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ENDORSED
FILED
ALAMEDA COUNTY

DEC 08 2010

K. McCoy, Exec. Off./Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

LULU NYC LLC, et al.,

Defendants.

) Lead Case No. RG-09-459448

) (Consolidated with Case Nos. RG-10-
) 494289, RG-10-494513, and RG-10-
) 494517)

) **[PROPOSED] CONSENT**
) **JUDGMENT AS TO QUIKSILVER,**
) **INC., QUIKSILVER AMERICAS,**
) **INC. AND QS WHOLESALE, INC.**

AND CONSOLIDATED CASES.

1. DEFINITIONS

1.1 "Accessible Component" means a component of a Covered Product that could be touched by a person during normal and reasonably foreseeable use.

1.2 "Covered Products" means Fashion Accessories that are (a) Manufactured by a Settling Defendant; or (b) distributed or sold for resale by a Settling Defendant, or (c) sold or offered for retail sale as a Private Label Covered Product by a Settling Defendant that is (i) the Private Labeler or (ii) a sister, parent, subsidiary, or affiliated entity that is under common ownership of the Private Labeler of such product.

1 1.3 “Effective Date” means the date on which this Consent Judgment is entered by
2 the Court.

3 1.4 “Fashion Accessories” means wallets, handbags, purses, clutches and totes.

4 1.5 “Lead Limits” means the maximum concentrations of lead and lead
5 compounds (“Lead”) by weight specified in Section 3.2.

6 1.6 “Manufactured” and “Manufactures” have the meaning defined in Section
7 3(a)(10) of the Consumer Product Safety Act (“CPSA”) [15 U.S.C. § 2052(a)(10)],¹ as amended
8 from time to time.

9 1.7 “Non-Suspect Materials” means natural materials other than leather that have
10 been determined not to exceed Lead limits for children’s products by the final rule of the
11 Consumer Product Safety Commission set forth at 16 C.F.R. § 1500.91(d) and (e), as it exists on
12 June 1, 2010.

13 1.8 “Private Label Covered Product” means a Fashion Accessory that bears a
14 private label where (i) the product (or its container) is labeled with the brand or trademark of a
15 person other than a manufacturer of the product, (ii) the person with whose brand or trademark
16 the product (or container) is labeled has authorized or caused the product to be so labeled, and
17 (iii) the brand or trademark of a manufacturer of such product does not appear on such label.

18 1.9 “Private Labeler” means an owner of a brand or trademark on the label of a
19 consumer product which bears a private label; provided, however, that Settling Defendants are
20 not a Private Labeler due solely to the fact that its name, brand or trademark is visible on a sign or
21 on the price tag of a Fashion Accessory that is not labeled with a third party’s brand or trademark.

22 1.10 “Paint or other Surface Coatings” has the meaning defined in 16 C.F.R.
23 § 1303.2(b)², as amended from time to time.

24
25 _____
26 ¹ As of June 1, 2010, the term “Manufactured” and “Manufactures” means to manufacture,
produce, or assemble.

27 ² As of June 1, 2010, “Paint or other Surface Coatings” means a fluid, semi-fluid, or other
28 material, with or without a suspension of finely divided coloring matter, which changes to a solid
film when a thin layer is applied to a metal, wood, stone, paper, leather, cloth, plastic, or other
surface. This term does not include printing inks or those materials which actually become a part

1 1.11 “Vendor” means a person or entity that Manufactures, imports, distributes, or
2 supplies a Fashion Accessory to a Settling Defendant, and that is not itself a Settling Defendant.

3 **2. INTRODUCTION**

4 2.1 The parties to this Consent Judgment (“Parties”) are the Center for
5 Environmental Health (“CEH”) and defendants Quiksilver, Inc., Quiksilver Americas, Inc., and
6 QS Wholesale, Inc. (collectively, the “Settling Defendants”).

7 2.2 Commencing in April 2009, the CEH served multiple 60-Day Notices of
8 Violation under Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986,
9 California Health & Safety Code §§ 25249.5, *et seq.*), alleging that the entities named in those
10 notices violated Proposition 65 by exposing persons to Lead contained in wallets, handbags,
11 purses, clutches, totes, belts and footwear, without first providing a clear and reasonable
12 Proposition 65 warning.

13 2.3 Each Settling Defendant manufactures, distributes or offers Fashion
14 Accessories for sale in the State of California or has done so in the past.

15 2.4 Each Settling Defendant represents that as of the date it executes this Consent
16 Judgment: (a) no public enforcer is diligently prosecuting an action related to Lead in its Fashion
17 Accessories; and (b) it does not have a pending 60-Day Notice of Violation of Proposition 65 as
18 to Lead in its Fashion Accessories (as defined below) from any entity that predates the 60-Day
19 Notice of Violation of Proposition 65 issued by CEH for Lead in such Fashion Accessories.
20 “Pending” in the prior sentence means that such 60-Day Notice has not been withdrawn, resolved
21 by judgment or resolved by settlement agreement.

22 2.5 On June 24, 2009 CEH filed the action entitled *CEH v. LuLu NYC LLC, et al.*,
23 Case No. RG 09-459448, in the Superior Court of California for Alameda County, alleging
24 Proposition 65 violations as to wallets, handbags, purses, clutches and totes. On or about January
25 15, 2010, CEH filed its First Amended Complaint, and also filed the following new actions
26 alleging Proposition 65 violations as to Lead in Fashion Accessories: *CEH v. Ashley Stewart*

27 _____
28 of the substrate, such as the pigment in a plastic article, or those materials which are actually
bonded to the substrate, such as by electroplating or ceramic glazing.

1 *Ltd., et al.*, Alameda County Superior Court Case No. RG 10-494289; *CEH v. Zappos.com, Inc.*,
2 *et al.*, Alameda County Superior Court Case No. RG 10-494513; and *CEH v. Bag Bazaar, Ltd., et*
3 *al.*, Alameda County Superior Court Case No. RG 10-494517. On March 3, 2010, the Court
4 consolidated the four actions for pre-trial purposes under Lead Case No. RG 09-459448.

5 2.6 On April 18, 2007, the Mateel Environmental Justice Foundation (“Mateel”)
6 filed a lawsuit in San Francisco Superior Court against Quiksilver, Inc., entitled *Mateel Envntl.*
7 *Justice Found. v. Quiksilver, Inc.*, Case No. CGC-07-462478, alleging violations of Proposition
8 65 based on Quiksilver, Inc.’s alleged sale of “Leaded Plastic Luggage.” On April 28, 2008, the
9 San Francisco Superior Court approved a Consent Judgment between Mateel and Quiksilver, Inc.
10 to resolve the claims alleged in the *Mateel* complaint.

11 2.7 On May 18, 2010, Settling Defendants filed a demurrer to the operative
12 complaint in the *Lulu* action on res judicata and exclusive concurrent jurisdiction grounds based
13 on the Consent Judgment entered in the Mateel lawsuit. On July 8, 2010, the Court overruled
14 Settling Defendants’ demurrer. Settling Defendants now wish to resolve the *Lulu* action by
15 entering into this Consent Judgment.

16 2.8 For purposes of this Consent Judgment only, the Parties stipulate that this
17 Court has jurisdiction over the allegations of violations contained in the operative Complaint
18 applicable to each Settling Defendant (the “Complaint”) and personal jurisdiction over each
19 Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County of
20 Alameda, and that this Court has jurisdiction to enter this Consent Judgment.

21 2.9 Nothing in this Consent Judgment is or shall be construed as an admission by
22 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
23 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
24 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
25 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
26 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
27 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
28 this action.

1 **3. INJUNCTIVE RELIEF**

2 **3.1 Specification Compliance Date.** To the extent it has not already done so, no
3 more than 30 days after the Effective Date, Settling Defendants shall provide the Lead Limits to
4 their Vendors of Fashion Accessories that will be sold or offered for sale to California consumers
5 and shall instruct each Vendor to use reasonable efforts to provide Fashion Accessories that
6 comply with the Lead Limits on a nationwide basis. This Section 3.1 is not applicable with
7 respect to Non-Suspect Materials.

8 **3.2 Lead Limits.**

9 Settling Defendants shall not purchase, import, Manufacture, or supply to an
10 unaffiliated third party any Covered Product that will be sold or offered for sale to California
11 consumers that exceeds the following Lead Limits:

12 3.2.1 Commencing on December 1, 2010, Paint or other Surface Coatings on
13 Accessible Components: 90 parts per million (“ppm”).

14 3.2.2 Commencing on December 1, 2010, leather (including composited leather)
15 Accessible Components: 600 ppm; and commencing on December 1, 2011: 300 ppm. In
16 the alternative, Covered Products containing multiple patches of different scrap leathers
17 may be sold with a clear and reasonable warning provided pursuant to the requirements of
18 Section 3.4.

19 3.2.3 Commencing on December 1, 2010, polyvinyl chloride (“PVC”)
20 Accessible Components: 300 ppm, and commencing on December 1, 2011, PVC
21 Accessible Components: 200 ppm.

22 3.2.4 Commencing December 1, 2010, for all other Accessible Components
23 other than cubic zirconia (sometimes called cubic zirconium, CZ), crystal, glass or rhinestones:
24 300 ppm.

25 **3.3 Final Retail Compliance Date.** Commencing on December 1, 2011, Settling
26 Defendants shall not sell or offer for sale in California any Covered Product that exceeds the Lead
27 Limits specified in Section 3.2 as being effective December 1, 2010. Commencing on December
28 1, 2012, Settling Defendants shall not sell or offer for sale in California any Covered Product that

1 exceeds the Lead Limits specified in Section 3.2 as being effective December 1, 2011. For
2 purposes of this Section 3.3, when Settling Defendants' direct customer sells or offers for sale to
3 California consumers a Covered Product after the applicable Final Retail Compliance Date, the
4 Settling Defendants are deemed to "offer for sale in California" that Covered Product.

5 **3.4 Warnings for Covered Products.**

6 **3.4.1 Interim Warning Option.** A Covered Product purchased, imported or
7 Manufactured by Settling Defendants before December 1, 2010, may, as an alternative to
8 meeting the Lead Limits, be sold or offered for retail sale in California after December 1,
9 2011, with a Clear and Reasonable Warning that complies with the provisions of Section
10 3.4.2.

11 **3.4.2 Proposition 65 Warnings.** A Clear and Reasonable Warning under this
12 Consent Judgment shall state either:

13 WARNING: This product contains lead, a chemical known to the State of
14 California to cause birth defects or other reproductive harm. Do not allow children
15 to mouth or chew.

16 Or

17 WARNING: This product contains lead, a chemical known to the State of
18 California to cause birth defects or other reproductive harm. Do not mouth or
19 chew.

20 This statement shall be prominently displayed on the Covered Product or the packaging of
21 the Covered Product with such conspicuousness, as compared with other words,
22 statements or designs as to render it likely to be read and understood by an ordinary
23 individual prior to sale. For internet, catalog or any other sale where the consumer is not
24 physically present and cannot see a warning displayed on the Covered Product or the
25 packaging of the Covered Product prior to purchase or payment, the warning statement
26 shall be displayed in such a manner that it is likely to be read and understood prior to the
27 authorization of or actual payment.

28

1 3.5 **Action Regarding Specific Products.**

2 3.5.1 On or before the Effective Date, Settling Defendants shall cease selling the
3 following specific products in California: (i) Roxy Green Hawaiian Print Tote Handbag,
4 SKU No. 8-83861-87035-3; (ii) Roxy Glam Bam Satchel, Item No. 452H50-XA273-
5 YEL; (iii) Roxy Orange Coast Purse, SKU No. 15101800070018; and (iv) Sweet &
6 Tender Yellow Handbag, Style No. A452G92 (collectively, the "Section 3.5 Products").
7 On or before the Effective Date, Settling Defendants shall also: (i) cease shipping the
8 Section 3.5 Products to any of their customers that resell the Section 3.5 Products in
9 California, and (ii) send instructions to their customers that resell the Section 3.5 Products
10 in California instructing them to cease offering such Section 3.5 Products for sale in
11 California.

12 3.5.2 If Settling Defendants have not complied with Section 3.5.1 prior to
13 executing this Consent Judgment, they shall instruct their California stores and/or
14 customers that resell the Section 3.5 Products either to (i) return all the Section 3.5
15 Products to the Settling Defendants for destruction; or (ii) directly destroy the Section 3.5
16 Products; or (iii) sell the Section 3.5 Products with a Clear and Reasonable Warning that
17 complies with the provisions of Section 3.4.2.

18 3.5.3 Any destruction of Section 3.5 Products shall be in compliance with all
19 applicable laws.

20 3.5.4 Within sixty days of the Effective Date, Settling Defendants shall provide
21 CEH with written certification from Settling Defendants confirming compliance with the
22 requirements of this Section 3.5.

23 **4. ENFORCEMENT**

24 4.1 Any Party may, after meeting and conferring, by motion or application for an
25 order to show cause before this Court, enforce the terms and conditions contained in this Consent
26 Judgment. Enforcement of the terms and conditions of Section 3.2 and 3.3 of this Consent
27 Judgment shall be brought exclusively pursuant to Sections 4.3 through 4.4.

1 4.2 Within 30 days after the Effective Date, Settling Defendants shall notify CEH
2 of a means sufficient to allow CEH to identify Covered Products supplied or offered by Settling
3 Defendants on or after that date, for example, a unique brand name or characteristic system of
4 product numbering or labeling. Information provided to CEH pursuant to this Section 4.2,
5 including but not limited to the identities of parties to contracts among Settling Defendants or
6 between Settling Defendants and third parties, may be designated by Settling Defendants as
7 competitively sensitive confidential business information, and if so designated shall not be
8 disclosed to any person, including but not limited to any Settling Defendant, without the written
9 permission of the Settling Defendant who provided the information. Any motions or pleadings or
10 any other court filings that may reveal information designated as competitively sensitive
11 confidential business information pursuant to this Section shall be submitted in accordance with
12 California Rules of Court 8.160 and 2.550, *et seq.*

13 4.3 **Notice of Violation.** CEH may seek to enforce the requirements of Sections
14 3.2 or 3.3 by issuing a Notice of Violation pursuant to this Section 4.3.

15 4.3.1 **Service of Notice.** CEH shall serve the Notice of Violation on the Settling
16 Defendant(s) that CEH alleges to have violated Sections 3.2 or 3.3 within 45 days of the
17 date the alleged violation(s) was or were observed, provided, however, that CEH may
18 have up to an additional 45 days to provide the Settling Defendant with the test data
19 required by Section 4.3.2(d) below if it has not yet obtained it from its laboratory.

20 4.3.2 **Supporting Documentation.** The Notice of Violation shall, at a minimum,
21 set forth for each Covered Product: (a) the date(s) the alleged violation(s) was observed,
22 (b) the location at which the Covered Product was offered for sale, (c) a description of the
23 Covered Product giving rise to the alleged violation, and of each Accessible Component
24 that is alleged not to comply with the Lead Limits and/or each Accessible Component that
25 is a Non-Suspect Material that is alleged to contain Lead in excess of 300 ppm, including
26 a picture of the Covered Product and all identifying information on tags and labels, and
27 (d) all test data obtained by CEH regarding the Covered Product and related supporting
28 documentation, including all laboratory reports, quality assurance reports and quality

1 control reports associated with testing of the Covered Products. Such Notice of Violation
2 shall be based at least in part upon total acid digest testing performed by an independent
3 accredited laboratory. Wipe, swipe, x-ray fluorescence, and swab testing are not by
4 themselves sufficient to support a Notice of Violation, although any such testing may be
5 used as additional support for a Notice. The Parties agree that the sample Notice of
6 Violation attached hereto as Exhibit A is sufficient in form to satisfy the requirements of
7 subsections (c) and (d) of this Section 4.3.2.

8 4.3.3 **Additional Documentation.** CEH shall promptly make available for
9 inspection and/or copying upon request by and at the expense of the Settling Defendant,
10 all supporting documentation related to the testing of the Covered Products and associated
11 quality control samples, including chain of custody records, all laboratory logbook entries
12 for laboratory receiving, sample preparation, and instrumental analysis, and all printouts
13 from all analytical instruments relating to the testing of Covered Product samples and any
14 and all calibration, quality assurance, and quality control tests performed or relied upon in
15 conjunction with the testing of the Covered Products, obtained by or available to CEH that
16 pertains to the Covered Product's alleged noncompliance with Section 3 and, if available,
17 any exemplars of Covered Products tested.

18 4.3.4 **Multiple Notices.** If the Settling Defendant has received more than four
19 Notices of Violation in any 12-month period, at CEH's option, CEH may seek whatever
20 fines, costs, penalties, or remedies are provided by law for failure to comply with the
21 Consent Judgment. For purposes of determining the number of Notices of Violation
22 pursuant to this Section 4.3.4, the following shall be excluded:

23 (a) Multiple notices identifying Covered Products Manufactured for or
24 sold to the Settling Defendant from the same Vendor; and

25 (b) A Notice of Violation that meets one or more of the conditions of
26 Section 4.4.3(c).

27 4.4 **Notice of Election.** Within 30 days of receiving a Notice of Violation
28 pursuant to Section 4.3, including the test data required pursuant to 4.3.2(d), the Settling

1 Defendant shall provide written notice to CEH stating whether it elects to contest the allegations
2 contained in the Notice of Violation ("Notice of Election"). Failure to provide a Notice of
3 Election shall be deemed an election to contest the Notice of Violation.

4 **4.4.1 Contested Notices.** If the Notice of Violation is contested, the Notice of
5 Election shall include all then-available documentary evidence regarding the alleged
6 violation, including any test data. Within 30 days the parties shall meet and confer to
7 attempt to resolve their dispute. Should such attempts at meeting and conferring fail,
8 CEH may file an enforcement motion or application pursuant to Section 4.1. If the
9 Settling Defendant withdraws its Notice of Election to contest the Notice of Violation
10 before any motion concerning the violations alleged in the Notice of Violation is filed
11 pursuant to Section 4.1, the Settling Defendant shall make a contribution to the
12 Proposition 65 Fashion Accessory Testing Fund in the amount of \$12,500 and shall
13 comply with all of the non-monetary provisions of Section 4.4.2. If, at any time prior to
14 reaching an agreement or obtaining a decision from the Court, CEH or the Settling
15 Defendant acquires additional test or other data regarding the alleged violation, it shall
16 promptly provide all such data or information to the other Party.

17 **4.4.2 Non-Contested Notices.** If the Notice of Violation is not contested, the
18 Settling Defendant shall include in its Notice of Election a detailed description of
19 corrective action that it has undertaken or proposes to undertake to address the alleged
20 violation. Any such correction shall, at a minimum, provide reasonable assurance that the
21 Covered Product will no longer be offered by the Settling Defendant or its customers for
22 sale in California. If there is a dispute over the sufficiency of the proposed corrective
23 action or its implementation, CEH shall promptly notify the Settling Defendant and the
24 Parties shall meet and confer before seeking the intervention of the Court to resolve the
25 dispute. In addition to the corrective action, the Settling Defendant shall make a
26 contribution to the Fashion Accessory Testing Fund in the amount of \$10,000, unless one
27 of the provisions of Section 4.4.3 applies.

28

1 4.4.3 **Limitations in Non-Contested Matters.**

2 (a) The monetary liability of a Settling Defendant that elects not to
3 contest a Notice of Violation before any motion concerning the violation(s) at issue has
4 been filed shall be limited to the contributions required by this Section 4.4.3, if any.

5 (b) If more than one Settling Defendant has manufactured, sold, offered
6 for sale or distributed a Covered Product identified in a non-contested Notice of Violation,
7 only one required contribution may be assessed against all Settling Defendants as to the
8 noticed Covered Product.

9 (c) The contribution to the Fashion Accessory Testing Fund shall be:

10 (i) One thousand seven hundred fifty dollars (\$1750) if the Settling
11 Defendant, prior to receiving and accepting for distribution or sale the
12 Covered Product identified in the Notice of Violation, obtained test results
13 demonstrating that all of the Accessible Components in the Covered
14 Product identified in the Notice of Violation complied with the applicable
15 Lead Limits, and further provided that such test results would be sufficient
16 to support a Notice of Violation and that the testing was performed within
17 two years prior to the date of the sales transaction on which the Notice of
18 Violation is based. The Settling Defendant shall provide copies of such
19 test results and supporting documentation to CEH with its Notice of
20 Election; or

21 (ii) Not required or payable, if the Notice of Violation concerns a
22 Non-Suspect Material; provided, however, that the foregoing exemption
23 shall not apply if the Settling Defendant has received more than three
24 Notices of Violation in an 18-month period for the same Non-Suspect
25 Material that was supplied by more than one Vendor; or

26 (iii) One thousand five hundred dollars (\$1500) for a Settling
27 Defendant that is in violation of Section 3.3 only insofar as that Section
28 deems the Settling Defendant to have "offered for sale" a product sold at

1 retail by that Settling Defendant's customer, provided however, that no
2 contribution is required or payable if the Settling Defendant has already
3 been required to pay a total of ten thousand dollars (\$10,000) pursuant to
4 this subsection. This subsection shall apply only to Covered Products that
5 the Settling Defendant demonstrates were shipped prior to the applicable
6 Shipping Compliance Date specified in Section 3.2.

7 (iv) Not required or payable, if the Notice of Violation identifies
8 the same Covered Product or Covered Products, differing only in size or
9 color, that have been the subject of another Notice of Violation within the
10 preceding 12 months.

11 **4.5 Additional Enforcement for Noncompliant Non-Covered Products.** If
12 CEH alleges that a Settling Defendant sold or offered for retail sale to California consumers a
13 Fashion Accessory that is not a Covered Product, and that contains Lead in an amount that
14 exceeds any of the applicable Lead Limits ("Noncompliant Non-Covered Product"), then prior to
15 CEH serving a 60-Day Notice under Proposition 65 on such Settling Defendant, CEH shall
16 provide notice to the Settling Defendant pursuant to this Section 4.5.

17 4.5.1 The notice shall contain the information required for a Notice of Violation
18 in Section 4.3. If the information is insufficient to allow the Settling Defendant to identify
19 the Noncompliant Non-Covered Product and/or Vendor, it may request that CEH provide
20 any further identifying information for the Noncompliant Non-Covered Product that is
21 reasonably available to it.

22 4.5.2 Within 30 days of receiving a notice pursuant to Section 4.5, or of any
23 requested further information sufficient to identify the Noncompliant Non-Covered
24 Product, whichever is later, the Settling Defendant shall serve a Notice of Election on
25 CEH. The Notice of Election shall:

26 (a) Identify to CEH (by proper name, address of principal place of
27 business and telephone number) the person or entity that sold the Noncompliant Non-
28 Covered Product to the Settling Defendant;

1 (b) Identify the manufacturer and other distributors in the chain of
2 distribution of the Noncompliant Non-Covered Product, provided that such information is
3 reasonably available; and

4 (c) Include either: (i) a statement that the Settling Defendant elects not
5 to proceed under this Section 4.5, in which case CEH may take further action including
6 issuance of a 60-Day Notice under Proposition 65; (ii) a statement that the Settling
7 Defendant elects to proceed under this Section 4.5, with a description of corrective action
8 that meets the conditions of Section 4.4.2., and a contribution to the Fashion Accessory
9 Testing Fund in the amount required under Section 4.5.6, or (iii) a statement that the
10 Settling Defendant contends that the Noncompliant Non-Covered Product is released from
11 liability by a Qualified Settlement under Section 4.5.4 along with a copy of such Qualified
12 Settlement.

13 4.5.3 A party's disclosure pursuant to this Section 4.5 of any (i) test reports, (ii)
14 confidential business information, or (iii) other information that may be subject to a claim
15 of privilege or confidentiality, shall not constitute a waiver of any such claim of privilege
16 or confidentiality, provided that the Party disclosing such information shall clearly
17 designate it as confidential. Any Party receiving information designated as confidential
18 pursuant to this Section 4.5.3 shall not disclose such information to any unrelated person
19 or entity, and shall use such information solely for purposes of resolving any disputes
20 under this Consent Judgment.

21 4.5.4 No further action is required of the Settling Defendant under this Consent
22 Judgment if the Noncompliant Non-Covered Product is otherwise released from liability
23 for alleged violations of Proposition 65 with respect to Lead in the Noncompliant Non-
24 Covered Product by the terms of a separate settlement agreement or consent judgment
25 entered into by CEH under Health & Safety Code § 25249.7 ("Qualified Settlement").

26 4.5.5 If the Settling Defendant elects not to proceed under Section 4.5, then
27 neither the Settling Defendant nor CEH has any further duty under this Section 4.5 and
28 either may pursue any available remedies under Proposition 65 or otherwise. If the

1 Settling Defendant elects to proceed under Section 4.5.2(c)(ii), then compliance with that
2 Section shall constitute compliance with Proposition 65 as to that Noncompliant Non-
3 Covered Product.

4 4.5.6 If the Settling Defendant elects to proceed under this Section 4.5 and is not
5 relieved of liability under Section 4.5.4, the Settling Defendant shall make a contribution
6 to the Fashion Accessory Testing Fund in the amounts that follow unless one of the
7 provisions of Section 4.4.3(c) applies, in which case the applicable amount specified in
8 Section 4.4.3(c) if any, shall instead apply. The contribution shall be \$5,000 if at least one
9 of the person(s) identified by the Settling Defendant pursuant to Section 4.5.2 (i) is a
10 person in the course of doing business as defined in Health & Safety Code § 25249.11(b)
11 and (ii) has a principal place of business located within the United States, and \$10,000 for
12 all other notices.

13 4.5.7 If a Settling Defendant makes a contribution pursuant to this Section and at
14 a later date CEH resolves the alleged violation with the direct or indirect Vendor of the
15 Noncompliant Non-Covered Product, CEH shall notify the Settling Defendant and the
16 Settling Defendant shall be entitled to a refund of the lesser amount of its contribution or
17 the settlement amount paid by such Vendor. If the settlement or consent judgment
18 between CEH and the direct or indirect Vendor of the Noncompliant Non-Covered
19 Product does not provide for the refund to be paid directly by the Vendor to the Settling
20 Defendant, then CEH shall pay the refund to the Settling Defendant within 15 days of
21 receiving the Vendor's settlement payment.

22 4.5.8 Any notice served by CEH pursuant to this Section 4.5 shall not be
23 considered a Notice of Violation for purposes of Section 4.3. Nothing in this Section 4.5
24 affects CEH's right to issue a 60-Day Notice under Proposition 65 against any entity other
25 than a Settling Defendant.

26 5. PAYMENTS

27 5.1 **Payments by Settling Defendants.** Other than any money that may be payable
28 after the Effective Date pursuant to the terms of Sections 4 or 10 hereof, the payment set forth in

1 this Section 5 shall constitute the total monetary liability of Settling Defendants under this
2 Consent Judgment. Within five days after Entry of Judgment as stipulated, Settling Defendants
3 shall pay the total sum of \$60,000 as a settlement payment. The total settlement amount for
4 Settling Defendants shall be paid in four separate checks delivered to the offices of the Lexington
5 Law Group (Attn: Eric Somers), 1627 Irving Street, San Francisco, California 94122 and made
6 payable and allocated as follows:

7 5.1.1 Settling Defendants shall pay the sum of \$2,000 pursuant to Health &
8 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Health &
9 Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
10 Environmental Health Hazard Assessment). The check shall be made payable to the Center For
11 Environmental Health.

12 5.1.2 Settling Defendants shall pay the sum of \$18,500 as payment to CEH in
13 lieu of payment pursuant to Health & Safety Code §25249.7(b), and California Code of
14 Regulations, Title 11, §3202(b). CEH will use such funds to continue its work educating and
15 protecting people from exposures to toxic chemicals, including heavy metals. In addition, as part
16 of its Community Environmental Action and Justice Fund, CEH will use four percent of such
17 funds to award grants to grassroots environmental justice groups working to educate and protect
18 people from exposures to toxic chemicals. The method of selection of such groups can be found
19 at the CEH web site at www.ceh.org/justicefund. The payment pursuant to this Section shall be
20 made payable to the Center For Environmental Health.

21 5.1.3 Settling Defendants shall pay the sum of \$37,500 as reimbursement of a
22 portion of CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost
23 reimbursement check shall be made payable to the Lexington Law Group.

24 5.1.4 Settling Defendants shall make a contribution of \$2,000 to the Proposition
25 65 Fashion Accessory Testing Fund. CEH shall use such funds to locate, purchase and test
26 Covered Products to verify compliance with the reformulation requirements of Section 3, to
27 prepare, send and prosecute Notices of Violation as necessary to Settling Defendants pursuant to
28 Section 4, and to reimburse attorneys' fees and costs incurred in connection with these activities.

1 The Proposition 65 Fashion Accessory Testing Fund check shall be made payable to the
2 Lexington Law Group Attorney Client Trust Account.

3 **6. MODIFICATION**

4 6.1 **Written Consent.** This Consent Judgment may be modified from time to
5 time by express written agreement of the Parties with the approval of the Court, or by an order of
6 this Court upon motion and in accordance with law.

7 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
8 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
9 modify the Consent Judgment.

10 **7. CLAIMS COVERED AND RELEASED**

11 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
12 behalf of itself and the public interest and Settling Defendants, and their parents, subsidiaries,
13 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
14 (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or sell
15 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
16 franchisees, cooperative members, licensors, and licensees (“Downstream Defendant Releasees”)
17 of any violation of Proposition 65 that was or could have been asserted in the Complaint against
18 Settling Defendants, Defendant Releasees, and Downstream Defendant Releasees, based on
19 failure to warn about alleged exposure to Lead contained in Fashion Accessories that were sold
20 by Settling Defendants prior to the Effective Date.

21 7.2 Compliance with the terms of this Consent Judgment by Settling Defendants
22 constitutes compliance with Proposition 65 with respect to Lead in that Settling Defendants’
23 Covered Products.

24 7.3 Nothing in this Section 7 affects CEH’s right to commence or prosecute an
25 action under Proposition 65 against any person other than a Settling Defendants, Defendant
26 Releasee, or Downstream Defendant Releasee.

27 7.4 Nothing in Section 7 affects CEH’s right to commence or prosecute an action
28 under Proposition 65 against a Downstream Defendant Releasee that: (a) is not a direct customer

1 of Settling Defendants under Section 3.3; (b) sells or offers for sale a Covered Product to
2 California consumers that does not comply with the Lead Limits after the applicable Final Retail
3 Compliance Date set forth in Section 3.3; and (c) is not sold or offered for sale with compliant
4 Proposition 65 warnings under this Consent Judgment.

5 **8. NOTICE**

6 8.1 When any Party is entitled to receive any notice under this Consent Judgment,
7 the notice shall be sent by certified mail and electronic mail.

8 8.1.1 The person for CEH to receive Notices pursuant to this Consent Judgment
9 shall be:

10 Eric S. Somers
11 Lexington Law Group
12 1627 Irving Street
13 San Francisco, California 94122
14 esomers@lexlawgroup.com

15 8.1.2 The person for Settling Defendants to receive Notices pursuant to this
16 Consent Judgment shall be:

17 Bob Nicksin
18 O'Melveny & Myers LLP
19 400 South Hope Street, Suite 1961
20 Los Angeles, CA 90071-2899
21 BNicksin@OMM.com

22 8.2 Any Party may modify the person and address to whom the notice is to be sent
23 by sending each other Party notice by certified mail and/or other verifiable form of written
24 communication.

25 **9. COURT APPROVAL**

26 9.1 This Consent Judgment shall become effective upon entry by the Court. CEH
27 shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendants
28 shall support entry of this Consent Judgment.

9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
effect and shall never be introduced into evidence or otherwise used in any proceeding for any
purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

1 **10. ATTORNEYS' FEES**

2 10.1 Should CEH prevail on any motion, application for an order to show cause or
3 other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its
4 reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
5 Settling Defendants prevail on any motion application for an order to show cause or other
6 proceeding, Settling Defendants may be awarded their reasonable attorneys' fees and costs as a
7 result of such motion or application upon a finding by the Court that CEH's prosecution of the
8 motion or application lacked substantial justification. For purposes of this Consent Judgment, the
9 term substantial justification shall carry the same meaning as used in the Civil Discovery Act of
10 1986, Code of Civil Procedure §§ 2016, *et seq.*

11 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
12 its own attorneys' fees and costs.

13 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
14 sanctions pursuant to law.

15 **11. TERMINATION**

16 11.1 This Consent Judgment shall be terminable by CEH or by Settling Defendants
17 at any time after September 1, 2017, upon the provision of 30 days advanced written notice; such
18 termination shall be effective upon the subsequent filing of a notice of termination with Superior
19 Court of Alameda County.

20 11.2 Should this Consent Judgment be terminated pursuant to this Section, it shall
21 be of no further force or effect as to the terminated parties; provided, however that if CEH is the
22 terminating Party, the provisions of Sections 5, 7, and 12.1 shall survive any termination and
23 provided further that Settling Defendants are the terminating Parties, the provisions of Sections 5,
24 7.1 and 12.1 shall survive any termination.

