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17  
18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**  
20 **SAN JOSE DIVISION**

21 ROBERT COLMAN and HILARY  
22 TAUBMAN-DYE, Individually and on Behalf  
of All Others Similarly Situated,

23 Plaintiffs,

24 vs.

25 THERANOS, INC., ELIZABETH HOLMES,  
26 and RAMESH BALWANI,

27 Defendants.

Case No. 5:16-cv-06822-NC

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION TO  
PREVENT SETTLEMENTS WITH  
ABSENT CLASS MEMBERS  
PENDING DISCOVERY**

Hearing Date: April 7, 2017  
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Judge: Hon. Nathanael Cousins

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**OPPOSITION MEMORANDUM OF POINTS AND AUTHORITIES**

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Defendants submit this Opposition to Plaintiffs’ Motion Pursuant to Fed. R. Civ. P. 23(d) to Prevent Settlements With Absent Class Members Pending Discovery and Court Review (the “Motion” or “Mot.”).

**I. INTRODUCTION**

Plaintiffs through their Motion seek to interfere with a pending tender offer transaction whereby Theranos has offered investors in its Series C-1 and C-2 Preferred Stock (the offer recipients are referred to as the “Investors”) the opportunity to tender existing stock in exchange for new shares with enhanced rights, in consideration for providing the Company and its personnel and directors with a release of claims in the Investors’ capacity as stockholders. The Investors are a highly sophisticated group: approximately 40 funds, family offices, and wealthy individuals with average investments of approximately \$17.5 million. The tender offer (which closes on April 14, 2017) is the culmination of negotiations between Theranos and lead investors that began in summer 2016, months before this case was filed. The Investors received repeated disclosures about this litigation, including a specific disclosure that participation in the tender offer would preclude participation in any recovery against Theranos. Under these circumstances, any Investor who chooses to exchange its shares and sign the release has made a knowing, uncoerced, and entirely proper decision to forego participation in this litigation.

Nonetheless, Plaintiffs—two individuals who have never owned Theranos stock and whose case is the subject of a pending motion to dismiss and faces substantial hurdles to class certification should it survive—move the Court to: (i) impose on Defendants a “protocol” for communicating with Theranos’s own investors; (ii) enjoin Defendants from entering into settlements (*i.e.*, enjoin Defendants from completing the tender offer); and (iii) require the parties to embark on unnecessary and premature expedited discovery. The Court should deny the Motion.

1 Under the First Amendment, Rule 23(d), and controlling case law, Plaintiffs must  
2 establish a clear record of abusive conduct to support an order limiting Defendants'  
3 communications with putative class members. Plaintiffs, however, do not offer even a specific  
4 allegation—let alone a shred of clear evidence—of abusive conduct. Instead, Plaintiffs merely  
5 observe that Theranos has been communicating with shareholders about the tender offer, and  
6 then try to shift the burden to Theranos to justify its actions. Mot. 8. But that is not the  
7 standard—*Plaintiffs* have the burden of providing a clear showing, and they have not met it.

8 Moreover, to the extent Plaintiffs seek to preliminarily enjoin Defendants from  
9 entering into settlements, the Plaintiffs not only fail to make the required showing of abusive  
10 conduct under Rule 23(d), but also fail to meet the requirements of Rule 65.

11 Plaintiffs also have not shown good cause for the Court to rescind its order staying  
12 discovery pending a ruling on Defendants' Motion to Dismiss. The request is futile given that  
13 Plaintiffs have not established grounds to enjoin the closing of the tender offer. Further,  
14 Plaintiffs' request would inflict costs on Defendants at a time when it is far from clear that  
15 Plaintiffs even have individual claims against Defendants, let alone that they could ever  
16 represent a class of Theranos's actual investors.

17 Finally, Plaintiffs fare no better with their fallback ground for injunctive relief based on  
18 speculation that Theranos may be disseminating its limited cash to only some shareholders.  
19 Plaintiffs have their facts wrong, as the tender offer does not involve cash consideration.

20 Under these circumstances, the proper result is clear. The Court should deny the  
21 motion. If Plaintiffs' case survives a motion to dismiss, and releases given by any Investors  
22 someday become relevant (*e.g.*, at class certification proceedings), Plaintiffs can then conduct  
23 discovery. But there is no basis for injunctive relief, and no reason to expedite discovery.

## 24 **II. FACTUAL BACKGROUND**

### 25 **A. The Tender Offer**

26 Theranos is a private company founded in 2003 with the goal of making actionable  
27 health information available to everyone, enabling early detection and intervention in disease,  
28

1 and empowering individuals with information. *See* Declaration of David Taylor (“Taylor  
2 Decl.”) ¶ 3.<sup>1</sup> Theranos has never offered securities to the public. *Id.* Instead, Theranos has  
3 periodically raised money from select, highly sophisticated private investors that have  
4 purchased preferred stock. *Id.* In particular, this Motion concerns approximately 40 funds,  
5 family offices, and wealthy individuals who, between 2010 and 2014, invested up to \$100  
6 million each in Theranos, with an average investment of approximately \$17.5 million  
7 (previously defined as the “Investors”). *Id.* ¶ 4.

8 Theranos experienced highly publicized difficulties beginning in late 2015, when *The*  
9 *Wall Street Journal* began publishing a series of negative articles. Predictably, various  
10 opportunistic lawsuits followed. Plaintiffs, for example, sued seeking to represent a putative  
11 class of shareholders—even though they themselves never purchased any Theranos stock.

12 Theranos’s actual investors, however, have responded far more constructively. In  
13 summer 2016—months before Plaintiffs filed this case—Investors represented by Cravath,  
14 Swaine, & Moore LLP approached Theranos with a proposal that the Company should  
15 negotiate with the Investors for a share exchange and release of claims. *Id.* ¶ 5.

16 In response, between approximately August 2016 and March 2017, Theranos  
17 negotiated with many of the Investors, both directly and through their spokespersons, who  
18 were themselves sophisticated investors. *Id.* ¶ 6. The parties exchanged hundreds of  
19 communications, met personally several times to negotiate the share exchange, and exchanged  
20 multiple term sheets over a variety of proposals. The parties always contemplated that, as part  
21 of any agreement, the Investors would provide a release of claims in favor of Theranos and its  
22 officers and directors in the Investors’ capacity as stockholders. *Id.* In fact, the very first  
23 iteration of a term sheet (exchanged in August 2016) provided for such a release. *Id.* The  
24 filing of this lawsuit had no impact on the form of the release being contemplated, or the  
25 consideration to be exchanged. *Id.*

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27 \_\_\_\_\_  
28 <sup>1</sup> David Taylor is the General Counsel of Theranos, and was personally involved in negotiating  
with the Investors.



1 As negotiations progressed—and following Plaintiffs’ filing of this action—Theranos  
2 provided the Investors with updates about pending litigation against it and its principals,  
3 including this action. *Id.* ¶ 7. Specifically, Theranos addressed this action and its status with  
4 Investors during in-person meetings on December 8, 2016, December 12, 2016, and January  
5 25, 2017. *Id.* This action was also addressed on a January 19, 2017 conference call with  
6 investors, and during numerous informal calls during which the Company gave brief litigation  
7 updates to Investors. *Id.*

8 After months of negotiations, the parties agreed to a non-binding term sheet that was  
9 distributed to the Investors for review. The parties concluded it was appropriate for Theranos  
10 to conduct a tender offer under federal securities laws to implement the deal with the  
11 Investors, each of whom could choose whether to participate. *Id.* ¶ 8. Specifically, in  
12 exchange for executing a release of claims, each Investor could exchange existing shares for  
13 new shares with an effective price adjustment of their original purchase price and enhanced  
14 rights, including expanded rights to information and voting rights, and, with respect to  
15 exchanged Series C-2 shares, the right to elect a member of Theranos’s board of directors. *Id.*  
16 Contrary to Plaintiffs’ speculation (*see* Mot. 10-11), the offer does not include any cash  
17 consideration. *Id.* ¶ 9.

18 On March 20, 2017, Theranos commenced the tender offer. *Id.* ¶ 10. Theranos  
19 provided offerees with a fourteen-page information statement (with over a hundred pages of  
20 appendices), which included a detailed description of pending litigation that Theranos was  
21 facing, including this action. *Id.* ¶¶ 10-11.

22 The tender offer closes on April 14, 2017. *Id.* ¶ 12. Any Investor wishing to accept  
23 must, by the deadline, take steps including surrendering existing share certificates and  
24 providing a signed Exchange and Release Agreement. *Id.* The Exchange and Release  
25 Agreement contains a release of claims, and becomes effective when the tender closes. *Id.*

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1           **B.       Plaintiffs’ Cynical Attempt To Interfere With The Tender Offer**

2           Plaintiffs are not and have never been investors in Theranos, and are not entitled to  
3 take part in the tender offer. Instead, they are two individuals who claim to have purchased  
4 interests in third-party funds that, in turn, invested in Theranos. *See* Compl. ¶¶ 11-12.  
5 Nevertheless, seeking to capitalize on Theranos’s negative press, they sued on November 28,  
6 2016, alleging violations of California’s securities laws, unfair competition law, and common  
7 law. Plaintiffs hope to represent a class including “[a]ll persons or entities who, directly or  
8 indirectly, purchased or committed to purchase (and subsequently closed a binding  
9 commitment to purchase) an interest in Theranos securities from July 29, 2013, through  
10 October 5, 2016.” Compl. ¶ 82.

