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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

| | |
|---|---|
| McKENZIE LAW FIRM, P.A., and OLIVER LAW OFFICES, INC. on Behalf of Themselves and All Others Similarly Situated,<br><br>Plaintiffs,<br><br>v.<br><br>RUBY RECEPTIONISTS, INC.,<br><br>Defendant. | Case No. 3:18−cv−01921−SI<br><br>**REPLY IN SUPPORT OF MOTION FOR FINAL APPROVAL AND AWARD OF ATTORNEYS' FEES AND COSTS AND SERVICE AWARDS TO PLAINTIFFS**<br><br>ORAL ARGUMENT REQUESTED |

More than 99% of the 18,662 individuals and entities on the Class Distribution List expressed no concerns about the Settlement. Of the many thousands of Class Members, only

two filed Objections, 11 requested exclusion from the Settlement, and a small handful sent correspondence to the Notice Administrator complaining about the case, the settlement terms, the legal system, or class action litigation in general. In a class, that owing to the nature of Ruby's customer base, includes many attorneys and law firms, the material lack of opposition to the Settlement is noteworthy.

The two filed objections and other correspondence to the Notice Administrator identify no new issues and provide no basis to conclude that the Settlement is anything other than fair and reasonable and should be approved. *See* Declaration of Joseph M. Fisher Reporting on Exclusions and Objections ("Fisher Decl."), Exh. C-E (attaching Objections and other correspondence). Nor does the Ninth Circuit's recent decision in *Briseño v. Henderson*, 998 F.3d 1014, 2021 WL 2197968 (9th Cir. June 1, 2021), provide any barrier to final approval, as its facts are distinct, and the Settlement withstands scrutiny as non-collusive, fair, and reasonable.

Final approval is appropriate because the Settlement removes the expense and risk of continued litigation, in exchange for meaningful direct compensation and injunctive relief, which serve as reasonable consideration for the releases granted to Ruby. The requested service awards to the Class Representatives and Maiden, along with the requested attorneys' fees and costs, are also reasonable and should be awarded.[1]

[1] This reply brief uses the same definitions as Plaintiffs' opening brief (ECF 286).



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## I. The Objections Identify No New Issues and Provide No Barriers to Approval of the Settlement

Only two Class Members filed Objections. Fisher Decl. ¶ 7. In addition, one email with the subject line, "Objections to Settlement," was sent to the Notice Administrator, who also received a handful of correspondence which could be construed as being critical of the Settlement or the case. *Id*. ¶ 8, Exh. D and E.

Notice of the Settlement was provided to each of the federal authorities and state attorney general offices required to be notified under the Class Action Fairness Act, so that they could object or otherwise reach out to the parties if they have concerns about the Settlement. Declaration of Joseph M. Fisher re Compliance with Notice Requirement (ECF 285) ¶ 7. None did. Moreover, no purported public interest groups have made any objections.

The objections to the settlement are *de minimis* and provide no grounds to dispute that the Settlement is fair and reasonable.[2] The objections primarily raise questions about the vouchers, the ability of Settlement Class Members to use them, and express a preference for cash.

There is a succinct, dispositive response to these objections: the mere fact that alternative or potentially more favorable settlement terms can be proposed in the abstract is no basis to reject a fair and adequate settlement. The Settlement was achieved through years of adversarial litigation and fully informed arm's-length negotiations that culminated in a mediator's proposal to avoid an imminent trial. "The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators." *Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir.

[2] Most of the correspondence in Exhibits D and E to the Fisher Declaration evidence a hostility towards the filing of the case in the first instance, the legal system generally, or Class Counsel and their perceived motivations, rather than specific objections to the terms of the Settlement.



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1982) (citations omitted). Instead, the Court should "put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution." *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009). The Court should reject the Objections and approve the Settlement.

**A. Objections of Graybill & Hazlewood LLC**

Class Member Graybill & Hazlewood LLC ("G&H") filed an Objection (ECF 282) claiming that: i) the vouchers provide no value to it, as G&H had cancelled Ruby's services because of Ruby's billing practices; and ii) the vouchers are coupons which should require additional scrutiny pursuant to 28 U.S.C. § 1712. These objections lack merit.[3]

G&H does not appear to understand that even as a former customer, the vouchers it will receive still have value. First, G&H's previous cancellation of Ruby's service does not prevent G&H from restoring the service and using the vouchers to obtain free services with no further obligation or expense. Second, even if G&H no longer needs receptionist services, the vouchers are transferrable and may be sold to a third-party or donated to charity. G&H's conclusion that the vouchers are of "no value to former customers" is unsupported by the actual terms of the Settlement Agreement.

G&H's argument that the Settlement is subject to additional scrutiny as a "coupon settlement" is wrong on the law and facts. Ninth Circuit law is clear that the vouchers are not coupons, which merely offer "a discount – frequently a small one – on class members' purchases from a settling defendant." *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 951 (9th Cir. 2015) (relying upon legislative history of CAFA). The vouchers in this case offer entirely

[3] G&H is a law firm and no doubt understood its right to opt-out and avoid the vouchers that it believes are of no value.



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free services – not discounts – with no additional purchase or expenditure required. *Id*. Moreover, the vouchers may be sold for value or donated. Thus, the vouchers are not "coupons" within the meaning of CAFA and not subject to the extra scrutiny provided by CAFA. *Id*.; *see also In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1181 (9th Cir. 2013).

Even if the vouchers were "coupons," it would not change the propriety of settlement approval. This Court is intimately familiar with the hard-fought nature of this litigation and that the Settlement was only reached through an arm's-length mediation process. As such, G&H's Objection is no bar to settlement approval and should be overruled.

**B. Objection of MagicSnow**

Class Member MagicSnow objects (ECF 289) without explanation that "[w]e have reviewed the case and found many issues and conflicts with this settlement that unfairly limit usage of the vouchers." MagicSnow also objects that its "only option is to receive more of the service that provided the initial alleged injury."

In fact, no claims whatsoever were alleged about Ruby's provision of the service itself in accordance with its obligations. Instead, the claims involved the specific manner in which Ruby billed for those services. The billing issues that were alleged to have caused damages would be rectified going forward through the disclosure provisions of this Settlement.

MagicSnow does not address that it is free to restore its Ruby service or sell or give away its vouchers. While MagicSnow might have preferred an all-cash settlement, this fails to appreciate the reality of Ruby's financial circumstances, the law, and rulings in this case, much less the trade-offs and compromises that must be made in recognition of the risks at trial and on appeal. MagicSnow's preference for a theoretical settlement in which Ruby would pay a material amount of cash to Class Members is unrealistic considering Ruby's financial condition,



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which rendered such a settlement impossible. *See* Hughes Decl. (ECF 272) ¶ 24. Moreover, Ruby had defenses to assert at trial both to the merits and amount of damages, making a substantial cash settlement unlikely. A trial might have produced a cash judgment against Ruby, but that would come only at heightened risk through certain appeals, which has now been eliminated through a settlement that is fair, reasonable, and adequate. MagicSnow's Objection should be overruled.

**C. Vijay Ingam "Objection"**

Although not filed with the Court as required, Vijay Ingam emailed correspondence to the Notice Administrator, subject line "Objections to Settlement." Fisher Decl., Exh. D. To the extent the Court considers this Objection, it provides no basis to reject the Settlement.

Mr. Ingam characterizes Class Counsel as "greedy lawyers" for "getting $4 million, while class members such as me are only getting a total of $4 million," and instead proposes that "the lawyers should only get $2 million with $6 million distributed to class members like me who have suffered." Putting to one side that Mr. Ingam's description of the Settlement terms is wrong, his Objections are meritless.

Mr. Ingam might consider Class Counsel "greedy," but likely does not appreciate that the negotiated fee represents no windfall for them as they have worked on this case for nearly 4 years, without any compensation to date or assurance of being paid, and that their charges for this work on an hourly basis would far exceed the amount of fees they have agreed to accept as a compromise to end this litigation. His comments also ignore that Class Counsel have invested several hundred thousand dollars of their own money to pay the expenses of this litigation, all of which was entirely at risk, and accrued to the benefit of Class Members like himself.



