SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

FRANK SICILIANO and MELISSA BLEAK, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

APPLE, INC., a California corporation,

Defendants.

Case No.: 2013-1-CV-257676

ORDER AFTER HEARING ON JULY 20, 2018

Motion by Plaintiffs for Preliminary Approval of Class Action Settlement

The above-entitled matter came on regularly for hearing on Friday, July 20, 2018 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh presiding. A tentative ruling was issued by the Court on July 19, 2018. The appearances are as stated in the record. Having reviewed and considered the argument and written submissions of all parties and being fully advised, the Court orders as follows:

This is a class action arising from the automatic renewal of "In-App Subscriptions" for digital content through defendant Apple Inc.'s "App Store." Before the Court is plaintiff's unopposed motion for preliminary approval of a class settlement.

I. Factual and Procedural Background

According to the allegations of the Third Amended Complaint ("TAC"), consumers enter into transactions for In-App Subscriptions with Apple, and Apple both delivers and charges subscribers for associated content. (TAC, ¶ 21.) However, Apple does so without complying with various provisions of Business & Professions Code sections 17600-17604, which govern automatic renewal and continuous service offers to consumers in California (the "Automatic Renewal Law" or "ARL").

In order to make purchases from Apple's online store, consumers are first required to set up an account with Apple's iTunes service, which includes creating an "Apple ID" and password, providing payment information, and consenting to three legal agreements (collectively, the "Legal Agreements"). (TAC, ¶ 23.) Paragraph 45 of the "MAC App Store, App Store and iBooks Store Terms and Conditions" (the "App Store Legal Agreement") establishes terms and conditions pertaining to In-App Subscriptions. (*Id.*, ¶ 29.) However, the Legal Agreements fail to state that In-App Subscriptions continue until cancelled or specify the recurring charges associated with automatic renewals as required by the Automatic Renewal Law, and they also fail to display the disclosures that are presented in a clear and conspicuous fashion. (*Id.*, ¶¶ 33-34.)

When consumers later open one of the various software applications (or "Apps") that offer In-App Subscriptions, Apple makes an automatic renewal offer by displaying a button labeled "subscribe" or "upgrade." (TAC, ¶¶ 20, 31.) Clicking on this button causes a screen to appear, which subscribers use to enter their desired subscription period, along with their Apple ID and password linked to their payment method. (*Id.*, ¶ 31.) The Legal Agreements are not accessible on the checkout page and are not located anywhere in the App Store, and there is no mechanism that requires subscribers to consent to the Legal Agreements or any other agreement containing automatic renewal terms during the checkout process for In-App Subscriptions. (*Id.*, ¶¶ 34, 36.) This practice violates the Automatic Renewal Law's requirements that businesses (1) display the renewal terms in visual proximity to the offer and (2) obtain subscribers' affirmative consent to an agreement containing the terms. (*Id.*, ¶¶ 32, 38.) In addition, while Apple sends

subscribers a confirmation email, this email fails to meet the requirement that businesses (3) provide an acknowledgement that includes the terms, cancellation policy, and information about how to cancel in a manner that is capable of being retained by the subscriber. (*Id.*, ¶ 39.)

Plaintiffs Frank Siciliano and Kelila Green (who are married) ordered a one-week free In-App Subscription to Hulu Plus using their Apple TV on October 9, 2013. (TAC, ¶ 9.) Beginning one week later, on October 16, 2013, Apple charged and continues to charge plaintiffs Siciliano and Green $7.99 per month on a recurring basis. (*Ibid.*) Plaintiff Melissa Bleak purchased a one-year In-App Subscription to Woman's Health Magazine in February 2013. (*Id.*, ¶ 10.) In or about February 2014, Apple again charged plaintiff Bleak for this subscription in accordance with the payment method associated with her iTunes account. (*Ibid.*)

Plaintiffs filed this action on December 13, 2013. On April 30, 2015, they filed a second amended complaint ("SAC"), asserting claims for: (1) violation of the Automatic Renewal Law; (2) violations of the Unfair Competition Law ("UCL") (Bus. & Prof. Code, §§ 17200-17204); (3) injunctive relief and restitution pursuant to Business and Professions Code section 17535 (the False Advertising Law or "FAL"); (4) violation of the Consumer Legal Remedies Act ("CLRA") (Civ. Code, § 1750 et seq.); and (5) common count for money had and received. On January 3, 2016, the Court (Hon. Kirwan) overruled Apple's demurrer to the SAC. On May 16, 2016, it granted Apple's motion for judgment on the pleadings as to the first cause of action, holding that the Automatic Renewal Law does not provide a direct, private right of action. Pursuant to the parties' stipulation, plaintiffs filed the operative TAC on June 15, 2016, which re-alleges the four causes of action that survived Apple's motion for judgment on the pleadings and adds a fifth cause of action for declaratory relief.

On April 21, 2017, the Court denied Apple's motion for summary judgment and granted plaintiffs' motion for class certification in part as to plaintiffs' theory that any subscription purchased under conditions that violate the Automatic Renewal Law must be deemed a "gift" under section 17603 of the statute. Certification was denied as to the third cause of action under the CLRA and as to the other claims insofar as they were based on a fraud or reliance theory: the

Court found that plaintiffs did not show commonality regarding class members' exposure to the assertedly material disclosures or articulate an appropriate basis for restitution under this theory.

Class notice was issued, and the notice period closed on October 25, 2017. The class administrator received about 400 timely opt-outs. The parties subsequently discovered that the original class list had omitted approximately 8,000 class members, and issued a second round of notices on February 2, 2018. In total, direct notice was sent to about 4 million class members.

After the class was certified, Apple moved for summary adjudication of the class claims on the ground that section 17603 does not apply to digital subscriptions. Following a hearing on March 23, 2018, the Court denied Apple's motion.

The parties have now reached a settlement. Plaintiff moves for an order preliminarily approving the settlement, certifying the settlement class, approving the form and method for providing notice to the class, scheduling a final fairness hearing, and staying the proceedings until a final decision on approval of the settlement is rendered.

II. Legal Standard for Approving a Class Action Settlement

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

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement.

(*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at pp. 244-245, internal citations and quotations omitted.)

The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case. (*Wershba v. Apple Computer, Inc., supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk v. Ford Motor Co., supra*, 48 Cal.App.4th at p. 1801, internal quotation marks omitted.)

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

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

The presumption does not permit the Court to "give rubber-stamp approval" to a settlement; in all cases, it must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interests of those whose claims will be extinguished," based on a sufficiently developed factual record. (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 130.)

III. Settlement Process

According to a declaration by plaintiffs' counsel, in addition to the motion practice summarized above, there has been nearly three years of formal discovery in this action. Plaintiffs' propounded, and defendant responded to, numerous written discovery requests, and Apple produced more than 150,000 pages of records. Plaintiffs deposed six Apple witnesses. They also responded to Apple's discovery requests, including sitting for their own full-day depositions.

After Apple's motion for summary adjudication of the class claims was denied, the parties agreed to mediate their dispute. They exchanged detailed mediation briefs and attended a full-day mediation with Randall W. Wulff on April 4, 2018. The case did not settle at that time, but the parties returned for a second session with Mr. Wulff on May 2. A settlement was achieved following these efforts.

IV. Provisions of the Settlement

The non-reversionary $16.5 million settlement includes attorney fees and expenses not to exceed $4 million, settlement administration expenses not to exceed $290,500 (or $500,000 if postcard notice is given as discussed below),[1] and service awards of up to $2,500 each to the named plaintiffs.

The net settlement of approximately $12 million will be distributed automatically to class members, pro rata, through non-expiring credits to their iTunes accounts, or, for class members without active iTunes accounts, through checks sent by mail. Funds allocated to class members with neither an active iTunes account nor a mailing address on record will be redistributed to the class. Funds associated with checks mailed to class members that are not cashed within 180 calendar days will be equally split between the National Center for Youth Law and Public Counsel. Based on the estimated 3,959,830 class members, each class member will receive approximately $3.

Class members who do not opt out of the settlement will release all claims, including claims against third-party developers, "(a) as they were alleged in the complaints, including those based on alleged violations of the Automatic Renewal Law, including claims for Unfair Competition Laws, money had and received, and declaratory and injunctive relief, or (b) that arise from the factual allegations in Plaintiffs' Third Amended Complaint," including unknown claims.

[1] Plaintiffs' counsel indicates that only $500,000 in administrative expenses will be deducted from the settlement, with Apple to pay the difference of the up to $691,500 in estimated costs for postcard notice.

