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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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR ATTORNEYS’ FEES, COSTS AND INCENTIVE AWARD

Date: February 19, 2016

Time: 9:00 a.m.

Department: 1

Honorable Judge Peter H. Kirwan

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1 **I. INTRODUCTION**

2 This case has been pending for close to five years, and Plaintiff’s counsel has not yet  
3 received any compensation for their work on this case or for the out of pocket expenses they have  
4 incurred. They collectively expended over 1900 hours investigating, litigating and negotiating to  
5 reach successful settlement of the case. The purpose of this motion is to apply for an award of  
6 attorneys’ fees, costs and incentive awards as provided in the settlement agreement. The amount is  
7 to be paid by Defendant separately from, and in addition to, all payments to class members, and will  
8 not reduce any class member’s recovery.

9 As was further explained in Plaintiff’s briefing in support of preliminary and final approval,  
10 the settlement confers significant benefits on class members and IMVU users. All class members, as  
11 well as persons excluded from the class because they are foreign users, will receive benefits in cash,  
12 credits or “predits.” In addition, all users will receive changed practices, including the restoration of  
13 the truncated audio files.

14 As provided in the Settlement Agreement, Plaintiff’s counsel now seeks an order from the  
15 Court awarding \$1,098,201.81 in attorneys’ fees, \$51,798.19 in costs for Plaintiff’s counsel, and  
16 \$10,000.00 as an incentive award for the named Plaintiff.<sup>1</sup> The Parties negotiated these provisions  
17 of the Settlement Agreement only after negotiating and reaching an agreement as to all the other  
18 material terms. Such an approach is endorsed by the *Manual For Complex Litigation*. See *Manual*  
19 *For Complex Litigation* ¶ 21.7 (4th ed. 2004) (“Separate negotiation of the class settlement before  
20 an agreement on fees is generally preferable.”). The resulting settlement is the product of a non-  
21 collusive, adversarial negotiation in light of the work devoted by Plaintiff’s counsel under  
22 California law. Plaintiff’s counsel’s corresponding request for fees and costs is fair, just and  
23 reasonable under California law and should be granted.

24 **II. ARGUMENT**

25 This Court has discretion over the amount of attorneys’ fees awarded. See *Lealao v.*

26 <sup>1</sup> Pursuant to section 6.6 of the Settlement Agreement, \$50,000.00 of the attorney fee award will  
27 remain in the Escrow Account until after the Court issues an order, as further described in section  
28 5.10 of the Settlement Agreement, finding that all required distributions have been made to  
Settlement Class Members.

1 *Beneficial Cal., Inc.* (2000) 82 Cal. App. 4th 19; *Levy v. Toyota Motor Sales, U.S.A.* (1992) 4 Cal.  
2 App. 4th 807, 813; *Horn v. Swoap* (1974) 41 Cal. App. 3d 375, 384 (use of mechanical formula  
3 rejected); C.E.B., *Attorney Fee Awards* 2d, Chap. 11; C.J.E.R., *Judges' Benchbook*, Civil  
4 Proceedings: Trial § 16.76. Plaintiff's counsel respectfully suggests that the requested fees, costs  
5 and incentive award are justified by the work performed and benefits obtained in this Litigation.

6 **A. Plaintiff's Counsel Should Be Awarded \$1,098,201.81 in Attorneys' Fees**  
7 **and \$51,798.19 in Costs.**

8 **1. Plaintiff's Counsel's Requested Fee Is Reasonable When Assessed**  
9 **Using The Lodestar-Multiplier Method.**

10 In California, attorneys' fee awards are traditionally determined by taking the "lodestar"—or  
11 the hours spent times the reasonable hourly compensation—and applying a "multiplier." *See*  
12 *Serrano v. Priest (Serrano III)* (1977) 20 Cal. 3d 25, 48-49; *see also Meister v. Regents of Univ. of*  
13 *Calif.* (1998) 67 Cal. App. 4th 437, 449; *Melnyk v. Robledo* (1976) 64 Cal. App. 3d 618, 624-25;  
14 *Clejan v. Reisman* (1970) 5 Cal. App. 3d 224, 241; *Fed-Mart Corp. v. Pell Enterprises* (1980) 111  
15 Cal. App. 3d 215, 222. Moreover, where fees are available under statute, the "lodestar" method  
16 should be used to determine a statutory attorneys' fee award unless the statutory authorization for  
17 the award provides for another method. In this case, fees are available by statute, and the statute  
18 does not provide for a method of computing fees, so the lodestar method is appropriate.<sup>2</sup> *See*  
19 *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 448-449; *see also*  
20 *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131 (stating "In determining the amount of reasonable  
21 attorney fees to be awarded under a statutory attorney fees provision, the trial court begins by  
22 calculating the 'lodestar' amount" and that the "California Supreme Court has further instructed that  
23 attorney fees awards 'should be fully compensatory.'")

