IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRUCE CORKER d/b/a RANCHO ALOHA; COLEHOUR BONDERA and MELANIE BONDERA, husband and wife d/b/a KANALANI OHANA FARM; ROBERT SMITH and CECELIA SMITH, husband and wife d/b/a SMITHFARMS, and SMITHFARMS, LLC on behalf of themselves and others similarly situated,

Plaintiff,

v.

MNS, LTD.,

Defendant.

CASE NO. 2:19-CV-00290-RSL

MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES

The Honorable Robert S. Lasnik

Noted for consideration: September 21, 2023

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Plaintiffs and Settlement Class Counsel[1] respectfully move for an Order awarding attorneys' fees, reimbursement of litigation expenses, and service awards to the named Plaintiffs in connection with the most recent settlement preliminarily approved by the Court on April 25, 2023. *See* Dkt. 866. The final approval hearing on this proposed settlement is set for September 21, 2023. *See id.*[2] Plaintiffs and Settlement Class Counsel request that they be awarded $5.837 million in fees, an amount that will total, when combined with previously awarded fees, 11.4 percent of the total economic value of settlements reached to date ($122.375 million),[3] that the Court approve reimbursement of $662,443 of litigation expenses, and that the class representatives be awarded service awards of $2,500 per farm (for a total of three awards) in recognition of their substantial and continuing commitments of time to this litigation, including to this settlement and its implementation. As demonstrated below, this request is fair and reasonable under the standard to be applied by this Court.

I. Introduction

This proposed settlement adds $12 million in cash compensation to the more than $21.4 million in approved settlements with other defendants to date. Even more importantly, like prior settlements, this settlement will ensure improved and clearer labeling of coffee held out to be from the Kona region. The injunctive relief also specifically requires MNS to take affirmative steps to ensure that the Kona coffee products sold in its stores from any of its suppliers only contain state-certified Kona coffee. This is a boon to the class: MNS operates the ABC Stores, which are ubiquitous in Hawaii and are a prime source of Kona coffee products for tourists visiting Hawaii. Indeed, the total value of injunctive relief for the class across all settlements is

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[1] Settlement Class Counsel are those counsel so appointed pursuant to the Court's Order Granting Motion for Preliminary Approval and Directing Issuance of Notice (Dkt. 866) ¶ 7: Nathan T. Paine of Karr Tuttle Campbell, and Jason Lichtman, Daniel Seltz, and Andrew Kaufman of Lieff Cabraser Heimann & Bernstein LLP.

[2] Consistent with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010), Class Counsel are making this application well in advance of the deadline for Settlement Class Members to opt-out or object to the proposed settlement, which is August 1, 2023, and will also post this application on the settlement website.

[3] This number includes the recent settlement with Mulvadi Corporation for $7.775 million and comprehensive injunctive relief.

$81.2 million. *See* Schreck Decl. ¶ 7 (attached as Exhibit 3 to the Lichtman Declaration).[4]

Through the litigation and the injunctive relief in the settlements, millions of pounds of falsely labeled Kona coffee have been removed from the market, and there has been an increase in market price for authentic Kona coffee. Kona farmers had longed tried to achieve these market reforms through legislative, public relations, and prior litigation efforts with little success. Even then, it required law firms willing and able to front millions of dollars in costs—resources far beyond the means of the typical Kona farmer—to conduct the scientific testing to identify the mislabeled Kona coffee products and retain economic, marketing, survey, and industry experts to achieve this remarkable result.

This settlement takes the parties and the Court almost to the end of a long road, but one which Class Counsel have ensured was as direct and efficiently traveled as possible. As this Court is aware, this case originally included more than twenty defendants. It pitted three small, long-time Kona coffee farms against 22 coffee suppliers and retailers, selling a variety of coffee products across the country in multiple channels of commerce. While many Kona farmers had previously expressed frustration at the misuse of the Kona name, they had been without the information and tools to identify defendants and formulate cognizable legal claims. With this litigation, Class Counsel have been able to transform the Kona farmers' frustration into tangible results with both immediate (substantial monetary relief) and long-term benefits (injunctive relief). This settlement with MNS represents the latest success benefiting the hard-working Kona farmers and further strengthening the Kona name.

As Class Counsel demonstrated in their prior applications for fees and reimbursement of expenses (Dkt. 415, Dkt. 654, Dkt. 742), litigation of this magnitude requires a substantial expenditure of time and money. Class Counsel have spent, as of this filing, 24,633.4 hours on this case, with 46 attorneys, paralegals, and other staff each devoting substantial time (at least 40 hours) to this case. There will, of course, be further work to implement this settlement, to present

[4] Included in Exhibit 3 is Dr. Schreck's backup calculation.

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and implement the recently negotiated settlement with Mulvadi, and to monitor previously settling defendants' compliance with the injunctive terms of their settlements.

