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SUPERIOR COURT OF CALIFORNIA

SANTA CLARA COUNTY

PETER MACKINNON, JR., an individual, on behalf of himself, the general public and those similarly situated

Plaintiff,

v.

IMVU, INC.,

Defendant.

Case No. 111 CV 193767

CLASS ACTION

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: October 30, 2015

Time: 9:00 a.m.

Department: 1

Honorable Judge Peter H. Kirwan

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TO DEFENDANT IMVU, INC. AND TO ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on October 30, 2015, at 9:00 a.m., in Department 1 of the above-entitled court, located at 191 N 1st Street, San Jose, California 95113, Plaintiff will, and does, move for the following:

(1) Preliminary approval of the settlement of this class action as set forth in the class action Settlement Agreement dated September 16, 2015 (“Settlement Agreement” or “Agreement”);

(2) Entry of an order directing the dissemination of notice in the form and manner set forth in the Settlement Agreement; and

(3) Setting a Final Approval hearing on January 28, 2016, at 9:00 a.m. or as soon thereafter as the Court’s schedule permits.

A copy of the [Proposed] Order For Preliminary Approval is attached to the Settlement Agreement as Exhibit C and submitted separately herewith.

This Motion is based on this Notice, the supporting Memorandum of Points and Authorities, the Declaration of Seth Safier, and the pleadings and papers on file in this action and any other matter of which this Court may take notice.

DATED: October 7, 2015

Respectfully submitted,

GUTRIDE SAFIER LLP



By: _____

Adam Gutride
Seth A. Safier
Todd Kennedy

Attorneys for Plaintiff, Peter MacKinnon, Jr.

PROOF OF SERVICE

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I, Seth A. Safier, declare:

My business address is 100 Pine Street, Suite 1250, San Francisco, California. I am employed in the County of San Francisco, where this mailing occurs. I am over the age of 18 years and not a party to the within cause.

On October 7, 2015, I served the following documents:

PLAINTIFF’S NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;

PLAINTIFF’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT;

[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT; and

DECLARATION OF SETH A. SAFIER IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

on the following person(s) in this action by placing a true copy thereof as follows:

William Tarantino, Esq.,
Morrison & Foerster LLP
425 Market Street, San Francisco, CA
94105-2482

BY ELECTRONIC MAIL. I caused said documents to be transmitted by electronic mail to the email address indicated after the address(es) via ECF.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on October 7, 2015, at San Francisco, California.

Seth A. Safier, Esq.

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1 **I. INTRODUCTION**

2 Defendant IMVU, Inc. operates an online software application that enables users to create
3 characters that interact in a virtual universe. Users can purchase virtual goods for their characters,
4 such as clothing and furniture, as well as audio files (songs) that can be played through the IMVU
5 application. These purchases are made using IMVU “credits,” which must be purchased with real
6 money or earned by creating and selling virtual items to others.

7 The Complaint in this lawsuit was filed more than four years ago, in February 2011. It
8 alleged that Defendant had sold various full-length audio files in exchange for IMVU credits but
9 subsequently truncated the files’ playback time to 20 seconds. It made claims for violations of the
10 California Consumer Legal Remedies Act (“CLRA”), false advertising under California Business
11 and Professions Code sections 17500, et seq.; and unfair business practices under California
12 Business and Professions Code sections 17200, et seq.; as well as for breach of contract;
13 conversion; and misrepresentation. In June 2011, Plaintiff MacKinnon joined the litigation and the
14 original plaintiff withdrew. Since then, this case has been hotly litigated both in this court and the
15 Court of Appeal. Gigabytes of data have been produced and reviewed, and numerous witnesses
16 have been deposed.

17 Under the terms of the Settlement Agreement, Defendant has agreed to implement
18 engineering changes that restores the *status quo ante*—i.e., removes the playback limit on the
19 affected audio products. Class members will also receive a partial refund of the credits they used to
20 pay for the audio products. No claim form need be submitted to obtain this benefit. Class members
21 who wish instead to receive a cash refund can do so by submitting a simple benefit election form.
22 Subject to this Court’s approval, Defendant will also pay Plaintiff \$10,000 to compensate him for a
23 general release and for the time he spent and risk he incurred serving as a named plaintiff.
24 Defendant has also agreed to pay Class Counsel attorneys’ fees and costs as awarded by this Court,
25 up to a maximum of \$1,150,000. Notice is to be provided directly to the class via electronic mail
26 and via direct message on the IMVU application, and there is additional notice through online
27 advertising.¹ The Settlement Agreement contains all the material terms of the settlement, including

28 ¹ IMVU does not typically maintain mailing addresses of its users. (Safier Decl. ¶ 5.)

