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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

No. C 18-03091 WHA

Plaintiff,

v.

**ORDER DENYING
CLASS CERTIFICATION**

LOGITECH, INC.,

Defendant.

_____ /

INTRODUCTION

In this consumer putative class action, plaintiff moves to certify two classes under Rule 23(b)(3). For the reasons stated herein, however, the proposed class representative, a three-time convicted felon, cannot be trusted as a fiduciary to lead any class. The motion for class certification is **DENIED**.

STATEMENT

Defendant Logitech, Inc. manufactures, distributes, and sells a computer speaker system called the “Logitech Z200.” The complaint alleges that Logitech falsely and deceptively advertised its Z200 speakers as containing four drivers when two of those “drivers” did not independently produce sound and were merely parasitic. In brief, speaker systems contain a component called a “driver,” which is an electromagnetic coil that turns modulated electrical

1 signals into sound waves. So, the greater number of drivers, the louder, perhaps richer, the
2 sound (Dkt. No. 1 ¶¶ 1, 3–5, 30, 32, 41, 42).

3 Another component in the Z200 looks like a driver, but does not independently produce
4 sound, called the “passive driver” (by Logitech) or the “passive radiator” (by plaintiff). This
5 component merely allows sound to resonate within a set frequency range. The essential legal
6 question is whether Logitech engaged in fraud when it advertised this passive component as a
7 “driver” (*id.* ¶¶ 4, 35).

8 Plaintiff’s law firm discovered this discrepancy, advertised for a plaintiff, and James
9 Porath answered the call. He owns a small business specializing in electronics repairs. He
10 purchased Logitech Z200 speakers from a third-party website called Newegg.com. Plaintiff
11 soon “discovered” that the speakers at issue here did not contain four drivers, but instead
12 contained two “active” drivers and two “passive” drivers (Porath Decl. ¶¶ 3–5, 9) (Balabanian
13 Decl. ¶ 3) (Dkt. Nos. 57-2; 61-1).

14 In May 2018, plaintiff filed the instant putative class action, alleging three claims:
15 (i) common law fraud; (ii) violation of Section 17200 of the California Business and
16 Professions Code; and (iii) violation of Section 17500 of the California Business and
17 Professions Code. Plaintiff also sought to represent two consumer classes under Rule 23(b)(2)
18 and Rule 23(b)(3). *First*, he sought to represent a nationwide class of “[a]ll individuals in the
19 United States who purchased Logitech’s Z200 stereo sound system.” *Second*, he sought to
20 represent a California subclass of “[a]ll members of the [n]ationwide [c]lass that are domiciled
21 in the State of California.” In July 2018, defendant answered the complaint (Dkt. Nos. 1 ¶ 47;
22 18).

23 In August 2018, two days before the initial case management conference, plaintiff
24 moved to be appointed interim class counsel so that the parties could discuss class-wide
25 settlement (Dkt. No. 25). Here, this order pauses to provide context. To protect absent class
26 members and to assist counsel in understanding the factors the Court considers in evaluating
27 proposed class settlements, the undersigned judge has long provided guidance to both sides at
28 the outset of any proposed class action. One aspect of this guidance has regulated the timing of

1 class-wide settlement discussions. Specifically, the order herein prohibited any discussion of
2 class settlement prior to the certification of claims worthy of class treatment and identifying the
3 scope of any class. Prior to formal class certification, there is a risk that class claims will be
4 discounted, not only on the merits (which is proper) but also by the risk that class certification
5 might be denied (which is improper or at least adverse to absent class members). Or, to quote
6 directly from the order (Dkt. No. 16 at 5) (internal citation omitted) (emphasis added):

7 Absent class members, of course, should be subject to normal
8 discounts for risks of litigation on the merits but they should not
9 be subject to a further discount for a risk of denial of class
10 certification, such as, for example, *a denial based on problems*
11 *with a proposed class representative, including a conflict of*
12 *interest or a prior criminal conviction.* This is a main reason the
13 Court prefers to litigate and vet a class certification motion *before*
14 any class settlement discussions take place. That way, the class
15 certification is a done deal and cannot compromise class claims.
16 Only the risks of litigation on the merits can do so.

17 Once a class is certified, counsel for the class can negotiate with the strength of a
18 certification order in hand, all to the good of the class. Nevertheless, the order also advised that
19 “[i]f counsel believe settlement discussions should precede a class certification, a motion for
20 appointment of interim class counsel must first be made” (*ibid.*). This guidance order issued
21 herein in June 2018.

22 Despite this express reference to a prior criminal conviction, plaintiff’s counsel
23 neglected to vet their client’s criminal history and moved to be appointed as interim class
24 counsel. The parties even stipulated to reasons why they believed pre-class certification
25 settlement discussions might have been appropriate at that moment (Dkt. No. 24 at 2). In
26 considering the arguments from the parties’ motion at the initial case management conference,
27 the Court explained the problem as follows (Dkt. No. 30 at 3:14–23, 4:5–6) (emphasis added):

28 See, 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 So we are going to find out if you have got a
legitimate class first.

1 So, again, the Court flagged the danger in discussing settlement on a class-wide basis
2 when there is a plaintiff with a criminal history. To be clear, the judge had no clue that James
3 Porath was, in fact, a convicted felon. The judge, though, had seen that scenario enough in the
4 past to use it as an illustration. The Court ended by urging counsel on both sides to do their
5 homework and specifically told counsel: “I want to go through the normal Rule 23 process. I
6 want to see if the plaintiff is a legitimate plaintiff. I want to see if he’s got standing.” The
7 Court then denied plaintiff’s interim counsel motion (*id.* at 11:7–8, 18–19).

8 Unsatisfied with this ruling, Logitech petitioned our court of appeals seeking an
9 extraordinary petition for writ of mandamus on the theory that the Court’s standard guidance
10 violated Rule 23 as well as Logitech’s First Amendment rights. In December 2018, our court of
11 appeals denied Logitech’s extraordinary writ without prejudice because its arguments had never
12 been raised below. In January 2019, Logitech raised those arguments in the district court but an
13 order rejected them. Logitech then renewed its petition. In February 2019, eight days before
14 the deadline for plaintiff’s motion for class certification, our court of appeals granted an
15 emergency stay of the action in full. Our court of appeals then sent the petition to a merits
16 panel, which held oral argument in July 2019. In September 2019, the merits panel denied the
17 petition. The stay was lifted. Logitech next applied for an emergency stay with our court of
18 appeals predicated on the representation it would pursue a petition for writ of certiorari “within
19 thirty days.” Our court of appeals denied the emergency motion. One week later, in October
20 2019, Logitech applied for an emergency stay from the United States Supreme Court. Justice
21 Elena Kagan denied that application. Logitech’s thirty days has since come and gone and no
22 petition for writ of certiorari has been filed (Dkt. Nos. 36, 38, 40, 46, 47, 53, 58; Case No. 19-
23 70248, 9th Cir. Sept. 24, 2019, Dkt. No. 26 at 1; Appl. No. 19A376, Kagan, Circuit Justice
24 2019).

25 Meanwhile, after the stay lifted, the undersigned judge resumed the class certification
26 process and gave plaintiff fourteen days to move for class certification. (The stay originally had
27 come eight days before the motion had been due.) Plaintiff complied with the deadline and
28 filed a timely motion for class certification (Dkt. Nos. 54, 57).

1 For the first time ever in this case, it came to light that “Porath does have some criminal
2 history,” according to plaintiff’s opening brief (Dkt. No. 57 at 12). No further detail was given.

3 One week later, after our court of appeals denied Logitech’s emergency stay pending
4 possible review in the Supreme Court, plaintiff’s counsel volunteered a supplemental brief in
5 the district court to disclose that *plaintiff James Porath was a convicted felon three times over*.
6 Further detail on these convictions will be provided below. Logitech’s counsel immediately
7 expressed apparent indignation as to the lateness of plaintiff’s disclosure. An order then asked
8 each side to say when counsel (on both sides) had received information on plaintiff’s criminal
9 history. The order also asked plaintiff’s counsel to explain the full extent to which the
10 pendency of the emergency motion was a consideration in their staged disclosure of the
11 criminal history, meaning disclosing merely that he had “some criminal history” while the
12 emergency stay was pending and later disclosing the felonies immediately after the stay was
13 denied. The order also invited counsel to seek leave to add a different named plaintiff (Dkt.
14 Nos. 61–63).

15 In response, plaintiff’s counsel brought even more crimes to the Court’s attention,
16 although none of the new crimes were felonies. For their part, defense counsel revealed that
17 they had known of plaintiff’s criminal history since February 2019. They had revealed the
18 information to no one, not to plaintiff, not to this Court, not to the court of appeals, and not to
19 the Supreme Court. Despite an invitation to move to add a new plaintiff, no new plaintiff so
20 moved (Dkt. Nos. 69 ¶ 8; 70; 74-1 ¶ 17).

21 After all that we have gone through in this case, including trips to the court of appeals
22 and even to the chambers of Justice Kagan, the reader will readily appreciate the district judge’s
23 disappointment in the failure of both sides to bring the felony record to anyone’s attention, the
24 issue of a possible criminal history having been in play during the appellate proceedings.
25 Throughout the appellate proceedings, one justification by the district judge for his
26 postponement of settlement discussions until after a Rule 23 ruling was possible unsuitability of
27 the named plaintiff by reason of a criminal record. Nevertheless, Logitech kept this information
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1 from every court involved. Had that information been disclosed, the pragmatism of the district
2 court’s exercise of discretion would have been all the more apparent.

3 We now have a Rule 23 motion with a convicted felon proposed as the class
4 representative. This motion, despite the Court’s disappointment with counsel, must be and will
5 be decided fairly and based on the law. Plaintiff Porath moves for certification of two classes.
6 *First*, plaintiff Porath proposes he represent the following nationwide “fraud” class (Dkt. No. 57
7 at 3):

8 All United States persons, except for citizens of Delaware and
9 Florida, who purchased Logitech’s Z200 stereo sound system
10 prior to May 23, 2018, either in person or from a website page
11 containing any of the following phrases (or derivations thereof):
12 “Two drivers per speaker,” “Two drivers per satellite,” “Two 2.5”
13 drivers per speaker,” “Two 2.5” drivers per satellite,” “Two 2.5
14 drivers per speaker,” “Two 2.5 drivers per satellite,” “Two 2.5-
15 inch drivers satellite,” “Two 2.5-inch drivers per speaker,” “Four
16 high quality 2.5-inch drivers,” “Two 2.5” drivers,” “Two 2.5”
17 (6.3-cm) drivers per satellite.”

18 (In his briefing, plaintiff Porath abandoned an attempt to represent citizens of Delaware and
19 Florida because those states do not allow class actions for fraud) (Dkt. No. 75 at 14). *Second*,
20 he also proposes to represent the following California subclass: All class members domiciled in
21 the State of California (Dkt. No. 57 at 3).

22 Perhaps because Porath made significant admissions at his deposition, Logitech does not
23 invoke plaintiff’s criminal history in opposing class certification. And, no doubt defense
24 counsel relish the opportunity to lay the felonies before the jury. A defendant, however, cannot
25 stipulate for the class. The district judge must protect the class even as to points not raised by
26 the defense. *See, e.g., Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 968 (9th Cir. 2009).

27 ANALYSIS

28 The party seeking class certification bears the burden of showing that the four
prerequisites of Rule 23(a) are met: (1) numerosity; (2) commonality; (3) typicality; and
(4) adequate representation. For a damages class under Rule 23(b)(3), a plaintiff must show
predominance and superiority.

The adequacy requirement of Rule 23(a)(4) permits certification only if “the
representative parties will fairly and adequately protect the interests of the class.” A district

1 court acts within its discretion when determining a named plaintiff inadequate due to a recent
2 criminal record. *Cf. Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir.
3 2012) *cert. denied*, 569 U.S. 975 (2013).

4 Plaintiff's lengthy and recent criminal history is disqualifying here. The criminal
5 history is as follows.

6 Plaintiff is a convicted felon three times over. In March 2013, plaintiff pled guilty to
7 three felony charges in exchange for a sentence of three years probation in addition to time
8 served. The first charge, for felony burglary, stemmed from September 2011 when plaintiff
9 entered into the home of his ex-wife and her boyfriend and took undisclosed items. The second
10 and third charge, for grand theft of property over \$950 and vandalism of \$400 or more,
11 stemmed from June 2011, when plaintiff took items out of his ex-wife's boyfriend's car (Porath
12 Decl. ¶¶ 5, 10; Logan Decl. Exh. 1 at 4) (Dkt. Nos. 61-2; 69-1).

13 In addition, plaintiff's criminal history included other misdemeanor convictions and
14 miscellaneous charges and arrests. In December 2001, in a dispute with plaintiff's brother,
15 plaintiff threw a brick through his brother's car window. He was charged with two
16 misdemeanors: (1) vandalism under \$1000 damage and (2) assault with a deadly weapon. The
17 former charge was dismissed. Plaintiff was convicted of the latter charge and subsequently
18 completed 36 months of probation. In October 2011, plaintiff was also charged with a
19 misdemeanor for contempt of court because plaintiff had walked onto his ex-wife and her
20 boyfriend's driveway, despite a restraining order. This charge was eventually dropped.
21 Furthermore, after avoiding jail time for his three felony convictions, plaintiff struggled with
22 depression and substance abuse. He did not check in with his probation officer. Then, in
23 March 2015, while still on probation, plaintiff was pulled over for speeding with his child in the
24 car. Plaintiff pled guilty to a misdemeanor of willful cruelty to a child. Plaintiff's probation
25 was subsequently revoked and plaintiff was sentenced to 315 days of jail time (Porath Decl.
26 ¶¶ 2 n.1, 6, 11-12; Logan Decl. Exh. 1 at 10) (Dkt. Nos. 61-2; 69-1).

27 Then, after this Court ordered that plaintiff provide his full criminal history, even more
28 came to light as follows:

1 In September 2001, plaintiff was cited for allowing his younger brother's girlfriend who
2 was not licensed to drive, to drive a car in which plaintiff was a passenger. Plaintiff failed to
3 appear at his hearing and was charged with a misdemeanor for his failure to appear. (The
4 charges were ultimately dismissed in 2006 and the case purged in 2012.) In December 2004,
5 plaintiff was arrested outside a Fry's electronics store in San Diego county on suspicion of
6 shoplifting. To the extent charges were ever filed, they were dismissed. The record on this
7 appears to have been expunged. In September 2009, plaintiff pled guilty to two misdemeanors
8 in Riverside County for (i) harassing by telephone and (ii) contempt of court. A felony charge
9 of making death threats was dismissed (Logan Decl. Exhs. 1 at 6, 12; 4 at 2; 5 at 1; Suppl.
10 Porath Decl. ¶¶ 3-5) (Dkt. Nos. 69-1; 70).

11 In short, to saddle a class with a representative who has seven criminal convictions, is a
12 convicted felon three times over, has a history of substance abuse, and of not reporting to his
13 probation officer, and of depression, is unacceptable. Two problems exist.

14 The first problem is Rule 609 and the risk that plaintiff could be clobbered on the stand
15 with his convictions, all to the detriment of the class. His felony convictions would be
16 admissible here. They will be particularly damaging to plaintiff's case here, where the element
17 of *reliance* will hinge on plaintiff's testimony. That is, in order for plaintiff to assert a claim
18 under either Section 17200 or Section 17500, plaintiff must have *relied* on Logitech's
19 representation. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326-27 (2011). Plaintiff
20 shows reliance in the instant motion by pointing only to his deposition testimony that he in fact
21 relied on defendant's representations (Dkt. No. 75 at 10-11). The possibility of impeachment
22 from plaintiff's three felony convictions is high, all to the detriment of the class depending on
23 him. Perhaps some misdemeanor convictions will also be admissible. But the felony
24 convictions are enough to make the point.

25 The second problem is that Rule 23 class representatives owe fiduciary duties to absent
26 class members and are responsible for critical litigation decisions on the class's behalf. The
27 class representative must be trusted in selecting counsel, responding to discovery, and guiding
28 settlement negotiations, among other duties.

1 This order finds that plaintiff is not an adequate Rule 23 class representative because he
2 is unfit to properly exercise his fiduciary duties to absent class members. He has a fifteen-year
3 history of crime stretching from 2001 to 2015, including an admitted four-year period of drug-
4 abuse. The tally since 2001 includes three felony convictions, four misdemeanor convictions,
5 and miscellaneous arrests and charges. The convictions include burglary, theft, vandalism,
6 willful cruelty to a child, and assault with a deadly weapon. In some cases, these were not
7 crimes against strangers, but crimes against family victims who should have been able to trust
8 plaintiff. This history is so deep, plaintiff himself evidently could not remember every wrong.

9 Plaintiff’s counsel contend that plaintiff worked with counsel to prepare his two
10 declarations and drove more than eight round-trip hours for his deposition. This shows,
11 according to counsel, that plaintiff will vigorously represent the class. In addition, plaintiff’s
12 counsel argue that plaintiff “has a true story of redemption to tell, and will make for a superior
13 witness at trial” (Dkt. No. 75 at 12). Indeed, plaintiff has allegedly tested clean on every drug
14 test since March 2016 and has broken no laws since his release in March 2016. He now even
15 has full legal and physical custody of his daughter. And, his parole came to an end in March of
16 this year, while this case was pending (Porath Decl. ¶¶ 14–16) (Dkt. No. 61-2).

17 Completion of parole is hardly a qualification for a fiduciary post, much less for the
18 fiduciary responsibility of a nationwide class under Rule 23. Plaintiff’s crime spree remains too
19 recent, too tender.

20 In short, plaintiff engaged in burglary, violated restraining orders, vandalized homes and
21 vehicles, endangered his child, became addicted to drugs, and routinely failed to report to his
22 probation officer. Class members should not be saddled with such a representative.
23 Accordingly, Rule 23(a)(4) is not satisfied. This order finds that plaintiff James Porath cannot
24 fairly and adequately protect the interest of the proposed class.

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CONCLUSION

Plaintiff’s motion for class certification is **DENIED**. All evidentiary objections are **OVERRULED**. At the hearing, plaintiff’s counsel stated that he had another California plaintiff waiting in the wings. This order now gives plaintiff’s counsel yet another chance to seek to add a new proposed class representative. The new deadline will be **DECEMBER 19, 2019**. Porath will remain an individual plaintiff. If a new representative is not timely proposed, then plaintiff’s counsel will likely have to provide notice to absent class members of the demise of this class action.

IT IS SO ORDERED.

Dated: November 18, 2019.


WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE