

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

ENDORSED
FILED
ALAMEDA COUNTY

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SUE PESKO

8 *Attorneys for Plaintiff*

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

12 EMA BELL,
13
14 Plaintiff,
15
16 vs.
17 MARSHALLS OF MA, INC.,
18 Defendant.

Case No.: RG18899101

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELEIF**

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

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

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

BY FAX

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 (“Marshalls” 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, WestBend Air Crazy Hot
21 Air Popcorn Poppers (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 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
2 Defendant to provide purchasers or users of the Product with the required warnings related to the
3 dangers and health hazards associated with exposure to BPA pursuant to Health and Safety Code
4 § 25249.7(a).

5 **PARTIES**

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

10 11. Defendant, through its business, effectively manufactures, imports, distributes,
11 sells, and/or offers the Product for sale or use in the State of California, or it implies by its
12 conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use
13 in the State of California.

14 12. Plaintiff alleges that Defendant is a “person” in the course of doing business
15 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

16 **VENUE AND JURISDICTION**

17 13. Venue is proper in the County of Alameda because one or more of the instances
18 of wrongful conduct occurred, and continues to occur in this county and/or because Defendant
19 conducted, and continues to conduct, business in the County of Alameda with respect to the
20 Product.

21 14. This Court has jurisdiction over this action pursuant to California Constitution
22 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
23 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
24 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
25 this Court has jurisdiction over this lawsuit.

26 15. This Court has jurisdiction over Defendant because it is either a citizen of the
27 State of California, has sufficient minimum contacts with the State of California, is registered
28 with the California Secretary of State as foreign corporations authorized to do business in the

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

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

28

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: April 11, 2018

BRODSKY, & SMITH, LLC

22 By: 
23 Evan J. Smith (SBN242352)
24 Ryan P. Cardona (SBN302113)
25 9595 Wilshire Boulevard, Suite 900
26 Beverly Hills, CA 90212
27 Telephone: (877) 534-2590
28 Facsimile: (310) 247-0160

Attorneys for Plaintiff