

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN LIP BALM PRODUCTS,  
CONTAINERS FOR LIP BALM, AND  
COMPONENTS THEREOF

Inv. No. 337-TA-961

**ORDER No. 5: INITIAL DETERMINATION GRANTING MOTION TO  
TERMINATE THE DOLLAR TREE RESPONDENTS BASED ON  
SETTLEMENT AGREEMENT AND GRANTING MOTION TO  
STAY INTERIM DEADLINES PENDING TERMINATION**

(July 29, 2015)

**INTRODUCTION**

On July 22, 2015, Complainants eos Products, LLC and The Kind Group LLC moved, pursuant to 19 C.F.R. § 210.21(b), to terminate the investigation as to Respondents Dollar Tree, Inc. and Dollar Tree Stores, Inc. (collectively, "Dollar Tree") based on a settlement agreement. (Motion Docket No. 961-001.) Complainants also moved to stay all interim deadlines with respect to the Dollar Tree Respondents pending the Commission's final disposition of the present Initial Determination. (*Id.*) None of the parties opposes Complainants' motion. On July 29, 2015, the Commission Investigative Staff ("Staff") filed a response in support of Complainants' motion to terminate and to stay.

**STANDARDS OF LAW**

Under Commission Rule 210.21(a)(2),

[a]ny party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement.

19 C.F.R. § 210.21(a)(2).

Commission Rule 210.21(b)(1) further specifies that the motion to terminate must include: (1) copies of the licensing or other settlement agreement; (2) any supplemental agreements; and (3) a statement that there are no other agreements, written or oral, express or implied, between the parties concerning the subject matter of the investigation. 19 C.F.R. § 210.21(b)(1).

Pursuant to Commission Rule 210.50(b)(2), I must also consider and make appropriate findings regarding the effect of the proposed termination on the public interest. 19 C.F.R. § 210.50(b)(2).

### **DISCUSSION**

Complainants' motion to terminate was publicly filed and included an unredacted copy of the settlement agreement with the Dollar Tree Respondents (Exhibit 1, hereto). Complainants have also represented that "there are no other agreements, written or oral, express or implied, between Complainants and Dollar Tree concerning the subject matter of this Investigation." (See Complainants' Mot. at 2.) Accordingly, I find that the requirements of Commission Rule 210.50(b)(1) have been met.

With regard to the public interest, I do not find any information indicating that termination of this investigation on the basis of the settlement agreement is contrary to the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. To the contrary, I find that termination of the Dollar Tree Respondents is in the public interest and will conserve public and private resources. See, e.g., *Certain Consumer Elecs., Including Mobile Phones and Tablets*, Inv. No. 337-TA-839, Order No. 35, 2013 WL 453756, \*2 (Feb. 4, 2013) ("[T]ermination of

litigation under these circumstances as an alternative method of dispute resolution is generally in the public interest and will conserve public and private resources.”).

**CONCLUSION**

Accordingly, for the reasons above, it is my Initial Determination to GRANT Complainants’ motion to terminate (Motion Docket No. 961-001), and the Dollar Tree Respondents are hereby terminated from this investigation. Additionally, Complainants’ motion to stay the interim deadlines with respect to the Dollar Tree Respondents pending the Commission’s final disposition of the present Initial Determination is also GRANTED.

This Initial Determination, along with any supporting documentation, is hereby certified to the Commission. Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

**SO ORDERED.**



Thomas B. Pender  
Administrative Law Judge

# **EXHIBIT 1**

## SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into and effective on the date of last signature hereof ("Effective Date") between **eos Products, LLC** together with its corporate parent **The Kind Group LLC**, each a New York corporation having a principal place of business is 19 West 44th Street, Suite 811, New York, NY 10036 (collectively, "EOS") on the one hand and **Dollar Tree Stores, Inc.** together with its corporate parent **Dollar Tree, Inc.**, each a Virginia corporation having a principal place of business at 500 Volvo Parkway, Chesapeake, VA 23320 (collectively, "Dollar Tree") on the other hand. EOS and Dollar Tree are sometimes referred to individually herein as a "Party" and collectively as the "Parties."

WHEREAS, on June 4, 2015, EOS filed a Complaint in the U.S. District Court for the District of Delaware captioned *eos Products, LLC v. OraLabs, Inc. et al.*, Case No. 1:15-cv-00453 (the "Delaware Litigation") and on June 12, 2015, EOS filed a Complaint under section 337 of the Tariff Act of 1930 with the United States International Trade Commission (the "ITC Litigation"), which both name as defendant Dollar Tree and are pending (collectively, the "Litigations"); and

WHEREAS, the Parties hereto desire to settle the Litigations with respect to each other and enter into this Agreement.

