

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 OFF-GRID SOLUTIONS USA, LLC,

15 Defendant.

Case No.: RG18914807

CONSENT JUDGMENT

Judge: Frank Roesch

Dept.: 24

Hearing Date: January 3, 2019

Hearing Time: 3:45 PM

Reservation #: R-2020079

1 **1. INTRODUCTION**

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

10 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (“DEHP”) from its sales of WakaWaka Waterproof
12 Pouch without providing a clear and reasonable exposure warning pursuant to Proposition 65.
13 DEHP is listed under Proposition 65 as a chemical known to the State of California to cause
14 cancer and reproductive toxicity. Defendant denies these allegations and denies that a warning
15 under Proposition 65 is required for any products it sells in California.

16 1.3 **Notice of Violation/Complaint.** On or about April 6, 2018, Ferreiro served
17 WakaWaka Holding B.V., Defendant’s parent company, Best Buy Co., Inc., and various public
18 enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health
19 & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated Proposition 65 for
20 failing to warn consumers and customers that use of the WakaWaka Waterproof Pouch expose
21 users in California to DEHP. No public enforcer has brought or is diligently prosecuting the
22 claims alleged in the Notice. On July 30, 2018, Ferreiro filed a complaint (the “Complaint”) in
23 the matter against defendant Best Buy Co., Inc. On November 7, 2018, Plaintiff amended
24 Complaint (the “Amended Complaint”)¹ in order to substitute WakaWaka as the defendant in the
25 Action.

26 _____

27 ¹ The Complaint and the Amended Complaint are collectively referred to herein as, the
28 “Action.”

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

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

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

2. DEFINITIONS

2.1 **Covered Products.** The term “Covered Products” means WakaWaka waterproof pouches, bags, totes and cases that are manufactured, distributed and/or offered for sale in California by WakaWaka

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

3. INJUNCTIVE RELIEF: WARNINGS

3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is signed by both Parties, and continuing thereafter, Covered Products that WakaWaka directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2 below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4 below. For purposes of this Consent Judgment, a “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in

1 § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any
2 Reformulated Product.

3 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered
4 Products that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of
5 DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies
6 3580A and 8270C or another methodology utilized by federal or state government agencies for
7 the purpose of determining the phthalate content in a solid substance.

8 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
9 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
10 this § 3.3 and in § 3.4 must be provided for all Covered Products that Defendant manufacturers,
11 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product.
12 There shall be no obligation for Defendant to provide a warning for Covered Products that enter
13 the stream of commerce prior to the date this Consent Judgment is signed by both Parties. The
14 warning shall consist of either the **Warning** or **Alternative Warning** described in § 3.3(a) or (b),
15 respectively:

16 (a) **Warning.** The “Warning” shall consist of the statement:

17 ⚠ **WARNING:** This product can expose you to chemicals including di(2-
18 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
19 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

20 (b) **Alternative Warning:** WakaWaka may, but is not required to, use the alternative
21 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

22 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

23 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the
24 word “**WARNING**” in all capital letters and in bold font, followed by a colon. The warning
25 symbol to the left of the word “**WARNING**” must be a black exclamation point in a yellow
26 equilateral triangle with a black outline, except that if the sign or label for the Covered Product
27 does not use the color yellow, the symbol may be in black and white. The symbol must be in a
28 size no smaller than the height of the word “**WARNING**”. The warning shall be affixed to or

1 printed on the Covered Product's packaging or labeling, or on a placard, shelf tag, sign or
2 electronic device or automatic process, providing that the warning is displayed with such
3 conspicuousness, as compared with other words, statements, or designs, as to render it likely to be
4 read and understood by an ordinary individual under customary conditions of purchase or use. A
5 warning may be contained in the same section of the packaging, labeling, or instruction booklet
6 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at
7 least the same font size as those other safety warnings.

8 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
9 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
10 Judgment or by complying with warning requirements adopted by the State of California's Office
11 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

12 **4. MONETARY TERMS**

13 **4.1 Civil Penalty.** WakaWaka shall pay \$2,000.00 as a Civil Penalty pursuant to
14 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California
15 Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining
16 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
17 § 25249.12(d).

18 **4.1.1** Within ten (10) days of the Effective Date, WakaWaka shall issue two
19 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
20 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00. Payment owed to
21 Ferreiro pursuant to this Section shall be delivered to the following payment address:

22 Evan J. Smith, Esquire
23 Brodsky & Smith, LLC
24 Two Bala Plaza, Suite 510
25 Bala Cynwyd, PA 19004

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

28 For United States Postal Service Delivery:
 Mike Gyurics

1 Fiscal Operations Branch Chief
2 Office of Environmental Health Hazard Assessment
3 P.O. Box 4010
4 Sacramento, CA 95812-4010

5 For Non-United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 1001 I Street
10 Sacramento, CA 95814

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

13 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, WakaWaka shall pay
14 \$18,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
15 Ferreiro's reasonable attorneys' fees and costs and all other expense incurred as a result of
16 investigating, bringing this matter to WakaWaka's attention, litigating, negotiating and obtaining
17 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure
18 §1021.5.

19 **5. RELEASE OF ALL CLAIMS**

20 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
21 acting on his own behalf, and on behalf of the public interest, and WakaWaka, and its past,
22 current and future parents, owners, shareholders, members, directors, officers, managers,
23 employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister
24 companies, and affiliates, and their predecessors, successors and assigns (collectively, the
25 "Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
26 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
27 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
28 cooperative members, including, but not limited to, Best Buy Stores, L.P. and its past, current and
future parents, owners, shareholders, members, directors, officers, managers, employees,
representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies
and affiliates, and their predecessors, successors and assigns (collectively, the "Downstream

1 Releasees”), of all claims for violations of Proposition 65 based on exposure to DEHP from
2 Covered Products. This Consent Judgment shall have preclusive effect such that no other person
3 or entity or authority, whether purporting to act in his, her, or its interests or in the public interest,
4 shall be permitted to pursue and/or take any action with respect to any violation of Proposition 65
5 that was alleged in the Action, in the Notice or that could have been brought against WakaWaka
6 and/or its Downstream Releasees relating to or in any way arising out of the Covered Products.
7 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
8 with regard to the Covered Products.

9 5.2 In addition to the foregoing, Ferreiro, on behalf of himself and his past and current
10 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
11 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
12 legal action against, and hereby releases, WakaWaka, the Defendant Releasees, and the
13 Downstream Releasees from any and all manner of actions, causes of action, claims, demands,
14 rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges,
15 losses, costs, expenses, fines, penalties and attorneys’ fees, of any nature whatsoever, known or
16 unknown, in law or equity, fixed or contingent, now or in the future, with respect to any alleged
17 violations of Proposition 65 related to or arising out of the Covered Products. With respect to the
18 foregoing waivers and releases in this paragraph, Ferreiro hereby specifically waives any and all
19 rights and benefits which he now has, or in the future may have, conferred by virtue of the
20 provisions of §1542 of the California Civil Code, which provides as follows:

21 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
22 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
23 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
24 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
25 SETTLEMENT WITH THE DEBTOR.

26 5.3 WakaWaka waives any and all claims against Ferreiro, his attorneys and other
27 representatives for any and all actions taken or statements made (or those that could have been
28 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein
7 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to,
13 and to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
17 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
18 party by the other party at the following addresses:

19 For Defendant:

20 Steve N. Siegel, Esq.
21 Dinsmore & Shohl LLP
22 255 East 5th Street, Suite 1900
Cincinnati, OH 45202

23 and

24 For Ferreiro:

25 Evan Smith
26 Brodsky & Smith, LLC
27 9595 Wilshire Blvd., Ste. 900
28 Beverly Hills, CA 90212

Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and may be delivered by
4 facsimile or electronic mail, each of which shall be deemed an original, and all of which, when
5 taken together, shall constitute one and the same document.

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

8 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
9 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
10 Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by
12 the Court and shall be null and void if, for any reason, it is not approved by the Court. In such
13 case, the Parties agree to meet and confer on how to proceed, and if an agreement as to how to
14 proceed is not reached within 30 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and that approval is reversed or
16 vacated by an appellate court, the Parties shall meet and confer as to whether to modify the terms
17 of this Consent Judgment. If the Parties do not jointly agree on a course of action to take in the
18 event of a reversal by an appellate court, the case shall proceed on its normal course.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 in writing and the approval of the Court or upon the granting of a motion brought to the Court by
22 either Party.

23 **12. ATTORNEY'S FEES**

24 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
25 Judgment shall be required to pay the prevailing party's reasonable attorneys' fees and costs.

26 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
27 pursuant to law.

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

13. RETENTION OF JURISDICTION

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

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 11/15/18

Date: November 8th, 2018

By: Anthony Ferreiro
ANTHONY FERREIRO

By: Camille van Gestel
-OFF-GRID SOLUTIONS USA, LLC



IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court