MAUREEN E. MCCLAIN, Bar No. 62050
KRISTA STEVENSON JOHNSON, Bar No. 185241
MATTHEW P. VANDALL, Bar No. 196962
LITTLER MENDELSON
A Professional Corporation
650 California Street, 20th Floor
San Francisco, CA 94108.2693
Telephone: 415.433.1940
Facsimile: 415.399.8490
Email: mmcclain@littler.com
kjohnson@littler.com
mvandall@littler.com

Attorneys for Defendant
DOLLAR TREE STORES, INC.

BETH HIRSCH BERMAN, VA Bar No. 28091
WILLIAMS MULLEN
A Professional Corporation
999 Waterside Drive
1700 Dominion Tower
Norfolk, VA 23510
Telephone: 757.629.0604
Facsimile: 757.629.0660
Email: bberman@williamsmullen.com

Pro Hac Vice Attorneys for Defendant
DOLLAR TREE STORES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. CRUZ and JOHN D. HANSEN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

DOLLAR TREE STORES, INC.,

Defendant.

ROBERT RUNNINGS, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

DOLLAR TREE STORES, INC.,

Defendant.

Case Nos. C 07 2050 SC and **C 07 04012 SC**

DEFENDANT DOLLAR TREE STORES, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS CLAIMS OF CLASS MEMBERS WHO FAILED TO RESPOND TO DEFENDANT'S DISCOVERY; MEMORANDUM OF POINTS AND AUTHORITIES [FED. R. CIV. P. RULE 37]

Date: January 28, 2011
Time: 10:00 a.m.
Dept.: Crtrm. 1, 17th Floor
Judge: Hon. Samuel Conti
Trial Date: March 7, 2011
Complaints Filed: April 11, 2007
July 6, 2007

TABLE OF CONTENTS

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
650 California Street
20th Floor
San Francisco, CA 94108.2693
415.433.1940

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER AUTHORITIES

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 28, 2011, at 10:00 a.m. before the Hon. Samuel Conti of this Court, Defendant Dollar Tree Stores, Inc. ("Dollar Tree") will move and hereby does move the Court under Fed. R. Civ. P. 37(b), (d) for an order that the claims of the following Plaintiffs be dismissed with prejudice for failing to respond to Defendant's prior interrogatories and requests to produce documents, despite a Court order to do so. In the alternative, Defendant requests that the Plaintiffs' claims be dismissed without prejudice, allowing them to pursue individual claims if they wish. The 112 Plaintiffs who are the subject of this motion are as follows "hereinafter Plaintiffs":

Le'ann Alarcon

Jesus Alejandre

Brenda Anderson

Diane Ashley

Robin Baker

Alicia Barkley

Robert Beights

Eric Bent

Jeffrey Braun

Hope Brewer

Eloisa Buitron

Christy Camacho

Rosemary Carlos

Shawn Cassidy

Kim Castellanos

Karen Cohen

Amanda Coker

Mike Cossolotto

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
650 California Street
20th Floor
San Francisco, CA 94108.2693
415.433.1940

William Cramer
David Cross
William Curtis
Gregg Daggett
Deann Dasher
Chris Dean
Sally Delcastillo
Elaine Edwards
Jen Edwards
James Ellis
Gary Ferguson
Teresa Fletcher
Kathy Fortune
Cindy Fukuhara
Mark Gabellini
Kenneth Galle
Claudia Garcia
Eric S. Garcia
Mireya Gomez
Gabriela Gonzalez
Wilber Gonzalez
Bikira Green
Jean M. Gregg
Rachel Haines
Richard Handrich
Evelyn Hanson
Kathryn L. Hansson
Kent Harwood

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
650 California Street
20th Floor
San Francisco, CA 94108.2693
415.433.1940

