UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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| In the Matter of<br><br>SCHYLLING ASSOCIATES, INC. | )<br>)<br>)<br>)<br>) | CPSC Docket No. 10-C0004 |

## SETTLEMENT AGREEMENT

1. In accordance with 16 C.F.R. § 1118.20, Schylling Associates, Inc. ("Schylling") 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. Schylling is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with principal offices located in Rowley, Massachusetts. At all times relevant hereto, Schylling designed, imported and sold toys and children's products.

## STAFF ALLEGATIONS

### A. INTRODUCTION/DISTRIBUTION IN COMMERCE OF BANNED TOYS

4. From January 24, 2002 through March 2002, Schylling imported approximately 10,200 units of certain tin pail toys ("Pails"), consisting of *Thomas and Friends*, *Curious George*, and *Primary Colors* (red/yellow) styles, which had been produced in China by one of its Hong Kong manufacturers, Eway Enterprises, Ltd. ("Eway"). Schylling distributed approximately 4,700 units of the Pails to its

customers in February and March 2002. The Pails were sold or offered for sale to consumers at toy stores and gift shops nationwide in February and March 2002, for about $6 per unit.

5. Between June 2001 and June 2002, Schylling imported approximately 66,000 units of certain spinning top toys ("Tops"), consisting of *Thomas and Friends*, *Curious George*, and *Circus* styles, which had been produced in China by another of its Hong Kong manufacturers, Sanda Kan Industrial, Ltd. ("Sanda Kan"). Schylling distributed these Tops to its U.S. customers from July 2001 until at least September 2002. The Tops were sold or offered for sale to consumers at toy stores and gift shops nationwide from July 2001 until at least September 2002, for about $13 per unit.

6. Between April 2003 and May 2003, Schylling imported approximately 3,600 units of certain *Winnie-the-Pooh* style spinning top toys, which also had been produced in China by Sanda Kan. Schylling distributed these *Winnie-the-Pooh* tops to its U.S. customers from April until November 2003. The *Winnie-the-Pooh* tops were sold or offered for sale to consumers at toy stores and gift shops nationwide from April until November 2003, for about $12 per unit.

7. The Pails, Tops and *Winnie-the-Pooh* tops described in paragraphs 4 through 6 above (collectively, the "Subject Products") are "consumer product(s)," and, at all times relevant hereto, Schylling was a "manufacturer" of those consumer products, which were "distributed in commerce," as those terms are defined in CPSA sections 3(a)(3), (5), (8), and (11), 15 U.S.C. § 2052(a)(3), (5), (8), and (11).

8. The Subject Products 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 "Lead-Paint Ban"). Under the Lead-Paint 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)[1]

9. On March 7, 2002, as a result of testing conducted in Hong Kong at its behest, Schylling obtained a test report from an independent laboratory demonstrating that the wooden handles of as many as 12 production samples of the *Primary Colors* (red/yellow) style tin pail toys bore paint or other surface coating materials whose lead content exceeded the permissible limit of 0.06 percent set forth in the Lead-Paint Ban. In late March 2002, without furnishing any copy of the associated test report, Eway informed Schylling that the supplier of the yellow and red paints used on the Pails had conducted re-testing and confirmed that the paints failed to comply with the Lead-Paint Ban.

10. Shortly after March 2002, following a brief evaluation of possibly purchasing additional pails from Eway having a clear (lacquer) finish instead of paint, Schylling reportedly severed its business relationship with Eway due to the referenced lead paint test failures. Beginning March 26, 2002, Schylling, without informing CPSC, initiated a unilateral recall of the Pails from its customers, as further discussed in paragraphs 19 and 20 below.

11. On June 30 and July 1, 2002, as a result of testing conducted in Hong Kong at its behest, Schylling obtained three test reports from an independent laboratory demonstrating that the wooden handles of production samples from each of the *Thomas and Friends*, *Curious George*, and *Circus* style spinning top toys respectively, representing altogether as many as 9 samples, bore paint or other surface coating materials whose lead content exceeded the permissible limit of 0.06 percent set forth in the Lead-Paint Ban. On July 15, 2002, as a result of re-testing conducted in Hong Kong at its behest, Schylling obtained an additional three failing test reports from an independent laboratory

