

1 **THE CHANLER GROUP**
2 CLIFFORD A. CHANLER (BAR NO. 135534)
3 DAVID LAVINE (BAR NO. 166744)
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff ANTHONY E. HELD,
10 PH.D., P.E.

11 **FULBRIGHT & JAWORSKI L.L.P.**
12 JEFFREY B. MARGULIES (BAR NO. 126002)
13 555 South Flower Street
14 Forty-First Floor
15 Los Angeles, CA 90071
16 Telephone: (213) 892-9200
17 Facsimile: (213) 892-9494

18 Attorneys for Defendant
19 BURLINGTON COAT FACTORY
20 WAREHOUSE CORPORATION

21 SUPERIOR COURT OF THE STATE OF CALIFORNIA
22 COUNTY OF SAN FRANCISCO

23 ANTHONY E. HELD, PH.D., P.E.,) Case No. CGC 08-481439
24)
25 Plaintiff,)
26)
27 v.)
28)
29 ASCENDIA BRANDS CO., INC.;)
30 BURLINGTON COAT FACTORY) **CONSENT JUDGMENT**
31 WAREHOUSE CORPORATION; ANACONDA)
32 SPORTS, INC.; CUTIE PIE BABY, INC.;)
33 TOMMY HILFIGER U.S.A., INC.; and DOES 4)
34 through 150, inclusive,)
35)
36 Defendants.)

1 **1. INTRODUCTION**

2 1.1 **Anthony E. Held, Ph.D., P.E., and Burlington Coat Factory Warehouse**
3 **Corporation.** This Consent Judgment is entered into by and between plaintiff Anthony E. Held,
4 Ph.D., P.E. (“Dr. Held” or “Plaintiff”) and defendant Burlington Coat Factory Warehouse
5 Corporation (“BCF” or “Defendant”), with Dr. Held and BCF collectively referred to as the
6 “Parties.”

7 1.2 **Plaintiff.** Dr. Held is an individual residing in the State of California who seeks to
8 promote awareness of exposure to toxic chemicals and improve human health by reducing or
9 eliminating hazardous substances contained in consumer products.

10 1.3 **Defendant.** BCF employs ten or more persons and is a person in the course of
11 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
12 California Health & Safety Code §25249.5 et seq. (“Proposition 65”).

13 1.4 **General Allegations.** Dr. Held alleges that BCF has manufactured, distributed
14 and/or sold certain products containing di(2-ethylhexyl)phthalate (“DEHP”) or lead and lead
15 compounds (“Lead”) for use in the State of California without the requisite health hazard
16 warnings. DEHP and Lead are known to cause birth defects and other reproductive harm, and are
17 listed pursuant to Proposition 65. BCF denies Dr. Held’s allegations, and asserts that upon
18 learning of plaintiff’s claims with respect to the Covered Products defined below, removed any
19 such products remaining in inventory in its stores in California.

20 1.5 **Notices of Violation.**

21 1.5.1 On July 10, 2008, Dr. Held served BCF and various public enforcement
22 agencies with a document entitled “60-Day Notice of Violation” that alleged that BCF
23 violated Proposition 65 by failing to warn consumers that “Baby Magic Starter Basket,”
24 exposed users in California to DEHP.

25 1.5.2 On April 2, 2009, Dr. Held served BCF and various public enforcement
26 agencies with a document entitled “60-Day Notice of Violation” that alleged that BCF
27 violated Proposition 65 by failing to warn consumers that “3pc Set Diary Keychain Pen,”

28

1 "Baby Magic Starter Basket," and "Tender Toes Shoes" exposed users in California to
2 DEHP.

3 1.5.3 On September 30, 2009, Dr. Held served BCF and various public
4 enforcement agencies with a document entitled "60-Day Notice of Violation" that alleged
5 that BCF violated Proposition 65 by failing to warn consumers that "Looney Tunes
6 French Toast Raincoat," exposed users in California to Lead.