Steven Hensley
Danny Herrera
Latuya Hobill
Naomi Star Hodgkins
Christina Hoes
William Huffer
Larry Huffstetler
Ron Jacobs
Chris James
Kirk Jansen
Hope Jennings
Betty Johnson
Charles Jones
Maria Juarez
Steve Kauhn
Ray Kienitz
Landon Kouba
Racheal Leggans
Rob Lewis
Tina Lipnicki
Tim Luddington
David Martin
Ricky Martin
Jesus Martinez
Sonia Martinez
Paul Massey
Adam Mcfarland
Rafael Mejia

LITTLER MENDELSON
A PROFESSIONAL CORPORATION
650 California Street
20th Floor
San Francisco, CA 94108.2693
415.433.1940

Janice Melo

Nephtali Mendoza

Jason Millstone

Oscar Molina

Miguel Munoz

Tom Nelson

Killian Nowden

Amy Osborn

Vaensa Pan

Michelle Panattoni

Michael Pastrone

Ruth E. Phipps

Joseph Prophet

Brandon Raes

Valentin Ramirez

Eleazar Reyes

Lorie Reyes (Kiefer)

David N. Robson

Monica Rosas

Norman Saban

Brandon Salazar

Jules Sanchez

Heidi Semenza

Tom Shaff

Susan Sigler

Brian A. Sjostrand

Billie Soto

Steven Taylor

Christina Valdez

Mike Van Buren

Joseph Vara

Edwin H. Walthall

Patti Wenzel

Kip Whiteacre

Deborah A. Wiebe

Robert Willey

Pat Woolweaver

Elizabeth Yoder

This Motion is based on Plaintiffs' continued refusal to provide discovery requested of them, despite a Court Order that they do so. This Motion is based on this Notice of Motion and Motion, Proposed Order, Declaration of Matthew Vandall, the files in this case, and any evidence or argument produced in reply papers or at the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The 112 Class Members ("CMs") who are the subject of this Motion to Dismiss are present or former Dollar Tree Store Managers who claim they are owed overtime wages, meal and rest period premiums, restitution and penalties. There are approximately 273 class members (Vandall Decl. ¶ 3). Of the 273, the 112 who are the subject of this Motion failed to respond to Defendant's Request for Production of Documents and Special Interrogatories despite a court order. The responses were due July 16, 2010. Yet, over five months later, and after two warning letters were ordered by the Court, Plaintiffs still failed to respond to the court ordered discovery, prejudicing Defendant. The Plaintiffs were given ample warning that if they failed to respond their claims would be subject to dismissal.

On November 19, 2010 this Court denied Defendant's prior motion to dismiss the claims of those Class members who failed to respond to discovery, but stated that it would entertain a renewed motion to dismiss after the non-responsive Class Members were provided with one final opportunity to respond (Vandall Decl. Exh U). The Court ordered Plaintiffs' counsel to send another written notice to all non-responsive Class Members indicating that the Court will dismiss them from the Class if they do not respond to Defendant's discovery. Non-responsive Class Members were given 21 days from the mailing of the warning notice to provide verified discovery responses. *Id.* Defendant's counsel was invited to file a renewed motion seeking that any non-responsive Class Members be dismissed. (ECF No. 254, p. 3, ¶ 4) Plaintiffs' counsel sent the (second) warning letter on November 23, 2010 (Vandall Decl. Exh V). As of December 17, 2010, only thirty-two (32) additional Class Members have responded to the discovery. Defendant renews its motion to dismiss the remaining 112 non-responsive Class Members. Defendant brings this Motion to Dismiss with prejudice pursuant to Fed. R. Civ. P. Rule 37(b), (d)(1). In the unlikely event the Court does not dismiss the claims with prejudice, they should be dismissed without prejudice, to allow them to pursue their own individual suits.

II. FACTS

A. Procedural History

As a result of Defendant's partially successful Motion to Decertify the Class, the current class consists of "all persons who were employed by Dollar Tree Stores, Inc. as California retail store managers at any time on or after December 12, 2004, and on or before May 26, 2009, and who responded 'no' at least once on Dollar Tree's weekly payroll certifications." (Vandall Decl., Exh. A, September 9, 2010 Order Granting in Part and Denying in Part Defendant's Motion to Decertify, ECF Document No. 260, page 23, lines 4-8). There are approximately 273 Class Members (Vandall Decl. ¶ 3).

Trial is scheduled to begin on March 7, 2011 and the non expert discovery cutoff was October 15, 2010. (Vandall Decl., Exh. B, 3/25/10 Order After Case Management Conference ("CMC Order" at ¶¶ 5, 9).

On March 25, 2010, this Court ordered that Defendant could serve each Class Member with 10 Special Interrogatories and 10 Requests for Production of Documents. ("Class Discovery Requests"). (CMC Order at ¶ 1 (Vandall Decl., Exh. B) Defendant served the Class Discovery Requests on March 26, 2010. (Vandall Decl., Exhs. C, D) On April 26, 2010, Class Counsel served Model Objections to all of the written discovery requests. (Vandall Decl., Exh. E, Model Objections to Interrogatories, and Exh. F, Model Objections to Requests for Production of Documents). The Model Objections asserted many boilerplate objections in an apparent attempt to evade Plaintiffs' discovery obligations altogether. After revising some of the requests Defendant brought a motion to compel responses to the Class Discovery Requests. On June 9, 2010, the Honorable Joseph Spero heard the Motion and ordered that slightly modified Interrogatories and Requests for Production of Documents be sent to Class Members, and ordered Plaintiffs to respond to such requests by July 16, 2010. (Vandall Decl., Exh. G, ¶ 8 (Order), Exh. H page 29 (Transcript of June 9, hearing). Defendant served modified Class Discovery Requests in compliance with Judge Spero's Order on June 10, 2010 (Copies attached as Exhibits I, J to Vandall Decl.).

On July 16, 2010, Plaintiffs submitted verified responses on behalf of 215 of the then 718 Class Members. For the remaining Class Members, Plaintiffs served unverified objections and

stated that no information was available.[1] (Vandall Decl., Exhs. K, L (sample objections).) In the following weeks, Plaintiffs submitted verified discovery responses for only 8 additional Class Members, two of which are members of the revised Class. (Vandall Decl., ¶7) The 112 Class Members who are the subject of this Motion submitted no signed discovery responses, only objections and a statement that no information was available (Vandall Decl. Exhs. K, L) (Vandall Dec. ¶7).

On August 27, 2010, Defendant's counsel requested that Class counsel send a letter to the non-responsive Class Members, advising them that their claims would be dismissed if they did not respond to the Class Discovery Requests. (Vandall Decl., Exh. M) Class counsel failed to do so. (Vandall Decl., ¶8).

On September 9, 2010, this Court issued an Order partially decertifying the Class (ECF Document No. 260, Vandall Decl., Exh. A). As a result, the class size was reduced from 718 to approximately 273 members.

On October 14, 2010, upon a motion filed by Defendant, Magistrate Judge Spero ordered that a warning notice be sent to all Class Members who had not responded to Class Discovery Requests advising them that their claims would be dismissed if they did not respond to the discovery by October 29, 2010. (Vandall Decl., ¶ 11.) Plaintiffs' counsel mailed the warning notice to all non-responsive Class Members on October 18, 2010. (Vandall Decl., Exh. R.)

Judge Spero stated that any Motion to Dismiss for failure to respond to the discovery would need to be heard by Judge Conti. (Vandall Decl., Exh. H, June 9, 2010 hearing pg. 27:1-18).

On November 1, Defendant received verified discovery responses from eight additional Class Members (Defendant does not move to dismiss the claims of these individuals). On November 3, Defendant received supplemental discovery responses from four Class Members who had previously provided objections (Defendant does not seek to dismiss these individuals). (Vandall Decl., ¶¶ 13, 14).

[1] Unsigned interrogatory responses are tantamount to no response at all. *McDougle v. Dunn*, 468 F.2d 468, 472 (4th Cir. 1972)

On November 19, 2010, this Court denied Defendant's motion to dismiss the claims of those Class Members who failed to respond to discovery, but stated that it would entertain a renewed motion to dismiss after Class Members were provided with one final opportunity to respond. The Court ordered Plaintiffs' counsel to send another written notice to non-responsive Class Members advising them that the Court would dismiss them from the class if they did not respond to Defendant's discovery. Non-responsive Class Members were given 21 days from the mailing of the notice to provide verified discovery responses. Defendant's counsel was invited to file a renewed motion that non-responsive Class Members be dismissed. (ECF No. 254, p. 3, ¶ 4)

Although requested to do so on December 2nd, Plaintiffs' counsel refused to provide Defendant with a copy of the (second) warning letter or proof of service for that letter. (Vandall Decl., ¶ 19). On December 6th, however, Class counsel indicated that the warning letter was mailed on November 23, 2010. (Vandall Decl., Exh V.)

On December 3, 2010, Plaintiffs' counsel wrote a letter to Defendant's counsel stating that they were having difficulty contacting some Class Members, and requesting assistance in locating them. On December 7, Defendant's counsel responded with updated contact information for nine employees on Plaintiffs' counsel's December 3 list who were employed by Dollar Tree as of March 2, 2010, the last time Defendant produced updated contact information at Class counsel's request, and whose contact information had changed since that date. (Vandall Decl., Exh. X). Shortly thereafter, Defendant's counsel verified that the contact information for all but three former employees on Plaintiffs' counsel's December 3 list accurately reflected the information contained in Defendant's files and provided new contact information for the three former employees who had provided Dollar Tree with updated contact information since their departure. (Vandall Decl., ¶ 20).

As of December 17, 2010, only thirty-two (32) additional Class Members responded to the discovery requests (Vandall Decl. ¶ 21)[2]. Hence, there are 112 Class Members who should be dismissed from this action.

[2] While these responses were inadequate, these individuals are not the subject of this motion, which is directed only to those Class Members who filed no responses. (Vandall Decl. ¶ 21).

B. Defendant Has and Will Suffer Prejudice If The Relief Requested Is Not Granted

Defendant has, and will suffer considerable prejudice in this matter, including in preparing for trial, without responses to the Class Discovery requests. Defendant suffered prejudice by having to file its decertification motions without the benefit of the discovery responses from the non-responsive class members. Its first motion was only partly successful and the second decertification motion was denied. Defendant also lost the opportunity to use the discovery responses for their dispositive motions for summary judgment and dismissal. (Vandall Decl. ¶ 22) Further, Defendant will have difficulty raising defenses to the individual claims of these Class Members without the benefit of their responses to the Class Discovery Requests, which includes the amount of time spent in various tasks, the veracity and meaning of their weekly written certifications of their weekly job duties, their experience taking meal and rest periods, the number of hours they worked during the Class Period, and their description of the work typically performed each week. (Vandall Decl., ¶ 22.) This information is crucial to a proper defense. Further, Defendant has difficulty making a reasonable estimate of its potential liability in this matter, given the refusal of Class Members to provide estimates of the number of hours worked, and the number of meal and rest periods taken. (Vandall Decl., ¶ 22) Defendant cannot determine which Class members, if any, to possibly call as adverse witnesses at trial (Vandall Decl. ¶ 22). Defendant also needs these responses to potentially impeach any trial witnesses of Plaintiffs. (Vandall Decl. ¶ 22) The information is also relevant to two of Defendant's experts and their trial testimony. (Vandall Decl. ¶ 23)

Plaintiffs' responses received on November 1 (responses from eight individuals) and December 14 (responses from 32 individuals) were inadequate (Vandall Decl. ¶ 13, 21; Exhs. Z, AA). For example, several CMs failed to provide a meaningful description of how they used various Dollar Tree tools and stated instead only that they used them (Vandall Decl. ¶ 13, 21; Exhs. Z, AA). (These individuals are not the subject of this motion). However, Defendant cannot move to compel further responses since discovery is closed. (Vandall Decl. ¶ 21). This creates further prejudice to Defendant in preparing for trial. It must try to prepare for trial with inadequate discovery responses.