[1] At the time of the alleged violations stated in this Settlement Agreement, the permissible limit of 0.06 percent was in effect for the Lead-Paint Ban. As of August 14, 2009, the limit was amended to 0.009 percent pursuant to 15 U.S.C. § 1278a(f)(1).

that confirmed the June 30th and July 1st results with respect to another set of production samples from each of these three styles of spinning top toys. For the reasons further discussed in paragraphs 21 and 22 below, however, Schylling reportedly concluded at the time that it had resolved the lead-containing paint problem before any non-compliant Tops were imported into the United States. In order to avoid any lead-in-paint problems in the future, Schylling then instructed its manufacturer, Sanda Kan, that henceforth all spinning top toys had to be made with unpainted plastic rather than wooden handles, and had to pass applicable testing for the presence of lead.

12. Some five years later, in early August 2007, a Chicago Tribune news reporter contacted Schylling and informed it that a sample of the *Thomas and Friends* style Top, purchased from a U.S. consumer via a website, had been tested by an independent laboratory for the presence of lead-containing paint and yielded failing results. Upon learning this information, Schylling submitted reports to CPSC under Section 15(b) with respect to the subject Tops and Pails, as further discussed in paragraph 24 below. On August 22, 2007, the Commission and Schylling announced a recall of about 66,000 Tops and about 4,700 Pails because "Surface paints on the wooden handles of the tops and pails contain excessive levels of lead, which violates the federal lead paint standard. Lead is toxic if ingested by young children and can cause adverse health effects."

13. On September 28, 2007, a representative of one of Schylling's licensors, the Walt Disney Company, informed Schylling that at Disney's behest a sample of the *Winnie-the-Pooh* style spinning top toys had been tested by an independent laboratory, which determined that the top's wooden handle bore red paint whose lead content exceeded the permissible limit of 0.06 percent set forth in the Lead-Paint Ban. Until that time Schylling reportedly was unaware that it had sold any *Winnie-the-Pooh* tops with wooden handles, as it supposedly had ordered the *Winnie-the-Pooh* tops from Sanda Kan with unpainted plastic rather than wooden handles, and the non-compliant tops reportedly had not been detected during Schylling's normal quality control review of incoming

shipments. Even though it had sold this toy only in 2003, Schylling was able to locate in storage a pair of the *Winnie-the-Pooh* tops that it believed to be from the same shipment as the sample tested by Disney, and the items were sent to an independent laboratory for confirmatory testing.

14. On October 22, 2007, as a result of testing conducted in Hong Kong at its behest, Schylling obtained a test report from an independent laboratory demonstrating that the wooden handles of both samples of the *Winnie-the-Pooh* tops bore red paint whose lead content exceeded the permissible limit of 0.06 percent set forth in the Lead-Paint Ban. Schylling promptly submitted a report to CPSC under Section 15(b) with respect to the *Winnie-the-Pooh* tops, and on November 7, 2007, the Commission and Schylling announced an expansion of the original recall of Tops and Pails to include about 3,600 of these tops because "Surface paint on the wooden handle of the top contains excessive levels of lead, violating the federal lead paint standard."

15. Although Schylling reported no incidents or injuries associated with the presence of excessive lead in the paint or other surface coatings of the Subject Products, it failed to take adequate action to ensure that none would bear or contain lead-containing paint. That created a risk of lead poisoning and adverse health effects to children.

16. The Subject Products constitute "banned hazardous products" under CPSA section 8 and the Lead-Paint 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.

17. Between June 2001 and November 2003, Schylling 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 Subject Products, in violation of section 19(a)(1) of the CPSA, 15 U.S.C.

§ 2068(a)(1). Schylling committed these prohibited acts "knowingly," as that term is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

18. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Schylling is subject to civil penalties for the violations described in paragraph 17.

B. FAILURE TO REPORT

19. Upon receiving the March 7, 2002 failing test results on certain samples of the tin pail toys, Schylling reportedly halted shipments immediately and locked-down its relevant inventory to prevent any further shipments of all three styles of the Pails, and contacted Eway to investigate the matter. Although it reportedly never obtained any failing lead test reports for them, Schylling included the *Thomas and Friends* and *Curious George* styles of Pails because it had reason to suspect they were also non-compliant as they had come from the same manufacturer, been part of the same shipments, and had similar red and yellow painted wooden handles. Schylling and Eway determined the scope of product units affected by this non-compliance issue encompassed shipments from Hong Kong to the United States initiated on January 24, 2002 and February 28, 2002, relating to a single Schylling purchase order from early December 2001. Schylling further determined that out of the nearly 10,200 imported Pails affected by this issue, only about 4,700 units had been shipped to its U.S. customers, the shipments occurred in February and March 2002, and that hundreds of its customers had received some quantity of these units.

