

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

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

Plaintiff,

v.

RUBY RECEPTIONISTS, INC.,

Defendant.

No. 3:18-cv-01921-SI

**ORDER OF PRELIMINARY
APPROVAL OF SETTLEMENT**

ORDER OF PRELIMINARY APPROVAL OF SETTLEMENT

This matter comes before the Court on the parties' joint motion for preliminary approval of the class settlement agreement pursuant to Federal Rule of Civil Procedure 23(e) (ECF 269). Having thoroughly considered the motion and the relevant record, the Court hereby GRANTS the motion for the reasons explained herein.

On February 17, 2021, named Plaintiffs McKenzie Law Firm P.A. and Oliver Law Offices, Inc. along with Maiden Insurance LLC ("Maiden"), executed a settlement agreement with Defendant Ruby Receptionists, Inc. (collectively, "the Parties"). For purposes of this order, all of the terms and definitions set forth in that settlement agreement shall apply herein. Having reviewed the settlement agreement and considered the parties' submission in support of preliminary approval of the settlement, the Court now FINDS and ORDERS as follows:

I. CERTIFICATION OF SETTLEMENT CLASS

A. The Expanded Settlement Class

1. The agreement settles all released claims, as defined therein, that have been or could have been brought in this putative class action. The agreement provides for a nationwide class settlement of the released claims concerning certain activities that are the subject of this lawsuit.

2. On or about January 6, 2020, the named plaintiffs moved for class certification. (ECF 107). The Court certified a class in the lawsuit on April 24, 2020, defining the class as follows:

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).

3. The parties have jointly requested the Court expand this certified class for purposes of settlement. This proposed settlement class would include those who obtained

services from Ruby between October 13, 2011 and November 2, 2012. Accordingly, the settlement class is defined as follows:

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.

To be excluded from the Settlement Class are:

- (a) Ruby, its affiliates, its Directors and Officers, the attorneys of any party, and the Court and its personnel.
- (b) Persons who have timely and validly opted out of the Settlement Class pursuant to the terms of the settlement agreement.
- (c) Persons or entities who have previously opted out of this action in response to the Notice of Pendency previously provided pursuant to the Court's August 3, 2020 Order Regarding Notice.

4. The Court hereby finds that this change is reasonable, fair, and adequate to the needs of the parties and the settlement class. Specifically, the proposed settlement class would expand the available number of individuals who stand to benefit under the terms of the settlement agreement.

B. Findings Regarding the Settlement Class

The Court finds as follows:

1. Defendant has determined the size of the settlement class through their records and have identified 21,144 such settlement class members.
2. There are questions of law and fact common to all members of the settlement class because Plaintiffs' breach of contract claim turns on common questions like whether Ruby's call time calculation method breached its contracts and whether these breaches caused damages to class members.
3. The named Plaintiffs' claims and those of Maiden are typical of the settlement class. The named Plaintiffs and Maiden are members of the settlement class and allege that they have been harmed by the same conduct of Defendant as other members of the settlement class.

Their claims are not in conflict with or antagonistic to the claims of the settlement class as a whole. The named Plaintiffs' claims and those of Maiden and of other settlement class members are based upon corresponding theories.

4. The settlement class is ascertainable. The unnamed members of the settlement class have in common that they each were identified by Defendant's records as someone who met the expanded settlement class definition as set forth above.

5. The named Plaintiffs and Maiden can fairly, fully, and adequately protect the interests of the settlement class. Class counsel is experienced in prosecuting complex class-action litigation, and the named Plaintiffs and class counsel have no interest that conflicts with, or is adverse to, the interests of the settlement class. The Court had previously appointed these class counsel and these named Plaintiffs to represent the interests of the original class in its prior certification order.

6. Questions of law and fact common to all members of the settlement class predominate over any questions affecting only individual members for settlement purposes.

C. Certification of Settlement Class and Appointment of Class Counsel

1. For the reasons above, the Court hereby CERTIFIES the following settlement class for settlement purposes only:

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.

Excluded from the Settlement Class are:

- (a) Ruby, its affiliates, its Directors and Officers, the attorneys of any party, and the Court and its personnel.
- (b) Persons who have timely and validly opted out of the Settlement Class pursuant to the terms of the settlement agreement.
- (c) Persons or entities who have previously opted out of this action in response to the Notice of Pendency previously provided pursuant to the Court's August 3, 2020 Order Regarding Notice.

2. The Court hereby APPOINTS Keith Dubanevich, Stoll Stoll Berne Lokting & Shlachter, P.C.; Laurence King, Kaplan Fox & Kilsheimer LLP; Robert I. Lax, Lax LLP; Jon M. Herskowitz, Baron & Herskowitz LLP; and Gregory J. Brod, Brod Law Firm, P.C., as counsel for the settlement class ("Class Counsel").

3. If for any reason the settlement agreement ultimately does not become effective, the parties may request that this order certifying a settlement class be vacated and that the parties be returned to their respective positions in this lawsuit as those positions existed immediately before the parties executed the settlement agreement. Nothing stated in the settlement agreement or in this order shall be deemed an admission or waiver of any kind by any of the parties or used as evidence against, or over the objection of, any of the parties for any purpose in this action or in any other action or proceeding of any kind.

II. PRELIMINARY APPROVAL OF THE TERMS OF THE SETTLEMENT

1. Defendant has at all times disputed, and continues to dispute, named Plaintiffs' allegations in this lawsuit, deny any liability for any of the claims that have or could have been alleged by Plaintiffs or other members of the settlement class.

2. The settlement agreement requires Defendant to provide specified settlement vouchers to each participating settlement class member, as defined and set forth in the settlement agreement. Specifically, each settlement class member who has not timely opted out of the settlement shall be compensated via a settlement voucher, redeemable for Ruby's Pure Chat service, or for Ruby's virtual receptionist service. The amount of the voucher for each eligible class member will be determined by that class member's billings from Ruby during the relevant time period, as a percentage of Ruby's total billings during that time, exclusive of amounts exercised for money back guarantees. At a minimum, each qualifying class member will receive a voucher worth no less than \$49.00. The vouchers will be distributed and become redeemable over a period of time not to exceed eighteen months from the date the Court's approval of the

settlement becomes final and class members will have up to one year to redeem them once the voucher is issued. The redeemable value of the vouchers to be distributed may equal, but is not to exceed, \$8 million. In addition, Ruby will continue to describe its billing practices in written and oral communications making clear that receptionist minutes are billed in 30-intervals rounded up to the next thirty-second mark, and that Ruby includes time callers are on hold when calculating receptionist minutes.

3. Defendant has already identified all settlement class members and, therefore, no settlement class member will be required to prove their eligibility to receive the benefits of the settlement agreement.

4. The Plaintiffs' damages expert has estimated damages totaling approximately \$18,700,000 for the previously certified class period. In the parties' proposed settlement, Ruby agrees to distribute to class members \$8 million in vouchers for Ruby services and to pay up to \$4 million in attorneys' fees and up to \$100,000 in settlement administration costs. Ruby also agrees to provisions requiring it to describe its receptionist minutes calculation policy as it began to describe that policy after the lawsuit was filed. The structure of the settlement is based on a proposal made to the two parties by the mediator, Mr. Hunter Hughes III of Atlanta, Georgia, who facilitated the parties' negotiations. In a declaration submitted by Mr. Hughes in support of this settlement, he states that he made his proposal taking into consideration the strengths and weaknesses of the case, the possible outcomes of a trial, and collectability of any judgment obtained. In addition, Mr. Hughes states that misalignment between a plaintiff's expectations about the amount of damages achievable at trial and what a defendant could reasonably afford to pay can present an obstacle to settlement. Mr. Hughes states that he received financial information from Ruby that informed his views and moved the plaintiffs' expectations about the size of a settlement Ruby could reasonably perform.

5. On a preliminary basis, therefore, taking into account (1) the defenses asserted by Defendant; (2) the risks to the settlement class members that Defendant would successfully defend against claims arising out of the facts and legal theories pleaded and asserted in this case, whether litigated by members of the settlement class themselves or on their behalf in a class action; and (3) the length of time that would be required for members of the settlement class, or any group of members of the settlement class, to obtain final judgment through one or more trials and appeals, the settlement appears fair, reasonable, and adequate. Moreover, the parties have reached the settlement after litigating the claims and defenses raised in this case, both formal and informal discovery conducted by the Plaintiffs, class counsel, and Defendant, and an arm's-length negotiation that included a full-day mediation session and subsequent negotiations. For all these reasons, the settlement falls within the appropriate range of possible approval and does not appear in any way to be the product of collusion.

6. Accordingly, it is hereby ORDERED that the settlement agreement and corresponding settlement are hereby preliminarily approved.

III. APPROVAL OF THE CLASS NOTICE, PLANS FOR ITS DISTRIBUTION, AND RESPONSIBILITIES FOR THE SETTLEMENT ADMINISTRATOR AND THE PARTIES

1. As provided for in the settlement agreement, the parties have submitted (i) a form of class notice, including a request for exclusion form, and frequently asked questions and answers ("Notice"), to be mailed and emailed to settlement class members; (ii) a plan for distributing the notice; (iii) a plan for establishing a settlement website, which will include the notice and other information and documents that the parties jointly agree to post concerning the nature of the case and the status of the settlement, including a copy of class counsel's fee application, a complete copy of the settlement agreement, and relevant orders of the Court.

2. The proposed plan for distributing and publishing the notice and settlement website appears reasonably likely to notify members of the settlement class of the settlement.

The proposed plan for publishing the notice on the settlement website and for mailing the notice to settlement class members is fair and reasonable. The proposed plan satisfies the notice requirements of Federal Rule of Civil Procedure 23(e) and all applicable federal laws.

3. The notice and settlement website will fairly, accurately, and reasonably inform members of the settlement class of (1) appropriate information about the nature of this litigation and the essential terms of the settlement agreement; (2) appropriate information about how to obtain additional information regarding this matter and the settlement agreement; and (3) appropriate information about, and means for, objecting to or excluding themselves from the settlement, if they wish to do so. The notice and settlement website also fairly and adequately inform members of the settlement class that if they do not comply with the specified procedures and deadline for excluding themselves from the settlement, they will be bound by the settlement and lose any opportunity to bring any of the released claims against the released parties. The agreement settles all released claims, as defined therein, that have been or could have been brought in this class action.

4. The Court, having reviewed the proposed notice and the proposed plan for distributing and disseminating each of them, finds and concludes that the proposed plan for distributing and disseminating each of them will provide the best notice practicable under the circumstances and satisfies all requirements of federal and Oregon laws and due process.

5. Accordingly, the Court hereby ORDERS that the proposed notice be APPROVED.

6. The Court appoints The Notice Company as the settlement administrator. The settlement administrator shall be subject to the jurisdiction of the Court with respect to the administration of the settlement agreement and shall comply with the terms of the settlement agreement. Promptly following the entry of this order, the parties and settlement administrator shall prepare final versions of the notice.

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7. Further, it is ORDERED that the parties and settlement administrator shall follow the following timeline with respect to the plan of notice in preparation for the final approval hearing.

Settlement Administrator Sends Notice and Settlement Website goes live (“Settlement Notice Date”)	April 21, 2021 (within 30 Days Following Entry of Preliminary Approval Order)
Parties file Declaration of Settlement Administrator of Compliance with Notice Requirement	May 6, 2021 (within 45 Days Following Entry of Preliminary Approval Order)
Motion for Final Approval and Award of Attorneys’ Fees and Expenses and Service Awards to Plaintiffs	May 11, 2021 (within 50 Days Following Entry of Preliminary Approval Order)
Last day for Settlement Class Members to Object to Settlement Agreement or Request Exclusion	June 15, 2021 (within 85 Days Following Entry of Preliminary Approval Order)
Reply, if any, in Support of Motion for Award of Attorneys’ Fees and Expenses and Service Awards to Plaintiffs and in Support of Motion Final Approval	July 6, 2021 (within 105 Days Following Entry of Preliminary Approval Order)
Last day for Ruby Counsel to file list of all exclusions, any objections received by the Administrator, and a declaration from the Claims Administrator summarizing those exclusions and objections	July 6, 2021 (within 105 Days Following Entry of Preliminary Approval Order)
Final Approval Hearing	Thursday, July 8, 2021, 2:00 p.m.¹

8. The settlement administrator to be jointly selected by the parties, shall perform the following functions in accordance with the settlement agreement, this order, and subsequent orders that might be entered by the Court in this case:

¹ Pursuant to 28 U.S.C. § 1715(d), this date must be at least 90 days following the distribution of notice of the proposed settlement to the Attorney General of the United States and the appropriate state officials.

a. Establish, pursuant to the timeline set out above, a settlement website that enables settlement class members to: (a) read the notice, class counsel's fee application, settlement agreement, relevant pleadings related to the settlement, and relevant orders of the court; and (b) complete, review, and submit a request for exclusion online.

b. Send or cause to be sent, by United States first-class mail, pursuant to the timeline set out above, the class notice to every settlement class member. The settlement administrator will forward settlement notices that are returned by the U.S. Postal Service with a forwarding address.

c. Process requests for exclusion from the settlement.

d. Process objections to the settlement.

IV. PROCEDURES FOR FINAL APPROVAL OF THE SETTLEMENT

A. Final Approval Hearing

The Court hereby schedules for **Thursday, July 8, 2021 at 2:00 p.m.**, a final approval hearing to be held at the Mark O. Hatfield United States Courthouse, Room 1527, 1000 Southwest Third Ave., Portland, Oregon 97204-2944 (or by videoconference if circumstances warrant), to determine whether the settlement should receive final approval. At that time, the Court will also consider any motion that might be made by class counsel for an award of attorneys' fees and reimbursement of litigation expenses, all in accordance with the terms of the settlement agreement.

B. Deadline for Members of the Settlement Class to Request Exclusion from the Settlement

The deadline for members of the settlement class to request exclusion from the settlement shall be **June 15, 2021**. Members of the settlement class who wish to be excluded from the settlement must mail or submit online their requests for exclusion no later than that date. Any exclusion that is sent via United States first-class mail must be postmarked by that date.

C. Procedure for Objecting to Matters to Be Heard at the Final Approval Hearing

Any objections to certification of the settlement class, the designation of named Plaintiffs and Maiden as representatives of the settlement class, the appointment of settlement class counsel, the settlement, the settlement agreement, or the amount of fees and expenses that settlement class counsel might request at the final approval hearing, must be made in writing and submitted by **June 15, 2021**. Any objection that is sent via United States first-class mail must be postmarked by that date.

Any member of the settlement class or his or her counsel may appear at the final approval hearing and present an objection to the certification of the settlement class, the designation of the settlement class representatives, the appointment of settlement class counsel, the settlement, the settlement agreement, or the amount of attorneys' fees and expenses requested, and/or present any other remarks, without submitting written objections or providing advance notice of an intent to appear or request to be heard at the final approval hearing. The Court will consider all written and oral objections submitted by any settlement class members.

V. ABSENCE OF ANY ADMISSION AND DENIAL OF ANY WRONGFUL ACT OR OMISSION AND OF ANY LIABILITY

The parties entered into the settlement agreement solely for the purpose of compromising and settling disputed claims. Defendant has at all times denied, and continues to deny, any wrongful act or omission alleged by named Plaintiffs, and any liability of any sort to named Plaintiffs, Maiden or any member of the settlement class. Nothing contained in the settlement agreement, in the documents relating to the settlement agreement, or in this Order shall be construed, deemed, or offered as an admission by the parties, or by any member of the settlement class, for any purpose in any judicial or administrative action or proceeding, whether in law or in equity.

VI. CONCLUSION

For the foregoing reasons, the parties' joint motion for preliminary approval of the class settlement agreement (ECF 269) is GRANTED.

IT IS SO ORDERED.

DATED this 22nd day of March 2021.



Michael H. Simon
UNITED STATES DISTRICT JUDGE