

EXHIBIT 1

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 9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN FRANCISCO DIVISION**

12 JAMES PORATH, individually on behalf of all
 13 others similarly situated individuals,

14 Plaintiffs,

15 v.

16 LOGITECH, INC., a California corporation,

17 Defendant.

Case No. 3:18-cv-03091-WHA

**LOGITECH INC.'S MOTION FOR
 RECONSIDERATION OF THE
 COURT'S JUNE 13, 2018 AND AUGUST
 23, 2018 ORDERS PROHIBITING
 SETTLEMENT DISCUSSIONS PRIOR
 TO A RULING ON CLASS
 CERTIFICATION; MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: TBD
 Time: TBD
 Location: TBD

Hon. William Alsup

Action Filed: May 23, 2018

1 **TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on a date to be determined by the Court, in
3 Courtroom 12 of this Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102,
4 before the Honorable William Alsup, Defendant Logitech Inc. will and hereby does respectfully
5 move the Court for an order reconsidering and modifying aspects of its June 13, 2018 (ECF No.
6 16) and August 23, 2018 (ECF No. 30 [Hearing Tr.]) orders prohibiting the parties from
7 engaging in settlement discussions prior to class certification. Pursuant to the Court's inherent
8 authority to reconsider its rulings and pursuant to Civil Local Rule 7-9(b)(1)-(2), Logitech
9 respectfully requests reconsideration of these two orders so that the parties may engage in
10 settlement discussions now, and submit a settlement plan to the Court for its review and
11 approval.

12 This motion is made pursuant to the Court's order granting Logitech leave to move for
13 reconsideration, and is based on the following:

- 14 1. The Ninth Circuit's December 24, 2018 order denying Logitech's petition for a
15 writ of mandamus without prejudice "to re-raising the [First Amendment] issues in this court
16 after presentation to the district court in the first instance";
- 17 2. This Court's December 26, 2018 order denying Logitech's motion to stay as moot
18 without prejudice "to a fresh motion as contemplated by the court of appeals";
- 19 3. The amended Fed. R. Civ. P. 23; and
- 20 4. The updated and amended United States District Court for the Northern District of
21 California's Procedural Guidance for Class Action Settlements.

22 This motion is based on this Court's inherent authority to reconsider its interim rulings,
23 Civil Local Rule 7-9, this Court's June 13, 2018 and August 23, 2018 orders, this Notice of
24 Motion and the accompanying memorandum, as well as all pleadings and documents on file in
25 this action, and on such other written and oral argument as may be presented to the Court.

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Dated: January 8, 2019

MAYER BROWN LLP
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By: /s/ Dale J. Giali
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Attorneys for Defendant Logitech Inc.

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STATEMENT OF ISSUE TO BE DECIDED

Should the Court reconsider its June 13, 2018 and August 23, 2018 orders prohibiting the parties from immediately engaging in settlement discussions, and permit the parties to engage in settlement discussions now, and submit a settlement proposal to the Court for its review and approval?

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Logitech respectfully seeks reconsideration of two rulings by this Court: (1) the Court's
4 June 13, 2018 order prohibiting the parties from entering into settlement discussions prior to a
5 class certification order; and (2) the Court's August 23, 2018 order denying Plaintiff's counsel's
6 motion to appoint lead plaintiff and class counsel and instructing the parties to proceed towards
7 class certification. Logitech respectfully requests that in light of constitutional challenges and
8 policy considerations favoring early resolution of class action litigation, the Court should permit
9 the parties to engage in settlement discussions now, and, if the parties agree on a settlement
10 proposal, to present to the Court a settlement proposal for its review and consideration.

11 **II. BACKGROUND**

12 On May 23, 2018, Plaintiff filed this putative class action alleging that Logitech falsely
13 and/or deceptively advertises its Z200 speakers as containing four drivers total (or two drivers
14 per speaker), when in fact two of those drivers (or one driver per speaker) are passive drivers that
15 do not independently produce sound. *See* Compl. ¶¶ 4-5, 15-25. The parties agreed that the
16 instant action would benefit from exploration of early resolution, and that the case could and
17 should be settled at the beginning stages, prior to the parties and Court expending large amounts
18 of time and resources litigating the case.