20. At the conclusion of its investigation of this matter, beginning on March 26, 2002, Schylling reportedly notified every customer, by telephone and mail, that they should return the Pails in their possession. However, Schylling did not inform the Commission of the non-compliance or other related information that could have allowed the CPSC staff to assess the attendant risks and any need for corrective action. While this unilateral recall of the Pails reportedly succeeded in recovering

approximately 84% (or 3,948) of the shipped units, the rest of the Pails were not recovered by Schylling at the time and for at least 5 years thereafter.

21. Upon receiving the June 30 and July 1, 2002 failing test results on certain samples of the spinning top toys, Schylling reportedly contacted Sanda Kan immediately to inform the factory that it was rejecting these tops because they could not be sold in the United States, and to investigate the matter. In response to Schylling's inquiries about the status of its then-existing inventory of Tops and these failing test results, Sanda Kan reportedly explained that it had recently changed paint suppliers and suspected that the new supplier had been the source of the lead-containing paint. Sanda Kan assured Schylling that these failed samples were from a new production run involving this new supplier, indicating that the scope of spinning top toys affected by this non-compliance issue included the most recent Schylling purchase order, which had not yet been imported into the United States. Schylling also had in its possession at the time two earlier passing test results that it believed to be pertinent: a November 1997 test report showed that various paint colors from several *Thomas and Friends* style top samples complied with the Lead-Paint Ban's regulatory limit for total lead content; and a January 2000 test report showed that various paints used on the same style tops likewise complied.

22. Even though it had recently encountered a similar non-compliance issue involving the Pails and Eway, Schylling reportedly concluded that it had resolved the lead-containing paint problem regarding the Tops before any non-compliant units of these toys were imported into the United States. This conclusion was reportedly based on Sanda Kan's assurances, Schylling's long-standing business relationship with and perception of that supplier as a reliable source in the industry, the passing test results from 1997 and 2000, and its instructions to Sanda Kan to switch to plastic handles. Schylling did not conduct testing for the presence of lead on any Tops (with wooden handles) in its warehouse at

the time, and continued to ship them to its U.S. customers for several more months until at least September 2002.

23. As previously described in paragraph 12, Schylling was contacted on August 7, 2007, by a Chicago Tribune news reporter who informed the company that a sample of the *Thomas and Friends* style Top had been purchased from a U.S. consumer via an Internet auction website in relation to an upcoming news story, and had subsequently failed independent lab testing for the presence of lead-containing paint. Specifically, Schylling learned that the University of Iowa Hygienic Laboratory had tested the sample twice, and results demonstrated that the Top's wooden handle bore red paint with a lead content of 2.4 percent. Schylling reportedly was surprised to learn this information, and upon further investigation received from Sanda Kan a passing test result obtained in 2001 that showed six bottles of wet paint, intended for use on the spinning top toys, had passed testing for compliance with the European Standard on Safety of Toys (EN71) limits for soluble lead (albeit not total lead) content. After reviewing the situation, Schylling determined that the *Thomas and Friends* style Top in question had been purchased from Sanda Kan prior to July 2002, when Schylling instructed that the handles be changed to plastic.

24. On August 9, 2007, Schylling filed a Section 15(b) report with the CPSC concerning the subject Tops. The next day, on August 10, 2007, reportedly "out of an abundance of caution," Schylling filed a Section 15(b) report with the CPSC concerning the subject Pails.

25. By dates well before August 2007, Schylling knew or should have known that at least a proportion of the subject Tops and Pails distributed in commerce did not comply with the Lead-Paint Ban, 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. Accordingly, Schylling had obtained information that reasonably supported the conclusion that the subject Tops and Pails failed to comply with an applicable consumer

product safety rule. CPSA section 15(b)(1), 15 U.S.C. 2064(b)(1), required Schylling to immediately inform the Commission of each of these failures to comply.

26. Schylling's failure to furnish information to CPSC as required by CPSA section 15(b)(1), 15 U.S.C. 2064(b)(1), violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), with respect to these toys. Schylling committed these prohibited acts "knowingly," as that term is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

27. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Schylling is subject to civil penalties for the violations described in paragraph 26.

