

1 LEXINGTON LAW GROUP, LLP
Eric S. Somers, State Bar No. 139050
2 Mark N. Todzo, State Bar No. 168389
Howard Hirsch, State Bar No. 213209
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 CENTER FOR ENVIRONMENTAL HEALTH

**ENDORSED
FILED
ALAMEDA COUNTY**

DEC 16 2008

CLERK OF THE SUPERIOR COURT
By Molly Kautz

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10

RG08425739

12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)

14 Plaintiff,)

15 v.)

16 DOLLAR TREE DISTRIBUTION, INC.,)
17 DOLLAR TREE STORES, INC.,)
18 GREENBRIER INTERNATIONAL, INC., and)
Defendant DOES 1 through 200, inclusive,)

19 Defendants.)
20

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code §25249.6 *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest and on behalf of
2 the general public, based on information and belief and investigation of counsel, except for
3 information based on personal knowledge, hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to lead, a chemical known to the State of
7 California to cause cancer, birth defects and other reproductive harm. Such exposures have
8 occurred, and continue to occur, through the manufacture, distribution, sale and consumer use of
9 Defendants' rainwear (the "Products"). Consumers are exposed to lead when they wear or
10 otherwise handle the Products. The route of exposure for the violations is direct ingestion when
11 consumers place the Products in their mouths, ingestion via hand to mouth contact after
12 consumers touch or handle the Products, and dermal absorption directly through the skin when
13 consumers touch, handle or wear the Products. Some of the Products are designed for and
14 marketed to children, who are particularly likely to place the Products in their mouths and who
15 are also particularly susceptible to hand to mouth contact exposures. These exposures occur in
16 homes, workplaces and everywhere else throughout California where the Products are used.

17 2. Under California's Proposition 65, Health and Safety Code §25249.5 *et*
18 *seq.*,¹ it is unlawful for businesses to knowingly and intentionally expose individuals in
19 California to chemicals known to the State to cause cancer and/or birth defects or other
20 reproductive harm without providing clear and reasonable warnings to individuals prior to their
21 exposure. Despite the fact that Defendants' Products expose consumers to lead, Defendants
22 provide no warnings whatsoever about the carcinogenic or reproductive hazards of lead.
23 Defendants' conduct thus violates Proposition 65. Health & Safety Code §25249.6.

24 **PARTIES**

25 3. Plaintiff Center for Environmental Health ("CEH") is a non-profit
26 corporation dedicated to protecting the public from environmental health hazards and toxic
27 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
28

¹ All statutory references herein are to California statutes, unless otherwise noted.

1 California. CEH is a "person" within the meaning of Health & Safety Code §25249.11(a) and
2 brings this enforcement action in the public interest pursuant to Health & Safety Code
3 §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
4 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
5 resulted in significant public benefit, including reformulation of hundreds of toxic products to
6 make them safer.

7 4. Defendant Dollar Tree Distribution, Inc. is a person in the course of doing
8 business within the meaning of Health & Safety Code §25249.11. Dollar Tree Distribution, Inc.
9 manufactures, distributes and/or sells the Products for sale and use in California.

10 5. Defendant Dollar Tree Stores, Inc. is a person in the course of doing
11 business within the meaning of Health & Safety Code §25249.11. Dollar Tree Stores, Inc.
12 manufactures, distributes and/or sells the Products for sale and use in California.

13 6. Defendant Greenbrier International, Inc. is a person in the course of doing
14 business within the meaning of Health & Safety Code §25249.11. Greenbrier International, Inc.
15 manufactures, distributes and/or sells the Products for sale and use in California.

16 7. DOES 1-200 are each a person in the course of doing business within the
17 meaning of Health & Safety Code §25249.11 and a person within the meaning of Business &
18 Professions Code §17201. DOES 1 through 200 manufacture, distribute and/or sell the Products
19 for sale or use in California.

20 8. The true names of DOES 1 through 200 are unknown to plaintiff at this
21 time. When their identities are ascertained, the complaint shall be amended to reflect their true
22 names.

