APPENDIX OF EXHIBITS

Exhibits

Exhibit A—Memorandum[denying petition for mandamus], *In re Logitech, Inc.*, No. 19-70248 (9th Cir. Sep. 12, 2019)

Exhibit B—Order [granting stay pending mandamus], *In re Logitech, Inc.*, No. 19-70248 (9th Cir. Feb. 13, 2019)

Exhibit C—Order [denying stay pending certiorari], *In re Logitech, Inc.*, No. 19-70248 (9th Cir. Sep. 27, 2019)

Exhibit D—Order setting deadline for motion for class certification, *Porath* v. *Logitech, Inc.* No. 3:18-cv-18-3091-WHA (N.D. Cal. Sep. 12, 2019)

Exhibit E—Notice and order re putative class actions, *Porath* v. *Logitech, Inc.* No. 3:18-cv-18-3091-WHA (N.D. Cal. June 13, 2018)

Exhibit F—Order denying motion for leave to file motion for reconsideration and to stay the action, *Porath* v. *Logitech, Inc.* No. 3:18-cv-18-3091-WHA (N.D. Cal. Jan. 18, 2019)

Exhibit G—Order re interim counsel, *Porath* v. *Logitech, Inc.* No. 3:18-cv-18-3091-WHA (N.D. Cal. Sep. 23, 2019)

EXHIBIT A

NOT FOR PUBLICATION

FILED

SEP 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: LOGITECH, INC., _____ LOGITECH, INC., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO, Respondent, JAMES PORATH, individually and on behalf of all similarly situated individuals, Real Party in Interest.	No. 19-70248 D.C. No. 3:18-cv-03091-WHA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted July 18, 2019
San Francisco, California

Before: PAEZ and RAWLINSON, Circuit Judges, and ANELLO,** District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Michael M. Anello, United States District Judge for

Petitioner Logitech, Inc. seeks a writ of mandamus directing the district court to withdraw its case management order prohibiting the parties from negotiating settlement as to class claims prior to class certification (the "Order").[1] The parties are familiar with the contours of the Order, so we do not recite them here. We have jurisdiction pursuant to 28 U.S.C. § 1651 and deny the petition.

"The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (internal quotations omitted). Whether to grant a writ of mandamus requires a case-by-case analysis of five factors. *Id*. (citing *Bauman v. U.S. Dist. Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)). The third factor, which asks whether the district court's order is clearly erroneous as a matter of law, is necessary. *Id*. at 841. Mandamus review is discretionary and neither depends on—nor necessarily follows from—satisfaction of all the factors. *Cole v. U.S. Dist. Court For Dist. of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004).

Our analysis begins and ends with the third factor: clear error. Logitech argues that the Order clearly violates Federal Rule of Civil Procedure 23, which governs class actions, and the parties' First Amendment petition and speech rights.

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the Southern District of California, sitting by designation.

[1] The Order includes an exception to the settlement-discussion prohibition where the court has granted a motion for appointment of interim class counsel. Such a motion was denied in this case, but Logitech does not challenge that denial in this mandamus petition.

1. We begin with the "nonconstitutional ground[] for decision": whether the Order is clearly erroneous under Rule 23. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99–100 (1981). First, Rule 23 explicitly contemplates the simultaneous certification of a class and settlement, albeit with permissive and not mandatory language: "The claims, issues or defenses of a certified class—*or a class proposed to be certified for purposes of settlement*—may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e) (emphasis added); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("[T]here is nothing inherently wrong with this practice[.]"). Indeed, there are many instances where classes have been certified for settlement, and their settlements have been approved, by scrutinizing courts. *See, e.g.*, *In re Hyundai & Kia Fuel Economy Litig.*, 926 F.3d 539, 552–53 (9th Cir. 2019) (en banc); *Lane v. Facebook, Inc.*, 696 F.3d 811, 818–19, 826 (9th Cir. 2012); *Hanlon*, 150 F.3d at 1025–27.

Second, sections of Rule 23 provide district courts with wide discretion, including the factors to be considered in the appointment of class counsel, which is required before a class can be certified and settled. *See* Fed. R. Civ. P. 23(g)(1)(A)–(B). Further, where class certification and class settlement are sought at the same time, courts "must pay 'undiluted, even heightened, attention' to class certification requirements." *Hanlon*, 150 F.3d at 1019 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)); *see also In re Bluetooth Headset Prods.*

Liability Litig., 654 F.3d 935, 947 (9th Cir. 2011) (noting that courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations"). Given the discretion afforded district courts by Rule 23 and its lack of mandatory class settlement language, we cannot say the Order's prohibition on class negotiations before certification is clear error.

In *Gulf Oil*, the Supreme Court considered an order limiting communications between parties and potential class members and recognized that, because class actions present "opportunities for abuse," district courts have "both the duty and the broad authority to exercise control over" such cases—so long as the district courts do not exceed the bounds of the Federal Rules. 452 U.S. at 100. Thus, any restriction on communications that would frustrate the policies of Rule 23 must follow "a specific record showing . . . the particular abuses . . . threatened" and the district court must "giv[e] explicit consideration to the narrowest possible relief which would protect the respective parties." *Id*. at 102 (quotation omitted). Here, the district court did not make specific findings of the abuses or explicitly consider narrower means of protecting the parties from any abuses threatened by pre-certification class negotiations. *See, e.g., Hyundai*, where a class was certified for settlement, the district court "appointed liaison counsel to act on behalf of [the]

plaintiffs not participating in [the settlement discussions] and to participate in confirmatory discovery," in addition to ordering "multiple rounds of briefing" and holding numerous hearings "concerning the fairness of the settlement, sufficiency of the class notice, . . . and other issues." 926 F.3d 553–54. Courts can reject class settlements after they have been negotiated, and it is unclear why that approach was not taken here. *See Bluetooth*, 654 F.3d at 945-46 (vacating a class settlement because a problem with the fee award tainted the whole settlement). That the Order appears to be neither drawn as narrowly as possible, nor based on a specific record showing the abuses particular to this case, however, does not amount to clear error.

2. We next turn to the First Amendment. Even if the Order "involved serious restraints on expression," *Gulf Oil*, 452 U.S. at 103–04, it is unclear whether the expression is protected by the First Amendment. Discussing and agreeing to class settlement—or petitioning for such a settlement—may not be protected speech because Logitech does not have a right to negotiate with absent, unrepresented, potential class members before there is a class or interim class counsel. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991). The Order is not clearly erroneous under the First Amendment, and we decline to issue a mandamus order.

PETITION DENIED.

EXHIBIT B

FILED

FEB 13 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: LOGITECH, INC.

LOGITECH, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

JAMES PORATH, individually and on behalf of all similarly situated individuals,

Real Party in Interest.

No. 19-70248

D.C. No. 3:18-cv-03091-WHA
Northern District of California,
San Francisco

ORDER

Before: CANBY, GRABER, and McKEOWN, Circuit Judges.

The emergency motion to stay district court proceedings pending resolution of this petition for a writ of mandamus (Docket Entry No. 2) is granted. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

This petition for a writ of mandamus raises issues that may warrant an answer. *See* Fed. R. App. P. 21(b). Accordingly, within 14 days after the date of this order, the district court may further address the petition if it so desires. The

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district court may elect to file an answer with this court or to issue a supplemental order and serve a copy on this court.

Petitioner Logitech, Inc., and the plaintiff in the underlying proceeding, James Porath, may file a reply within 5 days after service of the answer. The petition, answer, and any reply shall be referred to the next available motions panel.

The Clerk shall serve this order on the district court and District Judge William Alsup.

EXHIBIT C

FILED

SEP 27 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: LOGITECH, INC.,

LOGITECH, INC.,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO,

Respondent,

JAMES PORATH, individually and on behalf of all similarly situated individuals,

Real Party in Interest.

No. 19-70248

D.C. No. 3:18-cv-03091-WHA
Northern District of California,
San Francisco

ORDER

Before: PAEZ and RAWLINSON, Circuit Judges, and ANELLO,* District Judge.

The motion for a stay of district court proceedings pending filing of a certiorari petition is denied.

* The Honorable Michael M. Anello, United States District Judge for the Southern District of California, sitting by designation.

