The Honorable Robert S. Lasnik

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

BRUCE CORKER d/b/a RANCHO ALOHA, *et al.*;

Plaintiffs,

v.

L&K COFFEE CO. LLC, a Michigan limited liability company; MULVADI CORPORATION, a Hawaii corporation; MNS LTD., a Hawaii Corporation; and KEVIN KIHNKE,

Defendants.

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

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Noted for consideration: February 4, 2022

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

TABLE OF CONTENTS

Page

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

INTRODUCTION

Plaintiffs respectfully ask the Court to certify the class of Kona coffee farmers and set dates for two trials: one against Defendant L&K Coffee Co. ("L&K") and its owner, Kevin Kihnke, and one against Defendant Mulvadi Corporation ("Mulvadi") and its primary retailer, MNS Ltd. ("MNS").[1]

The case for class certification in this matter is overwhelming. The elements of Plaintiffs' claims turn entirely on Defendants' conduct in labeling the coffee they sell as originating from Kona, and thus do not present any individualized issues: each Defendant violated the Lanham Act as to all members of the proposed class or none. Summary judgment and trial on a class-wide basis will be as straightforward as the ones that would occur if Plaintiffs had brought their cases individually. And class members are as cohesive a group as exists in aggregate litigation: they all grow coffee from an objectively defined and unique geography – the Kona region of Hawaii.

Although the Court's role at class certification is not to adjudicate the merits of the case, it bears emphasis that the common evidence Plaintiffs will present is strong. Defendants L&K and Kevin Kihnke (L&K's owner) readily admit that their "Kona blend" contained at most a "handful" of coffee beans from Kona. And while Defendants Mulvadi and MNS maintain that their "100% Kona Coffee" contained 100% coffee from Kona, this is false: expert testing shows the coffee is not from Kona, and MNS' internal pricing documents show the coffee it was purchasing could not have been from Kona.

For present purposes, however, what matters is not whether Plaintiffs will ultimately prevail, but whether the proposed class will rise or fall together. It will. Plaintiffs thus ask the Court to grant this motion for class certification.

[1] Plaintiffs have moved for default against Mulvadi. If the Court grants that motion, the focus of any trial involving Mulvadi will be damages.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

I. RELEVANT BACKGROUND

The proposed class contains coffee farmers in the Kona region of Hawaii who grow the worldwide supply of Kona coffee. Five proposed representative plaintiffs have stepped forward, as their accompanying declarations each explain. *See, e.g.*, Declaration of Bruce Corker ¶ 5(a) ("I do not seek relief solely for myself, nor do I seek any type of relief that is different from the relief that I seek on behalf of all other proposed class members."). Each has taken his or her duties seriously and devoted significant time and attention to this case: producing documents, sitting for deposition, conferencing with attorneys, and reviewing numerous pleadings. *See id*. None has any interest that is antagonistic to other class members. *See, e.g.*, Declaration of Cecelia Smith ¶ 5(c) ("I know of no reason that I would gain financially while other class members would lose financially, nor do I know of any reason that I would lose financially while other class members would gain."). Perhaps most importantly, each has testified that he or she "will at all times consider the interest of other class members to be just as important as my own interests, and I will never seek to benefit myself at the expense of other class members." *See, e.g.*, Declaration of Melanie Bondera ¶ 5(b).

While Plaintiffs have settled their claims with most of the defendants, four remain: L&K Coffee, Kevin Kihnke (L&K's president), Mulvadi, and MNS (Mulvadi's primary retailer). The evidence against each is strong. More importantly for present purposes, this evidence is common: it does not vary by class member.

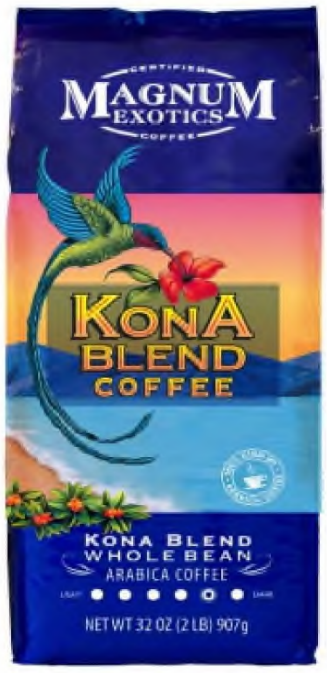
A. Kevin Kihnke & L&K Coffee.

Kevin Kihnke owns L&K Coffee, which he operates as "Magnum Coffee Roastery."[2] He approves L&K's decisions, including its product labeling and product contents. Dkt. 348-1 at 8. His company sold nearly [redacted] of coffee labeled as "Kona Blend" between 2015 and 2019,

[2] *See* https://bit.ly/3q1rB64; https://www.magnumcoffee.com/about-us-our-mission/our-mission/

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

see Ex. A,[3] although L&K has been producing "Kona Blends" since [redacted], *see* Ex. B at 142:5-15. Each of the labels displays the word "Kona" on the front of the label and most display Hawaiian imagery, such as tropical flowers on a beach with a mountainous backdrop. *See* Ex. C.



All of Mr. Kihnke's "Kona" product labels state that it is a "Kona Blend Coffee" or "Kona High Mountain Coffee," and many contain additional statements referencing Hawaii, such as the claim that its "Kona" coffee was "grown high in the mountains of Hawaii." *See* Ex. C.

Mr. Kihnke's marketing materials attributed his company's ability to offer [redacted] *See* Ex. D. But the reality is that Mr. Kihnke and L&K were able to offer this coffee at an affordable price because at least 99.99% of his coffee was from Central or South America. *See* Dkt. 348-1 at 9-12 (admitting that L&K's final product would contain at most 0.01% Kona). Indeed, L&K produced

[3] Unless otherwise noted, exhibits are attached to the Declaration of Nathan Paine ("Paine Decl.").

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

documents indicating that its recipes call [redacted] at, and that some "Kona Blends" [redacted]. *See* Ex. E (reflecting actual origins of L&K's coffee); *cf.* Ex. F at 153:19-177:25 ([redacted]).

The expert evidence against Mr. Kihnke and his company is also common to all Plaintiffs:

- Dr. James Ehleringer will present testing demonstrating that Mr. Kihnke's coffee contained, at most, trace amounts of Kona coffee. *See* Ex. S (Ehleringer Decl.).
- Dr. Melissa Pittaoulis will conduct a survey that Plaintiffs believe will demonstrate that a substantial segment of L&K consumers thought that more than a trace amount of coffee in its "Kona Blend Coffee" was from Kona. *See* Ex. T (Pittaoulis Report.).
- Dr. Michael Schreck attests that Plaintiffs suffered a common injury and will present a damages framework for the jury to measure the injury. *See* Ex. U (Schreck Decl.).
- Drs. Jeremy Verlinda & Yong Paek have calculated Defendants' revenues from the allegedly wrongful sales. *See* Ex. V (Verlinda/Paek Decl.).
- Mr. Cesar Vega has offered common testimony about the coffee industry on which Dr. Schreck relies, that helps demonstrate that Dr. Schreck's assumptions are reasonable and that will help the jury understand the litigation. *See* Ex. W (Vega Decl.).

None of this testimony requires any type of individual inquiry.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

B. Mulvadi

Steven Mulgrew formed Mulvadi 1997 in Honolulu, HI and remains its CEO and President today. *See* Ex. G at 8:20-10:5.[4] His company has apparently sold more than [redacted] of "100% Kona" coffee since 2015, although Plaintiffs do not know the exact number: Mulvadi has shielded that data, and other core information, from discovery. *See* Dkts. 544 & 561 (asking Court to strike Mulvadi's Answer). Mulvadi's at-issue labels proclaim that its coffee is "100% Kona Coffee:

See Ex. H. Mulvadi appears to agree that these labels are only lawful if Mulvadi's products contained only coffee that was grown in Kona and argues that its at-issue products were actual 100% Kona Coffee. *See, e.g.*, Dkt. 554 (response to default motion).[5]

Plaintiffs currently offer two primary common arguments in response to Mulvadi's contentions. *Cf.* Dkts. 544 & 561 (asking the Court to strike Mulvadi's Answer in part because

[4] *See also* https://hbe.ehawaii.gov/documents/business.html?fileNumber=108821D1

[5] Mulvadi admits, however, that it has never conducted any due diligence to confirm whether it is purchasing genuine Kona coffee. *See* Ex. G at 57:13-60:10; 95:24-99:6.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

Mulvadi is withholding critical evidence). First, Mulvadi claims to buy all its coffee from three small farms. *See* Dkt. 555 at 21-22. While Mulvadi continues to refuse to produce its QuickBooks data in violation of the Court's orders, *see* Dkts. 544 & 561, Mulvadi's president has asserted in a declaration that the company purchased approximately 190,380.32 pounds of roasted Kona coffee in 2018.[6] *See* Dkt. 555 at 22. But the three small farms Mulvadi has identified as its sole source of authentic Kona coffee could not have produced anywhere near that amount roasted Kona coffee. *See* Paine Decl. ¶¶ 17-18. The farm that purportedly provides the most Kona coffee to Mulvadi does not appear to exist. *See* Dkt. 563 ¶¶ 17-21. The records produced by the second farm show approximately 2,000 pounds of annual production of roasted Kona coffee. *See* Paine Decl. ¶ 17. And the third farm grows enough Kona coffee to potentially produce only 41,517 pounds of roasted coffee but sells only 10% of its annual production at wholesale in roasted form, *i.e.*, roughly 4,000 pounds. *See* Paine Decl. ¶ 18.

Moreover, according to industry estimates, all Kona coffee farmers combined only grow a total of approximately 2-3 million pounds of green Kona every year, meaning even less roasted Kona coffee can be sold to consumers.[7] In other words, Mulvadi is claiming to sell as much as 10% of the world's supply of roasted Kona coffee, *see* Dkt. 555 at 22, despite purchasing coffee grown exclusively on three small farms that either don't exist or whose own records demonstrate they are incapable of growing that much roasted Kona coffee. *See* Paine Decl. ¶¶ 17-18.

[6] Mulvadi testified that this number was generated from the same QuickBooks data that Mulvadi has failed to produce. *See* Dkt. 434-3 at 22-23. The number of pounds of Kona coffee that Mulvadi claims to sell is actually much higher as these figures do not account for Mulvadi's sales of its instant coffee labeled "100% Kona." Mulvadi continues to withhold this sales information from Plaintiffs' in violation of the Court's orders. *See* Dkts. 544 & 561.

[7] *See* Kona Coffee Council, http://www.kona-coffee-council.com/page-692163 ("just over two million pounds"); Greenwell Farms (https://blog.greenwellfarms.com/why-kona-coffee-prices-rise/) ("around 2.7 million pounds"); Imbibe Magazine, "Drinks Atlas: Kona Coffee" (https://imbibemagazine.com/drinks-atlas-kona-coffee-from-hawaiis-big-island/) ("more than two million pounds").

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

Second, Dr. Ehleringer has conducted scientific testing that indicates "very strongly" that Mulvadi's coffee is "not comprised of any significant amount of authentic Kona Region coffee beans, if any at all." Ex. S ¶ 26. He is a prominent researcher whose testimony has been accepted by courts, who has published about reliable scientific evidence with a then-prominent law professor (now a federal appellate judge), and whose research has withstood rigorous peer-review. *See id.* ¶ 6 (disclosing testimony); *id.* ¶ 8 ("I co-authored a paper with Scott Matheson, Jr. . . ."); *id.* ¶¶ 9-10 ("We published our findings in a refereed journal, and I am not aware of any academic publication that has questioned our methodology generally or those published findings specifically."). He used the same methodology in this case that he described in one of his peer-reviewed papers. *See id.* ¶ 11 ("I have applied the above methodology . . . in the manner that I describe . . . in the referenced publications."). That methodology is "very strong[]" evidence that Mulvadi's coffee is not what Mulvadi claims. *Id.* ¶ 26.

Two additional pieces of common evidence also weigh against Mulvadi:

- Mulvadi claims to purchase its coffee through an intermediary called HCC, whose [redacted] business is selling coffee to Mulvadi. HCC's records also confirm the intuition that [redacted]. *See* Ex. J. Indeed, HCC's records for 2018 show it sold [redacted] pounds of roasted Kona coffee to Mulvadi while purchasing only [redacted] pounds of roasted Kona coffee. *Id.* [8]
- Mulvadi testified that HCC has been its only supplier of freeze-dried Kona coffee since 2015. *See* Ex. G at 60:11-14. HCC testified that it has not supplied Mulvadi with any freeze-dried Kona coffee since 2017 because HCC's sole source for that product went out of business. *See* Ex. I at 115:11 -116:20. And while Mulvadi testified that it purchases the freeze-dried Kona coffee from HCC prepackaged in 1.5 ounce jars, Ex. G at 64:3-7, HCC has [redacted]. *See* Ex. I at 121:1-25; *cf.* Dkt. 544 at 15 (explaining that Mulvadi is refusing to produce discovery that would reveal its actual supplier of freeze-dried coffee).

[8] Troublingly, the records and testimony from the farms themselves show that they are incapable of selling to HCC the amount of roasted Kona coffee that HCC claims to have purchased from them. *See* Paine Decl. ¶¶ 17-18.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

Plaintiffs respectfully submit that the above evidence is very strong, particularly viewed in light of the significant evidence that Mulvadi continues to withhold. But what is most relevant for present purposes is that no aspect of this evidence differs by proposed class member.

C. MNS

MNS is the parent company of ABC Stores, a retail chain that touts itself as "one of the most recognizable brands in the Hawaii tourism industry." https://abcstores.com/about-us/ (last visited December 12, 2021). It has sold Mulvadi's "100% Kona" coffee for two decades, including more than [redacted] in sales since 2015. *See* Ex. K; *see also* Ex. L at 259:20-21 ("Mulvadi hundred percent Kona coffee sells."). MNS has created its own advertisements for Mulvadi's "100% Kona" coffee on its website, Facebook page, and Instagram page. *See* Ex. L at 126; 196-198; 217:16-25. MNS specifically authorized Mulvadi to use MNS's name and logo in television commercials for "100% Kona" coffee. *See* Ex. M. MNS jointly advertises "100% Kona" coffee with MNS on billboards in the Honolulu International Airport, *see* Ex. N, and just last month, published an advertisement offering a promotion on Mulvadi's "100% Kona" coffee products, *see* Ex. O.

Despite lending its name and efforts to this joint marketing, MNS has [redacted]. *See* Ex. L at 126: 22-25; 171:5-6; 177:19-24; 178:5-12; 185:6-12; 227:9-21. MNS has [redacted] *See* Ex. L at 163:6; 178:13-18; 215:11-20. Even after Plaintiffs initiated this litigation more than two years ago, MNS continued to market and sell Mulvadi products and [redacted]. Ex. L at 249:22-251:5.

Indeed, MNS continues to advertise and sell "100% Kona" coffee even though its attorney has observed first-hand that one of the farms where Mulvadi claimed to purchase its coffee did not exist and that the others were too small to supply the "100% Kona" coffee that

MNS sells. *See* Paine Decl. ¶ 25; *see also* Dkts. 444; 545-3. MNS, moreover, [redacted]. *See* Ex. W (Vega Decl.) ¶¶ 27-28.

II. LEGAL STANDARD

When plaintiffs seek class certification for money damages, they must affirmatively prove six prerequisites to class certification:

(1) Numerosity. Class certification is only appropriate if it is not practical to join all potential claimants in one litigation. Fed. R. Civ. P. 23(a)(1).

(2) Commonality. At least one legal or factual question must be common to every member of the class. Fed. R. Civ. P. 23(a)(2);

(3) Typicality. The named plaintiffs must have the same type of claim as other class members. Fed. R. Civ. P. 23(a)(3).

(4) Adequacy. The named plaintiffs and their counsel must represent the interests of absent class members. Fed. R. Civ. P. 23(a)(4).

(5) Predominance. Legal and factual issues that can be resolved on a classwide basis must be more important than those that could only be resolved on an individual basis. Fed. R. Civ. P. 23(b)(3).

(6) Superiority. A class action must be superior to many individual lawsuits. Fed. R. Civ. P. 23(b)(3).

See, e.g., Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013) (articulating the standards for class certification); *Stedman v. Progressive Direct Ins. Co.*, No. C18-1254RSL, 2021 WL 3036790, at *2-5 (W.D. Wash. July 19, 2021) (Lasnik, J.) (same).

III. ANALYSIS

Plaintiffs respectfully submit that class certification is not a close question. The essential questions are all common to the class, and the class shares identical claims: Defendants owe damages to every class member or none.

A. There are more than 600 class members, which satisfies the requirement of numerosity.

Plaintiffs must demonstrate that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs have established numerosity because the proposed class includes more than 600 members. *See* Dkt. 395 ¶ 6. Courts generally presume that numerosity is present when presumed when a class contains more than 40 members. *See, e.g.*, *Ali v. Menzies Aviation, Inc.*, No. 2:16-cv-00262RSL, 2016 WL 4611542, at *1 (W.D. Wash. Sept. 6, 2016) (Lasnik, J.) ("As a general rule a potential class of 40 members is considered impracticable to join.). Numerosity is satisfied.

B. There is at least one issue common to all members of the class.

Plaintiffs also must demonstrate that there is a question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2); *see also Moreno Galvez v. Cuccinelli*, No. C19-0321RSL, 2019 WL 3219418, at *1 (W.D. Wash. July 17, 2019) (Lasnik, J.). In particular, Plaintiffs must show that there is at least one common question such that "a classwide proceeding [can] generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original) (citation omitted); *see also id.* at 359 ("[E]ven a single common question will do."). Commonality is readily met in cases where, as here, the class claims arise from a defendant's uniform course of conduct. *See, e.g., 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, class members' 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

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

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 class as a whole. *Dukes*, 564 at 350.

Indeed, in another recent Lanham Act case brought by growers of an agricultural product – ginseng from the state of Wisconsin – the court found that commonality satisfied because "[t]he claims of every class member will rise or fall on the resolution of" the question of whether "defendants sold ginseng with a false designation of origin which is likely to cause confusion, mistake, or to deceive," in violation of the Lanham Act. *Baumann Farms, LLP v. Yin Wall City, Inc.*, 16-cv-605, 2017 WL 3669616, at *3 (E.D. Wis. Aug. 25, 2017). The same is true here.

C. <u>The proposed class representatives' claims are typical.</u>

Plaintiffs must also show that the representative plaintiffs' claims are typical. *See* Fed. R. Civ. P. 23(a)(3). This "focuses on the class representative's claim—but not the specific facts from which the claim arose—and ensures that the interest of the class representative aligns with the interests of the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (cleaned up). Plaintiffs establish typicality when "other members have the same or similar injury," if "the action is based on conduct which is not unique to the named plaintiffs," and if "other class members have been injured by the same course of conduct." *Id*. (cleaned up). But a class representative's "claims need not be identical to those of the absent class members . . . they must be reasonably similar in light of the injuries suffered and the conduct that allegedly caused the injuries. *Wilson v. PTT, LLC*, No. C18-5275RSL, 2021 WL 211532, at *4 (W.D. Wash. Jan. 21, 2021) (Lasnik, J.)

Typicality is met here. Proposed representative plaintiffs do not merely make arguments that are *similar* to the legal arguments of other class members (which is all that Rule 23

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

requires); the representative plaintiffs make the *same* legal arguments as other class members. Plaintiffs, like all members of the proposed Class, grew and sold authentic Kona coffee, but they competed against suppliers and sellers of coffee labeled as "Kona" or "Kona Blend" that contained little or no appreciable amount of authentic Kona coffee. Put another way, typicality is met for the same reason that commonality is met: Defendants either violated the Lanham Act as to all proposed class members, including the class representatives, or none. *Cf. Wilfredo Favela Avendaño v. Asher*, No. C20-0700JLR-MLP, 2021 WL 1424936, at *6 (W.D. Wash. Jan. 20, 2021) (explaining that in some cases the "commonality and typicality requirements of Rule 23(a) tend to merge"); *Z.D. ex rel. J.D. v. Grp. Health Co-op.*, No. C11-1119RSL, 2012 WL 1977962, at *10 (W.D. Wash. June 1, 2012) (Lasnik, J.) (same).

D. The proposed class representatives and their counsel will adequately represent the class.

Plaintiffs must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4); *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 625 (1997). The adequacy inquiry requires determining: (1) whether "the named plaintiffs and their counsel have any conflicts of interest with other class members;" and (2) whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class[.]" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citation and internal quotation marks omitted).

The proposed class representatives and their counsel meet Rule 23's "adequacy" prong. See *Ellis*, 657 F.3d at 985. First, there is no conflict between the proposed representative plaintiffs and other class members, each of who knows "of no reason that I would gain financially while other class members would lose financially, nor do I know of any reason that I would lose financially while other class members would gain." *See, e.g.*, Declaration of Cecelia Smith ¶ 5(c). Put another way "Plaintiffs' claims . . . are uniform across the class members, thus the Plaintiffs adequately represent the injuries of the putative class."). *Sampson v. Knight Transportation, Inc.*, No. C17-0028-JCC, 2020 WL 3050217, at *5 (W.D. Wash. June 8, 2020).

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

Second, there can be no serious doubt that the proposed named plaintiffs and their counsel will continue to vigorously pursue the claims of the class. *See Stedman*, 2021 WL 3036790 at *4*; David v. Bankers Life & Cas. Co.*, No. 14-cv-00766-RSL, 2019 WL 2339971, at *2 (W.D. Wash. June 3, 2019) (Lasnik, J.). Each of the proposed class representatives has testified that they "have participated actively in the case and will continue to do so" and "will at all times consider the interest of other class members to be just as important as [their] own interests, and [ ] never seek to benefit [themselves] at the expense of other class members." *See* accompanying Declarations of Corker, Bonderas, and Smiths. Indeed, the proposed class representatives and their counsel have already secured more than $13.1 million in settlements, plus injunctive relief to stop the practices at issues, for the class.[9] Adequacy should not be disputed.

E. Common issues predominate over individual ones.

Rule 23(b)(3) requires that (i) "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "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*, 568 U.S. at 459. 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, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon v. Chrysler*, 150 F.3d 1011, 1022 (9th Cir. 1998).

[9] In support of their adequacy to represent the class, proposed Class Counsel reference and incorporate the declarations, and exhibits thereto, submitted with prior settlements, which discussed their qualifications and commitment to the class. *See* Dkt. 394 (Lichtman Decl.); Dkt. 395 (Paine Decl.); *see also* Dkt. 478 ¶ 11 (finding adequacy of representation satisfied).

A court "[c]onsidering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund v. Halliburton, Co.*, 563 U.S. 804, 809 (2011). This "does *not* require a plaintiff seeking class certification to prove that each element of her claim is susceptible to classwide proof." *Amgen*, 568, U.S. at 469 (internal alterations and quotation marks omitted) (emphasis in original). Because all of the evidence that Plaintiffs will present to establish Defendants' liability applies classwide and none varies by Class member, common issues predominate here.

Plaintiffs seek to certify a single claim under the Lanham Act, invoking both Section 43(a)(1)(A) (false advertising) against all three defendants, and Section 43(a)(1)(B) (false designation) against all defendants other than MNS, against which that claim was dismissed. *See* Dkt. 154. The elements of Plaintiffs' claim under both subsections are straightforward and subject to proof common to all Class members.

1. Common issues predominate for Plaintiffs' false advertising claims.

This Court has explained that "[t]o state a claim under Section 43(a)(1)(A) of the Lanham Act, plaintiffs must allege that the supplier defendants (1) used in commerce (2) a word, false designation of origin, and/or false or misleading representation of fact (3) which is likely to cause confusion as to the origin of their coffee and (4) that such use has or is likely to damage plaintiffs." *Corker, et al. v. Costco Wholesale Corp., et al.*, 3:19-cv-00290, 2019 WL 5893291 at *2 (W.D. Wash. Nov. 12, 2019) (citing 15 U.S.C. § 1125(a)(1)(A) and *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 902 (9th Cir. 2007)).

The evidence that Plaintiffs will use to meet each of these elements is common to the Class. The focus of Plaintiffs' liability case will be Defendants' own labels, which contain the "word, false designation of origin, and/or false or misleading representation of fact" that Plaintiffs contend constitute a Lanham Act violation. Those labels, shown above in Section I, either do or do not contain a false designation of origin; the answer to question will not vary among individual Class members or apply only to some and not others. Similarly, the question of

whether Defendants' representations are likely to cause confusion as to the origin of their coffee is a common one – it does not require any inquiry of any individual Class members. Instead, Plaintiffs will offer evidence from their survey expert, as described above. *Cf. Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1110 (9th Cir. 2012) (noting that survey evidence, while not required, is "typically" offered to show materiality in Lanham Act cases). The accompanying Pittaoulis Report (Ex. T) explains how she can readily test consumers' understanding of Defendants' uniform representations – through their labels – about their coffee.

Whether Defendants' misuse of the Kona name has or is likely to damage Plaintiffs similarly raises no individual questions. Plaintiffs have alleged, and will prove, that Defendants' appropriation of the Kona name affected the prices that all Kona farmers receive for their coffee. The declaration of Dr. Michael Schreck describes a damages framework that a jury can use to measure the injury across the class. *See* Ex. U.

Finally, the question of whether Defendants' conduct was willful also does not turn on any individualized evidence. For example, L&K's decision to sell "Kona" coffee that contained no more than [redacted] actual Kona coffee (*see* Ex. F, at 153:19-177:25) may or may not contribute to a finding of willfulness, but that evidence applies across the class. The same is true for Mulvadi. It has uniformly contended that its coffee is genuine Kona against substantial evidence, none of it individualized, showing the opposite.

The only potential individual questions come from the allocation of damages—essentially an accounting exercise-which is not the type of issue that defeats a finding of predominance.[10] *See Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1155 (9th Cir. 2016) ("[T]he rule is clear: the need for individual damages calculations does not, alone, defeat class certification.").

[10] The smooth administration of prior settlements also shows that such an exercise is entirely feasible.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

2. Common issues predominate for Plaintiffs' false designation claims.

The elements of a claim under Section 43(a)(1)(B), covering false advertising, largely overlap with the elements of a false designation of origin, and similarly raise no individual questions. Those elements are:

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Skydive Ariz., 673 F.3d at 1110. Again, the focus at trial will be on Defendants' own conduct, which it directed in a uniform way towards the marketplace. Courts routinely find predominance satisfied in cases involving, as this one does, a common course of conduct involving a set of uniform alleged misrepresentations. *See, e.g., In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 559 (9th Cir. 2020) (en banc) (affirming finding of predominance).

The question of whether Defendants' alleged deceptions were likely to deceive "a substantial segment" of the consuming public is one that will be answered with common evidence – survey evidence to be offered by Plaintiffs' expert, who has offered the methodology that she will use. *See* Ex. T (Pittaoulis Report). Damages questions are also common, turning on Defendants' profits attributable to their misconduct, 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. *See* Ex. U (Schreck Decl.). These questions plainly "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022 (discussing predominance requirement). All class members' claims will rise and fall based on the answer to these questions, demonstrating that

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

their interests are "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

F. A class action is superior to other methods of adjudication.

Rule 23(b)(3) also requires a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Superiority is met here because, as a practical matter, Plaintiffs class members can only seek and obtain relief for Defendants' alleged misconduct using the class action device.

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). Each of these factors weighs heavily in favor of a finding of the superiority of the class action device.

First, 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 (as the multiple declarations supporting this motion reflect). *See Just Film*, 847 F.3d at 1123 (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"). It is also 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

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

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). Given these dynamics, it is not surprising that, as Rule 23(b)(3)(C) directs courts to consider, there is no other litigation concerning Defendants' conduct already commenced by any individual Class member.[11]

Finally, Rule 23(b)(3)'s fourth factor relevant to the superiority analysis, concerns manageability, and also weighs in favor of class certification. This factor, "which concerns the difficulty of managing a class action, depends in part on whether Plaintiffs' case 'rises and falls [on] common evidence.'" *Huynh v. Harasz*, 14-CV-02367-LHK, 2015 WL 7015567, at *12 (N.D. Cal. Nov. 12, 2015) (granting motion for class certification and quoting *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1228 (N.D. Cal. 2013)). This case will be straightforward to try, as Plaintiffs' claims – and those of the Class – will rise or fall on the strength of classwide evidence. And Plaintiffs have also shown, through the orderly execution of the notice and claims process of prior settlements, that there are no manageability issues related to the administration and payment of any monetary damages recovered for the class.

[11] As this Court has noted, for purposes of the superiority analysis, "the desirability of concentrating claims in a particular forum is relevant only when other class litigation has already been commenced elsewhere." *Olson v. Tesoro Refining and Mktg. Co.*, No. 06-cv-1311-RSL, 2007 WL 2703053, at *8 (W.D. Wash. Sept. 12, 2007) (internal quotation and citation omitted) (granting motion for class certification).

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant approval for class certification, as set out in the accompanying proposed order or as the Court deems fit.

Dated: December 22, 2021

KARR TUTTLE CAMPBELL

/s Nathan T. Paine
Nathan T. Paine, WSBA #34487
Daniel T. Hagen, WSBA #54015
701 Fifth Avenue, Suite 3300
Seattle, Washington 98104
206.223.1313

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

/s/ Jason L. Lichtman
Jason L. Lichtman (*pro hac vice*)
Daniel E. Seltz (*pro hac vice*)
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Telephone: 212-355-9500

Andrew Kaufman (*pro hac vice*)
222 2nd Avenue South, Suite 1640
Nashville, TN 37201
615.313.9000

Attorneys for the Plaintiffs and the Proposed Class

CERTIFICATE OF SERVICE

I, Daniel E. Seltz, certify that on December 22, 2021, 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

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

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.

L&K COFFEE CO. LLC, a Michigan limited liability company; MULVADI CORPORATION, a Hawaii corporation; MNS LTD., a Hawaii Corporation; and KEVIN KIHNKE,,

Defendants.

