No. 19-70248

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: LOGITECH, INC.

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.

STATEMENT OF DISTRICT COURT JUDGE WILLIAM ALSUP IN RESPONSE TO MANDAMUS PETITION

United States District Court
450 Golden Gate Avenue
San Francisco, CA 94102

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STATEMENT OF DISTRICT COURT
JUDGE WILLIAM ALSUP
IN RESPONSE TO MANDAMUS PETITION

Respondent District Court appreciates the invitation to address the petition filed by Logitech, Inc. The District Court set forth its main points in its January order denying reconsideration, included as an attachment to the petition (App. 44–49). For the convenience of the Court of Appeals, another copy is appended hereto.

Beyond that order, please consider the following. The central point is this — from the viewpoint of protecting absent class members, there is an important difference between a class settlement struck *before* a ruling under Rule 23 seeking class certification and one negotiated *after* a class has been certified. When a lawyer files a putative class action complaint and negotiates a proposed class-wide settlement *before* certification is decided, plaintiff's counsel necessarily negotiates from a

position weakened by the uncertainty over whether or not counsel will later win or lose a class certification motion. In turn, this weakness can prejudice any deal struck before the issue of certification is determined. *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. To avoid this prejudice to absent class members, it is better to clear away any doubts about certification, so that if certification is granted, plaintiff's counsel can negotiate from strength with a certification win in hand. In this way, the claims of absent class members are compromised only on their merits without further discount due to the uncertainty over whether plaintiff's counsel will win class certification.

We were on the verge of the class certification motion when the appellate stay issued herein. Had those proceedings gone forward, we would now be learning whether (and to what extent) the claims of absent class members can fairly be prosecuted by plaintiff and his counsel, including adequacy of representation and the extent to which there will be a method of proof common and effective for a class. The Rule 23 process would have flushed out any certification problems that might have steered plaintiff's counsel to accept less than a class deserves. Logitech, however, has successfully prevented us from learning of these potential problems by obtaining a stay.

Significantly, Logitech has never stipulated to any class. Its answer denied the class allegations (Case No. 3:18-cv-03091-WHA, Dkt. No. 18 at ¶ 6). Why, if Logitech desires to settle on a class-wide basis, hasn't Logitech simply stipulated to a class and *then* negotiated? The answer seems obvious. Logitech wants to take advantage of the uncertainty over the outcome of a Rule 23 motion to extract a cheaper settlement while wiping a class-wide liability off its books. Logitech's promise not to reference potential Rule 23 arguments in negotiating a pre-certification deal is an empty promise — it will not stop plaintiff's counsel from realizing the risks and consequently being tempted to accept less. Logitech wants to hold on to this advantage. Like all defendants in class actions, Logitech knows the tables will be turned when and if a claim is certified for class treatment. It is better, if a class is certifiable, to clear away this uncertainty and *then* to negotiate from strength based on the merits of the certified claim. Absent class members deserve, before their claims are extinguished, to have their recovery discounted only on the merits of their claims without further discount based on possible unsuitability of the case for class certification.

It is no answer to say that if a pre-certification class settlement is tendered for preliminary approval, these certification issues can all be flushed out by the district judge without the benefit of a Rule 23 motion. Once counsel have cut a deal, they will

align to support the deal. Neither counsel will surface any problems that might have plagued a certification motion. There will be no one to explain the extent to which plaintiff's counsel discounted the claims based on Rule 23 problems or even to point out what those problems were. Inquiries by the district judge can rarely uncover those concerns as clearly as a litigated Rule 23 motion.

Nor is it an answer to say that it is better for a class to receive something than wind up with nothing should a class not be certified. If a class is not certified for a curable reason, such as problems peculiar to the named plaintiff, then another lawyer with a better case for certification may step forward. That lawyer can win certification and then negotiate from strength. To be sure, there will be times when the Rule 23 problems are not curable and the putative class members will receive nothing (unless, of course, they pursue their own claims individually). Even so, is it worth prejudicing settlements for classes that deserve to be certified in order to promote settlements for classes that do not deserve to be certified? Respondent submits the answer should be no.

For these reasons, respondent asks the Court of Appeals to deny the petition and to allow the Rule 23 process to run its course. If certification is granted, then the class will have cleared away the risk and can negotiate from strength over the merits of the class claim, free of any discount based on Rule 23 problems. If certification is denied,

it will be because the Rule 23 process reveals problems that might have led plaintiff's counsel to compromise too much.

For a writ of mandamus to issue, "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citations and quotations omitted). "A litigant does not have a clear and indisputable right to a particular result in matters committed to the discretion of the District Court." *ACF Industries, Inc., Carter Carburetor Div. v. E.E.O.C.*, 439 U.S. 1081, 1085 (1979) (citation omitted). As such, our Court of Appeals has specified that one factor is whether or not "the district court's order is clearly erroneous as a matter of law." *Cole v. U.S. Dist. Court for Dist. Of Idaho*, 366 F.3d 813, 817 (9th Cir. 2004) (citation omitted). "[M]ost issues arising under Rule 23 [are] committed in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

Petitioner raises prior restraint concerns. Yet, the most that is at stake here is commercial speech. Speech is commercial when "all affected speech is either speech soliciting a commercial transaction or speech necessary to the consummation of a commercial transaction." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818 (9th Cir. 2013). Restrictions on commercial speech do not require the absolute least restrictive

means to achieve the desired end. Instead, they only require a "reasonable fit" between the purpose of the restriction and the means chosen to achieve it. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). For the reasons stated above, a reasonable fit exists between the timing limitation at issue and protecting absent class members. No "clearly erroneous" prior restraint can be shown here (and it is an open question whether prior restraint rules even extend to commercial speech. *See Hunt v. City of L.A.*, 638 F.3d 703, 718 n.7 (9th Cir. 2011) (collecting cases)). This is dispositive.

