The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UGOCHUKWU GOODLUCK NWAUZOR, FERNANDO AGUIRRE-URBINA, individually and on behalf of all those similarly situated, Plaintiffs/Counter-Defendants, v. THE GEO GROUP, INC., Defendant/Counter-Claimant.	Case No. 3:17-cv-05769-RJB **DEFENDANT THE GEO GROUP, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND NOTICE PLAN [ECF NO. 209]** **NOTE ON MOTION CALENDAR:** December 27, 2019

Defendant The GEO Group, Inc. ("GEO") submits its memorandum in opposition to Plaintiffs' motion to amend the notice plan. ECF 209.

INTRODUCTION

This Court previously resolved the issue of class notice. Now, mere days before the close of discovery, Plaintiffs seek to change the notice plan and, in doing so, limit the number of putative class members who receive notice of this action. Incredulously, Plaintiffs now also argue that, despite it being their burden to bear the costs of class notice, Defendant must do so. The underlying basis for Plaintiffs' argument is that the putative class members are transient, and as immigrants, do not have social security numbers. Plaintiffs have known since they initiated this action, and since they requested that this Court approve a notice plan including direct mail, that the putative class members would be transient, not identifiable by a social security number, and therefore unlike a typical wage and hour collective with easily available and discernible contact

AKERMAN LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

information. Nonetheless, Plaintiffs sought certification of a class. It is unreasonable for Plaintiffs to now avoid their obligation to notify those same members of the class based upon information that has been known to Plaintiffs since the time the original notice plan was approved. The Court should not entertain this eleventh hour request.

PROCEDURAL HISTORY

This Court certified the following class on August 6, 2018:

> All civil immigration detainees who participated in the Voluntary Work Program at the Northwest Detention Center at any time between September 26, 2014, and the date of final judgment in this matter. ECF 114.

In its Order, the Court directed the parties to confer about a class notice plan and present a joint proposal to the Court. Consistent with the Court's order, the parties submitted Plaintiffs' Proposed Notice Plan on January 9, 2019, that proposed effectuating notice utilizing a third party administrator, through the following methods: (1) long form notice by mail to class members residing in the United States; (2) publication of short form notices by radio and print to class members residing outside of the United States; (3) creation of a dedicated class website accessible to people within and outside of the United States; (4) the sophisticated use of internet banner ads on various social media and web platforms within and outside of the United States; and (5) a dedicated toll-free phone number. ECF 138. In Plaintiffs' proposed notice, they stated that "once finalized, this Proposed Notice Plan will provide the 'best notice practicable under the circumstances'" *Id.* Plaintiffs also acknowledged that "[m]any of the Class Members reside outside of the United States, with incomplete or unreliable address information making notification by direct mail difficult." *Id*.

GEO also clarified that the release of a class list would be subject to the entry of a protective order, and ICE approval (which at the time was difficult to obtain, as there was an ongoing federal government shutdown). On February 5, 2019, this Court approved a long form notice template for direct mailing. ECF 142. On March 25, 2019, this Court entered a protective order. ECF 163. GEO continued to work to obtain ICE's approval for releasing the class list and submitted a Joint Status Report to the Court indicating that GEO would be able to provide

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1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

Plaintiffs with the class list by April 12, 2019. ECF 165. At the same time, Plaintiffs requested additional information from GEO (that was not anticipated in the original notice plan) including, detainee addresses for both before and after detention, telephone numbers, email addresses, and alien registration numbers. *Id.*

In response to the Joint Status Report, the Court set a deadline for GEO to produce the class list (April 12, 2019) and a deadline for GEO to supplement its class list (April 29, 2019). ECF 166. The Court also ruled that the class list should include the additional address information Plaintiffs sought in the Joint Status Report "if any is available." *Id.* Consistent with the Court's order, GEO produced a class list to Plaintiffs over six months ago. And, just recently, in an effort to streamline notice, GEO worked with ICE to identify the individuals on the class list who are currently detained, including the addresses of the facilities at which they are detained. Thus, Plaintiffs have a class list that consists of all addresses that GEO and ICE are able to identify.

