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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, RG 10-494517,
) RG 11-598595, RG 11-598596, RG 11-
) 603764 and RG 12-658652)
) **[PROPOSED] CONSENT**
) **JUDGMENT AS TO AEROGROUP**
) **INTERNATIONAL, INC.**

AND CONSOLIDATED CASES.

1. DEFINITIONS

- 1.1 “Covered Products” means footwear that are Manufactured, distributed, sold or offered for sale by Settling Defendants.
- 1.2 “Effective Date” means the date on which this Consent Judgment is entered by the Court.
- 1.3 “Lead Limits” means the maximum concentrations of lead and lead compounds (“Lead”) by weight specified in Section 3.2.

1 1.4 “Manufactured” and “Manufactures” means to manufacture, produce, or
2 assemble.

3 1.5 “Paint or other Surface Coatings” means a fluid, semi-fluid, or other material,
4 with or without a suspension of finely divided coloring matter, which changes to a solid film
5 when a thin layer is applied to a metal, wood, stone, paper, leather, cloth, plastic, or other surface.
6 This term does not include printing inks or those materials which actually become a part of the
7 substrate, such as the pigment in a plastic article, or those materials which are actually bonded to
8 the substrate, such as by electroplating or ceramic glazing.

9 1.6 “Vendor” means a person or entity that Manufactures, imports, distributes, or
10 supplies a Covered Product to Settling Defendants.

11 **2. INTRODUCTION**

12 2.1 The parties to this Consent Judgment (“Parties”) are the Center for
13 Environmental Health (“CEH”) and defendant AeroGroup International, Inc. (“Settling
14 Defendant”).

15 2.2 On June 24, 2009, CEH filed the action entitled *CEH v. Lulu NYC LLC, et al.*,
16 Case No. RG 09-459448, alleging Proposition 65 violations as to wallets, handbags, purses and
17 clutches. The Court has consolidated the *Lulu* matter with a number of other related Proposition
18 65 cases.

19 2.3 On or about March 9, 2012, CEH served a 60-Day Notice of Violation under
20 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
21 & Safety Code §§ 25249.5, *et seq.*), alleging that Settling Defendant violated Proposition 65 by
22 exposing persons to Lead contained in footwear, without first providing a clear and reasonable
23 Proposition 65 warning. On or about December 5, 2012, CEH named Settling Defendant as a
24 “Footwear Defendant” in the action entitled *CEH v. Fashion Eden*, Case No. RG 12-658652.

25 2.4 Settling Defendant manufactures, distributes and/or offers for sale Covered
26 Products in the State of California or has done so in the past.

27 2.5 For purposes of this Consent Judgment only, the Parties stipulate that this
28 Court has jurisdiction over the allegations of violations contained in the operative Complaint

1 applicable to Settling Defendant (the “Complaint”) and personal jurisdiction over Settling
2 Defendant as to the acts alleged in the Complaint, that venue is proper in the County of Alameda,
3 and that this Court has jurisdiction to enter this Consent Judgment.

4 2.6 Nothing in this Consent Judgment is or shall be construed as an admission by
5 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
6 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
7 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
8 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
9 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
10 is accepted by the Parties for purposes of settling, compromising and resolving issues disputed in
11 this action.

12 **3. INJUNCTIVE RELIEF**

13 3.1 **Specification Compliance Date.** To the extent it has not already done so, no
14 more than 30 days after the Effective Date, Settling Defendant shall provide the Lead Limits to its
15 Vendors of Covered Products and shall instruct each Vendor to use reasonable efforts to provide
16 Covered Products that comply with the Lead Limits on a nationwide basis.

17 3.2 **Lead Limits.**

18 Commencing on the Effective Date, Settling Defendant shall not purchase, import,
19 or Manufacture any Covered Product that will be sold or offered for sale to California consumers
20 that contains a material or is made of a component that exceeds the following Lead Limits:

21 3.2.1 Paint or other Surface Coatings: 90 parts per million (“ppm”).

22 3.2.2 Polyvinyl chloride (“PVC”): 200 ppm.

23 3.2.3 All other materials or components other than cubic zirconia (sometimes
24 called cubic zirconium, CZ), crystal, glass or rhinestones: 300 ppm.

