GUTRIDE SAFIER LLP
ADAM J. GUTRIDE (State Bar No. 181446)
adam@gutridesafier.com
SETH A. SAFIER (State Bar No. 197427)
seth@gutridesafier.com
TODD KENNEDY (State Bar No. 250267)
todd@gutridesafier.com
100 Pine Street, Suite 1250
seth@gutridesafier.com
San Francisco, California 94111
Telephone: (415) 336-6545
Facsimile: (415) 449-6469

Attorneys for Plaintiff,
Peter MacKinnon, Jr.

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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Date: February 19, 2016
Time: 9:00 a.m.
Department: 1

Honorable Judge Peter H. Kirwan

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I. INTRODUCTION

On November 3, 2015, this Court preliminarily approved this class action settlement between Plaintiff and IMVU, Inc. It scheduled a final approval hearing for February 16, 2016 to determine: whether (1) the proposed settlement is just, fair, reasonable, and adequate for the Class such that it should be granted final approval; (2) certification of the Class should be made final; (3) the Court should enter the proposed judgment; (4) the Court should award Plaintiff's Counsel attorneys' fees and expenses in the amount set forth in the Settlement Agreement; and (5) the Court should award Plaintiff an incentive for his time and risks undertaken in the Litigation.

Under the terms of the Settlement Agreement, Defendant has agreed to implement engineering changes that restore the *status quo ante*—i.e., remove the playback limit on the affected audio products. Defendant also will provide approximately 210,000 persons a partial refund of the credits they used to pay for the audio products. No claim form need be submitted to obtain this benefit. Those who wish instead to receive a cash refund can do so by submitting a simple benefit election form.

As the Settlement is the product of a non-collusive, adversarial negotiation, Plaintiff respectfully requests that this motion be granted and final judgment entered.

II. BACKGROUND FACTS AND DETAILS OF SETTLEMENT

A. Litigation History

1. Filing and Removal

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

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

2. Plaintiff's Case Is Dismissed and He Successfully Appeals

Following remand, IMVU filed a motion for judgment on the pleadings. On May 2, 2012, this court (Kleinberg, J.) granted IMVU's motion as to all causes of action, with leave to amend only as to the CLRA and UCL. It held that under IMVU's Terms of Service ("TOS") agreement,

IMVU was permitted to make changes to the "content offered on this site, at any time without notice" and without giving a refund.

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

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

B. Settlement History

The proposed settlement was reached following significant, hard fought litigation and many rounds of arms-length talks. (Declaration of Seth Safier in Support of Motion for Preliminary Approval ("Prelim. Safier Decl.") ¶ 7.) Settlement discussions first began in December of 2014 when this case had been dismissed and was pending on appeal. Those discussions did not progress far. After the successful appeal, Defendant retained new counsel, and the parties agreed to attend mediation. On April 20, 2015, the parties mediated the case before well-reputed mediator Randall Wulff, of Wulff Quinby & Sochynsky in Oakland, California. Several months later, this settlement was reached.

C. Settlement Summary

The Settlement includes the following material terms and conditions:

1. Class Certification

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

> All persons who (1) after September 21, 2008 and before December 1, 2010, used IMVU Credits to purchase from the IMVU Virtual Catalog at least one audio product whose playback length was greater than twenty seconds, (2) subsequently logged into the IMVU service at least once after January 31, 2011, (3) as of April 20, 2015, had not held an IMVU 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 setting in the IMVU Application set as the United States.[1]

As stated in the motion for preliminary approval, Plaintiff had determined from Defendant's databases that approximately 432,000 unique persons had purchased the affected audio products during the class period. After preliminary approval, Defendant determined that the actual number of unique purchasers was 448,914, but that only approximately 119,417 of those persons were Settlement Class Members, with the others excluded because they (1) made their purchases with IMVU Predits rather than IMVU Credits, (2) previously had been terminated by IMVU for violations of IMVU terms of service, or (3) failed to set their country of residence in the IMVU Application as the United States. Defendant has now agreed to provide the benefits and changed practices under the settlement (as described in the following section) to persons regardless of country setting, or an additional 90,521 persons. Thus a total of total 209,938 persons will automatically obtain settlement benefits. (Declaration of Seth Safier in Support of Motion for Final Approval ("Final Safier Decl."), ¶ 62; Declaration of Kevin Henshaw in Support of Motion for Final Approval ("Henshaw Decl.").)

