

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*

9

10

11

SUPERIOR COURT OF THE STATE OF CALIFORNIA

12

COUNTY OF ALAMEDA

13

EMA BELL,

Case No.: RG18899101

14

Plaintiff,

CONSENT JUDGMENT

15

v.

Judge: Ronni MacLaren

16

MARSHALLS OF MA, INC.,

Dept.: 25

17

Defendant.

Hearing Date: May 31, 2019

18

Hearing Time: 9:00 AM

19

Reservation #: R-2067746

20

21

22

23

24

25

26

27

28

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Ema Bell
3 acting on behalf of the public interest (hereinafter “Bell”) and Marshalls of MA, Inc. (“Marshalls”)
4 with Bell and Marshalls collectively referred to as the “Parties” and each of them as a “Party.” Bell
5 is an individual residing in California who seeks to promote awareness of exposures to toxic
6 chemicals and improve human health by reducing or eliminating hazardous substances contained
7 in consumer products. Marshalls is a person in the course of doing business for purposes of
8 Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 **1.2 Allegations and Representations.** Bell alleges that Marshalls has exposed
10 individuals to bisphenol A (BPA) from its sales of WestBend popcorn machines without providing
11 clear and reasonable warnings under Proposition 65. BPA is listed under Proposition 65 as a
12 chemical known to the State of California to cause reproductive toxicity.

13 **1.3 Notice of Violation/Complaint.** On or about August 30, 2017, Bell served
14 Marshalls and various public enforcement agencies with a document entitled “60-Day Notice of
15 Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that Marshalls
16 was in violation of Proposition 65 for failing to warn consumers and customers that WestBend
17 popcorn machines exposed users in California to BPA. No public enforcer has brought and is
18 diligently prosecuting the claims alleged in the Notice. On April 2, 2018, Bell filed a complaint in
19 the matter (the “Complaint”). Bell filed a first amended complaint (the “Amended Complaint”) on
20 April 12, 2018. The Complaint and Amended Complaint are collectively referred to herein as, the
21 “Action.”

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Marshalls as to the allegations contained in the Action, that venue is proper in the
24 County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the
25 enforcement of this Consent Judgment as a full and final binding resolution of all claims which
26 were or could have been raised in the Complaint based on the facts alleged therein and/or in the
27 Notice.
28

1 1.5 Marshalls denies the material allegations contained in the Notice and Action and
2 maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Marshalls of any fact, finding, issue of law, or violation of law; nor
4 shall compliance with this Consent Judgment constitute or be construed as an admission by
5 Marshalls of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
6 denied by Marshalls. However, this section shall not diminish or otherwise affect the obligations,
7 responsibilities, and duties of Marshalls under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means WestBend popcorn
10 machines with style numbers 252778, 252781, 252786, 047806, 047808, and 047810 that are
11 distributed sold, and/or offered for sale in California by Marshalls, its parents, subsidiaries, sister
12 companies, and affiliates, or by any entity to whom Marshalls or its parents, subsidiaries, sister
13 companies, and affiliates directly or indirectly distributes the Covered Products.

14 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
15 entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
18 thereafter, Covered Products that Marshalls directly imports, distributes, sells, or offers for sale in
19 California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled
20 with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of
21 this Consent Judgment, a “Reformulated Product” is a Covered Product that is in compliance with
22 the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not
23 apply to any Reformulated Product.

24 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
25 that contain less than 20 parts per million BPA by weight, such concentration to be determined by
26 use of a test performed by an accredited laboratory using inductively coupled plasma mass
27 spectrometry (ICP-MS) equipment.

28

1 3.3 **Clear and Reasonable Warning.** As of the Effective Date, and continuing
2 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
3 provided for all Covered Products that Marshalls manufacturers, imports, distributes, sells, or offers
4 for sale in California that is not a Reformulated Product. There shall be no obligation for Marshalls
5 to provide a warning for Covered Products that are placed in retail stores in California prior to the
6 Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning**
7 described in §§ 3.3(a) or (b), respectively:

8 (a) **Warning. :**

9 ⚠ **WARNING:** This product can expose you to chemicals including bisphenol A
10 (BPA), which is known to the State of California to cause birth defects or other
11 reproductive harm. For more information go to www.P65Warnings.ca.gov.

12 (b) **Alternative Warning::**

13 ⚠ **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

14 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
15 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
16 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
17 triangle with a black outline, except that if the sign or label for the Covered Product does not use
18 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
19 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
20 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
21 automatic process, providing that the warning is displayed with such conspicuousness, as compared
22 with other words, statements, or designs as to render it likely to be read and understood by an
23 ordinary individual under customary conditions of purchase or use. A warning may be contained
24 in the same section of the packaging, labeling, or instruction booklet that states other safety
25 warnings, if any, concerning the use of the product and shall be at least the same size as those other
26 safety warnings.

1 3.5 **Compliance with Warning Regulations.** Marshalls shall be deemed to be in
2 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
3 Judgment or by complying with warning requirements adopted by OEHHA after the Effective Date.

4 **4. MONETARY TERMS**

5 4.1 **Civil Penalty.** Marshalls shall pay \$3,000.00 as a Civil Penalty pursuant to Health
6 and Safety Code § 25249.7(b), to be apportioned in accordance with California Health & Safety
7 Code § 25192, with 75% of the Civil Penalty remitted to the State of California’s Office of
8 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
9 remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

10 4.1.1 Within ten (10) business days of the Effective Date, or within ten (10)
11 business days of the date Bell provides Marshalls with W-9 Forms for each payee identified in
12 this section 4.1.1, whichever is later, Marshalls shall issue two separate checks for the Civil
13 Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; and to (b) “Brodsky & Smith,
14 LLC in Trust for Bell” in the amount of \$750.00. Payment owed to Bell pursuant to this Section
15 shall be delivered to the following payment address:

16 Evan J. Smith, Esquire
17 Brodsky & Smith, LLC
18 Two Bala Plaza, Suite 510
19 Bala Cynwyd, PA 19004

20 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
21 to OEHHA (Memo Line “Prop 65 Penalties”) at one of the following address(es):

22 For United States Postal Service Delivery:

23 Mike Gyurics
24 Fiscal Operations Branch Chief
25 Office of Environmental Health Hazard Assessment
26 P.O. Box 4010
27 Sacramento, CA 95812-4010

28 For Non-United States Postal Service Delivery:

 Mike Gyurics
 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 1001 I Street

1 Sacramento, CA 95814

2 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the address
3 set forth above as proof of payment to OEHHA.

4 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, or within ten
5 (10) business days of the date Bell provides Marshalls with W-9 Forms for the payee identified in
6 this section 4.2, whichever is later, Marshalls shall pay \$24,000.00 to Brodsky & Smith, LLC
7 ("Brodsky Smith") as complete reimbursement for Plaintiff Bell's attorneys' fees and costs incurred
8 as a result of investigating, bringing this matter to Marshalls's attention, litigating and negotiating
9 and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
10 Procedure § 1021.5.

11 **5. RELEASE OF ALL CLAIMS**

12 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
13 in the public interest, and Marshalls, and its parents, shareholders, divisions, subdivisions,
14 subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and
15 assigns ("Defendant Releasees"), and all entities to whom they directly or indirectly distribute or
16 sell Covered Products ("Downstream Defendant Releasees"), of all claims for violations of
17 Proposition 65 based on exposure to BPA from Covered Products, with respect to any Covered
18 Product manufactured, distributed, or sold by Marshalls prior to the Effective Date. Compliance
19 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to
20 the Covered Products for Marshalls, Defendant Releasees, and Downstream Defendant Releasees.

21 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
22 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
23 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
24 and releases any Marshalls, Defendant Releasees, and Downstream Defendant Releasees from any
25 and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
26 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
27 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
28 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising

1 from Covered Products manufactured distributed or sold by Marshalls, Defendant Releasees, or
2 Downstream Defendant Releasees. With respect to the foregoing waivers and releases in this
3 paragraph, Bell hereby specifically waives any and all rights and benefits which she now has, or in
4 the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code,
5 which provides as follows:

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

10 5.3 Marshalls waives any and all claims against Bell, her attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Bell and her attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
14 and/or with respect to Covered Products.

15 **6. INTEGRATION**

16 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
17 any and all prior negotiations and understandings related hereto shall be deemed to have been
18 merged within it. No representations or terms of agreement other than those contained herein exist
19 or have been made by any Party with respect to the other Party or the subject matter hereof.

20 **7. GOVERNING LAW**

21 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California and apply within the State of California. In the event that Proposition 65 is repealed or
23 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
24 Marshalls shall have no further obligations pursuant to this Consent Judgment with respect to, and
25 to the extent that, Covered Products are so affected.

26 **8. NOTICES**

27 8.1 Unless specified herein, all correspondence and notices required to be provided
28 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-

1 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
2 by the other party at the following addresses:

3 For Marshalls:

4 General Counsel
5 The TJX Companies, Inc.
6 770 Cochituate Road
7 Framingham, MA 01701

8 With Copy to:

9 Jeff Margulies
10 Norton Rose Fulbright US LLP
11 555 South Flower Street, Forty-First Floor
12 Los Angeles, CA 90071

13 And

14 For Bell:

15 Evan Smith
16 Brodsky & Smith, LLC
17 2 Bala Plaza, Suite 510
18 Bala Cynwyd, PA 19004

19 Any party, from time to time, may specify in writing to the other party a change of address to
20 which all notices and other communications shall be sent.

21 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

22 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
23 which shall be deemed an original, and all of which, when taken together, shall constitute one and
24 the same document.

25 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
26 **APPROVAL**

27 10.1 Bell agrees to comply with the requirements set forth in California Health & Safety
28 Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.

 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,

1 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
2 30 days, the case shall proceed on its normal course.

3 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
4 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
5 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
6 its normal course on the trial court's calendar.

7 **11. MODIFICATION**

8 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
9 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

10 **12. ATTORNEY'S FEES**

11 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
13 the unsuccessful party has acted with substantial justification. For purposes of this Consent
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
15 Discovery Act of 1986, Code of Civil Procedure § 2016, et seq.

16 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
17 pursuant to law.

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood and agree to all of the terms and conditions of this
24 document and certifies that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.
27
28

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

AGREED TO:

AGREED TO:

Date: _____

Date: 4/10/19

By: _____

By: M.A.B.

EMA BELL

MARSHALLS OF MA, INC.

*VP, Legal - The TX Companies,
Inc. (ultimate parent
company to Marshalls of
MA, Inc.)*

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

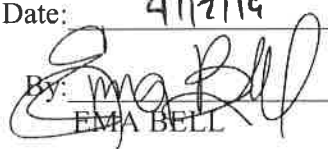
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

AGREED TO:

Date: 4/2/19

Date: _____

By: 
EMMA BELL

By: _____
MARSHALLS OF MA, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court