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6 Attorneys for Plaintiff
7 Consumer Advocacy Group, Inc.

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF LOS ANGELES – UNLIMITED**

10
11 CONSUMER ADVOCACY GROUP,
INC., in the public interest,

12 Plaintiff,

13 v.

14
15 NYGALA CORP. dba FLOMO®, a New
Jersey Corporation and DOES 1-20;

16 Defendants.
17

CASE NO. BC479596

[PROPOSED] CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Department: 17
Judge: Hon. Richard E. Rico
Complaint filed: February 24, 2012

18 **1. INTRODUCTION**

19 1.1 This Consent Judgment is entered into by and between plaintiff, CONSUMER
20 ADVOCACY GROUP, INC. (referred to as “CAG) acting on behalf of itself and in the interest
21 of the public and defendant, NYGALA CORP. allegedly dba FLOMO®, (herein referred to as
22 “Defendant”) with each a Party to the action and collectively referred to as “Parties.”

23
24 1.2 Defendant employs ten or more persons, is a person in the course of doing
25 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
26 California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”), and is alleged to
27 manufacture, distribute, and sell (1) “Flomo® Unlimited Stationery Set, Item No. RL-MG592”;

1 (2) “Flomo® 100 Color Clips, 50 mm, MG933” and (3) “Flomo® Stationary Set, Item No. RL-
2 MG591” (all three products together herein referred to as the “Covered Products”).

3 **1.3 Notice of Violation.**

4 On August 5, 2011, CAG served Defendant, and various public enforcement agencies
5 with a document entitled “60-Day Notice of Violation” (“August 5, 2011 Notice”) that provided
6 the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to
7 warn individuals in California of exposures to lead contained in the Covered Products sold by
8 Defendant. No public enforcer has commenced or diligently prosecuted the allegations set forth
9 in the August 5, 2011 Notice. Lead is known to the State of California to cause cancer and/or
10 birth defects or other reproductive harm.

11 **1.4 Complaint.**

12 On February 24, 2012, CAG filed a Complaint for civil penalties and injunctive relief
13 (“Complaint”) in Los Angeles Superior Court, Case No. BC479596, against Defendant and other
14 entities. The Complaint alleges, among other things, that Defendant violated Proposition 65 by
15 failing to give clear and reasonable warnings of exposure to lead from the Covered Products.
16

17 **1.5 Consent to Jurisdiction**

18 For purposes of this Consent Judgment, the Parties stipulate that this Court has
19 jurisdiction over the allegations of violations contained in the Complaint and personal
20 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
21 County of Los Angeles and that this Court has jurisdiction to enter this Consent Judgment as a
22 full settlement and resolution of the allegations contained in the Complaint and of all claims
23 which were or could have been raised by any person or entity based in whole or in part, directly
24 or indirectly, on the facts alleged therein or arising therefrom or related to.

25 **1.6 No Admission**

26 This Consent Judgment resolves claims that are denied and disputed. The Parties enter
27 into this Consent Judgment pursuant to a full and final settlement of any and all claims between
28

1 the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not
2 constitute an admission with respect to any material allegation of the Complaint, each and every
3 allegation of which Defendant denies, nor may this Consent Judgment or compliance with it be
4 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
5 Defendant, in this or any other case or proceeding of any kind hereafter.

6 **2. DEFINITIONS**

7 2.1 "Accessible Component" means any component of a Covered Product that could
8 be touched by a person during reasonably foreseeable use.

9 2.2 "Covered Product" or "Covered Products" means (1) "Flomo® Unlimited
10 Stationery Set, Item No. RL-MG592"; (2) "Flomo® 100 Color Clips, 50 mm, MG933" and (3)
11 "Flomo® Stationary Set, Item No. RL-MG591".

12 2.3 "Effective Date" means the date that this Consent Judgment is entered by the
13 Court.

14 2.4 "Lead" means lead and lead compounds.

15 2.5 "Notice" means the August 5, 2011 Notice.