In addition, First Amendment rights may be "subordinated" to other interests that arise during the pendency of litigation. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 n.18 (1984). It is telling that no First Amendment decision has ever found a violation in a safeguard like the one at issue here. This, too, is dispositive.

The only line of appellate prior restraint cases where the district court exceeded its Rule 23 authority has been in circumstances where the district judge prohibited communication between parties and their counsel, on the one hand, and potential class members, on the other. In the foremost example of these cases, the United States Court of Appeals for the Fifth Circuit concluded *en banc* that the sweeping order there violated both Rule 23 and the First Amendment. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 477–78 (5th Cir. 1980) (en banc), *aff'd*, 452 U.S. 89 (1981). That order

barred the plaintiffs' counsel from communicating with potential class members at a time when an Equal Employment Opportunity Commission conciliation agreement potentially covering hundreds of employees circulated. Counsel wanted to warn the employees against signing the agreement and thereby releasing their claims. The order, however, barred all such warnings, stating that "any further communication, either direct or indirect, oral or in writing . . . from the named parties, their representatives or counsel to the potential or actual class members not formal parties to this action is forbidden." *Gulf Oil*, 619 F.2d at 464 n.4. In holding that the order violated the First Amendment right of both the parties and their counsel to communicate with potential class members at a critical time in the process, the *en banc* appellate court also expressed its concern with an order "broad in scope and plenary in nature" which forbade such "a wide range of communications." *Id*. at 464.

The Supreme Court of the United States affirmed on Rule 23 grounds (without reaching the First Amendment issue). "Because of the potential for abuse" by counsel in class actions, the Supreme Court recognized that "a district court has *both the duty and the broad authority* to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Bernard v. Gulf Oil Co.*, 452 U.S. 89, 100 (1981) (emphasis added). The Supreme Court further observed that "[i]n the conduct of a case, a court often finds it necessary to restrict the free expression of

participants, *including counsel*, witnesses, and jurors." *Id*. at 104 n.21 (emphasis added). The order there, however, had gone too far.

In contrast, the limitation on settlement discussion challenged by the petition here in no way prohibits communication with potential class members, class representatives, or clients. Nor does it restrict any negotiations to settle the individual claims of the named plaintiff. Rather, the safeguard at issue merely *postpones* communications *between opposing counsel* on the subject of class settlement until they know what claims are certified for class treatment or until the district court grants a motion under Rule 23(g)(3) for the appointment of interim counsel specifically to negotiate a pre-certification class settlement. Anchored in the protection of absent class members, this safeguard clears away the uncertainty over certification so that class counsel can bargain based on the strength of the class claims themselves, undiminished by the possible unsuitability of class treatment.

The safeguard in question recognizes that in some circumstances it is in the best interest of absent class members to appoint plaintiff's counsel as interim counsel under Rule 23(g)(3) to try to settle on a class-wide basis before a formal certification motion. One such circumstance is when the defendant is nearing insolvency and it is best to strike a deal while there is money left to pay. Another is when the complaint seeks only (or mainly) injunctive relief and prompt relief is important. These are but

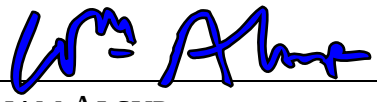
two examples. In the instant case, the record did not warrant any such relief and the district judge concluded that the absent class members would be better served by going through the Rule 23 process.

When it comes to class action settlements, the usual criticism of trial judges is that they have done too little — not too much — in protecting absent class members. Our Court of Appeals recently stated that inquiry into class action settlements "is not a casual one; the uncommon risks posed by class action settlements demand serious review by the district court. An entire jurisprudence has grown up around the need to protect class members . . . from the danger of a collusive settlement." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 610 (9th Cir. 2018) (collecting cases). Justice Mary Anne Mason for the Illinois Court of Appeals forcefully illustrated this point in a recent case (featuring, coincidentally, one of our lead counsel), in which she felt constrained "to comment on the exorbitant fees awarded to class counsel and the lack of any meaningful examination by the trial court of the justification for those fees." *Clark v. Gannett Co., Inc.*, — N.E. 3d —, 2018 IL App (1st) 172041, ¶ 89, 2018 WL 6173574 (concurring opinion). She regretted the trial court's passivity which "encourages the skepticism, cynicism, and distrust of our judicial system so prevalent in society today." *Id*. at ¶ 98.

Is the procedure used by respondent to safeguard absent class members clearly prohibited by Rule 23 or the First Amendment? Petitioner has not demonstrated a prohibition, much less a clear prohibition. To the contrary, the procedure lies within the broad authority granted to a district judge to protect absent class members. There having been no clear error, the petition should be denied.

Respectfully submitted,

Dated: February 28, 2019.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE