

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PHIL SHIN,  
Plaintiff,  
v.  
PLANTRONICS, INC.,  
Defendant.

Case No. 18-cv-05626-NC

**ORDER GRANTING  
PLAINTIFF’S RENEWED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS  
ACTION SETTLEMENT**

Re: Dkt. No. 70

Before the Court is plaintiff Phil Shin’s motion for preliminary approval of the parties’ amended class action settlement. *See* Dkt. No. 70. Because the amended settlement addresses the shortcomings identified in the Court’s previous order denying preliminary approval and the proposed settlement class is appropriate for class certification, the Court GRANTS Shin’s motion.

**I. Background**

**A. Factual and Procedural Background**

The factual background and procedural history of this case was previously set forth in greater detail in the Court’s order denying preliminary approval. *See* Dkt. No. 64 at 1–2. The Court will briefly recount it here.

Shin accuses defendant Plantronics, Inc. of selling defective BackBeat FIT wireless headphones (“Headphones”), marketing them as “sweatproof” and “waterproof” when they

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1 are not. *See* Dkt. No. 35 (“FAC”) ¶¶ 1–3, 11. In 2018, Shin brought this class action  
2 lawsuit bringing various consumer class claims. *See id.*

3 The parties settled on March 28, 2019, and Shin filed a motion for preliminary  
4 approval on May 24, 2019. *See* Dkt. Nos, 49, 50, 57. On June 17, 2019, the Court denied  
5 preliminary approval because (1) the proposed settlement sought to settle claims not  
6 alleged in the complaint; (2) the settlement was inadequate; and (3) proposed notice was  
7 also inadequate. *See* Dkt. No. 70.

8 The parties amended their settlement agreement and Shin moved for approval of the  
9 amended settlement agreement on July 31, 2019. *See* Dkt. No. 70; *see also* Dkt. No. 70-1  
10 (“Settlement”). The Court held a hearing on Shin’s motion on August 12, 2019. *See* Dkt.  
11 No. 73. This order follows.

12 **B. Amended Settlement Agreement**

13 As with the prior settlement agreement, the Settlement seeks to settle claims for a  
14 proposed settlement class of “all Persons domiciled within the United States and its  
15 territories who purchased at retail the Headphones . . . during the period of time from April  
16 1, 2014 through the Notice Date.” *See* Settlement § 3.8.

17 Class members are entitled to one of three alternative remedies. *See id.* § 6.  
18 Alternative 1 is an extended limited warranty that runs from the effective date of the  
19 Settlement. *See id.* § 6.2. This alternative is limited to class members who purchased  
20 Headphones after January 1, 2018. *Id.* Under the extended warranty, class members may  
21 receive a functional replacement<sup>1</sup> if their Headphones suffers from a battery, battery  
22 charging, battery performance, waterproofing, moisture, or sweat-proofing issue. *Id.*  
23 §§ 6.2(b), 6.4. Alternative 2 is a \$50 cash payment. *See id.* § 6.6.1. To qualify for this  
24 alternative, class members must provide proof of purchase and evidence that they had  
25 previously complained to Plantronics that their Headphones did not function properly due  
26

27 \_\_\_\_\_  
28 <sup>1</sup> The replacement headphones are not identical to the Headphones at issue; they “are a new design and utilize batteries from a different manufacturer than the Headphones that are the subject of this litigation.” *See* Dkt. No. 57-7 (“Goldenberg Decl.”) ¶ 9.

1 to a battery, battery charging, battery performance, waterproofing, moisture, or sweat-  
2 proofing issue. *Id.* § 6.6.1(b), (c). Alternative 3 is a \$25 cash payment. *See id.* § 6.6.2.  
3 Under this alternative, class members must provide proof of purchase and only need to  
4 attest that their Headphones malfunctioned or failed to work properly due to a battery,  
5 battery charging, battery performance, waterproofing, moisture, or sweat-proofing. *Id.*  
6 § 6.6.2(b), (c).

7 In return, class members who do not opt out of the settlement agree to release all  
8 claims relating to “the Headphones’ battery, battery performance, ability to retain a charge,  
9 or the Headphones’ resistance to water, moisture, or sweat” and Plantronics’s advertising  
10 relating to the Headphones. *Id.* § 11.1. Other claims are not waived. *Id.* § 11.2.

11 Under the Settlement, the Settlement Administrator is responsible for providing  
12 notice. *See id.* § 7. A full Settlement Notice and Short Form Notice will be sent to  
13 individuals who purchased or registered their Headphones from Plantronics, and  
14 reasonably identifiable individuals who purchased the Headphones from third parties. *Id.*  
15 §§ 7.3(a), (b); *see also* Dkt. Nos. 70-8 (full Settlement Notice), 70-9 (Short Form Notices).  
16 The Settlement requires Class Counsel to subpoena third-party retailers to provide contact  
17 information for customers who purchased the Headphones and seek Court assistance if  
18 necessary. *Id.* § 7.3(d); *see also* Dkt. No. 72. In addition, the Settlement Administrator  
19 will also publish the Settlement Notice and maintain a website for class members to submit  
20 claims. *See* Settlement §§ 7.4, 7.5.

## 21 **II. Findings and Conclusions**

22 1. The capitalized terms used in this Order have the same meaning as defined in  
23 the Settlement except as otherwise expressly provided.

24 2. Per the Parties’ representations at the August 12, 2019, hearing, the Court  
25 defines “Notice Date” as referenced in in paragraph 3.22 of the Settlement as the date by  
26 which the Settlement Administrator and any third parties must complete the mailing or  
27 emailing of the full Settlement Notices and Short Form Notices to Class Members, which  
28 must be no later than October 31, 2019.

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1           3. Pursuant to Federal Rule of Civil Procedure 23, the Court preliminarily  
2 certifies, for settlement purposes only, the Settlement Class defined as follows:

3           All Persons domiciled within the United States and its territories who  
4 purchased at retail the Headphones, as defined in the Agreement and described  
5 in the Complaint, during the period of time from April 1, 2014 through the  
6 Notice Date (the “Class Members”). Excluded from the Class is Defendant  
7 and its officers, directors and employees; Class Counsel and their partners,  
8 associates, lawyers, and employees; and the judicial officers and their  
9 immediate family members and associated Court staff assigned to this case.

10           4. The Court finds that the Settlement Class satisfies the requirements of  
11 Federal Rule of Civil Procedure 23(a): (1) the Class exceeds 1.2 million members,  
12 satisfying numerosity; (2) there are common questions of law and fact, including whether  
13 the Headphones perform as represented or contain a defect, satisfying commonality; (3)  
14 the proposed Class Representative’s claims are typical, in that he is a member of the Class  
15 and alleges that he has been damaged by the same conduct as other members of the Class;  
16 the proposed Class Representative; and (4) Class Counsel can fully, fairly, and adequately  
17 protect the interests of the Class.

18           5. The Court also finds that the Settlement Class satisfies the requirements of  
19 Federal Rule of Civil Procedure 23(b)(3) because: (1) question of law and fact common to  
20 members of the Class predominate over questions affecting only individual members for  
21 settlement purposes; and (2) a nationwide class action for settlement purposes is superior  
22 to other available methods for the fair and efficient adjudication of this controversy.

23           6. For the purposes of settlement, the Court appoints plaintiff Phil Shin as the  
24 Class Representative for the Settlement Class

25           7. Likewise, the Court appoints Ronald S. Kravitz and James C. Shah of  
26 Shepherd, Finkelman, Miller & Shah, LLP; W.B. Markovits, Terence R. Coates, Paul M.  
27 De Marco, and Justin C. Walker of Markovits, Stock & DeMarco, LLC; and Jeffrey S.  
28 Goldenberg of Goldenberg Schneider, L.P.A. as Class Counsel for the Settlement Class.

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1           8.       The Court preliminarily approves the Settlement, including the proposed  
2 notices and releases, as likely to be approved under Federal Rule of Civil Procedure  
3 23(e)(2), was negotiated at arm’s length with the assistance of private mediators, and is  
4 fair, reasonable, and adequate as to Class Members, subject to further consideration at the  
5 Fairness Hearing described below.

6           9.       A hearing (the “Fairness Hearing”) will be held before the Court on  
7 **December 20, 2019, at 11:00 a.m.** for the following purposes:

- 8                   a. To determine whether the proposed Settlement on the terms and
- 9                               conditions provided for by the Agreement is fair, reasonable, and
- 10                               adequate to the Class and should be approved by the Court;
- 11                   b. To determine whether a Final Approval Order, as defined in the
- 12                               Agreement, should be entered;
- 13                   c. To determine whether the claims process under the Settlement is fair and
- 14                               reasonable and should be approved by the Court;
- 15                   d. To determine whether Plaintiff’s application for attorneys’ fees and
- 16                               reimbursement of expenses and requested service award to the named
- 17                               Plaintiff should be approved; and
- 18                   e. To rule upon such other matters as the Court may deem appropriate,
- 19                               including considering and evaluating any objections that may be made to
- 20                               the Settlement.