11           On January 17, 2017, Defendants moved to dismiss the Complaint, arguing, *inter alia*,  
12 that Plaintiffs cannot assert securities claims against Defendants because they do not actually  
13 hold any Theranos stock. *See* Not. of Mot. & Mot. to Dismiss Class Action Compl., ECF No.  
14 29. On March 1, 2017, the Court held a hearing on Defendants’ Motion to Dismiss,  
15 postponed the scheduled case management conference, and stayed any discovery pending a  
16 ruling on Defendants’ Motion. *See* Declaration of Michael A. Mugmon (“Mugmon Decl.”),  
17 Ex. 1 (Hearing Tr. 25:22-23).

18           On March 28, 2017, Plaintiffs sent a letter to Theranos demanding that it refrain from  
19 entering any settlement agreements, and that it produce a substantial volume of information  
20 about the tender offer within two weeks. *See* Kathrein Decl. Ex. B, ECF No. 49-3. Although  
21 their letter (like this Motion) made no specific allegations of any wrongdoing, Plaintiffs falsely  
22 asserted that Defendants’ “communications . . . infringe upon the Court’s powers and  
23 responsibilities under Rule 23.” *Id.* Theranos rejected those demands. *See* Kathrein Decl.,  
24 Ex. C, ECF No. 49-4. This Motion followed.

25           On April 3, 2017, solely for the purpose of putting this matter to rest, Theranos  
26 provided all Investors with a Supplemental Notice Concerning Certain Litigation (the  
27 “Supplemental Notice”). Taylor Dec. ¶ 13, Ex. A (copy of Supplemental Notice). The  
28

1 Supplemental Notice explained that Plaintiffs’ counsel had raised concerns about the impact of  
2 the release on this action, specified the class that Plaintiffs seek to represent, noted that  
3 participants in the tender offer may be class members,<sup>2</sup> identified Plaintiffs’ counsel and  
4 provided counsel’s contact information, and underscored the fact that, by participating in the  
5 tender offer, a shareholder would release the claims asserted in this action. *Id.*

### 6 **III. ARGUMENT**

7 Plaintiffs’ Motion seeks Court orders: (i) “[e]stablishing a protocol for any future  
8 communication with putative class members”; (ii) “[p]rohibiting Defendants from entering  
9 into any settlements with putative class members” pending discovery and a hearing; and (iii)  
10 lifting the stay of discovery and requiring Defendants to respond to discovery on an expedited  
11 basis. *See* Mot. 12. The Court should reject all of these requests:

- 12 • The first request fails because Plaintiffs have not met the requirements of Rule  
13 23(d), which authorizes judicial interference with communications between a  
14 defendant and putative class members only upon a clear record of abusive  
15 conduct.
- 16 • The second request fails both because Plaintiffs have not met the requirements of  
17 Rule 23(d), and because Plaintiffs have not met the stringent requirements of  
18 Rule 65.
- 19 • The third request fails because Plaintiffs have not established good cause to lift  
20 the discovery stay.

21 Accordingly, the Court should deny Plaintiffs’ Motion.

#### 22 **A. Plaintiffs Have Not Met Their Rule 23(d) Burden To Justify An Order** 23 **Regulating Communications With Investors**

24 Plaintiffs seek to regulate Defendants’ ability to communicate with the Investors  
25 through the implementation of a judicially imposed “protocol” for communications. Mot. 12.  
26 However, Plaintiffs come nowhere close to establishing a clear record of abuse by Defendants.

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27 <sup>2</sup> Some tender offer recipients are former Theranos directors, and thus would not fall within  
28 Plaintiffs’ class definition.

1                   **1.       Judicial Restraints On Interactions With Putative Class Members**  
2                   **Require A “Clear Record” Of Abuse**

3                   Prior to class certification, Plaintiffs do not represent absent putative class members,  
4 and Plaintiffs’ counsel has no attorney-client relationship with them. As a result, “Rule 23  
5 pre-certification communication is permissible because no attorney-client relationship yet  
6 exists.” *See Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002).  
7 Thus, under the First Amendment, the federal rules, and settled case law, a defendant is free to  
8 communicate and enter into settlements with putative class members, and those settlements do  
9 not require court approval. *See Reid v. Unilever U.S., Inc.*, 964 F. Supp. 2d 893, 930 (N.D. Ill.  
10 2013) (“[P]erhaps to the displeasure of Plaintiffs’ counsel, [defendant] is entitled to settle  
11 cases with putative class members prior to class certification.”); *see also Javine v. San Luis*  
12 *Ambulance Serv., Inc.*, CV 13-07480-BRO (SSx), 2014 WL 12496988, at \*3 (C.D. Cal. Dec.  
13 12, 2014) (“[T]he majority view remains in a Rule 23 class action that pre-certification  
14 communication from the defense to prospective plaintiffs is generally permitted.” (internal  
15 quotation marks and alterations omitted)); *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. C  
16 05-1175 MHP, 2005 WL 4813532, at \*3 (N.D. Cal. Nov. 17, 2005) (“Pre-certification  
17 communications to potential class members by both parties are generally permitted, and also  
18 considered to constitute constitutionally protected speech.”); Fed. R. Civ. P. 23(e) (“The  
19 claims, issues, or defenses of a *certified class* may be settled . . . or compromised only with the  
20 court’s approval.” (emphasis added)).

