

No. 19-70248

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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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.*

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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

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**DEFENDANT-PETITIONER LOGITECH INC.'S EMERGENCY  
MOTION FOR STAY UNDER CIRCUIT RULE 27-3 PENDING  
RESOLUTION OF PETITION FOR WRIT OF MANDAMUS**

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### **CIRCUIT RULE 27-3 CERTIFICATE**

Pursuant to Ninth Circuit Rule 27-3, I hereby certify as follows in support of Logitech's emergency motion for a stay of proceedings below pending resolution of its Renewed Petition for a Writ of Mandamus to the United States District Court for the Northern District of California:

1. The following list contains the telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties.

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2. The following facts show the existence and nature of the emergency:

Under Rule 27-3, I certify that “to avoid irreparable harm relief is needed in less than 21 days” on Logitech’s motion to stay the proceedings below. Specifically, absent a stay of proceedings while the Court considers Logitech’s Petition for a Writ of Mandamus, irreparable harm will occur because Mr. Porath’s class certification brief is currently due on February 21, 2019, and the parties are ex-

pending time and resources engaging in discovery and litigating the matter when both parties agree that the action should be settled, and settled now. Irreparable harm will occur if the proceedings below are not stayed as soon as possible, because each day that passes requires the expenditure of additional resources. Yet the parties are forbidden from engaging in discussions that could immediately resolve the case.

3. Counsel for Logitech notified the Clerk of this motion via telephone on January 28, 2019. Counsel for Logitech notified Mr. Porath's counsel of this motion and served the motion via email on January 28, 2019.

4. I further certify that Logitech has requested a stay with the district court on three separate occasions. On November 30, 2018, Logitech requested a stay pending a decision from this Court on Logitech's initial Petition for a Writ of Mandamus. Dkt. 33. The district court denied the motion without prejudice as moot when this Court denied Logitech's initial Petition for a Writ of Mandamus. Dkt. 35. On January 8, 2019, Logitech again requested a stay from the district court pending resolution of its motion for leave to file a motion for reconsideration (a motion based on the same grounds as set

forth in Logitech’s Renewed Petition for a Writ of Mandamus). Dkt. 38. The district court denied the motion on January 18, 2019, stating “[a]s 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.” Dkt. 40 at 6.<sup>1</sup> The court declined to stay the action—both in light of its decision on the merits and because “[t]he 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.” App. 49. On January 25, 2019, Logitech again filed a motion for a stay in the district court, pending this Court’s resolution of Logitech’s Renewed Petition for a Writ of Mandamus. The district court denied the request the next day.

Dated: January 28, 2019

/s/ Dale J. Giali

Dale J. Giali, MAYER BROWN LLP

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<sup>1</sup> The district court granted a short two-week extension on January 24, 2019, providing Mr. Porath until February 21, 2019 to file his class certification motion, so that the parties can continue to engage in the discovery process. Dkt. 42. The parties had stipulated to and sought from the district court a four-week extension, but the district court extended the period by only two weeks.

## **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: January 28, 2019

/s/ Dale J. Giali  
Dale J. Giali

*Attorney for Petitioner  
Logitech Inc.*

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## INTRODUCTION

Logitech respectfully seeks an emergency stay of all proceedings in the district court pending resolution of Logitech's Renewed Petition for a Writ of Mandamus. *See* Ninth Cir. R. 27–3. The district court order from which Logitech seeks relief prohibits the parties from engaging in discussions to settle this case on a class-wide basis until an adversarial class certification proceeding has concluded. Without a stay, that proceeding may conclude before any writ could issue. And unless a stay is granted sooner than 21 days from now, both parties will be forced to expend substantial resources on discovery in preparation for imminent briefing on a motion for class certification. Plaintiff Porath's motion is currently due in just over three weeks—on February 21, 2019—while Logitech necessarily must gather and prepare its supporting evidence, including any expert analysis, in time for its response due March 7. Because granting the Petition would obviate the need for such expense, Logitech respectfully requests an immediate stay to avoid this irreparable harm.

## BACKGROUND

Logitech's Renewed Petition for a Writ of Mandamus comprehensively sets forth the background of this case. In brief, three weeks after Plaintiff James Porath filed this putative class action in the Northern District

of California, Judge William H. Alsup entered a standing order that prohibited the parties from discussing any settlement of class claims “prior to class certification.” App. 4. 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.” App. 5 (emphasis omitted). On August 21, 2018, Mr. Porath filed a motion to appoint lead plaintiff and lead counsel pursuant to Fed. R. Civ. P. 23(g). Dkt. 25. The district court denied the motion two days later. App. 34.

The district court then entered a Rule 16 scheduling order that, among other things, required Mr. Porath to file a motion for class certification by February 7, 2019. App. 38. The district court later granted a two-week extension, so that Mr. Porath’s class-certification motion is now due by February 21. Dkt. 42.

On October 8, 2018, Logitech petitioned this Court for a writ of mandamus directing the district court to withdraw its order. *See* Pet. for Writ of Mandamus, *Logitech, Inc. v. U.S. Dist. Court for the N. Dist. of Cal.*, No. 18-72732 (9th Cir. Oct. 8, 2018). A motions panel of the Court denied the petition without prejudice, on the ground that “[i]t does not appear that the parties have raised the constitutional questions presented in this

petition to the district court.” Order at 1, *Logitech* (9th Cir. Dec. 24, 2018), ECF No. 5.

Logitech accordingly filed a motion for leave to seek reconsideration of the district court’s order prohibiting pre-certification settlement discussions and to stay the action pending resolution of the issue, in which Logitech raised its constitutional objections to the standing order. *See* App. 45-46. The district court denied that motion, including declining to stay the action in light of its decision on the merits and because “[t]he 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.” App. 49. Upon filing its renewed Petition, Logitech filed a motion to stay with the district court. Dkt. 43. The district court denied the motion the next day. Dkt. 44.

### **ARGUMENT**

The issuance of a stay pending a petition for a writ of mandamus turns on the same four factors that apply to other stays: (1) whether there is a “fair prospect” of success on the merits, or the petition raises “serious legal questions”; (2) whether the defendant would be “irreparably injured” in the absence of a stay; (3) whether the plaintiff would be “substantially injured” if a stay is granted; and (4) “where the public’s interest lies.”

*Leiva-Perez v. Holder*, 640 F.3d 962, 964-70 (9th Cir. 2011); *see also Lair v. Bullock*, 697 F.3d 1200, 1203 (9th Cir. 2012) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Each of these factors weighs heavily in favor of a stay.

**A. There Is At Least A Fair Prospect That Logitech’s Petition Will Succeed On The Merits, And The Petition Raises Serious Legal Questions.**

The Petition explains at length why Logitech is likely to succeed on the merits. *See Leiva-Perez*, 640 F.3d at 966. This showing is satisfied by a showing of a “reasonable probability” or “fair prospect” of success on the merits; “a substantial case on the merits”; or that “serious legal questions are raised.” *Id.* at 967-68.

Logitech’s Petition demonstrates that the order forbidding the parties to discuss settlement violates the First Amendment and conflicts with both the Federal Rules and established policy favoring early settlement of class actions. The Petition further explains why the refusal to permit settlement discussions will require the parties to continue litigating a case neither wants to pursue, squandering judicial and party resources that will not be recoverable. When Logitech last petitioned this Court, the Court denied the petition without prejudice to allow the district court to explain itself. In light of the district court’s intervening order, Logitech

respectfully submits that there is a “fair prospect” that this Court will grant review and resolve these questions in its favor. The Petition unquestionably presents “serious legal questions” that, if not resolved, will result in unnecessary discovery and class certification briefing that will cost many hundreds of thousands of dollars.

*First*, the district court’s order constitutes an impermissible, content-based speech regulation. The parties have been ordered not to “discuss” settlement prior to a decision on class certification. That restriction is content-based because it is limited to the single topic of settlement. Thus, it is presumptively invalid unless it satisfies strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015). The district court suggested that its order is not subject to strict scrutiny because it is merely a “time, place, and manner” restriction. App. 48. But in order to qualify as a time, place, and manner restriction, a restraint must be content-neutral. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And as noted above, the district court’s order is not content-neutral; on the contrary, it singles out a particular subject—class-wide settlement—and restricts only speech on that subject.

