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8 Attorneys for Plaintiff Environmental Research Center

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ENVIRONMENTAL RESEARCH CENTER,
12 a California non-profit corporation

13 Plaintiff,

14 vs.

15 IDEAL SHAPE, LLC and DOES 1-100

16 Defendants.

CASE NO.

RG13704155

COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF AND
CIVIL PENALTIES

[Miscellaneous Civil Complaint (42)]
Proposition 65, Health & Safety Code
Section 25249.5 et seq.]

17 Plaintiff Environmental Research Center hereby alleges:

18 I

19 INTRODUCTION

20 1. Plaintiff Environmental Research Center (hereinafter "Plaintiff" or "ERC") brings this
21 action as a private attorney general enforcer and in the public interest pursuant to Health & Safety
22 Code section 25249.7, subdivision (d). This complaint seeks injunctive and declaratory relief and
23 civil penalties to remedy Defendant Ideal Shape, LLC and Does 1-100 (hereinafter "Ideal Shape")'s
24 failure to warn consumers that they have been exposed to lead from several of Ideal Shape's
25 nutritional health products. Lead is a chemical known to the State of California to cause cancer,
26 birth defects and other reproductive harm. Based on the Safe Drinking Water and Toxic
27
28

1 Enforcement Act of 1986 (Health & Safety Code section 25249.5 *et seq.*) also known as
2 "Proposition 65," businesses with ten or more employees must provide a "clear and reasonable
3 warning" prior to exposing persons to these chemicals.

4 **II**

5 **PARTIES**

6 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes,
7 helping safeguard the public from health hazards by reducing the use and misuse of hazardous and
8 toxic chemicals, facilitating a safe environment for consumers and employees and encouraging
9 corporate responsibility.

10 3. Defendant Ideal Shape is a business that distributes and/or sells nutritional health
11 products that have exposed users to lead in the State of California within the relevant statute of
12 limitations period. These "Covered Products" are Ideal Shape LLC Ideal Shape Ideal Shake Meal
13 Replacement Shake Chocolate, Ideal Shape LLC Ideal Shape Meal Replacement Shake Vanilla, and
14 Ideal Shape LLC Ideal Bar Enhanced Hunger Blocker Double Chocolate. Ideal Shape is a company
15 subject to Proposition 65 as it employs ten or more persons.

16 4. Defendants Does 1-100, are named herein under fictitious names, as their true names and
17 capacities are unknown to ERC. ERC is informed and believes, and thereon alleges, that each of
18 said Does is responsible, in some actionable manner, for the events and happenings hereinafter
19 referred to, either through said Defendant's conduct, or through the conduct of its agents, servants or
20 employees, or in some other manner, causing the harms alleged by ERC in this complaint. When
21 said true names and capacities of Does are ascertained, ERC will seek leave to amend this complaint
22 to set forth the same.

23 **III**

24 **JURISDICTION AND VENUE**

25 5. This Court has jurisdiction pursuant to California Constitution Article VI, Section 10
26 because this case is a cause not given by statute to other trial courts.

27 6. The Complaint is based on allegations contained in a Notice of Violation dated May
28 17, 2013, served on the California Attorney General, other public enforcers and Ideal Shape. A

1 true and correct copy of the Notice of Violation is attached as Exhibit A. More than 60 days
2 have passed since the Notice of Violation was mailed and no public enforcement entity has filed
3 a complaint in this case.

4 7. This Court is the proper venue for the action because the causes of action have arisen in
5 the County of Alameda where some of the violations of law have occurred. Furthermore, this Court
6 is the proper venue under Code of Civil Procedure section 395.5 and Health & Safety Code section
7 25249.7.

8 **IV**

9 **STATUTORY BACKGROUND**

10 **A. Proposition 65**

11 8. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative statute
12 passed as "Proposition 65" by an overwhelming majority vote of the people in November of 1986.

13 9. The warning requirement of Proposition 65 is contained in Health & Safety Code section
14 25249.6, which provides:

15 No person in the course of doing business shall knowingly and intentionally expose
16 any individual to a chemical known to the state to cause cancer or reproductive
17 toxicity without first giving clear and reasonable warning to such individual, except
as provided in Section 25249.10.

18 10. Implementing regulations for Proposition 65 define expose as "to cause to ingest,
19 inhale, contact via body surfaces or otherwise come into contact with a listed chemical." An
20 individual may come into contact with a listed chemical through water, air, food, consumer products
21 and any other environmental exposure as well as occupational exposures." (Cal. Code Regs., tit. 27,
22 § 25102, subd. (i).)

23 11. In this case, the exposures at issue are caused by consumer products. Implementing
24 regulations for Proposition 65 define a consumer product exposure as "an exposure which results
25 from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of
26 a consumer good, or any exposure that results from receiving a consumer service." (Cal. Code
27 Regs., tit. 27, § 25602, subd. (b).)

28 12. Whenever a clear and reasonable warning is required under Health & Safety Code

1 section 25249.6, the "method employed to transmit the warning must be reasonably calculated
2 considering the alternative methods available under the circumstances, to make the warning
3 message available prior to exposure." (Cal. Code Regs., tit. 27, § 25601.) The warning requirement
4 may be satisfied by a warning that appears on a product's label or other labeling, shelf labeling,
5 signs, a system of signs, public advertising identifying the system and toll-free information services,
6 or any other, system, that provides clear and reasonable warnings. (Cal. Code Regs., tit. 27, §
7 25603.1, subd. (a)-(d).)

8 13. Proposition 65 establishes a procedure by which the State is to develop a list of
9 chemicals "known to the State to cause cancer or reproductive toxicity." (Health & Safety Code,
10 § 25249.8.) There is no duty to provide a clear and reasonable warning until 12-months after the
11 chemical was published on the State list. (Health & Safety Code, § 25249.10, subd. (b).) Lead
12 was listed as a chemical known to the State of California to cause developmental toxicity in the
13 fetus and male and female reproductive toxicity on February 27, 1987. Lead was listed as a
14 chemical known to the State of California to cause cancer on October 1, 1992. (Cal. Code Regs., tit.
15 27, § 27001.)

16 14. The Maximum Allowable Dose Level for lead as a chemical known to cause
17 reproductive toxicity is 0.5 micrograms per day. (Cal. Code Regs., tit. 27, § 25805.) The No
18 Significant Risk Level for lead as a carcinogen is 15 micrograms per day. (Cal. Code Regs., tit.
19 27, § 25705.)

20 15. Proposition 65 may be enforced by any person in the public interest who provides
21 notice sixty days before filing suit to both the violator and designated law enforcement officials.
22 The failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed
23 pursuant to Health & Safety Code section 25249.7, subdivisions (c) and (d).

24 16. Proposition 65 provides that any person "violating or threatening to violate" Proposition
25 65 may be enjoined in any court of competent jurisdiction. (Health & Safety Code, § 25249.7,
26 subd. (a).) To "threaten to violate" means "to create a condition in which there is a substantial
27 probability that a violation will occur." (Health & Safety Code, § 25249.11, subd. (e).)

1 Furthermore, violators are subject to a civil penalty of up to \$2,500 per day for each violation.
2 (Health & Safety Code, § 25249.7, subd. (b)(1).

3
4 V

5 **STATEMENT OF FACTS**

6 17. Ideal Shape has distributed and/or sold the Covered Products containing lead into the
7 State of California. Consumers have been ingesting these products for many years, without any
8 knowledge of their exposure to lead, a very dangerous chemical.

9 18. For many years, Ideal Shape has knowingly and intentionally exposed numerous
10 persons to lead. Ideal Shape has at all times relevant hereto been aware that the Covered Products
11 contained lead and that persons using these products have been exposed to the chemical.

12 19. Ideal Shape has been aware of the lead in the Covered Products and has failed to
13 disclose the presence of this chemical to the public, who undoubtedly believed they have been
14 ingesting totally healthy and pure products. Both prior and subsequent to ERC's Notice of
15 Violation, Ideal Shape failed to provide consumers of the Covered Products with a warning that
16 they have been exposed to a chemical known to the State of California to cause cancer, birth defects
17 and other reproductive harm.

18 **FIRST CAUSE OF ACTION**

19 **(Violation of Section 25249.6 of the Health and Safety Code, Failure to Provide Clear
20 and Reasonable Warning under Proposition 65)**

21 20. ERC refers to paragraphs 1-19, inclusive, and incorporates them herein by this
22 reference.

23 21. By committing the acts alleged above, Ideal Shape has, in the course of doing business,
24 knowingly and intentionally exposed users of the Covered Products to lead, a chemical known to
25 the State of California to cause cancer, birth defects and other reproductive harm without first giving
26 clear and reasonable warning to such individuals, within the meaning of Health & Safety Code
27 section 25249.6.

28 22. Said violations render Ideal Shape liable for civil penalties up to \$2,500 per day, for
each violation.

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2
3 **SECOND CAUSE OF ACTION**

4 **(Declaratory Relief)**

5 23. ERC refers to paragraphs 1-22, inclusive, and incorporates them herein by this
6 reference.

7 24. There exists an actual controversy relating to the legal rights and duties of the parties,
8 within the meaning of Code of Civil Procedure section 1060, between ERC and Ideal Shape
9 concerning whether Ideal Shape has exposed individuals to a chemical known to the State of
10 California to cause cancer, birth defects and other reproductive harm without providing clear and
11 reasonable warning.

12 **VI**

13 **PRAYER**

14 WHEREFORE ERC prays for relief as follows:

15 1. On the First Cause of Action, for civil penalties for each and every violation according to
16 proof;

17 2. On the First Cause of Action, and pursuant to Health & Safety Code section 25249.7,
18 subdivision (a), for such temporary restraining orders, preliminary and permanent injunctive orders,
19 or other orders, prohibiting Ideal Shape from exposing persons to lead without providing clear and
20 reasonable warning;

21 3. On the Second Cause of Action, for a declaratory judgment pursuant to Code of Civil
22 Procedure section 1060 declaring that Ideal Shape has exposed individuals to a chemical known to
23 the State of California to cause, birth defects and other reproductive harm without providing clear
24 and reasonable warning; and

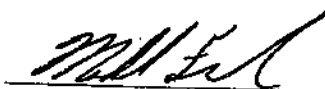
25 4. On all Causes of Action, for reasonable attorneys' fees pursuant to section 1021.5 of the
26 Code of Civil Procedure or the substantial benefit theory;

27 5. For costs of suit herein; and

28 6. For such other relief as the Court may deem just and proper.

1 Dated: November 14, 2013

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3 By



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5 Michael Freund
6 Ryan Hoffman
7 Attorneys for Environmental Research Center
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LAW OFFICE OF
MICHAEL FREUND

RYAN HOFFMAN
ATTORNEY AT LAW
1919 ADDISON STREET, SUITE 105
BERKELEY, CALIFORNIA 94704-1101

TEL (510) 540-1992
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EMAIL RRIHOFFMA@GMAIL.COM

May 17, 2013

**NOTICE OF VIOLATIONS OF
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET SEQ.
(PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center ("ERC"), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. ERC's Executive Director is Chris Heptinstall. ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

ERC has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Health and Safety Code Section 25249.7(d), ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with this letter served to the alleged Violator identified below.

Alleged Violator. The name of the company covered by this notice that violated Proposition 65 (hereinafter the "Violator") is:

Ideal Shape, LLC

Consumer Products and Listed Chemicals. The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

IdealShape LLC Ideal Shape Ideal Shake Meal Replacement Shake Chocolate – Lead
IdealShape LLC Ideal Shape Meal Replacement Shake Vanilla – Lead
IdealShape LLC Ideal Bar Enhanced Hunger Blocker Double Chocolate – Lead

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

Exhibit A

May 17, 2013

Page 2

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least May 17, 2010, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; and (2) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



Ryan Hoffman

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Ideal Shape, LLC and its Registered Agent for Service of Process only)

Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

Re: Environmental Research Center's Notice of Proposition 65 Violations by Ideal Shape, LLC

I, Ryan Hoffman, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.

2. I am an attorney for the noticing party.

3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemicals that are the subject of the notice.

4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.

5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: May 17, 2013



Ryan Hoffman

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On May 17, 2013, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO
Ideal Shape, LLC
921 West 500 North
Lindon, UT 84042

David A. Meine
(Ideal Shape, LLC's Registered
Agent for Service of Process)
176 Dry Canyon
Lindon, UT 84042

On May 17, 2013, I electronically served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** on the following party by uploading a true and correct copy thereof on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Oakland, CA 94612-0550

On May 17, 2013, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the Service List attached hereto, and depositing it at a U.S. Postal Service Office with the postage fully prepaid for delivery by Priority Mail.

Executed on May 17, 2013, in Fort Oglethorpe, Georgia.


Rebecca Turner-Smith

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 17, 2013

Page 5

Service List

District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612	District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012	District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101	District Attorney, Tuolumne County 423 N. Washington Street Sonoma, CA 95370
District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120	District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637	District Attorney, San Francisco County 850 Bryant Street, Suite 322 San Francisco, CA 94103	District Attorney, Ventura County 800 South Victoria Ave, Suite 314 Ventura, CA 93009
District Attorney, Amador County 708 Court Street, Suite 202 Jackson, CA 95642	District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903	District Attorney, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202	District Attorney, Yolo County 301 2 nd Street Woodland, CA 95695
District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965	District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338	District Attorney, San Luis Obispo County 1035 Palm St, Room 450 San Luis Obispo, CA 93408	District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901
District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249	District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482	District Attorney, San Mateo County 400 County Ctr., 3 rd Floor Redwood City, CA 94063	Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012
District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932	District Attorney, Merced County 550 W. Main Street Merced, CA 95340	District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101	San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101
District Attorney, Contra Costa County 900 Ward Street Martinez, CA 94553	District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020	District Attorney, Santa Clara County 70 West Hedding Street San Jose, CA 95110	San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlet PL San Francisco, CA 94102
District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531	District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517	District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060	San Jose City Attorney's Office 200 East Santa Clara Street, 16 th Floor San Jose, CA 95113
District Attorney, El Dorado County 515 Main Street Placerville, CA 95667	District Attorney, Monterey County Post Office Box 1131 Salinas, CA 93902	District Attorney, Shasta County 1355 West Street Redding, CA 96001	
District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721	District Attorney, Napa County 931 Parkway Mall Napa, CA 94559	District Attorney, Sierra County PO Box 457 Downieville, CA 95936	
District Attorney, Glenn County Post Office Box 430 Willows, CA 95988	District Attorney, Nevada County 110 Union Street Nevada City, CA 95959	District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097	
District Attorney, Humboldt County 825 5th Street 4 th Floor Eureka, CA 95501	District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701	District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533	
District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243	District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678	District Attorney, Sonoma County 600 Administration Drive, Room 212J Santa Rosa, CA 95403	
District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514	District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971	District Attorney, Stanislaus County 832 12 th Street, Ste 300 Modesto, CA 95354	
District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301	District Attorney, Riverside County 3960 Orange Street Riverside, CA 92501	District Attorney, Sutter County 446 Second Street Yuba City, CA 95991	
District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230	District Attorney, Sacramento County 901 "G" Street Sacramento, CA 95814	District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080	
District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453	District Attorney, San Benito County 419 Fourth Street, 2 nd Floor Hollister, CA 95023	District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093	
District Attorney, Lassen County 220 South Lassen Street, Ste. 8 Susanville, CA 96130	District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004	District Attorney, Tulare County 221 S. Mooney Blvd., Room 224 Visalia, CA 93291	