

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 99-C0007]

Consolidated Electrical Distributors, Inc., a Domestic Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1115.20(b)(4). Published below is a provisionally-accepted Settlement Agreement with Consolidated Electrical Distributors, Inc., containing a civil penalty of \$1,500,000.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on it contents by filing a written request with the Office of the Secretary by August 27, 1999.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 99-C0007, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Howard N. Tarnoff, Trial Attorney, Office of Compliance and Enforcement, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504-0626, 1346.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: August 5, 1999.

Sadye E. Dunn,
Secretary.

UNITED STATES OF AMERICA

Consumer Product Safety Commission

In the Matter of Consolidated Electrical Distributors, Inc.; Respondent
CPSC DOCKET NO. 99-C0007

Consent Agreement

This Consent Agreement is made by and between the staff of the Consumer Product Safety Commission, and Consolidated Electrical Distributors, Inc., a domestic corporation, to settle the staff's allegations that Consolidated Electrical Distributors, Inc., distributed in commerce certain allegedly defective in-wall electric heaters manufactured by Cadet Manufacturing Company ("Cadet"), a domestic corporation, with its principal place of business located at 2500 West Fourth Plain Boulevard, Vancouver, Washington 98660.

Parties

1. The "staff" is the staff of the Consumer Product Safety Commission ("CPSC" or "the Commission"), an independent regulatory agency of the United States of America, established by Congress pursuant to Section 4 of the Consumer Product Safety Act ("CPSA"), 15 U.S.C. 2053, as amended.

2. Respondent Consolidated Electrical Distributors, Inc. ("CED") is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business located at 31356 Via Colinas, Westlake Village, California 91362. CED is a distributor of electrical materials and products.

Subject Matter

3. Since approximately 1978, Cadet has allegedly manufactured, sold and/or distributed in commerce in-wall electric heaters for use in homes and residences under the brand names "Cadet" and "Encore." These include all models and variants within each model of the series FW (including models FW-051, FW-101, FW-122, FW-202, and FW-751), manufactured between 1978 and 1987; series FX (including models FX-051, FX-052, FX-071, FX-072, FX-101, FX-102, FX-122, FX-151, FX-152, FX-202, FX-242), manufactured between 1985 and 1994; series LX (including models LX-242, LX-302, LX-402, and LX-482), manufactured between 1985 and 1994; series TK (including models TK-051, TK-071, TK-072, TK-101, TK-102, TK-151, and TK-152), manufactured between 1984 and 1998; series ZA (including models ZA-051, ZA-052, ZA-071, ZA-072, ZA-101, ZA-102, ZA-122, ZA-151, ZA-152, ZA-202, and ZA-242), manufactured between 1985 and 1994; series Z (including models ZA-072, ZA-101, ZA-102, ZA-151, ZA-152, ZA-202, and ZA-208), manufactured between 1993 and 1999; and all series and models of the same or functionally identical heaters manufactured and distributed by Cadet under the Encore brand name, including series RX (including models RX-072, RX-101, RX-102, RX-151, RX-152, RX-202, and RX-242), manufactured between 1985 and 1994; series RLX (including models RLX-302, RLX-402, and RLX-482) manufactured between 1985 and 1994; series RK (including models RK-101 and RK-102), manufactured between 1984 and 1998; series RA (including models RA-101, RA-102, RA-151, RA-152, RA-202), manufactured between 1985 and 1994; and series ZC (including models ZC-072, ZC-101, ZC-102, ZC-151, ZC-152, ZC-202, and ZC-208), manufactured between 1993 and 1999. For each of these heaters, the variants signified by the suffix T (with thermostat), W (white color), and TW (with thermostat and white color) found after the model number are included. All the heaters and variants referred to in this paragraph shall hereinafter be collectively referred to as "the Heaters." The Heaters were sold and/or distributed to consumers principally in the States of California, Idaho, Montana, Oregon, and Washington. Since approximately 1978, CED has allegedly sold and/or distributed certain of the Heaters in commerce.

