

1 Plaintiff AS YOU SOW alleges as follows:

2 **INTRODUCTION**

3 1. This complaint seeks civil penalties and an injunction to remedy the
4 continuing failure of DOLLAR TREE STORES, INC., GREENBRIER
5 INTERNATIONAL, INC., and DOES 1 through 10 (“Defendants”) to give clear and
6 reasonable warnings to those residents of California prior to exposing those residents to
7 plastic toys (including fake teeth and bath toys) which contain Di(2-ethylhexyl) phthalate
8 (“DEHP”). The handling and use of these products causes these residents to be exposed
9 to DEHP. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
10 and Safety Code section 25249.6 *et seq.*, also known as “Proposition 65,” businesses must
11 provide persons with a clear and reasonable warning before exposing individuals to a
12 chemical known to the State of California to cause cancer or reproductive toxicity.
13 Plaintiff seeks injunctive relief and civil penalties to remedy these violations of
14 Proposition 65.

15 **PARTIES**

16 2. Plaintiff AS YOU SOW is a not for profit organization dedicated to
17 ensuring that corporations and other institutions act responsibly and in the long-term best
18 interests of the environment and the human condition. AS YOU SOW is based in San
19 Francisco, California and is incorporated under the laws of the State of California. AS
20 YOU SOW is a “person” pursuant to section 25249.11(a) of the Health and Safety Code.
21 AS YOU SOW brings this action in the interest of the general public pursuant to section
22 25249.7(d) of the Health and Safety Code.

23 3. Defendant DOLLAR TREE STORES, INC. is a business entity with more
24 than 10 employees that manufactures, distributes, markets and/or sells toys containing
25 DEHP in California, including in the City of Berkeley in Alameda County.

26 4. Defendant GREENBRIER INTERNATIONAL, INC. is a business entity
27 that manufactures, distributes, markets and/or sells toys containing DEHP in California,
28 including in the City of Berkeley in Alameda County. The following allegation is likely

1 to have evidentiary support after a reasonable opportunity for further investigation or
2 discovery: GREENBRIER INTERNATIONAL, INC. has ten or more employees.

3 5. The true names and capacities of the defendants sued as Does 1 through 10
4 are unknown to Plaintiff, who therefore sues them by fictitious names. Plaintiff will
5 amend this complaint to allege the true names and capacities of these defendants when
6 they have been determined. Each of the fictitiously named defendants is responsible for
7 the manufacture, distribution, marketing, or sale of toys containing DEHP in California.

8 6. Wherever reference is made to "Defendants," such reference includes the
9 defendants named in paragraphs 3 and 4 and Does 1 through 10.

10 JURISDICTION AND VENUE

11 7. This Court has jurisdiction pursuant to California Constitution Article VI,
12 section 10, because this case is not a cause given by statute to other trial courts.

13 8. This Court has jurisdiction over each Defendant named above, because each
14 is a business entity that does sufficient business, has sufficient minimum contacts in
15 California, or otherwise intentionally avails itself of the California market, though the
16 sale, marketing, and use of its products in California, to render the exercise of jurisdiction
17 over it by the California courts consistent with traditional notions of fair play and
18 substantial justice.

19 9. Venue is proper in this Court because Defendants' manufacturing,
20 distribution, marketing and/or sales of toys containing DEHP has occurred in Alameda
21 County and/or to people who live in Alameda County, which causes people to be exposed
22 to DEHP while they are physically present in Alameda County.

23 10. On October 16, 2007 Plaintiff provided a Notice of Violation of Proposition
24 65 to the California Attorney General, the District Attorney of each county in California,
25 the City Attorney of each California city with a population over 750,000 persons, and
26 each named Defendant, pursuant to section 25249.7(d) of the Health and Safety Code.
27 Each Defendant received a notice of violation of Proposition 65 from As You Sow on
28 October 18, 2007.

1 foreseeable use of a consumer good, or any exposure which results from receiving a
2 consumer service.” Cal. Code Regs., tit. 22, § 12601(b).

3 16. Proposition 65 establishes a procedure by which the state of California is to
4 develop a list of chemicals “known to the State to cause cancer or reproductive toxicity.”
5 Health & Safety Code § 25249.8. No warning need be given concerning a listed chemical
6 until one year after the chemical first appears on this list.

7 17. Any person “violating or threatening to violate” Proposition 65 may be
8 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. To
9 “threaten to violate” is defined to mean “to create a condition in which there is a
10 substantial probability that a violation will occur.” *Id.* § 25249.11(e).

11 18. Violators of Proposition 65 are liable for civil penalties of up to \$2,500 per
12 day for each violation, recoverable in a civil action. *Id.* § 25249.7(b).

13 19. Private parties may bring suit to enforce Proposition 65 “in the public
14 interest,” but only if the private party first provides written notice of the violation to the
15 alleged violator, the Attorney General, every District Attorney in whose jurisdiction the
16 violation is alleged to have occurred, and every city attorney of a city having a population
17 in excess of 750,000 where a violation is alleged to have occurred. If no public
18 prosecutors commence enforcement within sixty days, then the private party may sue. *Id.*
19 § 25249.7(d).

20 **FACTS**

21 20. The State listed DEHP as a chemical causing cancer on January 1, 1988.
22 Cal. Code Regs., tit. 22, § 12000(b). DEHP was listed by the state as causing male
23 reproductive toxicity on October 24, 2003. Cal. Code Regs., tit. 22, § 12000(c).

24 21. Each Defendant manufactures, distributes, imports, markets, or sells toys
25 made with components that contain DEHP for sale or use in the State of California,
26 including fake teeth and bath toys, which are marketed to children.

27 22. Individuals who handle or use the toys are exposed to DEHP through
28 contact between the toys and skin or by placing the toys, or parts thereof, in their mouths.

1 Individuals who handle or use the toys can and do ingest some portion of the DEHP,
2 either by placing the toys or parts of the toys in their mouth, through transfer of DEHP
3 from the skin to the mouth, through transfer of DEHP from the skin to objects that are put
4 in the mouth, including food, or through absorption of DEHP directly through the skin.
5 Both adults and children handle or use these toys and are exposed to DEHP that is
6 released from the toys in the course of their reasonable and foreseeable use.

7 23. Each Defendant knew or reasonably should have known that the toys it
8 manufactured, distributed, marketed or sold contained DEHP. Each Defendant has
9 intended that individuals use and handle the toys. Each Defendant has had knowledge
10 that individuals, including both adults and children, use and handle the toys it
11 manufactured, distributed, marketed or sold that are made with materials that contain
12 DEHP. Each Defendant has knowingly and intentionally exposed individuals to DEHP
13 through their deliberate act(s) of manufacturing, distributing, marketing, and/or selling
14 toys made with materials which contain DEHP.

15 24. Each Defendant has failed to provide clear and reasonable warnings that the
16 use of the products in question results in exposure to a chemical known to the State of
17 California to cause cancer and reproductive toxicity, and no such warning was provided
18 to those individuals by any other person.

19 **FIRST CAUSE OF ACTION**
20 **(VIOLATION OF PROPOSITION 65)**

21 25. Plaintiff hereby realleges and incorporates the allegations set forth in
22 paragraphs 1 through 24, inclusive, as if set forth fully here.

23 26. By committing the acts alleged above, each Defendant has, within the
24 previous twelve months, in the course of doing business, knowingly and intentionally
25 exposed individuals to chemicals known by the State of California to cause cancer and
26 reproductive toxicity without first giving clear and reasonable warning to such
27 individuals, within the meaning of section 25249.6 of the Health and Safety Code.

28 27. Said violations render each Defendant liable to Plaintiff for civil penalties

1 not to exceed \$2,500 per day for each violation, as well as other remedies.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff prays for relief as follows:

4 1. Pursuant to the First Cause of Action, assess civil penalties against each
5 Defendant in the amount of \$2,500 per day for each violation of Proposition 65,
6 according to proof;

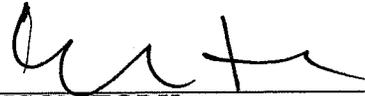
7 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary
8 restraining orders, preliminary injunctions, permanent injunctions, or other orders
9 prohibiting Defendants from exposing persons within the State of California to DEHP
10 caused by the use of these toys without providing a clear and reasonable warning, as
11 Plaintiff shall specify in further application to the Court;

12 3. That, pursuant to section 1021.5 of the Code of Civil Procedure and any
13 other applicable provision of law, order Defendants to pay Plaintiff such attorney's fees
14 and costs Plaintiff incurred in bringing this enforcement action; and

15 4. Grant such other relief that the Court deems just and proper.

16
17 Dated: January 24, 2007

SHUTE, MIHALY & WEINBERGER LLP

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19 By: 
20 ELLISON FOLK

21 Attorneys for Plaintiff
22 AS YOU SOW
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