21           10.       The Court approves, as to form and content, the various notices attached as  
22 exhibits to the Motion. The Court further finds that the direct mailing (and emailing),  
23 distribution, and publishing of the various notices in the proposed form and manner  
24 described in the Motion meet the requirements of Fed. R. Civ. P. 23 and due process, and  
25 is the best notice practicable under the circumstances, and shall constitute due and  
26 sufficient notice to all persons entitled to notice.

27           11.       The Settlement also complies with the Northern District of California’s  
28 Procedural Guidance for Class Action Settlements:

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1 <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>.

2 12. The Court further finds that the language of the class notices is appropriate  
3 and that the means of notice—including mail notice, electronic notice, and a supplemental  
4 digital publication notice program—is the best notice practicable under the circumstances  
5 under Federal Rule of Civil Procedure 23(c)(2)(B).

6 13. The Court directs Plantronics to notify the appropriate Federal and State  
7 officials about this Settlement under the Class Action Fairness Act of 2005, 28 U.S.C.  
8 §1715. Counsel for Plantronics shall, at or before the Fairness Hearing, file with the Court  
9 proof of compliance with the Class Action Fairness Act of 2005, 28 U.S.C. §1715.

10 14. The Court appoints A.B. Data, Ltd. to serve as the Settlement Administrator,  
11 under the supervision of Class Counsel and Counsel for Defendant, to administer the  
12 notice procedure as well as the processing of claims as more fully set forth below:

13 a. No later than **September 16, 2019**: (i) Class Counsel must begin mailing  
14 by first class mail or emailing to all potential Class Members who can be  
15 identified with reasonable effort the Short Form Notice, substantially in  
16 the form as presented to the Court in the Renewed Motion for  
17 Preliminary Approval of Class Settlement (*see* Dkt. No. 70); (ii) Class  
18 Counsel must post on the Settlement Website the Long Form Notice,  
19 substantially in the form as presented to the Court in the Motion along  
20 with other relevant court documents and settlement information; (iii)  
21 Class Counsel must implement the supplemental Publication Notice  
22 program, substantially in the form as developed by the Settlement  
23 Administrator and as presented to the Court; (iv) Class Counsel must  
24 publish and make available on the Settlement Website the electronic  
25 Claim Form, substantially in the form presented to the Court;

26 b. By **October 31, 2019**, Class Counsel must file an affidavit or declaration  
27 from the Settlement Administrator attesting that the notice and settlement  
28 implementation processes described above have been accomplished; and

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c. By **December 6, 2019**, the Settlement Administrator must prepare a list of the names of the persons who, pursuant to the Class Notice described herein, have excluded themselves from the Settlement Class in a valid and timely manner, and Class Counsel must file that list with the Court. The Court retains jurisdiction to resolve any disputed exclusion requests.

15. To make a claim under the Settlement, each Class Member must take the following actions and be subject to the following conditions:

- a. Class Members must submit a properly executed electronic or hard copy Claim Form to the Settlement Administrator no later than **December 31, 2019**. Each Claim Form submitted via U.S. Mail will be deemed to have been submitted when postmarked (if properly addressed and mailed by first class mail). Each Claim Form electronically submitted will be deemed to be submitted when transmitted. Any Claim Form submitted in any other manner will be deemed to have been submitted when it was actually received at the address designated by the Settlement Notice. Any Class Member who does not submit a Claim Form within the time limit provided is barred from receiving any benefit, unless otherwise ordered by the Court;
- b. The Claim Form submitted by each Class Member must be properly completed, signed, and submitted in a timely manner in accordance with the provisions of the preceding subparagraph; and
- c. As part of the Claim Form, each Class Member shall submit to the jurisdiction of the Court with respect to the claim submitted.

16. By **January 10, 2020**, Class Counsel must file with the Court an update as to the number and dollar amount of claims received by the Settlement Administrator between December 20, 2019 and December 31, 2019.

17. All papers in support of Class Counsel’s request for attorneys’ fees and costs or a service award for the Class Representative must be filed by **November 8, 2019**.

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1 18. All Class Members are bound by all determinations and judgments in the  
2 class action concerning the Settlement, including, but not limited to, the releases provided  
3 for in the Settlement, whether favorable or unfavorable, except those who timely and  
4 validly requested exclusion from the Class and have not opted back in. The persons and  
5 entities who timely and validly requested exclusion from the Class are excluded from the  
6 Class and do not have rights under the Settlement, are not be entitled to submit any Claim  
7 Forms, and are not be bound by the Settlement or the Final Approval Order in this action.

