SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

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

Plaintiff,

vs.

IMVU, INC., and Does 1 through 50, inclusive,

Defendants.

Case No.: 1-11-CV-193767

ORDER AFTER HEARING ON OCTOBER 30, 2015

Motion by Plaintiff Peter MacKinnon, Jr. for Preliminary Approval of Class Action Settlement

The above-entitled matter came on regularly for hearing on Friday, October 30, 2015 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. The Court reviewed and considered the written submission of all parties and issued a tentative ruling on October 29, 2015. No party contested the tentative ruling; as such, the

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Court orders the tentative ruling, attached as Exhibit A, be adopted and incorporated herein as the Order of the Court. The Final Fairness Hearing is set for February 19, 2016 at 9:00 a.m. in Department 1.

IT IS SO ORDERED.

Dated: 11/3/15

Honorable Peter H. Kirwan
Judge of the Superior Court

EXHIBIT A

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Calendar Line 2

Case Name: *MacKinnon, Jr. v. IMVU, Inc.*

Case No.: 1-11-CV-193767

This is a putative class action by plaintiff Peter MacKinnon Jr. ("Plaintiff") on behalf of himself and others similarly situated against defendant IMVU, Inc. ("Defendant"), a company that develops and operates an Internet-based entertainment service known as the Instant Messaging Virtual Universe ("IMVU"). Plaintiff alleges that Defendant marketed and sold full-length audio products to its customers, and then destroyed the value of those audio products by drastically cutting their playback length to only 20 seconds. (Third Amended Class Action Complaint, ¶ 1.) Defendant did so even after assuring its customers that: (1) they "own[ed]" the audio products they purchased; (2) Defendant would not limit the playback of audio products to 20 seconds; and (3) customers could use the audio products, as purchased, whenever they wanted. (*Ibid.*)

The Third Amended Class Action Complaint, filed on February 5, 2015, sets forth the following causes of action: [1] Violation of the Consumers Legal Remedies Act, California Civil Code § 1750, et seq.; [2] Unfair, Unlawful, and Deceptive Trade Practices, Business and Professions Code § 17200, et seq.; [3] Breach of the Covenant of Good Faith and Fair Dealing; [4] False Advertising, Business and Professions Code § 17500, et seq.; [5] Misrepresentation; [6] Conversion; and [7] Breach of Contract. The parties in this action have reached a settlement and Plaintiff now moves for preliminary approval of the class action settlement.

I. Plaintiff's Motion for Preliminary Approval of Class Action Settlement

A. Legal Standard

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794.)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' 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 stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624.)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned 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." (*Ibid.*, quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc., supra,* 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small."

(*Wershba v. Apple Computer, Inc., supra,* 91 Cal.App.4th at p. 245, citing *Dunk, supra,* 48 Cal.App.4th at p. 1802.)

B. Analysis

i. The Proposed Settlement

The settlement class includes 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 the settlement agreement (September 16, 2015) have their country of residence setting in the IMVU application set as the United States. (Declaration of Seth A Safier in Support of Motion for Preliminary Approval of Class Action Settlement ("Safier Decl."), Exhibit 1 ("Settlement Agreement"), ¶ 2.35.)

Defendant will provide one of three benefits to each settlement class member: (a) a refund to the class member's IMVU account of IMVU Predits[1], in a quantity equal to 60% of the quantity of IMVU Credits that the class member used to pay for the affected audio products; (b) a refund to the class member's IMVU account of IMVU Credits, in a quantity equal to 30% of the quantity of IMVU Credits that the class member used to pay for the affected audio products; or (c) a cash refund, computed at the rate of $0.40 per 1000 IMVU Credits (i.e., $$0.00040 per IMVU Credit) times 30% of the quantity of IMVU Credits that the class members used to pay for the affected audio products. (Settlement Agreement, ¶ 4.1.) The first benefit will be provided automatically to each class member unless a class member returns a benefit elections form with certain identifying information and a different benefit election. (Settlement Agreement, ¶ 4.2.)

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[1] IMVU Predits (i.e. IMVU promotional credits) are the same as IMVU Credits except that Credits can be transferred to other IMVU users and Predits are non-transferrable. (Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Approval of Class Action Settlement, p. 5, fn. 4.)

