Keith S. Dubanevich, OSB No. 975200
Cody Berne, OSB No. 142797
Megan K. Houlihan, OSB No. 161273
STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. Oak Street, Suite 500
Portland, Oregon 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: kdubanevich@stollberne.com
cberne@stollberne.com
mhoulihan@stollberne.com

Attorneys for Plaintiffs and the Class

[Additional Counsel on Signature Page.]

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,

Plaintiffs,

v.

RUBY RECEPTIONISTS, INC.,

Defendant.

Case No. 3:18−cv−01921−SI

MOTION FOR FINAL APPROVAL AND AWARD OF ATTORNEYS' FEES AND COSTS AND SERVICE AWARDS TO PLAINTIFFS

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

LR 7-1 CERTIFICATION 1

MOTION 1

MEMORANDUM IN SUPPORT OF MOTION 3

I. FACTUAL AND PROCEDURAL BACKGROUND OF THE TWO CASES 3

II. THE PARTIES REACHED A SETTLEMENT SHORTLY BEFORE TRIAL 6

III. SUMMARY OF THE SETTLEMENT TERMS 7

IV. NOTICE 9

V. LAW AND ARGUMENT 10

A. Legal Standards at Final Approval 10

B. Application of the *In re Online DVD* Criteria Demonstrate that the Settlement Is Fair and Reasonable and the Court Should Approve It 12

1. The Strength of Plaintiffs' Case 12

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation 16

3. The Risk of Maintaining Class Action Status Throughout the Trial 17

4. The Amount Offered in Settlement 18

5. The Extent of Discovery Completed and the Stage of the Proceedings 19

6. The Experience and View of Counsel 20

7. The Presence of a Government Participant 21

8. The Reaction of the Class Members to the Proposed Settlement 21

C. There Was No Fraud or Collusion 24

D. The Settlement Is Fair, Reasonable, and Adequate 26

E. The Resolution of Attorneys' Fees and Costs in the Settlement Is Fair and Reasonable 27

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PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

1. The Amount of the Fee Was the Subject of an Arm's Length Mediation 28

2. The Negotiated Fee Is Fair and Reasonable 30

a. The Results Achieved 30

b. The Risks of Litigation 30

c. The Skill Required and the Quality of Representation 32

d. The Contingent Nature of the Fee and the Financial Burden Carried by Class Counsel 33

e. The Award Sought Is Less than Awards in Similar Cases 34

3. The Court Should Utilize the Lodestar Method 34

a. Class Counsel's Lodestar Is Fair and Reasonable 36

b. The Number of Hours Expended is Reasonable 36

c. Class Counsel's Hourly Rates are Reasonable 38

4. A Cross-Check of the Fee Request Under the Percentage of Recovery Method Shows the Request is Reasonable 39

5. Litigation Expenses Are Reasonable and Should Be Reimbursed 43

E. The Service Awards are Reasonable and Justified 43

VI. CONCLUSION 45

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209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

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No. 3:16-cv-0483-SI, 2019 WL 7372658 (D. Or. Dec. 31, 2019)....................................*passim*

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297 F.R.D. 431 (E.D. Cal. 2013).. 21

Bell v. Consumer Cellular, Inc.
No. 3:15-cv-941-SI, 2017 WL 2672073 (D. Or. June 21, 2017)....................................... 25, 44

Brazil v. Dell, Inc.
No. C-07-01700 RMW, 2012 WL 1144303 (N.D. Cal. Apr. 4, 2012).................................... 29

Browne v. Am. Honda Motor Co.
No. CV 09-06750 MMM (DTBx), 2010 WL 9499073 (C.D. Cal. Oct. 5, 2010)..................... 33

Browning v. Yahoo! Inc.
No. C04-01463 HRL, 2007 WL 4105971 (N.D. Cal. Nov. 16, 2007).................................... 42

Campbell v. Facebook, Inc.
951 F.3d 1106 (9th Cir. 2020) 22, 24, 34

Ching v. Siemens Indus., Inc.
No. 11-cv-04838-MEJ, 2014 WL 2926210 (N.D. Cal. June 27, 2014)................................... 16

Churchill Vill., L.L.C. v. Gen. Elec.
361 F.3d 566 (9th Cir. 2004) 12

Class Plaintiffs v. City of Seattle
955 F.2d 1268 (9th Cir. 1992) 11

DeBoer v. Mellon Mortgage Co.
64 F.3d 1171 (8th Cir. 1995) 29

Demmings v. KKW Trucking, Inc.
No. 3:14-cv-0494-SI, 2018 WL 4495461 (D. Or. Sept. 19, 2018) 25

Evans v. Jeff D.
475 U.S. 717 (1986)... 28

Fernandez v. Vict. Secret Stores
No. CV 06-04149 MMM (SHx), 2008 WL 8150856 (C.D. Cal. July 21, 2008)...................... 33

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TEL. (503) 227-1600 FAX (503) 227-6840

Fischel v. Equitable Life Assurance Soc'y of U.S.
307 F.3d 997 (9th Cir. 2002) 27

Foos v. Ann, Inc.
No. 11cv2794 L(MDD), 2013 WL 5352969 (S.D. Cal. Sept. 24, 2013) 41

Glass v. UBS Fin. Servs.
331 Fed. App'x 452 (9th Cir. 2009) 30

Gustafson v. Valley Ins. Co.
No. CV 01-1575-BR, 2004 WL 2260605 (D. Or. Oct. 6, 2004) 32

Hanlon v. Chrysler Corp.
150 F.3d 1011 (9th Cir. 1998) .... *passim*

Harris v. Marhoefer
24 F.3d 16 (9th Cir. 1994) 43

Hefler v. Wells Fargo & Co.
No. 16-CV-05479-JST, 2018 WL 6619983 (N.D. Cal. Dec. 18, 2018) 36, 43

Hendricks v. Starkist Co.
No. 13- CV-00729-HSG, 2016 WL 5462423 (N.D. Cal. Sept. 29, 2016) 34

Hensley v. Eckerhart
461 U.S. 424 (1983) 28, 29, 30, 36

Hetherington v. Omaha Steaks, Inc.
No. 3:13-cv-02152-SI, 2016 WL 4374947 (D. Or. Aug. 12, 2016) 44

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No. C98-1646C, C93-0178C, 2001 WL 34089697 (W.D. Wash. Mar. 26, 2001) 26, 44

In re Apple Computer, Inc. Deriv. Litig.
No. C 06-4128 JF (HRL), 2008 WL 4820784 (N.D. Cal. Nov. 5, 2008) 28

In re Biolase, Inc. Sec. Litig.
No. SACV 13-1300-JLS (FFMx), 2015 WL 12720318 (C.D. Cal. Oct. 13, 2015) 36

In re Bluetooth Headset Prods. Liab. Litig.
654 F.3d 935 (9th Cir. 2011) 30, 34

In re Capacitors Antitrust Litig.
No. 3:17-md-02801-JD, 2018 WL 4790575 (N.D. Cal. Sept. 21, 2018) 36, 43

In re Equity Funding Corp. of Am. Sec. Litig.
438 F. Supp. 1303 (C.D. Cal. 1977) 32

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In re Ferrero Litig
583 Fed. Appx. 665 (9th Cir. 2014).. 35, 40, 41

In re Heritage Bond Litig.
No. 02-ML-1475 DT et al, 2005 WL 1594403 (C.D. Cal. June 10, 2005)........................ 31, 40

In re Immune Response Sec. Litig.
497 F. Supp. 2d 1166 (S.D. Cal. 2007).. 40

In re LendingClub Sec. Litig.
No. C 16-02627 WHA, 2018 WL 4586669 (N.D. Cal. Sept. 24, 2018)................................. 43

In re Mexico Money Transfer Litig.
164 F. Supp. 2d 1002 (N.D. Ill. 2000).. 21

In re OmniVision Techs.
559 F. Supp. 2d 1036 (N.D. Cal. 2008).. 30, 34, 40

In re Online DVD-Rental Antitrust Litig.
779 F.3d 934 (9th Cir. 2015).. 10, 12, 41

In re Painewebber Ltd. P'ships Litig.
171 F.R.D. 104 (S.D.N.Y. 1997).. 20

In re Premera Blue Cross Customer Data Security Breach Lit.
No. 3:15-md-2633-SI, 2019 WL 3410382 (D. Or. July 29, 2019).. 18, 24

In re Veeco Instruments Sec. Litig.
No. 05 MDL 01695(CM), 2007 WL 4115808 (S.D.N.Y. Nov. 7, 2007)................................ 33

In re Wash. Pub. Power Supply Sys. Secs. Litig.
19 F.3d 1291 (9th Cir. 1994).. 31

Ingram v. Coca-Cola Co.
200 F.R.D. 685 (N.D. Ga., 2001).. 29

Johnson v. Triple Leaf Tea Inc.
No. 3:14-cv-01570-MMC, 2015 WL 8943150 (N.D. Cal. Nov. 16, 2015)............................ 24

Lane v. Brown
166 F. Supp. 3d 1180 (D. Or. 2016).. 19

Matter of Continental Ill. Sec. Litig.
962 F.2d 566 (7th Cir. 1992).. 28

McKinnie v. JP Morgan Chase Bank, N.A.
678 F. Supp. 2d 806 (E.D. Wis. 2009).. 21

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209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

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534 F.3d 1106 (9th Cir. 2008) 38

Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.
221 F.R.D. 523 (C.D. Cal. 2004) 20

Officers for Justice v. Civil Serv. Comm'n of City and Cnty. of S.F.
688 F.2d 615 (9th Cir. 1982) .... *passim*

Pelletz v. Weyerhaeuser Co.
592 F. Supp. 2d 1322 (W.D. Wa 2009) 45

Rausch v. Hartford Fin. Servs. Group
No. 01-CV-1529-BR, 2007 WL 671334 (D. Or. Feb. 26, 2007) 45

Razilov v. Nationwide Mut. Ins. Co.
No. 01-CV-1466-BR, 2006 WL 3312024 (D. Or. Nov. 13, 2006) 44

Rodriguez v. West Publishing Corp.
563 F.3d 948 (9th Cir. 2009) 18, 20, 26, 43

Seebrook v. Children's Place Retail Stores, Inc.
No. C 11-837 CW, 2013 WL 6326487 (N.D. Cal. Dec. 4, 2013) 42

Shames v. Hertz Corp.
No. 07–CV–2174–MMA (WMC), 2012 WL 5392159 (S.D. Cal. Nov. 5, 2012) 25

Shvager v. Viasat, Inc
No. CV 12-10180 MMM (PJWx), 2014 WL 12585790 (C.D. Cal. Mar. 10, 2014) 26

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327 F.3d 938 (9th Cir. 2003) 44

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896 F.2d 403 (9th Cir. 1990) 38

Vargas v. Ford Motor Co.
No. CV-12-08388 AB (FFMx), 2020 WL 1164066 (C.D. Cal. Mar. 5, 2020) 24, 25

Villegas v. J.P. Morgan Chase & Co.
No. CV 09-00261 SBA (EMC), 2012 WL 5878390 (N.D. Cal. Nov. 21, 2012) 18, 19

Vizcaino v. Microsoft
290 F.3d 1043 (9th Cir. 2002) 30, 40

Wal-Mart Stores, Inc. v. Dukes
564 U.S. 338 (2011) 11

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209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

Weeks v. Kellogg Co.
No. CV 09-08102(MMM)(RZx), 2013 WL 6531177 (C.D. Cal. Nov. 23, 2013).................... 44

Williams v. MGM-Pathe Commc'ns Co.
129 F.3d 1026 (9th Cir. 1997) 28

Yogman v. Parrott
325 Or. 358 (1997).. 13, 14

Statutes

28 U.S.C. § 1712(a) 41

28 U.S.C. § 1712(b)(2) 41

28 U.S.C. § 1712(e) 41

28 U.S.C. § 1715.. 10, 21

Rules

Fed. R. Civ. P. 23 12

Fed. R. Civ. P. 23(e) 1

Fed. R. Civ. P. 23(e)(2).. 10, 12, 26

Fed. R. Civ. P. 23(h) 1

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ORCP 32 .... 4, 32

Other Authorities

Manual for Complex Litigation (Third) § 30.42 (1995)... 26

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FEDERAL PRACTICE AND PROCEDURE § 1797.1 (3d ed. Apr. 2021).. 19

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

LR 7-1 CERTIFICATION

In compliance with Local Rule 7-1(a), the parties conferred through counsel about the issues in this motion. Defendant's position is as set forth in the Settlement Agreement.

MOTION

Pursuant to Fed. R. Civ. P. 23(e), (h), and 54(d), Plaintiffs request the Court's final approval of the Settlement Agreement, an award of $4 million in attorneys' fees and costs, including $1,000 service awards to Plaintiffs and Maiden, and an order requiring Ruby to pay up to $100,000 in settlement administration costs.

The settlement provides meaningful relief to thousands of current and former Ruby customers, resolving this case and the related state case, *Maiden Insurance LLC v. Ruby Receptionists, Inc.*, Multnomah County Circuit Court Case No. 17CV48545 (the "State Action"). After years of litigation in two courts, including obtaining certification of a class, defeating dispositive motions, and faced with a Defendant with financial difficulties, Plaintiffs (McKenzie Law Firm, P.A., and Oliver Law Offices, Inc.) and Class Counsel obtained a good and fair result for the Settlement Class.[1]

This case, and the State Action, involve claims by current and former customers of Ruby Receptionists, Inc. ("Ruby" or "Defendant") arising from Ruby's call time calculation methods and billing practices. With trial only a few weeks away, the parties reached a settlement following a full day of mediation, subsequent negotiations, and only after the mediator made a final take it or leave it settlement proposal. Declaration of Hunter R. Hughes, III (ECF 272)

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[1] Except where otherwise indicated, the terms and definitions set forth in the original settlement agreement [ECF 269-1] apply in this motion. Citations to documents in the record use ECF page numbering.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

("Hughes Decl.") ¶ 20. The mediator's proposal reflected "the strengths and weaknesses of the case, the possible outcomes of a trial, and collectability of any judgment obtained in light of financial information Ruby provided." *Id*. ¶ 21; *see also* Corrected Order of Preliminary Approval of Settlement (ECF 281) at 6.

The Settlement Class includes 18,807 members (ECF 277 at 2), who are eligible to share in transferable vouchers worth up to $8 million redeemable for Ruby services with no further purchases required. *See* Corrected Order of Preliminary Approval of Settlement at 6. Along with vouchers, the settlement provides important disclosures and injunctive relief intended to prevent the alleged misconduct that led to these cases. Ruby must be clear in its communications that receptionist minutes are billed in 30-second intervals, rounded up to the next 30 seconds and include time callers are on hold. *Id*.

Ruby also agreed to pay up to $4 million in attorneys' fees and costs, which includes $1,000 service awards to Plaintiffs and Maiden Insurance LLC ("Maiden"), the named plaintiff in the State Action. *Id*. Ruby further agreed to pay up to $100,000 in settlement administration costs. *Id*.

By this motion, Plaintiffs ask the Court to grant final approval of the Settlement Agreement, award attorney fees and costs to Class Counsel of $4 million, award service fees to the two Class Representatives and Maiden of $1,000 each, and order the parties to otherwise effectuate the Settlement Agreement.[2]

[2] The Corrected Settlement Agreement (referred to herein as the "Settlement Agreement") is available as Exhibit 1 to the Joint Declaration in Support of Motion for Final Approval and Award of Attorneys' Fees and Costs and Service Awards to Plaintiffs ("Joint Decl."). The corrected agreement fixed scrivener errors in the original agreement.

MEMORANDUM IN SUPPORT OF MOTION

I. FACTUAL AND PROCEDURAL BACKGROUND OF THE TWO CASES

Plaintiffs and Maiden allege that Ruby overcharged its customers by impermissibly rounding up the length of each call to the next highest 30-second increment and billing for the time callers were in a hold queue. Both this case and the State Action: 1) alleged claims for breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and money had and received—accounting; and 2) sought monetary relief to remedy the alleged harm and injunctive relief to prevent it from recurring.

Ruby defended the cases with exceptional vigor, engaging two national defense firms and litigating zealously. In this case, substantive motions included Ruby's motion to dismiss or to stay (ECF 21), Plaintiffs' motion for partial summary judgment (ECF 33), Ruby's motion to preclude class certification (ECF 66), Plaintiffs' motion for class certification (ECF 107), three motions for summary judgment filed by Ruby (ECF 163, 164, 199), Ruby's motion to decertify the class (ECF 165), and Plaintiffs' motion for summary judgment (ECF 198). In addition, important privilege issues relating to Ruby's counsel's correspondence with a former employee were fully litigated in Plaintiffs' favor. (ECF 104). The parties also relied on experts, with Ruby submitting reports from three experts and Plaintiffs submitting reports from one expert.[3] The Court resolved all the dispositive motions by November 18, 2020 (ECF 256). The parties were preparing for trial in January 2021 (ECF 216) when they accepted the mediator's settlement proposal.

[3] More information about the work performed by Plaintiffs and Class Counsel, history of the cases, settlement terms, notice and settlement administration, attorneys' fees and costs, and service awards is available in the Joint Declaration filed herewith.

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Procedural and other issues were also hotly contested in this litigation. This Court's certification of a class led to motion practice enjoining Ruby's counsel from *ex parte* communications with members of the certified Class (ECF 133, 134), litigating the form and content of the Notice of Pendency (ECF 174, 176), excluding a Ruby expert (ECF 203), deposing opt-outs (ECF 235), and permitting communications with a particular class member (ECF 250). Plaintiffs also obtained an order that Ruby waived the work product protection for certain communications (ECF 104).

In the State Action, filed November 7, 2017, Ruby answered on May 14, 2018, filed a motion to dismiss on July 2, 2018, and an amended motion to dismiss on October 31, 2018.[4] The motions to dismiss involved a rarely used Oregon class action procedural rule, ORCP 32 I, through which a class action defendant offers to provide compensation or otherwise remedy the alleged harm. In its proposed ORCP 32 I remedy, while denying liability, Ruby offered to pay $348,581.71, plus $70,345.76 in interest, for hold time charges and nothing for damages from rounding.

On June 14, 2019, Maiden intervened in the State Action and substituted for the original plaintiff, Shapiro Law Group, P.A. Maiden filed an amended complaint on June 20, 2019 and an opposition to Ruby's amended motion to dismiss on November 8, 2019.

The state court denied Ruby's amended motion to dismiss on December 24, 2019, a little over a year after this case was filed. Maiden moved for class certification on January 27, 2020,

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[4] The original complaint in the state court was filed in *Shapiro Law Group, P.A. v. Ruby Receptionists, Inc.*, Multnomah County Circuit Court Case No. 17CV44939, on October 13, 2017. That case was dismissed on November 7, 2017. The case referred to herein as the State Action, *Maiden Insurance LLC v. Ruby Receptionists, Inc.*, Multnomah County Circuit Court Case No. 17CV48545, was filed on November 7, 2017.

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PORTLAND, OREGON 97204
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and Ruby moved for partial summary judgment on January 31, 2020. Before the state court ruled on those motions, this Court certified a class in this case. The certified class encompassed approximately 95% of the members of the proposed class in the State Action.

With a potentially overlapping class certified, Maiden moved to stay the State Action on May 22, 2020, which Ruby opposed despite having previously sought a stay in this case. *See* ECF 21. On May 29, 2020, with the motion to stay not yet decided, Ruby moved the state court for leave to file supplemental briefing in opposition to Maiden's motion for class certification. The state court granted Maiden's motion to stay on June 15, 2020. The State Action has been stayed since then. On April 6, 2021, Class Counsel advised the state court about the status of this case and provided the state court with a copy of the Order of Preliminary Approval of Settlement (ECF 280). The approval of this settlement would end litigation in both courts.

Both cases involved voluminous discovery and significant discovery disputes. Ruby produced over 325,000 pages of documents. Plaintiffs deposed ten Ruby fact witnesses, three Ruby expert witnesses, two Rule 30(b)(6) designees, and five Ruby customers. Plaintiffs also defended depositions of Plaintiffs and Maiden and of Plaintiffs' damages expert.

Discovery disputes in the two cases included several motions to compel, a motion to stay discovery, a motion for a protective order, motions relating to Ruby's designation of documents as confidential, a motion by Ruby to extend the case schedule, thereby reopening discovery, which led to Ruby producing thousands of documents months after the discovery cutoff, many conferrals, and many conferences with the Court.

Put simply, the long and contentious litigation involved unusually extensive discovery and briefing about a variety of complex legal issues.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

II. THE PARTIES REACHED A SETTLEMENT SHORTLY BEFORE TRIAL

The parties agreed to the mediator's proposed settlement only after working with two different mediators over several mediation sessions and later negotiations. Joint Declaration in Support of Motion for Preliminary Approval ¶¶ 12-13. The parties were only weeks away from trial when they agreed to resolve the litigation.

The parties held their first mediation in person with Teresa Wakeen on April 23, 2018. *Id.* ¶ 12. After two more years of litigation, the parties held a mediation with Hunter R. Hughes, III on July 7, 2020.[5] *Id.* ¶ 13. That full day mediation did not result in a settlement. ECF 172.

In early November 2020, the parties reengaged with Mr. Hughes. At the same time, the parties were awaiting a decision from the Court on several of the dispositive motions described above and preparing for trial. Mr. Hughes facilitated further negotiations that took place over several weeks. Hughes Decl. ¶¶ 17-23. Ruby provided financial information through Mr. Hughes that informed Plaintiffs of Ruby's ability to pay and the collectability of any judgment. *See id.* ¶ 19; *see also* Defendant's Responses to Questions Posed by the Court in Its March 3, 2021 Order (ECF 277) at 4.

In late November 2020, Mr. Hughes made a mediator's settlement proposal in a last ditch effort to resolve this case prior to trial. *Id.* ¶ 21. Only after the parties had agreed to the settlement of the Class's claims, Mr. Hughes made another proposal to settle the issue of attorneys' fees and costs, again on a take it or leave it basis, which the parties accepted. *Id.* ¶ 22.

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[5] The Joint Declaration in Support of Motion for Preliminary Approval of Proposed Settlement (ECF 271) incorrectly states that the parties' Zoom mediation with Mr. Hughes took place on July 7, 2019. That Zoom mediation was held on July 7, 2020.

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PORTLAND, OREGON 97204
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There "was no negotiation or proposal regarding attorneys' fees and costs until after the Parties accepted the class relief settlement negotiations." *Id*.

The Court granted preliminary approval of the settlement on March 22, 2021. ECF 280. The Court issued a Corrected Order of Preliminary Approval of Settlement on April 7, 2021, after counsel for the parties wrote to the Court on April 5, 2021, about scrivener errors in the origin settlement agreement and submitted the operative Settlement Agreement. ECF 281.

III. SUMMARY OF THE SETTLEMENT TERMS

The settlement provides valuable relief to the Class, especially in light of Ruby's financial situation. The Settlement Agreement is available as Exhibit 1 to the Joint Declaration filed herewith. The original settlement agreement is available at ECF 269-1. The Settlement Agreement supersedes and replaces the original. There are no other agreements between the parties or counsel for the parties that relate to the resolution of the cases.

Key aspects of the settlement include:

- Each qualifying Settlement Class Member, who is not excluded, will receive a voucher from Ruby for a set amount of free service at no charge and without further obligation to purchase anything. The voucher amount is determined by the Settlement Class Member's billing by Ruby between October 13, 2011 and May 31, 2018, as a percentage of Ruby's total billing during that time. Each voucher is worth a minimum of $49 of service, which is enough for one month of Ruby's Pure Chat service.
- Ruby will distribute $8 million in vouchers. Vouchers may be used for Ruby's virtual receptionist or chat services and are transferrable one time. No Settlement

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Class Member will have to prove eligibility or file any proof of claim, and the vouchers will be distributed automatically.

- After the lawsuits were filed, Ruby changed how it described its receptionist minute calculations and hold time billing practices. The Notice of Settlement discloses the issues in this case, and the settlement requires Ruby to be clear in its Terms and Conditions and communications that receptionist minutes are calculated by rounding up the length of each call to the next highest 30-second interval and includes time callers are in Ruby's hold queue.
- The class definition is expanded to be: All persons or entities in the United States who obtained receptionist services from Defendant Ruby between October 13, 2011 and May 31, 2018, pursuant to its form Service Agreements.
- By lengthening the time period of the class that the Court certified on April 24, 2020 (ECF 128), the expanded class definition now encompasses all claims and current and former customers in the proposed class period in the State Action. The proposed class period in the State Action is longer than the period this Court certified on April 24, 2020, because the State Action was filed first, before time-based defenses potentially limited certain claims and claimants. The expanded class definition means Settlement Class members who were previously only members of the proposed class in the State Action can participate in the settlement in this case.
- Ruby agreed to pay up to $100,000 in settlement administration costs and $4 million in attorneys' fees and costs. Ruby also agreed that Plaintiffs may seek service awards of up to $1,000 for Plaintiffs and Maiden.

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- The $4 million in attorneys' fees and costs are a substantial discount from Class Counsels' lodestar. As of May 1, 2021, Class Counsels' lodestar is already $6,028,139.75. Joint Decl. ¶ 84. Class Counsel also advanced $333,633.51 in costs as of that date. *Id.* ¶ 86. Class Counsel anticipate spending substantial additional time—thereby further increasing the downward multiplier on Class Counsels' lodestar—before the final conclusion of the two cases. See the individual declarations of Class Counsel (Exhibits 2-6 to the Joint Declaration) for more about Class Counsels' request for attorneys' fees and costs.

IV. NOTICE

The Settlement Administrator provided notice to the Settlement Class Members. Declaration of Joseph M. Fisher re Compliance with Notice Requirement ("Fisher Decl.") (ECF 285) ¶¶ 12-14. The Fisher Declaration describes the notice administration and procedures in detail and is incorporated by reference as if fully stated herein.

The notice includes, but is not limited to: (1) information about the nature of the litigation and essential terms of the settlement; (2) contact information for class counsel; (3) the date of the final approval hearing; (4) information about, and means for, objecting to or excluding oneself from the settlement. *Id*. Exh. B. The notice also informs Settlement Class Members that if they do not comply with the specified procedures and deadlines for excluding themselves, they will be bound by the settlement and lose any opportunity to bring any of the released claims against Ruby. *Id*.

Along with emailing or mailing notice, the Settlement Administrator used Rubyreceptionistslitigation.com to give anyone access to the Settlement Notice, relevant pleadings such as the operative complaints, and relevant orders of the Court. *Id*. ¶ 16.

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The Settlement Administrator also provided notice of the settlement to the appropriate federal, state, and other governmental officials on April 9, 2021, pursuant to 28 U.S.C. § 1715, which is 90 days prior to July 8, 2021, the scheduled date of the Final Approval Hearing. *Id.* ¶¶ 6-7.

V. LAW AND ARGUMENT

The Court should grant final approval of the settlement that resolves years of contentious litigation in two courts because the settlement is fair, reasonable, and adequate, particularly in light of the risks of continued litigation, trial, and appeal. The Court should also grant the service awards to Plaintiffs and Maiden and award Class Counsel the requested fees and costs, which are reasonable and much less than Class Counsels' lodestar.

Ruby's financial condition informed the mediator's proposed settlement, as well as Plaintiffs' acceptance of the proposal. While Plaintiffs and Class Counsel continue to believe in the merits of their claims, if the cases did not settle, the Settlement Class faced material risks of losing some or all of their claims at trial, decertification of some or all of the Class, obtaining a damages award significantly less than the maximum potential value of the case, a lengthy and unpredictable appeals process, and significant potential issues regarding collecting any judgment.

Along with eliminating these risks, the settlement provides substantial benefits of up to $8 million in Ruby services and injunctive relief and disclosure aimed at preventing Ruby from repeating the alleged misconduct that led to these cases. This is a good and fair result, especially in light of Ruby's financial constraints.

A. Legal Standards at Final Approval

A court must determine whether the settlement is "fair, reasonable, and adequate" when considering whether to approve it. Fed. R. Civ. P. 23(e)(2); *In re Online DVD-Rental Antitrust*

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Litig., 779 F.3d 934, 944 (9th Cir. 2015). "The settlement must be considered as a whole…." *Azar v. Blount Int'l, Inc.*, No. 3:16-cv-0483-SI, 2019 WL 7372658, at *2 (D. Or. Dec. 31, 2019). If "the interests of the class are better served by the settlement than by further litigation," then the settlement merits final approval. *See* Manual for Complex Litigation (Fourth) § 21.61 (4th ed. May 2020). The Court's role in reviewing the substance of the settlement is to ensure that it is "fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), *overruled on other grounds*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

In reviewing a motion for final approval, a court should give due regard to "what is otherwise a private consensual agreement negotiated between the parties…." *Officers for Justice v. Civil Serv. Comm'n of City and Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982); *see also Hanlon*, 150 F.3d at 1027 (explaining "[s]ettlement is the offspring of compromise"). A "court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id*. This reflects the Ninth Circuit's "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

In deciding whether to approve a class action settlement, courts consider several factors, including:

> (1) the strength of the plaintiff's 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

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> view of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

In re Online DVD, 779 F.3d at 944 (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). Each of these factors favors final approval or is neutral, so the Court should grant final approval.[6]

B. Application of the *In re Online DVD* Criteria Demonstrate that the Settlement Is Fair and Reasonable and the Court Should Approve It

1. The Strength of Plaintiffs' Case

Plaintiffs believe they have a strong liability and damages case. However, the Court identified important issues that Plaintiffs would have to overcome at trial to prevail on the merits and prove damages. The outcomes at trial and on appeal, including for the reasons discussed in the Court's Opinion and Order (ECF 256) denying the final round of dispositive motions, were uncertain. This uncertainty is in addition to the risk that Plaintiffs would be unable to collect a damages award because of Ruby's financial condition. Even a strong case on liability may have little value if the claims are not collectible.

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[6] The *In re Online DVD* factors overlap with the criteria enumerated in Fed. R. Civ. P. 23(e)(2). The Advisory Committee Notes to the 2018 Amendments to Fed. R. Civ. P. 23 explain that the intent of the amendment to Rule 23(e)(2) "is not to displace any factor" that courts have relied on to evaluate whether a class action settlement is fair, reasonable, and adequate. Instead, the amendment is meant to "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." Plaintiffs address the Rule 23(e)(2) criteria as part of the discussion that follows. Further, in connection with moving for preliminary approval, Plaintiffs briefed many of the issues before the Court at final approval. To minimize duplicative briefing, Plaintiffs restate and incorporate by reference as if fully stated herein Plaintiffs' [Corrected] Memorandum in Support of Joint Motion for Preliminary Approval of Proposed Settlement Agreement (ECF 273) and its supporting filings, declarations, and exhibits. Plaintiffs also restate and incorporate by reference as if fully stated herein Plaintiffs' Responses to Questions Posed by the Court in Its March 3, 2021 Order Concerning Joint Motion for Preliminary Approval of Proposed Settlement Agreement (ECF 278).

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The central issue regarding liability is the meaning of the term "receptionist minute" in Ruby's form contracts, as determined under the contract interpretation framework in *Yogman v. Parrott*, 325 Or. 358, 361 (1997). The Court determined that the form contracts are ambiguous at *Yogman's* first step. This meant each party could attempt to present extrinsic evidence of the meaning of "receptionist minute" at *Yogman's* second step. *See* Opinion and Order (ECF 256) at 5. If the ambiguity remained unresolved, the Court would apply maxims of contract interpretation to determine the meaning of the contract at *Yogman's* third step. *Id*. at 6.

The Court analyzed extrinsic evidence issues at *Yogman's* second step in the Opinion and Order at 12-17. Ruby argued that extrinsic evidence of intent "shows that a critical mass of the class members" understood "receptionist minute" to include rounding. *Id*. at 13. Among other evidence, Ruby offered invoices and call records showing receptionist minutes for calls were billed in half-minute increments. Ruby also offered disclosures in an FAQ and a document called Ruby 101 that Ruby said it provided to about 5,000 customers. Plaintiffs offered competing evidence of Ruby's communications, templates, web pages, statements, form contracts, and testimony from a former Ruby employee.

In analyzing the extrinsic evidence at summary judgment, the Court explained:

> That a genuine dispute of material fact exists as to whether extrinsic evidence resolves the ambiguities in the term "receptionist minute" in Ruby's favor does mean that the Court agrees with Plaintiffs that extrinsic evidence cannot resolve the ambiguities in that term. Indeed, Ruby proffered extrinsic evidence that creates a genuine issue of material fact as to the viability Plaintiffs' preferred interpretation of "receptionist minute"—that Ruby measures a receptionist minute in actual time, rounded to the nearest second. The invoices and mobile application call records that Ruby produced as part of its course of performance evidence represent significant evidence that class members understood that Ruby always billed in half-minute (or 30-second) increments, even if class members did not know that Ruby always rounded up to the next half-minute increment. At trial, the Court will evaluate all admissible evidence and make findings under the applicable preponderance standard…. Although the extrinsic evidence before the

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> Court at this stage does not entitle either party to summary judgment, extrinsic evidence at trial may yet resolve the ambiguities (or at least some of them) in the term "receptionist minute."

Id. at 16, 17.

The Court's analysis indicates that Ruby may have been able to persuade the Court at trial that "receptionist minute" should be interpreted at *Yogman's* second step to favor Ruby. If the Court determined that Ruby was permitted to round up the length of each call and bill for hold time, then the Class likely would have been unable to meet its burden of proof on each claim for relief.

If the Court could not resolve the ambiguity at *Yogman's* second step during trial, the Court explained that before proceeding to *Yogman's* third step and applying maxims of construction, the Court "might need to resolve factual issues." *Id*. at 20. While Plaintiffs believe they have strong arguments at *Yogman's* third step, the Court's analysis indicates that the meaning of "receptionist minute" may have been decided before *Yogman's* third step.

At trial, Plaintiffs would have also had to overcome the Court's concerns about damages. The Court wrote:

> Although the Court is tentatively inclined to agree with Ruby that class members who did not pay for overage minutes are not entitled to any damages, Plaintiffs have offered a report from an expert witness purporting to have crafted a formula for fairly compensating class members for damages resulting from the lost use of receptionist minutes even when they did not pay for any overage minutes. The Court denies summary judgment and will decide after all evidence has been presented whether class members who did not pay for overage minutes are entitled to recover any damages.

Id. at 28.

According to one of Ruby's experts, damages for overage minutes are at most $11,403,218, not including prejudgment interest. *Id*. If the Court only considered damages for

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overage minutes, the potential recovery would be much lower than under the damage theory Plaintiffs presented. Notably, the face value of the vouchers, combined with the attorneys' fees and costs Ruby agreed to pay in settlement, exceed Ruby's calculation of damages for overage minutes. This is before giving any value to the critical injunctive relief Ruby agreed to as part of the settlement.

Ruby also argued that damages should be cut off after September 2018, based on updates Ruby made to its Terms and Conditions, months after the State Action began. *Id*. Ruby would have significantly reduced the potential damages if it prevailed on this issue at trial.

In addition, Ruby moved to compel arbitration. While the Court found Ruby waived any purported right to arbitrate, Ruby filed a notice of appeal regarding this issue, and the Ninth Circuit may have reached a different conclusion than this Court. *See id*. at 29.

There were other potential risks, including collecting a judgment. Ruby's "financial constraints" are documented in several places in the record, including in the Hughes Declaration and Ruby's Responses to Questions Posed by the Court in Its March 3, 2021 Order at 4-5. In the mediator's words,

> … misalignment between plaintiffs' expectations about the amount of damages achievable at trial and what a defendant could reasonably afford to pay often presents a major obstacle to settlement. While the mediation privileges prevent me from disclosing specifics, I can say that while mediating this case, I received financial information from Ruby that informed my views and I believed moved the plaintiffs' expectations about the size of a settlement Ruby could reasonably perform.

Hughes Decl. ¶ 19.

Further, as discussed more in the next section, Plaintiffs faced ongoing risk, time, expense, and uncertainty during and after trial and on appeal. Based on Ruby's aggressive defense, Plaintiffs anticipate that Ruby would have appealed any judgment favorable to the

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Class. This would have caused substantial delay in compensating the Class, created uncertainty, and forced Plaintiffs to incur additional time and expense litigating their claims.

Accordingly, this factor weighs in favor of final approval.

2. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

As just discussed, the Class faced substantial risk in what would be an unpredictable trial, post-trial, and appellate process – which would be lengthy. Another factor in assessing the fairness of the settlement is the complexity, expense, and likely duration of the lawsuit had settlement not been achieved. *Officers for Justice*, 688 F.2d at 625. "The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals. Settlement is generally favored because it represents a compromise reached between the parties to the suit and relieves them, as well as the judicial system, of the costs and burdens of further litigation. NEWBERG ON CLASS ACTIONS, § 13:44 (5th ed. Dec. 2020); *Ching v. Siemens Indus., Inc.*, No. 11-cv-04838-MEJ, 2014 WL 2926210, at *4 (N.D. Cal. June 27, 2014) ("Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results.") (citation and internal quotation marks omitted).

Throughout this case, Ruby vigorously defended its position and indicated it would continue to do so at trial, post-trial, and on appeal. An appeal would likely involve not only the liability issues discussed above, but also whether a class should have been certified or decertified, along with Ruby's late attempt to compel arbitration. The Class faced a material risk that any favorable decision would be reversed on appeal.

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Finally, even if Plaintiffs were successful at trial, Ruby may have challenged the application of issue preclusion in the State Action. If Ruby persuaded the court in the State Action to not apply issue preclusion, Maiden and Class Counsel would have had to relitigate many of the issues that were decided in this Court. Maiden would have also had to seek a decision about class certification and take the State Action to trial.

This factor favors approval of the Settlement Agreement.

3. The Risk of Maintaining Class Action Status Throughout the Trial

The Class faced a risk that the Court would decertify the Class or create subclasses and exclude some class members. In this case, Ruby moved to preclude class certification, opposed Plaintiffs' motion for class certification, and moved to decertify the class. In the State Action, long after briefing on class certification was closed, Ruby moved to reopen briefing.

If Ruby persuaded the Court that a material number of class members knew about Ruby's billing practices, then the Court may have decertified the class. Ruby offered evidence at summary judgment that around 5,000 class members purportedly knew or could have known about Ruby's billing scheme. If Ruby convinced the Court at trial that these class members had such knowledge, Plaintiffs may have been unable to prove commonality and/or predominance.

Further, as discussed above, the Court explained that subclasses may be necessary because Ruby told different class members different things. *See* Opinion and Order (ECF 256) at 23-25. Dividing the class into subclasses could mean that some Settlement Class Members would not have a claim or would have a less valuable claim.

Settlement eliminates these risks. This factor weighs in favor of final approval.

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4. The Amount Offered in Settlement

The settlement offers valuable compensatory relief and injunctive relief intended to prevent the alleged misconduct from recurring. It "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. The complete package here was the product of years of litigation and reflects Ruby's ability to pay. *See* Hughes Decl. ¶¶ 19-21; *see also In re Premera Blue Cross Customer Data Security Breach Lit.*, No. 3:15-md-2633-SI, 2019 WL 3410382, at *24 (D. Or. July 29, 2019) (considering the complete settlement, including nonmonetary relief, in granting preliminary approval of class action settlement).

The combined amount that Ruby agreed to provide in vouchers, attorneys' fees and costs, and to administer the settlement is around 65% of the total damages Plaintiffs' expert calculated for the original class period. *See* Opinion and Order (ECF 281) at 6. In addition, the combined amount is greater than Ruby's calculation of the damages from overcharges and many times the approximately $419,000 Ruby offered in 2018 as a proposed remedy in the State Action. As discussed below, the nonmonetary relief in the settlement has very significant value as well.

A settlement, such as this one, negotiated with the assistance of a private mediator, is further proof that the settlement is fair and provides adequate relief. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 957, 961 (9th Cir. 2009) (referring several times to a mediator's opinion of the settlement and settlement negotiations); *Villegas v. J.P. Morgan Chase & Co.*, No. CV 09-00261 SBA (EMC), 2012 WL 5878390, at *6 (N.D. Cal. Nov. 21, 2012) (noting that private mediation "tends to support the conclusion that the settlement process was not collusive").

This factor weighs in favor of approval.

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5. The Extent of Discovery Completed and the Stage of the Proceedings

With trial only weeks away, discovery was complete. Through discovery and years of investigation, Class Counsel had a thorough understanding of the issues.

"A court is more likely to approve a settlement if most of the discovery is completed because it suggests that the parties arrived at a compromise based on a full understanding of the legal and factual issues surrounding the case." *Lane v. Brown*, 166 F. Supp. 3d 1180, 1190 (D. Or. 2016) (citation omitted); FEDERAL PRACTICE AND PROCEDURE (Wright & Miller), § 1797.1 n. 18 (3d ed. Apr. 2021) ("advanced stage of proceeding and extensiveness of completed discovery weighed in favor of approving" class action settlement) (citation omitted).

"In short, the more formal discovery that occurred prior to settlement, the more likely the court is to find the settlement is substantively adequate and procedurally fair." NEWBERG ON CLASS ACTIONS, § 13:49; *Villegas*, 2012 WL 5878390, at *6 (conducting two depositions and obtaining "thousands of pages of documents" through discovery, before settlement discussions, "support the conclusion that Plaintiff was appropriately informed in negotiating a settlement."); *Azar*, 2019 WL 7372658, at *7 (explaining case litigated for three years, parties engaged in significant discovery, and class counsel consulted with a financial expert in concluding this factor supported approval of settlement).

Class Counsel have thoroughly analyzed the facts and law. Class Counsel searched for and located public records, reviewed hundreds of thousands of pages produced by Ruby during discovery, took and defended more than 20 depositions, including four experts, met and conferred with defense counsel multiple times over many hours, and filed and responded to many motions. *See* Joint Decl. ¶¶ 32-34 (describing depositions).

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Plaintiffs also engaged an experienced CPA as an expert to devise a damages calculation methodology and calculate damages based on massive spreadsheets Ruby produced during discovery. The spreadsheets had data from millions of calls Ruby handled. Plaintiffs only obtained the call data after prevailing in a discovery dispute in the State Action.

Because of the advanced stage of the litigation, Plaintiffs also had the benefit of the Court's analysis regarding many of the issues that would be the focus at trial.

This factor supports approval of the settlement because the parties were thoroughly familiar with the issues and fully aware of the risks and benefits of further litigation.

6. The Experience and View of Counsel

Class Counsel reaffirm their conclusion that the settlement is fair, reasonable, and adequate. Class Counsel base this on what they learned about Ruby's financial situation during mediation, the strengths and weaknesses of the cases, and their decades of experience handling complex and class action litigation. *See* ECF 108, Exh. 27-30; ECF 109, ECF 111 (collectively, descriptions of Class Counsels' experience submitted in support of motion for class certification); *see also* Joint Decl., Exh. 2-6 (updated law firm resumes).

Parties "represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation." *Rodriguez*, 563 F.3d at 967 (citation omitted). "'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Azar*, 2019 WL 7372658, at *8 (citing *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (quoting *In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997)). "Absent fraud or collusion, courts can, 'and should, rely upon the judgment of

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experienced counsel for the parties,' when assessing a settlement's fairness and reasonableness." *Id*. (quoting *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 447 (E.D. Cal. 2013)).

Class Counsels' opinion here is entitled to significant weight, particularly because: (1) Class Counsel are highly experienced in class action litigation; (2) Class Counsel engaged in extensive discovery, voluminous briefing, and exhaustively evaluated the claims; and (3) the Settlement Agreement was reached at arm's length through negotiations facilitated by an experienced mediator. *See McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (factors including that "counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator... suggest that the settlement is fair and merits final approval."); *In re Mexico Money Transfer Litig*., 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (placing "significant weight on the unanimously strong endorsement of these settlements by Plaintiffs' well-respected attorneys"), *affirmed*, 267 F.3d 743 (7th Cir. 2001).

This factor further supports final approval of the settlement.

7. The Presence of a Government Participant

Class Counsel uncovered and pursued the alleged wrongs in this case without assistance from any government participants in either case. However, as stated above, pursuant to 28 U.S.C. § 1715, on April 9, 2021, the Settlement Administrator provided notice of the settlement to the appropriate government officials, and no objections have been received. This factor further supports final approval of the settlement.

8. The Reaction of the Class Members to the Proposed Settlement

Of the 18,807 entries on the class list Ruby provided the Settlement Administrator, as of May 6, 2021, the Settlement Administrator has received only nine requests (not including individuals who opted out in response to the Notice of Pendency) for exclusion and has been

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informed of one objection. Fisher Decl. ¶¶ 18-19. Class Counsel have also received several congratulatory notes from Settlement Class Members. Joint Decl. ¶ 77. The positive reaction to the settlement supports final approval. *See Hanlon*, 150 F.3d at 1027 ("In this regard, the fact that the overwhelming majority of the class willingly approved the offer and stayed in the class presents at least some objective positive commentary as to its fairness.").

Class Counsel is aware of one filed objection, ECF 282, submitted by Sean M. McGivern. Mr. McGivern states, on behalf of his law firm, "[w]e object to the settlement in that it provides coupons, which have no value to former customers. Former customers should be entitled to a meaningful recovery." Mr. McGivern is mistaken. The settlement provides valuable relief to both current and former customers and is the best possible relief for the Settlement Class, given Ruby's financial condition.

First, the relief does not depend on whether a Settlement Class Member is a current or former Ruby customer. Second, Mr. McGivern may be unaware that the Settlement Agreement provides that the vouchers are transferrable. Third, Settlement Class Members may use vouchers for free Ruby Pure Chat service. Fourth, as discussed below, the transferrable vouchers, which require no additional purchase to be used, and may be redeemed for free – not discounted – services, are not "coupons."

Mr. McGivern's objection also does not address the injunctive relief that requires Ruby to accurately disclose its billing practices. This relief has substantial value. *See Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1123 (9th Cir. 2020) (declining to adopt objector's view that class action settlement was invalid because the class received only injunctive relief, and explaining that district court's finding that disclosures on Facebook's website about its business

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practices at issue had value was not clearly erroneous). The injunctive relief is targeted at preventing the conduct that led to these cases.

Ruby's expert calculated the damages from just the allegedly improper overages as $11,403,218, not including prejudgment interest. Opinion and Order (ECF 256) at 28. There is no reasonable dispute that the changes in Ruby's disclosures about its billing practices, made after the State Action was filed, and required of Ruby going forward as part of the Settlement Agreement, have substantial value. Preventing Ruby from generating millions of dollars in revenue by calculating receptionist minutes in a way that was allegedly impermissible may be considered worth the value of the allegedly improper billing.

Mr. McGivern wrote, "[w]e dropped Ruby because of the company's billing practices." ECF 282. While Mr. McGivern does not describe the billing practices or state whether he knew of the rounding and hold time billing at issue in these cases, the injunctive relief will help Settlement Class Members and prospective Ruby customers understand Ruby's billing practices. This too has substantial value. *See Officers for Justice*, 688 F.2d at 628 (court examines complete settlement package for overall fairness).

Further, Mr. McGivern does not address that Ruby's financial condition informed the mediator's views and Plaintiffs' about the settlement Ruby "could reasonably perform." Hughes Decl. ¶ 19. Plaintiffs and Class Counsel litigated this case nearly to trial. Their assessment of the settlement value reflected the risks at trial, on appeal, and in collecting a judgment. Any objection must take into account the reality of Ruby's financial condition.

The last day for Settlement Class Members to object or request exclusion is June 15, 2021. Plaintiffs reserve their right to respond to all objections or requests for exclusion in their reply in support of final approval.

This factor favors granting final approval.

C. There Was No Fraud or Collusion

There was no fraud or collusion in settling these long and contentious cases. *See* Plaintiffs' Responses to Questions Posed by the Court in Its March 3, 2021 Order (ECF 278) at 8-12; *see also* Defendant's Responses to Questions Posed by the Court in Its March 3, 2021 Order (ECF 277) at 7-14.

First, the parties reached a settlement long after a class was certified and only a few weeks before trial. *See Campbell*, 951 F.3d at 1121-22 (noting that the "case does not implicate the 'higher standard of fairness' that applies when parties settle a case before the district court has formally certified a litigation class") (citing *Hanlon*, 150 F.3d at 1026).

Second, Ruby continues to dispute liability and damages. *See In re Premera*, 2019 WL 3410382, at *24 (finding "no evidence of collusion" where, among other things, the parties litigated the matter for years before settling, and the defendant "has and continues to dispute the claims against it…").

Third, the requested attorneys' fees and costs are not disproportionate to the $8 million in vouchers and valuable injunctive relief. Class Counsels' request for fees and costs is, as of May 1, 2021, already a substantial downward deflator—a discount or negative "multiplier"—on Class Counsels' lodestar. *See Vargas v. Ford Motor Co.*, No. CV-12-08388 AB (FFMx), 2020 WL 1164066, at *12 (C.D. Cal. Mar. 5, 2020) (finding that fee was not disproportionate to the benefits to the class where, among other things, the requested amount was less than class counsel's lodestar); *Johnson v. Triple Leaf Tea Inc.*, No. 3:14-cv-01570-MMC, 2015 WL 8943150, at *6 (N.D. Cal. Nov. 16, 2015) (same). The negative multiplier will increase with work on this motion after May 1, 2021, preparing a supporting reply, oral argument on final

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approval, addressing any issues in settlement administration, and possibly, litigating an appeal should one be filed.

Fourth, no party had an interest in more litigation over attorneys' fees and costs with the parties already having agreed to the mediator's proposal to settle the Class's claims. The added time, expense, and risk to all parties of protracted litigation over fees, in a case that has already been long and expensive, combined with Ruby's financial difficulties, favored settling the attorneys' fees and costs issues.

Fifth, the Settlement Agreement does not depend on the Court's approval of Class Counsels' requested fees and costs. 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 v. KKW Trucking, Inc.*, No. 3:14-cv-0494-SI, 2018 WL 4495461, at *11 (D. Or. Sept. 19, 2018); *see also Bell v. Consumer Cellular, Inc.*, No. 3:15-cv-941-SI, 2017 WL 2672073, at *8 (D. Or. June 21, 2017) (same).

Sixth, as discussed above, the parties engaged a neutral mediator who made a take it or leave it proposal to settle the claims. The mediator made a proposal to resolve attorneys' fees and costs only after the parties had already agreed to settle the class claims. *See Vargas*, 2020 WL 1164066, at *12 (approving settlement agreement containing clear sailing provision where fees were negotiated separately from the class relief); *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). Class Counsel did not trade away any relief for the Settlement Class to obtain more in fees. *See Azar*,

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2019 WL 7372658, at *9 (noting presence of mediator and multiple mediation sessions in finding settlement is product of "extensive arm's-length negotiations").

Seventh, the valuable relief to the Class under the Settlement Agreement is further evidence that there was no collusion. *See Shvager v. Viasat, Inc*, No. CV 12-10180 MMM (PJWx), 2014 WL 12585790, at *14 (C.D. Cal. Mar. 10, 2014) ("Despite the presence of the clear sailing and kicker 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.").

There was no fraud or collusion, and this further supports final approval of the settlement.

D. The Settlement Is Fair, Reasonable, and Adequate

As demonstrated above, the settlement should be approved because it is fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(2). The Ninth Circuit puts "a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution." *Rodriguez*, 563 F.3d at 965 (citing *Hanlon*, 150 F.3d at 1027); *Azar*, 2019 WL 7372658, at *2 (same). The Court's role is to ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon*, 150 F.3d at 1027 (internal quotation marks and citations omitted).

The result obtained, the experience of counsel, and the factors discussed above are *prima-facie* evidence of a settlement that is fair and reasonable. *See Hughes v. Microsoft Corp*., No. C98-1646C, C93-0178C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery.") (quoting Manual for Complex Litigation (Third) § 30.42 (1995)).

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The settlement treats the Class equitably with no one receiving preferential treatment. The voucher amount is objective—it is based on each Settlement Class Member's billing by Ruby during the class period, as a percentage of Ruby's total billing during that time. The amount does not depend on whether a Settlement Class Member is a current or former customer. To ensure that no one in the Settlement Class will have to pay out of pocket to use a voucher, each member of the Settlement Class will receive a voucher worth a minimum of $49, enough for one month of free chat service. The injunctive relief is also uniform across the Settlement Class.

For all of the reasons discussed in this memorandum, the settlement is fair, reasonable, and adequate.

E. The Resolution of Attorneys' Fees and Costs in the Settlement Is Fair and Reasonable

Mr. Hughes proposed, and the parties agreed, that Class Counsel would seek an award of up to $4 million for attorneys' fees and reimbursement of expenses. Class Counsel have spent $333,633.51 in unreimbursed costs, as of May 1, 2021, so the attorneys' fees for which approval is sought is $3,666,366.49. *See* Joint Decl. ¶¶ 84-86. Class Counsel's request is much less than $6,028,139.75, the attorneys' fees, before costs, had they undertaken the same work at their regular hourly rates, without any contingency risk, delay in payment, or need to advance significant expenses. *Id.* ¶ 84. The requested fees and costs should be awarded, whether the Court applies the lodestar or percentage of recovery methods. "Reasonableness is the goal, and mechanical or formulaic application of either method, where it yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

The mediated fee is no windfall for Class Counsel. The opposite might be said to be the case. An award in the amount requested is reasonable considering the efforts Class Counsel successfully undertook in two cases in a representation that began nearly 4 years ago against a defendant that zealously contested essentially every colorable issue. The fee is also reasonable considering the value of the benefits conveyed to the Class.

1. The Amount of the Fee Was the Subject of an Arm's Length Mediation

Negotiated fee agreements are encouraged, particularly where, as here, the attorneys' fees were negotiated separately from the settlement and after all terms of the settlement on behalf of the class had been agreed to by the parties. *See, e.g.*, *Evans v. Jeff D.*, 475 U.S. 717, 734-38 (1986) (indicating that parties may negotiate fees as well as settlement); *Williams v. MGM-Pathe Commc'ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) ("parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys' fees").

In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), the United States Supreme Court explained that negotiated, agreed-upon attorneys' fee provisions are the ideal toward which the parties should strive. "A request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Id.*; *Matter of Continental Ill. Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the fee).

The parties agree about the appropriate compensation for Class Counsel's efforts. In such circumstances, "[a] court should refrain from substituting its own value for a properly bargained-for agreement." *In re Apple Computer, Inc. Deriv. Litig.*, No. C 06-4128 JF (HRL), 2008 WL 4820784, at *4 (N.D. Cal. Nov. 5, 2008) (citation omitted).

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Unlike a limited common fund case, the fee here will not affect the Class's recovery. A decision to reduce or even to refuse to award a fee, would benefit only Ruby, not the Class. In *Brazil v. Dell, Inc.*, No. C-07-01700 RMW, 2012 WL 1144303, *1 (N.D. Cal. Apr. 4, 2012), the court awarded the agreed upon fee, because like here:

> The benefits achieved by Class Counsel are not in the form of a "common fund," but rather come in the form of structural changes to [Defendant's] advertising practices and the payment to Class Members on a claims-made basis. Moreover, the fee awarded to Class Counsel will be paid directly by [Defendant], over and above the consideration to be paid to Class Members, and will thus not reduce the benefits available to the Class.

See also DeBoer v. Mellon Mortgage Co., 64 F.3d 1171, 1178 (8th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996) (approving award of attorneys' fees where "[t]he vast majority of the fee will be paid by [the defendant] and will not come out of any class recovery"); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 695 (N.D. Ga., 2001) (where there is no evidence of collusion and no detriment to the parties, courts "should give substantial weight to a negotiated fee amount, assuming that it represents the parties' best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees.") (citation omitted).

The fact that the parties were able to avoid a "second major litigation," *Hensley,* 461 U.S at 437, by accepting the mediator's proposal after extensive arm's length negotiations and resolution of the benefits for the Class, militates strongly in favor of the requested fees. *See Hanlon*, 150 F.3d at 1029 (the requested fee was recommended by the mediator, which serves as "independent confirmation that the fee was not the result of collusion or a sacrifice of the interest of the class."). The parties have accepted as reasonable the mediator's independent determination of the reasonable fee, and the Court should confirm that agreed-upon amount.

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2. The Negotiated Fee Is Fair and Reasonable

Courts consider the following factors to determine whether a fee is fair and reasonable: (1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of the work; (4) the contingent nature of the fee and the financial burden carried by class counsel; and (5) awards in similar cases. *Vizcaino v. Microsoft*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). Class Counsel respectfully submit that an analysis of these factors, as well as an analysis under either lodestar or percentage of recovery method, demonstrates that the requested fee is fair and reasonable and should be approved.

a. The Results Achieved

The results achieved support the requested fees and costs. *See Azar*, 2019 WL 7372658 at *10-*11 ("The most critical factor in granting attorney's fees is the overall result and benefit to the class.") (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011)); *In re OmniVision Techs.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008) (same); *Glass v. UBS Fin. Servs.*, 331 Fed. App'x 452, 456 (9th Cir. 2009), *cert. denied*, 558 U.S. 1076 (2009).

Class Counsel obtained valuable compensation for the Class and nonmonetary relief meant to prevent the issues that led to these cases from recurring. This includes $8 million in transferrable vouchers and changes to Ruby's marketing practices and form contracts that require accurate descriptions of rounding and hold time billing. The settlement confers an immediate benefit to the Class in contrast to the delays, costs and uncertainty of the upcoming trial and the likelihood of a lengthy appeal.

b. The Risks of Litigation

In a case undertaken on a contingent fee basis, the risk of litigation is a key factor in determining an appropriate fee award. *See In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 19

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F.3d 1291, 1299-301 (9th Cir. 1994) ("It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases.") (citation omitted); *In re Heritage Bond Litig.*, No. 02-ML-1475 DT et al, 2005 WL 1594403, at *6-8 (C.D. Cal. June 10, 2005) ("the risk of non-payment or reimbursement of expenses is a factor in determining the appropriateness of counsel's proper fee award.") (citation omitted).

Under any measure, these were risky cases. In addition to the known risks discussed above, there were unanticipated and unknown risks, such as the COVID-19 pandemic. The risk that the Court would deny class certification here was especially real at the outset of this case, given the difficulty of proving a class wide methodology of assessing damages, as well as proving predominance of common issues. Trial would have created material uncertainties regarding liability, potential class decertification, and damages. In addition, even if Class Counsel won at trial, any recovery would likely be delayed by years of appeals – which were all but guaranteed regardless of the verdict. Lastly, and most importantly, the Class and Class Counsel faced the increasingly real risk of the impact of the pandemic on Ruby's ability to pay any judgment.

Class Counsel advocated relentlessly on behalf of the Settlement Class for over 3.5 years of litigation on a contingent fee basis—and advanced significant costs—despite these ever increasing risks. Unlike the typical successful consumer class action, Class Counsel are not asking for a premium over their normal hourly rates for a positive outcome in this contingency case. Instead, Class Counsel are only asking the Court to award the negotiated fee, which is much less than the lodestar.

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c. The Skill Required and the Quality of Representation

The skill of legal counsel and quality of the work also support the requested fee award. *See Gustafson v. Valley Ins. Co.*, No. CV 01-1575-BR, 2004 WL 2260605, at *2 (D. Or. Oct. 6, 2004) (considering "high quality" of work by both the plaintiffs' and defendants' counsel). Class Counsel include leading law firms, nationally known for their work in consumer class actions. *See* ECF 108, Exh. 27-30; ECF 109, ECF 111; Joint Decl. Exh. 2-6 (descriptions of Class Counsels' experience submitted in support of motion for class certification).

The quality of opposing counsel is also important in evaluating the quality of the services rendered. *See Gustafson*, 2004 WL 2260605, at *2; *In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (recognizing that "plaintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly."). Here, Defendant was represented by two prominent defense firms, Perkins Coie LLP and DLA Piper, LLP, that vigorously defended their client.

Class Counsel devoted nearly 10,000 hours as of May 1, 2021, to investigating, strategizing, researching and briefing issues ranging from Ruby's business practices to interpreting form contracts under Oregon law that the Court determined were ambiguous. *See* Joint Decl., Exh. 2-6 (individual declarations from Class Counsel categorizing their work in the cases).

As already noted, it is indisputable that the settlement is many times more valuable than the few hundred thousand dollars Ruby offered as a remedy pursuant to ORCP 32 I and also worth more than Ruby's own calculation of the damages from overage charges. Given the complexity of class certification, damages, and other issues, and faced with a defendant content to pay two national defense firms to pursue multiple defense strategies in two courts, leaving no

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line of defense unexplored, skilled counsel were required to obtain such a favorable recovery for the Class.

d. The Contingent Nature of the Fee and the Financial Burden Carried by Class Counsel

Awarding contingent fees that exceed the cost of hourly representation if provided on a non-contingent basis is commonplace to assure skilled representation for plaintiffs who cannot afford to pay on an hourly basis. *Fernandez v. Vict. Secret Stores*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, *13 (C.D. Cal. July 21, 2008) ("The contingency fee agreement into which plaintiffs and counsel entered reflects the mechanism available [in] the private legal market to compensate counsel for taking the risk of non-payment…. Given the risks assumed by class counsel, the court concludes that the percentage fee must encompass some risk multiplier to compensate counsel.").

"[T]he risk of non-payment in complex cases, such as this one, is very real." *In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695(CM), 2007 WL 4115808, *6 (S.D.N.Y. Nov. 7, 2007). The commencement of a class action is no guarantee of success; these cases are not always settled, nor are plaintiffs' lawyers always successful. *Id.*

As of May 1, 2021, Class Counsel have invested 9,756.63 hours on a contingent basis, for a lodestar of $6,028,139.75. Joint Decl., ¶ 84. Class Counsel also advanced $333,633.51 in expenses. *Id.* ¶ 86. There was a material risk that they would receive nothing in return. Class Counsel are not seeking a fee multiplier, despite this risk. *See Browne v. Am. Honda Motor Co.*, No. CV 09-06750 MMM (DTBx), 2010 WL 9499073, *11-12 (C.D. Cal. Oct. 5, 2010) (awarding fee multiplier, in part because of contingent nature of representation). Instead, Class Counsel request only that the Court award the fees and costs Ruby agreed to pay.

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e. The Award Sought Is Less than Awards in Similar Cases

In evaluating the reasonableness of a fee application, courts frequently consider fee awards in similar cases. The fee award requested in this case is at the low end of the scale when measured against the lodestar, with a significant negative multiplier, rather than the positive multiplier which would be more typical in case that settled favorably for a class only a few weeks before trial.

