

FITZGERALD JOSEPH LLP
JACK FITZGERALD (SBN 257370)
jack@fitzgeraldjoseph.com
PAUL K. JOSEPH (SBN 287057)
paul@fitzgeraldjoseph.com
MELANIE PERSINGER (SBN 275423)
melanie@fitzgeraldjoseph.com
TREVOR M. FLYNN (SBN 253362)
trevor@fitzgeraldjoseph.com
CAROLINE S. EMHARDT (SBN 321222)
caroline@fitzgeraldjoseph.com
2341 Jefferson Street, Suite 200
San Diego, California 92110
Phone: (619) 215-1741

Class Counsel

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL TESTONE, COLLIN SHANKS,
and LAMARTINE PIERRE, on behalf of
themselves, all others similarly situated, and
the general public,

Plaintiffs,

v.

BARLEAN'S ORGANIC OILS, LLC,

Defendant.

Case No. 3:19-cv-00169-RBM-BGS

**PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

Judge: Hon. Ruth Bermudez
Montenegro

Hearing Date: November 21, 2022

**NO ORAL ARGUMENT UNLESS
ORDERED BY THE COURT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
NOTICE OF MOTION	1
MEMORANDUM OF POINTS & AUTHORITIES.....	1
I. INTRODUCTION	1
II. PROCEDURAL HISTORY	2
III. THE SETTLEMENT.....	3
A. The Settlement Class.....	3
B. Benefits of the Settlement	3
1. \$1,612,500 Non-Reversionary Common Fund.....	3
2. Changes to Barlean’s Labeling.....	4
C. Class Notice and Claims Administration	5
D. The Settlement’s Release	5
E. Procedures for Opting Out	6
F. Procedures for Objecting.....	6
G. Attorneys’ Fees, Costs, and Service Awards	7
H. Timeline	8
IV. ARGUMENT.....	9
A. The Court Should Certify the Settlement Class.....	9
B. The Court Should Approve the Proposed Settlement.....	11
1. The Settlement is the Product of Serious, Informed, Non- Collusive Negotiations.....	12
2. The Settlement Falls within the Range of Possible Approval	15

1	a.	The <i>Churchill Village</i> Factors Favor Preliminary	
2		Approval	16
3	b.	The Monetary Relief is Fair in Relation to Potential	
4		Damages	21
5	c.	The Injunctive Relief is Appropriate and	
6		Meaningful.....	22
7	C.	The Court Should Approve the Class Notice Plan and Full Class	
8		Notice	23
9	V.	CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<i>Allen v. Similasan Corp.</i> , 2017 WL 1346404 (S.D. Cal. Apr. 12, 2017).....	passim
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	10
<i>Boyd v. Bechtel Corp.</i> , 485 F. Supp. 610 (N.D. Cal. 1979)	20
<i>Broomfield v. Craft Brew Alliance, Inc.</i> , 2018 WL 4952519 (N.D. Cal. Sept. 25, 2018)	11
<i>Broomfield v. Craft Brew Alliance, Inc.</i> , 2020 WL 1972505 (N.D. Cal. Feb. 5, 2020)	11
<i>Bruno v. Quten Research Inst., LLC</i> , 2013 WL 990495 (C.D. Cal. Mar. 13, 2013).....	23
<i>Campbell v. Facebook, Inc.</i> , 951 F.3d 1106 (9th Cir. 2020).....	13
<i>Carr v. Tadin, Inc.</i> , 2014 WL 7497152 (S.D. Cal. Apr. 18, 2014).....	24
<i>Carr v. Tadin, Inc.</i> , 51 F. Supp. 3d 970 (S.D. Cal. 2014).....	15
<i>Chevron Env't'l. Mgmt. Co. v. BKK Corp.</i> , 2013 WL 5587363 (E.D. Cal. Oct. 10, 2013).....	22
<i>Churchill Vill., L.L.C. v. Gen. Elec.</i> , 361 F.3d 566 (9th Cir. 2004).....	12, 16, 24
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	21

1	<i>Class Plaintiffs v. City of Seattle,</i>	
2	955 F.2d 1268 (9th Cir. 1992).....	12
3	<i>Edwards v. Andrews,</i>	
4	846 F. App'x 538 (9th Cir. 2021).....	24
5	<i>Edwards v. Nat'l Milk Producers Fed'n,</i>	
6	2017 WL 3623734 (N.D. Cal. June 26, 2017).....	24
7	<i>Farar v. Bayer AG,</i>	
8	No. 14-cv-4601 (N.D. Cal.)	17
9	<i>Hadley v. Kellogg Sales Co.,</i>	
10	2021 WL 5706967 (N.D. Cal. Nov. 23, 2021)	11, 23
11	<i>Hadley v. Kellogg Sales Co.,</i>	
12	324 F. Supp. 3d 1084 (N.D. Cal. 2018).....	11
13	<i>Hanlon v. Chrysler Corp.,</i>	
14	150 F.3d 1011 (9th Cir. 1998).....	10, 11, 12
15	<i>Harmsen v. Smith,</i>	
16	693 F.2d 932 (9th Cir. 1981).....	9
17	<i>Harris v. Vector Mktg. Corp.,</i>	
18	2011 WL 1627973 (N.D. Cal. Apr. 29, 2011)	15, 16
19	<i>Heim v. Heim,</i>	
20	2014 WL 1340063 (N.D. Cal. Apr. 2, 2014)	22
21	<i>Hesse v. Sprint Corp.,</i>	
22	598 F.3d 581 (9th Cir. 2010).....	5
23	<i>Hilsley v. Ocean Spray Cranberries, Inc.,</i>	
24	2020 WL 520616 (S.D. Cal. Jan. 31, 2020).....	22
25	<i>In re Apple Inc. Device Performance Litig.,</i>	
26	--- F.4th ---, 2022 WL 4492078 (9th Cir. Sept. 28, 2022).....	15
27	<i>In re Bluetooth Headset Prods. Liability Litig.,</i>	
28	654 F.3d 935 (9th Cir. 2011).....	13, 14

1	<i>In re Chinese-Manufactured Drywall Prods. Liability Litig.</i> ,	
2	424 F. Supp. 3d 456 (E.D. La. 2020).....	13, 14
3	<i>In re Hyundai & Kia Fuel Economy Litig.</i> ,	
4	926 F.3d 539 (9th Cir. 2019).....	9, 10, 11
5	<i>In re LinkedIn User Privacy Litig.</i> ,	
6	309 F.R.D. 573 (N.D. Cal. 2015).....	21
7	<i>In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices &</i>	
8	<i>Prod. Liab. Litig.</i> ,	
9	952 F.3d 471 (4th Cir. 2020).....	7
10	<i>In re Mego Fin. Corp. Sec. Litig.</i> ,	
11	213 F.3d 454 (9th Cir. 2000), <i>as amended</i> (June 19, 2000)	22
12	<i>In re Mercury Interactive Corp. Secs. Litig.</i> ,	
13	618 F.3d 988 (9th Cir. 2010).....	8
14	<i>In re Nissan Motor Corp. Antitrust Litig.</i> ,	
15	552 F.2d 1088 (5th Cir. 1977).....	25
16	<i>In re Pac. Enters. Sec. Litig.</i> ,	
17	47 F.3d 373 (9th Cir.1995).....	20
18	<i>In re Packaged Seafood Prod. Antitrust Litig.</i> ,	
19	2022 WL 2803110 (S.D. Cal. July 15, 2022)	25
20	<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> ,	
21	252 F.R.D. 83 (D. Mass. 2008).....	18
22	<i>In re Tableware Antitrust Litig.</i> ,	
23	484 F. Supp. 2d 1078 (N.D. Cal. 2007)	12
24	<i>In re TFT-LCD (Flat Panel) Antitrust Litig.</i> ,	
25	2011 WL 7575004 (N.D. Cal. Dec. 27, 2011).....	7
26	<i>In re Wells Fargo & Co. S'holder Derivative Litig.</i> ,	
27	445 F. Supp. 3d 508 (N.D. Cal. 2020)	15
28		

1	<i>Kaupelis v. Harbor Freight Tools,</i>	
2	2021 WL 4816833 (C.D. Cal. Aug. 11, 2021).....	10
3	<i>Krommenhock v. Post Foods, LLC,</i>	
4	2021 WL 2910205 (N.D. Cal. June 25, 2021).....	11
5	<i>Krommenhock v. Post Foods, LLC,</i>	
6	334 F.R.D. 552 (N.D. Cal. 2020).....	11
7	<i>Linney v. Cellular Alaska P’ship,</i>	
8	151 F.3d 1234 (9th Cir. 1998).....	20
9	<i>Makaeff v. Trump Univ., LLC,</i>	
10	309 F.R.D. 631 (S.D. Cal. 2015).....	19
11	<i>Manner v. Gucci Am., Inc.,</i>	
12	2016 WL 1045961 (S.D. Cal. Mar. 16, 2016)	12, 20, 21
13	<i>Mazza v. Am. Honda Motor Co., Inc.,</i>	
14	666 F.3d 581 (9th Cir. 2012).....	18
15	<i>McCabe v. Six Continents Hotels, Inc.,</i>	
16	2015 WL 3990915 (N.D. Cal. June 30, 2015).....	22
17	<i>McMorrow v. Mondelez Int’l, Inc.,</i>	
18	2022 WL 1056098 (S.D. Cal. Apr. 8, 2022).....	10
19	<i>Medellin v. Ikea U.S.A. W., Inc.,</i>	
20	672 Fed. App’x 782 (9th Cir. 2017).....	18
21	<i>Mendoza v. Tucson Sch. Dist. No. 1,</i>	
22	623 F.2d 1338 (9th Cir.1980).....	24
23	<i>NEI Contracting & Eng’g, Inc. v. Hanson Aggregates, Inc.,</i>	
24	2016 WL 2610107 (S.D. Cal. May 6, 2016).....	18
25	<i>NEI Contracting & Eng’g, Inc. v. Hanson Aggregates, Inc.,</i>	
26	926 F.3d 528 (9th Cir. 2019).....	18
27	<i>Pelzer v. Vassalle,</i>	
28	655 F. App’x 352 (6th Cir. 2016)	7

1	<i>Phillips Petroleum Co. v. Shutts</i> ,	
2	472 U.S. 797 (1985).....	9
3	<i>Racies v. Quincy Bioscience, LLC</i> ,	
4	No. 15-cv-292 (N.D. Cal.)	17, 19
5	<i>Rodriguez v. Bumble Bee Foods, LLC</i> ,	
6	2018 WL 1920256 (S.D. Cal. Apr. 24, 2018).....	18
7	<i>Rodriguez v. W. Publ’g Corp.</i> ,	
8	563 F.3d 948 (9th Cir. 2009).....	15, 18, 20, 24
9	<i>Romero v. Securus Techs., Inc.</i> ,	
10	2020 WL 3250599 (S.D. Cal. June 16, 2020).....	25
11	<i>Schneider v. Chipotle Mexican Grill, Inc.</i> ,	
12	2020 WL 511953 (N.D. Cal. Jan. 31, 2020).....	11
13	<i>Shannon v. Sherwood Mgmt. Co.</i> ,	
14	2020 WL 2394932 (S.D. Cal. May 12, 2020).....	7, 8
15	<i>Staton v. Boeing Co.</i> ,	
16	327 F.3d 938 (9th Cir. 2003).....	16
17	<i>Stull v. Baker</i> ,	
18	410 F. Supp. 1326 (S.D.N.Y. 1976).....	20
19	<i>Testone v. Barlean’s Organic Oils, LLC</i> ,	
20	2021 WL 4438391 (S.D. Cal. Sept. 28, 2021).....	2, 9
21	<i>Tschudy v. J.C. Penney Corp., Inc.</i> ,	
22	2015 WL 8484530 (S.D. Cal. Dec. 9, 2015).....	18
23	<i>Uschold v. NSMG Shared Servs., LLC</i> ,	
24	333 F.R.D. 157 (N.D. Cal. 2019).....	15
25	<i>Vasquez v. Coast Valley Roofing, Inc.</i> ,	
26	670 F. Supp. 2d 1114 (E.D. Cal. 2009).....	16
27	<i>Warner v. Toyota Motor Sales, U.S.A., Inc.</i> ,	
28	2016 WL 8578913 (C.D. Cal. Dec. 2, 2016)	18

1	<i>Wash. Mut. Bank, FA v. Super. Ct.,</i>	
2	24 Cal. 4th 906 (2001)	10
3	<i>Watkins v. Hireright, Inc.,</i>	
4	2016 WL 1732652 (S.D. Cal. May 2, 2016).....	11, 12, 17, 18
5	<i>Winters v. Two Towns Ciderhouse, Inc.,</i>	
6	2021 WL 1889734 (S.D. Cal. May 11, 2021).....	8
7	<i>Yeoman v. Ikea U.S.A. W., Inc.,</i>	
8	2014 WL 7176401 (S.D. Cal. Dec. 4, 2014).....	18
9	Other Authorities	
10	87 Fed. Reg. 5063, 5064 (Jan. 31, 2022)	23
11		
12	Fed. R. Civ. P. 23(e), advisory committee note (2003 amendment)	14
13	Rules	
14		
15	Fed. R. Civ. P. 23(c)(2)(B).....	23
16	Fed. R. Civ. P. 23(h)	7
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT, pursuant to Fed. R. Civ. P. 23(e), Plaintiffs hereby move the Court, the Honorable Ruth Bermudez Montenegro presiding, for an Order preliminarily approving a proposed settlement on behalf of a nationwide class (the “Settlement”); certifying the settlement class; approving the proposed notice plan; setting schedules for notice, claims, opting out, objecting; and for the Court to conduct a fairness hearing. The Motion is based upon this Notice of Motion, the below Memorandum, the concurrently-filed Declarations of Paul K. Joseph (“Joseph Decl.”) and Jeanne C. Finegan (“Finegan Decl.”) and all exhibits thereto, including the Settlement Agreement attached to the Joseph Declaration as Exhibit 1 (“Settlement Agreement” or “SA”), all prior pleadings and proceedings in this action, and any additional evidence and argument submitted in support of the Motion.

This Motion is made following the conference of counsel that took place on October 6, 2022. Barlean’s has indicated it does not oppose the Motion.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Filed on January 24, 2019, this consumer fraud class action has been litigated for over three and a half years. During the litigation there was substantial fact and expert discovery, including written discovery and depositions, on both merits and class certification issues. There was also considerable motion practice, including Plaintiffs’ motion for class certification that was granted on September 28, 2021 (Dkt. No. 98). Only after obtaining certification—and with their motion for partial summary judgement pending and the pretrial conference about one month away—were Plaintiffs able to secure the sizable relief embodied in the present settlement. *See* Joseph Decl. ¶¶ 11-17. The settlement provides a \$1,612,500 all-cash, non-reversionary common fund, and prohibits Barlean’s from using the labeling statements, as challenged in this case, on its Coconut Oil Products. *See* SA ¶¶ 1.12, 2.2 (defining Coconut Oil Products and identifying injunctive relief regarding the challenged claims). This relief is substantial considering the potential recovery and the risks associated

1 with trial. *See* Joseph Decl. ¶¶ 19-31. Accordingly, the Court should find that the proposed
 2 Settlement falls within the range of reasonableness and grant preliminary approval.

3 **II. PROCEDURAL HISTORY**

4 On January 24, 2019, Plaintiffs filed this action alleging Barlean’s breached warranties
 5 and violated other California and New York consumer protection laws, because Barlean’s
 6 “misleadingly markets its coconut oil Products as inherently healthy . . . despite that coconut
 7 oil is actually inherently *unhealthy*,” *Testone v. Barlean’s Organic Oils, LLC*, 2021 WL
 8 4438391 at *1-2 (S.D. Cal. Sept. 28, 2021) (record citations omitted).

9 On July 24, 2019, the parties attended an Early Neutral Evaluation Conference with
 10 Magistrate Bernard G. Skomal (*see* Dkt. No. 27), but the parties were unable to reach a
 11 resolution.

12 On September 4, 2019, Plaintiffs filed a First Amended Complaint (Dkt. No. 35,
 13 hereafter “FAC”), adding claims for damages under the CLRA (*see* Dkt. No. 31). Barlean’s
 14 answered on September 10. (Dkt. No. 36.)

15 Discovery proceeded with the parties serving written discovery requests and taking
 16 depositions of fact witnesses and the parties’ six total expert witnesses (three each). Joseph
 17 Decl. ¶¶ 4-10. In response to Plaintiffs’ written discovery requests, Barlean’s produced nearly
 18 60,000 pages of documents comprising, among other things, consumer research, labels and
 19 off-label marketing, pricing, sales, and internal email communications regarding the Coconut
 20 Oil Products. *See id.* ¶ 5. Barlean’s also produced literature regarding the health effects of
 21 consuming coconut oil, and materials related to its experts and their opinions. *See id.*

22 In March 2021, Plaintiffs moved for class certification (Dkt. No. 70). In connection
 23 with Plaintiffs’ class certification motion, the Parties raised various *Daubert* and evidentiary
 24 challenges to the other parties’ expert materials. (*See* Dkt. Nos. 86, 88, 89). In September
 25 2021, the Court granted Plaintiffs’ certification motion, certifying California and New York
 26 Classes. *See Testone*, 2021 WL 4438391.

27 On December 6, 2021, the parties attended a Mandatory Settlement Conference with
 28 Judge Skomal—but the case did not settle (Dkt. No. 106), and the Court issued a scheduling

1 order setting expert disclosure and discovery and pretrial deadlines (Dkt. No. 107).

2 On December 14, 2021, Plaintiffs filed a motion for partial summary judgment. (Dkt.
3 No. 108.)

4 In March of 2022, with Plaintiffs’ partial summary judgment motion pending and trial
5 looming, the parties resumed settlement negotiations. *See* Joseph Decl. ¶ 16. Over the next
6 several months, the parties continued to negotiate, trading dozens of offers and counteroffers.
7 *Id.* Finally, in late July, the parties reached an agreement in principle of which they notified
8 the Court. *See id.* ¶ 17.

9 **III. THE SETTLEMENT**

10 **A. The Settlement Class**

11 The Settlement Class is comprised of all persons who, between January 24, 2015 and
12 the date the Court grants preliminary approval (the “Class Period”), purchased in the United
13 States, for personal or household use and not for resale or distribution, one of the “Coconut
14 Oil Products.” *See* SA ¶¶ 1.3, 1.6, 1.12, and 1.24 (defining Class or Class Members, Class
15 Period, Coconut Oil Products, and Settlement Class).

16 **B. Benefits of the Settlement**

17 **1. \$1,612,500 Non-Reversionary Common Fund**

18 Barlean’s will establish a \$1,612,500 all-cash, non-reversionary common fund (the
19 “Common Fund”). This fund will be used to pay all settlement expenses, including: Full Class
20 Notice (SA ¶¶ 1.16, 3.2) and claims administration; Class Member claims; and any Court-
21 approved attorneys’ fees, expenses, and service awards. *See* SA ¶¶ 2.3, 2.5, 2.6.

22 *Class Member Claim Payments.*

23 Class Members can make a claim by completing and submitting a short form directly
24 through the Settlement Website, SA ¶ 1.25, or by downloading it and mailing it to the Claims
25 Administrator. SA ¶ 2.3 & Ex. 3, Finegan Decl. ¶ 48.

26 Class Members who have their claims validated by the Claims Administrator will be
27 reimbursed for each unit of the Coconut Oil Products purchase as follows:
28

Estimated <i>Per Unit</i> Reimbursement Without Proof of Purchase			
	Virgin	Culinary/Refined	Butter Flavored
16oz.	\$ 4	N/A	\$3
32oz.	\$ 7	\$5	\$3
60oz.	\$ 7	\$5	N/A

Class Members who submit valid proof of purchase, as determined by the Claims Administrator, can claim as many units (single containers) of the Coconut Oil Products for which they have, and submit, valid proof of purchase. SA ¶ 2.3. Class Members without valid proof of purchase can claim up to five units. *Id.*

Pro Rata Adjustments and Cy Pres.

If the total amount of funds claimed by Class Members is greater or less than the total amount of the Common Fund that is available to Class Members (after costs, fees, and service awards), then the amount paid to Class Members will be adjusted on a pro rata basis. For example, if the total amount of funds claimed by Class Members is less than the funds available for claims, the excess funds will be distributed to Class Members on a pro-rata basis that is proportional to the value of each valid Claim. The excess pro-rata distribution, if any, will be made concurrently with the distribution of the base claim amount. On the other hand, if the total amount of funds claimed by Class Members is greater than the funds available for claims, each claim will be reduced on a pro-rata basis that is proportional to the value of each Claim.

Any amounts remaining uncleared after one hundred eighty (180) days following distribution will be donated *cy pres* to the Tufts University Friedman School of Nutrition, subject to the Court's approval. *See id.* ¶ 2.3.

2. Changes to Barlean's Labeling

For five years from the date the Court issues a final approval order, the Settlement prohibits Barlean's from using any labeling representations challenged in this lawsuit on the Coconut Oil Products. (*Compare* FAC ¶ 197, with SA ¶ 2.2). The only exception is that if Barlean's modifies a claim to conform with the requirements for nutrient content or health

claims that are, at that point in time, applicable under federal and state law, it may use such authorized claims. SA ¶ 2.2.

C. Class Notice and Claims Administration

Subject to the Court's approval, the parties have retained Kroll Settlement Administration ("Kroll") as the Claims Administrator to effect Full Class Notice and claims administration. *See* SA ¶ 3.3 (listing duties of Claims Administrator). Kroll is an experienced administrator that numerous courts have praised for its excellent work in claims administration. *See* Finegan Decl. ¶¶ 1-11. Class Counsel requested bids from Kroll, epIQ Global, and CPT Group. *See* Joseph Decl. ¶ 26. After evaluating the competing bids, Kroll was selected as the best fit. *See id.* ¶¶ 28-29.

The Settlement provides that Full Class Notice will be effectuated through a Notice Plan, SA ¶ 1.18, designed by the Claims Administrator to comply with the requirements of Rule 23 and due process, and approved by the parties and Court. SA ¶ 3.3. The Notice Plan proposed by Kroll meets these requirements. *See* Finegan Decl. ¶¶ 13-51. On behalf of Barlean's, Kroll will also serve CAFA notice upon the appropriate officials within ten (10) days after the filing of this motion, as required by 28 U.S.C. § 1715(b). *See* SA ¶ 3.6.

D. The Settlement's Release

Upon the Final Effective Settlement Date, *see* SA ¶ 1.15 (five days after the judgement in the Action becomes final and non-appealable), each Class Member who has not opted out will be deemed to have released the Barlean's Released Parties from any and all claims, which have, or which could have been asserted in the Action, that are based on the identical factual predicate, or depend on the same set of facts alleged in the Action regarding the Coconut Oil Products, consistent with *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), *see* SA ¶ 4.3. The release includes a waiver of California Civil Code Section 1542 or any other state provision that is similar, comparable, or equivalent in substance or intent to Section 1542. *Id.*

Barlean's will also release any claims against Plaintiffs and Class Counsel arising from or in connection with the filing and conduct of the Action. SA ¶ 4.4.

1 **E. Procedures for Opting Out**

2 Class Members who wish to opt out of and be excluded from the Settlement must
3 submit a Request for Exclusion/Opt-Out to the Claims Administrator, postmarked or
4 submitted online no later than the Opt-Out Deadline. *See id.*; S.A. ¶ 3.5. The Request for
5 Exclusion/Opt-Out must be personally completed and submitted by the Class Member or his
6 or her attorney. S.A. ¶ 3.5. So-called “mass” or “class” opt-outs shall not be permitted. *Id.*

7 All Class Members who submit a timely, valid Request from Exclusion/Opt-Out will
8 be excluded from the Settlement and will not be bound by the terms of this Agreement, and
9 all Class Members who do not submit a timely, valid Request for Exclusion/Opt-Out will be
10 bound by this Agreement and the Judgment, including the release in paragraph 4.3. *See id.*

11 **F. Procedures for Objecting**

12 Settlement Class Members wishing to object must, by the Objection Deadline, file or
13 mail their written objections to the Court. *See* SA ¶¶ 1.19 (defining Objection Deadline), 3.4
14 (Procedures for Objecting to the Settlement), 3.4.1 (Timely Written Objection Required). If
15 a Class Member submits both a Request for Exclusion/Opt-Out and files an Objection, the
16 Class Member will be deemed to have opted out of the Settlement, and thus be ineligible to
17 object. *Id.* ¶ 3.4.4. Any objecting Class Member will be bound by the terms of the Agreement
18 upon the Court’s final approval of the Settlement. *Id.*

19 Class Notice and the Settlement Website will include instructions on how to object and
20 provide notice of intent to appear at the Fairness Hearing, if an objector wishes to appear.
21 Any objection must contain (i) a caption or title that clearly identifies the Action and that the
22 document is an objection, (ii) information sufficient to identify and contact the objecting
23 Class Member or his or her attorney if represented, (iii) information sufficient to establish the
24 person’s standing as a Settlement Class Member, (iv) a clear and concise statement of the
25 Class Member’s objection, as well as any facts and law supporting the objection, (v) the
26 objector’s signature, and (vi) the signature of the objector’s counsel, if any. *Id.* ¶ 3.4.2.

27 Class Members may object either on their own or through an attorney hired at their
28 own expense, but a Class Member represented by an attorney must sign either the Objection

1 itself or execute a separate declaration stating that the Class Member authorizes the filing of
 2 the Objection. *Id.* ¶ 3.4.3. Objecting Class Members may appear at the Fairness Hearing and
 3 be heard. SA ¶ 3.4.5. Such Class Members are requested, but not required, in advance of the
 4 Fairness Hearing, to file with the Court a Notice of Intent to Appear. *Id.*

5 The parties may respond to any objection, with a written response due the same day as
 6 the Motion for Final Approval, or as otherwise ordered by the Court. *Id.* ¶ 3.4.7. Upon Court
 7 order, the parties will have the right to obtain document discovery from and take depositions
 8 of any Objecting Class Member on topics relevant to the Objection. *Id.* ¶ 3.4.6.

9 **G. Attorneys’ Fees, Costs, and Service Awards**

10 “In a certified class action, the court may award reasonable attorney’s fees and
 11 nontaxable costs that are authorized by law or by the parties’ agreement.” *Shannon v.*
 12 *Sherwood Mgmt. Co.*, 2020 WL 2394932, at *10 (S.D. Cal. May 12, 2020) (quoting Fed. R.
 13 Civ. P. 23(h)). The Settlement Agreement provides that Plaintiffs and Class Counsel will seek
 14 Court approval for service awards and attorneys’ fees and costs, to be paid from the Common
 15 Fund. SA ¶¶ 2.3, 2.5.¹ The Settlement, however, “is not dependent or conditioned upon the
 16 Court’s approving Class Counsel’s and Class Representatives’ requests . . . or awarding the
 17 particular amounts sought,” and if the “Court declines Class Counsel’s or Class
 18 Representatives’ requests or awards less than the amounts sought, this Settlement will
 19 continue to be effective and enforceable,” *see id.* ¶ 2.5. *Cf. Shannon* 2020 WL 2394932, at
 20

21
 22 ¹ The Settlement Agreement includes a “quick pay” provision for attorneys’ fees. SA ¶ 2.4.
 23 These help deter meritless objections and are routinely approved in the Ninth and other
 24 Circuits. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 7575004, at *1 (N.D. Cal.
 25 Dec. 27, 2011) (collecting cases); *Pelzer v. Vassalle*, 655 Fed. App’x 352, 365 (6th Cir.
 26 2016) (“over one-third of federal class action settlement agreements in 2006 included quick-
 27 pay provisions” and they do “not harm the class members in any discernible way, as the size
 28 of the settlement fund available to the class will be the same regardless of when the attorneys
 get paid.”); *In re Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales
 Practices & Prod. Liab. Litig.*, 952 F.3d 471, 487 (4th Cir. 2020) (“we observe that quick-
 pay provisions have generally been approved by other federal courts.”).

*11 (the Court may “further scrutinize the reasonableness of the fee award at the final approval stage.”).

Here, Plaintiffs will likely request service awards of \$7,500 each, and Class Counsel will request fees of no more than one-third (33.3%) of the Common Fund, or up to \$537,500.²

Based on a preliminary tally of counsel’s raw billing records (*i.e.*, before making cuts), at the time this motion was submitted Class Counsel has spent over 1,489 hours working on the case, for a lodestar of approximately \$947,000. Joseph Decl. ¶ 43. The maximum fee request of one-third (33.3%) of the Common Fund thus represents a *negative* multiplier. *Compare Winters v. Two Towns Ciderhouse, Inc.*, 2021 WL 1889734, at *3 (S.D. Cal. May 11, 2021) (Approving fees representing 1.675 lodestar multiplier “because of the contingent nature of the litigation and the fact that counsel assumed the risk, including fronting the costs, of the litigation,” and “achieved the ultimate goal of getting Defendant to omit artificial DL-Malic Acid from its drink products as well as getting Defendant to change the packaging labels, which the Court finds to be a superior result.”).

In its anticipated fee motion, Class Counsel will show that the requests for service awards, fees, and costs are justified in this case. *See* Joseph Decl. ¶ 43.

H. Timeline

Assuming the Court grants preliminary approval, the schedule proposed below gives Class Members sufficient time to receive Notice, and to make a claim, opt out, or object after reviewing Plaintiffs’ Motion for Attorneys’ Fees, Costs, and Service Awards. *See In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 993-95 (9th Cir. 2010).

Event	Day	Weeks After Preliminary Approval	Example Assuming PA Granted November 21, 2022
Date Court grants preliminary approval	0	-	November 21, 2022

² Plaintiffs will also seek reimbursement of \$161,818 in costs. *See* Joseph Decl. ¶ 43.

Event	Day	Weeks After Preliminary Approval	Example Assuming PA Granted November 21, 2022
Deadline to commence 70-day notice period	14	2 weeks	December 5, 2022
Deadline for Plaintiffs to file Motion for Attorneys' Fees, Costs, and Service Awards	56	8 weeks	January 16, 2023
Notice completion date, and deadline to make a claim, opt out, and object	70	10 weeks	January 30, 2023
Deadline for Plaintiffs to file Motion for Final Approval	84	12 weeks	February 13, 2023
Fairness Hearing	112	16 weeks	March 13, 2023

IV. ARGUMENT

A. The Court Should Certify the Settlement Class

The Court has already found the requirements of Rules 23(a) and (b)(3) satisfied as to California and New York Classes. *See Testone*, 2021 WL 4438391. The proposed Settlement Class differs from the certified litigation classes only in that it is a single nationwide class. The Ninth Circuit held it is proper for a district court to apply California's consumer protection laws to a nationwide settlement class in *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 561-66 (9th Cir. 2019) (en banc) [*"Hyundai"*]. "Subject to constitutional limitations and the forum state's choice-of-law rules," the Ninth Circuit explained, "a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." *Id.* at 561 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985)). "[A] district court sitting in diversity must 'apply the substantive law of the state in which it sits, including choice-of-law rules,'" *id.* (quoting *Harmsen v. Smith*, 693 F.2d 932, 946-47 (9th Cir. 1981)). "By default, California courts apply California law 'unless a party litigant timely invokes the law of a foreign state,' in which case it is 'the foreign law proponent' who must 'shoulder the burden of demonstrating that foreign law, rather than California law,

1 should apply to class claims.” *Id.* (emphasis added) (quoting *Wash. Mut. Bank, FA v. Super.*
 2 *Ct.*, 24 Cal. 4th 906, 921 (2001) (citations omitted)).

3 And, as in *Hyundai*, “no party [has] argued that California’s choice-of-law rules should
 4 not apply to this class settlement arising . . . in a California court.” *See id.* Thus, at this
 5 preliminary approval stage, “neither the district court nor class counsel [a]re obligated to
 6 address choice-of-law issues beyond those raised” *See id.* at 562. Thus, while the
 7 Settlement anticipates certification of a nationwide Class, “[e]xpansion of the class to include
 8 all purchasers nationwide . . . does not change the class certification analysis,” *McMorrow v.*
 9 *Mondelez Int’l, Inc.*, 2022 WL 1056098, at *3 (S.D. Cal. Apr. 8, 2022) (citing *Allen v.*
 10 *Similasan Corp.*, 2017 WL 1346404, at *3 (S.D. Cal. Apr. 12, 2017)).

11 Moreover, while manageability is a factor for predominance, “manageability is not a
 12 concern in certifying a settlement class where, by definition, there will be no trial.” *Hyundai*,
 13 926 F.3d at 556-57; *accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)
 14 (“Confronted with a request for settlement-only class certification, a district court need not
 15 inquire whether the case, if tried, would present intractable management problems . . . for the
 16 proposal is that there be no trial.”); *see also Kaupelis v. Harbor Freight Tools*, 2021 WL
 17 4816833, at *7 (C.D. Cal. Aug. 11, 2021) (while the court previously rejected a Nationwide
 18 UCL Class, that was only “because conflicts of law required that different states’ laws be
 19 applied to different portions of the proposed classes, making the classes unmanageable for
 20 litigation. (citation). This concern need not be considered . . . where the Court is only inquiring
 21 into whether the proposed classes are sufficiently cohesive and warranted to justify
 22 settlement.” (citing *Hyundai*, 926 F.3d at 558)).

23 This reasoning “applies with even greater force . . . where”—as here—“the class claims
 24 turn on the [defendant’s] common course of conduct . . . and no objector [has] established
 25 that the law of any other states applie[s].” *Hyundai*, 926 F.3d at 563-64. But even if an
 26 objector “adequately raise[s] and convincingly argue[s] the distinctions between California
 27 and [foreign] law under the governmental interest test,” a court may, without abusing its
 28 discretion and “entirely consistent with [the Ninth Circuit’s] analysis in *Hanlon*” “f[i]nd that

1 the potential differences in [foreign] law [a]re not so substantial as to predominate over other
2 common issues or to preclude certification.” *Id.* at 564 n.8.

3 Accordingly, the Court should certify the Settlement Class. *See Schneider v. Chipotle*
4 *Mexican Grill, Inc.*, 2020 WL 511953, at *2, *5-6 & n.5 (N.D. Cal. Jan. 31, 2020) (after
5 having certified California, Maryland, and New York classes for litigation, concluding
6 predominance was satisfied for nationwide settlement class “because the Settlement Class
7 Members were exposed to uniform representations concerning Chipotle’s non-GMO claims
8 and suffered the same injuries”; and noting that, under *Hyundai*, “the Court at this stage need
9 not analyze whether any differences in state laws prevent provisional class certification”);
10 *Hameed-Bolden v. Forever 21 Retail, Inc.*, 2021 WL 5107729, at *2 n.4 (C.D. Cal. Sept. 27,
11 2021) (“As the en banc Ninth Circuit made clear recently in [*Hyundai*], the
12 predominance/manageability concerns presented by unknown or potential conflicts amongst
13 the laws of 50 states do not arise in the context of certification for settlement purposes. . . .
14 As such, there is no need – at least at this point in time – for the Court to engage in any
15 conflicts-of-law analysis . . . [and] the Court has no hesitation in concluding that California’s
16 laws may be applied in this action, to a nationwide class, without raising any due process
17 concerns.”); *Krommenhock v. Post Foods, LLC*, 2021 WL 2910205 (N.D. Cal. June 25, 2021)
18 (granting final approval to nationwide settlement class after certifying only California
19 classes³); *Hadley v. Kellogg Sales Co.*, 2021 WL 5706967 (N.D. Cal. Nov. 23, 2021) (same⁴);
20 *Broomfield v. Craft Brew Alliance, Inc.*, 2020 WL 1972505 (N.D. Cal. Feb. 5, 2020) (same⁵).

21 **B. The Court Should Approve the Proposed Settlement**

22 “The Ninth Circuit maintains a ‘strong judicial policy’ that favors the settlement of
23 class actions.” *Watkins v. Hireright, Inc.*, 2016 WL 1732652, at *3 (S.D. Cal. May 2, 2016)

24
25 ³ *See Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 567 (N.D. Cal. 2020).

26 ⁴ *See Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1121 (N.D. Cal. 2018).

27 ⁵ *See Broomfield v. Craft Brew Alliance, Inc.*, 2018 WL 4952519, at *1 (N.D. Cal. Sept. 25,
28 2018).

(quoting *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)). At this stage, the Court must make “a preliminary determination of whether the class-action settlement is ‘fair, reasonable, and adequate’ pursuant to Rule 23(e)(2).” *Id.*, at *6. “It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Factors relevant to this determination include, among others, “the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.” *Id.* at 1026; *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

“Preliminary approval of a settlement and notice to the proposed class is appropriate if ‘the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.’” *Manner v. Gucci Am., Inc.*, 2016 WL 1045961, at *6 (S.D. Cal. Mar. 16, 2016) [*“Gucci”*] (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and citations omitted)).

1. The Settlement is the Product of Serious, Informed, Non-Collusive Negotiations

The Settlement is the result of well-informed, non-collusive and arms’-length negotiations and the agreement was only reached after fact and expert discovery closed, the Court granted Plaintiffs’ certification motion, and Plaintiffs filed for partial summary judgment. Joseph Decl. ¶ 18. The parties first seriously discussed settlement at the July 24, 2019 Early Neutral Evaluation Conference, but the parties were far apart. *Id.* ¶ 12. Over the next year and a half, two settlement offers were made but neither resulted in serious discussions. *Id.* ¶¶ 12-14. On December 6, 2021, Magistrate Judge Skomal held a Mandatory

1 Settlement Conference, which was again unsuccessful. *Id.* ¶ 15. Only with both fact and
 2 expert discovery closed, Plaintiffs’ partial summary judgment motion pending, and trial
 3 looming, were the parties able to reach a compromise to resolve this matter. *Id.* ¶¶ 16-17.
 4 These negotiations spanned several months and involved exchanging dozens of offers
 5 between the parties. *Id.* And even after an agreement in principle was reached, negotiations
 6 about the details of certain material terms were hard fought and delayed filing of this motion
 7 seeking preliminary approval. *See id.* ¶ 17; Dkt. No. 125 (“The Parties had hoped to have
 8 finalized the settlement agreement and file for preliminary approval by now but, during their
 9 continued negotiations, the Parties had a disagreement on one issue that was only resolved
 10 on October 4, 2022.”).

11 Thus, the manner in which the Settlement was reached demonstrates it was the product
 12 of well-informed, non-collusive, and arms’-length negotiations. *See Campbell v. Facebook,*
 13 *Inc.*, 951 F.3d 1106, 1122, 1127 (9th Cir. 2020) (case being “nearly [at] the close of
 14 discovery” indicated “the settlement’s substantive fairness”); *In re Chinese-Manufactured*
 15 *Drywall Prods. Liability Litig.*, 424 F. Supp. 3d 456, 486 (E.D. La. 2020) (

16 Counsel on both sides have zealously advocated for their clients for . . . years,
 17 as evidenced by the extensive discovery, motions practice, and significant
 18 resources expended in this case. The parties entered the negotiation with the
 19 experience and institutional knowledge necessary to successfully negotiate on
 20 behalf of their clients, and the settlement was accordingly achieved as a result
 21 of the adversarial process.).

22 In *In re Bluetooth Headset Prods. Liability Litig.*, the Ninth Circuit identified “subtle
 23 signs” of collusion, including (1) “when counsel receive a disproportionate distribution of the
 24 settlement, or when the class receives no monetary distribution but class counsel are amply
 25 rewarded”; “(2) when the parties negotiate a ‘clear sailing’ arrangement”; or “(3) when the
 26 parties arrange for fees not awarded to revert to defendants[.]” 654 F.3d 935, 947 (9th Cir.
 27 2011) (citations omitted).

28 No such subtle signs of collusion are present here. Following deductions for costs of

1 notice and administration, expenses, fees, and services awards, Class Members will receive
 2 monetary payments distributed on a pro-rata basis according to the number and kind of
 3 Coconut Oil Products that they purchased. And because all settlement costs—including
 4 fees—will be paid from the common fund, nothing in the Agreement purports to entitle
 5 counsel to a disproportionate distribution of the settlement. Further, the Settlement
 6 Agreement includes no “clear sailing” agreement, instead providing only that counsel will
 7 apply to the Court for fees, imposing no conditions on Barlean’s response, SA ¶ 2.5,
 8 demonstrating Class Counsel did not subvert the Class’s interests to Barlean’s “in exchange
 9 for red-carpet treatment on fees,” *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d at
 10 947 (quotation omitted). *See also In re Chinese-Manufactured Drywall Prods. Liability Litig.*,
 11 424 F. Supp. 3d at 486 (“[T]he prospect of fraud or collusion is substantially lessened where,
 12 as here, the settlement agreement leaves the determination and allocation of attorney fees to
 13 the sole discretion of the trial court.”). In short, “[b]ecause the parties have not agreed to an
 14 amount of attorney fees and instead [will] merely petition[] the Court for an award they
 15 believe is appropriate, there is no threat of the issue tainting the fairness of the settlement
 16 negotiations.” *See id.*⁶ Moreover, an award of fees that is less than requested “shall not be a
 17 basis for rendering the entire Settlement null, void or unenforceable,” although “Class
 18 Counsel retain[s] the right to appeal any decision by the Court regarding the Court’s award
 19 of attorneys’ fees and costs.” *See* SA ¶ 2.5.

20 In addition, the Settlement does not treat the Class Representatives or any Class
 21 Members preferentially, since every Class Member who makes a claim, including the Class
 22 Representatives, will be subject to the same claims process that provides the same remedy
 23 based on the claimant’s purchase history. *See* SA ¶ 2.3. Specifically, each Class Members
 24 will receive the same amount for a given type of unit validly claimed, and any pro-rata

26 ⁶ Similarly, no other agreements have been made in connection with the settlement, Joseph
 27 Decl. ¶ 3, so there is no possibility such an agreement “may have influenced the terms of the
 28 settlement by trading away possible advantages for the class in return for advantages for
 others,” Fed. R. Civ. P. 23(e), advisory committee note (2003 amendment).

1 adjustments will be applied in an equal manner to all valid Class Member claims. *Id.*

2 That Class Representatives will move for service awards does not change this analysis.
 3 “It is well-established in this circuit that named plaintiffs in a class action are eligible for
 4 reasonable incentive payments, also known as service awards.” *In re Wells Fargo & Co.*
 5 *S’holder Derivative Litig.*, 445 F. Supp. 3d 508, 534 (N.D. Cal. 2020) (internal quotation
 6 marks and citation omitted), *aff’d*, 845 F. App’x 563 (9th Cir. 2021) [*“Wells Fargo”*]. Very
 7 recently the Ninth Circuit reaffirmed that service awards to named plaintiffs in a class action
 8 are permissible and do not render a settlement unfair or unreasonable. *See In re Apple Inc.*
 9 *Device Performance Litig.*, --- F.4th ----, 2022 WL 4492078, at *11–13 (9th Cir. Sept. 28,
 10 2022). “Incentive awards are payments to class representatives for their service to the class
 11 in bringing the lawsuit.” *Wells Fargo*, 445 F. Supp. 3d at 534 (internal quotation marks and
 12 citation omitted).⁷ *See also Carr v. Tadin, Inc.*, 51 F. Supp. 3d 970, 986 (S.D. Cal. 2014)
 13 (“Incentive awards are ‘fairly typical’ discretionary awards ‘intended to compensate class
 14 representatives for work done on behalf of the class, to make up for financial or reputational
 15 risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act
 16 as a private attorney general.” (quoting *Rodriguez*, 563 F.3d at 958–59)).

17 In short, although Class Representatives will apply for service awards for their service
 18 in this matter, this does not constitute preferential treatment since the settlement “provides
 19 equal relief to all class members” and “distributions to each class member—including
 20 Plaintiff—are calculated in the same way,” *see Harris v. Vector Mktg. Corp.*, 2011 WL
 21 1627973, at *9 (N.D. Cal. Apr. 29, 2011).

22 2. The Settlement Falls Within the Range of Possible Approval

23 “To evaluate the range of possible approval criterion, which focuses on substantive
 24

25 ⁷ “[I]ncentive *awards* [are distinguishable] from incentive *agreements*, the latter of which are
 26 ‘entered into as part of the initial retention of counsel’ and ‘put class counsel and the
 27 contracting class representatives into a conflict position from day one.’” *Uschold v. NSMG*
 28 *Shared Servs., LLC*, 333 F.R.D. 157, 171 (N.D. Cal. 2019) (quoting *Rodriguez v. W. Publ’g*
Corp., 563 F.3d 948, 958 (9th Cir. 2009) (emphasis in original)).

1 fairness and adequacy, courts primarily consider plaintiffs’ expected recovery balanced
 2 against the value of the settlement offer.” *Harris*, 2011 WL 1627973, at *9 (quoting *Vasquez*
 3 *v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009) (citation omitted)).

4 Additionally, to determine whether a settlement is fundamentally fair, adequate,
 5 and reasonable, the Court may preview the factors that ultimately inform final
 6 approval: (1) the strength of the plaintiffs’ case; (2) the risk, expense,
 7 complexity, and likely duration of further litigation; (3) the risk of maintaining
 8 class action status throughout the trial; (4) the amount offered in settlement; (5)
 9 the extent of discovery completed and the stage of the proceedings; (6) the
 10 experience and views of counsel; (7) the presence of a governmental participant;
 11 and (8) the reaction of class members to the proposed settlement.

12 *Id.* (citing *Churchill Village*, 361 F.3d at 575); accord *Winters v. Two Towns Ciderhouse,*
 13 *Inc.*, 2020 WL 5642754, at *3 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003))
 14 [*“Winters I”*].

15 **a. The *Churchill Village* Factors Favor Preliminary Approval**

16 Analysis of the *Churchill Village* factors favors preliminary approval.

17 ***The Strength of Plaintiffs’ Case and the Risk, Expense, Complexity, and Duration***
 18 ***of Further Litigation.*** Plaintiffs and Class Counsel believe the theory underlying this case
 19 was and is strong on the merits. Although Barlean’s expert Dr. Catherine Adams Hutt,
 20 disputed that consuming coconut oil is unhealthy, *see* Dkt. No. 116-3, February 25, 2022
 21 Rebuttal Expert Report of Catherine Adams Hutt, Ph.D., R.D., C.F.S, coconut oil is over 90%
 22 saturated fat, and its consumption significantly increases risk of cardiovascular disease by
 23 raising “bad” LDL- and total-cholesterol levels, causing inflammation, and impairing arterial
 24 endothelial function. *See* Dkt. No. 70-13, February 23, 2021 Report of Dr. Michael Greger,
 25 M.D., FACLM. This is not just the conclusion of Dr. Greger’s rigorous analysis. The
 26 American Heart Association has expressly warned that, “because coconut oil increases LDL
 27 cholesterol, a cause of [cardiovascular disease], and has no known offsetting favorable
 28 effects, we advise against the use of coconut oil.” *See* FAC ¶ 68. Further, many of the

1 challenged labeling statements are unauthorized nutrient content claims, meaning they violate
 2 FDA regulations and, in turn, violate the “unlawful” prong of California’s Unfair Competition
 3 Law. *See* FAC ¶¶ 89-123, 168; *see* Dkt. No. 108, Plaintiffs’ Partial Summary Judgement Mot.

4 Nevertheless, Barlean’s raised numerous defenses, including expert testimony from
 5 Sarah Butler that the challenged claims on the labels of Barlean’s Coconut Oil Products are
 6 not material. *See* Dkt. No. 81-1 Ex. D, April 20, 2021, Expert Report of Sarah Butler, and
 7 Dkt. No. 116-2, February 10, 2022 Expert Report of Sarah Butler, Barlean’s also challenged
 8 Plaintiffs’ damages model through the expert testimony of Stephanie Plancich, Ph.D., who
 9 opined Plaintiffs’ conjoint analysis would not, and could not, measure any alleged “price
 10 premium” or class wide damages. *See* Dkt. No. 81-1 Ex. L, April 22, 2021 Expert Report of
 11 Stephanie Plancich, Ph.D.

12 Thus, despite believing in the merits of their case, these defenses created real risk for
 13 Plaintiffs. There was a risk that Plaintiffs could lose at trial—as has happened in several
 14 seemingly meritorious consumer fraud class actions that have recently gone to trial in
 15 California with judgments returned for defendants. *See Farar v. Bayer AG*, No. 14-cv-4601
 16 (N.D. Cal.); *Allen v. Hyland’s, Inc.*, No. 12-cv-1150 DMG (MANx) (C.D. Cal.); *cf. Racies v.*
 17 *Quincy Bioscience, LLC*, No. 15-cv-292 (N.D. Cal.) (declaring mistrial and decertifying
 18 class). And, especially because of the need for expert scientific testimony from both sides,
 19 trial would have been complex and expensive. “[C]ontinued litigation of this matter would
 20 include motions for summary judgment, trial and appeal” and “further litigation would have
 21 significantly delayed any relief to Class Members.” *Watkins*, 2016 WL 1732652, at *7 (record
 22 citations and internal quotation marks omitted).

23 Even if Plaintiffs prevailed in establishing liability, they also faced the risk that the jury
 24 would find fault with their damages model and award little or no monetary relief at all.
 25 Further, even complete success at trial would leave Class Members outside California and
 26 New York uncompensated. For even the possibility of obtaining the nationwide relief
 27 conferred by the Settlement, Class Counsel or other attorneys would have to file and
 28 prosecute actions in all other states since—given existing precedent—it is virtually

impossible that the claims of the nationwide Settlement Class could ever be adjudicated in a single forum and trial. *See, e.g., Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL 8578913, at *12 (C.D. Cal. Dec. 2, 2016) (“Nationwide class certification under the laws of multiple states can be very difficult for plaintiffs’ counsel.” (citing *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 590-94 (9th Cir. 2012); *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 94 (D. Mass. 2008) (noting that “[w]hile numerous courts have talked-the-talk that grouping of multiple state laws is lawful and possible, very few courts have walked the grouping walk”))); *Rodriguez v. Bumble Bee Foods, LLC*, 2018 WL 1920256, at *3 (S.D. Cal. Apr. 24, 2018) (That “[t]he parties acknowledge[d] that obtaining a nationwide class may be difficult in light of recent case law . . . weigh[ed] in favor of settlement.”). Such litigation would cost the respective state classes millions of dollars to prosecute, be inherently risky, and continue for years, not including any appeals. *See* Joseph Decl. ¶ 25.

These factors thus weigh in favor of preliminary approval. *See Watkins*, 2016 WL 1732652, at *7 (“The Court agrees with the parties that the proposed Settlement eliminates the litigation risks and ensures that the Class Members receive some compensation for their claims. Therefore, on balance, the strength of Plaintiff’s case and risk of further litigation favor approving the proposed Settlement.”); *Allen*, 2017 WL 1346404, at *4 (holding the same where “the litigation involve[d] complex issues requiring extensive resources, expert testimony and a likely appeal, if [it went] to trial”); *Winters I*, 2020 WL 5642754, at *3.

The Risk of Maintaining Class Action Status Through Trial. “A district court may decertify a class at any time.” *Rodriguez*, 563 F.3d at 966. Decertification happens with some regularity, including in this district. *See NEI Contracting & Eng’g, Inc. v. Hanson Aggregates, Inc.*, 2016 WL 2610107, at *5-8 (S.D. Cal. May 6, 2016), *aff’d* 926 F.3d 528 (9th Cir. 2019); *Yeoman v. Ikea U.S.A. W., Inc.*, 2014 WL 7176401, at *7 (S.D. Cal. Dec. 4, 2014), *vacated and remanded sub nom.* on other grounds in *Medellin v. Ikea U.S.A. W., Inc.*, 672 Fed. App’x 782 (9th Cir. 2017); *see also Tschudy v. J.C. Penney Corp., Inc.*, 2015 WL 8484530, at *6 (S.D. Cal. Dec. 9, 2015); *Makaeff v. Trump Univ., LLC*, 309 F.R.D. 631, 643

(S.D. Cal. 2015) (partially granting “motion to decertify the subclasses on the issue of damages”). Indeed, Classes have been decertified at or following trial. *See Racies v. Quincy Bioscience, LLC*, No. 15-cv-292 (N.D. Cal.) (declaring mistrial and decertifying class).

Thus, Plaintiffs faced further risk if they proceeded to trial, and this factor weighs in favor of preliminary approval.

The Settlement Amount.

The amount of the settlement is an important factor in evaluating the reasonableness of a settlement. Here, the settlement provides \$1,612,500 in all cash and none of it reverts to Barlean’s. This amount is reasonable both when compared to the Class’s potential recovery at trial and when compared to other settlements regarding misleading health claims on coconut oils products. *See Joseph Decl.* ¶¶ 19-27.

Comparing this Settlement to other coconut oil settlements, as demonstrated below, this Settlement provides the highest recovery, by far, as a percentage of sales.

Case	Cash Common Fund	Estimated Retail Sales	Settlement as % of Sales
<i>Testone v. Barlean’s Org. Oils LLC</i>	\$1,612,500	\$16,030,927	10.0%
<i>Ducorsky v. Premier Organics</i>	\$312,500	\$5,700,000	5.5%
<i>Hunter v. Nature’s Way LLC</i>	\$1,850,000	\$98,400,000	1.9%
<i>Boswell v. Costco</i>	\$775,000	\$70,000,000	1.1%

Joseph Decl. ¶ 26.

As explained below, the amount is also reasonable in relation to the Settlement Class’s potential recovery at trial. *See id.* ¶¶ 23-25; *infra* Point IV(B)(2)(b).

Thus, the settlement amount is reasonable, and this factor favors approval.

The Extent of Discovery Completed and Procedural Posture.

Here, discovery was robust, with Barlean’s producing nearly 60,000 pages of documents and supplementing its interrogatory responses five times. *Joseph Decl.* ¶ 5. Plaintiffs also took depositions of Barlean’s key corporate witnesses and all of its experts. *Id.* ¶¶ 7, 9. Because fact and expert discovery were complete, the litigation class was certified,

1 and only a ruling on partial summary judgment and trial remained, “the parties ha[d]
 2 sufficient information to make an informed decision about settlement.” *See Linney v. Cellular*
 3 *Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998) (citation omitted). This factor thus favors
 4 preliminary approval. *See Allen*, 2017 WL 1346404 at *4 (factor favored approval where
 5 “Plaintiffs engaged in substantial discovery and negotiations” and “briefed, and the Court has
 6 ruled on, [] motions to dismiss . . . [and] a motion for class certification”).

7 ***The Experience and Views of Counsel.*** The Ninth Circuit has “held that ‘[p]arties
 8 represented by competent counsel are better positioned than courts to produce a settlement
 9 that fairly reflects each party’s expected outcome in litigation.’” *Rodriguez*, 563 F.3d at 967
 10 (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir.1995)). “Generally, ‘[t]he
 11 recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.’”
 12 *Allen*, 2017 WL 1346404 at *5 (quoting *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D.
 13 Cal. 1979)); *cf. Stull v. Baker*, 410 F. Supp. 1326, 1332 (S.D.N.Y. 1976) (holding that the
 14 court should consider the recommendation of counsel, and weight it according to counsel’s
 15 caliber and experience).

16 Class Counsel has considerable experience in consumer class actions involving the
 17 false advertising of foods. This includes multiple class actions involving false advertising of
 18 coconut oils, as this case is one of a line of cases that Class Counsel has prosecuted against
 19 coconut oil manufacturers. *See Joseph Decl.* ¶¶ 27, 40. In this and other coconut oil class
 20 actions, Class Counsel has been exposed to a wide variety of information about coconut oil
 21 claims and manufacturers’ defenses, and ultimately the potential upside and risks attendant
 22 to this case. *See id.* ¶¶ 40-41. Counsel strongly endorses this Settlement, as it achieves an
 23 excellent result, especially when compared to similar coconut oil settlements. *See id.* ¶ 27.

24 Accordingly, this factor favors preliminary approval. *See Gucci*, 2016 WL 1045961,
 25 at *7 (“[G]iving the appropriate weight to class counsel’s recommendation, the Court
 26 concludes that this factor also weighs in favor of approval.” (internal citation omitted)).

27 ***Governmental Participation.*** “There is no governmental participant in this case, so
 28 this factor is neutral.” *Allen*, 2017 WL 1346404, at *5.

Class Member Reaction. Because “Class Members will have an opportunity to object or opt out of the Settlement [,] at this time, this factor weighs in favor of approving the Settlement,” *see Gucci*, 2016 WL 1045961, at *7.

b. The Monetary Relief is Fair in Relation to Potential Damages

Here, Plaintiffs and Class Counsel secured for the Settlement Class direct monetary benefits of \$1,612,500. This is reasonable in relation to the maximum recovery at trial for both the California and New York Classes and based on hypothetical price premium recovery by a nationwide class.

At trial, the California Class could recover a maximum of \$1,132,374 in price premium damages. Joseph Decl. ¶ 23. And if awarded \$50 in statutory damages per unit, which are only available for units sold in New York (*see* N.Y. G.B.L. § 349), this would add \$1,712,800 in trial damages, for a combined total of \$2,845,174. *See id.* Thus, the settlement amount of \$1,612,500 is 54% of potential trial damages, which is more than reasonable given the risks attendant to trial. *See In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015) (“Immediate receipt of money through settlement, even if lower than what could potentially be achieved through ultimate success on the merits, has value to a class, especially when compared to risky and costly continued litigation.” (internal citation omitted)); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir. 1974) (“[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.”).

Given that the Settlement class is nationwide, it makes sense to compare the settlement amount to the hypothetical price premium recovery on a nationwide basis. Here, by applying the price premiums calculated by Plaintiffs’ experts in this matter to the estimated total nationwide sales figures, the *maximum* nationwide price premium damages would be \$3.4 million. Joseph Decl. ¶ 24. This means that the Settlement amounts to 47% of hypothetical nationwide price premium damages. *Id.* This is an excellent result. *See Winters I*, 2020 WL 5642754, at *4 (where “Class Members who file for monetary relief are likely on average to

1 receive approximately \$17.70, which represents a 31% refund on the purchase price of the
 2 product,” concluding that “monetary compensation and the stipulated injunctive relief offered
 3 in the Settlement Agreement is sufficient for approval”); *Hilsley v. Ocean Spray Cranberries,*
 4 *Inc.*, 2020 WL 520616, at *6 (S.D. Cal. Jan. 31, 2020) (\$1.00 recovery per purchase “is an
 5 excellent result” considering the fraction of purchase price recoverable at trial and in light of
 6 expert opinion that price premium was 19%); *cf. In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
 7 454, 459 (9th Cir. 2000), *as amended* (June 19, 2000) (“It is well-settled law that a cash
 8 settlement amounting to only a fraction of the potential recovery does not per se render the
 9 settlement inadequate or unfair.” (quotation omitted)).

10 In reality, however, because only California and New York Classes were certified,
 11 there would be no practical way to recover price premium damages on a nationwide basis in
 12 a single trial. Rather, for even the possibility of obtaining the nationwide relief conferred by
 13 the Settlement, Class Counsel or other attorneys would have to file and prosecute actions in
 14 all other states since, given the existing legal precedents, it is virtually impossible that the
 15 claims of the nationwide Settlement Class could ever be adjudicated in a single forum and
 16 trial. Such litigation would cost the respective state classes millions of dollars to prosecute,
 17 be inherently risky, and continue for years, not including any appeals. *See* Joseph Decl. ¶ 25.

18 This confirms the “reasonableness of the Settlement,” since “[d]istrict courts have
 19 approved settlements as being in good faith for payment of 3% of an alleged tortfeasor’s
 20 potential liability.” *Heim v. Heim*, 2014 WL 1340063, at *5, *6 (N.D. Cal. Apr. 2, 2014)
 21 (citing *Chevron Env’tl. Mgmt. Co. v. BKK Corp.*, 2013 WL 5587363, at *3 n.2 (E.D. Cal.
 22 Oct. 10, 2013) (approving settlement representing less than 3% of total clean-up costs)); *see*
 23 *also McCabe v. Six Continents Hotels, Inc.*, 2015 WL 3990915, at *10 (N.D. Cal. June 30,
 24 2015) (approving settlement representing between 0.3% and 2% of potential recovery).

25 **c. The Injunctive Relief is Appropriate and Meaningful**

26 In this lawsuit, “Plaintiffs primarily s[ought] an order compelling Barlean’s to cease
 27 marketing its coconut oil Products using the misleading and unlawful tactics,” FAC ¶ 3. And
 28 the Settlement’s injunctive relief prohibits Barlean’s from using any of the claims challenged

1 in this lawsuit for at least five years, SA ¶ 2.2. Therefore, the Settlement provides exactly
 2 what was sought. Further, because many of the labeling statements challenged in this case
 3 are alleged to be unauthorized nutrient content claims, meaning they violate FDA regulations,
 4 *see* FAC ¶¶ 89-123, 168, the injunctive relief obtained here is especially noteworthy because
 5 it conforms Barlean’s labels with FDA regulations. SA ¶ 2.2.

6 “[T]here is a high value to the injunctive relief obtained” in consumer class actions
 7 resulting in labeling changes. *See Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at
 8 *4 (C.D. Cal. Mar. 13, 2013). It benefits not just Class Members, but also “the marketplace,
 9 and competitors who do not mislabel their products.” *Id.* (“[n]ew labeling practices affect[]
 10 hundreds of thousands of bottles per year”). Similar “injunctive relief”—the cessation or
 11 revision of health and wellness claims on sugary cereals—has “provide[d] health benefits to
 12 all purchasers of Defendant’s products.” *See Hadley v. Kellogg Sales Co.*, 2021 WL 5706967,
 13 at *2 (N.D. Cal. Nov. 23, 2021). Similarly, the FDA recently concluded that limiting
 14 manufacturers’ use of “healthy” claims on sugary foods would result in healthcare savings of
 15 up to \$700 million over 20 years. *See* 87 Fed. Reg. 5063, 5064 (Jan. 31, 2022) (“Updating
 16 the definition of ‘healthy’ to align with current dietary recommendations can help consumers
 17 build more healthful diets to help reduce their risk of diet-related chronic diseases. Discounted
 18 at seven percent over 20 years, the mean present value of benefits of the proposed rule is \$260
 19 million, with a lower bound estimate of \$17 million and an upper bound estimate of \$700
 20 million.”).

21 C. The Court Should Approve the Class Notice Plan and Full Class Notice

22 “Under Rule 23(c)(2)(B), ‘the court must direct to class members the best notice that
 23 is practicable under the circumstances, including individual notice to all members who can
 24 be identified through reasonable effort.’” *Allen*, 2017 WL 1346404, at *5. “[T]he mechanics
 25 of the notice process are left to the discretion of the court subject only to the broad
 26 ‘reasonableness’ standards imposed by due process.” *Id.* (quotation and citation omitted).
 27 Here, Barlean’s is a manufacturer of various food and dietary supplement products, which it
 28 primarily sells to distributors and retailers, who then sell those products directly to consumers.

1 Because of Barlean’s business structure and processes, individual purchasers or class
 2 members cannot be identified through reasonable effort. Joseph Decl. ¶ 32. Accordingly,
 3 notice by publication is the best practicable notice under the circumstances. *See Carr v. Tadin,*
 4 *Inc.*, 2014 WL 7497152, at *8-9 (S.D. Cal. Apr. 18, 2014), *amended in part*, 2014 WL
 5 7499453 (S.D. Cal. May 2, 2014) (“find[ing] that the method and content of the Notice
 6 comply with Rule 23” where “[t]he parties assert[ed] that notice by publication is ‘the best
 7 notice practicable under the circumstances,’ because Defendant sells its products directly to
 8 third-party retailers, not individual consumers, and hence ‘individual notice is not possible’”
 9 (citations omitted)).

10 Given this, Kroll’s proposed Notice Plan by publication constitutes the best practicable
 11 form of notice and conforms with due process. The Notice Plan includes targeted print and
 12 online ads and will reach an estimated minimum 70% of Class Members, and more than twice
 13 each. *See Finegan Decl.* ¶¶ 3, 21 n.21, 51. Such notices that reach 70% of the target audience
 14 comply with due process. *See, e.g., Edwards v. Nat’l Milk Producers Fed’n*, 2017 WL
 15 3623734, at *4 (N.D. Cal. June 26, 2017), *aff’d sub nom. Edwards v. Andrews*, 846 Fed.
 16 App’x 538 (9th Cir. 2021) (“[N]otice plans estimated to reach a minimum of 70 percent are
 17 constitutional and comply with Rule 23.”).

18 The contents of a “[n]otice is satisfactory if it “generally describes the terms of the
 19 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
 20 forward and be heard.”” *Rodriguez*, 563 F.3d at 962 (quoting *Churchill*, 361 F.3d at 575)
 21 (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir.1980)). Here, the
 22 proposed notice informs Class Members of (1) the nature of the litigation, the Settlement
 23 Class, and the identity of Class Counsel, (2) the essential terms of the Settlement, including
 24 the gross settlement award and net settlement payments class members can expect to receive,
 25 (3) how notice and administration costs, court-approved attorneys’ fees, costs, and service
 26 awards will be paid from the Common Fund, (4) how to make a claim, opt out, or object to
 27 the Settlement, (5) procedures and schedules relating to final approval, and (6) how to obtain
 28 further information. *See* SA Exs. 1-2, Full Class and Short Form Notices. Thus, the proposed

1 notice is sufficient because it contains “information that a reasonable person would consider
 2 to be material in making an informed, intelligent decision of whether to opt out or remain a
 3 member of the class and be bound by the final judgment.” *See In re Nissan Motor Corp.*
 4 *Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977). *See also Romero v. Securus Techs., Inc.*,
 5 2020 WL 3250599, at *7 (S.D. Cal. June 16, 2020) (finding proposed class notice was
 6 sufficient since it “appear[ed] plain and easily understood because the notice describe[d] the
 7 claims, the class members, the relief provided under the settlement, and class members’ rights
 8 and option to appear at the final approval hearing personally or through counsel.”). Not only
 9 does the notice provide sufficient information to Class Members, it directs Class Members to
 10 the Settlement Website where they will be able to review the settlement agreement and other
 11 key documents case documents, and learn additional information about the case.

12 Thus, the Court should approve the Class Notice Plan and Full Class Notice. *See In re*
 13 *Packaged Seafood Prod. Antitrust Litig.*, 2022 WL 2803110, at *2, *8 (S.D. Cal. July 15,
 14 2022) (granting final approval and “find[ing] due process was satisfied and the Notice
 15 Program provided adequate notice to settlement class members” where the notice explained
 16 “the benefit of the COSI Settlement,” “how to get payment, how to be excluded from
 17 settlement, and how to object,” and “what happens if the settlement class member does
 18 nothing.”).

19 **V. CONCLUSION**

20 For the foregoing reasons, Plaintiffs respectfully request the Court grant preliminary
 21 approval to the settlement, authorize Class Notice, appoint Plaintiffs as Class
 22 Representatives and their counsel as Class Counsel, set deadlines for making claims, opting
 23 out, and objecting, and schedule a Final Approval Hearing and related deadlines.

1 Dated: October 21, 2022

Respectfully Submitted,

2 /s/ Paul K. Joseph

3 **FITZGERALD JOSEPH LLP**

4 JACK FITZGERALD

jack@fitzgeraldjoseph.com

5 PAUL K. JOSEPH

paul@fitzgeraldjoseph.com

6 MELANIE PERSINGER

melanie@fitzgeraldjoseph.com

7 TREVOR M. FLYNN

trevor@fitzgeraldjoseph.com

8 CAROLINE S. EMHARDT

caroline@fitzgeraldjoseph.com

9 2341 Jefferson Street, Suite 200

10 San Diego, California 92110

11 Phone: (619) 215-1741

12 ***Class Counsel***

FITZGERALD JOSEPH LLP

JACK FITZGERALD (SBN 257370)

jack@fitzgeraldjoseph.com

PAUL K. JOSEPH (SBN 287057)

paul@fitzgeraldjoseph.com

MELANIE PERSINGER (SBN 275423)

melanie@fitzgeraldjoseph.com

TREVOR M. FLYNN (SBN 253362)

trevor@fitzgeraldjoseph.com

CAROLINE S. EMHARDT (SBN 321222)

caroline@fitzgeraldjoseph.com

2341 Jefferson Street, Suite 200

San Diego, California 92110

Phone: (619) 215-1741

Class Counsel

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL TESTONE, COLLIN SHANKS,
and LAMARTINE PIERRE, on behalf of
themselves, all others similarly situated, and the
general public,

Plaintiffs,

v.

BARLEAN'S ORGANIC OILS, LLC,

Defendant.

Case No: 3:19-cv-00169-RBM-BGS

**DECLARATION OF PAUL K.
JOSEPH IN SUPPORT OF
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Judge: Ruth Bermudez Montenegro

1 I, Paul K. Joseph, declare:

2 1. I am a member in good standing of the State Bar of California; of the United
3 States District Courts for the Northern, Eastern, Central, and Southern Districts of California;
4 and of the United States Court of Appeals for the Ninth Circuit. I make this Declaration based
5 on my own personal knowledge in support of Plaintiffs' motion for preliminary approval of
6 the proposed class action settlement.

7 **The Settlement Agreement**

8 2. A true and correct copy of the parties' proposed Class Action Settlement
9 Agreement is attached hereto as Exhibit 1.

10 3. No other agreements have been made in connection with the Settlement.

11 **Fact and Expert Discovery**

12 4. Fact and expert discovery in this case was substantial.

13 5. Regarding written discovery, Plaintiffs served over 50 requests for the
14 production of documents. In response to Plaintiffs' document requests, Defendant produced
15 nearly 60,000 pages of documents comprising, among other things, consumer research, labels
16 and related business documents, pricing, sales, and science and expert related documents.

17 6. Plaintiffs also served Defendant with interrogatories seeking key information
18 regarding, *inter alia*, the labeling and advertising of the coconut oil products, sales
19 information for the products, key employees and third-parties, scientific literature that
20 Defendant contended substantiated the challenged claims, and other key information
21 regarding the claims and defenses in this matter. Although much negotiation was required,
22 Barlean's ultimately agreed to respond to each interrogatory, supplementing its interrogatory
23 responses five times.

24 7. Plaintiffs also deposed Barlean's key witnesses via depositions pursuant to Rule
25 30(b)(6), which spanned 17 different topics.

26 8. For its part, Defendant deposed Plaintiffs Michael Testone, Collin Shanks, and
27 Lamartine Pierre, which revealed key defenses and potential weaknesses in Plaintiffs' case.
28

9. The parties also conducted expert discovery. Each side deposed the other side's three experts (for a total of 6 depositions) and subpoenaed documents from the other side's experts.

10. Thus, discovery was comprehensive and complete (i.e., fact and expert discovery was closed) at the time settlement was reached. Because of this, counsel was able to fully evaluate the strength and weaknesses of the case.

Settlement Negotiations

11. Throughout the more than three years of litigation, the parties engaged in several formal and informal settlement negotiations. Not until California and New York Classes were certified, and Plaintiffs' Motion for Partial Summary Judgment was pending, did the parties reach a settlement.

12. The first settlement negotiations in a formal setting occurred at the July 24, 2019 Early Neutral Evaluation Conference before the Honorable Bernard G. Skomal. Although Plaintiffs made a demand, the conference did not result in meaningful negotiations as the parties were too far apart.

13. In March 2020, after receiving and evaluating the first tranche of discovery materials from Barlean's, Plaintiffs sent a settlement offer to Barlean's. However, no settlement was reached.

14. In January 2021, with the deadline for certification approaching and with Barlean's retaining new counsel, Plaintiffs sent another written offer of settlement. However, no settlement was reached.

15. In December 2021, after Plaintiffs obtained class certification, the parties participated in a Mandatory Settlement Conference with Judge Skomal, but again the case did not settle.

16. After both fact and expert discovery were completed in March 2022, the parties re-engaged in settlement negotiations. These negotiations, which spanned from March to July, included dozens of written exchanges.

1 17. Finally, in late July, the parties reached an agreement in principle. Even after
2 reaching an agreement in principle, however, the parties negotiated hard on other certain
3 terms of the agreement and disagreements on certain issues between the parties even resulted
4 in a delay of when we originally anticipated filing the instant preliminary approval motion.

5 18. In short, the Settlement is the result of well-informed, non-collusive and arms'-
6 length negotiations and the agreement was only reached after fact and expert discovery
7 closed, the Court granted Plaintiffs' certification motion, and Plaintiffs filed for partial
8 summary judgment.

9 **Settlement Considerations and Counsel's View of the Case**

10 19. The decision to settle this case was made balancing numerous considerations,
11 including the strength of the merits of the claims and defenses, the risks attendant in
12 establishing liability and damages at trial, and the amount of settlement in conjunction with
13 the benefits of securing immediate relief compared to the risks of proceeding with the
14 litigation.

15 20. On the merits, the class representatives and their counsel believe there is a strong
16 scientific case that coconut oil consumption is unhealthy, increasing LDL cholesterol and risk
17 of heart disease, and that on this basis, there is a reasonably good chance a jury would find it
18 misleading, within the meaning of California's consumer protection statutes, to advertise
19 coconut oil in a manner stating or suggesting that it is healthy.

20 21. Nevertheless, Barlean's raised numerous defenses all of which would have to be
21 overcome at trial. These defenses include challenging each Plaintiff's standing, as well as
22 defenses concerning the merits of Plaintiffs' claims and damages.

23 22. For example, Barlean's challenged the allegation that coconut oil is unhealthy,
24 supporting this contention with expert testimony of Dr. Catherine Hutt, Ph.D., R.D., C.F.S.
25 Barlean's also disputed whether the challenged claims were material based on expert survey
26 work and testimony of Sarah Butler. Barlean's also offered the expert testimony of Dr.
27 Stephanie Plancich, Ph.D., who opined that Plaintiffs' damages model is not reliable and
28 cannot adequately measure damages. If Barlean's evidence on any of these aspects were

1 compelling to the jury, it would break the chain of causality Plaintiffs needed to establish
2 liability and damages. At best, the outcome of trial would have depended on a battle of a
3 substantial number of experts, which always carries significant risk in a jury trial.

4 23. In light of these risks, we also considered the potential recovery at trial.
5 Plaintiffs' damages experts estimated price premiums of up to 28% for Barlean's Butter
6 Flavored Coconut Oil, 21% for its Virgin Coconut Oil, and 9% for its Culinary Coconut Oil.
7 Applying these price premiums to the estimated retail sales in California yields a maximum
8 price premium damages of \$1,132,374. For New York, Plaintiffs would seek statutory
9 damages under N.Y. G.B.L. § 349 and § 350. If Plaintiffs were awarded \$50 per unit, then
10 damages for the New York Class would be \$1,712,800. Thus, Plaintiffs estimated their
11 recovery at trial to be about \$2.8 million. The Settlement's \$1,612,500 is thus about 57% of
12 potential trial damages.

13 24. We also considered the total hypothetical damages, based purely on a price
14 premium theory, for a nationwide class. Based on information obtained during discovery,
15 applying the same premiums for New York and California to nationwide sales yields price
16 premium damages of \$3,401,036. Thus, the Settlement represents 47% of nationwide
17 damages based on a price premium theory.

18 25. There is, however, likely no venue in which these claims could be tried on a
19 nationwide basis. Instead, my firm or others would have to file at least several actions alleging
20 claims on behalf of individual or multi-state classes. This would cost millions of dollars more
21 and take at least many years of additional litigation. Even then it might be impossible to get
22 relief for consumers in some states, for example where class actions are not permitted, or
23 where reliance must be shown individually.

24 26. Finally, we compared the amount of the proposed settlement in this case in
25 relation to the settlements we have reached in similar coconut oil lawsuits. When looking at
26 the amount of the Settlement in relation to retail sales, the proposed Settlement exceeded the
27 recovery in similar coconut oil cases—confirming for us its reasonableness.
28

Case	Cash Common Fund	Estimated Retail Sales	Settlement as % of Sales
<i>Testone v. Barlean's Org. Oils LLC</i>	\$1,612,500	\$16,030,927	10.0%
<i>Ducorsky v. Premier Organics</i>	\$312,500	\$5,700,000	5.5%
<i>Hunter v. Nature's Way LLC</i>	\$1,850,000	\$98,400,000	1.9%
<i>Boswell v. Costco</i>	\$775,000	\$70,000,000	1.1%

27. Since 2016, my colleagues and I have been prosecuting a series of similar cases involving coconut oil, and thus have been exposed to a wide variety of information about the claims and defenses in these cases, so that we have an especially good appreciation of the value and risks of the case. When considering the amount and likelihood of recovering damages, the possible lengthy time to resolution because of a delayed trial and subsequent appeals, and the other expenses and risks attendant to trial, my colleagues and I ultimately determined that settling this action for a \$1,612,500 non-reversionary common fund is fair, reasonable, and appropriate. This is because it will provide a significant number of Americans with appropriate monetary compensation for Barlean's alleged false advertising, and prevent future misleading labeling of the coconut oil products. The settlement will also highlight an important issue of public health, and reduce the effect of health and wellness advertising in influencing consumers to eat products with substantial amounts of saturated fat. I am proud of having achieved this result, especially given the vigor with which Barlean's and its counsel litigated every aspect of this case over more than three years.

Selection of the Proposed Class Administrator

28. We began by identifying and considering settlement administrators with whom we had previously worked or received bids on other matters. Based on that, we requested bids from Kroll, epIQ Global, and CPT Group.

29. To compare their bids, we broke them down broadly into notice and administration costs. For notice costs, we compared (by inputting on a spreadsheet) the bids' estimated audience, reach, and frequency, online and hard copy publication costs, online and

1 additional impressions, total cost, cost per impression as stated, and cost per impression when
2 filtered through the proposed reach and frequency statistics.

3 30. For administration costs, we compared the number of claims assumed, and the
4 costs associated with case management and setup, a website and toll-free telephone number,
5 additional communications with class members, claims and opt-out processing, additional
6 processing and reporting, distribution and postage, and any additional or miscellaneous costs.
7 We then compared the total administration costs, and cost-per-claim, as well as the total
8 notice and administration cost, and the total of the notice cost-per-impression and
9 administration cost-per-claim. In this way, we were able to compare and evaluate the bids on
10 a variety of bases.

11 31. We shared the various bids received with Barlean's counsel and responded to
12 questions regarding how the various bids compared to one another. Based on my analysis and
13 several conversations with the various potential administrators, the parties agreed Kroll was
14 the best choice for administration of this Settlement.

15 **Estimated Cost of Notice & Administration**

16 32. Barlean's is a manufacturer of various food and dietary supplement products,
17 which it primarily sells to distributors and retailers, who then sell those products directly to
18 consumers. Because Barlean's business structure and processes is set up in this manner, I
19 understand that individual purchasers or class members cannot be identified through
20 reasonable effort, making publication notice the most appropriate form of notice in this
21 matter.

22 33. In the most recent bid Kroll provided, the estimated total cost of notice and
23 administration is \$185,710.95.

24 34. In class action settlements regarding low-cost consumer goods, like those here,
25 claims rates are typically between one and five percent.

26 35. Here, a three percent claims rate was assumed, meaning we estimated around
27 15,000 claims. Assuming these rates, of the total cost of \$185,710.95, we estimate \$85,515.95
28 for administration fees and expenses and \$100,195.00 for notice and media expenses.

The Cash Award to Class Members

36. Assuming that the estimated cost of notice and administration is approved and accurate, and that the Court approves the full amount of fees, expenses, and service awards requests, there would be \$704,971.05 left in the Settlement Fund as distribute as Cash Awards for claimants, as follows:

Settlement Fund:	\$1,612,500
Notice & Administration	(\$185,710.95)
Attorneys' Fees	(\$537,500)
Expenses	(\$161,818)
Service Awards	(\$22,500)
Remainder	\$704,971.05

37. Dividing this among the predicted 15,000 claimants, the average Cash Award would be approximately \$47.

Potential Cy Pres Recipients for Uncleared Funds

38. Paragraph 2.3 of the Settlement Agreement provides that, after cash awards are distributed to claimants, any amounts remaining uncleared will be provided to Class Member claimants in a supplemental distribution, or donated *cy pres*. The parties have met and conferred regarding potential *cy pres* recipients, keeping in mind the requirements that their activities be sufficiently tethered to Plaintiffs' claims. *See Dennis v. Kellogg Co.*, 697 F.3d 858, 866-67 (9th Cir. 2012). They jointly propose and ask the Court to approve the following entities as potential *cy pres* recipient:

- *The Tufts University Friedman School of Nutrition*. The Friedman School of Nutrition brings together biomedical, nutritional, clinical, social, and behavioral scientists to conduct research, educational, and community service programs in the field of human nutrition. Established in 1978, the school's mission is to generate trusted science, educate future leaders, and produce real world impact in nutrition science and

1 policy. The school currently enrolls over 200 masters and doctoral students. See
2 <https://nutrition.tufts.edu/about> for additional information.

3 39. The parties believe that the Friedman School of Nutrition is a proper *cy pres*
4 recipient as funds donated will contribute to nutrition science education, the development of
5 food law policy, and community service programs regarding human nutrition. These are all
6 related to and help redress the core alleged harm in this matter in the future—misleading
7 health claims on food products.

8 **The Qualifications of Fitzgerald Joseph LLP**

9 40. Fitzgerald Joseph LLP (“FJ”) was formed in May 2021, with the joining of The
10 Law Office of Jack Fitzgerald, PC (formed in April 2013) and The Law Office of Paul K.
11 Joseph, PC (formed in May 2015). FJ dedicates its practice almost entirely to prosecuting
12 class action lawsuits. The attorneys comprising FJ, Jack Fitzgerald, Paul Joseph, and their
13 associates, have been appointed class counsel in numerous cases and helped victimized
14 consumers recover millions of dollars. This specifically includes numerous cases involving
15 the misleading advertising of foods as healthy, and in particular, the misleading advertising
16 of coconut oil as unhealthy. Prior class settlements in coconut oil cases include:

17 a) *Hunter v. Nature’s Way Prods., LLC*, Case No. 3:16-cv-00532-WQH-
18 AGS (S.D. Cal.) – Allegations that Nature’s Way misleadingly and unlawfully
19 advertised its coconut oil as healthy. Following the filing of plaintiff’s motion for class
20 certification, the parties reached a settlement. The court granted final approval of the
21 settlement, which included \$1.85 million common fund and injunctive relief;

22 b) *Boswell et al. v. Costco Wholesale Corp.*, Case No. 8:16-cv-00278-DOC-
23 DFM (C.D. Cal.) – Allegations that Costco misleadingly and unlawfully advertised its
24 Kirkland brand coconut oil as healthy. Settlement involving \$775,000 common fund
25 and Costco’s agreement to cease using “health” claims to market coconut oil granted
26 final approval on December 13, 2017;

27 c) *Ducorsky v. Premier Organics*, Case No. HG16801566 (Alameda Super.
28 Ct.) – Allegations that Premier Organics misleadingly and unlawfully advertised its

1 coconut oil as healthy. Settlement involving \$312,500 common fund and Premier
 2 Organic's agreement to cease using the challenged claims to market coconut oil
 3 granted final approval on February 6, 2018; and

4 d) *Cumming v. BetterBody Foods & Nutrition, LLC*, Case No. 37-2016-
 5 00019510-CU-BT-CTL (San Diego Super. Ct.) – Allegations that BetterBody
 6 misleadingly and unlawfully advertised its coconut oil products as healthy, despite that
 7 scientific evidence demonstrates coconut oil consumption increases risk of
 8 cardiovascular heart disease, stroke, and death. Case settled for a \$1.1 million common
 9 fund and BetterBody's agreement to remove all challenged health and wellness claims
 10 from the labels of its coconut oil products. Court granted settlement final approval on
 11 February 24, 2017.

12 41. FJ has an especially strong understanding of this case, both on merits and
 13 potential damages, not only from litigating against Barlean's, but based on the portfolio of
 14 other coconut oil class actions. The firm's resume is attached hereto as **Exhibit 2**, providing
 15 further detail.

16 42. FJ has no conflicts and has been and will continue prosecuting the action
 17 vigorously on behalf of the Class.

18 **Attorneys' Fees, Costs, and Incentive Award Likely to be Requested**

19 43. As we will detail in a forthcoming fee motion if the Settlement is preliminarily
 20 approved, FJ has incurred over \$947,000 in fee lodestar, based on over 1,489 hours of work,
 21 and \$161,818 in out-of-pocket expenses. Nevertheless, as set forth in the Full Class Notice,
 22 we will seek no more than 33% of the common fund, or \$537,500 in fees (representing a more
 23 than 43% discount on our actual lodestar). We will also seek on behalf of Plaintiffs an
 24 incentive award of up to \$7,500 each. Mr. Testone, Mr. Shanks, and Mr. Pierre have all
 25 actively participated in the litigation since its inception over three and a half years ago. They
 26 have reviewed documents and pleadings, responded to discovery, attended the settlement
 27 conferences, were deposed, and were prepared to travel to, and testify at trial. Without their
 28 participation other Class Members would receive nothing, and therefore we believe their

1 contributions were indispensable and their effort over these years merit the awards we will
2 request.

3
4 I declare under penalty of perjury that the foregoing is true and correct to the best of
5 my knowledge. Executed October 21, 2022, in San Diego, California.

6 /s/ Paul K. Joseph

7 Paul K. Joseph
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit 1

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement (“Agreement”), effective upon the date of the signatures below, is made by and between, on the one hand, defendant Barlean’s Organic Oils LLC (“Barlean’s”), and on the other hand, the Class Representatives (defined below) on behalf of the Class (defined below) (collectively, the “Parties”), in the matter of *Michael Testone et al. v. Barlean’s Organic Oils, LLC*, Case No. 3:19-cv-00169-RBM-BGS (S.D. Cal.) (the “Action”).

RECITALS

- A. **WHEREAS**, on January 24, 2019, Class Representatives Michael Testone, Collin Shanks, and Lamartine Pierre commenced the Action for violations of California’s unfair competition law, false advertising law, and consumer legal remedies act, express and implied warranty laws; and for violations of New York’s unfair and deceptive business practices law, false advertising law, and express warranty law; in the United States District Court for the Southern District of California;
- B. **WHEREAS**, Barlean’s answered the Complaint and asserted various affirmative defenses on February 27, 2019.
- C. **WHEREAS**, on September 4, 2019, a First Amended Complaint was filed;
- D. **WHEREAS**, Barlean’s answered the First Amended Complaint and asserted various affirmative defenses on September 10, 2019.
- E. **WHEREAS**, Barlean’s contends the claims asserted in the Action have no merit, denies the allegations in the Action, denies that Class Representatives have been damaged in any sum whatsoever, and contends that it has affirmative defenses that could eliminate or reduce liability and monetary recovery in this case; and
- F. **WHEREAS**, Barlean’s and the Class Representatives on behalf of the Class wish to resolve any and all past, present, and future claims the Class has or may have against Barlean’s on a nationwide basis as they relate to the allegations in the Action.

NOW THEREFORE, the Parties, for good and valuable consideration, the sufficiency of which is hereby acknowledged, understand and agree to the following terms and conditions.

1. DEFINITIONS

In addition to the terms defined above, the below-listed terms shall be defined for purposes of this Agreement. Some of the definitions in this section use terms that are defined later in the section.

1.1. “Agreement” means this Class Action Settlement Agreement, including all Exhibits hereto.

1.2. “Claims Administrator” means or refers to the professional claims administrator, Kroll, and any successors chosen to effectuate the Agreement.

1.3. “Class” or “Class Members” means all persons who in the United States, during the Class Period, purchased Coconut Oil Products (defined below), for personal or household use.

Excluded from the Class are: (a) persons or entities who purchased Coconut Oil Products for the purpose of resale or distribution; (b) persons who are directors and Officers of Barlean’s or its parent, subsidiary, or affiliate companies; (c) governmental entities; (d) persons who timely and properly exclude themselves from the Class as provided in the Agreement; (e) persons who signed a release of Barlean’s for compensation for the claims arising out of the facts or claims asserted in the Action; and (f) any judicial officer hearing this Action, including his or her immediate family members and employees.

1.4. “Claims Deadline” means the date by which a Claim Form must be submitted to be considered timely. The Claims Deadline shall be seventy (70) calendar days after the Notice Date.

1.5. “Claim Form” means the document to be submitted by a Class Member seeking direct monetary benefits pursuant to this Agreement.

1.6. “Class Period” means January 24, 2015 to the date of filing of a motion for preliminary approval of this Agreement.

1.7. “Class Representatives” means plaintiffs Michael Testone, Collin Shanks, and Lamartine Pierre, in their representative capacities on behalf of the general public and the Class.

1.8. “Class Counsel” means:

FITZGERALD JOSEPH LLP
2341 Jefferson Street, Ste. 200
San Diego, California 92110
P | (619) 215-1741

1.9. “Court” means the United States District Court for the Southern District of California.

1.10. “Common Fund” means a qualified settlement fund (QSF) formed solely for purposes of effectuating this Agreement.

1.11 “Barlean’s Counsel” or “Defendant’s Counsel” means:

GORDON REES SCULLY MANSUKHANI, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101
P | (619) 696-6700

1.12 “Coconut Oil Products” means Barlean’s Organic Virgin Coconut Oil (16-, 32-, and 60-oz.), Barlean’s Organic Culinary Coconut Oil (32- and 60-oz.), and Barlean’s Organic Butter Flavored Coconut Oil (16- and 32-oz.) purchased during the Class Period.

1.13 “Fairness Hearing” means the hearing at or after which the Court will make a final decision whether to approve this Agreement as fair, reasonable, and adequate.

1.14 “Final Approval Order” means the order to be submitted to the Court in connection with the Fairness Hearing, substantially in the form attached hereto as **Exhibit 5**.

1.15 “Final Effective Settlement Date” shall be the date a judgment in the Action becomes final and non-appealable, plus five (5) business days.

1.16 “Full Class Notice” means the legal notice of the terms of the proposed Settlement, as approved by Plaintiffs’ Counsel, Defendant’s Counsel, and the Court, to be distributed according to a Notice Plan approved by the Court. The Full Class Notice shall be substantially in the form attached as **Exhibit 1** hereto, and/or any different or additional notice that might be ordered by the Court.

1.17 “Notice Date” means fourteen (14) calendar days after entry of the Preliminary Approval Order and is the date by which the Class Administrator will initiate the Notice Plan.

1.18 “Notice Plan” means the plan for notice as described in the Declaration of Jeanne C. Finegan set forth in **Exhibit 3** hereto.

1.19 “Objection Deadline” means the date by which Class Members must file with the Court a written statement objecting to any terms of the Settlement or to Class Counsel’s request for fees or expenses, and shall be seventy (70) calendar days after the Notice Date, or any other date required by the Court.

1.20 “Opt-Out Deadline” means the date by which a Class Member must exercise his or her option to opt out of the settlement so as not to release his or her claims, and shall be seventy (70) calendar days after the Notice Date, or any other date required by the Court.

1.21 “Preliminary Approval Order” means the proposed order to be submitted to the Court in connection with the Motion for Preliminary Approval, substantially in the form attached hereto as **Exhibit 4**.

1.22 “Request for Exclusion/Opt-Out” means any Class Member’s request to be excluded from the terms of this Agreement, by way of the procedures set forth in paragraph 3.5.

1.23 “Settlement” means the settlement into which the Parties have entered to resolve the Action. The terms of the Settlement are set forth in this Agreement and the attached exhibits, which are incorporated by reference herein.

1.24 “Settlement Class” means those persons who are members of the Class who have not properly and timely submitted a Request for Exclusion/Opt-Out.

1.25 “Settlement Website” means the website established by the Claims Administrator to aid in the administration of the Settlement.

1.26 “Short Form Notice” means the summary Class Notice that is attached to this Agreement as **Exhibit 2**, which the Parties acknowledge may be modified by the Court without affecting the enforceability of this Agreement.

2. SETTLEMENT TERMS

2.1. Certification of the Class.

(a) For the purposes of Settlement and the proceedings contemplated herein only, and subject to Court approval, the Parties stipulate and agree that the Class shall be provisionally certified pursuant to Federal Rule of Civil Procedure 23 in accordance with the definition contained herein, that Mr. Testone, Mr. Shanks, and Mr. Pierre shall be the Class Representatives for the Class, and that Class Counsel shall be appointed as counsel for the Class.

(b) As soon as reasonably practicable, Mr. Testone, Mr. Shanks, and Mr. Pierre shall apply to the Court for entry of the Preliminary Approval Order, as provided in this Agreement.

2.2 Injunctive Relief. For a period of five (5) years commencing from the date the Court issues a final approval order, Barlean’s agrees not to use any of the following statements on the Coconut Oil Products, except to the extent they are modified to conform with the requirements for nutrient content or health claims that are, at that point in time, applicable under federal and state law:

- a) “Nature’s Most Versatile Superfood”;
- b) “COCONUT OIL: A SMART FAT”;
- c) “A natural source of medium chain triglycerides (MCTs) coconut oil boosts the metabolism, supports the heart and immune system and provides quick energy”
- d) “Harvested at the Peak of Flavor and Nutrition”;
- e) “Harvested at the peak of flavor and nutritional value”;
- f) “Coconut Oil Nutrition[:] -Contains Lauric Acid, Caprylic Acid, & Capric Acid - Natural Source of Medium Chain Triglycerides”;
- g) “Coconut Oil Nutrition[:] -Rich in Lauric Acid & Caprylic Acid -Great Source of Medium Chain Triglycerides”;
- h) “The ultimate cooking oil for health-conscious gourmets. As versatile as it is delicious, Barlean’s Organic Culinary Coconut Oil is ideal for sautéing, stir-frying and baking, or as a dairy-free butter substitute”;
- i) “NO TRANS FAT OR CHOLESTEROL”;
- j) “HEALTHY ALTERNATIVE TO BUTTER”;
- k) “All the health benefits of coconut oil, now with the rich flavor of butter”;

- l) “No Trans or Hydrogenated Fats”;
- m) “Cholesterol Free”;
- n) “THE HEALTH BENEFITS OF COCONUT OIL, THE RICH TASTE OF BUTTER”;
- o) “SUB 1:1 FOR BUTTER”;
- p) “we’re bringing a whole new flavor to healthy eating”;
- q) “Our butter flavored coconut oil has all the healthy MCTs of our regular organic coconut oil, with a rich, buttery taste”;
- r) “No cholesterol, trans fats or hydrogenated fats”; and
- s) “Substitute 1:1 for butter”.

To the extent any of the aforementioned claims are currently on the Coconut Oil Products, Barlean’s shall have 180 days from the date of the Final Approval Order to remove such claims or otherwise modify them as set forth above (the “Grace Period”). Barlean’s shall not be liable for any sales of Coconut Oil Products that are delivered to retailers before the expiration of the Grace Period and in no event shall Barlean’s be required to recall any Coconut Oil Products that have already been delivered to retailers or Class Members prior to the expiration of the Grace Period.

For the avoidance of doubt, this injunction shall not apply to information that is required or otherwise permitted by law to be included in the Coconut Oil Products’ nutrition facts panel, such as, by way of example and not limitation, information disclosed in the nutrition facts panel disclosing the amount of trans fat and/or cholesterol in the Coconut Oil Products.

2.3 Common Fund for Class. Within forty-five (45) calendar days following entry of the Preliminary Approval Order, Barlean’s or any other entity on its behalf, shall deposit One Million Six Hundred Twelve Thousand Five Hundred dollars (\$1,612,500.00) into a Common Fund, through the Claims Administrator, to be held in trust.

The Common Fund shall be administered by the Claims Administrator. The Common Fund shall constitute the funds available to compensate Class Members, the Claims Administrator, Class Counsel, and the Class Representatives. The Common Fund, after deducting any attorneys’ fees and costs, class representative incentive payments, and notice and administration costs as approved and awarded by the Court, shall be paid to those Class Members who submit a timely and valid claim, as determined by the Claims Administrator.

Class Members who have their claims validated by the Claims Administrator will be reimbursed for each unit of the Coconut Oil Products purchase as follows:

Estimated <i>Per Unit</i> Reimbursement Without Proof of Purchase			
	Virgin	Culinary/Refined	Butter Flavored
16oz.	\$ 4		\$3
32oz.	\$ 7	\$5	\$3
60oz.	\$ 7	\$5	

Class Members who submit claims with valid proof of purchase, as determined by the Claims Administrator, will receive the allotted amount, subject to pro-rata adjustments, for each unit that they submit valid proof of purchase. Class Members without proof of purchase will be able to submit claims for up to five (5) units (single containers) of the Coconut Oil Products.

Pro rata Adjustments and Cy Pres. If the total amount of funds claimed by Class Members is less than the total amount of the fund that is available to Class Members after costs and expenses, the excess funds will be distributed to Class Members who submitted Valid Claims on a pro-rata basis that is proportional to the value of each Valid Claim, with such distribution occurring concurrently with the distribution of the original refund amount. If on the other hand, the total amount of funds claimed by Class Members is greater than the total amount of the fund that is available for Class Members after costs and expenses, each claim validated by the Claims Administrator will be reduced on a pro-rata basis that is proportional to the value of each claim validated by the Claims Administrator. In no event shall Barlean's be obligated to add any additional monies to the Common Fund.

If after any pro-rata adjustments in funds to be distributed to Class Members, the total amount of funds claimed and to be distributed is less than the total amount of the fund that is available to Class Members after costs and expenses, the excess funds will be paid to the Tufts University Friedman School of Nutrition or, if not acceptable to the Court, then to a nonprofit to be agreed to by the parties and approved by the Court. Likewise, excess funds that remain after distribution (i.e., uncashed checks), will be paid to the same nonprofits.

2.4 Release of Common Funds. Within seven (7) calendar days following the entry of a Final Approval Order, the Claims Administrator shall pay to Class Counsel the amount of attorneys' fees and costs awarded by the Court, provided, however, that counsel shall be obligated to return to the Common Fund any fees if the amount is reduced prior to the Final Effective Settlement Date. On the Final Effective Settlement Date, the remaining funds in the Common Fund will become available to pay any Court-approved incentive award, and to compensate Class Members. In the event that the Agreement does not obtain final approval from the Court, the Common Fund shall be remitted back to the funding party.

2.5 Attorneys' Fees and Expenses, and Incentive Award. At least fourteen (14) days before the Objection Deadline, Class Counsel and Class Representatives shall file a motion, set for hearing on the same date as the Fairness Hearing, requesting Fee Award and Service Awards, to be paid from the Common Fund.

The Parties have not agreed to any particular amounts that the Class Representative or Class Counsel may seek. Barlean's is not obligated to respond, but may respond to Class Counsel's fee motion and the Class Representative's motion for an incentive award in whatever

manner it deems appropriate. Any Court-approved attorney's fees and incentive award will be paid from the Common Fund. In the event the court does not approve the attorneys' fees and costs requested by class counsel, or the court awards fees and costs in an amount less than that requested by Class Counsel, such award shall not be a basis for rendering the entire Settlement null, void or unenforceable, provided however, that Class Counsel retain the right to appeal any decision by the Court regarding the Court's award of attorneys' fees and costs.

2.6 Settlement Implementation Costs. All reasonable costs of retaining the Claims Administrator to effectuate the Settlement and provide Full Class Notice in the manner prescribed in this Agreement shall be paid from the Common Fund.

3. CLASS SETTLEMENT PROCEDURES

3.1. Settlement Approval. As soon as practicable after the signing of this Agreement, Mr. Testone, Mr. Shanks, and Mr. Pierre shall prepare and file an application requesting that the Court enter the Preliminary Approval Order in substantially similar form as the proposed order attached as **Exhibit 4**.

3.2. Full Class Notice. Subject to Settlement Approval as provided in paragraph 3.1, Full Class Notice will commence no later than fourteen (14) days after entry of the Preliminary Approval Order, consistent with the manner set forth in the Notice Plan (**Exhibit 3**).

3.3. Claims Administrator Will Administer Claims Process.

- i. The Claims Administrator will administer the claims process and oversee the distribution of settlement proceeds to Class Members in accordance with the terms and conditions of the Settlement and orders of the Court.
- ii. The Claims Administrator will review and validate all claims submitted by Class members. The Claims Administrator shall have the discretion to review claims with the objectives of efficiency and effecting substantial justice to the Parties and the Class Members. The Claims Administrator shall have the right to contact Class Members to validate claims. Issues regarding the validity of claims that cannot be resolved by the Claims Administrator shall be submitted to Class Counsel and Barlean's Counsel for resolution and, if no resolution is reached, to the Court. The Parties shall have the right to review any claim handled by the Claims Administrator.

3.4. Procedures for Objecting to the Settlement. Class Members have the right to appear and show cause why the Settlement should not be granted final approval, subject to each of the provisions of this paragraph:

3.4.1 Timely Written Objection Required. Any objection to the Settlement must be in writing and must be filed with the Court on or before the Objection Deadline.

3.4.2 Form of Written Objection. Any objection regarding or related to the Agreement must contain:

- (i) a caption or title that clearly identifies the Action and that the document is an objection;
- (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney if represented;
- (iii) information sufficient to establish the person's standing as a Settlement Class Member;
- (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection;
- (v) the objector's signature; and
- (vi) the signature of the objector's counsel, if any.

3.4.3 Authorization of Objections Filed by Attorneys Representing Objectors. Class Members may object either on their own or through an attorney hired at their own expense, but a Class Member represented by an attorney must sign either the Objection itself or execute a separate declaration stating that the Class Member authorizes the filing of the Objection.

3.4.4 Effect of Both Opting Out and Objecting. If a Class Member submits both a Request for Exclusion/Opt-Out and files an Objection, the Class Member will be deemed to have opted out of the Settlement, and thus to be ineligible to object. However, any objecting Class Member who has not timely submitted a completed Request for Exclusion/Opt-Out will be bound by the terms of the Agreement upon the Court's final approval of the Settlement.

3.4.5 Appearance at Fairness Hearing. Objecting Class Members may appear at the Fairness Hearing and be heard. Such Class Members are requested, but not required, in advance of the Fairness Hearing, to file with the Court a Notice of Intent to Appear.

3.4.6 Right to Discovery. Upon Court order, the Parties will have the right to obtain document discovery from and take depositions of any Objecting Class Member on topics relevant to the Objection.

3.4.7 Response to Objections. The Parties shall have the right, but not the obligation, either jointly or individually, to respond to any objection, with a written response due the same day as the Motion for Final Approval, or as otherwise ordered by the Court.

3.5. Opt-Out Procedures. Class Members who wish to opt out of and be excluded from the Settlement must submit a Request for Exclusion/Opt-Out to the Class Administrator, postmarked or submitted online no later than the Opt-Out Deadline. The Request for Exclusion/Opt-Out must be personally completed and submitted by the Class Member or his or her attorney, and so-called "mass" or "class" opt-outs shall not be permitted or recognized. The Class Administrator shall periodically notify Class Counsel and Barlean's Counsel of any Requests for Exclusion/Opt-Outs. All Class Members who submit a timely, valid Request from Exclusion/Opt-Out will be excluded from the Settlement and will not be bound by the terms of this Agreement, and all Class Members who do not submit a timely, valid Request for

Exclusion/Opt-Out will be bound by this Agreement and the Judgment, including the release in paragraph 4.3 below.

3.6. CAFA Notice. The Class Action Fairness Act of 2005 (“CAFA”) requires Barlean’s to inform certain federal and state officials about this Agreement and proposed Settlement. *See* 28 U.S.C. § 1715. Under the provisions of CAFA, the Class Administrator, on behalf of Barlean’s, will serve notice upon the appropriate officials within ten (10) calendar days after the Parties file the proposed Agreement with the Court. *See* 28 U.S.C. § 1715(b). The costs of such notice will be paid from the Common Fund.

3.7. Motion for Final Approval. A Fairness Hearing to determine final approval of the Agreement shall be scheduled as soon as practicable, subject to the calendar of the Court, but no sooner than one-hundred-and-twelve (112) calendar days after entry of the Preliminary Approval Order. If the Court issues the Preliminary Approval Order and all other conditions precedent of the Settlement have been satisfied, no later than twenty-eight (28) calendar days before the Fairness Hearing all Parties, individually or collectively, will move the Court for entry of the Final Approval Order in substantially similar form as the proposed order attached as **Exhibit 5**, with Class Counsel filing a memorandum of points and authorities in support of the motion. Barlean’s may, but is not required to, file a memorandum in support of the motion.

4. FINAL APPROVAL ORDER AND RELEASES

4.1. Approval of This Agreement. As soon as practicable after execution of this Agreement, counsel for all Parties will take all necessary and appropriate steps to secure the Court’s approval of this Agreement as set forth herein.

4.2. Final Approval Order. This agreement is subject to and conditioned upon the issuance by the Court of the Final Approval Order that finally certifies the Class for the purposes of settlement only, and grants final approval of the Settlement, and provides the relief specified herein, which relief shall be subject to the terms and conditions of the Agreement and the Parties’ performance of their continuing rights and obligations hereunder.

4.3. Release of Barlean’s by All Class Members. Upon the Final Effective Settlement Date, Mr. Testone, Mr. Shanks, and Mr. Pierre and each member of the Settlement Class, and each of his or her successors, assigns, legatees, heirs, and personal representatives, hereby release and forever discharge Barlean’s, and each of its respective parents, sister and subsidiary corporations, affiliated entities, predecessors, successors and assigns, and any of their present and former directors, officers, employees, shareholders, agents, partners, licensors, privies, representatives, attorneys, accountants, insurers, manufacturers, retailers, distributors or any of them (collectively, “Released Barlean’s Parties”), from any and all claims, demands, rights, suits, liabilities, damages (including statutory damages), losses, injunctive and/or declaratory relief, and causes of action, including costs, expenses, penalties, and attorneys’ fees, whether known or unknown, matured or unmatured, fixed or contingent, at law or in equity, existing under federal or state law, that any Class Member has or may have against the Released Barlean’s Parties that, as set forth in *Hesse v. Sprint Corp.*, 598 F.3d 581 (9th Cir. 2010), are based on the identical factual predicate as the underlying claims in this Action or depend on the same set of facts alleged in the Action regarding the Coconut Oil Products.

In addition, with respect to the released claims specified in Section 4.3 of this Agreement, Mr. Testone, Mr. Shanks, and Mr. Pierre, on behalf of themselves expressly and affirmatively waive and relinquish all rights afforded by California Civil Code Section 1542 to the fullest extent permitted by law, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

In addition to the foregoing waiver of Section 1542 of the California Civil Code, upon the Final Effective Settlement Date, the Class Representatives and each member of the Settlement Class, and each of their successors, assigns, heirs, and personal representatives, shall be deemed to have waived any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States or any foreign country, and any and all principles of common law that are similar, comparable, or equivalent in substance or intent to Section 1542 of the California Civil Code.

4.4. Release of Plaintiffs and Related Persons. Upon the Final Effective Settlement Date, Barlean's will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, and discharged Class Representatives, and Class Counsel from any and all claims, demands, rights, suits, liabilities, and causes of action of every nature and description whatsoever, whether known or unknown, matured or unmatured, at law or in equity, existing under federal or state law, that Barlean's has or may have against any of them arising out of the transaction, occurrences, events, behaviors, conduct, practices, and policies alleged in the Action regarding the Coconut Oil Products, and in connection with the filing and conduct of the Action, that have been brought, could have been brought, or are currently pending in any forum in the United States.

4.5. Covenant Not To Sue. Upon the Final Effective Settlement Date, Mr. Testone, Mr. Shanks, and Mr. Pierre and each Class Member shall be deemed to have given and will be bound by the Covenant Not To Sue in favor of each Released Party. "Covenant Not To Sue" means for and in consideration of the Settlement, each Class Member shall be deemed to have covenanted that he or she will not in the future: (a) assert any claim for economic injury, damages (including statutory damages), or for an injunction related to the Coconut Oil Products and arising out of the facts and/or claims asserted in the Action; or (b) assert or maintain any Released Claim, directly or indirectly, against any Released Party in any court or other forum on behalf of the Class Member.

5. TERMINATION

5.1 This Agreement is being entered into only for the purpose of settlement. In the event that (a) the Court does not approve the Settlement or a Final Approval Order and Judgment is not entered for any reason, or (b) the Final Effective Settlement Date does not occur for any

reason, then either party may declare void ab initio the Agreement and Preliminary Approval Order, and all of their provisions shall be vacated by its own terms, and the Action shall revert to the status that existed prior to the execution date of this Agreement.

5.2 If there is a change in state or federal food labeling laws or regulations that expressly permits the use of any of the terms listed in paragraph 2.2, then the injunction provided in paragraph 2.2 shall terminate automatically as to those terms that become permitted by a change in law when the change in law goes into effect. Upon such an occurrence, Barlean's may label and market its Coconut Oil Products in accordance with such state or federal laws or regulations. Notwithstanding the foregoing, every other term of this Agreement shall remain in full force and effect.

6. ADDITIONAL PROVISIONS

6.1 No Admission of Liability / For Settlement Purposes Only. This Agreement reflects the compromise and settlement of disputed claims among the Parties and is for settlement purposes only. Neither the fact of, or any provision contained in this Agreement or its Exhibits, nor any action taken hereunder, shall constitute, be construed as, or be admissible in evidence as an admission of: (a) the validity of any claim or allegation by Mr. Testone, Mr. Shanks, and Mr. Pierre, or the Class, or of any defense asserted by Barlean's, in the Action or any other action or proceeding; or (b) any wrongdoing, fault, violation of law, or liability of any kind on the part of any Party, Defendant, Released Party, Class Member or their respective counsel.

6.2 Fair, Adequate, and Reasonable Settlement. The Parties believe this Settlement is fair, adequate, and reasonable, and the Parties arrived at this Settlement in arms-length negotiations, taking into account all relevant factors, present and potential.

6.3 Change of Time Periods. The time periods and/or dates described in this Agreement with respect to the giving of notices and notices of hearings are subject to approval and change by the Court or by the written agreement of counsel for the Parties, without notice to the Class.

6.4 Real Parties in Interest. In executing this Agreement, the Parties warrant and represent that they, including Mr. Testone, Mr. Shanks, and Mr. Pierre, in their representative capacities on behalf of the Class, are the only persons having any interest in any of the claims that are described or referred to herein, or in any of the pleadings, records, and papers in the Action, and, except as provided herein, neither said claims nor any part thereof have been assigned, granted, or transferred in any way to any other person, firm, or entity.

6.5 Voluntary Agreement. This Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of the Parties, or of any other person, firm, or entity.

6.6 Binding on Successors. This Agreement shall bind and inure to the benefit of the respective successors, assigns, legatees, heirs, and personal representatives of each of the Parties.

6.7 Parties Represented by Counsel. The Parties hereby acknowledge that they have been represented in negotiations for and in the preparation of this Agreement by independent counsel of their own choosing, that they have read this Agreement and have had it fully explained to them by such counsel, and that they are fully aware of the contents of this Agreement and of its legal effect.

6.8 Authorization. Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein and, further, that each Party is fully entitled and duly authorized to give this complete and final release and discharge.

6.9 Entire Agreement. This Agreement and Exhibits attached hereto contain the entire agreement between the Parties and constitutes the complete, final, and exclusive embodiment of their agreement with respect to the subject matter hereof. This Agreement is executed without reliance upon any promise, representation, or warranty by any Party or any representative of a Party, other than those expressly set forth herein.

6.10 Construction and Interpretation. Neither Party nor any of the Parties' respective attorneys shall be deemed the drafter of this Agreement for purposes of interpreting any provision hereof in any judicial or other proceeding that may arise between or among them. This Agreement has been, and must be construed to have been, drafted by all Parties to it, so that any rule that construes ambiguities against the drafter will have no force or effect.

6.11 Headings. The various headings used in this Agreement are solely for the convenience of the Parties and shall not be used to interpret this Agreement.

6.12 Exhibits. The exhibits to this Agreement are integral parts of the Agreement and Settlement and are hereby incorporated and made a part of this Agreement. The Parties contemplate that certain of the Exhibits relating to Class Notice may be modified by the Court or by subsequent agreement of Class Counsel and Barlean's counsel (with approval by the Court) prior to dissemination to Class members.

6.13 Modifications and Amendments. No amendment, change, or modification of this Agreement or any part thereof shall be valid unless in writing signed by the Parties and approved by the Court, except as otherwise expressly provided herein.

6.14 Governing Law. This Agreement is entered into in accordance with the laws of the State of California and shall be governed by and interpreted in accordance with those laws.

6.15 Further Assurances. Each of the Parties hereto shall execute and deliver any and all additional papers, documents, and other assurances and shall do any and all acts or things reasonably necessary in connection with the performance of his or her or its obligations hereunder to carry out the express intent of the Parties hereto.

6.16 Agreement Constitutes a Complete Defense. To the extent permitted by law this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of or contrary to this Agreement.

6.17 Execution Date. This Agreement shall be deemed executed upon the last date of execution of all of the undersigned.

6.18 Continuing Jurisdiction. The Parties agree that the Court has, and shall continue to have, jurisdiction to make any orders as may be appropriate to approve awards of attorneys' fees and costs pursuant hereto, to supervise the administration of and the distribution of money funded pursuant to this Agreement, and to enforce this Agreement.

6.19 Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original, but all of which together shall constitute one and the same instrument. The several signature pages will be collected and annexed to one or more documents to form a complete counterpart. Photocopies or "pdfs" of executed copies of signatures shall have the same force and effect as originals.

6.20 Resolution of Disputes. The Parties shall cooperate in good faith in the administration of this Settlement. Any unresolved dispute regarding the administration of this Agreement shall be decided by the Court.

6.21 Severability. Should any paragraph, sentence, clause or provision of this Agreement be held invalid or unenforceable, such provision shall be ineffective to the extent of such invalidity or unenforceability, without invalidating the remainder of such provision or the remaining portions of the Agreement.

6.22 Confidentiality of Documents and Information. All orders, agreements and designations regarding the confidentiality of documents and information remain in effect, and all Parties and counsel remain bound to comply with them. Within thirty (30) days of the Final Settlement Effective Date, the Parties will certify in writing that they have used their best efforts to destroy or return all documents and information produced in the Action that were designated as "Confidential" or "Highly Confidential – Attorneys' Eyes Only." It is stipulated and agreed that no money relief can remedy a breach of this provision such that immediate injunctive relief is proper and because of a breach of this provision by disclosure of or failure to destroy or return materials designated as "Confidential" or "Attorneys' Eyes Only," the prevailing party is entitled to reasonable attorneys' fees and costs associated with bringing and prosecuting such enforcement action or motion.

6.23 Notices Under Agreement. All notices or mailings required by this Agreement to be provided to or approved by Class Counsel and Barlean's Counsel, or otherwise made pursuant to this Agreement, shall be provided as follows:

Class Counsel

Paul Joseph
paul@fitzgeraldjoseph
Fitzgerald Joseph LLP
2341 Jefferson Street, Suite 200
San Diego, CA 92110

Barlean's Counsel

Gabriel Hedrick
ghedrick@grsm.com
Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

IN WITNESS WHEREOF, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below.

Dated: 10/20/2022 _____

DocuSigned by:

Michael Testone

2D2ED8C88EAD454...

Plaintiff Michael Testone, for himself and
for the Class

Dated: 10/19/2022 _____

DocuSigned by:

Collin Shanks

F24FE2CDBA20426...

Plaintiff Collin Shanks, for himself and for
the Class

Dated: 10/19/2022 _____

DocuSigned by:

Lamartine Pierre

247D72D5F5C6445...

Plaintiff Lamartine Pierre, for himself and
for the Class

Dated: _____

Defendant Barlean's Organic Oils, LLC
By (*print*): Joel Matteson, General Counsel

Class Counsel

Paul Joseph
paul@fitzgeraldjoseph.com
Fitzgerald Joseph LLP
2341 Jefferson Street, Suite 200
San Diego, CA 92110

Barlean's Counsel

Gabriel Hedrick
ghedrick@grsm.com
Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

IN WITNESS WHEREOF, each of the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below.

Dated: _____

Plaintiff Michael Testone, for himself and
for the Class

Dated: _____

Plaintiff Collin Shanks, for himself and for
the Class

Dated: _____

Plaintiff Lamartine Pierre, for himself and
for the Class

Dated: 10-25-22

Bruce Barlean
Defendant Barlean's Organic Oils, LLC
By: Bruce Barlean, Managing Member

Exhibit 1

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

NOTICE OF CLASS ACTION SETTLEMENT

MICHAEL TESTONE ET AL. v. BARLEAN'S ORGANIC OILS, LLC,
Case No. 3:19-cv-00169-RBM-BGS (S.D. Cal.)

*The United States District Court has authorized this notice.
This is not a solicitation from a lawyer.*

***IF YOU PURCHASED BARLEAN'S ORGANIC VIRGIN COCONUT OIL, ORGANIC
CULINARY COCONUT OIL, OR ORGANIC BUTTER FLAVORED COCONUT OIL,
YOU MAY BE ENTITLED TO A CASH PAYMENT***

THIS NOTICE CONCERNS YOUR LEGAL RIGHTS
PLEASE READ IT CAREFULLY

WHY ARE YOU RECEIVING THIS NOTICE?

- This settlement resolves a lawsuit (the “Action”) against Barlean’s Organic Oils, LLC (hereinafter “Barlean’s”), alleging that Barlean’s, which marketed and sold the Barlean’s Organic Virgin Coconut Oil, Organic Culinary/Gourmet Coconut Oil, and Organic Butter Flavored Coconut Oil (collectively, the “Coconut Oil Products” or “Products”) that are the subject of the Action, violated certain California, New York, and federal laws by misleadingly marketing the Products as healthy. Barlean’s contends the claims asserted in the Action have no merit, denies the allegations in the Action, denies that Class Representatives have been damaged in any sum whatsoever, and contends that it has affirmative defenses that could eliminate or reduce liability and monetary recovery in this case. However, to avoid the cost of litigation, and potential risks for both sides, the parties have reached a Class Action Settlement Agreement, which was preliminarily approved by the United States District Court for the Southern District of California on [DATE].
- If, you purchased any of the following products, Barlean’s Organic Virgin Coconut Oil (16-, 32-, or 60-oz.), Barlean’s Organic Culinary Coconut Oil (32-, or 60-oz.), or Barlean’s Organic Butter Flavored Coconut Oil (16- or 32-oz.), between January 24, 2015 and [Preliminary Approval Date], for your own personal or household use and bearing at least one of the Challenged Claims (listed on Settlement Website), you may be a member of the settling Class.
- The Court requires this Notice because you have the right to know about the proposed Settlement and about all of your options before the Court decides whether to approve the Settlement. This Notice explains the lawsuit, the settlement, your legal rights, what benefits are available, and how to get them.

- All Class Members who do not exclude themselves from the settlement will receive the relief provided for in the settlement and will be bound by the orders issued by the Court regarding the settlement.

WHAT ARE THE TERMS OF THE PROPOSED SETTLEMENT?

- The two sides disagree on what relief, and how much, could have been won, if any, if the Class won at trial. The settlement avoids costs and risks to you from continuing the lawsuit, provides relief to affected persons like you, and releases Barlean's and others from liability for the related claims.
- The proposed class action settlement will provide \$1,612,500 in funds to pay all aspects of Settlement (the "Common Fund"), including Class Member claims, notice, administration, Plaintiffs' service awards, legal expenses, and attorneys' fees. Barlean's will also be prohibited from using any of the Challenged Claims for five years, absent a change in law or modifications that conform to applicable federal and state law.
- Class Members who have their claims validated by the Claims Administrator will be reimbursed for each unit of the Coconut Oil Products purchase as follows:

Estimated <i>Per Unit</i> Reimbursement Without Proof of Purchase			
	Virgin	Culinary/Refined	Butter Flavored
16oz.	\$ 4		\$3
32oz.	\$ 7	\$5	\$3
60oz.	\$ 7	\$5	

Class Members who submit claims with valid proof of purchase, as determined by the Claims Administrator, will receive the allotted amount, subject to pro-rata adjustments, for each unit that they submit valid proof of purchase. Class Members without proof of purchase will be able to submit claims for up to five (5) units (single containers) of the Coconut Oil Products.

If the total amount of funds claimed by Class Members is less than the total amount of the fund that is available to Class Members after costs and expenses, the excess funds will be distributed to Class Members who submitted Valid Claims on a pro-rata basis that is proportional to the value of each Valid Claim, with such distribution occurring concurrently with the distribution of the original refund amount. If on the other hand, the total amount of funds claimed by Class Members is greater than the total amount of the fund that is available for Class Members after costs and expenses, each claim validated by the Claims Administrator will be reduced on a pro-rata basis that is proportional to the value of each claim validated by the Claims Administrator. Barlean's will not be obligated to add any additional monies to the Common Fund.

If after any pro-rata adjustments in funds to be distributed to Class Members, the total amount of funds claimed and to be distributed is less than the total amount of the fund that is available to Class Members after costs and expenses, the excess funds will be paid to the Tufts University

Friedman School of Nutrition, or, if not acceptable to the Court, then to a nonprofit to be agreed to by the parties and approved by the Court. Likewise, excess funds that remain after distribution (i.e., uncashed checks), will be paid to the same nonprofits.

- Class Counsel will petition the Court for a fee award in an amount no greater than 33% of the common fund (\$537,500), and actual litigation expenses, and each Class Representative will seek a service award of no more than \$7,500.

BACKGROUND ON THE LAWSUIT & SETTLEMENT

The lawsuit seeks to obtain compensation for alleged violations of California consumer protection statutes including the Unfair Competition Law (UCL), False Advertising Law (FAL), and Consumers Legal Remedies Act (CLRA), and for Breach of Express and Implied Warranties; and for violations of New York's Unfair and Deceptive Business Practices Law, False Advertising Law, and for Breach of Express Warranties.

After the parties engaged in substantial investigation, discovery, and settlement negotiations, Plaintiffs and Defendant have reached an agreement providing for the settlement of the lawsuit. The terms of the proposed Settlement are set forth in the Settlement Agreement filed with the Court, which is also available online, at www.BarleansCoconutOilSettlement.com. The proposed Settlement Class covers the time period of January 24, 2015 to [the date of preliminary approval].

Plaintiffs and Class Counsel have evaluated the information made available in the course of the lawsuit and have taken into account the risks and uncertainties of proceeding with this litigation, including the risks and uncertainties of class certification, prevailing on the merits, proving damages at trial, and prevailing on post-trial motions and appeal. Based upon their consideration of these factors, Plaintiffs and Class Counsel believe it is in the best interests of the Class to settle the lawsuit on the terms described below.

Barlean's denies Plaintiffs' allegations and any wrongdoing, and the Class's right to recover anything. Nevertheless, it has agreed to settle the lawsuit for the purpose of avoiding the time and expense of further litigation.

THE CLASS

The Court has certified a Settlement Class consisting of:

All persons who in the United States, during the Class Period, purchased Coconut Oil Products (defined below), for personal or household use.

Excluded from the Class are: (a) persons or entities who purchased Coconut Oil Products for the purpose of resale or distribution; (b) persons who are directors and Officers of Barlean's or its parent, subsidiary, or affiliate companies; (c) governmental entities; (d) persons who timely and properly exclude themselves from the Class as provided in the Agreement; (e) persons who signed a release of Barlean's for compensation for the claims arising out of the facts or claims asserted

in the Action; and (f) any judicial officer hearing this Action, including his or her immediate family members and employees.

DO I HAVE A LAWYER IN THE CASE?

The Court has appointed Fitzgerald Joseph LLP as Class Counsel in this case. The Court has determined that Class Counsel is qualified to represent you and all other Class Members. You will not be charged for these lawyers. The lawyers handling the case are experienced in handling similar cases.

Nevertheless, you have the right to consult or retain an attorney of your choice at your own expense to advise you regarding the Settlement and your rights in connection with the Settlement and Final Approval Hearing described below.

YOUR RIGHTS TO PARTICIPATE IN, EXCLUDE YOURSELF FROM, OR OBJECT TO THE SETTLEMENT

The purpose of this Notice is to inform you of this lawsuit so you can make an informed decision as to whether you should remain in or opt out of this Class Action. Your legal rights are affected, and you have a choice to make now. In response to this Notice, you may (1) submit a claim form, (2) ask to be excluded from the lawsuit, (3) object to the proposed Settlement, or (4) do nothing. Those options are summarized in the following table, and then discussed in greater detail below.

Your Legal Rights and Options in This Lawsuit	
Submit a Claim Form	The only way to get a monetary payment. Postmark or submit your Claim Form online by [DATE (within 70 days of commencement of full class notice)].
Ask To Be Excluded	Get out of this lawsuit. Get no benefits from it. Keep rights. If you ask to be excluded, you will not be bound by what the Court does in this case and will keep any right you might have to sue Barlean's separately about the same legal claims in this lawsuit. If there is a recovery in this case, including under the proposed Settlement, you will not share in that recovery. To opt out of the proposed Settlement, you must submit an opt out form no later than [by [DATE (within 56 days of commencement of full class notice)].]
Object	Tell the Court why you believe the proposed Settlement is unfair, unreasonable, or inadequate. You may file a written objection no later than [DATE (56 days of commencement of full class notice)], and/or appear at the Final Approval Hearing to tell the Court why you believe the proposed Settlement is unfair, unreasonable, or inadequate.

Your Legal Rights and Options in This Lawsuit	
Do Nothing	<p>Stay in this lawsuit. Await the outcome. Give up certain rights.</p> <p>By doing nothing, you will get no cash payment and give up any right you may have to sue Barlean's separately about the same legal claims in this lawsuit.</p>

1. Submit a Claim Form

You must submit a Claim Form to get a monetary payment. Claim Forms may be printed or filed online at the Settlement Website, www.BarleansCoconutOilSettlement.com. Claim Forms are simple and easy to complete, requiring (a) personal/contact information, (b) a statement of the quantity of products purchased during the Class Period, and (c) your affirmation that the information provided is true and correct. In exchange for receiving a monetary payment, under the Settlement Agreement, you will give up your rights to sue Barlean's about the same claims in this lawsuit.

Claim forms must be postmarked, faxed, or submitted online no later than [DATE (within 56 days of commencement of full class notice)].

2. Exclude Yourself from the Settlement and Do Not Receive Compensation

If you do not want to be bound by this settlement, you must request to be excluded from the Class. If you request to be excluded from the Class, you will retain any individual rights you have against Barlean's and will not have "released" it from any claims. However, you will *not* receive the compensation described above. You may not object to the Settlement under this option. If you wish to be excluded from the Class (also referred to as "opting out"), you must download and print an Opt-Out Form from the Settlement Website (www.BarleansCoconutOilSettlement.com), fill out and sign the form, and mail it to the class action administrator, postmarked on or before [DATE (within 56 days of commencement of full class notice)], at the following address:

Kroll
Attn: Barlean's Coconut Oil Settlement
Address
Address

3. Object to the Settlement

If you want to express an objection to part or all of the Settlement, you may appear at the Final Approval Hearing and/or object to the proposed Settlement. If the Settlement is approved, you will still receive the Settlement compensation and be bound by the Settlement Release.

If you wish to object, you must, no later than [DATE (56 days of commencement of full class notice)], file a signed, written objection with the Court, and serve copies on Class Counsel and Barlean's Counsel. The objection must contain:

- (i) a title that clearly identifies the Action ("*Testone et al. v. Barlean's Organic Oils, LLC*, Case No. 3:19-cv-00169-RBM-BGS") and that the document is an objection;
- (ii) information sufficient to identify and contact the objecting Class Member or his or her attorney if represented;
- (iii) information sufficient to establish the person's standing as a Settlement Class Member;
- (iv) a clear and concise statement of the Class Member's objection, as well as any facts and law supporting the objection;
- (v) the objector's signature; and
- (vi) the signature of the objector's counsel, if any.

If you wish to appear at the Final Approval Hearing, you should, no later than [DATE (within 56 days of commencement of full class notice)], file with the Court and serve on Class Counsel and Barlean's Counsel at the addresses set forth below, a Notice of Intent to Appear, either in person or through an attorney.

More detailed instructions and requirements for objecting are set forth in the Court's Preliminary Approval Order, which is available on the Class Settlement Website, at www.BarleansCoconutOilSettlement.com.

Class Counsel

Paul Joseph
Fitzgerald Joseph LLP
2341 Jefferson Street, Suite 200
San Diego, CA 92110

Barlean's Counsel

Gabriel Hedrick
Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101

4. Do Nothing

If you do nothing, you will get no money from the Settlement. But, unless you exclude yourself, you will not be able to start a lawsuit, continue with a lawsuit or be part of any other lawsuit against Barlean's about the claims in this case.

RELEASE OF CLAIMS

If the Court approves the Settlement and you have not excluded yourself as described above, you will be bound by the Settlement and will be forever barred from suing Barlean's and related entities

for the claims released in the Settlement. This applies whether you currently know about the existence of such claims or not.

Here, the claims you will give up are:

any and all claims, demands, rights, suits, liabilities, damages (including statutory damages), losses, injunctive and/or declaratory relief, and causes of action, including costs, expenses, penalties, and attorneys' fees, in law or equity, whether known or unknown, matured or unmatured, fixed or contingent, existing under federal or state law, that you have or may have had arising from the purchase of a Barlean's Coconut Oil product during the Class Period that are based on the identical factual predicate, or depend on the same set of facts alleged in the Action regarding the Coconut Oil Products, which have been, or which could have been asserted in the Action, and in connection with the conduct of the Action, that have been brought, could have been brought, or are currently pending in any forum in the United States.

FINAL APPROVAL HEARING

The Court has scheduled a Final Approval Hearing (also referred to as a "Fairness Hearing") to determine whether the Court should approve the Settlement as fair, reasonable, and adequate to the Class, and whether Judgment should be entered in accordance with the Settlement Agreement. The Court will also consider at the Final Approval Hearing the request of Class Counsel for an award of attorneys' fees and reimbursement of expenses, as well as the request of the Class Representatives for incentive awards for services rendered on behalf of the Class.

The Final Approval Hearing will occur at [DATE] Courtroom --, 333 West Broadway, San Diego, CA 92101.

Your attendance at the Final Approval Hearing is not required. However, you may be heard orally at the hearing in opposition to the proposed Settlement if you wish. You may also enter an appearance through an attorney retained at your own expense. If you do not enter an appearance through an attorney, and do not object, Class Counsel will represent you at the hearing.

WHERE CAN I GET MORE INFORMATION?

The Notice's description of the case and Settlement is general. For more details of the matters involved in this lawsuit and the Settlement, you may review the Settlement Agreement and related pleadings as set forth below.

If you want more detailed information about the lawsuit and proposed Settlement, including reviewing the Settlement documents, you may visit the Settlement Website at www.BarleansCoconutOilSettlement.com, contact Administrator at [Insert Phone Number], or contact Class Counsel at (619) 215-1741.

If you wish to review the Court's docket in this case, you may do so at www.pacer.gov, the Court's public access website.

DO NOT TELEPHONE OR ADDRESS ANY QUESTIONS ABOUT THE CASE OR SETTLEMENT TO THE CLERK OF THE COURT OR TO THE JUDGE. THEY ARE NOT PERMITTED TO ANSWER YOUR QUESTIONS. THE COURT EXPRESSES NO VIEW AS TO THE MERITS OF ANY CLAIMS OR DEFENSES ASSERTED BY ANY PARTY TO THE ACTION.

Exhibit 2

IF YOU PURCHASED BARLEAN'S ORGANIC VIRGIN COCONUT OIL, ORGANIC CULINARY COCONUT OIL, OR ORGANIC BUTTER FLAVORED COCONUT OIL, YOU MAY BE ENTITLED TO A CASH PAYMENT

Si desea recibir esta notificación en español, llámenos o visite nuestra página web

A proposed Settlement has been reached in a class action lawsuit known as *Testone et al. v. Barlean's Organic Oils, LLC*, Case No. 3:19-cv-00169-RBM-BGS, pending in U.S. District Court in the Southern District of California

What is this about?

The lawsuit claims that Barlean's, which marketed and sold the Barlean's Organic Virgin Coconut Oil, Organic Culinary/Gourmet Coconut Oil, and Organic Butter Flavored Coconut Oil (collectively, the "Coconut Oil Products" or "Products") violated certain California, New York, and federal laws by misleadingly marketing the Products as healthy. Barlean's denies the allegations and any wrongdoing. However, to avoid the cost of litigation, and potential risks for both sides, the parties have reached a Class Action Settlement Agreement, which was preliminarily approved by the United States District Court for the Southern District of California on [DATE]. The two sides disagree on what relief, and how much, could have been won, if any, if the Class won at trial. The settlement avoids costs and risks to you from continuing the lawsuit, provides relief to affected persons like you, and releases Barlean's and others from liability for related claims.

Who is Included?

If you purchased, for personal use, Barlean's Organic Virgin Coconut Oil (16-, 32-, or 60-oz.), Barlean's Organic Culinary/Gourmet Coconut Oil (32-, or 60-oz.), or Barlean's Organic Butter Flavored Coconut Oil (16- or 32-oz.), between January 24, 2015 and [_____], you may be a member of the settling Class.

What are the Benefits?

The proposed class action settlement will provide \$1,612,500 in funds to pay all aspects of Settlement (the "Common Fund"), including Class Member claims, notice, administration, Plaintiffs' service awards, legal expenses, and attorneys' fees. Barlean's will also be prohibited from using any of the Challenged Claims for five years, absent a change in law or modifications to the labels that comply with the law.

Eligible class members who timely file a claim may receive between \$3.00 to \$7.00, per unit, depending on the size of the product, for up to five (5) units (single containers) of the Coconut Oil Products **without Proof of Purchase**.

Class Members who timely submit claims **with valid proof of purchase**, as determined by the Claims Administrator, will receive the allotted amount for each unit that they submit valid proof of purchase.

The total amount of funds to be claimed by Class Members will be calculated based on the total number of people who file claims and will be adjusted up or down accordingly.

WHAT ARE YOUR OPTIONS?

The only way to receive benefits from the proposed Settlement is to file a claim. Claim Forms may be submitted online or mailed to the Settlement Administrator at: Barlean's Coconut Oil Settlement, c/o Kroll Settlement Administration, P.O. Box _____, New York, NY 10150-5391. The deadline to file a claim is **Month 00, 2022**.

Exclude Yourself. If you do not want to be included in the Settlement, you may print an Opt-Out Form from the Settlement Website, www.BarleansCoconutOilSettlement.com, fill out and sign the form, and mail it to the class action administrator, postmarked on or before **Month 00, 2022**. You will keep your right to sue Defendant about the claims in this case, but you will not receive money. Detailed instructions and answers to questions on how to exclude yourself can be found on www.BarleansCoconutOilSettlement.com.

Object/Comment. You have the right to object to or comment on the Settlement and still get benefits. If you want to object to or tell the Court what you think about the Settlement, you must submit your objection/comment in writing by **Month 00, 2022**. Detailed instructions on how to object or comment are found on www.BarleansCoconutOilSettlement.com.

Do nothing. You will not receive any benefits from the Settlement. You will be legally bound by decisions of the Court and you give up your right to sue the Defendant relating to the claims resolved by this Settlement.

The Court has scheduled a Final Fairness Hearing on **[Month, day, year]** at **[time]** at **[address and court room]** to consider: 1) whether to approve the Settlement; 2) any objections; 3) the requests for awards to the Settlement Class Representatives as incentives and for services rendered on behalf of the Class of up to \$7,500 each, and 4) the request for an award of attorneys' fees and expenses of up to \$537,500. You may attend the Final Approval Hearing, but you do not have to attend. The motion for attorneys' fees and expense and service awards will be posted on www.BarleansCoconutOilSettlement.com after they are filed with the Court.

This is only a summary. For more information, visit www.BarleansCoconutOilSettlement.com or call toll free (XXX) XXX-XXXX.

Exhibit 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL TESTONE, COLLIN SHANKS, and)
LAMARTINE PIERRE, on behalf of themselves,)
all others similarly situated, and the general)
public,)

Plaintiffs,)

vs.)

BARLEAN'S ORGANIC OILS, LLC,)

Defendant.)
)
)
)
)

Case No.: 3:19-cv-00169-RBM-BGS

**DECLARATION OF JEANNE C.
FINEGAN, APR IN CONNECTION WITH
PROPOSED NOTICE TO SETTLEMENT
CLASS MEMBERS**

INTRODUCTION

1. I am the Managing Director and Head of Kroll Notice Media Solutions ("Kroll Media"),¹ a business unit of Kroll Settlement Administration LLC ("Kroll"), the proposed Claims Administrator in the above-captioned case. This declaration (the "Declaration") is based upon my personal knowledge as well as information provided to me by my associates and staff, including information reasonably relied upon in the fields of advertising media and communications.

2. Kroll has been designated by the Parties as the proposed Claims Administrator to, among other tasks, develop and implement a proposed publication Notice Plan as part of the Parties' proposed class action settlement in the above captioned case, as reflected in the Settlement Agreement (the "Settlement Agreement").

¹ Capitalized terms used but not defined herein have the meanings given to them in the Settlement Agreement (as defined below).

1 3. My team and I have crafted a highly targeted Notice Plan, which employs best-in-class tools
2 and technology. The Notice Plan is specifically designed to reach at least 70% of the target audience
3 (i.e., Class Members) an average of two times by utilizing, among other tools, online display, search
4 terms, social media impressions, a settlement website, and a toll-free number. This Declaration
5 describes my experience in designing and implementing notices and notice programs, as well as my
6 credentials to opine on the overall adequacy of the Notice Plan. This Declaration will also describe
7 the proposed Notice Plan and address how this comprehensive proposed program is consistent with
8 due process, other best practicable court-approved notice programs, the requirements of Fed. Civ. P.
9 23(c)(2)(B), and the Federal Judicial Center guidelines for best practicable due process notice.

10 **QUALIFICATIONS**

11
12 5. My credentials, expertise, and experience that qualify me to provide an expert opinion and
13 advice regarding notice class action cases include more than 30 years of communications and
14 advertising experience, specifically in class action and bankruptcy notice context. My Curriculum
15 Vitae delineating my experience is attached hereto as **Exhibit A**.

16 6. In summary, I have served as an expert and have been directly responsible for the design and
17 implementation of numerous notice programs, including some of the largest and most complex
18 programs ever implemented in the United States as well as globally in over 140 countries and thirty-
19 seven languages. I have been recognized by numerous courts in the United States as an expert on
20 notification and outreach.

21 7. During my career, I have planned and implemented over one thousand complex notice
22 programs for a wide range of class action, bankruptcy, regulatory, and consumer matters. The
23 subject matters of which have included product liability, data breach, construction defect, antitrust,
24 asbestos, medical, pharmaceutical, human rights, civil rights, telecommunications, media,
25 environmental, securities, banking, insurance, and bankruptcy.

8. I have provided testimony before the United States Congress on issues of notice.² I have lectured, published, and been cited extensively on various aspects of legal noticing, product recall, and crisis communications. I have served the Consumer Product Safety Commission (“CPSC”) as an expert to determine ways in which the CPSC can increase the effectiveness of its product recall campaigns. Additionally, I have published and lectured extensively on various aspects of legal noticing and taught continuing education courses for Jurists and lawyers alike on best practice methods for providing notice in various contexts.

9. I worked with the Special Settlement Administrator’s team to assist with the outreach strategy for the historic Auto Airbag Settlement. In re Takata Airbag Prods. Liab. Litig., No. 15-MD-2599-FAM (S.D. Fla.). I was the notice section lead contributing author for “Guidelines and Best Practices Implementing 2018 Amendments to Rule 23 Class Action Settlement Provisions” published by Duke University School of Law.

10. Among others, my relevant experience includes In re: *Yahoo! Inc. Customer Data Security Breach Litigation*, Case No. 5:16-MD-02752 (N.D. Cal. 2016). Further, I have been recognized as being at the forefront of modern notice practices,³ and I was one of the first notice experts to

² See, e.g., Report on the Activities of the Committee on the Judiciary of the House of Representatives: “Notice” Provision in the *Pigford v. Glickman* Consent Decree: Hearing Before Subcommittee on the Constitution, 108th Cong. 2nd Sess. 805 (2004) (statement of Jeanne C. Finegan); *Pigford v. Glickman & U.S. Dep’t of Agric.*, 185 F.R.D. 82, 102 (D.D.C. Apr. 14, 1999) (J. Finegan provided live testimony and was cross-examined before Congress in connection with a proposed consent decree settling a class action suit against the U.S. Department of Agriculture. In the court opinion that followed, the Honorable Paul L. Friedman approved the consent decree and commended the notice program, stating, “The [c]ourt concludes that class members have received more than adequate notice . . . the timing and breadth of notice of the class settlement was sufficient . . . The parties also exerted extraordinary efforts to reach class members through a massive advertising campaign in general and African American targeted publications and television stations.”)

³ See, e.g., Deborah R. Hensler et al., *Class Action Dilemmas, Pursuing Public Goals for Private Gain*, RAND (2000).

integrate digital media,⁴ social media and influencers⁵ into court-approved legal notice programs.

My work includes:

- *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. 2019).
- *In Re: PG&E Corporation*, No. 19-30088 Bankr. (N.D. Cal. 2019).
- *Hill's Pet Nutrition, Inc., Dog Food Products Liability Litigation*, No. 19-MD-2887 (D. Kan. 2021).
- *Pettit et al., v. Procter & Gamble Co.*, No. 15-cv-02150-RS (N.D. Cal. 2019).
- *Cook et. al., v. Rockwell International Corp.* et al., No. 90-cv-00181- KKK (D. Colo. 2017).

11. As further reference, in evaluating the adequacy and effectiveness of my notice programs, courts have repeatedly recognized my work as an expert. For example:

a. *Yahoo! Inc. Customer Data Security Breach Litigation*, No. 5:16-MD-02752 (N.D. Cal. 2016). In the Order of Preliminary Approval, dated July 20, 2019, para 21, the Honorable Lucy Kho stated:

“The Court finds that the Approved Notices and Notice Plan set forth in the Amended Settlement Agreement satisfy the requirements of due process and Federal Rule of Civil Procedure 23 and provide the best notice practicable under the circumstances.”

b. *Hill's Pet Nutrition, Inc., Dog Food Products Liability Litigation*, Case No. 19-MD-2887 (D. Kan. 2021). In the Preliminary Approval Transcript, February 2, 2021, p. 28-29, the Honorable Julie A. Robinson stated:

“I was very impressed in reading the notice plan and very educational, frankly to me, understanding the communication, media platforms,

⁴ See *In re Louisiana-Pacific Inner-Seal Siding Litig.*, Nos. 879-JE, 1453-JE (D. Or. 1995).

⁵ See *In Re: PG&E Corporation*, No. 19-30088 Bankr. (N.D. Cal. 2019).

1 technology, all of that continues to evolve rapidly and the ability to not only
 2 target consumers, but to target people that could rightfully receive notice
 3 continues to improve all the time.”

4 c. *In re Purdue Pharma L.P.*, No. 19-23649 (Bankr. S.D.N.Y. 2019).
 5 Omnibus Hearing, Motion Pursuant to 11 U.S.C. §§ 105(a) and 501 and Fed. R. Bankr. P.
 6 2002 and 3003(c)(3) for Entry of an Order (I) Extending the General Bar Date for a Limited
 7 Period and (II) Approving the Form and Manner of Notice Thereof, June 3, 2020, transcript
 8 p. 88:10, the Honorable Robert Drain stated:

9 “The notice here is indeed extraordinary, as was detailed on page 8 of Ms.
 10 Finegan’s declaration in support of the original bar date motion and then in
 11 her supplemental declaration from May 20th in support of the current motion,
 12 the notice is not only in print media, but extensive television and radio notice,
 13 community outreach, -- and I think this is perhaps going to be more of a
 14 trend, but it's a major element of the notice here -- online, social media, out of
 15 home, i.e. billboards, and earned media, including bloggers and creative
 16 messaging. That with a combined with a simplified proof of claims form and
 17 the ability to file a claim or first, get more information about filing a claim
 18 online -- there was a specific claims website -- and to file a claim either
 19 online or by mail. Based on Ms. Finegan’s supplemental declaration, it
 20 appears clear to me that that process of providing notice has been quite
 21 successful in its goal in ultimately reaching roughly 95 percent of all adults in
 22 the United States over the age of 18 with an average frequency of message
 23 exposure of six times, as well as over 80 percent of all adults in Canada with
 24 an average message exposure of over three times.”

25
 26 d. *In Re: PG&E Corporation*, No. 19-30088 Bankr. (N.D. Cal. 2019). Hearing
 27 Establishing, Deadline for Filing Proofs of Claim, (II) establishing the Form and Manner of
 28

1 Notice Thereof, and (III) Approving Procedures for Providing Notice of Bar Date and Other
 2 Information to all Creditors and Potential Creditors PG&E. June 26, 2019, Transcript of
 3 Hearing pp. 21:1, 201:20, the Honorable Dennis Montali stated:

4 “...the technology and the thought that goes into all these plans is almost
 5 incomprehensible... Ms. Finegan has really impressed me today...”

6 e. *Carter v. Forjas Taurus S.S., Taurus International Manufacturing, Inc.*,
 7 Case No. 1:13-CV-24583- PAS (S.D. Fla. 2016). In her Final Order and Judgment Granting
 8 Plaintiffs’ Motion for Final Approval of Class Action Settlement, the Honorable Patricia
 9 Seitz stated:

10 “The Court considered the extensive experience of Jeanne C. Finegan and the notice
 11 program she developed. . . There is no national firearms registry and Taurus sale
 12 records do not provide names and addresses of the ultimate purchasers... Thus, the
 13 form and method used for notifying Class Members of the terms of the Settlement
 14 was the best notice practicable. . . . The court-approved notice plan used peer-
 15 accepted national research to identify the optimal traditional, online, mobile, and
 16 social media platforms to reach the Settlement Class Members.”

17 Additionally, in the January 20, 2016, Transcript of Class Notice Hearing, p. 5, Judge Seitz
 18 noted:

19 “I would like to compliment Ms. Finegan and her company because I was quite
 20 impressed with the scope and the effort of communicating with the Class.”

21 **SETTLEMENT CLASS DEFINITION**

22
 23 12. The proposed Notice Plan is designed to inform Class Members of the proposed class action
 24 settlement among the Parties. Pursuant to the Settlement Agreement, the Class is defined as:

25 All persons who in the United States, during the Class Period, purchased Coconut
 26 Oil Products, including Barlean’s Organic Virgin Coconut Oil (16-, 32-, and 60-oz.),
 27

Barlean's Organic Culinary Coconut Oil (32- and 60-oz.), and Barlean's Organic Butter Flavored Coconut Oil (16- and 32-oz.)), for personal or household use during the Class Period.

SUMMARY OF NOTICE PLAN ELEMENTS

13. The proposed Notice Plan includes the following components to reach Class Members:

- Online display banner advertising;
- Keyword search online advertising;
- Social media advertising through Facebook, Instagram, YouTube, and Pinterest.
- A press release;
- CLRA notice via newspaper;
- An informational website on which the notices and other important Court documents will be posted; and
- A toll-free information line by which Class Members can call 24/7 for more information about the Settlement, including, but not limited to, requesting copies of the Full Class Notice.

CONSUMER RESEARCH AND FACTORS IN NOTICE DEVELOPMENT

14. In addition to the media research data, described below, Kroll's media team studied various sources on how consumers tend to use coconut oil and perceptions concerning its health effects.

15. Understanding how consumers perceive a product and use this information in making purchase decisions is a cornerstone to developing effective audience targeting and media placements. It allows the Notice Plan to focus on websites and content that are contextually relevant sources of information to these consumers. This is why as described below, we are casting a broad Notice Plan net to reach Class Members who may currently use the product for its nutritional characteristics, or those who may perceive it as a healthy food, approved for among other things,

1 diets such as Paleo and Keto. We also take into consideration those who may be current purchasers
2 as well as those who are not brand loyal and use Barlean's along with competitive brands.

3 **METHODOLOGY FOR THE APPLICATION OF APPROPRIATE NOTICE**

4
5 16. Further target insight is guided by best-in-class nationally syndicated media research data
6 provided by MRI-Simmons Research ("MRI"),⁶ and online measurement comScore,⁷ among others,
7 to provide media consumption habits and audience delivery verification of the potentially affected
8 population. This tells us which media channels the target audience of Class Members prefer and
9 then how many of them the Notice Plan is estimated to reach. Based on this research, our cutting-
10 edge approach to notice focuses on the quality of media exposure, engagement, and appropriate
11 media environment.

12 17. These data resources are used by numerous advertising agencies nationwide as the basis to
13 select the most appropriate media to reach specific target audiences. The resulting key findings are
14 instrumental in our selection of media channels and outlets for determining the estimated net
15 audience reached through the Notice Plan. Specifically, this research identifies which media
16 channels are favored by the target audience, (*i.e.*, Class Members). Further, this research identifies
17 browsing behaviors on the Internet, which social media channels are visited, and which magazines
18 are read, by Class Members.

19 18. By using these media research tools, we can create target audience characteristics or
20 segments and then select the most appropriate media and communication methods to best reach
21 them. The first step is to define them within our media research. Here, we are using the applicable
22 MRI media definition "*purchasers of 'other specialty' cooking oils including coconut oil.*"

23
24 ⁶ MRI's *Survey of the American Consumer*® is the industry standard for magazine audience ratings
25 in the U.S. and is used by the majority of media and marketing agencies in the country. MRI
26 provides comprehensive reports on demographic, lifestyle, product usage and media exposure.

27 ⁷ comScore is a global Internet information provider on which leading companies and advertising
28 agencies rely for consumer behavior insight and Internet usage data.

19. This MRI media definition is a proxy definition for the Class as no nationally syndicated media research data provides an exact target audience brand definition for Barlean's coconut oils. But importantly, the target audience is broader than the definition of the Settlement Class by including other specialty cooking oils and coconut oil brands and is many times larger in size than the estimated Class size. As reported by MRI, this target audience is approximately 40 million individuals in the United States. Utilizing an overinclusive proxy audience is commonplace in both class action litigation and advertising generally,⁸ particularly where, as in the instant matter, an exact class size is not possible to calculate given the lack of adequate individual purchasing data.⁹ By casting a wide net, the Notice Plan accounts for those who: 1) infrequently purchase the product; and 2) those who are not brand-loyal, or who may have switched to another brand.

OBJECTIVE MEASURES TO QUANTIFY TARGET AUDIENCE REACH

20. This media research technology allows Kroll to accurately report to the Court the estimated percentage of the target audience that will be reached and the average number of times members of the target audience will have the opportunity to see the message. In advertising, this is commonly referred to as a "reach and frequency" analysis, where "reach" refers to the estimated percentage of the unduplicated audience exposed to the campaign, and "frequency" refers to how many times, on average, the target audience had the opportunity to see the message. The calculations are used by

⁸ "If the total population base (or number of class members) is potentially unknown, it is accepted advertising and communication practice to use a proxy-media definition, which is based on accepted media research tools and methods that will allow the notice expert to establish that number. The percentage of the population reached by supporting media can then be established." *Duke Law School, GUIDELINES AND BEST PRACTICES IMPLEMENTING 2018 AMENDMENTS TO RULE 23 CLASS ACTION SETTLEMENT PROVISIONS*, at 56. This publication is available online at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1003&context=bolch>.

⁹ While it is common for brands to track total sales units, in my experience, it is less common for them to precisely know the exact total unique net number of consumers who make these purchases over extended periods of time. However, I am informed by Class Counsel that they believe there are approximately 500,000 Class Members.

1 advertising and communications firms worldwide and have become a critical element to help
2 provide the basis for determining adequacy of notice in class actions.

3 21. Here, the reach percentage of over 70% exceeds the guidelines as set forth in The Federal
4 Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language
5 Guide¹⁰ to implement a notice program which reaches a majority of Settlement Class Members.

6
7 **PROCESS CONCERNING HOW DIGITAL ADS TARGET AN AUDIENCE**

8 22. To ensure that digital display¹¹ ads are shown to the correct person, in the correct
9 environment and at the right time, Kroll will employ a media buying tactic known as
10 "programmatic advertising." That means digital display banner ads will be served to a targeted user
11 wherever they may browse on the internet. A programmatic Notice Plan may employ tens-of-
12 thousands of websites visited by these users. For this Notice Plan, the targeting will focus on
13 contextually relevant websites and content, which may include among numerous others.

14 23. For the instant matter, programmatic advertising combines consumer data, computer
15 software and algorithms to specifically serve ads to individuals through:

- 16 1) *Contextual Targeting*, which is a technique used to serve the advertising
17 impressions to the intended audience based on a website's content. Ads are targeted
18 to sites that fall into specific topics, or sites that feature specific content where ads
19 are targeted to pages matching specific keywords and topics.

20
21
22 ¹⁰ FED. JUD. CTR., *Judges' Class Action Notice and Claims Process Checklist and Plain Language*
23 *Guide* (2010), available at <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>. The guide
suggests that the minimum threshold for adequate notice is 70%. *See id.* at pp. 1, 3.

24 ¹¹ Digital display banner ads appear across online publishers which are *not* social media platforms.
25 Social media ads appear only on social media platforms, such as Facebook, Instagram Pinterest and
26 YouTube. Social media advertising is separate and apart from display advertising (*i.e.*, Google
27 Display Ads), as social media advertising focuses on demographic characteristics and followers of
certain pages, likes, interests and hashtag content. The notice program will retarget (*i.e.*, provided
reminder ads), those who visited the Settlement website.

2) *Website Retargeting* is a method used to reach potential Settlement Class Members who have already visited the dedicated Settlement Website. Ads are served to these browsers as the user journeys through the web visiting other sites and pages. Retargeting functions as a reminder ad, directed to Settlement Class Members about the Settlement.

THE PROCESS OF SERVING ADS TO THE CORRECT TARGET AUDIENCE

24. In practice, when a user visits a website, an IP¹² connection between the user's device and the publisher's webserver is established. The website then flags available ad tags so that the ad server can analyze data about the user such as demographic attributes or location. This information is shared with advertising exchanges (digital advertising marketplaces for ad space) where ad buyers can bid on the ad unit, relevant to the campaign. If the ad unit is user-relevant, a bid is offered. Upon winning the bid for the ad unit, the ad is downloaded on a webpage for a user to see and this counts as an impression.

25. An impression is simply an occurrence of an ad presented to a user. It is frequently referred to as an "*opportunity to see*" an advertisement. Each time an ad is shown via page, or search result, an ad impression is counted.

26. Both digital banner ads and social media ads include relevant information for the user to self-identify. If the user clicks on the ad, an embedded link takes them to the Settlement Website, where they can learn more about the Settlement and potentially file a claim.

27. Digital banner ads and social media ads are tracked and accounted for through various means including Urchin Tracking Module ("UTM") codes. UTM codes are used to track, among other things, clicks, or other website statistics including visits to the Settlement Website.

¹² An IP address, or Internet Protocol address is a series of numbers that identifies any device on a network. Computers use IP addresses to communicate with each other both over the internet as well as on other networks.

KEY TARGET AUDIENCE MEDIA USE INSIGHTS

28. Numerous brands and advertising agencies use objective syndicated data tools, like the ones described above, to quantify net reach. These sources ensure that advertising placements are measured against advertising standards so that the placements can be reported accurately. This method of using objective syndicated media research data and tools has been embraced by numerous Courts to provide the basis for evaluating the efficacy of a Notice Plan.

29. Here, the target audience has been reported to have the following characteristics according to MRI: More than 80% of the target audience is over the age of 35, and nearly 70% are women. Of this target audience, over 95% have been online in the last 30 days. In the last 30 days, 67% report that they have visited Facebook, 56% report that they have spent time on YouTube, and 22% report that they have spent time on Pinterest.

PUBLICATION ELEMENTS ONLINE DISPLAY BANNER ADS

30. As discussed above, this campaign will employ a programmatic¹³ approach across multi-channel and inventory sources. Display ads will be targeted to reach those who have an interest in healthy cooking, cooking with coconut oil, organic and natural foods as well as those who are on Paleo and Keto diets.¹⁴ Display ads will be contextually targeted to content related to cooking fats and oils, healthy cooking, organic and natural foods, Keto approved foods and Paleo food. Additionally, MRI reports that 56% of this target audience shops on Amazon, therefore ads will also be targeted to Amazon shoppers.

¹³ Programmatic refers to a media buying tactic which combines consumer data, computer software and algorithms to serve digital ads to the right person at the right time and in the right context.

¹⁴ See: <https://paleoleap.com/paleo-foods-coconut-oil/>. Also see: [https://www.healthline.com/nutrition/coconut-oil-for-keto#:~:text=Coconut%20oil%20is%20perfectly%20keto,burning%20\(%203%20%2C%204%20\)](https://www.healthline.com/nutrition/coconut-oil-for-keto#:~:text=Coconut%20oil%20is%20perfectly%20keto,burning%20(%203%20%2C%204%20).).

GOOGLE KEY WORD AND SEACH TERMS

31. Further, keyword search advertising will supplement the Notice Plan to show advertisements to users in their Google Search results. This will help drive Settlement Class Members to the Settlement Website who are actively searching for information about the Settlement. When a user conducts a search for Settlement-related content, a sponsored ad link appears, which provides brief information about the Settlement and directs them to the Settlement Website.

SOCIAL MEDIA ADS ON FACEBOOK, INSTAGRAM, PINTEREST AND YOUTUBE

33. Social media ads on Facebook and Instagram will appear in a user's Newsfeed, in their "Stories," or in their "Reels." These ads will employ multiple layers of targeting and will focus on people who have *liked, followed, or interacted* with relevant pages, accounts, videos or posts and tags.

Kroll will target those who like or follow these pages:

- Costco Facebook page: 2.6M people like this
- Costco Instagram page: 1.1M followers
- Mary Ruth's Facebook page: 108K people like this
- Mary Ruth's Instagram page: 419K followers
- Nature's Way Brands Facebook page: 24K people like this
- Nature's Way Brands Instagram page: 18K followers
- Nutiva Facebook page: 148K people like this
- Nutiva Instagram page: 70K followers
- Puritan's Pride Facebook page: 371K people like this
- Puritans Pride Instagram page: 25K followers

34. Additionally, Kroll will target relevant pages such as Ketogenic Diet Recipes Facebook page which has 186K followers. Kroll will also target users based on hash tagged topics including *#coconutoilcooking, #organiccookingoil, #cookingoil*.

1 35. On **Pinterest**, promoted pins (ads) will be placed using contextual and key word targeting
 2 tactics. Ads will appear on pages related to topics including Barlean's, coconut oil cooking, healthy
 3 cooking/recipe content, Keto and Paleo diet cooking.

4 36. On **YouTube**, display ads will be served to users when they view video content related to
 5 healthy cooking, cooking with coconut oil, Barlean's and Keto or Paleo diets, among others.

6 37. **Retargeting.** Additionally, social media ads will retarget, (i.e., provide reminder ads) to
 7 people who visit the Settlement Website.

8 39. In total, it is estimated that more than 40 million impressions will be served across display
 9 and social media for this Notice Plan.

10 **CLRA NOTICE**

11 40. In order to be compliant with California's Legal Remedy Act "CLRA" Code §1750, et seq.,
 12 the Summary Notice will be published in the Los Angeles edition of *USA Today*, once a week for
 13 four consecutive weeks. *USA Today's* Los Angeles edition has a circulation of 8,100.
 14

15 **ACTIVE CAMPAIGN MANAGENT TO MITIGATE DIGITAL AD FRAUD**

16 41. Kroll actively manages its legal notice plans. Kroll's media team intends to optimize the
 17 media in this Notice Plan to ensure digital ads appear on quality publishers and that the ads are
 18 served in brand safe environments. These tactics help to improve Class Members' opportunities to
 19 see the Notice Plan ads.

20 42. Further, to mitigate digital ad fraud, or non-human viewership of the digital Notice Plan, and
 21 to confirm/validate impression delivery, Kroll engages validation technology from, among others,
 22 Integral Ad Science ("IAS") and comScore's Content Activation. These layers of validation and
 23 verification help to ensure that the Notice Plan ads are being targeted to real websites where actual
 24
 25
 26
 27
 28

1 (human) Settlement Class Members are likely to visit, rather than serving ads to websites and bots
2 attempting to fraudulently earn advertising revenue from the campaign.¹⁵

3 43. To this end, online ads will be tagged with specific codes which will validate the
4 impressions. Further, digital ad logs will be examined for fraudulent anomalies such as ads being
5 called to data centers, uncommon browser sizes and outdated browser versions as well as other
6 parameters that are indicators of non-human traffic. In addition, through these efforts, we will
7 identify which websites are generating validated human click-throughs to the Settlement Website
8 and in turn, we are able to optimize impressions to those sites. Any online impressions identified as
9 invalid will be culled from the final reach calculation reported to the Court.

10
11 **PRESS RELEASE**

12 44. A press release will be issued over PR Newswire's USA1 Newswire. PR Newswire's
13 distribution includes thousands of print and broadcast newsrooms nationwide, as well as websites,
14 databases and online services including featured placement in news sections of leading content
15 portals.

16 45. Kroll intends to monitor various media channels for subsequent news articles and various
17 social mentions as a result of the notice efforts. A complete report on the results will be provided to
18 Class Counsel upon completion of the media program.

19 46. In this case, Counsel has advised that the Class consists of approximately 500,000
20 purchasers. Each class settlement is unique, and in my experience many factors tend to influence
21 response rates and claim submission. These factors include benefit to be received, the perceived
22 physical or financial harm by the issue at hand, brand awareness and favorability, the perceived
23 value of the benefit, and the effort required to file a claim among others.

24
25
26
27 ¹⁵ See: You Probably Don't Think Digital Ad Fraud Doesn't Affect You. Think Again.
https://innovation.media/magazines/how_digital_ad_fraud_affects_everyone

1 Consequently, there is no formula to project response rates with any certainty, even when Class
2 Members are exposed to a highly targeted and reasonably calculated notice program., Nevertheless,
3 based on our experience, in a matter of this nature, and the scope of work, among other factors,
4 Kroll estimates that it would be reasonable to assume a claim rate between 1% to 3%.

5 47. Based on Kroll's current understanding of the class and requested administration
6 services, estimated fees and expenses for notice and administration are approximately \$185,750 for
7 fees and costs for notice and claims administration under the Settlement. The current estimate is
8 subject to change depending on factors such as the actual Settlement class size and/or any
9 Settlement administration scope change not currently under consideration.

10
11 **OFFICIAL SETTLEMENT WEBSITE**

12 48. An informational website will be established and maintained by Kroll (the "Settlement
13 Website"). The Settlement Website URL will be determined and approved by Class Counsel and
14 defendant's counsel (planned to be www.BarleansCoconutOilSettlement.com). The Settlement
15 Website will contain a summary of the Settlement, will allow Class Members to contact the Claims
16 Administrator with any questions or changes of address, provide notice of important dates such as
17 the Fairness Hearing, Claims Deadline, Objection Deadline, and Opt-Out Deadline, and provide
18 Class Members who file Claim Forms online the opportunity to select payment by ACH, check, or
19 an electronic payment method, including Venmo, Zelle, and Paypal.

20
21 **TOLL-FREE INFORMATION LINE**

22 49. Kroll will establish and maintain a 24-hour toll-free IVR telephone line, where callers may
23 obtain information about the Settlement.

24 **CONCLUSION**

25 50. In my opinion, the Notice Plan reflects a particularly appropriate, highly targeted, and
26 contemporary way to provided notice to Class Members. The Notice Plan is designed to reach an
27 estimated 71 percent of targeted Class Members. In my opinion, the efforts to be used in this
28

1 proposed Notice Plan are of the highest modern communication standards, are reasonably calculated
2 to provide notice, and are consistent with best practicable court-approved notice programs in similar
3 matters and the Federal Judicial Center's guidelines concerning appropriate reach.

4 51. At the conclusion of the notice program, and in conjunction with consideration of final
5 approval of the Settlement, Kroll will submit a declaration confirming that it has implemented the
6 Notice Plan and will provide any other information requested by the Court.

7
8 I declare under penalty of perjury, under the laws of the United States of America, that the
9 foregoing is true and correct.

10 Executed on October 21, 2022, in Tigard, Oregon.

11 _____
12 Jeanne C. Finegan
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Exhibit 4

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 MICHAEL TESTONE, COLLIN SHANKS,
11 and LAMARTINE PIERRE, on behalf of
12 themselves, all others similarly situated, and the
13 general public,

14 Plaintiffs,

15 vs.

16 BARLEAN’S ORGANIC OILS, LLC,
17

18 Defendant.
19
20
21
22
23
24
25
26
27
28

Case No: 3:19-cv-00169-RBM-BGS

**ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

Judge: Hon. Ruth Bermudez Montenegro

1 WHEREAS, the above-entitled action is pending before this Court (the “Action”);

2 WHEREAS, Plaintiffs Michael Testone, Collin Shanks, and Lamartine Pierre have
3 moved, pursuant to Federal Rule of Civil Procedure 23(e), for an order approving the
4 Settlement of this Action in accordance with the [DATE], 2022 Class Action Settlement
5 Agreement (“Settlement Agreement”) attached as Exhibit 1 to the Declaration of Paul K.
6 Joseph in Support of Plaintiffs’ [DATE] Motion for Preliminary Approval of Class Settlement
7 (the “Motion”), which Settlement Agreement sets forth the terms and conditions for a
8 proposed classwide settlement of the Action;

9 WHEREAS, the Court, has read and considered the Settlement Agreement, Plaintiffs’
10 Motion, and the arguments of counsel;

11 **NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS AS**
12 **FOLLOWS:**

13 1. Settlement Terms. All capitalized terms herein have the same meanings ascribed
14 to them in the Settlement Agreement.

15 2. Jurisdiction. The Court has jurisdiction over the subject matter of the action and
16 over all parties to the action, including all members of the Settlement Class.

17 3. Preliminary Approval of Proposed Settlement Agreement. The Court finds that,
18 subject to the fairness hearing, the proposed Settlement Agreement is fair, reasonable,
19 adequate, and within the range of possible approval considering the possible damages at issue
20 and defenses to overcome. The Court also finds that the Settlement Agreement: (a) is the
21 result of serious, informed, non-collusive, arms-length negotiations, involving experienced
22 counsel familiar with the legal and factual issues of this case; and (b) meets all applicable
23 requirements of law, including Federal Rule of Civil Procedure 23, and the Class Action
24 Fairness Act (“CAFA”), 28 U.S.C. § 1715. Therefore, the Court grants preliminary approval
25 of the Settlement.

26 4. Class Certification for Settlement Purposes Only. The Court conditionally certifies, for
27 settlement purposes only, a Settlement Class defined as all persons who in the United States,
28

during the Class Period, purchased Coconut Oil Products (defined by the Settlement Agreement), for personal or household use. Excluded from the Class are: (a) persons or entities who purchased Coconut Oil Products for the purpose of resale or distribution; (b) persons who are directors and Officers of Barlean's or its parent, subsidiary, or affiliate companies; (c) governmental entities; (d) persons who timely and properly exclude themselves from the Class as provided in the Agreement; (e) persons who signed a release of Barlean's for compensation for the claims arising out of the facts or claims asserted in the Action; and (f) any judicial officer hearing this Action, including his or her immediate family members and employees.

5. The Court finds, for settlement purposes only, that class certification under Federal Rule of Civil Procedure 23(b)(3) is appropriate in the settlement context because (a) the Settlement Class Members are so numerous that joinder of all Settlement Class Members is impracticable; (b) there are questions of law and fact common to the Settlement Class which predominate over any individual questions; (c) the claims of the Plaintiffs and proposed Class Representatives are typical of the claims of the Settlement Class; (d) the Plaintiffs and proposed Class Representatives and their counsel will fairly and adequately represent and protect the interests of the Settlement Class Members; (e) questions of law or fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. Class Representatives. The Court appoints Plaintiffs Michael Testone, Collin Shanks, and Lamartine Pierre as Class Representatives.

7. Class Counsel. The Court appoints Fitzgerald Joseph LLP as Class Counsel.

8. Settlement Class Administrator. The Court hereby approves Kroll to act as Class Administrator. Kroll shall be required to perform all the duties of the Class Administrator as set forth in the Agreement and this Order.

1 9. Qualified Common Fund. [---] is authorized to establish the Common Fund
 2 under 26 C.F.R. §§ 1.468B-1(c) and (e)(1), to act as the “administrator” of the Common Fund
 3 pursuant to 26 C.F.R. § 1.468B-2(k)(3), and to undertake all duties as administrator in
 4 accordance with the Treasury Regulations promulgated under § 1.468B of the Internal
 5 Revenue Code of 1986. All costs incurred by the Class Administrator operating as
 6 administrator of the Common Fund shall be construed as costs of Claims Administration and
 7 shall be borne solely by the Common Fund. Interest on the Common Fund shall inure to the
 8 benefit of the Class.

9 10. Class Notice. The Court approves the form and content of the Class Notice in
 10 the long form attached to the Settlement Agreement as Exhibit 1, the short form attached to
 11 the Settlement Agreement as Exhibit 2, and the other forms of notice submitted with
 12 Plaintiffs’ Motion for Preliminary Approval. The Court finds that dissemination of the Class
 13 Notice as proposed in the Settlement Agreement and in Kroll’s Notice Plan as set forth in the
 14 [DATE] Declaration of Jeanne C. Finegan, meets the requirements of Federal Rule of Civil
 15 Procedure 23(c)(2), and due process, and further constitutes the best notice practicable under
 16 the circumstances. Accordingly, the Court hereby approves the Notice Plan.

17 11. Objection and Opt-Out/Exclusion Deadline. Settlement Class Members who
 18 wish either to object to the Settlement or to exclude themselves from the Settlement must do
 19 so by the Objection Deadline and Opt-Out/Exclusion Deadline of [date]. Settlement Class
 20 Members may not both object to and exclude themselves from the Settlement. If a Settlement
 21 Class Member submits both a Request for Exclusion and an Objection, the Request for
 22 Exclusion will be controlling.

23 12. Exclusion from the Settlement Class. To submit a Request for Exclusion,
 24 Settlement Class Members must follow the directions in the Notice and submit online at the
 25 settlement website by the Opt-Out/Exclusion Deadline, or send a compliant request to the
 26 Class Administrator at the address designated in the Class Notice, postmarked by the
 27
 28

1 Exclusion Deadline. No Request for Exclusion may be made on behalf of a group of
2 Settlement Class Members.

3 13. All Settlement Class Members who submit a timely, valid Request for Exclusion
4 will be excluded from the Settlement and will not be bound by the terms of the Settlement
5 Agreement and any determinations and judgments concerning it. All Settlement Class
6 Members who do not submit a valid Request for Exclusion by [date], in accordance with the
7 terms set forth in the Agreement, will be bound by all determinations and judgments
8 concerning the Agreement.

9 14. Objections to the Settlement. To object to the Settlement, Settlement Class
10 Members should follow the directions in the Notice and file with the Court or mail to the
11 Class Administrator a written Objection by the Objection Deadline. In the written Objection,
12 the Settlement Class Member should include (i) a caption or title that clearly identifies the
13 Action and that the document is an objection, (ii) the Settlement Class Member's name,
14 current address, and telephone number, or—if objecting through counsel—his or her lawyer's
15 name, address, and telephone number, (iii) the Coconut Oil Product(s) the Settlement Class
16 Member bought during the Class Period, (iv) a clear and concise statement of the Class
17 Member's objection, as well as any facts and law supporting the objection, (v) the objector's
18 signature, and (vi) the signature of the objector's counsel, if any. Upon the Court's Order at
19 the parties' request, the parties will have the right to obtain document discovery from and
20 take depositions of any objecting Settlement Class Member on topics relevant to the
21 Objection.

22 15. If a Settlement Class Member does not submit a written Objection to the
23 Settlement or to Class Counsel's application for attorneys' fees and costs or the Service
24 Awards in accordance with the deadline and procedure set forth in the Class Notice and this
25 Order, but the Settlement Class Member wishes to be appear and be heard at the Fairness
26 Hearing, the Settlement Class Member may do so provided the Objector satisfies the
27 requirements of Federal Rule of Civil Procedure 23(e)(5)(A) at the Fairness Hearing.
28

16. Objecting Settlement Class Members may appear at the Fairness Hearing and be heard. Such Class Members are requested, but not required, in advance of the Fairness Hearing, to file with the Court or mail to the Class Administrator a Notice of Intent to Appear.

17. All Members of the Settlement Class, except those who submit timely Requests for Exclusion, will be bound by all determinations and judgments regarding the Settlement, whether favorable or unfavorable to the Settlement Class.

18. Submission of Claims. To receive a Cash Award, Settlement Class Members must follow the directions in the Class Notice and file a claim with the Class Administrator by the Claims Deadline of [date], 2022. Settlement Class Members who do not submit a claim will not receive a Cash Award but will be bound by the Settlement.

19. Schedule of Future Events. The Court adopts the schedule proposed by Plaintiffs, as follows (with Day “0” the date of this Order):

Event	Day	Approximate Weeks After Preliminary Approval
Date of Preliminary Approval Order	0	-
Deadline to Initiate Notice Plan	14	2 weeks
Deadline for Plaintiffs to file Motion for Attorneys’ fees, costs, and incentive awards	56	8
Notice completion date and deadline to make a claim, opt out, or object	70	10
Deadline for Plaintiffs to file Motion for Final Approval	84	12
Fairness Hearing Date	112	16

20. Fairness Hearing. A Fairness Hearing is scheduled for [date], 2022, at [time] a.m./p.m., for the Court to determine whether the proposed settlement of the Action on the terms and conditions provided for in the Settlement Agreement is fair, reasonable, and adequate to the Settlement Class and should be finally approved by the Court; whether a Judgment should be entered; and to determine any amount of fees, costs, and expenses that should be awarded to Class Counsel and the amount of any service awards to Plaintiffs. The

1 Court reserves the right to adjourn the date of the Fairness Hearing without further notice to
2 the members of the Settlement Class, and retains jurisdiction to consider all further
3 applications arising out of or connected with the proposed Settlement. The Court may approve
4 the Settlement, with such modifications as may be agreed to by the settling parties, if
5 appropriate, without further notice to the Settlement Class.

6 21. Stay of Proceedings. All proceedings in this action are stayed until further order
7 of this Court, except as may be necessary to implement the Settlement or comply with the
8 terms of the Settlement Agreement.

9 22. Pending the final determination of whether the Settlement should be approved,
10 the Settlement Class Representatives and all Settlement Class Members are hereby stayed
11 and enjoined from commencing, pursuing, maintaining, enforcing, or prosecuting, either
12 directly or indirectly, any claims released under the Settlement Agreement in any judicial,
13 administrative, arbitral, or other forum, against any of the released parties. Such injunction
14 will remain in force until Final Approval or until such time as the parties notify the Court that
15 the Settlement has been terminated. Nothing herein will prevent any Settlement Class
16 Member, or any person actually or purportedly acting on behalf of any Settlement Class
17 Member(s), from taking any actions to stay or dismiss any released claim(s). This injunction
18 is necessary to protect and effectuate the Agreement, this Preliminary Approval Order, and
19 the Court's flexibility and authority to effectuate the Agreement and to enter Judgment when
20 appropriate, and is ordered in aid of this Court's jurisdiction and to protect its judgments.
21 This injunction does not apply to any person who files a timely, valid Request for Exclusion.

22 23. If the Settlement is not approved or consummated for any reason whatsoever,
23 the Settlement and all proceedings in connection with the Settlement will be without prejudice
24 to the right of Defendant or the Class Representatives to assert any right or position that could
25 have been asserted if the Agreement had never been reached or proposed to the Court, except
26 insofar as the Agreement expressly provides to the contrary. In such an event, the certification
27 of the Settlement Class will be deemed vacated. The certification of the Settlement Class for
28

1 settlement purposes will not be considered as a factor in connection with any subsequent class
2 certification issues.

3 24. No Admission of Liability. By entering this Order, the Court does not make any
4 determination as to the merits of this case. Preliminary approval of the Settlement Agreement
5 is not a finding or admission of liability by Barlean's. Furthermore, the Agreement and any
6 and all negotiations, documents, and discussions associated with it will not be deemed or
7 construed to be an admission or evidence of any violation of any statute, law, rule, regulation,
8 or principle of common law or equity, or of any liability or wrongdoing by Barlean's, or the
9 truth of any of the claims. Evidence relating to the Agreement will not be discoverable or
10 used, directly or indirectly, in any way, whether in this Action or in any other action or
11 proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the
12 terms and conditions of the Agreement, this Order, the Final Approval Order, and the
13 Judgment.

14 25. Retention of Jurisdiction. The Court retains jurisdiction over the Action to
15 consider all further matters arising out of or connected with the Settlement Agreement and
16 the settlement described therein.

17 **IT IS SO ORDERED.**

18
19
20 Dated: _____, 2022

21 Hon. Ruth Bermudez Montenegro
22 United States District Judge
23
24
25
26
27
28

Exhibit 5

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 MICHAEL TESTONE, COLLIN SHANKS,
11 and LAMARTINE PIERRE, on behalf of
12 themselves, all others similarly situated, and the
13 general public,

14 Plaintiffs,

15 vs.

16 BARLEAN’S ORGANIC OILS, LLC,
17

18 Defendant.
19
20
21
22
23
24
25
26
27
28

Case No: 3:19-cv-00169-RBM-BGS

**ORDER GRANTING MOTION FOR
FINAL APPROVAL OF CLASS
SETTLEMENT**

Judge: Hon. Ruth Bermudez Montenegro

1 The Court having held a Final Approval Hearing on [date], 2022, notice of the Final
2 Approval Hearing having been duly given in accordance with this Court's Order Granting
3 Preliminary Approval of the Class Action Settlement, and having considered all matters
4 submitted to it at the Final Approval Hearing and otherwise, and good cause appearing
5 therefore,

6 **THE COURT HEREBY FINDS AND ORDERS AS FOLLOWS:**

7 1. Incorporation of Other Documents. The Class Action Settlement Agreement
8 dated [date], 2022, including its exhibits (collectively, "Settlement Agreement"), and the
9 definitions of words and terms contained therein are incorporated by reference in this Order.
10 The terms of this Court's Preliminary Approval Order are also incorporated by reference in
11 this Order.

12 2. Jurisdiction. This Court has jurisdiction over the subject matter of this Action
13 and over the Parties, including all members of the following Settlement Class certified for
14 settlement purposes in this Court's Preliminary Approval Order: all persons who in the United
15 States, during the Class Period, purchased Coconut Oil Products (defined by the Settlement
16 Agreement), for personal or household use. Excluded from the Class are: (a) persons or
17 entities who purchased Coconut Oil Products for the purpose of resale or distribution; (b)
18 persons who are directors and Officers of Barlean's or its parent, subsidiary, or affiliate
19 companies; (c) governmental entities; (d) persons who timely and properly exclude
20 themselves from the Class as provided in the Agreement; (e) persons who signed a release of
21 Barlean's for compensation for the claims arising out of the facts or claims asserted in the
22 Action; and (f) any judicial officer hearing this Action, including his or her immediate family
23 members and employees.

24 3. Class Certification. For purposes of settlement only, the Settlement Class, as
25 defined in the Settlement Agreement and above, meets the requirements of Federal Rule of
26 Civil Procedure Rule 23(a) and 23(b). Accordingly, for purposes of settlement, the Court
27 finally certifies the Settlement Class.
28

1 4. Adequate Representation. The Class Representatives and Class Counsel have
2 adequately represented the Settlement Class in accordance with Federal Rule of Civil
3 Procedure 23(e)(2)(A).

4 5. Arms-Length Negotiations. The Settlement Agreement is the product of arms-
5 length settlement negotiations between the Plaintiffs and Class Counsel, on the one hand, and
6 Defendant and its counsel, on the other, in accordance with Federal Rule of Civil Procedure
7 23(e)(2)(B).

8 6. Class Notice. The Class Notice and claims submission procedures set forth in
9 Sections X and X of the Settlement Agreement, and the Notice Plan filed on [date], 2022,
10 fully satisfy Rule 23 of the Federal Rules of Civil Procedure and the requirements of due
11 process, were the best notice practicable under the circumstances, provided individual notice
12 to all Settlement Class Members who could be identified through reasonable effort, and
13 support the Court's exercise of jurisdiction over the Settlement Classes as contemplated in
14 the Settlement Agreement and this Order. *See* Fed. R. Civ. P. 23(e)(2)(C)(ii).

15 7. CAFA Notice. The notice provided by the Class Administrator to the appropriate
16 State and federal officials pursuant to 28 U.S.C. § 1715 fully satisfied the requirements of
17 that statute.

18 8. Settlement Class Response. A total of [number] Settlement Class Members
19 submitted timely and proper Requests for Exclusion, as reported in the declaration of the
20 Class Administrator submitted to this Court. The Court hereby orders that each of the
21 individuals listed by the Class Administrator as having submitted a valid Request for
22 Exclusion is excluded from the Settlement Class. Those individuals will not be bound by the
23 Settlement Agreement, and neither will they be entitled to any of its benefits.

24 9. Objections. A total of [number] Settlement Class Members submitted timely and
25 proper Objections to the Settlement Agreement. Having considered those Objections and the
26 Parties' responses to them, the Court finds that none of the Objections is well founded.
27 Plaintiffs faced serious risks both on the merits of their claims and on the ability to maintain
28

1 certification as a litigation class in this matter. The relief provided to the Settlement Class
 2 pursuant to the Settlement Agreement is adequate, given the costs, risks, and delay of trial
 3 and appeal, and taking into consideration the attorney's fees this Court has awarded. *See* Fed.
 4 R. Civ. P. 23(e)(2)(C)(i), (iii). The Settlement also treats class members equitably relative to
 5 each other. *See* Fed. R. Civ. P. 23(e)(2)(D).

6 10. Final Settlement Approval. The Court hereby finally approves the Settlement
 7 Agreement, the exhibits, and the Settlement contemplated thereby ("Settlement"), and finds
 8 that the terms constitute, in all respects, a fair, reasonable, and adequate settlement as to all
 9 Settlement Class Members in accordance with Rule 23 of the Federal Rules of Civil
 10 Procedure, and directs its consummation pursuant to its terms and conditions.

11 11. Attorneys' Fees and Costs; Service Awards. The Court approves Class
 12 Counsel's application for attorneys' fees and costs in the amount of \$ _____ in
 13 fees and \$ _____ in costs; and approves service awards of \$ _____ for
 14 Plaintiffs Michael Testone, Collin Shanks, and Lamartine Pierre. The Settlement Agreement
 15 provides for Class Counsel's Fee Award to be paid before the time to appeal this Order has
 16 expired. If the Fee Award is voided or reduced on appeal, either directly or as a result of the
 17 final approval of the Settlement as a whole being vacated, overturned, reversed, or rendered
 18 void as a result of an appeal, Class Counsel shall within thirty (30) days repay either to the
 19 Common Fund or to Barlean's the affected amount of the attorneys' fees and costs paid to
 20 Class Counsel, in an amount proportionate to the distribution among Class Counsel's firms,
 21 in accordance with the directions in the Settlement Agreement. By receiving any payments
 22 pursuant to the Settlement Agreement, Fitzgerald Joseph LLP and their shareholders,
 23 members, and/or partners submit to the jurisdiction of this Court for the enforcement of the
 24 reimbursement obligation set forth herein and in the Settlement Agreement. If Class Counsel
 25 fails to timely repay the attorneys' fees and costs that are owed under this provision, the Court
 26 shall be entitled, upon application of Barlean's and notice to Class Counsel, to summarily
 27 issue orders, including but not limited to judgments and attachment orders against each of
 28

1 Class Counsel.

2 12. Dismissal. The Court hereby DISMISSES WITH PREJUDICE, without costs to
3 any party, except as expressly provided for in the Settlement Agreement, the Action, as
4 defined in the Settlement Agreement.

5 13. Release. Upon the Effective Date as defined in the Settlement Agreement, the
6 Plaintiffs and each and every one of the Settlement Class Members unconditionally, fully,
7 and finally releases and forever discharges the Released Parties from the Released Claims.

8 14. Injunction Against Released Claims. Each and every Settlement Class Member,
9 and any person actually or purportedly acting on behalf of any Settlement Class Member(s),
10 is hereby permanently barred and enjoined from commencing, instituting, continuing,
11 pursuing, maintaining, prosecuting, or enforcing any Released Claims (including, without
12 limitation, in any individual, class or putative class, representative or other action or
13 proceeding), directly or indirectly, in any judicial, administrative, arbitral, or other forum,
14 against the Released Parties. This permanent bar and injunction is necessary to protect and
15 effectuate the Settlement Agreement, this Final Order of Dismissal, and this Court's authority
16 to effectuate the Settlement Agreement, and is ordered in aid of this Court's jurisdiction and
17 to protect its judgments.

18 15. No Admission of Liability. The Settlement Agreement and any and all
19 negotiations, documents, and discussions associated with it will not be deemed or construed
20 to be an admission or evidence of any violation of any statute, law, rule, regulation, or
21 principle of common law or equity, or of any liability or wrongdoing by Defendant, or the
22 truth of any of the claims. Evidence relating to the Agreement will not be discoverable or
23 admissible, directly or indirectly, in any way, whether in this Action or in any other action or
24 proceeding, except for purposes of demonstrating, describing, implementing, or enforcing the
25 terms and conditions of the Agreement, the Preliminary Approval Order, or this Order.

26 16. Findings for Purposes of Settlement Only. The findings and rulings in this Order
27 are made for the purposes of settlement only and may not be cited or otherwise used to support
28

1 the certification of any contested class or subclass in any other action.

2 17. Effect of Termination or Reversal. If for any reason the Settlement terminates or
3 Final Approval is reversed or vacated, the Settlement and all proceedings in connection with
4 the Settlement will be without prejudice to the right of Defendant or the Class Representatives
5 to assert any right or position that could have been asserted if the Agreement had never been
6 reached or proposed to the Court, except insofar as the Agreement expressly provides to the
7 contrary. In such an event, the certification of the Settlement Classes will be deemed vacated.
8 The certification of the Settlement Classes for settlement purposes will not be considered as
9 a factor in connection with any subsequent class certification issues.

10 18. Injunctive Relief. By attaching the Settlement Agreement as an exhibit and
11 incorporating its terms herein, the Court determines that this Final Order complies in all
12 respects with Federal Rule of Civil Procedure 65(d)(1).

13 19. Retention of Jurisdiction. Without affecting the finality of the Judgment, the
14 Court reserves jurisdiction over the implementation, administration, and enforcement of the
15 Judgment and the Agreement and all matters ancillary to the same.

16 20. Entry of Judgment. The Clerk of the Court is directed to enter Judgment.
17
18

19 Dated: _____, 2022

20 Hon. Ruth Bermudez Montenegro
21 United States District Judge
22
23
24
25
26
27
28