Even if preventing collusive settlements constitutes a compelling state interest, forbidding settlement discussions is not the “least restric-

tive 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). Federal Rule of Civil Procedure 23(e), which requires the district court to closely examine any proposed class settlement and to approve only if “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)), already provides the district court with all the tools it needs to weed out improper settlements, without the need to impose a content-based prior restraint on the parties’ speech.

**Second**, the order violates the First Amendment’s Petition Clause, which encompasses the “right of access to the courts.” *Cal. Mot. Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). The district court forbids the parties from submitting a proposed class-wide settlement agreement, and such a bar is unjustified—particularly given the procedural safeguards inherent in Rule 23.

**Third**, the order conflicts with Federal Rule of Civil Procedure 23 and 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). The recent amendments to Rule 23(e) confirm that parties may engage in pre-certification settlement discussions

by explicitly providing that the approval procedures under that subsection apply to a proposed settlement of the claims of “a class proposed to be certified for purposes of settlement.” Fed. R. Civ. P. 23(e)(1). The Advisory Committee explained that the suitability of a case for class certification is a “key element” of a court’s review under Rule 23(e), and that, “*if a class has not been certified,*” the parties must give the court a sufficient basis in the record to conclude that it will be able to certify the class “after the final hearing” assessing the settlement. Fed. R. Civ. P. 23(e)(1) advisory committee’s note to 2018 amendment.

The remaining factors pertinent to mandamus overlap with the stay analysis. As explained below and in the Petition, all favor issuance of the writ and of the stay.

**B. Logitech Will Suffer Irreparable Injury If The Court Does Not Grant A Stay.**

Logitech will suffer irreparable injury in the absence of a stay. If Logitech is “forced to incur the expense of litigation” before the Petition is decided—expenditures that a grant of the writ may render unnecessary—the Petition may be “meaningless” in whole or in part. *Gray v. Golden Gate Nat. Recreational Area*, 2011 WL 6934433, at \*3 (N.D. Cal. Dec. 29, 2011) (granting a stay pending appeal). Logitech has no other means of relief; the unjustified delay in settlement and the associated costs cannot be

remedied (or even addressed) in any future appeal. Discovery and briefing pertaining to class certification remains ongoing. Discovery in this consumer class action case spans multiple custodians, several years, and tens of thousands of electronically stored documents. Logitech has already produced over 14,000 pages of documents, and Mr. Porath has indicated that he intends to seek additional discovery, including depositions. Logitech will also be forced to expend its resources preparing its opposition to Mr. Porath's motion for class certification. All of these non-recoverable expenses—likely in the hundreds of thousands of dollars—would be rendered unnecessary if this Court determined that the parties should be able to submit a settlement proposal to the district court before class certification.

**C. Mr. Porath Will Not Be Harmed By A Stay**

A stay will not harm Mr. Porath, who has also expressed his desire to engage in settlement negotiations and to settle this case. On the contrary, the absence of a stay will harm him because he, too, will have to incur the costs of proceeding with this case.

**D. The Public Interest Favors A Stay**

A stay would be in the public interest because judicial as well as party resources will have been wasted if no stay is granted, yet a writ permitting settlement discussions is ultimately issued. The district court may

have to resolve discovery disputes as well as the class certification motion itself, only to repeat the latter process in the context of a settlement proposal.

### **CONCLUSION**

The Court should stay proceedings in the district court until this Court rules on the Renewed Petition for a Writ of Mandamus.

Respectfully submitted,

January 28, 2019

/s/ Dale J. Giali

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## CERTIFICATE OF SERVICE

I hereby certify that that on January 28, 2019, I electronically filed the foregoing Circuit Rule 27-3 Emergency Motion to Stay with the Clerk of the Court using the appellate CM/ECF system. Service has been accomplished via email and overnight delivery to the following counsel for James Porath:

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The district court has been provided with a copy of this Circuit Rule 27-3 Emergency Motion to Stay via overnight delivery to:

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San Francisco, CA 94102

Dated: January 28, 2019

/s/ Dale J. Giali