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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JACKIE FITZHENRY-RUSSELL, on behalf of  
herself, the general public and those similarly  
situated,

Plaintiffs,

v.

The COCA-COLA COMPANY,

Defendant.

Case No. 5:17-cv-00603-EJD

~~[PLAINTIFFS' UNOPPOSED PROPOSED]~~  
**ORDER GRANTING PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT**

DATE: June 13  
TIME: 9:00 a.m.  
CTRM: 4, 5<sup>th</sup> Floor  
JUDGE: Hon. Edward J. Davila

**RECITALS**

1  
2 Plaintiff Jackie Fitzhenry-Russell, and Plaintiffs-In-Intervention David Swartz, Ashley  
3 Salcedo, Scott Miller, Isabelo Pascual, Florin Carlin, and Kristina Hoffman (collectively  
4 “Plaintiffs” or “Class Representatives”) have moved the Court for preliminary approval of a  
5 proposed class action settlement with Defendant The Coca-Cola Company (“Defendant”), the  
6 terms and conditions of which are set forth in the Settlement Agreement filed with the Court on  
7 May 9, 2019 (“Settlement Agreement”).

8 This case concerns the marketing and labeling of Seagram’s Ginger Ale Products  
9 (“Products”) from April 1, 2013 to the date of this order (“Class Period”).

10 Plaintiffs contend that the Products are mislabeled as “Made with Real Ginger,” and that  
11 this claim misleads consumers about the form of ginger in the Products and about the Products’  
12 health properties. Plaintiffs contend that, by marketing the Products as “Made with Real Ginger,”  
13 Defendant caused people to purchase the Products who would not otherwise have done so. They  
14 also contend that the Products were sold at a higher price than they would have been sold without  
15 the “Made with Real Ginger” claim. Plaintiff Fitzhenry-Russell alleged claims for violations of  
16 the California Consumer Legal Remedies Act (“CLRA”); false advertising under California  
17 Business and Professions Code sections 17500, *et seq.*; unfair business practices under California  
18 Business and Professions Code sections 17200, *et seq.*; and common law misrepresentation. She  
19 sought to pursue these claims on behalf of herself and a nationwide class of purchasers of the  
20 Products. The Plaintiffs-in-Intervention have sought leave to file a Second Amended Complaint  
21 alleging similar claims under the laws of various states, on behalf of purchasers nationwide. All  
22 Plaintiffs seek money damages and an injunction prohibiting Defendant from marketing the  
23 Products as “Made with Real Ginger.”

24 Defendant denies Plaintiffs’ allegations. It contends that the “Made with Real Ginger”  
25 claim on the Product labeling is, and has always been, truthful and not misleading. Defendant also  
26 disputes that the “Made with Real Ginger” claim induced consumers to purchase the Products or  
27 had any effect on the Products’ price. Defendant therefore denies any liability, and denies that  
28 Plaintiffs or any class members have suffered injury as a result of the Products’ labeling

1 Defendant further denies that this case meets the requirements for class certification under Fed. R.  
2 Civ. P. 23, except for purposes of settlement.

3 The history of this litigation is summarized in Part I of the Settlement Agreement. In brief,  
4 this case was filed on December 23, 2016 in California Superior Court, and removed to this Court  
5 in February 2017. Shortly thereafter, Defendant filed a motion to dismiss, which the Court denied  
6 in October 2017. Between October 2017 and fall 2018, the parties engaged in significant  
7 discovery. Plaintiffs' counsel reviewed thousands of pages of the Defendants' documents and  
8 deposed three of Defendant's corporate representatives. Defendant deposed Plaintiff Fitzhenry-  
9 Russell. The parties also exchanged expert reports, and deposed one another's experts, regarding  
10 issues relevant to class certification and to Plaintiffs' claim for money damages. Plaintiffs'  
11 experts, relying on conjoint analysis, opined that the Products commanded a 6 percent "price  
12 premium" throughout the Class Period as a result of the "Made With Real Ginger" claim.  
13 Defendants' experts countered with survey-based evidence that the claim did not affect  
14 consumers' purchasing decisions or the prices they were willing to pay, and opined that pricing  
15 and sales data from the Products and comparable soft drinks during the Class Period refuted  
16 Plaintiffs' claim of a price premium.

17 In late 2018, while expert discovery was ongoing, this Court approved the parties' joint  
18 application to stay the case pending the trial of *Jackie Fitzhenry-Russell v. Keurig Dr. Pepper,*  
19 *Inc.*, Case No. 5:2017-cv-00564-NC (N.D. Cal.) (the "California Canada Dry case"), in which  
20 Plaintiff Jackie Fitzhenry-Russell, represented by Plaintiffs' Counsel, asserted substantially  
21 similar claims against Keurig Dr Pepper, the manufacturer of Canada Dry Ginger Ale, regarding  
22 the claim "Made from Real Ginger" on that product. That case had been certified as a class  
23 action, and trial was scheduled to begin on January 7, 2019. The California Canada Dry case was  
24 one of several putative class actions, in various states, in which consumers asserted these claims  
25 against Keurig Dr Pepper.

26 Prior to the California Canada Dry trial, however, Keurig Dr Pepper agreed to settle all of  
27 these putative class actions through two agreements: one with a putative class of California  
28 Canada Dry Ginger Ale consumers in the California Canada Dry Case, and one with a putative

1 class of Canada Dry Ginger Ale consumers in the other 49 states. *See George v. Keurig Dr.*  
2 *Pepper, Inc.*, No. 1822-CC11811 (Mo. Cir. Ct.) (the “49-State Canada Dry case”). Under these  
3 settlement agreements, Keurig Dr Pepper agreed to entry of a permanent injunction barring use of  
4 the unmodified phrase “Made from Real Ginger” on its Canada Dry labeling or marketing, but  
5 permitting use of certain variations on that phrase.

6 Keurig Dr Pepper also agreed to allow consumers in both classes to submit monetary  
7 claims for purchases of Canada Dry Ginger Ale for payment of \$0.40 per unit purchased, for a  
8 total of up to \$5.20 per consumer with no proof of purchase and \$40.00 per consumer with proof  
9 of purchase. In the 49-State Canada Dry case, Keurig Dr Pepper agreed to pay valid claims on  
10 these terms up to a cap of \$11.2 million. There was no settlement-value cap in the California  
11 Canada Dry case, but Keurig Dr Pepper could have terminated the settlement had more than one  
12 million valid claims been filed. However, neither of these caps was triggered, and both  
13 settlements received final approval in April 2019.

14 On February 19, 2019, the parties to this case participated in an all-day mediation  
15 conducted by the Honorable Wayne Andersen (Ret.) at JAMS in Chicago, Illinois. That  
16 mediation resulted in the settlement that is the subject of this Order.

17 The terms of the settlement are summarized in the proposed Long Form Notice to  
18 Settlement Class Members, which is attached as Exhibit B1 to the Settlement Agreement.  
19 Defendant has agreed to a permanent nationwide injunction substantially similar to the one  
20 Keurig Dr Pepper agreed to in the Canada Dry settlements, prohibiting Defendant’s use of the  
21 phrase “Made with Real Ginger” on the Products’ labels while permitting the use of such  
22 alternatives as, *inter alia*, “Made with Real Ginger Flavor” and “Real Ginger Taste.”

23 Defendant has also agreed to make cash payments to Settlement Class Members on  
24 similar terms to those of the Canada Dry settlements. Defendant has agreed to create a Settlement  
25 Fund of \$2,450,000 from which consumers who submit Valid Claims can receive a payment of up  
26 to \$0.80 per Unit purchased (the “Benefit”), with a minimum payment of 5 Units (up to \$4.00),  
27 subject to the following limitations:

- 28 • The Benefit may be reduced on a pro-rata basis if, after accounting for all other

1 expenses deducted from the Settlement Fund (*e.g.*, attorneys' fees and  
2 administration costs), there are insufficient funds in the Settlement Fund to pay a  
3 Benefit of \$0.80 per Unit on each Valid Claim.

- 4 • Settlement Class Members who do not provide proof of purchase may claim the  
5 Benefit for a maximum of 13 Units *per Household*, for a maximum payment of  
6 \$10.40.
- 7 • Settlement Class Members who provide proof of purchase may claim the Benefit  
8 for a maximum of 100 Units *per Household*, for a maximum payment of \$80.00,  
9 provided they furnish proof of purchase for at least 87 of those Units.
- 10 • Settlement Class Members who submit a Valid Claim to have purchased 1-5 Units  
11 will receive the Benefit for 5 Units.
- 12 • A "Unit" is any product unit purchased individually at retail.

13 The amount offered per claimed purchase exceeds, on a per-Unit basis, the payments that  
14 Plaintiffs would be awarded if successful at trial: a Settlement Class Member who purchased 10  
15 Product Units for \$1.50 each may receive up to \$8.00 under the proposed settlement, but would  
16 receive only \$0.90 if Plaintiffs proved their theory of a 6 percent "price premium" at trial. And,  
17 although the \$2.45 million common fund is less than the total \$58 million damages Plaintiffs  
18 could recover if fully successful at trial, it is reasonable in light of the risks of proceeding to trial.  
19 Moreover, even if Plaintiffs won at trial, class members would still need to make claims in order  
20 to receive compensation as Defendant has no records of individual purchases, and the recovery  
21 would likely be lower.

22 If there are too few Valid Claims to exhaust the Settlement Fund at a per-Unit Benefit  
23 value of \$0.80, the remainder of the Settlement Fund will be divided between the National  
24 Consumers' League and the Better Business Bureaus Institute for Marketplace Trust. Both are  
25 501(c)(3) nonprofit organizations devoted to empowering and educating consumers to make  
26 informed choices.

27 As part of the settlement, Plaintiffs' attorneys may apply to this Court to award them up to  
28 \$735,000.00 from the Settlement Fund to pay their attorneys' fees, plus their actual expenses

1 (currently estimated at \$80,000.00), as well as up to \$11,000 from the Settlement Fund in  
2 payments to the Class Representatives. Such amounts must be approved by the Court, and the  
3 Court will defer any ruling on the appropriateness of such awards until the final approval hearing.

4 Notice is to be provided as described in the Settlement Agreement consistent with a notice  
5 plan designed by RG/2 Claims Administration (“RG/2”), a well-known and experienced class  
6 action administrator. RG/2 also will receive and process Claim Forms. In brief, notice will be  
7 provided on a Settlement Website, located at [www.gingeralesettlement.com](http://www.gingeralesettlement.com). In addition, a black  
8 and white version of the Print Publication Notice will be published in People Magazine.  
9 Additional online notice shall be provided on websites accessible to desktop and mobile users,  
10 including social media sites such as Facebook and Instagram, so that overall notice of the  
11 Settlement (including the Online Notice and Print Publication Notice) is reasonably calculated to  
12 apprise the Settlement Class Members of the settlement. An appropriate online platform has been  
13 chosen based on reliable demographic information about those media and about likely Settlement  
14 Class Members. There will be a toll-free number for people to obtain more information and  
15 request a printed version of the claim form and notice. No later than September 19, 2019, the  
16 Claim Administrator shall submit a declaration to the Court attesting to the number of  
17 impressions delivered and the number of click-throughs to the Settlement Website.

18 All of the notices will link or point to the Settlement Website, which contains a detailed  
19 class notice, including the procedures for class members to exclude themselves from the  
20 settlement or object, as well as a copy of the Settlement Agreement and motion papers filed in  
21 connection with the settlement.

## 22 FINDINGS AND CONCLUSIONS

23 Having considered all matters submitted to it at the hearing on the motion and otherwise,  
24 including the complete record of this action, and good cause appearing therefore, the Court  
25 hereby finds and concludes as follows:

- 26 1. The capitalized terms used in this Order shall have the same meaning as defined  
27 in the Settlement Agreement except as otherwise expressly provided.
- 28 2. The Court preliminarily approves the Settlement Agreement as likely to be

1 approved under Rule 23(e)(2) and as meriting notice to the Class for its consideration.

2 Considering the factors set forth in Rule 23(e)(2), the Court preliminarily finds as follows:

3 a. Class Representatives and Class Counsel have adequately represented the  
4 Class.

5 b. The Settlement was negotiated at arm's length with the assistance of a  
6 well-respected and experienced private mediator.

7 c. The relief provided to the class in the form of injunctive and monetary  
8 relief is adequate given the risks and uncertainty of trial; the monetary  
9 recovery offered by the Settlement is higher on a per Unit basis than  
10 Plaintiffs' evidence would have allowed for at trial.

11 d. The proposed award of attorneys' fees is reasonable given the two years of  
12 litigation.

13 e. The proposal treats all class members equally relative to each other.

14 3. The Settlement also complies with the Northern District of California's  
15 Procedural Guidance for Class Action Settlements,

16 <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>.

17 4. For purposes of the settlement only, the Court provisionally grants the pending  
18 Motion to Intervene (Dkt. No. 75) and Motion for Leave to File a Second Amended Complaint  
19 (Dkt. No. 76), and stays Defendant's deadline to respond to the Second Amended Complaint  
20 pending a final ruling on the settlement.

21 5. For purposes of the settlement only, the Court provisionally certifies the  
22 Settlement Class, which consists of all persons who between April 1, 2013 and the date of  
23 Preliminary Approval, purchased, in the United States, any Seagram's Ginger Ale Products.  
24 "Excluded Persons" from the Settlement Classes are: (1) the Honorable Edward J. Davila, the  
25 Honorable Virginia K DeMarchi; the Honorable Howard R. Lloyd; the Honorable Wayne  
26 Andersen (Ret.); (2) any member of their immediate families; (3) any government entity, (4)  
27 Defendant; (5) any entity in which Defendant has a controlling interest; (6) any of Defendant's  
28 subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs,

1 successors, or assigns; (7) counsel for the Parties; and (8) any persons who timely opt-out of the  
2 Settlement Class.

3           6. The Court preliminarily finds, solely for purposes of considering this settlement,  
4 that the requirements of Rule 23 of the Federal Rules of Civil Procedure are conditionally  
5 satisfied, including requirements that the Settlement Class Members are too numerous to be  
6 joined in a single action; that common issues of law and fact exist and predominate; that the  
7 claims of the Class Representatives are typical of the claims of the Settlement Class Members;  
8 that the Class Representatives and Class Counsel can adequately protect the interests of the  
9 Settlement Class Members; and that a settlement class is superior to alternative means of  
10 resolving the claims and disputes at issue in this Litigation.

11           7. A Final Approval Hearing shall be held before this Court at 9:00 a.m. on  
12 October 3, 2019, in Courtroom 4, Fifth Floor, of the United States District Court for the Northern  
13 District of California, 280 South First Street, San Jose, CA 95113, to address: (a) whether the  
14 proposed settlement should be finally approved as fair, reasonable, and adequate, and whether the  
15 Final Approval Order should be entered, and (b) whether Class Counsel's application for  
16 attorneys' fees, costs, and a payment to the Class Representative should be approved.

17           8. The Court approves, as to form and content, the Claim Form and the Notices,  
18 substantially similar to the forms attached as Exhibits A and B1 to B3 to the Settlement  
19 Agreement. The Claim Form and all of the notices are written in plain English, are easy to  
20 comprehend, and fully comply with the requirements of the Due Process Clause of the United  
21 States Constitution, Rule 23 of the Rules of Civil Procedure, and any other applicable law. The  
22 Parties shall have discretion to jointly make non-material minor revisions to the Claim Form or  
23 Notices. Responsibility regarding settlement administration, including, but not limited to, notice  
24 and related procedures, shall be performed by the Claim Administrator, subject to the oversight of  
25 the Parties and this Court as described in the Settlement Agreement.

26           9. The Court conditionally designates the law firm of Gutride Safier LLP as  
27 Settlement Class Counsel and Jackie Fitzhenry-Russell, David Swartz, Ashley Salcedo, Scott  
28 Miller, Isabelo Pascual, Florin Carlin, and Kristina Hoffman as Class Representatives for

1 purposes of this settlement. The Court preliminarily finds that the Class Representatives and  
2 Class Counsel fairly and adequately represent and protect the interests of the absent Settlement  
3 Class Members. The Court designates, and approves, RG/2 to serve as Claim Administrator.

4           10. Defendant shall pay \$365,000.00 into the Settlement Fund within seven (7) days  
5 of the date of this Order. RG/2 is authorized to remove the costs of notice and administration  
6 from the Settlement Fund.

7           11. The Court finds that the Parties' plan for providing notice to the Class (the  
8 Notice Plan) is reasonably calculated to provide notice to the Class of the pendency of the terms  
9 of the Settlement Agreement, the Final Approval hearing, and applicable deadlines, and complies  
10 fully with the requirements of the Due Process Clause of the United States Constitution, Rule 23  
11 of the Rules of Civil Procedure, and any other applicable law. The Parties and the Claim  
12 Administrator shall comply with the Notice Plan and other deadlines as set forth in the Settlement  
13 Agreement and this Order.

14           12. Any member of the Class who desires to be excluded from the Settlement, and  
15 therefore not be bound by the terms of the Settlement Agreement, must submit a timely request  
16 for exclusion to the Claim Administrator, pursuant to the instructions set forth in the Long Form  
17 Notice. The request must be received by the Claim Administrator (not just postmarked) no later  
18 than September 5, 2019, or if mailed, must be delivered to and received by, the Claim  
19 Administrator no later than September 5, 2019. No one shall be permitted to exercise any  
20 exclusion rights on behalf of any other person, whether as an agent or representative of another or  
21 otherwise, except upon proof of a legal power of attorney, conservatorship, trusteeship, or other  
22 legal authorization, and no one may exclude other persons within the Class as a group, class, or in  
23 the aggregate.

24           13. No later than September 19, 2019, the Claim Administrator shall prepare a list  
25 of the names of the persons who, pursuant to the Class Notice described herein, have excluded  
26 themselves from the Settlement Class in a valid and timely manner, and Plaintiff's Counsel shall  
27 file that list with the Court. The Court retains jurisdiction to resolve any disputed exclusion  
28 requests.

1           14. Any member of the Class who elects to be excluded shall not receive any  
2 benefits of the settlement, shall not be bound by the terms of the Settlement Agreement, and shall  
3 have no standing to object to the settlement or intervene in the Litigation. Members of the Class  
4 who do not wish to be bound by a judgment in favor of or against the Class must exclude  
5 themselves from the Litigation. Any Class Member who does not submit a valid and timely  
6 request for exclusion may submit an objection to the Settlement Agreement (“Objection”). The  
7 Objection must satisfy the requirements set forth in the Long Form Notice and must be filed as a  
8 written objection with the Clerk of the Court, postmarked by mail, express mail, or personal  
9 delivery, such that the Objection is postmarked, and received by, the Clerk on or before the  
10 Objection Deadline or it will be rejected.

11           15. Any Class Member shall have the right to appear and be heard at the Final  
12 Approval hearing, either personally or through an attorney retained at the Class Member’s own  
13 expense. However, if the Class Member wishes to object to the Settlement at the Final Approval  
14 hearing (either personally or through counsel), the Class Member must submit a timely written  
15 objection in compliance with the requirements referenced in the prior paragraph of this Order.

16           16. Plaintiff shall file any reply in support of Final Approval and for any award of  
17 attorneys’ fees, costs and a class representative payment (including responses to objections) no  
18 later than September 19, 2019. All such filings and supporting documentation shall be posted to  
19 the Settlement Website within one day of filing.

20           17. Any Class Member wishing to make a claim must submit a Claim Form to the  
21 Claim Administrator, pursuant to the instructions set forth in the Settlement Notice. The request  
22 must be submitted online by no later than September 5, 2019, or, if mailed, it must be delivered  
23 to, and received by, the Claim Administrator by no later than September 5, 2019.

24           18. No later than September 19, 2019, the Claim Administrator shall provide a  
25 declaration to the Court regarding the provision of notice and as required by the Settlement  
26 Agreement and as to the number and dollar amount of claims received.

27           19. In the event that the proposed settlement is not finally approved by the Court, or  
28 in the event that the Settlement Agreement becomes null and void or terminates pursuant to its

1 terms, this Preliminary Approval Order and all orders entered in connection herewith shall  
2 become null and void, shall be of no further force and effect, and shall not be used or referred to  
3 for any purposes whatsoever in this Litigation or in any other case or controversy, in such event  
4 the Settlement Agreement and all negotiations and proceedings directly related thereto shall be  
5 deemed to be without prejudice to the rights of any and all of the Parties, who shall be restored to  
6 their respective positions as of the date and time immediately preceding the execution of the  
7 Settlement Agreement.

8           20. This Order shall not be construed as an admission or concession by Defendant  
9 of the truth of any allegations made by the Plaintiff or of liability or fault of any kind.

10           21. The Court may, for good cause, extend any of the deadlines set forth in this  
11 Order without further notice to Settlement Class Members, though such extensions shall be  
12 posted to the Settlement Website. The Final Approval hearing may, from time to time and without  
13 further notice to Settlement Class Members beyond updates to the Court's docket and the  
14 Settlement Website, be continued by Order of the Court.

15           22. If the Court grants Final Approval to the Settlement Agreement, then Settlement  
16 Class Members who have not timely requested to be excluded including persons who objected to  
17 the Settlement Agreement or submitted a Valid Claim, shall be deemed to have released their  
18 claims as set forth therein.

19           23. Counsel for the Parties are hereby authorized to utilize all reasonable procedures  
20 in connection with the administration of the settlement which are not materially inconsistent with  
21 either this Order or the terms of the Settlement Agreement.

22           24. All further proceedings and deadlines in this action are hereby stayed except for  
23 those required to effectuate the Settlement Agreement and this Order.

24           **IT IS SO ORDERED** this 13<sup>th</sup> day of June, 2019.

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HON. EDWARD J. DAVILA  
UNITED STATES DISTRICT COURT JUDGE