No. 18- __

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE LOGITECH INC.,

Petitioner,

vs.

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

Respondent,

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

Real Party in Interest.

On petition for a writ of mandamus to the United States District Court for the Northern District of California, Case No. 3:18-cv-03091-WHA, Hon. William H. Alsup

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 21-3, petitioner Logitech Inc. states that Logitech International S.A. is the parent corporation of Logitech Inc., and owns more than 10 percent of the stock of Logitech Inc.

Dated: October 8, 2018

/s/ *Dale J. Giali*
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES, RULES, & REGULATIONS

INTRODUCTION

Both parties to this false-advertising class action agree that it should be settled, and settled now. Petitioner Logitech Inc. has already begun the process of revising the advertisements that gave rise to the lawsuit, and has told plaintiff James Porath that it is committed to finalizing a class settlement that will make all similarly affected purchasers whole. Continuing the litigation will only serve to waste the money, time, and resources of all concerned—including the district court.

At present, however, the parties are *required* to continue litigating the case on an adversarial basis, even though they both want to end it. The district court has entered a standing order—as it apparently does in every putative class action—prohibiting the parties from even discussing a class-wide settlement, let alone agreeing to one, until after the parties engage in discovery and brief class certification adversarially, and the district court rules on the class certification motion.

That order cannot stand. It infringes the parties' First Amendment rights to communicate with one another and to seek relief from the court. The order runs contrary to well-established judicial policy *favoring* the settlement of disputes—particularly class actions. And the settlement ban is not necessary to serve the district court's stated purpose of weeding out

"collusive" class actions; Rule 23 already empowers (indeed, requires) the district court to accomplish that goal. This Court should issue a writ of mandamus ordering the district court to permit the parties to pursue settlement negotiations immediately.

BACKGROUND

Petitioner Logitech Inc. manufactures, distributes, and sells peripheral devices used with computers—including, as relevant here, a popular audio speaker system known as the "Logitech Z200." App. 9. In May 2018, Plaintiff James Porath sued Logitech in the U.S. District Court for the Northern District of California, on behalf of putative nationwide and California classes of consumers. Mr. Porath alleges that Logitech falsely advertised the Z200 as having four drivers—*i.e.*, components that produce sound from electrical audio signals—when it fact it only has two. *Id.* He has asserted causes of action for common law fraud and under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and False Advertising Law ("FAL"), *id.* §§ 17500 *et. seq.*

The case was assigned to Judge William H. Alsup. Dkt. 10. Shortly thereafter, on June 13, 2018, the district court entered a standing order regarding the factors that it would consider in evaluating any settlement of the action. Among other things, the order prohibited the parties from

discussing any settlement of class claims "prior to class certification." App. 4. The district court indicated that it forbade settlements of class claims before class certification was adjudicated because it perceived a danger that, in such settlements, "class claims have been discounted, at least in part, by the risk that class certification might be denied." App. 4-5. The court explained that, although settling class plaintiffs "should be subject to normal discounts for risks of litigation on the merits," they "should not be subject to a further discount for a risk of denial of class certification." App. 5.

The standing order acknowledged that "there will be some cases in which it will be acceptable to conserve resources and to propose a resolution sooner" than after class certification. App. 5. In particular, the order noted, early resolution might be warranted "if the proposal will provide full recovery (or very close to full recovery)." *Id.* The order indicated that "[i]f counsel believe settlement discussions should precede a class certification, a motion for appointment of interim class counsel must first be made." *Id.* (emphasis omitted).

On August 16, 2018, the parties filed their initial joint case management statement and Rule 26(f) report. App. 8-17. The parties indicated to the court that they had met and conferred regarding alternative dispute

resolution, as required by the Northern District's local rules, and that both "strongly believe this case is the rare putative class action that is appropriate for early resolution under the Court's" standing order. App. 14. The parties stated that they anticipated filing stipulations to inform the district court of the relevant facts and that Mr. Porath would be filing a motion for appointment of interim class counsel, as required by the standing order. *Id.* Mr. Porath filed the motion for appointment on August 21. Dkt. 25.

On the same day, the parties jointly filed a stipulation asking the district court to refer them to a magistrate judge for the purpose of pre-certification settlement discussions. The parties indicated that they believed pre-certification settlement was appropriate because (1) Logitech had agreed not to seek a "discount" based on the potential risk that the putative class would not be certified; (2) Logitech had already begun revising the advertising at issue; (3) Logitech was prepared to make all similarly situated purchasers of the Z200 speakers whole; and (4) the parties were prepared to engage in reasonable and appropriate discovery to develop the factual record necessary to resolve the case. App. 20.

Two days later, on August 23, 2018, the district court held a scheduling conference with the parties. At the hearing, the court expressed opposition to allowing settlement at this stage of the case:

> THE COURT: . . . look, here's the problem. It's called collusive settlements. I've had the following scenario. You apply to be -- you bring a class action. The other side realizes that you've got a convicted felon. I'm making this up hypothetically. Or there's some other reason that you don't want the judge to know.
>
> Then you go do a collusive deal, come back, and say: Oh, Judge, we got it off your calendar, no problem. Great. And for X dollars to the class and a huge, much bigger amount to the lawyer, you're going to settle the case.
>
> Well, a lot of judges would rubber-stamp that because they'd love to get rid of the case. Well, I don't do that. My job is to protect the absent class members.
>
> And in that kind of a deal, what the lawyer is doing for Mayer Brown, hypothetically, is buying you off with a big amount and getting a release of class – I've had this happen many times. I stop it when I find out about it. So we are going to find out if you have got a legitimate class first.

App. 26-27.

Counsel for Mr. Porath indicated to the court that they were mindful of the court's concerns about "collusive" settlements and that they believed pre-certification settlement in this case was warranted based on Logitech's

stated commitment to change its practices and to make similarly situated consumers whole. App. 29. But the court disagreed, stating:

> I want to go through the normal Rule 23 process. I want to see if the plaintiff is a legitimate plaintiff. I want to see if he's got standing. I want to go through the normal process.
>
> I don't see any good reason -- I have appointed interim counsel in other cases where the company is going out of business, and you'd better get your money now while the getting is good. But that's not our case.
>
> So I don't want you -- see, you lawyers ought to go out there and do -- do the homework. Find out if you have got punitive damages, find -- you know, spend the money on behalf of the class to do your due diligence.
>
> So the motion for interim counsel on this record is denied.

App. 34.

Following the hearing, the district court entered a Rule 16 scheduling order setting a discovery cut-off, expert disclosure due dates, and a trial date, and requiring Mr. Porath to file a motion for class certification by February 7, 2019. App. 38.[1]

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[1] The order also assigned an ADR process (referring case to a magistrate judge for mediation), as is customary in Rule 16 case management orders. App. 43. But the district court made clear in its June 13, 2018, order and during the August 23, 2018, conference, that the parties are banned from engaging in settlement communications and that settlement

RELIEF SOUGHT

Petitioner seeks a writ of mandamus directing the district court to withdraw its order prohibiting the parties from settling or discussing settlement of class claims prior to its ruling on a motion for class certification. App. 4-5.

ISSUE PRESENTED FOR REVIEW

Whether a district court may forbid parties to a putative class action from engaging in good-faith settlement discussions before the court has ruled on class certification, and instead force litigants to expend both their own and the court's resources on costly class certification discovery and adversarial motions practice.

ARGUMENT

In determining whether to issue a writ of mandamus, this Court considers whether: "(1) the party seeking the writ has no other means, such as a direct appeal, of attaining the desired relief, (2) the petitioner will be damaged in a way not correctable on appeal, (3) the district court's order is clearly erroneous as a matter of law, (4) the order is an oft-repeated error, or manifests a persistent disregard of the federal rules,

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talks must await the court's ruling on a class certification motion. App. 4, 25. Both parties accordingly understand themselves to be barred from discussing settlement at this time.

and (5) the order raises new and important problems, or issues of law of first impression." *Cole v. U.S. Dist. Court for Dist. of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004) (citing *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Here, the relevant factors all point to the conclusion that mandamus relief is warranted. The district court's position that parties may not even *discuss* settlement prior to the court's decision on a class certification motion is legally untenable. And the court's refusal to permit settlement discussions will require the parties to continue litigating a case on an adversarial basis that neither wants to pursue, wasting not only judicial resources but also the resources of both parties—which will not be recoverable in any appeal. This Court should grant mandamus to remedy this clear infringement on the parties' rights.

I. THE DISTRICT COURT'S REFUSAL TO PERMIT PRE-CERTIFICATION SETTLEMENT NEGOTIATIONS IS UNCONSTITUTIONAL AND IMPROPER.

Mandamus is warranted, first and foremost, because the district court's standing order is "clearly erroneous as a matter of law." *Cole*, 366 F.3d at 817. Indeed, the order violates multiple provisions of the First Amendment and is in direct tension with the well-settled judicial policy favoring settlements.

A. The District Court's Standing Order Violates The First Amendment.

1. The order is an impermissible, content-based speech regulation

As the Supreme Court has held time and again, the core command of the First Amendment's Free Speech Clause is that the government "'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). Indeed, restrictions on speech that are content-based—*i.e.*, that "appl[y] to particular speech because of the topic discussed or the idea or message expressed" (*id.* at 2227)—"are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests" (*id.* at 2226) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992), and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). And this presumption of unconstitutionality is even stronger in cases where a prior restraint has been imposed; in such cases, the government must carry a "heavy burden" in order to justify the restraint. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *see also, e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559

(1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights").

The district court's standing order imposed a clear prior restraint on the parties' speech: virtually from the outset of the case, they have been under a prospective order not to "discuss" settlement prior to the court's decision on a class certification motion. App. 4.[2] And that restriction is just as clearly content-based, because it is limited to a single topic: settlement. *Id.* The restriction is presumptively invalid, therefore, unless it satisfies strict scrutiny.

The order cannot pass that stringent test. Even assuming for argument's sake that district court's stated objective—*i.e.*, to prevent "collusive" settlements in which class claims are unduly discounted (App. 26)—rises to the level of a compelling state interest, the restriction on settlement talks manifestly is not the "least restrictive means to further [that] interest," as it must be in order to satisfy strict scrutiny. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

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[2] There can be no doubt that the district court's order is subject to the constraints of the First Amendment. *See, e.g.*, *Levine v. U.S. Dist. Court for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985) (stating that "[w]e recognize that attorneys and other trial participants do not lose their constitutional rights at the courthouse door" and applying First Amendment scrutiny to district court order restricting attorney communications with the media).

On the contrary, the district court could accomplish its stated purpose without restricting any speech at all, by simply adhering to Rule 23's class certification and settlement procedures. If the parties were to agree to a classwide settlement before class certification, the district court would be obliged to determine whether the proposed settlement class satisfied the requirements of Rule 23(a) and (b). Indeed, a district court "must pay 'undiluted, even heightened, attention' to class certification requirements in a settlement context." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). The district court would therefore have ample ability to examine, for example, whether Mr. Porath is an adequate class representative (Fed. R. Civ. P. 23(a)(4)), including his standing to bring a claim, and whether the class is sufficiently cohesive to warrant certification (*id.* 23(a)(2), (3)). To satisfy the Rule 23 analysis, the court could require the parties to do as much "homework" (App. 34) as would be needed to certify a class before a settlement had been reached. The only difference is that a settlement class need not establish that the class is manageable for purposes of trial. *Amchem,* 521 U.S. at 620.

The district court would also have the opportunity to assess the fairness of the proposed settlement before approving it. *See* Fed. R. Civ. P.

23(e) ("The claims . . . of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."). The settlement would be approved if, and only if, the court concluded after a fairness hearing "that the settlement taken as a whole is fair, reasonable, and adequate." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). And under this Court's precedents, any settlement agreed to before class certification would be subject to "a higher standard of fairness," given the "unique" concerns involved in such settlements. *Hanlon*, 150 F.3d at 1026. The district court would therefore be able to examine whether the benefits to the members of the settlement class were fair in light of the risks of litigation, and to reject the settlement if it believed the settlement was improperly "collusive."

In short, Rule 23 gives the district court ample "authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process." *Hanlon*, 150 F.3d at 1025. Indeed, the district court implicitly conceded that this mechanism is effective at preventing improper settlements, noting that "I've had" such settlements "many times" and that "I stop it when I find out about it." App. 27. The district court erred in concluding that, despite its considerable authority to protect the putative class, it was justified in

imposing an additional gag order preventing the parties from discussing settlement.

2. The order infringes the parties' right to petition

The district court's order also violates the First Amendment's Petition Clause. The right of petition is "one of the most precious of the liberties safeguarded by the Bill of Rights" (*BE & K Const. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (internal quotation marks omitted), and encompasses the right of access to the courts (*see, e.g.*, *Cal. Mot. Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition.")). Thus, as this court has recognized, "[r]estricting access to the courts is . . . a serious matter" with grave First Amendment implications. *Ringgold-Lockhart v. Cty. of L.A.*, 761 F.3d 1057, 1061 (9th Cir. 2014).

The district court's order substantially infringes upon the parties' access to the court. Although both parties have indicated a strong interest in settlement, the district court's order forbids them from even submitting a proposed settlement agreement to the court for consideration. This is an extraordinary measure; courts are ordinarily loath to bar litigants *ex ante* from seeking relief from a court. *Cf. Ringgold-Lockhart*, 761 F.3d at 1062 (noting that pre-filing orders for vexatious litigation conduct "impose[] a

substantial burden on the free-access guarantee" and "should rarely be filed") (internal quotation marks omitted). And in light of the procedural mechanisms detailed above, the bar on pre-certification settlement is entirely unjustified. There is no need for the district court to bar the parties outright from seeking court approval of a proposed settlement as long as it retains plenary authority to review both the putative class and any proposed settlement under Rule 23. The standing order's bar on pre-certification settlement is thus also invalid under the Petition Clause.

B. The District Court's Standing Order Conflicts With The Policy Favoring Settlements.

Finally, the district court's order cannot be squared with the "'strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.'" *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); see also *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("The compromise of complex litigation is encouraged by the courts and favored by public policy"); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."). Settlement is beneficial to litigants and the court: it conserves the court's and the parties' resources, and it often allows the parties to reach a mutually acceptable resolution to a dispute rather than going to trial and running the risk of an

all-or-nothing verdict. For these reasons, both this Court's rules and the district court's seek to encourage settlement by providing voluntary or mandatory settlement mechanisms to parties. *See* Ninth Cir. R. 33-1 (creating the Circuit Mediation Office); N.D. Cal. ADR Local Rule 3 (creating a multi-option ADR program for civil cases).

The district court's standing order undermines these efforts, by barring parties from presenting *any* precertification settlement proposal to the court, or even discussing one. Early settlements conserve considerable resources in cases like this, where the alternative is months or years of litigation until a class certification motion and, potentially, a summary judgment motion or trial can be resolved. The standing order replaces this speedy and efficient solution to disputes with additional litigation—litigation that serves little purpose, given that the parties agree about the need for class adjudication and the proper scope of class relief.

This result makes no sense. A district court should *encourage* parties to explore settlement, not preemptively shut down any and all settlement discussions. And although a district court is required to scrutinize any settlement for fairness to absent class members, it should not be in the business of preventing settlement altogether and denying absent class members even the chance of obtaining speedy relief. This Court should inter-

vene and put a stop to the district court's erroneous and unwarranted bar on pre-certification settlement.

II. MANDAMUS RELIEF IS WARRANTED.

The remaining *Bauman* factors also counsel strongly in favor of issuing a writ of mandamus in these circumstances.

1. To begin with, Logitech has no other means of obtaining relief short of a mandamus petition. Appellate review by this Court after a final judgment below would not be an adequate substitute for mandamus relief, because Logitech's entire purpose in seeking mandamus relief is to avoid being forced to litigate the case any further. Neither can Logitech obtain relief through an interlocutory appeal under 28 U.S.C. § 1292(b). The only orders by the district court that could be appealed are (i) the court's decision denying Mr. Porath's motion for interim appointment of class counsel, which Logitech has no right to appeal, and (ii) the court's standing order barring settlement discussions, which will be mooted once a class certification motion is fully briefed and decided.

2. Logitech (and Mr. Porath) also will be harmed by the order, in a way not correctable on appeal, if a writ does not issue. *Cole*, 366 F.3d at 817. The standing order effectively conscripts the two parties into litigating this case at least through the first part of next year, and perhaps long-

er depending on how long the district court takes to rule on a class certification motion. During that time, Logitech would incur substantial legal costs, likely in the hundreds of thousands of dollars—which is one reason why it is interested in settling the case now.[3] Those costs will never be recoverable on appeal.

3. Next, the district court's error is clearly both "oft-repeated" and emblematic of a "persistent disregard of the federal rules." *Cole*, 366 F.3d at 817. The district court appears to issue standing orders very similar to the order at issue here in every putative class action that is assigned to it.[4] Absent intervention by this Court, therefore, the district court may impede

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[3] Mr. Porath will also incur legal costs—as the district court expressly contemplated when it told Mr. Porath's counsel to "go out there" and "spend the money on behalf of the class to do your due diligence" in preparing the class certification motion. App. 34. And, of course, both sides will likely incur substantial expert fees on such issues as materiality and damage modeling.

[4] *See, e.g.*, Notice and Order Re Putative Class Actions at 4, *Kent v. Abaxis, Inc.*, No. 3:18-cv-03834-WHA (N.D. Cal. Sept. 11, 2018), ECF No. 5 ("The parties shall not discuss settlement as to any class claims prior to class certification."); Notice and Order Re Putative Class Actions at 4, *Felix v. Symantec Corp.*, No. 3:18-cv-02902-WHA (N.D. Cal. July 20, 2018), ECF No. 49 (same); Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement at 4, *McFaddin v. Conagra Brands, Inc.*, No. 3:17-cv-00387-WHA (N.D. Cal. Feb. 9, 2017), ECF No. 19 ("[I]t is better to develop and to present a proposed compromise *after* class certification."); Notice Regarding Factors to Be Evaluated for Any Proposed Class Settlement at 4, *Backus v. Conagra, Inc.*, No. 3:16-cv-00454-WHA (N.D. Cal. Apr. 8, 2016), ECF No. 22 (same).

many other parties in many other class actions from engaging in reasonable, pre-certification settlement efforts.

4. Finally, the issue presented is both new and important. *Cole*, 366 F.3d at 817. Logitech is unaware of any other cases addressing the question whether a district court may prohibit litigants in putative class actions from discussing settlement prior to class certification, as a standing matter of policy. Courts across the Circuit would benefit from this Court's guidance about whether this practice is permissible, particularly in light of the many tools that district courts already have at their disposal to ensure the fairness of pre-certification class action settlements.

CONCLUSION

The petition for a writ of mandamus should be granted.

Respectfully submitted,

/s/ *Dale J. Giali*

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Dated: October 8, 2018

STATEMENT OF RELATED CASES

Petitioner is not aware of any related cases pending in this Court.

Dated: October 8, 2018 /s/ *Dale J. Giali*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for petitioner certifies that this petition:

(i) complies with the length limitation of Circuit Rules 21-2 and 32-3 because it contains 3,981 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: October 8, 2018 /s/ *Dale J. Giali*

CERTIFICATE OF SERVICE

I hereby certify that that on October 8, 2018, I electronically filed the foregoing petition with the Clerk of the Court using the appellate CM/ECF system. Service has been accomplished via overnight delivery to the following counsel for James Porath:

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The district court has been provided with a copy of this petition via overnight delivery to:

The Hon. William H. Alsup
U.S. District Court for the Northern District of California
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Dated: October 8, 2018 /s/ *Dale J. Giali*