Every aspect of the litigation has been and continues to be hard fought. To recap, Class Counsel's work has included: extensive pre-litigation investigation, which included the identification and retention of a renowned scientist, Dr. James Ehleringer from the University of Utah, to test hundreds of coffee samples to accurately identify the falsely labeled Kona coffee products flooding the market, successfully opposing multiple motions to dismiss, document production and review of thousands of documents from the named plaintiffs, review of thousands of documents from Defendants, more than a dozen discovery motions, extensive third-party discovery that has involved 52 subpoenas and the production of more than 7,400 documents, more than thirty depositions, including full-day depositions of each of the plaintiffs, a motion for default, and a litigated class certification motion that included extensive expert work. After the close of fact discovery, Plaintiffs presented expert reports from seven testifying witnesses, six of whom were deposed and provided rebuttal reports. Plaintiffs deposed all five of MNS's testifying experts and filed motions to exclude the testimony of four of them, in addition to filing a motion for summary judgment. Class Counsel also moved for sanctions against Mulvadi's counsel, have appeared in and participated in the bankruptcy proceedings involving both Mulvadi and HIKC to advocate for the claims of the class as creditors, and continue to spend time and resources monitoring various defendants' compliance with their settlement terms. *See* Lichtman Decl. ¶¶ 4-8; Paine Decl. ¶¶ 4-8.

To date, Class Counsel have spent nearly $3.3 million in out-of-pocket costs, much of it attributable to identifying and working with their experts, who were prepared to testify concerning the coffee industry, marketing, consumer confusion, accounting, and damages. Of those total costs, $662,443.26 remains unreimbursed; Class Counsel anticipate that there will be additional costs required to administer the notice, claims, and distribution processes of this settlement, prior settlements, and the recently submitted settlement involving Mulvadi, Lichtman

Decl. ¶ 17, but do not seek reimbursement of those anticipated costs through this application. The compensation that Class Counsel seek for their work remains well below the standard benchmarks in successful class litigation, whether measured as a percentage of total economic value of the settlement or under the lodestar method.

II. Background

The Court is familiar with this litigation's factual and procedural background, but Plaintiffs again provide an updated recounting so that the record supporting this request is complete.

Class Counsel filed this case in 2019 following an extensive and unprecedented investigation aimed at solving a question that had troubled Kona farmers: How is more than 20 million pounds of coffee labeled as "Kona" sold annually, when only a fraction of that is actually produced each year from the Kona region? *See* Third Am. Compl. (Dkt. 381) ¶ 44. The answer, Plaintiffs alleged, was that these suppliers were selling coffee labeled as "Kona" coffee that expert testing revealed contained little or no authentic Kona coffee. Plaintiffs alleged that this conduct violated the Lanham Act, 15 U.S.C. § 1125, *et seq.*, and sought monetary compensation, as well as injunctive relief that would repair the Kona name going forward. Class actions under the Lanham Act, while not unheard of, are unusual, and to Class Counsel's knowledge, no other case invoking the statute had been brought on behalf of a class of Kona farmers to remedy the harms alleged here. Following the investigation set out in the complaint into the contents of the coffee at issue, which included costly and time-consuming scientific testing of hundreds of coffee samples,[5] Plaintiffs identified and named nineteen Defendants, ultimately adding three additional defendants as the case progressed.

A group of retailer defendants and a group of supplier defendants filed motions to dismiss; one defendant filed a separate motion to dismiss. *See* Dkt. Nos. 100, 106, & 107, respectively. On November 12, 2019, the Court denied the suppliers' and the separate

[5] *See* Dkt. 574-19 (Dr. Ehleringer declaration explaining his testing); Dkt. 734-1 (Dr. Ehleringer's expert report).

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defendant's motions in full, and denied the retailers' motion in part, dismissing only false advertising claims against the retailers. *See* Dkt. Nos. 154-56.

An extended period of hard-fought discovery then began in the fall of 2019. The sheer number of parties, their geographic dispersal, and their separate representation would have presented management challenges in ordinary times, but the onset of the global health crisis in March 2020 compounded these difficulties. Class Counsel were up to the challenge: they gathered more than 113,000 documents totaling more than 427,000 pages from all of the defendants (including production of data in large spreadsheets). They also responded to comprehensive requests to the class representatives, who themselves produced more than 58,000 documents, totaling more than 114,000 pages, in response to a collective 543 requests for documents, while also responding to 261 interrogatories and 514 requests for admission. The parties also engaged in extensive third-party discovery, collectively serving 52 subpoenas, which have yielded 7,428 documents and more than 123,000 pages. While Class Counsel sought to find efficiencies where at all possible and to avoid judicial intervention in discovery disputes, they have litigated, and the Court has resolved, numerous disputes involving the proper scope of discovery. *See* Dkt. Nos. 144, 248, 255, 266, 274, 341, 350, 362, 382, 470, 477, 487, 578, 694,; *see also* Dkt. 621, 641. Plaintiffs also moved to strike certain affirmative defenses asserted by most defendants (Dkt. 179), prompting the withdrawal of the affirmative defenses by certain defendants (Dkt. 191), as well as the Court's striking the defenses of another defendant (Mulvadi). Dkt. 230. The Court also denied another defendant's motion to dismiss for lack of jurisdiction. *See* Dkt. 606.

The parties ultimately took 31 depositions. Defendants took the depositions of the five named plaintiffs during the week of August 17, 2020, plus a third party. Plaintiffs have taken or participated in twelve depositions (including a creditor examination in Mulvadi's bankruptcy proceeding) of parties and non-parties to date, took two expert depositions in connection with class certification, deposed each of MNS's five experts, and defended the depositions of six of

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their merits experts.

Plaintiffs filed their class certification motion against non-settling defendants, which at that time included MNS and one other defendant (L&K), on December 22, 2021, supported by five expert declarations. That motion followed a motion for default against defendant Mulvadi Corporation (Dkt. 544) on November 23, 2021. Fact discovery closed on March 11, 2022. Expert discovery then proceeded, which involved the exchange of seventeen reports and the eleven depositions described above. The remaining parties then filed their summary judgment and *Daubert* motions on December 16, 2022, along with motion to disqualify two of MNS's retained experts.

Class Counsel balanced this continuous and intensive litigation work with efforts at resolution where appropriate. From early in the case, in part in order to negotiate effectively on behalf of the Settlement Class, Class Counsel identified, interviewed, engaged, and intensively worked with nationally recognized experts in the fields of marketing, accounting, and the coffee industry, as well as retained damages experts. An early mediation in San Francisco with Hon. David Garcia on January 30, 2020 resulted in the settlement with Copper Moon; a near-global mediation on June 2, 2020 with Hon. Edward Infante resulted in a settlement with Boyer's Coffee Company. Settlements with Cost Plus and Maui Coffee Company followed that mediation, and an all-day mediation with Mark LeHocky, of ADR Services, Inc., on November 17, 2020, led to a settlement with Cameron's Coffee and Distribution Company. Another session with Mr. LeHocky led to settlements with another group of defendants, and additional settlements with two retailer defendants followed thereafter. The previous set of settlements presented to the Court – with Kroger, Safeway/Albertsons, and HIKC – also followed a mediation with Mark LeHocky involving Kroger and a mediation with Kale Feldman involving HIKC. The settlement with L&K was mediated by Robert Meyer of JAMS.

This settlement with MNS comes out of that long process. MNS participated in the initial mediation with Judge Infante. After all case activities other than trial preparation were complete,

including class certification, summary judgment, and expert discovery, the parties again mediated, this time with Mr. Meyer of JAMS, on June 9, 2022. *Id.* Counsel continued to hold settlement discussions after that mediation, and kept Mr. Meyer involved and informed in those discussions. Mr. Meyer ultimately made a mediator's proposal, which both parties accepted on September 12, 2022, with the parties signing the settlement agreement immediately thereafter on September 13, 2022.

This settlement is another outstanding outcome for the Settlement Class. The relatively small class of approximately 700 farms will see significant payments from MNS. In addition, MNS will, like previously settling defendants, alter its labeling of Kona-labeled coffee so that such products "will accurately and unambiguously state on the front label of the product the minimum percentage of authentic Kona coffee beans the supplier of the products states are contained in the product" in compliance with Hawaii law (regardless of whether the product is sold in Hawaii or not), and even if Hawaii law changes in the future. Dkt. 865-1 ¶ 12(a). MNS will also require its vendors to provide a letter confirming its compliance with these requirements. *Id.* ¶ 12(c). Thus, with MNS agreeing to this term, any supplier of Kona coffee who wants MNS to carry its products in its ubiquitous ABC Stores will also need to comply with the same labeling requirements.

As with the previous settlements, which were successfully implemented, Class Counsel have been working diligently with the notice administrator to effectuate the notice plan and prepare to distribute the settlement funds. Class Counsel will repeat the successful claims process (which will not require the provision of any additional information for the hundreds of class members who previously submitted claims) and work with the Settlement Administrator to implement that process promptly after final approval, as they have done successfully in three prior claims processes.

III. Argument

Federal Rule of Civil Procedure 23(h) permits the court to award reasonable attorney's

fees and costs in class action settlements as authorized by law or by the parties' agreement. Fed. R. Civ. P. 23(h). "[L]awyer[s] who recover[] a common fund . . . [are] entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977). In deciding whether a requested fee is appropriate, the Court's task is to determine whether such amount is "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003) (quoting Fed. R. Civ. P. 23(e)); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1294-95 n.2 (9th Cir. 1994) (overriding principle is that the fee award be "reasonable under the circumstances").

In this Circuit, the determination typically involves analysis of a number of factors, including: (1) the results achieved by class counsel; (2) the complexity of the case and skill required; (3) the risks of litigation; (4) the benefits to the class beyond the immediate generation of a cash fund; (5) the market rate of customary fees for similar cases; (6) the contingent nature of the representation and financial burden carried by counsel; and (7) a lodestar cross-check. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2017 WL 1047834, at *1 (N.D. Cal. Mar. 17, 2017) ("*VW 2L Fee Order*") (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-52 (9th Cir. 2002)). Each of these factors supports Class Counsel's request in this case.

Because the benefit achieved "is easily quantified in common-fund settlements," courts can "award attorneys a percentage of the common fund in lieu of the often more time-consuming task of calculating the lodestar." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011).[6] When awarding attorney's fees on the percentage of the fund method in

[6] Courts rely on the lodestar method in cases very different than this one, in which "there is no way to gauge the net value of the settlement or of any percentage thereof." *Hanlon*, 150 F.3d at 1029. Courts may also elect to (but need not) conduct a "cross-check" even in common fund litigation. *See* Section III(A)(4), below. In successful cases, counsel frequently receive between 2 and 6 times their lodestar. *See id*. Class Counsel are far below this standard measure here, largely because of the amount of time that was devoted to navigating issues with Buchalter, the subject of a separate motion.

common fund cases, twenty-five percent (25%) is the benchmark, but a court may adjust that benchmark upward when warranted. *See Powers v. Eichen*, 229 F.3d 1249, 1256–57 (9th Cir. 2000); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (holding that "complexity and novelty of the issues" can justify upward departure from benchmark); *In re HQ Sustainable Maritime Indus., Inc. Deriv. Litig.*, No. 11-910, 2016 WL 5421626, at *3 (W.D. Wash. Sept. 26, 2013) (Lasnik, J.) (holding that complexity of the dispute, including number of participants, justified upward departure from benchmark); *Benson v. DoubleDown Interactive, LLC*, 18-cv-525, 2023 WL 3761929 (W.D. Wash. June 1, 2023) (Lasnik, J.) (holding upward departure justified). Courts have recognized that "in most common fund cases, the award exceeds that [25%] benchmark." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008). Indeed, courts in the Ninth Circuit "routinely" award fee awards of one-third or higher in appropriate cases. *Attia v. Neiman Marcus Grp., LLC*, 2019 WL 13089601, at *7 (C.D. Cal. Feb. 25, 2019) (gathering authorities).

A. Class Counsel's Requested Fee is Fair, Reasonable, and Appropriate.

1. Class Counsel Achieved an Outstanding Result For the Class.

The results obtained for the class are generally considered to be the most important factor in determining the appropriate fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983); *In re Omnivision*, 559 F. Supp. 2d at 1046; *see also* Federal Judicial Center, *Manual for Complex Litigation* § 21.71, p. 336 (4th ed. 2004) (the "fundamental focus is the result actually achieved for class members") (citing Fed. R. Civ. P. 23(h) committee note). Here, any assessment of the results achieved must include both the monetary and injunctive components of this settlement. While each standing alone is outstanding (the settlement amount of $12 million is nearly double the largest of the monetary recoveries obtained to date in a single settlement), they together form what is unquestionably an exceptional result, and one that justifies the fee sought.

Where a class settlement includes both monetary and injunctive relief, courts "include [the latter] as part of the value of a common fund for purposes of applying the percentage

method of determining fees" when "the value to individual class members of benefits deriving from injunctive relief can be accurately ascertained." *Staton*, 327 F.3d at 974; *see also Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1056 (9th Cir. 2019) ("readily quantifiable"); *see also, e.g., Martin v. Toyota Motor Cred. Corp.*, No. 20-cv-10518, 2022 WL 17038908, at *11 (C.D. Cal. Nov. 15, 2022) (adding value of injunctive relief, including business practice changes, to cash award in awarding fee on percentage of total economic value of settlement); *Bennett v. SimplexGrinnell LP*, No. 11-1854, 2015 WL 12932332, at *6 (N.D. Cal. Sept. 3, 2015) (same); *Herrera v. Wells Fargo Bank, N.A.*, No. 18-cv-00332, 2021 WL 9374975, at *12 (C.D. Cal. Nov. 16, 2021) (same). The Court's fee calculation should reflect the actual and readily-quantifiable economic value of the settlements that Class Counsel have negotiated to date, up to and including the one with MNS.

Because this is a Lanham Act case, retrospective relief (damages due to past sales of infringing products) and prospective relief (agreement to stop selling in the future) are two sides of the same coin. Either way, the theory of liability and damage is the same: the sale of fake Kona coffee products depresses the market price of legitimate Kona coffee products. As an economic matter, whether that price impact occurred in the past or will occur in the future is immaterial: the farmer loses money both times in the same way and for the same reason.[7] In other words, the past misconduct (remediated) and future misconduct (prevented) cause or would cause the *same injury* to Plaintiffs and the class. *See* Schreck Decl. ¶ 10 (explaining that the damages due to past infringement are the best tool to use to calculate the value of future non-infringement). This Court has previously accepted Dr. Schreck's methodology for valuing injunctive relief with respect to prior settlements and found that the relief was quantifiable. *See*

[7] That distinguishes this case from other class settlements where the damages and injunctive relief are fundamentally distinct. For example, it is common in class settlements for the defendant to pay damages for past harm, and to institute practice changes to reduce the *risk* of future harm—better warnings, more training of personnel, etc. In those situations, courts are understandably reluctant to assign an economic value to the injunctive relief, as doing so can be inherently speculative. *See, e.g., Roes*, 944 F.3d at 1041 (in employee misclassification case, relief included unpaid minimum wages and an "injunction … under which any dancer interested in working at the clubs would be given the 'option' of working as an employee or independent contractor").

Dkt. 477 ¶ 2.

Plaintiffs have previously presented expert declarations concerning the economic value of the prospective relief that they negotiated in prior settlements. In the first of these declarations, Dr. Michael Schreck calculated the total market price damages attributable to counterfeit Kona coffee from 2015 to 2019, and forecast the economic benefit of the removal of mislabeled coffee from the market. *See* Dkt. 419 ¶¶ 27-34. Dr. Schreck has now updated those calculations, using the average annual damages amount that he calculated in his merits expert report (Dkt. 720-2), to again calculate the economic benefit, in 2023 dollars, that Kona farmers will experience as prices react to the injunctive relief mandated by these settlements. He calculates that the injunctions achieved in these settlements (including the recent Mulvadi settlement) provide $81.2 million in value to the class. *See* Schreck Decl. ¶ 7.

This approach is analytically sound and sufficiently rigorous to "accurately ascertain[]" the value of the injunctive relief. *Staton*, 327 F.3d at 974. It is the same one Plaintiffs used to value their case for settlement. It is, in broad strokes, the same one Dr. Schreck presented as Plaintiffs' damages expert at class certification and as a proposed testifying expert and which was subject to vigorous cross-examination from MNS's counsel. It is thus highly appropriate for the court to use this measure to value the relief in this case. *See id.*; *see also, e.g.*, *In re: Samsung Top-Load Washing Machine Marketing, Sales Practices and Products Liability Litig.*, 997 F.3d 1077, 1094-95 (10th Cir. 2021) (crediting the value of injunctive relief when considering compensation to class counsel).[8]

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[8] Indeed, courts have accounted for the value of prospective relief in cases where that value was less ascertainable and certain than the logical and straightforward economic calculation here. *See Bennett*, 2015 WL 12932332, at *6 (acknowledging it was "difficult to determinate the monetary value of … prospective relief" in the form of "future payment of prevailing wages," but given the "substantial and immediate benefit to the class," employing a "conservative assumption" of future value, resulting in a fee equal to 38.8% of the cash component); *Corzine v. Whirlpool Corp.*, No. 15-5764, 2019 WL 7372275, at *12 (N.D. Cal. Dec. 31, 2019) (on cross-check, crediting expert valuation of an extended warranty); *Chieftain Royalty Co. v. XTO Ener. Inc.*, No. 11-29, 2018 WL 2296588, at *4 (E.D. Okla. Mar. 27, 2018) (policy change with respect to calculating and paying royalties, fee equal to 40% of the cash component); *Fleisher v. Phoenix Life Ins. Co.*, No. 11-8405, 2015 WL 10847814, at *14-15 (S.D.N.Y. Sept. 9, 2015) (change in insurance policies permitting rate changes and challenges to validity and enforceability under certain circumstances); *In re Checking Account Overdraft Litig.*, No. 09-2036, 2013 WL 11319243, at *13-14 (S.D.

Taking the already substantial cash component of the settlements and adding the future economic value, Class Counsel's requested fee amounts to 11.4 percent of the total economic value of the settlements, a request that falls squarely within those that have been approved by this Court and other courts in this Circuit.

2. The Complexity and Risk Associated With This Litigation Supports the Requested Fees.

The degree of complexity and risk present at all stages of this case weighs heavily in favor of the requested fee. *See, e.g., In re Bluetooth*, 654 F.3d at 942 (noting complexity and novelty of issues as among factors justifying departure from benchmark percentage). This was and is far from a cookie-cutter case, and Class Counsel have had to anticipate and respond to arguments that do not tend to emerge in most class actions to continue to drive the case towards trial. "The risk that further litigation might result in Plaintiffs not recovering at all, particularly a case involving complicated legal issues, is a significant factor in the award of fees." *Omnivision*, 559 F. Supp. 2d at 1046-47. Courts "have recognized the risk of litigation to be perhaps the foremost factor to be considered in determining the award of appropriate attorneys' fees [in part because] despite the most vigorous and competent of efforts, success is never guaranteed." *Tiro v. Public House Invs., LLC*, 2013 WL 4830949, at *13 (S.D.N.Y. Sep. 10, 2013) (citations and quotations omitted).

This case presented risks at every stage. To start, Defendants advanced a legal theory that the Lanham Act does not authorize the core claim in this case—false designation of geographic origin. *See* Dkt. 107, at 6. Although the Court denied Defendants' motions to dismiss on that basis, the issue would remain alive in the case through appeal.

Fla. Aug. 2, 2013) (changes to how transactions are posted for purposes of assessing overdraft fees, fee equal to 38% of cash component); *Browning v. Yahoo! Inc.*, No. 04-1463, 2007 WL 4105971, at *13 (N.D. Cal. Nov. 16, 2007) (retail cost of free credit scores); *Lucken Family Ltd. P'ship, LLLP v. Ultra Resources, Inc.*, 2010 WL 5387559, at *2 (D. Colo. Dec. 22, 2010) (basing fee award on percentage of common fund including future economic benefit of settlement). *See also Wilson v. Playtika, Ltd.*, 18-cv-5277, 2021 WL 512230, at *2 (W.D. Wash. Feb. 11, 2021) (Lasnik, J.) (considering "whether counsel's performance generated benefits beyond the cash settlement fund" in assessing reasonableness of fee request).

Defendants, including MNS, also had factual defenses that (1) consumers were not confused by false designations of Kona geographic origin and that (2) Plaintiffs' claims were barred by laches. Although Plaintiffs believed these defenses to be meritless, they posed an ongoing risk. In particular, whether consumers were confused or were likely to be confused by Defendants' product labels would have come down to a "battle of the experts" at trial (indeed, both sides had numerous experts ready to testify), the result of which is always uncertain.

This case was also risky because it was a class action. The only previous attempt to bring a class action on behalf of Kona farmers ended in a denial of class certification more than twenty years before Plaintiffs brought this case. *See Sugai Prods., Inc. v. Kona Kai Farms, Inc.*, No. 97-cv-00043, 1997 WL 824022 (D. Haw. Nov. 19, 1997). Although many elements of a Lanham Act claim map well onto the Rule 23 class certification requirements, successful Lanham Act cases are rare. The typical Lanham Act plaintiff is an individual or corporation holding rights to a trademark. A class case was possible here only because the geographic designation at issue is legitimately used by a relatively small and identifiable group of people.

Class certification here posed particular risks because of the need to prove that damages could be measured on a class-wide basis. This required assessing the market for coffee in general, specialty coffees more specifically, and Kona coffee more precisely than that, and then creating a "but-for" world where there was no counterfeiting of coffee. Doing so required accounting for variations in how coffee is sold (green, cherry, or roasted). MNS attacked that analysis at both *Daubert* and summary judgment, and marshaled its own experts to testify that market price damages are not measurable on a classwide basis or, in the alternative, that damages were small. If Plaintiffs could not put forward a reliable, admissible, and ultimately persuasive damages model, then no class could be certified. Plaintiffs anticipated and overcame these hurdles, successfully certifying the class and positioning the class for a successful trial, but as the attached records show, it has been expensive to develop a defensible damages methodology.

Other forms of damages carried real risks too. When this case was filed, the law of the

Ninth Circuit, since reversed by the Supreme Court, *see Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020), was that a finding of willfulness was a prerequisite to an award of profits. Plaintiffs also sought to recover funds for corrective advertising, and undoubtedly, MNS had developed competing expert testimony challenging the existence and amount of any corrective advertising damages

Finally, this case was inherently risky because it involved more 22 defendants. Any task, any work, any expense could potentially be multiplied by 22. Although the case did produce some economies of scale, this risk materialized in very real form in conducting discovery against so many defendants simultaneously. The global pandemic compounded those risks, particularly as to certain defendants who were acutely affected by Hawaii's closure to tourism beginning in 2020. This introduced the possibility of no recovery from defendants who were at the risk of or did declare bankruptcy.

Despite these risks, Class Counsel took on this case on a contingent basis. It is an established practice to reward attorneys who assume representation on a contingent basis to compensate them for the risk that they might be paid nothing at all. *See In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994). Such a practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney. *Id*. That Class Counsel have foregone other work to litigate the case on a contingent basis also favors the request. *See In re Infospace, Inc. Sec. Litig.*, 330 F. Supp. 2d 1203, 1212 (W.D. Wash. 2004) (noting that "preclusion of other employment by the attorney due to acceptance of the case" is a factor to consider when determining an appropriate fee award).

Moreover, the quality of the opposition they faced should also be considered. *See DeStefano v. Zynga, Inc.*, 2016 WL 537946, at *17 (N.D. Cal. Feb. 11, 2016) ("The quality of opposing counsel is also relevant to the quality and skill that class counsel provided."). Class Counsel faced well-resourced and experienced counsel, including for MNS. This factor also

weighs in favor of the requested fee.

3. The Requested Fees Are Below That Awarded in Other Common Fund Cases Involving Valuable Injunctive Relief.

A review of fee awards in other common fund cases underscores the reasonableness of the fee requested here. Class Counsel here request a fee totaling 11.4 percent of the total economic value of the settlements to date, which is substantially lower than the benchmark percentage in this district. As set out above, it is appropriate for the Court to include the value of the settlements' injunctive relief "as part of the value of a common fund for purposes of applying the percentage method of determining fees." *Staton*, 327 F.3d at 974; § III(A)(1), *supra*. Class Counsel's request is in line with fees approved in other settlements involving both a common fund and quantifiable injunctive relief.

If the common fund in this case includes the total economic value of the settlement, Class Counsel's requested fee, of approximately 11.4 percent, is less than that frequently awarded in class actions. *See, e.g. Omnivision*, 559 F. Supp. 2d at 1047 ("[I]n most common fund cases, the award exceeds that [25%] benchmark."); *In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 463 (9th Cir. 2000), as amended (June 19, 2000) (affirming fee award of one third of common fund); *Lusby v. GameStop Inc.*, No. 12-3783, 2015 WL 1501095, at *9 (N.D. Cal. Mar. 31, 2015) (awarding fee of one-third of common fund); *de Mira v. Heartland Emp't Serv., LLC*, No. 12 - 4092, 2014 WL 1026282, at *4 (N.D. Cal. Mar. 13, 2014) (awarding fee of 28% of common fund); *Knight v. Red Door Salons, Inc.*, 08-cv-1520, 2009 WL 248367, at *7-*8 (N.D. Cal. Feb. 2, 2009)(awarding 30% of common fund); *Linney v. Cellular Alaska P'ship*, No. 96-3008, 1997 WL 450064, at *7 (N.D. Cal. July 18, 1997) (granting fee award of one-third common fund where settlement provided additional non-monetary relief).[9]

[9] Even if the Court treated the immediate monetary benefits and the injunctive components of the settlements separately, Class Counsel's request is still consistent with awards in cases in which the Court took note of benefits beyond a cash settlement. *See Bennett*, 2015 WL 12932332, at *6 (taking into account future value, awarding fee equal to 38.8% of the cash component); *Anderson v. Merit Energy Co.*, 07-916, 2009 WL 3378526, at *1 (D. Colo. Oct. 20, 2009) (awarding 26 percent of common fund including future economic benefit, or 45 percent of immediate cash component); *Chieftain Royalty*, 2018 WL 2296588, at *4 (awarding fee equal to 40% of the cash component in

4. A Lodestar Cross-Check, If Conducted, Confirms the Reasonableness of the Requested Award.

Courts evaluating the reasonableness of fee requests have the discretion to perform a lodestar cross-check, "which measures the lawyers' investment of time in the litigation." *Vizcaino*, 290 F.3d at 1050. The Ninth Circuit has held that district courts need not perform a such a check in assessing fee applications. *See Wilson*, 2021 WL 512230, at *2 (citing *Farrell v. Bank of Am. Corp., N.A.*, 827 F. Appx. 628, 630 (9th Cir. 2020)); *see also Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1122 (C.D. Cal. 2008) ("A lodestar cross-check is not required in this circuit, and in some cases is not a useful reference point."); *Benson*, 2023 WL 3761929, at *12 (declining to conduct lodestar cross-check). Nevertheless, courts sometimes employ a "streamlined" lodestar analysis to "cross-check" the reasonableness of a requested award. *See, e.g.*, *Vizcaino*, 290 F.3d at 1050 ("[W]hile the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award."). As explained in prior fee applications and as the Court acknowledged in the most recent order concerning fees (Dkt. 843 ¶ 9), Class Counsel have not, to date, recovered their lodestar. If conducted, a lodestar cross-check including this requested fee would reveal that Class Counsel fees are still just below their lodestar, and well below what numerous courts have approved in common fund cases. *See* Lichtman Decl. ¶¶ 9-14 (providing lodestar and rate information for LCHB); Paine Decl. ¶¶ 9-14 (same for KTC).[10] *See, e.g., Vizcaino*, 290 F.3d at 1051 n.6 (compiling fee awards and finding that 83 percent fell between 1.0 and 4.0); *Martin*, 2022 WL 17038908, at *14 (approving 6.33 multiplier); *Johnson v. Fujitsu Tech. & Bus. of Am., Inc.*, No. 16-cv-03698-NC, 2018 WL 2183253, at *7, (N.D. Cal. May 11, 2018) (approving 4.37

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settlement also prospective changes to royalty calculation)); *In re Checking Account Overdraft Litig.*, 2013 WL 11319243, at *13-14 (awarding fee equal to 38% of cash component in settlement also mandating changes to how transactions are posted for purposes of assessing overdraft fees).

[10] The declarations of counsel calculate lodestar to date using current rates. It is a "well established" common practice for "attorneys in common fund cases" to adjust their billing to their current levels to account for "any delay in payment." *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *14 n.17 (N.D. Cal. Dec. 18, 2018) (quoting *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1010 (9th Cir. 2002)).

multiplier); *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.*, 2017 WL 6040065, at *9, (N.D. Cal. Dec. 6, 2017) (finding 3.66 multiplier to be "well within the range of awards in other cases."); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524 (S.D.N.Y. Apr. 26, 2016) (approving 6.0 multiplier); *In re Payment Card Antitrust Litig.*, 991 F. Supp. 2d 437, 448 (E.D.N.Y. 2014) (approving 3.4 multiplier); *In re Enron Corp. Sec. Litig.*, 586 F. Supp. 2d 732, 741 (S.D. Tex. 2008) (approving 5.2 multiplier). Of course, Class Counsel's lodestar will increase as Class Counsel will spend substantial amounts of time ensuring that the claims process goes smoothly and that the settlement is implemented effectively, just as they have done and continue to do with prior settlements.

B. Class Counsel's Expenses Are Reasonable.

"The Ninth Circuit allows recovery of pre-settlement litigation costs in the context of class action settlement." *Arthur v. Sallie Mae Inc.*, 10-cv-198, 2012 WL 4076119, at *2 (W.D. Wash. Sept. 17, 2012) (citing *Staton*, 327 F.3d at 974); *see also* Fed. R. Civ. P. 23(h). This includes expenses that are reasonable, necessary, directly related to the litigation, and normally charged to a fee-paying client. *See, e.g.*, *Willner v. Manpower Inc.*, No. 11-cv-02846-JST, 2015 WL 3863625, at *7 (N.D. Cal. June 22, 2015).

Here, Class Counsel seeks reimbursement of $662,443. Class Counsel have expended $3,282,943.26 in out-of-pocket expenses to date, $2,620,500 of which have been reimbursed, leaving $662,443.26 unreimbursed. *See* Lichtman Decl. ¶¶ 15-16; Paine Decl. ¶ 15-17.

Litigating a case of this size and complexity inevitably costs money, and these expenses – attributable largely to, among other items set out in the accompanying declarations of counsel, experts, travel, document hosting, and multiple mediation days – are commensurate with the stakes, complexity, intensity, and technical nature of the litigation. They also demonstrate Class Counsel's commitment to the litigation, even as Class Counsel have made every effort to litigate efficiently. *See Beesley v. Int'l Paper Co.*, No. 3:06-CV-703-DRH-CJP, 2014 WL 375432, at *3 (S.D. Ill. Jan. 31, 2014) ("Class Counsel had a strong incentive to keep expenses at a reasonable

level due to the high risk of no recovery when the fee is contingent.").

C. Service Awards for the Class Representatives Are Appropriate.

The Ninth Circuit has recognized that "named plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable [service awards]." *Staton*, 327 F.3d at 977; *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (service awards "are fairly typical in class action cases"). Such awards are "intended to compensate class representatives for work done on behalf of the class [and] make up for financial or reputational risk undertaken in bringing the action." *Rodriguez*, 563 F.3d at 958. Service awards are appropriate in this case, in which the class representatives have invested enormous amounts of time into the prosecution of this action, even as they continue to run their small coffee farms.

Declarations submitted by each of the class representatives set out their unflagging commitment to this case and to delivering positive results to their community through this case. *See* Dkt. 421-25, Dkt. 569-73. As those declarations explained, even while they ran their small coffee farms, they have devoted countless hours to this case, meeting regularly with Class Counsel, responding to voluminous discovery requests, and then actively participating in settlement efforts, including every mediation to date. They have made themselves visible in their community through their participation in this lawsuit, and have spent additional countless hours answering questions from other class members about the case. *Id.* These efforts have continued through the implementation of the prior settlements, through the negotiation of this settlement with MNS, and will continue as the case continues. The class representatives continue to carry out their duties diligently, energetically, and effectively, up to and through the recent litigated class certification motion. *See* Dkt. 569-73.

Under these circumstances, the requested service awards ($2,500 per farm) are well within the range regularly awarded by Ninth Circuit courts, or if anything, less than typically awarded. *See, e.g.*, *In re High-Tech Employee Antitrust Litig.*, 11-cv-2509, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (awarding service awards of $120,000 and $80,000); *Beck, et al. v.*

Boeing Co., Case No. 00-CV-0301-MJP, Dkt. 1067 at 4 (W.D. Wash. Oct. 8, 2004) (awarding $100,000 service payments to each named plaintiff); *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365 CW EMC, 2010 WL 1687832, at *17 (N.D. Cal. Apr. 22, 2010) (granting $20,000 service award where plaintiff "was subjected to questioning regarding her personal financial affairs and other sensitive subjects"). Courts elsewhere have awarded amounts far exceeding those sought here. *See, e.g.*, *In re Titanium Dioxide Antitrust Litig.*, No. 10-318, 2013 WL 6577029, at *1 (D. Md. Dec. 13, 2013) (approving $125,000 service award); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001) (awarding $300,000 service payments to each of four representative plaintiffs); *Been v. O.K. Indus., Inc.*, No. CIV-02-285-RAW, 2011 WL 4478766, at *12–13 (E.D. Okla. Aug. 16, 2011) (awarding $100,000 service awards); *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194 (CM), 2010 WL 4877852, at *8, *26 (S.D.N.Y. Nov. 30, 2010) (granting service awards of $175,000 and higher); *Seaman v. Duke Univ.*, No. 1:15-CV-462, 2019 WL 4674758, at *7-8 (M.D.N.C. Sept. 25, 2019) (approving service award of $125,000).

IV. Conclusion

Class Counsel respectfully request that the Court approve attorneys' fees, reimbursement of expenses, and service awards to the named plaintiffs.

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CERTIFICATE OF SERVICE

I, Daniel E. Seltz, certify that on July 18, 2023, caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system.

/s *Daniel E. Seltz*
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