25 3.3 **Final Retail Compliance Date.** Commencing on July 1, 2013, Settling
26 Defendant shall not sell or offer for sale in California any Covered Product that exceeds the Lead
27 Limits specified in Section 3.2. For purposes of this Section 3.3, when Settling Defendant’s
28 direct customer sells or offers for sale to California consumers a Covered Product after July 1,

1 2013, Settling Defendant is deemed to “offer for sale in California” that Covered Product.

2 **3.4 Action Regarding Specific Products.**

3 3.4.1 On or before the Effective Date, Settling Defendant shall cease selling the
4 the Aerosoles Dozen Roses Slingback Sandal in Yellow, SKU No. 8-85833-50926-1(the
5 “Section 3.4 Product”) in California. On or before the Effective Date, Settling Defendant
6 shall also cease shipping the Section 3.4 Product to any of their stores and/or customers
7 that resell the Section 3.4 Product in California.

8 **4. ENFORCEMENT**

9 4.1 Any Party may, after meeting and conferring, by motion or application for an
10 order to show cause before this Court, enforce the terms and conditions contained in this Consent
11 Judgment. Enforcement of the terms and conditions of Sections 3.2 and 3.3 of this Consent
12 Judgment shall be brought exclusively pursuant to Sections 4.2 through 4.3.

13 4.2 **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 4.2.

15 4.2.1 **Service of Notice.** CEH shall serve the Notice of Violation on Settling
16 Defendant within 45 days of the date the alleged violation(s) was or were observed,
17 provided, however, that CEH may have up to an additional 45 days to provide Settling
18 Defendant with the test data required by Section 4.2.2(d) below if it has not yet obtained it
19 from its laboratory; and (ii) CEH may serve a Notice of Violation to a supplier of a
20 Covered Product so long as: (a) the identity of the supplier cannot be discerned from the
21 labeling of the Covered Product; and (b) the Notice of Violation to the supplier is served
22 within 45 days of the date the supplier is identified by CEH.

23 4.2.2 **Supporting Documentation.** The Notice of Violation shall, at a minimum,
24 set forth for each Covered Product: (a) the date(s) the alleged violation(s) was observed,
25 (b) the location at which the Covered Product was offered for sale, (c) a description of the
26 Covered Product giving rise to the alleged violation, and of each material or component
27 that is alleged not to comply with the Lead Limits, including a picture of the Covered
28 Product and all identifying information on tags and labels, and (d) all test data obtained by

1 CEH regarding the Covered Product and related supporting documentation, including all
2 laboratory reports, quality assurance reports and quality control reports associated with
3 testing of the Covered Products. Such Notice of Violation shall be based at least in part
4 upon total acid digest testing performed by an independent accredited laboratory. Wipe,
5 swipe, x-ray fluorescence, and swab testing are not by themselves sufficient to support a
6 Notice of Violation, although any such testing may be used as additional support for a
7 Notice. The Parties agree that the sample Notice of Violation attached hereto as Exhibit A
8 is sufficient in form to satisfy the requirements of subsections (c) and (d) of this Section
9 4.2.2.

10 4.2.3 **Additional Documentation.** CEH shall promptly make available for
11 inspection and/or copying upon request by and at the reasonable expense of Settling
12 Defendant, all supporting documentation related to the testing of the Covered Products
13 and associated quality control samples, including chain of custody records, all laboratory
14 logbook entries for laboratory receiving, sample preparation, and instrumental analysis,
15 and all printouts from all analytical instruments relating to the testing of Covered Product
16 samples and any and all calibration, quality assurance, and quality control tests performed
17 or relied upon in conjunction with the testing of the Covered Products, obtained by or
18 available to CEH that pertains to the Covered Product's alleged noncompliance with
19 Section 3 and, if available, any exemplars of Covered Products tested.

20 4.2.4 **Multiple Notices.** If Settling Defendant has received more than four
21 Notices of Violation in any 12-month period, at CEH's option, CEH may seek whatever
22 fines, costs, penalties, or remedies are provided by law for failure to comply with the
23 Consent Judgment. For purposes of determining the number of Notices of Violation
24 pursuant to this Section 4.2.4, the following shall be excluded:

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

27 (b) A Notice of Violation that meets one or more of the conditions of
28 Section 4.3.3(b).

1 4.3 **Notice of Election.** Within 30 days of receiving a Notice of Violation
2 pursuant to Section 4.2, including the test data required pursuant to 4.2.2(d), Settling Defendant
3 shall provide written notice to CEH stating whether it elects to contest the allegations contained in
4 the Notice of Violation (“Notice of Election”). Failure to provide a Notice of Election shall be
5 deemed an election to contest the Notice of Violation. Any contributions to the Fashion
6 Accessory Testing Fund required under this Section 4.3 shall be made payable to The Center for
7 Environmental Health and included with Settling Defendant’s Notice of Election.

8 4.3.1 **Contested Notices.** If the Notice of Violation is contested, the Notice of
9 Election shall include all then-available documentary evidence regarding the alleged
10 violation, including any test data. Within 30 days the parties shall meet and confer to
11 attempt to resolve their dispute. Should such attempts at meeting and conferring fail,
12 CEH may file an enforcement motion or application pursuant to Section 4.1. If Settling
13 Defendant withdraws its Notice of Election to contest the Notice of Violation before any
14 motion concerning the violations alleged in the Notice of Violation is filed pursuant to
15 Section 4.1, Settling Defendant shall make a contribution to the Proposition 65 Fashion
16 Accessory Testing Fund in the amount of \$12,500 and shall comply with all of the non-
17 monetary provisions of Section 4.3.2. If, at any time prior to reaching an agreement or
18 obtaining a decision from the Court, CEH or Settling Defendant acquires additional test or
19 other data regarding the alleged violation, they shall promptly provide all such data or
20 information to the other Party.

21 4.3.2 **Non-Contested Notices.** If the Notice of Violation is not contested,
22 Settling Defendant shall include in its Notice of Election a detailed description of
23 corrective action that it has undertaken or proposes to undertake to address the alleged
24 violation. Any such correction shall, at a minimum, provide reasonable assurance that the
25 Covered Product will no longer be offered by Settling Defendant or its customers for sale
26 in California, or alternatively, that the Covered Product will comply with the Lead Limits
27 in Section 3.2. If there is a dispute over the sufficiency of the proposed corrective action
28 or its implementation, CEH shall promptly notify Settling Defendant and the Parties shall

1 meet and confer before seeking the intervention of the Court to resolve the dispute. In
2 addition to the corrective action, Settling Defendant shall make a contribution to the
3 Fashion Accessory Testing Fund in the amount of \$10,000, unless one of the provisions of
4 Section 4.3.3 applies.

5 **4.3.3 Limitations in Non-Contested Matters.**

6 (a) If Settling Defendant elects not to contest a Notice of Violation
7 before any motion concerning the violation(s) at issue has been filed, the monetary
8 liability of Settling Defendant shall be limited to the contributions required by Section
9 4.3.2 and this Section 4.3.3, if any.

10 (b) The contribution to the Fashion Accessory Testing Fund shall be:

11 (i) One thousand seven hundred fifty dollars (\$1,750) if Settling
12 Defendant, prior to receiving and accepting for distribution or sale the
13 Covered Product identified in the Notice of Violation, obtained test results
14 demonstrating that all of the materials or components in the Covered
15 Product identified in the Notice of Violation complied with the applicable
16 Lead Limits, and further provided that such test results meet the same
17 quality criteria to support a Notice of Violation as set forth in Section 4.2.2
18 and that the testing was performed within two years prior to the date of the
19 sales transaction on which the Notice of Violation is based. Settling
20 Defendant shall provide copies of such test results and supporting
21 documentation to CEH with its Notice of Election; or

22 (ii) One thousand five hundred dollars (\$1,500) if Settling
23 Defendant is in violation of Section 3.3 only insofar as that Section deems
24 Settling Defendant to have “offered for sale” a product sold at retail by
25 Settling Defendant’s customer, provided however, that no contribution is
26 required or payable if Settling Defendant has already been required to pay
27 a total of ten thousand dollars (\$10,000) pursuant to this subsection. This
28 subsection shall apply only to Covered Products that Settling Defendant

1 demonstrates were shipped prior to July 1, 2013; or

2 (iii) Not required or payable, if the Notice of Violation identifies
3 the same Covered Product or Covered Products, differing only in size or
4 color, that have been the subject of another Notice of Violation within the
5 preceding 12 months.