## RESPONSIVE ALLEGATIONS OF SCHYLLING

28. Schylling denies that it violated Sections 15(b)(1), 19(a)(1) or 19(a)(4) of the CPSA, 15 U.S.C. §§ 2064(b)(1), 2068(a)(1), or 2068(a)(4), and further denies that it did so "knowingly" (as defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d)). Schylling further denies the factual or legal conclusions or characterizations in the Staff Allegations, in paragraphs 4 – 27, including that Schylling had any knowledge prior to August 2007 that it had imported or sold any spinning tops that did not comply with the lead paint standard.

29. Schylling never intentionally or knowingly imported, sold or offered for sale any products that did not comply with the lead paint standard or other legal requirement. At all times relevant to this matter, Schylling's actions were reasonable, were based on its good faith understanding of the operative facts and fully satisfied any and all standards of care.

30. Schylling has entered into the Agreement for settlement purposes only, to avoid incurring additional expenses and the distraction of litigation. Accordingly, the Agreement and Order do not constitute, and are not evidence of, any fault or wrongdoing on the part of Schylling.

## AGREEMENT OF THE PARTIES

31. Under the CPSA, the Commission has jurisdiction over this matter and over Schylling.

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

33. In settlement of the Staff's allegations, Schylling shall pay a civil penalty in the total amount of Four Hundred Thousand ($400,000.00) dollars. The civil penalty shall be paid in four (4) installments as follows: $75,000.00 shall be paid within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement; $75,000.00 shall be paid on or before the one-year anniversary of the Commission's final Order accepting the Agreement; $125,000.00 shall be paid on or before the two-year anniversary of service of the Commission's final Order accepting the Agreement; and $125,000.00 shall be paid on or before the three-year anniversary of service of the Commission's final Order accepting the Agreement. Each payment shall be made by check payable to the order of the United States Treasury.

34. 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*.

35. Upon the Commission's final acceptance of the Agreement and issuance of the final Order, Schylling 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 Schylling 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.

36. The Commission may publish the terms of the Agreement and Order.

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

38. The Commission issues the Order under the provisions of the CPSA, and violation of the Order may subject those referenced in paragraph 37 to appropriate legal action.

39. 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.

40. 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 Schylling agree that severing the provision materially

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affects the purpose of the Agreement and Order.

SCHYLLING ASSOCIATES, INC.

Dated: May 17, 2010

By: _____
Jack Schylling
President
Schylling Associates, Inc.

Dated: May 18 2010

By: _____
Victor E. Schwartz
Cary Silverman
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U.S. CONSUMER PRODUCT SAFETY COMMISSION STAFF

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Dated: 18 May 2010

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

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| In the Matter of<br><br>SCHYLLING ASSOCIATES, INC. | ) | CPSC Docket No. 10-C0004 |

ORDER

Upon consideration of the Settlement Agreement entered into between Schylling Associates, Inc. ("Schylling"), and the U.S. Consumer Product Safety Commission ("Commission") staff, and the Commission having jurisdiction over the subject matter and over Schylling, and it appearing that the Settlement Agreement and Order are in the public interest, it is

ORDERED, that the Settlement Agreement be, and hereby is, accepted; and it is

FURTHER ORDERED, that Schylling shall pay a civil penalty in the total amount of Four Hundred Thousand ($400,000.00) dollars. The civil penalty shall be paid in four (4) installments as follows: $75,000.00 shall be paid within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement; $75,000.00 shall be paid on or before the one-year anniversary of service of the Commission's final Order accepting the Agreement; $125,000 shall be paid on or before the two-year anniversary of service of the Commission's final Order accepting the Agreement; and $125,000 shall be paid on or before the three-year anniversary of service of the Commission's final Order accepting the Agreement. Each payment shall be made by check payable to the order of the United States Treasury. Upon the failure of Schylling to make any of the foregoing payments when due, (i) the entire amount of the civil penalty shall become due and payable, and (ii) interest on the outstanding balance shall accrue and be paid by Schylling at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b).

Provisionally accepted and provisional Order issued on the 26th day of May, 2010.

BY ORDER OF THE COMMISSION:

Todd A. Stevenson, Secretary
U.S. Consumer Product Safety Commission