

1 LEXINGTON LAW GROUP
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

FILED

SEP 02 2011

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

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

11
12
13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 a non-profit corporation,)

15 Plaintiff,)

16 v.)

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

20 Defendants.)
21
22
23
24
25
26
27
28

Case No. CVI005571

[PROPOSED] CONSENT JUDGMENT

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. INTRODUCTION

1.1 On October 20, 2010, plaintiff Center for Environmental Health (“CEH”), a non-profit corporation acting in the public interest, filed a complaint in Marin County Superior Court, entitled *Center for Environmental Health v. Dollar Tree Distribution, Inc., et al.*, Marin County Superior Court Case Number CVI005571 (the “Action”), for civil penalties and injunctive relief pursuant to the provisions of California Health & Safety Code §25249.5 *et seq.* (“Proposition 65”).

1.2 Defendants Dollar Tree Distribution, Inc., Dollar Tree Stores, Inc., and Greenbrier International, Inc. (collectively, “Dollar Tree”) are each a “person in the course of doing business” under Proposition 65 and manufacture, distribute and/or sell aluminum water bottles (“the Products”) in the State of California. Dollar Tree and CEH are referred to collectively herein as the Parties.

1.3 On or about August 6, 2010, CEH served Dollar Tree and the appropriate public enforcement agencies with the requisite 60-day notice that Dollar Tree is in violation of Proposition 65. CEH’s notice and the Complaint in this Action allege that Dollar Tree exposes individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer, birth defects and other reproductive harm, without first providing clear and reasonable warning to such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and Complaint allege that Dollar Tree’s conduct violates Health & Safety Code §25249.6, the warning provision of Proposition 65.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and personal jurisdiction over Dollar Tree as to the acts alleged in CEH’s Complaint, that venue is proper in the County of Marin, and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein.

1 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
2 certain disputed claims between the Parties as alleged in the Complaint. By executing this
3 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties'
4 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
5 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
6 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
7 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
8 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
9 any other or future legal proceedings. This Consent Judgment is the product of negotiation and
10 compromise and is accepted by the parties, for purposes of settling, compromising and resolving
11 issues disputed in this action, including future compliance by Dollar Tree with Section 2 of this
12 Consent Judgment, and shall not be used for any other purpose, or in any other matter.

13 **2. COMPLIANCE - REFORMULATION**

14 **2.1 Lead Reformulation.** After the date of entry of this Consent Judgment
15 (the "Compliance Date"), Dollar Tree shall not manufacture, distribute, ship, or sell, or cause to
16 be manufactured, distributed, or sold, any Product that contains Lead in concentrations that
17 exceed 90 parts per million ("ppm") or includes any component part (including but not limited to
18 the paint or other surface coating of the Product) that contains Lead in concentrations that exceed
19 90 ppm. Products that were manufactured prior to the Compliance Date shall not be subject to
20 the provisions of Section 2, or the related provisions herein.

21 **2.2 Certification of level from suppliers.** Dollar Tree shall obtain written
22 certification with corresponding test results from its suppliers of the Products certifying that
23 neither the Products nor any component parts of the Products contain Lead concentrations
24 exceeding 90 ppm.

25 **2.3 Testing.** In order to help ensure compliance with the requirements of
26 Section 2.1, Dollar Tree shall conduct testing to confirm that neither the Products nor any
27 component parts of the Products contain more than 90 ppm Lead. Testing pursuant to this
28 section shall be conducted pursuant to the most current version of United States Environmental

1 Protection Agency Method SW-846 3051 or Method 3050B (the "Test Protocol"). The results of
2 all testing performed pursuant to this section shall be retained for a period of three years from the
3 date of the test and shall be made available to CEH upon request. Dollar Tree shall test 8
4 randomly selected Products from each delivered shipment of each of the Products.

5 **2.3.1 Products that exceed 90 ppm pursuant to Dollar Tree**

6 **Testing.** If the results of the testing required pursuant to section 2.3 shows levels of Lead
7 exceeding 90 ppm for a Product, Dollar Tree shall return all of the Products that were purchased
8 under the particular purchase order to the supplier with a letter explaining that such Products do
9 not comply with the supplier's certification. In addition, Dollar Tree shall increase the number
10 of units tested to 16 randomly selected Products from each delivered shipment of each of the
11 Products from such supplier for the two shipments purchased immediately following a Product
12 test exceeding 90 ppm. Should the testing of Products purchased from a particular supplier
13 demonstrate Lead levels exceeding 90 ppm more than once, Dollar Tree shall cease purchasing
14 Products from such supplier for a period of at least five years.

15 **2.4 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
16 of the Products sold in California. Any such testing will be conducted pursuant to the Test
17 Protocol at an independent laboratory. In the event that CEH's testing demonstrates Lead levels
18 in excess of 90 ppm for one or more Products sold in California, CEH shall inform Dollar Tree
19 of the violation(s), including information sufficient to permit Dollar Tree to identify the
20 Product(s). Dollar Tree shall, within 10 days following such notice, provide CEH, at the address
21 listed in section 12, with its supplier certification and testing information demonstrating its
22 compliance with sections 2.2 and 2.3 of this Consent Judgment. Dollar Tree shall then increase
23 the amount of testing performed on the Products supplied by the supplier of the Product(s) for
24 which CEH demonstrates a test with Lead levels exceeding 90 ppm to 16 randomly selected
25 Products from each delivered shipment from each purchase order of each of the Products from
26 such supplier for the two purchase orders following a Product test exceeding 90 ppm. Dollar
27 Tree shall also be liable for stipulated payments in lieu of penalties for Products for which CEH
28 produces tests demonstrating Lead levels exceeding 90 ppm as set forth below. These payments

1 shall be made to CEH and used for the purposes described in this section 2.4 and to pay for
2 related attorneys' fees and costs. The stipulated payments in lieu of penalties and other remedies
3 provided for herein are in addition to any other remedies available to enforce the terms of this
4 Consent Judgment.

5 **2.4.1 Stipulated penalty assuming compliance with sections**
6 **2.2 and 2.3.** Assuming Dollar Tree provides CEH with information demonstrating that it
7 complied with sections 2.2 and 2.3 for the Products purchased pursuant to the same purchase
8 order as those with tests showing Lead levels exceeding 90 ppm, the stipulated penalty shall be
9 as follows for each unit of Product for which CEH produces a test result with Lead levels
10 exceeding 90 ppm:

11 First Occurrence: \$500
12 Second Occurrence: \$1,000
13 Third Occurrence: \$2,000
14 Thereafter: \$5,000

15 **2.4.2 Stipulated penalty assuming non-compliance with**
16 **sections 2.2 and 2.3.** Assuming Dollar Tree fails to provide CEH with information
17 demonstrating that it complied with sections 2.2 and 2.3 for the Products purchased pursuant to
18 the same purchase order as those with tests showing Lead levels exceeding 90 ppm, the
19 stipulated penalty shall be as follows for each unit of Product for which CEH produces a test
20 result with Lead levels exceeding 90 ppm:

21 First Occurrence: \$2,000
22 Second Occurrence: \$5,000
23 Third Occurrence: \$10,000
24 Thereafter: \$20,000

25 **2.4.3 Recall of Products testing in excess of 300 ppm.** Should
26 CEH's testing demonstrate that a Product sold in California contains Lead levels in excess of
27 300 ppm ("Recall Product"), Dollar Tree shall send a recall letter to all distribution facilities and
28 retail outlets that may have received the Products that were purchased in the same purchase order

1 as any Recall Product informing them that they must pull the items from public distribution and
2 send them back to Dollar Tree. Dollar Tree shall destroy all such Products and send certification
3 to CEH that it has completed this process. Such certification shall indicate how many units of
4 the Products were returned via the recall.

5 **3. SETTLEMENT PAYMENTS**

6 **3.1** Within five days of entry of this Consent Judgment, Dollar Tree shall pay
7 a total of \$40,000 as a settlement payment. This total shall be paid in three separate checks
8 delivered to the offices of the Lexington Law Group at the address set forth in section 12 below
9 and made payable and allocated as follows. Any failure by Dollar Tree to comply with the
10 payment terms herein shall be subject to a stipulated late fee in the amount of \$50 for each day
11 after the delivery date the payment is received. The late fees required under this section shall be
12 recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought
13 pursuant to section 5 of this Consent Judgment.

14 **3.1.1 Penalty:** The sum of \$4,000 in penalties pursuant to Health and
15 Safety Code § 25249.7(b). This payment shall be made by check payable to Center for
16 Environmental Health. CEH shall apportion the penalties in accordance with Health and Safety
17 Code § 25249.12.

18 **3.1.2 Monetary Payment in Lieu of Penalty:** The sum of \$11,500 shall
19 be paid to CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This
20 payment shall be made by check payable to Center for Environmental Health. CEH shall use
21 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
22 this work, CEH intends to conduct periodic testing of the Products as set forth in section 2.4.

23 **3.1.3 Attorneys' Fees and Costs:** The sum of \$24,500 shall be used to
24 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,
25 and any other costs incurred as a result of investigating, bringing this matter to Dollar Tree's
26 attention, litigating and negotiating a settlement in the public interest. This payment shall be
27 made by check payable to Lexington Law Group.

28

1 **4. MODIFICATION OF CONSENT JUDGMENT**

2 **4.1** This Consent Judgment may be modified by written agreement of CEH
3 and Dollar Tree, or upon motion of CEH or Dollar Tree as provided by law.

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

5 **5.1** CEH may, by motion or application for an order to show cause before the
6 Superior Court of the County of Marin, enforce the terms and conditions contained in this
7 Consent Judgment. Should CEH prevail on any motion or application under this section, CEH
8 shall be entitled to recover its reasonable attorneys' fees and costs associated with such motion
9 or application.

10 **6. APPLICATION OF CONSENT JUDGMENT**

11 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
12 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
13 them.

14 **7. RELEASE**

15 **7.1** In further consideration of the promises and agreements contained herein,
16 CEH on behalf of itself and its past and current agents, successors and/or assignees, and in the
17 interest of the general public, hereby releases all claims, including, without limitation, all
18 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
19 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
20 fees, expert fees, and attorney's fees) of any nature whatsoever, whether known or unknown,
21 fixed or contingent (collectively "Claims"), against Dollar Tree and each of its parents,
22 subsidiaries, affiliates, directors, officers, representatives, shareholders, employees, agents,
23 attorneys, distributors, retailers, or customers ("Releasees") that arise under Proposition 65, as
24 such Claims relate to Dollar Tree's failure to warn about exposures to Lead contained in any
25 Products manufactured, distributed or sold by Dollar Tree on or prior to the date of entry of this
26 Consent Judgment.

27 **7.2** This Consent Judgment is a full, final and binding resolution
28 between CEH and Dollar Tree of any violation of Proposition 65 that was or could have been

1 asserted in the Complaint against Dollar Tree or its parents, subsidiaries, affiliates, directors,
2 officers, employees, agents, attorneys, distributors, retailers, or customers based on failure to
3 warn about alleged exposure to Lead contained in the Products, with respect to any Products
4 manufactured, distributed or sold by Dollar Tree on or prior to the date of entry of this Consent
5 Judgment.

6 **7.3** This release as set forth in this Section 7 does not limit or effect the
7 obligations of any party created under this Consent Judgment.

8 **8. SEVERABILITY**

9 **8.1** In the event that any of the provisions of this Consent Judgment are held
10 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
11 affected.

12 **9. SPECIFIC PERFORMANCE**

13 **9.1** The Parties expressly recognize that Dollar Tree's obligations under this
14 Consent Judgment are unique. In the event that Dollar Tree is found to be in breach of this
15 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the parties agree
16 that it would be extremely impracticable to measure the resulting damages and that such breach
17 would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or
18 remedies, may sue in equity for specific performance, and Dollar Tree expressly waives the
19 defense that a remedy in damages will be adequate.

20 **10. GOVERNING LAW**

21 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
22 State of California.

23 **11. RETENTION OF JURISDICTION**

24 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce
25 the terms this Consent Judgment.

26 **12. PROVISION OF NOTICE**

27 **12.1** All notices required pursuant to this Consent Judgment and
28 correspondence shall be sent by electronic and first class mail to the following:

1 For CEH:

2 Howard Hirsch
3 Lexington Law Group
4 503 Divisadero Street
5 San Francisco, CA 94117
6 hhirsch@lexlawgroup.com

7 For Dollar Tree:

8 Peg Carew Toledo
9 MENNEMEIER, GLASSMAN & STROUD LLP
10 980 9th Street, Suite 1700
11 Sacramento, CA 95814
12 toledo@mgsllaw.com

13 **12.2** Either Party can modify the person or address to whom the notice is to be
14 sent by sending the other Party notice by first class and electronic mail.

15 **13. COURT APPROVAL**

16 **13.1** If this Consent Judgment is not approved by the Court, it shall be of no
17 further force or effect. The Parties agree to support a Motion for Approval of this Consent
18 Judgment.

19 **14. EXECUTION AND COUNTERPARTS**

20 **14.1** The stipulations to this Consent Judgment may be executed in
21 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
22 document.

23 **15. AUTHORIZATION**

24 **15.1** Each signatory to this Consent Judgment certifies that he or she is fully
25 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
26 into and execute the Consent Judgment on behalf of the party represented and legally bind that
27 party. The undersigned have read, understand and agree to all of the terms and conditions of this
28 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
costs.

1 **AGREED TO:**

2 CENTER FOR ENVIRONMENTAL HEALTH
3

4 
5 _____
Signature

6 *CHARLES PIZARRO*
7 _____
Printed Name

8 *ASSOCIATE DIRECTOR*
9 _____
Title

10

11 DOLLAR TREE DISTRIBUTION, INC.,
12 DOLLAR TREE STORES, INC., and
GREENBRIER INTERNATIONAL, INC.

13

14 _____
Signature

15

16 _____
Printed Name

17

18 _____
Title

19

20

21

22

23

24

25

26

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:

CENTER FOR ENVIRONMENTAL HEALTH

Signature

Printed Name

Title

DOLLAR TREE DISTRIBUTION, INC.,
DOLLAR TREE STORES, INC., and
GREENBRIER INTERNATIONAL, INC.


Signature

James A. Gorry III

General Counsel and
Corporate Secretary

Title

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

ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between the Parties, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: SEP 02 2011

FAYE D'OPAL

Judge, Superior Court of the State of California