4. On January 14, 1999, the staff filed an Administrative Complaint ("Complaint")

against Cadet, seeking a determination that certain of the Heaters present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2), and public notice and a recall of certain of the Heaters pursuant to Sections 15(c) and (d) of the CPSA, 15 U.S.C. 2064(c) and (d). The Complaint alleged that certain of the Heaters are defective and present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. 2064(a)(2), because their design and/or manufacture causes them to overheat, fail, and catch fire; and/or allows lint, dirt, or debris to build up within the heaters and catch fire. The Complaint also alleged that the design of certain of the Heaters can cause the Heaters to spew flames and/or burning or molten particles, or eject sparks into the living space of a home or residence, or energize the Heaters creating a risk of electric shock. The staff has agreed with Cadet to the terms of a corrective action plan for notification to consumers and for the replacement of the Heaters ("the Corrective Action Plan" or "the Plan"). The Corrective Action Plan is incorporated in a Consent Agreement and Order between Cadet and the staff, which was executed by Cadet on June 17, 1999 and executed by the staff on June 18, 1999, and will be submitted to the Commission for final approval.

Agreement of the Parties

5. It is the express purpose of the parties entering this Consent Agreement to protect the public safety by assisting Cadet's recall and replacement of the Heaters.

6. Fulfillment of the terms of this Consent Agreement and the attached Order (hereinafter "Order" or "the Order"), which is hereby incorporated by reference, shall resolve all potential obligations of CED (and each of CED's predecessors, successors, assigns, parents, subsidiaries, affiliated entities, agents, representatives, attorneys, employees, officers, directors, stockholders, and principals) (collectively "the CED Releasees") under Section 15(c) and (d) of the CPSA, 15 U.S.C. 2064(c) and (d), to give public notice of the alleged hazard presented by the Heaters, and to repair, replace, or refund the purchase price of the Heaters. Fulfillment of the terms of this Consent Agreement and Order shall also resolve all potential obligations and liabilities of the CED Releasees for all other claims and causes of action which could have been alleged by the CPSC against the CED Releasees relating to the Heaters, based upon information known to the CPSC, or otherwise in the CPSC's possession, at the time the CPSC staff signs this Consent Agreement. Nothing in this Paragraph 6 is intended to limit the CPSC's rights under Paragraph 21 of this Consent Agreement.

7. The staff believes that this Consent Agreement and Order is an equitable resolution of consumer claims against CED for replacement heaters, and the staff has concluded that the Corrective Action Plan, and CED's participation in that Plan, will provide an effective, fair, reasonable and adequate remedy for consumers throughout the United States who own or are otherwise exposed to the heaters by notifying

consumers of the alleged hazard and providing replacement heaters to them, and that this Agreement is, therefore, in the best interests of consumers.

8. This Consent Agreement and Order shall not be deemed or construed as an admission by CED or as evidence: (a) Of any violation of law or regulation by CED; (b) of other wrongdoing by CED; (c) that the Heaters are defective, create a substantial product hazard, or are unreasonably dangerous; or (d) of the truth of any claims or other matters alleged or otherwise stated by the CPSC or any other person either against CED or with respect to the Heaters. Except as specifically set forth in Paragraphs 9, 10, and 11, below, CED does not admit the factual allegations and other statements, or any conclusions of law, as alleged or otherwise stated in the Complaint or this Consent Agreement and Order which relate to the Heaters.

9. The Heaters are "consumer products" within the meaning of Section 3(a)(1) of the CPSA, 15 U.S.C. 2052(a)(1).

10. CED is a "distributor" of "consumer product[s]," which are "distributed in commerce," as those terms are defined in Sections 3(a)(1), (5), and (11) of the CPSA, 15 U.S.C. 2052(a)(1), (5), and (11).

11. The CPSC has jurisdiction over CED and the Heaters under Sections 3(a)(1), (5), and (11) and Section 15 of the CPSA, 15 U.S.C. 2052(a)(1), (5), and (11) and § 2064.

12. For purposes of this settlement only, CED agrees not to contest the staff's allegation, which CED denies, that the Heaters contain a "defeat which creates a substantial product hazard," as those terms are defined in Section 15(a) of the CPSA, 15 U.S.C. 2064(a).

13. Upon final acceptance by the CPSC of this Consent Agreement and Order, CED knowingly, voluntarily, and completely waives and relinquishes any past, present, and/or future right or rights in this matter captioned *In the Matter of Consolidated Electrical Distributors, Inc.*, CPSC Docket No. 99-C0007: (a) To an administrative or judicial hearing and to all further procedural steps—including findings of fact and conclusions of law—to determine whether the Heaters contain a defect which creates a substantial product hazard within the meaning of Section 15 of the CPSA; (b) to seek judicial review or otherwise challenge or contest the validity of this Consent Agreement and Order as issued and entered; (c) to seek judicial review of this or any past orders, findings, and/or determinations of the CPSC in this matter, except as set forth in Paragraphs 22 and 25 of this Consent Agreement; and (d) to file any claim or to seek any remedy under the Equal Access to Justice Act.

