Scott Edward Cole, Esq. (S.B. #160744)
Molly A. DeSario, Esq. (S.B. #230763)
SCOTT COLE & ASSOCIATES, APC
1970 Broadway, Ninth Floor
Oakland, California 94612
Telephone: (510) 891-9800
Facsimile: (510) 891-7030
email: scole@scalaw.com
email: mdesario@scalaw.com
web: www.scalaw.com

Attorneys for Representative Plaintiffs and the Plaintiff Class

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

MIGUEL A. CRUZ and JOHN D. HANSEN, individually, and on behalf of all others similarly situated, Plaintiffs, vs. DOLLAR TREE STORES, INC., Defendant.	**Case No. C-07-2050 SC** **CLASS ACTION** **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT DOLLAR TREE STORES, INC.'S MOTION TO DISMISS CLAIMS OF CLASS MEMBERS WHO FAILED TO RESPOND TO DEFENDANT'S DISCOVERY**
ROBERT RUNNINGS, individually, and on behalf of all others similarly situated, Plaintiffs, vs. DOLLAR TREE STORES, INC., Defendant.	**Case No.: C-07-4012 SC *(Consolidated Action)*** **CLASS ACTION** **Date: February 4, 2011** **Time: 10:00 a.m.** **Dept.: Courtroom 1, 17th Floor** **Judge: Hon. Samuel Conti**

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

I. INTRODUCTION

Plaintiffs Miguel A. Cruz, John D. Hansen, and Robert Runnings ("Plaintiffs") hereby submit their Opposition to Defendant Dollar Tree Stores, Inc's. ("Dollar Tree" and/or "Defendant") Motion to Dismiss Claims of Class Members Who Failed to Respond to Defendant's Discovery (the "MTD").[1] Plaintiffs' Opposition is based on this Memorandum of Points and Authorities, the Declaration of Molly A. DeSario, Esq. in support of Plaintiffs' Opposition to Defendant's MTD and exhibits thereto, filed herewith, ("*DeSario Decl.*"), the complete files and records of this action, and argument that counsel may present at the hearing on the instant Motion.

Defendant contends that absent class members who have not yet responded to its discovery requests (the "pertinent class members") should be dismissed from the class. However, the legal authorities and factual bases set forth in the MTD pertain only to *discovery* issues and do not meet *any* standard for *dismissal*. Moreover, the great weight of legal authority **rejects** the imposition of terminating sanctions against non-parties' claims.[2] Even if that were not so, Dollar Tree has not shown that class counsel or **any** of the pertinent class members have willfully disregarded this Court's Orders or done so in bad faith. Finally, and most importantly, there is no practical reason to dismiss these class members now. This Court has already said that this case is going to be tried with testimony from a "handful" of class member witnesses[3] -- a decision which effectively eliminates the need for individual discovery responses from all but those "handful" of class members. Moreover, Plaintiffs have already agreed that the "handful" of class members should be required to submit complete discovery responses. That "handful," however, has yet to be selected. Therefore, the question of whether any class members should be dismissed for failure to respond to discovery is premature. Dismissing more than a hundred class members from the case when only five out of 273

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[1] *Dckt. No.* 259, *et seq*. Unless otherwise indicated, all citations to the docket refer to the record in the instant matter of *Runnings, et al. v. Dollar Tree Stores, Inc.*, Case No. C-07-4012 SC ("*Runnings*"). Citations to the "*Cruz Dckt.*" refer to the record in the related matter of *Cruz, et al. v. Dollar Tree Stores, Inc.*, Case No. C-07-02050 SC ("*Cruz*").

[2] Even if this were not the case, no Court has issued any order compelling any particular absent class member to respond to the disputed discovery so the MTD should be denied on this basis alone.

[3] *Cruz Dckt. No.* 232 at 21:19-27, fn. 5.

of them will testify at trial not only goes against the weight of the case law, but also turns Rule 23 jurisprudence on its head by improperly turning this into an "opt-in" case.

Accordingly, this Court should deny Dollar Tree's MTD in its entirety, or, alternatively, continue the hearing thereon until *after* the selection of the "handful" of representative class member witnesses.

II. STATEMENT OF FACTS

On March 25, 2010, Defendant served written discovery requests on class counsel to propound on each of the then 700-plus class members (the "class discovery requests").[4] Plaintiffs objected,[5] and the parties submitted a joint letter brief to Judge Spero when the parties meet and confer efforts failed.[6] On March 25, 2010, this Court authorized Dollar Tree to propound written discovery requests on the then 700+ absent class members.[7] In the May 28, 2010 Joint Letter Brief to Judge Spero, Defendant argued that "responses to the Class Member Discovery Requests are necessary and relevant to Dollar Tree's argument that this case is not amenable to class treatment or that it cannot be tried through representational testimony [and] …should therefore be completed before Judge Conti rules upon Dollar Tree's Motion to Decertify the Class."[8]

After the parties resolved various disputes regarding Plaintiffs' objections – many of which were sustained – at the June 9, 2010 telephonic hearing before Judge Spero,[9] class counsel served the class discovery requests on each and every class member ***at the addresses provided by Dollar Tree***.[10] Class counsel also hired temporary staffers and externs to contact the class members by

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[4] *See Cruz Dckt. No.* 260 at Exhibits "C" and "D."