The discovery requests at issue were first served almost nine months ago. (Vandall Decl., ¶5) They were mailed to Class Members in June, over six months ago. Plaintiffs have continued to ignore the Court's June 9, 2010 Order, and two warning letters from the Court. Plaintiffs received ample warning of this Motion. (Vandall Decl. ¶ 11, 12, 19 and Exhs. R, V).

III. ARGUMENT

Fed. R. Civ. P. Rule 37(b)(2)(A)(v) allows the Court to dismiss an action or proceeding in whole or in part, if a party disobeys a discovery order. Fed R. Civ. P. Rule 37(d)(1), (3) also allows dismissal as a sanction for failing to respond to discovery. Orders under Rule 37 are subject to an abuse of discretion standard on appeal. *Phipps v. Blakeney*, 8 F.3d 778, 790 (11th Cir. 1993) District courts have broad discretion in determining whether to impose Rule 37 non-monetary sanctions. Moore's Federal Practice, Third, Section 37.51[I] p. 37-96; *United States Ex. Rel. Wiltec Guam, Inc. v. Kahaluu Construction Company, Inc.*, 857 F.2d 600, 602 (9th Cir. 1988).

Dismissal is not an abuse of discretion "[w]hen a party demonstrates flagrant disregard for the Court and the discovery process". *Aztec Steel Co. v. Florida Steel Corp.*, 691 F. 2d 480, 482 (11th Cir. 1982), cert denied 460 U.S. 1040, 103 S. Ct. 1433, 75 L. Ed. 2d 792 (1983)

The Ninth Circuit has identified several factors that the Court must consider in determining whether to impose dismissal or default sanctions for a party's failure to comply with a discovery order. A district court must consider the following:

> (1) the public's interest in expeditious resolution of litigation; (2) the Court's need to manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; [and] (5) the availability of less drastic actions.

Moore's Federal Practice, Third *supra*, page 37-95; *In Re Exxon Valdez*, 102 F.3d 429, 433 (9th Cir. 1996); *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166-1167 (9th Cir. 1994); *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990).

The Ninth Circuit has established three subparts for the fifth factor (the availability of less drastic sanctions): (1) whether the court considered lesser sanctions; (2) whether it tried the lesser sanctions; and (3) whether it warned the recalcitrant party about the possibility of case

dispositive sanctions. Moore's Federal Practice, Third, *supra*, page 37-95; *Connecticut General Life Insurance Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007).

"The first two of these [five] factors favor the imposition of sanctions in most cases, while the fourth cuts against a . . . dismissal sanction. Thus the key factors are prejudice and the availability of lesser sanctions." *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 948 (9th Cir. 1993); *Wanderer v. Johnston, supra*, 910 F.2d at 656. Only willfulness, bad faith and fault justify terminating sanctions. *Connecticut General Life Insurance Co. v. New Images of Beverly Hills*, 482 F.3d 1091, 1096 (9th Cir. 2007). However, "disobedient conduct not shown to be outside the control of the litigant is all that is required to demonstrate willfulness, bad faith or fault.'' *Henry supra*, 983 F.2d at 948, quoting from *Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334, 1341 (9th Cir. 1985); *United Artists Corp. v. La Cage Aux Folles*, 771 F.2d 1265, 1270 (9th Cir. 1985) disapproved on other grounds in *Mount Graham v. Madigan*, 954 F.2d 1441, 1462 (9th Cir. 1992) (order of dismissal affirmed; plaintiffs argument that his "travel schedule" prevented him from answering interrogatories for three months "indicated a lack of diligence in keeping abreast of the status of his case" and did not excuse his failure to answer).