8 19. Any Class Member who requests to be excluded from the Settlement must be  
9 either postmarked by the United States Postal Service (in the case of mailed exclusions) or  
10 actually received by the Settlement Administrator (in the case of electronically submitted  
11 exclusions) by **November 22, 2019**.

12 20. Pending final determination of whether the Settlement should be approved,  
13 Class Counsel, Plaintiff, and Class Members are barred and enjoined from commencing or  
14 prosecuting any action asserting any Released Claims against Plantronics.

15 21. Any Class Member may enter an appearance in this action, individually or, at  
16 their own expense, through counsel of their own choice, in which case such counsel must  
17 file with the Clerk of Court and deliver to Class Counsel and counsel for Plantronics a  
18 notice of such appearance no later than **November 22, 2019**. If they do not enter an  
19 appearance, they will be represented by Class Counsel.

20 22. Any Class Member may appear and show cause, if he, she, or it has any  
21 reason why the proposed Settlement should not be approved as fair, reasonable, and  
22 adequate, or why Class Counsel’s application for an award of attorneys’ fees and for  
23 reimbursement of expenses should not be granted. No person shall be heard or entitled to  
24 contest such matters unless that person files a written request with the Court saying that it  
25 is their “Notice of Intent to Appear at the Fairness Hearing in *Phil Shin, on behalf of*  
26 *himself and all others similarly situated, v. Plantronics, Inc.*, Case No. 5:18-cv-05626-  
27 NC.” If the Class Member intends to have their own attorney speak for them at the  
28 hearing, they must also include the name, address, and telephone number of the attorney



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1 who will appear. The Class Member’s written request must be filed or delivered to the  
2 Court by **November 22, 2019**.

3 23. Any person who does not make their objection in the manner provided in this  
4 Order waives such objection and is forever be foreclosed from making any objection to the  
5 fairness or adequacy of the proposed Settlement, unless otherwise ordered by the Court.  
6 Class Counsel’s response to any such objections or in further support of final approval  
7 must be filed no later than **December 6, 2019**.

8 24. This Order, the Settlement, and any of their terms, and all negotiations,  
9 discussions, and proceedings in connection with this Order and the Settlement, do not  
10 constitute evidence, or an admission by Plantronics, that any acts of wrongdoing have been  
11 committed and may not be deemed to create any inference that there is any liability on the  
12 part of Plantronics. This Order, the Settlement, and any of their terms, and all  
13 negotiations, discussions, and proceedings in connection with this Order and the  
14 Settlement may not be offered or received in evidence or used for any purpose in this or  
15 any other proceeding in any court, administrative agency, arbitration tribunal, or other  
16 forum of any kind or character in the United States or any other country except as  
17 necessary to enforce the terms of this Order or the Settlement.

18 25. The Court authorizes Class Counsel to issue subpoenas to the top ten third-  
19 party retailers and/or distributors of Plantronics Headphones (as identified by Plantronics  
20 and communicated to Class Counsel) to reasonably produce relevant Class Member  
21 contact information and transaction information to Class Counsel for the purpose of  
22 assisting Class Counsel in identifying and/or contacting Class Members to provide notice  
23 of this Amended Settlement and for the purpose of establishing Proof of Purchase as  
24 required by the Amended Settlement.

25 26. Class Counsel must file a written update regarding the third-party retailers’  
26 responses and whether any Court assistance is necessary by **September 23, 2019**. Except  
27 otherwise provided by further Court order, the Court will hold a telephonic discovery  
28 hearing on **September 30, 2019, at 10:00 a.m.**

1 All further proceedings and deadlines in this action are hereby stayed except for  
2 those to effectuate the Settlement and this Order. Relevant deadlines are summarized as  
3 follows:

<b>Notice Date</b>	October 31, 2019
<b>File Motion for Attorneys' Fees, Costs, or Representative Service Award</b>	November 8, 2019
<b>Opt-out or Object to Proposed Settlement</b>	November 22, 2019
<b>File Notice of Intent to Appear at Fairness Hearing</b>	November 22, 2019
<b>Final Approval Hearing</b>	December 20, 2019, at 11:00 a.m.
<b>Submit Claim</b>	December 31, 2019

13  
14 **IT IS SO ORDERED.**

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16 Dated: August 12, 2019

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19 NATHANAEL M. COUSINS  
20 United States Magistrate Judge

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