

**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

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, 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; Andrew D. Day, DLA PIPER LLP, 400 Capitol Mall, Suite 2400, Sacramento, CA 95814. 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, 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.

ECF 128 at 23. Before the Court are Defendant's Motion to Include Opt-Out Form with Class Notice (ECF 144) and Plaintiffs' Motion to Approve Form of Notice (ECF 145). For the reasons that follow, the Court GRANTS IN PART AND DENIES IN PART both motions.

The parties currently are negotiating the required proposed Notice of Class Certification ("Notice") and proposed Class Notice Plan ("Plan") for approval by the Court, but two disputes have arisen. First, Defendant wants all paper copies of the Notice that will be sent to class members by U.S. Mail to include, at Defendant's expense, a postage paid and preaddressed postcard for class members to complete, sign, and return if they wish to exclude themselves (or, "opt-out") from this class action. Defendant notes that paper copies of the Notice will only be sent by U.S. mail to class members for whom there is no current email address but for whom a postal mailing address is available. When a current email address is available, a class member will only be sent an electronic copy of the Notice. Defendant does not ask that return postcards be sent to class members who receive the Notice by electronic means. Plaintiffs oppose Defendant's request for inclusion of return postcards being mailed with paper copies of the Notice, even at Defendant's expense. Second, Defendant wants all Notices that are sent by electronic means to include a link to an opt-out webform. Plaintiffs do not expressly respond to that portion of Defendant's motion.

Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure provides in relevant part:

For any class certified under Rule 23(b)(3) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) *that the court will exclude from the class any member who requests exclusion;*
- (vi) *the time and manner for requesting exclusion;* and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). A class notice “must only have information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt-out or remain a member of the class.” *Stafford v. Brink's, Inc.*, 2016 WL 6583046, at *1 (C.D. Cal. Mar. 8, 2016) (citation and quotation marks omitted). The Court “is ultimately responsible for directing notice to the class members and protecting their due process rights to remain in the class or be excluded.” *Id* (citing Fed. R. Civ. P. 23(c)).

Further, “the use of opt-out postcards or forms is not standard practice and often rejected for risk of engendering confusion among class members.” *Id.* at *2. On the other hand, any absent class member may choose (for a number of reasons) not to want to be part of a class action, and the Court must ensure that it is easy for class members to exclude themselves if they wish. *See generally Manual for Complex Litigation*, Fourth, § 21.311 at 289 (2004) (“A simple

and clear form for opting out is often included with the notice.”); *see also id.* § 21.312 at 295 (“In a Rule 23(b)(3) class, the notice and any Internet Web site should include opt-out forms.”). When class members want to exclude themselves from a class action, a court must ensure that they can do so in a way that is not burdensome and they have clear and understandable instructions how and when to do so.

The Court accepts Plaintiff’s argument that an opt-out postcard that accompanies a paper copy of the Notice may risk confusion and result in members of the class erroneously “opting out” by returning a postcard when thinking that by doing so they were “opting in.” The Court observes, however, that the Notice’s discussion of exclusion can be simplified and made less burdensome. Section 15 of Plaintiff’s Proposed Notice, titled, “How do I ask the Court to exclude me from the Class,” reads:

If you do not wish to participate in the lawsuit, you must submit either a signed written request or an email to be excluded that includes the following information:

ECF 146-1 at 6. Because an email request is acceptable (and just as good as a signed written request) and is often significantly less burdensome, the Court directs that the opening sentence be modified to place the email option before the signed written request option.

Further, Defendant requests that all Notices sent by electronic means include a link to an opt-out webform and not merely a statement that a class member may opt out by sending an email or signed written request. Plaintiffs do not expressly respond to this portion of Defendant’s motion, and it appears reasonable to the Court. Accordingly, either the case website, www.RubyReceptionistsLitigation.com, or an official Class Website maintained by the Claims Administrator, must conspicuously display on its home page a link to an opt-out webform with clear and conspicuous instructions about how and when a class member may opt out.

The Notice sent by electronic means also must contain such a link and related instructions. This will also require further explanation in Section 15 of the Notice. Class members will need to be informed that they may opt out by: (1) using the link in the Notice sent by electronic means; (2) sending an email to the email address indicated; or (3) mailing a signed written request to the postal address indicated.

Finally, the Court notes that the instructions, as currently drafted, may confuse a class member who wants to opt out into thinking that an opt-out *reason* must be given. None need be given, and the Notice must make that clear with words to the following effect: “You need not give any reason for why you want to be excluded from this lawsuit, only that you want to be excluded.”

The Court GRANTS IN PART AND DENIES IN PART Defendant’s Motion to Include Opt-Out Form with Class Notice (ECF 144) and Plaintiffs’ Motion to Approve Form of Notice (ECF 145).

IT IS SO ORDERED.

DATED this 16th day of June, 2020.

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