and costs incurred for the arbitration.
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1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Dr. Held’s Release of Anaconda**

3 In further consideration of the promises and agreements herein contained, the injunctive relief
4 set forth in Section 2, and for the payments to be made pursuant to Sections 3 and 4 above, Dr. Held,
5 on behalf of himself, his past and current agents, representatives, attorneys, successors and/or
6 assignees, and in the interest of the general public, hereby waives all rights to institute or participate
7 in, directly or indirectly, any form of legal action and releases all claims, including, without
8 limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
9 damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees,
10 expert fees and attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed or
11 contingent (collectively “Claims”), against Anaconda and each of its downstream distributors,
12 wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, customers, owners,
13 purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers,
14 directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent
15 entities, including but not limited to Burlington Coat Factory Warehouse Corporation (collectively
16 “Releasees”). This release is limited to those claims that arise under Proposition 65, as such claims
17 relate to the alleged failure to warn about exposures to or identification of DEHP contained in the
18 Products, including as raised in, or which could have been raised in, the First Amended Complaint.

19 The Parties further understand and agree that the above releases shall not extend upstream to
20 any entities that manufactured the Products or any component parts thereof, or any distributors or
21 suppliers who sold the Products or any component parts thereof to Anaconda.

22 **5.2 Anaconda’s Release of Dr. Held**

23 Anaconda waives any and all claims against Dr. Held, his attorneys and other representatives,
24 for any and all actions taken or statements made (or those that could have been taken or made) by Dr.
25 Held and his attorneys and other representatives, whether in the course of investigating claims or
26 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the
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1 Products.

2 **6. COURT APPROVAL**

3 This Consent Judgment is not effective until it is approved and entered by the Court and shall
4 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
5 has been fully executed by all parties, in which event any monies that have been provided to Dr.
6 Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
7 (15) days after receiving written notice from Anaconda that the one-year period has expired.

8 **7. SEVERABILITY**

9 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
10 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
11 remaining shall not be adversely affected.

12 **8. GOVERNING LAW**

13 The terms of this Consent Judgment shall be governed by the laws of the State of California
14 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
15 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
16 Anaconda shall have no further obligations pursuant to this Consent Judgment with respect to, and to
17 the extent that, the Covered Products are so affected.

18 **9. NOTICES**

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

23 For Anaconda:

24 Carolyn Collins, Esq.
25 Lauren M. Michals, Esq.
26 Nixon Peabody LLP
27 One Embarcadero Center, 18th Floor
28 San Francisco, CA 94111-3600

1 For Dr. Held:

2 Proposition 65 Coordinator
3 Hirst & Chanler, LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710

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

9 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

13 **11. COMPLIANCE WITH HEALTH & SAFETY CODE §25249.7(f)**

14 Dr. Held agrees to comply with the reporting form requirements referenced in California
15 Health & Safety Code §25249.7(f).

16 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

17 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
18 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
19 approval, Dr. Held and Anaconda and their respective counsel agree to mutually employ their best
20 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
21 Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall
22 include, at a minimum, cooperating on the drafting and filing any papers in support of the required
23 motion for judicial approval.

24 **13. MODIFICATION**

25 This Consent Judgment may be modified only: (1) by written agreement of the parties and
26 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
27 any party and entry of a modified consent judgment by the Court. The Attorney General shall be
28 served with notice of any proposed modification to this Consent Judgment at least fifteen days in
advance of its consideration by the Court.

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14. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions hereof.

AGREED TO:

APPROVED
By Anthony E Held at 5:13 pm, 5/12/09

Date: _____

By: Anthony E Held
Anthony E. Held, Ph.D., P.E.

AGREED TO:

Date: _____

By: _____
John Stote, Jr. President
Anaconda Sports, Inc.

APPROVED AS TO FORM:

Date: 5/13/09

HIRST & CHANLER LLP

By: Christy Chen for
David Lavine
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

APPROVED AS TO FORM:

Date: _____

NIXON PEABODY LLP

By: _____
Carolyn Collins
Attorneys for Defendant
ANACONDA SPORTS, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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14. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions hereof.

AGREED TO:

AGREED TO:

Date: _____

Date: 5/13/09

By: _____
Anthony E. Held, Ph.D., P.F.

By: *John Stole, Jr.*
John Stole, Jr. President
Anaconda Sports, Inc.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: _____

Date: May 13, 2009

HIRST & CHANLER LLP

NIXON PEABODY LLP

By: _____
David Lavine
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

By: *Carolyn Collins*
Carolyn Collins
Attorneys for Defendant
ANACONDA SPORTS, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT