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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIGUEL A. CRUZ, and JOHN D. HANSEN, individually and on behalf of all others similarly situated, ) Case Nos. 07-2050 SC  
07-4012 SC

Plaintiffs,

v.

DOLLAR TREE STORES, INC.,  
Defendant.

) ORDER GRANTING IN PART AND  
) DENYING IN PART DEFENDANT'S  
) MOTION TO DISMISS CLAIMS OF  
) CLASS MEMBERS WHO FAILED TO  
) RESPOND TO DISCOVERY  
) REQUESTS

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

Plaintiffs,

v.

DOLLAR TREE STORES, INC.,  
Defendant.

**I. INTRODUCTION**

This matter comes before the Court on the Motion to Dismiss Claims of Class Members Who Failed to Respond to Defendant's Discovery filed by Defendant Dollar Tree Stores, Inc. ("Defendant" or "Dollar Tree"). ECF No. 259 ("Mot.").<sup>1</sup> Plaintiffs Robert Runnings, Miguel Cruz, and John Hansen (collectively, "Plaintiffs")

<sup>1</sup> Cruz v. Dollar Tree, Case No. 07-2050 ("Cruz Action"), and Runnings v. Dollar Tree, Case No. 07-4012 ("Runnings Action"), have been consolidated. Unless otherwise noted, all docket numbers in this Order refer to docket entries in the Cruz Action.

1 filed an Opposition, and Defendant submitted a Reply. ECF Nos. 268  
2 ("Opp'n"), 274 ("Reply"). For the following reasons, the Court  
3 GRANTS IN PART and DENIES IN PART the Motion.

4  
5 **II. BACKGROUND**

6 The Court assumes the parties are familiar with the procedural  
7 and factual background of this dispute, which the Court set out in  
8 its Order Granting the Amended Motion for Class Certification. ECF  
9 No. 107 ("May 26, 2009 Order"). Plaintiffs allege they were  
10 improperly classified as exempt employees. See Runnings Action,  
11 ECF No. 1 ("Runnings Compl."); Cruz Action, ECF No. 23 ("Cruz Am.  
12 Compl."). As a result, Plaintiffs allege that Dollar Tree failed  
13 to pay them overtime compensation and failed to provide meal and  
14 rest breaks, in violation of California and federal law. Id.

15 In its May 26, 2009 Order, the Court certified a class  
16 consisting of 718 store managers ("SMs") who worked in 273 retail  
17 locations. On September 9, 2010, the Court granted in part  
18 Defendant's Motion to Decertify the Class. ECF No. 232 ("Sep. 9,  
19 2010 Order"). As a result, the class now consists of 273 members  
20 and is currently defined as "all persons who were employed by  
21 Dollar Tree Stores, Inc. as California retail store managers at any  
22 time on or after December 12, 2004, and on or before May 26, 2009,  
23 and who responded 'no' at least once on Dollar Tree's weekly  
24 payroll certifications." Mot. at 7.

25 On March 25, 2010, the Court ordered that Defendant could  
26 serve each class member with ten Special Interrogatories and ten  
27 Requests for Production of Documents. ECF No. 150 ("Mar. 25, 2010  
28 Order"). On June 9, 2010, Magistrate Judge Spero resolved disputes

1 among the parties as to the form of the discovery requests and  
2 ordered that the modified interrogatories and requests for  
3 production be sent to class members. ECF No. 184 ("June 9, 2010  
4 Order"). Judge Spero's order provided that "[a]ll responses to  
5 these document requests (including documents produced) and  
6 interrogatories are due on or before July 16, 2010." Id. at 2.  
7 Only 215 of the then 718 class members responded by the deadline,  
8 and eight more responded shortly thereafter. Mot. at 8. On  
9 October 14, 2010, upon a motion filed by Defendant, Judge Spero  
10 ordered that a warning notice be sent to all class members who had  
11 not responded to the discovery requests indicating that they must  
12 respond by October 29, 2010 and that Defendant was seeking  
13 dismissal of their claims due to their failure to respond. ECF No.  
14 247 ("Oct. 14, 2010 Order") at 1. Defendant received responses  
15 from twelve additional class members after this warning notice was  
16 sent. Mot. at 8.

17 On November 19, 2010, the Court denied Defendant's motion to  
18 dismiss the claims of class members who failed to respond to  
19 discovery but stated that "the Court will entertain a renewed  
20 motion to dismiss after class members are provided with one final  
21 opportunity to respond." ECF No. 254 ("Nov. 19, 2010 Order") at 3.  
22 The Court ordered Plaintiffs' counsel to send another written  
23 notice to non-responsive class members advising them that the Court  
24 would dismiss them from the class if they did not respond to the  
25 discovery requests within twenty-one days of Plaintiffs' mailing  
26 the notice. Id. Plaintiffs mailed the final warning letter on  
27 November 23, 2010. Mot. at 9. As of December 17, 2010, only  
28 thirty-two additional class members had responded. Id.

1 In the instant Motion, Defendant asks the Court to issue  
2 sanctions under Federal Rule of Civil Procedure 37(b)(2)(A)(v) by  
3 dismissing the claims of the class members who did not respond to  
4 Defendant's discovery requests. The Motion initially sought  
5 dismissal of 112 class members. However, in support of their  
6 Opposition, Plaintiffs filed a declaration indicating that one of  
7 the class members whom Defendant's Motion sought to dismiss,  
8 Claudia Garcia ("Garcia"), had recently responded to the discovery  
9 requests. DeSario Decl. ¶ 10.<sup>2</sup> Defendant then agreed to drop  
10 Garcia from the list of class members it seeks to dismiss. Reply  
11 at 2 n.3. Plaintiffs later filed a supplemental declaration in  
12 support of their Opposition. See "Supp. DeSario Decl." In the  
13 supplemental declaration, Plaintiffs point out that Defendant's  
14 Motion erroneously seeks to dismiss two class members, Ruth E.  
15 Phipps ("Phipps") and Thomas Shaff ("Shaff"), who did in fact  
16 respond to the discovery requests. Id. ¶¶ 4-6. Defendant admits  
17 its mistake and has agreed to drop Phipps and Shaff from the  
18 Motion. ECF No. 276 ("Def.'s Obj. to DeSario Supp. Decl.") at 1.  
19 These developments leave 109 class members who remain subject to  
20 Defendant's Motion.

21 Plaintiffs' supplemental declaration also indicates that  
22 twenty of the final warning letters sent to class members were  
23 returned as undeliverable. Supp. DeSario Decl. ¶ 7. Plaintiffs  
24 ask the Court to exclude these class members from Defendant's  
25 Motion on the grounds that they did not receive the final warning  
26

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27 <sup>2</sup> Molly A DeSario, attorney for Plaintiffs, filed a declaration  
28 ("DeSario Decl."), ECF No. 269, and a supplemental declaration  
("Supp. DeSario Decl."), ECF No. 275, in support of Plaintiffs'  
Opposition.

1 letter. Id. at ¶ 8. Defendant argues that the Court should not  
2 entertain this argument because Plaintiffs' supplemental  
3 declaration violates Civil Local Rule 7-3(d). Def.'s Obj. to  
4 DeSario Supp. Decl. at 1.

5  
6 **III. Legal Standard**

7 Federal Rule of Civil Procedure 37(b)(2)(A)(v) authorizes a  
8 court to dismiss an action or proceeding in whole or in part if a  
9 party "fails to obey an order to provide or permit discovery."  
10 Rule 37(d)(3) also authorizes dismissal as a sanction for a party's  
11 failure to respond to interrogatories. The decision whether to  
12 impose sanctions under Rule 37 is within the district court's  
13 discretion. Halaco Eng'g Co. v. Costle, 843 F.2d 376, 379 (9th  
14 Cir. 1988).

15 The Ninth Circuit has established a five-part test for  
16 determining whether a case-dispositive sanction is warranted for a  
17 party's failure to comply with a discovery order. A district court  
18 must consider the following:

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

23 In Re Exxon Valdez, 102 F.3d 429, 433 (9th Cir. 1996). "The first  
24 two of these [five] factors favor the imposition of sanctions in  
25 most cases, while the fourth cuts against . . . a dismissal  
26 sanction. Thus the key factors are prejudice and the availability  
27 of lesser sanctions." Henry v. Gill Indus., Inc., 983 F.2d 943,  
28 948 (9th Cir. 1993) (internal citation omitted) (ellipsis in

1 original). The Ninth Circuit has also established three subparts  
2 for the fifth factor (the availability of less drastic sanctions):  
3 (1) whether the court considered lesser sanctions; (2) whether it  
4 tried the lesser sanctions; and (3) whether it warned the  
5 recalcitrant party about the possibility of case dispositive  
6 sanctions. Connecticut Gen. Life Ins. Co. v. New Images of Beverly  
7 Hills, 482 F.3d 1091, 1096 (9th Cir. 2007). The test is not  
8 mechanical. Rather, "[i]t provides the district court with a way  
9 to think about what to do, not a set of conditions precedent for  
10 sanctions or a script that the district court must follow." Id.  
11 Lastly, because dismissal of a plaintiff's action is a severe  
12 sanction, the Ninth Circuit has held that dismissal is only  
13 justified by a showing of "willfulness, bad faith, and fault." Id.

14

#### 15 **IV. DISCUSSION**

##### 16 **A. The Court Denies Defendant's Motion With Respect to the** 17 **Twenty Plaintiffs Who Did Not Receive the Final Warning**

18 The Court agrees with Plaintiffs that the claims of the twenty  
19 class members whose final warning letters were returned as  
20 undeliverable should not be dismissed. Defendant argues that the  
21 Court should not consider the evidence that these class members did  
22 not receive the warning letters because Plaintiffs' supplemental  
23 declaration violates Civil Local Rule 7-3(d). Civil Local Rule 7-  
24 3(d) prohibits the filing of additional papers without court  
25 approval once a reply brief has been filed, except in certain  
26 circumstances not present here. Defendant argues that Plaintiffs  
27 should have submitted the evidence of failed delivery with their  
28 Opposition.

1 Plaintiffs should have sought leave of the Court before filing  
2 their supplemental declaration. Nevertheless, in the interest of  
3 fairness to the class, the Court excuses the late filing and  
4 failure to seek leave of the Court and considers the supplemental  
5 declaration. The supplemental declaration states that the final  
6 warning letters mailed to twenty of the class members were returned  
7 as undeliverable, and Plaintiffs have attached copies of the  
8 envelopes returned as undeliverable. Supp. DeSario Decl. ¶ 7, Ex.  
9 F. The Court's November 19, 2010 Order required that a final  
10 warning letter be sent because the Court felt that class members  
11 should be given "one final opportunity to respond." Nov. 19, 2010  
12 Order at 3. Because the twenty class members at issue did not  
13 receive this final opportunity, the Court declines to dismiss their  
14 claims. Accordingly, Defendant's Motion to Dismiss is DENIED with  
15 regard to these class members.<sup>3</sup>

16 **B. The Court Grants the Motion With Regard to the Remaining**  
17 **Eighty-Nine Class Members Who Did Not Respond**

18 After the removal of Garcia, Shaff, and Phipps from  
19 Defendant's Motion by agreement of the parties, and in light of  
20 this Court's refusal to dismiss the claims of the twenty class  
21 members who did not receive the final warning letter, 89 of the  
22 original 112 class members who were originally the subject of  
23 Defendant's Motion remain to be addressed.

24 **1. The Ninth Circuit's Five-Part Test Supports Dismissal**

25 Four of the five factors established by the Ninth Circuit for  
26 determining whether case-dispositive sanctions are warranted favor  
27

28 <sup>3</sup> The names of the class members with regard to whom Defendant's  
Motion is DENIED are attached to this Order as Exhibit A.

1 dismissal here. The first and second factors -- the public's  
2 interest in expeditious resolution of litigation and the Court's  
3 need to manage its docket -- favor granting the motion so as to not  
4 delay this nearly four-year-old case any further. With regard to  
5 the third factor, Defendant has shown that it will suffer prejudice  
6 in its ability to defend the case if the non-responsive class  
7 members' claims are not dismissed. The lack of discovery responses  
8 would make it particularly difficult for Defendant to determine  
9 which class members to call as adverse witnesses or rebuttal  
10 witnesses at trial. Plaintiffs argue that this concern is  
11 unwarranted because Plaintiffs have already committed to providing  
12 full discovery for the class members who testify at trial. Opp'n  
13 at 15. This argument fails because one of the reasons Defendant  
14 seeks the discovery responses is to help it determine precisely  
15 which class members should testify at trial.<sup>4</sup> Defendant's lack of  
16 access to the discovery responses of the eighty-nine class members  
17 would also prejudice Defendant by preventing it from providing its  
18 experts with information that could prove critical to their  
19 analysis.

20 As is always the case with a motion seeking dismissal  
21 sanctions, the fourth factor -- the policy favoring the disposition  
22 of cases on their merits -- weighs against granting the instant  
23 motion. Nevertheless, in this case the other factors support  
24 granting the motion and outweigh the policy in favor of disposing  
25

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26 <sup>4</sup> Plaintiffs similarly argue that if the Court declines to deny  
27 Defendant's request for terminating sanctions it should at least  
28 continue the motion until after the selection of which class  
members will testify at trial. Opp'n at 17. Again, Plaintiffs  
miss the point that the discovery responses are necessary to  
guarantee the fairness of that selection process.



1 of cases on their merits.

2 The Court has considered lesser sanctions and finds that they  
3 would not be effective. Monetary sanctions would be difficult, if  
4 not impossible, to collect from the eighty-nine class members, and  
5 would do nothing to ameliorate the prejudice that Defendant would  
6 suffer as a result of the class members' failure to respond. The  
7 sanction of claim preclusion, authorized by Rule 37(b)(2)(A)(ii),  
8 is not a feasible option in this case either. Because the  
9 discovery at issue covers all of Plaintiffs' claims, precluding  
10 Plaintiffs from presenting the affected claims would be tantamount  
11 to dismissal. Moreover, the Court notes that the non-responsive  
12 class members received multiple warnings about the possibility of  
13 case-dispositive sanctions. The Court notes that it is not  
14 imposing the most severe sanction available. Rather, it dismisses  
15 the claims of the class members without prejudice, and will toll  
16 the statute of limitations for 120 days from this Order, so that  
17 class members who wish to do so may pursue their individual claims.  
18 The Court finds that it is imposing the least severe sanction that  
19 will be effective in this case.

20 Lastly, the Court finds that the requisite showing of  
21 willfulness, bad faith, and fault has been satisfied. All that is  
22 required to demonstrate willfulness, bad faith, and fault is  
23 "disobedient conduct not shown to be outside the control of the  
24 litigant." Henry, 983 F.2d at 948. The non-responsive class  
25 members have engaged in such disobedient conduct by repeatedly  
26 ignoring letters instructing them to respond to discovery and  
27 warning them that they would face dismissal of their claims if they  
28

1 failed to respond.<sup>5</sup>

2 2. Plaintiffs' Arguments in Opposition

3 Plaintiffs argue that Defendant's Motion should be denied  
4 because: (1) it is procedurally improper; (2) it is unsupported by  
5 relevant case law; (3) Defendant has failed to show willfulness,  
6 bad faith, or fault; and (4) Defendant will not suffer prejudice if  
7 the Motion is denied. The analysis above disposes of the latter  
8 two arguments, and the Court finds the former two unpersuasive.

9 Plaintiffs' various procedural arguments are unavailing.  
10 First, they contend that the Motion is improper because it does not  
11 comply with the requirements for a motion to dismiss under Federal  
12 Rule of Civil Procedure 12(b)(6). However, Defendant does not seek  
13 to dismiss a complaint for failure to state a claim. The Motion's  
14 caption makes clear that Defendant seeks dismissal as a sanction  
15 pursuant to Rule 37. Rule 37 expressly authorizes dismissal as a  
16 sanction for failure to respond to a discovery order. Fed. R. Civ.  
17 P. 37(b)(2)(A)(v). Plaintiffs apparently contend that the Motion  
18 should be denied because it contains the words "motion to dismiss"  
19 in the caption instead of "motion for sanctions." This argument  
20 borders on frivolity.

21 Next, Plaintiffs argue that Rule 37 only authorizes dismissal  
22 of "parties" and cannot be invoked to dismiss absent class members

23 <sup>5</sup> Plaintiffs argue that Defendant has not shown that the non-  
24 responsive class members ignored the discovery requests and warning  
25 letters because Defendant has not produced evidence that the class  
26 members actually received the discovery requests and warning  
27 letters. This argument fails because "[m]ail that is properly  
28 addressed, stamped, and deposited into the mail is presumed to be  
received by the addressee. . . The presumption can only be overcome  
by clear and convincing evidence that the mailing was not, in fact,  
accomplished." In re Bucknum, 951 F.2d 204, 207 (9th Cir. 1991).  
Plaintiffs have provided no evidence that the letters were not  
received.

1 who, Plaintiffs contend, are not "parties." As the Ninth Circuit  
2 has explained, class members are treated as parties for some  
3 procedural purposes but are not treated as parties for others. In  
4 re Cement Antitrust Litig., 688 F.2d 1297, 1309 (9th Cir. 1982).  
5 There is a circuit split with regard to whether class members are  
6 considered parties for Rule 37 purposes, and the Ninth Circuit has  
7 not ruled on the issue. Id. The strongest support for Plaintiffs'  
8 argument comes from the Eleventh Circuit. In Wainwright v. Kraftco  
9 Corp., 54 F.R.D. 532, 534 (N.D. Ga. 1972), the court held that  
10 class members were not parties and were thus not subject to  
11 discovery under the Federal Rules. The court noted, "[n]othing in  
12 Rule 23 suggests that class members are deemed 'parties' . . .  
13 Since discovery [pursuant to Rule 33 and Rule 34] may be had only  
14 against 'parties,' the court does not believe such discovery may be  
15 had from [class members other than the party-plaintiffs]." The  
16 court further stated that it perceived "serious constitutional  
17 problems with a decision that would dismiss with prejudice from a  
18 lawsuit people who were never made parties." Id.

19 By contrast, the Seventh Circuit has decided that class  
20 members are "parties" for the purposes of Rule 37. See Brennan v.  
21 Midwestern United Life Ins. Co., 450 F.2d 999, 1004 (7th Cir.  
22 1971). The movants in Brennan argued, as Plaintiffs do here, that  
23 class members are not "parties" and consequently are not subject to  
24 the "party" discovery procedures set forth in Rules 33 and 34. Id.  
25 Noting that the question was a difficult one, the Brennan court  
26 rejected this argument. Id. As further discussed below, the court  
27 invoked Rule 37 and dismissed with prejudice the claims of class  
28 members who failed to respond to court-authorized discovery

1 requests. The court reasoned that, while class members should not  
2 be required to submit to discovery "as a matter of course,"  
3 requiring them to respond to discovery in some cases is warranted.  
4 Id. In particular, the court reasoned that, in cases where  
5 discovery from class members is necessary or helpful to the proper  
6 adjudication of the suit, it should be allowed so long as it is not  
7 used as a tactic to reduce the number of claimants and adequate  
8 precautionary measures are taken to insure that class members are  
9 not misled or confused. Id. at 1004-05.

10 The Court finds the Brennan court's reasoning persuasive.  
11 Here, there is no evidence that Defendant's purpose in propounding  
12 the discovery requests was to reduce the number of claimants.  
13 Furthermore, Judge Spero oversaw the crafting of the requests to  
14 insure that they were not misleading or confusing. Moreover,  
15 unlike the district court order at issue in Brennan, the Court here  
16 dismisses the class members' claims without prejudice and tolls the  
17 statute of limitations so that they may proceed with individual  
18 claims if they so desire. This approach ameliorates the  
19 "constitutional problems with a decision that would dismiss [class  
20 members] with prejudice" that concerned the Kraftco court. 54  
21 F.R.D. at 534.

22 Plaintiffs next contend that the absent class members have not  
23 disobeyed a court order per se and therefore cannot be subject to  
24 sanctions under Rule 37, which provides for sanctions if a party  
25 "fails to obey an order to provide or permit discovery." Fed. R.  
26 Civ. P. 37(b)(2)(A). Plaintiffs argue that the Court's prior  
27 orders simply instructed class counsel to send certain  
28 communications to class members and did not order the class members

1 to do anything. Plaintiffs contend that Rule 37 does not authorize  
2 the Court to impose sanctions on the non-responsive class members  
3 because Plaintiffs' counsel, not the class members, was the subject  
4 of the order. This argument lacks merit. On June 9, 2010, Judge  
5 Spero explicitly ordered all class members to respond to discovery.  
6 ECF No. 201 (Transcript of June 9, 2010 hearing) at 29:18-21 ("All  
7 class members are required to respond by July 16th."). Moreover,  
8 the implication of Plaintiffs' argument is that, even though this  
9 Court authorized the sending of discovery requests to class members  
10 and instructed class counsel to warn them that "the Court will  
11 dismiss them from the class if they do not respond," the Court in  
12 fact lacks the power to back words with actions because it did not  
13 issue an order with each class member's name on it. Nov. 19, 2010  
14 Order at 3. The Court finds this reading of Rule 37(b)(2) too  
15 narrow. The Court further notes that Rule 37(d)(3), which  
16 authorizes the Court to impose dismissal as a sanction for failure  
17 to respond to interrogatories, provides an alternative basis for  
18 dismissal.

19 The last of Plaintiffs' procedural arguments is that requiring  
20 class members to respond to discovery imposes a de facto opt-in  
21 scheme in contravention of the opt-out scheme established by  
22 Federal Rule of Civil Procedure 23. This argument amounts to the  
23 contention that the Court should not have permitted Defendant to  
24 propound discovery upon the class members in the first place. The  
25 Court already ruled on that issue in its March 25, 2010 Order  
26 allowing discovery to be sent and will not revisit that decision  
27 here.

28 Plaintiffs' non-procedural arguments are similarly

1 unpersuasive. They contend that the case law does not support  
2 Defendant's motion. However, they provide no controlling authority  
3 to support their argument that Rule 37 does not authorize dismissal  
4 of class members for failure to respond to discovery requests.  
5 Indeed, neither Plaintiffs nor Defendant points to controlling  
6 authority on this issue. The primary cases from this circuit  
7 discussed by the parties deal with whether discovery directed to  
8 absent class members should be allowed in the first place. See  
9 Tierno v. Rite Aid Corp., 2008 U.S. Dist. LEXIS 112461, \*20 (N.D.  
10 Cal. July 8, 2008) (denying defendant's request to depose one  
11 hundred class members); McPhail v. First Command Fin. Planning,  
12 Inc., 251 F.R.D. 514, 515 (S.D. Cal. 2008) (denying defendant's  
13 request to send discovery to absent class members). Again, this  
14 Court has already permitted discovery to be sent to class members  
15 and will not revisit that decision.

