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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' NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS** Judge: Hon. Ruth Bermudez Montenegro Hearing: March 3, 2023 Time: 3:00 p.m. Court: 5B

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8
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10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

NOTICE OF MOTION 1

MEMORANDUM OF POINTS & AUTHORITIES 1

I. INTRODUCTION 1

II. ARGUMENT 2

A. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR FEES 2

1. Class Counsel's Fee Request is Reasonable Under the Percent-of-Fund Method 3

a. The Result Achieved 5

b. The Contingent Nature of the Representation and Risk Involved in the Litigation 8

c. The Skill Required and Quality of Class Counsel's Work 11

d. Awards in Similar Cases 12

2. A Lodestar Crosscheck Shows Class Counsel's Fee Request is Reasonable 15

a. Class Counsel's Hours are Reasonable 16

b. Class Counsel's Rates are Reasonable 18

c. The Resulting Lodestar Multiplier is Reasonable 20

B. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF EXPENSES 22

C. THE COURT SHOULD GRANT THE CLASS REPRESENTATIVES' REQUESTS FOR SERVICE AWARDS 23

III. CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Aarons v. BMW of N. Am., LLC,
2014 WL 4090512 (C.D. Cal. June 20, 2014) 18

Aarons v. BMW of N. Am., LLC,
2014 WL 4090564 (C.D. Cal. Apr. 29, 2014) 18

Allen v. ConAgra Foods Inc.,
2020 WL 4673914 (N.D. Cal. Aug. 12, 2020) 10

Allen v. Hyland's, Inc.,
2021 WL 718295 (C.D. Cal. Feb. 23, 2021) 10

Allen v. Similasan Corp.,
2017 WL 3537716 (S.D. Cal. Aug. 17, 2017) 2

Alvarez v. Farmers Ins. Exch.,
2017 WL 2214585 (N.D. Cal. Jan. 18, 2017) 17, 22, 25

Arredondo v. Delano Farms Co.,
2017 WL 4340204 (E.D. Cal. Sept. 29, 2017) 22

Baker v. SeaWorld Ent., Inc.,
2020 WL 4260712 (S.D. Cal. July 24, 2020) 15

Beaver v. Tarsadia Hotels,
2017 WL 4310707 (S.D. Cal. Sept. 28, 2017) 4, 12, 14, 18

Behrens v. Wometco Enters., Inc.,
118 F.R.D. 534 (S.D. Fla. 1988) 16

Bellinghausen v. Tractor Supply Co.,
306 F.R.D. 245 (N.D. Cal. 2015) 8

Boyd v. Bank of Am. Corp.,
2014 WL 6473804 (C.D. Cal. Nov. 18, 2014) 20

Brazil v. Dole Packaged Foods, LLC,
2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) 10

Bruno v. Quten Research Inst., LLC,
2013 WL 990495 (C.D. Cal. Mar. 13, 2013) 7

Buccellato v. AT & T Operations, Inc.,
2011 WL 3348055 (N.D. Cal. June 30, 2011) 22

Buchannon v. Associated Credit Servs., Inc.,
2021 WL 5360971 (S.D. Cal. Nov. 17, 2021) 19

Burnthorne-Martinez v. Sephora USA, Inc.,
2018 WL 5310833 (N.D. Cal. May 16, 2018) 7

Chambers v. Whirlpool Corp.,
980 F.3d 645 (9th Cir. 2020) 6

Corzine v. Whirlpool Corp.,
2019 WL 7372275 (N.D. Cal. Dec. 31, 2019) 22

Couser v. Comenity Bank,
125 F. Supp. 3d 1034 (S.D. Cal. 2015 16

Cumming v. BetterBody Foods & Nutrition, LLC,
No. 37-2016-00019510-CU-BT-CTL (San Diego County Super. Ct. Feb. 24, 2017) 13

De Leon v. Ricoh USA, Inc.,
2020 WL 1531331 (N.D. Cal. Mar. 31, 2020) 9

de Mira v. Heartland Employment Serv., LLC,
2014 WL 1026282 (N.D. Cal. Mar. 13, 2014) 6

Dennings v. Clearwire Corp.,
2013 WL 1858797 (W.D. Wash. May 3, 2013) 18

Ducorsky v. Premier Organics,
HG16801566 (Super. Ct. Alameda County Feb. 6, 2018) 13

Farrell v. Bank of Am. Corp., N.A.,
827 Fed. App'x 628 (9th Cir. 2020) 15

Fernandez v. Victoria Secret Stores, LLC,
2008 WL 8150856 (C.D. Cal. 2008) 14

Fox v. Vice,
563 U.S. 826 (2011) 17

Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.,
2016 WL 6156076 (C.D. Cal. Aug. 16, 2016) 6

Grace v. Apple Inc.,
2021 WL 1222193 (N.D. Cal. Mar. 31, 2021) 23

Grant v. Martinez,
973 F.2d 96 (2d Cir. 1992) 17

Guttmann v. Ole Mexican Foods, Inc.,
2016 WL 9107426 (N.D. Cal. Aug. 1, 2016) 7, 9

Hadley v. Kellogg Sales Co.,
2021 WL 5706967 (N.D. Cal. Nov. 23, 2021) 7, 11

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 15

Hartless v. Clorox Co.,
273 F.R.D. 630 (S.D. Cal. 2011) 17

Hensley v. Eckerhart,
461 U.S. 424 (1983) 15

Howell v. Advantage RN, LLC,
2020 WL 5847565 (S.D. Cal. Oct. 1, 2020) 4

In re Activision Sec. Litig.,
723 F. Supp. 1373 (N.D. Cal. 1989) 4

In re Anthem, Inc. Data Breach Litig.,
2018 WL 396006 (N.D. Cal. Aug. 17, 2018) 3, 5, 8, 11

In re Apple Inc. Device Performance Litig.,
50 F.4th 769 (9th Cir. 2022) 3

In re Bluetooth Headsets Prods. Liab. Litig.,
654 F.3d 935 (9th Cir. 2011) 3

In re Consumer Privacy Cases,
175 Cal. App. 4th 545 (2009)........ 14

In re Ferrero Litig.,
583 Fed. App'x 665 (9th Cir. 2014)........ 6

In re Heritage Bond Litig.,
2005 WL 1594403 (C.D. Cal. June 10, 2005)........ 8

In re Hyundai and Kia Fuel Economy Litig.,
926 F.3d 539 (9th Cir. 2019)........ 20

In re Immune Response Sec. Litig.,
497 F. Supp. 2d 1166 (S.D. Cal. 2007)........ 3

In re Media Vision Tech. Sec. Litig.,
913 F. Supp. 1362 (N.D. Cal. 1996)........ 22

In re Omnivision Technologies, Inc.,
559 F. Supp. 2d 1036 (N.D. Cal. 2008)........ 5

In re Online DVD-Rental Antitrust Litig.,
779 F.3d 934 (9th Cir. 2015)........ 23, 25

In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions,
148 F.3d 283 (3d Cir. 1998)........ 16

In re TracFone Unlimited Serv. Plan Litig.,
112 F. Supp. 3d 993 (N.D. Cal. 2015)........ 18

In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.,
895 F.3d 597 (9th Cir. 2018)........ 5

In re: High-tech Emp. Antitrust Litig.,
2014 WL 10520478 (N.D. Cal. May 16, 2014)........ 22

In re: Wash. Pub. Power Supply Sys. Sec. Litig.,
19 F.3d 1291 (9th Cir. 1994)........ 21

Jamil v. Workforce Res.,
2020 WL 6544660 (S.D. Cal. Nov. 5, 2020)........ 4

Kelly v. Wengler,
822 F.3d 1085 (9th Cir. 2016).. 20

Khoja v. Orexigen Therapeutics, Inc.,
2021 WL 5632673 (S.D. Cal. Nov. 30, 2021) 4, 13

Larsen v. Trader Joe's Co.,
2014 WL 3404531 (N.D. Cal. July 11, 2014)... 4, 7, 13, 22

Lloyd v. Navy Fed. Credit Union,
2019 WL 2269958 (S.D. Cal. May 28, 2019)... 4

Loomis v. Slendertone Distribution, Inc.,
2021 WL 873340 (S.D. Cal. Mar. 9, 2021) 24

Luna v. Marvell Tech. Grp.,
2018 WL 1900150 (N.D. Cal. Apr. 20, 2018) 21

Lusby v. GameStop Inc.,
2015 WL 1501095 (N.D. Cal. Mar. 31, 2015)... 12

Marshall v. Northrop Grumman Corp.,
2020 WL 5668935 (C.D. Cal. Sept. 18, 2020) 20

McCown v. City of Fontana,
565 F.3d 1097 (9th Cir. 2009).. 15

McCurley v. Royal Sea Cruises, Inc.,
2020 WL 4582686 (S.D. Cal. Aug. 10, 2020) 10

McMorrow v. Mondelez,
2022 WL 1056098 (S.D. Cal. Apr. 8, 2022).. 11

Milburn v. PetSmart, Inc.,
2019 WL 5566313 (E.D. Cal. Oct. 29, 2019).. 16

Morizur v. SeaWorld Parks & Entm't, Inc.,
2020 WL 6044043 (N.D. Cal. Oct. 13, 2020).. 10

Morris v. Lifescan, Inc.,
54 F. App'x 663 (9th Cir. 2003) 4

1 *Nangle v. Penske Logistics, LLC*,
2 2017 WL 2620671 (S.D. Cal. June 16, 2017)........ 8

3 *Nitsch v. DreamWorks Animation SKG Inc.*,
4 2017 WL 2423161 (N.D. Cal. June 5, 2017)........ 16

5 *Ontiveros v. Zamora*,
6 303 F.R.D. 356 (E.D. Cal. 2014)........ 22

7 *Pemberton v. Nationstar Mortg., LLC*,
8 2020 WL 230014 (S.D. Cal. Jan. 15, 2020)........ 16

9 *Quiruz v. Specialty Commodities, Inc.*,
10 2020 WL 6562334 (N.D. Cal. Nov. 9, 2020)........ 21

11 *Racies v. Quincy Bioscience, LLC*,
12 2020 WL 2113852 (N.D. Cal. May 4, 2020)........ 11

13 *Ries v. Ariz. Beverages USA LLC*,
14 2013 WL 1287416 (N.D. Cal. Mar. 28, 2013)........ 10

15 *Rodriguez v. W. Pub'g Corp.*,
16 563 F.3d 948 (9th Cir. 2009)........ 5

17 *Roes, 1-2 v. SFBSC Mgmt., LLC*,
18 944 F.3d 1035 (9th Cir. 2019)........ 5

19 *Ruiz v. XPO Last Mile, Inc.*,
20 2017 WL 6513962 (S.D. Cal. Dec. 20, 2017)........ 4

21 *San Diego Cty. Credit Union v. Citizens Equity First Credit Union*,
22 2021 WL 6210596 (S.D. Cal. Dec. 2, 2021)........ 19

23 *Sandoval v. Tharaldson Empl. Mgmt., Inc.*,
24 2010 WL 2486346 (C.D. Cal. Jun. 15, 2010)........ 25

25 *Schutza v. Walter E. Fielder, Inc.*,
26 2019 WL 5295075 (S.D. Cal. Oct. 18, 2019)........ 18

27 *Selk v. Pioneers Mem'l Healthcare Dist.*,
28 159 F. Supp. 3d 1164 (S.D. Cal. 2016)........ 15, 22

Sengvong v. Probuild Company LLC,
2021 WL 4504620 (S.D. Cal. Oct. 1, 2021) 15, 19

Shanks v. Jarrow Formulas, Inc.,
2019 WL 4398506 (C.D. Cal. Aug. 27, 2019)........ 1, 9, 12

Shanks v. Jarrow Formulas, Inc.,
2019 WL 7905745 (C.D. Cal. Dec. 27, 2019) 2, 9

Shannon v. Sherwood Mgmt. Co.,
2020 WL 2394932 (S.D. Cal. May 12, 2020)........ 2

Six (6) Mexican Workers v. Arizona Citrus Growers,
904 F.2d 1301 (9th Cir. 1990)) 3

Spann v. J.C. Penney Corp.,
211 F. Supp. 3d 1244 (C.D. Cal. 2016) 8

Spears v. First Am. Eappraiseit,
2015 WL 1906126 (N.D. Cal. Apr. 27, 2015) 11

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003)........ 5

Stuart v. Radioshack Corp.,
2010 WL 3155645 (S.D. Cal. Aug. 9, 2010) 19

Tait v. BSH Home Appliances Corp.,
2015 WL 4537463 (C.D. Cal. July 27, 2015)........ 3

Testone v. Barlean's Organic Oils, LLC,
2021 WL 4438391 (S.D. Cal. Sept. 28, 2021)........ 2, 12

Van Vranken v. Atl. Richfield Co.,
901 F. Supp. 294 (N.D. Cal. 1995) 16

Vasquez v. Coast Valley Roofing, Inc.,
266 F.R.D. 482 (E.D. Cal. 2010) 4

Vizcaino v. Microsoft Corp.,
290 F.3d 1043 (9th Cir. 2002)........ 3, 4, 5, 6

Walsh v. Kindred Healthcare,
2013 WL 6623224 (N.D. Cal. Dec. 16, 2013) 18

Washington v. CVS Pharm. Inc.,
No. 4:15-cv-3504-YGR (N.D. Cal.) 10

Watkins v. Hireright, Inc.,
2016 WL 5719813 (S.D. Cal. Sept. 30, 2016) 23, 24

Werdebaugh v. Blue Diamond Growers,
2014 WL 7148923 (N.D. Cal. Dec. 15, 2014) 10

Wert v. U.S. Bancorp,
2017 WL 5167397 (S.D. Cal. Nov. 7, 2017) 4, 5

Winters v. Two Towns Ciderhouse, Inc.,
2021 WL 1889734 (S.D. Cal. May 11, 2021) 6, 20, 24

Wooldridge v. Marlene Indus. Corp.,
898 F.2d 1169 (6th Cir. 1990) 17

Zakaria v. Gerber Prods. Co.,
2017 WL 9512587 (C.D. Cal. Aug. 9, 2017) 10

Zakaria v. Gerber Prods. Co.,
755 Fed. App'x 623 (9th Cir. 2018) 10

Statutes

Cal. Civ. Code § 1780(e) 3

N.Y. G.B.L. § 349 8

Rules

Fed. R. Civ. P. 23(h) 3, 30

NOTICE OF MOTION

TO THE COURT, ALL PARTIES, AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE THAT, on March 3, 2023 at 3:00 p.m. in Courtroom 5B, or as soon thereafter as may be heard, Plaintiffs will move the Court, the Honorable Ruth Bermudez Montenegro presiding, for an Order awarding Class Counsel attorneys' fees and costs, and for service awards to each Class Representative. The Motion is based on this Notice of Motion; the below Memorandum; the concurrently-filed Declarations of Paul Joseph ("Joseph Decl."), Michael Testone ("Testone Decl."), Collin Shanks ("Shanks Decl."), and Lamartine Pierre ("Pierre Decl."); and all exhibits thereto; all prior pleadings and proceedings, including Plaintiffs' Motion for Preliminary Approval (Dkt. No. 126, "PA Mot."), the Declaration of Paul Joseph in Support of Preliminary Approval (Dkt. No. 126-1, "PA Joseph Decl."), and the Settlement Agreement, attached as Exhibit 1 to the PA Joseph Decl. (Dkt. No. 126-2, "SA"); and any additional evidence and argument submitted in support of the Motion.

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

The Settlement Agreement's $1,612,500 all-cash, non-reversionary common fund is an excellent result for the Class, representing more than 57% of potential trial damages (assuming statutory damages of $50 per unit sold in New York) that Plaintiffs could have recovered at trial for the certified California and New York Classes. PA Joseph Decl. ¶ 23. It also compares favorably with other settlements resolving coconut oil false advertising class actions as it provides the highest monetary recovery as a percentage of estimated retail sales. *See id*. ¶ 26. To achieve this result, Class Counsel worked 1,450 hours and advanced nearly one hundred and sixty thousand dollars in out-of-pocket expenses. They did so by working diligently for four years before securing a strong result for the Class. *See id*. ¶¶ 4-18 (detailing fact and expert discovery and settlement negotiations).

Success was far from certain. For example, in a similar coconut oil case, plaintiffs were denied class certification and the defendant coconut oil manufacturer prevailed on summary judgment. *See Shanks v. Jarrow Formulas, Inc*., 2019 WL 4398506 (C.D. Cal. Aug. 27, 2019)

[“*Shanks I*”] (denying motion for class certification); *Shanks v. Jarrow Formulas, Inc.*, 2019 WL 7905745 (C.D. Cal. Dec. 27, 2019) [“*Shanks II*”] (granting defendant’s motion for summary judgement in full).

Despite clear challenges—and before finally achieving Settlement—in September 2021, Plaintiffs and Class Counsel obtained certification of California and New York Classes of Barlean’s coconut oil purchasers. *See Testone v. Barlean’s Organic Oils, LLC*, 2021 WL 4438391, at *2, 19 (S.D. Cal. Sept. 28, 2021). It was through skillful lawyering and diligence that Class Counsel secured the $1.625 million non-reversionary common fund and Barlean’s agreement to make significant changes to its advertising practices. This is an excellent result and, therefore, the Court should grant Class Counsel’s request for one-third of the common fund in fees. The Court should also award Class Counsel costs of $159,411.09, which were necessary to achieve this excellent outcome for the Class. *See* Joseph Decl. ¶ 24.

Finally, the Court should grant service awards of $7,500 each to Messrs. Testone, Shanks, and Pierre, who faithfully executed their duties as named Class Representatives. This is reasonable given the considerable time and effort they dedicated, including responding to discovery, sitting for depositions, and attending settlement conferences, and the amount is relatively modest compared to the total value of the settlement fund.

II. ARGUMENT

A. THE COURT SHOULD GRANT CLASS COUNSEL’S REQUEST FOR FEES

“‘In a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.’” *Shannon v. Sherwood Mgmt. Co.*, 2020 WL 2394932, at *10 (S.D. Cal. May 12, 2020) (quoting Fed. R. Civ. P. 23(h)). The CLRA also mandates that the “Court shall award court costs and attorney’s fees to a prevailing plaintiff,” *see* Cal. Civ. Code § 1780(e). “Where a settlement produces a common fund for the benefit of the entire class, the courts have the discretion to employ a ‘percentage of recovery method.’” *Allen v. Similasan Corp.*, 2017 WL 3537716, at *2 (S.D. Cal. Aug. 17, 2017) (quoting *In re Bluetooth Headsets Prods. Liab. Litig.*, 654

F.3d 935, 942 (9th Cir. 2011)).

Here, Class Counsel requests that the Court apply the percent-of-fund method and award fees of $537,500, representing one-third of the common fund, which is within the range awarded by courts in similar cases. This amount is also reasonable under a lodestar-multiplier crosscheck analysis, as it represents a *negative* 0.45 multiplier to Class Counsel's reasonable lodestar, which as of January 1, 2023 is $972,456.50.

1. Class Counsel's Fee Request is Reasonable Under the Percent-of-Fund Method

"The use of the percentage-of-the-fund method in common-fund cases is the prevailing practice in the Ninth Circuit for awarding attorneys' fees and permits the Court to focus on showing that a fund conferring benefits on a class was created through the efforts of plaintiffs' counsel." *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2 (N.D. Cal. Mar. 17, 2021) (alteration and quotation omitted), *rev'd on other grounds*, *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 775 (9th Cir. 2022). Courts in this district have found that a "percentage of the award is an appropriate form of attorneys' fees" and the Ninth Circuit has "repeatedly affirmed" the "district court's employment of the percentage method." *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1175 (S.D. Cal. 2007) (header capitalization disregarded) (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)). The method "confers 'significant benefits . . . including consistency with contingency fee calculations in the private market, aligning the lawyers' interests with achieving the highest award for the class members, and reducing the burden on the courts that a complex lodestar calculation requires.'" *In re Apple Inc. Device Performance Litig.*, 2021 WL 1022866, at *2 (quoting *Tait v. BSH Home Appliances Corp.*, 2015 WL 4537463, at *11 (C.D. Cal. July 27, 2015)); *see also In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *5 (N.D. Cal. Aug. 17, 2018) ["*Anthem*"] ("By tying the award to the recovery of the Class, Class Counsel's interests are aligned with the Class," so that "Class Counsel are incentivized to achieve the best possible result." (citation omitted)). By contrast, "the lodestar method

creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement." *Vizcaino*, 290 F.3d at 1050, n.5.

"'District courts in this circuit have routinely awarded fees of one-third of the common fund *or higher*'" and "the Ninth Circuit has upheld such awards." *Khoja v. Orexigen Therapeutics, Inc.*, 2021 WL 5632673, at *9 (S.D. Cal. Nov. 30, 2021) (alteration omitted) (emphasis added) (quoting *Beaver v. Tarsadia Hotels*, 2017 WL 4310707, at *9 (S.D. Cal. Sept. 28, 2017) ("California courts routinely award attorneys' fees of one-third of the common fund" (collecting cases)); *see also Morris v. Lifescan, Inc.*, 54 F. App'x 663, 664 (9th Cir. 2003) (affirming district court "finding an award of 33 percent to be reasonable"); *Jamil v. Workforce Res.*, 2020 WL 6544660, at *4 (S.D. Cal. Nov. 5, 2020) (approving an attorneys' fees award of one-third of the common fund); *Howell v. Advantage RN, LLC*, 2020 WL 5847565, at *5 (S.D. Cal. Oct. 1, 2020) (approving an attorneys' fees award of one-third of the common fund); *Ruiz v. XPO Last Mile, Inc.*, 2017 WL 6513962, at *7 (S.D. Cal. Dec. 20, 2017) (approving an attorneys' fees award of 35 percent of the common fund).

Accordingly, "[i]n *most* common fund cases, the award exceeds the 25% benchmark." *Lloyd v. Navy Fed. Credit Union*, 2019 WL 2269958, at *13 (S.D. Cal. May 28, 2019) (emphasis added) (citations omitted). And the "Ninth Circuit does not foreclose a different benchmark, since the district court must determine what is reasonable in a given case," *Wert v. U.S. Bancorp*, 2017 WL 5167397, at *6 (S.D. Cal. Nov. 7, 2017) (citing *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1377 (N.D. Cal. 1989)) (citing *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) ("[t]he typical range of acceptable attorneys' fees in the Ninth Circuit" includes up to one-third *Larsen v. Trader Joe's Co.*, 2014 WL 3404531, at *8-9 (N.D. Cal. July 11, 2014) (collecting cases awarding fees of 32% or greater); *Morris v. Lifescan, Inc.*, 54 F. App'x 663 (9th Cir. 2003) (affirming award 33% of class fund)).

> "To determine the reasonableness of the percentage requested in any given case, the court generally must consider: (1) the result achieved; (2) the risk of

> litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases' with the overall result and benefit to the class as the most critical factor."

Id. (quoting *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (citing *Vizcaino*, 290 F.3d at 1048-50)).

Because, here, each of the *Vizcaino* factors support Class Counsel's one-third request, the Court should award Class Counsel's fees as requested.

a. The Result Achieved

"First, the Court considers the overall result and benefit to the Class. This factor has been called 'the most critical factor in granting a fee award.'" *Anthem,* 2018 WL 3960068 at *9 (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1046). In conducting this analysis, "[t]he fact that counsel obtained injunctive relief in addition to monetary relief for their clients is . . . a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1055-56 (9th Cir. 2019) (alteration and emphasis omitted) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 946 (9th Cir. 2003)).

Considering its monetary and injunctive relief, the Settlement is an excellent result achieved by Class Counsel for the Class. First, the Settlement's monetary relief is an all-cash, non-reversionary common fund—the gold standard for class action settlements because it provides the most transparent and concrete value to class members while minimizing the chances and impact of collusion. *See Rodriguez v. W. Pub'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) ("cash . . . is a good indicator of a beneficial settlement"); *cf. In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liab. Litig.*, 895 F.3d 597, 611 (9th Cir. 2018) ("A reversion can benefit both defendants and class counsel, and thus raise the specter of their collusion.").

Assuming that Plaintiffs could maintain the Classes through trial, the California Class could recover a maximum of $1,132,374 in price premium damages. PA 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), the New York Class would receive $1,712,800. Therefore, the Classes might recover a combined total of about $2.8 million. *See id*. Thus, the settlement amount of $1,612,500 is 57% of potential trial damages, which is more than reasonable given the risks attendant to trial. This is an excellent result, especially considering the continued risk of maintaining certification to trial and the risk of trial. *See* PA Mot. at 17-19 (noting risk of decertification before or at trial).

The Settlement's injunctive relief is significant and meaningful. 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).