23 9. The defendants named in paragraphs 4 through 6 above and DOES 1
24 through 200 are collectively referred to herein as "Defendants."

25 **JURISDICTION AND VENUE**

26 10. The Court has jurisdiction over this action pursuant to Health & Safety
27 Code §25249.7, which allows enforcement in any court of competent jurisdiction. The
28 California Superior Court has jurisdiction over this action pursuant to California Constitution

1 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all cases except
2 those given by statute to other trial courts.” The statutes under which this action is brought do
3 not grant jurisdiction to any other trial court.

4 11. This Court has jurisdiction over the Defendants because each is a business
5 entity that does sufficient business, has sufficient minimum contacts or otherwise intentionally
6 avails itself of the California market through the sale, marketing or use of the Products in
7 California and/or by having such other contacts with California so as to render the exercise of
8 jurisdiction over it by the California courts consistent with traditional notions of fair play and
9 substantial justice.

10 12. Venue is proper in the Alameda County Superior Court because one or
11 more of the violations arise in Alameda County.

12 **BACKGROUND FACTS**

13 13. The People of the State of California have declared by initiative under
14 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
15 defects, or other reproductive harm.” Proposition 65, §1(b).

16 14. To effectuate this goal, Proposition 65 requires that individuals be
17 provided with a “clear and reasonable warning” before being exposed to chemicals listed by the
18 State of California as causing cancer, birth defects and other reproductive harm unless the
19 business responsible for the exposure can prove that it fits within a statutory exemption. Health
20 & Safety Code §25249.6 states, in pertinent part:

21 No person in the course of doing business shall knowingly and
22 intentionally expose any individual to a chemical known to the
23 state to cause cancer or reproductive toxicity without first giving
clear and reasonable warning to such individual....

24 15. On February 27, 1987, the State of California officially listed lead as a
25 chemical known to cause reproductive toxicity. On February 27, 1988, one year after it was
26 listed as a chemical known to cause reproductive toxicity, lead became subject to the clear and
27 reasonable warning requirement regarding reproductive toxins under Proposition 65. 27
28 California Code of Regulations (“CCR”) §27001(c); Health & Safety Code §25249.10(b).

1 16. On October 1, 1992, the State of California officially listed lead and lead
2 compounds (referred to interchangeably herein as "Lead") as chemicals known to cause cancer.
3 On October 1, 1993, one year after it was listed as a chemical known to cause cancer, Lead
4 became subject to the clear and reasonable warning requirement regarding carcinogens under
5 Proposition 65. 27 CCR §27001(b); Health & Safety Code §25249.10(b).

6 17. The Products contain sufficient quantities of Lead such that consumers
7 who wear or touch the Products are exposed to Lead through the reasonably foreseeable use of
8 the Products. No clear and reasonable warning is provided with the Products regarding the
9 carcinogenic or reproductive hazards of Lead.

10 18. Defendants both know and intend that the Products contain Lead.

11 19. Defendants both know and intend that individuals will wear, use, touch,
12 and otherwise handle the Products, thus exposing them to Lead.

13 20. Any person acting in the public interest has standing to enforce violations
14 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
15 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
16 action within such time. Health & Safety Code §25249.7(d).

17 21. More than sixty days before naming each Defendant in this suit, Plaintiff
18 provided a 60-Day Notice of Violation of Proposition 65 to the California Attorney General, the
19 District Attorneys of every county in California, the City Attorneys of every California city with
20 a population greater than 750,000, and to each of the named Defendants. Each Notice contained
21 the information required by Health & Safety Code §25249.7(d) and 27 CCR §25903(b).

22 22. Plaintiff also sent a Certificate of Merit for each Notice of Violation to the
23 California Attorney General, the District Attorneys of every county in California, the City
24 Attorneys of every California city with a population greater than 750,000, and to each of the
25 named Defendants. In compliance with Health & Safety Code §25249.7(d) and 11 CCR §3101,
26 each Certificate of Merit certified that Plaintiff's counsel: (1) has consulted with one or more
27 persons with relevant and appropriate experience or expertise who reviewed facts, studies or
28 other data regarding the exposures to nicotine alleged in the Notice; and (2) based on the

1 information obtained through such consultations, believes that there is a reasonable and
2 meritorious case for a citizen enforcement action based on the facts alleged in the attached
3 Notice. In compliance with Health & Safety Code §25249.7(d) and 11 CCR §3102, the
4 Certificate served on the Attorney General included factual information – provided on a
5 confidential basis – sufficient to establish the basis for the Certificates, including the identity of
6 the person(s) consulted by Plaintiff's counsel and the facts, studies or other data reviewed by
7 such persons.

8 23. None of the public prosecutors with the authority to prosecute violations
9 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action under
10 Proposition 65 against Defendants based on the claims asserted in the Notice and herein.

11 24. Proposition 65 provides for injunctive relief and civil penalties not to
12 exceed \$2,500 per day for each violation of Proposition 65.

13 25. CEH has engaged in good-faith efforts to resolve the claims alleged herein
14 prior to filing this complaint.

15 **FIRST CAUSE OF ACTION**
16 **(Violations of the Health & Safety Code §25249.6)**

17 26. Plaintiff realleges and incorporates by reference as if specifically set forth
18 herein Paragraphs 1 through 25 inclusive.

19 27. By placing the Products into the stream of commerce, Defendants are
20 persons in the course of doing business within the meaning of Health & Safety Code §25249.11.

21 28. Defendants know that through the reasonably foreseeable use of the
22 Products, users of the Products are exposed to Lead. Defendants intend that the Products be
23 worn by children and adults in such a manner that they will be exposed to Lead contained in the
24 Products.

25 29. Defendants have failed, and continue to fail, to provide clear and
26 reasonable warning regarding the carcinogenicity and reproductive toxicity of Lead to users of
27 the Products.

28 30. Lead is a chemical listed by the State of California as known to cause
cancer, birth defects and other reproductive harm.

1 31. By committing the acts alleged above, Defendants have at all times
2 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
3 individuals to Lead without first giving clear and reasonable warning to such individuals
4 regarding the carcinogenicity and reproductive toxicity of Lead.

5 Wherefore, Plaintiff prays judgment against Defendants, as set forth hereafter.

6 **PRAYER FOR RELIEF**

7 Wherefore, Plaintiff prays for judgment against Defendants as follows:

8 1. That the Court, pursuant to Health & Safety Code §25249.7(b), assess civil
9 penalties against each of the Defendants in the amount of \$2,500 per day for each violation of
10 Proposition 65 according to proof;

11 2. That the Court, pursuant to Health & Safety Code §25249.7(a),
12 preliminarily and permanently enjoin Defendants from offering the Products for sale in
13 California with sufficient quantities of Lead such that users of the Products are exposed to a
14 “significant amount” of Lead under Proposition 65 without providing clear and reasonable
15 warnings, as Plaintiff shall specify in further application to the Court;

16 3. That the Court, pursuant to Health & Safety Code §25249.7(a), order
17 Defendants to take action to stop ongoing unwarned exposures to Lead resulting from use of
18 Products sold by Defendants, as Plaintiff shall specify in further application to the Court;

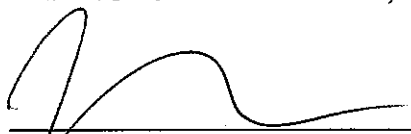
19 4. That the Court, pursuant to Code of Civil Procedure §1021.5 and any other
20 applicable theory, grant Plaintiff its reasonable attorneys’ fees and costs of suit; and

21 5. That the Court utilize its inherent equitable power to grant such other and
22 further relief as may be just and proper.

23 Dated: December 16, 2008

Respectfully submitted,

LEXINGTON LAW GROUP, LLP



Howard Hirsch
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL
HEALTH