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17 and the putative class

18 **UNITED STATES DISTRICT COURT**
19 **NORTHERN DISTRICT OF CALIFORNIA**
20 **SAN JOSE DIVISION**

21 Jessica Day, individually and on behalf of
22 all others similarly situated,

23 Plaintiff,

24 v.

25 GEICO CASUALTY COMPANY,
26 GEICO INDEMNITY COMPANY, and
27 GEICO GENERAL INSURANCE
28 COMPANY,

Defendants.

No.: 5:21-cv-02103 BLF

**PLAINTIFF'S REVISED PROPOSED
CLASS NOTICE PLAN**

Judge Beth Labson Freeman

1 Pursuant to the Court’s Orders, (ECF Nos. 116, 127, 132), Plaintiff submits the
2 following revised proposed class notice plan pursuant to Fed. R. Civ. P. 23(c)(2)(B):

3 1. On October 31, 2022, the Court granted Plaintiff’s motion for class certification
4 and certified the following class pursuant to Fed. R. Civ. P. 23(b)(3):

5 All California residents who purchased personal automobile, motorcycle, or RV
6 insurance from GEICO covering any portion of the time period from March 1, 2020 to
7 the present.

8 (ECF No. 116 at 16-17.)

9 2. Based upon data provided to Plaintiff by GEICO, there are 3,137,117 class
10 members. GEICO has email addresses for 3,071,215 class members, and a mailing address only
11 for 65,902 class members. Accordingly, Plaintiff proposes to send notice by (1) email to those
12 class members for whom GEICO has an email address and (2) First Class U.S. Mail to the
13 remaining class members for whom GEICO has only a mailing address. *See* Fed. R. Civ. P.
14 23(c)(2)(B), 2018 advisory committee’s note (“Although it may sometimes be true that
15 electronic methods of notice, for example email, are the most promising, it is important to keep
16 in mind that a significant portion of class members in certain cases may have limited or no
17 access to email or the Internet.”). Plaintiff proposes a 90-day period for class members to
18 timely opt out of the class pursuant to the process outlined in the proposed notice, which is
19 attached hereto.

20 3. After seeking quotes from several reputable administration firms, Class Counsel
21 have selected A.B. Data (<https://www.abdataclassaction.com/>) to administer the notice at the
22 quoted total estimated cost of \$73,742.27 for the services listed below. A summary of the
23 administration plan is as follows:

- 24 a. A.B. Data will send Email Notice to all class members, to the extent email
25 addresses are available. For emailed notice, A.B. Data will utilize best practices
26 to increase deliverability and avoid spam and junk filters, such as avoiding
27 attachments, not using certain words that are typically associated with junk
28 email, and strategically releasing the emails in stages. A.B. Data will also track

1 the deliverability of all emails sent and are able to provide additional statistics
2 on opens, click-throughs, and other relevant metrics. The proposed Email Notice
3 is attached as **Exhibit A**.

4 b. A.B. Data will also prepare, print, and mail a 4.25” x 6” postcard Summary
5 Notice to all class members who either do not have an email address, or whose
6 email notice is returned undeliverable and who have a valid mailing address.

7 The proposed postcard Summary Notice is attached as **Exhibit B**.

8 c. Before the initial mailing of the Notice postcards, A.B. Data will run the
9 addresses of all known class members through the United States Postal Service
10 National Change of Address database.

11 d. Notice postcards that are returned undeliverable as addressed with forwarding
12 addresses provided by USPS will be processed, updated in a case-specific
13 database, and re-mailed. For Notice Postcards returned by USPS without any
14 forwarding addresses, A.B. Data will attempt to obtain updated addresses for the
15 addressees concerned using proprietary database resources and, in instances
16 where updated addresses are found, re-mail the Notice Postcards.

17 e. A.B. Data will host and maintain a dynamic case-specific website where class
18 members will have access to the class notice, relevant case information, FAQs,
19 and applicable deadlines.

20 f. A.B. Data will post a Long Form Notice on the website, which will also be
21 translated into Spanish. The proposed Long Form Notice for posting on the
22 website is attached as **Exhibit C**.

23 g. A.B. Data will process all correspondence received, including exclusion
24 requests, and report to the parties regarding such exclusion requests as
25 necessary.

26 4. Exhibits A, B, and C identified above have been modified to conform to the
27 Court’s comments set forth in the Order re Proposed Class Notice Plan, ECF No. 132, and to
28 resolve certain objections raised by GEICO. Outstanding objections are addressed below. The

1 revised Exhibits are submitted in redline for the Court’s convenience.

2 5. Based on communications with A.B. Data, Plaintiff anticipates that the website
3 will be operational and that email notice will commence within 30 days of receipt from GEICO
4 of the final class list with class member email and/or mailing addresses. A.B. Data expects that
5 all Notices, including postcards to bounced email addresses, will be complete within 15 days of
6 notice commencement.

7 **GEICO’S OBJECTIONS AND PLANTIFF’S RESPONSES**

8 6. **Objection No. 1:** GEICO requests a simpler way for recipients of the notice to
9 opt out, such as with a link in the email communication to do so readily and easily. Or,
10 alternatively, to simply reply to the email to opt out. For those receiving solely hard copy mail
11 notice, to enclose a form and self-addressed, postage prepaid envelope to the class
12 administrator to opt out. GEICO believes that the current Notice requiring an affirmative,
13 signed opt out in writing without a form or link may lead to the over-inclusion of class
14 members who simply don’t have time or willingness to undertake the effort to opt out.

15 **Plaintiff’s Response:** Plaintiff opposes both requests. “Rule 23 requires only that the
16 class members receive notice that explains in ‘plain, easily understood language . . . that the
17 court will exclude from the class any member who requests exclusion.’” *Makaeff v. Trump*
18 *Univ., LLC*, No. 10-CV-0940-GPC-WVG, 2015 WL 5638192, at *4 (S.D. Cal. Sept. 21, 2015)
19 (quoting Fed. R. Civ. P. 23(c)(2)(B)). “The proposed method [of opting out] should be as
20 convenient as possible, while protecting against unauthorized opt-out notices. Fed. R. Civ. P.
21 23(c)(2), 2018 advisory committee’s note. Here, the proposed notice plan communicates in
22 easily understood language that the Court will exclude any class members who request
23 exclusion and explains how to do so. (*See, e.g.*, Ex. A at 2.) Requiring class members to do so
24 in writing is the norm. As one court recently explained, “[t]he individual signature requirement
25 on opt-out requests is not burdensome at all. . . . [I]t ensures that each individual has carefully
26 considered [their] options and understands that [they are] giving up [their] right to relief[.]” *In*
27 *re Centurylink Sales Pracs. & Sec. Litig.*, No. CV 17-2832, 2020 WL 3512807, at *3 (D. Minn.
28 June 29, 2020) (quoting *In re Equifax Inc. Customer Data Sec. Breach Litig.*, No. 1:17-MD-

1 2800-TWT, 2020 WL 256132, at *26 (N.D. Ga. Mar. 17, 2020)). For example, in the context of
2 class settlements, which also must comply with Rule 23(c)(2)(B), this Court’s Procedural
3 Guidelines provide that the opt-out notice “should instruct class members who wish to opt out
4 of the settlement to send a letter, setting forth their name and information needed to be properly
5 identified and to opt out of the settlement, to the settlement administrator and/or the person or
6 entity designated to receive opt outs.”¹ Plaintiff’s Proposed Class Notice Plan complies with
7 this Court’s guidance.

8 With respect to GEICO’s request for an embedded link by which class members may
9 opt out, or allowing class members to opt-out by merely replying to the notice email, this would
10 only create the likelihood of confusion and unintended or unauthorized opt-outs. For instance,
11 rather than making a deliberate and thoughtful decision to exclude themselves from the
12 litigation, class members might incorrectly believe that by clicking an electronic link or
13 replying to an email that they are simply unsubscribing from a business solicitation, or are
14 actually opting *into* the litigation. Furthermore, hastily drafted email replies are likely to be
15 unclear, leading to additional confusion and burden on the Court, the parties, and the settlement
16 administrator. *See, e.g., Makaeff, LLC*, 2015 WL 5638192, at *5 (rejecting a method of opting
17 out that could result in class members “unwittingly excluding themselves from the litigation”);
18 *also Chinitz v. Intero Real Est. Servs.*, No. 18-CV-05623-BLF, 2020 WL 7042871, at *5 (N.D.
19 Cal. Dec. 1, 2020) (rejecting request for electronic submission of opt-out forms, finding that
20 “submission of opt-outs by mail is standard and complies with due process”); *Fitzhenry-Russell*
21 *v. Coca-Cola Co.*, No. 5:17-CV-00603-EJD, 2019 WL 6111378, at *5 (N.D. Cal. June 13,
22 2019) (requiring class settlement exclusion requests to be postmarked or personally delivered
23 by opt-out deadline); *Stuart v. State Farm Fire & Cas. Co.*, 332 F.R.D. 293, 300 (W.D. Ark.
24 2019) (rejecting email opt-out proposal and holding mail-in opt-out procedure provides
25 necessary due process to class members).

26
27 ¹ *See* Procedural Guidelines for Class Actions Settlements in the Northern District of
28 California, <https://www.cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>.

1 The same is true with respect to the inclusion of an opt-out form and self-addressed
 2 postage-paid envelope for class members receiving only hard-copy notice by U.S. Mail.
 3 “Courts have found that Rule 23 does not require that class members must be sent opt-out
 4 forms or that they be prepaid.” *Senne v. Kansas City Royals Baseball Corp.*, No. 14-CV-00608-
 5 JCS, 2021 WL 134889, at *3 (N.D. Cal. Jan. 14, 2021). Rather, they are more likely to cause
 6 confusion and lead to unwitting opt outs. *See Makaeff*, 2015 WL 5638192, at *4 (noting that
 7 pre-paid opt-out cards are far from “routine” and explaining the potential disadvantages);
 8 *Krzesniak v. Cendant Corp.*, No. C 05-05156 MEJ, 2007 WL 4468678, at *3 (N.D. Cal. Dec.
 9 17, 2007) (“Further, the Court finds that on balance, such a separate form will ‘engender
 10 confusion’ and may encourage class members to ‘unwittingly opt out of the class.’”).

11 7. **Objection No. 2:** GEICO requests that the Proposed Class Notice Plan not be
 12 sent (or be deferred) until after merits discovery is completed (e.g., in the event that there is a
 13 motion to decertify the class, which is a potential eventuality the Court has previously noted in
 14 its Order granting the motion for class certification).

15 **Plaintiff’s Response:** Plaintiff opposes this request. The possibility of a future
 16 decertification motion is no reason to delay notice to a certified class. Under Rule 23(c)(2),
 17 “[f]or any class certified under Rule 23(b)(3) . . . the court *must* direct to class members the
 18 best notice that is practicable . . .” Fed. R. Civ. P. 23(c)(2)(B) (emphasis added). “[N]otice
 19 clearly must be sent long before the merits of the case are adjudicated, and generally should be
 20 sent as soon as possible after certification of the class.” *Beale v. EdgeMark Fin. Corp.*, No. 94
 21 C 1890, 1995 WL 631840, at *2 (N.D. Ill. Oct. 23, 1995) (internal citation omitted); *see also*
 22 *Wright & Miller*, 7AA Fed. Prac. & Proc. Civ. § 1788 (3d ed.) (“[I]t should be sent as soon as
 23 practicable after the court determines that the class action is proper[.]”). “The underlying
 24 concern is that absentee class members have a full and meaningful opportunity to intervene to
 25 protect their rights or to opt out.” *Id. Beale*, 1995 WL 631840, at *2.

26 Rule 23 does not permit delay based on the mere possibility of future decertification.
 27 *Sullivan v. Kelly Servs., Inc.*, No. C 08-3893 CW, 2011 WL 31534, at *1 (N.D. Cal. Jan. 5,
 28 2011) (“Defendant does not persuade the Court that notice should be delayed until after its

1 impending decertification motion is resolved.”); *Beale*, 1995 WL 631840, at *5 (“Having lost
 2 [their] battle against class certification, Defendants seek, by delaying notice, to cancel the effect
 3 of the class certification”). GEICO has not demonstrated that it will suffer irreparable harm, or
 4 any harm whatsoever, if class notice is disseminated. *Adoma v. Univ. of Phoenix, Inc.*, No.
 5 CIV. S-10-0059 LKK/G, 2010 WL 4054109, at *4 (E.D. Cal. Oct. 15, 2010) (delay in class
 6 notice is not in the interest of judicial economy where defendants did not demonstrate that they
 7 will suffer irreparable harm); *see also Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*,
 8 No. 2:20-CV-265, 2022 WL 433006, at *19 (E.D. Va. Feb. 11, 2022) (denying request to defer
 9 class notice where defendants cited no authority and provided no explanation as to why deferral
 10 is warranted).

11 Dated: January 6, 2023

By: /s/Robert L. Schug

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