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ENDORSED
FILED
ALAMEDA COUNTY

APR 16 2018

CLERK OF THE SUPERIOR COURT
By C. Collins Deputy

Attorneys for Plaintiff
ENVIRONMENTAL RESEARCH CENTER, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

11 ENVIRONMENTAL RESEARCH CENTER,) Case No. RG 18900999
12 INC., a non-profit California corporation,)
13 Plaintiff,) **COMPLAINT FOR PERMANENT**
14 v.) **INJUNCTION, CIVIL PENALTIES AND**
15) **OTHER RELIEF**
16 TONE IT UP, LLC, a California limited liability) Health & Safety Code §25249.5, *et seq.*
17 company; TONE IT UP, INC., a Delaware)
18 corporation; and DOES 1 – 25,)
19 Defendants.)

19 Plaintiff Environmental Research Center, Inc. (“PLAINTIFF” or “ERC”) brings this
20 action in the interests of the general public and, on information and belief, hereby alleges:

INTRODUCTION

22 1. This action seeks to remedy the continuing failure of Defendants TONE IT UP, LLC;
23 TONE IT UP, INC. (collectively “TIU”); and DOES 1-25 (hereinafter individually referred to
24 as “DEFENDANT” or collectively as “DEFENDANTS”) to warn consumers in California that
25 they are being exposed to lead, a chemical known to the State of California to cause cancer, birth
26 defects, and other reproductive harm. According to the Safe Drinking Water and Toxics
27 Enforcement Act of 1986, Health and Safety Code (“H&S Code”) section 25249.5 (also known
28 as and referred to hereinafter as “Proposition 65”), businesses must provide persons with a “clear

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8 Attorneys for Plaintiff
9 ENVIRONMENTAL RESEARCH CENTER, INC.

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13

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25 action in the interests of the general public and, on information and belief, hereby alleges:

26 **INTRODUCTION**

27 1. This action seeks to remedy the continuing failure of Defendants TONE IT UP, LLC;
28 TONE IT UP, INC. (collectively “TIU”); and DOES 1-25 (hereinafter individually referred to
as “DEFENDANT” or collectively as “DEFENDANTS”) to warn consumers in California that
they are being exposed to lead, a chemical known to the State of California to cause cancer, birth
defects, and other reproductive harm. According to the Safe Drinking Water and Toxics
Enforcement Act of 1986, Health and Safety Code (“H&S Code”) section 25249.5 (also known
as and referred to hereinafter as “Proposition 65”), businesses must provide persons with a “clear

1 and reasonable warning” before exposing individuals to a chemical known to the state to cause
2 cancer or reproductive harm. DEFENDANTS manufacture, package, distribute, market, and/or
3 sell in California certain products containing lead (the “SUBJECT PRODUCTS”):

- 4 • **Tone It Up Plant Based Protein Chocolate**
- 5 • **Perfect Fit Protein Plant-Based Chocolate**

6 2. Lead (hereinafter, the “LISTED CHEMICAL”) is a chemical known to the State of
7 California to cause cancer, birth defects, and other reproductive harm.

8 3. Consumption of the SUBJECT PRODUCTS causes exposures to the LISTED
9 CHEMICAL at a level requiring a “clear and reasonable warning” under Proposition 65.
10 DEFENDANTS exposed consumers to the LISTED CHEMICAL and have failed to provide the
11 health hazard warnings required by Proposition 65.

12 4. DEFENDANTS’ continued manufacturing, packaging, distributing, marketing
13 and/or sales of the SUBJECT PRODUCTS without the required health hazard warnings, causes,
14 or threatens to cause, individuals to be involuntarily, unknowingly and unwittingly exposed to
15 levels of the LISTED CHEMICAL that violate Proposition 65.

16 **PARTIES**

17 5. PLAINTIFF is a non-profit corporation organized under California law. ERC is
18 dedicated to, among other causes, reducing the use and misuse of hazardous and toxic
19 substances, consumer protection, worker safety, and corporate responsibility.

20 6. ERC is a person within the meaning of H&S Code §25249.11 and brings this
21 enforcement action in the public interest pursuant to H&S Code §25249.7(d). H&S Code §
22 25249.7 (d) specifies that actions to enforce Proposition 65 may be brought by a person in the
23 public interest, provided certain notice requirements and no other public prosecutor is diligently
24 prosecuting an action for the same violation(s).

25 7. TONE IT UP, LLC is now, and was at all times relevant herein, a limited liability
26 company organized under the laws of California and is doing business within the meaning of
27 H&S Code §25249.11.

1 8. TONE IT UP, INC. is now, and was at all times relevant herein, a corporation
2 organized under the laws of Delaware and is doing business within the meaning of H&S Code
3 §25249.11.

4 9. DEFENDANTS own, administer, direct, control and/or operate facilities and/or
5 agents, distributors, sellers, marketers, or other retail operations who place their SUBJECT
6 PRODUCTS into the stream of commerce in California (including but not limited to Alameda
7 County) under the brand names Tone It Up, Perfect Fit, and other brand names, which contain the
8 LISTED CHEMICAL without first giving clear and reasonable warnings.

9 10. DEFENDANTS, separately and each of them, are or were, at all times relevant to the
10 claims in this Complaint and continuing through the present, legally responsible for compliance
11 with the provisions of Proposition 65. Whenever an allegation regarding any act or omission of a
12 DEFENDANT is made herein, such allegation shall be deemed to mean that DEFENDANT, or
13 its agent, officer, director, manager, supervisor, or employee did, or so authorized, or failed to do,
14 such acts while engaged in the affairs of DEFENDANT's business operations and/or while acting
15 within the course and scope of their employment or while conducting business for
16 DEFENDANT(S) for a commercial purpose.

17 11. In this Complaint, when reference is made to any act or omission of a DEFENDANT,
18 such allegation shall mean that the owners, officers, directors, agents, employees, contractors, or
19 representatives of DEFENDANT acted or authorized such actions, and/or negligently failed and
20 omitted to act or adequately and properly supervise, control or direct its employees and agents
21 while engaged in the management, direction, operation or control of the affairs of the business
22 organization. Whenever reference is made to any act of any DEFENDANT, such allegation shall
23 be deemed to mean the act or omission of each DEFENDANT acting individually, jointly, and
24 severally as defined by Civil Code Section 1430 *et seq.*

25 12. PLAINTIFF does not know the true names, capacities and liabilities of
26 DEFENDANTS DOES Nos. 1-25, inclusive, and therefore sues them under fictitious names.
27 PLAINTIFF will amend this Complaint to allege the true name and capacities of the DOE
28 Defendants upon being ascertained. Each of these Defendants was in some way legally

1 responsible for the acts, omissions, and/or violations alleged herein.

2 **JURISDICTION AND VENUE**

3 13. This Court has jurisdiction over this action pursuant to California Constitution Article
4 VI, Section 10, which grants the Superior Court “original jurisdiction in all causes except those
5 given by statute to other trial courts.” The statute under which this action is brought does not
6 specify any other court with jurisdiction.

7 14. This Court has jurisdiction over DEFENDANTS because they are business entities
8 that do sufficient business, have sufficient minimum contacts in California or otherwise
9 intentionally avail themselves of the California market, through the sale, marketing and use of
10 their SUBJECT PRODUCTS in California, to render the exercise of jurisdiction over them by
11 the California courts consistent with traditional notions of fair play and substantial justice.

12 15. Venue in this action is proper in the Alameda County Superior Court because the
13 cause, or part thereof, arises in the County of Alameda since DEFENDANTS’ products are
14 marketed, offered for sale, sold, used, and/or consumed in this county.

15 **STATUTORY BACKGROUND**

16 16. The People of the State of California declared in Proposition 65 their right “[t]o be
17 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
18 harm.” (Section 1(b) of Initiative Measure, Proposition 65).

19 17. To effect this goal, Proposition 65 requires that individuals be provided with a “clear
20 and reasonable warning” before being exposed to a chemical listed by the State of California as
21 causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent part:

22 No person in the course of doing business shall knowingly and intentionally
23 expose any individual to a chemical known to the state to cause cancer or
24 reproductive toxicity without first giving clear and reasonable warning to such
individual....

25 18. An exposure to a chemical in a consumer product is one “which results from a
26 person’s acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a
27 consumer good, or any exposure that results from receiving a consumer service.” (Cal. Code
28 Regs., tit. 22, § 12601, subd. (b).)

1 19. Proposition 65 provides that any “person who violates or threatens to violate” the
2 statute may be enjoined in a court of competent jurisdiction. (H&S Code §25249.7). The phrase
3 “threaten to violate” is defined to mean creating “a condition in which there is a substantial
4 probability that a violation will occur” (H&S Code §25249.11(e)). Violators are liable for civil
5 penalties of up to \$2,500 per day for each violation of the Act. (H&S Code §25249.7.)

6 **FACTUAL BACKGROUND**

7 20. On February 27, 1987, the State of California officially listed lead as a chemical
8 known to cause reproductive toxicity. Lead became subject to the warning requirement one year
9 later and was therefore subject to the “clear and reasonable” warning requirements of Proposition
10 65 beginning on February 27, 1988. (27 California Code of Regulations (“CCR”) §25000, *et*
11 *seq.*; H&S Code §25249.5, *et seq.*).

12 21. On October 1, 1992, the State of California officially listed lead and lead compounds
13 as chemicals known to cause cancer. Lead and lead compounds became subject to the warning
14 requirement one year later and were therefore subject to the "clear and reasonable" warning
15 requirements of Proposition 65 beginning on October 1, 1993. (27 CCR § 25000, *et seq.*; H&S
16 Code §25249.6, *et seq.*). Due to the high toxicity of lead, the maximum allowable dose level for
17 lead is 0.5 µg/day (micrograms a day) for reproductive toxicity and the no significant risk level
18 for carcinogens is 15µg/day (oral).

19 22. To test DEFENDANTS’ SUBJECT PRODUCTS for lead, PLAINTIFF hired a well-
20 respected and accredited testing laboratory. The results of testing undertaken by PLAINTIFF of
21 DEFENDANTS’ SUBJECT PRODUCTS show that the SUBJECT PRODUCTS tested were in
22 violation of the 0.5 µg/day “safe harbor” daily dose limits set forth for lead in Proposition 65’s
23 regulations. Very significant is the fact that people are being exposed to lead through ingestion
24 as opposed to other not as harmful methods of exposure such as dermal exposure. Ingestion of
25 lead produces much higher exposure levels and health risks than dermal exposure to this
26 chemical.

27 23. At all times relevant to this action, DEFENDANTS, therefore, have knowingly and
28 intentionally exposed the consumers of the SUBJECT PRODUCTS to the LISTED CHEMICAL

1 without first giving a clear and reasonable warning to such individuals.

2 24. The SUBJECT PRODUCTS have allegedly been sold by DEFENDANTS for use
3 in California since at least November 28, 2014. The SUBJECT PRODUCTS continue to be
4 distributed and sold in California without the requisite warning information.

5 25. As a proximate result of acts by DEFENDANTS, as persons in the course of doing
6 business within the meaning of Health & Safety Code §25249.11, individuals throughout the
7 State of California, including in the County of Alameda have been exposed to the LISTED
8 CHEMICAL without a clear and reasonable warning on the SUBJECT PRODUCTS. The
9 individuals subject to the violative exposures include normal and foreseeable users of the
10 SUBJECT PRODUCTS, as well as all other persons exposed to the SUBJECT PRODUCTS.

11 26. On November 28, 2017 and February 2, 2018, ERC served TIU and each of the
12 appropriate public enforcement agencies with a document entitled “Notice of Violations of
13 California Health & Safety Code Section 25249.5” that provided TIU and the public enforcement
14 agencies with notice that TIU was in violation of Proposition 65 for failing to warn purchasers
15 and individuals using the SUBJECT PRODUCTS that the consumption of the SUBJECT
16 PRODUCTS exposes them to lead, a chemical known to the State of California to cause cancer
17 and/or reproductive toxicity (“Prop. 65 Notice”). True and correct copies of the 60-Day Notices
18 (“NOTICES”) are attached hereto as Exhibits A and B respectively and each is incorporated by
19 reference, and is available on the Attorney General’s website located at <http://oag.ca.gov/prop65>.

20 27. The NOTICES were issued pursuant to, and in compliance with, the requirements of
21 H&S Code §25249.7(d) and the statute's implementing regulations regarding the notice of the
22 violations to be given to certain public enforcement agencies and to the violator. The NOTICES
23 included, *inter alia*, the following information: the name, address, and telephone number of the
24 noticing individuals; the name of the alleged violators; the statute violated; the approximate time
25 period during which violations occurred; and descriptions of the violations including the
26 chemical involved, the route of toxic exposure, and the specific product or type of product
27 causing the violations.

28 28. TIU was also provided copies of the document entitled "The Safe Drinking Water and

1 Toxic Enforcement Act of 1986 (Proposition 65): A Summary," which is also known as Appendix
2 A to Title 27 of CCR §25903, via Certified Mail.

3 29. The California Attorney General was provided copies of the NOTICES and a
4 Certificate of Merit for each Notice by the attorney for the noticing party, stating that there is a
5 reasonable and meritorious case for this action, and attaching factual information sufficient to
6 establish a basis for the certificate, including the identity of the persons consulted with and relied
7 on by the certifier, and the facts, studies, or other data reviewed by those persons, pursuant to
8 H&S Code §25249.7(h) (2) via online submission.

9 30. After expiration of the sixty (60) day notice period, the appropriate public enforcement
10 agencies failed to commence and diligently prosecute a cause of action under H&S Code
11 §25249.5, *et seq.* against DEFENDANTS based on the allegations herein.

12 **FIRST CAUSE OF ACTION**

13 **(Injunctive Relief for Violations of Health and Safety Code § 25249.5, *et seq.* concerning**
14 **the SUBJECT PRODUCTS described in the November 28, 2017 and February 2, 2018**
15 **Prop. 65 Notices of Violation) Against DEFENDANTS**

16 31. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 30,
17 inclusive, as if specifically set forth herein.

18 32. By committing the acts alleged in this Complaint, DEFENDANTS at all times relevant
19 to this action, and continuing through the present, have violated, or threaten to violate, H&S Code
20 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals
21 in California to a chemical known to the State of California to cause cancer or reproductive
22 toxicity without first giving clear and reasonable warnings to such persons who consume the
23 SUBJECT PRODUCTS containing the LISTED CHEMICAL, pursuant to H&S Code §§
24 25249.6 and 25249.11(f).

25 33. By the above-described acts, DEFENDANTS have violated, or threaten to violate,
26 H&S Code § 25249.6 and are therefore subject to preliminary and permanent injunctions ordering
27 DEFENDANTS to stop violating Proposition 65, to provide warnings to all present and future
28 customers, and to provide warnings to DEFENDANTS' past customers who purchased or used
the SUBJECT PRODUCTS without receiving a clear and reasonable warning.

1 34. An action for injunctive relief under Proposition 65 is specifically authorized by H&S
2 Code §25249.7(a).

3 35. Continuing commission by DEFENDANTS of the acts alleged above will irreparably
4 harm the citizens of the State of California, for which harm they have no plain, speedy, or
5 adequate remedy at law.

6 36. In the absence of preliminary and then permanent injunctive relief, DEFENDANTS
7 will continue to create a substantial risk of irreparable injury by continuing to cause consumers
8 to be involuntarily, unknowingly and unwittingly exposed to the LISTED CHEMICAL through
9 the consumption of the SUBJECT PRODUCTS.

10 **SECOND CAUSE OF ACTION**
11 **(Civil Penalties for Violations of Health and Safety Code § 25249.5, *et seq.* concerning the**
12 **SUBJECT PRODUCTS described in the November 28, 2017 and February 2, 2018 Prop.**
13 **65 Notices of Violation) Against DEFENDANTS**

14 37. PLAINTIFF re-alleges and incorporates by reference Paragraphs 1 through 36,
15 inclusive, as if specifically set forth herein.

16 38. By committing the acts alleged in this Complaint, DEFENDANTS at all times
17 relevant to this action, and continuing through the present, have violated H&S Code §25249.6
18 by, in the course of doing business, knowingly and intentionally exposing individuals in
19 California to a chemical known to the State of California to cause cancer or reproductive toxicity
20 without first giving clear and reasonable warnings to such persons who consume the SUBJECT
21 PRODUCTS containing the LISTED CHEMICAL, pursuant to H&S Code §§ 25249.6 and
22 25249.11(f).

23 39. By the above-described acts, DEFENDANTS are liable, pursuant to H&S Code
24 §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each unlawful exposure
25 to the LISTED CHEMICAL from the SUBJECT PRODUCTS, in an amount in excess of \$1
26 million.

27 **THE NEED FOR INJUNCTIVE RELIEF**

28 40. PLAINTIFF re-alleges and incorporates by this reference Paragraphs 1 through 39,
as if set forth below.

1 41. By committing the acts alleged in this Complaint, DEFENDANTS have caused or
2 threaten to cause irreparable harm for which there is no plain, speedy or adequate remedy at law.
3 In the absence of equitable relief, DEFENDANTS will continue to create a substantial risk of
4 irreparable injury by continuing to cause consumers to be involuntarily and unwittingly exposed
5 to the LISTED CHEMICAL through the consumption of the SUBJECT PRODUCTS.

6 **PRAYER FOR RELIEF**

7 Wherefore, PLAINTIFF prays for the following relief:

8 A. A preliminary and permanent injunction, pursuant to H&S Code §25249.7(b),
9 enjoining DEFENDANTS, their agents, employees, assigns and all persons acting in concert or
10 participating with DEFENDANTS, from manufacturing, distributing, marketing or selling the
11 SUBJECT PRODUCTS in California without first providing a clear and reasonable warning,
12 within the meaning of Proposition 65, that the consumers of the SUBJECT PRODUCTS are
13 exposed to the LISTED CHEMICAL;

14 B. An injunctive order, pursuant to H&S Code §25249.7(b), compelling
15 DEFENDANTS to identify and locate each individual who has purchased the SUBJECT
16 PRODUCTS since November 28, 2014, and to provide a warning to such person that the use of
17 the SUBJECT PRODUCTS will expose the consumer to a chemical known to cause cancer, birth
18 defects, and other reproductive harm;

19 C. An assessment of civil penalties pursuant to Health & Safety Code §25249.7(b),
20 against DEFENDANTS in the amount of \$2,500 per day for each violation of Proposition 65, in
21 an amount in excess of \$1 million, according to proof;

22 D. An award to PLAINTIFF of its reasonable attorney's fees and costs of suit
23 pursuant to California Code of Civil Procedure §§ 1032 *et. seq* and 1021.5, as PLAINTIFF shall
24 specify in further applications to the Court; and,

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1 E. Such other and further relief as may be just and proper.

2
3 DATED: April 16, 2018

AQUA TERRA AERIS LAW GROUP

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8 Matthew C. Maclear
9 Anthony M. Barnes
10 Attorneys for Plaintiff
11 Environmental Research Center, Inc.
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EXHIBIT A



Matthew Maclear
mcm@atalawgroup.com
415-568-5200

November 28, 2017

**NOTICE OF VIOLATION 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, Inc. ("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:

Tone It Up, LLC



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
November 28, 2017
Page 2

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

- 1. Tone It Up Plant Based Protein Chocolate - Lead**
- 2. Perfect Fit Protein Plant-Based 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.

Route of Exposure. The consumer exposures that are the subject of this notice result from the recommended use of these products. Consequently, the route of exposure to this chemical has been and continues to be through ingestion.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least November 28, 2014, 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 this known toxic chemical is 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 chemical. 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 this chemical.

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 chemical, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time-consuming litigation.



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
November 28, 2017
Page 3

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

Sincerely,

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style with a large, stylized initial "M".

Matthew Maclear
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Tone It Up, LLC and its Registered Agent for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
November 28, 2017
Page 4

CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Tone It Up, LLC

I, Matthew Maclear, 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 chemical that is 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: November 28, 2017

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style.

Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
November 28, 2017
Page 5

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

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 and over the age of 18 years of age. 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 November 28, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION 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 each of the parties 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
Tone It Up, LLC
1110 Manhattan Avenue
Manhattan Beach, CA 90266

Current President or CEO
Tone It Up, LLC
703 Pier Avenue, Suite B #806
Hermosa Beach, CA 90254

New Season Corporate Services (C2928478)
(Tone It Up, LLC’s Registered Agent for
Service of Process)
4600 Larson Way
Sacramento, CA 95822

On November 28, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, 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)** were served on the following party when a true and correct copy thereof was uploaded 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 November 28, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
November 28, 2017
Page 6

Stacey Grassini, Deputy District Attorney
Contra Costa County
900 Ward Street
Martinez, CA 94553
sgrassini@contracostada.org

Michelle Latimer, Program Coordinator
Lassen County
220 S. Lassen Street
Susanville, CA 96130
mlatimer@co.lassen.ca.us

Dije Ndreu, Deputy District Attorney
Monterey County
1200 Aguajito Road
Monterey, CA 93940
Prop65DA@co.monterey.ca.us

Allison Haley, District Attorney
Napa County
931 Parkway Mall
Napa, CA 94559
CEPD@countyofnapa.org

Paul E. Zellerbach, District Attorney
Riverside County
3072 Orange Street
Riverside, CA 92501
Prop65@rivcoda.org

Anne Marie Schubert, District Attorney
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901 G Street
Sacramento, CA 95814
Prop65@sacda.org

Gregory Alker, Assistant District Attorney
San Francisco County
732 Brannan Street
San Francisco, CA 94103
gregory.alker@sfgov.org

Tori Verber Salazar, District Attorney
San Joaquin County
222 E. Weber Avenue, Room 202
Stockton, CA 95202
DAConsumer.Environmental@sjcda.org

Eric J. Dobroth, Deputy District Attorney
San Luis Obispo County
County Government Center Annex, 4th Floor
San Luis Obispo, CA 93408
edobroth@co.slo.ca.us

Yen Dang, Supervising Deputy District Attorney
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70 W Hedding St
San Jose, CA 95110
EPU@da.sccgov.org

Jeffrey S. Rosell, District Attorney
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701 Ocean Street
Santa Cruz, CA 95060
Prop65DA@santacruzcounty.us

Stephan R. Passalacqua, District Attorney
Sonoma County
600 Administration Dr
Sonoma, CA 95403
jbarnes@sonoma-county.org

Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

Gregory D. Totten, District Attorney
Ventura County
800 S Victoria Ave
Ventura, CA 93009
daspecialops@ventura.org



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

November 28, 2017

Page 7

Jeff W. Reisig, District Attorney

Yolo County

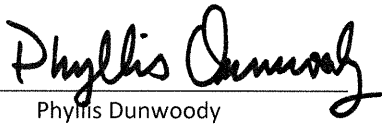
301 Second Street

Woodland, CA 95695

cfepd@yolocounty.org

On November 28, 2017 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 First Class Mail.

Executed on November 28, 2017, in Fort Oglethorpe, Georgia.


Phyllis Dunwoody



Service List

- | | | | |
|--|--|--|---|
| District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612 | District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012 | District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063 | San Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113 |
| District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120 | District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637 | District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101 | |
| 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, Shasta County 1355 West Street Redding, CA 96001 | |
| 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, Sierra County PO Box 457 Downieville, CA 95936 | |
| 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, Siskiyou County Post Office Box 986 Yreka, CA 96097 | |
| 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, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533 | |
| District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531 | District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020 | District Attorney, Stanislaus County 832 12th Street, Ste 300 Modesto, CA 95354 | |
| District Attorney, El Dorado County 515 Main Street Placerville, CA 95667 | District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517 | District Attorney, Sutter County 463 2 nd Street Yuba City, CA 95991 | |
| District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721 | District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959 | District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080 | |
| District Attorney, Glenn County Post Office Box 430 Willows, CA 95988 | District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701 | District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093 | |
| District Attorney, Humboldt County 825 5th Street 4 th Floor Eureka, CA 95501 | District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678 | District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370 | |
| District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243 | District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971 | District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901 | |
| District Attorney, Inyo County P.O. Drawer D Independence, CA 93526 | District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023 | Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012 | |
| District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301 | District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92401 | San Diego City Attorney's Office 1200 3rd Avenue, Ste 1620 San Diego, CA 92101 | |
| District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230 | District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101 | San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102 | |
| District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453 | | | |

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EXHIBIT B



Matthew Maclear
mcm@atalawgroup.com
415-568-5200

February 2, 2018

**NOTICE OF VIOLATION 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, Inc. ("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:

Tone It Up, Inc.

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



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 2

- 1. Tone It Up Plant Based Protein Chocolate - Lead**
- 2. Perfect Fit Protein Plant-Based 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.

Route of Exposure. The consumer exposures that are the subject of this notice result from the recommended use of these products. Consequently, the route of exposure to this chemical has been and continues to be through ingestion.

Approximate Time Period of Violations. Ongoing violations have occurred every day since at least November 28, 2014, 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 this known toxic chemical is 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 chemical. 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 this chemical.

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 chemical, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time-consuming litigation.



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 3

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

Sincerely,

A handwritten signature in black ink that reads "Matthew Maclear". The signature is written in a cursive style with a large, stylized initial "M".

Matthew Maclear
AQUA TERRA AERIS LAW GROUP

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Tone It Up, Inc. and their Registered Agents for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 4

CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Tone It Up, Inc.

I, Matthew Maclear, 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 chemical that is 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: February 2, 2018

A handwritten signature in cursive script that reads "Matthew Maclear".

Matthew Maclear



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 5

CERTIFICATE OF SERVICE PURSUANT TO 27 CCR § 25903

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 and over the age of 18 years of age. 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 February 2, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I served the following documents: **NOTICE OF VIOLATION 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 each of the parties 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
Tone It Up, Inc.
1110 Manhattan Avenue
Manhattan Beach, CA 90266

CT Corporation System
(Tone It Up, Inc.’s Registered Agent
for Service of Process)
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

Current President or CEO
Tone It Up, Inc.
703 Pier Avenue, Suite B #806
Hermosa Beach, CA 90254

The Corporation Trust Company
(Tone It Up, Inc.’s Registered Agent
for Service of Process)
Corporation Trust Center
1209 Orange Street
Wilmington, DE 19801

On February 2, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, 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)** were served on the following party when a true and correct copy thereof was uploaded 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 February 2, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, I verified the following documents **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** were served on the following parties when a true and correct copy thereof was sent via electronic mail to each of the parties listed below:



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 6

Stacey Grassini, Deputy District Attorney
Contra Costa County
900 Ward Street
Martinez, CA 94553
sgrassini@contracostada.org

Michelle Latimer, Program Coordinator
Lassen County
220 S. Lassen Street
Susanville, CA 96130
mlatimer@co.lassen.ca.us

Dije Ndreu, Deputy District Attorney
Monterey County
1200 Aguajito Road
Monterey, CA 93940
Prop65DA@co.monterey.ca.us

Allison Haley, District Attorney
Napa County
1127 First Street, Suite C
Napa, CA 94559
CEPD@countyofnapa.org

Paul E. Zellerbach, District Attorney
Riverside County
3072 Orange Street
Riverside, CA 92501
Prop65@rivcoda.org

Anne Marie Schubert, District Attorney
Sacramento County
901 G Street
Sacramento, CA 95814
Prop65@sacda.org

Gregory Alker, Assistant District Attorney
San Francisco County
732 Brannan Street
San Francisco, CA 94103
gregory.alker@sfgov.org

Tori Verber Salazar, District Attorney
San Joaquin County
222 E. Weber Avenue, Room 202
Stockton, CA 95202
DAConsumer.Environmental@sjcda.org

Eric J. Dobroth, Deputy District Attorney
San Luis Obispo County
County Government Center Annex, 4th Floor
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edobroth@co.slo.ca.us

Yen Dang, Supervising Deputy District Attorney
Santa Clara County
70 W Hedding St
San Jose, CA 95110
EPU@da.sccgov.org

Jeffrey S. Rosell, District Attorney
Santa Cruz County
701 Ocean Street
Santa Cruz, CA 95060
Prop65DA@santacruzcounty.us

Stephan R. Passalacqua, District Attorney
Sonoma County
600 Administration Dr
Sonoma, CA 95403
jbarnes@sonoma-county.org

Phillip J. Cline, District Attorney
Tulare County
221 S Mooney Blvd
Visalia, CA 95370
Prop65@co.tulare.ca.us

Gregory D. Totten, District Attorney
Ventura County
800 S Victoria Ave
Ventura, CA 93009
daspecialops@ventura.org



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 7

Jeff W. Reisig, District Attorney
Yolo County
301 Second Street
Woodland, CA 95695
cfepd@yolocounty.org

On February 2, 2018 between 8:00 a.m. and 5:00 p.m. Eastern Time, 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 First Class Mail.

Executed on February 2, 2018, in Fort Oglethorpe, Georgia.

A handwritten signature in black ink that reads "Phyllis Dunwoody". The signature is written in a cursive, flowing style.

Phyllis Dunwoody



Notice of Violation of California Health & Safety Code §25249.5 *et seq.*
February 2, 2018
Page 8

Service List

| | | | |
|--|--|--|---|
| District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612 | District Attorney, Los Angeles County Hall of Justice 211 West Temple St., Ste 1200 Los Angeles, CA 90012 | District Attorney, San Mateo County 400 County Ctr., 3rd Floor Redwood City, CA 94063 | San Jose City Attorney's Office 200 East Santa Clara Street, 16th Floor San Jose, CA 95113 |
| District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120 | District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637 | District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101 | |
| 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, Shasta County 1355 West Street Redding, CA 96001 | |
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| 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, Siskiyou County Post Office Box 986 Yreka, CA 96097 | |
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| District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721 | District Attorney, Nevada County 201 Commercial Street Nevada City, CA 95959 | District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080 | |
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| District Attorney, Inyo County P.O. Drawer D Independence, CA 93526 | District Attorney, San Benito County 419 Fourth Street, 2nd Floor Hollister, CA 95023 | Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012 | |
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| District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453 | | | |