21                   The Court may restrict pre-certification communications between a defendant and  
22 putative class members only upon a “clear record and specific findings” demonstrating that  
23 defendants’ conduct is abusive or threatens the fairness of the litigation. *See Gulf Oil Co. v.*  
24 *Bernard* (“*Gulf Oil*”), 452 U.S. 89, 100 (1981) (“[A]n order limiting communications between  
25 parties and potential class members should be based on a clear record and specific findings  
26 that reflect a weighing of the need for a limitation and the potential interference with the rights  
27 of the parties.”) (cited at Mot. 6). That standard requires a specific record showing coercion  
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1 or, at the very least, misleading communications. “While some ‘[c]ourts have limited pre-  
 2 certification communications with potential class members after misleading, coercive, or  
 3 improper communications were made,’ courts ‘may not exercise the power without a specific  
 4 record showing by the moving party of the particular abuses by which it is threatened.’” *See*  
 5 *Javine*, 2014 WL 12496988, at \*3 (citations omitted); *see also Castaneda v. Burger King*  
 6 *Corp.*, No. C 08-4262 WHA (JL), 2009 WL 2382688, at \*5 (N.D. Cal. July 31, 2009)  
 7 (“Defense counsel is entitled to have precertification *ex parte* contacts with putative plaintiffs,  
 8 absent specific findings of deception, coercion or abuse.”). Further, even where plaintiffs  
 9 meet their burden for justifying judicial interference, it must “result in a carefully drawn order  
 10 that limits speech as little as possible, . . . giving explicit consideration to the narrowest  
 11 possible relief which would protect the respective parties.” *Gulf Oil*, 452 U.S. at 102 (citation  
 12 omitted).<sup>3</sup>

13 Judicial interference unsupported by a clear record of abuse violates the First  
 14 Amendment as an unconstitutional prior restraint. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459,  
 15 477 (5th Cir. 1980) (“We therefore hold that the district court’s order restricting  
 16 communication by parties and their counsel with . . . potential class members [without any  
 17 record of abuse] is an unconstitutional prior restraint.”), *aff’d*, 452 U.S. 89 (1981); *Roberts v.*  
 18 *Heim*, 130 F.R.D. 416, 423 (N.D. Cal. 1988) (“Plaintiffs have not made a substantial showing  
 19 of a need for what amounts to a prior restraint on constitutionally protected  
 20 communication. . . . Should any wrongdoing occur . . . , plaintiffs may bring it to the Court’s  
 21 attention, and we will devise a remedy at that time.”).

22  
 23 <sup>3</sup> Raising the mere possibility of coercion or deception—something Plaintiffs have not even  
 24 done here—is insufficient. *See Gulf Oil*, 452 U.S. at 104 (“[T]he mere possibility of abuses  
 25 does not justify routine adoption of a communications ban . . . .”); *In re M.L. Stern Overtime*  
 26 *Litig.*, 250 F.R.D. 492, 496 (S.D. Cal. 2008) (“It is not enough that a potentially coercive  
 27 situation exists. The court cannot issue an order without evidence that a potential for serious  
 28 abuse exists.” (alternation and citation omitted)); *Cram v. Elec. Data Sys. Corp.*, No.  
 07CV1842-LAB (NLS), 2008 WL 178449, at \*3 (S.D. Cal. Jan. 17, 2008) (“A mere  
 possibility of confusion is insufficient to justify the district court’s exercise of supervisory  
 authority over parties’ communications with potential class members.”).

1                   **2. Plaintiffs Have Not Established A Clear Record Of Abusive Conduct**

2                   Plaintiffs make *no showing whatsoever* that Defendants’ conduct has been abusive.  
 3                   Their Motion does not contain a single specific allegation of wrongdoing—let alone evidence.  
 4                   Instead, Plaintiffs attempt an impermissible burden-shift, criticizing *Defendants* for not  
 5                   coming forward with evidence. *See* Mot. 8 (arguing that *Defendants* “provide no evidence”).  
 6                   But Plaintiffs have it backwards: the burden is on *Plaintiffs* to justify a restraint by making a  
 7                   clear showing of abuse, and they have done nothing to meet it. This, without more, requires  
 8                   the Court to deny their Motion.<sup>4</sup>

9                   In fact, the record shows that Plaintiffs cannot meet their burden of demonstrating  
 10                  abusive conduct. As a threshold matter, the Investors are a highly sophisticated group. The  
 11                  average investment is *\$17.5 million dollars*, and some invested \$100 million. Plaintiffs offer  
 12                  nothing to support that this group could be coerced into unknowingly giving away its rights,  
 13                  would not understand the consequences of granting a release, or would not have access to