[5] *See Cruz Dckt. No.* 260 at Exhibits "E" and "F."

[6] *Cruz Dckt. No.* 178 (Joint Letter Brief to Compel Class Discovery Requests dated May 28, 2010).

[7] *Dckt No.* 208 (Order after Case Management Conference) at 1:8-10 ("[d]efendant shall serve 10 Special Interrogatories and 10 Requests for the Production of Documents on Class Members. Written discovery shall be served through Class Counsel. Class Counsel preserves all rights to object to such *discovery* on any grounds").

[8] *Cruz Dckt. No.* 178 at 4.

[9] *Cruz Dckt. No.* 183.

[10] Declaration of Molly A. DeSario, Esq. in support of Plaintiffs' Memorandum in Opposition to Defendant Dollar Tree Stores, Inc.'s Motion to Dismiss Claims of Class Members Who Failed to Respond to Defendant's Discovery ("*DeSario Decl.*") at ¶¶ 3-6, filed herewith.

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

telephone, and used online database, social networking websites and word-of-mouth resources to locate the significant number of class members whose contact information was outdated.[11] Class counsel repeated this process *twice* following this Court's Decertification Order.[12] Class counsel personally served the class members' discovery responses on defense counsel on July 16, 2010.[13] Class counsel subsequently served additional class member discovery responses on Defendant on a rolling basis.[14, 15]

In the parties' September 27, 2010 Joint Letter Brief to Judge Spero, Defendant stated that it would seek terminating sanctions (i.e., dismissal) against those class members who had not yet responded to the class discovery requests.[16] Judge Spero did not levy terminating sanctions during the October 14, 2010 telephonic discovery hearing and did not reach the merits of any such request for dismissal.[17] Contrary to Defendant's characterization of the events,[18] Judge Spero did **not** state "that [the class members'] claims would be dismissed if they did not respond to the discovery by October 29, 2010." The Court merely ordered that class counsel send notice informing the class

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[11] *DeSario Decl.* at ¶ 6.

[12] *Cruz Dckt. No.* 232.

[13] *Cruz Dckt. No.* 318 at Ex. A.

[14] *Cruz Dckt. No.* 318 at ¶ 4.

[15] Indeed, Plaintiffs' counsel affected personal service of class member Claudia Garcia's verified responses to Defendant's class discovery requests today. *See* Ex. A to the *DeSario Decl.* Accordingly, Plaintiffs respectfully request that this Court summarily deny the MTD with respect to Ms. Garcia as moot.

[16] *Cruz Dckt. No.* 233.

[17] *Cruz Dckt. No.* 247. The Civil Minute Order regarding Joint Letter Brief merely ordered class counsel to send notice to class members that Defendant would seek the relief requested in the instant MTD.

[18] *See* MTD at 8:14-17. (Defendant wrote that "Judge Spero issued an order that a final warning notice would 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") (emphasis added).

The MTD incorrectly characterized Defendant's evidentiary support for this statement; i.e., paragraph eleven of the Declaration of Matthew Vandall in Support of Defendant Dollar Tree Stores, Inc.'s Motion to Dismiss Claims of Class Members Who Failed to Respond to Defendant's Discovery ("*Vandall Decl.*"). *Dckt. No.* 260. In reality, that declaration does not contain *any* such statement and says only that "On October 14, 2010 Magistrate Judge Spero heard Defendants' motion for an Order that a warning letter be sent to all Class Members who had not responded to the Class Discovery Requests. Judge Spero ordered that a warning letter be mailed to all Class members who had not responded to the discovery." *Dckt. No.* 260 at 7:10.

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

members that Defendant would *seek* dismissal.[19] **Notably, this is the *second* time defense counsel misrepresented the record to the Court regarding this *precise* issue.**[20] Contrary to Defendant's accusatory characterization, class counsel has not "disobeyed" any of this Court's Orders and in fact has expended considerable resources to locate the pertinent class members.[21]

On September 9, 2010, the Court has stated that it "is not opposed, in principle, to the parties' use of representative testimony … [and] does not anticipate allowing each side to call more than *a handful* of SMs as witnesses as part of the liability phase of the trial" (emphasis added).[22] In response to the Court's anticipated trial plan, and Dollar Tree's concerns regarding its ability to impeach class member witnesses, Plaintiffs committed to providing full discovery for each testifying class member.[23] Nevertheless, Dollar Tree filed the instant MTD on December 23, 2010 arguing that it needs discovery responses from every single class member or it will suffer undue prejudice at trial.[24] Until Dollar Tree furnished the class list to Plaintiffs in November 2009, it had unilateral access to all but 100 of the class members for nearly **two years**.[25]

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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[19] *Cruz Dckt. No.* 247 ("Plaintiff shall send out a written notice on 10/18/10 to class members who have not responded to discovery indicating … that **Defendants have *sought* dismissal** on the basis that they have not responded") (emphasis added).