To GEO's knowledge, Plaintiffs have not worked with a class administrator to identify whether the addresses provided by ICE and GEO can be narrowed using the National Change of Address system.[1] Indeed, this approach is frequently used in class actions and often narrows the number of missing or incomplete addresses. *See e.g., Yue v. Conseco Life Ins. Co.*, No. CV 11-09506 AHM SHX, 2013 WL 5289743, at *5 (C.D. Cal. Mar. 6, 2013) (utilizing National Change of Address in notice process); *Bolton v. U.S. Nursing Corp.*, No. C 12-04466 LB, 2013 WL 2456564, at *5 (N.D. Cal. June 6, 2013) (same); *Sandoval v. Tharaldson Employee Mgmt., Inc.*, No. EDCV 08-482-VAP(OP), 2010 WL 2486346, at *3 (C.D. Cal. June 15, 2010) (utilizing National Change of Address database to narrow the missing or out-of-date addresses). And, for Plaintiffs' claims that they worked with a consulting expert to cull through the data, GEO cannot speak to that: no data expert has been disclosed and GEO is unaware of what specific attempts the data expert made to narrow the dataset (nor are those attempts detailed in Plaintiffs' motion).

While Plaintiffs argue that the class list is unwieldy, GEO's own review of the class list

[1]The U.S. Postal service maintains the National change of Address database and tracks individuals who have moved. *See* NCOA Processing, Experian, *available at* https://www.edq.com/services/ncoa-processing/.

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1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

does not square with Plaintiff's' analysis. As an initial matter, Plaintiffs sought address information for before and after each individual was in detention. ECF 165. Thus, by their own request, Plaintiffs received multiple addresses for each individual. Many of the addresses (which are self-reported) either provide that the individual is in ICE custody, list a foreign address, or have the same address listed twice under both the "Mailing Address" and "Home Address" fields collected by ICE. As provided for in the original notice plan, the parties only agreed to send notice to United States addresses, so all foreign addresses can be quickly eliminated by a Third Party Administrator (or Plaintiffs). Thereafter, the listed addresses for the Northwest Detention Center (and other ICE facilities) that are now outdated can be easily eliminated[2] because GEO has affirmatively identified (through ICE) the 130 individuals who are still in detention, and where they are detained. However, regardless of whether it is culled, the class list contains sufficient information to provide direct notice to a large percentage of the class.

ARGUMENT

A. Direct Mail is the Most Effective Method of Notice, and Without it, Many Putatitve Class Members Will Not Receive Notice.

In an effort to provide best notice under the circumstances, the parties created a comprehensive notice plan that included direct notice by mail, publication notice, and social media notice. ECF 138. The parties also agreed that a website would be set up to allow class members to obtain additional information about the lawsuit, or easily opt out. *Id*. Direct notice is mandated where contact information can be obtained through reasonable effort. *Ostrowski v. Amazon.com, Inc.*, No. C16-1378-JCC, 2016 WL 4992051, at *2 (W.D. Wash. Sept. 16, 2016) (quoting *Eisen*, 417 U.S. at 175–77). Thereafter, "including a generalized publication of a Notice to class members serves the worthy purpose of supplementing direct mailings in the event that an

[2] From GEO's own assessment of the spreadsheet, Plaintiffs can easily remove all addresses for 1623 East J Street (the Northwest Detention Center) or those that state "DHS Custody." From GEO's counsel's review of the data, it has found that doing so eliminates nearly 5,000 addresses. Eliminating incomplete, or blank address lines eliminates another 13,000+ addresses. A class administrator, trained in working with these types of data sets, could easily winnow down the list to a manageable and effective set of addresses.

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1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

absent class member's address is misidentified, is changed, or is otherwise unavailable." *In re Potash Antitrust Litig.*, 161 F.R.D. 411, 413 (D. Minn. 1995).

Notice by direct mail was the only direct method of notice the parties agreed to. They did not agree to directly contact putative class members by email or text message—as those forms of contact are not readily available for the class. To accomplish direct notice, both GEO and ICE have expended significant efforts collecting the addresses requested by Plaintiffs. While GEO concedes the list is not perfect, imperfection does not justify depriving individuals of notice. *Parrish v. Manatt, Phelps & Phillips, LL*P, No. C 10-03200 WHA, 2010 WL 5141848, at *5 (N.D. Cal. Dec. 13, 2010) ("Class actions are most useful but imperfect devices."). From the outset, Plaintiffs have anticipated that the address data would not be perfect. ECF 138. With these considerations in mind, the class list indisputably contains addresses for a substantial number[3] of class members. ECF 209 at 3 ("the class list contains an average of about 5.1 addresses for each class member"). The fact that the proposed class is transient does not justify forgoing mailed notice. *See e.g., Desio v. Russell Rd. Food & Beverage, LLC*, No. 215CV01440GMNCWH, 2017 WL 4349220, at *5 (D. Nev. Sept. 29, 2017) (providing for notice by mail to dancers even though they were "transient."). As Plaintiffs note in their motion, the concern they have is *too many* addresses, not too few. Yet, Plaintiffs requested all address data for each individual, and as noted above, the additional addresses can be easily narrowed.[4] Thus, direct mail, coupled with the other methods of notice the parties have agreed to, is the best notice possible. *Decohen v. Abbasi, LLC*, 299 F.R.D. 469, 479 (D. Md. 2014) ("Under the circumstances of this case, when all class members are known in advance, the Court finds that the method of direct mail notice to each class member's last known address—and a second notice if the first was returned as undeliverable—was the best practicable notice.")

