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.

COSTCO WHOLESALE CORPORATION, a Washington corporation; AMAZON.COM, INC., a Delaware corporation; HAWAIIAN ISLES KONA COFFEE, LTD., LLC, a Hawaiian limited liability company; COST PLUS/WORLD MARKET, a subsidiary of BED BATH & BEYOND, a New York corporation; BCC ASSETS, LLC d/b/a BOYER'S COFFEE COMPANY, INC., a Colorado corporation; L&K COFFEE CO. LLC, a Michigan limited liability company; MULVADI CORPORATION, a Hawaii corporation; COPPER MOON COFFEE, LLC, an Indiana limited liability company; GOLD COFFEE ROASTERS, INC., a Delaware corporation; CAMERON'S COFFEE AND DISTRIBUTION COMPANY, a Minnesota corporation; PACIFIC COFFEE, INC., a Hawaii corporation; THE KROGER CO., an Ohio corporation; WALMART INC., a Delaware corporation; BED BATH & BEYOND INC., a New York corporation; ALBERTSONS COMPANIES INC., a Delaware Corporation; SAFEWAY INC., a Delaware Corporation; MNS LTD., a Hawaii Corporation; THE TJX COMPANIES d/b/a T.J. MAXX, a Delaware Corporation; MARSHALLS OF MA, INC. d/b/a MARSHALLS, a Massachusetts corporation; SPROUTS FARMERS MARKET, INC. a Delaware corporation; COSTA RICAN GOLD COFFEE CO., INC., a Florida Corporation; and KEVIN KIHNKE, an individual,

Defendants.

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

MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND MEMORANDUM IN SUPPORT (CORRECTED VERSION)

The Honorable Robert S. Lasnik

Noted for consideration: September 29, 2022

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INTRODUCTION

Plaintiffs respectfully move for preliminary approval of a class action settlement with two of the last four remaining defendants in this litigation. This settlement – with defendants L&K Coffee Co. LLC ("L&K") and its owner, Kevin Kihnke – follows eleven prior settlements previously approved by this Court and successfully implemented by Class Counsel. Along with valuable injunctive relief, L&K has agreed to pay $6.15 million to settle Plaintiffs' and class members' claims, bringing the total amount recovered for the class to over $21 million. After approval of this settlement, only two defendants will remain – Mulvadi Coffee Corporation and its primary retailer, MNS Ltd.

This Court has previously assessed the propriety of preliminary approval and the issuance of notice as to multiple defendants and settlements in this litigation. Those prior settlements were on behalf of the identical class of Kona coffee farmers, involved the same claims, the same allegations, and were structured substantially identically as the ones that are now before the Court. Just as the Court previously found as to those prior settlements, Plaintiffs respectfully submit that the Court is likely to certify the proposed class for settlement purposes and approve this latest settlement after notice and a final approval hearing. Like the previously approved settlements, this settlement will deliver a substantial monetary payment to class members and also provide for valuable injunctive relief that will benefit the members of the settlement class and prevent future economic harm. This settlement readily satisfies Rule 23(e)'s standard for preliminary approval, and the Court may approve the issuance of notice to the class and set a schedule for final approval.

BACKGROUND AND PROCEDURAL HISTORY

As the Court is aware, this is Plaintiffs' fourth motion for preliminary approval of settlements reached in this litigation. In their previous motions for preliminary approval (Dkt. 393, 411, and 602), Plaintiffs set forth the relevant background to their motions, and do so again here for completeness of the record and with updates through the filing of this motion.

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Plaintiffs are coffee farmers in the Kona region of Hawaii, and along with members of the proposed Settlement Class, grow the entire worldwide supply of Kona coffee. Plaintiffs filed their initial complaint on February 27, 2019, alleging that Defendants, who are both suppliers and retailers of coffee, violated the Lanham Act, 15 U.S.C. § 1125, by misleadingly labeling and selling coffee not from the Kona region as "Kona" coffee. The complaint included the results of an extraordinary pre-filing investigation that included scientific testing to confirm that the coffee marketed and sold by Defendants as "Kona" coffee in fact contained little or no such coffee.

A group of retailer defendants and a group of supplier defendants filed motions to dismiss; Defendant BCC Assets, LLC ("BCC") filed a separate motion to dismiss. *See* Dkt. Nos. 100, 106, & 107, respectively. On November 12, 2019, the Court denied the suppliers' and BCC's motions in full, and denied the retailers' motion in part, dismissing only false advertising claims against the retailers. *See* Dkt. Nos. 154-56. Discovery then commenced, and closed on March 11, 2022. Plaintiffs filed their class certification motion against those non-settling defendants on December 22, 2021, which followed a motion for default against defendant Mulvadi Corporation (Dkt. 544) on November 23, 2021. Plaintiffs served reports from seven different experts on August 11, 2022. The remaining defendants served their rebuttal reports on September 22, 2022, and expert discovery will close on November 18, 2022.

As this history reflects, the parties have litigated the case intensively. The parties served dozens of document requests, interrogatories, and requests for admission, and produced tens of thousands of documents. This Court resolved numerous discovery disputes involving the scope of document production and depositions. *See* Dkt. Nos. 144, 248, 255, 266, 274, 341, 350, 362, 382, 470, 477, 487, 578, 694. Defendants took the depositions of the five named plaintiffs during the week of August 17, 2020. Plaintiffs have taken or participated in nine depositions of parties and non-parties to date (plus noting and appearing for two depositions in which a third party failed to appear), as well as taken two expert depositions.

As Plaintiffs described in their motion for preliminary approval of the first set of

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settlements (Dkt. 393), there were parallel efforts at resolution as the parties litigated the case. First, in the spring of 2020, the parties agreed to a brief pause in most discovery activity to engage in a near-global mediation with Hon. Edward Infante on June 2, 2020. *See* Declaration of Jason L. Lichtman ("Lichtman Decl.") ¶ 6. L&K participated in that mediation, but did not reach a settlement with Plaintiffs at that time and returned to active litigation. L&K and Plaintiffs participated in a mediation with Mark LeHocky, of ADR Services, Inc., on February 3, 2021, and another mediation with Mr. LeHocky on May 5, 2021. *Id.* ¶ 7. After returning to discovery, including fully litigating class certification, the parties again mediated, this time with Robert 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. *Id.*

SUMMARY OF SETTLEMENT TERMS

Like the previous settlements, Plaintiff's settlement with L&K, attached as Exhibit 1 to the Lichtman Declaration, delivers substantial monetary relief to the Settlement Class and includes injunctive terms that continue to transform the marketplace, with L&K agreeing to changes in its labeling practices that will prevent further economic harm to the growers of legitimate Kona coffee.

First, L&K will pay $6,150,000. Second, it 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 contained in the product using the same font type and same (or similar) color as the word Kona, and no smaller than one-half (1/2) the size as the word "Kona" appears, on the front of the package." Ex. 1 ¶ 11(a). The agreements clarifies, "Only Kona coffee certified and graded by the Hawaii Department of Agriculture as 100% Kona shall be considered authentic Kona coffee." *Id.* HIKC also agrees "to use at least the percentage of Kona coffee required by Hawaiian law, or as

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may be required by Hawaii law in the future, in any product labeled as "'Kona' or "'Kona Blend.'" *Id.* ¶ 11(b). These injunctive terms compound the benefits of the agreements of the previously settling defendants that increase and improve the information found on Kona-labeled products in the marketplace.

LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) provides that class actions "may be settled … only with the court's approval." Rule 23(e) governs a district court's analysis of the fairness of a proposed class action settlement and creates a multistep process for approval. First, a court must determine that it is likely to (i) approve the proposed settlement as fair, reasonable, and adequate, after considering the factors outlined in Rule 23(e)(2), and (ii) certify the settlement class after the final approval hearing. *See* Fed. R. Civ. P. 23(e)(1)(B). Second, a court must direct notice to the proposed settlement class, describing the terms of the proposed settlement and the definition of the proposed class, to give them an opportunity to object to or to opt out of the proposed settlement. *See* Fed. R. Civ. P. 23(c)(2)(B); Fed. R. Civ. P. 23(e)(1), (5). Third, after a hearing, the court may grant final approval of the proposed settlement on a finding that the settlement is fair, reasonable, and adequate, and certify the settlement class. Fed. R. Civ. P. 23(e)(2).

Through this motion, Plaintiffs respectfully request that the Court set in motion the first two steps of this three-part process: provide preliminary approval of the settlement, and approval of the issuance of notice to the class.

ARGUMENT

I. The Court will be able to approve the settlement as fair, reasonable, and adequate.

The December 1, 2018 amendments to Rule 23 "provide new guidance on the 'fair, adequate, and reasonable' standard at the preliminary approval stage." *O'Connor v. Uber Techs., Inc.*, No. 13-03826, 2019 WL 1437101, at *4 (N.D. Cal. Mar. 29, 2019). Even after the amendments, fairness, reasonableness, and adequacy remain the "touchstones" for approval of a class action settlement. *Zamora Jordan v. Nationstar Mortg., LLC,* No. 2:14-CV-0175-TOR,

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2019 WL 1966112, at *2 (E.D. Wash. May 2, 2019). The amendments served "to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id.* (quoting Fed. R. Civ. P. 23 advisory committee's note to 2018 amendments).

Under the amended rule, a court is to preliminarily approve the settlement and direct notice to the class if it finds that the court "is likely to approve the proposal under Rule 23(e)(2)." Rule 23(e)(2) contains the "core concerns of procedure and substance" that guide this inquiry. Just as the previous settlements did, this settlement readily satisfies the criteria for preliminary approval.

A. Class Counsel and the Settlement Class Representatives Have Adequately Represented the Class.

Under Rule 23(e)(2), the Court first considers whether counsel for the class, as well as the class representatives, adequately represent the class. Fed. R. Civ. P. 23(e)(2)(A). This requirement is met. Class Counsel have zealously advanced the interests of the Plaintiffs and the proposed Settlement Class. Following an extensive pre-filing investigation, they defeated motions to dismiss by the retailer defendants and the supplier defendants, and took on the daunting logistical task of pursuing discovery against over twenty defendants and from numerous third parties. These efforts put Plaintiffs and the Class in a position to negotiate the prior sets of settlements with the help of experienced mediators. Even with approval of settlements against the majority of the defendants, Class Counsel did not slow down, and instead continued to prepare for class certification and trial. Most recently, Plaintiffs served expert reports from seven experts, in fields ranging from consumer surveys to accounting to coffee trading.

As explained in previous motions for preliminary approval, the class representatives have worked tirelessly on behalf of Settlement Class members, and more than meet this standard. They have worked closely with proposed Class Counsel at every stage of this litigation, answered dozens of written discovery requests, produced thousands of documents, sat for day-

long depositions, and personally participated in various mediations. They have also monitored and participate actively in both sets of claims processes relating to the prior settlements, answering questions from class members, while monitoring ongoing litigation against the remaining defendants. Each Plaintiff runs a small coffee farm, and amidst the challenges of the global pandemic, have unflaggingly devoted their time, along with expertise and experience as Kona farmers, to help Class Counsel move this litigation in a positive direction for the Settlement Class.

B. The Settlement Is the Result of Arm's Length Negotiations.

To grant final approval, this Court will determine if the proposed settlement was negotiated at arm's length. Fed. R. Civ. P. 23(e)(2)(B). This Court is likely to so find here. Settlements reached after a supervised mediation are entitled to a presumption of reasonableness and the absence of collusion. 2 McLaughlin on Class Actions, § 6:7 (8th ed. 2011); *see also Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. 08-482, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive"); *Free Range Content, Inc. v. Google, LLC*, No. 14-CV-02329-BLF, 2019 WL 1299504, at *6 (N.D. Cal. Mar. 21, 2019) (holding that a "presumption of correctness" attaches where, as here, a "class settlement [was] reached in arm's-length negotiations between experienced capable counsel after meaningful discovery").

Here, proposed Settlement Class Counsel negotiated these this settlement after full discovery was complete, and after they had moved for class certification and served expert reports. Where extensive information has been exchanged, "[a] court may assume that the parties have a good understanding of the strengths and weaknesses of their respective cases and hence that the settlement's value is based upon such adequate information." William B. Rubenstein, et al., 4 Newberg on Class Actions § 13:49 (5th ed. 2012) ("*Newberg*"); *see also In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 320 (N.D. Cal. 2018) (concluding that the "extent of discovery" and factual investigation undertaken by the parties gave them "a good sense of the

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strength and weaknesses of their respective cases in order to 'make an informed decision about settlement") (citing *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000)).

Further, there is no evidence of fraud or collusion in arriving at resolution. Only after pertinent discovery and the meaningful exchange of information did the parties participate in mediation; subsequent negotiations were protracted, as described above and in the accompanying declarations of counsel. Plaintiffs continued to litigate against L&K after most other defendants settled, and have shown their willingness to continue with highly contested litigation with the two remaining defendants.

C. The Relief for the Class is Substantial.

Next, Rule 23(e)(2)(C) asks whether the relief provided for the class is "adequate," taking into account: "(i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)." Fed. R. Civ. P. 23(e)(2)(C). Here, the proposed settlement provides significant monetary relief and important injunctive relief to the Class.

1. The settlement relief outweighs the costs, risks, and delay of trial and appeal.

The settlement provides significant monetary and injunctive relief to the proposed Settlement Class, and avoids the hurdles and delays associated with litigating class certification and potential interlocutory appeals, dispositive motions, trial, and appeals. *See Munday v. Navy Fed. Credit Union*, No. 15-1629, 2016 WL 7655807, at *8 (C.D. Cal. Sept. 15, 2016) (granting preliminary approval of class action settlement). The settlement accounts for these risks, costs, and delays, and accordingly compensate Settlement Class Members for their past harm, and prevent future harm by requiring L&K to join the other settling defendants in changing its practices going forward. While Plaintiffs believe in the merits of their case, success at class

certification, summary judgment, and trial is not guaranteed. And any trial victory would come only after the COVID-related backlog is cleared, and would be subject to years of appeals.

The relief obtained in this settlement is extraordinary. The settlement amount of $6.15 million is the largest of the monetary recoveries obtained to date in a single settlement. In addition, L&K has agreed to the same injunctive relief that previous settling defendants have agreed to, further ensuring that labeling of Kona coffee will, going forward, be accurate and clear to consumers, relief that Plaintiffs' experts have explained carries substantial value. *See* Dkt. 419.

The immediate relief provided by the settlement outweighs risks associated with further litigation. As one court has put it in approving a class settlement, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

2. Settlement Class Members will obtain relief through a straightforward claims process.

"[T]he effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," is also a relevant factor in determining the adequacy of relief. Fed. R. Civ. P. 23(e)(2)(C)(ii). This factor is intended to encourage courts to evaluate a proposed claims process "to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Id.* Advisory Committee's note to 2018 amendments.

The claims process to be administered by the experienced settlement administrator will be yet more straightforward and manageable than the two processes completed in connection with the previous settlements. During the first claims period, the discrete community of farmers who make up the class submitted information about their sales during the relevant time period,

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which were then used to calculate their share of the settlement proceeds. *See, e.g., Hefler v. Wells Fargo & Company*, No. 16-CV-05479-JST, 2018 WL 6619983, at *12 (N.D. Cal. Dec. 18, 2018) (approving pro rata settlement distribution based on the purchase and sales data provided by class members); *Thomas v. MagnaChip Semiconductor Corp.*, No. 14-CV-01160-JST, 2017 WL 4750628, at *8-9 (N.D. Cal. Oct. 20, 2017) (same). Class members were contacted through a combination of direct mail and publication, and the notice administrator painstakingly verified their identity and status as a Kona farmer. *See* Dkt. 600 (Supp. Decl. Jennifer Keough). During the second claims process, Settlement Class Members who submitted claims did not even need to do so again, because they had submitted the necessary information and the claims administrator has reviewed, verified, and approved it. Settlement Class Members who did not previously make a claim had the opportunity to do so in that second process, resulting in additional claims. This time, those new claimants will not need to submit anything further. Accordingly, the prior claims processes provides a floor for direct payments to Settlement Class Members.

3. The terms of any proposed award of attorney's fees, including timing of payment, will be reasonable.

Proposed Class Counsel will move the Court for an award of reasonable attorneys' fees and reimbursement of their litigation expenses that is squarely in line with Ninth Circuit precedent. Fed. R. Civ. P. 23(e)(2)(C)(iii). Class Counsel intend to seek reimbursement of litigation expenses, as well as fees not to exceed one-third percent of the settlement fund, with the total request not to exceed $3 million.[1] Class Counsel will file their fees and costs application, which will provide the supporting basis for their request, sufficiently in advance of the Exclusion/Objection deadline, and it will be available on the Settlement website after it is

[1] The Court does not need to approve any specific fee amount before granting preliminary approval, only determine whether the request raises any obvious red flags that would preclude settlement approval. But it bears emphasis that counsel's request is well within the norm for class settlements. When awarding attorney's fees on the percentage of the fund method in common fund cases, twenty-five percent (25%) is the benchmark, but a court may adjust that benchmark up or down when warranted. *See Powers v. Eichen*, 229 F.3d 1249, 1256–57 (9th Cir. 2000).

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filed. Settlement Class Members will thus have the opportunity to comment on or object under Fed. R. Civ. P. 23(h) prior to the Final Approval Hearing.[2]

D. The Proposal Treats Class Members Equitably Relative to Each Other.

Pursuant to Rule 23(e)(2)(D), the settlement fund will be distributed fairly and equitably. *See* Fed. R. Civ. P. 23(e)(2)(D). This subsection of Rule 23(e) determines "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief." *Id.* advisory committee's note to 2018 amendments. Each member of the proposed Class will receive a pro rata share of the settlement based on the volume of Kona coffee they sold during the limitations period. This allocation plan ensures members of the proposed Class will receive meaningful compensation directly proportional to the harm they suffered based on their actual sales. Additionally, Plaintiffs will request service awards for each plaintiff farm (three in total), as are commonly awarded in class actions, and are justified here by Plaintiffs' efforts in prosecuting the litigation. *See*, *e.g.*, *Durant v. State Farm Mut. Auto. Ins. Co.*, No.2-15-01710-RAJ, 2019 WL 2422592 at *2 (W.D. Wash. June 10, 2019) (approving $10,000 incentive award to plaintiff as part of final approval of class action); *Carr v. United Health Care Serv., Inc.*, No.2:15-CV-1105, 2017 WL 11458425 at *3 (W.D. Wash. June 2, 2017) (approving incentive award); *Hardie v. Countrywide*, 2010 WL 3894377, at *2 (W.D. Wash. Sept. 30, 2010) (approving incentive award).

II. The Court will be able to certify the Class for settlement purposes upon final approval.

Since December 2018, the court must determine if it will be likely to certify the class

[2] Per Fed. R. Civ. P. 23(e)(3), the parties have negotiated a separate agreement providing additional assurances of the availability of settlement funds, which the parties will submit to the Court for *in camera* review upon request. *See* 2 McLaughlin on Class Actions § 6.22 (18th ed.) (describing as "good practice" availability of *in camera* review of any agreements required to be disclosed pursuant to Rule 23(e)(3).

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prior to granting preliminary approval of the proposed class settlement. Fed. R. Civ. P. 23(e)(1)(B)(ii); *David v. Bankers Life and Cas. Co.*, No. 14-CV-00766-RSL, 2019 WL 2339971, at *1 (W.D. Wash. June 3, 2019) (Lasnik, J.). Certification of a settlement class is "a two-step process." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 2672 CRB (JSC), 2016 WL 4010049, at *10 (N.D. Cal. July 26, 2016) (Breyer, J.) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997)). First, the Court must find that the proposed settlement class satisfies Rule 23(a)'s four requirements. *Id.* (citing Fed. R. Civ. P. 23(a)). Second, the Court must find that "a class action may be maintained under either Rule 23(b)(1), (2), or (3)." *Id.* (citing *Amchem*, 521 U.S. at 613). The proposed Settlement Class here readily satisfies all requirements of Rule 23(a), as well as those of Rule 23(b)(3). The Settlement Class is identical to the one that the Court has twice found meets the requirements of Rule 23. *See* Dkt. 400 ¶ 3; Dkt. 604 ¶ 3. Plaintiffs also set out, in the litigated context, why this case is well suited to class treatment. *See* Dkt. 568.

A. <u>The Settlement Class Meets Rule 23(a)'s Requirements.</u>

Rule 23(a)(1): The Class is sufficiently numerous. Rule 23(a)(1) is satisfied where, as here, "the class is so numerous that joinder of all class members is impracticable." Fed. R. Civ. P. 23(a)(1). A "class of 41 or more is usually sufficiently numerous." 5 *Moore's Federal Practice—Civil* § 23.22 (2016); *see also In re Banc of California Sec. Litig.*, 326 F.R.D. 640, 646 (C.D. Cal. 2018). Plaintiffs alleged that there are more than 600 members of the Settlement Class, Third Am. Compl. ¶¶ 33, 43, Dkt. No. 381, and through discovery from third parties that provide milling and processing services to a large proportion of the class, as well as through class notice of the prior settlements, have confirmed the size of the class. *See* Dkt. 395; Dkt. 600 (Supp. Keough Decl.). Numerosity is satisfied.

Rule 23(a)(2): Common questions of law and fact are present. "Federal Rule of Civil Procedure 23(a)(2) conditions class certification on demonstrating that members of the proposed class share common 'questions of law or fact.'" *Stockwell v. City & Cnty. of San Francisco*, 749

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F.3d 1107, 1111 (9th Cir. 2014). Courts routinely find commonality where, as here, the class claims arise from a defendant's uniform course of conduct. *Jama v. Golden Gate America, LLC*, No. 2:16-CV-00611-RSL, 2017 WL 7053650, at *1 (W.D. Wash. June 27, 2017) (Lasnik, J.).

Here, the Settlement Class' claims are rooted in common questions of fact relating to Defendants' use of the "Kona" name. This Court has recognized that Plaintiffs alleged that Defendants "falsely designated the geographic origin of their coffee as Kona," that they misled "consumers into believing their products contain an appreciable amount of Kona coffee beans in order to use the reputation and goodwill of the Kona name to justify higher prices for what is actually ordinary commodity coffee," and that the alleged false designation "damages the geographic designation itself and the designation's value to the farmers of authentic Kona coffee from the Kona District." *See* Dkt. No. 155 at 2–3 (Order Denying Mot. to Dismiss). The answer to the question of whether a defendant's label does or does not contain a false designation of origin will not vary among class members. This case thus presents common questions of fact that would yield, if litigated, common answers "apt to drive the resolution of the litigation" for the Settlement Class as a whole. *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011). *See also* Dkt. 568 (Plaintiffs' Motion for Class Certification), at 10. This common course of conduct satisfies commonality.

Rule 23(a)(3): Settlement Class Representatives' claims are typical of those of the Class members'. Under Rule 23(a)(3), "'the claims or defenses of the representative parties'" must be "'typical of the claims or defenses of the class.'" *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (quoting Fed. R. Civ. P. 23(a)(3)). "Typicality 'assure[s] that the interest of the named representative aligns with the interests of the class.'" *Id.* (quoting *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citation and quotations omitted)). Specifically, "'representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.'" *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

The Settlement Class Representatives' claims are typical of other Settlement Class Members' claims; they assert the same claims under the Lanham Act. The Settlement Class Representatives have alleged that a common course of conduct injured the Settlement Class Representatives and the proposed Settlement Class in the same way. The Settlement Class Representatives, like the members of the proposed Settlement Class, grew and sold authentic Kona coffee, but they competed against suppliers and sellers of coffee labeled as "Kona" or "Kona Blend" that in fact contained little or no appreciable amount of authentic Kona coffee. *See* Sec. Am. Compl. ¶ 33(c). Further, Plaintiffs alleged that the false designation of ordinary commodity coffee as "Kona" coffee depressed the market price of authentic Kona coffee, which negatively affected the price both the Settlement Class Representatives and Settlement Class Members could receive for their Kona coffee. *See Id.* ¶ 3. Typicality is satisfied.

Rule 23(a)(4): The Settlement Class Representatives have and will protect the interests of the Class. Rule 23(a)(4)'s adequacy requirement is met where, as here, "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy entails a two-prong inquiry: "'(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1031 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020). Both prongs are readily satisfied here.

First, the Settlement Class Representatives have no interests antagonistic to Settlement Class Members and will continue to protect the Class' interests in the implementation of the settlement and in continuing litigation against the non-settling defendants, and there are no conflicts of interest between the class representatives and members of the Settlement Class. *See Sampson v. Knight Transportation, Inc.*, No. C17-0028-JCC, 2020 WL 3050217, at *5 (W.D. Wash. June 8, 2020) ("Plaintiffs' claims . . . are uniform across the class members, thus the Plaintiffs adequately represent the injuries of the putative class."). The Class Representatives

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"suffered the same injuries as other members" of the Class in the form of reduced market prices and damage to goodwill and reputation. *Id.* The Class Representatives also understand their duties, have agreed to consider the interests of absent Settlement Class Members, and have reviewed and uniformly endorsed the Settlement terms. *See* Lichtman Decl. ¶ 15.

Second, proposed Class Counsel have and will continue to vigorously and ethically pursue this litigation. *See Wilbur v. City of Mount Vernon*, 298 F.R.D. 665, 669 (W.D. Wash. 2012) (Lasnik, J.) (finding adequacy requirement satisfied and granting class certification). The two firms serving as proposed Class Counsel bring a wealth of experience in complex civil litigation and class actions, along with relevant expertise in intellectual property litigation. They have and will continue to commit substantial resources to this case. *See* Lichtman Decl. ¶ 3. Proposed Class Counsel have undertaken an enormous amount of work, including a pre-filing scientific investigation, litigating dispositive motions, and extensive discovery to advocate for the Class. *Id.* ¶ 8. They satisfy Rule 23(a)(4)'s adequacy requirement, as well as the standard for appointment of class counsel under Rule 23(g).

B. The Settlement Class Meets Rule 23(b)(3)'s Requirements.

Rule 23(b)(3)'s requirements are also satisfied because (i) "questions of law or fact common to class members predominate over any questions affecting only individual members"; and (ii) a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Predominance. "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The rule requires "a showing that *questions* common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans and Tr. Funds*, 568 U.S. 455, 459 (2014). Thus, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication,

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there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

Here, common questions predominate because there are few, if any, individualized factual issues, and because the core factual and legal questions involve the defendants' conduct: (1) whether their labels were false or misleading; (2) whether those labels created or were likely to create confusion among consumers; and (3) whether the conduct was willful. Questions of damages are also common: these will turn on how much money defendants made by selling their products and the extent to which conduct at issue negatively impacted the market price of authentic Kona Coffee and/or damaged the goodwill and reputation of the Kona name. Common questions predominate.

Superiority. Rule 23(b)(3)'s superiority requirement asks "whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. In other words, the court must "determine whether maintenance of this litigation as a class action is efficient and whether it is fair." *Wolin*, 617 F.3d at 1175-76. Under Rule 23(b)(3), "the Court evaluates whether a class action is a superior method of adjudicating plaintiff's claims by evaluating four factors: '(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.'" *Trosper v. Styker Corp.*, 13-CV-0607-LHK 2014 WL 4145448, at *17 (N.D. Cal. August 21, 2014).

A class action is the superior method of adjudication of these claims. First, the Settlement Class Members have little incentive to individually prosecute this action: the risks and expense of proceeding individually are prohibitive in a case like this one, in which individual damages are comparatively small in relation to the costs an individual plaintiff would have to incur to prove liability and damages, which requires expert analysis from multiple fields. *See Just Film v.*

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Buono, 847 F.3d 1108, 1123 (9th Cir. 2017) (affirming finding of superiority in case where individual damages are too small "to make litigation cost effective in a case against funded defenses and with a likely need for expert testimony"). Second, it is more efficient for the parties and the Court to have a single resolution rather than individual cases about the same issue. Without a class, the hundreds of individuals and entities that grow authentic Kona coffee would have no recourse, or a multiplicity of suits would follow resulting in an inefficient and possibly disparate administration of justice. By resolving these issues in one action, the Court "will avoid the risk of duplicative efforts by multiple judges, as well as potentially inconsistent rulings." *McCluskey v. Trustees of Red Dot Corp. Emp. Stock Ownership Plan and Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010).

Finally, because this Court is considering the likelihood of class certification in the settlement context, this Court need not consider any possible management-related problems as it otherwise would. *See Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. R. Civ. P. 23(b)(3)(D), for the proposal is that there be no trial."). Superiority is met here, and Rule 23(e)(1)(B)(ii) is satisfied.

III. The proposed notice plan should be approved.

Before a proposed class settlement may be finally approved, the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Where certification of a Rule 23(b)(3) settlement class is sought, the notice must also comply with Rule 23(c)(2)(B), which requires:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or

> defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974).

The proposed Notice program here is identical to the ones that the Court previously approved (Dkt. 400, 414, 604) and that Plaintiffs, with the Settlement Administrator, successfully effectuated, including the follow-on claims process. Like the recently approved and implemented program, it was designed in consultation with the proposed Settlement Administrator and meets all applicable standards. *See Ali v. Menzies Aviation, Inc.*, No. 2:16-CV-00262RSL, 2016 WL 4611542, at *4 (W.D. Wash. Sept. 6, 2016) (Lasnik, J.) (approving form and plan of notice).

It will, in fact, be even more efficient and effective than the notice processes for the first sets of settlements. This is because, in the course of implementing the prior notice program, the Settlement Administrator was able to refine an accurate list of addresses for Settlement Class Members, and also verify the identity of Settlement Class Members who were not on the original class list, but stepped forward to make claims after becoming aware of the settlements through publication or otherwise. That list was further refined in the second claims process.

In short, Class Counsel will again send direct notice to Settlement Class Members sent via first class U.S. Mail for all members for whom address information is available (a list that has, again, been refined and verified through implementation of the previous settlements), publication notice in the newspaper widely read and circulated in the Kona region (the *West Hawaii Today*), update the already existing settlement website—where Settlement Class Members can view the full Settlement Agreements, the Notice, and other key case documents—and update the toll-free telephone number where Settlement Class Members can get additional information. Moreover, the proposed forms of notice (Ex. 2 and Ex. 3) inform Settlement Class

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Members, in clear and concise terms, about the nature of this case, the Settlement, and their rights, including all of the information required by Rule 23(c)(2)(B).[3] The Court should approve the proposed Notice program.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant preliminary approval of the proposed settlement, direct notice to the Settlement Class, and set a schedule for the remaining steps towards final approval, as set out in the accompanying proposed order or as the Court deems fit.

Dated: September 29, 2022

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Attorneys for the Plaintiffs and the Proposed Settlement Class

[3] As in the prior settlements, certain dates in the notices are tied to the date that this Court grants preliminary approval of the proposed settlements and issuance of notice, as reflected in the accompanying proposed order. When those dates are known, the Settlement Administrator will fill in dates in the notices consistent with this Court's order. In addition, in the event that Plaintiffs either settle with or are enter into serious settlement discussions with one of the remaining defendants, Plaintiffs may ask the Court to defer the notice program associated with this settlement both to conserve notice costs that come from the class recovery and to avoid confusion among class members who have received multiple notices of settlement and claims periods.

CERTIFICATE OF SERVICE

I, Daniel E. Seltz, certify that on September 29, 2022, I 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*
Daniel E. Seltz

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

BRUCE CORKER, *et al*., on behalf of themselves and others similarly situated,

Plaintiff,

v.

COSTCO WHOLESALE CORPORATION, *et al*.,

Defendants.

Case No. 2:19-CV-00290-RSL

[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND DIRECTING ISSUANCE OF NOTICE

The Honorable Robert S. Lasnik

Upon review and consideration of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement, and all briefing, arguments, exhibits, and other evidence submitted in support thereof, including the Settlement Agreement, executed by Bruce Corker d/b/a Rancho Aloha, Melanie Bondera and Melanie Bondera, husband and wife, d/b/a Kanalani Ohana Farm, and Robert Smith and Cecilia Smith, husband and wife, d/b/a Smithfarms ("Plaintiffs"), L&K Coffee Company, LLC dba Magnum Coffee Roastery ("L&K") (collectively "Parties"), THE COURT HEREBY FINDS, CONCLUDES, AND ORDERS THE FOLLOWING:

1. Capitalized terms not otherwise defined herein shall have the same meaning as set for in the Settlement Agreement.
2. This Court has subject matter jurisdiction over this matter pursuant to 15 U.S.C. § 1125(a) and federal question jurisdiction under 28 U.S.C. § 1331.
3. The Motion is GRANTED.
4. The Court hereby preliminarily approves the Settlement Agreement and the terms embodied therein. The Court finds that the proposed Settlement Class, composed of all persons and entities who commercially farmed Kona coffee in the Kona District and then sold their coffee from February 27, 2015 to the present, likely meets the requirements for class certification

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under Fed. R. Civ. P. 23(a) and 23(b)(3) as follows:

a. The Settlement Class is so numerous that joinder of all members in a single proceeding would be impracticable;

b. The members of the Settlement Class share common questions of law and fact;

c. The Plaintiffs' claims are typical of those of the Settlement Class Members;

d. The Plaintiffs and Class Counsel have fairly and adequately represented the interests of the Settlement Class and will continue to do so; and

e. Questions of law and fact common to the Class predominate over the questions affecting only individual Class Members, and certification of the Class is superior to other available methods to the fair and efficient adjudication of this controversy.

5. The Court finds, pursuant to Fed. R. Civ. P. 23(e)(1)(B)(i), that the proposed Settlement Agreement is likely fair, reasonable, and adequate, entered into in good faith, and free from collusion. The Court finds Class Counsel have ably represented the Class as they conducted a thorough investigation of the facts and law prior to filing suit, extensive discovery, and they are knowledgeable of the strengths and weaknesses of the case. The involvement of Judge Edward Infante (Ret.) and Mark LeHocky, two highly-qualified mediators, in the settlement process supports this Court's finding that the Settlement Agreement was reached at arm's length and is free from collusion. The relief, monetary and injunctive, provided for in the Settlement Agreement outweighs the substantial costs, the delay, and risks presented by further prosecution of issues during pre-trial, trial, and possible appeal. Additionally, the proposed allocation plan treats the class members equitably in proportion to their sales to provide Class Members with adequate relief. Based on these factors, the Court concludes that the Settlement Agreement meets the criteria for preliminary settlement approval and is deemed fair, reasonable, and adequate, such that notice to the Settlement Class is appropriate.

6. The Court appoints Plaintiffs as class representatives for the Settlement Class.

7. The Court appoints Nathan Paine, of Karr Tuttle Campbell, and Jason Lichtman, Daniel

Seltz, and Andrew Kaufman, of Lieff Cabraser Heimann & Bernstein, LLP, as Class Counsel upon consideration of the factors set forth in Fed. Riv. Civ. P. 23(g).

8. Pursuant to Fed. R. Civ. P. 23(e)(1) and 23(c)(2)(B), the Court approves the proposed Notice ("Notice"), attached as Exhibit 2 to Plaintiffs' Motion. The Notice is a reasonable method calculated to reach members of the Settlement Class who would be bound by the Settlement Agreement. The Notice will be sent via first class U.S. Mail to all members for whom address information is available, and posted on the Class Settlement Website. The Court also approves the Publication Notice, attached as Exhibit 3, which will be published in the West Hawaii Daily. The Court approves, as to form and content, the proposed Notice and Publication Notice because they concisely state in plain, easily understood language, *inter alia*: (1) the nature of the case and the Settlement Agreement, including the terms thereof; (2) the definition of the Settlement Class; (3) the Class Representatives' applications for service awards; (4) that a class member may enter an appearance through an attorney and the procedures for filing an objection to the Settlement Agreement; (5) contact information for Class Counsel, and a toll-free number to ask questions about the Settlement Agreement; (6) the address of the case-specific website (the "Class Settlement Website") maintained by the Settlement Administrator that links to important case documents, including motion for preliminary approval papers, and instructions on how to access the case docket via PACER or in person; (7) important dates in the settlement approval process, including the date of the Final Approval Hearing (as described below); (8) the binding effect of a class judgment on Settlement Class Members; and (9) Class Counsel's forthcoming Attorneys' Fees Motion.

9. The Court appoints JND Legal Administration as Settlement Administrator.

10. The Court finds that the Notice meets the requirements of due process under the U.S. Constitution and Fed. R. Civ. P. 23.

11. Notice Program: Notice to Class Members shall include delivery of Notice by first class U.S. Mail and publication in the West Hawaii Today, which shall begin within 42 days of the

entry of this Order.

12. Settlement Website: As soon as practicable, the Settlement Administrator shall update the Class Settlement Website. The Class Settlement Website shall (1) post, without limitation, the Third Amended Complaint, the Settlement Agreement, and Notice; (2) notify Class Members of their rights to object or opt-out; (3) inform Class Members that they should monitor the Class Settlement Website for developments; and (4) notify Class Members that no further notice will be provided to them once the Court enters the Final Order and Judgment, other than updates on the Class Settlement Website. Furthermore, the Settlement Administrator shall establish an email account and P.O. Box to which Class Members may submit questions regarding the Settlement Agreement. The Settlement Administrator will monitor the email account and P.O. Box and respond promptly to administrative inquiries from Class Members and direct new substantive inquiries to Class Counsel.

13. No later than 21 days after entry of this Order, the Notice Administrator shall update the toll-free telephone number that Class Members can call to receive additional information about the Settlement Agreement. The toll-free number shall be operational until at least the effective date of the Settlement Agreement.

14. As provided for in the Settlement Agreement, all costs associated with implementing Notice, including fees and costs of the Settlement Administrator, will be paid out of the Settlement Fund.

15. No later than 84 days after entry of this Order, Class Counsel shall file its application for attorneys' fees and Class Representatives' request for service awards.

16. No later than 14 days before the Final Approval Hearing, the Settlement Administrator shall file an affidavit with the Court confirming its implementation of Notice in accordance with this Order.

17. Any Class Member may comment on, or object to, the Settlement Agreement, Class Counsel's application for attorneys' fees and costs, and/or the request for Plaintiffs' service

awards.

18. The following chart summarizes the dates and deadlines set by this Order:

Event	Date
Notice of Settlement to be Disseminated	45 days after entry of the Court's Preliminary Approval Order
Update of Settlement Website	21 days after the entry of the Court's Preliminary Approval Order
Update of Toll-Free Number	21 days after the entry of the Court's Preliminary Approval Order
Deadline for Class Counsel's application for attorneys' fees and Class Representatives' request for service awards	84 days after the entry of the Court's Preliminary Approval Order
Notice Administrator affidavit of compliance with notice requirements	14 days before Final Approval Hearing
Deadline to have postmarked and/or filed a written objection to the Settlement or request exclusion.	98 days after entry of the Court's Preliminary Approval Order
Final Approval Hearing	Not less than 126 calendar days after entry of the Preliminary Approval Order, or as soon thereafter as is convenient for the Court

DATED this _____ day of _____, 2022.

_____
The Honorable Judge Robert S. Lasnik
United States District Court Judge

Presented by:

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