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FILED

JUL 24 2015

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of California, County of Santa Clara
BY [Signature] DEPUTY
ROWENA WALKER

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

ETAN GOLDMAN, individually and on behalf
of all others similarly situated,

Plaintiff,

vs.

LIFELOCK, INC., a Delaware corporation,

Defendants.

Case No.: 1-15-CV-276235

**ORDER AFTER HEARING ON
JULY 24, 2015**

**Motion by Plaintiff for Preliminary
Approval of Class Action Settlement**

The above-entitled matter came on regularly for hearing on Friday, July 24, 2015 at 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Peter H. Kirwan presiding. The appearances are as stated in the record. The Court, having reviewed and considered the written submission of all parties, having heard and considered the oral argument of counsel, and being fully advised, orders that Exhibit A attached to and incorporated herein is the Order of the Court.

IT IS SO ORDERED.

Dated: 7/24/15

[Signature]

Honorable Peter H. Kirwan
Judge of the Superior Court

EXHIBIT A

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Case Name: *Goldman v. LifeLock, Inc.*

Case No.: 1-15-CV-276235

Plaintiff Etan Goldman ("Plaintiff") brings this putative class action on behalf of himself and others similarly situated in California that, since December 1, 2010, purchased subscriptions to identity theft protection services from defendant LifeLock, Inc. ("Defendant"). (Complaint, ¶ 1.) Defendant made automatic renewal or continuous service offers to consumers in and throughout California and (a) at the time of making the automatic renewal offers, failed to present the terms in a clear and conspicuous manner; (b) charged Plaintiff's and class members' credit or debit cards without first obtaining affirmative consent to the agreement containing the automatic renewal offer terms; and (c) failed to provide an acknowledgment that includes the renewal offer terms, cancellation policy, and information regarding how to cancel. (Complaint, ¶ 2.)

The Complaint, filed on January 29, 2015, sets forth the following causes of action: [1] Failure to Present the Automatic Renewal Offer Terms or Continuous Service Offer Terms Clearly and Conspicuously and in Visual Proximity to the Request for Consent Offer (Bus. & Prof. Code, § 17602, subd. (a)(1)); [2] Failure to Obtain the Consumer's Affirmative Consent Before the Subscription is Fulfilled (Bus. & Prof. Code, §§ 17602, subd. (a)(2) and 17603); [3] Failure to Provide Acknowledgment with Automatic Renewal Terms and Information Regarding Cancellation Policy (Bus. & Prof. Code, § 17602, subd. (a)(3)); [4] Unfair

Competition Law Violations (Bus. & Prof. Code, § 17200, et seq.); and [5] Injunctive Relief and Restitution (Bus. & Prof. Code, § 17535).

On April 15, 2015, following a day-long mediation, the parties reached a settlement. Plaintiff now brings an unopposed motion for preliminary approval of the settlement.

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

A. Legal Standard

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

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

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

“The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case.” (*Wershba v. Apple Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Ibid.*, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com’n, etc.*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

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

B. Analysis

i. The Proposed Settlement

Under the terms of the settlement, Defendant will pay a total of \$2,500,000 into the settlement fund. (Declaration of Julian Hammond in Support of Plaintiff's Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement ("Hammond Decl."), Exhibit 2 ("Settlement Agreement"), ¶ 14.) From that amount, Plaintiff will request \$500,000 for attorneys' fees, \$5000 for an incentive award, and \$300,000 for administration costs. (Settlement Agreement, ¶¶ 46, 50; Hammond Decl., ¶ 14.) There is no claims process; each class member shall automatically receive his/her pro rata share of the net settlement amount, estimated to be \$5.65. (Hammond Decl., ¶ 19.) As part of the settlement, Plaintiff and the settlement class members will release Defendant from all claims arising from or related to Defendant's conduct challenged in the Complaint, including a waiver under Civil Code section 1542. (Settlement Agreement, ¶¶ 54-56.)

Any settlement checks that are not cashed within 90 days will be distributed to a designated *cy pres* recipient – Identity Theft Resource Center. (Settlement Agreement, ¶¶ 18-19; Memorandum of Points and Authorities in Support of Plaintiff's Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement, p. 4:26-27.)

Plaintiff states that the settlement is fair, reasonable, and adequate. The settlement was reached through arm's length negotiations facilitated by Hon. Howard Wiener (Ret.). (Hammond Decl., ¶ 9.) The parties engaged in investigation and informal discovery, which provided sufficient information to make an informed decision about the settlement. (Hammond Decl., ¶¶ 21-23.)

Plaintiff points out that Defendant intends to invoke its Arizona choice of law provision, which would have an impact on the automatic renewal law and UCL claims. Additionally, Plaintiff and the class face the risk that the Court might conclude Defendant provided sufficient disclosures or that the first month and all months following the second month of the subscription could not be included in the damages or restitution calculation. There is also the risk that the class will not be certified. Settlement at this relatively early stage of the case not only reduces the expense of litigation, it also eliminates the risk that Plaintiff and the class will lose at trial. Therefore, it is clear that there are many benefits to the settlement.

