

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

APR 2 / 2010

CLERK OF THE SUPERIOR COURT  
By TANIA PIERCE  
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

10 EMA BELL,  
11 Plaintiff,  
12 vs.  
13 MARSHALLS OF MA, INC.,  
14 Defendant.

Case No.: Rg18899101  
**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**  
**(Violation of Health & Safety Code §25249.5  
et seq.)**

18 Plaintiff Ema Bell ("Plaintiff"), by and through her attorneys, alleges the following cause  
19 of action in the public interest of the citizens of the State of California.

20 **BACKGROUND OF THE CASE**

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

27 2. This complaint is a representative action brought by Plaintiff in the public interest  
28 of the citizens of the State of California to enforce the People's right to be informed of the health

1 hazards caused by exposure to Bisphenol A (BPA), a toxic chemical found in WestBend Air  
2 Crazy Hot Air Popcorn Poppers sold and/or distributed by defendant Marshalls of MA, Inc.  
3 (“ByTech” or “Defendant”) in California.

4 3. BPA is a harmful chemical known to the State of California to cause reproductive  
5 toxicity as well. On May 11, 2015, the State of California listed BPA as a chemical known to the  
6 State to cause reproductive toxicity and BPA has come under the purview of Proposition 65  
7 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§  
8 25249.8 & 25249.10(b).

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

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

19 6. Plaintiff alleges that Defendant manufactures, distributes, imports, sells and/or  
20 offers for sale in California, without the requisite exposure warning, Aux/Charging Cables/Cords  
21 (the “Products”) that expose persons to BPA.

22 7. Defendant’s failure to warn consumers and other individuals in California of the  
23 health hazards associated with exposure to BPA in conjunction with the sale, manufacture and/or  
24 distribution of the Products is a violation of Proposition 65 and subjects Defendant to the  
25 enjoinder and civil penalties described herein.

26 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
27 65 in accordance with Health and Safety Code § 25249.7(b).

28



1 State of California, and/or has otherwise purposefully availed itself of the California market.  
2 Such purposeful availment has rendered the exercise of jurisdiction by California courts  
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

5 16. On August 30, 2017, Plaintiff gave notice of alleged violation of Health and  
6 Safety Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California  
7 citizens to BPA contained in the Products without proper warning, subject to a private action to  
8 Defendant and to the California Attorney General's office and the offices of the County District  
9 attorneys and City Attorneys for each city with a population greater than 750,000 persons  
10 wherein the herein violations allegedly occurred.

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

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

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

22 **FIRST CAUSE OF ACTION**

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

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

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

28

1           22.     The Products contain BPA, a hazardous chemical found on the Proposition 65 list  
2 of chemicals known to be hazardous to human health.

3           23.     The Products do not comply with the Proposition 65 warning requirements.

4           24.     Plaintiff, based on her best information and belief, avers that at all relevant times  
5 herein, and at least since November 2, 2016, continuing until the present, that Defendant has  
6 continued to knowingly and intentionally expose California users and consumers of the Product  
7 to BPA without providing required warnings under Proposition 65.

8           25.     The exposures that are the subject of this notice result from the purchase,  
9 acquisition, handling and recommended use of the product. Consequently, the primary route of  
10 exposure to these chemicals is through oral ingestion. The air popcorn top is expected to be in  
11 contact with food during normal expected use and thus BPA can leach from the plastic into foods  
12 that come into contact with the plastic top. Migration of BPA out of the plastic top and into  
13 foods may be enhanced at elevated temperatures such as would be expected during air popping.  
14 When BPA contaminated foods are consumed, oral ingestion of BPA will result. Gas phase  
15 BPA can be present in the air when the popcorn maker is used which can also absorb to popcorn  
16 surfaces or be inhaled by the user. Over time, it is expected that the clear plastic top will be  
17 exposed to hot water and abrasion during hand and/or machine washing and future BPA leaching  
18 rates can be expected to increase with continued exposure to hot water and washing cycles.  
19 Washing the product with hard water and/or dishwashing soaps at elevated pH will result in  
20 higher extraction rates of BPA with subsequent uses of the product. Dermal exposure to BPA  
21 will occur when the clear plastic top is handled with bare hands during normal expected use and  
22 cleaning. Finally, while direct mouthing of the product is not likely, some amount of exposure to  
23 BPA through ingestion can occur by handling the product, with subsequent touching of the  
24 user's hand to mouth. mouthing of the shaker is possible and direct ingestion of BPA due to  
25 mouthing will occur.

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

1 27. Defendant has knowledge that the normal and reasonably foreseeable use of the  
2 Product exposes individuals to BPA, and Defendant intends that exposures to BPA will occur by  
3 its deliberate, non-accidental participation in the manufacture, importation, distribution, sale and  
4 offering of the Product to consumers in California

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

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

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

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff demands judgment against Defendant and requests the  
13 following relief:

- 14 A. That the court assess civil penalties against Defendant in the amount of  
15 \$2,500 per day for each violation in accordance with Health and Safety  
16 Code § 25249.7(b);
- 17 B. That the court preliminarily and permanently enjoin Defendant mandating  
18 Proposition 65 compliant warnings on the Product;
- 19 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 20 D. That the court grant any further relief as may be just and proper.

21 Dated: March 30, 2018

BRODSKY & SMITH, LLC

22 By:  \_\_\_\_\_

23 Evan J. Smith (SBN242352)

24 Ryan P. Cardona (SBN302113)

9595 Wilshire Boulevard, Suite 900

Beverly Hills, CA 90212

25 Telephone: (877) 534-2590

26 Facsimile: (310) 247-0160

27 *Attorneys for Plaintiff*