Zev B. Zysman (176805)
zev@zysmanlawca.com
LAW OFFICES OF ZEV B. ZYSMAN APC
15760 Ventura Boulevard, 16th Floor
Encino, California 91436
Telephone: (818) 783-8836

Jordan L. Lurie (130013)
jordan.lurie@capstonelawyers.com
Robert K. Friedl (134947)
robert.friedl@capstonelawyers.com
CAPSTONE LAW APC
1840 Century Park East, Suite 450
Los Angeles, California 90067
Telephone: (310) 556-4811

Leigh A. Parker (170565)
lparker@weisslawllp.com
WEISSLAW LLP
1516 South Bundy Drive, Suite 309
Los Angeles, California 90025
Telephone: (310) 208-2800

Attorneys for Plaintiff and the Proposed Settlement Class

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

NILOOFAR SAEIDIAN, on Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

THE COCA COLA COMPANY,

Defendant.

Case No. 09-cv-06309 SJO (JRPx)

CLASS ACTION

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: March 28, 2016
Time: 10:00 a.m.
Room: Courtroom 1 – 2nd Floor
Judge: Honorable S. James Otero

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

SECONDARY AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

By this motion, Plaintiff Niloofar Saeidian respectfully requests preliminary approval of the proposed nationwide settlement of this class action with Defendant The Coca-Cola Company ("Coca-Cola"). The proposed settlement, set forth in the concurrently filed Settlement Agreement and Release (the "Agreement"), will bring to an end a case that has been pending for over six years, and provides significant relief to Settlement Class Members through one hundred percent cash refunds, fully transferable vouchers for free Coca-Cola products, and assurance from The Coca-Cola Company that it has stopped selling Minute Maid Enhanced Pomegranate Blueberry Flavored Blend of 5 Juices (the "Product") and has no plans to reintroduce it into the market.

In addition to providing substantial relief to the Settlement Class, Coca-Cola will pay for the costs of notice and settlement administration estimated not to exceed $400,000. This includes a robust Notice Plan to be conducted by Angeion Group, a well-regarded and experienced claims administrator. Coca-Cola also will pay Class Counsel's attorneys' fee and expenses, which will not exceed $700,000 (and is well below the actual combined lodestar), and a modest incentive award of $5,000 to the Class Representative separate and apart from payments made to Settlement Class Members.

The Agreement is the result of hard-fought and arm's-length settlement discussions commencing with a full-day mediation at JAMS conducted by the Honorable Richard A. Kramer (Ret.), and followed by many months of further negotiations, often with the further assistance of Judge Kramer. The Parties negotiated the payment of attorneys' fees and costs, over and above the class relief, only *after* reaching agreement upon all other terms of this Agreement, with the direct assistance of Judge Kramer. In sum, the Agreement provides meaningful monetary relief and non-monetary relief for Settlement Class

Members who purchased the Product during the Settlement Class Period.

This case satisfies the requirements of Federal Rule of Civil Procedure 23 under the relaxed standards adopted by this Circuit for purposes of settlement. Accordingly, Plaintiff respectfully requests that the Court enter an Order which: (1) preliminarily approves the Class settlement; (2) certifies the Settlement Class for the purpose of effectuating the settlement; (3) approves the form and method of notice of the settlement and of the pendency of the litigation to the Settlement Class and order that such notice be given; and (4) schedules a hearing for final approval of the settlement. Coca-Cola supports the proposed resolution to this Action, and while it admits no liability under the Agreement, Coca-Cola has no objection to the entry of this Order.

II. SUMMARY OF THE CASE AND PROCEDURAL HISTORY

This case has a long and complicated procedural history, including a motion for class certification, a motion for judgment on the pleadings, three motions for summary judgment, a motion for reconsideration, extensive discovery, a stay while a related case proceeded to the Supreme Court, extensive settlement negotiations, and finally, this Agreement.

A. Procedural History

Plaintiff filed her original class action complaint on August 28, 2009, six and a half years ago. Plaintiff's claims were substantially similar to claims made by Pom Wonderful, in *Pom Wonderful LLC v. Coca Cola Co.*, 727 F. Supp. 2d 849, 871 (C.D. Cal. 2010) (Otero, J.), *aff'd in part, vacated in part, remanded*, 679 F.3d 1170 (9th Cir. 2012), *rev'd*, 134 S. Ct. 2228 (2014) (the "Pom Case").

In the complaint, Plaintiff alleged that the labeling, packaging, advertising and marketing methods used by Coca-Cola were false and misleading because they created the impression that the Product primarily contained pomegranate and blueberry juices, and that Coca-Cola had sought to capitalize on consumers' desire for the healthful and nutritional benefits provided by pomegranate and blueberry

juice. In truth, the product contained very little pomegranate or blueberry juice and was actually composed of mostly cheap filler juices, such as apple and grape juices. As a result, Plaintiff alleged that she and other members of the class overpaid for the Product, in that they did not get the high quality juices they believed they were purchasing. Plaintiff asserted claims under California Business & Professions Code §§17200, *et seq*. ("UCL") and California Business & Professions Code §§17500, *et seq.* ("FAL").

Defendant answered Plaintiff's Complaint in October 2009, and the Parties submitted a Joint Discovery Plan pursuant to Fed. R. Civ. P. 26(f) in November 2009, and began discovery from both sides. In March 2010, Plaintiff moved for class certification. Defendant opposed class certification, and filed a concurrent motion for judgment on the pleadings in April 2010. Both Parties thereafter moved for summary judgment. All four dispositive motions were fully briefed when, on October 8, 2010, less than two months before trial was scheduled to begin, this Court stayed this case due to developments in the Pom Case.

Specifically, this Court held that Pom Wonderful's state-law claims failed for lack of standing, and that Pom Wonderful's federal claim under the Lanham Act was precluded by the Food Drug and Cosmetic Act (the "FDCA") and FDA regulations governing the labeling for flavored juice blends. Pom Wonderful appealed those rulings, and the Court determined that, because the issues on appeal in the Pom Case overlapped with issues in this Action, a stay would promote judicial economy. The Court then struck the four fully briefed dispositive motions in this Action as moot, without prejudice to the motions being refiled at a later date.

The Pom Case followed a lengthy appellate process. With respect to Pom's state-law claims, the Ninth Circuit vacated this Court's standing ruling and remanded the state-law claims to this Court for further proceedings. This Court then held that Pom's state-law claims were expressly preempted by the FDCA and

barred by California's safe harbor doctrine, and Pom appealed that ruling. Meanwhile, with respect to Pom's federal claim, the Ninth Circuit affirmed this Court's ruling that Pom's federal claim was precluded by the FDCA, but the U.S. Supreme Court reversed that decision on June 12, 2014. Pom at that point voluntarily dismissed its appeal from the dismissal of its state-law claims, which left this Court's preemption and safe-harbor rulings as to Pom's state-law claims undisturbed.

On the heels of the Supreme Court decision, in June 2014, a putative consumer class action based on similar allegations to those asserted in this Action was filed in Florida entitled *Stansfield v. The Minute Maid Company,* Case No. 14-cv-290 (N.D. Fla.). Thereafter, on October 10, 2014, Coca-Cola filed a MDL Motion to Transfer the *Stansfield* action requesting that Panel on Multidistrict Litigation (the "Panel") coordinate and/or consolidate the *Stansfield* action with this Action in the Central District pending before this Court. Plaintiff Saeidian opposed the MDL transfer motion. On February 5, 2015, following oral argument in Florida, the Panel denied the MDL transfer motion. The Florida district court subsequently dismissed the *Stansfield* action, finding that state-law claims challenging the Product's name and label were expressly preempted.

The Court lifted the stay in this Action on February 23, 2015. On March 16, 2015, Plaintiff filed a First Amended Complaint and on April 6, 2015, Coca-Cola filed a renewed motion for summary judgment, asserting that Plaintiff's UCL and FAL claims are preempted by the FDCA and barred by California's safe harbor doctrine. This Court denied Defendant's motion on July 6, 2015. Defendant moved for reconsideration of that decision on August 26, 2015, which this Court denied on September 15, 2015. While this motion was pending, the Parties engaged in a day-long mediation before the Hon. Judge Kramer (Ret.) on September 9, 2015. The Parties did not reach an agreement that day, but resumed extensive settlement discussions for the remainder of the year with Judge

Kramer's assistance. The Parties reached a tentative agreement regarding the terms of a proposed settlement in December 2015.

B. Counsel's Efforts in Achieving this Settlement

Class Counsel has dedicated significant time and resources to this case over the course of the past six years. Class Counsel prepared the initial complaint, amended complaint, memoranda of law in support of class certification; a memorandum of law in opposition to Defendant's motion for judgment on the pleadings; memoranda of law in support of Plaintiff's motion for summary judgment and in opposition to Defendant's two motions for summary judgment; and a memorandum of law in opposition to Defendant's motion for reconsideration of its renewed motion for summary judgment. In connection with Plaintiff's motion for class certification and summary judgment, Plaintiff retained a consumer survey expert, Dr. Michael Belch, who conducted an exhaustive consumer survey regarding the advertising of the Product at considerable expense to Class Counsel.

In addition, Class Counsel engaged in an extensive period of discovery. Class Counsel served detailed class and merits discovery requests, including one set of special interrogatories, one set of requests for admission, and two sets of document requests, resulting in the production of nearly *200,000* pages of documents which Class Counsel reviewed. Throughout discovery, Class Counsel participated in hours of meet-and-confers with Defendant's counsel. Class Counsel also took three depositions of Defendant's employees, and served seven subpoenas on third party advertising and marketing firms that did work for Coca-Cola. Class Counsel also prepared responses to one set of special interrogatories and requests for admission, two sets of requests for production served by Coca-Cola, and prepared for and attended Plaintiff's all-day deposition. Class Counsel has also reviewed all the deposition transcripts and expert reports in the Pom Case.

This case has required significant resources by Class Counsel, in extensive

time and money required to litigate this case against a sophisticated and well-represented Defendant. As a result of these efforts, Class Counsel is fully informed of the merits of this Action and the proposed settlement.

C. Uncertainty Regarding the Outcome

Plaintiff is confident in the merits of her claims, but as with any litigation, the outcome of this case is far from certain. Many issues remain to be determined, and there is no guarantee that a trial would result in a liability finding against Defendant. Nor is it assured that recovery would be awarded to Plaintiff or Class Members. If the Parties did not reach a settlement, Defendant would have undoubtedly asserted it had no liability whatsoever to the Class and, that even in the event liability were established, it was uncertain whether Class Members could recover damages in the full amount of the purchase price of the Products, as permitted under the Settlement. *See Ivie v. Kraft Foods Global, Inc*., 2015 WL 183910, at *2 (N.D. Cal. Jan. 14, 2015) (advocating for the price premium model rather than awarding the full purchase price of the misbranded products).

Moreover, even if Plaintiff were to prevail at class certification and trial, any relief to Plaintiff and Class Members could be substantially delayed, and perhaps overturned, on appeal. Defendant has maintained throughout this case that Plaintiff's claims are preempted by the FDCA and barred by California's safe harbor ruling. While this Court rejected Defendant's motion for summary judgment on those grounds, Defendant has the right to appeal that determination after entry of a final judgment, and it is possible that the Ninth Circuit could reach a different conclusion, especially when two courts—the *Stansfield* court and this Court in the Pom Case—previously held that similar claims are preempted. As such, in the absence of the settlement, Plaintiff would have faced significant litigation risks and no substantial prospect of obtaining a better result on behalf of the Class Members. Therefore, this settlement provides complete relief to the Class without the delay and risk of further litigation.

III. THE PROPOSED SETTLEMENT IS A FAIR AND REASONABLE DISTRIBUTION OF BENEFITS TO CLASS MEMBERS

Federal Rule of Civil Procedure 23(e) requires judicial approval for any compromise of claims brought on a class basis. Approval of a proposed settlement is a matter within the discretion of the district court. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). This discretion should be exercised in the context of a public policy which strongly favors the pretrial settlement of class action lawsuits. *Id.*; *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("Voluntary conciliation and settlement are the preferred means of dispute resolution . . . ."); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *In re NVIDIA Corp. Deriv. Litig.*, No. C-06-06110-SBA, 2008 WL 5382544, at *2 (N.D. Cal. Dec. 22, 2008). As the Court in *Nelson v. Bennett* explained:

> [T]he suggestion that there is no federal policy to encourage settlement truly borders on the absurd. Not only have federal courts long recognized the public policy in favor of the settlement of complex securities actions, but the Ninth Circuit in particular has stated: "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits . . . which frequently present serious problems of management and expense." Especially in these days of burgeoning federal litigation, the promotion of settlement is as a practical matter, an absolute necessity.

662 F. Supp. 1324, 1334 (E.D. Cal. 1987) (internal citations omitted) (quoting *Van Bronkhorst*, 529 F.2d at 950).

Beyond this strong judicial policy favoring settlements, "the Court need only conclude that the settlement of the claims on the agreed upon terms is within

the range of possible approval." *In re NVIDIA Corp.*, 2008 WL 5382544, at *2. In making this determination, the Court evaluates whether the settlement is "fair, reasonable, and adequate," and that it is "not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Id.* (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir.1982). The court need not "engage in analysis as rigorous as is appropriate for final approval." Manual for Complex Litigation, § 21.63 commentary, p. 489; *see also Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008) (stating that the court need do no more than a "cursory review of the terms of the parties' settlement for the purpose of resolving any glaring deficiencies").

An evaluation of the costs and benefits of settlement must be tempered by a recognition that any compromise involves concessions of the part of all of the settling parties. *In re NVIDIA Corp.*, 2008 WL 5382544, at *3. Indeed, "the very essence of a settlement is compromise, a yielding of absolutes and an abandoning of higher hopes." *Id.* (quoting *Officers for Justice*, 688 F.2d at 624) (internal quotation marks omitted). As the Fifth Circuit noted in *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977): "The trial court should not make a proponent of a proposed settlement justify each term of settlement against a hypothetical or speculative measure of what concessions might have been gained" (internal quotation marks omitted).

Applying the foregoing standards in this case, the proposed settlement between Plaintiff and Coca-Cola should be preliminarily approved.

A. The Proposed Notice Program Satisfies the Requirements of Due Process

Defendant has retained Angeion Group, which has developed a robust notice program that reaches the maximum number of Settlement Class Members practicable. As set forth in the Declaration of Steven Weisbrot, attached as Exhibit A to the Settlement Agreement, the Notice Plan will consist of a

combination of online advertisements and an advertisement in *People* magazine. This combined plan will reach approximately 70.2% of Class Members, which satisfies due process. *See also* Agreement, §§6.6-6.7.

Class Members will be directed to a Settlement Website, www.flavoredjuicesettlement.com, where claimants can easily locate all court documents and information regarding the settlement. Settlement class members will also be able to submit claims through an easy-to-use online submission program on the Settlement Website. Angeion will also establish a toll-free telephone support program, which will provide Settlement Class Members with general information about the settlement, answers to frequently asked questions, and the opportunity to request more information and to receive a claim form by mail, which they can subsequently submit by mail. In addition, Coca-Cola will place a direct link on the Minute Maid website (www.minutemaid.com) that will connect directly to the Settlement Website, allowing users who visit the Minute Maid website to locate information about the settlement and submit claims online. Agreement, §§6.3, 6.8, 6.9.

This Notice Plan satisfies the requirements for due process, provides class members with readily available information regarding the settlement, and provides a straightforward, easy method for submitting claims online.

B. The Settlement Provides Significant Value to Class Members Through Cash Refunds and Product Vouchers

Settlement Class Members can file a claim for ***full*** cash refunds pertaining to their purchases of the Product during the 90-day Class Period. Settlement Class Members who provide a Proof of Purchase, such as a sales receipt, print out from a loyalty program, or other relevant documentation will receive full cash refunds for all purchases so documented. To obtain the cash payment, Class Members need only fill out and submit a simple, straight-forward Claim Form where the claimant provides his or her name, address, telephone number, and the total

amount of their actual purchase(s) of the Product during the Class Period. There is ***no*** cap on the total amount of money that will be refunded to those Settlement Class Members who provide Proof of Purchase. The Claim Forms can be submitted online via the Settlement Website at www.flavoredjuicesettlement.com or downloaded and submitted by U.S. Mail. Settlement Class Members will also be able to request a copy of the Claim Form by calling a toll-free number operated by the Settlement Administrator or writing the Settlement Administrator. Agreement, §§4.1, 4.3. This relief is arguably more than claimants would have been able to obtain at trial, because it refunds the full purchase price of the Products, rather than limiting damages to the price premium attributable to Defendant's alleged misrepresentations. *See Ivie*, 2015 WL 183910, at *2.

At the Settlement Class Member's election, Coca-Cola will provide Product Replacement Vouchers (the "Vouchers") to Class Members who purchased the Product, but do not provide a Proof of Purchase. Agreement, §4.2. The Vouchers are redeemable for a ***free*** product replacement(s) of an eligible product. Eligible Coca-Cola products include products sold under the Minute Maid, Simply, Smartwater, Vitaminwater, Vitaminwater Zero, and Honest Tea brands. Class Members' claims will be honored on a first-come, first served basis until the number of Vouchers claimed reaches 200,000. Agreement, §§4.2.1, 4.2.3, 4.2.4.

In order to receive a Voucher(s), Settlement Class Members need only submit a short Claim Form where the claimant provides his or her name, address, telephone number, the number of Products (any size) purchased during the Class Period, and attesting that they purchased the Product(s). Agreement, §§4.2.2. This option for recovery is significant because it ensures that Class Members can participate in a manner that is convenient and does not require them to maintain or submit proof of past purchases.

For each bottle of the Product purchased, Class Members will receive one Voucher, with a maximum recovery of two Vouchers. The Vouchers in this case

may be used for the purchase of any product under the Minute Maid, Simply, Smartwater, Vitaminwater, Vitaminwater Zero, and Honest Tea brands, and have a maximum value of $4.99, which is intended to cover the full purchase price of the product. Class Members may submit one Claim Form per household. Absolutely ***no*** cash is required to redeem a Voucher for an eligible product as the Vouchers cover the entire purchase price of the eligible product. The maximum value of a single Voucher is $4.99, or $9.98 for a total of two (2) Vouchers. Vouchers are valid for eighteen (18) months and are fully transferable. Agreement, §§4.2.3, 4.2.5-4.2.8.

Courts have regularly held that vouchers like those to be distributed to Class Members in this case constitute valuable compensation. Moreover, in a recent decision, the Ninth Circuit determined that vouchers do not constitute a "coupon settlement" within the Class Action Fairness Act ("CAFA") and are not subject to the heightened scrutiny required under 28 U.S.C. § 1712(e). As explained by the Ninth Circuit, in CAFA's findings and purposes, "Congress emphasized its concern about settlements when class members receive little or no value" in cases in which "class members receive nothing more than promotional coupons to purchase more products from the defendants" and are required to "hand over more of their own money before they can take advantage of the coupon, and they often are only valid for select products or services." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 950–51 (9th Cir. 2015) (citing S. Rep. No. 109-14 at 15 (2005)). The Ninth Circuit contrasted those concerns with the settlement before it, which gave class members $12 gift cards to spend on any item sold at Walmart. *Id.* at 951. The gift cards could be used on multiple products, were "freely transferrable," and "did not require consumers to spend their own money," which the court found to be appropriate relief to the class. *Id.* Accordingly, the Court should follow the example of *Online DVD* and find that the Vouchers, like the gift cards in *Online DVD*, are not "coupons" within the meaning of CAFA.

District courts in the Ninth Circuit have consistently reached the same conclusion in class action settlements that offer gift cards or vouchers. *See Morey v. Louis Vuitton North America, Inc.*, 2014 U.S. Dist. LEXIS 3331 (S.D. Cal. Jan. 10, 2014) (emphasizing that coupons and vouchers are "not equivalent" and reasoning that a "voucher is more like a gift card or cash where there is an actual cash value, is freely transferable, and does not require the class members to spend any additional money in order to realize the benefits of the settlement"); *Foos v. Ann, Inc.*, 2013 U.S. Dist. LEXIS 136918 (S.D. Cal. Sept. 14, 2013) (holding that $15 gift cards to Ann Taylor stores were not "coupons" under CAFA because class members "will have the opportunity to receive *free* merchandise, as opposed to merely *discounted* merchandise") (emphasis in original); *Young v. Polo Retail, LLC*, 2007 U.S. Dist. LEXIS 27269 (N.D. Cal. Mar. 28, 2007) (approving settlement that distributed gift cards that were fully transferable; "this enables class members to obtain cash – something all class members find useful").

C. The Settlement Includes a Commitment From Coca-Cola That It Is No Longer Selling the Product and Has No Plans to Reintroduce It, As Well As a Donation by Coca-Cola of $300,000 in Goods To a Charitable Organization.

In addition to distributing an unlimited amount of cash refunds to class members with proof of purchase, 200,000 Vouchers worth $4.99 each, and separately covering the costs of notice and administration of this lawsuit (approximately $400,000), attorneys' fees and costs (up to $700,000), and an incentive payment ($5,000)[1], Coca-Cola has also affirmed that, while this case was pending, it stopped selling the Product, and that it has no plans to reintroduce it in

[1] Pursuant to *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 2010 WL 3239460 (9th Cir. 2010), Class Counsel will file an application to the Court for a fee and expense award and incentive award no later than 14 days in advance of the deadline for filing objections.

the United States. This relief provides additional value to Class Members, who will not be subject to the labeling and advertising that Plaintiff alleged was false and misleading. Coca-Cola has also agreed to donate $300,000 in goods to Feeding America, a charitable organization, in connection with this settlement.

IV. THE COURT SHOULD CERTIFY A CLASS FOR SETTLEMENT

"Parties may settle a class action before class certification and stipulate that a defined class be conditionally certified for settlement purposes." *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) (citing *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003)). For the purpose of conditionally certifying the class for settlement purposes, the Court evaluates the relevant factors under Rule 23:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. Pro. 23(a); *see also In re Wireless Facilities, Inc.*, 253 F.R.D. at 610.

In addition, Plaintiff must establish that one of the factors under Rule 23(b) is met: (1) there is a risk of inconsistent or unfair adjudication if parties proceed with separate actions; (2) the defendant acted or refused to act on grounds generally applicable to the class, making injunctive or declaratory relief appropriate to the class as a whole; or (3) common questions of law or fact predominate and class resolution is superior to other available methods for fair and efficient adjudication of the controversy. Fed. R. Civ. Pro. 23(b).

Here, the Settlement Class satisfies the Rule 23(a) elements of numerosity, commonality, typicality, and adequacy of representation, and additionally satisfies Rule 23(b)(3), as set forth in full below.

A. Numerosity

To satisfy numerosity, Rule 23(a)(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. Pro. 23(a)(1). "Impracticability means difficulty or inconvenience of joinder; the rule does not require impossibility of joinder." *In re Ashanti Goldfields Secs. Litig.*, No. CV 00 0717(DGT), 2004 WL 626810, at *11 (E.D.N.Y. Mar. 30, 2004) (quoting *In re Blech Sec. Litig.*, 187 F.R.D. 97, 103 (S.D.N.Y. 1999)). Plaintiff need not allege the exact number or identity of class members to satisfy the numerosity requirement. *See Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 637 (N.D. Cal. 2007). "As a general matter, courts have found that numerosity is satisfied when the class size exceeds 40 members." *Slaven v. BP Am., Inc*., 190 F.R.D. 649, 654 (C.D. Cal. 2000).

Here, the numerosity requirement is clearly satisfied. Among other things, Defendant is one of the largest beverage manufacturers in the United States. The Settlement Class is comprised of thousands of consumers who purchased the Juice Product, spread geographically throughout the United States. This overwhelming number of class members demonstrates that joinder is both difficult and impracticable. Accordingly, Rule 23(a)(1)'s numerosity requirement is readily satisfied.

B. Commonality

Next, Rule 23(a)(2) requires a showing of "questions of law or fact common to the Class." Fed. R. Civ. Pro. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This means that the class members' claims "must depend on a common contention . . . of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that it is central to the validity of each one of the claims in one stroke." *Id*. "What matters to class certification . . . is not the

raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. As the Ninth Circuit has noted, "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler*, 150 F.3d 1011, 1019 (9th Cir. 1998).

Here, there are ample issues of both fact and law that are common to the members of the Class. The common and unifying allegations in the action are, *inter alia*, whether Defendant made false and/or misleading misrepresentations and/or omissions on the label of the product packaging and advertising with respect to the actual pomegranate and blueberry juice content of the Product and whether Defendant's representations and/or omissions have misled or are likely to mislead the Class into believing that the Product contains more pomegranate and blueberry juice than it actually does. Commonality is satisfied here, for settlement purposes, by the existence of these common factual issues. Courts have consistently certified classes in cases involving a course of conduct arising out of a common nucleus of operative facts. *See Browder v. Fleetwood Enters., Inc.*, No. ED CV 07-01180 SGL, 2008 WL 4384245, at *6 (C.D. Cal. 2008) (holding that commonality existed because defendant was alleged to have given the *same* defective instruction to all class members).

Moreover, Plaintiff's claims are brought under legal theories common to the class as a whole. Alleging a common legal theory is alone enough to establish commonality. *See Morgan v. Laborers Pension Trust Fund*, 81 F.R.D. 669, 676 (N.D. Cal. 1979). Here, all of the legal theories and causes of action, particularly those based on common law (breach of express warranty, negligent misrepresentation, and unjust enrichment) asserted by Plaintiff are common to all Settlement Class Members. Consumers who purchased the Product can establish

their claims via uniform and common proof, namely, that Plaintiff and the Class did not receive any disclosure on the product packaging that the Product contains very little pomegranate or blueberry juice. Because this case challenges Coca-Cola's labeling and advertising that contained the ***same*** representations and/or omissions, this is sufficient to demonstrate commonality under Rule 23(a)(2). Thus, the determination of whether the Defendant's labeling and advertising is or is not misleading will resolve a central issue on a classwide basis in "one stroke."

C. Typicality

The typicality requirement of Rule 23(a)(3) is met if the claims of the named plaintiff are typical of the class, though "they need not be substantially identical." *Hanlon*, 150 F. 3d at 1020. Rather, factual differences may exist between the class and the named plaintiff, provided the claims arise from the same events or course of conduct and are based upon the same legal theories. *Id*. The typicality and commonality elements under Rule 23(a) "tend to merge" because both assess whether the claims of the class and the named plaintiffs are sufficiently interrelated to make class treatment appropriate. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13 (1982). Moreover, the focus is "'on the defendants' conduct and plaintiff's legal theory,' not the injury caused to the plaintiff." *Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) (quoting *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992)).

Here, Plaintiff's claims arise from the same factual matrix and are based on the same legal theory as the claims of the absent class members. The claims of Plaintiff and the other Class Members all arise from the "same course of events" - that is, Coca-Cola's identical representations and/or omissions on the product label concerning the pomegranate and blueberry juice content of the product - and each Class Member would have been required to make the same legal arguments to prove Coca-Cola's liability. Plaintiff and the Settlement Class allege they have suffered or are likely to suffer the same type of injury as a result

of purchasing the Product. Plaintiff's claims are thus typical of the claims of the members of the Class.

D. Fair and Adequate Representation

Rule 23(a)(4) requires the court to ensure that "the representative parties will fairly and adequately protect the interests of the class." This factor requires (1) that the proposed representative Plaintiff does not have conflicts of interest with the proposed class, and (2) that Plaintiff is represented by qualified and competent counsel. *Hanlon*, 150 F. 3d at 1020.

Under this standard, Plaintiff will fairly and adequately protect the interests of the class. Plaintiff's interests are fully aligned with the Class Members, and no conflict of interest exists. The adequacy of Plaintiff and her counsel is also evidenced by the settlement negotiated with Defendant, which provides for significant relief to the Settlement Class. Further, Plaintiff is represented by competent counsel who have outstanding records of accomplishments in the prosecution of complex consumer class actions in both state and federal courts. *See* Declaration of Zev B. Zysman In Support of Motion for Preliminary Approval, ¶¶12-13, and Exhibit A.

E. Common Questions of Law and Fact Predominate Over Any Questions Affecting Only Individual Members, And A Class Action Is Superior To Other Methods of Adjudication

Plaintiffs seek certification of a Settlement Class under Rule 23(b)(3), in that "the actual interests of the parties can be served best by settling their difference in a single action." *Hanlon*, 150 F.3d at 1022 (quoting 7A C.A. Wright, A.R Miller, & M. Kane, Federal Practice & Procedure §1777 (2d ed. 1986). There are two fundamental conditions to certification under Rule 23(b)(3): (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R Civ. P. 23(b)(3); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir. 2001); *Hanlon*, 150 F.3d at 1022. Rule 23(b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (citations omitted and alterations in original). Moreover, when assessing predominance and superiority, the Court may consider that the class will be certified for settlement purposes only. *Id*. at 618-620. Accordingly, considerations of potential management problems for trial need ***not*** be considered in the settlement context. *Id*. at 621.

1. Common Questions Predominate Over Individual Issues

The Rule 23 (b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "Predominance is a test readily met in certain cases alleging consumer . . . fraud . . ." *Id*. "When 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." Fed. Prac. & Proc., § 1778; *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.l3 (1982) (noting that commonality and typicality tend to merge).

The predominance requirement is satisfied here. Plaintiff's and Class Members' claims are based on the *identical* misrepresentations and/or omissions concerning the actual pomegranate and blueberry juice content that Coca-Cola made on *the label of every single bottle* it sold to the Class Members. There were *no* variances in their content from one consumer to the next. All purchasers were uniformly exposed to the identical labeling. As such, Plaintiff alleges that Class Members are entitled to the same legal remedies based on the same alleged

wrongdoing. The central issues for every Class Member are whether Defendant engaged in unlawful, unfair, misleading, or deceptive business acts or practices in violation of the UCL and FAL, whether Defendant is liable for negligent misrepresentation and breach of express warranty, whether Defendant has been unjustly enriched, and whether Plaintiff and Class Members are entitled to any damages, restitution, and/or other monetary relief, and if so, the amount and nature of such relief.

Under these circumstances, there is sufficient basis to find that the requirements of Rule 23(b)(3) are present. *See Weiner v. Dannon*, 255 F.R.D. 658, 669 (C.D. Cal. 2009) (predominance satisfied when alleged misrepresentation of product's health benefits were displayed on ***every*** package); *Hanlon*, 150 F.3d at 1022-23 ("[G]iven the limited focus of the action, the shared factual predicate and the reasonably inconsequential differences in state law remedies, the proposed class was sufficiently cohesive to survive Rule 23(b)(3) scrutiny."); *In Re Sony SXRD Rear Projection Television Class Action Litigation*, 2008 WL 1956267 (S.D.NY. 2008) (class treatment in the context of nationwide settlement-only is proper because allegations regarding Sony's violations of, *inter alia*, the various states express and implied warranties subject to the same generalized proof).

Furthermore, the Second Amended Complaint adds claims for common law causes of action, which ensure that common questions of law predominate over the nationwide class. Courts routinely certify nationwide classes in false advertising cases, particularly in cases that bring claims under the common law. *See In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 675 (S.D. Fla. 2015) (granting class certification in nationwide suit alleging unjust enrichment and concluding that, where defendant allegedly misled class members through uniform misrepresentations, "minor variations in the elements of unjust enrichment under the laws of the various states" do not defeat class certification) (citation, quotation marks, and ellipses omitted); *Rodriguez v. It's Just Lunch, Int'l*, 300 F.R.D. 125,

135–36 (S.D.N.Y. 2014) (certifying nationwide class for common law fraud claims where plaintiffs demonstrated materially uniform misrepresentations to class members); *Ebin v. Kangadis Food, Inc*., 297 F.R.D. 561 (S.D.N.Y. 2014) (certifying nationwide class of purchasers of oil allegedly mislabeled as "100% olive oil"); *Rossi v. P&G*, 2013 U.S. Dist. LEXIS 143180, at *1 (D.N.J. Oct. 3, 2013) (certifying and approving settlement in consumer class action over allegedly false labeling for Crest Sensitivity toothpaste); *Johnson v. General Mills, Inc.*, 2013 U.S. Dist. LEXIS 90338, at *1 (C.D. Cal. June 17, 2013) (granting final approval to nationwide settlement in suit over "digestive health" claims in yogurt); *Gallucci v. Boiron, Inc.*, 2012 U.S. Dist. LEXIS 157039, at *1 (S.D. Cal. Oct. 31, 2012), *aff'd sub nom. Galluci v. Gonzales*, 603 F. App'x 533 (9th Cir. 2015) (approving nationwide class settlement in suit over labeling and advertising of homeopathic product). The predominance requirement is clearly satisfied in this case, as the Second Amended Complaint asserts claims for breach of express warranty, unjust enrichment, and negligent misrepresentation on behalf of a nationwide class of consumers. Variations in the elements of each cause of action in each state (if any) do not defeat the undeniable fact that common issues predominate over any individual variation in class members' claims in light of the uniform misrepresentations and omissions made by Coca-Cola in its labeling and advertising of the Product.

