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and others similarly situated

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OSIE MARSHALL, YASNA CUEVAS, and JOHN VAN ES, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

MONSTER ENERGY COMPANY, D/B/A HANSEN BEVERAGE COMPANY, AND DOES 1 THROUGH 50, INCLUSIVE,

Defendant.

Case No. 14-cv-06311-MMM (PLAx)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Date: January 25, 2016
Time: 10:00 a.m.

Hon. Margaret M. Morrow
Courtroom 780

Complaint Filed: April 4, 2014
Trial Date: April 12, 2016

TO THE PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 25, 2016 at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 780 of the above-referenced court, located at 255 East Temple Street, Los Angeles, California, 90012, Plaintiffs Osie Marshall, Yasna Cuevas, and John Van Es ("Plaintiffs") will, and hereby do, move this Court for an order granting preliminary approval of a class-wide settlement reached in the above-captioned action, as well as for conditional certification of the Class defined in the Settlement Agreement and Release ("Agreement"). This motion is filed pursuant to the Court's Minute Order dated October 20, 2015 [ECF No. 69].

This Motion is made pursuant to Federal Rule of Civil Procedure 23 and is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Anthony J. Orshansky and Justin Kachadoorian filed concurrently herewith, all of the pleadings and other documents on file in this case, all other matters of which the Court may take judicial notice, and any further argument or evidence that may be received by the Court.

The required meet and confer pursuant to Local Rule 7-3 took place throughout the settlement negotiations, and, in particular, the filing of this Motion is contemplated by the Agreement and is unopposed by Monster Energy.

Dated: December 28, 2015

COUNSELONE, P.C.

By: /s/ Anthony J. Orshansky
Anthony J. Orshansky

ATTORNEYS FOR PLAINTIFFS OSIE MARSHALL, YASNA CUEVAS, AND JOHN VAN ES

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I. INTRODUCTION

After almost two years of informal negotiations and litigation, Plaintiffs Osie Marshall, Yasna Cuevas, and John Van Es present for the Court's consideration an agreement to settle this consumer class action pursuant to the terms set forth in the accompanying Settlement Agreement and Release (the "Agreement").[1]

This case was brought by Plaintiffs against Defendant Monster Energy Company for relief associated with labeling violations relating to certain juice and soda products developed, marketed, and sold by Monster Energy. After Plaintiffs sent their demand letter in September 2013, the parties participated in a formal, unsuccessful mediation with the assistance of the Hon. Steven Stone of JAMS (Ret.). Once Plaintiffs filed suit, the parties engaged in informal and formal discovery, and Monster Energy produced documents addressing the labeling, packaging, advertising, sales, and pricing of the products at issue. These efforts, combined with Class Counsel's independent investigation and analysis, have afforded the parties an in-depth understanding of the respective strengths and weaknesses of Plaintiffs' claims and of Monster Energy's defenses.

Based on arm's-length negotiations, the parties have reached an Agreement that provides substantial monetary and injunctive relief to California consumers. Class Members have the option to choose either: (i) a $0.50 Cash Payment per purchase for up to 20 purchases (maximum value of $10.00) or (ii) a $1.00 Off Merchandise Certificate per purchase for up to 20 purchases (maximum value of $20.00). Monster Energy has already revised labels for several Hansen's products, particularly with respect to "No Sugar Added" representations. Monster Energy has further committed to ensure that the labels for any accused product it is responsible for developing and marketing comply with U.S. Food and Drug

[1] All capitalized terms have the same meaning as those defined terms in the Agreement. (Declaration of Anthony J. Orshansky, Ex. A.)

Administration (FDA) labeling regulations, guidance, and policies. Class Members will be notified of the settlement through published and banner ad notice, and will have sufficient opportunity to submit claims or object to or opt out of the settlement. The Agreement is fair and achieves meaningful relief for the Class. To facilitate the settlement, Plaintiffs respectfully request that the Court grant preliminary approval of the Agreement and conditional class certification.

II. FACTUAL AND PROCEDURAL HISTORY

A. Plaintiffs' Demand Letter and Initiation of the Action

On September 16, 2013, Plaintiffs' counsel sent a demand letter to Monster Beverage Corporation ("MBC") for relief associated with various labeling violations on a range of Hansen's products. Following that demand letter, the parties attempted to reach a pre-litigation resolution, including by engaging in formal mediation. When those discussions failed to resolve the dispute, on April 4, 2014, Plaintiffs filed a putative class action complaint against MBC in the Superior Court of the State of California, County of San Francisco, entitled *Osie Marshall, et al. v. Monster Beverage Corporation*, Case No. CGC-14-538447 ("Action"). Plaintiffs asserted claims for violation of California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*), False Advertising Law (Cal. Bus. & Prof. Code § 17500, *et seq.*), and Consumers Legal Remedies Act (Cal. Civ. Code § 1750, *et seq.*), and for restitution based on quasi-contract/unjust enrichment.

B. Litigation and Discovery

On May 13, 2014, pursuant to the Class Action Fairness Act of 2005, MBC removed the Action to the United States District Court for the Northern District of California (Case No. 3:14-CV-02203-JD). [ECF No. 1.] On June 25, 2014, MBC moved to transfer the Action to the United States District Court for the Central District of California, and on August 6, 2014, the Hon. James Donato granted MBC's motion (Case No. 2:14-cv-06311-MMM (PLAx)). [ECF Nos. 15, 27.] On

September 29, 2014, Plaintiffs filed a First Amended Complaint ("FAC"), which, among other things, substituted Monster Energy for MBC as the defendant. [ECF No. 38.] Monster Energy answered the FAC on October 31, 2014. [ECF No. 40.]

Over the past nearly two years, Plaintiffs have conducted extensive investigation regarding the labeling, ingredients, and pricing of the accused products. (Orshansky Decl., ¶ 4.) The parties have also engaged in informal and formal discovery and have served initial disclosures pursuant to Federal Rule of Civil Procedure 26(a). (*Id.*) In addition, all Plaintiffs have responded to Monster Energy's requests for production of documents, and Monster Energy has responded to almost 200 requests for production of documents and over 20 interrogatories. (*Id.*) Monster Energy has also produced documents addressing the labeling, packaging, advertising, sales, and pricing of the products at issue. (*Id.*)

C. Settlement Discussions

On November 20, 2013, the parties participated in a mediation before the Hon. Steven J. Stone (Ret.) of JAMS. The parties were unable to resolve the claims at the mediation. With the benefit of discovery to inform their understanding of the asserted claims and likely defenses, the parties reengaged discussions concerning a resolution of the action. The parties reached agreement regarding the class benefit afforded by the proposed settlement prior to Plaintiffs' June 8, 2015 deadline to move for class certification. (Orshansky Decl., ¶ 7.) Plaintiffs were prepared to file a timely motion for class certification but declined to do so in view of the advanced stage of settlement negotiations as the deadline approached. (*Id.*) After the parties finalized the terms of a settlement in principle, Plaintiffs promptly filed a Notice of Conditional Class Settlement on June 16, 2015. [ECF No. 49.]

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III. SUMMARY OF THE PROPOSED SETTLEMENT AGREEMENT

A. The Class Definition

The proposed Class consists of "all residents of California who, between June 27, 2009 and entry of the Preliminary Approval Order, purchased one or more Qualifying Products from an authorized retailer in California." (Agreement, § 1.7.)[2] The Qualifying Products are all: (i) Hansen's®-brand Sodas, Juices, Junior Juices, Smoothie Nectars, Energy, and Fruit & Tea Stix; (ii) Blue Sky® products; (iii) Angeleno™ Aguas Frescas products; (iv) Hubert's® Lemonade products; (v) Vidration products; and (vi) Peace Tea products. (*Id.* § 1.26.)

B. Monetary Benefit and Claim Form

Class Members have the option to choose either: (i) a $0.50 Cash Payment or (ii) a $1.00 Off Merchandise Certificate. (*Id.* § 2.3.) The $0.50 Cash Payment is a payment by check of $0.50 for each Purchase made by an Authorized Claimant for up to 20 purchases (total maximum value of $10.00). (*Id.* § 1.12.) The $1.00 Off Merchandise Certificate is a single-use merchandise certificate per Purchase for up to 20 purchases (total maximum value of $20.00), valid for six (6) months, entitling the Authorized Claimant to $1.00 off a purchase of two 64-ounce Hansen's® juice products or two multi-packs of any other Qualifying Products from an authorized retailer in California. (*Id.* § 1.11.)

To elect either option, a Class Member must accurately complete and submit a Claim Form via the Settlement Website no later than ninety (90) calendar days after the Notice Date (or other date required by the Court). (*Id.* § 3.5, Ex. D.)[3] Class Members will identify a physical mailing address on the Claim Form, which

[2] Excluded from this definition are: (1) officers, directors, and employees of Monster Energy; (2) any judicial officer presiding over the Action and the members of his or her immediate family and judicial staff; and (3) persons who submit a valid and timely Request for Exclusion. (Agreement, § 1.7.)

[3] The "Notice Date" is fourteen (14) days after notice of entry of the Preliminary Approval Order. (Agreement, § 1.21.)

will be used to distribute the $1.00 Off Merchandise Certificate or $0.50 Cash Payment. (*Id.* § 2.3.) If a Class Member submits a timely and otherwise proper Claim Form, but: (1) chooses more than one option; (2) fails to choose any option; or (3) submits multiple claim forms that choose different options, the Class Member will receive a $1.00 Off Merchandise Certificate. (Agreement, § 3.5.)

C. Injunctive Relief

Since filing of the Action, Monster Energy has revised the labels of several Hansen's Products, particularly to address "No Added Sugar" representations. (*Id.* § 2.4.) Monster Energy will also ensure that, as of the Effective Date of the Agreement, the labels for any Qualifying Products it is responsible for developing and marketing comply with all then-current FDA labeling regulations, guidance, and policies, including, without limitation, 21 C.F.R. § 101.22, 21 C.F.R. § 101.30, 21 C.F.R. § 101.54, 21 C.F.R. § 101.60, 21 C.F.R. § 102.33, and 21 C.F.R. § 104.20, as applicable. (*Id.*) That notwithstanding, Monster Energy is permitted to distribute any Qualifying Product inventory that has already been manufactured as of the Effective Date. (*Id.*) Class Members do not need to complete a Claim Form to obtain the benefits of this injunctive relief.