7 **1.6 Complaints.**

8 1.6.1 **Original Complaint.** On October 30, 2008, Dr. Held, who is acting in the
9 interest of the general public in California, filed a complaint ("Complaint" or "Action")
10 against BCF, Ascendia Brands, Inc., and Does 1 through 150, alleging violations of
11 California Health & Safety Code §25249.6 based on the alleged exposure to DEHP from
12 "vinyl bathroom toys/children's items."

13 1.6.2 **First Amended Complaint.** On February 25, 2009, Dr. Held filed a first
14 amended complaint ("FAC") alleging violations of California Health & Safety Code
15 §25249.6 based on the alleged exposure to DEHP from the following products: "Got
16 Milk? 4 Piece Bottle Cooler Set," "Baby Magic Starter Basket," "Special Day It's A Boy
17 Mini Football," and "Tommy Hilfiger Layette Beach in a Bag."

18 1.6.3 **Second Amended Complaint.** On August 5, 2009, plaintiff filed a second
19 amended complaint ("SAC"). In the SAC, plaintiff alleged exposure to DEHP from "Got
20 Milk? 4 Piece Bottle Cooler Set," "Special Day It's A Boy Mini Football," "Baby Magic
21 Starter Basket," "Soccer Insulated Lunch Cooler," "Disney/Pixar Cars 11 Piece Study
22 Kit," "Roadblock Hooded Sweatshirt HGrey," "Hot Wheels Cinch and Sack Wallet Set,"
23 "Winnie the Pooh Hat & Gloves Set," "Hawke & Co. Outfitter Jacket, Black," "Airwalk
24 Hooded Jacket," "Disney's Winnie the Pooh Lunch Bag," "Barney Touch Down Shoes,"
25 "Lovable Friends Baby Booties," and "Zero Exposur Authentic Element Protector
26 Jacket."

27 1.6.4 **Third Amended Complaint.** On May 3, 2010, pursuant to leave of court,
28 plaintiff will file a third amended complaint ("TAC"). In the TAC, plaintiff alleged

1 exposure to DEHP from "Baby Magic Starter Basket," "3pc Set Diary Keychain Pen," and
2 "Tender Toes Shoes," and exposure to lead from "Looney Tunes French Toast Raincoat."

3 1.7 **No Admission.** The Parties enter into this Consent Judgment as a full and final
4 settlement of all claims that were raised in the Complaints or that could have been raised in the
5 Complaints, arising out of the facts or conduct alleged therein. By execution of this Consent
6 Judgment and agreeing to comply with its terms, BCF does not admit any facts or conclusions of
7 law, including, but not limited to, any facts or conclusions of law suggesting or demonstrating
8 any violations of Proposition 65 or any other statutory, common law or equitable requirements
9 relating to DEHP or lead in Covered Products. Nothing in this Consent Judgment shall be
10 construed as an admission by BCF of any fact, conclusion of law, issue of law or violation of law,
11 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
12 BCF of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Consent
13 Judgment shall prejudice, waive or impair any right, remedy, argument or defense BCF may have
14 in this or any other or future legal proceedings. This Consent Judgment is the product of
15 negotiation and compromise and is accepted by BCF for purposes of settling, compromising, and
16 resolving issues disputed in this action. However, this section shall not diminish or otherwise
17 affect the obligations, responsibilities and duties of BCF under this Consent Judgment.

18 1.8 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, BCF
19 stipulate that this Court has jurisdiction over BCF as to the allegations contained in the
20 Complaints, that venue is proper in the County of San Francisco and that this Court has
21 jurisdiction to enter and enforce the provisions of this Consent Judgment.

22 **2. Definitions.**

23 2.1 "Complaints" means the original and amended complaints identified in Section
24 1.6.

25 2.2 "DEHP Covered Products" means the following products:

26 2.2.1 Baby Magic Starter Basket

27 2.2.2 3pc Set Diary Keychain Pen

28 2.2.3 Tender Toes Shoes

1 2.3 “Effective Date” means the date this Consent Judgment is approved by the court.