1 the form of notice to be given to the Class, the claim form, the contingencies or conditions to the
2 Settlement’s final approval, and other necessary and proper terms.

3 Since the Settlement meets the criteria for preliminary approval, and is easily within the
4 range of what might be approved as fair, reasonable and adequate, Plaintiff respectfully requests
5 that this Court enter the proposed Preliminary Approval Order.

6 **II. SUMMARY OF THE LITIGATION**

7 **A. Plaintiff’s Allegations**

8 **1. IMVU Misled and Deceived Class Members**

9 Prior to September 2008, the IMVU virtual catalog contained many full-length songs and
10 audio clips. (Second Amended Complaint, Dkt. 53 (“SAC”) ¶ 22.) IMVU enabled users to preview
11 the products by clicking a “TRY” button in the IMVU Application, which would cause them to play
12 at full-length. (*Id.* ¶ 23.) Once IMVU users purchased the audio products, IMVU then informed
13 them that, “**You own this.**” (*Id.* ¶ 24.) IMVU also informed users on its website that if they
14 purchase an audio product, it will be “delivered to your inventory and becomes available to be used
15 whenever you like.”² (*Id.* ¶ 25.) Approximately 432,000 persons purchased these audio files,
16 expending 3.3 billion IMVU credits to do so. (Safier Decl. ¶ 5.) It typically cost \$1 to purchase
17 1000 credits, so the number of credits expended equates to roughly \$3.3 million. (*Id.*)

18 In September 2008, IMVU announced that, going forward, it would “cut down” all audio
19 files submitted to the IMVU catalog to only twenty seconds. (SAC ¶ 26.) IMVU assured its users
20 that “[t]his will not affect products already in the catalog, just new products submitted. (*Id.*) IMVU
21 modified its website to include, on every virtual product purchase page, a pink notification bar with
22 a hyperlink to the September 2008 announcement. (*Id.* ¶ 29.) At no time did IMVU inform its users
23 that the playback length of audio products submitted to the catalog after September 2008 may later
24 be limited. (*Id.* ¶ 30.)

25 In accordance with its announcement, IMVU imposed a 20-second playback restriction on
26 audio products submitted to the IMVU virtual catalog after September 2008. (*Id.* ¶ 27.) As

27
28 ² Subsequent to the initiation of this litigation, IMVU removed this and other representations from
its website. (Safier Decl. ¶ 10.)

1 promised, IMVU initially did not limit the playback time of audio products that had been submitted
2 to the IMVU catalog prior to September 2008. IMVU thereby retained a large selection of full-
3 length audio products in its catalog. (Id. ¶ 28.)

4 On January 31, 2011, IMVU, without any warning, announced that “[e]ffective today, we
5 are applying the 20 second limit to ALL audio products in the catalog,” including the pre-
6 September 2008 full-length songs and audio files that IMVU had represented would not be affected
7 by the 20-second restriction policy and that users had purchased after the representation. (Id. ¶ 31.)

8 **2. Plaintiff Relied To His Detriment on IMVU’s Misrepresentations**
9 **and Material Omissions.**

10 Plaintiff joined IMVU on or about October 22, 2009. Soon thereafter, Plaintiff came to
11 understand that the playback time of some audio files were limited, by IMVU, to 20 seconds. He
12 reviewed IMVU’s September 2008 announcement, which explained that only audio products
13 submitted to the virtual catalog after September 2008 would be “cut down” to only 20 seconds, but
14 that “[t]his will not affect products already in the catalog, just new products submitted.” He spent
15 hundreds of dollars purchasing IMVU credits, with cash, which he used to purchase hundreds of
16 audio files. After January 2011, the value of his purchases was substantially degraded because the
17 files would stop playing after 20 seconds. (Id. ¶¶ 40-49; Declaration of Peter MacKinnon in
18 Opposition To Motion For Judgment On The Pleadings, Dkt. 42, at ¶¶ 4-11.)

19 **B. Procedural History**

20 **1. Filing and Removal**

21 This case was filed on February 7, 2011. A first amended complaint, adding Mr.
22 MacKinnon, was filed in June 2011. Defendant answered in July, and discovery began in earnest.

23 On September 30, 2011, IMVU removed this case to United States District Court for the
24 Northern District of California. Plaintiff moved to remand. The District Court held that the removal
25 was improper and, in January 2012, it remanded the case to this Court.

26 **2. Plaintiff’s Case Is Dismissed and He Successfully Appeals**

27 Following remand, IMVU filed a motion for judgment on the pleadings. On May 2, 2012,
28 this court (Kleinberg, J.) granted IMVU’s motion as to all causes of action, with leave to amend

1 only as to the CLRA and UCL. It held that under IMVU’s Terms of Service (“TOS”) agreement,
2 IMVU was permitted to make changes to the “content offered on this site, at any time without
3 notice” and without giving a refund.

4 Plaintiff filed a second amended complaint, which addressed each of the trial court’s rulings
5 and incorporated deposition testimony that corroborated his allegations with respect to the
6 interpretation of the TOS. IMVU responded with a general demurrer. On December 12, 2011, the
7 court sustained the demurrer, without leave to amend, reiterating that the terms of the TOS
8 permitted IMVU to act as it had.

9 Plaintiff appealed, and both parties filed lengthy briefs. After oral argument on October 20,
10 2014, the Court of Appeal issued an opinion affirming in part and reversing in part the trial court’s
11 orders. *See MacKinnon v. IMVU, Inc.*, No. H039236, 2014 WL 5488404, at *3 (Cal. Ct. App. Oct.
12 30, 2014). The Court of Appeal remanded with directions to deny the motion for judgment on the
13 pleadings and overrule the demurrer as to the conversion claim, breach of contract claim, breach of
14 the covenant of good fair and fair dealing claim, CLRA claim (with respect to allegations about the
15 September 2008 announcement) and UCL claim (same).

16 On April 20, 2015, the parties mediated the case before well-reputed mediator Randall
17 Wulff, of Wulff Quinby & Sochynsky in Oakland, California. Several months later, this settlement
18 was reached.

19 **III. SUMMARY OF SETTLEMENT**

20 The parties have entered into the Settlement Agreement, which completely resolves this
21 action. The Settlement Agreement includes the following material terms and conditions:

22 **A. Class Certification**

23 The parties have agreed to the certification of a Settlement Class defined as:

24 All persons who (1) after September 21, 2008 and before December 1, 2010, used IMVU
25 Credits to purchase from the IMVU Virtual Catalog at least one audio product whose
26 playback length was greater than twenty seconds, (2) subsequently logged into the IMVU
27 service at least once after January 31, 2011, (3) as of April 20, 2015, had not held an IMVU
28 account that had been terminated by IMVU for violations of IMVU terms of service, and (4)
as of the date of this Agreement [September 16, 2015] have their country of residence

1 setting in the IMVU Application set as the United States.³

2 **B. Class Benefit and Changed Practices.**

3 Each Class Member will automatically receive a refund, to his or her IMVU Account, of
4 IMVU Promotional Credits (“Predits”),⁴ in a quantity equal to 60% of the quantity of IMVU Credits
5 he or she used to pay for the Affected Audio Products.⁵ No claim form is required.

6 If the Class Member does not want to receive the IMVU Predits, he or she may elect one of
7 two alternative remedies, by submitting a benefit election form: (1) a refund, to his or her IMVU
8 Account, of IMVU Credits, in a quantity equal to 30% of the quantity of IMVU Credits he or she
9 used to pay for the Affected Audio Products or (2) the cash value of those refunded Credits,
10 computed at the rate of \$0.00040 per IMVU Credit.⁶

11 Beginning no later than forty-five (45) days after the Effective Date, IMVU has additionally
12 agreed to implement all of the following:

- 13 • IMVU shall implement changes to the operation of the IMVU Application to remove
14 any barriers that would prevent any Affected Audio Product that remains in the
15 IMVU Virtual Catalog to be played at its full length.
- 16 • IMVU will revise its Terms of Service agreement to expressly inform IMVU users of
17 its policies, as follows:
 - 18 ○ By stating in bold font, in the third paragraph that “All IMVU purchases,

19 ³ The Settlement Class excludes 1) the Honorable Judges Peter H. Kirwan, James P. Kleinberg, and
20 Patricia J. Hamilton, (2) Randall W. Wulff; (3) any member of their immediate families; (4) any
21 government entity; (5) IMVU; (6) any entity in which IMVU has a controlling interest; (7) any of
22 IMVU’s subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives,
23 heirs, successors, or assigns; and (8) any persons who timely opt-out of the Settlement Class.

24 ⁴ IMVU Predits and IMVU Credits are the same, except that IMVU Credits can be transferred to
25 other IMVU users (with certain limitations), while IMVU Predits are non-transferrable and non-
26 exchangeable. Items can be purchased from the IMVU virtual catalog for the same number of
27 IMVU Predits as IMVU Credits.