19 On June 13, 2018, the Court entered in this action its standard order it issues in cases
20 filed as class actions regarding the factors it would consider in evaluating any settlement of the
21 action, and prohibiting the parties from discussing any settlement of class claims "prior to class
22 certification." ECF No. 16. The Court further stated as an exception to this rule that "[i]f counsel
23 believe settlement discussions should precede a class certification, a motion for appointment of
24 interim class counsel must first be made." *Id.*

25 On August 14, 2018, the parties jointly filed a stipulation asking the Court to refer them
26 to a magistrate judge for the purpose of pre-certification settlement discussions. ECF No. 21. The
27 parties indicated that they believed pre-certification settlement was appropriate because (1)
28 Logitech had agreed not to seek a "discount" based on the potential risk that the putative class

1 would not be certified; (2) Logitech had already begun revising the advertising at issue; (3)
2 Logitech was prepared to make whole all purchasers of the Z200 speakers who were similarly
3 situated to Plaintiff; and (4) the parties were prepared to engage in reasonable and appropriate
4 discovery to develop the factual record necessary to resolve the case. *Id.*

5 On August 16, 2018, the parties filed their initial joint case management statement and
6 Rule 26(f) report. ECF No. 23. The parties indicated to the Court that they had met and conferred
7 regarding alternative dispute resolution, as required by the Northern District's local rules, and
8 that both "strongly believe this case is the rare putative class action that is appropriate for early
9 resolution under the Court's" standing order. *Id.* The parties stated that they anticipated filing
10 stipulations to inform the Court of the relevant facts and that Plaintiff would be filing a motion
11 for appointment of interim class counsel, as required by the standing order. *Id.*

12 On August 21, 2018, Plaintiff filed a motion to appoint interim lead plaintiff and lead
13 counsel pursuant to Fed. R. Civ. P. 23(g), so that the parties could engage in settlement
14 discussions pursuant to the Court's order. ECF No. 25.

15 On August 23, 2018, during the initial scheduling conference, the Court denied Plaintiff's
16 interim motion, stating instead that the parties must proceed with the normal, litigated Rule 23
17 class certification process. Aug. 23, 2018 Hearing Tr. at 11:6-19.

18 On October 9, 2018, Logitech filed a Petition for a Writ of Mandamus with the Ninth
19 Circuit. *See* Case No. 18-72732 (9th Cir. Oct. 9, 2018). In its petition, Logitech argued that the
20 parties should be permitted to convene a settlement conference to explore a class settlement on
21 terms consistent with the Court's June 13, 2018 order, and further, that the case be referred to an
22 early settlement conference with Magistrate Judge Jacqueline Scott Corley. *Id.* While Logitech's
23 Petition was pending, it filed a motion to stay this action in this Court. ECF No. 33.

24 On December 24, 2018, the Ninth Circuit denied Logitech's Petition for Writ of
25 Mandamus, but issued its denial without prejudice "to re-raising the . . . constitutional questions
26 presented in this petition . . . in this court *after* presentation to the district court in the first
27 instance." Order, *Logitech, Inc. v. United States District Court for the Northern District of*
28 *California, San Francisco*, No. 18-72732 (9th Cir. Dec. 24, 2018), at ECF No. 5 at 1 (emphasis

1 now and, if the parties are able to agree, to permit the parties to submit a settlement proposal for
2 the Court's consideration.

3 1. The Order Is An Impermissible, Content-Based Speech Regulation

4 The core command of the First Amendment's Free Speech Clause is that the government
5 "has no power to restrict expression because of its message, its ideas, its subject matter, or its
6 content." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (quoting *Police Dep't of*
7 *Chi. v. Mosley*, 408 U.S. 92, 95 (1972)). Indeed, restrictions on speech that are content-based—
8 *i.e.*, that "appl[y] to particular speech because of the topic discussed or the idea or message
9 expressed" (*id.* at 2227)—"are presumptively unconstitutional and may be justified only if the
10 government proves that they are narrowly tailored to serve compelling state interests" (*id.* at
11 2226) (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992), and *Simon & Schuster, Inc. v.*
12 *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). And this presumption of
13 unconstitutionality is even stronger in cases where a prior restraint has been imposed; in such
14 cases, the government must carry a "heavy burden" in order to justify the restraint. *Org. for a*
15 *Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *see also, e.g., Neb. Press Ass'n v. Stuart*, 427
16 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the
17 least tolerable infringement on First Amendment rights").

18 The Court's June 13, 2018 standing order imposes a prior restraint on the parties' speech:
19 virtually from the outset of the case, the parties may not "discuss" settlement prior to the court's
20 decision on a class certification motion. ECF No. 16.¹ And that restriction is content-based,
21 because it is limited to a single topic: settlement. *Id.* The restriction is presumptively invalid,
22 therefore, unless it satisfies strict scrutiny.

23 Logitech respectfully contends that the order cannot pass that stringent test. Even
24 assuming that preventing "collusive" settlements in which class claims are unduly discounted
25 rises to the level of a compelling state interest, the restriction on settlement talks manifestly is

26 ¹ The Court's order is subject to the constraints of the First Amendment. *See, e.g., Levine v. U.S.*
27 *Dist. Court for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985) (stating that "[w]e
28 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).

1 not the “least restrictive means to further [that] interest,” as it must be in order to satisfy strict
2 scrutiny. *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

3 On the contrary, the Court could accomplish its stated purpose without restricting any
4 speech at all, by simply adhering to Rule 23’s class certification and settlement procedures. If the
5 parties were to agree to a classwide settlement before class certification, the Court would be
6 obliged to determine whether the proposed settlement class satisfied the requirements of Rule
7 23(a) and (b). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting
8 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“A district court “must pay
9 ‘undiluted, even heightened, attention’ to class certification requirements in a settlement
10 context.”)). The Court would therefore have ample ability to examine, for example, whether
11 Plaintiff is an adequate class representative (Fed. R. Civ. P. 23(a)(4)), including his standing to
12 bring a claim, and whether the class is sufficiently cohesive to warrant certification (*id.* 23(a)(2),
13 (3)). To satisfy the Rule 23 analysis, the Court could require the parties to do as much
14 “homework” as would be needed to certify a class before a settlement had been reached. The
15 only difference is that a settlement class need not establish that the class is manageable for
16 purposes of trial. *Amchem*, 521 U.S. at 620.

17 The Court would also have the opportunity to assess the fairness of the proposed
18 settlement before approving it. *See* Fed. R. Civ. P. 23(e) (“The claims . . . of a certified class may
19 be settled, voluntarily dismissed, or compromised only with the court’s approval.”). The
20 settlement would be approved if, and only if, the Court concluded after a fairness hearing “that
21 the settlement taken as a whole is fair, reasonable, and adequate.” *In re Bluetooth Headset Prods.*
22 *Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *see* Fed. R. Civ. P. 23(e)(2). And under Ninth
23 Circuit precedent, any settlement agreed to before class certification would be subject to “a
24 higher standard of fairness,” given the “unique” concerns involved in such settlements. *Hanlon*,
25 150 F.3d at 1026. The Court would therefore be able to examine whether the benefits to the
26 members of the settlement class were fair in light of the risks of litigation, and to reject the
27 settlement if it believed the settlement was improperly “collusive.”

28 In short, Rule 23 gives the Court ample “authority and discretion to protect the interests

1 and rights of class members and to ensure its control over the integrity of the settlement approval
2 process.” *Hanlon*, 150 F.3d at 1025. Logitech respectfully requests that the Court reconsider its
3 order prohibiting the parties from discussing settlement, particularly given the Court’s
4 considerable authority to protect the putative class.

5 **2. The Order Infringes The Parties’ Right To Petition**

6 Logitech also respectfully contends that the Court’s June 13, 2018 order violates the First
7 Amendment’s Petition Clause. The right of petition is “one of the most precious of the liberties
8 safeguarded by the Bill of Rights” (*BE & K Const. Co. v. NLRB*, 536 U.S. 516, 524 (2002)
9 (internal quotation marks omitted), and encompasses “[t]he right of access to the courts.” *Cal.*
10 *Mot. Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Thus, as the Ninth Circuit
11 has recognized, “[r]estricting access to the courts is . . . a serious matter” with grave First
12 Amendment implications. *Ringgold-Lockhart v. Cty. of L.A.*, 761 F.3d 1057, 1061 (9th Cir.
13 2014).

