



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

Record of Commission Action
Commissioners Voting by Ballot*

This is a DRAFT RCA.
It will be replaced by a Final RCA.

Commissioners Voting: Chairman Inez M. Tenenbaum
 Commissioner Nancy A. Nord
 Commissioner Robert S. Adler

ITEM:

Kolcraft Enterprises, Inc. - Proposed Civil Penalty Settlement of \$400,000
(Briefing package dated February 6, 2013, OS No. 3687)

DECISION:

The Commission voted (2-1) to provisionally accept the attached Settlement Agreement and Order, with changes, which would order Kolcraft Enterprises, Inc. (Kolcraft) of Chicago, IL, to pay a civil penalty of \$400,000. The provisional Settlement Agreement and Final Order will be announced in a *Federal Register* Notice. Chairman Tenenbaum and Commissioner Adler voted to accept the Settlement Agreement and Order with changes. Commissioner Nord voted to accept the Settlement Agreement and Order as specified. The Commission's Office of the General Counsel negotiated the proposed agreement to settle staff allegations that Kolcraft knowingly failed to report in a timely manner under section 15(b) of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064(b), a defect in the play yard's side rail in violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4). Section 20(a)(1) of the CPSA, 15 U.S.C. § 2069(a)(1), permits the imposition of civil penalties for any person who knowingly violates section 19 of the CPSA by a company's failure to report information under section 15(b).

For the Commission:

Todd A. Stevenson
Secretary

*Ballot vote due February 15, 2013
(Commissioner Nord extended the due date from February 12, 2013.)
Attachments: Adopted Changes
 Provisional Settlement Agreement and Order

1. On page 5 after paragraph #22, insert the following new paragraph:

“Kolcraft shall implement and maintain a compliance program designed to ensure compliance with the safety statutes and regulations enforced by the CPSC that, at a minimum, contains the following elements (i) written standards and policies; (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; (iii) effective communication of company compliance-related policies and procedures to all employees through training programs or otherwise; (iv) senior manager responsibility for compliance; (v) board oversight of compliance (if applicable); and (vi) retention of all compliance-related records for at least five (5) years and availability of such records to CPSC upon request.”

2. On page 5 in paragraph #24, strike “, until the obligation in paragraph 18 has been fulfilled.”
3. On page 7 on the second line from the bottom of the page, after the words “If Kolcraft fails to make such payment” insert the words “or to comply in full with any other provision”

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of:	)	CPSC Docket No.: 13- <u>C0004</u>
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Kolcraft Enterprises, Inc.	)	
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SETTLEMENT AGREEMENT AND ORDER

1. In accordance with the Consumer Product Safety Act (CPSA), 15 U.S.C. §§ 2051–2089, (CPSA), and 16 C.F.R. § 1118.20, Kolcraft Enterprises, Inc. (Kolcraft) and staff (staff) of the United States Consumer Product Safety Commission (Commission or CPSC) hereby enter into this Settlement Agreement (Agreement). The Agreement and the attached Order resolve staff’s allegations set forth below.

THE PARTIES

2. Staff is the staff of the Commission, an independent federal regulatory agency established pursuant to, and responsible for, enforcement of the CPSA.

3. Kolcraft is a privately-held company, organized and existing under the laws of the state of Delaware, with its principal office located in Chicago, IL.

4. Kolcraft is a small business as set forth in the Small Business Administration guidelines regarding size of business.

STAFF ALLEGATIONS

5. Between 2000 and 2009, Kolcraft imported approximately 1 million play yards (the “Play Yards”) and distributed them nationwide through major retailers and Internet sales.

6. The Play Yards are “consumer products” and, at all relevant times, Kolcraft was a “manufacturer” of “consumer products,” of the subject Play Yards, which were “distribute[d] in commerce,” as those terms are defined or used in sections 3(a)(5), (8), and (11) of the CPSA, 15 U.S.C. § 2052(3)(a)(5), (8), and (11).

7. The Play Yards are defective because the side rail of a Play Yard can fail to latch properly, and when a child pushes against the rail, the rail can unlatch unexpectedly, posing a fall hazard to children.

8. From 2000 through July 2009, Kolcraft received approximately 350 reports of Play Yards collapsing unexpectedly, including 21 incidents that resulted in injuries to young children.

9. In July 2005, Kolcraft engaged failure analysis experts to examine and test the latching system on the Play Yards. By August 2005, these experts had identified the potential for false latching.

10. During 2006, Kolcraft made prospective improvements to the warning labels, instruction sheets, and the side-rail latch to eliminate false latching in future production of the Play Yards. None of these improvements addressed the potential for false latching that existed in the more than 880,000 Play Yards in commerce at the time.

11. Kolcraft waited until January 15, 2009, however, to report to the CPSC regarding the Play Yards.

12. On July 8, 2009, Kolcraft, in cooperation with the CPSC, announced a recall of the Play Yards.

13. Well before January 15, 2009, Kolcraft had obtained sufficient information to reasonably support the conclusion that the Play Yards contained a defect that could create a

substantial product hazard, or created an unreasonable risk of serious injury or death; yet, Kolcraft failed to inform the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4). In failing to inform the Commission immediately of the defect or risk involving the Play Yards, Kolcraft knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

14. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Kolcraft is subject to civil penalties for its knowing failure to report, as required under section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

RESPONSE OF KOLCRAFT

15. The Firm denies staff’s allegations that it knew that the Subject Products contained a defect which could create a substantial product hazard pursuant to section 15(a) of the CPSA, 15 U.S.C. § 2064(a), and further denies that it knowingly violated the reporting requirements of section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

AGREEMENT OF THE PARTIES

16. Under the CPSA, the Commission has jurisdiction over this matter and over Kolcraft.

17. The parties enter this Agreement for settlement purposes only. The Agreement does not constitute an admission by Kolcraft or a determination by the Commission that Kolcraft knowingly violated the CPSA.

18. In settlement of staff’s allegations, Kolcraft shall pay a civil penalty in the amount of four hundred thousand dollars (\$400,000.00) (Settlement Amount). The civil penalty shall be

paid within twenty (20) calendar days of service of the Commission's final Order accepting the Agreement. The payment shall be made to the CPSC via: www.pay.gov.

19. Upon provisional acceptance of the Agreement by the Commission, 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). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date it is published in the Federal Register, in accordance with 16 C.F.R. § 1118.20(f).

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

21. Kolcraft shall maintain and enforce a system of internal controls and procedures designed to ensure that: (i) information required to be disclosed by Kolcraft to the Commission is recorded, processed and reported in accordance with applicable law; (ii) all reporting made to the Commission is timely, truthful, complete and accurate; and (iii) prompt disclosure is made to Kolcraft's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to adversely affect in any material respect Kolcraft's ability to record, process and report to the Commission in accordance with applicable law.

22. Upon request of Staff, Kolcraft shall provide written documentation of such improvements, processes, and controls, including, but not limited to, the effective dates of such improvements, processes, and controls. Kolcraft shall cooperate fully and truthfully with Staff and shall make available all information, materials, and personnel **deemed** necessary by Staff to evaluate Kolcraft's compliance with the terms of the Agreement.

23. Kolcraft shall implement and maintain a compliance program designed to ensure compliance with the safety statutes and regulations enforced by the CPSC that, at a minimum, contains the following elements (i) written standards and policies; (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; (iii) effective communication of company compliance-related policies and procedures to all employees through training programs or otherwise; (iv) senior manager responsibility for compliance; (v) board oversight of compliance (if applicable); and (vi) retention of all compliance-related records for at least five (5) years and availability of such records to CPSC upon request.

24. The Commission may publicize the terms of the Agreement and the final Order.

25. The Agreement and the final Order shall apply to, and be binding upon, Kolcraft, and each of its successors and/or assigns.

26. The Commission issues the final Order under the provisions of the CPSA, and a violation of the final Order may subject Kolcraft, and each of its successors and/or assigns, to appropriate legal action.

27. The Agreement may be used in interpreting the final Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict the terms of the Agreement and the final Order.

The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto, executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

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

29. This Agreement may be signed in counterparts.

KOLCRAFT ENTERPRISES, INC.

Dated: 2/25/2013 By: Thomas Koltun
Thomas Koltun
President
Kolcraft Enterprises, Inc.

Dated: 2/26/2013 By: Erika Z. Jones
Erika Z. Jones, Esq.
Counsel to Kolcraft Enterprises, Inc.
Mayer Brown LLP
Washington, D.C.

U.S. CONSUMER PRODUCT SAFETY COMMISSION STAFF
Stephanie Tsacoumis

General Counsel

Mary B. Murphy
Assistant General Counsel
Divisions of Compliance and Import Surveillance

Dated: 2/27/13

By: Dasgupta
Richa Syam Dasgupta
Trial Attorney
Division of Compliance
Office of the General Counsel

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of:)
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Kolcraft Enterprises, Inc.)
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CPSC Docket No.: 13- C0004

ORDER

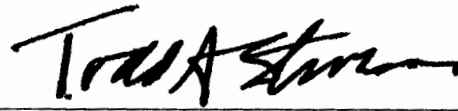
Upon consideration of the Agreement entered into between Kolcraft Enterprises, Inc. ("Kolcraft"), and U.S. Consumer Product Safety Commission (Commission) staff, and the Commission having jurisdiction over the subject matter and over Kolcraft, and it appearing that the Agreement and the Order are in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

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

FURTHER ORDERED, that Kolcraft shall pay a civil penalty in the total amount of four hundred thousand dollars (\$400,000.00), paid within twenty (20) days of service of the Commission's Order upon counsel for Kolcraft. The payments shall be made electronically to the CPSC via: www.pay.gov. Upon the failure of Kolcraft to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by Kolcraft at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b). If Kolcraft fails to make such payment or to comply in full with any other provision as set forth in the Agreement, such conduct will be considered a violation of this Agreement and Order.

Provisionally accepted and provisional Order issued on the 27th day of February, 2013.

BY ORDER OF THE COMMISSION:

A handwritten signature in black ink, appearing to read "Todd A. Stevenson", written over a horizontal line.

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

Finally accepted and final Order issued on the _____ day of _____, 2013.

BY ORDER OF THE COMMISSION:

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