V. Fairness of the Settlement

Plaintiffs' motion is supported by a detailed and reasonable assessment of the risks and merits of their claims, which the Court will not repeat here. Notably, plaintiffs explain that Apple would likely argue that any recovery in this action should be limited to a portion of the value of class members' first automatic subscription renewal. This is because the ARL is concerned with disclosures regarding such renewals, and class members were arguably on notice that their subscriptions would continue to renew after this point. Further, class members likely obtained some value from the subscriptions that they received. Plaintiffs indicate that the net pro rata recovery per class member (approximately $3) falls "roughly between" the value of class members' initial subscription terms and a portion of their first automatic renewal payments. The gross benefit to class members (approximately $4 each) is greater than the average amount Apple retained for the first subscription term per unique subscription, and the net benefit is greater than the average amount Apple retained for the first renewal.[2] Plaintiffs believe that estimating realistic recovery based on the value of one subscription term is in line with other ARL settlements, and submit evidence of similar settlements consistent with this conclusion. Finally, plaintiffs explain that the parties agreed to a pro rata distribution of the settlement due to the prohibitive administrative costs that would result from more precisely accounting for variations in subscription prices.

Based on this analysis, the Court agrees that the settlement is fair and reasonable to the class. The parties reached agreement following years of hard-fought litigation and months of focused arms-length bargaining. While plaintiffs had cleared significant hurdles in their attempt to obtain a recovery for the class at trial, substantial risks and costs remained. In the Court's view, the settlement represents a good result for the class.

The Court retains an independent right and responsibility to review the requested attorney fees and award only so much as it determines to be reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) While 1/4 of the common fund

[2] While subscriptions primarily ranged from $1.99 to $18.99 per subscription term, Apple itself retained only a portion of these payments.

for attorney fees is generally considered reasonable and plaintiffs' estimated lodestar supports such an award, counsel shall submit their final lodestar information for the Court's review prior to the final approval hearing. (See *Laffitte v. Robert Half Intern. Inc.* (2016) 1 Cal.5th 480, 504 [trial courts have discretion to double-check the reasonableness of a percentage fee through a lodestar calculation].) At that time, counsel should also address whether and how the distribution of the settlement through iTunes credits impacts the attorney fee analysis.

VI. Settlement Class

The Court previously certified a class of "all persons in California who purchased a third-party developer's automatically renewing In-App subscription from Apple, Inc., billed through the Apple iTunes Store from December 1, 2010 to September 13, 2016," excluding plaintiffs' counsel and any employees of their firms. The parties submit that the settlement class should further exclude Apple employees, employees of defendant's counsel, the Court, and the Court's staff. Also excluded from the class are those individuals who filed a timely and valid request for exclusion in response to the notice that issued following class certification.

These exclusions from the class are appropriate. However, since the Court has already certified the class, it is unnecessary for the Court to re-certify the class for settlement purposes as plaintiffs request.

VII. Notice

The content of a class notice is subject to court approval. (Cal. Rules of Court, rule 3.769(f).) "The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement." (*Ibid.*) In determining the manner of the notice, the court must consider: "(1) The interests of the class; (2) The type of relief requested; (3) The stake of the individual class members; (4) The cost of notifying class members; (5) The resources of the parties; (6) The possible prejudice to class members who do

not receive notice; and (7) The res judicata effect on class members." (Cal. Rules of Court, rule 3.766(e).)

Here, the notice describes the lawsuit, explains the settlement, and instructs class members that they may opt out of the settlement or object. The gross settlement amount and estimated attorney fees and service awards are stated, and the estimated $3 credit per class member is reflected. At the Court's direction, plaintiffs modified the notice to state the estimated administrative costs that will be deducted from the settlement. Class members are granted 50 days to request exclusion from the class or submit a written objection. More concise email and postcard notices will notify class members where they can locate the full notice. The full, email and postcard notices are appropriate and are approved.

Turning to the notice procedure, the full notice and other relevant documents will be posted to a dedicated website. The administrator will send the email notice to class members at their most recent address reflected in Apple's records or any more recent address obtained through the earlier notice process. The administrator will calculate the percentage of emails that are "hard bounces," i.e., permanently undeliverable. If that percentage is above ten percent, postcard notice will be provided to the most recent mailing address reflected in Apple's records for class members whose email notices were undeliverable. Any postcard notices returned with forwarding information shall be promptly re-mailed.

These notice procedures are appropriate and are approved. Prior to final approval, but after the last date to opt out or object, plaintiff shall file a declaration by the administrator addressing the results of the notice process.

VIII. Conclusion and Order

Plaintiffs' motion for preliminary approval is GRANTED. The final approval hearing shall take place on **November 2, 2018** at 9:00 a.m. in Dept. 1.

Apple employees, employees of defendant's counsel, the Court, and the Court's staff are excluded from the class.

The action is stayed until 6 months after November 2, 2018 or until further order of the Court.

IT IS SO ORDERED.

Dated: 7-20-18

Honorable Brian C. Walsh
Judge of the Superior Court