16 **3. INJUNCTIVE RELIEF/REFORMULATION/CLEAR AND REASONABLE** 17 **WARNINGS.**

18 3.1 Defendant shall not sell or distribute the Covered Product in California unless it is
19 reformulated to contain less than 100 parts per million of lead.

20 **4. SETTLEMENT PAYMENT**

21 4.1 Within 14 days of the Effective Date or receipt of Forms W-9 from CAG,
22 whichever is later, Defendant shall pay a total of thirty-thousand dollars and zero cents
23 (\$30,000.00) to CAG in full and complete settlement of all monetary claims by CAG related to
24 the Notice, as follows.

25 4.2 **Payment In Lieu of Civil Penalties:** Defendant shall pay one-thousand dollars
26 (\$1,000.00) in lieu of civil penalties to CAG pursuant to California Health and Safety Code §
27

1 25249.7(b). CAG will use this payment for investigation of the public's exposure to Proposition
2 65 listed chemicals through various means, laboratory fees for testing for Proposition 65 listed
3 chemicals, expert fees for evaluating exposures through various mediums, including but not
4 limited to consumer product, occupational, and environmental exposures to Proposition 65 listed
5 chemicals, and the cost of hiring consulting and retained experts who assist with the extensive
6 scientific analysis necessary for those files in litigation, in order to reduce the public's exposure
7 to Proposition 65 listed chemicals by notifying those persons and/or entities believed to be
8 responsible for such exposures and attempting to persuade those persons and/or entities to
9 reformulate their products or the source of exposure to completely eliminate or lower the level of
10 Proposition 65 listed chemicals, thereby addressing the same public harm as allegedly in the
11 instant Action. Further, should the court require it, CAG will submit under seal, an accounting
12 of these funds as described above as to how the funds were used. The check shall be made
13 payable to "Consumer Advocacy Group, Inc." and delivered to Reuben Yeroushalmi,
14 Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California
15 90212.

16 **4.3 Reimbursement of Attorneys Fees and Costs:** Defendant shall pay twenty-
17 eight thousand dollars (\$28,000.00) to "Yeroushalmi & Associates" as reimbursement for the
18 investigation fees and costs, testing costs, expert fees, attorney fees, and other litigation costs and
19 expenses for all work performed through the approval of this Consent Judgment.

20 **4.4 Civil Penalty:** Defendant shall issue two separate checks for a total amount of
21 one-thousand dollars (\$1,000.00) as penalties pursuant to Health & Safety Code § 25249.12: (a)
22 one check made payable to the State of California's Office of Environmental Health Hazard
23 Assessment (OEHHA) in the amount of \$750.00, representing 75% of the total penalty; and (b)
24 one check to Consumer Advocacy Group, Inc. in the amount of \$250.00, representing 25% of the
25 total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be
26 issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of
27 \$750.00. The second 1099 shall be issued in the amount of \$250.00 to CAG and delivered to:
28

1 Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California
2 90212.

3 4.5 Payments shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates,
4 9100 Wilshire Blvd., Suite 610E, Beverly Hills, CA 90212.

5 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

6 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
7 behalf of itself and in the public interest and Defendant, all the recipients in the August 5, 2011
8 Notice and Defendant's officers, directors, insurers, employees, parents, shareholders, divisions,
9 subdivisions, subsidiaries, partners, affiliates, sister companies and their successors and assigns
10 ("Defendant Releasees") and each of their suppliers, customers, distributors, wholesalers,
11 retailers, or any other person in the course of doing business, and the successors and assigns of
12 any of them who may use, maintain, distribute or sell the Covered Products, and all persons and
13 entities who are downstream in the stream of commerce from Defendant who sell or distribute
14 the Covered Products ("Downstream Defendant Releasees"), for all claims for violations of
15 Proposition 65 up through the Effective Date based on exposure to Lead from Covered Products
16 as set forth in the Notice. Defendant and Defendant Releasees' compliance with this Consent
17 Judgment shall constitute compliance with Proposition 65 with respect to Lead from the Covered
18 Products as set forth in the Notice.