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Most importantly, however, Mr. Ingam's preferences should not be substituted for the reasoned decisions of Plaintiffs, after years of intense litigation and months of negotiations, or the informed opinions of a highly respected mediator who provided the mediator's proposal upon which the terms of the Settlement are based. While these terms are less generous than Plaintiffs' best hopes, they have the overarching benefit of providing the certainty of a fair and reasonable resolution to this litigation, while avoiding the risks and expenses of a trial and appeals. Mr. Ingam's unfiled Objection provides no basis to reject the Settlement.

## II. The Facts of This Case Are Distinct From *Briseño* But the Settlement, Requested Service Awards, and Attorneys' Fees Meet Any Level of Scrutiny as Fair, Reasonable, and Non-Collusive

Three weeks after Plaintiffs filed the Motion for Final Approval and Award of Attorneys' Fees and Costs and Service Awards to Plaintiffs (the "Motion"), the Ninth Circuit issued its opinion in *Briseño*. While *Briseño* extends the heightened scrutiny of the Ninth Circuit's *Bluetooth* test to cases settled post-class certification, it calls for such scrutiny only in the presence of indicia of collusion that are not present here.

The Ninth Circuit found the *Briseño* settlement raised "a squadron of red flags billowing in the wind and begging for further review." Included in this "squadron" were a claims-made distribution of tiny refunds only to the 1.5% of the class who submitted claims—with no provision for direct notice to inform the class of their right to do so—and an injunction that was meaningless. As a result, the awarded fees in that case were far in excess of what the class might have received and "reeks of collusion at the expense of the class members." *Briseño*, 2021 WL 2197968, at *1.[4]

[4] The version of *Briseño* available to Class Counsel as of July 1, 2021, does not include federal reporter page numbering.



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While this Settlement shares the clear sailing and fee reversion provisions of *Briseño* – as do most class action settlements[5] – none of the "squadron of red flags" identified in that case are present here. This Settlement provided direct notice to nearly every Class Member and will provide them all with valuable vouchers for real services, which they may use without additional expense or commitment, or sell to third-parties, or give to charity, which will be distributed to them automatically without any need to file any proof of claims. The full value of the vouchers will be distributed here. Moreover, the injunctive provisions are real and valuable and require disclosure of Ruby's billing practices. The fees sought are not only much less than Class Counsels' lodestar but are also reasonably related to the value of the Settlement to Class Members. The warning signs of *Briseño* are simply not found here.

Moreover, the *Briseño* court emphasized that, "[w]e stress that nothing in this opinion suggests that courts should unnecessarily meddle in class settlements negotiated by the parties or that courts have a duty to maximize the settlement fund for class members. Far from it." *Id*. at *9. The existence of potential signs of collusion, such as "[d]isproportionate fee awards, clear sailing agreements, and kicker clauses," standing alone, are not an "independent basis for withholding settlement approval." *See Monica Smith & Erika Sierra v. Kaiser Foundation Hospitals*, No. 18-CV-00780-KSC, 2021 WL 2433955, at *8 (S.D. Cal. June 15, 2021) (citing *Briseño*, 2021 WL 2197968, at *10); *Rodriguez v. Evergreen Professional Recoveries, Inc.*, No. C19-0184-JCC, 2021 WL 2577130, at *3 (W.D. WA June 23, 2021) (discussing *Briseño* and potential signs of collusion and granting final approval of class action settlement in which

[5] The fact that nearly all class action settlements share these features should not be surprising. The benefit of settlements is that they bring litigation to an end and eliminate risk for all sides.



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plaintiff's counsel sought between 68% and 73% of the settlement amount). Instead, courts "must scrutinize them where they appear." *Briseño*, 2021 WL 2197968, at *9.

*Briseño* does not alter Ninth Circuit law that courts "will rarely overturn an approval of a compromised settlement unless the terms of the agreement contain convincing indications that … self-interest rather than the class's interest in fact influenced the outcome of the negotiations." *Id*. at *5 (internal quotation marks omitted; citing *Staton v. Boeing Co.*, 327 F.3d 938, 960 (9th Cir. 2003)).

