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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

MCKENZIE LAW FIRM, P.A., and OLIVER LAW OFFICES, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

RUBY RECEPTIONISTS, INC.,

Defendant.

No. 3:18-cv-01921-SI

DEFENDANT'S RESPONSES TO QUESTIONS POSED BY THE COURT IN ITS MARCH 3, 2021 ORDER

In connection with its consideration of the parties' proposed settlement of this class action, by its Order dated March 3, 2021, the Court instructed the parties to be prepared to respond to a series of questions at a hearing to be scheduled in the near future. The parties have conferred and determine that certain of the Court's questions are probably best directed to one party or the other, although both parties will be prepared to address each of the Court's questions. The parties also agreed that it might facilitate the proceedings if they first responded to the questions in writing, so that the Court has the responsive data in advance of the hearing, and the parties can address any follow-up questions the Court may have at that time.

Accordingly, Defendant Ruby Receptionists, Inc., hereby responds to the Court's questions as follows:

1. **How many Settlement Class Members who would be entitled to a voucher under the Proposed Settlement Agreement are no longer current Ruby customers?**

As of January 13, 2021, there were 14,273 former customers in the McKenzie and Maiden classes (before excluding McKenzie class opt-outs).

	Count
Current	4,3534
Former	14,273
	18,807

2. **How many Settlement Class Members would not be entitled to a voucher because they "either never paid for Ruby service or w[ere] refunded all monies paid for Ruby service"? ECF 269-1 at 7. How many Settlement Class Members would be entitled to the $49.00 minimum voucher offered to Settlement Class Members whose pro rata share "is greater than zero dollars ($0) but less than $49.00"? *Id.***

As of January 13, 2021, there were 2,372 customers who received no billing from Ruby or were fully refunded by Ruby during the class period. Most of these customers used Ruby during a free trial period, had a coupon code for free service (e.g. come back to Ruby and get your first month free), or exercised a money back guarantee.

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Based on the damages calculations the parties have reviewed, 2,569 class members would be entitled to the $49.00 minimum voucher offered to Settlement Class Members whose pro rata share "is greater than zero dollars ($0) but less than $49.00". Of these, as of that date, 327 were current customers, and 2,242 were inactive.

3. **What action, if any, must a Settlement Class Member who is a current Ruby customer take to redeem a voucher received under the Proposed Settlement Agreement?**

Current customer class members will not be required to do anything other than present their vouchers online for credit. Class members will be assigned a unique voucher code that is linked to the class member's client ID number. Current customers wishing to redeem their voucher will simply go to a web browser and enter the voucher code, specifying whether they wish to redeem for Reception Services or for Self Service Chat. If the Current Customer elects Reception Services, the redemption system will automatically credit the voucher into the client's existing account.

4. **Plaintiffs assert that the vouchers contemplated in the Proposed Settlement Agreement are "not 'coupons' within the meaning of [The Class Action Fairness Act] 28 U.S.C. § 1712" because the Proposed Settlement Agreement "do[es] not require Settlement Class Members to spend any money in order to utilize the [v]oucher." ECF 273 at 38. The Proposed Settlement Agreement provides that some Settlement Class Members will receive a voucher worth no more than $49.00. ECF 269-1 at 7. Under the terms of the Proposed Settlement Agreement, however, vouchers may be used only for Ruby's Chat or Receptionist Services. *Id.* What is the cost of the least expensive Ruby Receptionist Service Plan? What is the cost of the least expensive Ruby Chat Service Plan?1 How would Settlement Class Members who are not current Ruby customers and who receive a voucher in an amount less than the amount of the least expensive Ruby Receptionist or Chat Service Plan use their voucher without "hand[ing] over more of their own money" first? *See In re Online DVD-Rental Antitrust Litig.,* 779 F.3d 934, 951 (9th Cir. 2015).**

Ruby's Self Service Chat option, currently marketed under the name "Pure Chat" www.purechat.com, is priced at $49 per month. Chat has become a preferred communication

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device among professionals, particularly during the pandemic environment. Pure Chat customers may use their vouchers up to its designated amount and cancel at any time.

Ruby's lowest Reception Services offering is a cloud-based phone number, mobile application and free Internet-based calling with no receptionist minutes. The price of this plan is also $49. Class members choosing this plan can also choose to have Ruby answer their phone with an incremental per reception minute charge. This is not a published plan but will be made available to class members on both the voucher itself and in Ruby's redemption workflow.

5. **Plaintiffs imply that it is impossible to provide Settlement Class Members "with any meaningful amount of cash." ECF 273 at 40. Why is it impossible to provide Settlement Class Members—particularly members who do not wish to use or no longer have a need for Ruby's services—with meaningful amounts of cash, perhaps $49.00? What benefit, if any, do Settlement Class Members who are not current customers receive if they do not wish to resume or no longer need Ruby's services?**

Ruby has financial constraints that limit the amount of cash that can be applied to a total settlement to $4M. This settlement contemplates that the cash be used to pay attorney's fees. The nature and extent of Ruby's financial constraints were discussed during the parties' mediation. In a declaration submitted by Plaintiffs ECF 272, Mr. Hughes describes the financial information provided by Ruby during the course of the mediation and its impact on his, and the Plaintiffs' analysis:

As part of the continued negotiations, I also facilitated the production of certain of Defendant's financial information to Plaintiffs' counsel. In my experience as a mediator, misalignment between a plaintiff's expectations about the amount of damages achievable at trial and what a defendant could reasonably afford to pay sometimes presents an obstacle to settlement. While the settlement privilege prevents me from disclosing specifics, I can say that while mediating this case, I received financial information from Ruby that informed my views and moved the plaintiffs' expectations about the size of a settlement Ruby could reasonably perform. Declaration of Hunter Hughes at para. 19.

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Mr. Hughes makes it clear that, during the course of the mediation, he "directed considerable discussion and attention to Defendant's financial information, as well as the uncertainties posed by the national health crisis which might potentially impact this case." Hughes Decl. at para. 13. The structure of the settlement eventually reached was largely based on the mediator's proposal for a settlement, which took "into consideration the strengths and weaknesses of the case, the possible outcomes of a trial and collectability of any judgment obtained, and the financial information provided by Ruby." Id. at para. 22. In sum, the parties' mediator believes that "that this 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. at para. 25.

The financial information discussed by Ruby during the mediation process is of a highly sensitive and proprietary nature. That said, Ruby can make Kate Winkler, Chief Executive Officer of the company, available to answer, *in camera* and pursuant to the protective order provisions entered in this case, any questions the Court may have related to these circumstances.

Ruby also notes that any customer that wishes to not redeem their voucher has the option to transfer or sell their voucher to another entity.

6. What purposes are served by the following conditions on Settlement Class Members' vouchers: (a) the one-time transfer limit on vouchers; (b) the prohibition on using vouchers to pay for overage minutes; (c) Ruby's right to determine which Settlement Class Members shall receive vouchers in each quarter; and (d) Ruby's right to defer activation of service to Settlement Class Members who are not current Ruby customers and who seek to redeem a voucher in the first billing period after receipt.

a) One Time Transfer: Ruby wants to ensure that prior customers that are no longer in business have the opportunity to use their voucher with either a new business or potentially sell their voucher to get some benefit. All Ruby customers are required to agree to Ruby's terms of service, which would include extinguishing past due balances on the account before resuming

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services, and exclusion of certain types of services such as hate groups, law enforcement, social services and certain segments that have special training requirements. For a voucher to be properly transferred to ensure it can be redeemed in accordance with Ruby's terms of services, the customer must identify their use case and agree to Ruby's terms of service. Ruby's intake resources are limited and unable to handle an unlimited number of transfers requiring compliance with the terms and conditions.

b) Overage: Overage is billed in the next month based on actual minutes used. Should a customer wish to use Ruby for only 1 month, then Ruby cannot match the voucher to the service use and will be exposed to having to write off any overage that occurred. Class Members would have the option to select the next highest plan to ensure that they do not go over their allotted receptionist minutes.

c) Allotment of Vouchers: The use of vouchers by different types of class members will impact Ruby's ongoing business in different but material ways. Simply put, use of vouchers by current customers will, at minimum, negatively impact Ruby's cash flow. Use of vouchers by returning customers or transferees will, at minimum, require additional onboarding and other resources. To keep the system from becoming overwhelmed by new demand, and to maintain service for everyone making use of Ruby's services, it is essential to spread the impact over a relatively brief period of time. Thus, Ruby's goal is to fix the voucher allotment upfront by breaking the class into six quarterly cohorts that have a roughly equal mix of different customer types.

d) First quarter deferral: Similarly, Ruby is having to build a new voucher redemption system and signup process in order to be able to handle the volume of potential class member redemptions. For instance, if 14,273 former class members are divided over 6 quarters, Ruby potentially has as many as 2,379 new customers to be onboarded as soon as vouchers arrive. For comparison, Ruby's current onboarding capacity in a normal month is about 300 new reception

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customers. Additionally, even at the rate of voucher redemption contemplated in the settlement agreement, Ruby will need to redesign its onboarding processes to handle "speedy set ups" which will allow customers to quickly turn their accounts back on to their original configuration and then use Ruby's mobile application or online portal to perform account updates. The settlement allows for an additional quarter of room to accommodate any potential delays that could occur with new systems and with new processes.

7. **The Ninth Circuit has instructed courts to look for "subtle signs of collusion" between class counsel and defendants when considering a proposed settlement agreement. *See Roes, 1-2 v. SFBSC Mgmt., LLC,* 944 F.3d 1035, 1048-49 (9th Cir. 2019). Signs of collusion, as relevant here, can include: "when counsel receive a disproportionate distribution of the settlement," id., and when "the agreement contains a 'clear sailing' provision for attorney's fees separate and apart from class funds," *In re Hyundai & Kia Fuel Economy Litigation*, 926 F.3d 539, 569 (9th Cir. 2019) (en banc). At the hearing, the parties should be prepared to address whether there are subtle signs of collusion as described by the Ninth Circuit.**

The Court called to counsel's attention its recent order in *Brinkmann v. ABM Onsite Servs. – West, Inc*., in which the Court ordered the parties in that case to provide supplemental briefing on aspects of the proposed settlement agreement that may be—but are not necessarily—signs of collusion between counsel. Case Nos. 3:17-cv-275-SI (Lead Case); 3:17-cv-478-SI, slip op. at 8 (D. Or. Feb. 10, 2021). Ruby addresses the concerns raised in the Brinkmann opinion here to facilitate the Court's scrutiny into similar aspects of the proposed settlement agreement in this case. As discussed below, although the proposed settlement agreement has two of the signs of potential collusion, several indicia support a finding that these signs and the agreement as a whole were not the result of collusion and that the proposed settlement agreement is fair to the parties.

As the Court noted in *Brinkmann*, that case involves a settlement reached before class certification. In evaluating whether a proposed settlement agreement reached prior to class certification is fair to the parties, courts apply "an even higher level of scrutiny for evidence of

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collusion or other conflicts of interest than is ordinarily required under Rule 23(a)[.]" *In re Bluetooth Headset Prods. Liab. Litig.* ("*In re Bluetooth*"), 654 F.3d 935, 946 (9th Cir. 2011). Even if In re Bluetooth's higher scrutiny applied here, the proposed settlement agreement would survive it.

In applying *In re Bluetooth's* scrutiny, courts look for "subtle signs that class counsel have allowed pursuit of their own self-interests." Id. at 947. Three subtle signs of collusion are (1) counsel receiving "a disproportionate distribution of the settlement"; (2) a "clear sailing" provision under which the defendant agrees not to oppose an award of attorney's fees; and (3) a reversion provision providing that any amount of attorney's fees not awarded does not get added to the class fund. Id. The presence of any or all of these signs does not, by itself, mean that a settlement agreement is the product of collusion; instead, where these signs are present, a court must "examine them, and adequately develop the record to support" a conclusion that the agreement is "still . . . fair, reasonable, [and] adequate." *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015).

a. Class Counsel Does Not Receive a Disproportionate Distribution of the Settlement.

As to the first sign of collusion, here, class counsel does not receive a disproportionate distribution of the settlement. Under the settlement agreement, Ruby agrees to establish an $8 million fund to be used to provide vouchers to class members. See Settlement Agreement § 4.2.1. The settlement agreement provides that class counsel will receive, subject to Court approval, $4 million for attorneys' fees and expenses. Id. § 6.1. Thus, the agreed upon fees represent approximately 33% of the total settlement fund. This is slightly higher than the 25% benchmark used by the Ninth Circuit, but courts sitting in the Ninth Circuit routinely approve of similar fee requests. *See, e.g., Mathein v. Pier 1 Imports (U.S.), Inc.,* No. 1:16-cv-00087-DAD-SAB, 2018 WL 1993727, at *8 (E.D. Cal. Apr. 27, 2018) (finding that fees amounting to 1/3 of

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settlement fund were not disproportionate to the amount distributed to the class); *Fronda v. Staffmark Holdings, Inc.,* Case No. 15-cv-02315-MEJ, 2017 WL 5665671, at *10 (N.D. Cal. Nov. 27, 2017) (same); *Cabiness v. Edu. Fin. Sols., LLC,* Case No. 16-cv-01109-JST, 2018 WL 3108991, at *7 (finding that fees amounting to 30% of settlement fund were not disproportionate to the amount distributed to the class); see also *Demmings v. KKW Trucking, Inc*., Case No. 3:14-cv-0494-SI, 2018 WL 4495461, at *11 (D. Or. Sept. 19, 2018) (holding that if class counsel received the full amount of fees under the proposed settlement agreement, which constituted 40% of the total settlement amount, "the amount would not be disproportionate [because] [t]he class still receives considerably more than counsel"); *Shvager v. ViaSat, Inc.,* CASE NO. CV 12-10180 MMM (PJWx), 2014 WL 12585790, at *13 (C.D. Cal. Mar. 10, 2014) (finding that settlement agreement providing for attorneys' fees that represented 41.1% of the total settlement amount was "not so disproportionate to the class's recovery that it suggest[ed] collusion"). Moreover, the $4 million provided for by the settlement agreement is less than class counsel's lodestar. Mem. in Supp. of Prelim. Approval at 27-28. This weighs against a finding that the fee award is disproportionate to the class recovery. *See Vargas v. Ford Motor Co.,* Case No. CV-12-08388 AB (FFMx), 2020 WL 1164066, at *12 (C.D. Cal. Mar. 5, 2020) (stating fee was not disproportionate to the benefits to the class where, among other things, the requested amount was less than class counsel's lodestar); *Cabiness*, 2018 WL 3108991, at *7 (finding that fee was not disproportionate where it was less than class counsel's lodestar).

In *Roes 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1050-1055 (9th Cir. 2019), cited by the Court in its March 3, 2021 Order, the Ninth Circuit directed the district court to carefully examine the "claimed value" of a non-cash portion of a settlement when more settlement cash went to class counsel than went to class members, even if the non-cash portion of the settlement did not constitute a coupon settlement, to ensure that class counsel was not inflating the value of the non-cash portion of the settlement to justify higher fees. *Id.* at 1051-52. The court was

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especially concerned about possible inflation where the settlement agreement allowed the value of unused vouchers to revert to the defendant because the defendant could "create a larger [non-cash settlement] pool than [it] know[s] will be claimed or used" to inflate the settlement value and attorneys' fees while knowing it "will not be on the hook" for the full pool. Id. at 1054. Here, the agreement does not provide for the value of unused vouchers to revert to Ruby. Even if it did, however, the parties here structured the voucher distribution as they did because Ruby anticipates most or all of the vouchers will be claimed and redeemed, either by class members or by the persons or entities to whom those members transfer or sell the vouchers. *See supra* 6(c). The record before the Court suggests that Ruby expects most or all of the voucher fund to be redeemed, indicating that Ruby did not inflate the value of the voucher fund.

The *Roes 1-2* court also faulted the district court for failing to address concerns by objectors that the value of the non-cash portion of the settlement was inflated by developing a record establishing that the non-cash portion of the settlement was not overstated where only 75 out of 865 claimants had requested recovery from the non-cash portion of the settlement and the vouchers "had an expiration date, were not transferable, and required class members to do business with defendants to redeem" the vouchers. *Id.* at 1053-54. Here, the vouchers are transferable one time, which means that class members can sell their vouchers and receive value from the settlement without having to do business with Ruby. Moreover, as discussed above, the record suggests that the parties anticipate that most or all class members will redeem their vouchers. Finally, although the vouchers have an expiration date, the expiration date does not reduce the value of the voucher because in no case will the voucher expire before a class member can redeem its full value. See Settlement Agreement § 4.9 ("A Voucher will be valid for a period running from the date of its actual distribution to a Settlement Class Member until the latter of (a) one year, or (b) the minimum period of time necessary to utilize the full value of the Voucher."); *see also Roes 1-2*, 944 F.3d at 1055 (stating that district court could have asked

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whether class members could realistically redeem the full value of the vouchers before they expired to "better understand how the . . . expiration date potentially limited the vouchers' value").

Accordingly, the value of the voucher fund is not inflated, and the attorneys' fees are not disproportionate to the value of that voucher fund.

b. The Settlement Agreement is Fair Even Though it Contains Clear Sailing and Reversion Provisions Because Several Factors Indicate that it was the Product of Good-Faith, Robust Negotiations Between Counsel, Not Collusion.

As to the second and third signs, the settlement agreement contains both a clear sailing and reversion provision; however, the agreement is still fair, reasonable, and non-collusive and should be approved. Here, the agreement is not collusive even though it contains a clear sailing clause because the settlement agreement provides that the settlement is not contingent on approval of fees. Settlement Agreement § 6.1. The presence of a clear sailing provision "does not warrant denying . . . approval" where the agreement "provides that the Court's approval of the attorney's fees is separate from its approval" of the settlement. *Demmings*, 2018 WL 4495461, at *11; see also *Bell v. Consumer Cellular, Inc.,* Case No. 3:15-cv-941-SI, 2017 WL 2672073, at *8 (D. Or. June 21, 2017) (same).

Similarly, the presence of a reversion provision does not mean that the settlement agreement here is collusive. Even though reversion may be a sign of collusion, "[t]he Ninth Circuit instructs that 'reversion to the defendant may be appropriate when deterrence is not a goal of the statute or is not required by the circumstances.'" *Bell v. Consumer Cellular, Inc.,* Case No. 3:15-cv-00941-SI, 2016 WL 3063870, at *3 (D. Or. May 31, 2016) (quoting *Six Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1308 (9th Cir. 1990)). Where, as here, the claims involve breach of contract, "there does not appear to be any deterrence or punitive purpose to the claims," and reversion is appropriate. *Cf. Willcox v. Lloyds TBS Bank, plc*, Civ. No. 13-00508 ACK-RLP, 2017 WL 487018, at *3 (D. Haw. Feb. 6, 2017) (finding that

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allowing unclaimed settlement funds to revert to the defendant where claims involved breach of contract and citing Six Mexican Workers).

Additionally, the settlement approval contains further indicia that it was the product of robust, good-faith negotiation, not collusion. First, the parties agreed to the settlement after engaging in negotiations overseen by a neutral, experienced mediator, and the settlement agreement is largely based on the mediator's own proposal for settlement. See Hughes Decl. at para. 4, 22. The "presence of a neutral mediator" is "a factor weighing in favor of non-collusiveness[.]" *In re Bluetooth*, 654 F.3d at 948; *In re Hyundai & Kia Fuel Economy Litig*., 926 F.3d 539, 569 (9th Cir. 2019) (also cited by the Court in its March 3, 2021 Order); see also *In re HP Laser Printer Litig*., No. SACV 07–0667 AG (RNBx), 2011 WL 3861703, at *4 (C.D. Cal. Aug. 31, 2011) (approving settlement agreement that awarded class counsel a disproportionate share of monetary settlement and contained both clear sailing and reversion provisions where a neutral mediator oversaw negotiations and submitted a declaration stating that the settlement process was long, counsel vigorously negotiated terms, and resolved settlement terms for the class before addressing compensation for class counsel); *Consumer Cellular, Inc*., 2017 WL 2672073 at *8 (approving settlement agreement that contained both clear sailing and reversion provision where settlement negotiations were overseen by a neutral mediator); *Georgino v. Sur la Table, Inc.,* CASE NO. CV 11-03522 MMM (JEMx), 2013 WL 12122430, at *16 (C.D. Cal. May 9, 2013) (same); *Demmings*, 2018 WL 4495461, at *11 (approving settlement agreement with clear sailing provision where negotiations were overseen by neutral mediators); *Vargas*, 2020 WL 1164066, at *12 (approving settlement agreement containing clear sailing provision where negotiations were overseen by a mediator).

Second, the parties agreed to the settlement only after litigating the matter for years, a fact that weighs against a finding of collusion. *In re Premera Blue Cross Customer Data Sec. Breach Litig.,* Case No. 3:15-md-2633-SI, 2019 WL 3410382, at *24 (D. Or. July 29, 2019)

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(finding "no evidence of collusion" where, among other things, the parties litigated the matter for years before reaching a proposed settlement agreement).

Third, the parties negotiated the fee award only after reaching an agreement on the class settlement, Hughes Decl. at para. 20, 22, which suggests that counsel did not trade away any relief for the class in order to obtain more in fees or the clear sailing provision. *See Shvager*, 2014 WL 12585790, at *14-15 (approving settlement agreement with both clear sailing and reversion clause where "the parties decided on the common fund amount before negotiating the amount of attorneys' fees[, which] supports a conclusion that the settlement was not the result of collusion, but rather the product of good faith negotiation"); *Shames v. Hertz Corp.,* No. 07–CV–2174–MMA (WMC), 2012 WL 5392159, at *13 (S.D. Cal. Nov. 5, 2012) (finding no evidence of collusion and approving settlement agreement that contained a clear sailing provision where, among other things, the parties negotiated fees only after finalizing class settlement); *Vargas*, 2020 WL 1164066, at *12 (approving settlement agreement containing clear sailing provision where fees were negotiated separately from the class relief).

Finally, the settlement agreement provides genuine value to class members. Even when settlement agreements contain clear sailing and reversion provisions, courts are likely to find that they are not the product of collusion when class members obtain significant value from the settlement. *Shvager*, 2014 WL 12585790, at *14 ("Despite the presence of the clear sailing and [reversion] provisions, the fact that the settlement agreement provides significant value to the class persuades the court that the presence of these indications of collusion do not warrant invalidating the agreement as a whole."); *Vargas*, 2020 WL 1164066, at *12 (approving settlement agreement containing a clear sailing provision where, among other things, "the settlement entitle[d] the class to substantial relief").

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Here, several factors support a finding that the settlement agreement was not the product of collusion and is fair to the class. Accordingly, the Court should preliminarily approve the settlement.

DATED: March 12, 2021

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