6 **5. PAYMENTS**

7 **5.1 Payments by Settling Defendant.** Within five (5) business days of the Effective
8 Date, Settling Defendant shall pay the total sum of \$55,000 as a settlement payment. The total
9 settlement amount for Settling Defendant shall be paid in three separate checks and delivered to
10 the offices of the Lexington Law Group (Attn: Eric Somers), 503 Divisadero Street, San
11 Francisco, California 94117-2212, and made payable and allocated as follows:

12 5.1.1 Settling Defendant shall pay the sum of \$7,250 as a civil penalty pursuant
13 to Health & Safety Code § 25249.7(b). CEH shall apportion this payment in accordance with
14 Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
15 Environmental Health Hazard Assessment). The civil penalty check shall be made payable to the
16 Center For Environmental Health.

17 5.1.2 Settling Defendant shall pay the sum of \$10,900 as a payment in lieu of
18 civil penalty to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
19 Regulations, Title 11, § 3203(b). CEH shall use such funds to continue its work educating and
20 protecting people from exposures to toxic chemicals, including heavy metals. In addition, as part
21 of its Community Environmental Action and Justice Fund, CEH will use four percent of such
22 funds to award grants to grassroots environmental justice groups working to educate and protect
23 people from exposures to toxic chemicals. The method of selection of such groups can be found
24 at the CEH web site at www.ceh.org/justicefund. The payment pursuant to this Section shall be
25 made payable to the Center For Environmental Health.

26 5.1.3 Settling Defendant shall also separately pay the sum of \$36,850 to the
27 Lexington Law Group as reimbursement of a portion of CEH's reasonable attorneys' fees and
28 costs. The attorneys' fees and cost reimbursement check shall be made payable to the Lexington

1 Law Group.

2 **6. MODIFICATION**

3 6.1 **Written Consent.** This Consent Judgment may be modified from time to
4 time by express written agreement of the Parties with the approval of the Court, or by an order of
5 this Court upon motion and in accordance with law.

6 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
7 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
8 modify the Consent Judgment.

9 **7. CLAIMS COVERED AND RELEASED**

10 7.1 This Consent Judgment is a full, final and binding resolution between CEH on
11 behalf of itself and the public interest and Settling Defendant, and its parents, subsidiaries,
12 affiliated entities that are under common ownership, directors, officers, employees, and attorneys
13 (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or sell
14 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
15 franchisees, cooperative members, licensors, and licensees (“Downstream Defendant Releasees”) of
16 any violation of Proposition 65 that was or could have been asserted in the Complaint against
17 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees, based on failure
18 to warn about alleged exposure to Lead contained in Covered Products that were sold by Settling
19 Defendant prior to the Effective Date.

20 7.2 Compliance with the terms of this Consent Judgment by Settling Defendant
21 constitutes compliance with Proposition 65 with respect to Lead in Settling Defendant’s Covered
22 Products.

23 7.3 Nothing in this Section 7 affects CEH’s right to commence or prosecute an
24 action under Proposition 65 against any person other than Settling Defendant, Defendant
25 Releasee, or Downstream Defendant Releasee.

26 **8. NOTICE**

27 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
28 notice shall be sent by first class and electronic mail to:

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Eric S. Somers
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
esomers@lexlawgroup.com

8.2 When Settling Defendant is entitled to receive any notice under this Consent Judgment, the notice shall be sent by first class to:

Linda I. Vogel
Senior Vice President & General Counsel
Aerosoles
201 Meadow Road
Edison, NJ 08817

With a copy by first class and electronic mail to:

William J. Carroll
P. Mark Mahoney
Schiff Hardin LLP
One Market, Spear Street Tower
32nd Floor
San Francisco, CA 94105
pmahoney@schiffhardin.com

8.3 Any Party may modify the person and address to whom the notice is to be sent by sending each other Party notice by first class and electronic mail.

9. COURT APPROVAL

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

10. ATTORNEYS' FEES

10.1 Should CEH prevail on any motion, application for an order to show cause or other proceeding to enforce a violation of this Consent Judgment, CEH shall be entitled to its reasonable attorneys' fees and costs incurred as a result of such motion or application. Should Settling Defendant prevail on any motion application for an order to show cause or other

1 proceeding, Settling Defendant may be awarded its reasonable attorneys' fees and costs as a result
2 of such motion or application upon a finding by the Court that CEH's prosecution of the motion
3 or application lacked substantial justification. For purposes of this Consent Judgment, the term
4 substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986,
5 Code of Civil Procedure §§ 2016, *et seq.*

6 10.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
7 its own attorneys' fees and costs.

8 10.3 Nothing in this Section 10 shall preclude a Party from seeking an award of
9 sanctions pursuant to law.

10 **11. TERMINATION**

11 11.1 This Consent Judgment shall be terminable by CEH or by Settling Defendant
12 at any time after January 1, 2019, upon the provision of 30 days advanced written notice; such
13 termination shall be effective upon the subsequent filing of a notice of termination with Superior
14 Court of Alameda County.

15 11.2 Should this Consent Judgment be terminated pursuant to this Section, it shall
16 be of no further force or effect as to the terminated parties; provided, however that if CEH is the
17 terminating Party, the provisions of Sections 5 and 7 shall survive any termination and provided
18 further that if Settling Defendant is the terminating Party, the provisions of Sections 5 and 7.1
19 shall survive any termination.

20 **12. OTHER TERMS**

21 12.1 The terms of this Consent Judgment shall be governed by the laws of the State
22 of California.

23 12.2 This Consent Judgment shall apply to and be binding upon CEH and Settling
24 Defendant, and the successors or assigns of any of them.

25 12.3 This Consent Judgment contains the sole and entire agreement and
26 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
27 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
28 merged herein and therein. There are no warranties, representations, or other agreements between

1 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
2 implied, other than those specifically referred to in this Consent Judgment have been made by any
3 Party hereto. No other agreements not specifically contained or referenced herein, oral or
4 otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation,
5 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
6 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
7 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
8 whether or not similar, nor shall such waiver constitute a continuing waiver.

9 12.4 Nothing in this Consent Judgment shall release, or in any way affect any rights
10 that any Settling Defendant might have against any other party, whether or not that party is a
11 Settling Defendant.

12 12.5 This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

14 12.6 The stipulations to this Consent Judgment may be executed in counterparts
15 and by means of facsimile or portable document format (pdf), which taken together shall be
16 deemed to constitute one document.

17 12.7 Each signatory to this Consent Judgment certifies that he or she is fully
18 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
19 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
20 Party.

21 12.8 The Parties, including their counsel, have participated in the preparation of
22 this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.
23 This Consent Judgment was subject to revision and modification by the Parties and has been
24 accepted and approved as to its final form by all Parties and their counsel. Accordingly, any
25 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
26 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
27 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
28 be resolved against the drafting Party should not be employed in the interpretation of this Consent

1 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

2 **IT IS SO ORDERED:**

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4 Dated: _____, 2013

The Honorable Steven A. Brick
Judge of the Superior Court

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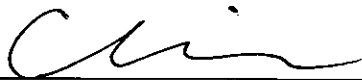
7 **IT IS SO STIPULATED:**

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9 **CENTER FOR ENVIRONMENTAL HEALTH**

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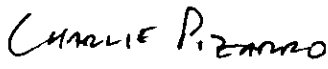
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Signature

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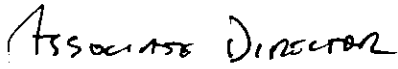


Printed Name

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AEROGROUP INTERNATIONAL, INC.

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Signature

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Printed Name

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Title

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1 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

2 **IT IS SO ORDERED:**

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4 Dated: _____, 2013

The Honorable Steven A. Brick
Judge of the Superior Court

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7 **IT IS SO STIPULATED:**

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9 **CENTER FOR ENVIRONMENTAL HEALTH**

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Signature

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Printed Name

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19 **AEROGROUP INTERNATIONAL, INC.**

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Signature

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Linda F. Vogel

Printed Name

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Senior Vice President & General Counsel

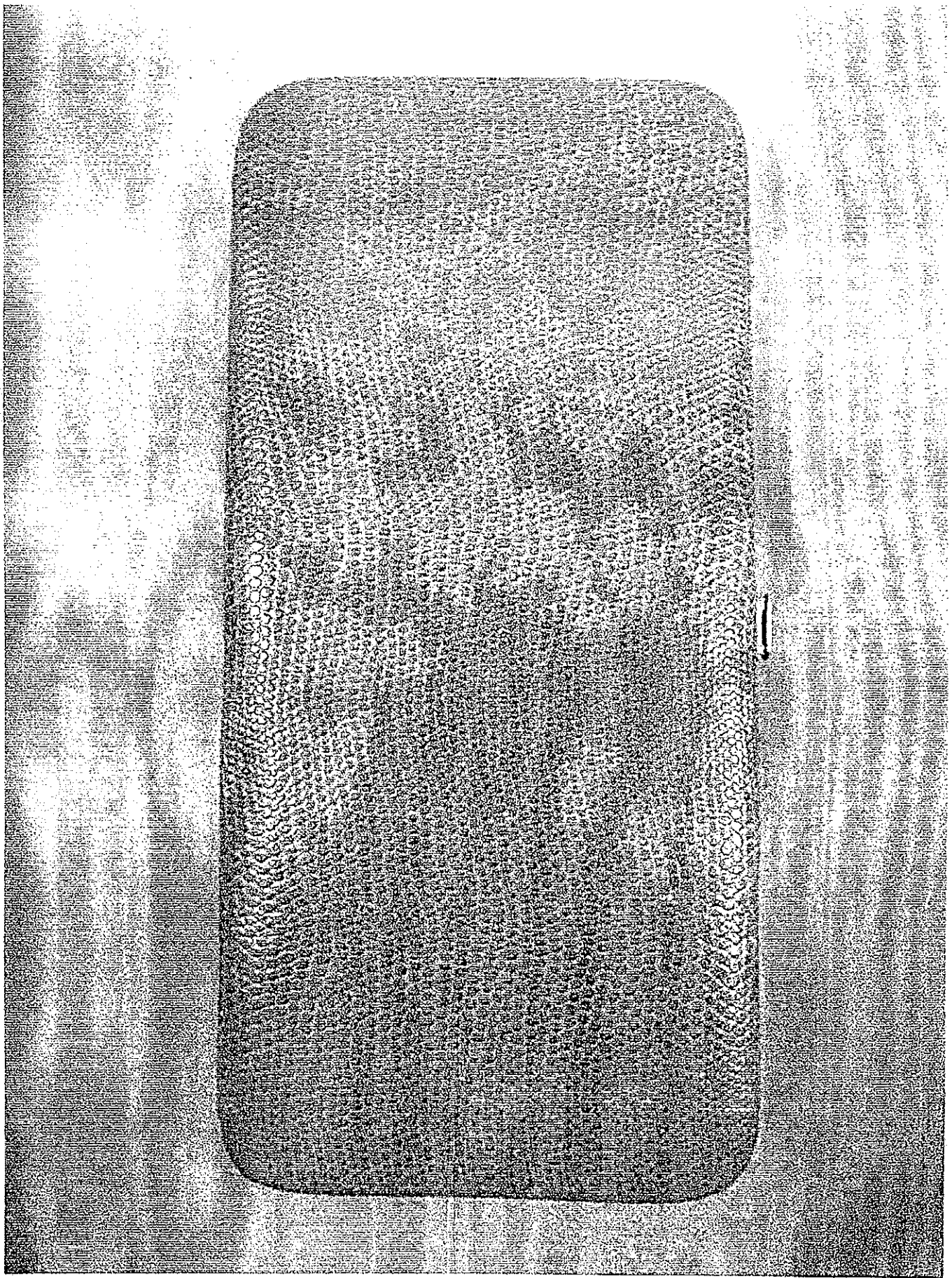
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Exhibit A



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OFFICE

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THE

365 North Canyons Parkway, Suite 201
Tech Center: 2441 Constitution Drive
Livermore CA 94551



925-828-1440
www.TheNFL.com

Analytical Report

August 03, 2011

Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117

Analytical Report No.: CL3573-33
Analysis Dates: 07/26/11 - 08/03/11

Listed below are the results of our analyses for sample(s) received on July 26, 2011.

CEH ID#AB789L, [REDACTED] Wallet (Orange Surface Material On Main Part Of W
NFL ID AF02363

Analyte	Result	Units	Method Ref.
Lead	67500	ppm	NIOSH 7082

A portion of the sample was digested in a microwave oven with concentrated nitric acid and analyzed by ICP-MS.

Sample(s) were received in good condition unless and 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.

The National Food Lab services are provided subject to our standard terms and conditions, which can be found on our website, www.TheNFL.com. Should you have any questions concerning these results, please do not hesitate to contact us. Thank you for using the services of the National Food Lab.

Sincerely,

Grace Bandong, Division Manager, Food Contaminants -Chemistry

cc: The NFL's Accounts Receivable