In their opening papers, Plaintiffs discussed each of the Rule 23(e)(2) factors at length in their examination of the *In re Online DVD* criteria. Motion, Part V., B-E. The Motion also closely examined the requested attorneys' fees and costs and addressed any potential concerns about collusion. *Id*., Part V., C. and E. This supplemented earlier briefing by the parties (ECF 277 at 7-14; ECF 278 at 8-12) in response to the Court's instruction at the preliminary approval stage that the parties address whether there are subtle signs of collusion.

In this reply, Plaintiffs wish to emphasize three key reasons why the settlement and requested attorneys' fees satisfy Rule 23(e)(2) and *Briseño*. First, an independent, highly respected mediator proposed the class settlement before any discussion of resolving the issue of attorneys' fees. Second, the mediator's proposed settlement reflected the reality of Ruby's financial circumstances. Third, the settlement provides both vouchers and meaningful nonmonetary relief.

### A. Unlike *Briseño*, an Independent Mediator Proposed the Key Terms of the Settlement

The parties relied on two independent mediators and only reached a settlement after agreeing to a proposal presented by mediator Hunter Hughes, III a few weeks before trial. *Briseño*, in contrast, makes only a passing reference to a third-party being involved in settlement



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discussions—a magistrate judge who was assigned "to help the parties grease the wheels of justice…." 2021 WL 2197968, at *3. As Mr. Hughes' declaration (ECF 272) makes clear, he was heavily involved in the settlement of this case to an extent that the possibility of collusion was simply eliminated.

Also unlike *Briseño*, Mr. Hughes only proposed a resolution to the attorneys' fees issue after the parties had accepted his proposal to settle the Class's claims. "Class Counsel, however, were particularly adamant that they would not consider any proposed resolution of the attorneys' fee issue unless and until there was material agreement on the benefits to be provided through the settlement to the Class." Hughes Decl. ¶ 20. "Again, there was no negotiation or proposal regarding attorneys' fees and costs until after the Parties accepted the class relief settlement recommendation." *Id.* ¶ 22.

The Settlement Agreement reflects the reality that "neither side was assured of victory." *Id.* ¶ 9. "I can also attest that the negotiations were extremely vigorous, completely at arm's-length, and fully conducted in good faith." *Id.* ¶ 23. "[T]his Settlement represents a recovery and outcome that is reasonable and fair to all parties. This is especially the case given the financial information provided by Ruby and the considerable business challenges the epidemic has posed to it." *Id.* ¶ 24.

**B. The Settlement Reflects the Reality of Ruby's Finances**

Ruby's financial circumstances brought about by the pandemic drove the Settlement.

Mr. Hughes referred to Ruby's "financial information" and financial challenges repeatedly in his declaration. *See id.* ¶¶ 13, 19, 21, 23, 24. "I received financial information from Ruby that informed my views and I believe moved the plaintiffs' expectations about the size of a settlement Ruby could reasonably perform." *Id.* ¶ 19. And, "many business and



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financial challenges posed by the epidemic [] could have resulted in a pyrrhic victory for the ultimate winner." *Id*. ¶ 23.

The settlement was not driven by attorneys' fees. *See Briseño*, 2021 WL 2197968, at *5 (referring to special attention given to class settlements "when the record suggests that settlement is driven by fees") (citation omitted). As already noted, the mediator made a proposal to resolve the issue of attorneys' fees and costs only *after* the parties had agreed to the mediator's proposal to settle the Class's claims.

Further, the mediated fee is a substantial downward discount on Class Counsels' fees and costs. *See* Motion at 35-37 [ECF page numbering]. As of May 1, 2021, before the briefing on final approval or in connection with the reply was complete, the requested fee award, less costs, is 60.8% of Class Counsels' lodestar. *Id*. at 44.

There also is no evidence Class Counsel "frittered away hours on pointless motions or unnecessary discovery." *Briseño*, 2021 WL 2197968, at *8 (citation omitted). To the contrary, these were hard fought, contentious cases, involving extensive discovery and briefing. As stated by the mediator, "the arguments and positions asserted by all involved were the product of hard work, and they were complex and highly adversarial." Hughes Decl. ¶ 10.

Nor is this a case in which Class Counsel "devoted tremendous hours but achieved very little for the class"—what *Briseño* called "scraps." *Briseño*, 2021 WL 2197968, at *8. Plaintiffs discuss in more detail in the next section the valuable relief they obtained for the Class.

**C. The Settlement Provides Vouchers and Meaningful Nonmonetary Relief**

The settlement is unlike those that provide pennies only to those few class members who file claims, or provide worthless injunctive relief criticized in *Briseño*. Each Settlement Class



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Member will receive a voucher worth enough to pay for at least one month of chat service at no additional expense. Many will receive vouchers worth hundreds or thousands of dollars.[6]

For no fewer than three years after the Effective Date of the Settlement Agreement, Ruby must describe its billing practices according to specific, negotiated guidelines. This is not "illusory" or "meaningless" relief called out in *Briseño*. 2021 WL 2197968, at *10. Ruby's alleged misrepresentations about its billing practices led to this case and the State Action. The requirement that Ruby accurately describe its billing practices means that current and prospective Ruby customers will have the information necessary to evaluate the true value and cost of Ruby's services.

Ruby revised its Terms & Conditions to include its rounding and hold time billing practices only after the State Action was filed. *See* Escobar Decl. (ECF 22), Exh. E (Ruby's Amended Motion to Dismiss [the State Action] Pursuant to ORCP 32 I) at 31 (arguing that after the State Action was filed, Ruby "ceased from engaging in the alleged wrongful practices by further enhancing its disclosures") (formatting omitted)). This is in contrast to *Briseño*, 2021 WL 2197968, at *3, in which the defendant "maintains that this litigation played no role" in its removal of a disputed product label and change to its marketing practices.

The injunctive relief in the Settlement Agreement has substantial value. *See Briseño*, 2021 WL 2197968, at *10 (requiring district court to "attempt to quantify the value of the injunctive relief" or "exclude it from calculations") (citation omitted). One of Ruby's experts calculated the damages from allegedly improper overage charges as $11,403,218, exclusive of prejudgment interest. Opinion and Order (ECF 256) at 28. While Plaintiffs alleged that the

[6] Class Counsel understand that there are more than 6,900 Settlement Class Members set to receive vouchers worth at least $300 of services. Of these Settlement Class Members, 2,265 are set to receive vouchers worth at least $999 in services.



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damages stemming from these now disclosed practices was in fact higher, Ruby's $11 million calculation provides a fair estimate of the *minimum* value of the injunctive relief—the catalyst effect of these lawsuits plus Ruby's disclosures going forward—and the harm that will be avoided by the Settlement.

The Settlement Agreement is also distinguishable from the types of agreements criticized in *Briseño* for another important reason—all Settlement Class Members have been identified and nearly all received direct notice. *See Briseño*, 2021 WL 2197968, at *3 (explaining *Briseño* involved a claims made settlement with no direct notice to the class or even the identification of class members); Fisher Decl. ¶ 10 (undeliverable notices represent only about 6% of the total Class Distribution List).

## III. Conclusion

Plaintiffs and Class Counsel obtained certification of a nationwide class and defeated several dispositive motions and procedural maneuvers by Ruby in two cases to limit claims, potential damages, and the size of the class. Despite Plaintiffs' pretrial successes, several outstanding factual and legal issues meant that the outcome at trial and on appeal remained uncertain. Plaintiffs agreed to the mediator's proposed resolution only a few weeks before trial because the proposal offered meaningful relief to the Class, especially considering the risks of continued litigation, and the certainty of a long appellate process to confirm any judgment. Most importantly, Ruby's financial circumstances made what the mediator called a "pyrrhic victory" a real possibility for the Class.

For these and all the reasons discussed in this reply and Plaintiffs' Motion, the Court should grant final approval of the Settlement Agreement and award the requested service awards and attorneys' fees and costs.



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DATED this 6th day of July, 2021.

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