2. A Class Action is the Superior Method to Settle this Controversy

Rule 23(b)(3) sets forth the relevant factors for determining whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy. These factors include: (i) the class members' interest in individually controlling separate actions; (ii) the extent and nature of any litigation concerning the controversy already begun by or against class members; (iii) the desirability or undesirability of concentrating the litigation of the claims in the

particular forum; and (iv) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3); *see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92 (9th Cir. 2001). "[C]onsideration of these factors requires the court to focus on the efficiency and economy elements of the class action so that cases allowed under subdivision (b)(3) are those that can be adjudicated most profitably on a representative basis." *Zinser*, 253 F.3d at 1190 (citations omitted); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (finding the superiority requirement may be satisfied where granting class certification "will reduce litigation costs and promote greater efficiency"). Application of the Rule 23(b)(3) "superiority" factors shows that a class action is the preferred procedure for this Settlement.

First, the amount of damage to which an individual class member would be entitled is not large. *Zinser*, 253 F.3d at 1191; *Wiener*, 255 F.R.D. at 671. It is neither economically feasible, nor judicially efficient, for the tens of thousands of Class Members to pursue their claims against Defendant on an individual basis. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Hanlon*, 150 F.3d at 1023; *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971).

Second, except for this Action, Plaintiff is unaware of any other actions by Class Members against Defendant asserting similar claims as here.

Third, certification would be superior because concentrating this litigation in one forum would not only prevent the risk of inconsistent outcomes but would also "reduce litigation costs and promote greater efficiency." *Negrete v. Allianz Life Ins. Co. Of North America*, 238 F.R.D. 482, 493 (C.D. Cal. 2006).

Finally, the question here is "whether reasonably foreseeable difficulties render some other method of adjudication superior to class certification." *In re Prudential Ins. Co. Of Am. Sales Practice Litig*., 962 F. Supp. 450, 525 (D.N.J. 1997). Since this Action will now settle, the Court need not consider issues of manageability relating to the trial. As the Supreme Court recognized in *Amchem*,

for certification of a settlement class "predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Id.* at 625. The Court explained that predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. Accordingly, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Id.* at 620.

Indeed, under these same guiding principles, the Ninth Circuit has upheld *settlement-only* class certification in nationwide settlements. In *Hanlon*, the Ninth Circuit found predominance met for purpose of certifying a nationwide vehicle defect settlement class applying each individual's state consumer protection laws. Relying on *Amchem* and in discussing the elements of Rule 23(b)(3), the Ninth Circuit noted, "although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and 'lemon laws.'" *Id.* at 1022. Accordingly, the Ninth Circuit upheld certification of the nationwide settlement-only class explaining that "idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims." *Id.* at 1022-23.

Therefore, there are no serious manageability difficulties presented by conditionally certifying this case for nationwide *settlement purposes only*, such as choice of law issues. *See Johnson v. General Mills*, No. 10-cv-00061, 2013 WL 3213832, at *1 (C.D. Cal. June 17, 2013) (nationwide class certified for settlement purposes); *United Desert Charities v. Sloan Valve Company, et al.*, No. 12-cv-

06878-SJO, ECF No. 147 (C.D. Cal. Aug. 25, 2014) (same); *In re Alexia Foods, Inc. Litig.*, No. 11-cv-06119-PJH, ECF No. 66 (N.D. Cal. Dec. 12, 2013) (same). As this case will not go to trial if finally approved, all that would remain is claims administration if the settlement is granted final approval. Therefore, Plaintiff has satisfied the requirements of Rule 23(b)(3).

V. THE FINAL APPROVAL HEARING SHOULD BE SCHEDULED

The last step in the settlement approval process is a Final Approval Hearing at which this Court may hear all evidence and argument to determine whether to grant final approval to the settlement. Plaintiff respectfully requests that the Court set the following schedule for final approval of the settlement:

Serving Notice on Appropriate Federal and State Officials	Within 10 days following the filing of Proposed Settlement Agreement
Commencement of Class Notice to the Class Members ("Notice Date")	Within 30 days after Preliminary Approval
Last day for filing Plaintiff's Motion for Attorneys' Fees, Costs, and Incentive Award	No later than 14 days prior to the Objection Deadline
Last day for Class Members to Opt-Out or submit Objections to Settlement	Within 90 days from the Notice Date
Last day for filing Motion for Final Approval and Response to any Objections	No later than 14 days prior to Final Approval Hearing

Final Approval Hearing	On August 29, 2016 at 10:00 a.m. or first available date thereafter

VI. CONCLUSION

For the foregoing reasons, the Parties respectfully request that this Court (1) preliminarily approve the terms of the settlement reached by the Parties; (2) certify the Settlement Class for the purpose of effectuating the settlement; (3) approve the form and method of notice of the settlement and of the pendency of the litigation to the Class and order that such notice be given; and (4) set a hearing for Final Approval of the settlement.

Dated: February 26, 2016

/s/ Zev B. Zysman

LAW OFFICES OF ZEV B. ZYSMAN

A Professional Corporation
15760 Ventura Boulevard, 16th Floor
Encino, CA 91436
Telephone: (818) 783-8836
Facsimile: (818) 783-9985

Attorneys for Plaintiff and the Proposed Settlement Class