

## **SETTLEMENT AGREEMENT**

This Settlement Agreement is entered into this 16<sup>th</sup> day of September 2015 between Plaintiff Peter MacKinnon, Jr. (“Plaintiff”), on the one hand, and IMVU, Inc. (“IMVU” or “Defendant”), on the other hand.

### **I. RECITALS**

1.1. On February 7, 2011, Colby Stratton filed a complaint against IMVU in the Superior Court of California, County of Santa Clara, Case No. 1-11-CV-193767. Stratton alleged that IMVU had sold customer-generated products, provided to IMVU with the representation that customer had full rights to distribute products, some of which contained full-length audio files (e.g., songs), to its customers for use in IMVUs 3D messaging service and then substantially reduced the value of those audio files by cutting their playback length to 20 seconds. Stratton alleged claims for violations of the California Consumer Legal Remedies Act (“CLRA”), false advertising under California Business and Professions Code sections 17500, *et seq.*; and unfair business practices under California Business and Professions Code sections 17200, *et seq.*; breach of contract; conversion; and misrepresentation.

1.2. On March 9, 2011, IMVU answered the complaint and denied its allegations.

1.3. On April 11, 2011, the Court deemed the case complex and assigned it for all purposes to the complex litigation department.

1.4. On May 23, 2011, the Court granted leave, pursuant to the parties’ stipulation, for filing of an amended complaint. The first amended complaint, filed on June 6, 2011, added a new plaintiff, Peter MacKinnon, Jr., who joined in Stratton’s existing claims, and

who also pled a new claim for breach of warranty. The next day, Stratton voluntarily dismissed his claims, leaving MacKinnon as the sole plaintiff.

1.5. On July 28, 2011, IMVU answered the first amended complaint, denying its allegations.

1.6. On September 30, 2011, IMVU removed the Litigation, pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. 1332(d), *et seq.*, to the United States District Court for the Northern District of California. Plaintiff moved in the U.S. District Court to remand to state court, which IMVU opposed. Plaintiff also moved for sanctions under Rule 11. On December 21, 2011, while those motions were pending, IMVU filed a motion in the U.S. District Court for judgment on the pleadings. On January 11, 2012, the U.S. District Court (Hamilton, J.) granted the motion to remand the case to state court, denied the motion for sanctions and denied as moot the motion for judgment on the pleadings.

1.7. Upon return to state court, IMVU re-filed its motion for judgment on the pleadings, on February 3, 2012. Plaintiff opposed the motion. On May 2, 2012, the Court (Kleinberg, J.) granted the motion, dismissing all claims but granting leave to amend as to the claims under the CLRA and the UCL.

1.8. On June 1, 2012, Plaintiff filed a second amended complaint with respect to those two claims. On June 27, 2012, IMVU demurred to the second amended complaint. Plaintiff opposed the demurrer. On December 31, 2012, the Court (Kleinberg, J.) sustained the demurrer without leave to amend and entered judgment for IMVU.

1.9. On January 3, 2013, Plaintiff filed a notice of appeal from the order granting judgment on the pleadings and from the demurrer. While the appeal was pending, IMVU sought an award of costs and Plaintiff moved to tax costs. That motion was not decided.

1.10. Plaintiff filed his opening brief on appeal on May 10, 2013. IMVU filed its opposition on August 14, 2013, and Plaintiff replied on October 17, 2013. Oral argument was held October 23, 2014. On October 30, 2014, the Court of Appeal, Sixth Appellate District, reversed the judgment of the Superior Court and 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 (in part) and UCL claim (in part).

1.11. On January 23, 2015, the Superior Court (Kirwan, J.) entered a new order consistent with the Court of Appeal's directions. On February 4, 2015, Plaintiff filed a third amended complaint re-pleading the claims for conversion, breach of contract, breach of the covenant of good fair and fair dealing claim, violations of the CLRA, and violations of the UCL.

1.12. On February 19, 2015, the Court approved the parties' stipulation to stay IMVU's obligation to answer to attempt to resolve the Litigation through mediation.

1.13. IMVU denies all of Plaintiff's allegations and all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Litigation and contends that any and all changes to the content of the files (audio files and all other file type), including the reduction of playback length of the audio files, were and are expressly permitted under the applicable IMVU Terms of Service. IMVU also denies allegations that Plaintiff or any other member of the Settlement Class has suffered damage or harm by reason of any alleged conduct, statement, act or omission of IMVU, or in any amount and type. IMVU further denies that the Litigation meets the requirements for certification as a class action, except for purposes of settlement, or that the evidence is sufficient to support a finding of liability or monetary or equitable relief.

1.14. Plaintiff's Counsel conducted a thorough examination and investigation of the facts and law relating to the matters in the Litigation, including but not limited to engaging in intensive discovery, both formal and informal, reviewing over 100,000 pages of IMVU's documents and data and programming code from IMVU's servers and databases, constructing complex database queries to determine the number of persons affected and the amount of IMVU Credits expended; taking five days' of depositions of IMVU employees, and requesting and receiving written discovery responses from IMVU and several third parties.

1.15. Since the filing of the Litigation, the Parties have engaged in several rounds of settlement discussions. On April 20, 2015, the Parties participated in all-day mediation session conducted by Randall W. Wulff of Wulff Quinby & Sochynsky in Oakland, California.

1.16. The undersigned Parties agree, subject to approval by the Court, that the Litigation between Plaintiff, on the one hand, and IMVU, on the other hand, shall be fully and finally compromised, settled and released on the terms and conditions set forth in this Agreement.

1.17. Plaintiff's Counsel has analyzed and evaluated the merits of all Parties' contentions and this Settlement as it impacts upon all Parties and the Settlement Class Members. Among the risks of continued litigation are the possibility that the Court will not certify the case as a class action; that summary judgment will be entered against Plaintiff and the class; and/or that Plaintiff will be unable to prove liability or damages at trial on a classwide or individual basis.

1.18. Plaintiff and Plaintiff's Counsel, after taking into account the foregoing, along with the risks and costs of further litigation, are satisfied that the terms and conditions of

this Agreement are fair, reasonable, adequate, and equitable, and that a settlement of the Litigation and the prompt provision of effective relief to the Settlement Class are in the best interests of the Settlement Class Members.

1.19. IMVU, while continuing to deny all allegations of wrongdoing and disclaiming any liability with respect to any and all claims, considers it desirable to resolve the Litigation on the terms stated herein, in order to avoid further expense, inconvenience, and interference with ongoing business operations, and to dispose of burdensome litigation. Therefore, IMVU have determined that settlement of this Litigation on the terms set forth herein is in its best interests.

1.20. This Agreement is contingent upon the issuance by the Court of both Preliminary Approval and Final Approval. Should the Court not issue Preliminary Approval and Final Approval, IMVU does not waive, and instead expressly reserves, its rights to defend this Litigation, including, *inter alia*, challenging the continuation of this case as a class action and the sufficiency and propriety of all claims alleged.

1.21. This Agreement reflects a compromise between the Parties, and shall in no event be construed as or be deemed an admission or concession by any Party of the truth, or lack thereof, of any allegation or the validity, or lack thereof, of any purported claim or defense asserted in any of the pleadings or filings in the Litigation, or of any fault on the part of IMVU, and all such allegations are expressly denied. Nothing in this Agreement shall constitute an admission of liability or be used as evidence of liability, by or against any Party hereto.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, and of the releases and dismissals of claims described below, the Parties agree to this Settlement, subject to Court approval, under the following terms and conditions:

## II. DEFINITIONS

Capitalized terms in this Agreement shall be defined as follows:

2.1. “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.

2.2. “Agreement” means this Settlement Agreement, including all exhibits hereto.

2.3. “Benefit Elections Form” means a form in substantially the same form as Exhibit A hereto.

2.4. “Benefit Elections Period” means the period beginning on the Notice Date and continuing until thirty (30) days after Final Approval.

2.5. “Claim Administrator” means \_\_\_\_\_ or another third party administrator agreed to by the Parties and approved by the Court.

2.6. “Class Representative” means Plaintiff.

2.7. “Content Creator” means an IMVU user who created and developed Affected Audio Products and placed those products in the IMVU Virtual Catalog.

2.8. “Court” and “Superior Court” means the Superior Court for the State of California, County of Santa Clara.

2.9. “Court of Appeals” means the California Court of Appeals for the Sixth Appellate District.

2.10. “Effective Date” means the later of: (i) 60 days after entry of Final Approval or (ii) if an appeal is filed, but the Final Approval is affirmed or the appeal is dismissed, the date upon which the Court of Appeals issues its remittitur.

2.11. “Email Notice” means the Court-approved abbreviated form of notice to Settlement Class Members in substantially the same form as Exhibit B2, which will notify Settlement Class Members of preliminary approval of the settlement and scheduling of the Final Approval Hearing, among other things.

2.12. “Escrow Account” means the settlement fund account as described in Section 6.4 of this Agreement.

2.13. “Excluded Persons” are (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.

2.14. “Final Approval” means issuance of judgment, substantially in the form of Exhibit D, granting final approval of this Agreement as binding upon the Parties.

2.15. “IMVU” means IMVU, Inc., a Delaware corporation.

2.16. “IMVU Account” means a user account, attached to the user’s individual login ID and password, which tracks items purchased by the user from the IMVU Virtual Catalog and the user’s account balance of IMVU Credits and IMVU Predits, and through which the user can purchase new Credits by paying in U.S. dollars (and certain other currencies) with a valid credit or debit card.

2.17. “IMVU Application” means the 3D messaging service, an online social entertainment destination accessible via personal computer at <http://www.imvu.com> and through mobile (Android and iOS) apps.

2.18. “IMVU Credits” means the virtual currency, other than IMVU Predits, used in the IMVU Application to purchase items from the IMVU Virtual Catalog. IMVU Credits can be transferred to other IMVU users (with certain limitations).

2.19. “IMVU Forums” means the page of the IMVU Website accessible at <http://www.imvu.com/forums>.

2.20. “IMVU Predits” means promotional credits (also known as “promo credits”) that IMVU provides its users, for free, to use in lieu of IMVU Credits as a virtual currency to purchase items from the IMVU Virtual Catalog. IMVU Predits cannot be transferred to other IMVU users nor can they be exchanged for cash.

2.21. “IMVU Virtual Catalog” means the catalog of virtual items (e.g., costumes, furniture, music, etc.) available for use on the IMVU Application, which can be searched at <http://www.imvu.com/shop>.

2.22. “IMVU Website” means <http://www.imvu.com>.

2.23. “Litigation” means *Peter Mackinnon v. IMVU, Inc., et al.*, Superior Court for the State of California, County of Santa Clara, Case No. 1-11-CV-193767.

2.24. “Long Form Notice” means the Court-approved form of notice to Settlement Class Members in substantially the same form as Exhibit B1, which will notify Settlement Class Members of preliminary approval of the settlement and scheduling of the Final Approval Hearing, among other things.



2.25. “Notice Date” means the day on which the Claim Administrator initiates the Email Notice.

2.26. “Opt Out Deadline” means thirty (30) days prior to the initially scheduled hearing date on Final Approval.

2.27. “Parties” means Plaintiff and IMVU, collectively.

2.28. “Party” means any one of Plaintiff or IMVU.

2.29. “Plaintiff” means Peter MacKinnon, Jr..

2.30. “Plaintiff’s Counsel” means the law firm of Gutride Safier LLP.

2.31. “Preliminary Approval” means issuance of an order, substantially in the form of Exhibit C, granting preliminary approval of the Settlement described in this Agreement.

2.32. “Released Claims” means the claims released as set forth in Sections 8.1 through 8.3 of this Agreement.

2.33. “Released Parties” means IMVU, and all of IMVU’s past and present officers, directors, attorneys, parents, subsidiaries, managers, successors, predecessors, agents, assigns, and legal representatives.

2.34. “Settlement Benefit” means the benefits provided to Settlement Class Members as set forth in Section 4.1 of this Agreement.

2.35. “Settlement Class” or “Settlement Class Members” means 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 have their country of residence setting in the IMVU Application set as the United States.

2.36. “Settlement Website” means an internet website created and maintained by the Claim Administrator. The URL of the Settlement Website shall be “www.\_\_\_\_\_.com”.

2.37. “Text Notice” means the Court-approved form of notice to Settlement Class Members in substantially the same form as Exhibit B2, not to exceed 140 characters, which will link to the Settlement Website.

2.38. “Undertaking” means an undertaking signed by Adam Gutride and Seth Safier substantially in the form of Exhibit E hereto.

### **III. CHANGED PRACTICES**

3.1. No later than thirty (30) days after Preliminary Approval, IMVU shall implement changes to the operation of the IMVU Application to remove any barriers that would prevent any Affected Audio Product that remains in the IMVU Virtual Catalog and that was not modified by the Content Creator on or after December 1, 2010, to be played at its full length.

3.2. Beginning no later than than forty-five (45) days after the Effective Date, IMVU will comply with the following:

(a) IMVU will revise its Terms of Service agreement to expressly inform IMVU users of its policies, as follows:

1. By stating 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, Developer Tokens, cash or monetary equivalent, are non-refundable, except, in IMVU’s sole and absolute discretion.”**

2. By removing the language “with cash or monetary equivalents” 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.

(b) IMVU 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.

(c) 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.”

3.3. IMVU shall continue the practices described in this Part III until no earlier than two years after the Effective Date.

3.4. Nothing in this Part III shall affect IMVU’s obligations to comply with U.S. copyright laws, including, without limitation, the Digital Millennium Copyright Act (17 U.S.C. §§512(c)(3) and 512(d)(3)) (“DMCA”), including without limitation its obligation to remove from the IMVU Virtual Catalog and the IMVU Application any audio product for which

it receives a valid DMCA takedown notice, and the obligation not to host full length playback files for Affected Audio Products for which IMVU has actual knowledge that the Content Creator uploaded the Affected Audio Products in violation of U.S. copyright laws.

#### **IV. SETTLEMENT BENEFITS AND CLAIMS ADMINISTRATION**

4.1. IMVU shall provide each Settlement Class Member one of the following three Settlement Benefits, at the election of the Settlement Class member:

(a) A refund, to the Settlement Class Member's IMVU Account, of IMVU Predits, in a quantity equal to 60% of the quantity of IMVU Credits that the Settlement Class Member used to pay for the Affected Audio Products.

(b) A refund, to the Settlement Class Member's IMVU Account, of IMVU Credits, in a quantity equal to 30% of the quantity of IMVU Credits that the Settlement Class Member used to pay for the Affected Audio Products.

(c) A cash refund, computed at the rate of USD \$0.40 per 1000 IMVU Credits (i.e., \$0.00040 per IMVU Credit), times 30% of the quantity of IMVU Credits that the Settlement Class Member used to pay for the Affected Audio Products.

4.2. The Settlement Benefit set forth in paragraph 4.1(a) shall be provided automatically to the Settlement Class Member unless the Settlement Class Member returns a Benefit Elections Form by the end of the Benefit Elections Period that specifies the following:

- (a) The Settlement Class Member's name,
- (b) The Settlement Class Member's email address used to open the affected IMVU Account,

(c) The Settlement Class Member's current email address, if different from the email address used to open the affected IMVU Account,

(d) The Settlement Class Member's IMVU user name(s),

(e) The Settlement Class Member's mailing address,

(f) The Settlement Class Member's election to receive the Settlement benefit in section 4.1(b) or 4.1(c).

4.3. The Benefit Election Form may be submitted through the Settlement Website, or the Settlement Class Member may print and mail the Benefit Election Form to the Claim Administrator. If no Benefit Election Form is received by the Benefit Election Deadline, or the Benefit Election Form lacks information required by section 4.2, the Settlement Class Member shall receive the Settlement Benefit set forth in section 4.1(a).

4.4. If the Settlement Class Member opts to receive the cash Settlement Benefit described in section 4.1(c), that cash Settlement Benefit shall be provided via check mailed to the Settlement Class Member's mailing address as stated on the Benefits Election Form, unless the Settlement Class Member:

(a) Elects to receive the Settlement Benefit via direct deposit to the Settlement Class Member's bank account and provides a valid U.S. bank name, ABA routing number and active account number, or

(b) Elects to receive the Settlement Benefit via transfer to the Settlement Class Member's Paypal account and provides a valid Paypal account ID (i.e., an email address associated with the Settlement Class Member's Paypal account).

4.5. If an attempted direct deposit or Paypal deposit is rejected, the Settlement Benefit shall be provided by check mailed to the Settlement Class Member's mailing address. All settlement checks shall be subject to a one hundred eighty (180) day void period, after which the checks shall no longer be negotiable. If a settlement check is not negotiated within this period, the Settlement Class Member shall not be entitled to any further payment under this Agreement.

4.6. All refunds of IMVU Predits and IMVU Credits shall be paid to the IMVU Account from which the purchase of Affected Audio Products was made. To ensure that refunded IMVU Credits do not flood the IMVU economy, IMVU may issue refunds of IMVU Credits at the date or dates of IMVU's choosing, so long as all refunds are complete within six months after the Effective Date.

4.7. If any Settlement Class Member has forgotten his or her IMVU password and is unable to reset the password because he or she no longer has access to the email address associated with the IMVU Account, IMVU shall develop a process for such persons to verify that he or she is owner of and obtain access to his or her IMVU Account, without requiring the Settlement Class Member to receive email at the email address previously associated with the IMVU Account, as further described in the Long Form Notice.

4.8. Any Settlement Class Member may opt out of (exclude himself or herself from) the Settlement Class by completing an online form on the Settlement Website or by delivering a paper request to Claims Administrator before the Opt Out Deadline, as provided in the Long Form Notice.

4.9. No deductions for taxes will be taken from any Settlement Benefit at the time of distribution; Settlement Class Members are responsible for paying all taxes due on such Settlement Benefits. All Settlement Benefit payments shall be deemed to be paid solely in the year in which such payments are actually issued. Counsel do not purport to provide legal advice on tax matters. To the extent this Agreement, or any of its exhibits or related materials, is interpreted to contain or constitute advice regarding any U.S. Federal or any state tax issue, such advice is not intended or written to be used, and cannot be used, by any person or entity for the purpose of avoiding penalties under the Internal Revenue Code or any state's tax laws. If required to do so by applicable law or IRS regulation, the Claim Administrator shall issue a form 1099 to the Settlement Class Member at the time it issues payment.

4.10. To identify the Settlement Class Members and the number of IMVU Credits each Settlement Class Member expended on Affected Audio Products, IMVU shall query its databases using queries reasonably approved by Plaintiff's Counsel. The Claim Administrator shall be responsible for processing Benefit Election Forms and administering the Settlement Website, opt-out process, and for compiling into a spreadsheet all information provided by Settlement Class Members on their Benefit Election Forms. IMVU shall be responsible for delivering the Settlement Benefits to the Settlement Class Members using the information returned from its database queries and information in the spreadsheet compiled by the Claim Administrator as described in this paragraph. Plaintiff's Counsel and IMVU's Counsel shall monitor the Claim Administrator's work and upon request shall receive copies from the Claim Administrator of the complete set of Benefits Election Form data and any associated documentation provided by the Settlement Class Member. Should Plaintiff dispute any action or conclusion by the Claim Administrator or by IMVU pursuant to this paragraph, Plaintiff and

IMVU will meet and confer in good faith to attempt to resolve the dispute. Any unresolved disputes between Plaintiff and IMVU regarding administration or the payment of Settlement Benefits shall be resolved by the Court. All written communications between the Claim Administrator and any Party shall be copied to representatives of all Parties.

4.11. IMVU shall bear all fees and expenses incurred by the Claim Administrator or by IMVU in connection with administration of the Settlement Benefits and requests to opt out.

## **V. NOTICE**

5.1. Prior to the Notice Date, the Claim Administrator shall establish the Settlement Website, which shall contain the Long Form Notice in both downloadable PDF format and HTML format with a clickable table of contents; answers to frequently asked questions; a Contact Information page that includes the address for the Claim Administrator and addresses and telephone numbers for Plaintiff's Counsel and IMVU's Counsel; the Agreement; the signed order of Preliminary Approval; a downloadable and online version of the Benefit Elections Form; a downloadable and online version of the form by which persons may opt out of the Settlement Class; and (when it becomes available) Plaintiff's application for attorneys' fees, expenses and incentive awards.

5.2. Not later than seven (7) days following Preliminary Approval, IMVU shall provide the Claim Administrator with the names and email addresses of all persons who may be Settlement Class Members, as well as the number of IMVU Credits each such person expended on Affected Audio Products.



5.3. As soon as reasonably practicable, but not later than fourteen (14) days following Preliminary Approval, the Claim Administrator shall send the Email Notice via electronic mail to each Settlement Class Member at the email address provided by IMVU.

5.4. No later than 14 days after Preliminary Approval, IMVU shall send a Direct Message to each Settlement Class Member with the same information that is provided in the Email Notice.

5.5. No later than 14 days after Preliminary Approval, IMVU shall ensure that the Text Notice appears on:

(a) The IMVU Application, upon the Settlement Class Member's first login through a personal computer (Mac/PC);

(b) The IMVU Website, upon the Settlement Class Member's first visit.

(c) The IMVU forum page ([www.imvu.com/forums/](http://www.imvu.com/forums/)).

5.6. The Settlement Website and Text Notices shall remain accessible until 180 days after all Settlement Benefits are distributed.

5.7. The Claim Administrator shall purchase \$15,000.00 in online banner advertisements via Google AdWords and/or Facebook advertisements (or other online advertiser agreeable to all Parties), substantially in the form of Exhibits B4 and B5, which shall be directed at likely Settlement Class Members. Such advertisements shall hyperlink to the Settlement Website and shall be run during the period from 14 to 35 days after Preliminary Approval.

5.8. IMVU shall pay all costs of notice as set forth in this Part V.

5.9. At least fourteen (14) days prior to the final approval hearing referenced in Part VII of this Agreement, IMVU and the Claim Administrator shall certify to the Court that they have complied with the notice requirements set forth herein.

5.10. No later than one week after all distributions have occurred, or six months and one week after the Effective Date, whichever is earlier, the Parties shall submit a joint report to the Court certifying that all required distributions under Sections 4.1 through 4.6 of this Agreement have been made to Settlement Class Members. The joint report shall state the number of persons who were provided IMVU Predits, IMVU Credits, and cash under the Settlement, as well as the aggregate amounts of IMVU Predits, IMVU Credits and cash paid to Settlement Class Members. The Parties shall submit with the joint report a stipulation and proposed order finding that the distributions are complete. Any party shall be entitled to appear ex parte, pursuant to the Court's regular ex parte procedures, to obtain the Court's approval of the stipulated order.

## **VI. ATTORNEYS' FEES, EXPENSES AND INCENTIVE AWARDS**

6.1. Attorneys' Fees, Costs, Expenses and Incentive Awards. Plaintiff's Counsel may apply to the Court for an award of attorneys' fees and expenses not to exceed \$1,150,000.

6.2. Plaintiff may additionally apply to the Court for an incentive award of up to \$10,000 as compensation for (a) the time and effort undertaken in and risks of pursuing this Litigation, including the risk of liability for the Parties' costs of suit, and (b) the general release set forth in Section 8.2.

6.3. IMVU agrees not to oppose or to submit any evidence or argument challenging or undermining Plaintiff's application for attorneys' fees, costs, expenses, or

incentive awards. IMVU shall not be in violation of this term if its attorneys provide the Court evidence of their lodestar in response to a request by Plaintiff or the Court. The attorneys' fees and expenses awarded by the Court as set forth under Section 6.1 shall be the total obligation of IMVU to pay attorneys' fees and expenses of any kind to Plaintiff's Counsel. The incentives awarded to Plaintiff by the Court as set forth in Section 6.2 shall be the total obligation of IMVU to pay money to any Plaintiff, in connection with the Litigation and this Settlement, other than amounts due to any Plaintiff for any valid claims submitted pursuant to Part IV of this Agreement. Plaintiff's Counsel and Plaintiff agree that the denial, downward modification or failure to grant the request for attorneys' fees, costs or incentive awards shall not constitute grounds for modification or termination of the Settlement.

6.4. Within seven (7) days following Preliminary Approval of the Settlement, IMVU will pay the amount set forth in Section 6.1 to the Claim Administrator, who shall deposit it into a neutral, interest-bearing qualified settlement fund account ("Escrow Account"). The Claim Administrator shall use reasonable efforts to obtain an interest rate equal to or greater than the Vanguard Prime Institutional money market fund for a deposit of that size. The banking and administration fees, if any, shall be paid from the Escrow Account.

6.5. Within five (5) days after the Court makes an award of attorneys' fees and expenses to Plaintiff's Counsel, if the amount of such award is less than \$1,150,000.00, then the difference, along with Interest accrued on that difference, shall be paid to IMVU. If an order of attorneys' fees and expenses to Plaintiff's Counsel is reduced on appeal, then the amount of the reduction, plus Interest accrued thereon, shall be paid from the Escrow Account to IMVU within five (5) days of an order of the Court implementing the instructions of the court of appeal.

6.6. All attorneys' fees and costs awarded to Plaintiff's Counsel, less \$50,000.00, shall be paid from the Escrow Account to Plaintiff's Counsel within seven (7) days after all of the following occur: (1) the Court enters Final Approval; (2) the Court makes an award of attorneys' fees and/or expenses to Plaintiff's Counsel; and (3) Plaintiff's Counsel execute the Undertaking. The remaining \$50,000.00, along with Interest accrued in the Escrow Account, shall be paid to Plaintiff's Counsel only after the Court issues an order, as further described in section 5.10, finding that all required distributions have been made to Settlement Class Members.

6.7. Within seven (7) days of the Effective Date, IMVU shall pay the Court-approved incentive awards to Class Representatives.

## **VII. CLASS SETTLEMENT PROCEDURES**

7.1. Settlement Approval. As soon as practicable after the signing of this Agreement, Plaintiff shall move, with the support of IMVU, for a Preliminary Approval order, substantially in the form of Exhibit C, preliminarily approving this Agreement and this settlement as fair, just, reasonable and adequate; approving Class Notice to the Settlement Class Members as described in Part V above; and setting a hearing to consider Final Approval of the settlement and any objections thereto.

7.2. Final Approval Order and Judgment. At or before the hearing on Final Approval, Plaintiff, with the support of IMVU, shall move for entry of an order of Final Approval, substantially in the form of Exhibit D, granting final approval of this Settlement and holding this Agreement to be final, fair, reasonable, adequate, and binding on all Settlement Class Members who have not excluded themselves as provided below, and ordering that the

settlement relief be provided as set forth in this Agreement, ordering the releases as set forth in Part VIII, below, and entering judgment in this case.

7.3. Opt-Outs and Objections. The Long Form Notice and the Email Notice shall advise prospective Settlement Class Members of their rights to forego the benefits of this Settlement and pursue an individual claim; to object to this Settlement individually or through counsel; and, if they object, to appear at the final approval hearing.

7.4. If, within such time as is ordered by the Court and contained in the Long Form Notice, any Settlement Class Member wishes to object to the settlement and/or to be heard, the Settlement Class Member must file a written notice of objection by the deadlines established by the Court and, if not filed through the Electronic Case Filing system, serve the same upon the Claim Administrator. Each such objection must include the name, address and telephone number of the Settlement Class Member; shall provide documents or testimony sufficient to establish membership in the Settlement Class; and shall provide a detailed statement of any objection asserted, including the grounds therefor and reasons, if any, for requesting the opportunity to appear and be heard at the final approval hearing. Failure to include the foregoing information shall be grounds for striking an objection.

7.5. If, within such time as is ordered by the Court and contained in the Long Form Notice, any Settlement Class Member wishes to be excluded from this Settlement, the Settlement Class Member may do so by downloading or completing the form at the Settlement Website and submitting a valid request to opt-out, as described in the Notice, to the Claim Administrator. Requests to opt-out must be received (not just postmarked) by the opt-out deadline or they shall not be valid. A Settlement Class Member who elects to opt-out of this Settlement shall not be permitted to object to this Settlement or request the right to intervene.

The proposed Preliminary Approval order and Long Form Notice will provide that any Settlement Class Member wishing to object or opt-out who fails to properly or timely file or serve any of the requested information and/or documents will be precluded from doing so. At least fifteen (14) days prior to the hearing on Final Approval, the Claim Administrator shall prepare a list of the names of the persons who, pursuant to the Long Form Notice, have excluded themselves from the Settlement Class in a valid and timely manner, and Plaintiff's Counsel shall file that list with the Court.

7.6. IMVU have the exclusive right to void this Settlement if more than 5,000 Settlement Class Members timely and properly submit opt-out requests.

7.7. If a Settlement Class Member submits both a Benefit Elections Form and an opt-out request, the Benefit Elections Form shall take precedence and be considered valid and binding, and the opt-out request shall be deemed to have been sent by mistake and rejected.

7.8. Effect if Settlement Not Approved or Agreement is Terminated. This Agreement was entered into only for purposes of settlement. In the event that Preliminary or Final Approval of this Settlement and this Agreement does not occur for any reason, including without limitation termination of this Agreement by IMVU pursuant to Section 7.6, or if Final Approval is reversed on appeal, then no term or condition of this Agreement, or any draft thereof, or discussion, negotiation, documentation, or other part or aspect of the Parties' settlement discussions shall have any effect, nor shall any such matter be admissible in evidence for any purpose in the Litigation, or in any other proceeding; and the Litigation shall continue as if the settlement had not occurred. The Parties agree that all drafts, discussions, negotiations, documentation or other information prepared in relation to this Agreement, and the Parties' settlement discussions, shall be treated as strictly confidential and may not, absent a court order,

be disclosed to any person other than the Parties' counsel, and only for purposes of the Litigation.

## **VIII. RELEASES**

8.1. Nature of Release. The obligations incurred by IMVU pursuant to this Agreement shall be a full and final disposition and settlement of all claims, actions, suits, obligations, debts, demands, rights, causes of action, liabilities, controversies, costs, expenses, and attorneys' fees, known or unknown, which actually were, or could have been, asserted in the Litigation against them, whether individual, class, representative, legal, equitable, administrative, direct or indirect, or any other type or in any other capacity, all of which shall be finally and irrevocably compromised, settled, released, and discharged with prejudice, as set forth in Sections 8.2 and 8.3 below.

8.2. Release Regarding Plaintiff and Released Parties. Upon Final Approval, Plaintiff (for purposes of this Section 8.2, Plaintiff includes Plaintiff and his agents, assigns, attorneys and members of his family) on the one hand, and the Released Parties on the other hand, shall mutually release and forever discharge each other from and shall be forever barred from instituting, maintaining, or prosecuting:

(a) any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise, known or unknown, that actually were, or could have been, asserted in the Litigation, based upon any violation of any state or federal statutory or common law or regulation, and any claim arising directly or indirectly out of, or in any way relating to, the claims that actually were, or could have been, asserted in the Litigation, that Plaintiff, on the one hand, and IMVU, on the

other hand, have had in the past, or now have, related in any manner to the Released Parties' products, services or business affairs;

(b) any and all other claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise, known or unknown, that Plaintiff, on the one hand, and IMVU, on the other hand, have had in the past or now have, related in any manner to any and all Released Parties' products, services or business affairs, or otherwise. Plaintiff and IMVU expressly understand and acknowledge that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Plaintiff and IMVU explicitly took that into account in entering into this Agreement, and a portion of the consideration and the mutual covenants contained herein, having been bargained for between Plaintiff and IMVU with the knowledge of the possibility of such unknown claims, were given in exchange for a full accord, satisfaction, and discharge of all such claims. Consequently, Plaintiff and IMVU expressly waive all provisions, rights and benefits of California Civil Code section 1542 (and equivalent, comparable, or analogous provisions of the laws of the United States or any state or territory thereof, or of the common law). **Section 1542 provides:**

**“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”**

(c) Each and every term of this Section shall be binding upon, and inure to the benefit of Plaintiff and the Released Parties, and any of their successors and personal representatives, which persons and entities are intended to be beneficiaries of this section.



8.3. Release Regarding Settlement Class Members and Released Parties.

(a) Upon Final Approval, Settlement Class Members (except any such person who has filed a proper and timely request for exclusion from the Settlement Class) shall release and forever discharge the Released Parties from and shall be forever barred from instituting, maintaining, or prosecuting any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, known or unknown, whether arising under any international, federal, state or local statute, ordinance, common law, regulation, principle of equity or otherwise, that were, or could have been, asserted in the Litigation and that are based on the truncation of the playback time of the Affected Audio Products.

(b) With respect to the released claims set forth in Section 8.3(a), each Settlement Class Member shall be deemed to have waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of California Civil Code section 1542 (and equivalent, comparable, or analogous provisions of the laws of the United States or any state or territory thereof, or of the common law). **Section 1542 provides:**

**“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”**

(c) Each and every term of this section shall be binding upon the Settlement Class Members and any of their successors and personal representatives, and inure to the benefit of the Released Parties, and any of their successors and personal representatives, which persons and entities are intended to be beneficiaries of this Section.

(d) The Parties shall be deemed to have agreed that the release set forth herein will be and may be raised as a complete defense to and will preclude any action or proceeding based on the Released Claims.

(e) Nothing in this Section 8.3 shall operate to bar or release any defense, cross-claim or counter-claim in any action initiated by any of the Released Parties against any Settlement Class Member.

8.4. Effectuation of Settlement. None of the above releases include releases of claims to enforce the terms of the Settlement.

8.5. No Admission of Liability. This Agreement reflects, among other things, the compromise and settlement of disputed claims among the Parties hereto, and neither this Agreement nor the releases given herein, nor any consideration therefor, nor any actions taken to carry out this Agreement are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or the validity of any claim, or defense, or of any point of fact or law (including but not limited to matters respecting class certification) on the part of any Party. IMVU expressly denies the allegations of the complaints in the Litigation. Neither this Agreement, nor the fact of settlement, nor the settlement proceedings, nor settlement negotiations, nor any related document, shall be used as an admission of any fault or omission by the Released Parties, or be offered or received in evidence as an admission, concession, presumption, or inference of any wrongdoing by the Released Parties in any proceeding, other than such proceedings as may be necessary to consummate, interpret, or enforce this Agreement.

## **IX. ADDITIONAL PROVISIONS**

9.1. Best Efforts. The Parties' counsel shall use their best efforts to cause the Court to give Preliminary Approval to this Agreement and settlement as promptly as practicable, to take all steps contemplated by this Agreement to effectuate the settlement on the stated terms and conditions, and to obtain Final Approval of this Agreement.

9.2. Change of Time Periods. The time periods and/or dates described in this Agreement with respect to the giving of notices and hearings are subject to approval and change by the Court or by the written agreement of Plaintiff's Counsel and IMVU's Counsel, without notice to Settlement Class Members except that the Claim Administrator shall ensure that such dates are posted on the Settlement Website.

9.3. Time for Compliance. If the date for performance of any act required by or under this Agreement falls on a Saturday, Sunday or court holiday, that act may be performed on the next business day with the same effect as if it had been performed on the day or within the period of time specified by or under this Agreement.

9.4. Governing Law. This Agreement is intended to and shall be governed by the laws of the State of California, without regard to conflicts of law principles.

9.5. Entire Agreement. The terms and conditions set forth in this Agreement constitute the complete and exclusive statement of the agreement between the Parties hereto relating to the subject matter of this Agreement, superseding all previous negotiations and understandings, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Agreement constitutes the complete and exclusive statement of its terms as between the Parties hereto, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial proceeding, if any, involving this Agreement. Any

amendment or modification of the Agreement must be in writing signed by Plaintiff, Plaintiff's Counsel, IMVU, and IMVU's Counsel.

9.6. Advice of Counsel. The determination of the terms of, and the drafting of, this Agreement have been by mutual agreement after negotiation, with consideration by and participation of all Parties hereto and their counsel. The presumption found in California Civil Code section 1654 that uncertainties in a contract are interpreted against the party causing an uncertainty to exist is hereby waived by all Parties.

9.7. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the respective heirs, successors and assigns of the Parties hereto.

9.8. No Waiver. The waiver by any Party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

9.9. Execution in Counterparts. This Agreement shall become effective upon its execution by all of the undersigned. The Parties may execute this Agreement in counterparts and/or by fax or electronic mail, and execution of counterparts shall have the same force and effect as if all Parties had signed the same instrument.

9.10. Captions. Captions and section numbers herein are inserted merely for the reader's convenience, and in no way define, limit, construe, or otherwise describe the scope or intent of the provisions of this Agreement.

9.11. Extensions of Time. The Parties reserve the right, by agreement and subject to the Court's approval, to grant any reasonable extension of time that might be needed to carry out any of the provisions of this Agreement.

9.12. Enforcement of this Agreement. The Court shall retain jurisdiction to enforce, interpret, and implement this Agreement.

9.13. Plaintiff to be Included in Settlement Class. Plaintiff hereby agrees not to request to opt out or otherwise be excluded from the Settlement Class. Any such request shall be void and of no force or effect.

9.14. Notices. All notices to the Parties or counsel required by this Agreement, shall be made in writing and communicated by mail and fax or email to the following addresses:

If to Plaintiff or Plaintiff's Counsel:

Adam Gutride, Esq.  
Seth Safier, Esq.  
Todd Kennedy, Esq.  
Gutride Safier LLP  
100 Pine Street, Suite 1250  
San Francisco, CA 94111  
Telephone: (415) 639-9090  
Fax: (415) 449-6469  
Email: adam@gutridesafier.com, seth@gutridesafier.com,  
todd@gutridesafier.com

If to IMVU or IMVU' Counsel:

Penelope A. Prevolos, Esq.  
William F. Tarantino, Esq.  
Morrison Forester & Singer LLP  
425 Market Street  
San Francisco, CA 94105-2482  
P (415) 268-7000  
F (415) 268-7522  
Email : pprevolos@mofocom, wtarantino@mofocom

IN WITNESS HEREOF the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on the date it is executed by all of the undersigned.

**APPROVED AS TO FORM:**

DATED: September 16, 2015                      GUTRIDE SAFIER LLP

\_\_\_\_\_  
Adam Gutride  
Seth A. Safier  
Todd Kennedy  
Attorneys for Plaintiff

DATED: September 16, 2015                      MORRISON & FOERSTER, LLP

\_\_\_\_\_  
Penelope A. Preovolos, Esq.  
William F. Tarantino, Esq.  
Attorneys for IMVU

**APPROVED AND AGREED:**

DATED: September 16, 2015

\_\_\_\_\_  
Peter MacKinnon, Jr.

DATED: September 16, 2015                      IMVU, INC.

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

## **LIST OF EXHIBITS**

Exhibit A: Benefit Election Form

Exhibit B1: Long Form Notice

Exhibit B2: Email Notice

Exhibit B3: Text Notice

Exhibit B4: Banner Advertisement

Exhibit B5: Facebook Advertisement

Exhibit C: Preliminary Approval Order

Exhibit D: Judgment/Final Approval Order

Exhibit E: Undertaking

# **EXHIBIT A**



***MacKinnon v. IMVU Class Action Settlement***  
**[Downloadable] Benefit Elections Form**

[Class Member name, address, email address, and IMVU user name—populated from Defendant records unless class member does not have claim/control number]

You do NOT need to return this form to receive the Settlement Benefits. **Return this form ONLY if you want to receive the second or third Settlement Benefit listed below or need to update your contact information.**

I understand that, if the Settlement is approved, and I am a member of the Settlement Class, I will be entitled to Settlement Benefits as provided in the Class Notice. I wish to elect one of the following Settlement Benefits:

Choose One:

IMVU Predits, computed as the number of IMVU Credits I paid for the Affected Audio Products x 60%.

**If you choose this option, you do NOT need to return this form, unless your contact information shown above is incorrect.**

IMVU Credits, computed as the number of IMVU Credits I paid for the Affected Audio Products x 30%.

A cash refund, computed as the number of IMVU Credits I paid for Affected Audio Products x 30% x \$0.00040 per Credit.

For cash refund only: send my refund by (Select one):

Check to my address.

Direct deposit to Bank Name: \_\_\_\_\_

ABA Routing No. \_\_\_\_\_ Account No. \_\_\_\_\_

PayPal to my PayPal account (email address): \_\_\_\_\_

First Name: \_\_\_\_\_ Last Name: \_\_\_\_\_

Email Address Used For IMVU Account: \_\_\_\_\_

Current Email Address (if different): \_\_\_\_\_

Current Mailing Address: \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

IMVU User Name \_\_\_\_\_

I certify under penalty of perjury under the laws of the State of California that all of the foregoing is true and correct.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Settlement Benefits will be distributed after the Settlement's Effective Date. Please save a copy of this completed form for your records. All information will be kept private. It will not be disclosed to anyone other than the Court, the Claim Administrator, and the Parties in this case, and will be used only for purposes of administering this Settlement. **For further information, visit [URL].**

**Mail to: MacKinnon v. IMVU Claim Administrator, [address]**

# **EXHIBIT B1**

## **Attention IMVU Users Who Purchased Certain Audio Files On IMVU Before December 1, 2010**

**This notice may affect your rights. Please read it carefully.**

*A court authorized this notice. This is not a solicitation from a lawyer.*

- The class action settlement will resolve a lawsuit against IMVU, Inc. (“IMVU”). The lawsuit claims that from September 21, 2008 to December 1, 2010, IMVU sold full-length audio files to its customers for use in IMVU’s 3D messaging application and later substantially reduced the value of those audio files by reducing their playback length to 20 seconds. IMVU contends that the file modifications were lawful, and denies any wrongdoing.
- To settle the case, IMVU has agreed to eliminate the restrictions that prevented the files from playing at their full length and to ensure that the preview length of an audio item does not exceed the length of playback after purchase, absent any modification by the IMVU member-developer. IMVU also has agreed to make clarifying changes to its terms of service agreement and to its other online notifications regarding the non-refundability of purchases. The agreement does not change IMVU’s obligation to comply with U.S. copyright laws, including requirements to remove audio files from its site if notified of copyright infringement by the copyright owner or if it has actual knowledge of copyright violation.
- The lawyers who brought the lawsuit will ask the Court for up to \$1,150,000.00 to be paid by IMVU as fees and expenses for investigating the facts, litigating the case, and negotiating the settlement. They will additionally ask for \$10,000.00 for the Plaintiff who brought this lawsuit, as an incentive award.
- Your legal rights are affected whether you act, or don’t act. Read this notice carefully.
- This notice summarizes the proposed settlement. For the precise terms and conditions of the Settlement, please see the settlement agreement available at [URL], by contacting class counsel at Gutride Safier LLP, 100 Pine Street, Suite 1250, San Francisco, CA 94111, by accessing the Court docket in this case at <http://www.sceffiling.org> or <http://www.sccaseinfo.org> (enter case number 111CV193767), or in person at Records, Superior Court for the State of California, County of Santa Clara, 191 North First Street, San Jose, CA 95113, from 8:30 a.m. and 3:00 p.m., Monday through Friday, excluding Court holidays.

**PLEASE DO NOT TELEPHONE THE COURT OR THE COURT CLERK’S  
OFFICE TO INQUIRE ABOUT THIS SETTLEMENT OR THE CLAIM  
PROCESS.**

EXHIBIT B1: LONG FORM NOTICE

<b>YOUR RIGHTS AND OPTIONS IN THIS SETTLEMENT</b>		<b>DEADLINE</b>
<b>DO NOTHING</b>	You will automatically receive a refund, to your IMVU Account, of IMVU promotional credits (“Predits”), computed as 60% of the IMVU Credits you used to purchase Affected Audio Products.	
<b>SUBMIT A BENEFIT ELECTIONS FORM</b>	If you do not want the automatic refund of IMVU Predits, you may request your refund to be paid as one of the following:  (a) IMVU Credits, computed as 30% of the IMVU Credits you used to purchase Affected Audio Products or  (b) Cash, computed as \$0.00041 per IMVU Credit, multiplied by the number of IMVU Credits in (a).	[30 days after Final Approval]
<b>EXCLUDE YOURSELF</b>	Get out of the lawsuit and the settlement. This is the only option that allows you to ever bring or join another lawsuit against IMVU that raises the same claims in this case. You will receive no payment.	[28 days before Final Approval]
<b>OBJECT OR COMMENT</b>	Write to the Court about why you do or don’t like the settlement, the amount of attorneys’ fees, or the payments to Mr. MacKinnon.	[28 days before Final Approval]
<b>GO TO A HEARING</b>	Ask to speak in Court about the fairness of the settlement, the amount of attorneys’ fees, or the payments to Mr. MacKinnon.	[28 days before Final Approval]

- These rights and options—and the deadlines to exercise them—are explained in this notice.
- The Court in charge of this case still has to decide whether to approve the settlement. Payments will be made if the Court approves the settlement and after appeals are resolved. Please be patient.

### **Fairness Hearing**

On \_\_\_\_\_, at \_\_\_\_\_, the Court will hold hearings to determine (1) whether the proposed settlement is fair, reasonable and adequate and should receive final approval; (2) whether the applications for attorneys’ fees and/or expenses brought by the Class Counsel should be granted; and (3) whether the application for a special incentive payment to the Plaintiff who brought the lawsuit should be granted. The hearing will be held at the Superior Court for the State of California, County of Santa Clara, 191 North First Street, San Jose, CA 95113, in Department 1, courtroom of the Honorable Judge Peter H. Kirwan. This hearing date may change without further notice to you. Consult the Settlement Website at [URL], or the Court docket in this case at <http://www.scefiling.org> or <http://www.sccaseinfo.org> (enter case number 111CV193767), for updated information on the hearing date and time.

## Important Dates

_____	Objection Deadline
_____	Benefits Election Form Deadline
_____	Exclusion Deadline
_____	Fairness Hearing

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## How Do I Know If I Am Affected By The Settlement?

For purposes of settlement only, the Court has certified a settlement class. You are a member of the settlement class if you: (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 September 16, 2015, had your country of residence setting in the IMVU Application set as the United States. However, 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.

If you are a member of the settlement class, you will be bound by the settlement and

judgment in this case, unless you request to be excluded.

### What Is The Lawsuit About?

A lawsuit was brought against IMVU. The suit claims that IMVU offers an application that permits users to interact with each other using virtual characters, otherwise known as avatars, and allows users to customize their experience by purchasing virtual items such as clothing, jewelry, furniture and audio files. IMVU lists these items in a virtual catalog where users can purchase them by exchanging “IMVU credits,” which in turn can be purchased for cash. The suit claims that prior to September 21, 2008, the IMVU virtual catalog contained many “full length” audio products, which were several minutes long. On September 2008, IMVU announced that any new audio files added to the IMVU catalog would be “cut down” to twenty seconds, but that audio files added prior to September 21, 2008 would not be affected and could continue to be purchased and played at full length. After the announcement, IMVU continued to allow persons to sample the pre-2008 audio files before purchase and played them at full length. On January 31, 2011, IMVU announced that all audio files, including those added prior to September 21, 2008 but purchased after that date, would be “cut down” to twenty seconds. IMVU provided refunds only to persons who had made such purchases after December 1, 2010. The suit alleges that IMVU’s conduct is illegal and unconscionable, and it seeks an injunction against IMVU and refunds for all persons who bought the affected audio products. “Affected audio products” means all audio products offered for sale in the IMVU Virtual Catalog that were purchased after September 21, 2008 and before December 1, 2010, whose original playback length was greater than twenty seconds.

IMVU denies that there is any factual or legal basis for Plaintiff’s allegations. IMVU contends that its user agreement makes all purchases non-refundable and gives it sole discretion to remove or alter any audio products, and that the agreement is enforceable. It also argues that it truthfully marketed and advertised its service. IMVU therefore denies any liability and denies that Plaintiff or any other members of the settlement class have suffered injury or are entitled to

monetary or other relief. IMVU also denies that this case can be certified as a class action, except for purposes of settlement.

The Court has not determined whether Plaintiff or IMVU is correct.

### **What Does Plaintiff Seek To Recover In The Lawsuit?**

Plaintiff contends that IMVU is legally obligated to refund the purchase price for the affected audio products. Plaintiff contends that approximately 4.5 billion IMVU credits (equivalent to \$4.5 million) was spent on the affected audio products by approximately 875,000 persons. Plaintiff asserts that, if he is successful at trial on all of his claims for a nationwide class of IMVU users, he could win damages and restitution of at least this amount.

IMVU denies that there is any legal entitlement to a refund or any other monetary relief.

### **Why Is This Case Being Settled?**

This case has been pending since February 2011. Since then, the Plaintiff has conducted substantial investigation into the operation of the IMVU application and its communications to users. IMVU has produced more than 100,000 pages of documents, data and programming code, which Plaintiff's counsel have reviewed. In addition, the parties have taken depositions of numerous witnesses. The parties also have exchanged written responses, under oath, to questions posed by the other party.

Based on this investigation, Plaintiff's Counsel has determined that there are significant risks of continuing the litigation. In particular, there may be substantial difficulties establishing: (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, even if all these problems were overcome, 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 would be difficult to establish that IMVU had an obligation to pay cash damages to affected users.

In April 2015, Plaintiff and IMVU participated in an all-day mediation session in Oakland, California in an attempt to settle the litigation. This settlement was reached as a result of the mediation.

After taking into account the risks and costs of further litigation, Plaintiff and his counsel believe that the terms and conditions of the settlement are fair, reasonable, adequate and equitable, and that the settlement is in the best interest of the Settlement Class Members.

### **What Is The Settlement?**

IMVU has agreed to make changes to the operation of the IMVU application so that all audio products that were uploaded to the IMVU virtual catalog prior to September 2008 and that remain in the catalog play at their full length.<sup>1</sup> IMVU also has agreed to make clarifying revisions to its terms of service agreement as detailed in section 3.2 of the settlement agreement. The settlement does not change IMVU’s obligations to comply with U.S. copyright laws such as the Digital Millennium Copyright Act (17 U.S.C. §§512(c)(3) and 512(d)(3)) (“DMCA”), including without limitation its obligation to remove from the IMVU virtual catalog and the IMVU application any audio product for which it receives a valid DMCA takedown notice or which it knows was uploaded to the virtual catalog in violation of U.S. copyright laws.

In addition, as part of the settlement, IMVU will provide refunds to settlement class members and payments to class counsel and the named Plaintiff, as described in the next

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<sup>1</sup> Most items are added to the virtual catalog by third-party developers, i.e. other IMVU users, who retain the right to remove or alter them. IMVU also has the duty to remove items from the catalog in response to a valid DMCA notice.



sections.

### **What Can I Get In The Settlement?**

Each settlement class member will automatically receive benefits under the settlement.

The settlement class member can elect to receive any one of the following:

- (a) A refund to his or her IMVU Account, of IMVU Predits, computed as 60% of the IMVU Credits that he or she used to pay for the Affected Audio Products.
- (b) A refund, to his or her IMVU Account, of IMVU Credits, computed as 30% of the IMVU Credits that he or she used to pay for the Affected Audio Products.
- (c) A cash refund, computed as 30% of the IMVU Credits that he or she used to pay for the Affected Audio Products, times \$0.00040 per IMVU Credit.

The difference between IMVU Predits and IMVU Credits is that Credits can be transferred to other IMVU users (with some limitations). IMVU Predits are non-transferrable and non-exchangeable. In all other respects IMVU Predits and IMVU Credits are the same, meaning that items can be purchased from the IMVU virtual catalog for the same number of IMVU Predits as IMVU Credits.

### **How Do I Make A Claim?**

If you are a member of the settlement class, you will automatically receive the settlement benefit (a) listed in the prior section. You do not need to make a claim. However, if you wish to obtain the settlement benefit (b) or (c) listed in the prior section, you must file a benefit election form available on this settlement website, [URL]. You can submit the benefit election form online, or you can print it and mail it to the claim administrator at: [address]. Benefit election forms are due by [30 days after scheduled final approval hearing].

### **What If I No Longer Have Access To My IMVU Account?**

If you have forgotten your IMVU user ID (avatar name) or password, you can follow the

instructions at [http://www.imvu.com/catalog/password\\_forgotten.php](http://www.imvu.com/catalog/password_forgotten.php) to obtain the user ID and a link to reset your password. If you no longer have access to the email address that you used to create your IMVU account, IMVU will modify your account to associate it with your current email address, and you can then use the link above and your current email address to obtain your user ID and reset your IMVU password. To have IMVU modify your account to be associated with your current email address, please send an email to the claim administrator at \_\_\_\_\_, which includes (1) your full name, (2) your current email address, (3) the email address that was used to create the IMVU account, and (4) at least two of the following: (a) your IMVU avatar name, (b) the dates and amounts of at least one transaction in which you purchased IMVU Credits through the IMVU application, (c) the name of at least one virtual product you purchased through the IMVU application, or (d) the last four digits of the credit card that you used for a purchase in the IMVU application or on [www.imvu.com](http://www.imvu.com).

### **What Do Plaintiff And Their Lawyers Get?**

To date, Plaintiff's lawyers have not been compensated for any of their work on this case. Plaintiff's lawyers estimate that they have spent more than 1700 hours litigating this case. In addition, Plaintiff's lawyers have paid out-of-pocket expenses (including deposition transcript fees, court reporter fees, filing fees, service costs, copying costs, and travel expenses) of approximately \$65,000. None of these expenses has yet been reimbursed. As part of the settlement, Plaintiff's lawyers may apply to the Court to award them up to \$1,150,000.00 to pay their attorneys' fees and expenses.

In addition, the named Plaintiff in this case may apply to the Court for an incentive award of up to \$10,000.00. This incentive award is designed to compensate the named Plaintiff for the time, effort and risks he undertook in pursuing this litigation and for executing a broader release of claims than other settlement class members.

Plaintiff and his lawyers will file a motion with the Court on or before [42 days before final approval hearing, i.e., 14 days before objection deadline] in support of their applications for

attorneys' fees, costs and expenses and incentive awards. A copy of that motion will be available on the settlement website.

The award of attorneys' fees, costs and expenses will be paid to Plaintiff's lawyers within seven days after the Court grants final approval to the settlement, except that \$50,000.00 of the award will be held in an interest-bearing account until the parties certify, and the Court finds, that all required distributions have been made to settlement class members. If the order finally approving the settlement is later reversed on appeal, Plaintiff's lawyers will be required to repay the previously paid fees, costs and expenses, plus interest.

The Court will determine the amount of fees, costs, expenses, and incentives to award.

### **What Claims Are Released By The Settlement?**

The settlement releases all claims by settlement class members against IMVU and any person or entity affiliated with IMVU that were or could have been asserted by Plaintiff that relate to the truncation of the playback time of the affected audio products. This release includes claims that may not yet be known or suspected. For further information, please see Section 8.3 of the Settlement Agreement.

### **How Do I Exclude Myself From The Settlement?**

You can exclude yourself from the settlement class if you want to be able to sue IMVU separately for the claims released by the settlement. If you exclude yourself, you cannot file a claim or object to the settlement.

To exclude yourself, you must complete and submit the online form at the settlement website or mail a request to opt out of the settlement to the claim administrator at [address]. If mailed, the exclusion request must contain your name, address, the words "I wish to be excluded from the IMVU Class Action Settlement," and your signature.

If submitted online, exclusion requests must be made by [28 days before Final Approval Hearing]. If mailed, exclusion requests must be *received* (not postmarked) by [28 days before

Final Approval Hearing].

### How Do I Object To The Settlement?

You can ask the Court to deny approval by filing an objection. You can't ask the Court to order a larger settlement; the Court can only approve or deny the settlement. If the Court denies approval to the entire settlement, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.

You can also ask the Court to disapprove the requested payments to Plaintiff and to his attorneys. If those payments are disapproved, the money will not be paid to the settlement class, but instead, the funds earmarked for Plaintiff and his attorneys will be returned to IMVU.

You may also appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for paying that attorney. To appear at the Final Approval hearing, you need to file a written objection to the settlement or a written request to the Court for permission to appear.

Any objection must include your name, address and telephone number; shall provide documents or testimony sufficient to establish your membership in the Settlement Class; and shall provide a detailed statement of any objection asserted, including the grounds therefor and reasons, if any, for requesting the opportunity to appear and be heard at the final approval hearing. Failure to include the foregoing information shall be grounds for striking an objection.

All written objections, requests to appear, and supporting papers must (a) clearly identify the case name and number, *MacKinnon v. IMVU*, Case No. 1-11-cv-193767, (b) be submitted to the Court either by mailing them to the Clerk, Superior Court for the State of California, County of Santa Clara, 191 North First Street, San Jose, CA 95113, or by filing them in person at that location, from 8:30 a.m. and 3:00 p.m., Monday through Friday, excluding Court holidays, (c) be served on counsel for Plaintiff and IMVU at the addresses shown on the settlement website, and (d) be filed or postmarked on or before [28 days before Final Approval Hearing].

### When Will The Court Decide If The Settlement Is Approved?

The Court will hold a hearing on [hearing date] to consider whether to approve the settlement. The hearing will be held in the San Jose Superior Court, 191 North First Street, San Jose, CA 95113, Department 1. The hearing is open to the public. However, only persons who have filed a request to appear at the hearing may actually address the Court. This hearing date may change without further notice to you. Consult the settlement website at [URL] or the Court docket in this case at <http://www.sccaseinfo.org> or <http://www.scefiling.org> (enter case number 111CV193767), for updated information on the hearing date and time.

### How Do I Get More Information?

You can inspect many of the court documents connected with this case on the settlement website. Other papers filed in this lawsuit are available by accessing the Court docket in this case at <http://www.sccaseinfo.org> or <http://www.scefiling.org> (enter case number 111CV193767), or by visiting the office of the Clerk of the Court for the Superior Court for the State of California, County of Santa Clara, 191 North First Street, San Jose, CA 95113, from 8:30 a.m. and 3:00 p.m., Monday through Friday, excluding Court holidays.

You can also obtain additional information by contacting Plaintiff's Counsel at IMVU Settlement, Gutride Safier LLP, 100 Pine Street, Suite 1250, San Francisco, CA 94111.

# **EXHIBIT B2**

To: [Customer email address]  
From: *MacKinnon v. IMVU* Class Action Settlement Administrator  
Subject: Notice of Class Action and Proposed Settlement

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**Why Am I Receiving This Notice?**

According to our records, during the period September 20, 2008 to December 30, 2010, you used IMVU credits to purchase, from the IMVU virtual catalog, one or more audio files whose playback length was greater than twenty seconds; you used the IMVU application at least once after January 31, 2011, when IMVU limited the playback length of all audio files to twenty seconds; you have not held an IMVU Account that had been terminated by IMVU for violations of IMVU terms of service; and you have your country of residence setting in the IMVU application set as the United States..

**What's this about?**

A lawsuit was brought against IMVU. It claims that IMVU promised not to shorten the audio files that you purchased and should give refunds because it broke that promise. IMVU contends that the file size reduction was necessary, that it complied with the terms of service, and that IMVU has always truthfully marketed its service. The Court has not determined who is correct. To avoid the costs and risks of continued litigation, the parties have agreed to a settlement. Under the settlement, IMVU has agreed to remove the restrictions that prevented full playback length of the affected audio files. It also has agreed to give partial refunds to purchasers of the affected audio files, pay Court-approved incentives to the customer who brought the lawsuit, pay Court-approved fees and costs to their counsel, and pay all settlement administration costs. The settlement releases all class members' claims against IMVU regarding the truncation of the affected audio files.

**What can I receive?**

If the Court approves the settlement, and you fall within the group described in the first paragraph of this email, you will automatically receive a refund of IMVU promotional credits ("Predits"). The Predits will be computed as 60% of the IMVU Credits that you used to pay for the affected audio products. They will be deposited in your IMVU Account. If you do not wish to receive IMVU Predits, you can choose to receive a refund of IMVU Credits, computed as 30% of the IMVU Credits that you used to pay for the affected audio products. Alternatively, you can choose to receive a cash refund, computed as 30% of the IMVU Credits that you used to pay for the Affected Audio Products, times \$0.00040 per IMVU Credit.

**How do I make a claim?**

It is not necessary to make a claim. You will automatically receive the refund of IMVU Predits. If you wish to receive the IMVU Credits or cash instead of the IMVU Predits, you must file a benefit elections form, available [here](#). [Benefit election forms](#) are due by [30 days after scheduled final approval hearing].

**What are my other options?**

You can [exclude yourself](#) from the class if you want to be able to sue IMVU separately for the claims released by the settlement. If you exclude yourself, you cannot file a claim or object to the settlement.

Alternatively, you can object to the settlement by filing papers in the California Superior Court in San Jose, California (*MacKinnon v. IMVU*, Santa Clara Super. Ct. Case No. 1-11-cv-193767). If you object to the settlement, you also can appear at the settlement approval hearing or can hire your own attorney to appear, although your objection will be considered even if you do not appear or hire an attorney.

You must submit, not just mail, your exclusion or objection by [deadline] by following the specific instructions at the [settlement website](#).

The Court will hold a hearing on [hearing date] to consider whether to approve the settlement. If the settlement is approved, the attorneys for the class will ask the Court to award them up to \$1,150,000.00 in fees, reasonable costs and expenses, and to award up to \$10,000 as an incentive to the customer who started the lawsuit. This hearing date may change without further notice to you.

For updated information on the hearing date and time, or to view the precise terms and conditions of the settlement, please see the settlement agreement available at the [settlement website](#): [URL]; contact class counsel at Gutride Safier LLP, 100 Pine Street, Suite 1250, San Francisco, CA 94111; or access the Court's docket in this case in this case at <http://www.sccaseinfo.org> or <http://www.scefiling.org> (enter case number 111CV193767) or in person at Records, Superior Court for the State of California, County of Santa Clara, 191 North First Street, San Jose, CA 95113, from 8:30 a.m. and 3:00 p.m., Monday through Friday, excluding Court holidays.

Claim Number \_\_\_\_\_. Control Number \_\_\_\_\_.

EXHIBIT B2 – SUMMARY EMAIL NOTICE

# **EXHIBIT B3**



IMVU settles class action re 20-second limit on audio, agrees to lift limit and give refunds for pre-December 2010 purchases. Details [here](#).

# **EXHIBIT B4**

**Attention IMVU Users**  
**A Class Action Settlement May Affect You. [Click Here](#)**  
**If You Bought Audio Files On IMVU Between Sept. 2008 and Dec. 2010.**

# **EXHIBIT B5**

**IMVU Class Action Settlement**  
**[URL for Settlement Website]**  
**If you bought audio files on IMVU**  
**Between Sept. 2008 and Dec. 2010, Click Here.**

# **EXHIBIT C**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

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

Plaintiff,

v.

IMVU, INC., and DOES 1 THROUGH 50

Defendants.

CASE NO: 111 CV 193767

[PROPOSED] ORDER GRANTING PRE-  
LIMINARY APPROVAL OF CLASS AC-  
TION SETTLEMENT

DATE: October 30, 2015  
TIME: 9:00 a.m.  
CTRM: 1  
JUDGE: Hon. Peter H. Kirwan

Trial Date: None

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**RECITALS**

Plaintiff Peter MacKinnon, Jr. (“Class Representative”) and Defendant IMVU, Inc. (“Defendant”) have moved the Court for preliminary approval of a proposed class action settlement, the terms and conditions of which are set forth in the Settlement Agreement filed with the Court on October 7, 2015 (“Settlement Agreement”).

This case centers on decisions by IMVU in 2008 and 2011 to truncate the playback time of various audio files that were purchased for use in IMVU’s 3D messaging application, which is an online social entertainment destination. Plaintiff, who purchased several of the affected audio products, contends that IMVU promised not to truncate the playback time and misled its customers. Plaintiff contends that IMVU is required to give refunds of the IMVU Credits he and approximately 432,000 others used to make the purchases, a total of approximately 3.3 billion IMVU Credits, which Plaintiff claims were purchased for cash or cash equivalents of approximately \$3.3 million. (IMVU users may purchase IMVU Credits for cash or earn IMVU Credits for performing other activities on the IMVU application.) Plaintiff contends that Defendant denies that it make such a promise or misrepresentation and contends that its terms of service agreement makes all purchases nonrefundable. The Court has not decided who is correct.

The history of this litigation is summarized in Part I of the Settlement Agreement. In brief, this case was filed in February 2011. The litigation was removed to federal court and remanded. Substantial discovery was taken by both parties, before this Court entered judgment on the pleadings as to certain causes of action and granted a demurrer as to the other causes of action. The Court of Appeal reversed with instructions to deny the motion for judgment on the pleadings and to overrule the demurrer as to certain causes of action. The settlement was negotiated, after remand, with the assistance of a reputable mediator.

The terms of the Settlement are summarized in the proposed Long Form Notice to settlement class members, which is attached as Exhibit B1 to the Settlement Agreement. In brief, IMVU has agreed to restore the full length of the affected audio files; amend its terms of use and notices to users to clarify its no-refund policy; and give partial refunds to purchasers of the affected audio products. Each member of the settlement class will automatically receive a refund, to



1 his or her IMVU Account, of IMVU “Predits,” computed as 60% of the IMVU Credits that he or  
2 she used to pay for the affected audio products. The difference between IMVU Predits and IMVU  
3 Credits is that Credits can be transferred to other IMVU users (with some limitations), while  
4 Predits are non-transferrable and non-exchangeable. In all other respects IMVU Predits and  
5 IMVU Credits are the same, meaning that items can be purchased from the IMVU virtual catalog  
6 for the same number of IMVU Predits as IMVU Credits.

7 Settlement class members who not wish to receive IMVU Predits can elect instead to re-  
8 ceive either: (a) a refund of IMVU Credits, computed as 30% of the IMVU Credits that they used  
9 to pay for the affected audio products, or (b) a cash refund, computed as 30% of the IMVU Cred-  
10 its that they used to pay for the affected audio products, times \$0.00040 per IMVU Credit.

11 No claim need be made to obtain the IMVU Predits, which will be refunded automatically  
12 after the settlement becomes effective. To obtain the alternative IMVU Credits or cash refund,  
13 the settlement class member must submit a benefit election form no later than 30 days after Final  
14 Approval. Such form will be made available on the settlement website and can be submitted on-  
15 line or by mail.

16 There are approximately 432,000 members of the settlement class.

17 IMVU has also agreed to pay up to \$1,150,000.00 to Plaintiff’s attorneys for fees and ex-  
18 penses, plus up to \$10,000.00 as an incentive award to the Plaintiff. Such amounts must be ap-  
19 proved by the Court, and the Court will defer any ruling on the appropriateness of such awards  
20 until the final approval hearing. Any awarded fees and expenses are to be paid to Plaintiff’s  
21 counsel seven days after Final Approval, except that \$50,000.00 will remain in an interest-bearing  
22 account until the parties certify, and the Court finds, that all required distributions have been  
23 made to settlement class members.

24 Notice is to be provided to settlement class members directly, by electronic mail to the  
25 email address on file with IMVU, as well as by “direct message” through the IMVU application.  
26 Notice will also be posted on various webpages maintained by IMVU. In addition, banner adver-  
27 tisements will be purchased using Google Adwords and additional advertising will be purchased  
28 on Facebook. All of these notices will link to the settlement website, which contains a detailed

1 class notice, including the procedures to opt-out and object, as well as a copy of the settlement  
2 agreement and motion papers filed in connection with the settlement.

3 The parties have proposed Garden City Group as Claim Administrator, a well-known and  
4 experienced class action administrator, to send the notices and receive and tabulate benefit elec-  
5 tion forms.

### 6 FINDINGS AND CONCLUSIONS

7 Having considered all matters submitted to it at the hearing on the motion and otherwise,  
8 including the complete record of this action, and good cause appearing therefore, the Court here-  
9 by finds and concludes as follows:

10 1. The capitalized terms used in this Order shall have the same meaning as defined  
11 in the Settlement Agreement except as otherwise expressly provided.

12 2. The Court preliminarily approves the Settlement as within the range of possible  
13 final approval, and as meriting submission to the Settlement Class for its consideration.

14 3. For purposes of the Settlement only, the Court certifies the Settlement Class,  
15 which consists of all persons (other than Excluded Persons) who (1) after September 21, 2008 and  
16 before December 1, 2010, used IMVU Credits to purchase from the IMVU virtual catalog at least  
17 one audio product whose playback length was greater than twenty seconds, (2) subsequently  
18 logged into the IMVU service at least once after January 31, 2011, (3) as of April 20, 2015, had  
19 not been terminated by IMVU for violations of IMVU terms of service, and (4) as of the date of  
20 the Settlement Agreement have their country of residence setting in the IMVU Application set as  
21 the United States. "Excluded Persons" are (1) the Honorable Judges Peter H. Kirwan, James P.  
22 Kleinberg, and Patricia J. Hamilton, (2) Randall W. Wulff; (3) any member of their immediate  
23 families; (4) any government entity; (5) IMVU; (6) any entity in which IMVU has a controlling  
24 interest; (7) any of IMVU's subsidiaries, parents, affiliates, and officers, directors, employees,  
25 legal representatives, heirs, successors, or assigns; and (8) any persons who timely opt-out of the  
26 Settlement Class.

27 4. The Court preliminarily finds, solely for purposes of considering this Settle-  
28 ment, that the requirements of Civil Procedure Code section 382 and Civil Code section 1781 are

1 conditionally satisfied, including requirements that the Settlement Class Members are too numer-  
2 ous to be joined in a single action; that common issues of law and fact exist and predominate; that  
3 the claims of the Class Representative is typical of the claims of the Settlement Class Members;  
4 that the Class Representative and Class Counsel can adequately protect the interests of the Set-  
5 tlement Class Members; and that a settlement class is superior to alternative means of resolving  
6 the claims and disputes at issue in this Action.

7           5. The Court conditionally designates the law firm of Gutride Safier LLP as Class  
8 Counsel and Peter MacKinnon, Jr. as Class Representative for purposes of this Settlement. The  
9 Court preliminarily finds that the Class Representative and Class Counsel fairly and adequately  
10 represent and protect the interests of the absent Settlement Class Members. The Court designates,  
11 and approves, Garden City Group to serve as Claims Administrator.

12           6. Not later than December 17, 2015 [42 days before final approval], Plaintiff and  
13 Class Counsel may make a written application to the Court for an award of attorneys' fees, costs  
14 and incentive awards to the Plaintiff. That application and all supporting documentation shall si-  
15 multaneously be posted to the settlement website.

16           7. A Final Approval Hearing shall be held before this Court at 9:00 a.m. on Janu-  
17 ary 28, 2016, Courtroom 1 of the Superior Court for the State of California, County of Santa  
18 Clara, 191 North First Street, San Jose, CA 95113, to address: (a) whether the proposed Settle-  
19 ment should be finally approved as fair, reasonable and adequate, and whether the Final Approval  
20 Order should be entered, and (b) whether Class Counsel's application for attorneys' fees, costs,  
21 and incentive award should be approved.

22           8. The Court approves, as to form and content, the Benefit Election Form and the  
23 Notices, substantially similar to the forms attached as Exhibits A and B1 to B5 to the Settlement  
24 Agreement. All the notices are written in plain English and are easy to comprehend. The Parties  
25 shall have discretion to jointly make non-material minor revisions to the Notices before emailing  
26 and publishing. Responsibility regarding settlement administration, including, but not limited to,  
27 notice and related procedures, shall be performed by the Claim Administrator, subject to the over-  
28 sight of the parties and this Court as described in the Settlement Agreement.

1           9. The Court finds that the Parties' plan for providing notice to the Settlement  
2 Class (the Notice Plan) is reasonably calculated to provide notice to the Settlement Class of the  
3 pendency of the Action, certification of the Settlement Class, the terms of the Settlement Agree-  
4 ment, and the Final Approval hearing, and complies fully with the requirements of the California  
5 and United States Constitutions, Civil Code section 1781, Rule of Court 3.769, and any other ap-  
6 plicable law. The Parties and the Claim Administrator shall comply with the Notice Plan as set  
7 forth in the Settlement Agreement.

8           10. Any member of the Settlement Class who desires to be excluded from the Set-  
9 tlement Class, and therefore not be bound by the terms of the Settlement Agreement, must submit  
10 an online request for exclusion by December 31, 2015 [28 days prior to Final Approval Hearing]  
11 or mail to the Claim Administrator, pursuant to the instructions set forth in the Long Form Notice,  
12 a timely and valid written request for exclusion, received (not postmarked) no later than Decem-  
13 ber 31, 2015 [28 days prior to Final Approval Hearing]. No one shall be permitted to exercise  
14 any exclusion rights on behalf of any other person, whether as an agent or representative of an-  
15 other or otherwise, except upon proof of a legal power of attorney, conservatorship, trusteeship,  
16 or other legal authorization and no one may exclude other persons within the Settlement Class as  
17 a group, class, or in the aggregate.

18           11. At least fourteen (14) days prior to the hearing on Final Approval, the Claim  
19 Administrator shall prepare a list of the names of the persons who, pursuant to the Class Notice  
20 described herein, have excluded themselves from the Settlement Class in a valid and timely man-  
21 ner, and Plaintiff's Counsel shall file that list with the Court. The Court retains jurisdiction to  
22 resolve any disputed exclusion requests.

23           12. Any member of the Settlement Class who elects to be excluded shall not receive  
24 any benefits of the Settlement, shall not be bound by the terms of the Settlement Agreement, and  
25 shall have no standing to object to the Settlement or intervene in the Action.

26           13. Any Settlement Class Member who does not submit a valid and timely request  
27 for exclusion may object to the Settlement Agreement. Any such Settlement Class Member shall  
28 have the right to appear and be heard at the Final Approval hearing, either personally or through

1 an attorney retained at the Settlement Class Member's own expense. Any such Settlement Class  
2 Member must file with the Court a written objection to the Settlement ("Objection"). The Objec-  
3 tion must satisfy the requirements set forth in Section 7.4 of the Settlement Agreement and must  
4 be filed and served no later than December 31, 2015 [28 days prior to Final Approval Hearing].  
5 Any Settlement Class Member who does not submit a timely Objection in accordance with the  
6 Settlement Agreement and as set forth herein shall be stricken and not be treated as having filed a  
7 valid objection to the Settlement.

8           14. Any Settlement Class Member who wishes to intervene in the Litigation must  
9 file a motion or application to do so with the Court and contemporaneously serve it upon Class  
10 Counsel and Defendant's Counsel at the addresses set forth on the Settlement Website by De-  
11 cember 31, 2015 [28 days prior to Final Approval Hearing].

12           15. Any Class Member who wishes to appear at the Final Approval hearing must  
13 file a notice of his or her intention to do so with the Court and contemporaneously serve it upon  
14 Class Counsel and Defendant's Counsel at the addresses set forth in the Long Form Notice no  
15 later than December 31, 2015 [28 days prior to Final Approval Hearing].

16           16. Plaintiff, with the Defendant's support, shall file a motion for Final Approval no  
17 later than December 17, 2015 [42 days prior to Final Approval Hearing] and the reply in support  
18 of that motion and responses to any objections and requests to intervene no later than January 14,  
19 2016 [14 days prior to Final Approval Hearing].

20           17. In the event that the proposed Settlement is not finally approved by the Court, or  
21 in the event that the Settlement Agreement becomes null and void pursuant to its terms, this Pre-  
22 liminary Approval Order and all orders entered in connection herewith shall become null and  
23 void, shall be of no further force and effect, and shall not be used or referred to for any purposes  
24 whatsoever in this Action or in any other case or controversy; in such event the Settlement  
25 Agreement and all negotiations and proceedings directly related thereto shall be deemed to be  
26 without prejudice to the rights of any and all of the Parties, who shall be restored to their respec-  
27 tive positions as of the date and time immediately preceding the execution of the Settlement  
28 Agreement and the Third Amended Complaint shall be stricken from the record.

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18. This Order shall not be construed as an admission or concession by Defendant of the truth of any allegations made by the Plaintiff or of liability or fault of any kind.

19. The Court may, for good cause, extend any of the deadlines set forth in this Order without further notice to the Settlement Class Members. The Final Approval Hearing may, from time to time and without further notice to the Settlement Class Members, be continued by Order of the Court.

**IT IS SO ORDERED** this \_\_\_\_ day of October, 2015.

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HON. PETER H. KIRWAN  
SUPERIOR COURT JUDGE

# **EXHIBIT D**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA

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

Plaintiff,

v.

IMVU, INC., and DOES 1 THROUGH 50

Defendants.

CASE NO: 111 CV 193767

[PROPOSED] ORDER GRANTING FINAL  
APPROVAL OF CLASS ACTION SETTLE-  
MENT AND JUDGMENT

DATE:  
TIME:  
CTRM: 1  
JUDGE: Hon. Peter H. Kirwan

Date of Filing:  
Trial Date: None



1 **RECITALS**

2 Plaintiff Peter MacKinnon, Jr. (“Class Representative”) and Defendant IMVU, Inc. (“De-  
3 fendant”) have moved the Court for final approval of a proposed class action settlement, the terms  
4 and conditions of which are set forth in the Settlement Agreement filed with the Court on Octo-  
5 ber 7, 2015 (“Settlement Agreement”).

6 The facts and procedural history of this case, as well as the terms of the settlement and the  
7 process of notifying class members, are more fully explained in the Court’s Order Granting Pre-  
8 liminary Approval of Class Action Settlement, which is incorporated herein by reference.

9 The parties and the claim administrator have submitted evidence, which the Court accepts,  
10 showing the following. Notice of the settlement was sent, both by email and by “direct message”  
11 through the IMVU application, to \_\_\_\_\_ Settlement Class Members. Notice was also posted on  
12 the IMVU home page and various other webpages maintained by IMVU. In addition, approxi-  
13 mately \_\_\_ banner advertisement impressions, purchased using Google Adwords for searches in-  
14 volving the terms \_\_\_\_\_, were displayed on a variety of websites, and \_\_\_ advertisement  
15 impressions were displayed on Facebook, directed at \_\_\_\_\_. All of these notices linked to  
16 the Settlement Website, which contains a detailed class notice, including the procedures to opt-  
17 out and object, as well as a copy of the Settlement Agreement and motion papers filed in connec-  
18 tion with the settlement.

19 Pursuant to the Settlement Agreement, settlement benefits are to be provided automati-  
20 cally to Settlement Class Members who did not opt out. A total of \_\_\_ persons filed timely re-  
21 quests to opt out of the Settlement Class. In addition \_\_\_ persons filed objections to the  
22 settlement. [Discuss substance of objections.]

23 **FINDINGS AND CONCLUSIONS**

24 Having considered all matters submitted to it at the hearing on the motion and otherwise,  
25 including the complete record of this action, and good cause appearing therefore, the Court here-  
26 by finds and concludes as follows:

27 1. The capitalized terms used in this Final Approval Order and Judgment shall have the  
28 same meaning as defined in the Settlement Agreement except as may otherwise be ordered.

1           2.     The Court has jurisdiction over this case and over all claims raised therein and all Par-  
2 ties thereto.

3           3.     The Court finds that the prerequisites of section 382 of the Code of Civil Procedure  
4 and section 1781 of the Civil Code have been satisfied for certification of the Settlement Class for  
5 settlement purposes because: Settlement Class Members are ascertainable and are so numerous  
6 that joinder of all members is impracticable; there are questions of law and fact common to the  
7 Settlement Class; the claims and defenses of the Class Representative are typical of the claims  
8 and defenses of the Settlement Class they represent; the Class Representative has fairly and ade-  
9 quately protected the interests of the Settlement Class with regard to the claims of the Settlement  
10 Class he represents; common questions of law and fact predominate over questions affecting only  
11 individual Settlement Class Members, rendering the Settlement Class sufficiently cohesive to  
12 warrant a class settlement; and the certification of the Settlement Class is superior to individual  
13 litigation and/or settlement as a method for the fair and efficient resolution of this matter.

14           4.     For purposes of the Settlement and this Final Approval Order and Judgment, the  
15 Court hereby finally certifies the following Settlement Class: All persons (other than Excluded  
16 Persons) who (1) after September 21, 2008 and before December 1, 2010, used IMVU Credits to  
17 purchase from the IMVU virtual catalog at least one audio product whose playback length was  
18 greater than twenty seconds, (2) subsequently logged into the IMVU service at least once after  
19 January 31, 2011, (3) as of April 20, 2015, had not been terminated by IMVU for violations of  
20 IMVU terms of service, and (4) as of the date of the Settlement Agreement had their country of  
21 residence setting in the IMVU Application set as the United States. “Excluded Persons” are (1)  
22 the Honorable Judges Peter H. Kirwan, James P. Kleinberg, and Patricia J. Hamilton, (2) Randall  
23 W. Wulff; (3) any member of their immediate families; (4) any government entity; (5) IMVU; (6)  
24 any entity in which IMVU has a controlling interest; (7) any of IMVU’s subsidiaries, parents, af-  
25 filiates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; and  
26 (8) any persons who timely opt-out of the Settlement Class.

27           5.     For the purpose of this Settlement, the Court hereby finally certifies Plaintiff Peter  
28 MacKinnon, Jr., as Class Representative, and Gutride Safier LLP as Class Counsel.

1           6.     The Parties complied in all material respects with the Notice Plan set forth in the Set-  
2 tlement Agreement. The Court finds that the Notice Plan set forth in the Settlement Agreement,  
3 and effectuated pursuant to the Preliminary Approval Order constituted the best notice practicable  
4 under the circumstances and constituted due and sufficient notice to the Settlement Class of the  
5 pendency of the Litigation; the existence and terms of the Settlement Agreement; their rights to  
6 make claims, opt out, or object; and the matters to be decided at the Final Approval Hearing. Fur-  
7 ther, the Notice Plan satisfied the requirements of the United States Constitution, Civil Code sec-  
8 tion 1781, Rule of Court 3.769, and any other applicable law.

9           7.     The Court has determined that full opportunity has been given to the members of the  
10 Settlement Class to opt out of the Settlement, object to the terms of the Settlement or to Class  
11 Counsel's request for attorneys' fees and expenses and incentive awards, and otherwise partici-  
12 pate in the Final Approval Hearing held on [           ], 2015. The Court has considered all sub-  
13 missions and arguments made at the final approval hearing provided by Class Members objecting  
14 to the Settlement as well as the Parties' responses to those objections, and has determined, for all  
15 the reasons set forth in the Parties' responses, that none of the objections have any merit or war-  
16 rant disapproval of the Settlement Agreement. In addition, [     ]. All such objections to the Set-  
17 tlement are overruled.

18           8.     The Court finds that the Settlement is in all respects fair, reasonable and adequate.  
19 The Court therefore finally approves the Settlement for all the reasons set forth in the Motion for  
20 Final Approval including, but not limited to, the fact that the Settlement Agreement was the prod-  
21 uct of informed, arms-length negotiations between competent, able counsel and conducted with  
22 the oversight and involvement of an independent, well respected, and experienced mediator; the  
23 record was sufficiently developed and complete through meaningful discovery and motion pro-  
24 ceedings to have enabled counsel for the Parties to have adequately evaluated and considered the  
25 strengths and weaknesses of their respective positions; the Litigation involved disputed claims,  
26 and this dispute underscores the uncertainty and risks of the outcome in this matter; the Settle-  
27 ment provides meaningful remedial and monetary benefits for the disputed claims; and the Parties  
28 were represented by highly qualified counsel who, throughout this case, vigorously and ade-

1 quately represented their respective parties' interests.

2 9. The Settlement is in the best interests of the Settlement Class in light of the degree of  
3 recovery obtained in relation to the risks faced by the Settlement Class in litigating the Class  
4 Claims. The relief provided to the settling Class Members under the Settlement Agreement is ap-  
5 propriate as to the individual members of the settling Class and to the Class as a whole. All re-  
6 quirements of statute, rule, and Constitution necessary to effectuate the Settlement have been met  
7 and satisfied. The Parties shall continue to effectuate the Settlement Agreement in accordance  
8 with its terms.

9 10. By operation of this Final Approval Order and Judgment, Plaintiff on the one hand,  
10 and the Released Parties on the other hand, shall have unconditionally, completely, and irrevoca-  
11 bly released and forever discharged each other from and shall be forever barred from instituting,  
12 maintaining, or prosecuting (1) any and all claims, liens, demands, actions, causes of action, obli-  
13 gations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise,  
14 known or unknown, that actually were, or could have been, asserted in the Litigation, based upon  
15 any violation of any state or federal statutory or common law or regulation, and any claim arising  
16 directly or indirectly out of, or in any way relating to, the claims that actually were, or could have  
17 been, asserted in the Litigation, that Plaintiff on the one hand, and Defendant on the other hand,  
18 have had in the past, or now have, related in any manner to the Released Parties' products, serv-  
19 ices or business affairs, and (2) any and all other claims, liens, demands, actions, causes of action,  
20 obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or other-  
21 wise, known or unknown, that Plaintiff on the one hand, and Defendant on the other hand, have  
22 had in the past or now have, related in any manner to any and all Released Parties' products, serv-  
23 ices or business affairs, or otherwise.

24 11. By operation of this Final Approval Order and Judgment, Settlement Class Members  
25 shall have unconditionally, completely, and irrevocably released and discharged the Released Par-  
26 ties from any and all claims, rights, demands, actions, causes of action, suits, debts, liens, con-  
27 tracts, liabilities, agreements, costs, expenses, or losses of any kind whatsoever, including any  
28 known or unknown claims, which actually were, or could have been, asserted in the Litigation

1 and that are based on the truncation of the playback time of the Affected Audio Products. “Af-  
2 fected Audio Products” means all audio products offered for sale in the IMVU Virtual Catalog  
3 that were purchased after September 21, 2008 and before December 1, 2010, whose original  
4 playback length was greater than twenty seconds. “Released Parties” means IMVU, and all of  
5 IMVU’s past and present officers, directors, attorneys, parents, subsidiaries, managers, succes-  
6 sors, predecessors, agents, assigns, and legal representatives.

7 12. Plaintiff and Settlement Class Members shall, by operation of this Final Approval Or-  
8 der and Judgment, be deemed to have waived the provisions, rights and benefits of California  
9 Civil Code § 1542, and any similar law of any state or territory of the United States or principle  
10 of common law. Section 1542 provides:

11 A general release does not extend to claims which the creditor does not know or suspect to  
12 exist in his or her favor at the time of executing the release, which if known by him or her  
13 must have materially affected his or her settlement with the debtor.

14 13. Nothing herein shall bar any action or claim to enforce the terms of the Settlement  
15 Agreement.

16 14. No action taken by the Parties, either previously or in connection with the negotia-  
17 tions or proceedings connected with the Settlement Agreement, shall be deemed or construed to  
18 be an admission of the truth or falsity of any claims or defenses heretofore made or an acknowl-  
19 edgment or admission by any Party of any fault, liability or wrongdoing of any kind whatsoever  
20 to any other Party. Neither the Settlement Agreement nor any act performed or document exe-  
21 cuted pursuant to or in furtherance of the Settlement: (a) is or may be deemed to be or may be  
22 used as an admission of, or evidence of, the validity of any claim made by the Settlement Class  
23 Members or Class Counsel, or of any wrongdoing or liability of the persons or entities released  
24 under this Final Approval Order and Judgment and the Settlement Agreement, or (b) is or may be  
25 deemed to be, or may be used as an admission of, or evidence of, any fault or omission of any of  
26 the persons or entities released under this Final Approval Order and Judgment and the Settlement  
27 Agreement, in any proceeding in any court, administrative agency, or other tribunal. Defendant’s  
28 agreement not to oppose the entry of this Final Approval Order and Judgment shall not be con-

1 strued as an admission or concession by Defendant that class certification was appropriate in the  
2 Litigation or would be appropriate in any other action.

3 15. For the reasons stated in the separate Order on Class Counsel's Application for an  
4 award of attorneys' fees and costs and incentives, the following amounts shall be paid by IMVU:

5 a. Fees and expenses to Class Counsel: \$\_\_\_\_\_

6 b. Incentive award to Plaintiff Peter MacKinnon, Jr.: \$\_\_\_\_\_

7 Such amounts shall be paid according to the terms of the Settlement Agreement. Of the amount  
8 paid to Class Counsel, \$50,000.00 shall be held in the Escrow Account, until the parties certify  
9 and the Court finds that all required distributions have been made to Settlement Class Members.

10 16. No later than one week after all distributions have occurred, or six months and one  
11 week after the Effective Date, whichever is earlier, the Parties shall submit a joint report to the  
12 Court certifying that all required distributions have been made to Settlement Class Members and  
13 detailing the number of persons who were provided IMVU Predits, IMVU Credits, and cash un-  
14 der the settlement, as well as the aggregate amounts of IMVU Predits, IMVU Credits and cash  
15 paid to Settlement Class Members. The Parties shall submit with the joint report a stipulation and  
16 proposed order finding that the distributions are complete. Any party shall be entitled to appear  
17 ex parte, pursuant to the Court's regular ex parte procedures, to obtain the Court's approval of the  
18 stipulated order.

19 17. Except as provided in this Order, Plaintiff shall take nothing against Defendant by  
20 their Complaint.

21 18. This order shall constitute a final judgment binding the parties with respect to this  
22 Litigation.

23 19. Without affecting the finality of the judgment hereby entered, the Court reserves ju-  
24 risdiction over the implementation of the Settlement Agreement.

25 20. Without further order of the Court, the parties may agree to reasonable extensions of  
26 time to carry out any provisions of the Settlement Agreement.

27 There is no just reason for delay in the entry of this Judgment, and immediate entry by the  
28 Clerk of the Court is expressly directed.

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**IT IS SO ORDERED** this \_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
HON. PETER H. KIRWAN  
SUPERIOR COURT JUDGE

# **EXHIBIT E**



1 ADAM J. GUTRIDE (State Bar No. 181466)  
adam@gutridesafier.com  
2 SETH A. SAFIER (State Bar No. 197427)  
seth@gutridesafier.com  
3 TODD KENNEDY (State Bar No. 250267)  
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4 **GUTRIDE SAFIER LLP**  
100 Pine Street, Suite 1250  
5 San Francisco, California 94111  
Telephone: 415.639.9090  
6 Facsimile: 415.449.6469

7 Attorneys for Plaintiff

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SANTA CLARA

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

13 Plaintiff,

14 v.

15 IMVU, INC., and DOES 1 THROUGH 50

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17 Defendants.  
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CASE NO: 111 CV 193767

UNDERTAKING RE ATTORNEYS' FEES  
AND COSTS

JUDGE: Hon. Peter H. Kirwan

1           **WHEREAS**, as required by the Class Action Settlement Agreement (the “Settlement  
2 Agreement”) in this matter, (i) Plaintiff’s Counsel Gutride Safier LLP (the “Gutride Safier  
3 Firm”), (ii) its principal Adam Gutride, Esq. (“Gutride”), and (iii) its principal Seth Safier, Esq.  
4 (“Safier”) (each, an “Obligor” and collectively, the “Obligors”) desire to provide for the benefit  
5 of Defendant IMVU, Inc., (“Defendant”) an undertaking for repayment of any award of  
6 attorneys’ fees, costs, and expenses that any of the Obligors may be paid from the Escrow Fund in  
7 connection with the Settlement Agreement (the “Undertaking”).

8           **NOW, THEREFORE**, each of the undersigned Obligors, on behalf of himself as an  
9 individual and as an agent for the Gutride Safier Firm, hereby submits himself and the Gutride  
10 Safier Firm to the jurisdiction of the Court for the purpose of enforcing the provisions of this  
11 Undertaking. Capitalized terms used herein without definition have the meanings given to them  
12 in the Settlement Agreement. The obligations of the Obligors with respect to the Undertaking are  
13 joint and several.

14           In the event the award of attorneys’ fees, costs, and expenses by the Court pursuant to or  
15 in connection with the Settlement Agreement (the “Fee Award”) is vacated or reduced on appeal,  
16 Obligors shall, within seven (7) days after the order vacating or reducing the Fee Award becomes  
17 final, repay to the Escrow Fund the entire amount of the Fee Award (in the case of vacatur) or the  
18 amount by which the Fee Award was reduced, plus interest. Interest shall be computed as the  
19 amount that would have accrued on the amount to be repaid, had it remained in the Escrow Fund  
20 between the date that amount was paid to Plaintiff’s Counsel and the date of repayment by  
21 Obligors to the Escrow Fund.

22           In the event the Obligors fail to timely repay any amounts that are owed to the Escrow  
23 Fund pursuant to this Undertaking, the Court shall, upon application of Defendant and notice to  
24 Plaintiff’s Counsel, summarily issue orders, including but not limited to judgments and  
25 attachment orders, against the Obligors, jointly and severally, and may make appropriate findings  
26 for sanctions for contempt of court. Any such judgments shall accrue interest as set forth herein.

27           The Obligors each hereby pledge and grant a continuing security interest to Defendant in  
28 all of his or its assets and the assets of the Gutride Safier Firm (collectively, “Assets”) to secure

1 the obligations set forth in this Undertaking, and hereby agrees to execute and deliver such further  
2 documentation and take such further action as Defendant may request in order to enforce its  
3 security interest. "Assets" means all properties and assets of any nature, including, without  
4 limitation, the full extent of each Obligor's right, title and interest in and to the following property  
5 (whether now existing or hereafter arising or acquired, wherever located):

6 (1) All present and future accounts, accounts receivable, agreements,  
7 contracts, leases, contract rights, rights to payment (including, without limitation, any award or  
8 other legally enforceable payment of attorneys' fees, costs, and expenses for services rendered),  
9 instruments, documents, chattel paper, security agreements, guaranties, letters of credit,  
10 undertakings, surety bonds, insurance policies, notes and drafts, and all forms of obligations  
11 owing to each Obligor or in which each Obligor may have any interest, however created or  
12 arising and whether or not earned by performance;

13 (2) All goods and equipment now owned or hereafter acquired, including,  
14 without limitation, all machinery, fixtures, vehicles, and any interest in any of the foregoing, and  
15 all attachments, accessories, accessions, replacements, substitutions, additions, and improvements  
16 to any of the foregoing, wherever located;

17 (3) All other contract rights and general intangibles now owned or hereafter  
18 acquired, including, without limitation, goodwill, trademarks, service marks, trade styles, trade  
19 names, patents, patent applications, leases, license agreements, purchase orders, customer lists,  
20 route lists, infringements, claims, computer programs, computer discs, computer tapes, literature,  
21 reports, catalogs, design rights, income tax refunds, payments of insurance and rights to payment  
22 of any kind;

23 (4) All deposit accounts, securities, securities entitlements, securities  
24 accounts, investment property, letters of credit and certificates of deposit now owned or hereafter  
25 acquired and each Obligor's books relating to the foregoing; and

26 (5) Each Obligor's books and records relating to the foregoing and any and all  
27 claims, rights and interests in any of the above and all substitutions for, additions and accessions  
28 to and proceeds thereof.

1 Each Obligor agrees, as applicable, that he or it will not change its state of organization or  
2 locations at which the Assets are located without giving Defendant at least thirty (30) days prior  
3 written notice thereof. In addition, the Gutride Safier Firm agrees that it will not (i) change its  
4 name, federal employer identification number, entity structure or identity, or (ii) create or operate  
5 under any new fictitious name without giving Defendant at least thirty (30) days prior written  
6 notice thereof. The Obligors further agree to maintain liquid funds that exceed the amount of the  
7 Fee Award until the termination of this Undertaking.

8 Each Obligor hereby authorizes Defendant to file UCC financing statements covering the  
9 Assets without Obligor's signature in all applicable jurisdictions.

10 In the event of a default by Obligors in their repayment obligations, the Obligors each  
11 shall cooperate with Defendant in identifying their respective Assets and shall take no steps to  
12 conceal any such Assets or otherwise render them unavailable to satisfy their repayment  
13 obligations.

14 The undersigned stipulate, warrant and represent that they have both actual and apparent  
15 authority to enter into this stipulation, agreement and Undertaking on behalf of the Gutride Safier  
16 Firm. This Undertaking may be executed in one or more counterparts, each of which shall be  
17 deemed an original but all of which together shall constitute one and the same instrument.  
18 Signatures by facsimile or email shall be as effective as original signatures. The undersigned  
19 declare under penalty of perjury under the laws of the State of California and the United States  
20 that they have read and understand the foregoing and that it is true and correct.

21 This Undertaking and all obligations set forth herein shall expire on the fourteenth (14)  
22 day after which the Final Approval and any Fee Award have been affirmed on appeal and are not  
23 subject to further judicial review, or if no such appeal is filed, upon the fourteenth (14) day after  
24 the expiration of the time in which to bring such an appeal.

25  
26 ADAM GUTRIDE  
27  
28

1 DATED: \_\_\_\_\_, 2015

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Adam Gutride

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SETH SAFIER

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6 DATED: \_\_\_\_\_, 2015

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Seth Safier

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GUTRIDE SAFIER LLP

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10 DATED: \_\_\_\_\_, 2015

by: \_\_\_\_\_

Adam Gutride, Partner

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13 DATED: \_\_\_\_\_, 2015

by: \_\_\_\_\_

Seth Safier, Partner

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