As stated above, each class member will receive approximately \$5.65. (Hammond Decl., ¶ 19.) Plaintiff contends that this is more than half of the average monthly revenue per LifeLock member (\$9.91). The Court previously found that it was not clear from Plaintiff's papers that the amount that is actually paid by LifeLock members on a monthly basis is the same as monthly revenue. The Court continued this motion so that Plaintiff could file a supplemental declaration setting forth the monthly subscription fees paid by LifeLock members. Plaintiff has now filed a supplemental declaration confirming that the average monthly subscription fees paid by LifeLock's members for the years 2011-2014 and the first quarter of 2015 are the same as the average monthly revenue for that period. (Declaration of Stephen Palmer in Support of Plaintiff's Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement, ¶¶ 5, 7.) Given the potential risks discussed above, and the early stage of the litigation, the Court finds that the amount each class member will receive is fair because it each class member is guaranteed to receive more than half of an average monthly subscription payment.

The Court also has an independent right and responsibility to review the requested attorney's fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiff's attorneys are seeking fees in the amount of \$500,000. (Hammond Decl., ¶ 14.) While this is 20% of the total settlement fund, which would normally be a fair amount of fees, the case was only filed approximately half a year ago. Therefore, the requested amount seems to be high. Plaintiff states that a separate motion will be filed regarding the requested fees as well as the requested incentive award. In filing the motion regarding attorneys' fees, Plaintiff should provide time records so that a lodestar can be calculated. With regard to the incentive award, a declaration from Goldman should be provided that shows the time spent on the case.

ii. Provisional Certification of Class

Plaintiff requests that the putative class be certified for purposes of the settlement. Rule 3.769(d) of the California Rules of Court states that "[t]he court may make an order approving or denying certification of a provisional settlement class after [a] preliminary settlement hearing." California Code of Civil Procedure Section 382 authorizes certification of a class "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . ." As interpreted by the California Supreme Court, Section 382 requires: (1) an ascertainable class; and (2) a well-defined community of interest among the class members. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326.)

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

As explained by the California Supreme Court,

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

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

(A) Ascertainable Class

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

Defendant estimates that there are approximately 300,000 class members. (Declaration of Luanne Sacks in Support of Plaintiff’s Unopposed Motion for Order Granting Preliminary Approval of Class Action Settlement (“Sacks Decl.”), ¶ 38.) Those class members can be identified by reference to Defendant’s records. (Sacks Decl., ¶ 43.) Therefore, the class is ascertainable.

(B) Community of Interest

1. Predominant Questions of Law or Fact

i. Legal Standard

Regarding the predominance of questions of law or fact:

The ultimate question in every case of this type is whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.

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

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

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

ii. Analysis

As set forth by Plaintiff, the factual and legal questions that are common to the class members include: (1) whether Defendant failed to disclose the automatic renewal offer terms in a clear and conspicuous manner; (2) whether Defendant failed to obtain consumers’ affirmative consent to the automatic renewal offer terms; and whether Defendant failed to provide an acknowledgement, capable of being retained by the consumer, that contained the automatic renewal offer terms and information on how to cancel. These issues are the same for all class members. Accordingly, the requirement of common questions of law and fact is satisfied.

2. Typicality

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

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

Plaintiff's claims arise out of the same course of conduct as the claims he seeks to pursue on behalf of the class. Plaintiff, like the other class members, purchased a LifeLock subscription and was exposed to the same allegedly unwanted recurring subscription charges. Plaintiff has sufficiently demonstrated typicality.

3. Adequacy of Representation

Regarding adequacy of representation, this factor "depends on whether the plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*McGhee v. Bank of America* (1976) 60 Cal.App.3d 442, 450.) Regarding the class representative's interest, the class representative does not necessarily have to incur all of the damages suffered by each different class member in order to provide adequate representation to the class. (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 238.) "Differences in individual class members' proof of damages is not fatal to class certification. Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." (*Ibid.*, internal citations and quotation marks omitted.)

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

(C) Substantial Benefits of Class Litigation

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

As discussed above, the proposed class is numerous, consisting of approximately 300,000 class members. It would be inefficient for the Court to hear and decide the same issues separately and repeatedly for each class member. Further, it would be cost prohibitive

for each class member to file suit individually. It is clear that a class action provides substantial benefits both to the litigants and the Court in this case.

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

iii. Class Notice

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

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

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

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

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

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

The parties will provide class members with both a summary notice and a long-form notice. (Hammond Decl., ¶ 17.) The summary notice will include a summary of the settlement terms, information on how to object to or opt out of the settlement, and a link to the settlement website, where more information, including the long-form notice, can be found. (*Ibid.*) The long-form notice will explain the settlement terms; the settlement benefits; the class members' rights and options; the attorneys' fees and costs to be requested by class counsel; the incentive award to be requested by Goldman; and the date, time, and place of the final settlement approval hearing. (*Ibid.*) Both forms of notice will be sent by email to those individuals for whom email addresses are available and by mail to the remainder of the class members. (Settlement Agreement, ¶¶ 20, 23.)

The long-form notice generally complies with the requirements for class notice. (See Settlement Agreement, Exhibit 1.) It provides basic information about the settlement, including the settlement terms and states the approximate amounts that class members will receive in payment. It also explains what claims are being released as part of the settlement. The notice lets class members know that they are not required to do anything to receive money from the settlement and explains class members' rights and options, including the right to exclude oneself from the settlement. However, the notice provided to class members states

that objections to the settlement by class members must be in writing and must be mailed to class counsel. (See Settlement Agreement, Exhibit 1, pp. 6-7 and Exhibit 2.) The long-form notice states that any class member that does not timely make a valid objection will be deemed to have waived all objections and will not be entitled to speak at the final approval hearing. (Settlement Agreement, p. 6.) The notices should be modified to state that class members may appear, object, and speak at the final fairness hearing without filing or mailing a written objection.

In sum, subject to the above modifications, the motion for preliminary approval of class action settlement is GRANTED.