D. Incentive and Attorneys' Fee Awards

Prior to the Fairness Hearing, each of the Plaintiffs, in their capacity as Class Representatives, may request the Court to issue an incentive award not to exceed $1,000. (*Id.* § 2.6.) *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) ("Incentive *awards* are fairly typical in class action cases."). This compensation recognizes the efforts expended by Plaintiffs as the class representatives in bringing and prosecuting this Action. (*Id.*) Class Counsel will also apply to the Court, prior to the Fairness Hearing, for an award of attorneys' fees and expenses incurred in prosecuting this action, not to exceed $282,000.00. (*Id.* § 2.5.) Significantly, the effectiveness of the Agreement is not conditioned

upon the Court's approval of the incentive awards or the fee application.

E. Release And Discharge of Claims

The Agreement provides for the release of all claims or causes of action relating to the allegations that underlie or relate to the Action. (Agreement, § 4.) The release will finally resolve Plaintiffs' and Class Members' claims against Monster Energy and other Monster Energy Released Parties upon entry of the Final Approval Order and Judgment. (*Id*. § 4.3.)

IV. STANDARD FOR PRELIMINARY APPROVAL

A "strong judicial policy" favors settlement of class actions. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The decision as to whether to grant preliminary approval is left to the discretion of the district court. *See In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 972 (9th Cir. 2007) ("[T]he district court has substantial discretion in approving the details of a class action settlement"). In exercising that discretion, "there is an overriding public interest in settling and quieting litigation," and this is "particularly true in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (district courts should give "proper deference to the private consensual decision of the parties").

Where, as here, "parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). There are therefore two parts to the Court's inquiry. "First, the district court must assess whether a class exists." *Id.* "Second, the district court must carefully consider whether a proposed settlement is fundamentally fair, adequate, and reasonable, recognizing that [i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Staton*, 327 F.3d at 952 (internal quotations omitted).

However, at the preliminary approval stage, the Court must determine only if the settlement falls within the "range of possible judicial approval." *Monterrubio v. Best Buy Stores, L.P.*, 291 F.R.D. 443, 448 (E.D. Cal. 2013).

Here, the two-part inquiry dictates that the Court should: (1) conditionally certify the class; and (2) preliminarily approve the Agreement.

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

Class actions may be certified for the purpose of settlement only. *See Hanlon*, 150 F.3d at 1019 (discussing "proposed settlement class"); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (discussing approval of settlement class). The Court has wide discretion in certifying a class for settlement purposes and will be reversed "only upon a strong showing that [its] decision was a clear abuse of discretion." *Dunleavy v. Nadler*, 213 F.3d 454, 461 (9th Cir. 2000).

Rule 23(a) sets forth the four prerequisites to class certification: (1) the class must be so numerous "that joinder of all members is impracticable," (2) there must be "questions of law or fact common to the class," (3) the claims of the class representative must be "typical of the claims . . . of the class," and (4) the class representative must show that he "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). These requirements are commonly referred to as "numerosity," "commonality," "typicality," and "adequacy of representation." *Hanlon*, 150 F.3d at 1019. One of the factors in Rule 23(b) must also be satisfied. The class should be certified under Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

Under these standards, for settlement purposes, the Court should conditionally certify a class consisting of "all residents of California who, between June 27, 2009 and entry of the Preliminary Approval Order, purchased one or more

Qualifying Products from an authorized retailer in California."

A. The Class Satisfies Rule 23(a)(1)'s "Numerosity" Requirement

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." *See* Fed. R. Civ. P. 23(a)(1). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000); *Celano v. Marriott Intern., Inc.*, 242 F.R.D. 544, 548-49 (N.D. Cal. 2007). Here, because Monster Energy does not directly sell Qualifying Products to consumers and maintains no records regarding the identities of Class Members, the parties do not know the precise size of the Class. That notwithstanding, the proposed Class is unquestionably numerous because it is comprised of California resident purchasers of approximately 170 different Qualifying Products sold in California over more than six years. *See In re Abbott Laboratories Norvir Anti-Trust Litigation*, Nos. C 04-1511 CW, C 04-4203 CW, 2007 WL 1689899, at *6 (N.D. Cal. 2007) ("Where 'the exact size of the class is unknown, but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.'") (quoting 1 Alba Cone & Herbert B. Newberg, *Newberg on Class Actions* § 3.3 (4th ed. 2002)).

B. The Class Satisfies Rule 23(a)(2)'s Commonality Requirement

Rule 23(a)(2) requires the existence of "questions of law or fact common to the class." *See* Fed. R. Civ. P. 23(a)(2). Commonality is established if class members' claims "depend upon a common contention," "capable of class-wide resolution . . . mean[ing] that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The commonality requirement may be satisfied if the claims of the prospective class have even one significant issue common to the class. *See, e.g., In re Paxil Litig.*, 212 F.R.D. 539,

549 (C.D. Cal. 2003) ("[T]he commonality requirement is interpreted to require very little."); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009) (finding that Rule 23(a)(2)'s "common question" requirement creates only a "low hurdle" to class certification).

Here, all Class Members' claims arise from a common nucleus of facts—whether, and to what extent, the Qualifying Products bear labels that do not comply with FDA regulations and mislead consumers. *See Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole.") The action also hinges on common legal questions and theories, including:

(1) whether the labeling of the Qualifying Products is a "fraudulent practice" under the UCL, in that it is likely to mislead consumers;

(2) whether the labeling of the Qualifying Products is an "unfair practice" under the UCL, in that it offends public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers;

(3) whether the labeling of the Qualifying Products is an "unlawful" practice under the UCL;

(4) whether the labeling of the Qualifying Products is likely to deceive a consumer acting reasonably in the same circumstances;

(5) whether Monster Energy advertises or markets the Qualifying Products in a way that is false or misleading to the reasonable consumer;

(6) whether Monster Energy violated the FAL or CLRA through its labeling of the Qualifying Products;

(7) whether Plaintiffs and Class Members are entitled to restitution, injunctive, declaratory, and/or other equitable relief; and

(8) whether Plaintiffs and Class Members have sustained monetary loss as a result of Monster Energy's labeling of the Qualifying Products.

There is no question that common questions of fact and law predominate.

C. The Class Satisfies Rule 23(a)(3)'s Typicality Requirement

Rule 23(a)(3) requires that the claims of the representative plaintiff be "typical of the claims . . . of the class." *See* Fed. R. Civ. P. 23(a)(3). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *See Hanlon*, 150 F.3d at 1020; *see also Staton*, 327 F.3d at 957 ("[T]ypicality does not mean that the claims of the class representative[s] must be identical or substantially identical to those of the absent class members." (internal citations omitted)).

Plaintiffs' claims are typical because they arise from the same labeling practices and legal theories that allegedly give rise to the claims of the Class Members. Plaintiffs and Class Members have all purchased one or more of the Qualifying Products. Based on these purchases, Plaintiffs and the Class assert the same statutory and common law claims based on alleged mislabeling, and must prove the same elements of those claims. Plaintiffs and all Class Members also allege the same injuries based on the same alleged course of conduct. Plaintiffs' claims are therefore the same (not just typical) as those of the other Class Members.

D. The Class Satisfies Rule 23(a)(4)'s Adequacy Requirement

Rule 23(a)(4) requires that the representative parties "fairly and adequately protect the interests of the class." Adequacy is established where: (1) plaintiffs and their counsel do not have conflicts of interests with other class members; and (2) plaintiffs and their counsel prosecute the action vigorously on behalf of the class. *See Staton*, 327 F.3d at 957.

Plaintiffs and Class Counsel have vigorously and competently pursued the Class Members' claims over the past nearly two years, and they have no conflicts of

interests with absent Class Members.[4] Plaintiffs share with each Class Member the *same* interest in proving that the labeling of the Qualifying Products violated then-current FDA regulations and misled consumers. Moreover, the arm's-length settlement negotiations that led to the proposed settlement demonstrate that Class Counsel adequately represent the interests of the Class. *See* 2 *Newberg on Class Actions*, *supra*, § 11.28, at 11-59 (adequacy is presumed where a fair settlement was negotiated at arm's-length). The overlapping and duplicative *Krinsk* and *Cuzakis* Actions (*see* section VIII.A, *infra*) had no bearing on the proposed settlement's timing or terms. There is no evidence of a reverse auction. *Gallucci v. Gonzales*, 603 Fed.App'x 533, 535 (9th Cir. 2015) (Absent "evidence suggesting that a bidding war between the various potential class counsel actually occurred . . . if the mere existence of multiple potential classes were sufficient to prove collusion, the reverse auction argument would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions.").

E. The Class Satisfies the Requirements of Rule 23(b)(3)

Plaintiffs seek certification under Rule 23(b)(3), which is appropriate "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022. That is the case here.

1. Common Questions Of Law And Fact Predominate

Predominance exists "[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." *Hanlon*, 150 F.3d at 1022. Here, the common questions of law and fact identified in Section V.B predominate over any individual questions. Because a "common nucleus of facts and potential legal remedies dominates this litigation," judicial economy will be served through a single proceeding. *Id*; *Zinzer v. Accufix*

[4] Class Counsel has extensive experience and expertise in prosecuting complex class actions. (Orshansky Decl., ¶¶ 19-21.)

Research Inst., Inc., 253 F.3d 1180, 1189 (9th Cir. 2001).

2. A Class Action Is The Superior Mechanism

The class action mechanism is superior to other available means for the fair and efficient adjudication of Class Members' claims. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Here, the *de minimis* recovery each Class Member can expect in connection with purchases of Qualifying Products is outweighed by the considerable expense of proving the underlying claims. *See Baghdasarian v. Amazon.com, Inc.*, No. CV 05-8060 AG (CTx), 2009 WL 2263581, at *7 (C.D. Cal., Jul. 7, 2009) (the superiority inquiry addresses "the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"). The class action device presents far fewer management difficulties and ensures that all claims and claimants are before this Court for consistent adjudication of the issues.[5]

VI. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

Under Rule 23(e), a class settlement should be approved if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982) ("the universally applied standard is whether the settlement is fundamentally fair, adequate and reasonable"). "At this first step of preliminary approval, the Court must conduct a *prima facie* review of the relief and notice provided by the [Agreement], before the Court orders notice sent to the tentative Settlement Class Members." *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2006

[5] In view of the proposed settlement, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. R Civ. P. 23(b)(3)(D), for the proposal is that there be no trial.").

WL 3826714, at *4 (N.D. Cal. Dec. 27, 2006). "The initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge." *Officers for Justice*, 688 F.2d at 625; *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 972 (9th Cir. 2007) ("[T]he district court has substantial discretion in approving the details of a class action settlement.").

In conducting this analysis, the Court may look to the factors relevant to final approval of the settlement. *See West v. Circle K Stores, Inc.*, No. CIV. S-04-0438, 2006 WL 1652598, at *9 (E.D. Cal. June 13, 2006). Among these are: (1) the strength of Plaintiffs' case, (2) the risk, expense, complexity, and likely duration of further litigation, (3) the risk of maintaining class action status throughout the trial, (4) the amount offered in settlement, (5) the extent of discovery completed and the stage of the proceedings, (6) the experience and views of counsel, (7) the presence of a governmental participant, and (8) the reaction of the proposed class members to the proposed settlement. *Id.* (citing *Hanlon*, 150 F.3d at 1026). But, "[g]iven that some of these factors cannot be fully assessed until the court conducts its fairness hearing, a full fairness analysis is unnecessary at this stage." *Id.*

A. The Proposed Settlement Should be Presumed to be Fair

"[T]he fact that the settlement agreement was reached in arm's length negotiations after relevant discovery [has] taken place create[s] a presumption that the agreement is fair." *In re Immune Response Securities Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007) (quotations omitted); *Nat'l Rural Telcomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). The proposed settlement here is the product of extensive arm's-length negotiations conducted by experienced counsel after significant discovery and independent investigation by Class Counsel. *In re NVIDIA Corp. Derivative Litig.*, No. C-06-06110-SBA (JCS), 2008 WL 5382544, at *4 (N.D. Cal. Dec. 22, 2008) ("[S]ignificant weight should be attributed to counsel's belief that the settlement is in the best interest of those

affected by the settlement."). The settlement was not the result of collusion or a reverse auction; it was negotiated independently of the overlapping *Krinsk* and *Cuzakis* actions. *See Gallucci*, 603 Fed.App'x at 535.

B. Other Factors Demonstrate the Fairness of the Settlement

1. The Strengths of Plaintiffs' Case and Risks of Litigation

This factor requires the Court to balance the strength of Plaintiffs' case on the merits against the amount offered in settlement. *See DirecTV*, 221 F.R.D. at 526. "[A] proposed settlement is not to be judged against a speculative measure of what might have been awarded in a judgment in favor of the class." *Id.*

Monster Energy continues to vigorously deny any wrongdoing and denies any liability to the Plaintiffs or any Class Members. Although Plaintiffs believe their claims have merit, they face significant legal, factual, and procedural obstacles to recovery, including establishing that: (1) Monster Energy's marketing and advertising of the Qualifying Products was likely to deceive reasonable consumers; (2) alleged labeling misrepresentations and omissions were material to reasonable consumers; (3) common questions predominate over individual issues, particularly with respect to Class Members' understanding of product labels; (4) an ascertainable class exists, given that Monster Energy does not sell directly to consumers;[6] and (5) damages or restitution should be awarded or, if so, that any such award should be more than nominal. The recovery and certainty achieved through settlement, as opposed to the uncertainty inherent in class certification and the trial and appellate process, weigh heavily in favor of settlement. Simply put, the immediate, concrete benefits of the settlement outweigh the uncertainties of obtaining no class relief at all.

[6] *See, e.g., In re Clorox Consumer Litig.*, 301 F.R.D. 436 (N.D. Cal. 2014); *Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 U.S. Dist. LEXIS 18600 (N.D. Cal. Feb. 13, 2014).

2. The Likely Duration of Continued Litigation

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *DirecTV*, 221 F.R.D. at 526 (quoting 4 A. Conte & H. Newberg, *Newberg on Class Actions*, § 11:50 at 155 (4th ed. 2002)). Here, even if judgment were ultimately entered against Monster Energy, any appeal would likely take years to resolve. By settling, Plaintiffs and Class Members avoid the delays and uncertainties of protracted litigation. *Id.* ("It has been held proper to take the bird in hand instead of a prospective flock in the bush.").

3. The Benefits Obtained Through the Proposed Settlement

This factor "assess[es] the consideration obtained by the class members in a class action settlement." *DirecTV*, 221 F.R.D. at 527. "[I]t is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Officers for Justice*, 688 F.2d at 628. "In this regard, it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that might be available to the class members at trial." *DirecTV*, 221 F.R.D. at 527.

The Agreement provides Class Members with meaningful monetary relief (up to $20.00 in Merchandise Certificates or $10.00 in Cash Payment) and injunctive relief (already-implemented labeling changes and commitments to ensure labels for Qualifying Products comply with FDA regulations). (Agreement, §§ 2.3, 2.4.) The monetary benefit represents a significant percentage of the retail price of the Qualifying Products. Class Counsel's investigation reveals the following average retail prices for the Qualifying Product lines:

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Product Line	Average Retail Price
Hansen's Juices (64 ounce)	$4.11
Hansen's Sodas (eight pack)	$4.24
Junior Juices (four pack)	$1.79
Hubert's Lemonade (single)	$2.14
Blue Sky Sodas (6 pack)	$4.99
Peace Time (single)	$1.34
Hansen's Energy	Item not found
Hansen's Juice Boxes	Item not found
Hansen's Smoothie Nectar	Item not found
Hansen's Fruit & Tea Stix	Item not found
Vidration Enhanced	Item not found

(Declaration of Justin Kachadoorian ¶ 2.) A $0.50 Cash Payment ranges from ranges from 10 to 37 percent of the average retail price of Qualifying Products, and the Merchandise Certificate option confers a savings of up to 12 percent off the average retail price of two 64-ounce Hansen's juice products and of up to 28 percent off the average retail price of two multi-packs of other Qualifying Products. (*Id.*)

In light of the relief obtained and the magnitude and risks of the litigation, the Court should conclude that the Agreement's terms are well "within the range" of being "fair, adequate, and reasonable." *Class Plaintiffs*, 955 F.2d at 1276; *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007).

VII. THE PROPOSED NOTICE PLAN SHOULD BE APPROVED

A. Settlement Administration and Contents of Class Notice

Due process requires that class members receive notice of the settlement and an opportunity to be heard and participate in the litigation. *See* Fed. R. Civ. P. 23(c)(2). "Notice is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004) (quotations omitted); *Rosenburg v. I.B.M.*, No. CV06-00430PJH, 2007 WL 128232, at *5 (N.D. Cal. Jan.11, 2007) (notice should inform class

members of essential terms of settlement, including claims procedure and rights to object or opt-out of settlement).

Here, Monster Energy will work with a claims administrator (the "Settlement Administrator") to effectuate notice to the Class and administer the settlement. (Agreement, § 3.2.) The Settlement Administrator is responsible for: (a) arranging for and overseeing publication of the Class Notice through USA Today and Internet banner advertisements; (b) creating and maintaining a Settlement Website and toll-free number through which information about the Agreement can be obtained; (c) receiving requests for exclusion, or opt-outs, from the Class and compiling records relating to those requests; and (d) receiving and compiling objections to the Agreement. (*Id.*)

The proposed Notice provides a definition of the Class, highlights the terms of the settlement, and summarizes instructions for requesting exclusion from the Class and objecting to the Agreement. (Agreement, Exs. B and C.) The forms of Notice also set forth the date, time, and place of the final approval hearing, and include the addresses of the Court, Class Counsel, and the Settlement Administrator. (*Id.*) The forms of Notice provide information to Class Members regarding their rights under the proposed settlement.

1. The Manner In Which Notice Will Be Disseminated

"The court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). In addition, the Court must "direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1).

Where, as here, a class "consists of persons with unknown addresses, notice by publication is reasonable." *Weeks v. Kellogg Co.*, No. CV 09-08102-MMM (RZx), 2013 WL 6531177, at *11 (C.D. Cal. Nov. 23, 2013) (Morrow, M.); *In re*

Google Referrer Header Privacy Litig., No. 5:10-cv-04809 EJD, 2014 WL 1266091, at *7 (N.D. Cal. Mar. 26, 2014) (where individual notice is not practical, "publication or something similar is sufficient to provide notice"); *In re Tableware*, 484 F. Supp. 2d at 1080 (absent records identifying individual class members, publication notice is "reasonable").

In *Weeks*, this Court approved a notice plan for a class of cereal purchasers that consisted of: (i) notice published in online versions of newspapers, websites sponsored by television stations, parenting websites, and consumer affairs blogs; (ii) the creation of a website specifically addressing the settlement; and (iii) the establishment of a toll-free number to obtain information regarding the settlement. 2013 WL 6531177, at *1, *11. Here, the proposed Notice Plan applies a similar (but more extensive) three-pronged approach to target consumers who have purchased Qualifying Products during the putative class period (Agreement, § 3.2.):

- **Published Notice.** Monster Energy will publish the notice twice in a 1/4-page advertisement in the California edition of *USA Today*.

- **Internet Banner Ad Notice.** Monster Energy will publish notice on an array of online websites that includes sites in the genres of arts & entertainment, automotive, business, personal finance, careers & jobs, community, family & parenting, food & drink, health, home & garden, news & media, pets, politics, education, shopping, and sports. These online advertisements will take the form of "banners," that when clicked will take Class Members to the Settlement Website. *Cf. Weeks*, 2013 WL 6531177, at *4 (approving banner ads that redirect consumers to a settlement website). Banner ads provides flexibility during the notice period to, if necessary, increase total reach or focus on a particular segment of the Class.

- **Settlement Website and Toll-Free Number.** The Settlement Administrator will set up and maintain the Settlement Website and a toll-free number to advise Class Members regarding various aspects of the settlement. The Settlement Website will be accessible through the banner ad, as well as through

routine Internet searches like those at google.com.

The parties are currently evaluating notice proposals from various claims administrators. These proposals contemplate a total reach that meets or exceeds the 70 percent threshold recognized by the Federal Judicial Center. *See* Federal Judicial Center, Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, at p. 27 (3d ed. 2010). This multi-pronged Notice Plan remains the best notice practicable, and is reasonably designed to reach Class Members within the meaning of Rule 23(e).

VIII. THE COURT SHOULD ENJOIN OVERLAPPING LITIGATION

As part of the Preliminary Approval Order, Plaintiffs respectfully request that the Court enjoin Class Members from prosecuting, continuing, or asserting any action with regard to the claims asserted in this Action. (Agreement, § 4.2.) Specifically, the Court should exercise its discretion to enjoin two overlapping actions pending in California state courts, the *Krinsk* Action and *Cuzakis* Action. The respective Superior Courts have stayed both actions pending approval of the proposed settlement, given: (i) the risk of inconsistent rulings in duplicative, parallel proceedings; and (ii) the fact that named plaintiffs in both actions have moved to intervene in this case [ECF Nos. 53, 63]. (Declaration of Purvi G. Patel Regarding Motion for Preliminary Approval of Class Settlement ¶¶ 6, 8.)

A. Summary of Overlapping State Court Actions

1. *Krinsk*: The Copy Cat Case

Krinsk, et al. v. Monster Beverage Corporation, San Diego Superior Court, Case No. 37-2014-20192-CU-BT-CTL, was filed on June 19, 2014, more than two months after Plaintiffs filed their complaint. *Krinsk* essentially plagiarized the complaint filed in this case.[7] (Patel Decl., Exs. A, B ("*Krinsk* FAC").)[8] There is a

[7] The *Krinsk* plaintiffs assert claims against both Monster Energy and Monster Beverage Corporation ("MBC"). Plaintiffs in this case originally named MBC as a defendant, but after meet and confer, substituted in the correct defendant,

(Footnote continues on next page.)

near-perfect overlap between the two cases (the original *Krinsk* complaint copied the original *Marshall* complaint down to its typographical errors):

(1) the case description and specific factual allegations pled in *Krinsk* are identical in all material respects to those pled here (though *Krinsk* encompasses fewer accused product families);

(2) the *Krinsk* FAC repeats almost verbatim each and every cause of action and purported injury asserted in this case;

(3) the relief sought in both cases is identical; and

(4) the putative California-only class in *Krinsk* is duplicative of, and fully subsumed by, the class alleged in this case.[9]

The chart below summarizes the key areas of overlap:

	***Marshall* FAC**	***Krinsk* FAC**
Gravamen of FAC	"Hansen deceptively labels and advertises the Misbranded Products . . . [to] create the impression that the Misbranded products are natural, healthy beverages." (¶ 8)	"Hansen deceptively labels and advertises the Misbranded Products . . . [to] create the impression that the Misbranded products are natural, healthy beverages." (¶ 8)

(Footnote continued from previous page.)

Monster Energy. The proposed settlement includes a release of claims against Monster Energy and its parent, MBC.

[8] Pursuant to Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record," including complaints filed in other courts. *See e.g.*, *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001), *overruled on other grounds as discussed in Gallardo v. Dicarlo*, 203 F.Supp.2d 1160, 1162 n.2; *Dawson v. Mahoney*, 451 F.3d 550, 551 n.1 (9th Cir. 2006).

[9] The *Krinsk* action was originally brought by a single named plaintiff, Marcy Krinsk, who is the wife of one of the name partners of Finkelstein & Krinsk, the law firm representing Mrs. Krinsk and the putative class. (Patel Decl. ¶ 3.) In response to MBC's motion to disqualify Finkelstein & Krinsk, Mrs. Krinsk filed an amended complaint in which she remained in the case in her individual capacity only and substituted in two new named plaintiffs (including proposed intervenor Mayan Mooney) as proposed class representatives. (*Id*. ¶¶ 4, 5, Ex. B.)

	***Marshall* FAC**	***Krinsk* FAC**
Accused Products	• Hansen's Juice or Juice Box • Hansen's Smoothie Nectar • Hubert's Lemonade • Angeleno Agua Frescas • Fruit & Tea Stix • Vidration • Hansen's Sodas, • Blue Sky Sodas, • Hansen's Energy (¶ 2)	• Hansen's Juice or Juice Box • Hansen's Smoothie Nectar • Hubert's Lemonade (¶ 1)
Proposed Class	"All persons in the United States or, alternatively, California who purchased one or more of the Misbranded Products from four years prior to the filing of the Complaint and continuing to the present." (¶ 91)	"All persons who were residents in California when they purchased one or more of the Misbranded Products from four years prior to the filing of the Complaint and continuing to the present." (¶ 54)
Types of Alleged Mislabeling	• "All Natural" (¶¶ 9-31) • "No Preservative" (¶¶ 32-41) • "100% Juice" (¶¶ 42-48) • "No Added Sugar" (¶¶ 49-57) • "Made From Concentrate" (¶¶ 58-63) • "Sweetened With Splenda" (¶¶ 64-71) • "Fortification" (¶¶ 72-80)	• "All Natural" (¶¶ 9-25) • "No Preservative" (¶¶ 26-31) • "100% Juice" (¶¶ 32-34) • "No Added Sugar" (¶¶ 35-37) • "Made From Concentrate" (¶¶ 38-39) • "Sweetened With Splenda" (¶¶ 40-42) • "Fortification" (¶¶ 43-46)
Claims	• UCL • FAL • CLRA • Quasi-contract / Unjust Enrichment	• UCL • FAL • CLRA • Quasi-contract / Unjust Enrichment
Injury Alleged	Plaintiffs "did not receive the products [] bargained for and [] lost money as a result . . . of paying money to Defendants and paying a premium for Defendants' products owing to the misrepresentations." (¶¶ 31, 41, 48, 57, 63, 71, 80)	Plaintiffs "did not receive the products [] bargained for and [] lost money as a result . . . of paying money to Defendants and paying a premium for Defendants' products owing to the misrepresentations." (¶ 53)
Relief	• Damages	• Damages

	***Marshall* FAC**	***Krinsk* FAC**
Requested	• Restitution • Injunctive Relief • Attorneys' fees	• Restitution • Injunctive Relief • Attorneys' fees

2. *Cuzakis*: The Subsumed Case

Cuzakis, et al. v. Monster Energy Company, et al., Los Angeles Superior Court, Case No. BC513620 was filed in June 2013, shortly before the pre-litigation discussions between the parties in this matter. The asserted claims, accused products, and putative classes at issue in the operative Third Amended Complaint are entirely subsumed by those in this case. (Patel Decl., Ex. C ("*Cuzakis* TAC").) Specifically, the *Cuzakis* TAC: (i) alleges California-only classes (¶ 47); (ii) addresses only the "no sugar added" claims that are also asserted in this case (¶ 2); (iii) concerns only Hansen's-brand juices (i.e., Natural Apple Grape Juice, Natural Pineapple Juice, Natural Apple Strawberry Juice, and Natural Organic 100% Apple Juice), which are also at issue here (¶ 15); and (iv) seeks the same relief that is sought in this case (¶ 103). The proposed settlement of this case eclipses all claims that are at issue in *Cuzakis*.

B. The Court Should Enjoin the Overlapping Actions

The Court is authorized to, and should, enjoin the *Krinsk* and *Cuzakis* actions in order to protect its jurisdiction to oversee and enforce this settlement pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and the "necessary-in-aid-of-jurisdiction" exception to the Anti-Injunction Act, 28 U.S.C. § 2283. The All Writs Act grants the authority to federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). This authority is restricted by the Anti-Injunction Act, which is designed to preclude federal court interference with state court proceedings. 28 U.S.C. § 2283. But under the Anti-Injunction Act, a federal court may issue an injunction to stay state court proceedings when (1) expressly authorized by Act of Congress, (2) where necessary in aid of its

jurisdiction, or (3) to protect or effectuate its judgments. *Id*.

Here, the "necessary-in-aid-of-jurisdiction" exception applies. *See Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1102 (9th Cir. 2008) ("Courts have held that the existence of advanced federal in personam litigation may, in some instances, permit an injunction in aid of jurisdiction."). *Jacobs v. CSAA Inter-Insurance*, No. C 07-00362 MHP, 2009 WL 1201996, at *3 (N.D. Cal. May 1, 2009) is instructive. In *Jacobs*, the parties requested a preliminary injunction against named and absent members of a federal class action from responding to or otherwise communicating with plaintiff's counsel in the state class action after the Court granted preliminary approval of the settlement and conditionally certified three subclasses. *Id.* at *1. The district court agreed, holding that "enjoining class members from participating in a state action relating to claims that are similarly asserted in the federal action is necessary and appropriate to preserve this court's jurisdiction." *Id*. at *3.

As in *Jacobs*, the Court should enjoin the state court proceedings in *Krinsk* and *Cuzakis* because those actions implicate *the same rights* of the Class Members. If the stays currently in place are lifted, there is a material risk that the courts in those cases could issue rulings on class certification or the merits while the settlement remains pending in this Court. These determinations could be inconsistent with the terms of the proposed settlement, imperiling both the jurisdiction of this Court and the benefits to be received by the conditional settlement class. *See Caiafa Prof'l Law Corp. v. State Farm Fire & Cas. Co.*, 15 Cal.App.4th 800, 807 (1993) (if the broader federal action proceeds and resolves issues in the state court action, "'[u]nseemly conflict' will have been avoided and the interest in judicial economy well served"].); *Simmons v. Superior Court*, 96 Cal.App.2d 119, 130 (1950) ("Equity abhors a multiplicity of actions . . . . A conflict of authority should not occur if it can be avoided."). While Class Members who opt-out may still pursue related litigation on an individual basis, enjoining Class Members who have not opted-out will best preserve the proposed

settlement's chances of success and protect this Court's jurisdiction.

IX. PROPOSED SCHEDULE OF FURTHER PROCEEDINGS

The Court should set a final approval hearing date, as well as dates for providing Notice to the Class and objecting to or opting out of the Agreement.[10] Rule 23(h)(1) requires that "[n]otice of the motion [for attorneys' fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." Fed. R. Civ. P. 23(h)(1).

Here, the Notice and Agreement satisfy the requirements of CAFA and Rule 23(h)(1). The parties can adjust the schedule proposed below, subject to Court approval, based on the date the Preliminary Approval Order is entered. The "Notice Date" is 14 days after notice of entry of the Preliminary Approval Order.

Event	Deadline
Publication of Class Notice in USA Today and via banner ads on the Internet	In the 14-day period following the Notice Date
Deadline for submitting a Claim	No later than ninety (90) calendar days after the Notice Date
Deadline for requesting exclusion from the Class, objecting to the Agreement, or serving notice of appearance at Fairness Hearing	Postmarked no later than sixty (60) calendar days after the Notice Date
Motion for attorneys' fees and costs to be filed	30 calendar days after the Notice Date
Deadline for filing motion for final approval of the Settlement Agreement	30 days after the claims submission deadline
Deadline for filing response to any objections to the Settlement Agreement	30 days after the claims submission deadline
Fairness Hearing (motions for final approval and attorney's fees and costs)	Within 30 days after Plaintiffs file their motion for final approval

[10] Notice of the settlement has already been provided to certain state and federal officials in compliance with CAFA (28 U.S.C. § 1715). (Patel Decl. ¶ 9.)

X. CONCLUSION

Plaintiffs respectfully request that the Court grant preliminary approval of the Agreement, provisionally certify the Class, approve the proposed notice plan and enter the Preliminary Approval Order submitted concurrently herewith.

Dated: December 28, 2015 COUNSELONE, P.C.

By: /s/ Anthony J. Orshansky
Anthony J. Orshansky

Attorneys for Plaintiffs Osie Marshall, Yasna Cuevas, and John Van Es