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, EOS and Dollar Tree agree to the following terms and conditions:

1. Discontinued Activities by Dollar Tree. Dollar Tree agrees that, except for lip balm products obtained from EOS or duly licensed by EOS, it will not:
  - a) make, have made, use, sell, offer for sale, or import the products accused in the Litigations, or any products that are substantially similar thereto, until the expiration of EOS's U.S. Patent No. 8,888,391 except with respect to (i) any claim for which there has been a final non-appealable judgment or determination that such claim is invalid or unenforceable or (ii) any product for which there has been a final non-appealable judgment or determination of non-infringement with respect to the claims of this patent;
  - b) make, have made, use, sell, offer for sale, or import products that are the same or substantially similar to EOS's U.S. Design Patent No. 644,939, until the expiration thereof, except (i) if there has been a final non-appealable judgment or determination that the single claim of this patent is invalid or unenforceable or (ii) with respect to any product for which there has been a final non-appealable judgment or determination of non-infringement with respect to the single claim of this patent; or
  - c) use EOS's Trade Dress (including, but not limited to, as product packaging and/or in connection with the promotion, marketing, advertising and sale of products) or any colorable imitation thereof, or any similar trade dress, as long as EOS's Trade Dress is enforceable, with EOS's Trade Dress defined as the

**Error! Unknown document property name.**

overall appearance of an egg-shaped plastic lip balm container, unless there has been a final non-appealable judgment or determination holding that (i) EOS's Trade Dress is unenforceable or invalid; or (ii) the product does not infringe EOS's Trade Dress.

2. Phase-Out Period. EOS grants to Dollar Tree a phase-out period of thirty (30) calendar days from the Effective Date during which time Dollar Tree is permitted to sell its remaining stock of lip balm products otherwise subject to the limitations of Section 1 above.

3. Dismissal of Litigations. Upon execution of the Agreement, EOS shall within five (5) business days (a) dismiss all claims with prejudice against Dollar Tree in the Delaware Litigation and (b) either notify the ITC in writing not to institute the ITC Litigation against Dollar Tree or otherwise terminate Dollar Tree from the ITC Litigation, as appropriate in view of the Effective Date of this Agreement (i.e., whether an investigation has already been instituted by that date) and any instructions from the ITC concerning how to remove Dollar Tree as a respondent in the ITC Litigation.

4. Release. Each Party shall, upon execution of the Agreement, forever and irrevocably release, absolve and discharge the other Party from any and all claims, demands, charges, complaints, actions, suits, causes of action, damages, judgments and liabilities of whatever kind or nature, in law, equity or otherwise, whether known or unknown, whether suspected or unsuspected, foreseen or unforeseen, which the respective Party now has, owns or holds, or claims to have or hold or which the respective Party at any time heretofore had, owned or held, or claimed to have, own or hold, against the other Party relating to any event, act or omission or claim occurring prior to or as of the execution date of the Agreement arising out of or relating to (a) any of the Parties' claims pled in the Litigations including with respect to EOS's U.S. Patent No. 8,888,391, (b) EOS's U.S. Design Patent No. 644,939, and (c) EOS's Trade Dress.

5. Costs and Attorney's Fees. The Parties agree that they shall bear their own costs and attorneys' fees relating to the Litigations and relating to the negotiation of this Agreement.

6. Disputes. The Parties shall endeavor to amicably settle any dispute that may arise under this Agreement. If senior management is unable to resolve a dispute within a reasonable time not less than twenty (20) business days after notice as provided herein, the Parties agree (a) that all disputes and litigation regarding this Agreement, its construction and matters connected with its performance be subject to the exclusive jurisdiction of the federal court in the District of Delaware (the "Court"), and (b) to submit any disputes, matters of interpretation, or enforcement actions arising with respect to the subject matter of this Agreement exclusively to the Court. The Parties shall first engage in alternative dispute resolution provided by the Court, if available. The Parties hereby waive any challenge to the jurisdiction or venue of the Court over these matters.

7. Representations and Warranties. EOS and Dollar Tree each represent and warrant that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individuals executing this Agreement are authorized to sign on behalf of their respective Party.

8. Affiliates. As used in this Agreement, "EOS" and "Dollar Tree" each shall include Affiliates thereof, and the term "Affiliate" shall mean any corporation, partnership or other business organization which EOS or Dollar Tree, as the case may be, directly or indirectly controls, or any corporation, partnership or other business organization by which EOS or Dollar Tree, respectively, is controlled or is under common control with. For the purpose of this Agreement, control shall mean the holding of a substantial ownership interest as permitted by the applicable laws or regulations of the jurisdiction where such entity is located.

9. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be delivered by hand, or if dispatched by prepaid air courier with package tracing capabilities or by registered or certified airmail, postage prepaid. Notices to EOS or Dollar Tree shall be sent, respectively, to EOS's Managing Partner and Dollar Tree's Chief Legal Officer, at their respective addresses on the first page hereof. Such notices shall be deemed to have been served when received by addressee. Either Party may give written notice of a change of address or individual to whom notice shall be sent and, after notice of such change has been received, any notice or request shall thereafter be given to such Party as above provided at such changed address or individual.

10. Governing Law. This Agreement and matters connected with the performance thereof shall be construed, interpreted, applied and governed in all respects in accordance with the laws of the United States of America and the State of Delaware, without reference to conflict of laws principles.

11. No Partnership. This Agreement shall not be construed as creating any partnership, joint venture or other legal relationship between the Parties.

12. Sophisticated Parties Represented by Counsel. The Parties each acknowledge, accept, warrant and represent that (i) they are sophisticated Parties represented at all relevant times during the negotiation and execution of this Agreement by counsel of their choice, and that they have executed this Agreement with the consent and on the advice of such independent legal counsel, and (ii) they and their counsel have determined through independent investigation and robust, arm's-length negotiation that the terms of this Agreement shall exclusively embody and govern the subject matter of this Agreement. Each Party acknowledges that it has entered into this Agreement freely and voluntarily and that it had the opportunity to seek the benefit of counsel in entering into this Agreement

13. Severability. If any provision of this Agreement is held to be illegal or unenforceable, such provision shall be limited or eliminated to the minimum extent necessary so that the remainder of this Agreement will continue in full force and effect and be enforceable. The Parties agree to negotiate in good faith an enforceable substitute provision for any invalid or unenforceable provision that most nearly achieves the intent of such provision.

14. Entire Agreement. This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any prior agreements between them as related to the subject matter of this Agreement. This Agreement can only be amended or altered in a writing signed by the Parties. Any waiver hereunder must be in writing and signed by the Parties.

15. Interpretation and Successors-in-Interest. This Agreement is for the benefit of and is binding on the Parties and their respective heirs, administrators, representatives, agents, successors, assigns and Affiliates. The language of all parts of this Agreement will in all cases be interpreted as if each Party were the drafter of this Agreement, and according to its fair meaning.

16. No Admission of Liability. This Agreement is a compromise and settlement of disputed claims and such compromise and settlement shall not be taken as an admission of liability on the part of any Party to this Settlement Agreement, but rather, any such liability is expressly denied. Neither this Settlement Agreement nor any of the terms hereof shall be offered or received in evidence in any action or proceeding, or be otherwise used, as an admission or concession of liability of wrongdoing of any nature on the part of any of the Parties.

17. Delay. No Party to this Agreement shall be liable for delay or failure in the performance of any of its obligations hereunder if such delay or failure is due to causes beyond its reasonable control, including, without limitation, acts of God, fires, earthquakes, strikes and labor disputes, acts of war, civil unrest, or intervention of any governmental authority, but any such delay or failure shall be remedied by such Party as soon as is reasonably possible.

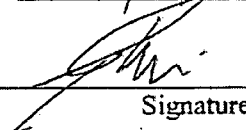
18. Headings. Titles or headings of paragraphs contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or prescribe the scope of this Agreement or the intent of any provision.

19. Counterparts. This Agreement may be executed in counterparts or duplicate originals, all of which shall be regarded as one and the same instrument, and which shall be the official and governing version in the interpretation of this Agreement. This Agreement may be executed by facsimile signatures and such signatures shall be deemed to bind each Party as if they were original signatures.

*eos Products, LLC and The Kind Group LLC:*      *Dollar Tree Stores, Inc. and Dollar Tree, Inc.:*

Dated: 7/10/15

Dated: 7/10/15

By:   
Signature

By:   
Signature

Sanjiv Mehra  
Managing Partner

ROBERT H. RUDMAN  
Printed Name

CMO  
Title



**CERTAIN LIP BALM PRODUCTS,  
CONTAINERS FOR LIP BALM, AND  
COMPONENTS THEREOF**

**Inv. No. 337-TA- 961**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 5** has been served by hand upon the **Commission Investigative Attorney, Peter Sawert, Esq.**, and the following parties as indicated, on 7/29/2015



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
500 E Street, SW, Room 112  
Washington, DC 20436

**On Behalf of Complainants EOS Products, LLC and The Kind Group LLC:**

Louis S. Mastriani, Esq.  
ADDUCI, MASTRIANI & SCHAUMBERG, LLP  
1133 Connecticut Avenue, N.W., 12 Floor  
Washington, DC 20036

- Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: \_\_\_\_\_

**On Behalf of Respondents Five Below Inc., OraLabs, Inc.; CVS Health Corporation; CVS Pharmacy, Inc., Walgreens Boots Alliance, Inc.; Walgreen Co.; Wuxi Sunmart Science and Technology Co., Ltd.; and Wuxi Sunmart Plastic Co., Ltd.:**

Jeremy A. Younkin  
FOLEY HOAG LLP  
Seaport West  
155 Seaport Boulevard  
Boston, Massachusetts 02210-2600

- Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: \_\_\_\_\_

**DOLLAR TREE, INC.**  
500 Volvo Parkway  
Chesapeake, VA 23320

- Via Hand Delivery  
 Via Express Delivery  
 Via First Class Mail  
 Other: \_\_\_\_\_

**CERTAIN LITHIUM METAL OXIDE CATHODE  
MATERIALS, LITHIUM-ION BATTERIES FOR POWER  
TOOL PRODUCTS CONTAINING SAME, AND POWER  
TOOL PRODUCTS WITH LITHIUM-ION BATTERIES  
CONTAINING SAME**

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Certificate of Service – Page 2

**DOLLAR TREE STORES, INC**  
500 Volvo Parkway  
Chesapeake, VA 23320

- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: \_\_\_\_\_