[20] *See, e.g.*, *Dckt. No.* 317 at 2:20-26, fn. 10 (*citing Dckt.* Nos. 300 at 9:14-17 and 301 at 2:9-11) and fn. 11 (*citing Cruz Dckt.* No. 247).

[21] *Cruz Dckt. No.* 232 (Decertification Order) at 21:19-27, fn. 5.

[22] *Cruz Dckt. No.* at 21:19-27, fn. 5 (Order Granting in Part and Denying in Part Defendant's Motion to Decertify).

[23] *Dckt. No.* 317 at 3:1-2 (Plaintiffs' Opposition to Defendant's first Motion to Dismiss the pertinent class members); *see also Cruz Dckt. No.* 142 at 8:20-9:30 (Plaintiffs' section of the February 25, 2010 Joint Case Management Statement).

[24] *See* MTD at §II(B) (Defendant Has and Will Suffer Prejudice if The Relief Requested is Not Granted).

[25] *Cruz Dckt. No.* 76 (Order Granting in Part and Denying in Part Motion to Compel Responses to Plaintiffs' Special Interrogatory No. 1, in which Judge Spero Ordered Dollar Tree to produce the names and *mailing addresses* – but *not* telephone numbers – for 100 of the then approximately 655 putative class members); *see also Dckt. No.* 87 (overruling Plaintiff Robert Runnings' Objection to Judge Spero's Order declining to compel production of most class members' contact information).

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

III. LEGAL ARGUMENT

A. DEFENDANT'S MOTION TO DISMISS IS PROCEDURALLY IMPROPER

1. The MTD Does Not Comply with the Requirements Set Forth in Federal Rule of Civil Procedure 12(b)(6)

The proper legal standard for Defendant's MTD differs substantially from that governing a motion for sanctions under Federal Rule of Civil Procedure 37. As such, this Court -- if it even reaches the merits of the MTD -- should apply the correct legal standard therefor. Federal Rule of Civil Procedure 12(b)(6) requires dismissal if a complaint lacks sufficient facts to support the alleged claim or fails to assert a cognizable theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (a motion to dismiss should be granted if a plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face"). None of Defendant's arguments in the MTD are remotely related to this standard, so there is no legal basis for granting it. For all intents and purposes, the MTD merely seeks terminating sanctions. Defendant's MTD relies heavily on Rule 37 jurisprudence, which does nothing to advance its position that the relevant CMs' claims should be "dismissed." A motion to dismiss "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). As the pleading stage of this matter concluded long ago, any motion to dismiss should be denied as untimely. Thus, Defendant's MTD should fail on this basis alone.

2. Dismissal is Not an Appropriate Sanction Because Absent Class Members are Not Parties

Defendant asks this Court to extend a doctrine that allows dismissal of *parties* who willfully refuse to provide discovery responses to absent class members. Terminating sanctions -- such as dismissal -- are only available to *named parties* who fail to obey a discovery order, and absent class members are not "parties" in the class action context. FRCP Rule 37(b)(2)(A)(v) does not apply to absent class members; it only authorizes dismissal "[i]f a party or a party's officer, director, or managing agent --or a witness designated under Rule 30(b)(6) or 31(a)(4) -- fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a)." Fed. R. Civ. P. 37(b)(2)(A). *See, e.g., Stirman v. Exxon Corp.*, 280 F.3d 554, 563, fn. 7 (5th Cir. 2002) (absent class members are "by definition those people [who] do not and cannot participate in any stipulations

concocted by the named parties"); *see also Epstein v. MCA, Inc.*, 50 F.3d 644, 667 *overruled on other grounds by Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996) (noting that "class members [are] unlike individual litigants"). Even after class certification, "an absent class-action plaintiff is not required to do anything." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985).

Here, none of the pertinent class members is "a party," "a party's officer, director or managing agent -- or a witness designated under Rule 30(b)(6) or 31(a)(4)." Fed. R. Civ. P. 37(b)(2)(A). These class members are **passive participants** in a certified class action. As such, they do not fall into any category of individuals (i.e., "parties") contemplated under this rule. Since the pertinent class members are not "parties" to this class action, they cannot be dismissed because they failed to provide discovery responses.

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

3. There Is No Evidence that the Pertinent Class Members Have Disobeyed any Discovery Order

Dismissal is also inappropriate because there is no evidence that the pertinent class members have disobeyed any discovery order. Defendant relies primarily on the controversial opinion issued in *Brennan v. Midwestern United Life Insurance Co.*, 450 F.2d 999 (7th Cir. 1971), however, is distinguishable for myriad reasons, discussed *infra* at Section III(B)(4). Significantly, the *Brennan* Court expressly ordered each of the class members to respond to the class discovery requests, and there was no question that those class members had received *actual notice* – including a copy of the Court's order. *See id.* at 1005; *see also* Section III(B)(4), *infra*. Here, the Court merely ordered class counsel to send a notice to the pertinent class members stating that they would be dismissed from the class if they did not respond. *See Dckt. No.* 348 at ¶ 4. The gravity of a class member receiving a Court Order with his or her name on its face (as was the case in *Brennan*) would obviously have a greater impact than a generalized warning notice from class counsel, if in fact the class members actually received the Order.

This Court has not ordered *any* of the pertinent class members to respond to the class discovery requests. Indeed, this Court and Judge Spero have merely ordered *class counsel* to serve as a liaison for the requests, and class counsel has dutifully complied with every aspect of each Order.

See, generally, Section II, *supra*. None of the absent class members, however, have been ordered to provide responses to the class discovery requests. Since FRCP Rule 37(b)(2)(A)(v) is only available where the **subject** of the implicated discovery "fails to obey an order to provide or permit discovery," dismissal under that rule is not a viable remedy. Simply put, where, as here, a person is not the subject of an order, that person cannot logically be sanctioned for disobeying it. Defendant's MTD should therefore be denied on the basis that the pertinent class members have not actually been ordered to do anything.

4. Defendant's MTD Improperly Asks this Court to Impose a *de facto* "Opt In" Scheme

Dollar Tree's MTD improperly asks this Court to ignore Rule 23's "opt out" provision and treat this case as a FLSA "opt in" class action. As the Kline Court so clearly explained:

> "In some of the cases where discovery of absent class members was permitted, when absent class members failed to comply with discovery requests, the defendants filed motions to have those class members dismissed from the case under Federal Rule of Civil Procedure 37. This strategy is essentially a 'back door' way to create an 'opt in' scheme, where class members are required to take some affirmative step in order to remain in the class. This is inconsistent with the 'opt out' provision of Rule 23."

Kline v. First Western Government, 1996 WL 122717, *2 (E.D.Pa., March 11, 1996).

Other courts have agreed. *See Kern ex rel. Estate of Kern v. Siemens Corp.*, 393 F.3d 120, 125-26 (2d Cir. 2004)

("Dismissal of an absent class member's claims as sanctions for failure to answer a questionnaire is contrary to the opt-out policy of Rule 23."). *See also Tierno v. Rite Aid Corp.*, 2008 U.S. Dist. LEXIS 112461 (N.D. Cal. July 8, 2008) ("requiring [absent class members] to respond [to discovery] would undercut the purposes of class certification and effectively create an "opt in" scheme for absent plaintiffs.") (c*iting McPhail v. First Command Financial Planning, Inc.*, 251 F.R.D. 514, 2008 WL 2167198, 2 (S.D.Cal. April 3, 2008)).

Since this case is a Rule 23 class action and therefore subject to Rule 23's "opt out" provision, this Court should not dismiss absent class members who have not responded to Dollar Tree's individual discovery requests, or, in the alternative, continue the hearing thereon until *after* it selects the "handful" of representative class member witnesses.

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

B. COURTS DO NOT ISSUE TERMINATING SANCTIONS AGAINST UNREACHABLE ABSENT CLASS MEMBERS IN RULE 23 CLASS ACTIONS FOR DISCOVERY LAPSES

1. Dollar Tree's References to Cases Where Absent Class Member Discovery was Permitted Do Not Support its Request for Sanctions

Defendant cites myriad cases where, as here, absent class member discovery was *permitted*. However, none of the "[o]ther Courts [that] have permitted interrogatories to be sent to unnamed class members"[26] were issued by the Ninth Circuit,[27] and none imposed terminating sanctions (or *any* sanctions) for failure to respond. Moreover, each of these decisions is factually distinguishable:

- *Transamerican Refining Corp. v. Dravo Corp.*, 139 F.R.D. 619, 622 (SD Tex. 1991):

Unlike Dollar Tree's request to take written discovery from the entire class, the *Transamerican Refining* Court only permitted discovery from a small fraction of the class members **and did not impose sanctions on those who did not provide them**. *See, id.* (allowing discovery on only 0.83% of absent class members on the basis that "[i]t is unduly burdensome to propound interrogatories" to the entire class). *Id.* Here, Dollar Tree has *already received* verified responses from the *majority* (161 out of 273, or almost 70%) of absent class members.

- *Dellums v. Powell*, 566 F.2d 167, 187 (D.C. Cir. 1977):

The *Dellums* Court noted that limited discovery from absentees is only permissible "when the interrogatories or document requests are tendered in good faith and are not unduly burdensome, and when the information is not available from the representative parties."*Id.* **It said nothing about imposing sanctions on absent class members who failed to respond to discovery.** Furthermore, Dollar Tree's MTD does not make any showing that the discovery sought here is unavailable through other, less intrusive means, nor could it. Indeed, as explained above, Dollar Tree had unilateral access to the vast majority of class members prior to class certification. Its failure to

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[26] *See* MTD at 16:7-27.

[27] Contrary to Defendant's representation that the *Cornn* Court "approv[ed] sending of interrogatories to absent class members" (*see* MTD at 16:12-13), the *Cornn* Court noted that the *defendant* was required "to justify requesting discovery from a particular number of absent class members" (*see id.* at *4) and by no means authorized or implied that every single absent class member should be required to submit to written discovery much less be subjected to sanctions. *Cornn v. UPS*, Case No. No. C03-2001 TEH, 2006 W.L. 2642540 (N.D. Cal., Sept. 14, 2006).

adequately investigate the liability issues of their claims through informal interviews and/or surveys early in the ligation does not justify burdening the relevant class members with discovery and discovery sanctions *after* the discovery cut-off date.

- *U.S. v. Trucking Emp., Inc.*, 72 F.R.D. 101 (D. DC 1976):

The *Trucking Emp., Inc.* Court allowed the *plaintiff* to propound limited discovery on absent members of an *uncertified **defendant** class*. 72 F.R.D. 101 (D. DC 1976). Significantly, the *Trucking Emp., Inc.* Court observed that "[t]he most important relevant circumstances are that the party seeking the discovery must demonstrate … that the *discovery **not** be undertaken with the purpose or effect of … **altering the membership** of the opposing class*." 72 F.R.D. at 104 (emphasis added). **The *Trucking Emp., Inc.* Court never said anything about absent class members providing discovery or being subject to sanctions for not providing it.** Furthermore, the remedy Defendant's MTD seeks here is nothing short of an order that would literally ***alter the membership*** of the class by dismissing absentee class members prior to their day in court.

- *Easten & Co. v. Mutual Benefit Life*, 1994 U.S. Dist. Lexis 12308 (D. N.J., May 18, 1994):

The *Easten & Co.* Court expressed disfavor of dismissal as a remedy where absent class members (in that case, aggrieved investors, not employees) **do not respond to discovery.** In fact, the *Easten & Co.* Court expressly ordered "that defendants re-draft the discovery requests to exclude the warnings regarding dismissal" "as a precaution against ***unnecessary intimidation of class members***." *Id.* at *15 (emphasis added).

- *M. Berenson Co., Inc. v. Faneuil Marketplace, Inc.*, 103 F.R.D. 635 (D. Mass. 1984):

Unlike the instant payroll dispute between a nationwide retail chain and its store level employees, *M. Berenson Co., Inc.* was a class action against a commercial landlord on behalf of commercial tenants where the defendant asserted counterclaims against certain unnamed class members. These counterclaims necessarily made each absentee class member a potential party (and therefore subject to discovery) because the "factual bases of many of their counterclaims are so interwoven with those of plaintiffs' claims that they cannot be independently submitted to a jury without confusion and uncertainty." *Id.* at 637. Partially on this basis, the *M. Berenson Co., Inc.* Court found that limited class member discovery was permissible **notwithstanding the well settled**

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

principle that "discovery against absentee class members under Rules 33 and 34 cannot be had as a matter of course." *Id.* Here, Dollar Tree has not asserted any counterclaims against the pertinent class members. Moreover, the class members here are Defendant's employees rather than its retail tenants. Thus, the facts in *M. Berenson Co., Inc.* are sufficiently incongruous from those in the instant matter that it is wholly inapposite.

Since **none** of these cases address the propriety of imposing terminating sanctions on absent class members, Dollar Tree's MTD should be denied, or, alternatively, this Court should continue the hearing thereon until *after* selection of the "handful" of representative class member witnesses.

2. The Cases Defendant Cites Where Absent Class Members Were Dismissed are Inapposite

The cases Dollar Tree cites that permitted dismissal of absent class members are wholly inapposite here:

- *Estrada v. RPS, Inc.*, 125 Cal.App.4th 976 (2005):

In *Estrada v. RPS, Inc.*, 125 Cal.App.4th 976 (2005), the trial Court chose to dismiss class members who did not respond to a survey asking **one binary question** (i.e., whether the class member drove a truck or not) after amending the class definition to exclude individuals who did not drive a truck. The Court explained that dismissal was warranted there since the Defendant had "no records confirming which contractors actually drove a truck" and the Court had certified a class consisting of "an admittedly over-inclusive group." *Id.* at 979. Here, there is no question as to the composition of the class.

- *Aquilino v. Home Depot U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 30819 (D. N.J. 2008):

In *Aquilino v. Home Depot U.S.A., Inc.*, 2008 U.S. Dist. LEXIS 30819 (D. N.J. Apr. 15, 2008), **a FLSA case**, the Court elected to dismiss certain absent class members since "unlike the typical class action, a FLSA action requires that each employee consent in writing in order to be part of the suit." *Id.* at *7. Under the FLSA, "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C.A. § 216(b). As explained above, (Section III(A)(4), *supra*),

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

the class members in the instant matter are not opt-in FLSA plaintiffs, but are instead members of a certified **opt-out** class under Rule 23.

- *Anderson v. Cagle's, Inc.*, 488 F.3d 945 (11th Cir. 2007):

Dollar Tree also references *Anderson v. Cagle's, Inc.*, which is also **not a Rule 23 class action**. That Court similarly acknowledged that "[u]nlike class actions governed by Rule 23 of the Federal Rules of Civil Procedure, in which potential class members may choose to opt out of the action, FLSA collective actions require potential class members to notify the court of their desire to opt in to the action." *Anderson*, 488 F.3d at 950, fn. 3 (11th Cir. 2007).

