

#### ATTORNEYS AT LAW

Tel: 619-629-0527 Fax: 619-393-0154 noam@entornolaw.com 225 Broadway, Suite 1900 San Diego, CA 92101

## August 2, 2021

## Via Certified Mail

Amerifoods Trading Company, LLC CT Corporation System 818 W. 7<sup>th</sup> st. STE 930 Los Angeles, CA 90017

Amerifoods Trading Co. Attn. Legal Department P.O. Box 512377 Los Angeles, CA 90051-0377

Amerifoods Trading Co. Attn. Legal Department 600 Citadel Drive Commerce, CA 90040 Smart & Final, LLC Attn. Legal Department 600 Citadel Drive Commerce, CA 90040

Smart & Final, LLC The Corporation Trust Company Corporation Trust Center 1209 Orange Street Wilmington, DE 19801

Smart & Final, LLC CT Corporation System 818 W. 7<sup>th</sup> st. STE 930 Los Angeles, CA 90017

# **Re:** Proposition 65 Notice of Violation

## To Whom It May Concern:

We represent Environmental Health Advocates, Inc., an organization in the State of California acting in the interest of the general public. This letter serves as notice that the parties listed above are in violation of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, commencing with section 25249.5 of the Health and Safety Code ("Proposition 65"). In particular, the violations alleged by this notice consist of types of harm that may potentially result from exposures to the toxic chemical Acrylamide. This chemical was listed as a carcinogen on , 1990 and listed as a developmental and reproductive toxin on February 25, 2011.

The specific type of product that is causing exposures in violation of Proposition 65 are tortilla chips including but not limited:

	<b>Product Name</b>	<u>Manufacturer</u>	Distributor	<u>Retailer</u>
1.	Sun Harvest Organic Blue	Amerifoods Trading	Amerifoods Trading Co.	Smart and Final, LLC
	Corn Tortilla Chips	Company, LLC		

The routes of exposure for the violations include ingestion by consumers. These exposures occur through the reasonably foreseeable use of the product. The sales of this product have been occurring since at least June 2021, are continuing to this day and will continue to occur as long as the product subject to this notice is sold to and used by consumers.

Proposition 65 requires that a clear and reasonable warning is provided with these products regarding the exposures to Acrylamide caused by ordinary use of the product. The Parties are in violation of Proposition 65 by failing to provide such warning to consumers and as a result of the sales of this product, exposures to Acrylamide have been occurring without proper warnings.

Pursuant to Proposition 65, notice and intent to sue shall be provided to violators 60-days before filing a complaint. This letter provides notice of the alleged violation to the parties listed above and the appropriate governmental authorities. A summary of Proposition 65 is attached.

If you have any questions or wish to discuss any of the above, please contact me.

Sincerely,

Noam Glick

Noan Sleit

## **CERTIFICATE OF MERIT**

## I, Noam Glick, hereby declare:

- 1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the parties identified in the notice have violated Health and 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 has reviewed facts, studies, or other data regarding the alleged exposure to the listed chemical that is the subject of the action.
- 4. Based on the information obtained through those consultations, and on all 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 plaintiffs' case can be established and 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. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code section 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: August 2, 2021

Noam Glick, Attorney at Law

Noan Sleite

## **CERTIFICATE OF SERVICE**

I, Natalie Palmberg, declare that I am over the age of 18 years, and am not a party to the within action. I am employed in the County of San Diego, California, where the mailing occurs; and my business address is 225 Broadway, 19<sup>th</sup> Floor, San Diego, California 92101.

On August 2, 2021, I served the following documents: (1) 60-DAY NOTICE OF VIOLATION SENT IN COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(d); (2) CERTIFICATE OF MERIT; (3) PROPOSITION 65: A SUMMARY; and (4) CERTIFICATE OF MERIT ATTACHMENT (served only on the Attorney General) on the parties listed below by placing a true and correct copy thereof in a sealed envelope, addressed to each party and depositing it at my business address with the U.S. Postal Service for delivery by Certified Mail with the postage thereon fully prepaid:

#### **Via Certified Mail**

Amerifoods Trading Company, LLC CT Corporation System 818 W. 7<sup>th</sup> st. STE 930 Los Angeles, CA 90017

Amerifoods Trading Co. Attn. Legal Department P.O. Box 512377 Los Angeles, CA 90051-0377

Amerifoods Trading Co. Attn. Legal Department 600 Citadel Drive Commerce, CA 90040 Smart & Final, LLC Attn. Legal Department 600 Citadel Drive Commerce, CA 90040

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Smart & Final, LLC CT Corporation System 818 W. 7<sup>th</sup> st. STE 930 Los Angeles, CA 90017

On August 2, 2021, I served the California Attorney General (via website Portal) by uploading a true and correct copy thereof as a PDF file via the California Attorney General's website.

On August 2, 2021 I transmitted via electronic mail the above-listed documents to the electronic mail addresses of the City and/or District Attorneys who have specifically authorized e-mail serviceand the authorization appears on the Attorney General's web site.

### **See Attached Service List**

On August 2, 2021, I served the following persons and/or entities at the last known address by placing a true and correct copy thereof in a sealed envelope and depositing it at my business address with the U.S. Postal Service for delivery with the postage thereon fully prepaid, and addressed as follows:

#### **See Attached Service List**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 2, 2021, at San Diego, California.

Natalis Palmberg

Natalie Palmberg

#### APPENDIX A

# OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

# THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA implementing regulations (see citations below) for further information.

FOR INFORMATION CONCERNING THE BASIS FOR THE ALLEGATIONS IN THE NOTICE RELATED TO YOUR BUSINESS, CONTACT THE PERSON IDENTIFIED ON THE NOTICE.

The text of Proposition 65 (Health and Safety Code Sections 25249.5 through 25249.13) is available online at: http://oehha.ca.gov/prop65/law/P65law72003.html. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.¹ These implementing regulations are available online at: http://oehha.ca.gov/prop65/law/P65Regs.html.

#### WHAT DOES PROPOSITION 65 REQUIRE?

**The "Proposition 65 List."** Under Proposition 65, the lead agency (OEHHA) publishes a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. Chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as damage to

<sup>&</sup>lt;sup>1</sup> All further regulatory references are to sections of Title 27 of the California Code of Regulations unless otherwise indicated. The statute, regulations and relevant case law are available on the OEHHA website at: http://www.oehha.ca.gov/prop65/law/index.html.

female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at: <a href="http://www.oehha.ca.gov/prop65/prop65\_list/Newlist.html">http://www.oehha.ca.gov/prop65/prop65\_list/Newlist.html</a>.

Only those chemicals that are on the list are regulated under Proposition 65. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

Clear and reasonable warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical unless an exemption applies. The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm; and (2) be given in such a way that it will effectively reach the person before he or she is exposed to that chemical. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

**Prohibition from discharges into drinking water.** A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

#### DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. You should consult the current version of the statute and regulations (http://www.oehha.ca.gov/prop65/law/index.html) to determine all applicable exemptions, the most common of which are the following:

**Grace Period.** Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

**Governmental agencies and public water utilities.** All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

**Businesses with nine or fewer employees.** Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

Exposures that pose no significant risk of cancer. For chemicals that are listed under Proposition 65 as known to the State to cause cancer, a warning is not required if the business causing the exposure can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "No Significant Risk Levels" (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at:

http://www.oehha.ca.gov/prop65/getNSRLs.html for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

**Exposures that will produce no observable reproductive effect at 1,000 times the level in question.** For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business causing the exposure can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level" divided by 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: http://www.oehha.ca.gov/prop65/getNSRLs.html for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

**Exposures to Naturally Occurring Chemicals in Food.** Certain exposures to chemicals that naturally occur in foods (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant<sup>2</sup> it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

Discharges that do not result in a "significant amount" of the listed chemical entering any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" level for chemicals that cause cancer or that is 1,000 times below the "no observable effect" level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

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<sup>&</sup>lt;sup>2</sup> See Section 25501(a)(4).

#### **HOW IS PROPOSITION 65 ENFORCED?**

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of Title 27 and sections 3100-3103 of Title 11. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an enforcement action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

A private party may not file an enforcement action based on certain exposures if the alleged violator meets specific conditions. For the following types of exposures, the Act provides an opportunity for the business to correct the alleged violation:

- An exposure to alcoholic beverages that are consumed on the alleged violator's premises to the extent onsite consumption is permitted by law;
- An exposure to a Proposition 65 listed chemical in a food or beverage prepared and sold on the alleged violator's premises that is primarily intended for immediate consumption on- or off-premises. This only applies if the chemical was not intentionally added to the food, and was formed by cooking or similar preparation of food or beverage components necessary to render the food or beverage palatable or to avoid microbiological contamination;
- An exposure to environmental tobacco smoke caused by entry of persons (other than employees) on premises owned or operated by the alleged violator where smoking is permitted at any location on the premises;
- An exposure to listed chemicals in engine exhaust, to the extent the exposure occurs inside a facility owned or operated by the alleged violator and primarily intended for parking non-commercial vehicles.

If a private party alleges that a violation occurred based on one of the exposures described above, the private party must first provide the alleged violator a notice of special compliance procedure and proof of compliance form.

A copy of the notice of special compliance procedure and proof of compliance form is included in Appendix B and can be downloaded from OEHHA's website at: http://oehha.ca.gov/prop65/law/p65law72003.html.

## FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at P65Public.Comments@oehha.ca.gov.

Revised: May 2017

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.7, 25249.9, 25249.10 and 25249.11, Health and Safety Code.

# **E-Mail Service List**

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

Jeannine M. Pacioni, 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

Barbara Yook, District Attorney CALAVERAS COUNTY 891 Mountain Ranch Rd. San Andreas, CA 95249 Prop65Env@co.calaveras.ca.us

Alethea M. Sargent, Assistant District Attorney SAN FRANCISCO COUNTY 350 Rhode Island Street San Francisco, CA 94103 alethea.sargent@sfgov.org

Summer Stephan, District Attorney SAN DIEGO COUNTY 330 West Broadway San Diego, CA 92101 SanDiegoDAProp65@sdcda.org

Mark Ankcorn, Deputy City Attorney CITY OF SAN DIEGO 1200 Third Avenue San Diego, CA 92101 CityAttyCrimProp65@sandiego.gov

Valerie Lopez, Deputy City Attorney CITY OF SAN FRANCISCO 1390 Market Street, 7th Floor San Francisco, CA 94102 Valerie.Lopez@sfcityatty.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

Bud Porter, Supervising Deputy District Attorney SANTA CLARA COUNTY 70 W Hedding St San Jose, CA 95110 EPU@da.sccgov.org

Stephan R. Passalacqua, District Attorney SONOMA COUNTY 600 Administration Drive 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

Jeff W. Reisig, DistrictAttorney YOLO COUNTY 301 Second Street Woodland, CA 95695 cfepd@yolocounty.org

Tori Verber Salazar, District Attorney SAN JOAQUIN COUNTY 222 E. Weber Avenue, Room 202 Stockton, CA 95202 DAConsumer.Environmental@sjcda.org

Christopher Dalbey, Deputy District Attorney SANTA BARBARA COUNTY 1112 Santa Barbara St. Santa Barbara, CA 93101 DAProp65@co.santa-barbara.ca.us

Nancy O'Malley, District Attorney ALAMEDA COUNTY 7776 Oakport Street, Suite 650 Oakland, CA 94621 CEPDProp65@acgov.org

Barbara M. Yook, District Attorney CALAVERAS COUNTY 891 Mountain Ranch Road San Andreas CA 95249 Prop65Env@co.calaveras.ca.us David Hollister, District Attorney PLUMAS COUNTY 520 Main St. Quincy, CA 95971 davidhollister@countyofplumas.com

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

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

Kimberly Lewis, District Attorney MERCED COUNTY 550 West Main Street Merced, CA 95340 Prop65@countyofmerced.com

Clifford H. Newell, District Attorney NEVADA COUNTY 201 Commercial Street Nevada City, CA 95959 DA.Prop65@co.nevada.ca.us

Thomas L. Hardy, District Attorney INYO COUNTY
168 North Edwards Street Independence, CA 93526 inyoda@inyocounty.us

Walter W. Wall, District Attorney MARIPOSA COUNTY P.O. Box 730 Mariposa, CA 95338 mcda@mariposacounty.org

Morgan Briggs Gire, District Attorney PLACER COUNTY 10810 Justice Center Drive Roseville, CA 95678 prop65@placer.ca.gov

### **Mail Service List**

District Attorney ALAMEDA COUNTY 1225 Fallon St, Room 900 Oakland, CA 94612

District Attorney ALPINE COUNTY PO Box 248 Markleeville, CA 96120

District Attorney AMADOR COUNTY 708 Court Street, #202 Jackson, CA 95642

District Attorney BUTTE COUNTY 25 County Center Drive Administration Building Oroville, CA 95965

District Attorney CALAVERAS COUNTY 891 Mountain Ranch Road San Andreas, CA 95249

District Attorney COLUSA COUNTY 346 5th Street, Suite. 101 Colusa, CA 95932

District Attorney CONTRA COSTA COUNTY 900 Ward Street Martinez, CA 94553

District Attorney DEL NORTE COUNTY 450 H Street, Room 171 Crescent City, CA 95531

District Attorney EL DORADO COUNTY 778 Pacific St Placerville, CA 95667

District Attorney FRESNO COUNTY 2220 Tulare Street, Suite. 1000 Fresno, CA 93721

District Attorney GLENN COUNTY PO Box 430 Willows, CA 95988

District Attorney HUMBOLDT COUNTY 825 5th Street Eureka, CA 95501

District Attorney IMPERIAL COUNTY 940 West Main Street, Suite. 102 El Centro, CA 92243

District Attorney TULARE COUNTY 221 South Mooney Blvd., Suite 224 Visalia, CA 93291

District Attorney TUOLUMNE COUNTY 423 No. Washington Street Sonora, CA 95370 Richard Doyle City Attorney CITY OF SAN JOSE 200 East Santa Clara Street San Jose, CA 95113

District Attorney INYO COUNTY 168 N Edwards St Independence, CA 93526

District Attorney KERN COUNTY 1215 Truxtun Avenue Bakersfield, CA 93301

District Attorney KINGS COUNTY 1400 West Lacey Blvd. Hanford, CA 93230

District Attorney LAKE COUNTY 255 N. Forbes Street Lakeport, CA 95453

District Attorney LASSEN COUNTY 220 S. Lassen Street, Suite. 8 Susanville, CA 96130

District Attorney LOS ANGELES COUNTY 210 W. Temple Street Los Angeles, CA 90012

District Attorney MADERA COUNTY 209 West Yosemite Avenue Madera, CA 93637

District Attorney MARIN COUNTY 3501 Civic Center Drive, Room 130 San Rafael, CA 94903

District Attorney MARIPOSA COUNTY PO BOX 730 Mariposa, CA 95338

District Attorney MENDOCINO COUNTY PO BOX 1000 Ukiah, CA 95482

District Attorney MODOC COUNTY 204 S. Court Street, Room 202 Alturas, CA 96101

District Attorney MONO COUNTY PO BOX 2053 Mammoth Lakes, CA 93546

District Attorney VENTURA COUNTY 800 South Victoria Avenue Ventura, CA 93009

District Attorney YOLO COUNTY 301 Second Street Woodland, CA 95695 City Attorney CITY OF SAN FRANCISCO City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102

City Attorney CITY OF SAN DIEGO 1200 Third Ave, 3rd Flr San Diego, CA 92101

District Attorney NAPA COUNTY 1127 First Street, Ste. C Napa, CA 94559

District Attorney ORANGE COUNTY 401 Civic Center Drive West Santa Ana, CA 92701

District Attorney PLACER COUNTY 10810 Justice Center Drive Roseville, CA 95678

District Attorney PLUMAS COUNTY 520 Main Street, Room 404 Quincy, CA 95971

District Attorney SACRAMENTO COUNTY 901 G Street Sacramento, CA 95812

District Attorney SAN BENITO COUNTY 419 4th Street Hollister, CA 95023

District Attorney SAN BERNARDINO COUNTY 303 W. Third Street San Bernardino, CA 92415

District Attorney SAN DIEGO COUNTY 330 W. Broadway, Suite 1300 San Diego, CA 92101

District Attorney SAN FRANCISCO COUNTY 880 Bryant Street, Third Floor San Francisco, CA 94103

District Attorney SAN JOAQUIN COUNTY PO BOX 990 Stockton, CA 95202

District Attorney YUBA COUNTY 215 Fifth Street, Suite. 152 Marysville, CA 95901

City Attorney CITY OF LOS ANGELES 200 N. Main Street Los Angeles, CA 90012

District Attorney SAN LUIS OBISPO 1035 Palm St San Luis Obispo, CA 93408 District Attorney SAN MATEO COUNTY 400 County Center, Third Floor Redwood City, CA 94063

District Attorney SANTA BARBARA COUNTY 1112 Santa Barbara Street Santa Barbara, CA 93101

District Attorney SANTA CLARA COUNTY 70 West Hedding Street, West Wing San Jose, CA 95110

District Attorney SANTA CRUZ COUNTY 701 Ocean Street, Room 200 Santa Cruz, CA 95060

District Attorney SHASTA COUNTY 1355 West Street Redding, CA 96001

District Attorney SIERRA COUNTY 100 Courthouse Square Downieville, CA 95936

District Attorney SISKIYOU COUNTY PO BOX 986 Yreka, CA 96097

District Attorney SOLANO COUNTY 675 Texas Street, Suite 4500 Fairfield, CA 94533

District Attorney SONOMA COUNTY 600 Administration Drive, Room 212J Santa Rosa, CA 95403

District Attorney STANISLAUS COUNTY 832 12th Street, Suite 300 Modesto, CA 95353

District Attorney SUTTER COUNTY 446 Second Street, Suite 102 Yuba City, CA 95991

District Attorney TEHAMA COUNTY PO BOX 519 Red Bluff, CA 96080

District Attorney TRINITY COUNTY PO BOX 310 Weaverville, CA 96093