24 "The lodestar (or touchstone) is produced by multiplying the number of hours reasonably  
25 expended by counsel by a reasonable hourly rate." *Lealao*, 82 Cal. App. 4th at 26. Once the court  
26 has fixed the lodestar, it may increase or decrease that amount by applying a positive or  
27 "negative"—i.e., less than 1—"multiplier to take into account a variety of other factors, including

28 <sup>2</sup> On Plaintiff's CLRA claims, Civil Code section 1780(d) provides "The court shall award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to this section."

1 the quality of the representation, the novelty and complexity of the issues, the results obtained and  
2 the contingent risk presented.” *Id.*; see also *Serrano III*, 20 Cal. 3d at 48-49; *Ramos v. Countrywide*  
3 *Home Loans, Inc.* (2000) 82 Cal. App. 4th 615, 622; *Beasley v. Wells Fargo Bank* (1991) 235 Cal.  
4 App. 3d 1407, 1418 (multipliers are used to compensate counsel for the risk of loss, and to  
5 encourage counsel to undertake actions that benefit the public interest.).

6 **a. Plaintiff’s Counsel’s Lodestar Is Reasonable.**

7 Plaintiff’s counsel’s lodestar through the date of this Application is \$1,517,675.00.  
8 (Declaration of Seth A. Safier in support of Final Approval and Fee Application (“Final Safier  
9 Decl.”), ¶¶ 76-77 (table showing hours worked by timekeeper).) Plaintiff’s counsel’s efforts to date  
10 included, without limitation:

- 11 • Researching, drafting and filing a comprehensive class action complaint;
- 12 • Researching, drafting and filing a comprehensive amended class action complaint  
13 which, among other things, substituted a new plaintiff;
- 14 • Opposing Defendant’s removal of this action and obtaining remand by the United  
15 States District Court for the Northern District of California;
- 16 • Opposing Defendant’s motion for judgment on the pleadings and its request for  
17 judicial notice;
- 18 • Researching, drafting and filing a comprehensive second amended class action  
19 complaint against Defendant;
- 20 • Opposing Defendant’s demurrer and request for judicial notice;
- 21 • Moving to tax Defendant’s costs;
- 22 • Successfully appealing the Court’s orders granting Defendant’s motion for judgment  
23 on the pleadings and demurrer;
- 24 • Researching, drafting and filing a comprehensive second amended class action  
25 complaint against Defendant that was consistent with the decision from the Court of  
26 Appeals;

- 1 • Conducting significant discovery including by written interrogatories, document
- 2 requests and depositions;<sup>3</sup>
- 3 • Litigating numerous discovery disputes, including drafting and filing discovery
- 4 disputes according to this Court’s discovery dispute procedure;
- 5 • Researching and drafting, but not filing a motion for class certification.
- 6 • Defending Plaintiff’s deposition;
- 7 • Conducting significant third party discovery.
- 8 • Negotiating and meeting and conferring with Defendant regarding discovery disputes
- 9 and stipulations;
- 10 • Drafting a mediation statements and participating in a all day mediation before
- 11 Randall Wulff;
- 12 • Negotiating, editing, drafting and finalizing the Settlement Agreement along with all
- 13 corresponding documents, including claim forms, summary notice and long form
- 14 notice, and proposed orders;
- 15 • Researching, drafting, filing, and serving the motion for preliminary approval and
- 16 supporting documents, including proposed preliminary approval order, proposed and
- 17 final judgment;
- 18 • Supervising the work of the Claims Administrator;
- 19 • Researching, drafting, filing, and serving the motion for final approval and
- 20 supporting documents;
- 21 • Preparing this Application and supporting documentation; and
- 22 • Preparing for and attending numerous hearings and case management conferences.

23 (Id., ¶¶ 4-65.)

24 Before the final approval hearing, Plaintiff’s counsel’s efforts will also include, without  
25 limitation:

- 26 • Continued correspondence with Settlement Class Members and supervision of the

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27 <sup>3</sup> As part of the discovery in this case, Plaintiff’s Counsel has taken the depositions of four of  
28 Defendant’s PMK witnesses. The Parties also have exchanged written responses, under oath, to  
questions posed by the other Party.



1 work of the Claims Administrator;

- 2 • Updating, if necessary, this Application; and
- 3 • Updating, if necessary, final approval papers and opposing objections, if any.

4 (Id., ¶ 66.)