14. The Order is issued under Sections 15(c) and (d) of the CPSA, 15 U.S.C. 2064(c) and (d), and a violation of this Consent Agreement and Order is a prohibited act within the meaning of Section 19(a)(5) of the CPSA, 15 U.S.C. 2068(a)(5), and may subject CED to civil and/or criminal penalties under Sections 20 and 21 of the CPSA, 15 U.S.C. 2069 and 2070.

15. The parties agree to fulfill all requirements of this Consent Agreement and Order.

16. For all purposes, the Consent Agreement and Order shall constitute an enforceable judgment obtained in an action or proceeding by a governmental unit to enforce its police and regulatory power. CED acknowledges and agrees that this Consent Agreement and Order are pursuant to the CPSC's police and regulatory power to remedy the alleged risk created by the Heaters, and that, once CED signs the Consent Agreement and Order, the Consent Agreement and Order will not be subject to an automatic stay in any bankruptcy proceeding involving CED.

17. CED acknowledges that any interested person may bring any action pursuant to Section 24 of the CPSA, 15 U.S.C. 2073, in the United States District Court in which CED is found or transacts business, to enforce the Order and to obtain appropriate injunctive relief.

18. This Consent Agreement and Order shall be binding upon and inure to the benefit of the parties hereto and their successors, assigns, and any operating bankruptcy trustees or receivers. If, prior to the termination of this Consent Agreement and Order, CED merges with any other business entity or sells, assigns, or otherwise transfers substantially all of its assets, CED shall provide reasonable prior notice to the surviving corporation or to the purchaser, assignee, or transferee of substantially all of CED's assets, of this Consent Agreement and Order, and of its binding effect upon said surviving corporation, purchaser, assignee, or transferee. The existence of this Consent Agreement and Order and its binding effect shall be noted in any agreement between CED and such surviving corporation, purchaser, assignee, or transferee. It shall be a condition of any such merger, sale, assignment, or transfer that the surviving corporation or the purchaser, assignee, or transferee shall execute a document agreeing to be bound by the provisions of this Consent Agreement and Order and shall submit to the jurisdiction of the CPSC for purposes of enforcement of this Consent Agreement and Order. In the event of any merger, sale, assignment, or transfer of substantially all of CED's assets, CED shall provide written notice to the staff at least sixty (60) days prior to any such merger, asset sale, assignment, or transfer.

19. The CPSC, the staff, and/or CED may disclose terms of this Consent Agreement and Order to the public.

20. The staff is entering into this Consent Agreement and Order upon reliance on CED's representation that CED and Cadet have executed a settlement agreement dated June 22, 1999 ("the CED/Cadet Settlement Agreement") that provides, *inter alia*: (a) For the payment by CED to Cadet, subject to the terms of the CED/Cadet Settlement Agreement, of Six Hundred and Fifty-One Thousand Dollars (\$651,000) in satisfaction of CED's pre- and post-bankruptcy petition accounts receivable debts claimed by Cadet; and (b) for CED to purchase Two Million Dollars (\$2,000,000) worth of products from Cadet, at market prices, over the next two years following the effective date of this Consent Agreement and Order, subject to the terms and conditions of the CED/Cadet Settlement Agreement.

21. The CPSC, at its sole discretion and upon reasonable notice to the staff and CED, may void, suspend, or rescind all, or any part, of this Consent Agreement and Order if, in CED's letter to the staff dated March 10, 1999, CED materially and knowingly misrepresented the dollar amount of the products it purchased from Cadet from 1989 through 1998, or if CED and Cadet have not executed the CED/Cadet Settlement Agreement referred to in Paragraph 20 of this Consent Agreement. In no event shall a default by Cadet under the CED/Cadet Settlement Agreement or any termination resulting from a default by Cadet affect the CPSC's and CED's rights and obligations under this Consent Agreement and Order. Notwithstanding the provisions of Paragraph 32 of this Consent Agreement, the CPSC may exercise its rights under this Paragraph 21 within, and not later than, three (3) years after the date on which the CPSC finally accepts this Consent Agreement and enters the Order.

