

1 Reuben Yeroushalmi (SBN 193981)
2 Daniel D. Cho (SBN 105409)
3 Ben Yeroushalmi (SBN 232540)
4 **YEROUSHALMI & ASSOCIATES**
5 9100 Wilshire Boulevard, Suite 610E
6 Beverly Hills, California 90213
7 Telephone: 310.623.1926
8 Facsimile: 310.623.1930

9 Attorneys for Plaintiffs,
10 Consumer Advocacy Group, Inc.

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ORIGINAL FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DEC 30 2010

John A. ~~Clark~~, Executive Officer/Clerk
BY Shaunya Wesley, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF LOS ANGELES – CENTRAL DISTRICT

13 CONSUMER ADVOCACY GROUP, INC.,
14 in the public interest,

15 Plaintiff,

16 v.

17 NYGALA CORPORATION, a New Jersey
18 Corporation; and DOES 1-50;

19 Defendants.

CASE NO.

BC452178

COMPLAINT FOR PENALTY,
INJUNCTION, AND RESTITUTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

20
21 Plaintiff Consumer Advocacy Group, Inc. alleges a cause of action against Defendants as
22 follows:

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THE PARTIES

1. Plaintiff Consumer Advocacy Group, Inc. (“Plaintiff” OR “CAG”) is a corporation qualified to do business in the State of California. CAG is a person within the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting as a private attorney general, brings this action in the public interest as defined under Health and Safety Code section 25249.7, subdivision (d).
2. Defendant Nygala Corporation (“Nygala”) is a company incorporated in the State of New Jersey.
3. Plaintiff is presently unaware of the true names and capacities of defendants Does 1-50, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed, believes, and thereon alleges that each fictitiously named defendant is responsible in some manner for the occurrences herein alleged and the damages caused thereby.
4. At all times mentioned herein, the term “Defendants” includes Nygala Corp. and Does 1-50.
5. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all times mentioned herein have conducted business within the State of California.
6. At all times relevant to this action, each of the Defendants, including Does 1-50, was an agent, servant, or employee of each of the other Defendants. In conducting the activities alleged in this Complaint, each of the Defendants was acting within the course and scope of this agency, service, or employment, and was acting with the consent, permission, and authorization of each of the other Defendants. All actions of each of the Defendants alleged in this Complaint were ratified and approved by every other Defendant or their officers or managing agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged wrongful conduct of each of the other Defendants.
7. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the Defendants was a person doing business within the meaning of Health and Safety Code

1 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
2 employees at all relevant times.

3 **JURISDICTION**

- 4 8. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
5 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
6 those given by statute to other trial courts. This Court has jurisdiction over this action
7 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
8 violations of Proposition 65 in any Court of competent jurisdiction.
- 9 9. This Court has jurisdiction over Defendants named herein because Defendants either
10 reside or are located in this State or are foreign corporations authorized to do business in
11 California, are registered with the California Secretary of State, or who do sufficient
12 business in California, have sufficient minimum contacts with California, or otherwise
13 intentionally avail themselves of the markets within California through their manufacture,
14 distribution, promotion, marketing, or sale of their products within California to render
15 the exercise of jurisdiction by the California courts permissible under traditional notions
16 of fair play and substantial justice.
- 17 10. Venue is proper in the County of Los Angeles because one or more of the instances of
18 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
19 because Defendants conducted, and continue to conduct, business in the County of Los
20 Angeles with respect to the consumer product that is the subject of this action.

21 **BACKGROUND AND PRELIMINARY FACTS**

- 22 11. In 1986, California voters approved an initiative to address growing concerns about
23 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
24 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
25 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
26 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
27 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
28 from contamination, to allow consumers to make informed choices about the products

1 they buy, and to enable persons to protect themselves from toxic chemicals as they see
2 fit.

3 12. Proposition 65 requires the Governor of California to publish a list of chemicals known to
4 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
5 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
6 chemicals and chemical families. Proposition 65 imposes warning requirements and
7 other controls that apply to Proposition 65-listed chemicals.

8 13. All businesses with ten (10) or more employees that operate or sell products in California
9 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
10 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
11 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and
12 reasonable" warnings before exposing a person, knowingly and intentionally, to a
13 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

14 14. Proposition 65 provides that any person "violating or threatening to violate" the statute
15 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.
16 "Threaten to violate" means "to create a condition in which there is a substantial
17 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).
18 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
19 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

20 15. Plaintiff identified certain practices of manufacturers and distributors of lead-bearing
21 products of exposing, knowingly and intentionally, persons in California to the
22 Proposition 65-listed chemicals of such products without first providing clear and
23 reasonable warnings of such to the exposed persons prior to the time of exposure.
24 Plaintiff later discerned that Defendants engaged in such practice.

25 16. On October 1, 1992, the Governor of California added Lead and Lead Compounds to the
26 list of chemicals known to the State to cause cancer (*Cal. Code Regs.* tit. 27, § 27001(b)).
27 Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20) months
28 after addition of Lead and lead compounds to the list of chemicals known to the State to

1 cause cancer, Lead and lead compounds became fully subject to Proposition 65 warning
2 requirements and discharge prohibitions.

3 17. On February 27, 1987, the Governor of California added Lead to the list of chemicals
4 known to the State to cause reproductive toxicity (*Cal. Code Regs. tit. 27, § 27001(c)*).
5 Lead is known to the State to cause developmental, female, and male reproductive
6 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
7 months after addition of Lead to the list of chemicals known to the State to cause
8 reproductive toxicity, Lead became fully subject to Proposition 65 warning requirements
9 and discharge prohibitions.

10 **SATISFACTION OF PRIOR NOTICE**

11 18. On or about September 15, 2010 Plaintiff gave notice of alleged violations of Health and
12 Safety Code section 25249.6, concerning consumer products exposures, subject to a
13 private action to Nygala, identified in the notice as “Nygala Corp.” and to the California
14 Attorney General, County District Attorneys, and City Attorneys for each city containing
15 a population of at least 750,000 people in whose jurisdictions the violations allegedly
16 occurred, concerning Flomo® Unlimited Stationary Set Paper Clips, Item No. RL-
17 MG592

18 19. Before sending the notice of alleged violation, Plaintiff investigated the consumer
19 products involved, the likelihood that such products would cause users to suffer
20 significant exposures to lead, and the corporate structure of each of the Defendants.

21 20. Plaintiff’s notice of alleged violation included a Certificate of Merit executed by the
22 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for
23 Plaintiff who executed the certificate had consulted with at least one person with relevant
24 and appropriate expertise who reviewed data regarding the exposures to lead,
25 respectively, which are the subject Proposition 65-listed chemicals of this action. Based
26 on that information, the attorney for Plaintiff who executed the Certificate of Merit
27 believed there was a reasonable and meritorious case for this private action. The attorney
28 for Plaintiff attached to the Certificate of Merit served on the Attorney General the

1 confidential factual information sufficient to establish the basis of the Certificate of
2 Merit.

3 21. Plaintiff's notice of alleged violations also included a Certificate of Service and a
4 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
5 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).

6 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
7 gave notice of the alleged violations to Nygala and the public prosecutors referenced in
8 Paragraph 18.

9 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
10 any applicable district attorney or city attorney has commenced and is diligently
11 prosecuting an action against the Defendants.

12
13 **FIRST CAUSE OF ACTION**

14 **(By Consumer Advocacy Group, Inc. and against Nygala for Violations of Proposition 65,
15 The Safe Drinking Water and Toxic Enforcement Act of 1986 (*Health & Safety Code*, §§
16 25249.5, *et seq.*))**

17 **Flomo® Unlimited Stationary Set Paper Clips, Item No. RL-MG592**

18 24. Plaintiff Consumer Advocacy Group, Inc. repeats and incorporates by reference
19 paragraphs 1 through 24 of this complaint as though fully set forth herein.

20 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
21 distributor, promoter, or retailer of Flomo® Unlimited Stationary Set Paper Clips, Item
22 No. RL-MG592 ("Paper Clips"), a consumer product designed for within the home
23 environment, and is suitable for various home, business, and office applications.

24 26. Plaintiff is informed, believes, and thereon alleges that Paper Clips contains Lead.

25 27. Defendants knew or should have known that Lead has been identified by the State of
26 California as a chemical known to cause cancer and reproductive toxicity and therefore
27 was subject to Proposition 65 warning requirements. Defendants were also informed of
28 the presence of Lead in the Paper Clips within Plaintiff's notice of alleged violations
further discussed above at Paragraph 18.

1 28. Plaintiff's allegations regarding Paper Clips concern "[c]onsumer products exposure[s],"
2 which "is an exposure that results from a person's acquisition, purchase, storage,
3 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
4 that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*.
5 Paper Clips is a consumer product, and, as mentioned in herein, exposures to Lead took
6 place as a result of such normal and foreseeable consumption and use.

7 29. The principal routes of exposure are through dermal contact, ingestion and inhalation.

8 Persons sustain exposures by handling Paper Clips without wearing gloves or by touching
9 bare skin or mucous membranes with gloves after handling Paper Clips as well as hand to
10 mouth contact (*e.g.*, by inserting surfaces, such as hands, that have contacted Paper Clips
11 into their mouths), hand to mucous membrane, or breathing in particulate matter released
12 or emanating from Paper Clips during application and use, as well as through
13 environmental mediums that carry the Lead and Lead Compounds once contained within
14 the Paper Clips.

15 30. Especially of concern is that Paper Clips have a coating in various colors, such as pink,
16 red, black, green, and yellow, and has a colorful "party theme" packaging, which makes
17 Paper Clips especially susceptible of being handled by small children who play with the
18 product, put the product in their mouths, or put their bare skin which has been exposed to
19 the products, in their mouths, and are exposed to the lead contained in Paper Clips
20 because they regard it as a toy.

21 31. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of
22 Proposition 65 as to Paper Clips have been ongoing and continuous to the date of the
23 signing of this complaint, as Defendants engaged and continue to engage in conduct
24 which violates Health and Safety Code section 25249.6, including the manufacture,
25 distribution, promotion, and sale of Paper Clips, so that a separate and distinct violation
26 of Proposition 65 occurred each and every time a person was exposed to Lead by Paper
27 Clips as mentioned herein.

1 32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
2 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
3 violations alleged herein will continue to occur into the future.

4 33. Based on the allegations herein, Defendants are liable for civil penalties of up to
5 \$2,500.00 per day per individual exposure to Lead from Paper Clips, pursuant to Health
6 and Safety Code section 25249.7(b).

7 34. In the absence of equitable relief, the general public and Defendants' employees will
8 continue to be involuntarily exposed to Lead that is contained in Paper Clips, creating a
9 substantial risk of irreparable harm. Thus, by committing the acts alleged herein,
10 Defendants have caused irreparable harm for which there is no plain, speedy, or adequate
11 remedy at law.

12 35. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
13 filing this Complaint.

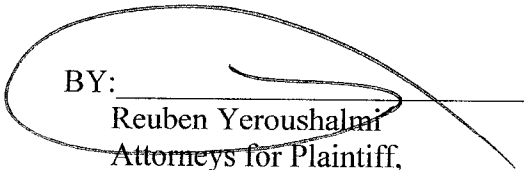
14 **PRAYER FOR RELIEF**

15 Plaintiff demands against each of the Defendants as follows:

- 16 1. A permanent injunction mandating Proposition 65-compliant warnings;
17 2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
18 3. Costs of suit;
19 4. Reasonable attorney fees and costs; and
20 5. Any further relief that the court may deem just and equitable.

21
22 Dated: 12/27, 2010

YEROUSHALMI & ASSOCIATES

23
24
25 BY: 
26 Reuben Yeroushalmi
27 Attorneys for Plaintiff,
28 Consumer Advocacy Group, Inc.