

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

RYOO DENTAL, INC. d/b/a RYOO
DENTAL and RICHARD MARCUS,
individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

OCO BIOMEDICAL, INC.,

Defendant.

Case No. 8:16-cv-001626-DOC-KES

Judge: Honorable David O. Carter
Room: 9C

**PRELIMINARY APPROVAL
ORDER**

1 WHEREAS, this Action is a putative class action under the Telephone Consumer
2 Protection Act, 47 U.S.C. § 227, *et seq.*;

3 WHEREAS, Plaintiffs Richard Marcus and Ryoo Dental, Inc. (“Plaintiffs”) have
4 filed a Motion for Preliminary Approval of a Class Wide Settlement (the “Motion”),
5 which included a Settlement Agreement¹ (the “Settlement Agreement”) which,
6 together with the exhibits thereto, sets forth the terms and conditions for the settlement
7 and release of certain claims, on a class wide basis, against OCO Biomedical Inc.
8 (“OCO”), as more fully set forth below;

9 WHEREAS, the Court having carefully considered the Motion and the
10 Settlement Agreement and all of the files, records, and proceedings herein, and it
11 appearing to the Court that upon preliminary examination the Settlement Agreement
12 appears fair, reasonable and adequate, and that the proposed plan of notice to the class
13 is the best notice practicable under the circumstances and consistent with Due Process
14 and Federal Rule of Civil Procedure 23, and that a hearing should and will be held after
15 notice to the Class to confirm that the Settlement Agreement is fair, reasonable, and
16 adequate, and to determine whether a judgment approving settlement and order of
17 dismissal should be entered in this action based upon the Settlement Agreement;

18 **NOW, THEREFORE, IT IS HEREBY ORDERED:**

19 1. For purposes of settlement only, the Court has jurisdiction over the subject
20 matter of this action and personal jurisdiction over the parties and the members of the
21 Class described below.

22

23

24

25

26

27

28 ¹ Unless otherwise defined herein, all capitalized terms have the same definition
as set forth in the Settlement Agreement (ECF 32-1).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Certification of Settlement Class

2. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and for the purposes of settlement only, the “Class” is preliminarily certified, consisting of the following class:

All persons or business entities who were sent a telephone facsimile message of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of OCO Biomedical, Inc. on or after March 18, 2012.

3. All people and business entities who are members of the Class are collectively the “Settlement Class Members” or individually a “Settlement Class Member.”

4. For purposes of settlement only, the Court finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been preliminarily satisfied in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the class representative are typical of the claims of the respective classes within the Settlement Class they seek to represent; (d) the class representative will fairly and adequately represent the interests of the Settlement Class; (e) the questions of law and fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court further finds, for purposes of settlement only, that: (A) the members of the class have a limited interest in individually prosecuting the claims at issue; (B) the Court is satisfied with Class Counsel’s representation that they are unaware of any other litigation commenced regarding the claims at issue by members of the Settlement Class; (C) it is desirable to concentrate the claims in this forum; and (D) it is unlikely

1 that there will be difficulties encountered in administering this Settlement. Counsel
2 shall file a consolidated action or motion or stipulation to consolidate the above-
3 captioned case and *Marcus v. OCO Biomedical, Inc.*, Case No. 2:17-cv-07425-ODW-
4 AS, United States District Court, Central District of California, with the Court within
5 30 days of this Order.

6 5. Under Federal Rule of Civil Procedure 23, and for settlement purposes
7 only, plaintiffs Richard Marcus and Ryoo Dental, Inc. are hereby appointed as class
8 representatives and Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L., Todd
9 M. Friedman, P.C., Schultz & Associates LLP, and DeNittis, Osefchen Prince, P.C.
10 hereby are appointed as Class Counsel.

11 6. The foregoing determination regarding class certification is for purposes
12 of settlement only. The Court recognizes that, under the Settlement Agreement, OCO
13 retains the right to dispute that a class may be certified in this case, should the
14 Settlement not be finally approved. Therefore, as more fully set forth below, if the
15 Settlement is not finally approved, and litigation resumes, this preliminary finding
16 regarding class certification shall be of no further force or effect whatsoever, and this
17 Order will be vacated in its entirety.

18 **Notice and Administration**

19 7. The Court hereby approves of Kurtzman Carson Consultants, LLC, as
20 claims administrator to perform the duties of the Claims Administrator set forth in the
21 Settlement Agreement, including providing Notice to Settlement Class Members, to
22 perform such other functions and duties of the administrator as are set forth in the
23 Settlement Agreement, and to provide such administration services as are reasonably
24 necessary to facilitate the completion of the Settlement.

25 8. The Court has carefully considered the plan for notice set forth in the
26 Settlement Agreement, including receiving briefs on the issue of the propriety of the
27 notice. The Court finds that the form and method set forth or identified in the Settlement
28 Agreement of notifying the Settlement Class, and the members thereof, of the

1 Settlement and its terms and conditions constitutes the best notice practicable under the
2 circumstances, including individual notice to all Settlement Class Members who could
3 be identified through reasonable effort, and satisfies fully the requirements of Rule 23
4 of the Federal Rules of Civil Procedure, the requirements of due process and any other
5 applicable law, such that the Settlement Agreement and final judgment will be binding
6 on all Class Members.

7 9. The Court hereby approves the form, content and requirements of the
8 Class Notice annexed to the Settlement Agreement as Exhibit A. The Court approves
9 the regime for notice set forth in the Settlement Agreement. Claims Administrator shall
10 cause the Class Notice to be emailed or mailed on or before January 29, 2018, to the
11 individuals that OCO identified as Class Members, and notice shall also be published
12 in Dentistry Today by the same date, which the Court finds constitutes reasonable effort
13 to identify Settlement Class Members for purposes of making individual notice.

14 10. Settlement Class Members who wish to receive benefits under the
15 Settlement Agreement must complete and submit a claim form in accordance with the
16 instructions provided therein. The Court hereby approves as to form and content the
17 claim form attached to the Settlement Agreement along with the Class Notice as
18 Exhibit A, which shall be included in the direct notice package, and as the Claim Form
19 attached to the Settlement Agreement. All Claim Forms must be postmarked or
20 received by the Claims Administrator no later than March 30, 2018.

21 11. All costs of providing notice to the Settlement Class, processing claim
22 forms and administering distributions from the Settlement Fund according to a Court-
23 approved procedure in the Final Approval Order, shall be paid out of the Settlement
24 Fund, as provided by the Settlement Agreement.

25 **Exclusion & “Opt-Outs”**

26 12. Settlement Class Members shall be bound by all determinations and orders
27 pertaining to the Settlement, including the release of all claims to the extent set forth
28 in the Settlement Agreement, whether favorable or unfavorable, unless such persons

1 request exclusion from the Settlement Class in a timely and proper manner, as
2 hereinafter provided. Settlement Class Members who do not timely and validly request
3 exclusion shall be so bound even if they have previously initiated or subsequently
4 initiate individual litigation or other proceedings against OCO relating to the claims
5 released pursuant to or covered by the terms of the Settlement.

6 13. A Settlement Class Member wishing to make a request for exclusion from
7 the Settlement Class shall mail the request in written form, by first class mail, postage
8 prepaid, and postmarked no later than March 30, 2018, to the Claims Administrator at
9 the address specified in the Notice. In the written request for exclusion, the Settlement
10 Class Member must state their full name, address, telephone numbers, and whether
11 each telephone number is a cellular phone or a residential landline. Further, the
12 Settlement Class Member must include a statement in the written request for exclusion
13 that they wish to be excluded from the Settlement. The request for exclusion shall not
14 be effective unless the request for exclusion provides the required information and is
15 made within the time stated above, or the exclusion is otherwise accepted by the Court.
16 No Settlement Class Member, or any person acting on behalf of or in concert or in
17 participation with that Settlement Class Member, may request exclusion of any other
18 Settlement Class Member from the Settlement Class.

19 14. Settlement Class Members who opt out of the Settlement will relinquish
20 their rights to benefits under the Settlement and will not release their claims. However,
21 Settlement Class Members who fail to submit a valid and timely request to exclude
22 themselves from the class on or before the dates specified herein shall be bound by all
23 terms of the Settlement Agreement and Final Approval Order, regardless of whether
24 they have requested exclusion from the Settlement Agreement.

25 15. The Claims Administrator will promptly provide all Parties with copies of
26 any opt-out requests, and Plaintiffs shall file a list of all who have opted out with the
27 Court no later than ten (10) calendar days prior to the Final Approval Hearing.

28

Objections

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

16. Any member of the Settlement Class who is not excluded from the Settlement Class and who objects to the approval of the proposed settlement must file with the Court and serve on all Parties a written statement with his or her full name, address, telephone numbers that s/he maintains was called, all grounds for the objection with factual and legal support for the stated objection, the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Final Approval Hearing, which shall be attached. A member of the Settlement Class may appear at the Final Approval Hearing in person or through counsel to show cause why the proposed settlement should not be approved as fair, reasonable, and adequate. Attendance at the hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement and/or the request for attorneys' fees and/or the request for compensation awards to the Class Representatives are required to indicate in their written objection their intention to appear at the Fairness Hearing on their own behalf or through counsel.

17. The Court will consider comments and/or objections to the Settlement, the award of attorneys' fees and reimbursement of expenses, and the service award to the Class Representatives only if, on or before March 30, 2018, such comments or objections and any supporting papers are filed in writing with the Clerk of this Court. No Settlement Class Member shall be entitled to be heard and no objection shall be considered unless these requirements set forth in this Order are satisfied.

18. Any Settlement Class Member who does not opt out and/or make his objection to the Settlement in the manner provided herein shall be deemed to have waived any such objection by appeal, collateral attack, or otherwise, and shall be bound by the Settlement Agreement, the releases contained therein, and all aspects of the Final Approval Order.

Final Approval Hearing

19. The Federal Rule of Civil Procedure 23(e) Final Approval Hearing is hereby scheduled to be held before the Court on June 4, 2018, at 8:30 am for the following purposes:

(a) to finally determine whether the applicable prerequisites for settlement class action treatment under Federal Rules of Civil Procedure 23(a) and (b) are met;

(b) to determine whether the Settlement is fair, reasonable and adequate, and should be approved by the Court;

(c) to determine whether the judgment as provided under the Settlement Agreement should be entered, including a bar order prohibiting Settlement Class Members from further pursuing claims released in the Settlement Agreement;

(d) to consider the application for an award of attorneys' fees, costs, and expenses of Class Counsel;

(e) to consider the application for incentive awards to the class representatives;

(f) to consider the distribution of the Settlement Benefits under the terms of the Settlement Agreement; and

(g) to rule upon such other matters as the Court may deem appropriate.

20. Briefs and papers in support of the final approval of the proposed settlement shall be filed no later than fourteen (14) calendar days before the Final Approval Hearing. The Final Approval Hearing may be postponed, adjourned, transferred or continued by order of the Court without further notice to the Settlement Class. At, or following, the Final Approval Hearing, the Court may enter a judgment approving the Settlement Agreement and Final Approval Order in accordance with the Settlement Agreement that will adjudicate the rights of all class members.

1 21. On or before fourteen (14) calendar days prior to the Final Approval
2 Hearing, Class Counsel shall file and serve (i) a motion for final approval; (ii) any
3 application for award of attorneys' fees and expenses; and (iii) any application for
4 compensation awards to the Class Representatives. For clarity, the deadlines the
5 Parties shall adhere to are as follows:

6 **Class Notice Mailed/Emailed by:** **January 29, 2017**

7 **Objection/Exclusion:** **March 30, 2018**

8 **Claim Deadline:** **March 30, 2018**

9 **Final Approval Hearing:** **June 4, 2018 at 8:30 am**

10 22. Settlement Class Members do not need to appear at the Final Approval
11 Hearing or take any other action to indicate their approval.

12 **Further Matters**

13 23. All discovery and other pretrial proceedings in the Action as between the
14 Plaintiffs and OCO are stayed and suspended until further order of the Court except
15 such actions as may be necessary to implement the Settlement Agreement and this
16 Order.

17 24. Settlement Class Members shall be bound by all determinations and
18 judgments in the Action concerning the Action and/or Settlement Agreement, whether
19 favorable or unfavorable.

20 25. In the event that the Settlement Agreement is terminated under the terms
21 of the Settlement Agreement, or for any reason whatsoever the approval of it does not
22 become final and no longer subject to appeal, then: (i) the Settlement Agreement shall
23 be null and void, including any provisions related to the award of attorneys' fees and
24 expenses, and shall have no further force and effect with respect to any party in this
25 Action, and shall not be used in this Action or in any other proceeding for any purpose;
26 (ii) all negotiations, proceedings, documents prepared, and statements made in
27 connection therewith shall be without prejudice to any person or party hereto, shall not
28 be deemed or construed to be an admission by any party of any act, matter, or

1 proposition, and shall not be used in any manner of or any purpose in any subsequent
2 proceeding in this Action or in any other action in any court or other proceeding; and
3 (iii) this Order shall be vacated and of no further force or effect whatsoever, as if it had
4 never been entered.

5 26. The Court retains jurisdiction to consider all further matters arising out of
6 or connected with the Settlement.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED: November 21, 2017


United States District Court Judge
David O. Carter