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

[PROPOSED] ORDER GRANTING MOTION FOR CLASS CERTIFICATION

The Honorable Robert S. Lasnik

1. Upon review and consideration of Plaintiffs' Motion for Class Certification ("Motion"), and all briefing, arguments, exhibits, and other evidence submitted in support thereof, the Court grants the Motion.
2. Plaintiffs are farmers who grow and sell coffee from their farms in the Kona region of Hawaii. Plaintiffs allege that Defendants L&K Coffee Co. LLC and its owner, Kevin Kihnke, Mulvadi Corporation ("Mulvadi"), and MNS Ltd. ("MNS") sell coffee that is labeled as originating from the Kona region, but in fact contains little or no genuine Kona coffee. Plaintiffs contend that Defendants' conduct has injured them and all Class members in the same way: it has depressed the price of genuine Kona coffee, damaged the reputation and goodwill of their coffee, and allowed Defendants unjustly to profit off of the Kona name.
3. Pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, Plaintiffs seek to represent a class of composed of all persons and entities who farmed Kona coffee in the Kona District and then sold their coffee from February 27, 2015 to the present.
4. The Court may certify a class under Rule 23(b)(3) if it finds that:
    a. The Class is so numerous that joinder of all members in a single proceeding would be impracticable;

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson Street, 8th Floor
New York, NY 10013-1413
Tel. 212.355.9500 • Fax 212.355.9592

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

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

d. Plaintiffs and proposed Class Counsel have fairly and adequately represented the interests of the 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 Settlement Class Members, and certification of the Class is superior to other available methods to the fair and efficient adjudication of this controversy.

5. As to Rule 23(a)(1)'s numerosity requirement, Plaintiffs have presented evidence that the Class includes more than 600 members. The Court thus finds that the proposed Class is so numerous that joinder of all members in a single proceeding would be impracticable.

6. Plaintiffs have demonstrated that there is a question of fact or law common to the class, satisfying Fed. R. Civ. P. 23(a)(2). Class members' claims are rooted in common questions of fact relating to Defendants' use of the "Kona" name and whether a defendant's label does or does not contain a false designation of origin.

7. Plaintiffs have demonstrated that their claims are typical of the claims of the class. *See* Fed. R. Civ. P. 23(a)(3). Plaintiffs establish typicality when "other members have the same or similar injury," if "the action is based on conduct which is not unique to the named plaintiffs," and if "other class members have been injured by the same course of conduct." Plaintiffs allege that grew and sold authentic Kona coffee, but they competed against suppliers and sellers of coffee labeled as "Kona" or "Kona Blend" that contained little or no appreciable amount of authentic Kona coffee, a claim that is typical of the class members they seek to represent.

8. The Court finds that the class representatives have fairly and adequately represented the class, and that there is no conflict between the class representatives and the class members. *See* Fed. R. Civ. P. 23(a)(4). The Court further finds that upon consideration of the factors

set forth in Fed. R. Civ. P. 23(g), it appoints as Class Counsel Nathan Paine, of Karr Tuttle Campbell, and Jason Lichtman, Daniel Seltz, and Andrew Kaufman, of Lieff Cabraser Heimann & Bernstein, LLP.

9. In determining whether common issues predominate over individual issues for purposes of Rule 23(b)(3), the Court has evaluated "the relationship between the common and individual issues." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). The Court has also considered the elements of the claims that Plaintiffs have brought, *see Erica P. John Fund v. Halliburton, Co.*, 563 U.S. 804, 809 (2011), and whether "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 Court concludes that common issues predominate over potential individual issues.

10. The second Rule 23(b)(3) finding requires the Court to evaluate alternative mechanisms of dispute resolution based on the factors listed in subsections (A) through (D). *See* Fed. R. Civ. P. 23(b)(3)(D). The Court has considered these factors and concludes that a class action is the superior method for adjudicating the claims of the class.

11. For the foregoing reasons, Plaintiffs' Motion is GRANTED. It is hereby ORDERED that the following class is certified pursuant to Fed. R. Civ. P. 23(b)(3): All persons and entities who farmed Kona coffee in the Kona District and then sold their coffee from February 27, 2015 to the present.

12. Class Counsel shall present a form and plan of notice to the Class, pursuant to Rule 23(c), no later than 14 days from the issuance of this Order.

DATED this _____ day of _____, 2021.

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

Presented by:

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

/s/ Daniel E. Seltz

Daniel E. Seltz (pro hac vice)
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: 212-355-9500
Email: dseltz@lchb.com

KARR TUTTLE CAMPBELL

Nathan T. Paine, WSBA #34487
Daniel T. Hagen, WSBA #54015
Joshua M. Howard, WSBA #52189
701 Fifth Avenue, Suite 3300
Seattle, Washington 98104
206.223.1313
npaine@karrtuttle.com