22. If any provision of this consent Agreement and Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the term of this Consent Agreement and Order, such provision shall be fully severable. In such event, there shall be added as part of this consent Agreement and Order a provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible and be legal, valid, and enforceable. The effective date of the added provision shall be the date upon which the prior provision was held to be invalid, illegal, or unenforceable. The rest of the Consent Agreement and Order shall remain in full effect, unless the CPSC determines, after providing CED with notice and a reasonable opportunity to comment, that severing the provision materially impacts the Corrective Action Plan or remediation program set forth in this Consent Agreement and Order. The CPSC determination shall constitute the final agency decision and shall be subject to judicial review, such review to be based upon the record of any such CPSC proceeding and according to law.

23. This Consent Agreement and Order have been negotiated by the parties. CED is not relying on the advice of the staff, nor anyone associated with the staff, as to legal, tax, or other consequences of any kind arising out of this Consent Agreement and Order, and CED specifically assumes the risk of all legal, tax, and other consequences.

24. CED acknowledges that this Consent Agreement and Order have been negotiated between unrelated, sophisticated, and knowledgeable parties acting in their own self-interest and represented by counsel, and the provisions of this Consent Agreement and Order shall not be interpreted or construed against any person or entity because that person or entity or any of its attorneys or representatives drafted or participated in drafting this Consent Agreement and Order.

25. The provisions of this Consent Agreement and Order shall be interpreted in a reasonable manner to effect its purpose to remedy the alleged hazard that the Heaters pose and to resolve potential claims by the CPSC against CED with respect to the

Heaters. In the event of a dispute between the parties arising under this Consent Agreement and Order, the parties agree to submit the dispute to non-binding arbitration by a panel of three arbitrators, according to the rules of the American Arbitration Association then in effect. The CPSC and CED shall each have the right to select one arbitrator, and shall jointly select the third arbitrator. If the CPSC and CED are unable to agree on the selection of the third arbitrator, that arbitrator shall be selected by the American Arbitration Association. Either party may institute an action, following the non-binding decision rendered by the arbitration panel, in the United States District Court for the District Court for the District of Columbia. Notwithstanding the foregoing, neither the arbitrators nor the CPSC shall have authority to resolve dispute arising under the CED/Cadet Settlement Agreement, including but not limited to those provisions referred to in Paragraph 20, above, nor may any rights or obligations arising out of the CED/Cadet Settlement Agreement be enforced through this Consent Agreement and Order.

26. The existence of a dispute between the staff and CED over any provision of this Consent Agreement and Order shall not excuse, toll, or suspend any obligation or deadline imposed upon CED or the staff under this Consent Agreement and Order, other than the specific provisions in dispute.

27. This Consent Agreement and Order shall not be waived, changed, amended, modified, or otherwise altered, except in writing executed by the parties and approved by the CPSC.

28. This Consent Agreement and Order contain the entire agreement, understanding, representation, and interpretation of the parties herein, and nothing else may be used to vary or contradict its terms.

29. CED and the staff consent to the entry of the Order attached hereto.

30. Upon provisional acceptance of this Consent Agreement and Order by the CPSC, this Consent Agreement and Order shall be placed on the public record and shall be published in the **Federal Register** in accordance with the procedures set forth in 16 CFR 1115.20(b)(4). If the CPSC does not receive any written request not to accept this Consent Agreement and Order within fifteen (15) calendar days, this Consent Agreement and Order shall be deemed finally accepted on the twentieth (20th) calendar day after the date it is published in the **Federal Register**, in accordance with 16 CFR 1115.20(b)(5).

31. Upon final acceptance by the CPSC of this Consent Agreement and Order, the CPSC shall issue the incorporated Order. This Consent agreement and Order shall become effective upon service of the signed Order upon CED.

32. CED's obligations under this Consent Agreement and Order shall terminate when CED makes the final payment required under Paragraphs 4 and 5 of the Order.

33. CED makes the monetary payments described in Paragraphs 4 and 5 of the Order solely as restitution to fund the Corrective Action Plan and thereby to settle claims arising out of its alleged distribution of the Heaters. CED makes the monetary payment described in paragraph 20 of this Consent

Agreement solely to satisfy Cadet's claims against CED for pre- and post-bankruptcy petition accounts receivable debts claimed by Cadet. No payment made pursuant to or referred to in this Consent Agreement and Order is a fine or other penalty paid with respect to any violation of any law or regulation. Payment hereunder does not constitute, nor shall it be construed or treated as, payment in lieu of a fine or other penalty, punitive recovery, or forfeiture.

34. Each party shall cooperate fully to implement its obligation under the terms and conditions of this Consent Agreement and Order.