Since **none** of these cases address factual circumstances that are remotely analogous to those presented here, Dollar Tree's MTD should be denied.

3. The Majority of Courts Have Declined to Follow *Brennan*

The only case that Dollar Tree can offer to support its MTD is *Brennan* which contradicts the weight of more recent authority, particularly within this circuit, *disfavoring* dispositive discovery sanctions against absent non-responsive class members. **The *Brennan* remedy is the exception, not the rule.** Indeed, myriad subsequent opinions have outright disagreed with *Brennan* or distinguished it on factual bases similar to those present in the instant case.

"The limited holding in *Brennan* is cited often, but it has received uneven application." 5 *Newberg* § 16:3. In fact, a majority of courts have **declined** to adopt the *Brennan* Court's all-or-nothing approach to compelling discovery from absent class members. This is predictable since "[a] Rule 23 class action is intended to be prosecuted by a class representative without the necessity of absent class members taking an active role in the litigation. The class action rule was designed to protect the class member from this burden." 5 *Newberg* 16:4. In the employment context, the *Cox v. American Cast Iron Pipe Co.* Court noted that class-wide "interrogatories were improperly used as a strategy to reduce class size. Their 'necessity' is further questionable since, as appellants point out, they were used in stage one proceedings in which the focus is the broad pattern and practice at issue, not the merits of individual claims." 784 F.2d 1546, 1556 (11th Cir. 1986) (*citing International Broth. of Teamsters v. U.S.*, 431 U.S. 324 36-62 (1977). The *Cox* Court also observed that *Brennan*

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

"has not met with wide acceptance in this Circuit." *Cox, supra.* (*citing Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N. D. Ga. 1972) ("[s]ince discovery by written interrogatories pursuant to Rule 33 … and by … production of documents pursuant to Rule 34 may be had only against 'parties,' the court does not believe such discovery may be had from the class members in this action, other than the … party-plaintiffs")). *Wainwright* expressly rejects the use of individual class member discovery to reduce the size of a plaintiff class, noting that it "perceives ***serious constitutional problems*** with a decision that would dismiss with prejudice from a lawsuit people who were never made parties." *Wainwright*, 54 F.R.D. at 534 (emphasis added).

4. The Facts in *Brennan* are Inapposite Here

The *Brennan* opinion -- which notes that the "discovery orders here were made in a somewhat unusual setting" (*see id.* at 1003) -- is predicated upon a very different set of facts than those before this Court.

- The issues in this matter differ from those in *Brennan*:

Brennan was a securities class action alleging that the Midwestern United Life Ins. Co. had violated section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 under the theory that one of its agents had allegedly engaged in fraudulent conduct. *See Brennan* at 1001. This litigation, however, is a certified *employment* class action where no individual demonstration of reliance is required to establish liability; i.e., Defendant bears the burden of proof with respect to its affirmative defense under the executive exemption, an inquiry which this Court has already determined is amenable to common evidence and can be adjudicated through testimony from a "handful" of class members.

- Unlike the pertinent class members in the instant case, the *Brennan* class members were ordered to respond:

The *Brennan* trial court "ordered the unresponsive members of the class … to show cause … why their claims should not be dismissed with prejudice for failure to answer the interrogatories." *Id.* at 1002. Toward that end, "counsel for the named plaintiff mailed to each class member, including movants, copies of the January 4 order, the order to produce documents, and the agreed-upon interrogatories." *Id.* By contrast, as explained in Section III(A)(3) *supra*, the pertinent class members here *have **not** been ordered* to do anything.

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

- The *Brennan* class members received actual notice:

The order dismissing members of the *Brennan* class issued only after each received *actual notice* of the Order to Show Cause. *See id.* at 1005("[i]t is not disputed that movants and those similarly situated received actual notice of the show-cause order and counsel's letter transmitting a copy to them"). Here, Dollar Tree has not shown, and Plaintiffs do not concede, that any one of the pertinent class members received actual notice. Indeed, despite class counsel's reasonable and diligent efforts, not every pertinent class member has been apprised of the class discovery requests. As such, dismissal of their claims as requested in the MTD would violate their right to due process.

Since the *Brennan* remedy has been rejected by courts in this circuit and is based on inapposite facts, the Court should reject Defendant's request to employ it here.

C. TERMINATING SANCTIONS ARE INAPPROPRIATE WHERE DEFENDANT HAS NOT SHOWN WILLFUL OR BAD FAITH DISREGARD

In general, dismissal is only authorized in "extreme circumstances" and only where the violation is "due to willfulness, bad faith, or fault of **the party**." *United States v. Kahaluu Const.*, 857 F.2d 600, 603 (9th Cir. 1988) (emphasis added) (*quoting Fjelstad v. American Honda Motor Co., Inc.*, 762 F.2d 1334, 1338 (9th Cir. 1985) and *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983)); *Allen v. Exxon Corp. (In re Exxon Valdez)*, 102 F.3d 429, 432 (9th Cir. 1996) (**total refusal by appellants over a period of more than two years** to comply with discovery obligations and orders warranted dismissal) (emphasis added); *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1411-12 (9th Cir. 1990), *cert denied sub nom.*; *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (**appellant's total failure to respond to discovery** and the time consumed by attempting to secure compliance prejudiced appellees) (emphasis added).