25 **12. OTHER TERMS**

26 12.1 The terms of this Consent Judgment shall be governed by the laws of the State
27 of California.

28 12.2 This Consent Judgment shall apply to and be binding upon CEH and Settling

1 Defendants, and their respective divisions, subdivisions, and subsidiaries, and the successors or
2 assigns of any of them.

3 12.3 This Consent Judgment contains the sole and entire agreement and
4 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
5 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
6 merged herein and therein. There are no warranties, representations, or other agreements between
7 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
8 implied, other than those specifically referred to in this Consent Judgment have been made by any
9 Party hereto. No other agreements not specifically contained or referenced herein, oral or
10 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
11 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
12 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
13 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
14 whether or not similar, nor shall such waiver constitute a continuing waiver.

15 12.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
16 that any Settling Defendant might have against any other party, whether or not that party is a
17 Settling Defendant.

18 12.5 This Court shall retain jurisdiction of this matter to implement or modify the
19 Consent Judgment.

20 12.6 The stipulations to this Consent Judgment may be executed in counterparts
21 and by means of facsimile or portable document format (pdf), which taken together shall be
22 deemed to constitute one document.

23 12.7 Each signatory to this Consent Judgment certifies that he or she is fully
24 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
25 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
26 Party.

27 12.8 The Parties, including their counsel, have participated in the preparation of
28 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.

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

8
9 **IT IS SO ORDERED:**

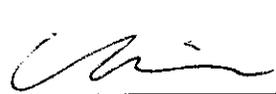
11 12 Dated: <u>Dec. 8</u> , 2010	11 STEVEN A. BRICK 12 <u>The Honorable Steven A. Brick</u> 13 Judge of the Superior Court
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IT IS SO STIPULATED:

CENTER FOR ENVIRONMENTAL HEALTH

 8/27/10

Signature

CHARLES PIZARRO

Printed Name

ASSOCIATE DIRECTOR

Title

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QUIKSILVER, INC.



Signature

Sean Pence

Printed Name

SVP

Title

QUIKSILVER AMERICAS, INC.



Signature

Sean Pence

Printed Name

SVP

Title

QS WHOLESALE, INC.