35. The parties have executed two (2) identical copies of this Consent Agreement and the two copies shall be treated as one and the same executed Consent Agreement.

Dated: July 19, 1999.

Howard N. Tarnoff, Trial Attorney,
Magaret H. Plank, Trial Attorney

Eric L. Stone, Director, Legal Division, Alan H. Schoem, Assistant Executive, Director, Office of Compliance, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, Telephone: (301) 504-0626

Dated July 19, 1999.

Blake A. Biles, Esq., Jamellah L. Braddock, Esq., Arnold & Porter, 555 Twelfth Street, NW, Washington, DC 20004-1206, Telephone: (202) 942-5836

Counsel for Respondent, Consolidated Electrical Distributors, Inc.

H. Dean Bursch, President & Chief Executive Officer, Consolidated Electrical Distributors, Inc.

Order

Upon Consideration of the Consent Agreement entered into between Respondent Consolidated Electrical Distributors, Inc. ("CED") and the staff of the Consumer Product Safety Commission ("the staff") (collectively "the parties"); and

The Consumer Product Safety Commission ("CPSC" or "the Commission") having jurisdiction over the subject matter and CED;

It is hereby ordered that:

1. The Consent Agreement between CED and the staff is incorporated herein by reference and accepted, and CED shall comply with all obligations of the Consent Agreement and this Order.

2. Based on the Consent Agreement, the CPSC finds that the Consent Agreement and this Order are necessary to protect the public from the alleged hazard presented by Cadet's series FW, FX, LX, TK, ZA, and Z in-wall electric heaters, and the functionally identical heaters manufactured and distributed by Cadet under the Encore brand name, including series RX, RLX, RK, RA, and ZC. These heaters shall hereinafter be collectively referred to as "the Heaters."

3. CED shall immediately cease and desist offering for sale and/or distributing in commerce any of the Heaters, whether by itself or through its subsidiaries, affiliates, CED-owned distribution centers, or any other persons or entities over whom CED has control.

4. CED shall pay into a staff-designated, interest-bearing escrow account ("the escrow

account"), the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000), according to the following schedule:

a. TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000) upon the CPSC's final acceptance of this Order.

b. FIVE HUNDRED THOUSAND DOLLARS (\$500,000) on or before the later of August 1, 1999, or upon the CPSC's final acceptance of this Order.

c. FIVE HUNDRED THOUSAND DOLLARS (\$500,000) on or before the later of October 1, 1999, or upon the CPSC's final acceptance of this Order.

d. TWO HUNDRED AND FIFTY THOUSAND DOLLARS (\$250,000) on or before the later of December 1, 1999, or upon the CPSC's final acceptance of this Order.

5. CED shall pay into the escrow account a contingent contribution of an additional FIVE DOLLARS (\$5.00) for every heater in excess of two hundred and fifty thousand (250,000) heaters ordered by consumers under the Consent Agreement and Order between Cadet and the staff executed by Cadet on June 17, 1999 and by the staff on June 18, 1999 (the "Cadet Consent Agreement and Order"); provided, CED's contingent contribution shall be capped at FIVE HUNDRED THOUSAND DOLLARS (\$500,000), and in no event shall CED be required to make more than one contingent contribution payment. CED shall pay its contingent contribution within fifteen (15) days of CED's receipt of written notice from the staff either: (a) That consumers have ordered at least 350,000 total replacement heaters under the Cadet Consent Agreement and Order; or (b) specifying the number of replacement heaters in excess of 250,000 ordered by consumers within twenty-four (24) months after the Effective Date of the Cadet Consent Agreement and Order.

6. The monetary payments referred to in Paragraphs 4 and 5, above, may be distributed by the CPSC to offset expenses directly related to Cadet's CPSC-approved Corrective Action Plan.

7. In addition to any penalty it may incur pursuant to Paragraph 14 of the Consent Agreement, if CED fails to make timely contributions to the escrow account, as required by Paragraphs 4 and 5 of this Order, CED shall be liable for additional contributions to the escrow account. Such additional contributions shall include the following:

a. Interest at the percentage rate established by the Department of the Treasury pursuant to 31 U.S.C. 3717, for any period after the due date; and

b. A five percent (5%) per month penalty charge if the deposit is not made within thirty (30) days after the due date.

Provisionally accepted and Provisional Order issued on the 5th day of August, 1999.

By order of the Commission.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 99-20803 Filed 8-11-99; 8:45 am]

BILLING CODE 6355-01-M