28 ⁵“Affected Audio Products” means all audio products offered for sale in the IMVU Virtual Catalog
that (a) were uploaded by the Content Creator prior to September 21, 2008, (b) were purchased on
or after September 21, 2008 and before December 1, 2010 and (c) had original playback length
greater than twenty seconds. “Content Creator” means an IMVU user who created and developed
Affected Audio Products and placed those products in the IMVU Virtual Catalog.

⁶ This is the same exchange rate at which, at the time of settlement, IMVU allowed users to sell
their credits. (Safier Decl. ¶ 9.)

1 including, without limitation, IMVU Credits, passes, Products, bundles,
2 Submissions, avatar names, and all other virtual products, whether made with
3 Credits, Currencies, Promo Credits, Credits, Development Tokens, cash or
4 monetary equivalent, are non-refundable, except, in IMVU's sole and
5 absolute discretion."

- 6 ○ By removing the language "with cash or monetary equivalent" from the
7 sentence "When you purchase items or services on this Service such as
8 Credits, credit bundles, avatar names and account upgrades with cash or
9 monetary equivalent, your purchases are non-refundable and are made at your
10 own risk," in the Terms and Conditions of Sale section of the Terms of
11 Service Agreement.

- 12 • IMVU will ensure that, when IMVU users preview an audio item before purchasing
13 it, the audio plays for a duration no longer than the duration for which the item will
14 actually play after purchase, unless the audio is subsequently modified by the third-
15 party developer (i.e., the IMVU user) who posted the audio to the IMVU Virtual
16 Catalog.
- 17 • IMVU will ensure that, when IMVU users view items in their inventories, the
18 notification bar will state "In your inventory" or substantially the equivalent, rather
19 than "You own this."

20 Class Counsel believes that the provision of the above benefits adequately compensates
21 Class Members for the harm they suffered, in light of the risks of litigation. There are numerous
22 risks in continuing with this Litigation, including the possibility of being unable to prove (1) that an
23 ascertainable group of persons saw the September 2008 announcement stating that earlier audio
24 files would not be "cut down" or sampled the audio files before purchase; (2) that IMVU violated
25 its contract or took action that was likely to deceive reasonable persons, or that its interpretation of
26 the contract is unconscionable; (3) that the alleged misrepresentations and omissions were material
27 to reasonable persons; (4) that IMVU is required to provide a refund if it modifies the audio files;
28 (5) that common questions predominate over individual issues such that a class may be certified on

1 some or all claims; and/or (6) that damages or restitution should be awarded or, if so, that any such
2 award should be more than nominal. Further, because the purchases were made with IMVU credits
3 rather than cash, and such IMVU credits might have been “earned” by IMVU users in exchange for
4 activities on the IMVU application rather than purchased with cash, it might be difficult to establish
5 that IMVU had an obligation to pay cash damages to affected users. Even if Plaintiff’s claims were
6 successful, the “best case” recovery would likely not be better than the settlement remedy, as
7 Settlement Class Members are getting **both** reinstatement of the full-length audio files **and** a refund
8 of up to 60% of the credits they spent on the audio files. Given the risks associated with this
9 litigation, this recovery is excellent.

10 Defendant will retain an experienced claim administrator to administer the settlement under
11 the supervision of the parties and the Court.

12 **C. Settlement Release**

13 The Settlement includes a simple “res judicata” release to bind Class Members. A broader
14 release applies to Plaintiff, as he releases all claims of any kind against Defendant. (Safier Decl.
15 Ex. 1, §§ 8.2-8.3.)

16 **D. Class Notice**

17 The claim administrator will send email notice to each settlement class member not later
18 than 14 days after Preliminary Approval. Within the same time period, IMVU also will send the
19 same notice to each class member via “direct message” through the IMVU application. Each notice
20 will summarize the key terms of the settlement and the class member’s rights to opt out or object
21 and provide a link to the Settlement Website where a more detailed notice can be found.
22 Abbreviated text notices that hyperlink to the Settlement Website will also appear on: (i) the IMVU
23 Application, upon initial login via a computer, (ii) the IMVU Website (www.imvu.com), upon the
24 class member’s first visit, and (iii) the IMVU forum page (www.imvu.com/forums/). Finally,
25 \$15,000 in advertisements will be purchased via Google AdWords and/or Facebook, to appear
26 during the period from 14 to 35 days after Preliminary Approval, which will link to the Settlement
27 Website.

28

1 **E. Payment to Class Representatives and Attorneys’ Fees and Costs**

2 Subject to Court approval, Defendant has agreed to pay up to \$10,000 to Plaintiff and up to
3 \$1,150,000 in attorneys’ fees and costs.⁷ Class Members will not be personally liable for the
4 payment to the Class Representatives or any attorneys’ fees or expenses awarded by the Court, nor
5 will these amounts reduce Class Member benefits.

6 **IV. ARGUMENT IN FAVOR OF PRELIMINARY SETTLEMENT APPROVAL**

7 **A. The Settlement Should Be Preliminarily Approved.**

8 Under Rule of Court 3.769, any party may file a motion for preliminary approval of a
9 settlement. California courts have adopted the procedures and standards developed by federal courts
10 for such review and approval. *See Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 820; *La Sala v.*
11 *Am. Sav. & Loan Ass’n* (1971) 5 Cal. 3d 864, 872.

12 Preliminary approval does not require the Court to make a final determination that the
13 settlement is fair, reasonable and adequate. Rather, that decision is made only after notice of the
14 settlement has been given to the class members and they have had an opportunity to voice their
15 views of the settlement or to exclude themselves from the settlement. *See* 5 James Wm. Moore,
16 *Moore’s Federal Practice* 23.83[1], at 23-336.2 to 23-339 (3d ed. 2001). Thus, in considering a
17 potential settlement, the Court need not reach any ultimate conclusions on the issues of fact and law
18 which underlie the merits of the dispute, *Detroit v. Grinnell Corp.* (2d Cir. 1974) 495 F.2d 448, 456,
19 and need not engage in a trial on the merits, *Officers for Justice v. Civil Service Comm’n.* (9th Cir.
20 1982) 688 F.2d 615. Preliminary approval is merely the prerequisite to giving notice of the
21 settlement “to members of the prospective class for their acceptance or rejection.” *Philadelphia*
22 *Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.* (E.D. Pa. 1970) 323 F. Supp. 364, 372.

23 Preliminary approval of the settlement should be granted if there are no “grounds to doubt
24 its fairness or other obvious deficiencies, such as unduly preferential treatment of class
25 representatives or segments of the class, or excessive compensation for attorneys, and appear to fall
26 within the range of possible approval.” *Manual for Complex Litigation*, § 21.632 (4th ed. 2011).

27 _____
28 ⁷ Plaintiff’s counsel will file their fee application at least two weeks before the deadline for class
members to opt-out or object and post a copy on the Settlement Website.

1 This proposed settlement satisfies the standard for preliminary approval as it is within the range of
2 possible approval and there are no grounds to doubt its fairness.

3 **1. A Presumption of Fairness is Applicable to this Settlement.**

4 There is a presumption that a proposed settlement is fair and reasonable when it is the result
5 of arm's-length negotiations, there has been investigation and discovery that are sufficient to permit
6 counsel and the court to act intelligently, and counsel are experienced in similar litigation. *See Dunk*
7 *v. Ford Motor Company* (1996) 48 Cal. App. 4th 1794, 1800-01; 2 Herbert Newberg & Alba Conte,
8 *Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992).

9 This settlement is the product of many hours of arm's-length negotiations, including an in-
10 person mediation conducted by Randall Wulff. The parties did not negotiate about attorneys' fees
11 or expenses until they had reached agreement on all other material terms of the settlement,
12 including the Class Benefit and notice described above. Plaintiff engaged in significant discovery
13 including reviewing documents and written discovery responses, and conducting depositions
14 regarding Defendant's business policies and practices. (Safier Decl. ¶ 6.) All parties are represented
15 by counsel with significant experience in class action litigation. (Id., ¶ 4 & Ex. 2.)

16 Class Counsel believes the settlement to be in the Class' best interests, taking into account
17 the costs and risks of continued litigation. Indeed, Plaintiff believes that the Class Benefit is as good
18 as, if not better than, the likely result at trial. At trial, Plaintiff might in the best-case scenario obtain
19 a 100% refund to each user of the IMVU Credits expended, or an order requiring IMVU to restore
20 the full length of the audio files, but not both. Further, as the audio files were merely shortened
21 rather than eliminated, Plaintiff probably could not obtain a 100% refund of credits expended. Even
22 if credits were required to be refunded, Plaintiff might not be able to obtain any cash remedy; the
23 settlement does provide such a remedy. (Safier Decl. ¶ 8.)