Although, courts generally do not directly include the monetary value injunctive relief in the common fund value when calculating attorneys' fees because it is difficult to quantify, *see Winters v. Two Towns Ciderhouse, Inc.*, 2021 WL 1889734, at *1 (S.D. Cal. May 11, 2021), courts should still "determine the significance of th[e] benefit, and employ it as a qualitative factor in deciding whether a[n upward departure from the benchmark] is warranted," *see Chambers v. Whirlpool Corp.*, 980 F.3d 645, 664 (9th Cir. 2020); *de Mira v. Heartland Employment Serv., LLC*, 2014 WL 1026282, at *3 (N.D. Cal. Mar. 13, 2014) ("[T]he significant risk and non-monetary results achieved by Class Counsel . . . warrant an upward departure from the 25% benchmark"). In similar circumstances, the Ninth Circuit held that an "attorneys' fee award . . . stands up when evaluated using the factors set forth in *Vizcaino*," and that "counsel's procurement of monetary and injunctive relief appears to have been an exceptional result," where the injunctive relief was "meaningful and consistent with the relief requested in plaintiffs' complaint," *In re Ferrero Litig.*, 583 Fed. App'x 665, 668 (9th Cir. 2014); *Good Morning to You Prods. Corp. v. Warner/Chappell Music, Inc.*, 2016 WL 6156076, at *4 (C.D. Cal. Aug. 16, 2016) (Where "the settlement has substantial monetary and nonmonetary components," "[t]his factor weighs heavily in favor of an upward departure from the benchmark.").

Here, "there is a high value to the injunctive relief obtained" where "[n]ew labeling practices affecting hundreds of thousands of [units] per year . . . bring a benefit to class consumers, the marketplace, and competitors who do not mislabel their products." *Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *4 (C.D. Cal. Mar. 13, 2013). The injunctive relief here is especially significant because, by reducing or eliminating the suggestion that the products are healthy, it "provides substantial *health* benefits to all purchasers . . . in light of the evidence offered by Plaintiff[s] about the health effects of" certain harmful nutrients. *See Guttmann v. Ole Mexican Foods, Inc.*, 2016 WL 9107426, at *3 (N.D. Cal. Aug. 1, 2016) (emphasis added) (record citation omitted). The district court in *Hadley* found that injunctive relief restricting food manufacturers from labeling products containing excessive added sugars with health and wellness claims "provides health benefits to all purchasers," *Hadley v. Kellogg Sales Co.*, 2021 WL 5706967, at *2 (N.D. Cal. Nov. 23, 2021). The same reasoning applies here as Class Members and the public in general will benefit from a marketplace free of misleading health and wellness claims.

Finally, the Settlement offers benefits to those who would not otherwise see them because the Settlement Class is comprised of purchasers nationwide, rather than in California and New York only. While it is theoretically possible that, absent settlement, some Settlement Class Members could eventually see relief through additional lawsuits brought in other states, other Settlement Class Members would be left without remedies, since some states preclude class actions and others require individual proof of reliance for consumer fraud claims, making them impossible to adjudicate on a classwide basis. That "Class Counsel successfully negotiated direct payments for a class of individuals that in all likelihood may have never received any compensation or redress for the conduct complain[]ed of" weighs in favor of granting Class Counsel's fee request. *See Burnthorne-Martinez v. Sephora USA, Inc.*, 2018 WL 5310833, at *3 (N.D. Cal. May 16, 2018).

All these circumstances demonstrate why the Court should find this factor supports Class Counsel's fee request. *See Larsen*, 2014 WL 3404531, at *8-9 (finding factor favored upward departure where "Class members who ha[d] made claims w[ould] receive cash" and

"[t]he Settlement Agreement also provide[d] the equitable relief that [defendant] will stop using the disputed labels," which were "significant benefits to the class").

b. The Contingent Nature of the Representation and Risk Involved in the Litigation

Courts recognize that when "Class Counsel assumed the risk of taking this case on a contingency fee basis," *Nangle v. Penske Logistics, LLC*, 2017 WL 2620671, at *6 (S.D. Cal. June 16, 2017), and faced the additional "risk of non-payment or reimbursement of expenses" these are significant factors to consider in "determining the appropriateness of counsel's fee award," *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1264 (C.D. Cal. 2016) (internal quotation marks and citation omitted). "[W]hen counsel takes cases on a contingency fee basis," and especially so when the "litigation is protracted, the risk of non-payment after years of litigation justifies a significant fee award." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 261 (N.D. Cal. 2015) (citing *In re Heritage Bond Litig.*, 2005 WL 1594403, at *19 (C.D. Cal. June 10, 2005)). Courts also "tend to find above-market-value fee awards more appropriate in this context given the need to encourage counsel to take on contingency-fee cases for plaintiffs who otherwise could not afford to pay hourly fees." *Id.* (citation omitted); *see also Anthem*, 2018 WL 3960068, at *14 (finding upward departure warranted where the "case was conducted on a contingent-fee basis against well-represented Defendants," "the financial risk of litigation was assumed by Class Counsel throughout the pendency of the action," and "the representation ha[d] lasted for nearly three years and the case schedule was compressed, thereby requiring Class Counsel to forego work on other matters").

The circumstances under which Class Counsel brought this case and the risk they faced during the course of the litigation satisfy each of these criteria. First, Class Counsel not only took this case on a contingency fee basis and therefore faced the risk of not being compensated for their time, but also risked hundreds of thousands of dollars in out-of-pocket expenses for the Class that they may have never recovered. *See* Joseph Decl. ¶¶ 2-5. Working on this matter for four years, without any compensation and incurring nearly one hundred and

sixty thousand in out-of-pocket expenses, involved considerable sacrifice—including forgoing other work. *See id.* ¶ 6. This is in part because the firm representing Plaintiffs is "small . . . consisting of only [five] attorneys, [it] w[as] [ ] precluded from taking other fee generating employment," *De Leon v. Ricoh USA, Inc.*, 2020 WL 1531331, at *15 (N.D. Cal. Mar. 31, 2020) (docket quotation omitted), during the four-year-long litigation. *See* Joseph Decl. ¶¶ 2-3. But we believe that these cases are important for consumers and benefit public health. *Id.* ¶ 7. Therefore, we took on these risks because—given the limited stake any one Class Member has in the matter—named plaintiffs could never be expected to bear these risks themselves. *Id.* ¶¶ 8-9.

Besides the inherent risk in all contingency fee litigation, the risk borne by Class Counsel was magnified by several specific factors.

First, as another court has opined, "food labeling claims are difficult to maintain" where plaintiffs "would need to prove that Defendant's labels . . . were misleading entirely by virtue of the product containing [an allegedly harmful nutrient]." *See Guttmann*, 2016 WL 9107426, at *3. This makes these cases inherently complex because they involve the intersection of scientific evidence regarding physiology and nutrition, and various aspects of marketing and consumer perception. In this case, this resulted in the parties offering the testimony of six experts on the physiological effects of coconut oil consumption, consumer perception, as well as conjoint analysis and economics regarding damages. PA Joseph Decl. ¶¶ 9, 22.

That the case's theory of liability was risky from the outset is manifestly demonstrated by the *Shanks* matter, a similar case brough by Class Counsel against another coconut oil manufacturer, where the court denied certification and granted summary judgment against plaintiff. *See Shanks I*, 2019 WL 4398506 (denying motion for class certification); *Shanks II*, 2019 WL 7905745 (granting defendant's motion for summary judgement in full).

Second, the class action nature of the case added significantly to the time and expenses incurred by Class Counsel, who for the majority of the litigation could never be sure a class

would be certified, likely resulting in a negative value case.[1] The difficulty in pursuing class-wide claims, and successfully recovering damages for the class, is evinced by the numerous examples of California courts initially certifying food labeling cases, then later decertifying or granting defendants summary judgment. *See*, *e.g.*, *Brazil v. Dole Packaged Foods, LLC*, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (decertifying damages class); *Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014) (same); *Allen v. ConAgra Foods Inc.*, 2020 WL 4673914 (N.D. Cal. Aug. 12, 2020) (granting defendant's motion for summary judgment after having previously decertified several state subclasses); *Ries v. Arizona Beverages USA LLC*, 2013 WL 1287416 (N.D. Cal. Mar. 28, 2013) (granting defendant's motion for summary judgment and decertifying class); *see also Morales*, 2017 WL 2598556 (decertifying class and granting defendant partial summary judgment); *Zakaria v. Gerber Prods. Co.*, 2017 WL 9512587 (C.D. Cal. Aug. 9, 2017) (decertifying class and granting defendant summary judgment), *aff'd* 755 F. App'x 623 (9th Cir. 2018). This Court has seen these risks play out before, as the Southern District has decertified classes in the past. *See, e.g., McCurley v. Royal Sea Cruises, Inc.*, 2020 WL 4582686, at *2 (S.D. Cal. Aug. 10, 2020). This demonstrates the unique risk of continued litigation in class actions.

Third, even if Class Counsel could maintain the classes to trial and avoid summary judgement, proving liability at trial would also have been a challenging prospect, as demonstrated by recent examples of consumer fraud trials ending in defense verdicts. *See*, *e.g.*, *Washington v. CVS Pharm. Inc.*, No. 4:15-cv-3504-YGR (N.D. Cal.), Dkt. No. 611 (June 23, 2021 defense verdict in action alleging overcharging for generic drugs); *Allen v. Hyland's, Inc.*, 2021 WL 718295 (C.D. Cal. Feb. 23, 2021) (defense verdict following jury and bench trial on claims that homeopathic remedies were falsely advertised as effective); *Morizur v. SeaWorld Parks & Entm't, Inc.*, 2020 WL 6044043 (N.D. Cal. Oct. 13, 2020) (defense verdict after bench trial on false advertising claims); *cf. Racies v. Quincy Bioscience, LLC*, 2020 WL

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[1] This risk is not just hypothetical as certification rates in food labelling cases are well below 50 percent and Class Counsel itself has suffered the financial losses of their significant out-of-pocket investment after having certification denied. *See Shanks I*, 2019 WL 4398506.

2113852 (N.D. Cal. May 4, 2020) (decertifying after trial a false advertising class action alleging misleading advertising of memory supplement and noting "the Court found Plaintiff's case at trial underwhelming"). Here, trial was not a mere hypothetical as fact and expert discovery were both closed and all that remained before trial was Plaintiffs' partial summary judgment motion.

Finally, much of this case was litigated during the global COVID-19 pandemic that created unique challenges, caused delays, and increased the uncertainty of how this case could or would proceed.

In short, Class Counsel bore all the risk of a contingency fee false advertising class action that was based on a novel and unproven liability theory they developed. The litigation was protracted in length because of Barlean's vigorous defense. Class Counsel took on this risk because the accurate portrayal of the healthfulness of foods is a matter of public health—especially given the current obesity epidemic—and no individual plaintiff could bear the financial risk given the limited damages for each Class Member relative to the cost of litigation. Accordingly, this justifies Class Counsel's one-third fee request especially since their sacrifice has obtained a significant monetary recovery for the class as well as injunctive relief that "provides health benefits to all purchasers," *Hadley*, 2021 WL 5706967, at *2. *See also McMorrow v. Mondelez*, 2022 WL 1056098, at *8 (S.D. Cal. Apr. 8, 2022) (granting award of one third of common fund).

c. The Skill Required and Quality of Class Counsel's Work

Some courts "have recognized that litigating complicated matters, especially unprecedented issues, is a circumstance that points in favor of a larger percentage." *Anthem*, 2018 WL 3960068, at *13 (citing *Spears v. First Am. Eappraiseit*, 2015 WL 1906126, at *2 (N.D. Cal. Apr. 27, 2015) (awarding 35% of $7,557,096 net settlement fund where class counsel "faced at least three significant novel issues of law"); (additional citation omitted)). In *Lusby v. GameStop Inc.*, for example, the court awarded one-third of common fund—as Class Counsel requests here—based in part on counsel "achiev[ing] class certification in many different scenarios," "develop[ing] an extensive factual record to obtain the evidence

needed to convince Defendant of the risks of continued litigation," 2015 WL 1501095, at *4 (N.D. Cal. Mar. 31, 2015). The court also noted Class Counsel's "history of successful prosecution of similar cases" which "made credible its commitment to pursue this action through trial and beyond." *Id.*

Likewise, great skill was required by Class Counsel given the challenging theory, class action procedural hurdles, and technical subject matter requiring expert testimony. Barlean's attorneys were also strategic. For example, they retained the same experts (Ms. Butler and Ms. Plancich) as hired by Jarrow who were instrumental in defeating plaintiff's certification motion in *Shanks I*. *See, e.g.*, 2019 WL 4398506, at *6 (relying on Butler survey to conclude "Defendant has submitted persuasive evidence that consumers of Defendant's coconut oil typically do not read the label, conclude based on the challenged statements that Defendant's coconut oil is healthy, and then purchase Defendant's coconut oil based on that belief"). Yet, despite this unfavorable precedent, Class Counsel was able to demonstrate that certification was appropriate in this matter. *See Testone v. Barlean's Organic Oils, LLC*, 2021 WL 4438391 (S.D. Cal. Sept. 28, 2021).

Class Counsel's use of experts to help obtain certification and prepare a strong evidentiary basis for trial was part of their "skillful preparation," *see Hopkins v. Stryker Sales Corp.*, 2013 WL 496358, at *2 (N.D. Cal. Feb. 6, 2013). Indeed, as in *Hopkins*, the "discovery that was undertaken by Class Counsel brought to light evidence of Defendant's violations of California . . . unfair competition laws," *id.* at *2-3. Further, as in *Hopkins*, Class Counsel "employed the services of [three] experts," and "investigated, researched, and filed a comprehensive motion for class certification" that was granted "[d]espite [ ] strong opposition," *Id.* All this demonstrates the "significant skill and quality work" of Class Counsel in this matter and further supports Class Counsel's fee request.

d. Awards in Similar Cases

Class Counsel's fee request is supported by similar cases and the circumstances of this case. *See*, *e.g.*, *Beaver*, 2017 WL 4310707, at *9 ("California courts routinely award attorneys' fees of one-third of the common fund." (collecting cases)); *Larsen*, 2014 WL

3404531, at *9 (collecting cases awarding fees of 32% or greater).

In *Khoja*, the district court awarded one-third of the $4.8 million settlement amount finding that "several factors support[ed]" the award, including that the total settlement amount "represent[ed] approximately 25 percent of the estimated potential damages," the case was taken "purely on a contingency basis," and counsel "fronted '$100,529.65 in costs and expenses' . . . with no guarantee of recovery." 2021 WL 5632673, at *9. Comparing the Settlement here to that in *Khoja*, the Settlement represents a more than double the percentage of potential trial damages (57%), and Class Counsel took on over 50% more financial risk in expenses. Thus, Class Counsel's request of one-third of the common fund is reasonably justified.

The awards in similar cases involving allegations that other coconut oils bore misleading health and wellness claims also support Class Counsel's request here. For example, in *Hunter*, the settlement provided injunctive relief and created a $1.85 million common fund to pay class member claims and all settlement expenses. *See Hunter v. Nature's Way Prod., LCC*, 2020 WL 71160 (S.D. Cal. Jan. 6, 2020). The Honorable Barry Moskowitz granted counsel's request for one-third of the common fund ($610,500.00) finding it was reasonable—especially given that the request was only "approximately 75% of Counsel's lodestar." *Id.*, at *4. Likewise, in *Cummings*, the settlement provided injunctive relief and a common fund of $1 million (65% cash, 35% gift cards) and counsel were awarded "a total of $333,333" in fees, which equated to a final multiplier of 2.1 on counsel's $157,497 lodestar. *See Cumming v. BetterBody Foods & Nutrition, LLC*, No. 37-2016-00019510-CU-BT-CTL, Order Granting Final Approval to Class Action Settlement; Awarding Attorneys Fees and Costs; Awarding Class Representative Enhancement Award; and Entering Judgement ¶¶ 7, 10-10 (San Diego County Super. Ct. Feb. 24, 2017). And in *Ducorsky*, the settlement provided injunctive relief and created a $312,500 common fund. *See Ducorsky v. Premier Organics*, HG16801566, Order of Final Approval and Judgment ¶¶ 7, 16(a) (Super. Ct. Alameda County Feb. 6, 2018). The court granted counsel's request of "$104,000[, which] represent[ed] just less than 33% of the financial benefit to the class" and "a 0.693 (negative)

1 multiplier." *Id.* ¶ 16(f), (g).[2]

2 Not only is there clear precedent for an award of fees of one-third in similar coconut
3 oil cases,[3] the Settlement here is stronger in many respects to those cases. First, the common
4 fund value of $1,612,500 is a greater percentage of the estimated products sales than any of
5 these other coconut oil settlements. *See* PA Joseph Decl. ¶ 26 (common fund of $1,612,500
6 constitutes 10% of estimated retail sales, while common funds in *Ducorsky*, *Hunter*, and
7 *Boswell*, respectively, were 5.5%, 1.9%, and 1.1%); Joseph Decl. ¶¶ 10-12 (*Cummings*
8 common fund represented 1.6% of estimated retail sales). Second, Class Counsel is taking a
9 45% haircut on its lodestar in this case—far more than in any of these other coconut oil
10 settlements.

11 In sum, "Class Counsel's fee request of one-third of the common fund is in line with
12 the market rate for similar representation," *Beaver*, 2017 WL 4310707, at *12 (citing *In re*
13 *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 557 (2009)). "Attorneys with comparable
14 skill and experience, and who litigate class actions on a contingency basis routinely charge
15 one-third of the recovery, or 40% or more if the case goes to trial." *Id.* (citing *Fernandez v.*
16 *Victoria Secret Stores*, *LLC*, 2008 WL 8150856, at *16 n.59 (C.D. Cal. 2008) (fees
17 representing one-third of the recovery are justified based on study showing that standard
18 contingency fee rates are 33% if the case settles before trial, 40% if a trial commences, and
19 50% if trial is completed)).
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24 [2] The only outlier is *Boswell v. Costco*, in which counsel requested and received 25%, *see*
25 Joseph Decl. ¶ 12, but in that case the settlement only provided 1.1% recovery of estimated
retail sales, *see* Joseph PA Decl. ¶ 26.

26 [3] The same is true for other recent food cases in this district involving misleading health and
27 wellness claims. *See McMorrow v. Mondelez Int'l, Inc.*, 2022 WL 1056098 (S.D. Cal. Apr.
28 8, 2022), *appeal dismissed sub nom. McMorrow v. Huang*, No. 22-55475, 2022 WL 3226187
(9th Cir. June 6, 2022).

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2. A Lodestar Crosscheck Shows Class Counsel's Fee Request is Reasonable

Although a cross check is not required, *see Farrell v. Bank of Am. Corp., N.A.*, 827 F. App'x 628, 630-31 (9th Cir. 2020), "the Ninth Circuit has encouraged district courts to cross-check any calculations" of a percentage of the fund against counsel's lodestar. *Sengvong v. Probuild Company LLC*, 2021 WL 4504620, at *8 (S.D. Cal. Oct. 1, 2021). "The lodestar figure is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer." *Selk v. Pioneers Mem'l Healthcare Dist.*, 159 F. Supp. 3d 1164, 1180 n.5 (S.D. Cal. 2016) (internal quotation marks and citation omitted).

"Though the lodestar figure is 'presumptively reasonable,' the court may adjust it upward or downward by an appropriate positive or negative multiplier reflecting a host of 'reasonableness' factors, 'including the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues presented, and the risk of nonpayment.'" *Baker v. SeaWorld Ent., Inc.*, 2020 WL 4260712, at *9 (S.D. Cal. July 24, 2020) (internal citations omitted). These factors "largely mirror the considerations" discussed above with respect to the percent-of-fund method, *In re Lidoderm Antitrust Litig.*, 2018 WL 4620695, at *3 (N.D. Cal. Sept. 20, 2018) ["*Lidoderm*"], and include "the quality of representation, the benefit obtained for the class, the complexity and novelty of the issues present, and the risk of nonpayment," *id.*, at *2 (quoting *Bluetooth*, 654 F.3d at 942 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998))). "Foremost among these considerations, however, is the benefit obtained for the class." *Baker*, 2020 WL 4260712, at *9 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983); *McCown v. City of Fontana*, 565 F.3d 1097, 1102 (9th Cir. 2009) (ultimate reasonableness of the fee "is determined primarily by reference to the level of success achieved by the plaintiff")).

Based on these factors, especially the benefit to the class, "a lodestar multiplier is typically applied[,]" and those "'in the 3-4 range are common in lodestar awards for lengthy

1 and complex class action litigation,'" *Milburn v. PetSmart, Inc.*, 2019 WL 5566313, at *8
2 (E.D. Cal. Oct. 29, 2019) (quoting *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 298
3 (N.D. Cal. 1995) (citing *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 549 (S.D. Fla.
4 1988))); *see also* 4 Newberg on Class Actions § 14.7 (courts typically approve percentage
5 awards based on lodestar cross-checks of 1.9 to 5.1 or even higher, and "the multiplier of 1.9
6 is comparable to multipliers used by the courts"); *In re Prudential Ins. Co. Am. Sales Prac.*
7 *Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four
8 are frequently awarded in common fund cases when the lodestar method is applied." (quoting
9 3 Newberg 14.03 at 14-15)). There are also "various cases in which other judges in th[e
10 southern] district have awarded multipliers of 3 or more," *Couser v. Comenity Bank*, 125 F.
11 Supp. 3d 1034, 1048 (S.D. Cal. 2015).

12 As detailed below, Class Counsel's reasonable lodestar here is $972,456.50, Joseph
13 Decl. ¶¶ 13-21, so that the request for $537,500 in fees represents a 45% discount, which
14 pales in comparison to multipliers in the 3-4 range that are common in complex class
15 actions—and is reasonable under the circumstances of this case. *See, e.g.*, *Nitsch v.*
16 *DreamWorks Animation SKG Inc.*, 2017 WL 2423161, at *10 (N.D. Cal. June 5, 2017)
17 ("Considering all the facts and circumstances of this case," and "[f]oremost among the[m]"
18 being "the benefit obtained for the class," a "multiplier of 2.0 is appropriate") (internal
19 citations omitted).

20 **a. Class Counsel's Hours are Reasonable**

21 The total time spent by Class Counsel on this matter though January 1, 2023 is 1,449.8
22 hours. Joseph Decl. ¶ 16, Ex. 1. For proffering a reasonable lodestar for a cross-check, Class
23 Counsel reviewed raw time records for timekeeping errors and removed those errors. *Id.* ¶
24 14. Class Counsel is also only basing its lodestar on attorney hours, excluding hours worked
25 by paralegals. *See id.* ¶ 17, n.2. And Class Counsel recognizes that "'[t]ime spent obtaining
26 an attorneys' fee in common fund cases is not compensable because it does not benefit the
27 Plaintiff class,'" *Pemberton v. Nationstar Mortg., LLC*, 2020 WL 230014, at *2 (S.D. Cal.
28 Jan. 15, 2020) (quotation marks and citation omitted), so it has not included any of those

hours in its lodestar calculation. *See id.* ¶ 16, n.1. Moreover, Class Counsel is not counting time spent after January 1, 2023, including drafting the motion for final approval, preparing for and participating in the Final Approval hearing, working with the Claims Administrator on notice and claims issues, responding to any objections, and post-judgment work, such as overseeing the post-distribution accounting and any supplemental distribution of unclaimed funds. *See* Joseph Decl. ¶ 22.

The hours incurred by Class Counsel have been reasonably expended, *see* Joseph Decl. ¶ 16, and courts should avoid engaging in an "*ex post facto* determination of whether attorney hours were necessary to the relief obtained," *see Grant v. Martinez*, 973 F.2d 96, 99 (2d Cir. 1992). The issue "is not whether hindsight vindicates an attorney's time expenditures, but whether at the time the work was performed, a reasonable attorney would have engaged in similar time expenditures." *Id.* (citing *Wooldridge v. Marlene Indus. Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990)); *see also Fox v. Vice*, 563 U.S. 826, 838 (2011) ("The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection.").

The hours Class Counsel dedicated to this matter occurred between July 9, 2018 and January 1, 2023—a total of 1,638 days, or nearly 54 months. This is equivalent to about 26.8 hours per month, or 6.2 hours per week. The Court should find these hours were reasonable and necessary to the litigation, especially considering the result obtained for the Class. *Compare In re High-Tech Emp. Antitrust Litig.*, 2015 WL 5158730, at *10 (N.D. Cal. Sept. 2, 2015) ["*High-Tech*"] ("36,215 hours is a reasonable amount of time for Class Counsel to have spent on this litigation . . . . [i]n the more than four years that this case has been pending . . . .").[4]

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[4] *See also Alvarez v. Farmers Ins. Exch.*, 2017 WL 2214585, at *5 (N.D. Cal. Jan. 18, 2017) (finding "reasonable and necessary" 4,727.6 hours "over nearly three years of litigation"); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 644 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012) ("Given the complexity of the case," 5,995.4 hours was "reasonable," with the time "represent[ing] approximately . . . 28 hours per week for a four year time period"); *In re TracFone Unlimited Serv. Plan Litig.*, 112 F. Supp. 3d 993, 1009 (N.D. Cal.

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b. Class Counsel's Rates are Reasonable

The second part of the lodestar calculation is multiplying the hours spent "by a reasonable hourly rate for the region and for the experience of the lawyer." *High-Tech*, 2015 WL 5158730, at *9 (quoting *Bluetooth*, 654 F.3d at 941). To determine whether an hourly rate is reasonable, "the court looks to the 'prevailing market rates in the relevant community,' [citation], for 'similar work performed by attorneys of comparable skill, experience, and reputation.'" *Schutza v. Walter E. Fielder, Inc.*, 2019 WL 5295075, at *2 (S.D. Cal. Oct. 18, 2019) (internal quotation marks and citations omitted). "The relevant community is generally the forum in which the district court sits." *Id*. Class Counsel's requested rates herein are as follows:

Timekeeper	Position	Rate
Jack Fitzgerald	Principal	$865
Paul Joseph	Principal	$715
Melanie Persinger	Partner	$685
Trevor Flynn	Senior Associate	$665
Caroline Emhardt	Associate	$575
Richelle Kemler	Associate	$550

Joseph Decl. ¶ 17. These rates are reasonable because they are in line with previous fee awards and rates charged for similar complex class action litigation by attorneys in the

2015) (finding reasonable "more than 5,000 hours" expended over two years); *Walsh v. Kindred Healthcare*, 2013 WL 6623224, at *2 (N.D. Cal. Dec. 16, 2013) (finding reasonable 5,728 hours expended over 3 years); *Dennings v. Clearwire Corp.*, 2013 WL 1858797, at *5 (W.D. Wash. May 3, 2013) *aff'd* (Sept. 9, 2013) (finding reasonable 4,265.2 hours over 2.5 years of litigation, or approximately 142.1 hours per month); *Aarons v. BMW of N. Am., LLC*, 2014 WL 4090564, at *16-17 (C.D. Cal. Apr. 29, 2014) (finding reasonable 4,673.2 hours over 31 months, or approximately 150.7 hours per month), *objections overruled*, 2014 WL 4090512 (C.D. Cal. June 20, 2014); *Beaver*, 2017 WL 4310707, at *13-14 (finding reasonable 9,104 hours over more than six years (73 months), or approximately 124.7 hours per month).

Southern District of California with comparable experience, skill, and reputation.[5] *See* Joseph Decl. ¶¶ 18-20. For example, "[r]ecently, courts in this District have awarded hourly rates for work performed in civil cases by attorneys with significant experience anywhere in range of $550 per hour to more than $1000 per hour." *Sengvong*, 2021 WL 4504620, at *8–9; *see also San Diego Cty. Credit Union v. Citizens Equity First Credit Union*, 2021 WL 6210596, at *2 (S.D. Cal. Dec. 2, 2021) (awarding rates as high as $1,135 for an equity partner, $770 for an associate (and a lower rate of $540 for a less experienced associate admitted to the California Bar in only 2019)). Thus, the rates requested here compare favorably to other comparable awards.

The reasonableness of the rates is further demonstrated by the fact that they reflect modest increases from rates previously approved for these timekeepers to account for the increased experience and inflation. Three years ago, in January 2020, a court in this district approved rates for each timekeeper in this matter: Jack Fitzgerald ($750), Paul K. Joseph ($600), Trevor Flynn ($575)[6], Melanie Persinger ($510)[7], and Richelle Kemler Vanden Bergh ($500). *See Hunter*, 2020 WL 71160, at *7. In *Hunter*, the Honorable Barry Moskowitz found these "rates are reasonable [in part] because other District Courts in the Southern District of California have found a blended rate of $708 to be reasonable." *Id.* (citing *Stuart v. Radioshack Corp.*, 2010 WL 3155645, at *6 (S.D. Cal. Aug. 9, 2010)). The Court should approve Class Counsel's requested rates as they have previously been approved in the Southern District, less a small increase for inflation and experience. *See Buchannon v. Associated Credit Servs., Inc.*, 2021 WL 5360971, at *15 (S.D. Cal. Nov. 17, 2021) (considering previously approved rates, applying inflation multipliers for each year that passed, and recognizing that one attorney was "promoted to Senior Associate Attorney").

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[5] The rates are further reasonable because they reflect additional costs often billed to clients for which Class Counsel does not seek reimbursement, such as photocopying, working meals, legal research, and PACER charges. Joseph Decl. ¶ 23, n.5.

[6] Mr. Flynn has since been promoted to Senior Associate.

[7] Ms. Persinger has since been promoted to Partner.

c. The Resulting Lodestar Multiplier is Reasonable

Class Counsel's lodestar of $972,456.50, which represents a lodestar negative multiplier of 0.45 of the sought attorneys' fee award, is reasonable given that "[m]ultipliers of 1 to 4 are commonly found to be appropriate in complex class action cases," *Hopkins*, 2013 WL 496358, at *4 (citation omitted). "[A] lodestar of 1.675 is not unreasonable or out of the realm of multipliers other courts have awarded." *Winters*, 2021 WL 1889734, at *3 (citing *Vizcaino*, 290 F.3d at 1043 (upholding a lodestar multiplier cross-check of 3.65); *Kelly v. Wengler*, 822 F.3d 1085, 1093, 1105 (9th Cir. 2016) (affirming lodestar multipliers of 2.0 and 1.3); *In re Hyundai and Kia Fuel Economy Litig.*, 926 F.3d 539, 572 (9th Cir. 2019) (finding multipliers of 1.22 and 1.55 to be "modest or in-line with others we have affirmed")). Given that the requested fee amount represents a 45% discount on the reasonable lodestar, this strongly favors granting the request in full.

The Quality of Representation. As discussed above, "Class [C]ounsel provided their clients with diligent and skilled representation in this matter," including "litigat[ing] numerous complex issues[,] and their efforts produced substantial benefits for the [ ] Class," *see Lidoderm*, 2018 WL 4620695, at *3. Moreover, Class Counsel was extremely efficient in prosecuting this case through settlement, spending about 1,450 hours to achieve an $1,612,500 settlement, or about $1,112 per hour worked. This efficiency was achieved in part due to scaling efficiencies from Class Counsel's other coconut oil cases. *Compare Marshall v. Northrop Grumman Corp.*, 2020 WL 5668935, at *3 (C.D. Cal. Sept. 18, 2020) ("[A] one-third fee is appropriate where '[c]ounsel litigated effectively, and their experience was essential for obtaining the result.'" (quoting *Boyd v. Bank of Am. Corp.*, 2014 WL 6473804, at *10 (C.D. Cal. Nov. 18, 2014))).

The Benefit Obtained for the Class. The Settlement provides Class Members with millions of dollars in relief, including an $1,612,500 non-reversionary cash fund, and significant prospective injunctive relief. As discussed above, this compares favorably both to other settlements in similar coconut oil cases, and to the Class's likely recovery at trial, particularly considering the risks involved in continuing litigation. *See* PA Mot. at 13-15.

The Complexity and Novelty of the Issues Present. In addition to the complexities and novel claims discussed above, Class Counsel brought this case at a time when coconut oil proponents were vigorously asserting it was a healthy fat. Regardless of the scientific evidence supporting Plaintiffs' case, their theory was complex, leading Class Counsel to engage a scientific expert to explain why consuming coconut oil is detrimental, as well as two experts to prove potential damages.

Moreover, Barlean's was able to leverage arguments raised in *Shanks*. *See* Defendant Barlean's Organic Oils, LLC's Opposition to Plaintiffs' Motion For Class Certification, Dkt. No. 81 at 12, 13, 14, 15, 16, 17, 20. Although Class Counsel was able to defeat these arguments on class certification, these would likely be close questions for the jury.

The Risk of Nonpayment. "[C]ourts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases." *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994); *see also id.* at 1302 (finding abuse of discretion where district court did not apply a multiplier when case was "fraught with risk and recovery was far from certain"). As discussed above, Class Counsel took this case on a contingency basis and faced a very real risk of non-payment—including non-reimbursement of significant out-of-pocket expenses—as evidenced by the outcome in *Shanks*. "Because counsel worked on a contingent-fee basis despite risks of litigation, this weighs in favor of awarding more than the lodestar." *See Luna v. Marvell Tech. Grp.*, 2018 WL 1900150, at *4 (N.D. Cal. Apr. 20, 2018) (applying 2.0 multiplier); *see also Lidoderm*, 2018 WL 4620695, at *3 (factor favored applying a positive multiplier where "Class Counsel litigated this action without pay for several years, even though recovery was uncertain" (quotation marks and citation omitted)); *Quiruz v. Specialty Commodities, Inc.*, 2020 WL 6562334, at *11 (N.D. Cal. Nov. 9, 2020) (1.95 multiplier warranted, in part, because counsel "faced a significant risk of nonpayment given the contingent nature of the representation").

The Court should find each of the factors supports Class Counsel and that the lodestar crosscheck, which represents a 45% discount on Class Counsel's reasonable lodestar, supports an award of one-third of the common fund. *See Corzine v. Whirlpool Corp.*, 2019

1 WL 7372275, at *11 (N.D. Cal. Dec. 31, 2019) ("a lodestar multiplier of 1.86 is modest");
2 *compare Buccellato v. AT & T Operations, Inc.*, 2011 WL 3348055, at *2 (N.D. Cal. June
3 30, 2011) (A "multiplier of 4.3 is reasonable in light of the time and labor required, the
4 difficulty of the issues involved, the requisite legal skill and experience necessary, the
5 excellent and quick results obtained for the Class, the contingent nature of the fee and risk of
6 no payment, and the range of fees that are customary." (citation omitted)).

7 **B. THE COURT SHOULD GRANT CLASS COUNSEL'S REQUEST FOR**
8 **REIMBURSEMENT OF EXPENSES**

9 "'There is no doubt that an attorney who has created a common fund for the benefit of
10 the class is entitled to reimbursement of reasonable litigation expenses from that fund.'" *Selk*,
11 159 F. Supp. 3d at 1181 (quoting *Ontiveros v. Zamora*, 303 F.R.D. 356, 375 (E.D. Cal. 2014)
12 (citation omitted)); *see also Alvarez*, 2017 WL 2214585, at *5 ("'Class counsel is entitled to
13 reimbursement of reasonable expenses.'" (quoting Fed. R. Civ. P. 23(h) (citations omitted)).
14 Here, Class Counsel seeks reimbursement of expenses in the amount of $159,411.09, the vast
15 majority of which $144,747.25 (90.8%), was for expert witness expenses (and then the
16 majority of that to modeling damages classwide), Joseph Decl. ¶ 23, as required by *Comcast.*

17 Both Class Counsel and Plaintiffs used standard or economy travel and
18 accommodations when traveling. *Id.*, Exs. 2-3. Thus, the Court is not being asked to approve
19 reimbursement of "unreasonable costs, such as 'first class airplane tickets, luxury hotel
20 accommodations, [or] gourmet dinner meetings' at the expense of a common fund recovery."
21 *See Arredondo v. Delano Farms Co.*, 2017 WL 4340204, at *6 (E.D. Cal. Sept. 29, 2017)
22 (quoting *In re Media Vision Tech. Sec. Litig.*, 913 F. Supp. 1362, 1372 (N.D. Cal. 1996)).
23 Because "[t]he categories of expenses for which plaintiffs' seek reimbursement are the type
24 of expenses routinely charged to hourly clients," *Larsen*, 2014 WL 3404531, at *10 (citation
25 omitted), including "expert witness fees; [ ] mediators' fees; . . . court reporting and
26 videographer services . . . [;] and [ ] case-related travel for Plaintiffs, witnesses, experts, and
27 counsel," the full amount should be reimbursed. *See In re: High-tech Emp. Antitrust Litig.*,
28 2014 WL 10520478, at *2 (N.D. Cal. May 16, 2014); *see also Grace v. Apple Inc.*, 2021 WL

1222193, at *6 (N.D. Cal. Mar. 31, 2021) (Approving reimbursement of $1,090,393.14 in expenses where "[a]bout 91% . . . are attributable [to] expert fees, Class Counsel's on-line document database, court reporters, and mediation," and "the remainder is attributable to travel, including economy-class airfare and hotels.") (record citations omitted).

C. THE COURT SHOULD GRANT THE CLASS REPRESENTATIVES' REQUESTS FOR SERVICE AWARDS

Class Counsel requests that the Court order a service award of $7,500 to each Class Representative. Service or "incentive awards that are intended to compensate class representatives for work undertaken on behalf of a class are fairly typical in class actions cases and do not, by themselves, create an impermissible conflict between class members and their representatives." Watkins *v. Hireright, Inc.*, 2016 WL 5719813, at *3 (S.D. Cal. Sept. 30, 2016) (citing *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015)) (cleaned up).

> Factors the Court may consider in determining whether an incentive award is appropriate or not include: (1) the risk taken on by the named plaintiff—both financial and otherwise; (2) the notoriety and any personal difficulties faced by the named plaintiff as a result of his work; (3) the amount of time and effort expended by the representative on behalf of the class; (4) the duration of the litigation; and (5) the personal benefit or lack thereof enjoyed by the class representative as a result of the litigation.

Id.

Here, each named Plaintiff has worked with and supported Class Counsel in litigating this matter for nearly four years. *See generally* Testone Decl., Shanks Decl., and Pierre Decl. They each assisted in drafting the pleadings, reviewed and authorized the filing of the complaint, stayed abreast of the litigation, and were prepared to attend and testify at trial. They also each assisted Class Counsel in responding to formal discovery requests and were deposed by Barlean's, They also each reviewed the settlement to ensure it was fair and reasonable, and without their effort and participation the Class would receive nothing. *See*

generally Testone Decl., Shanks Decl., and Pierre Decl.; *see also* Joseph Decl. ¶¶ 24-28.

Each Plaintiff was also falsely accused of "ma[king] material false statements in his deposition," by Barlean's prior counsel. *See* Dkt. No. 51, Amended Motion to Disqualify at 2. Plaintiffs' counsel was able to show these accusations of perjury were baseless and the result of shoddy lawyering, *see* Dkt. No. 58, Opposition to Motion to Disqualify at 12-18. In fact, Barlean's former counsel ultimately admitted her most serious accusations were based on her inadequate investigation and admitted mea culpa she "would not have argued [Mr. Shanks committed perjury]" had she done her due diligence and proclaimed "[she] had no intention to mislead the Court," Dkt. No. 59-1, Supp. Decl. of Marilyn Jenkins, at ¶ 2. But the damage of the accusations was already done and created serious risk of reputational damage. *See* Testone Decl. ¶ 10, Shanks Decl. ¶ 9, and Pierre Decl. ¶ 8.

In light of these facts, the requested $7,500 service awards are reasonable and well within the standard range awarded in this district. *See Winters*, 2021 WL 1889734, at *3 (awarding $7,500 incentive award to plaintiff who "assisted with drafting pleadings, helped with informal discovery, sent the cans of product he had retained to the lab for testing, and attended the mediation that resulted in this settlement.") (record citation omitted); *Watkins*, 2016 WL 5719813, at *4 (awarding $10,000 incentive award to plaintiff in a case "pending for over three years and during that time period, [plaintiff] was called on to answer questions both in a deposition and in extensive written discovery" and "also assisted in the investigation of the claims and was required to produce many requested documents."); *Loomis v. Slendertone Distribution, Inc.*, 2021 WL 873340, at *13 (S.D. Cal. Mar. 9, 2021) (awarding $10,000 incentive award to plaintiff in a $175,000 common fund case, considering the excellent recovery for each claimant and plaintiff's role in "securing the advertising changes" in injunctive relief).

Moreover, the aggregate service award amount requested, $22,500, is just 1.4% of the Settlement Fund and thus fall within the range of "approximately 1% of the total settlement awarded by some courts." *See Fowler v. Wells Fargo Bank, N.A.*, 2019 WL 330910, at *8 (N.D. Cal. Jan. 25, 2019) (citing *Sandoval v. Tharaldson Empl. Mgmt., Inc.*,

1 2010 WL 2486346, at *10 (C.D. Cal. June 15, 2010) (finding a $7,500 award, or 1% of the
2 settlement fund, fair and reasonable)); *see also Alvarez*, 2017 WL 2214585, at *1 (awarding
3 a $10,000 service award per plaintiff, totaling $90,000, "constitut[ing] 1.8% of the total
4 settlement value"). Because the focus of this inquiry is on "the number of class
5 representatives, the average incentive award amount, and the proportion of the total
6 settlement that is spent on incentive awards," the Court should find this fact weighs in favor
7 of finding the requested incentive awards reasonable. *See In re Online DVD-Rental Antitrust*
8 *Litig.*, 779 F.3d at 947.

9 **III. CONCLUSION**

10 The Court should grant Class Counsel's request for an award of one-third of the
11 common fund, and $159,411.09, in costs; and grant the Class Representatives' requests for
12 service awards of $7,500 to each Class Representative.

13

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Respectfully Submitted,

15 /s/ Paul Joseph

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