[3] On April 29, 2019, GEO, through its counsel Kristin Asai, sent Plaintiffs' counsel a class list that included detainee names, inmate numbers, A-numbers, and the most recent address information that was received from ICE. In its transmittal email, GEO noted that ICE could not find any information for only three individuals.

[4] Indeed, it does not appear that Plaintiffs have even taken the initial step of removing foreign addresses.

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1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

As for the individuals who are detained, it is not clear how Plaintiffs envision providing them notice at all in the absence of notice by direct mail. It is highly unlikely that individuals who are in ICE custody will have access to social media banners or radio ads. While Plaintiffs propose that notice could be posted in GEO facilities "where class members are known to congregate," they do not provide any information about (1) whether ICE would permit such a posting, and (2) whether the posting would be as effective as individually mailed notice. Indeed, GEO believes that individually mailed notice that makes clear the notice is not from GEO or ICE would be more effective for the detained individuals. Notice that is posted in the common area may be disregarded as information from GEO or ICE. And, given the many different housing units within each facility, it is unclear where the notice would be posted. Would it be posted in every dorm, regardless of whether there were class members in the dorm? Or, would it only be posted in some dorms with the risk of discord between detainees who are afforded an opportunity to view the notice and those who are not? Likewise, posting notice may cause confusion among the many individuals who may not be eligible to join the class. Further, posting notice in the facility could lead to some detainees joining the Voluntary Work Program simply to become members of the class. Thus, mailed notice is the better avenue for detained individuals—particularly where GEO and ICE have already expended significant efforts to provide Plaintiffs with information about those who remain in detention.

Additionally, the case law Plaintiffs cite to for the proposition that mailed notice is not necessary in this case, is inapposite. In *Cohorst v. BRE Prop., Inc.*, the "Claims Administrator provided individual notice to 1,111,222 potential class members (using six different servers) which after three different e-mail blasts resulted in a 95.35% receipt rate." 2011 WL 7061923, *6 (S.D. Cal. 2011). As a result of the effective email campaign, and the significant number of class members, the Court concluded it was not necessary to send notice via US Mail, where doing so would be less effective than email. *Id.* Here, ICE does not routinely collect phone numbers or email addresses of detainees. Instead, ICE routinely collects detainees' addresses. And, the

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1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

number of putative class members here does not come close to the large numbers in *Cohorst*. Thus, mailed notice is the best available under the circumstances.

Likewise, *DeJulius v. New England Health Care Employees Pension Fund*, 429 F.3d 935, 940 (10th Cir. 2005), does not provide support for Plaintiff's' position. Plaintiffs claim that *DeJulius* "uph[eld] [a] notice plan even though notice was sent to brokerage houses and not directly to class." ECF 209 at 5. Rather, in *DeJulius* the district court approved a plan that it found to be the best notice practicable under the circumstances that included direct mail. Specifically, the "court ordered that notice packets should be mailed to all Sprint shareholders in the class within ten days, to the extent those persons were identifiable by Sprint records." *DeJulius*, 429 F.3d at 939. In complying with the court's order, "56,078 packages were mailed . . . directly to potential class members." *Id.* at 940. Thus, rather than supporting Plaintiffs position, *DeJulius* demonstrates that mailing notice is proper, and that here, it would be much less burdensome than it was in *DeJulius*.

B. Plaintiffs Have Not Shown Exceptional Circumstances That Would Justify Shifting the Cost of Notice.

In general, "a plaintiff must initially bear the cost of notice to the class," unless there are exceptional circumstances justifying departure from the general rule. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). "[C]ourts must not stray too far from the principle underlying [Eisen] that the representative plaintiff should bear all costs relating to the sending of notice because it is he who seeks to maintain the suit as a class action." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Occasionally, "'the district court has some discretion' in allocating the cost of complying with an order concerning class notification." *Hunt v. Imperial Merch. Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009). A court may only shift that cost to the defendant in the rare case of an "exceptional circumstance" or in the event that the plaintiff has demonstrated success on the merits. *Eisen*, 417 U.S. at 178. At the end of the case, of course, the district court can allocate the cost of identifying and giving notice to class members "as it would any other item of costs." *In re Nissan Motor Corp. Antitrust*

AKERMAN LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

Litigation, 552 F.2d 1088, 1102 (5th Cir.1977). Here, Plaintiffs have not demonstrated success on the merits, nor exceptional circumstances that would justify cost-shifting.

Cost-shifting is not appropriate where a plaintiff has not established that the case involves exceptional circumstances. *Beeson v. Med-1 Sols., LLC*, No. 1:06CV1694SEB-JMS, 2008 WL 4809958, at *2 (S.D. Ind. Oct. 24, 2008). Here, Plaintiffs point to two circumstances that are not exceptional, nor do they justify cost shifting. First, Plaintiffs point to the range of costs involved in providing notice generally—regardless of whether notice is mailed or not. Plaintiffs argue that these costs are "unduly expensive." ECF 209 at 3. Plaintiffs offer a range with the low-end costs being over $800,000 less than the high-end costs. While they do not provide any of the estimates so that this Court (or GEO) may understand the large range, it does not appear that the costs offered by Plaintiffs actually address the specific issue for which they argue justifies shifting the costs to GEO: the mailed notice. Instead, a review of Plaintiffs' motion shows that they base the cost of mailed notice on the price of mailing notice to a single address—not the specific circumstances at issue here. While Plaintiffs speculate that the costs of mailing notice here could be "double or triple" their estimates, they again provide no support for this supposition. Nor do Plaintiffs indicate whether any of their estimates include costs for culling the address list, or otherwise ensuring that mailings are only sent to deliverable addresses. Indeed, Plaintiffs cannot establish "extraordinary circumstances" based upon the expense of providing notice when they do not provide any of the underlying estimates, or the costs that they believe are in excess of what was originally submitted to the Court. In sum, Plaintiffs have not established that the figures they cite in their motion are different from those in any other proceeding where the Plaintiff bears the burden of notice.

Furthermore, the mere fact that multiple addresses were provided for each individual does not justify cost shifting. Plaintiffs explicitly sought more than one address for each individual. In response, the Court ordered GEO to provide those addresses, if available. ECF 166. GEO worked with ICE to provide Plaintiffs with all address fields. Thus, Plaintiffs cannot now rely upon the additional addresses they requested as a reason to shift the costs of notice. As GEO has described

AKERMAN LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

above—the list can easily be culled to eliminate duplicates, non-U.S. addresses, and the addresses of ICE detention centers. Accordingly, this Court should not shift the cost of notice to GEO.

C. Plaintiffs' Proposed Notice Is Not Adequate.

Should this Court eliminate mailed notice, it should order Plaintiffs to revise and re-draft their proposed publication notice. As an initial matter, the publication notice states that the only way a class member can opt-out is by mailing physical correspondence to the class administrator. ECF 210 ("you may send a letter to the address below. . . "). This is both inaccurate and misleading. It does not explain that an individual may opt-out by using the website set up for the class, by email, by fax, or even by asking class counsel for assistance. *Rosas v. Sarbanand Farms, LLC*, No. C18-0112-JCC, 2019 WL 859225, at *5 (W.D. Wash. Feb. 22, 2019) (ordering multiple methods for individuals to opt-out, including the ability to contact class counsel directly). In contrast, the long-form class notice informs class members that they can opt-out via mail, email, or fax. ECF 142. At the same time, the proposed notice eliminates key admonitions on the notice, and instead has the scope of the class defined twice on the publication—including a bolded section in the center of the page. This is inadequate.

> The long form notice included the following disclaimer prominently at the top:
>
> The Court has not decided whether GEO did anything wrong. There is no money available now, and no guarantee there will be. However, your legal rights are affected, and you have a choice to make now. ECF 142.

By removing this critical admonition[5], the notice that Plaintiffs now propose (in lieu of the long form notice) does not alert individuals of the status of this case. Rather, it implies that individuals who opt-out will be excluded from a sum certain in this case, by stating, "[i]f you ask to be excluded from the Class, you cannot get any money or benefits from this lawsuit . . ." ECF 210-1. In comparison, the long form notice provides, "If you ask to be excluded and money or benefits are later awarded, you won't share in those…" ECF 142. It bolsters this explanation by affirming, "[n]o money or benefits are available now because the Court has not yet decided whether GEO

[5] In the long-form notice, this admonition appears again, in greater detail under the heading: "Has the Court Decided who is right?"

AKERMAN LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

did anything wrong, and the two sides have not settled the case. There is no guarantee that money or benefits ever will be obtained." *Id.* Thus, as currently drafted, Plaintiffs' proposed notice inaccurately frames putative class members potential to collect damages.

Likewise, Plaintiffs have changed the language approved in the long form notice that explains the lawsuit. The proposed notice provides, "[t]he lawsuit is about whether GEO owes backwages to people who participated in the Voluntary Work Program." ECF 210-1. This once again places the emphasis squarely on potential damages—and not the actual facts of the case. In contrast, the long form notice answers the question "[w]hat is this lawsuit about?" with the following:

> This lawsuit is about whether GEO, as the owner and operator of the Northwest Detention Center, is an "employer" and whether the Class Members are "employees" under the Washington Minimum Wage Act. And if so, whether GEO violated the Act by failing to pay Class Members the minimum hourly wage under Washington law for work performed under the $1-a-day Program. GEO denies the allegations made in the lawsuit.

Again, the notice proposed by Plaintiffs eliminates GEO's position from its posting and improperly focuses on potential damages—which may mislead class members. Accordingly, if the long form notice is not sent by mail, Plaintiffs' proposed publication notice must be revised. GEO has great concern over Plaintiffs' last minute attempts to short-cut, to their advantage, the Court-approved notice language. As currently drafted, it is both misleading and inadequate.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to amend the notice plan should be denied.

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AKERMAN LLP
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: 303-260-7712

Respectfully submitted, this 23rd day of December, 2019.

By: *s/ Colin L. Barnacle*
AKERMAN LLP
Colin L. Barnacle (Admitted *pro hac vice*)
Ashley E. Calhoun (Admitted *pro hac vice*)
Adrienne Scheffey (Admitted *pro hac vice*)
Allison N. Angel (Admitted *pro hac vice*)
1900 Sixteenth Street, Suite 1700
Denver, Colorado 80202
Telephone: (303) 260-7712
Facsimile: (303) 260-7714
Email: colin.barnacle@akerman.com
Email: ashley.calhoun@akerman.com
Email: adrienne.scheffey@akerman.com
Email: allison.angel@akerman.com

By: *s/ Joan K. Mell*
III BRANCHES LAW, PLLC
Joan K. Mell, WSBA #21319
1019 Regents Boulevard, Suite 204
Fircrest, Washington 98466
Telephone: (253) 566-2510
Facsimile: (281) 664-4643
Email: joan@3brancheslaw.com

Attorneys for Defendant The GEO Group, Inc.

PROOF OF SERVICE

I hereby certify on the 23rd day of December, 2019, pursuant to Federal Rule of Civil Procedure 5(b), I electronically filed and served the foregoing **DEFENDANT THE GEO GROUP, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO AMEND NOTICE PLAN** via the Court's CM/ECF system on the following:

SCHROETER GOLDMARK & BENDER
Adam J. Berger, WSBA #20714
Lindsay L. Halm, WSBA #37141
Jamal N. Whitehead, WSBA #39818
Rebecca J. Roe, WSBA #7560
810 Third Avenue, Suite 500
Seattle, Washington 98104
Telephone: (206) 622-8000
Facsimile: (206) 682-2305
Email: hberger@sgb-law.com
Email: halm@sgb-law.com
Email: whitehead@sgb-law.com
Email: roe@sgb-law.com

THE LAW OFFICE OF R. ANDREW FREE
Andrew Free (Admitted *Pro Hac Vice*)
P.O. Box 90568
Nashville, Tennessee 37209
Telephone: (844) 321-3221
Facsimile: (615) 829-8959
Email: andrew@immigrantcivilrights.com

OPEN SKY LAW PLLC
Devin T. Theriot-Orr, WSBA #33995
20415 72nd Avenue S, Suite 100
Kent, Washington 98032
Telephone: (206) 962-5052
Facsimile: (206) 681-9663
Email: devin@openskylaw.com

MENTER IMMIGRATION LAW, PLLC
Meena Menter, WSBA #31870
8201 164th Avenue NE, Suite 200
Redmond, Washington 98052
Telephone: (206) 419-7332
Email: meena@meenamenter.com

Attorneys for Plaintiffs

s/ Nick Mangels
Nick Mangels