24 The opinion of experienced counsel supporting the settlement is entitled to considerable
25 weight. *See, e.g., In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.* (C.D. Cal. June 10,
26 1992) MDL Docket No. 901 All Cases, 1992 U.S. Dist. LEXIS 14337, at *8 (finding belief of
27 counsel that the proposed settlement represented the most beneficial result for the class to be a
28 compelling factor in approving settlement); *Kirkorian v. Borelli* (N.D. Cal. 1988) 695 F. Supp. 446,

1 451 (opinion of experienced counsel is entitled to considerable weight); *Boyd v. Bechtel Corp.*
2 (N.D. Cal. 1979) 485 F. Supp. 610, 622 (recommendations of plaintiffs’ counsel should be given a
3 presumption of reasonableness).

4 **2. There Are No Grounds To Doubt The Fairness Of The**
5 **Settlement.**

6 The Settlement provides no preferential treatment for Plaintiff or other Class Members.
7 Although it provides for an incentive award to Plaintiff, which is subject to the Court’s approval,
8 that incentive is designed to separately compensate Plaintiff for (1) granting a release of *all* his
9 claims, (2) having incurred substantial risks in undertaking this litigation, including the potential
10 liability for costs of suit, and (3) having expended substantial time in prosecuting this case,
11 including reviewing drafts of pleadings, reviewing settlement proposals, being deposed, attending
12 mediation and supervising counsel.

13 The Settlement also provides for an award of attorneys’ fees and expenses, subject to the
14 Court’s approval. Plaintiff’s forthcoming motion for award of fees and expenses will explain why
15 the award is justified by, at a minimum, a lodestar-multiplier analysis. The fees and expenses were
16 negotiated only after the Parties agreed to all other terms, and they will be paid separately from, and
17 will not reduce, the Class Benefit. (Safier Decl. ¶ 7.)

18 **3. The Settlement Falls Within the Range of Possible Approval.**

19 The proposed Settlement recognizes the inherent risks, costs and delay associated with the
20 prosecution of complex cases. If the matter were to proceed, Defendant might defeat class
21 certification and/or obtain summary judgment or a favorable verdict at trial. Furthermore, even if a
22 judgment were obtained against Defendant at trial, the recovery might be of no greater value to
23 Class Members, and indeed might be substantially less valuable than the proposed Settlement. The
24 only thing that is certain if this case goes to trial is that Class Members would have to wait much
25 longer for any recovery, and both parties will incur significant additional costs and fees.

26 **B. The Settlement Class Should Be Preliminarily Certified.**

27 In California there are two certification prerequisites: (1) the existence of an “ascertainable
28 class,” and (2) “a well defined community of interest in the questions of law and fact involved

1 affecting the parties to be represented.” *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 704 (1967)
2 (citation omitted). In addition, California courts utilize the procedures prescribed by the Federal
3 Rules of Civil Procedure for class actions. *See Schneider v. Vennard* (1986) 183 Cal. App. 3d 1340,
4 1345-46; *Daar*, 67 Cal. 2d at 695; *Vasquez*, 4 Cal. 3d 800; *La Sala*, 5 Cal. 3d at 872. California
5 Civil Code §1781(b) provides:

6 (b) The court shall permit the suit to be maintained on behalf of all
7 members of the represented class if all of the following conditions exist:

- 8 (1) It is impracticable to bring all members of the class before the
9 court.
- 10 (2) The questions of law or fact common to the class are
11 substantially similar and predominate over the questions
12 affecting the individual members.
- 13 (3) The claims or defenses of the representative plaintiffs are
14 typical of the claims or defenses of the class.
- 15 (4) The representative plaintiffs will fairly and adequately protect
16 the interests of the class.

17 Each of the criteria for class certification is satisfied.

18 **1. Numerosity**

19 California Civil Code §1781(b) requires the class to be so numerous that joinder is
20 impractical. *See Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 470. Defendant’s databases
21 show that 432,166 unique purchasers bought audio items through IMVU in the period between
22 September 22, 2008 and December 1, 2010 that were longer than 20 seconds. (Safier Decl. ¶
23 5.) These persons’ identities are also easily discerned from Defendant’s records. (Id.)

24 **2. Commonality and Predominance**

25 California Civil Code §1781(b)(2) requires that “questions of law or fact common to the
26 class [be] substantially similar and predominate over the questions affecting the individual
27 members.” Common issues predominate when they would be “the principal issues in any individual
28 action, both in terms of time to be expended in their proof and of their importance.” *Vasquez*, 4 Cal.
3d at 810. Common questions need only be “sufficiently pervasive to permit adjudication in a class
action rather than in a multiplicity of suits.” *Id.* Commonality is easily satisfied if there is one issue
common to class members. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998).

1 Here, common issues include whether reasonable consumers would be deceived by (1) IMVU's
2 representations that the consumers "own[ed]" the audio products they purchased; (2) IMVU's
3 promise not to not limit the playback of audio products added to the catalog before September 2008;
4 (3) IMVU's representations that customers could use the audio products, as purchased, whenever
5 they wanted; (4) the fact that when sampled before purchase using the "TRY" button, audio files
6 played at full-length; and (5) IMVU's policy and practice of refunding the purchase price of audio
7 products that were later altered, broken or re-rated. *See Cel-Tech Comm., Inc. v. Los Angeles*
8 *Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 180 (UCL prohibits conduct that is unfair or deceptive,
9 even if it is not unlawful); *Comm. on Children's Television, Inc. v. General Foods Corp.* (1983) 35
10 Cal. 3d 197, 211.

11 As IMVU is headquartered in California and directed the alleged activities from this state
12 (Safier Decl. ¶ 10), the law of California applies to all Class members' claims. *See Norwest*
13 *Mortgage, Inc. v. Superior Court* (1999) 72 Cal. App. 4th 214 (upholding certification of a
14 nationwide class in a consumer protection action against defendant with both its headquarters and
15 principal place of business located outside the state of California for alleged wrongful conduct
16 occurring in California); *Clothesrigger v. GTE Corp.* (1987) 191 Cal. App. 3d 605 (nationwide
17 class could be certified against foreign corporation for allegedly fraudulent representations
18 prepared in and disseminated from California). Additionally, IMVU's terms of service agreement
19 specified that: "these Terms will be governed and interpreted pursuant to the laws of the State of
20 California, United States of America, for contracts to be executed and fully performed therein and
21 notwithstanding any principles of conflicts of law." (Safier Decl. ¶ 10.) Each class member arguably
22 agreed to these terms when purchasing the Affected Audio Products.

23 3. Typicality

24 Typicality requires that the named Plaintiff's interests in the action be significantly similar
25 to those of other class members. *See Richmond*, 29 Cal. 3d at 470-75. A representative plaintiff's
26 claims are typical if they (1) arise from the same event, practice, or course of conduct that gives rise
27 to the claims of other class members, and (2) are based on the same legal theories. *See Miller v.*
28 *Woods* (1983) 148 Cal. App. 3d 862, 874. When the same underlying conduct affects the named

1 plaintiffs and the class sought to be represented, the typicality requirement is met irrespective of
2 varying fact patterns that may underlie individual claims. *See Daniels v. Centennial Group, Inc.*
3 (1993) 16 Cal. App. 4th 467, 473.

4 In this case, the Representative Plaintiff's claims are precisely the same as those of the class
5 he seeks to represent; like other members of the Class, he purchased the Affected Audio Products in
6 reliance on Defendant's representations that they were (and would continue to be) full-length. As
7 the court in *B.W.I. Custom Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal. App. 3d 1341, explained,
8 "it has never been the law in California that the class representative must have identical interests
9 with the class members. The only requirements are that common questions of law and fact
10 predominate and that the class representative be similarly situated." *Id.* at 1347 (citation omitted,
11 emphasis in original).

12 **4. Adequacy of Representation**

13 To maintain a class action, the representative plaintiff must adequately protect the interests
14 of the class. *See* Cal. Civ. Code §1781(b)(4). Adequacy of representation requires that: (1) there be
15 no disabling conflicts of interest between the class representative and the class and (2) class counsel
16 be competent and experienced. *See McGhee v. Bank of Am.* (1976) 60 Cal. App. 3d 442, 450.

17 No conflicts exist between the Representative Plaintiff and Class Members, because Plaintiff
18 and Class members have been damaged by the same conduct, and he has the incentive to fairly
19 represent all Class Members' claims to achieve the maximum possible recovery. *See Richmond*, 29
20 Cal. 3d at 473; *Harrison v. Bd. of Supervisors*, 44 Cal. App. 3d 852, 863 (1975).

21 Plaintiff's Counsel are experienced class action attorneys, have been appointed as lead
22 counsel in numerous nationwide consumer class actions, and have a successful track record in
23 litigating major class actions. (Safier Decl., Ex 2.)

24 **5. Superiority of Class Action**

25 Also relevant to the Court's certification decision is whether a class action is the superior
26 method of adjudication. *See Schneider*, 183 Cal. App. 3d at 1347. The California Supreme Court
27 has "repeatedly emphasized the importance of the class action device for vindicating the rights
28 asserted by large groups of persons." *Keating v. Superior Court* (1982) 31 Cal. 3d 584, 609;

1 *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *see also Richmond*, 29 Cal. 3d at 469 (recognizing
2 that class actions are useful for fashioning effective and inclusive group remedy). The class device
3 is even more appropriate to adjudicate the rights of large numbers of similarly situated victims who
4 lack the sophistication, financial wherewithal, or individual incentive to sue on their own. For
5 example, in *Vasquez v. Superior Court*, the California Supreme Court emphasized that “[i]ndividual
6 actions by each of the defrauded consumers is often impracticable because the amount of individual
7 recovery would be insufficient to justify bringing a separate action; thus an unscrupulous seller
8 retains the benefits of its wrongful conduct.” *Vasquez*, 4 Cal. 3d at 808. The Court in *Vasquez* also
9 recognized several other benefits of class action treatment:

10 A class action by consumers produces several salutary byproducts, including a
11 therapeutic effect upon those sellers who indulge in fraudulent practices, aid to
12 legitimate business enterprises by curtailing illegitimate competition, and avoidance
13 to the judicial process of the burden of multiple litigation involving identical claims.
14 *Id.*; *see also State v. Levi Strauss & Co.*, 41 Cal. 3d 460, 471 (1986) (noting that consumer class
15 actions are “an essential tool for the protection of consumers against exploitative business
16 practices”). This case is paradigmatic: approximately 432,000 persons spent approximately \$3.3
17 million to purchase the IMVU credits that they expended on the affected audio products, or an
18 average of \$7.64 per class member. (The actual dollar amount spent out-of-pocket is lower, because
19 some credits were earned by users in exchange for selling virtual items or services through the
20 IMVU application.) Thus, it would be impractical to bring each class member’s claim individually.

21 Accordingly, the Class meets all criteria for certification and should be certified for purposes
22 of effectuating this settlement. *See Hogya v. Superior Court* (1977) 75 Cal. App. 3d 122 (if the
23 action satisfies the statutory criteria, the court must certify the class); *see also Dunk*, 48 Cal. App.
24 4th at 1807 n.19 (lesser standard of scrutiny applies when evaluating these criteria for settlement
25 purposes and courts should take settlement into account in evaluating class certification); *cf.*
26 *Amchen Prods., Inc. v. Windsor* (1997) 521 U.S. 591, 620 (because Court is certifying action for
27 settlement purposes only, it need not determine whether the class would be manageable for
28 litigation purposes.)

C. The Proposed Notice Is Adequate.

The proposed Notices (a Long-Form Notice to be posted on the Settlement Website, and a

1 shorter Email Notice to be sent to each class member) are accurate, informative, neutral, and
2 readable by the average person. (Safier Decl. Ex. 1, sub-Ex. B.) They are written in simple, plain
3 language. They provide the key information about the Settlement so that the Class can choose what
4 to do, including: the settlement benefits; the fact that class members will be bound by the judgment;
5 the rights to opt out or object and the methods for doing so; and the date, time, and place of the final
6 settlement approval hearing. The Notices are “adequate to ‘fairly apprise the prospective members
7 of the class of the terms of the proposed settlement and of the options that are open to them in
8 connection with [the] proceedings.’” *7-Eleven Owners for Fair Franchising v. Southland Corp.*
9 (2000) 85 Cal. App. 4th 1135, 1164. (citation omitted.)

10 **V. PROPOSED SCHEDULE OF EVENTS**

11 The Court’s entry of the Preliminary Approval Order would, among other things, (i) certify
12 the action as a class action for the purposes of settlement; (ii) direct notice of the settlement to all
13 members of the Class; and (iii) schedule a hearing to consider whether the settlement should be
14 approved as being fair, reasonable, and adequate (the “Settlement Fairness Hearing”). The parties
15 respectfully request that the Preliminary Approval Order set the following deadlines:

- 16 • **Deadline for initiating notice to the Class: 14 days after Preliminary Approval**
- 17 • **December 31, 2015 is the deadline to Opt-Out, object, or request to intervene.**
- 18 • **January 28, 2016 at 9:00 a.m. is the Settlement Hearing Date.**
- 19 • **February 29, 2016, or 30 days after Final Approval, whichever is later, is the**
20 **deadline to submit a Benefit Election Form.**

21 This schedule is similar to those used and approved in many class action settlements, and it
22 provides due process to Settlement Class Members with respect to their rights concerning the
23 settlement. *See Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993).

24 **VI. CONCLUSION**

25 Plaintiff respectfully requests that the Court grant preliminary approval of the proposed
26 settlement and enter the proposed Preliminary Approval Order, submitted herewith.

27 DATED: October 7, 2015

GUTRIDE SAFIER LLP

/s/Seth Safier/s/

28 By: _____
Seth A. Safier, Attorneys for Plaintiff