Signature

Sean Pence

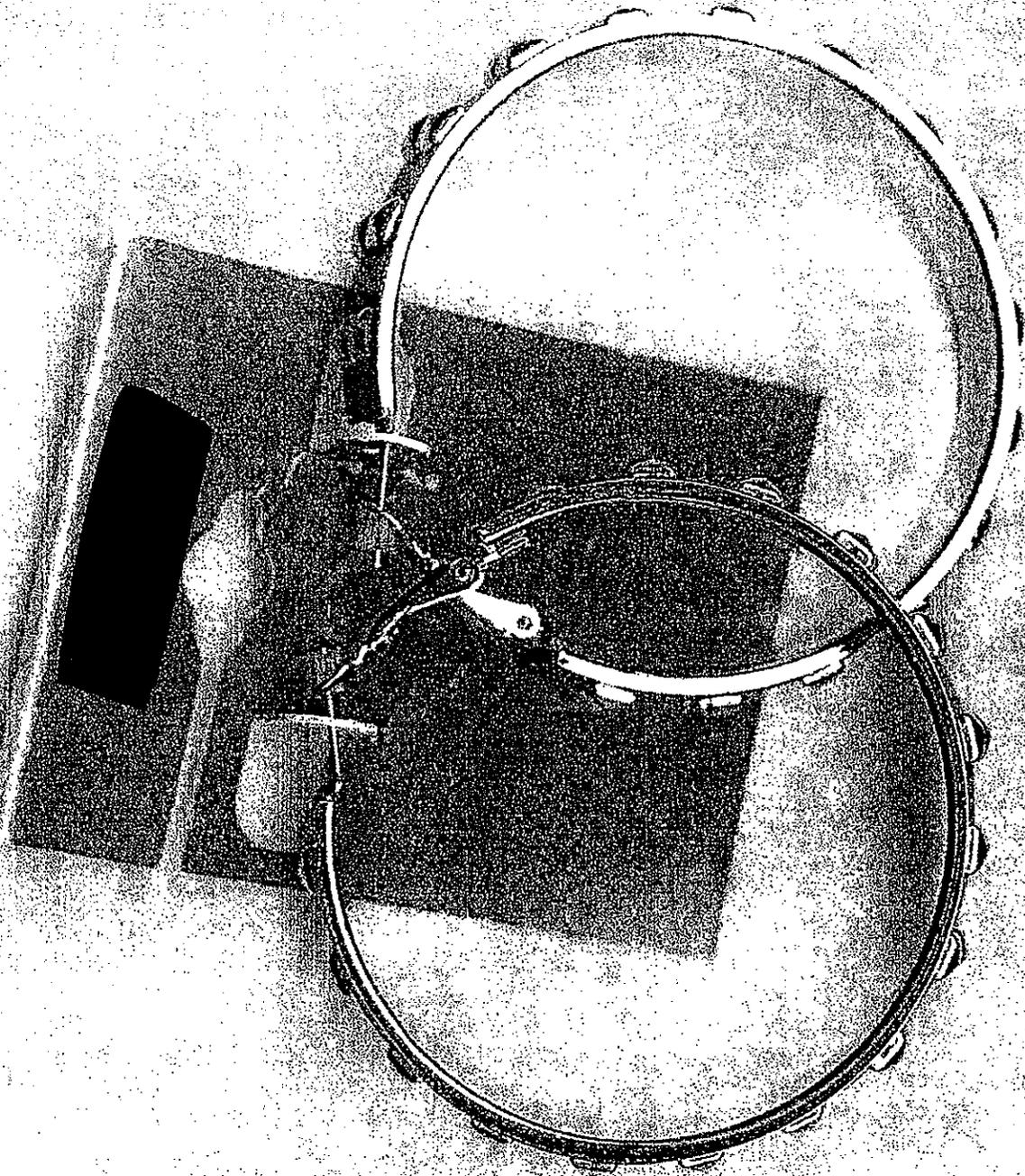
Printed Name

SVP

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**Exhibit A
Sample Notice**

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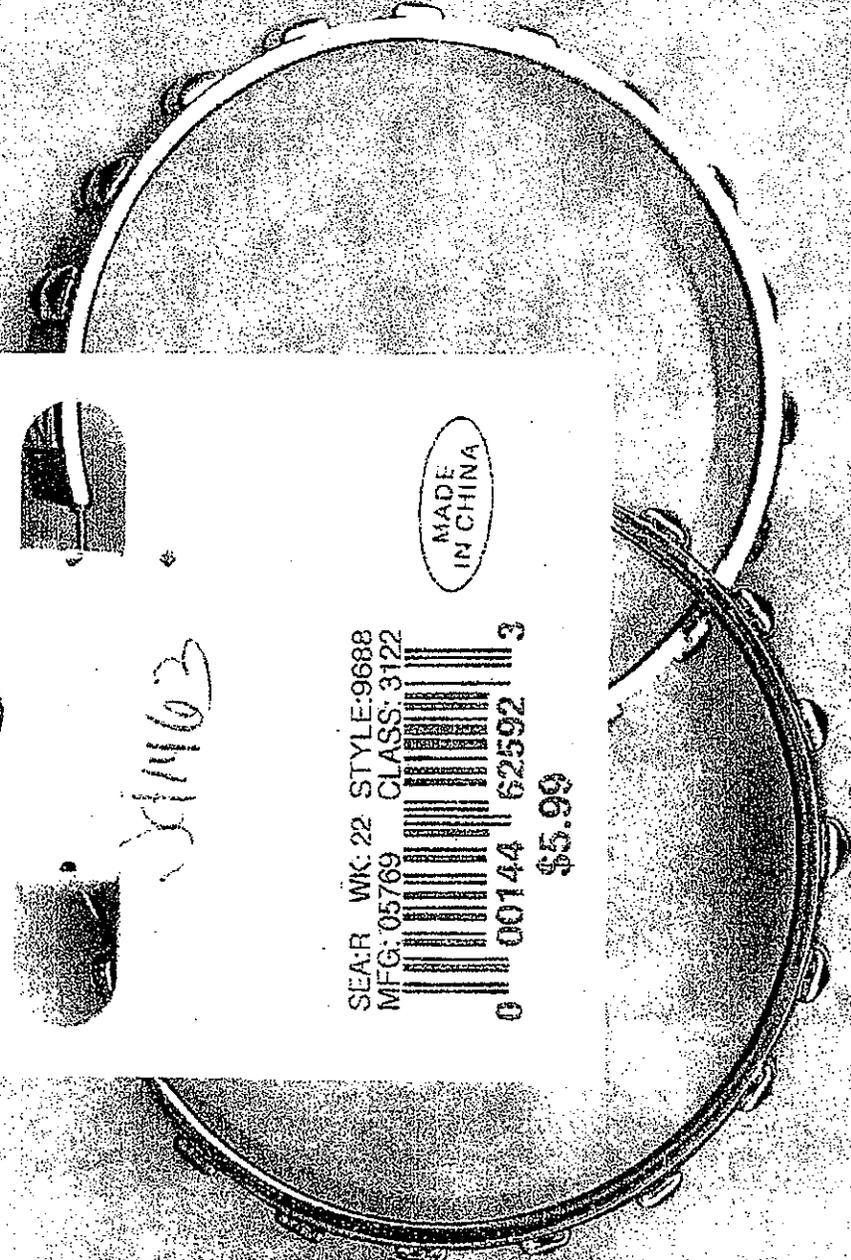
21463

SEARCH WK: 22 STYLE: 9688
MFG: 05769 CLASS: 3122



\$5.99

MADE IN CHINA





THE
NATIONAL
FOOD
LAB

September 28, 2009

Analytical Report No.: CL1405-61

Center For Environmental Health
2201 Broadway, Suite 302
Oakland, CA 94612-3017

Listed below are the results of our analyses for sample(s) received on September 02, 2009.

CEH ID: JCT1463b, [REDACTED] Earrings (black faux leather on hoops)

NFL ID AE10383

Analyte	Result	Units
Lead	4140	ppm

Method Reference

Testing was conducted according to testing protocol outlined in exhibit D of the amended consent judgment, People of the State of California v. Burlington Coat Factory, June 15, 2006 and California Health Safety Code §25214.4. In summary, a portion of the sample was digested in a microwave oven with concentrated nitric acid and analyzed by ICP-MS.

Results are reported based on the sample(s) as received, unless otherwise noted.

Please note that these results apply only to the sample(s) submitted for this report. Samples from a different portion of the same lot may produce different results.

Thank you for using the services of The National Food Laboratory.

Sincerely,

Grace Bandong, Laboratory Manager, Analytical Services - Chemistry Division

cc: Patrick Manning, Accounting

where art meets science

365 North Canyons Parkway, Suite 201, Livermore CA 94551 Tech Center: 2441 Constitution Drive, Livermore CA 94551
925.828.1440 www.TheNFL.com