"[I]n most common fund cases, the award exceeds th[e] benchmark" of 25%. *In re Omnivision Techs*., 559 F. Supp. 2d at 1047. *Hendricks v. Starkist Co*., No. 13- CV-00729-HSG, 2016 WL 5462423, at *12 (N.D. Cal. Sept. 29, 2016) (finding award of 30% reasonable in consumer fraud case), *aff'd sub nom* 754 Fed. Appx. 510 (2018).

There is no basis to award Class Counsel less than the fee that the mediator proposed and the parties accepted in this litigation that was a long battle in two courts.

3. The Court Should Utilize the Lodestar Method

In light of the substantial discount Class Counsel seek from their lodestar and the significant nonmonetary relief obtained for the Settlement Class, the Court should utilize the lodestar method to evaluate the fee request.

The lodestar method is often more appropriate where the relief is difficult to quantify because it is injunctive or non-monetary, so as to "ensure compensation for counsel undertaking socially beneficial litigation." *See In re Bluetooth*, 654 F.3d at 941 (citing *Hanlon*, 150 F.3d at 1029); *Campbell*, 951 F.3d at 1126 ("where the benefit to the class is not easily quantified, district courts have discretion to award fees based on how much time counsel spent and the value of that time (a lodestar calculation) without needing to perform a crosscheck in which they attempt to estimate how this compares to the recovery for the class") (citation and internal

quotation marks omitted); *see also In re Ferrero Litig*., 583 Fed. Appx. 665, 668 (9th Cir. 2014) (affirming over objection that fees should have been assessed only under percentage of recovery method because "district court here had discretion to instead award attorneys' fees using the lodestar method. Under the lodestar method, a court need not determine the value of particular injunctive relief. . . Contrary to objectors' contentions, the injunctive relief in this case is meaningful and consistent with the relief requested in plaintiffs' complaint") (internal citations and quotations marks omitted).

Use of the lodestar approach is appropriate here because although the issuance of $8 million of transferable vouchers is easily monetized, the substantial injunctive relief is not.[7] This non-monetary relief has not only served to uncover and fully inform Settlement Class Members of Ruby's many years of veiled practices, but also assures disclosure of the bargains entered into by Ruby's customers and ends practices which Plaintiffs alleged to be misleading. Ruby's customers and potential customers will now be able to accurately compare the value of competing services – impossible without the disclosures provided under the Settlement Agreement – and avoid (or accept with full knowledge) charges for rounding up and hold time.

While the precise value of this benefit is difficult to measure, Ruby's expert's calculation of over $11 million in overage charges is a reasonable estimate of the harm, which will now be avoided. *See* Opinion and Order (ECF 256) at 28 (Ruby's expert calculated damages from allegedly improper overages as $11,403,218, not including prejudgment interest). That this benefit is valuable and furthers the goals for which the litigation was undertaken is clear.

[7] It is also difficult to monetize the value of Ruby's changes to its terms and conditions that were made shortly after this litigation was filed. As the Court will recall, Ruby argued at summary judgment that damages should have stopped accruing after these changes were made.

a. Class Counsel's Lodestar Is Fair and Reasonable

Although it is common for prevailing plaintiff's counsel to be awarded multiples of their lodestar, Class Counsel seek a fee which represents a substantial discount. Class Counsel's requested fee, after deducting costs from the $4 million total award requested, is $3,666,366.49. This amount is only 60.8% of Class Counsel's lodestar, as of May 1, 2021. The substantial discount on Class Counsel's lodestar will continue to increase until final resolution of the cases.

The discount underscores the reasonableness of the fee request. *See e.g.*, *In re Biolase, Inc. Sec. Litig.*, No. SACV 13-1300-JLS (FFMx), 2015 WL 12720318, at *8 (C.D. Cal. Oct. 13, 2015) (negative multiplier suggests fee "is reasonable and fair") (citation omitted).

b. The Number of Hours Expended is Reasonable

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. The two cases were zealously defended by Ruby with extensive motions practice and involvement by two courts. Class Counsel's 9,756.63 hours in the cases, as of May 1, 2021, were reasonable and necessary.

The work Class Counsel did is detailed in the accompanying Joint Declaration ¶¶ 10-63.[8] To summarize, Class Counsel: (1) uncovered Ruby's scheme and filed the state case and later this case; (2) opposed two motions to dismiss the state case, as well as a motion to stay this case;

[8] In assessing the lodestar, courts "need not, and indeed should not, become green-eyeshade accountants" but rather "do rough justice, not to achieve auditing perfection." *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *14 (N.D. Cal. Dec. 18, 2018) (citations omitted), *aff'd* 802 Fed. Appx. 295 (2020); *In re Capacitors Antitrust Litig.*, No. 3:17-md-02801-JD, 2018 WL 4790575, at *6 (N.D. Cal. Sept. 21, 2018) (lodestar assessment "need entail neither mathematical precision nor bean-counting. The district courts may rely upon summaries submitted by the attorneys and need not review actual billing records."). Class Counsel's detailed time records of course can be provided to the Court *in camera* if requested.

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(3) served extensive discovery, filed numerous motions to compel – some involving novel issues – reviewed Defendants' voluminous productions, and took many depositions; (4) responded to extensive discovery and defended depositions; (5) retained and worked extensively with an expert; (6) successfully obtained class certification, litigated various notice issues, and defended against Ruby's decertification attempts; (7) filed a class certification motion in state court and then obtained a stay in that case over Defendant's opposition after a class in this case was certified; (8) filed summary judgment motions and defeated Ruby's multiple summary judgment motions; and (9) prepared for trial while mediating this case and crafting the Settlement Agreement after extensive arm's-length negotiations. In addition, the parties engaged in extensive litigation over collateral issues, including (1) waiver of the attorney client privilege as to Ruby's counsel's communications with a former employee; (2) an injunction against Ruby's counsel's *ex parte* communications with the certified Class; and (3) several issues relating to the form and content of the Notice of Pendency. Ruby's defense in this matter was simply relentless, and Class Counsel were forced to respond in-kind.

Class Counsel's responsibilities, however, are not finished. They remain available to answer inquiries from Settlement Class Members, oversee settlement administration and work with Defendant's counsel to remedy any issue that may arise, for which Class Counsel will not receive any additional payment.

Class Counsel worked exceptionally hard, and their time in the case is reasonable given the efforts required to bring this case to a successful resolution and vindicate the rights of the Class.[9]

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[9] Knowing it was possible they would never be paid or reimbursed for the substantial costs they advanced, Class Counsel had no incentive to act in a manner that was anything but economical.

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c. Class Counsel's Hourly Rates are Reasonable

As set forth in the individual attorney declarations, Exhibits 2-6 to the Joint Declaration, Class Counsel's customary rates are the same rates they charge to fee paying clients without adjustment for contingency risk and have been approved by other courts. *See United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (explaining in civil rights case that rate determinations in other cases are evidence of market rate in relevant community), *appeal after remand* 944 F.2d 910 (1991).

Courts generally look to the forum of the litigation to determine the prevailing rate, but there are exceptions which should be applied here when counsel outside of the forum are necessary. Several factors in this case warranted the need for counsel outside the forum.

First, the action itself stems from a hidden and nationwide practice uncovered through an investigation by out of state attorneys for the original non-Oregon plaintiff in the State Action. Indeed, the impact of Ruby's practices was felt primarily outside Oregon, as the vast majority of Ruby's customers are located outside the state. Without the expertise of out of state counsel in uncovering the hidden practices that form the subject matter of this case, this novel litigation would never have existed.

Second, this case was brought in this District not because it was convenient for or otherwise desired by counsel or plaintiff, but rather because it was mandated by the forum selection clause of Ruby's form contracts.

See Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008) (rejecting reduction of attorney's fee in civil rights case where district court did not adequately explain basis for reducing fee).

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Third, once it was determined that this matter must be brought in Portland, out of town counsel for Plaintiffs did in fact conduct a substantial search for local counsel, which led to the Stoll Berne firm generally, and Mr. Dubanevich's well recognized skills in particular.

Fourth, given the massive time and financial resources necessary, the specialized class action experience called for which resulted in the successful certification of this Class, and the contingent nature of the fees in what would be a long uphill battle without the guaranty of payment or when it might occur, the geographic composition of Class Counsel cannot be faulted. Indeed, Ruby did not so limit itself, with its principal counsel for the majority of the litigation from out of state.

As such, to the extent some of Class Counsel's rates exceed local rates, dispensation is in order because they were necessary to this action and are the fair, usual, and customary rates for attorneys of their skill and experience in the jurisdiction in which each lawyer has their principal office. To the extent the Court applies only local rates, Class Counsel's lodestar would still exceed the requested fees by the still large margin of $1,332,124.46.[10]

4. A Cross-Check of the Fee Request Under the Percentage of Recovery Method Shows the Request is Reasonable

The Court does not need to conduct a percentage of recovery analysis of this settlement. As discussed above, the Court need only conduct a lodestar analysis. The Ninth Circuit rejected an argument from an objector that the district court should have used the percentage of recovery

[10] This amount was calculated by taking the sum of 1) all partner hours multiplied by $635 (Mr. Dubanevich's rate); 2) all associate and of counsel hours multiplied by $415 (Mr. Berne's rate); and 3) all paralegal and para-support hours multiplied by $290 (Stoll Berne's paralegal rate). The total value of Class Counsel's time at these rates is $4,998,490.95. The requested fee award of $3,666,366.49 (after $333,633.51 in costs) is 73.3% of Class Counsel's lodestar, using these rates.

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method in a consumer class action because the settlement involved monetary and injunctive relief with a value that was too "speculative to be ascertainable…." *In re Ferrero Litigation,* 583 Fed. Appx. 665, 667 (2014). The Ninth Circuit explained:

> Under the lodestar method, a court need not determine the "value" of particular injunctive relief because fees are calculated through an assessment of time expended on the litigation, counsel's reasonable hourly rate and any multiplier factors such as contingent representation or quality of work. Contrary to objectors' contentions, the injunctive relief in this case is meaningful and consistent with the relief requested in plaintiffs' complaint: As a result of the settlement, Ferrero must include extra nutritional information on Nutella's packaging and follow new protocols in its Nutella advertising. The district court did not abuse its discretion in approving a settlement that compensated counsel under the lodestar method for procuring such relief.

Id.

If the Court still decides to perform a percentage of recovery cross-check, that check demonstrates that the fee request is reasonable when any fair value is given to the injunctive relief and catalyst effect the litigation had on causing Ruby to rewrite its Terms and Conditions, after the State Action was filed, to include Ruby's rounding and hold time billing practices.

When the percentage of recovery method is used, 25% of the fund is the "benchmark" award. *Vizcaino*, 290 F.3d at 1047. However, "in most common fund cases, the award exceeds that [25%] benchmark." *In re OmniVision*, 559 F. Supp. 2d at 1047; *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007) (discussing securities class action settlements and noting "a proposed fee of 25% is consistent, if not below, the average award in similar complex actions"); *In re Heritage Bond Litig.*, 2005 WL 1594403, at *18 n.12 (awarding fees of 33⅓% and explaining "courts have consistently approved of attorney fee awards over the 25% benchmark").

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As discussed above, the value of the $8 million in vouchers is not illusory in that they allow class members to avail themselves of free services which they are either using or previously used. The vouchers require no additional purchase and once their use is initiated, the vouchers may continue to be used until their entire value has been redeemed. For Settlement Class Members no longer in need of receptionist services, they may use the vouchers for chat service. The vouchers are also freely transferable and distributed automatically, such that they require no proof of claims. For Settlement Class Members who have no use for any of the available services, they may sell or trade the vouchers to someone who does, whether for value or through a donation to a not-for profit organization.[11]

As such, the vouchers were designed with Ninth Circuit requirements in mind and are not coupons[12] which offer "only a discount on another product or service." *In re Online DVD*, 779 F.3d at 950-951; *Foos v. Ann, Inc.*, No. 11cv2794 L(MDD), 2013 WL 5352969, at *2 (S.D. Cal. Sept. 24, 2013) ("the distinction between a coupon and a voucher is that a coupon is a discount on merchandise or services offered by the defendant and a voucher provides for *free* merchandise

[11] While some Settlement Class Members may decide not to redeem or transfer their vouchers, just like some class members do not cash checks, the focus on the fee question should be the value conferred, rather than the redemption rate. *See e.g., In re Online DVD* at 950-51 (discussing differences between coupon and non-coupon settlements); *Officers for Justice*, 688 F.2d at 628 (court should examine total settlement package).

[12] This settlement is not subject to the provisions of the Class Action Fairness Act governing coupon settlements. *See* 28 U.S.C. § 1712(e). Such settlements may not rely upon the value of issued coupons as a basis to recover attorneys' fees under the percentage method. 28 U.S.C. § 1712(a). Even if, however, the Court were to determine that the vouchers were coupons under CAFA, the requested fees should still be awarded under the lodestar method. *See* 28 U.S.C. § 1712(b)(2)("Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees."); *In re Ferrero*, 583 Fed. Appx. at 668.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.
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or services.") (emphasis in original); *Seebrook v. Children's Place Retail Stores, Inc.*, No. C 11-837 CW, 2013 WL 6326487 (N.D. Cal. Dec. 4, 2013) (in-kind relief not a coupon because it "does not require class members to spend money in order to realize the settlement benefit.") (quoting *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at *5 (N.D. Cal. Nov. 16, 2007)).

While the precise value of the nonmonetary benefits is difficult to reduce to a cash value, precision is not necessary given that any reasonable value ascribed to the injunction, disclosures, and marketing changes confirms the fairness of the fee under the percentage method. Class Counsel respectfully suggest that their work on this case, filing novel claims that required investigations to uncover, in two parallel cases, over 3.5 years of contentious litigation, in which the Defendant rewrote how it described its billing practices after the litigation commenced, the Class ultimately prevailed on key pre-trial issues, certified the Class, defeated summary judgment, and cleared the way to trial, requires an upward departure from the 25% benchmark to at least 33.3%.

If the Court concludes that the percentage method is appropriate or necessary as a crosscheck, the Court need ascribe only a value of $2,999,099.47 to the injunctive relief and catalyst effect of the litigation, over and above the $8 million value of the vouchers.[13] Ruby was charging its customers millions of dollars each year (*see* ECF 197-1 at 7-8 (Plaintiffs' expert's damages analysis)) for the rounding and hold time charges. These millions of dollars will no longer be charged without full disclosure of all material facts and the opportunity to avoid them. Auditing perfection to determine the cash value of the nonmonetary relief is not required, as any

[13] Calculated as ($8,000,000 + X) * (1/3) = $3,666,366.49 [requested fee award less costs]. X = $2,999,099.47.

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fair value supports the reasonableness of the fee under the percentage method. *See Hefler*, 2018 WL 6619983, at *14; *In re Capacitors Antitrust Litig.*, 2018 WL 4790575, at *6.

5. Litigation Expenses Are Reasonable and Should Be Reimbursed

Class Counsel have incurred $333,633.51 in unreimbursed litigation expenses, including costs advanced in connection with experts, legal research, court reporting services, travel for depositions, copying and mailing, notice administration associated with class certification, and other customary litigation expenses. Joint Decl. ¶ 86. The expenses are described in more detail in the individual declarations attached as Exhibit 2-6 to the Joint Declaration.

"An attorney is entitled to recover as part of the award of attorney's fees those out-of-pocket expenses that would normally be charged to a fee paying client." *Hefler*, 2018 WL 6619983, at *16 (quoting *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (internal quotation marks omitted)).

The expenses incurred here were reasonable and necessary for prosecuting this case and should be recoverable. *See, e.g., In re LendingClub Sec. Litig.*, No. C 16-02627 WHA, 2018 WL 4586669, at *3 (N.D. Cal. Sept. 24, 2018) (expenses such as expert and consultant fees, court fees, travel and lodging costs, legal research fees, and copying expenses were reasonable and recoverable). The Court should therefore allow reimbursement of Class Counsels' litigation expenses in the amount requested.

E. The Service Awards are Reasonable and Justified

Class Counsel request that the Court award $1,000 to Plaintiffs and Maiden for the time and effort spent on behalf of the Settlement Class. Service awards are intended to compensate named plaintiffs for their work on behalf of the Settlement Class and for the financial and reputational risks associated with litigation. *See Rodriguez*, 563 F.3d at 958-959. Service

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209 S.W. OAK STREET, SUITE 500
PORTLAND, OREGON 97204
TEL. (503) 227-1600 FAX (503) 227-6840

awards also promote the public policy of encouraging individual plaintiffs to undertake the responsibility of representative lawsuits. *Id*. at 958 ("Incentive awards are fairly typical in class action cases.") (emphasis omitted). Although discretionary, courts regularly approve service awards. NEWBERG ON CLASS ACTIONS § 17:1.

In reviewing whether an incentive award is appropriate, the Court should take into account "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, [and] the amount of time and effort the plaintiff expended in pursuing the litigation." *Bell*, 2017 WL 2672073, at *8 (quoting *Staton v. Boeing Co*., 327 F.3d 938, 977 (9th Cir. 2003)). The length and type of litigation is also pertinent. *See Weeks v. Kellogg Co.*, No. CV 09-08102(MMM)(RZx), 2013 WL 6531177, at *36 (C.D. Cal. Nov. 23, 2013) ("When litigation has been particularly protracted, an incentive award is especially appropriate.") (citation omitted).

Plaintiffs and Maiden remained involved in the cases, including but not limited to traveling for depositions, searching for and producing documents, reviewing pleadings, and communicating with Class Counsel, among other things, about strategy, discovery, and settlement. These cases would not have been possible without their participation.

The requested $1,000 services awards are also less than awards approved in this District and elsewhere. *See, e.g., Hetherington v. Omaha Steaks, Inc.*, No. 3:13-cv-02152-SI, 2016 WL 4374947, at *3 (D. Or. Aug. 12, 2016) (awarding $10,000); *Bell*, 2017 WL 2672073, at *9 (awarding $2,500); *Razilov v. Nationwide Mut. Ins. Co.*, No. 01-CV-1466-BR, 2006 WL 3312024, *3-*4 (D. Or. Nov. 13, 2006) (awarding $10,000); *Hughes*, 2001 WL 34089697, at *12-*13 (awarding $7,500, $25,000, and $40,000); *Rausch v. Hartford Fin. Servs. Group,* No.

01-CV-1529-BR, 2007 WL 671334, *3 (D. Or. Feb. 26, 2007) (awarding $10,000); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1330 (W.D. Wa 2009) (awarding $7,500).

The Court should order $1,000 service awards to Plaintiffs and Maiden.

VI. CONCLUSION

The settlement provides meaningful relief that reflects Ruby's financial condition and ability to pay, along with the risks and delay of trial and appeal. The attorney fees and costs requested are significantly less than the lodestar and a full award of the negotiated amount is appropriate given the success on behalf of the Settlement Class and Ruby's vigorous defense. The service awards provide modest compensation to Plaintiffs and Maiden for their time and service. The settlement should also be approved because it allows the parties to resolve the dispute and move on.

For all the reasons discussed above, the Court should approve the Settlement Agreement, award Class Counsel $4 million in attorneys' fees and costs, award Plaintiffs and Maiden $1,000 each, and order the parties to otherwise effectuate the Settlement Agreement.

DATED this 11th day of May, 2021.

STOLL STOLL BERNE LOKTING & SHLACHTER P.C.

By: s/ Cody Berne
Keith S. Dubanevich, OSB No. 975200
Cody Berne, OSB No. 142797
Megan K. Houlihan, OSB No. 161273
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: kdubanevich@stollberne.com
cberne@stollberne.com
mhoulihan@stollberne.com

-And-

KAPLAN FOX & KILSHEIMER LLP
Laurence D. King (admitted *pro hac vice*)
Matthew B. George (admitted *pro hac vice*)
Mario M. Choi (admitted *pro hac vice*)
1999 Harrison Street, Suite 1560
Oakland, CA 94612
Telephone: (415) 772-4700
Facsimile: (415) 772-4709
Email: lking@kaplanfox.com
mgeorge@kaplanfox.com
mchoi@kaplanfox.com

-And-

LAX LLP
Robert I. Lax (admitted *pro hac vice*)
380 Lexington Avenue, 31st Floor
New York, NY 10168
Telephone: (212) 818-9150
Facsimile: (212) 208-4309
Email: rlax@lax-law.com

-And-

BARON & HERSKOWITZ
Jon M. Herskowitz (admitted *pro hac vice*)
9100 S Dadeland Blvd #1704
Miami, FL 33156
Telephone: (305) 670-0101
Fax: (305) 670-2393
Email: jon@bhfloridalaw.com

-And-

BROD LAW FIRM, PC
Gregory J. Brod (admitted *pro hac vice*)
96 Jessie Street
San Francisco, CA 94105
Telephone: (415) 397-1130
Email: gregb@brodfirm.com

Attorneys for Plaintiffs and the Class