With respect to the third factor (the risk of prejudice to the moving party) "[a] defendant suffers prejudice if the plaintiff's actions impair the defendant's ability to go to trial or threatens to interfere with the rightful decision of the case." *Henry, supra*, 983 F.2d at 948, quoting from *Adriana International Corp. v. Thoeren*, 913 F.2d, 1406-1412 (9th Cir. 1990).

Four of these five factors supports the request for dismissal here. The first and second factors (public's interest in expeditious resolution of litigation and the Court's need to manage the docket) favor dismissal. The case is scheduled for trial in March of 2011. The Court ordered all non-expert discovery to be concluded by October 15, 2010. Allowing Plaintiffs another opportunity to respond to the discovery requests would likely cause delay in the trial date. Likewise, the Court's need to manage its docket favors dismissing the Plaintiffs from the suit. The Court can properly decide the merits of the Class claims of those Class Members who have fulfilled their responsibility as litigants by responding to the Class Discovery Requests at the trial in March of 2011. Those Class Members who have blatantly ignored the Court's order that they respond to the

discovery should not share in the fruits of the trial (if any). All parties are entitled to a prompt resolution of this matter on the trial date scheduled. Allowing the non responding Class Members another chance to comply with the Court's June 9th Order compelling them to respond to the discovery would only cause further delay in resolving this case.

As to the third factor, Defendant has, and will suffer prejudice if the relief sought is not granted for the reasons discussed above. Defendant was unable to use the discovery responses in its decertification motion, or its potentially dispositive dismissal and summary judgment motions. Defendant cannot properly prepare for trial without receiving the responses to the discovery. For example, Defendant will have difficulty raising individual defenses to the claims of these Class Members without the benefit of their responses to the discovery, including such information as the amount of time they spent on various tasks, their taking of meal and rest periods during their employment, the number of hours they worked during the class period, and questions concerning their weekly certifications of their job duties (Vandall Decl., ¶ 22). Defendant has difficulty in making a reasonable estimate as to potential liability in this matter, given the refusal of 112 Plaintiffs out of 273 remaining class members to provide estimates of the number of hours worked and the number of meal and rest periods taken (Vandall Decl., ¶ 22). Defendant may want to use the information from the Class Discovery Responses to give to its experts for inclusion in its expert report (Vandall Decl., ¶ 23). Further, Defendant could use the responses to possibly subpoena Plaintiffs as adverse witnesses at trial, and to impeach any potential trial witnesses (Vandall Decl., ¶ 22). Plaintiffs' late responses on November 1 and December 14, 2010 are inadequate, yet Defendant cannot move to compel further responses as discovery closed October 31. This creates additional prejudice to Defendant (Vandall Decl., ¶ 21).

As to the fourth factor, the public policy favoring disposition of cases on their merits would cut against dismissing the claims with prejudice, but none of the five factors are dispositive.

As to the fifth factor, less drastic sanctions were sought in the form of two final warning notices. On June 9, 2010, Judge Spero ordered Plaintiffs to respond to the Class Discovery Requests by July 16, 2010 (Vandall Decl. Exh. G). On October 14, 2010 Judge Spero also issued an order that a warning letter should be sent to all class members who had not responded to the

discovery (Vandall Decl., ¶ 11). Class members were given until October 29 to respond to the discovery requests under penalty of possible dismissal of their claims (Vandall Decl., ¶ 11). The warning was mailed to all class members who are the subject of this Motion on October 18 (Vandall Decl., ¶ 12). Only eight previously non-responsive Class Members provided discovery responses after receipt of the October 18 warning letter (Vandall Decl., ¶ 13). On November 23, Defendant's counsel served a second warning letter pursuant to this Court's Order. (ECF No. 254, p.3, ¶ 4). Only 32 additional Class Members provided discovery responses after receipt of the second warning letter. The Class Members who are the subject of this motion filed no responses. (Vandall Decl., ¶¶ 7, 21).