14 \_\_\_\_\_  
 15 <sup>4</sup> Plaintiffs’ own case citations prove the point: each involved coercion or misinformation, in  
 16 circumstances involving manifestly unequal bargaining power between defendants and  
 17 unsophisticated or uninformed putative class members. *E.g.*, *Slavkov v. Fast Water Heater*  
 18 *Partners I, LP*, No. 14-cv-04324-JST, 2015 WL 6674575, at \*3-4 (N.D. Cal. Nov. 2, 2015)  
 19 (finding communication coercive in part due to the inherent disparity of bargaining power in  
 20 the employer-employee relationship) (cited at Mot. 6-7); *Camp v. Alexander*, 300 F.R.D. 617,  
 21 624-26 (N.D. Cal. 2014) (finding communication coercive in part due to the inherent disparity  
 22 of bargaining power in the employer-employee relationship); *O’Connor v. Uber Techs., Inc.*,  
 23 No. C-13-3826 EMC, 2013 WL 6407583, at \*6 (N.D. Cal. Dec. 6, 2013) (finding arbitration  
 24 provision improper where defendant’s drivers “for whom English is not their native language”  
 25 were sent a licensing agreement that included an arbitration provision which “shrouded” the  
 26 fact that agreement waived participation in the putative class) (cited at Mot. 6, 8); *Wright v.*  
 27 *Adventures Rolling Cross Country, Inc.*, No. C-12-0982 EMC, 2012 WL 2239797, at \*5 (N.D.  
 28 Cal. June 15, 2012) (finding communication coercive in part due to defendant’s assertion that  
 participation in class action would affect the reputation of employees and former employees);  
*Cnty. of Santa Clara v. Astra USA, Inc.*, No. C 05-03740 WHA, 2010 WL 2724512, at \*4-5  
 (N.D. Cal. July 8, 2010) (finding communications between defendant and its consumers  
 misleading where they did not explain the claims in the case, misrepresented the status of the  
 case, misrepresented how the settlement payments were calculated, and gave the false  
 impression the settlement payments were approved and endorsed by government agencies);  
*Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 563 (S.D. Fla. 2008) (finding communication  
 coercive given the potentially dependent relationship between defendant and its consumers,  
 and the defendant’s warning regarding the defective nature of its product while implying  
 repairs could not be performed during the pendency of the class action).

1 professional advisors. *Cf. Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-  
2 00302 MRP, 2013 WL 6577020, at \*10 (C.D. Cal. Dec. 5, 2013) (holding named plaintiffs  
3 adequately represented putative class because the “putative class members, a majority of  
4 which [were] highly sophisticated investors, had ample opportunity to learn of this litigation,  
5 evaluate whether Named Plaintiffs adequately protected their rights, and pursue their own  
6 claims if desired.”). Indeed, there could not be a starker contrast between the Investors and the  
7 groups of putative class members at issue in the cases Plaintiffs cite. *See* note 4, *supra*  
8 (collecting Plaintiffs’ cited cases, which concern putative classes of lower-level employees and  
9 consumers).

10 Moreover, unlike the cases Plaintiffs cite, Theranos did not hatch the tender offer to  
11 thwart this litigation. As set forth above, Theranos and the Investors were already negotiating  
12 a deal, specifically including a full release of all claims, *months* before Plaintiffs filed this  
13 lawsuit. The negotiations were initiated by the Investors, not Theranos. In short, the Investors  
14 would be giving the exact same releases regardless of whether Plaintiffs had ever sued.

15 Further, nothing is misleading about Theranos’s communications with the Investors  
16 about this litigation and the impact of the release on it. Over the course of negotiations, the  
17 Investors received repeated disclosures concerning this litigation. The Information Statement  
18 (which formally makes the tender offer) describes this lawsuit (including that Plaintiffs seek to  
19 represent a class of Theranos investors), and repeatedly warns that the release “protects the  
20 Company and its officers, directors and stockholders from any potential legal claims by  
21 holders of Series C-1 Preferred and Series C-2 Preferred as stockholders.” Taylor Dec. ¶ 10.  
22 And the Supplemental Notice quotes the class definition, tells recipients that by accepting the  
23 tender they are forfeiting the right to participate in this case, and provides the name and  
24 contact information of Plaintiffs’ counsel. *Id.* ¶ 13, Ex. A. Thus, there can be no doubt that  
25 any Investor who accepts the tender does so with full knowledge of the consequences for this  
26 case.

1 In short, Plaintiffs have not met their burden under Rule 23(d) to justify judicial  
2 intervention to restrain communications.<sup>5</sup>

3 **B. Plaintiffs Are Not Entitled To An Order Prohibiting Defendants From**  
4 **Entering Into Settlements**

5 Plaintiffs next seek an order “[p]rohibiting Defendants from entering into any  
6 settlements with putative class members until . . . discovery and [a] hearing is completed.”  
7 Mot. 12. Plaintiffs cite Rule 23(d) as a basis for their request. However, as detailed above,  
8 Plaintiffs have not met the standard, because they have not shown a clear record of abusive  
9 conduct. This, without more, defeats their claim for relief.

10 In addition, the Court should deny this relief for a second, independent reason:  
11 Plaintiffs are seeking a form of preliminary injunctive relief, and must meet the requirements  
12 of Rule 65 to obtain it. However, Plaintiffs make no attempt to satisfy Rule 65 requirements  
13 and cannot.

14 By seeking to prohibit “settlements,” Plaintiffs seek injunctive relief subject to Rule  
15 65. The tender offer does not involve any free-standing settlement agreements. Instead, there  
16 is an “Exchange and Release Agreement” (the “Exchange Agreement”) containing terms  
17 including a release. Investors who choose to participate in the tender offer and reap the  
18 attendant benefits must execute and submit the Exchange Agreement prior to the closing of the  
19 tender offer. Presently, the tender offer is open, and willing Investors are submitting executed  
20 Exchange Agreements. The Exchange Agreement by its terms becomes effective on closing  
21 of the tender. Taylor Dec. ¶ 12. Thus, by requesting an order to “prohibit” Defendants from  
22 entering into “settlements,” Plaintiffs are seeking an order preliminarily enjoining the  
23 scheduled closing of the tender offer, which would render the releases effective.

24 \_\_\_\_\_  
25 <sup>5</sup> Plaintiffs try to make their request sound benign by framing their arguments around a  
26 purported request that the Court “scrutinize” Defendants’ conduct. Mot. 7-10. But the relief  
27 sought in their motion is not mere “scrutiny”; rather, it is a judicial restraint on  
28 communications and on completing a transaction. Mot. 12 (listing relief sought). In any  
event, whether framed as “scrutiny” or intervention, the controlling standard requires a clear  
record of abuse.



1 Ninth Circuit law is clear that Rule 65 applies to such a request for relief. *See*  
 2 *Newmont Min. Corp. v. Pickens*, 831 F.2d 1448 (9th Cir. 1987) (recognizing implicitly that  
 3 motion to enjoin tender offer subject to preliminary injunction standard); *Pac. Realty Trust v.*  
 4 *APC Investments, Inc.*, 685 F.2d 1083, 1086 & n.5 (9th Cir. 1982) (recognizing implicitly that  
 5 order enjoining tender offer subject to injunction standard); *Dixon v. Cost Plus*, No. 12-CV-  
 6 02721-LHK, 2012 WL 2499931, at \*12 (N.D. Cal. June 27, 2012) (subjecting motion to  
 7 enjoin tender offer to Rule 65 standard); *Unocal Corp. v. Pickens*, 608 F. Supp. 1081 (C.D.  
 8 Cal. 1985) (denying preliminary injunction seeking to enjoin tender offer due to failure to  
 9 show irreparable harm); *see also Litwin v. OceanFreight, Inc.*, 865 F. Supp. 2d 385, 402  
 10 (S.D.N.Y. 2011) (“There is a significant public interest in giving parties to potential [tender  
 11 offers] confidence that courts *will not enjoin such [tender offers] where the requisite showings*  
 12 *that support preliminary injunctive relief are absent.*” (emphasis added)).<sup>6</sup>

13 While Rule 23(d) authorizes a court (without regard for Rule 65 requirements) to  
 14 enjoin litigants from engaging in *abusive communications*, that is because an order enjoining  
 15 abusive communications is “a directive[] to counsel in their capacity as officers of the court,  
 16 pursuant to the court’s inherent power to manage its cases.” *Kleiner v. First Nat. Bank of*  
 17 *Atlanta*, 751 F.2d 1193, 1201 (11th Cir. 1985); *see also Perkins v. Benore Logistics Sys., Inc.*,  
 18 2017 WL 445603 (E.D. Mich. Feb. 2, 2017) (cited by Plaintiffs, Mot at 6) (citing *Kleiner* and  
 19 applying Rule 23(d) only to abusive communications); *Tolmasoff v. General Motors, LLC*,  
 20 2016 WL 3548219, \*10 (E.D. Mich. Jun. 30, 2016) (same). This logic does not extend to a  
 21 request to bar persons (some of whom are not even before the Court) from making an  
 22 agreement or completing a tender offer. Notably, Plaintiffs do not cite a single case (and  
 23 Defendants have not located one) in which a court invoked Rule 23(d) to order such injunctive  
 24 relief. Thus, Rule 65 applies to Plaintiffs’ request.

25  
 26  
 27 <sup>6</sup> There are good reasons why Plaintiffs must meet Rule 65 standards to enjoin a transaction.  
 28 For instance, Rule 65(c) requires Plaintiffs to post bond for damages that Defendants could  
 incur due to an inappropriate injunction of the closing.

1 Plaintiffs do not even attempt to meet the Rule 65 standard for an injunction. Plaintiffs  
2 fail to address the merits of their underlying claims, irreparable harm, or the balance of  
3 harms—not surprisingly, because each factor clearly weighs against the imposition of an  
4 injunction.