2 **3. INJUNCTIVE RELIEF: REFORMULATION**

3 3.1 **DEHP Covered Products.** Commencing May 15, 2010, BCF shall not sell or
4 offer for sale in California any DEHP Covered Product containing DEHP in concentrations
5 exceeding 0.1 percent (1,000 parts per million (“ppm”)) when analyzed pursuant to any
6 methodology utilized by federal or state agencies for the purpose of determining DEHP content in
7 a solid substance.

8 3.2 **Looney Tunes French Toast Raincoat.** Commencing May 15, 2010, BCF shall
9 not sell or offer for sale the Looney Tunes French Toast Raincoat in California with Lead in
10 concentrations exceeding 100 ppm when analyzed pursuant to EPA testing methodologies 3050B
11 and 6010B, or equivalent methodologies utilized by federal or state agencies for the purpose of
12 determining lead content in a solid substance.

13 **4. ENFORCEMENT OF CONSENT JUDGMENT**

14 4.1 **General Enforcement Provisions.** Any Party may, by motion or application for
15 an order to show cause before the Superior Court of the County of San Francisco, enforce the
16 terms and conditions contained in this Consent Judgment. A Party may file such a motion or
17 application only after that Party first provides 30 days notice to the Party allegedly failing to
18 comply with the terms and conditions of this Consent Judgment and attempts to resolve such
19 Party’s failure to comply in an open and good faith manner.

20 **5. MONETARY PAYMENTS**

21 5.1 **Payments Made Pursuant to Health & Safety Code §25249.7(b).** In settlement
22 of all the claims referred to in this Consent Judgment, BCF shall pay \$8,000 to be apportioned in
23 accordance with California Health & Safety Code §25192, with 75% of these funds remitted to
24 the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the
25 remaining 25% of the amount remitted to Anthony Held as provided by California Health &
26 Safety Code §25249.12(d). BCF shall issue two separate checks for the payment: (a) one check
27 made payable to “The Chanler Group in trust For OEHHA” in the amount of \$6,000, representing
28 75% of the total payment; and (b) one check to “The Chanler Group in trust for Anthony Held” in

80813647.1

1 the amount of \$2,000, representing 25% of the total payment. Two separate 1099s shall be issued
2 for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-
3 0284486); and (b) Anthony Held, whose information shall be provided five calendar days before
4 the payment is due.

5 Payment shall be delivered to Dr. Held's counsel within two business days of the
6 Effective Date, at the following address:

7 THE CHANLER GROUP
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

10 5.2 **Reimbursement of Fees and Costs.** Pursuant to Code of Civil Procedure (CCP)
11 §1021.5, BCF shall reimburse Dr. Held and his counsel a total of \$48,000 for fees and costs
12 incurred as a result of investigating, bringing this matter to BCF's attention, and litigating and
13 negotiating a settlement in the public interest. BCF shall issue a separate 1099 for fees and costs
14 (EIN: 20-3929984) and shall make the check payable to "The Chanler Group" and to be delivered
15 within two business days of the Effective Date, to the following address:

16 THE CHANLER GROUP
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

19 6. CLAIMS COVERED AND RELEASE

20 6.1 This Consent Judgment is a full, final, and binding resolution between Dr. Held
21 and BCF and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates,
22 sister companies and their successors and assigns ("Defendant Releasees") of any violation of
23 Proposition 65 that has been or could have been asserted in the public interest against BCF and
24 Defendant Releasees regarding the failure to warn about exposure to DEHP in DEHP Covered
25 Products and the failure to warn about exposure to lead in Looney Tunes French Toast Raincoat.

26 6.2 Dr. Held on behalf of himself, his past and current agents, representatives,
27 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all
28 rights to institute or participate in, directly or indirectly, any form of legal action and releases all

80813647.1

- 5 -

1 claims, including, without limitation, all actions, and causes of action, in law or in equity, suits,
2 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including,
3 but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever,
4 whether known or unknown, fixed or contingent (collectively "Claims"), against BCF and
5 Defendant Releasees arising from any violation of Proposition 65 regarding the failure to warn
6 about exposure to DEHP in DEHP Covered Products and lead in Looney Tunes French Toast
7 Raincoat.

8 6.3 Except as to Buddy Boys Football Shirt; Carter's Watch The Wear Hooded
9 Sweatshirt; Draw the Marvel Comics Super Heroes; Gerber Crib Shoes; Healthtex G-Force T-
10 Shirt; Iron Man Card Game Set; Lee Outerwear Jacket; Sesame Street Zipper Pull Change
11 Holder; The Lion King Bath Time Bubble Book; Vitamins Baby Newborn Set; Winnie the Pooh
12 Jacket; and Eyewear Case with Sunglasses ("Excluded Products") Dr. Held on behalf of himself,
13 his past and current agents, representatives, attorneys, successors, and/or assignees, but *not* in his
14 representative capacity hereby waives all Claims against BCF and Defendant Releasees arising
15 from any violation of Proposition 65 that was or could have been asserted regarding the alleged
16 failure to warn about exposure to DEHP and Lead in any product sold by BCF prior to the
17 Effective Date. In this regard, Dr. Held in his individual capacity only, specifically waives the
18 provisions of section 1542 of the California Civil Code, which provides as follows:

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

24 6.4 The provisions of Sections 6.1 through 6.3 expressly shall not extend to: (a) any
25 entities that manufactured the DEHP Covered Products, Looney Tunes French Toast Raincoat or
26 any other product, or (b) any distributors or suppliers who sold the DEHP Covered Products,
27 Looney Tunes French Toast Raincoat or any other product sold to BCF.

28 6.5 **Defendant's Release of Dr. Held.** BCF and Defendant Releasees waive any and
all claims against Dr. Held, his attorneys, and other representatives for any and all actions taken

1 or statements made (or those that could have been taken or made) by Dr. Held and his attorneys
2 and other representatives, whether in the course of investigating claims or otherwise seeking
3 enforcement of Proposition 65 against them in this matter, and/or with respect to the DEHP
4 Covered Products, Looney Tunes French Toast Raincoat or any other product sold by BCF.

5 6.6 BCF also provides a general release herein which shall be effective as a full and
6 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
7 attorneys' fees, damages, losses, claims, liabilities and demands of BCF of any nature, character
8 or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the
9 Action. BCF acknowledges that it is familiar with Section 1542 of the California Civil Code,
10 which provides as follows:

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

16 BCF expressly waives and relinquishes any and all rights and benefits which it may have under,
17 or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as
18 well as under any other state or federal statute or common law principle of similar effect, to the
19 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
20 In furtherance of such intention, the release hereby given shall be and remain in effect as a full
21 and complete release notwithstanding the discovery or existence of any such additional or
22 different claims or facts arising out of the released matters.

23 7. COURT APPROVAL

24 7.1 By this Consent Judgment and upon its approval, the Parties waive their right to
25 trial on the merits, and waive rights to seek appellate review of any and all interim rulings,
26 including all pleading, procedural, and discovery orders.

27 7.2 Plaintiff shall file a motion seeking approval of this Consent Judgment pursuant to
28 California Health & Safety Code §25249.7(f), and BCF shall support the entry of such motion.

1 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
2 and any and all prior agreements between the parties merged herein shall terminate and become
3 null and void, and the action shall revert to the status that existed prior to the execution date of
4 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
5 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
6 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
7 action, or in any other proceeding; and (c) the parties agree to meet and confer to determine
8 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

9 **8. ATTORNEYS' FEES**

10 8.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
11 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
12 unless the unsuccessful Party has acted with substantial justification. For purposes of this
13 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
14 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

15 8.2 Except as specifically provided in Section 5.2, Section 8.1, each Party shall bear its
16 own costs and attorney's fees in connection with this action.

17 8.3 Nothing in this Section 8 shall preclude a Party from seeking or shall authorize an
18 award of (a) sanctions pursuant to law, or (b) attorney's fees and costs incurred in defending the
19 trial court's approval of this Consent Judgment on an appeal brought by a third party.