19
20 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
21 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
22 indirectly, any form of legal action and releases all claims, including, without limitation, all
23 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
24 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
25 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
26 fixed or contingent (collectively "Claims"), against Defendant, all the recipients in the August 5,
27 2011 Notice, Defendant Releasees, and Downstream Defendant Releasees arising from any
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1 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
2 about exposure to Lead in the Covered Products. In furtherance of the foregoing, as to alleged
3 exposures to the Covered Products, CAG hereby waives any and all rights and benefits which it
4 now has, or in the future may have, conferred upon it with respect to the Claims by virtue of the
5 provisions of section 1542 of the California Civil Code, which provides as follows:

6
7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
9 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
DEBTOR.

10 CAG understands and acknowledges that the significance and consequence of this waiver of
11 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
12 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,
13 including but not limited to any exposure to, or failure to warn with respect to exposure to, lead
14 or lead compounds from Covered Products, CAG will not be able to make any claim for those
15 damages against Defendant, all the recipients in the August 5, 2011 Notice, the Defendant
16 Releasees, or Downstream Defendant Releasees. Furthermore, CAG acknowledges that it
17 intends these consequences for any such Claims as may exist as of the date of this release but
18 which CAG does not know exist, and which, if known, would materially affect their decision to
19 enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of
20 ignorance, oversight, error, negligence, or any other cause.

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22 **6. ENFORCEMENT OF JUDGMENT**

23 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
24 hereto. Subject to Section 6.2, the parties may, by noticed motion or order to show cause before
25 the Superior Court of California, Los Angeles County, giving the notice required by law, enforce
26 the terms and conditions contained herein. A Party may enforce any of the terms and conditions
27 of this Consent Judgment only after that Party first provides 30 days notice to the Party allegedly
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1 failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve
2 such Party's failure to comply in an open and good faith manner.

3 **6.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other
4 proceeding to enforce Section 3.1 of this Consent Judgment, CAG shall provide a Notice of
5 Violation ("NOV") to Defendant. The NOV shall include for each Covered Product: the date(s)
6 the alleged violation(s) was observed and the location at which the Covered Product was offered
7 for sale, and shall be accompanied by all test data obtained by CAG regarding the Covered
8 Product, including an identification of the component(s) of the Covered Product that were tested.

9 **6.2.1 Non-Contested NOV.** CAG shall take no further action regarding the
10 alleged violation if, within 30 days of receiving such NOV, Defendant serves a Notice of
11 Election ("NOE") that meets one of the following conditions:

12 (a) The Covered Product was shipped by Defendant for sale in
13 California before the Effective Date, or

14 (b) Since receiving the NOV Defendant has taken corrective action by
15 either (i) requesting that its customers in California remove the Covered Product
16 identified in the NOV from sale in California and destroy or return the Covered Product
17 to Defendant, or (ii) providing a clear and reasonable warning for the Covered Product
18 identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

19 **6.2.2 Contested NOV.** Defendant may serve an NOE informing CAG of its
20 election to contest the NOV within 30 days of receiving the NOV.

21 (a) In its election, Defendant may request that the sample(s) Covered
22 Product tested by CAG be subject to confirmatory testing at an EPA-accredited
23 laboratory.

24 (b) If the confirmatory testing establishes that the Covered Product
25 does not contain lead in excess of the level allowed in Section 3.1 CAG shall take no
26 further action regarding the alleged violation. If the testing does not establish compliance
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1 with Section 3.1, Defendant may withdraw its NOE to contest the violation and may
2 serve a new NOE pursuant to Section 6.2.1.

3 (c) If Defendant does not withdraw an NOE to contest the NOV, the
4 Parties shall meet and confer for a period of no less than 30 days before CAG may seek
5 an order enforcing the terms of this Consent Judgment.

6 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
7 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
8 violation of Proposition 65 or this Consent Judgment.