14 The Court’s order infringes upon the parties’ access to the Court. Although both parties
15 have indicated a strong interest in settlement, they are forbidden from even submitting a
16 proposed settlement agreement to the Court for consideration. This is an extraordinary measure;
17 courts are ordinarily loath to bar litigants *ex ante* from seeking relief from a court. *Cf. Ringgold-*
18 *Lockhart*, 761 F.3d at 1062 (noting that pre-filing orders for vexatious litigation conduct
19 “impose[] a substantial burden on the free-access guarantee” and “should rarely be filed”)
20 (internal quotation marks omitted). And in light of the procedural mechanisms detailed above,
21 the bar on pre-certification settlement is unnecessary. There is no need for the Court to bar the
22 parties outright from seeking approval of a proposed settlement as long as it retains plenary
23 authority to review both the putative class and any proposed settlement under Rule 23. Logitech
24 thus respectfully asks the Court to reconsider its standing order’s bar on pre-certification
25 settlement and its implications for the Petition Clause.

26 **B. The Order Conflicts With Policy Favoring Settlements**

27 Logitech also respectfully states that the Court’s June 13, 2018 order runs counter to
28 “strong judicial policy that favors settlements, particularly where complex class action litigation

1 is concerned.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); see also *Wal-*
2 *Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) (“The compromise of
3 complex litigation is encouraged by the courts and favored by public policy”); *In re U.S. Oil &*
4 *Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (“Public policy strongly favors the pretrial
5 settlement of class action lawsuits.”). Settlement is beneficial to litigants and the Court: it
6 conserves the Court’s and the parties’ resources, and it often allows the parties to reach a
7 mutually acceptable resolution to a dispute rather than going to trial and running the risk of an
8 all-or-nothing verdict. For these reasons, both the Ninth Circuit’s and this District’s rules seek to
9 encourage settlement by providing voluntary or mandatory settlement mechanisms to parties. *See*
10 Ninth Cir. R. 33-1 (creating the Circuit Mediation Office); N.D. Cal. ADR Local Rule 3
11 (creating a multi-option ADR program for civil cases).

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

19 Recent developments underscore that policy considerations are in accord and that the
20 Court has numerous tools at its disposal to guard against collusion without prohibiting settlement
21 discussions or settlement prior to class certification:

22 **1. Amended Fed. R. Civ. P. 23 Demonstrates That Policy Considerations**
23 **Favor Early Resolution**

24 Since the Court’s August 23 Order, there have been certain amendments made to Fed. R.
25 Civ. P. 23, which became effective on December 1, 2018. *See* Exhibit B. The amendments
26 confirm that policy considerations favor permitting the parties to engage in settlement
27 discussions and to submit a proposal to the Court to settle this case. In light of these
28 amendments, Logitech asks the Court to reconsider its orders, and permit the parties to engage in

1 settlement discussions, and to submit a proposal for the Court’s consideration, now.

2 As amended, Rule 23(e)(1)(B)(ii) now requires a district court to determine that it “will
3 likely be able to . . . certify the class” before giving notice to class members of a proposed
4 settlement. Ex. B at 9-10. Rule 23(e)(1)(A) now requires the settling parties to “provide the court
5 with information sufficient to enable it to determine whether to give notice . . . to the class,”
6 including information on the class’s certifiability. *Id.* These amendments reflect the Advisory
7 Committee’s judgment that the suitability of a case for class certification is a “key element” of a
8 court’s determination regarding whether to give notice of a settlement, and that, “*if a class has*
9 *not been certified,*” the parties must give the court a sufficient basis in the record to conclude that
10 it will be able to certify the class “after the final hearing.” *Id.* at 38 (emphasis added).

11 In short, the revised Rule 23(e)(1) recognizes that, contrary to the Court’s June 13, 2018
12 order, parties to class actions may settle their disputes—and submit their settlement agreements
13 to the district court—*before* class certification. The revised rule ensures that, in a precertification
14 settlement, the district court will have two opportunities to scrutinize whether the settlement
15 class meets the requirements of Rule 23(a) & (b)—on a preliminary basis before approving
16 notice to the proposed class, and then more comprehensively before approving the settlement.
17 Because it prohibits *any* settlement discussions or proposals until a class has been certified,
18 Logitech respectfully contends that the Court’s standing order conflicts with Rule 23, and that
19 the Rule contains already-robust protections in itself.

20 **2. The United States District Court for the Northern District of** 21 **California’s Procedural Guidance for Class Action Settlements**

22 On November 1, 2018, the Northern District of California updated its Procedural
23 Guidance for Class Action Settlements.² The Northern District of California amended the
24 updated guidance on December 5, 2018. *See* Exhibit C (a true and correct copy of the Northern
25 District of California’s guidance, downloaded on Dec. 31, 2018). The guidance confirms that
26 policy considerations in this District anticipate that parties to litigation may engage in settlement

27 _____
28 ² The current version of the Northern District’s guidance can be found at
<https://www.cand.uscourts.gov/ClassActionSettlementGuidance>.

1 discussions prior to class certification, and provides safeguards regarding the same. In light of
2 this guidance, Logitech asks the Court to reconsider its orders, and permit the parties to engage
3 in settlement discussions, and to submit a proposal for the Court's consideration, now.

4 Specifically, the Northern District of California's guidance anticipates that settlements
5 may occur prior to class certification, and states that the motion for preliminary approval should
6 include, "[i]f a litigation class has not been certified, any differences between the claims to be
7 released and the claims in the operative complaint and an explanation as to why the differences
8 are appropriate in the instant case." (Emphasis added.) The guidance also provides methods by
9 which parties and the Court can protect against collusion and guarantee that a class settlement is
10 fair and appropriate. The guidance is another recent data point that policy favors permitting
11 parties to class actions to settle their disputes—and submit their settlement agreements to the
12 district court—*before* class certification.

13 For all of these reasons, Logitech respectfully requests that the Court permit the parties to
14 engage in settlement discussions and, if a reasonable settlement can be reached, to submit to the
15 Court for its review a settlement proposal prior to the Court ruling on a motion for class
16 certification.

17 **IV. CONCLUSION**

18 Logitech respectfully requests that its motion for reconsideration of the Court's June 13,
19 2018 standing order and August 23, 2018 order be granted. Specifically, Logitech respectfully
20 requests that the parties be permitted to enter into settlement discussions now, and if the parties
21 are able to agree to proposed settlement terms, to submit a proposed settlement agreement to the
22 Court for its review and consideration.

23 Dated: January 8, 2019

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Rebecca B. Johns

26 By: /s/ Dale J. Giali
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27 Attorneys for Defendant Logitech Inc.

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 9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**
 11 **SAN FRANCISCO DIVISION**

12 JAMES PORATH, individually on behalf of all
 13 others similarly situated individuals,

14 Plaintiffs,

15 v.

16 LOGITECH, INC., a California corporation,

17 Defendant.

Case No. 3:18-cv-03091

**[PROPOSED] ORDER GRANTING
 DEFENDANT LOGITECH, INC.'S
 MOTION FOR RECONSIDERATION
 OF THE COURT'S JUNE 13, 2018 AND
 AUGUST 23, 2018 ORDERS
 PROHIBITING SETTLEMENT
 DISCUSSIONS PRIOR TO A RULING
 ON CLASS CERTIFICATION**

Date: TBD
 Time: TBD
 Location: TBD

Hon. William Alsup

Action Filed: May 23, 2018

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This matter is before the Court on Defendant Logitech, Inc.’s Motion for Leave to Seek Reconsideration. After consideration of the brief and all other matters presented, the Court concludes that Logitech’s motion for reconsideration of the Court’s June 13, 2018 standing order and August 23, 2018 order should be granted.

Accordingly, IT IS HEREBY ORDERED THAT Logitech’s Motion is GRANTED and the parties are permitted to:

1. Engage in settlement discussions now, absent any order on class certification; and
2. If the parties agree on a settlement, submit to the Court a proposed settlement agreement for the Court’s review and consideration.

IT IS SO ORDERED.

DATED: _____

Honorable William Alsup
United States District Judge