2. Class Benefit and Changed Practices.

Each Class Member (and each person who was excluded from the class solely because his country of residence setting was not set as the United States) will automatically receive a refund, to his or her IMVU Account, of IMVU Promotional Credits ("Predits"),[2] in a quantity equal to 60% of

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

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

the quantity of IMVU Credits he or she used to pay for the Affected Audio Products.[3] No claim form is required. The 209,938 persons eligible for settlement benefits made approximately 2.7 million purchases of Affected Audio Products using IMVU Credits, expending a total of approximately 1.97 billion Credits. Because the purchase price for IMVU Credits during the class period was typically $1 per 1000 Credits, it is estimated that they paid approximately $1.97 million for the Affected Audio Products. (Final Safier Decl. ¶ 63.)[4] They will automatically receive 60% of this value back in their accounts, in the form of IMVU Predits.

Any person who does not want to receive the IMVU Predits may elect one of two alternative remedies, by submitting a one-page benefit election form: (1) a refund, to his or her IMVU Account, of IMVU Credits, in a quantity equal to 30% of the quantity of IMVU Credits he or she used to pay for the Affected Audio Products or (2) the cash value of those refunded Credits, computed at the rate of $0.00040 per IMVU Credit.[5]

IMVU also has separately agreed to change the IMVU Application so that Affected Audio Products that remain in the IMVU Virtual Catalog can be played at their full length. This change benefits not only Settlement Class Members, but *all* IMVU users, regardless of whether they purchased the Affected Audio Products with Predits or Credits, and regardless of their place of residence. There were approximately 4.1 million separate purchases of Affected Audio Products during the class period (i.e. of audio greater whose playback duration was restricted after purchase); the playback restriction will now be removed. (Final Safier Decl. ¶ 64.) [6]

IMVU also will revise its Terms of Service agreement to remove language that previously

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[3] "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.

[4] In some cases, these persons may have earned the Credits in exchange for selling goods or services through the IMVU Application, rather than purchasing the Credits for cash.

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

[6] IMVU is not required to restore the full length of any audio product if doing so would violate the rights of the product's copyright holder.

was likely to deceive. In particular it will state in bold font, in the third paragraph that "All IMVU purchases, including, without limitation, IMVU Credits, passes, Products, bundles, Submissions, avatar names, and all other virtual products, whether made with Credits, Currencies, Promo Credits, Predits, Development Tokens, cash or monetary equivalent, are non-refundable, except, in IMVU's sole and absolute discretion." It will also remove the language "with cash or monetary equivalent" from the sentence "When you purchase items or services on this Service such as Credits, credit bundles, avatar names and account upgrades with cash or monetary equivalent, your purchases are non-refundable and are made at your own risk," in the Terms and Conditions of Sale section of the Terms of Service Agreement.

Further, IMVU will ensure that, when IMVU users preview an audio item before purchasing it, the audio plays for a duration no longer than it will actually play after purchase, unless the audio is subsequently modified by the third-party developer (i.e., the IMVU user) who posted the audio to the IMVU Virtual Catalog.

Finally, IMVU will ensure that, when IMVU users view items in their inventories, the notification bar will state "In your inventory" or substantially the equivalent, rather than "You own this."

Plaintiff's counsel believes that the provision of the above benefits adequately compensates Class Members for the harm they suffered, in light of the risks of litigation. There are numerous risks in continuing with this Litigation, including the possibility of being unable to prove (1) that an ascertainable group of persons saw the September 2008 announcement stating that earlier audio files would not be "cut down" or sampled the audio files before purchase; (2) that IMVU violated its contract or took action that was likely to deceive reasonable persons, or that its interpretation of the contract is unconscionable; (3) that the alleged misrepresentations and omissions were material to reasonable persons; (4) that IMVU is required to provide a refund if it modifies the audio files; (5) that common questions predominate over individual issues such that a class may be certified on some or all claims; and/or (6) that damages or restitution should be awarded or, if so, that any such award should be more than nominal. Further, because the purchases were made with IMVU credits rather than cash, and such IMVU credits might have been "earned" by IMVU users in exchange for

activities on the IMVU application rather than purchased with cash, it might be difficult to establish that IMVU had an obligation to pay cash damages to affected users. Even if Plaintiff's claims were successful, the "best case" recovery would likely not be better than the settlement remedy, as Settlement Class Members are getting ***both*** reinstatement of the full-length audio files ***and*** a refund of up to 60% of the credits they spent on the audio files. Indeed, the settlement provides the reinstatement benefit to *all* users—whether or not they are members of the Settlement Class—and provides the refund benefit to both Settlement Class members and foreign users. Given the risks associated with this litigation, this recovery is excellent.

3. Settlement Release

The Settlement includes a simple "res judicata" release to bind Class Members. A broader release applies to Plaintiff, as he releases all claims of any kind against Defendant. (Prelim. Safier Decl. Ex. 1, §§ 8.2-8.3.) There is no release by non-class members (e.g., foreign users) even if they receive settlement benefits.

4. Administrative Expenses, Attorneys' Fees and Costs, Incentive Awards

All costs of notice and administration of the Settlement will be paid by Defendant. Plaintiff's counsel requests payment of $10,000 for Plaintiff. The incentive fee is designed to compensate the named Plaintiff for (1) the time and risk he took in prosecuting this action (including the risk of liability for Defendant's costs) and (2) agreeing to a release broader than the one that will bind settlement class members. (Prelim. Safier Decl., Ex. 1, § 8.2.) Plaintiff also requests payment of his attorneys' out of pocket expenses of $51,798.19, plus attorneys' fees of $1,098,201.81, for a total of $1,150,000.00 (Of this amount, $50,000.00 will be paid only upon proof that all settlement benefits have been distributed to settlement class members, and further order of this Court.) The reasonableness of Plaintiff's request is discussed in more detail in Plaintiff's separately submitted memorandum of points of authority in support of his application for attorneys' fees, costs and an incentive award.

D. Class Notice

The claim administrator (Garden City Group) has established a settlement website at

http://www.audiofilesettlement.com, which contained the settlement notices, a contact information page that includes address and telephone numbers for the claim administrator and the parties, the settlement agreement, the signed order of preliminary approval, online and printable versions of the claim form and the opt out forms, and answers to frequently asked questions. In addition, this motion for final approval and application for attorneys' fees, costs, and incentive awards will be placed on the website upon filing. (Declaration of Lori I. Castaneda Regarding Notice and Settlement Administration ("Castaneda Decl.") ¶ 6.)

The claim administrator sent email notice to 122,688 persons initially identified by Defendant as potential Settlement Class Members.[7] (Id., ¶¶ 7-8.) IMVU has additionally sent notices of the settlement to each class member via "direct message" through the IMVU application. The notices were sent before November 17, 2015. (Id.) Both forms of notice summarized the key terms of the settlement and the class members' rights to opt out or object and provided a link to the Settlement Website where a more detailed notice can be found. In addition, IMVU posted abbreviated text notices that hyperlink to the Settlement Website on: (i) the IMVU Application, upon initial login via a computer, (ii) the IMVU Website (www.imvu.com), upon the class member's first visit, and (iii) the IMVU forum page (www.imvu.com/forums/). (Henshaw Decl. ¶ 5.) Finally, at the Claim Administrator's request, Facebook displayed 9,611,372 impressions of an advertisement about the settlement, and Google displayed another 311,138 impressions of the advertisement about the settlement. Both the Facebook and Google advertisements linked to the settlement website. (Castaneda Decl. ¶ 9.) Details about the notice program can be found in the Declarations of Lori Castaneda and Kevin Henshaw submitted herewith.

E. Class Response

Of the more than 120,000 persons sent direct notice of the Settlement, to date, no objections have been filed. (Final Safier Decl. ¶83.) Moreover, only 24 persons have opted out. (Castaneda Decl. ¶ 15.)