9 **7. ENTRY OF CONSENT JUDGMENT**

10 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
11 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
12 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

13 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
14 and any and all prior agreements between the parties merged herein shall terminate and become
15 null and void, and the actions shall revert to the status that existed prior to the execution date of
16 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
17 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
18 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
19 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
20 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

21 **8. MODIFICATION OF JUDGMENT**

22 8.1 This Consent Judgment may be modified only upon written agreement of the
23 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
24 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

25 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
26 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.
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1 **9. RETENTION OF JURISDICTION**

2 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
3 terms of this Consent Judgment.

4 **10. DUTIES LIMITED TO CALIFORNIA**

5 10.1 This Consent Judgment shall have no effect on Covered Products sold by
6 Defendant outside the State of California.

7 **11. SERVICE ON THE ATTORNEY GENERAL**

8 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
9 California Attorney General so that the Attorney General may review this Consent Judgment
10 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
11 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
12 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
13 the parties may then submit it to the Court for approval.

14 **12. ATTORNEY FEES**

15 12.1 Except as specifically provided in Section 4, each Party shall bear its own costs
16 and attorney fees in connection with this action.

17 **13. ENTIRE AGREEMENT**

18 13.1 This Consent Judgment contains the sole and entire agreement and understanding
19 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
20 negotiations, commitments and understandings related hereto. No representations, oral or
21 otherwise, express or implied, other than those contained herein have been made by any party
22 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
23 deemed to exist or to bind any of the Parties.
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1 **14. GOVERNING LAW**

2 14.1 The validity, construction and performance of this Consent Judgment shall be
3 governed by the laws of the State of California, without reference to any conflicts of law
4 provisions of California law.

5 14.2 The Parties, including their counsel, have participated in the preparation of this
6 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
7 Consent Judgment was subject to revision and modification by the Parties and has been accepted
8 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
9 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
10 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
11 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
12 resolved against the drafting Party should not be employed in the interpretation of this Consent
13 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

14 **15. EXECUTION AND COUNTERPARTS**

15 15.1 This Consent Judgment may be executed in counterparts and by means of
16 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
17 one document.

18 **16. NOTICES**

19 Any notices under this Consent Judgment shall be by personal delivery of First Class
20 Mail.

21 If to CAG:

22 Reuben Yeroushalmi
23 9100 Wilshire Boulevard, Suite 610E
24 Beverly Hills, CA 90212
25 (310) 623-1926

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1 If to Defendant, Nygala Corp. dba Flomo®:

2 Nygala Corp. dba Flomo®
3 698 US Highway 46 West
4 Teterboro, NJ 07608

5 With a copy to:

6 Nicholas Boylan, Esq.
7 Law Offices of Nicholas A. Boylan, APC
8 450 A. Street, Suite 400
9 San Diego, CA 92101

10 **17. AUTHORITY TO STIPULATE**

11 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
12 party he or she represents to enter into this Consent Judgment and to execute it on behalf of the
13 party represented and legally to bind that party.

14 AGREED TO:

AGREED TO:

15 Date: 4-24, 2013

Date: _____, 2013

17 

18 Name: Michel Sassoon

Name: _____

19 Title: Executive Director
20 CONSUMER ADVOCACY GROUP,
21 INC.

Title: _____
NYGALA CORP. dba FLOMO®.

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23 **IT IS SO ORDERED.**

24 Date: _____

25 _____
26 JUDGE OF THE SUPERIOR COURT

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If to Defendant, Nygala Corp. dba Flomo®:

Nygala Corp. dba Flomo®
698 US Highway 46 West
Teterboro, NJ 07608

With a copy to:

Nicholas Boylan, Esq.
Law Offices of Nicholas A. Boylan, APC
450 A. Street, Suite 400
San Diego, CA 92101

17. AUTHORITY TO STIPULATE

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

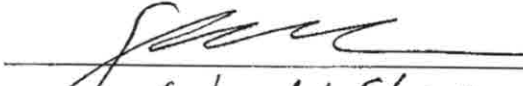
AGREED TO:

Date: _____, 2013

AGREED TO:

Date: April 29th, 2013

Name: _____
Title: _____
CONSUMER ADVOCACY GROUP,
INC.



Name: Wendy Shen
Title: President / CEO
NYGALA CORP. dba FLOMO®.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT