

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

)
In the Matter of)
)
)
EXCELLIGENCE LEARNING)
CORPORATION)
D/B/A)
DISCOUNT SCHOOL SUPPLY)
_____)

CPSC Docket No. _____

SETTLEMENT AGREEMENT

1. In accordance with 16 C.F.R. § 1118.20, Excelligence Learning Corporation, d/b/a Discount School Supply ("Excelligence") and the staff ("Staff") of the United States Consumer Product Safety Commission ("CPSC" or the "Commission") enter into this Settlement Agreement ("Agreement"). The Agreement and the incorporated attached Order ("Order") settle the Staff's allegations set forth below.

PARTIES

2. The Commission is an independent federal regulatory agency established pursuant to, and responsible for the enforcement of, the Consumer Product Safety Act, 15 U.S.C. §§ 2051 – 2089 ("CPSA").

3. Excelligence is a corporation organized and existing under the laws of Delaware, with its principal offices located in Monterey, California. At all times relevant hereto, Excelligence imported and/or sold educational toys and school products.

STAFF ALLEGATIONS

4. Between May 2004 and May 2007, Excelligence imported into the United States about 20,000 units of certain "shaving-style" paint brushes, each about 4-inches long, with handles that are painted blue, purple, orange, yellow, lime green, or pink, and the item number #SHVBRSB printed on

the product's packaging ("Brush(es)"). The Brushes were sold as a set of six consisting of a variety of the aforementioned colors, and also sold as part of the "BioColor® Foam Paint Starter Kit" and "Colorations® Foam Paint Starter Kit." The Brushes were, in turn, offered for sale or sold to schools, childcare centers, and other organizations, and directly to consumers, via Discount School Supply catalogs and the company's Web site, as follows: sets were sold from May 2004 through August 2007 for about \$5 per unit; the BioColor® kits were sold from May 2004 through June 2006 for about \$60 per kit; and the Colorations® kits were sold from July 2006 through August 2007 for about \$60 per kit.

5. Between August 2000 and August 2007, Excelligence imported into the United States about 13,000 units of "Giant Grow" measuring charts, each consisting of a giant yellow ruler-shaped plastic chart for measuring a child's growth with a picture of a bean stalk painted on it from top to bottom ("Chart(s)"). The Charts were, in turn, offered for sale or sold to schools, childcare centers, and other organizations, and directly to consumers, from August 2000 through August 2007 for about \$10 per unit, via Discount School Supply catalogs and the company's Web site.

6. During June 2007, Excelligence imported into the United States about 60 units of "Tic Tac Turtle Toss" play mats, each consisting of a 50-inch vinyl/polyester play mat that is double-sided, with a number design on one side and a turtle design on the other, the "Discount School Supply" name and logo printed in the corner on both sides, and numbers and designs painted in red, blue, green and black over a yellow background ("Mat(s)"). The Mats were, in turn, offered for sale or sold to schools, childcare centers, and other organizations, and directly to consumers, from June 2007 through September 2007 for about \$40 per unit, via Discount School Supply catalogs and the company's Web site.

7. The Brushes, Charts and Mats are "consumer product(s)," and, at all times relevant hereto, Excelligence was a "manufacturer" and/or a "retailer" of those consumer product(s), which were

“distributed in commerce,” as those terms are defined in CPSA sections 3(a)(3), (5), (8), (11), and (13), 15 U.S.C. §§ 2052(a)(3), (5), (8), (11), and (13).

8. The Brushes, Charts and Mats are articles intended to be entrusted to or for use by children, and, therefore, are subject to the requirements of the Commission’s Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. Part 1303 (the “Ban”). Under the Ban, toys and other children’s articles must not bear “lead-containing paint,” defined as paint or other surface coating materials whose lead content is more than 0.06 percent of the weight of the total nonvolatile content of the paint or the weight of the dried paint film. 16 C.F.R. § 1303.2(b)(1)

9. On August 20, 2007, Excelligence reportedly received “preliminary” test results from an independent laboratory indicating the presence of excessive lead levels in surface coatings of tested Brush handles. Ten days later, on August 30, 2007, Excelligence reported to CPSC that it had commissioned an independent laboratory to conduct further testing for the presence of lead in surface coatings on additional Brush samples. As expressed in two test reports of the same date, the confirmatory testing demonstrated that the green, yellow and orange paints on handles of a Brush set each contained a total lead content of more than 10,000 parts per million (ppm); and that the green, yellow and orange paints of another Brush set each contained a total lead content of more than 10,000 ppm. These levels of lead are in excess of the permissible 0.06 percent limit set forth in the Ban.

10. On August 29, 2007, Excelligence reported to CPSC that it had received “preliminary” test results showing that surface paint on the Charts had excessive levels of lead, but indicated that it was in the process of obtaining further results to determine the scope of affected units. On October 25, 2007, Excelligence reported to CPSC that it had commissioned an independent laboratory to conduct confirmatory testing for the presence of lead in surface coatings on additional Chart samples, and determined that product units received by customers in 2002 and in 2005 failed to comply with the Ban. As expressed in two test reports dated October 12, 2007, the testing of a Chart sample

manufactured in 2005 demonstrated that the "Black Coating on Plastic Sheet (Scale)" contained a total lead content of more than 0.390 percent, and the "Coatings (Green & White) on Plastic Sheet (Tree)" contained a total lead content of more than 0.204 percent; and testing of a Chart sample manufactured in 2002 demonstrated that corresponding paints contained a total lead content of more than 0.260 percent, and more than 0.262 percent, respectively. These levels of lead are in excess of the permissible 0.06 percent limit set forth in the Ban.

11. After learning on September 17, 2007 that "preliminary" test results on a pre-production run of the Mats had indicated the presence of excessive lead levels in surface coatings, Excelligence sent production samples of Mats from current warehouse inventory for further testing by an independent laboratory. On October 24, 2007, Excelligence reported to CPSC that confirmatory testing by the laboratory testing for lead in surface coatings on the additional Mat samples, whose results were set forth in an October 15, 2007 test report, demonstrated that the blue, red, yellow, black and green surface coatings of the plastic patterns contained a total lead content from 4,440 ppm to 9,110 ppm. These levels of lead are in excess of the permissible 0.06 percent limit set forth in the Ban.

12. On November 21, 2007, the Commission and Excelligence announced a consumer-level recall of about 20,000 units of the Brushes because "Surface paint on the brush handles can contain excessive levels of lead, violating the federal lead paint standard." On December 19, 2007, the Commission and Excelligence announced a recall of about 13,000 units of the Charts because "The paint on the grow chart contains excess levels of lead, violating the federal lead paint standard." The next month, on January 16, 2008, the Commission and Excelligence likewise announced a recall of about 60 units of the Mats because "The paint on the Tic Tac Turtle Toss mats contains excess levels of lead, violating the federal lead paint standard."

13. Although Excelligence reported no incidents or injuries associated with the Brushes, Charts and Mats, it failed to take adequate action to ensure that none would bear or contain lead-containing paint, thereby creating a risk of lead poisoning and adverse health effects to children.

14. The Brushes, Charts and Mats constitute “banned hazardous products” under CPSA section 8 and the Ban, 15 U.S.C. § 2057 and 16 C.F.R. §§ 1303.1(a)(1), 1303.4(b), in that they bear or contain paint or other surface coating materials whose lead content exceeds the permissible limit of 0.06 percent of the weight of the total nonvolatile content of the paint or the weight of the dried paint film.

15. Between August 2000 and September 2007, Excelligence sold, manufactured for sale, offered for sale, distributed in commerce, or imported into the United States, or caused one or more of such acts, with respect to the aforesaid banned hazardous Brushes, Charts and Mats, in violation of section 19(a)(1) of the CPSA, 15 U.S.C. § 2068(a)(1). Excelligence committed these prohibited acts “knowingly,” as that term is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

16. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Excelligence is subject to civil penalties for the aforementioned violations.

EXCELLIGENCE RESPONSE

17. Excelligence denies the Staff’s allegations set forth above that Excelligence knowingly violated the CPSA.

AGREEMENT OF THE PARTIES

18. Under the CPSA, the Commission has jurisdiction over this matter and over Excelligence.

19. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Excelligence, or a determination by the Commission, that Excelligence has knowingly violated the CPSA.

20. In settlement of the Staff's allegations, Excelligence shall pay a civil penalty in the amount of twenty five thousand dollars (\$25,000.00) within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement. This payment shall be made by check payable to the order of the United States Treasury.

21. Upon the Commission's provisional acceptance of the Agreement, the Agreement shall be placed on the public record and published in the *Federal Register* in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). In accordance with 16 C.F.R. § 1118.20(f), if the Commission does not receive any written request not to accept the Agreement within fifteen (15) days, the Agreement shall be deemed finally accepted on the sixteenth (16th) day after the date it is published in the *Federal Register*.

22. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, Excelligence knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (1) an administrative or judicial hearing; (2) judicial review or other challenge or contest of the validity of the Commission's Order or actions; (3) a determination by the Commission of whether Excelligence failed to comply with the CPSA and its underlying regulations; (4) a statement of findings of fact and conclusions of law; and (5) any claims under the Equal Access to Justice Act.

23. The Commission may publicize the terms of the Agreement and Order.

24. The Agreement and Order shall apply to, and be binding upon, Excelligence and each of its successors and assigns.

25. The Commission issues the Order under the provisions of the CPSA, and violation of the Order may subject Excelligence to appropriate legal action.

26. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and Order may not be used to vary or contradict its terms. The Agreement shall not be waived, amended, modified, or

otherwise altered, except in a writing that is executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

26. If any provision of the Agreement and Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and Order, such provision shall be fully severable. The balance of the Agreement and Order shall remain in full force and effect, unless the Commission and Excelligence agree that severing the provision materially

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affects the purpose of the Agreement and Order.

EXCELLIGENCE LEARNING CORPORATION

Dated: _____

By: _____
Kelly Crampton, Chief Executive Officer
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d/b/a Discount School Supply
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Monterey, CA 93940

Dated: _____

By: _____
Jonathan I. Price, Esq.
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U.S. CONSUMER PRODUCT SAFETY COMMISSION
STAFF

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Office of the General Counsel

Dated: _____

By: _____
M. Reza Malihi, Trial Attorney
Division of Compliance
Office of the General Counsel