While a Court can order that a disobedient party be precluded from presenting certain claims or contesting defenses instead of dismissal (Fed. R. Civ. P.Rule 37(b)(2)(A)(ii)), this would not be feasible, particularly if the Court allows the Plaintiffs to proceed at trial by way of "representative" testimony. (See Vandall Decl., Exh. A, 9/9/10 Order, p. 21 fn. 5). If "representative" testimony is allowed, precluding the 112 non-responsive Plaintiffs from presenting evidence would be a meaningless sanction. Furthermore, since the discovery at issue covers all of the Plaintiffs' claims, precluding Plaintiffs from presenting the claims would be tantamount to a dismissal. The lesser sanction of claim preclusion under Fed. R. Civ. P. Rule 37(b)(2)(A)(ii) is not feasible.

Monetary sanctions would be inadequate as they would be difficult, if not impossible, to collect from the 112 Class Members, and would not eliminate any of the prejudice Defendant has and will suffer as a result of Plaintiffs' failure to respond to the Class Discovery Requests.

In *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999 (7th Cir. 1971), the Court upheld the dismissal of absent class members who refused to comply with discovery requests. The absent class members had been sent the written discovery along with a memorandum explaining the reasons for the discovery requests, advising them of the deadline for responding and encouraging the class members to seek the advice of counsel. *Brennan*, *supra*, 450 F.2d at 1002. The absent class members who had not responded were notified that their claims would be dismissed if they did not respond to the discovery. The appellate court upheld the district court's dismissal of

the case with prejudice as to those absent class members who failed to respond to the discovery. The Court noted that "movants ignored repeated requests that they comply with the discovery orders." The *Brennan* court also noted that it could have taken the lesser step of dismissing the plaintiffs from the class without prejudice and allowing them to proceed with their individual claims if any, (*Brennan, supra*, 450 F.2d at 1004 n. 2).

Likewise in *Estrada v. RPS, Inc.*, 125 Cal. App. 4th 976, 23 Cal. Rptr. 3d 261 (2005) the trial Court approved the defendant's sending a questionnaire to the class members in a wage hour class action. About half of the 550 putative class members failed to respond to the questionnaire. The trial Court dismissed with prejudice the claims of those class members who had failed to respond to the questionnaire (*Estrada, supra*, at 982-983.) While the Court of Appeals in *Estrada* affirmed the dismissal for lack of standing without addressing the merits, the case supports Defendant's request here.

In *Aquilino v. Home Depot U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 30819 (D.N.J. 2008), a class of assistant store managers (ASMs) sued defendant Home Depot alleging failure to pay FLSA-mandated overtime wages. The court authorized a short set of interrogatories to an initial group of 58 ASMs. There were few initial responses, and those that came in were incomplete or uncertified, so the court ordered compliance and briefly extended the response period. Ultimately, 15 ASMs failed to respond and 17 failed to certify their responses. The remaining 26 apparently responded in full. The Court dismissed from the case without prejudice the 32 plaintiffs who either failed to respond, or failed to certify their responses. *See also, Anderson v. Cagle's Inc.*, 488 F.3d 945, 950 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2902 (2008) (of the employees opting-in to a FLSA collective action, "115 were dismissed for failure to comply with discovery requests").

Plaintiffs' disobedient conduct has prejudiced Dollar Tree. The information Dollar Tree sought – with explicit Court approval – is necessary to defend itself and make wise decisions regarding this case. Without complete, sworn, and timely responses, Dollar Tree has been frustrated in its efforts to properly defend itself. Only terminating sanctions will adequately address the prejudicial effect of such bad faith. *See Phipps, supra*, 8 F.3d at 791; *Cooks v. Alabama Shipyard, Inc.*, 1999 U.S. Dist. LEXIS 8488 (S.D. Ala. 1999).

In their opposition to the final warning motion of Defendant (September 27, 2010, Joint Letter Vandall Decl., Exh. N, pp. 6-8), Plaintiffs' counsel argued that the *Brennan* case had not been followed, and that the discovery should not have been sent to absent class members. However, Plaintiffs already lost this battle when the Court ordered the limited discovery be sent to putative Class members in its May 25, 2010 Order (CMC Order at Paragraph 1, Vandall Decl., Exh. B). Plaintiffs give no reason why the court should reconsider its CMC order.

Many other Courts have permitted interrogatories to be sent to unnamed class members. *Transamerican Refining. Corp., v. Dravo Corp.* 139 F.R.D. 619, 622 (S.D. Tex. 1991; *Dellums v. Powell,* 566 F.2d 167, 187 (D.C. Cir. 1977), disapproved on other grounds in *Bell v. Little Axe Independent School Dist*. No. 70, 766 F.2d 1391, 1411 (10th Cir. 1985) (document requests to unnamed Class members permitted); *United States v. Trucking Employers, Inc,*. 72 F.R.D. 101, 105 (D.D.C. 1976) (interrogatories permitted); *Cornn v. UPS*, 2006 W.L. 2642540 (N.D. Cal. 2006) (approving sending of interrogatories to absent class members); *Easten & Co. v. Mutual Benefit Life*, 1994 U.S. Dist. Lexis 12 308 (D.N.J. 1996) (discovery to absent class members permitted); *M. Berenson Co., Inc. v. Faneuil Marketplace, Inc*., 103 F.R.D. 635 (D. Mass. 1984) (discovery to absent class members can proceed when the information is relevant, the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and where the information is not available from the representative parties). Allowing the discovery here was well within the Court's discretion.

This case is no different than any other case of a parties' refusal to respond to discovery. It would be grossly unfair to allow the Plaintiffs to share in a possible monetary recovery in this case, without sharing in the minimal burden of responding to the discovery ordered by the Court.

Moreover, Plaintiffs should not be allowed to willfully violate Court orders without consequences. The integrity of the Court will suffer if the motion is not granted. *Aztec Steel Co., supra* 691 F.2d 480, 482; *In re Amtrak Sunset Ltd. Train Crash*, 136 F. Supp 2d 1251, 1265 (S.D. Ala. 2001)

//

IV. CONCLUSION

The CMs violated the Court's June 9 discovery order. CMs have had ample warning of this Motion. Defendant needs the information in the Class Discovery to defend itself in the case. It is not unfair for CMs to be dismissed with prejudice. In the unlikely event the Court declines to do so, CMs should be dismissed without prejudice, so they can file their own suits if they choose.

Pursuant to Local Rule 7-8, by separate motion, Defendant reserves the right to seek monetary sanctions for the cost of bringing this Motion to Dismiss.[3]

Dated: December 23, 2010

Respectfully submitted.

/s/ Matthew Vandall
MATTHEW VANDALL
LITTLER MENDELSON
A Professional Corporation
Attorneys for Defendant
DOLLAR TREE STORES, INC.

Firmwide:99227506.3 061603.1004

[3] Defendant complied with all meet and confer obligations prior to filing this Motion. In the joint letter brief to Judge Spero, Defendant's counsel advised Plaintiffs' counsel that any Plaintiffs who did not respond to discovery would be subject to a motion to dismiss (Vandall Decl., Exh. N., p. 2). Plaintiffs' counsel admitted receiving this warning at the June 9th hearing (Vandall Decl., Exh. H, p. 25:24-26:21). On September 28, 2010, Defendant's counsel once again informed Plaintiffs' counsel that it intended to bring a motion for dismissal under Rule 37. Plaintiff's counsel stated that Plaintiffs would not voluntarily dismiss or stipulate to remove these individuals from the class (Vandall Decl., Exh. O).
After the second warning letter was sent by Plaintiffs' counsel to the Class on November 23, Defendant's counsel notified Plaintiffs' counsel that the Rule 37 motion would be renewed for non-responsive Class Members. Plaintiffs' counsel would not voluntarily dismiss them. (Vandall Decl., ¶ 25). Defendant has fulfilled all meet and confer requirements.