

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

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-1921-SI

**ORDER APPROVING NOTICE
ADMINISTRATOR AND NOTICE
PLAN**

Keith S. Dubanevich and Cody Berne, STOLL BERNE PC, 209 SW Oak Street, Suite 500, Portland, OR 97204; Laurence D. King, Matthew B. George, and Mario M. Choi, KAPLAN FOX & KILSHEIMER LLP, 350 Sansome Street, Suite 400, San Francisco, CA 94104; Robert I. Lax, LAX LLP, 380 Lexington Avenue, 31st Floor, New York, NY 10168; Jon M. Herskowitz, BARON & HERKSOWITZ, 9100 S. Dadeland Blvd, # 1704, Miami FL; Gregory J. Brod, BROD LAW FIRM PC, 96 Jessie Street, San Francisco, CA 94105. Of Attorneys for Plaintiffs.

Renee E. Rothauge, Misha A.D. Isaak, Julia E. Markley, Philip Richard Higdon, and Patrick L. Rieder, PERKINS COIE LLP, 1120 NW Couch Street, Tenth Floor, Portland, OR 97209; Andrew R. Escobar and Austin Rainwater, DLA PIPER LLP, 701 Fifth Avenue, Suite 6900, Seattle, WA 98104. Of Attorneys for Defendant.

Michael H. Simon, District Judge.

In this certified class action, class representatives McKenzie Law Firm, P.A. and Oliver Law Offices, Inc. are former clients of Defendant Ruby Receptionists, Inc. (“Ruby”). Ruby is a business that provides virtual receptionist services to its clients. Plaintiffs allege breach of

contract, unjust enrichment, breach of the duty of good faith and fair dealing, and money had and received, all based on Ruby's allegedly misleading practices relating to the billing of "receptionist minutes." On April 24, 2020, the Court certified a class, under Rule 23(b)(3) of the Federal Rules of Civil Procedure, consisting of:

All persons or entities in the United States who obtained receptionist services from Defendant Ruby Receptionists between November 2, 2012 and May 31, 2018, pursuant to its form Service Agreements.

By stipulation of the parties, the Court has set a bench trial to begin on January 5, 2021.

Before the Court is Plaintiffs' motion for approval of Notice Administrator and Notice Plan. The parties agree on all Notice Plan issues other than: (1) whether Ruby may send an electronic "reminder notice" to class members; and (2) under what circumstances, if any, Plaintiffs may employ publication notice, including issuing a press release or supplemental media effort. As previously explained to the parties, the Court will defer ruling the second issue until after more information has been obtained regarding the number of "undeliverable" emailed and mailed notices; until then, there shall be no press release or supplemental media effort. In addition, Ruby requests approval of a "script" to be used by Ruby if class members initiate contact with Ruby seeking additional information about this lawsuit. Plaintiffs oppose Ruby's proposed script. The Court addresses each issue in turn.

A. Reminder Notice

Under the Notice Plan, the approved Notice Company will develop and deploy an approved informational Notice Website at www.RubyReceptionistsLitigation.com on which the notices and other important Court documents will be posted. The Notice Website will include a webform that may be used by class members to opt out of the Class. It will also include a webform that may be used by class members to contact the Class Administrator to request

updates on the litigation. The Notice Company will establish a dedicated email address to receive requests from class members to opt out of the Class. The Notice Company also will establish and maintain a 24-hour, toll-free telephone line for callers to obtain information about the litigation through a recorded message, request that documents be sent to them by mail or email, or leave a message with questions.

Further, the Notice Company will email an approved summary notice (“Email Notice”) to all known class members identified through Ruby’s records (“Ruby’s List”) where email contact information is available and deliverable. The Email Notice will be formatted in a manner so that it is viewable in most email platforms. The Email Notice will include links and related instructions for opting out of the Class.

The Notice Company also will mail to all known class members identified on Ruby’s List, other than those with an available and deliverable email address, an approved Notice of Pendency of Class Action (“Long Form Notice”), which includes appropriate instructions for requesting exclusion from the Class. The Long Form Notice will be mailed in an envelope with a message on the front of the envelope identifying that the mailing is court-ordered and encouraging class members to open and read the Notice.

Ruby expresses concern that email notice is less likely to be received and read than a paper notice sent by mail. As Ruby notes, emails are often screened by spam filters and, even when not screened, emails sent from unknown senders or that appear to be “junk mail” are commonly deleted before reading. If that occurs, the unread email would not be returned to the Notice Company as “undeliverable,” and the affected class members would not be sent a Long Form Notice by mail. Ruby’s concern is reasonable. *See In re Uber FCRA Litig.*, 2017 WL 2806698, at *9 (N.D. Cal. June 29, 2017) (expressing concern whether email notice is

effective when it can be screened by spam filters); *Pokorny v. Quixtar Inc.*, 2011 WL 2912864, at *3 (N.D. Cal. July 20, 2011) (“In this era of spam-filters and mass email advertising, the Court is concerned that email notice alone may be insufficient to draw the attention of class members.”); *see also Roes, 1-2 v. SFBSC Management, LLC*, 944 F.3d 1035, 1045-48 (9th Cir. 2019) (noting that in an opt-in FLSA class settlement with a low claims rate and reversionary settlement terms, the notice plan employed did not adequately provide the constitutionally required due process).

To remedy this problem, Ruby’s proposes sending a “reminder notice” from Ruby by email one or two days after the Email Notice is sent by the Notice Company. Ruby specifically suggests that the supplemental email begin with the following message and include the entire Email Notice:

Yesterday, you received an email about a class action lawsuit that has been filed against Ruby Receptionists (see below). The email contains important information about your rights, including how to exclude yourself from the case if you wish. Please read it. You can also go to www.RubyReceptionistsLitigation.com to learn more about the lawsuit.

ECF 176 at 7-8 of 11.

Plaintiffs assert that this text is not neutral because it suggests how one may opt out of this class action lawsuit but not remain in it. With a slight modification to the proposed supplemental text, the Court approves Ruby’s proposed reminder notice. The supplemental email, which must include the entire Email Notice, shall begin as follows:

Yesterday, you received an email about a class action lawsuit that has been filed against Ruby Receptionists (see below). The email contains important information about your rights, including a choice that you may wish to make now. Your options are explained in the notice below. To ask to be excluded from this class action lawsuit, you must act before **Month 00, 2020**. To be included, you don’t need to do anything. Please read the following notice. You

can also go to www.RubyReceptionistsLitigation.com to learn more about the lawsuit.

With this amendment, the Court approves Ruby's proposed "reminder notice."

B. Ruby's Scripted Response to Class Member Inquiries

Ruby states that it may receive incoming communications from class members with questions about the lawsuit. Ruby requests permission to respond with the following script:

A class action lawsuit has been filed against Ruby Receptionists. You should have received an email with important information regarding the suit, including how to exclude yourself from the case should you prefer. Under the Judge's direction, we are unable to discuss the suit with those who may be affected, but you can learn more at www.RubyReceptionistsLitigation.com.

ECF 176 at 8-9 of 11.

With a slight modification to the proposed script, the Court approves Ruby's request.

Ruby shall not *initiate* any discussion with any class member about the lawsuit but may respond to incoming questions from class members as follows:

A class action lawsuit has been filed against Ruby Receptionists. You should have received an email with important information regarding the suit, including a choice that you may wish to make now. Your options are explained in the notice. To ask to be excluded from this class action lawsuit, you must act before **Month 00, 2020**. To be included, you don't need to do anything. Under the Judge's direction, we are unable to discuss the suit with those who may be affected, but you can learn more at www.RubyReceptionistsLitigation.com.

CONCLUSION

With the modifications described in this Order, the Court approves Plaintiffs' proposed Notice Administrator and Notice Plan (ECF 174) as reasonably calculated to reach all interested parties and inform absent class members of their rights. After the information becomes available, the parties shall promptly file with the Court a status report indicating the number of Email

Notices sent, the number of Email Notices returned as undeliverable, the number of Long Form Notices mailed, and the number of Long Form Notices returned as undeliverable.

IT IS SO ORDERED.

DATED this 3rd day of August, 2020.

/s/ Michael H. Simon
Michael H. Simon
United States District Judge