

FILED BY FAX
ALAMEDA COUNTY

October 14, 2011

CLERK OF
THE SUPERIOR COURT
By Denise Dalton, Deputy

CASE NUMBER:
RG11599984

1 Michael Freund SBN 99687
2 Law Office of Michael Freund
3 1915 Addison Street
4 Berkeley, CA 94704
5 Telephone: (510) 540-1992
6 Facsimile: (510) 540-5543

7 Attorney for Plaintiff Environmental Research Center

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ALAMEDA**

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

Case No.

13 **Plaintiff,**

**COMPLAINT FOR CIVIL
PENALTIES**

14 **v.**

15
16 **BARLEAN'S ORGANIC OILS, LLC and**
17 **DOES 1-100**

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

18 **Defendants.**

19
20 Plaintiff Environmental Research Center hereby alleges:

21
22 **I**

23 **INTRODUCTION**

24
25 1. Plaintiff Environmental Research Center (hereinafter "Plaintiff" or "ERC") brings this
26 action as a private attorney general enforcer and in the public interest pursuant to Health & Safety
27 Code Section 25249.7 (d). This complaint seeks civil penalties to remedy Barlean's Organic Oils,
28

1 LLC's ("Barlean's") failure to warn consumers that they have been exposed to lead from one of the
2 company's nutritional health products. Lead is a chemical known to the State of California to
3 cause cancer, birth defects and other reproductive harm. Based on the Safe Drinking Water and
4 Toxic Enforcement Act of 1986 (Health & Safety Code Section 25249.5 et seq) also known as
5 "Proposition 65," businesses with ten or more employees must provide a "clear and reasonable
6 warning" prior to exposing persons to these chemicals.
7

8 II

9 PARTIES

10
11 2. Plaintiff ERC is a California non-profit corporation dedicated to, among other causes, helping
12 safeguard the public from health hazards by bringing about a reduction in the use and misuse of
13 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and
14 encouraging corporate responsibility.
15

16 3. Defendant Barlean's is a business that manufactures, distributes and/or sells a nutritional health
17 product that has exposed users to lead in the State of California within the relevant statute of
18 limitations period. The Covered Product is called Barlean's Organic Oils Barlean's Greens Powder
19 Formula. Barlean's is a company subject to Proposition 65 as it employs ten or more persons.
20

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

JURISDICTION AND VENUE

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

6. The Complaint is based on allegations contained in the Notice of Violation dated January 14, 2011, served on the California Attorney General, other public enforcers and Barlean's. A true and correct copy of this Notice of Violation is attached hereto as Exhibit A. More than 60 days have passed since this Notice of Violation was mailed and no public enforcement entity has filed a complaint in this case.

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

IV

STATUTORY BACKGROUND

A. Proposition 65

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

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

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

10. Implementing regulations for Proposition 65 provide that warnings are required for consumer product exposures. A "consumer product exposure is an exposure which results from a person's

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10. Implementing regulations for Proposition 65 provide that warnings are required for consumer product exposures. A "consumer product exposure is an exposure which results from a person's

1 acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer
2 good, or any exposure that results from receiving a consumer service.” 27 CCR Section 25601 (b).

3
4 11. Whenever a clear and reasonable warning is required under Health & Safety Code Section
5 25249.6, the “method employed to transmit the warning must be reasonably calculated considering
6 the alternative methods available under the circumstances, to make the warning message available
7 prior to exposure.” 27 CCR Section 25601. The warning requirement may be satisfied by a
8 warning that appears on a product’s label or other labeling, shelf labeling, signs, a system of signs,
9 public advertising identifying the system and toll-free information services, or any other, system,
10 that provides clear and reasonable warnings. *Id.*, Section 25603.1 (a) – (d).

12 12. Proposition 65 establishes a procedure by which the State is to develop a list of
13 chemicals “known to the State to cause cancer or reproductive toxicity.” Health & Safety Code
14 Section 25249.8. There is no duty to provide a clear and reasonable warning until 12-months after
15 the chemical was published on the State list. *Id.*, Section 25249.10 (b). Lead was listed as a
16 chemical known to the State of California to cause developmental toxicity and male and female
17 reproductive toxicity on February 27, 1987. Lead was listed as a chemical known to the State of
18 California to cause cancer on October 1, 1992. Title 27, Cal. Code Regs., Section 27001.

19
20
21 13. Proposition 65 may be enforced by any person in the public interest who provides notice
22 sixty days before filing suit to both the violator and designated law enforcement officials. The
23 failure of law enforcement officials to file a timely complaint enables a citizen suit to be filed
24 pursuant to Health & Safety Code Section 25249.7 (c).

25
26 14. Proposition 65 provides that any person “violating or threatening to violate” Proposition 65
27 may be enjoined in any court of competent jurisdiction. Health & Safety Code Section 25249.7 (a).
28 To “threaten to violate” means “to create a condition in which there is a substantial probability that a

1 violation will occur.” Id., Section 25249.11 (e). Furthermore, violators are subject to a civil penalty
2 of up to \$2,500 per day for each violation. Id., Section 25249.7 (b).
3

4 V

5 **STATEMENT OF FACTS**

6 15. Barlean’s has manufactured, distributed and/or sold the Covered Product containing
7 lead to the State of California. Consumers have been ingesting these products for many years,
8 without any knowledge of their exposure to lead, a very dangerous chemical.
9

10 16. For many years, Barlean’s has knowingly and intentionally exposed numerous persons to
11 lead, without providing a Proposition 65 warning. Prior to ERC’s Notice of Violation, Barlean’s
12 failed to provide a warning on the label of the Covered Product, nor was there any mention on the
13 company’s website that the products contained lead. Barlean’s has at all times relevant hereto been
14 aware that the Covered Product contained lead and that persons using these products have been
15 exposed to the chemical. The company’s website represents to the public that they strive to
16 maximize people’s health, vitality and wellness. While aware of the lead in the Covered Product,
17 Barlean’s has failed to disclose this to the public, who undoubtedly believed they have been
18 ingesting totally healthy and pure products.
19

20 17. Prior to ERC’s Notice of Violation, Barlean’s failed to provide consumers of the Covered
21 Product with a clear and reasonable warning that they have been exposed to a chemical known to
22 the State of California to cause cancer, birth defects and other reproductive harm.
23

24 **FIRST CAUSE OF ACTION**

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

27 18. ERC refers to paragraphs 1-17, inclusive, and incorporates them herein by this reference.
28

1 19. By committing the acts alleged above, Barlean's has, in the course of doing business,
2 knowingly and intentionally exposed users of the Covered Product to lead, a chemical known to the
3 State of California to cause cancer, birth defects and other reproductive harm without first giving
4 clear and reasonable warning to such individuals, within the meaning of Health & Safety Code
5 Section 25249.6.
6

7 20. Said violations render Barlean's liable for civil penalties up to \$2,500 (two thousand,
8 five hundred dollars) per day, for each violation.
9

10 VI

11 PRAYER

12 WHEREFORE ERC prays for relief as follows:

- 13 1. On the First Cause of Action, for civil penalties for each and every violation according to
14 proof;
15
16 2. For reasonable attorneys' fees pursuant to Section 1021.5 of the Code of Civil Procedure or
17 the substantial benefit theory;
18
19 3. For costs of suit herein; and
20
21 4. For such other relief as the Court may deem just and proper.

22 Dated: October 10, 2011

23 By



24 Michael Freund
25 Attorney for Environmental Research Center
26
27
28



Environmental Research Center

5694 Mission Center Road #199

San Diego, CA 92108

619.309.4194

January 14, 2011

VIA CERTIFIED MAIL

Current President or CEO
Barlean's Organic Oils, LLC
4936 Lake Terrell Road
Ferndale, WA 98248

Karen Martin
(Barlean's Organic Oils, LLC's Registered
Agent for Service of Process)
4936 Lake Terrell Road
Ferndale, WA 98248

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

VIA PRIORITY MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

Re: Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*

Dear Addressees:

I am the Executive Director of the Environmental Research Center ("ERC") in connection with this Notice of Violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at California Health & Safety Code Section 25249.5 *et seq.* and also referred to as Proposition 65.

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.

The name of the Company covered by this Notice that violated Proposition 65 is:

Barlean's Organic Oils, LLC

The product that is the subject of this Notice and the chemical in that product identified as exceeding allowable levels is:

Barlean's Organic Oils Barlean's Greens Powder Formula/15 Day Supply 132g - Lead

EXHIBIT A

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 as chemical known to cause cancer.

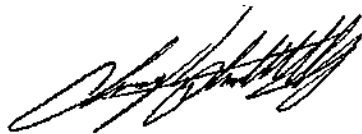
This letter is a Notice to Barlean's Organic Oils, LLC and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This Notice covers all violations of Proposition 65 involving Barlean's Organic Oils, LLC currently known to ERC from the information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, has been provided to the Noticed Company with a copy of this letter.

Barlean's Organic Oils, LLC has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemicals. The primary route of exposure to these chemicals has been through ingestion, but may have also occurred through inhalation and/or dermal contact. 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's label. Barlean's Organic Oils, LLC violated Proposition 65 because the Company has failed to provide an appropriate warning to persons using these products that they are being exposed to the identified chemical.

Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this Notice unless Barlean's Organic Oils, LLC agrees in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemicals; and (2) pay an appropriate civil penalty. Consistent with the public interest goals of Proposition 65 and ERC's objectives in pursuing this Notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemicals and expensive and time consuming litigation.

Please direct all questions concerning this notice to ERC's attorney, Michael Freund, address: 1915 Addison Street, Berkeley, California, 94704-1101, telephone no.: 510-540-1992, e-mail: Freund1@aol.com.

Sincerely,



Chris Heptinstall, Executive Director
Environmental Research Center

cc: Karen Evans

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Barlean's Organic Oils, LLC and its Registered Agent of Service for Process only)

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

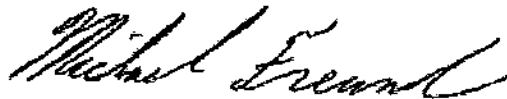
CERTIFICATE OF MERIT

Re: Environmental Research Center's Notice of Proposition 65 Violations by Barlean's Organic Oils, LLC

I, Michael Freund, declare:

1. This Certificate of Merit accompanies the attached sixty-day Notice in which it is alleged 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: January 14, 2011



Michael Freund
Attorney for Environmental Research Center

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

On January 14, 2011, 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 in a US Postal Service Office for delivery by Certified Mail:

Current President or CEO
Barlean's Organic Oils, LLC
4936 Lake Terrell Road
Ferndale, WA 98248

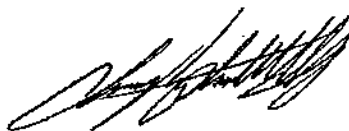
Karen Martin
(Barlean's Organic Oils, LLC's Registered
Agent for Service of Process)
4936 Lake Terrell Road
Ferndale, WA 98248

On January 14, 2011, I 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 parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550

On January 14, 2011, 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 with the U.S. Postal Service for delivery by Priority Mail.

Executed on January 14, 2011, in Fort Oglethorpe, Georgia.



Chris Heptinstall

Service List

District Attorney, Alameda County
1225 Fallon Street, Room 900
Oakland, CA 94612

District Attorney, Alpine County
P.O. Box 248
Markleeville, CA 96120

District Attorney, Amador County
708 Court Street, #202
Jackson, CA 95642

District Attorney, Butte County
25 County Center Drive
Oroville, CA 95965

District Attorney, Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

District Attorney, Colusa County
547 Market Street
Colusa, CA 95932

District Attorney, Contra Costa County
900 Ward Street
Martinez, CA 94553

District Attorney, Del Norte County
450 H Street, Ste. 171
Crescent City, CA 95531

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney, Fresno County
2220 Tulare Street, #1000
Fresno, CA 93721

District Attorney, Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney, Humboldt County
825 5th Street
Eureka, CA 95501

District Attorney, Imperial County
939 West Main Street, Ste 102
El Centro, CA 92243

District Attorney, Inyo County
230 W. Line Street
Bishop, CA 93514

District Attorney, Kern County
1215 Truxtun Avenue
Bakersfield, CA 93301

District Attorney, Kings County
1400 West Lacey Boulevard
Hanford, CA 93230

District Attorney, Lake County
255 N. Forbes Street
Lakeport, CA 95453

District Attorney, Lassen County
220 South Lassen Street, Ste. 8
Susanville, CA 96130

District Attorney, Los Angeles County
210 West Temple Street, Rm 345
Los Angeles, CA 90012

District Attorney, Madera County
209 West Yosemite Avenue
Madera, CA 93637

District Attorney, Marin County
3501 Civic Center, Room 130
San Rafael, CA 94903

District Attorney, Mariposa County
Post Office Box 730
Mariposa, CA 95338

District Attorney, Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney, Merced County
2222 M Street
Merced, CA 95340

District Attorney, Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney, Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney, Monterey County
230 Church Street, Bldg 2
Salinas, CA 93901

District Attorney, Napa County
931 Parkway Mall
Napa, CA 94559

District Attorney, Nevada County
110 Union Street
Nevada City, CA 95959

District Attorney, Orange County
401 Civic Center Drive West
Santa Ana, CA 92701

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

January 14, 2011

Page 6

District Attorney, Placer County
10810 Justice Center Drive, Ste 240
Roseville, CA 95678

District Attorney, Plumas County
520 Main Street, Room 404
Quincy, CA 95971

District Attorney, Riverside County
4075 Main Street, 1st Floor
Riverside, CA 92501

District Attorney, Sacramento County
901 "G" Street
Sacramento, CA 9581

District Attorney, San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney, San Bernardino County
316 N. Mountain View Avenue
San Bernardino, CA 92415-0004

District Attorney, San Diego County
330 West Broadway, Room 1300
San Diego, CA 92101

District Attorney, San Francisco County
850 Bryant Street, Room 325
San Francisco, CA 94103

District Attorney, San Joaquin County
Post Office Box 990
Stockton, CA 95201

District Attorney, San Luis Obispo County
1050 Monterey Street, Room 450
San Luis Obispo, CA 93408

District Attorney, San Mateo County
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Santa Barbara, CA 93101

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70 West Hedding Street
San Jose, CA 95110

District Attorney, Santa Cruz County
701 Ocean Street, Room 200
Santa Cruz, CA 95060

District Attorney, Shasta County
1525 Court Street, Third Floor
Redding, CA 96001-1632

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Downieville, CA 95936

District Attorney, Siskiyou County
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Yreka, CA 96097

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Fairfield, CA 94533

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Santa Rosa, CA 95403

District Attorney, Stanislaus County
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Modesto, CA 95353

District Attorney, Sutter County
446 Second Street
Yuba City, CA 95991

District Attorney, Tehama County
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Red Bluff, CA 96080

District Attorney, Trinity County
Post Office Box 310
Weaverville, CA 96093

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221 S. Mooney Avenue, Room 224
Visalia, CA 93291

District Attorney, Tuolumne County
423 N. Washington Street
Sonora, CA 95370

District Attorney, Ventura County
800 South Victoria Avenue
Ventura, CA 93009

District Attorney, Yolo County
301 2nd Street
Woodland, CA 95695

District Attorney, Yuba County
215 Fifth Street
Marysville, CA 95901

Los Angeles City Attorney's Office
City Hall East
200 N. Main Street, Rm 800
Los Angeles, CA 90012

San Diego City Attorney's Office
1200 3rd Avenue, Ste 1620
San Diego, CA 92101

San Francisco City Attorney's Office
City Hall, Room 234
1 Drive Carlton B Goodlett Place
San Francisco, CA 94102

San Jose City Attorney's Office
200 East Santa Clara Street
San Jose, CA 95113