

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  
NOV 08 2018  
CLERK OF THE SUPERIOR COURT  
By CURTIAH GANTER  
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,  
11 Plaintiff,  
12 vs.  
13 OFF-GRID SOLUTIONS USA, LLC,  
14 Defendant.

Case No.: RG18914807  
Dept.: 24  
Judge: Frank Roesch

**AMENDED COMPLAINT FOR CIVIL  
PENALTIES AND INJUNCTIVE RELIEF**

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

15 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the  
16 following cause of action in the public interest of the citizens of the State of California.

**BACKGROUND OF THE CASE**

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

24 2. This complaint is a representative action brought by Plaintiff in the public interest  
25 of the citizens of the State of California to enforce the People's right to be informed of the health  
26 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
27 WakaWaka waterproof pouches/bags/totes/cases sold and/or distributed by defendant Off-Grid  
28 Solutions USA, LLC ("WakaWaka" or "Defendant") in California.

BY FAX

1           3.       DEHP is a harmful chemical known to the State of California to cause cancer and  
2 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical  
3 known to the State to cause cancer and DEHP has come under the purview of Proposition 65  
4 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§  
5 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical  
6 known to cause reproductive toxicity.

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

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

17           6.       Plaintiff alleges that Defendant distributes, sells and/or offers for sale in  
18 California, without a requisite exposure warning, WakaWaka waterproof  
19 pouches/bags/totes/cases (the “Products”) that expose persons to DEHP.

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

24           8.       Plaintiff seeks civil penalties against Defendant for its violations of Proposition  
25 65 in accordance with Health and Safety Code § 25249.7(b).

26           9.       Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring  
27 Defendant to provide purchasers or users of the Products with required warnings related to the  
28

1 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety  
2 Code § 25249.7(a).

3 **PARTIES**

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

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

12 12. Plaintiff alleges that WakaWaka is a “person” in the course of doing business  
13 within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

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

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

24 15. This Court has jurisdiction over Defendant because Defendant is either a citizen  
25 of the State of California, has sufficient minimum contacts with the State of California, is  
26 registered with the California Secretary of State as foreign corporations authorized to do business  
27 in the State of California, and/or has otherwise purposefully availed itself of the California  
28

1 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts  
2 consistent and permissible with traditional notions of fair play and substantial justice.

### 3 SATISFACTION OF NOTICE REQUIREMENTS

4 16. On April 6, 2018, Plaintiff gave notice of alleged violations of Health and Safety  
5 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to  
6 DEHP contained in the Products without proper warning, subject to a private action to Defendant  
7 and to the California Attorney General's office and the offices of the County District attorneys  
8 and City Attorneys for each city with a population greater than 750,000 persons wherein the  
9 herein violations allegedly occurred.

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

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

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

### 21 FIRST CAUSE OF ACTION

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

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

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

27 22. The Products contain DEHP, a hazardous chemical found on the Proposition 65  
28 list of chemicals known to be hazardous to human health.

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

2           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
3 herein, and at least since February 2, 2018, that Defendant has continued to knowingly and  
4 intentionally expose California users and consumers of the Products to DEHP without providing  
5 required warnings under Proposition 65.

6           25.     The exposures that are the subject of the Notice result from the purchase,  
7 acquisition, handling and recommended use of the Product. Consequently, the primary route of  
8 exposure to these chemicals is through dermal absorption. Dermal absorption of DEHP can  
9 occur through direct skin contact with the clear plastic curing routine use when the pouch is  
10 grasped, opened, or manipulated with bare hands. If the plastic window becomes wet due to  
11 contact with water and is handled or in contact with wet skin, aqueous DEHP skin permeation  
12 rates have been reported to be faster than neat DEHP permeation. Concentrations of gas phase  
13 DEHP can be expected to build within the small, enclosed interior of the pouch. This gas phase  
14 and surface DEHP can potentially be absorbed to the surface of the interior contents, including  
15 but not limited to smartphones or tablet computers that are subsequently handled, held in direct  
16 contact with skin, mouthed, or ingested by the user. If the pouch is stored or transported in a  
17 carrier, DEHP that leaches from the clear plastic may contaminate other articles contained within  
18 the storage area or carrier that are subsequently handled, worn, mouthed, or ingested by the user.  
19 Finally, while mouthing of the product does not seem likely, some amount of exposure through  
20 ingestion can occur by touching the clear plastic with subsequent touching of the user's hand to  
21 mouth, through touching the DEHP contaminated smartphone screen after it is removed from the  
22 pouch with subsequent touching of the user's hand to mouth, or if the smartphone surface is  
23 contaminated with DEHP and comes into contact with the user's mouth during use.

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

27           27.     Defendant has knowledge that the normal and reasonably foreseeable use of the  
28 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur

1 by their deliberate, non-accidental participation in the importation, distribution, sale and offering  
2 of the Products to consumers in California

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

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

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

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff demands judgment against Defendant and requests the  
11 following relief:

- 12 A. That the court assess civil penalties against Defendant in the amount of  
13 \$2,500 per day for each violation in accordance with Health and Safety  
14 Code § 25249.7(b);
- 15 B. That the court preliminarily and permanently enjoin Defendant mandating  
16 Proposition 65 compliant warnings on the Product;
- 17 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 18 D. That the court grant any further relief as may be just and proper.

19  
20 Dated: November 7, 2018

BRODSKY & SMITH, LLC

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

*Attorneys for Plaintiff*

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**PROOF OF SERVICE**

I, Evan J. Smith, Esquire, declare:

I am over the age of 18 years and not a party to this action; my business address is 9595 Wilshire Blvd., Ste. 900, Beverly Hills, CA 90212 and 333 E. City Avenue, Suite 510, Bala Cynwyd, PA 19004.

On November 7, 2018, I served the following document:

**AMENDED COMPLAINT**

by serving a true copy of the above-described document in the following manner:

**BY ELECTRONIC MAIL & FEDERAL EXPRESS OVERNIGHT DELIVERY**

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The above-described documents were transmitted via electronic mail and federal express overnight delivery to the following parties on July 15, 2016:

Steve N. Siegel, Esq.  
Dinsmore & Shohl LLP  
255 East 5<sup>th</sup> Street, Suite 1900  
Cincinnati, OH 45202

*Attorneys for Defendant*

I declare under penalty of perjury under the laws of California and of the United States of America that the above is true and correct.

Executed on November 7, 2018, at Bala Cynwyd, Pennsylvania.

  
\_\_\_\_\_  
Evan J. Smith