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 15 ***Class Counsel***

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

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

22 Plaintiffs,

23 v.

24 BARLEAN’S ORGANIC OILS, LLC,

25 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



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:

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

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.

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/s/ Paul K. Joseph

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Paul K. Joseph

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