16 The Court again finds the Seventh Circuit's decision in  
17 Brennan persuasive authority in favor of dismissal. The absent  
18 class members in Brennan had been sent the written discovery along  
19 with a memorandum explaining the reasons for the discovery  
20 requests, advising them of the deadline for responding and  
21 encouraging them to seek the advice of counsel. 450 F.2d at 1002.  
22 The court subsequently issued an order to show cause why the claims  
23 of class members who had not responded should not be dismissed with  
24 prejudice. Id. Plaintiffs' counsel sent the non-responsive class  
25 members copies of the show-cause order along with a letter warning  
26 them that their claims would be dismissed if they did not respond.  
27 Id. When the deadline for responding passed, the court granted the  
28 defendants' motion to dismiss with prejudice the claims of the non-

1 responsive class members. Id. The Seventh Circuit affirmed,  
2 noting that "movants ignored repeated requests that they comply  
3 with the discovery orders." Id. at 1004 n.2.

4 Here, as in Brennan, the non-responsive class members ignored  
5 repeated requests that they comply with discovery. Moreover, this  
6 Court's ruling is substantially more lenient than the court's in  
7 Brennan. While the class members in Brennan were sent a single  
8 warning letter, the class members here received two warning letters  
9 in addition to the initial discovery requests. More importantly,  
10 unlike the Brennan court, this Court today dismisses without  
11 prejudice the claims of the non-responsive class members.

12 Plaintiffs' attempts to distinguish Brennan are not  
13 compelling. They note that the class members dismissed in Brennan  
14 were subject to a court order to show cause, and plaintiffs'  
15 counsel mailed each class member a copy of that order. They  
16 contend that the gravity of a class member receiving a court order  
17 with his or her name on it would have a greater impact than a  
18 warning notice from class counsel. While this may be so, the Court  
19 finds multiple letters from the class members' own attorney warning  
20 them of the possibility of dismissal should have been a sufficient  
21 incentive to compel a response.

22 Plaintiffs also contend that the class members in Brennan  
23 received actual notice, whereas here Defendant has allegedly not  
24 shown that the class members actually received the multiple warning  
25 letters. This argument fails. The Ninth Circuit has made clear  
26 that "[m]ail that is properly addressed, stamped, and deposited  
27 into the mail is presumed to be received by the addressee . . . The  
28 presumption can only be overcome by clear and convincing evidence

1 that the mailing was not, in fact, accomplished." In re Bucknum,  
2 951 F.2d 204, 207 (9th Cir. 1991). Plaintiffs have provided no  
3 evidence that the eighty-nine class members at issue did not  
4 receive the discovery requests and warning notices.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS IN PART and DENIES  
3 IN PART the Motion to Dismiss Claims of Class Members Who Failed to  
4 Respond to Discovery filed by Defendant Dollar Tree Stores, Inc.  
5 The Court DENIES the Motion with regard to the twenty class  
6 members, listed in Exhibit A attached to this Order, whose final  
7 warning letters were returned as undeliverable. The Court GRANTS  
8 the Motion with regard to the remaining eighty-nine class members,  
9 listed in Exhibit B attached to this Order, named in the Motion.  
10 The claims of those eighty-nine class members are hereby dismissed  
11 without prejudice.

12 The Court also invokes its equity powers to toll the statute  
13 of limitations on the claims of the eighty-nine class members whose  
14 claims are dismissed in order to preserve their right to pursue  
15 individual claims against Dollar Tree. The statute of limitations  
16 is hereby tolled for 120 days from the date of this Order.  
17 Plaintiffs' counsel shall so notify the affected class members  
18 within ten days of this Order and shall file a declaration with the  
19 Court within thirty days of this Order confirming that they have  
20 done so.

21 IT IS SO ORDERED.

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23 Dated: March 8, 2011

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26 UNITED STATES DISTRICT JUDGE  
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EXHIBIT A

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The Court DENIES Defendant's Motion to Dismiss with regard to the following class members:

1. Alicia Barkley
2. Brenda Anderson
3. Charles Jones
4. Chris Dean
5. Christy Camacho
6. Deborah Wiebe
7. Diane Ashley
8. Eleazar Reyes
9. Elizabeth Yoder
10. Eloisa Buitron
11. Gary Ferguson
12. Hope Brewer
13. Kathryn Hansson
14. Kenneth Galle
15. Killian Nowden
16. Latuya Hobill
17. Nephtali Mendoza
18. Richard Handrich
19. Rob Lewis
20. Tim Luddington

EXHIBIT B

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The Court GRANTS Defendant's Motion to Dismiss with regard to the following class members. The claims of the following class members are hereby dismissed without prejudice:

1. Le'ann Alarcon
2. Jesus Alejandre
3. Robin Baker
4. Robert Beights
5. Eric Bent
6. Jeffrey Braun
7. Rosemary Carlos
8. Shawn Cassidy
9. Kim Castellanos
10. Karen Cohen
11. Amanda Coker
12. Mike Cossolotto
13. William Cramer
14. David Cross
15. William Curtis
16. Gregg Daggett
17. Deann Dasher
18. Sally Delcastillo
19. Elaine Edwards
20. Jen Edwards
21. James Ellis
22. Teresa Fletcher

**United States District Court**  
For the Northern District of California

- 1 23. Kathy Fortune
- 2 24. Cindy Fukuhara
- 3 25. Mark Gabellini
- 4 26. Eric S. Garcia
- 5 27. Mireya Gomez
- 6 28. Gabriela Gonzalez
- 7 29. Wilber Gonzalez
- 8 30. Bikira Green
- 9 31. Jean M. Gregg
- 10 32. Rachel Haines
- 11 33. Evelyn Hanson
- 12 34. Kent Harwood
- 13 35. Steven Hensley
- 14 36. Danny Herrera
- 15 37. Naomi Star Hodgkins
- 16 38. Christina Hoes
- 17 39. William Huffer
- 18 40. Larry Huffstetler
- 19 41. Ron Jacobs
- 20 42. Chris James
- 21 43. Kirk Jansen
- 22 44. Hope Jennings
- 23 45. Betty Johnson
- 24 46. Maria Juarez
- 25 47. Steve Kuhn
- 26 48. Ray Kienitz
- 27 49. Landon Kouba
- 28 50. Racheal Leggans

**United States District Court**  
For the Northern District of California

- 1 51. Tina Lipnicki
- 2 52. David Martin
- 3 53. Ricky Martin
- 4 54. Jesus Martinez
- 5 55. Sonia Martinez
- 6 56. Paul Massey
- 7 57. Adam Mcfarland
- 8 58. Rafael Mejia
- 9 59. Janice Melo
- 10 60. Jason Millstone
- 11 61. Oscar Molina
- 12 62. Miguel Munoz
- 13 63. Tom Nelson
- 14 64. Amy Osborn
- 15 65. Vaensa Pan
- 16 66. Michelle Panattoni
- 17 67. Michael Pastrone
- 18 68. Joseph Prophet
- 19 69. Brandon Raes
- 20 70. Valentin Ramirez
- 21 71. Lorie Reyes (Kiefer)
- 22 72. David N. Robson
- 23 73. Monica Rosas
- 24 74. Norman Saban
- 25 75. Brandon Salazar
- 26 76. Jules Sanchez
- 27 77. Heidi Semenza
- 28 78. Susan Sigler

- 1 79. Brian A. Sjostrand
- 2 80. Billie Soto
- 3 81. Steven Taylor
- 4 82. Christina Valdez
- 5 83. Mike Van Buren
- 6 84. Joseph Vara
- 7 85. Edwin H. Walthall
- 8 86. Patti Wenzel
- 9 87. Kip Whiteacre
- 10 88. Robert Willey
- 11 89. Pat Woolweaver
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