Defendant's MTD concedes, and the record confirms, that various good-faith efforts have been made by class counsel to comply with the class discovery requests.[28] Most recently, class

[28] *See, e.g.*, MTD at 7:27-28 ("[o]n July 16, 2010, Plaintiffs submitted verified responses on behalf of 215 of the … Class Members"); 8:1-3 ("[i]n the following weeks, Plaintiffs submitted verified responses for" additional class members).

counsel sent (in strict compliance with this Court's Order), a letter to the last known address of each pertinent class member asking each to respond to Defendant's discovery requests.[29] Given all of class counsel's efforts to reach the class members, it is clear that class counsel has not acted in bad faith or willful disregard of the discovery rules.

Nor has Dollar Tree shown that the absent class members have acted in bad faith or willful disregard. Even if the pertinent class members were the subject of an order (which they are *not*) and did not comply with that order, dismissal is an inappropriate sanction here. "The decision to dismiss a claim, like the decision to enter a default judgment, ought to be a last resort -- ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders." *Cox*, 784 F.2d at 1556. For this reason, terminating sanctions are an inappropriate remedy where, as here, Defendant has not shown that **any** of the pertinent class members have **willfully** disregarded this Court's Orders or done so in **bad faith**. Indeed, appellate courts "will find abuse of discretion if lesser sanctions would suffice." *Id.* To do so, Dollar Tree would have to show that each pertinent class member actually received its discovery requests and chose to ignore them. Dollar Tree's MTD fails to even argue this point. Instead, Dollar Tree attempts to persuade this Court to take the drastic action of dismissing the pertinent class members because lesser sanctions would be meaningless. *See* MTD at 14:14-15 ("precluding the 112 non-responsive Plaintiffs from presenting evidence would be a meaningless sanction"). Since this Court has already opined that this case will be tried through representative testimony,[30] however, lesser sanctions like precluding the pertinent class members

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

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[29] *See DeSario Decl.* at ¶ 9.

[30] This class action will be tried through representative testimony in the same manner as *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233 (11th Cir. 2008), a closely analogous matter where **1,424** purportedly exempt retail store managers successfully prosecuted and tried a nationwide FLSA collective action against Dollar Tree's direct competitor Family Dollar Stores. The *Morgan* Court held that there "was legally sufficient evidence … to produce a reliable and just verdict" after hearing trial testimony from *seven of 1,424* store manager plaintiffs and 39 executives and district managers, and reviewing corporate manuals, deposition testimony of 12 store managers, charts summarizing wages and hours, emails, internal correspondence, payroll budgets and in-store schematics. *Id.* at 1280. Here, Plaintiffs have **already** admitted onto the record over 1,500 pages of documentary evidence (including numerous handbooks, operations manuals, internal company email messages, budgets, payroll certification responses, and in-store schematics), the parties have **already** deposed *more than* 50 Store Managers, and more than half of the (just 273) class members have **already** provided written discovery responses.

from offering representative trial testimony would be sufficient punishment. In other words, this Court need not use a sledge hammer where a fly swatter will suffice.

Since this matter will be resolved through the use of representative testimony and other common evidence, Defendant's claims of prejudice if the pertinent class members remain passive participants in this action fall flat.

D. DOLLAR TREE WILL NOT BE PREJUDICED IF THIS COURT DENIES THE MTD

Defendant has not made any credible showing that it will be prejudiced without individual class member discovery or that such discovery is necessary.[31] Moreover, defendants' claims of undue prejudice from absent class members in the employment context is further diminished where, as here, the class members' identities are known to employers from the outset of litigation. *See, e.g.*, *Tierno*, 2008 U.S. Dist. LEXIS 112461 at * 18 (denying Rite Aid Corp.'s request to depose absent members of a certified class partially on the basis that it "had unfettered access to its own Store Managers for nearly a year and a half while the class was being certified"). Defendant argues that it "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 are also needed because they are "relevant to two of Defendant's experts and their trial testimony." MTD at 10:18-20. Fortunately for Dollar Tree, this Court has twice determined that **common issues predominate**, so Defendant need not raise *any* defenses to the class members' *individual* claims during the upcoming trial on class-wide liability questions.

Dollar Tree also claims that it needs these responses to impeach Plaintiffs' trial witnesses and to determine which class members to call as adverse witnesses. MTD at 13:18-19. Since Plaintiffs have already committed to providing full discovery for the class members who give representative testimony at trial, however, this argument is moot.[32]

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[31] Defendant has also made the argument (which this Court twice rejected) that discovery from absent class members was necessary to support its Motion to Decertify the Class. *See Cruz Dckt. No.* 232 (September 9, 2010 Order Granting in Part and Denying in Part Defendant's Motion to Decertify (the "Decertification Order")).

[32] *Dckt. No.* 317 at 3:1-2 (Plaintiffs' opposition to Defendant's first motion to dismiss the pertinent class members); *see also Cruz Dckt. No.* 142 at 8:20-9:30 (Plaintiffs' section of the

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
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ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
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Finally, Dollar Tree argues that the information sought by way of the class discovery requests "is crucial to a proper defense" on the basis that it will have "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." MTD at 10:13-17. Questions regarding the number of hours worked and/or breaks missed, however, pertain to *damages*, not liability. Such a damages inquiry will only become necessary *after* this Court finds that Dollar Tree is liable for misclassifying its Store Managers as exempt (and will be unnecessary in the unlikely event that Defendant is not found liable). Furthermore, Defendant's repetitious claims that more than 200 absent class member discovery responses -- on top of some 50 class member depositions, tens of thousands of pages of discovery and a handful of FRCP Rule 30(b)(6) and expert depositions -- are not enough for Defendant to "make a reasonable estimate of its potential liability in this matter"[33] -- belie credibility. Indeed, Defendant's ongoing push to have the pertinent class members dismissed from this certified class action suggests that the class discovery requests were propounded primarily, if not exclusively, to reduce the size of the class. *See, e.g.*, *McPhail*, 251 F.R.D. at 518 ("notwithstanding Defendants' stated purpose of utilizing the discovery responses to rebut the presumption of reliance and to defend other elements of Plaintiffs' claim, the ***practical effect of the discovery would be to reduce the size of the class***") (emphasis added).

Even if these requests were served for a legitimate purpose (which they were not), this Court has observed that "Dollar Tree's common policy of having SMs fill out weekly certifications obviates the need for much individual testimony from SMs concerning how they spent their time."[34] This Court's clear willingness to employ representative testimony and other innovative tools to try class-wide liability undermines Dollar Tree's claims of necessity and prejudice if this Court declines to adopt the *Brennan* dismissal remedy. This Court already eviscerated a large portion of the class

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February 25, 2010 Joint Case Management Statement) (Plaintiffs have not contested providing discovery from class members selected to provided representational testimony).

[33] *See Cruz Dckt. No.* 246 at 3; MTD at 3; *see also* MTD at 10:7-8, 12:25-26; *and see Dckt. No.* 302 at ¶ 12.

[34] *Decert. Order* at 13:11-13; 21 at fn. 5 ("[t]he Court also is not opposed, in principle, to the parties' use of representative testimony").

members from the class definition[35] and previously declined to consider responses to the class discovery requests in the adjudication of Defendant's Motion to Decertify the Class. *See Dckt. No.* 250. Since this Court did not see fit to decertify the entire class, it should decline to "finish the job" through the levy of a dispositive discovery sanctions. For these reasons, Defendant's request for terminating sanctions against absent class members should be denied or, alternatively, continued until *after* the selection of the "handful" of representative class member witnesses.

IV. CONCLUSION

The statutory basis for Dollar Tree's MTD does not apply to passive, absentee class members, and the weight of judicial precedent disfavors the use of terminating sanctions even against named parties. Indeed, where such sanctions are levied against named parties, they are only appropriate as a last resort where the party seeking discovery can show willful disregard of a court order or bad faith. Here, Defendant has not claimed that any of the pertinent class members received actual notice of the class discovery requests, so it cannot logically claim that their purported failure to respond was a willful or bad faith omission.

Moreover, Dollar Tree had ample opportunity to investigate the class members' claims for **nearly two years** prior to class certification. Rather than fully investigating this matter prior to class certification, Defendant propounded formal written discovery on over 700 absent class members - - extraordinary relief for a case of this kind. Now, on the eve of trial and with millions of dollars on the line, Defendant makes a last ditch effort to pare the ranks of the class by arguing that it will suffer undue prejudice if the class members who haven't submitted discovery responses are allowed to stay in the case. Such a claim flies in the face of Rule 23's "opt out" requirement, this Court's prior determination that liability will be tried through representative testimony and Plaintiffs' stated commitment to provide full discovery for each testifying class member.

This Court may safely refrain from taking any action against the pertinent class members right now since their individual discovery responses are unnecessary for class-wide liability

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[35] *See, generally, Decert. Order.*

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800

determinations. Thus, the Court can assess the impact the class members' discovery responses (or the lack thereof) have on the individual issues that remain *after* trial.

For all of the foregoing reasons, this Court should deny Defendant's MTD, or, alternatively, continue the hearing thereon until *after* the selection of the "handful" of representative class member witnesses.

Dated: January 14, 2011

SCOTT COLE & ASSOCIATES, APC

By: /s/ Molly A. DeSario
Molly A. DeSario, Esq.
Attorneys for Representative Plaintiffs
and the Plaintiff Class

SCOTT COLE & ASSOCIATES, APC
ATTORNEY'S AT LAW
THE WACHOVIA TOWER
1970 BROADWAY, NINTH FLOOR
OAKLAND, CA 94612
TEL: (510) 891-9800