20 **9. GOVERNING LAW**

21 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California, and shall apply only to DEHP Covered Products and Looney Tunes French Toast
23 Raincoat offered for sale in the State of California. In the event that Proposition 65 is repealed or
24 is otherwise rendered inapplicable by reason of law generally, or as to the DEHP Covered
25 Products and Looney Tunes French Toast Raincoat, then BCF may provide written notice to Dr.
26 Held of any asserted change in the law, and shall have no further obligations pursuant to this
27 Consent Judgment with respect to, and to the extent that, the DEHP Covered Products and
28 Looney Tunes French Toast Raincoat are so affected.

1 9.2 The Parties, including their counsel, have participated in the preparation of this
2 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
3 Consent Judgment was subject to revision and modification by the Parties and has been accepted
4 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
5 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
6 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
7 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
8 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
9 this regard, the Parties hereby waive California Civil Code § 1654.

10 **10. NOTICES**

11 10.1 Unless specified herein, all correspondence and notices required to be provided
12 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
13 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
14 Party by the other Party at the following addresses:

15 To BCF:

16 General Counsel
17 Burlington Coat Factory Warehouse Corporation
18 1830 Route 130
19 Burlington, NJ 08016

20 With a copy to:

21 Jeffrey B. Margulies, Esq.
22 Fulbright & Jaworski LLP
23 555 South Flower Street
24 41st Floor
25 Los Angeles, California 90071

26 To Dr. Held:

27 Proposition 65 Coordinator
28 The Chanler Group
 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

10.2 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.

1 **11. MODIFICATION**

2 11.1 **Modification.** This Consent Judgment may be modified by written agreement of
3 the Parties and upon entry of a modified Consent Judgment by the court, or by motion of any
4 Party and entry of a modified Consent Judgment by the court.

5 11.2 **Subsequent Legislation.** If, subsequent to the Effective Date, legislation or
6 regulation is adopted that addresses the DEHP content of DEHP Covered Products sold in
7 California or Lead content of Looney Tunes French Toast Raincoat, any Party shall be entitled to
8 request that the Court modify the reformulation standard of Section 3.1 of this Consent Judgment
9 for good cause shown.

10 11.3 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
11 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
12 modify the Consent Judgment.

13 **12. ENTIRE AGREEMENT**

14 12.1 Except as to Excluded Products, this Consent Judgment contains the sole and
15 entire agreement and understanding of the Parties with respect to the entire subject matter hereof,
16 and any and all prior discussions, negotiations, commitments, or understandings related thereto, if
17 any, are hereby merged herein and therein. No supplementation, modification, waiver, or
18 termination of this Consent Judgment shall be binding unless executed in writing by the Party to
19 be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed
20 or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
21 such waiver constitute a continuing waiver.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. COUNTERPARTS; FACSIMILE SIGNATURES**

26 14.1 This Consent Judgment may be executed in counterparts and by facsimile or
27 portable document format (pdf), each of which shall be deemed an original, and all of which,
28 when taken together, shall constitute one and the same document.

1 **15. AUTHORIZATION**

2 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of
3 their respective Parties and have read, understood, and agree to all of the terms and conditions of
4 this Consent Judgment.

5

6

7

8

9

10

11

12

AGREED TO:	AGREED TO:
<p>Date: APPROVED <i>By Anthony Held at 5:07 pm, Apr 29, 2010</i></p> <p>By: <i>Anthony E Held</i> Plaintiff, ANTHONY E. HELD, Ph.D., P.E.</p>	<p>Date: _____</p> <p>By: _____ Defendant, BURLINGTON COAT FACTORY WAREHOUSE CORPORATION.</p>

13

14

IT IS SO ORDERED.

15

16

17

18

19

20

21

22

23

24

25

26

27

28

Date: _____ JUDGE OF THE SUPERIOR COURT

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

15. AUTHORIZATION

15.1 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 of this Consent Judgment.

AGREED TO:	AGREED TO:
Date: _____	Date: <u>May 2009</u>
By: _____ Plaintiff, ANTHONY E. HELD, Ph.D., P.E.	By: <u>[Signature]</u> Defendant, BURLINGTON COAT FACTORY WAREHOUSE CORPORATION. <u>[Signature]</u>

IT IS SO ORDERED.

Date: _____ JUDGE OF THE SUPERIOR COURT