5 For instance, Plaintiffs are unlikely to prevail on their class claims, not only for the  
6 reasons set out in the Motion to Dismiss, but also because they will not be able to show that  
7 their claims are typical of those actual shareholders who dealt directly with Theranos and  
8 bought their stock only after individualized negotiations. This problem also would defeat  
9 predominance. *See Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 217 (N.D. Cal. 1994)  
10 (individual questions of reliance precluded certification of common law fraud and negligent  
11 misrepresentation claims).

12 Nor can Plaintiffs show irreparable harm. If the tender offer closes and Defendants  
13 receive releases from putative class members, Plaintiffs’ rights (if any) will not be  
14 compromised. If releases become relevant to this case (*e.g.*, as a potential barrier to class  
15 certification), Plaintiffs have the right to seek discovery and argue the releases are invalid.  
16 Indeed, that is the usual way releases are litigated, *i.e.*, after they have been executed. *See Fed.*  
17 *R. Civ. P. 8(c)* (specifying “release” as an affirmative defense to be adjudicated once raised in  
18 an answer).

19 Similarly, the balance of harms and the public interest also counsel against enjoining  
20 the tender offer. The interest of a company and its shareholders in pursuing a mutually  
21 beneficial transaction far outweigh any single plaintiff’s interest in preventing it. “In tender  
22 offer cases, there is a strong public policy in favor of preserving shareholders’ freedom to  
23 choose between selling stock at a tender offer price and retaining their securities. As such,  
24 requests for injunctions against tender offers are frequently denied because the hardships to the  
25 moving party do not often outweigh this strong policy of shareholder freedom.” *See Dixon*,  
26 2012 WL 2499931, at \*12 (citation omitted). These considerations have special weight here,  
27 where Plaintiffs are not even Theranos shareholders, and have no interest in the tender offer  
28

1 other than to try to defeat it to preserve their own leverage. Moreover, the deal is designed to  
2 benefit the shareholders (and putative class members), and has overwhelming support from the  
3 Investors, actual Theranos shareholders.

4 Thus, because Plaintiffs have not met Rule 23(d) requirements, and because they also  
5 cannot meet Rule 65 requirements, the Court should deny Plaintiffs' Motion to the extent they  
6 seek to "prohibit" Defendants from entering into settlements.

7 **C. Plaintiffs Have Not Shown Good Cause For Lifting The Discovery Stay**

8 Plaintiffs also have not met their burden of establishing why the Court should order  
9 expedited discovery, and thereby rescind its order staying discovery until and unless Plaintiffs  
10 survive a motion to dismiss. *See* Mugmon Decl., Ex. 1 (Hearing Tr. 25:22-23) (ordering that  
11 discovery be deferred until a ruling on a motion to dismiss, noting that it is "premature to  
12 launch discovery before we know there's plausible claims").

13 To merit relief from a stay and schedule, plaintiffs must establish good cause, and that  
14 the benefit outweighs the prejudice. *See* Fed. R. Civ. P. 16(b)(4) ("A schedule may be  
15 modified only for good cause."); *Semitoil, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273,  
16 276 (N.D. Cal. 2002) ("Good cause may be found where the need for expedited discovery  
17 [pursuant to Fed. R. Civ. P. 26(d)(1)], in consideration of the administration of justice,  
18 outweighs the prejudice to the responding party."). Plaintiffs have not meet that standard.

19 *First*, where, as here, Plaintiffs seek expedited discovery based on allegations of  
20 abusive conduct under Rule 23(d), their failure to meet Rule 23(d) requirements (discussed  
21 above) also means that they lack good cause for expedited discovery premised on those same  
22 allegations. *See In re M.L. Stern Overtime Litig.*, 250 F.R.D. 492, 500 (S.D. Cal. 2008)  
23 (denying motion to compel discovery of pre-certification communications in the absence of a  
24 "'clear record' of 'particular abuses'").

25 *Second*, expedited discovery is futile because the tender offer will close (and thus the  
26 releases become effective) before the parties would complete expedited discovery. As detailed  
27 above, the tender offer is set to close on April 14, and Plaintiffs have not established any basis  
28

1 to preliminarily enjoin it. Even under Plaintiffs’ own proposed schedule, the parties could not  
2 complete expedited discovery until at earliest April 21.<sup>7</sup> At that point, Plaintiffs would simply  
3 be adjudicating the propriety of existing releases—something that the parties could do in the  
4 normal course if releases ever become relevant.

5 *Third*, good cause is also lacking because discovery concerning the tender offer is  
6 premature, and disallowing it will not prejudice the Plaintiffs. This case is at a nascent stage.  
7 It is unclear whether any claims will survive a motion to dismiss, whether Plaintiffs have  
8 standing, or what (if any) class certification motion may be viable in the future. Even if this  
9 case proceeds, it is unclear whether any releases will be relevant to the claims asserted by  
10 Plaintiffs. *If* this case survives the pleading stage, and *if* releases become relevant, and *if*  
11 Defendants raise them as a defense, then Plaintiffs can, in the normal course, take discovery  
12 concerning the releases, and the parties can litigate any impact on these proceedings. *See, e.g.,*  
13 *O’Connor v. Uber Techs., Inc.*, No. C-13-3826 EMC, 2013 WL 6407583, at \*2 (N.D. Cal.  
14 Dec. 6, 2013) (refusing as premature a request to invalidate arbitration clause that functioned  
15 as a release; “This is not to say that the issue may not properly be addressed later in the  
16 proceedings.... [E]nforceability of the arbitration provision may arise at the class certification  
17 stage.”) (cited at Mot. 6).<sup>8</sup>

18 *Finally*, expedited discovery would be costly, and it would prejudice Theranos to incur  
19 that cost now, particularly under circumstances where, if this case instead proceeds on the  
20 existing schedule (*i.e.*, motion to dismiss proceedings prior to discovery), that cost may never  
21 accrue (*e.g.*, the motion to dismiss could eliminate or impact the scope of this case). Theranos  
22 and the Investors negotiated for many months, and discovery pertaining to those

23 \_\_\_\_\_  
24 <sup>7</sup> Plaintiffs seek an order that Defendants must respond to discovery requests within 14 days.  
25 If the Court were to enter that order at the hearing, responses would be due on April 21.  
26 Moreover, as detailed below, 14 days is not enough time, because Plaintiffs’ requests would  
27 require Theranos to engage in E-discovery, including use of a discovery vendor.

28 <sup>8</sup> Plaintiffs get it backwards by asserting that litigating the effect of the offered releases now  
will avoid future “collateral disputes or litigation regarding the scope or enforceability of any  
releases.” Mot. 10. Plaintiffs are proposing to accelerate discovery and briefing (with  
attendant cost) on issues that may never ripen.

1 communications would be a significant undertaking, involving hundreds of documents. *See*  
2 Taylor Dec. ¶¶ 8, 14.<sup>9</sup> To comply with Plaintiffs’ demands, Theranos would need to engage a  
3 discovery vendor on an expedited basis (potentially at premium rates given the time crunch),  
4 and engage in E-discovery. *Id.*

5 In short, given *no evidence* of wrongdoing, *no reason* why the parties cannot litigate  
6 release issues in the normal course if they ever become relevant, and a certainty of *present*  
7 substantial costs of expedited discovery, the Court should not lift its stay of discovery.

#### 8 **D. Plaintiffs’ Fallback “Limited Fund” Argument Also Cannot Justify Relief**

9 Unable to establish any basis for relief under Rule 23(d) or Rule 65, Plaintiffs offer a  
10 fallback argument that the Court should preclude Theranos from completing its tender offer  
11 based on speculation that Theranos is depleting funds needed to satisfy a judgment. *See* Mot.  
12 10-11. However, Theranos is *not* paying any cash as part of the tender offer. Taylor Decl. ¶ 9.  
13 Thus, Plaintiffs’ argument, which is premised on supposed “dissipation of limited assets,”  
14 Mot. 10, is groundless.

15 In any event, Plaintiffs appear to have invented out of whole cloth the notion that the  
16 Court may preclude “selective offers of settlement” where a putative class action is pending  
17 and a putative class plaintiff expresses concerns about dissipation of assets. The four cases on  
18 which Plaintiffs rely, *see* Mot. 4 n.5, 10-11, state only the general proposition that Rule  
19 23(b)(1)(B) provides for certification of limited fund class actions.<sup>10</sup> Plaintiffs’ cited cases do  
20 not state or suggest that a putative class plaintiff, pre-certification, may preempt a defendant  
21 from settling with some shareholders, whether with or without cash consideration.

#### 22 **IV. CONCLUSION**

23 For the foregoing reasons, the Court should deny Plaintiffs’ Motion.

24  
25 <sup>9</sup> The vast majority of the communications likely do not mention this matter. But Plaintiffs’  
26 discovery requests are not restricted to such communications.

27 <sup>10</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Baker v. Washington Mut. Fin. Grp., LLC*,  
28 193 Fed. App’x 294 (5th Cir. 2006) (unpublished); *Stott v. Capital Fin. Services, Inc.*, 277  
F.R.D. 316 (N.D. Tex. 2011); *Williams v. Nat’l Sec. Ins. Co.*, 237 F.R.D. 685 (M.D. Ala.  
2006).

1 Dated: April 5, 2017

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**SIGNATURE ATTESTATION**

I am the ECF User whose identification and password are being used to file the foregoing Opposition. In compliance with Local Rule 5-1(i)(3), I hereby attest that the other signatories have concurred in this filing.

Dated: April 5, 2017

WILMER CUTLER PICKERING HALE  
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