[7] Of these, 81,488 were delivered and 41,100 bounced.

III. ARGUMENT

A. Standard for Final Approval

In order "[t]o prevent collusion or unfairness to the Class, the settlement or disapproval of a class action requires court approval." *Malibu Outrigger Board of Governors v. Superior Cour*t (1980) 103 Cal.App.3d 572, 578-79. The standard for granting approval is whether the proposed class action settlement as a whole is fair, adequate and reasonable. *See Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801 ("*Dunk*"); *see also Wershba v. Apple Computer, Inc*. (2001) 91 Cal.App.4th 224, 234; *7-Eleven Owners for Fair Franchising v. Southland Corp*. (2000) 85 Cal.App.4th 1135, 1145. There is, however, a "strong judicial policy that favors settlement," particularly (like here) "where complex class action litigation is concerned." *Class Plaintiffs v. City of Seattle* (9th Cir. 1992) 955 F.2d 1268, 2176 ; 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (4th ed. 2002) § 11:41("*Newberg*") (citations omitted.)

This Court has broad discretion in determining whether a proposed class action settlement is fair. *See Rebney v. Wells Fargo Bank* (1990) 220 Cal.App. 3d 1117, 1138. As the Ninth Circuit has explained, "[t]he district court's decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof." *In re Mego Financial Corp. v. Securities Litigation* (9th Cir. 2000) 213 F. 3d 454, 458; *Hanlon v. Chrysler Corp*. (9th Cir. 1998) 150 F.3d 1011, 1026.[8]

In exercising this discretion, the Court must generally give "[d]ue regard…to what is otherwise a private consensual agreement between the parties." *Dunk*, Cal.App.4th at 1801. Indeed, the Court's inquiry "must be limited to the extent necessary to reach a reasonable judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *Id.* (citations omitted.)

[8] To the extent that they are not inconsistent with California jurisprudence, California courts are advised to look for guidance to Rule 23 of the Federal Rules of Civil Procedure and federal cases applying Rule 23. *See Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 821; *see also Green v. Obledo* (1980) 29 Cal.3d 126, 145-46; *Dunk*, *supra*, 48 Cal.App.4th at 1801 fn. 7.

The Court must "explore[] all the relevant factors" bearing on approval of a class action settlement. *See Hanlon v. Chrysler Corp*., 150 F.3d at 1026. In California, the "relevant factors" include the strength of plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the state of the proceedings; the experience and view of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *See Wershba*, 91 Cal.App.4th at 244-45. This list of factors is not, however, exclusive. Rather, the trial court is free to engage in a balancing and weighing of factors, depending on the circumstances of each case. *Id*. at 245. The Court, however, is not to engage in a mini-trial on the merits. As Judge Friendly instructed:

> [T]he role of the court in passing upon the propriety of the settlement of a…class action is a delicate one….[W]e recognize that since '[t]he very purpose of compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the court must not turn the settlement hearing into a trial or a rehearsal of the trial.' Rather, in the words of the Supreme Court,…it must reach an 'intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense, and likely duration of such litigation…[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of the law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion—and the judge will not be reversed if the appellate court concludes that the settlement lies within that range.

Newman v. Stein (2d Cir. 1972) 464 F.2d 689, 691-93, *cert denied sub nom, Benson v. Newman* (1972) 409 U.S. 2039; *see also Dunk*, 48 Cal.App.4th at 1801, *citing Officers for Justice v. Civil Service Comm'n* (9th Cir. 1982) 688 F.2d 615, 625 ("ultimately, the court's determination in nothing more than 'an amalgam of delicate balancing, gross approximation and rough justice.'").

B. All Of The Relevant Factors Favor Approval Of The Settlement

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

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

a. Settlement Was Reached Through Arms' Length Negotiation

The proposed settlement herein is the product of thousands of hours of active, hard-fought litigation, and protracted and equally hard-fought settlement discussions and negotiations over the course of many months between counsel for Plaintiff and counsel for Defendant, including an in-person mediation session conducted by Randall Wulff. (Prelim. Safier Decl. ¶ 7.)

Prior to mediation, Plaintiff had engaged in significant discovery, including reviewing documents and written declarations and deposing Defendant's corporate representatives on Defendant's business practices. (Id., ¶ 7.) All parties are represented by counsel with significant experience in class action litigation, including litigation related to consumer class actions. (Final Safier Decl. ¶¶ 73-74.) The parties did not negotiate about attorneys' fees or expenses until they had reached agreement on all other material terms of the Settlement, including the class benefit and notice. (Id., ¶¶ 49-54.) After an agreement in principle was reached, the parties spent a great deal of time hammering out the Settlement Agreement, claim forms, notices, and orders. (Id. ¶ 56.) This Settlement was accordingly the "product of hard-fought adversarial negotiations by the parties." *Wershba*, 91 Cal.App.4th at 245.

b. The Settlement Is The Result Of Significant Investigation And Discovery.

In determining whether a settlement is fair, adequate and reasonable, courts often consider "[t]he extent of discovery completed and the stage of the proceedings." *Dunk*, 48 Cal.App.4th at 1801. This Settlement was achieved after over four years of active litigation, including significant investigation and discovery. (Prelim. Safier Decl. ¶¶ 5-8.) Apart from formal discovery, Plaintiff's counsel engaged in significant independent investigation, including tracking Defendant's terms and conditions of use, public statements, online catalog offerings, and day-to-day operations, and obtaining and reviewing documents from sources other than Defendant. (Id. ¶ 6.)

c. Counsel For The Parties Are Experienced Class Action Attorneys

This litigation, the settlement negotiations and appeal were conducted by counsel with experience in consumer class actions and other complex litigation. (Prelim. Safier Decl. ¶ 4, Ex. 2.) Plaintiff's counsel was familiar with the legal and factual issues of the case, including damage analyses and litigation risk analyses. (Id. ¶¶ 5-8; Final Safier Decl. ¶¶ 4-59, 67.) Such experience

underscores the presumption of fairness that the Court should apply to this Settlement. *See Wershba*, 91 Cal.App.4th at 245.

d. To Date, No Objections Have Been Filed.

Direct notice was sent to all of the nearly 120,000 class members, by email and direct message via the IMVU Application. (Castaneda Decl. ¶¶ 7-8; Henshaw Decl. ¶5.)[9] There was also a comprehensive Internet advertisement campaign. (Castaneda Decl. ¶ 9.) Nevertheless, as of the date of this motion, no objections have been filed. (Final Safier Decl. ¶ 83.) Further, only 24 class members have opted out. (Castaneda Decl. ¶ 15.) Where, like here, only an extremely small percentage of the class has reacted negatively, the law strongly favors final approval. *See, e.g.*, 4 *Newberg on Class Actions* at § 11.41; *Wershba*, 91 Cal.App.4th at 244-45.

For all of the above reasons, it appropriate for the Court to presume that the proposed Settlement is fair, adequate and reasonable under California law.

2. Additional Relevant Criteria Confirm That The Settlement Is Fair, Adequate and Reasonable.

In addition to the factors establishing a presumption of fairness, in deciding whether to grant final approval to a class action settlement, California courts consider several additional (related) factors, including without limitation: (a) the amount offered in the settlement; (b) the risks inherent in continued litigation; (c) the complexity and stage of the proceedings when settlement was reached; (d) the experience and views of counsel; and (e) the reaction of the class. *See Dunk*, 48 Cal.App.4th at 1801. Again, this "list of factors is not exhaustive and should be tailored to each case." *Id.*

In considering these factors "it must not be overlooked that voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation…" *Officers for Justice*, 688 F.2d at 625; *7-Eleven*, 85 Cal.App.4th at 1151. Applied to the instant matter, all of these factors also favor final approval.

[9] In connection with their reply papers, the parties will file an updated declaration from the claim administrator regarding opt-outs and objections.

a. The Settlement Consideration Is Significant, Appropriate And Fair.

Here, the benefits to Class Members are clear, demonstrable and immediate. Each Class Member will automatically receive a refund, to his or her IMVU Account, of IMVU Promotional Credits ("Predits"), in a quantity equal to 60% of the quantity of IMVU Credits he or she used to pay for the Affected Audio Products. No claim form is required. If the Class Member does not want to receive the IMVU Predits, he or she may elect a refund, to his or her IMVU Account, of IMVU Credits, in a quantity equal to 30% of the quantity of IMVU Credits he or she used to pay for the Affected Audio Products or (2) the cash value of those refunded Credits, computed at the rate of $0.00040 per IMVU Credit.[10]

The same benefits are being provided to foreign users of the IMVU website, even though they are not bound by the settlement release.

Moreover, the settlement benefits are not limited to IMVU Predits, IMVU Credits, or cash. Most importantly, *all* users will have the full length of their audio files restored, subject only to IMVU's right to remove audio for copyright violations. There will be numerous revisions to IMVU's terms of service and other disclosures to reduce the likelihood of further deception. IMVU will also ensure that the pre-purchase "preview" function does not play audio for a longer duration than it will play after purchase. (Prelim. Safier Decl., Ex. 1.)

Additionally, the Settlement provides no preferential treatment for Plaintiff or other Class Members. Plaintiff will receive no more than a $10,000.00 incentive award to compensate him for the time he spent on this litigation and risks of undertaking this litigation, including the potential liability for costs of suit and his broad release against Defendant. (Prelim Safier Decl., Ex. 1.) Moreover, the Settlement does not mandate excessive compensation for Plaintiff's attorneys.[11]

b. The Settlement Extinguishes All Of The Risks Involved In Litigating This Matter.

The Court must next weigh the settlement benefits against the risk inherent in continued

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

[11] *See* Plaintiff's Application For Attorneys' Fees, Costs and Incentive Award.

litigation. *See Dunk*, 48 Cal.App.4th at 1801-02. This balancing further supports approval of the Settlement.

Plaintiff's counsel believes that the provision of the above monetary benefits and the changed practices adequately compensate Class Members for the harm they suffered, in light of the risks of litigation. Indeed, the above benefits are likely better than what Plaintiff might, in the best-case scenario, obtain at trial. For example, at trial, Plaintiff may obtain a 100% refund to each user of the IMVU Credits expended, or an order requiring IMVU to restore the full length of the audio files, but not both. Further, as the audio files at issue in this case were merely shortened rather than eliminated, Plaintiff probably could not obtain a 100% refund of credits expended. Even if credits were required to be refunded, Plaintiff might not be able to obtain any cash remedy, but the Settlement does provide such a remedy.

There are also numerous risks in continuing with this Litigation, including the possibility of losing on summary judgment or being denied class certification. *See supra* page 5.

This Court, which has maintained oversight of these proceedings, is uniquely situated to evaluate the risks of continued litigation. Because the Settlement provides immediate and substantial relief, without the attendant risks of future litigation, it warrants this Court's final approval. *See, e.g., 7-Eleven*, 85 Cal.App.4th at 1145 (a full and fair assessment of a settlement "is nearly assured when all discovery has been completed and the case is ready for trial.")

c. The Complexity, Expense, And Likely Duration Of Continued Litigation Against Defendant Favors Final Approval.

Another related factor for the Court to consider in assessing fairness is the complexity, expense and likely duration of the litigation had the Settlement not been reached. *See Dunk*, 48 Cal.App.4th at 1801; *Officers for Justice*, 688 F.2d at 625; *Marshall v. Holiday Magic, Inc.* (9th Cir. 1977) 550 F.2d 1173, 1178; *Girsh v. Jepson* (3rd Cir. 1975) 521 F.2d 153, 157. In weighing this factor, the Court must compare the benefits of the Settlement to the expenses and delay involved in achieving an equivalent or more favorable result at trial. *See Young v. Katz* (5th Cir. 1971) 447 F.2d 431, 434.

The only thing that is assured from additional litigation is additional expenditures of time

and money. Even if this Court or a jury might ultimately award each Class Member more damages and equitable relief, the amount of time and expense to get to that point could be astronomical. It could be years before Class Members received anything. During that time, the practice could have continued unabated and the value of the Class Benefit decreased.

d. The Experience And Views Of Counsel Favor Final Approval.

Plaintiff's counsel support the settlement as fair, reasonable, adequate and in the best interests of the Class as a whole. (Prelim. Safier Decl. ¶ 9.) The opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See, e.g., In re First Capital Holdings Corp. Fin. Prods. Sec. Litig*., MDL Docket No. 901 All Cases, 1992 U.S. Dist. LEXIS 14337, at *8 (C.D. Cal. June 10, 1992) (finding belief of counsel that the proposed settlement represented the most beneficial result for the class to be a compelling factor in approving settlement); *Kirkorian v. Borelli* (N.D. Cal. 1988) 695 F. Supp. 446, 451 (opinion of experienced counsel is entitled to considerable weight); *Boyd v. Bechtel Corp*. (N.D. Cal. 1979) 485 F. Supp. 610, 616-17, 622 (recommendations of plaintiffs' counsel should be given a presumption of reasonableness)*; Dunk*, 48 Cal.App.4th at 1802.

e. The Settlement Enjoys Overwhelming Class Support.

It is also appropriate for the Court to conclude that the settlement is fair, adequate and reasonable when relatively few Class Members opt-out or object. *See Wershba*, 91 Cal.App.4th at 244-45; *Hanlon*, 150 F.3d at 1027 ("the fact that the overwhelming majority of the Class willingly approved the offer and stayed in the Class presents at some objective positive as to the fairness.") A certain number of objections are to be expected in a class action with a notice campaign and a potentially large number of class members. *See* 4 *Newberg on Class Actions* at § 11.41. If, however, only a small number of objections are made, that fact can (and should) be viewed as indicative of the adequacy of the settlement. For example, in *Bell Atlantic Corp. v. Bolger* (3d Cir. 1993) 2 F.3d 1304, 1313, the Court characterized as an "infinitesimal number" the less than 30 of approximately 1.1 million class members who objected.

Here, there are approximately 119,00 class members, but as of this motion, no objections have been filed, and only 24 have opted out. (Castaneda Decl. ¶ 15; Final Safier Decl. ¶ 83.) *See*

White v. National Football League (D. Minn. 1993) 822 F. Supp.3d 1389, 1425 ("If the vast preponderance of the class members do not object to the settlement, the claims of inadequacy by some class members are entitled to little weight."); *7-Eleven*, 85 Cal.App.4th at 1152–1153 (response of absent class members was "overwhelmingly positive" where only 1.5 percent elected to opt out).

This Court is also not ultimately tasked with determining whether a revised class benefit would be "better," "fairer," "more reasonable" or even whether this settlement agreement is the most perfect agreement that could have been reached. *See, e.g., 7-Eleven*, 85 Cal.App.4th at 1145 ("the [trial] court's determination [of the fairness of a class action settlement agreement] is nothing more than an amalgam of delicate balancing, gross approximation, and rough justice") (citation omitted). Rather, the question before the Court is, giving due regard to what "is otherwise a private consensual agreement between the parties," whether this proposed settlement is fair, reasonable, and adequate to all concerned. *See Dunk*, 48 Cal. App. 4th at 1801; *see also Hanlon*, 150 F.3d at 1027 ("Settlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion.") The answer to that question in this case is "yes." The most meaningful benchmark for evaluating a class action settlement is whether it "secures an adequate advantage for the class." Newberg § 11:46. This Settlement Agreement clearly satisfies that test.

IV. CONCLUSION

For the foregoing reasons, and the reasons provided in the concurrently filed application for approval of attorneys' fees, costs and incentive award, Plaintiff requests that the Court enter final judgment certifying the settlement class and approving the settlement, granting his application for an incentive award of $10,000.00, and awarding his counsel $1,150,000.00 in attorneys' fees and costs.

DATED: January 14, 2016

GUTRIDE SAFIER LLP

/s/Seth Safier/s/

By:_____

Seth A. Safier, Attorneys for Plaintiff