5 Plaintiff's counsel calculated their lodestar using Plaintiff's counsel's billing rates of \$825  
6 and \$800 per hour for Adam Gutride and Seth Safier, respectively, and billing rates \$750 for Todd  
7 Kenney, \$700 for Jay Kuo, and \$675 for Kristen Simplicio and \$650. (Final Safier Decl., ¶¶ 76-80.)

8 These hourly rates are market rates in San Francisco for attorneys of Plaintiff's counsel's  
9 background and experience. (Id.); *Tait v. BSH Home Appliances Corp.*, No.

10 SACV100711DOCANX, 2015 WL 4537463, at \*12 (C.D. Cal. July 27, 2015) (approving as  
11 reasonable \$800 per hour for partners, associate time to a maximum of \$550 per hour, and paralegal  
12 time to a maximum of \$225 per hour); *Vinh Nguyen v. Radient Pharm. Corp.*, 2014 WL 1802293, at  
13 \*11 (C.D. Cal. May 6, 2014) (approving 2014 rates up to \$750 per hour for partners, \$550 per hour  
14 for associates, and \$225 per hour for paralegals); *see also Wren v. RGIS Inventory Specialists*, 2011  
15 U.S. Dist. LEXIS 38667 (N.D. Cal. Apr. 1, 2011) (finding as reasonable \$650 per hour for a 1993  
16 graduate); *Californians for Disability Rights v. Cal. DOT*, 2010 U.S. Dist. LEXIS 141030 (N.D.  
17 Cal. Dec. 13, 2010) (finding as reasonable \$570 per hour for a 2000 graduate, \$350 per hour for a  
18 2007 graduate, and \$475 per hour for a 2005 graduate); *Suzuki v. Hitachi*, 2010 U.S. Dist. LEXIS  
19 22908, 2010 WL 956896 \*3 (N.D. Cal. March 12, 2010) (finding as reasonable attorneys fees rates  
20 of \$650 for partner services, \$500 for associate attorney services and \$150 for paralegal services).

21 Plaintiff's counsel Adam Gutride and Seth Safier are, respectively, graduates from Yale Law School  
22 1994 and Harvard Law School 1998, with twenty-one and eighteen years of litigation experience.  
23 (Final Safier Decl., ¶¶ 79-80.) Todd Kennedy, Jay Kuo, and Kristen Simplicio have, respectively,  
24 over thirteen, twenty-one, and years of experience. (Id.)<sup>4</sup>

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25 <sup>4</sup> Adam Gutride and Seth Safier were previously attorneys at the San Francisco office of the law  
26 firm of Orrick Herrington & Sutcliffe, where litigators who graduated in 1994 and 1998  
27 respectively currently bill at hourly rates of in excess of \$1000. (Final Safier Decl., ¶¶ 79-80.) Jay  
28 Kuo is a 1994 graduate from Boalt Hall Law School. Seth Safier is a 1998 graduate from Harvard  
Law School. Todd Kennedy is a 2003 graduate from the Yale Law School. Ms. Simplicio is 2007  
graduate of the American University, Washington College of Law. (Id.) Furthermore, it is almost  
certain the rates paid by the Defendant to its current firm in this case far exceed the rates requested

1           These rates are the current rates charged by Plaintiff’s counsel, which is appropriate given  
2 the deferred (and contingent) nature of counsel’s compensation.<sup>5</sup> See *LeBlanc-Sternberg v. Fletcher*  
3 (2nd Cir. 1998) 143 F.3d 748, 764 (“[C]urrent rates, rather than historical rates, should be applied in  
4 order to compensate for the delay in payment....”) citing *Missouri v. Jenkins* (1989) 491 U.S. 274,  
5 283-84, *In re Washington Pub. Power Supply Sys. Sec. Litig.* (9th Cir. 1994) 19 F.3d 1291, 1305  
6 (“The district court has discretion to compensate delay in payment in one of two ways: (1) by  
7 applying the attorneys’ current rates to all hours billed during the course of litigation; or (2) by  
8 using the attorneys’ historical rates and adding a prime rate enhancement.”).

9   **b.       An Upward Multiplier Would Be Appropriate In This**  
10   **Case.**

11   **(1)       This Court Has The Discretion To Apply A**  
12   **Multiplier.**

13           A law firm that focuses on contingent-fee class action cases does not get paid in every case.  
14 Sometimes—as in several other cases involving this firm—it gets nothing or is awarded fees equal  
15 to only a small percentage of the amount it had worked. Where a plaintiff’s firm does succeed,  
16 therefore, it is appropriate to award a multiplier, to compensate for the risks the firm regularly  
17 undertakes. Because Plaintiff’s counsel’s lodestar of \$1,517,675 is more than the requested fee  
18 award of \$1,098,201.81, no multiplier is necessary. But if this Court for some reason reduces the  
19 lodestar below \$1,517,675 it should still award Plaintiff’s counsel \$1,098,201.81, by applying a  
20 very modest multiplier.<sup>6</sup>

21           This Court has discretion to apply a multiplier to account for various factors, including, *inter*  
22 *alia*, the contingent nature of the fee award (both from the point of view of eventual victory on the  
23 for Plaintiff’s counsel. See *Managing Class Action Litigation: A Pocket Guide For Judges* § IV(F)  
24 (suggesting an examination of the Defendant’s attorney fee records as a measure of what might be  
25 reasonable.) Finally, Plaintiff’s counsel’s billing rates have repeatedly been approved by other  
26 California Superior Court Judges, as well as other judges throughout California, including, most  
27 recently, by Chief Judge Wilken, and Magistrate Judge Beeler, of the Northern District of  
28 California. (Final Safier Decl., ¶ 78.)

26 <sup>5</sup> Plaintiff’s counsel employs its 2015 rates.

27 <sup>6</sup> For example, if this Court eliminated 50% of Plaintiff’s counsel’s hours or cut their hourly rates  
28 by 50%, the lodestar would be \$758,838, and a fee award of \$1,098,201.81 would still require less  
than a 1.45 multiplier.

1 merits and the point of view of establishing eligibility for an award), the novelty and complexity of  
2 the questions involved, the value of class benefits obtained, and the importance of other injunctive  
3 relief obtained. *See Ramos*, 82 Cal. App. 4th at 622. There is no exclusive list of factors, nor any  
4 “mechanical formula that dictates how the trial court should evaluate” them. *Lealao*, 82 Cal. App.  
5 4th at 41, *quoting Flannery v. California Highway Patrol* (1988) 61 Cal. App. 4th 629, 639. *See*  
6 *also Serrano III*, 20 Cal. 3d at 49; *Ketchum v. Moses* (2001) 24 Cal. 4th 1122; *City of Oakland*, 203  
7 Cal. App. 3d at 78; *Downey Cares*, 196 Cal. App. 3d at 995 n11; *see also Maria P. v. Riles* (1987)  
8 43 Cal. 3d 1281, 1294 n8; *Press v. Lucky Stores, Inc.* (1983) 34 Cal. 3d 311, 322; *Serrano v. Unruh*  
9 (*Serrano IV*) (1982) 32 Cal. 3d 621, 625 n6.

10 **(2) Plaintiff’s Counsel Displayed Skill In Presenting**  
11 **The Settlement Class Members’ Claims.**

12 Plaintiff’s counsel presented Settlement Class Members’ claims with creativity, skill and  
13 ingenuity. As Defendant was represented by able counsel (including lawyers from three different  
14 law firms, including DLA Piper, Sacks Ricketts LLP, and Morrison Foerester) who fought hard on  
15 all fronts, the settlement of this case was due to Plaintiff’s counsel’s litigation skill and experience.  
16 Plaintiff’s counsel could have insisted on continuing to litigate through certification and trial to  
17 increase its lodestar. Plaintiff’s counsel should be rewarded for its efficiency (and the concomitant  
18 savings to the judicial system) by application of a multiplier.

19 In *Lealao*, for example, the Court explained that, unless multipliers are provided to reflect  
20 the size of the class recovery when counsel agree to settle before trial, there will be “a disincentive  
21 to settle promptly inherent in the lodestar methodology. Considering that our Supreme Court has  
22 placed an extraordinarily high value on settlement, it would seem counsel should be rewarded, not  
23 punished, for helping to achieve that goal, as in federal courts.” *Lealao*, 82 Cal. App. 4th at 52,  
24 *citing Merola v. Atlantic Richfield Company* (3d Cir. 1975) 515 F.2d 165, 168 (lodestar-multiplier  
25 approach “permits the court to recognize and reward achievements of a particularly resourceful  
26 attorney who secures a substantial benefit for his clients with a minimum of time invested”);  
27 *Bowling v. Pfizer, Inc.* (S.D. Ohio 1996) 922 F. Supp. 1261, 1282-1283 (case settled “in swift and  
28 efficient fashion”); *Arenson v. Board of Trade of City of Chicago* (N.D. Ill. 1974) 372 F. Supp.  
1349, 1358 (awarding a fee of four times the normal hourly rate on ground that, if the case had not

1 settled and gone to verdict, “there is no doubt that the number of hours of lawyer’s time expended  
2 would be more than quadruple the number of hours expended to date.”) Similarly, in *Thayer v.*  
3 *Wells Fargo Bank* (2001) 92 Cal. App. 4th 819, the Court noted that “[t]he California cases appear  
4 to incorporate the ‘results obtained’ factor into the ‘quality’ factor: i.e., high-quality work may  
5 produce greater results in less time than would work of average quality, thus justifying a  
6 multiplier.” *Id.*

7 **(3) Plaintiff’s Counsel Bore Considerable Risk.**

8 Application of a multiplier would also be warranted by the risks Plaintiff’s counsel bore in  
9 prosecuting this case. *See Serrano III*, 20 Cal. 3d at 49 (listing contingent risk and foregone  
10 employment opportunities as factors to be considered in lodestar multipliers). As the California  
11 Supreme Court has explained:

12 [a] contingent fee must be higher than a fee for the same legal services paid as they  
13 are performed. The contingent fee compensates the lawyer not only for the legal  
14 services he renders but for the loan of those services. The implicit interest rate on  
15 such a loan is higher because the risk of default (the loss of the case, which cancels  
16 the debt of the client to the lawyer) is much higher than that of conventional loans.  
A lawyer who both bears the risk of not being paid and provides legal services is not  
receiving the fair market value of his work if he is paid only for the second of these  
functions. If he is paid no more, competent counsel will be reluctant to accept fee  
award cases.

17 *Ketchum*, 24 Cal. 4th at 1132-33; *see also Cazares v. Saenz* (1989) 208 Cal. App. 3d 279, 288. (“In  
18 addition to compensation for the legal services rendered, there is a *raison d’etre* for the contingent  
19 fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff  
20 obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success  
21 should be twice the amount of a non-contingent fee for the same case.”).

22 Indeed, in *In re Continental Illinois Securities Litigation* (7th Cir. 1993) 962 F.2d 566, a  
23 federal appellate court reversed a fee award in a class action for, among other things, the trial  
24 court’s refusal to enhance Plaintiff’s counsel’s lodestar for contingency risk. “The judge refused to  
25 award a risk multiplier—that is, to give the lawyers more than their ordinary billing rates in order to  
26 reflect the risky character of their undertaking. This was error in a case in which the lawyers had no

1 source of compensation for their services.”<sup>7</sup> *Id.* at 569. “[T]he failure to make any provision for risk  
2 of loss may result in systematic under-compensation of Plaintiff’s counsel in a class action case,  
3 where as we have said the only fee that counsel can obtain is, in the nature of the case, a contingent  
4 one.” *Id.*

5 Throughout this litigation, Plaintiff’s counsel have expended a substantial amount of time  
6 and advanced costs to prosecute a class action suit with no guarantee of compensation or  
7 reimbursement in the hope of prevailing against a company represented by first-rate attorneys.  
8 (Final Safier Decl., ¶¶ 4-58, 65—66, 73-74.) Plaintiff faced substantial risks at class certification  
9 and at trial. (*Id.*, ¶¶ 73-74.) Plaintiff’s counsel also bore the risk that Defendant would dig in and  
10 attempt to bury Plaintiff’s counsel in work. (*Id.*) Plaintiff’s counsel turned away work due, in part,  
11 to the pendency of this litigation, including the protracted appeal. (*Id.*, ¶ 73.)

12 **(4) Plaintiff’s Counsel Conferred Substantial Benefits**  
13 **On Settlement Class Members.**

14 Plaintiff’s counsel also achieved an excellent settlement in this Litigation. Each Class  
15 Member will automatically receive a refund, to his or her IMVU Account, of IMVU Predits in a  
16 quantity equal to 60% of the quantity of IMVU Credits he or she used to pay for the Affected Audio  
17 Products. No claim form is required.

18 If the Class Member does not want to receive the IMVU Predits, he or she may elect one of  
19 two alternative remedies, by submitting a benefit election form: (1) a refund, to his or her IMVU  
20 Account, of IMVU Credits, in a quantity equal to 30% of the quantity of IMVU Credits he or she  
21 used to pay for the Affected Audio Products or (2) the cash value of those refunded Credits,  
22 computed at the rate of \$0.00040 per IMVU Credit. Finally, IMVU has agreed to implement a  
23 number of beneficial changes to its business practices, including restoring the playback of the  
24 truncated audio files.

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28 <sup>7</sup> California courts look to the jurisprudence interpreting Federal Rule 23 in class action litigation.  
*See Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 438.

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**(5) Any Necessary Multiplier Would Fall Well Within  
The Range Commonly Applied.**

A multiplier to offset any reduction in Plaintiff’s counsel’s lodestar would fall well within (indeed below) the range commonly applied by California courts. For example, in *Sternwest Corp. v. Ash* (1986) 183 Cal. App. 3d 74, the Court of Appeal remanded a case for a lodestar enhancement of “two, three, four or otherwise.” *Id.* at 76. Another California court explicitly stated that “[m]ultipliers can range from two to four or even higher.” *Wershba*, 91 Cal. App. 4th at 240, *citing Coalition for L. A. County Planning etc. Interest v. Board of Supervisors* (1977) 76 Cal. App. 3d 241, 251 (affirming a multiplier of 2) and *Arenson*, 372 F. Supp. at 1358 (awarding a fee four times the normal hourly rate on ground that, if the case had not settled and gone to verdict, “there is no doubt that the number of hours of lawyer’s time expended would be more than quadruple the number of hours expended to date”); *see also City of Oakland*, 203 Cal. App. 3d at 83 (affirming a 2.34 multiplier); *Glendora Community Redevelopment Agency v. Demeter* (1984) 155 Cal. App. 3d 465, 479-80 (approving a fee award representing a multiplier of 12.).

**(6) Additional Work Will Likely Be Required Of  
Plaintiff’s counsel.**

More work remains. This Application is being submitted (and posted to the Settlement Website) before the period has ended for Settlement Class Members to opt out or object. Even after final approval, Plaintiff’s counsel likely will have to answer questions from Settlement Class Members and consult with Defendant and the Claims Administrator concerning the fulfillment of the Class Benefits. Though unlikely, Plaintiff’s counsel may also have to spend significant time opposing appeals. This time might not be compensated, but it will be required of Plaintiff’s counsel to make certain the Settlement Class Members receive their benefits as soon as practicable.<sup>8</sup>

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<sup>8</sup> Plaintiff’s counsel anticipates that there will be another 10-15 hours before this Litigation is entirely complete and an estimated 175-250 hours, in the unlikely event that this Court’s judgment is appealed. (Final Safier Decl., ¶ 82, 84.) Should the Court award less than the maximum amount of fees agreed to be paid by Defendant, Plaintiff’s counsel reserves its right to seek additional attorneys’ fees for later-performed work.

1                                   **2.       A “Cross-Check” Of The Requested Fee Under The Percentage-**  
2                                   **Of-Recovery Approach Confirms Its Reasonableness.**

3                                   In evaluating this Application, the Court may explicitly consider the requested fees as a  
4 percentage of the total settlement value. In other words, the Court may “cross-check” the  
5 reasonableness of the lodestar-based fee under the percentage-of-recovery (or percentage-of-  
6 benefit) approach. This cross-check is a common practice in both California and federal courts of  
7 adjusting the lodestar based on the “amount at stake” and the “results obtained.” *See Lealao*, 82 Cal.  
8 App. 4th at 39-40 (“in cases in which the value of the class recovery can be monetized with a  
9 reasonable degree of certainty and it is not otherwise inappropriate, a trial court has discretion to  
10 adjust the basic lodestar through the application of a positive or negative multiplier where necessary  
11 to ensure that the fee awarded is within the range of fees freely negotiated in the legal marketplace  
12 in comparable litigation.”); *see also Glendora Community Redevelopment Agency*, 155 Cal. App. 3d  
13 465; *In re Activision Securities Litigation* (N.D. Cal. 1989) 723 F. Supp.1373, 1378 (percentage of  
14 benefit approach is preferred to ensure “proportionality, predictability and protection of the class,”  
15 while ignoring that approach “encourages abuses such as unjustified work and protracting the  
16 litigation.”)

17                                   In *Lealao*, the Court explained in detail the rationale and propriety of this practice:  
18 “[I]ntermediate appellate courts in this state have, in effect, adopted the common federal practice of  
19 ‘cross-checking’ the lodestar against the value of recovery (which is not duplicative because the  
20 amount or value of the recovery is reflected in the basic lodestar), because the award is still  
21 anchored in the time spent by counsel on the case and the practice is therefore consistent with the  
22 mandate of *Serrano II*.” *Id.* “Courts agree that, because, the percentage-of-the benefit approach ‘is  
23 result-oriented rather than process-oriented, it better approximates the workings of the  
24 ‘marketplace’ than the lodestar approach.” *Id.* at 48. “It is in large part because it provides a  
25 credible measure of the market value of the legal services provided that some federal courts use a  
26 percentage-of-the-benefit analysis to “cross-check” the propriety of a lodestar [based] fee award.”  
27 *Id.* at 49.

28                                   Here, the absolute minimum value of the recovery can be monetized with a reasonable  
degree of certainty. A total of approximately 4.7 billion credits, equating to approximately \$4.7

1 million, was spent on Affected Audio Products. Those products are now being restored. In addition,  
2 approximately 209,000 persons will automatically receive refunds to their accounts of an additional  
3 approximately 1.2 billion IMVU Predits, equating to an additional approximate \$1.2 million. Thus  
4 the total value of settlement benefits is approximately \$5.9 million. (Final Safier Decl. ¶¶ 59-64.) In  
5 addition, IMVU is making changes to its representations that will decrease future deception, saving  
6 class members and the general public from additional losses. (Id.)

7 Courts applying the percentage-of-the-benefit approach have typically awarded fees in a  
8 range from 20 to 30 percent and sometimes higher. *See, e.g., Six Mexican Workers v. Arizona Citrus*  
9 *Growers* (9<sup>th</sup> Cir. 1990) 904 F.2d 1301, 1311; *accord Paul, Johnson, Alston & Hunt v. Gaulty* (9<sup>th</sup>  
10 Cir. 1989) 886 F.2d 268, 273 (“25 percent has been a proper benchmark figure . . . and any  
11 modification should be accompanied by a reasonable explanation of why the benchmark is  
12 unreasonable under the circumstances.”) Studies also show that this benchmark is within the range  
13 followed by most courts. *See, e.g., Lynk, The Courts and the Plaintiff’s Bar: Awarding the*  
14 *Attorney’s Fee in Class-Action Litigation* (1994) 23 J. Legal Study 185, 208; Newberg & Conte,  
15 *Attorney Fee Awards* (2d ed. 1993) § 14.6 at 550-51 (“In the normal range . . . fee awards fall in the  
16 20 to 33 percent range . . . usually 50 percent . . . is the upper limit”); *Paul, Johnson*, 886 F.2d at 273  
17 (“ordinarily . . . fee awards range from 20 percent to 30 percent of the fund created”); *In re Activision*  
18 *Sec. Litig.*, 723 F. Supp. at 1378 (setting 30 percent as fee for all future class action common-fund  
19 cases in that court). In the free market, one regularly sees negotiated contingent fee arrangements in  
20 which the lawyers retain 25%, 33%, 40% or even more of the plaintiff’s recovery.

21 Based on the \$5.9 million minimum benefit, the 25% benchmark would suggest fees of  
22 \$1,475,000.00, substantially more than the \$1,098,201.81 being requested here. (Final Safier Decl.  
23 ¶¶ 59-64.) Indeed, the requested award is only 18.6% of the settlement benefit. Thus, a “cross-  
24 check” reveals that the fee requested by Class Counsel is quite reasonable.

25 Further, when determining the value of the settlement, courts properly consider the non-  
26 monetary benefits, such as changed practices, required by the settlement. *See, e.g., Staton v. Boeing*  
27 *Co.*, 327 F.3d 938, 972-74 (9<sup>th</sup> Cir. 2003); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal.  
28 2011), *aff’d*, 473 F. App’x. 716 (9<sup>th</sup> Cir. 2012); *Pokorny v. Quixtar, Inc.*, No. C 07-0201 SC, 2013



1 WL 3790896, at \*1 (N.D. Cal. July 18, 2013), *appeal dismissed* (Sept. 13, 2013); *In re Netflix*  
2 *Privacy Litig.*, No. 5:11-CV-00379 EJD, 2013 WL 1120801, at \*7 (N.D. Cal. Mar. 18, 2013),  
3 *appeal dismissed* (Dec. 19, 2013). This settlement provides significant additional value in non-  
4 monetary benefits, including restoration of the full functionality of the affected audio files, changes  
5 to IMVU’s terms of service, and additional disclosures. Though these benefits are more difficult to  
6 monetize, they are likely no less (and potentially of much greater value). This Court need not  
7 ascribe a precise value to the injunctive relief but is entitled to estimate it. *See Wehlage v.*  
8 *Evergreen at Arvin LLC*, No. 4:10-CV-05839-CW, 2012 WL 4755371, at \*4 (N.D. Cal. Oct. 4,  
9 2012); *see also Hanlon*, 150 F.3d at 1029 (affirming fee award based on the lodestar approach  
10 where the district court performed a cross-check using the percentage approach with respect to the  
11 estimated value of the injunctive relief).

12 **3. Plaintiff’s Counsel Should Be Awarded \$51,798.19 in Costs.**

13 Plaintiff’s counsel requests that, in addition to reasonable attorneys’ fees, the Court grant its  
14 application for reimbursement of approximately \$51,798.19 in expenses incurred by it in connection  
15 with the prosecution of this Litigation.<sup>9</sup> The expenses incurred are itemized in the Safier  
16 Declaration. (Final Safier Decl., ¶ 81.) Defendant agreed in the Settlement Agreement to reimburse  
17 these expenses as long as the total amount of fees and costs did not exceed \$1,150,000. Plaintiff  
18 believes that the expenses are reasonable and should be reimbursed. (Id.)

19 Plaintiff’s counsel is typically entitled to reimbursement of all reasonable out-of-pocket  
20 expenses and costs in prosecution of the claims and in obtaining a settlement. *See Vincent v.*  
21 *Hughes Air West* (9th Cir. 1977) 557 F.2d 759, 769. In *Serrano III*, for example, the Supreme  
22 Court advised that reimbursement of costs in a common fund is “grounded in ‘the historic power of  
23 equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the  
24 benefit of others in addition to himself, to recover his costs, including his attorneys’ fees, from the  
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26 \_\_\_\_\_  
27 <sup>9</sup> The expenses are current as of January 4, 2016. They do not include expenses that have yet to be  
28 invoiced, including (for example) service and filing fees and expenses associated with this  
Application and the Final Approval Motion. Plaintiff’s counsel anticipates that these costs will be  
approximately \$400, including the service and filing of Plaintiff’s final approval papers.

1 fund or property.’” *Serrano III*, 20 Cal. 3d at 35, citing *Alyeska Pipeline Co. v. Wilderness Society*  
2 (1995) 421 U.S. 240, 257.

3 **4. Awarding Less Than The Requested Fees and Costs Will Cause A**  
4 **Windfall To Defendant.**

5 Defendant has already agreed to pay the full amount of the requested fees and costs, separate  
6 from and in addition to the amounts paid for notice and claims administration and the amounts paid  
7 to Class Members. If the request is cut, no additional money will be paid to Class Members.  
8 Rather, the money will remain with, and be a windfall to, Defendant. As the negotiations of the  
9 Settlement were hard-fought, Defendant already believes that it is better off paying the full amounts  
10 owing under the Settlement than proceeding to trial. That conclusion is not surprising, as Defendant  
11 has been charged with substantial wrongdoing in its business practices. It is not in the interests of  
12 justice to allow Defendant to retain the funds that even it believes should be paid to Plaintiff’s  
13 counsel for Plaintiff’s counsel’s work on the case.

14 **B. The Incentive Award To The Representative Plaintiff Is Reasonable.**

15 This Court should also approve a \$10,000.00 incentive award to the named Plaintiff, as it is  
16 just, fair and reasonable. In deciding whether to approve an incentive award, a court should  
17 consider: “(1) the risk to the class representative in commencing suit, both financial and otherwise;  
18 (2) the notoriety and personal difficulty encountered by the class representative; (3) the amount of  
19 time and effort spent by the class representative; (4) the duration of the litigation and; (5) the  
20 personal benefit (of lack thereof) enjoyed by the class representative as a result of the litigation.”  
21 *Van Vranken v. Atlantic Richfield Co.* (N.D. Cal. 1995) 901 F. Supp. 294, 299. Further, as a matter  
22 of public policy, incentive awards are necessary to encourage consumers to formally challenge  
23 perceived false advertising and unfair business practices.

24 Plaintiff took on substantial risk, most importantly the risk of bearing Defendant’s costs.  
25 (Final Safier Decl., ¶ 69.) Plaintiff also spent in excess of 250 hours, over close to 5 years, on this  
26 Litigation, including reviewing documents, attending mediation, being deposed, and remaining  
27 actively involved in the case during and after settlement. (Id., ¶¶ 69-72; MacKinnon Decl. ¶¶ 3-15.)  
28

1 Had he not come forward, there is no reason to believe that Defendant would ever have agreed to  
2 pay.

3 In light of Plaintiff's efforts, Defendant has agreed to pay him a \$10,000.00 incentive award.  
4 Plaintiff's counsel respectfully requests that the Court approve the incentive award, which is  
5 reasonable in light of the Plaintiff's efforts and the relief to the Settlement Class resulting from this  
6 Litigation and his broader release. *See* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards*  
7 *to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (an empirical  
8 study of incentive awards to class action plaintiffs has determined that the average aggregate  
9 incentive award within a consumer class action case is \$29,055.20, and that the average individual  
10 award is \$6,358.80.); *see also In re Mego Fin. Corp Sec. Litig.* (9th Cir. 2000) 213 F.3d 454, 463  
11 (awarding the named plaintiff \$5,000 involving a class of 5,400 people and a total recovery of  
12 \$1.725 million); *In re U.S. Bancorp Litig.* (8th Cir. 2002) 291 F.3d 1035, 1038 (awarding the named  
13 plaintiff \$2,000 in a case with a total recovery of \$3 million).

14 **III. CONCLUSION**

15 For the foregoing reasons, Plaintiff asks this Court to grant this application for an award of  
16 \$10,000.00 to him, and \$1,150,000.00 in attorneys' fees and expenses incurred in this Litigation to  
17 be paid by Defendant separately from the benefits provided to the Settlement Class, in accordance  
18 with the Settlement Agreement.

19  
20 DATED: January 14, 2016

**GUTRIDE SAFIER LLP**

/s/Seth Safier/s/

21 By: \_\_\_\_\_  
22 Seth A. Safier, Attorneys for Plaintiff  
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