Defendant will also make certain changes to its practices. Specifically, Defendant will revise its Terms of Service agreement to expressly inform IMVU users of its policies; Defendant will ensure that, when IMVU users preview an audio item before purchasing it, the audio plays for a duration no longer than the duration for which the item will actually play after purchase, unless the audio is subsequently modified by the content creator; Defendant 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." (Settlement Agreement, ¶ 3.2.)

As part of the settlement, Plaintiff releases claims of any kind against Defendant. (Settlement Agreement, ¶ 8.2.) Class members release all claims that were or could have been asserted in the litigation that are based on the truncation of the playback time of the affected audio products. (Settlement Agreement, ¶ 8.3.)

Plaintiff contends the settlement is fair. Plaintiff states that the settlement is the product of many hours of arm's-length negotiations, including in-person mediation by Randall Wulff. The parties did not negotiate about attorneys' fees or expenses until they had reached agreement on all other material terms of the settlement. Plaintiff also had the benefit of significant discovery.

Plaintiff believes the settlement is as good as, if not better than, the likely result at trial. Plaintiff asserts that, at trial, Plaintiff might in the best-case scenario obtain a 100% refund for each user of the UMVU Credits expended, or an order requiring IMVU to restore the full length of the audio files, but not both. Under these circumstances, the Court finds that the settlement is fair and provides a benefit to the class. Moreover, the settlement prevents the added expense of continued litigation and avoids the uncertainty of going to trial.

Plaintiff will seek a class representative incentive payment of $10,000. Prior to final approval of the settlement, Plaintiff must submit a declaration specifically detailing his participation in the case.

The Court also has an independent right and responsibility to review the requested attorney's fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's counsel will seek attorneys' fees and costs of $1,150,000. While this may be reasonable in light of the recovery for the class, Plaintiff's counsel should submit billing records and lodestar information prior to the final approval hearing in this matter so the Court can compare the lodestar information with the requested fees.

ii. Provisional Certification of Class

Plaintiff requests that the putative class be certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class;

and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

The "community-of-interest" requirement encompasses three factors: (1) predominant questions of law or fact; (2) class representatives with claims or defenses typical of the class; and, (3) class representatives who can adequately represent the class. (*Id.* at p. 326.) "Other relevant considerations include the probability that each class member will come forward ultimately to prove his or her separate claim to a portion of the total recovery and whether the class approach would actually serve to deter and redress alleged wrongdoing." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The plaintiff has the burden of establishing that class treatment will yield "substantial benefits" to both "the litigants and to the court." (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 385.)

As explained by the California Supreme Court,

> The certification question is essentially a procedural one that does not ask whether an action is legally or factually meritorious. A trial court ruling on a certification motion determines whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Sav-On Drug Stores, Inc. v. Superior Court, supra,* 34 Cal.4th at p. 326, internal quotation marks, ellipses, and citations omitted.)

(A) Ascertainable Class

"The trial court must determine whether the class is ascertainable by examining (1) the class definition, (2) the size of the class and (3) the means of identifying class members." (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 873.) "Class members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records." (*Rose v. City of Hayward* (1981) 126 Cal. App. 3d 926, 932.)

According to Defendant's database, at least 432,166 unique purchasers bought audio items through IMVU in the period between September 22, 2008, and December 1, 2010, that were longer than 20 seconds. (Safier Decl., ¶ 5.) Therefore, the class is both ascertainable and numerous.

(B) Community of Interest

1. Predominant Questions of Law or Fact

i. Legal Standard

Regarding the predominance of questions of law or fact:

> The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication,

> are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

(*Lockheed Martin Corp. v. Superior Court, supra,* 29 Cal.4th at pp. 1104-1105, quoting *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.)

> A class may be certified when common questions of law and fact predominate over individualized questions. As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. In order to determine whether common questions of fact predominate the trial court must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.

(*Hicks v. Kaufman & Broad Home Corp.* (2001) 89 Cal.App.4th 908, 916.)

ii. Analysis

There are common issues including whether reasonable consumers would be deceived by: (1) IMVU's representations that the consumers "own[ed]" the audio products they purchased; (2) IMVU's promise not to limit the playback of audio products added to the catalog before September 2008; (3) IMVU's representations that customers could use the audio products whenever they wanted; (4) the fact that when sampled before purchase using the "TRY" button, audio files played at full length; and (5) IMVU's policy and practice of refunding the purchase price of audio products that were later altered, broken or re-rated. Therefore, this factor is satisfied.

2. Typicality

> The typicality requirement is meant to ensure that the class representative is able to adequately represent the class and focus on common issues. It is only when a defense unique to the class representative will be a major focus of the litigation, or when the class representative's interests are antagonistic to or in conflict with the objectives of those she purports to represent that denial of class certification is appropriate. But even then, the court should determine if it would be feasible to divide the class into subclasses to eliminate the conflict and allow the class action to be maintained.

(*Medrazo v. Honda of North Hollywood* (2008) 166 Cal. App. 4th 89, 99, internal citations, brackets, and quotation marks omitted.)

Plaintiff's claims arise out of the same course of conduct as the claims he seeks to pursue on behalf of the class. Plaintiff has sufficiently demonstrated typicality.

3. Adequacy of Representation

Regarding adequacy of representation, this factor "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d

442, 450.) Regarding the class representative's interest, the class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages is [sic] not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks omitted.)

Plaintiff has the same interest in maintaining this action as any class member would have. Further, Plaintiff has hired experienced counsel. Plaintiff has sufficiently demonstrated adequacy of representation.

(C) Substantial Benefits of Class Litigation

"[A] class action should not be certified unless substantial benefits accrue both to litigants and the courts. . . ." (*Basurco v. 21st Century Ins.*, *supra,* 108 Cal.App.4th 110, 120, internal quotation marks omitted.) The question is whether a class action would be superior to individual lawsuits. (*Ibid.)* "Thus, even if questions of law or fact predominate, the lack of superiority provides an alternative ground to deny class certification." (*Ibid.*) Generally, "a class action is proper where it provides small claimants with a method of obtaining redress and when numerous parties suffer injury of insufficient size to warrant individual action." (*Id.* at pp. 120-121, internal quotation marks omitted.)

As stated above, the proposed class is numerous. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive for each class member to file suit individually, as they would each have the potential for little to no monetary recovery. It is clear that a class action provides substantial benefits both to the litigants and the Court in this case.

In sum, Plaintiff has demonstrated that the proposed class should be conditionally certified.

iii. Class Notice

The content of a class notice is subject to court approval.

> If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.

(Cal. Rules of Court, rule 3.769(f).)

In determining the manner of the notice, the court must consider:

(1) The interests of the class;
(2) The type of relief requested;

(3) The stake of the individual class members;
(4) The cost of notifying class members;
(5) The resources of the parties;
(6) The possible prejudice to class members who do not receive notice; and
(7) The res judicata effect on class members.

(Cal. Rules of Court, rule 3.766(e).)

Notice will be provided to each class member by email. (Settlement Agreement, ¶ 5.3.) Defendant will also send the same information to each class member via "direct message" through the IMVU application. (Settlement Agreement, ¶ 5.4.) Text notices that hyperlink to the settlement website will appear on the IMVU application, the IMVU website, and the IMVU forum page. (Settlement Agreement, ¶ 5.5.) The settlement website will contain a long form notice in downloadable PDF format and HTML format with a clickable table of contents, answers to frequently asked questions, a contact information page, the Settlement Agreement, the signed order of preliminary approval, a downloadable and online version of the benefit elections form, a downloadable and online version of the opt-out form, and (when it becomes available) Plaintiff's application for attorneys' fees, expenses, and incentive awards. (Settlement Agreement, ¶ 5.1.) The claims administrator will purchase $15,000 in online banner advertisements via Google AdWords and/or Facebook advertisements that will be directed at likely class members. (Settlement Agreement, ¶ 5.7.)

A review of the different forms of notice shows that they generally comply with the requirements for class notice. (See Safier Decl., Exhibits B1, B2, B3, B4, B5.) The Court notes, however, that the long form notice includes an "Appendix – List of Products" in the table of contents, but there is no Appendix in the notice. Additionally, on pages 10 and 11 of the long form notice there is language that requires class members to file a written objection to the settlement or a written request to the Court for permission to appear if any class member wants to appear at the final approval hearing. All such language should be removed from the notice and the notice should instead state that class members may appear at the final approval hearing and make an objection without filing or mailing any written objection or request.

In sum, the motion for preliminary approval is GRANTED subject to the above modifications.