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LOGITECH, INC., a California corporation,

Defendant.
/

No. C 18-03091 WHA

ORDER SETTING DEADLINE FOR MOTION FOR CLASS CERTIFICATION

Eight days before plaintiff's deadline to move for class certification, our court of appeals issued an emergency stay of "district court proceedings pending resolution of this petition for a writ of mandamus" (Dkt. No. 46). Our court of appeals has now resolved the petition and entered judgment (Dkt. No. 53; Memorandum, *Logitech, Inc. v. United States District Court for the Northern District of California, San Francisco*, No. 19-70248 (9th Cir. Sep. 12, 2019), at ECF No. 25). With the emergency stay lifted, the new deadline for plaintiff to move for class certification is now **SEPTEMBER 26, 2019, AT NOON**. The motion will be heard on a 49-day track.

IT IS SO ORDERED.

Dated: September 12, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiff,

v.

LOGITECH, INC.,

Defendant.

/

No. C 18-03091 WHA

NOTICE AND ORDER RE PUTATIVE CLASS ACTIONS AND FACTORS TO BE EVALUATED FOR ANY PROPOSED CLASS SETTLEMENT

It has become a recurring problem in putative class actions that one or both sides may wish to interview absent putative class members regarding the merits of the case, potentially giving rise to conflict-of-interest or other ethical issues. To get ahead of this problem, the undersigned judge requires both sides to **MEET AND CONFER** and agree on a detailed proposed protocol for interviewing absent putative class members. In their joint case management statement due at the outset of the case, the parties shall either describe their agreed-upon protocol or explain why no such protocol is necessary in their particular case. No interviews of absent putative class members may take place unless and until the undersigned judge has reviewed and approved the parties' proposed protocol, or has agreed that no such protocol is necessary.

* * *

For the guidance of counsel, please review the *Procedural Guidance for Class Action Settlements*, which is available on the website for the United States District Court for the Northern District of California at www.cand.uscourts.gov/ClassActionSettlementGuidance.

In addition, counsel should review the following substantive and timing factors that the undersigned judge will consider in determining whether to grant preliminary and/or final approval to a proposed class settlement. Many of these factors have already been set forth in *In re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946–47 (9th Cir. 2011), but the following discussion further illustrates the undersigned judge's consideration of such factors:

1. ADEQUACY OF REPRESENTATION.

Anyone seeking to represent a class, including a settlement class, must affirmatively meet the Rule 23 standards, including adequacy. It will not be enough for a defendant to stipulate to adequacy of the class representation (because a defendant cannot speak for absent class members). An affirmative showing of adequacy must be made in a sworn record. Any possible shortcomings in a plaintiff's resume, such as a conflict of interest, a criminal conviction, a prior history of litigiousness, and/or a prior history with counsel, must be disclosed. Adequacy of counsel is not a substitute for adequacy of the representative.

2. DUE DILIGENCE.

Please remember that when one undertakes to act as a fiduciary on behalf of others (here, the absent class members), one must perform adequate due diligence before acting. This requires the representative and his or her counsel to investigate the strengths and weaknesses of the case, including the best-case dollar amount of claim relief. A quick deal up front may not be fair to absent class members.

3. COST-BENEFIT FOR ABSENT CLASS MEMBERS.

In the proposed class settlement, how do the costs of what absent class members will give up compare to the benefits of what they will receive in exchange? If the recovery will be a full recovery, then much less will be required to justify the settlement than for a partial recovery, in which case the discount will have to be justified. The greater the discount, the greater must be the justification. This will require an analysis of the specific proof, such as a synopsis of any conflicting evidence on key fact points. It will also require a final class-wide damage study or a very good substitute, in sworn form. If little discovery has been done to see

how strong the claim is, it will be hard to justify a substantial discount on the mere generalized theory of "risks of litigation." A coupon settlement will rarely be approved. Where there are various subgroups within the class, counsel must justify the plan of allocation of the settlement fund.

4. THE RELEASE.

The proposed release should be limited only to the claims certified for class treatment. Language releasing claims that "could have been brought" is too vague and overbroad. The specific statutory or common law claims to be released should be spelled out. Class counsel must justify the release as to each claim released, the probability of winning, and its estimated value if fully successful.

Does the proposed class settlement contemplate that claims of absent class members will be released even for those whose class notice is returned as undeliverable? Usually, the Court will *not* extinguish claims of individuals known to have received no notice or who received no benefit (and/or for whom there is no way to send them a settlement check). Put differently, usually the release must extend only to those who receive money for the release.

5. EXPANSION OF THE CLASS.

Typically, defendants vigorously oppose class certification and/or argue for a narrow class. In settling, however, defendants often seek to expand the class, either geographically (*i.e.*, nationwide) or claim-wise (including claims not even in the complaint) or person-wise (*e.g.*, multiple new categories). Such expansions will be viewed with suspicion. If an expansion is to occur it must come with an adequate plaintiff and one with standing to represent the add-on scope and with an amended complaint to include the new claims, not to mention due diligence as to the expanded scope. The settlement dollars must be sufficient to cover the old scope plus the new scope. Personal and subject-matter jurisdiction over the new individuals to be compromised by the class judgment must be shown.

6. REVERSION.

A proposed class settlement that allows for a reversion of settlement funds to the defendant(s) is a red flag, for it runs the risk of an illusory settlement, especially when combined with a requirement to submit claims that may lead to a shortfall in claim submissions.

7. CLAIM PROCEDURE.

A settlement that imposes a claim procedure rather than cutting checks to class members for the appropriate amount may (or may not) impose too much of a burden on class members, especially if the claim procedure is onerous, or the period for submitting is too short, or there is a likelihood of class members treating the notice envelope as junk mail. The best approach, when feasible, is to calculate settlement checks from a defendant's records (plus due diligence performed by counsel) and to send the checks to the class members along with a notice that cashing the checks will be deemed acceptance of the release and all other terms of the settlement.

8. ATTORNEY'S FEES.

To avoid collusive settlements, the Court prefers that all settlements avoid any agreement as to attorney's fees and leave that to the judge. If the defense insists on an overall cap, then the Court will decide how much will go to the class and how much will go to counsel, just as in common fund cases. Please avoid agreement on any division, tentative or otherwise. A settlement whereby the attorney seems likely to obtain funds out of proportion to the benefit conferred on the class must be justified.

9. DWINDLING OR MINIMAL ASSETS?

If the defendant is broke or nearly so with no prospect of future rehabilitation, a steeper discount may be warranted. This must be proven. Counsel should normally verify a claim of poverty via a sworn record, thoroughly vetted.

10. TIMING OF PROPOSED SETTLEMENT.

The parties shall not discuss settlement as to any class claims prior to class certification. To elaborate, when a class settlement is proposed prior to formal class certification, there is a risk that class claims have been discounted, at least in part, by the risk that class certification

might be denied. Absent class members, of course, should be subject to normal discounts for risks of litigation on the merits but they should not be subject to a further discount for a risk of denial of class certification, such as, for example, a denial based on problems with a proposed class representative, including a conflict of interest or a prior criminal conviction. *See* Howard Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL (Nov. 24, 2014). This is a main reason the Court prefers to litigate and vet a class certification motion *before* any class settlement discussions take place. That way, the class certification is a done deal and cannot compromise class claims. Only the risks of litigation on the merits can do so.

In order to have a better record to evaluate the foregoing considerations, it is better to develop and to present a proposed compromise *after* class certification, *after* diligent discovery on the merits, and *after* the damage study has been finalized. On the other hand, there will be some cases in which it will be acceptable to conserve resources and to propose a resolution sooner. For example, if the proposal will provide full recovery (or very close to full recovery) then there is little need for more due diligence. The poorer the settlement, however, the more justification will be needed and that usually translates to *more* discovery and *more* due diligence; otherwise, it is best to let absent class members keep their own claims and fend for themselves rather than foist a poor settlement on them. Particularly when counsel propose to compromise the potential claims of absent class members in a low-percentage recovery, the Court will insist on a detailed explanation of why the case has turned so weak, an explanation that usually must flow from discovery and due diligence, not merely generalized "risks of litigation." Counsel should remember that merely filing a putative class complaint does not authorize them to extinguish the rights of absent class members. *If counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made.* "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

11. A RIGHT TO OPT OUT IS NOT A CURE-ALL.

A borderline settlement proposal cannot be justified merely because absent class members may opt out if they wish. The Court has (and counsel have) an independent, stand-alone duty to assess whether the proposed class settlement is reasonable and adequate. Once the named parties reach a settlement in a purported class action, they are always solidly in favor of their own proposal. There is no advocate to critique the proposal on behalf of absent class members. That is one reason that Rule 23(e) insists that the district court vet all class settlements.

12. INCENTIVE PAYMENT.

If the proposed class settlement by itself is not good enough for the named plaintiff, why should it be good enough for absent class members similarly situated? Class litigation proceeded well for many decades before the advent of requests for "incentive payments," which too often are simply ways to make a collusive or poor settlement palatable to the named plaintiff. A request for an incentive payment is a red flag.

13. NOTICE TO CLASS MEMBERS.

Is the notice in plain English, plain Spanish, and/or plain Chinese (or the appropriate language)? Does it plainly lay out the salient points, which are mainly the foregoing points in this memorandum? Will the method of notice distribution really reach every class member? Will it likely be opened or tossed as junk mail? How can the envelope design enhance the chance of opening? Can mail notice be supplemented by e-mail notice?

* * *

Counsel will please see from the foregoing that the main focus will be on what is in the best interest of absent class members. Counsel should be mindful of the factors identified in *In re Bluetooth*, 654 F.3d at 946–47, as well as the fairness considerations detailed in *Hanlon*, 150 F.3d at 1026. Finally, for an order denying proposed preliminary approval based on many

of the foregoing considerations, *see Kakani v. Oracle Corp.*, No. C 06-06493 WHA, 2007 WL 1793774 (N.D. Cal. June 19, 2007).

IT IS SO ORDERED.

Dated: June 13, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LOGITECH, INC.,

Defendant.
/

No. C 18-03091 WHA

ORDER DENYING MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION AND TO STAY THE ACTION

To protect absent class members and to assist counsel in understanding the factors the Court considers in evaluating proposed class settlements, the undersigned judge has long provided guidance to both sides at the outset of any proposed class action. The guidance has been in the form of an order entitled "Notice and Order Re Putative Class Actions and Factors To Be Evaluated For Any Proposed Class Settlement." No one has ever complained about it — until now. Defendant Logitech, Inc. objects to a requirement regulating the timing of settlement discussions of class-wide claims, contending it violates its First Amendment rights. This order disagrees with Logitech and explains why the provision in question is in the best interest of absent class members and is constitutional.

Plaintiff James Porath filed this putative class action in May 2018, alleging that Logitech falsely and deceptively advertised its Z200 speakers as containing four drivers when in fact two of those drivers did not independently produce sound and were parasitic speakers (Dkt. No. 1 at 4–5, 15–25). In June 2018, the usual order issued describing the factors for evaluating any class action settlement and prohibiting the parties from discussing any settlement

of class claims prior to class certification. That prohibition was qualified by the further statement that if "counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made" (Dkt. No. 16). (The order dealt only with class settlements and did not bar counsel from discussing settlement of plaintiff's individual claim.)

In August 2018, counsel moved to appoint interim lead plaintiff and lead counsel under Federal Rule of Civil Procedure 23(g) (Dkt. No. 25). The parties stipulated to four reasons why they believed pre-class certification settlement discussions might have been appropriate at that moment: (1) Logitech agreed not to seek a "discount" based on the potential risk that the putative class would not be certified; (2) Logitech had already began revising the advertising at issue; (3) Logitech was prepared "with respect to purchases of the Z200 speakers to make all such consumers whole" (separately, in a case management statement, defendant further specified: "whole with respect to any damages that may have been caused by the challenged advertising"); and (4) the parties were prepared to engage in reasonable and appropriate discovery to develop the factual record necessary to resolve the case (Dkt. No. 23, 24). After considering the arguments from the parties' motion and at the initial case management conference, the motion to appoint interim counsel was denied.

Logitech then petitioned our court of appeals in October 2018 for a writ of mandamus. A motion to stay the action pending resolution by our court of appeals followed much later (Dkt. No. 33). Before this Court, however, could rule on the stay request, our court of appeals denied the petition without prejudice "to re-raising the . . . constitutional questions presented in this petition . . . in this court after presentation to the district court in the first instance." Order, *Logitech, Inc. v. United States District Court for the Northern District of California, San Francisco*, No. 18-72732 (9th Cir. Dec. 24, 2018). The motion to stay was then denied as moot, but "without prejudice to a fresh motion as contemplated by the court of appeals" (Dkt. No. 35).

Logitech now moves for leave to file a motion for reconsideration of the orders issued last June (prohibiting the parties from discussing any class-wide settlement until after the Court determines which claims deserve class treatment or until an appointment of interim counsel

under Rule 23) and last August (denying the motion for appointment of interim class counsel) and to stay the action (Dkt. No. 38). Plaintiff's counsel take no position (Dkt. No. 39). No hearing having been requested, this order follows.

Logitech's motion is **DENIED**.

The basic problem concerns the protection of absent class members. For the orderly management of putative class actions and for the protection of absent class members, the Court directs the parties not to discuss class-wide settlements until we determine what claims are suitable for class treatment under Rule 23. Thereafter, of course, it becomes the duty of counsel to consider settlement on a class-wide basis — but only of those certified claims. This avoids the awkward situation in which counsel waste time on a proposed settlement of issues that should not be litigated or settled on a class-wide basis. And, it avoids the creation of an artificial ceiling for the value of a case before we determine which issues deserve class treatment. It also avoids overbroad releases by absent class members of claims that should not be released.

As importantly, it protects the absent class members from inappropriately discounted settlements. Once a claim is certified for class treatment, everyone agrees that a class settlement may be discounted based on the merits of the claim. On the other hand, the recovery by absent class members should *not* be further discounted by the risk that a claim will not eventually be certified for class treatment. This view is supported by Professor Howard Erichson. *See, e.g.*, Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 WASH. U. L. REV. 951 (2014); Howard M. Erichson, *Beware The Settlement Class Action*, DAILY JOURNAL, Nov. 24, 2014.

For example, counsel for plaintiff may fear that particular claims will not be certified for class treatment due to lack of a class-wide method of proof. Counsel, therefore, might be tempted to accept a lowball offer to salvage a class recovery. Other similar Rule 23 hurdles concern standing or adequacy of representation. These might also lead to a further discount, further reducing recovery to absent class members. Postponing class settlement discussion until

after we determine which claims are class-worthy prevents these concerns from reducing a class recovery.

With respect to the individual claim of a plaintiff, the procedure in question permits any discussion at any time. As to absent class members, however, plaintiff's counsel have no authority to negotiate for the absent class members until a standard appointment under Rule 23(g)(1) or an appointment as "interim counsel" under Rule 23(g)(3). It is in the best interest of absent class members to first work through the protections of Rule 23 to define what claims, if any, are suitable for class treatment, what specific classes and subclasses, if any, are viable, and whether or not plaintiff and his counsel are adequate to represent absent class members. These should be vetted before discussions take place so the rights of the absent class members won't be compromised on problems other than the merits.

The guidelines further state that a settlement should be negotiated only after adequate and reasonable investigation and discovery by class counsel. This requirement serves the due diligence obligation of class counsel, who owe a fiduciary duty to the class to develop the facts well enough to negotiate a good settlement. Our court of appeals emphasized the "rigorous analysis" required by the district court in class action determinations and the role discovery plays in this analysis in recently invalidating a local rule that required moving for class certification within ninety days of filing the complaint. Such rigorous analysis "may require discovery" and take more than ninety days. *ABS Entertainment, Inc. v. CBS Corporation*, 908 F.3d 405, 427 (9th Cir. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011)).

In this same vein, one of the factors the Court "must consider" in appointing interim class counsel and class counsel is "the work counsel has done in identifying or investigating potential claims in the action." Rule 23(g)(1)(A)(i). Here, at the time of the original motion for appointment of interim counsel, plaintiff's counsel said they would do some homework, but they didn't say that they had yet done it. That remains true today.

The guidelines in question have long recognized that pre-certification settlement discussions are sometimes warranted. The guidelines invite counsel to move to be appointed as

"interim counsel" for precisely this purpose. As stated, Rule 23(g)(3) specifically calls out appointment of "interim counsel." One circumstance where such a motion would likely be granted is where the defendant has dwindling resources such that a prompt settlement is necessary to recover anything at all, even when little discovery has been possible.

When counsel here moved for the appointment of interim counsel, however, no showing of dire circumstances was made. No discovery had been conducted (Dkt. No. 23 at 4). Even though defendant's counsel vaguely stated that Logitech was prepared to make all purchasers "whole with respect to any damages that may have been caused by the challenged advertising," this clever wording offered little of substance, not even conceding that there had been "any" damages (Dkt. No. 23 at 6). Making the class "whole" could have meant a number of unacceptable scenarios, such as a mere coupon that would've burdened class members with a trip to a distant service center, or a cash refund only to those willing to fill out a laborious claim form. The record was therefore too conclusory, and thus, did not warrant such an appointment. Even now, Logitech's motion for reconsideration states nothing new.

Whether or not to appoint interim counsel is an issue of discretion for the district court. Logitech merely disagrees with the exercise of discretion by the district judge in this case. It is true that amendments to Rule 23 contemplate that a proposed settlement may be presented before a class has been certified. But, at the risk of repetition, so do the guidelines in question. Both turn on the interim counsel device.

With respect to free speech, the viewpoint neutral guidelines in question allow for plenty of settlement discussion and merely regulate the time, place, and manner of these discussions. The only restraint is on talking about a class-wide settlement before someone is authorized under Rule 23 to negotiate on behalf of a class — a sensible precaution for the protection of absent class members.

Full settlement discussions *at any time* with respect to the individual claim are permitted. Full settlement discussions as to class claims are permitted once those class claims are identified or after interim counsel is appointed. No permanent or overly broad ban on speech exists. To the extent a limited restriction exists, the interests are overwhelmingly

outweighed by the interest of the Court in effectuating orderly case management and the interests of the absent class members whose rights are also at risk. *See, e.g.*, *U.S. v. Richey*, 924 F.2d 857, 859 (9th Cir. 1991); *United States v. Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977). Counsel has no specific First Amendment right to try to extract a class-wide release from a lawyer who has no authority to act for a class (meaning, someone who has not yet been certified as class counsel or appointed as interim counsel).

No one has a First Amendment right to petition the government (including the courts) on behalf of a class and to impose a release onto a class until a proper representative has been appointed to look out for the class. It is true that some judges don't insist on such an appointment beforehand, but that is a matter of discretion, not a matter of right by the litigants. Logitech cites no case-law to the contrary.

No new facts have been shown to warrant reconsideration of either prior order. The motion for leave to file a motion for reconsideration of both the orders issued last June and August is **DENIED**. As provided in the original case management order, the motion for class certification remains due on February 7 to be heard on a 49-day track. All other deadlines remain in effect.

The class certification motion will be decided one way or the other long before any extraordinary writ petition could be determined by our court of appeals, so the motion to stay is **DENIED** on that ground (as well as on the merits).

IT IS SO ORDERED.

Dated: January 18, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES PORATH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

LOGITECH, INC.,

Defendant.
_____/

No. C 18-03091 WHA

ORDER RE INTERIM COUNSEL

In light of the recent ruling by our court of appeals, the Court is inclined, once the Rule 23 motion is fully briefed on both sides, to appoint plaintiff's counsel as interim counsel to negotiate a class settlement — if plaintiff's counsel believe they can do so without prejudice to a class. The Court still believes any class would be better served by waiting for a certification order and then negotiating from strength, but it may be instructive to see how it works out in this case. The Court will rely on the briefing to help illuminate any Rule 23 problems that may have influenced a settlement. If plaintiff's counsel wish to try this, please make an application to be appointed as interim counsel once all briefing on the Rule 23 motion is completed.

IT IS SO ORDERED.

Dated: September 23, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE