


1 Evan J. Smith, Esquire (SBN 242352)  
2 Ryan P. Cardona, Esquire (SBN 302113)  
3 BRODSKY & SMITH, LLC  
4 9595 Wilshire Blvd., Ste. 900  
5 Beverly Hills, CA 90212  
6 Telephone: (877) 534-2590  
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

ENDORSED  
FILED  
ALAMEDA COUNTY

MAR 07 2017

CLERK OF THE SUPERIOR COURT  
By   
JAMIE THOMAS, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA

11 EMA BELL,

12 Plaintiff,

13 v.

14 MUSIC BY MAIL, INC.,

15 Defendant.

Case No. **RG17851900**

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

(Violation of Health & Safety Code §25249.5  
*et seq.*)

16  
17 Plaintiff Ema Bell, by and through her attorneys, alleges the following cause of action in  
18 the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

20 1. Plaintiff Ema Bell ("Plaintiff" or "Bell"), brings this representative action on  
21 behalf of all California citizens to enforce relevant portions of Safe Drinking Water and Toxic  
22 Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 *et seq* ("Proposition  
23 65"), which reads, in relevant part, "[n]o person in the course of doing business shall knowingly  
24 and intentionally expose any individual to a chemical known to the state to cause cancer or  
25 reproductive toxicity without first giving clear and reasonable warning to such individual ...".  
26 Health & Safety Code § 25249.6.

27  
28

1           2.       This complaint is a representative action brought by Plaintiff in the public interest  
2 of the citizens of the State of California to enforce the People’s right to be informed of the health  
3 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
4 headphones and earbuds sold and/or distributed by defendant Music By Mail, Inc. t/a Audiology  
5 (“Audiology” or “Defendant”) in California.

6           3.       DEHP is a harmful chemical known to the State of California to cause cancer and  
7 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical  
8 known to the State to cause cancer and it has come under the purview of Proposition 65  
9 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§  
10 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical  
11 known to cause reproductive toxicity.

12           4.       Proposition 65 requires all businesses with ten (10) or more employees that  
13 operate within California or sell products therein to comply with Proposition 65 regulations.  
14 Included in such regulations is the requirement that businesses must label any product containing  
15 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and  
16 intentionally” exposing any person to it.

17           5.       Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation  
18 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety  
19 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin  
20 the actions of a defendant which “violate[s] or threaten[s] to violate” the statute. Health &  
21 Safety Code § 25249.7.

22           6.       Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,  
23 and/or offers for sale in California, without the required warning, Audiology headphones and  
24 earbuds, including but not limited to, Stealth Bluetooth Headphones, UPC No. 6 33711 34272 2  
25 (“Product” or “Products”) that contain DEHP.

26           7.       Defendant’s failure to warn consumers and other individuals in California of the  
27 health hazards associated with exposure to DEHP in conjunction with the sale, manufacture,  
28

1 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendant to the  
2 enjoinder and civil penalties described herein.

3 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
4 65 in accordance with Health and Safety Code § 25249.7(b).

5 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
6 Defendant to provide purchasers or users of the Product with the required warnings related to the  
7 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety  
8 Code § 25249.7(a).

9 **PARTIES**

10 10. Plaintiff is a citizen of the State of California acting in the interest of the general  
11 public to promote awareness of exposures to toxic chemicals in products sold in California and  
12 to improve human health by reducing hazardous substances contained in such items. He brings  
13 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

14 11. Defendant Audiology manufactures and markets electronics. Through its  
15 business, Audiology effectively manufactures, imports, distributes, sells, and/or offers the  
16 Product for sale or use in the State of California, or it implies by its conduct that it manufactures,  
17 imports, distributes, sells, and/or offers the Product for sale or use in the State of California.

18 12. Defendant Audiology is a “person” in the course of doing business within the  
19 meaning of Health & Safety Code sections 25249.6 and 25249.11.

20 **VENUE AND JURISDICTION**

21 13. Venue is proper in the County of Alameda because one or more of the instances  
22 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant  
23 conducted, and continues to conduct, business in the County of Alameda with respect to the  
24 Product.

25 14. This Court has jurisdiction over this action pursuant to California Constitution  
26 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those  
27 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the  
28

1 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,  
2 this Court has jurisdiction over this lawsuit.

3 15. This Court has jurisdiction over Defendant because it is either a citizen of the  
4 State of California, has sufficient minimum contacts with the State of California, is registered  
5 with the California Secretary of State as foreign corporations authorized to do business in the  
6 State of California, and/or has otherwise purposefully availed itself of the California market.  
7 Such purposeful availment has rendered the exercise of jurisdiction by California courts  
8 consistent and permissible with traditional notions of fair play and substantial justice.

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On December 5, 2016, Plaintiff gave notice of alleged violation of Health and  
11 Safety Code § 25249.6 (the "Notice") to Audiology concerning the exposure of California  
12 citizens to DEHP contained in the Product without proper warning, subject to a private action to  
13 Audiology and to the California Attorney General's office and the offices of the County District  
14 attorneys and City Attorneys for each city with a population greater than 750,000 persons  
15 wherein the herein violations allegedly occurred.

16 17. The Notice complied with all procedural requirements of Proposition 65 including  
17 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at  
18 least one person with relevant and appropriate expertise who reviewed relevant data regarding  
19 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a  
20 private action.

21 18. After receiving the Notice, and to Plaintiff's best information and belief, none of  
22 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted  
23 a cause of action against Audiology under Proposition 65 to enforce the alleged violations which  
24 are the subject of Plaintiff's notice of violation.

25 19. Plaintiff is commencing this action more than sixty (60) days from the date of the  
26 Notice to Audiology, as required by law.

27 **FIRST CAUSE OF ACTION**

28 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

1           20.     Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of  
2 this complaint as though fully set forth herein.

3           21.     Defendant has, at all times mentioned herein, acted as manufacturer, distributor,  
4 and/or retailer of the Product.

5           22.     The Product contains DEHP, a hazardous chemical found on the Proposition 65  
6 list of chemicals known to be hazardous to human health.

7           23.     The Product does not comply with the Proposition 65 warning requirements.

8           24.     Plaintiff, based on her best information and belief, avers that at all relevant times  
9 herein, and at least since November 2, 2016, continuing until the present, that Audiology has  
10 continued to knowingly and intentionally expose California users and consumers of the Product  
11 to DEHP without providing required warnings under Proposition 65.

12           25.     The exposures that are the subject of the Notice result from the purchase,  
13 acquisition, handling and recommended use of the product. Consequently, the primary route of  
14 exposure to these chemicals is through direct skin exposure. The ear cushion cover of these  
15 headphones is likely to be in constant contact with the user's ears and during normal expected  
16 use and direct skin exposure is likely to occur. Skin exposure through direct contact with the  
17 user's hands is possible during application, removal, and manipulation of the headphones.  
18 Should the wearer's skin perspire underneath the ear cushion, aqueous DEHP skin permeation  
19 rates have been reported to be faster than neat DEHP permeation. Although the association  
20 between HMWP phthalates such as DEHP and atopic dermatitis has never been elucidated, as a  
21 multitude of chemicals are present in headphones that come into contact with human skin, DEHP  
22 in headphones and hearing protection aids has been reported to induce contact dermatitis. The  
23 ear cushion cover can be expected to emit gas phase DEHP into the air over the lifetime of the  
24 product. This gas phase DEHP can potentially be inhaled as the product is used in the vicinity of  
25 the user's facial area. If the headphones are stored or transported in a carrier, DEHP that leaches  
26 from the headphones may contaminate other articles contained within the carrier bag that are  
27 subsequently handled, worn, or consumed by people. Finally, while mouthing of the product  
28

1 does not seem likely, some amount of exposure through ingestion can occur by handling the  
2 product with subsequent touching of the users hand to mouth.

3 26. Plaintiff, based on her best information and belief, avers that such exposures will  
4 continue every day until clear and reasonable warnings are provided to Product purchasers and  
5 users or until this known toxic chemical is removed from the Product.

6 27. Defendant has knowledge that the normal and reasonably foreseeable use of the  
7 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur  
8 by their deliberate, non-accidental participation in the manufacture, importation, distribution,  
9 sale and offering of the Product to consumers in California

10 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
11 Complaint.

12 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above  
13 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

14 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically  
15 authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff demands judgment against Defendant and requests the  
18 following relief:

- 19 A. That the court assess civil penalties against Defendant in the amount of  
20 \$2,500 per day for each violation in accordance with Health and Safety  
21 Code § 25249.7(b);
- 22 B. That the court preliminarily and permanently enjoin Defendant mandating  
23 Proposition 65 compliant warnings on the Product;
- 24 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 25 D. That the court grant any further relief as may be just and proper.

26  
27 Dated: March 6, 2017

BRODSKY & SMITH, LLC

28 By:  \_\_\_\_\_

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Evan J. Smith (SBN242352)  
Ryan P. Cardona (SBN302113)  
9595 Wilshire Boulevard, Suite 900  
Beverly Hills, CA 90212  
Telephone: (877) 534-2590  
Facsimile: (310) 247-0160

*Attorneys for Plaintiff*