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8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SANTA CLARA
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11 LATANYA SIMMONS, et al.,

12 Plaintiffs,

13 vs.

14 APPLE INC., et al.,

15 Defendants.
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Case No.: 17CV312251

**ORDER AFTER HEARING ON
AUGUST 7, 2020**

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

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19 The above-entitled matter came on regularly for hearing on Friday, August 7, 2020 at
20 9:00 a.m. in Department 1 (Complex Civil Litigation), the Honorable Brian C. Walsh
21 presiding. A tentative ruling was issued prior to the hearing. The appearances are as stated in
22 the record. Having reviewed and considered the written submissions of all parties and being
23 fully advised, the Court orders as follows:
24

25 **I. INTRODUCTION**

26 This is a putative consumer class action. According to the allegations of the Complaint, filed
27 on June 26, 2017, plaintiffs Latanya Simmons and Kevin Tobin (“Plaintiffs”) challenge
28 defendant Apple, Inc.’s (“Defendant”) actions in connection with their marketing, advertising,

1 and sale of the defective Powerbeats 2 and Powerbeats 3 headphones. (Complaint, ¶ 1.) Despite
2 advertising the headphones as “built to endure” and “sweat & water resistant,” the Powerbeats
3 have a design defect that causes them to stop retaining a charge. (*Id.* at ¶ 3.)

4 The Complaint sets forth the following counts: (1) Express Warranty; (2) Breach of the
5 Song-Beverly Act – Implied Warranty of Merchantability; (3) Violation of the CLRA;
6 (4) Violation of the UCL; (5) Unjust Enrichment; (6) Common Law Fraud; and (7) Negligence.

7 The parties have reached a settlement. Plaintiffs move for preliminary approval of the
8 settlement.

9 10 **II. LEGAL STANDARD**

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

16 In determining whether a class settlement is fair, adequate and reasonable, the
17 trial court should consider relevant factors, such as “the strength of plaintiffs’
18 case, the risk, expense, complexity and likely duration of further litigation, the
19 risk of maintaining class action status through trial, the amount offered in
20 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.”

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

24 “The list of factors is not exclusive and the court is free to engage in a balancing and
25 weighing of factors depending on the circumstances of each case.” (*Wershba v. Apple*
26 *Computer, Inc.*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the “proposed
27 settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is
28 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.*,

1 quoting *Dunk, supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n,*
2 *etc., supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

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

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

10 **III. DISCUSSION**

11 **A. Provisions of the Settlement**

12 The case has been settled on behalf of the following class:

13 [A]ll persons residing in the United States who purchased new Powerbeats 2
14 earphones for primarily personal, family, or household purposes, and not for
15 resale, before the date the Court enters the Preliminary Approval Order. Excluded
16 from the Class are employees, officers, and directors of Apple, members of the
17 immediate families of the officers and directors of Apple, and their legal
representatives, heirs, successors, or assigns, and any entity in which they have a
controlling interest. Also excluded from the Class are the Court, and the Court’s
staff, as well as their heirs, successors, or assigns.

18 (Declaration of Hassan A. Zavareei in Support of Plaintiffs’ Motion for Preliminary Approval of
19 Class Action Settlement, Ex. 1 (“Settlement Agreement”), § 1.4.)

20 The settlement states Defendant will pay a non-reversionary total of \$9,750,000.

21 (Settlement Agreement, § 1.23.) This amount includes attorneys’ fees of \$3,250,000 (33% of the
22 total settlement fund), costs (not specified at this time), settlement administration costs estimated
23 between \$516,000 and \$552,600, and service awards of \$1,000 for each class representative.

24 Checks not cashed for 90 days from the date of issuance will become void and will be distributed
25 to a *cy pres* recipient, Consumer Federation of America. (*Id.* at §§ 3.3.4 and 3.3.6.)

26 Class members must submit claims for payment. (Settlement Agreement, § 5.1.) Payments
27 to class members will be made using a points system. (*Id.* at § 3.2.) Authorized claimants with
28 no proof of purchase and for whom there is no record of a warranty repair or replacement will

1 receive one point. (*Id.* at § 3.2.1(a).) Authorized claimants with a valid proof or purchase or a
2 warranty repair or replacement will receive two points. (*Id.* at § 3.2.1(b).) A “point multiplier”
3 will be calculated by dividing the net settlement amount by the total points claimed and then the
4 settlement share of each authorized claimant will be calculated by the number of points claimed
5 by the claimant multiplied by the point multiplier. (*Id.* at §§ 3.2.2-3.2.3.) The maximum amount
6 an authorized claimant may receive is \$189 multiplied by the number of valid proofs of purchase
7 submitted. (*Id.* at § 3.2.3.) Class counsel estimates the point multiplier will be approximately
8 \$38, meaning class members with no proof of purchase or record of repair or replacement will
9 receive approximately \$38 and class members with a proof of purchase or record will receive
10 approximately \$76.

11 **B. Fairness of the Settlement**

12 Plaintiff asserts the settlement is fair and reasonable. The settlement was reached after
13 months of arm’s-length negotiations, which included two full-day mediation sessions. Plaintiffs
14 state Defendant provided extensive and detailed informal discovery concerning the products at
15 issue.

16 The court finds the settlement is fair. It provides for a significant recovery for each class
17 member and eliminates the risk and expense of further litigation.

18 **C. Incentive Award, Fees, and Costs**

19 Plaintiffs request class representative incentive awards of \$1,000 for each of the two class
20 representatives – Latanya Simmons and Kevin Tobin.

21 The rationale for making enhancement or incentive awards to named plaintiffs is
22 that they should be compensated for the expense or risk they have incurred in
23 conferring a benefit on other members of the class. An incentive award is
24 appropriate if it is necessary to induce an individual to participate in the suit.
25 Criteria courts may consider in determining whether to make an incentive award
26 include: 1) the risk to the class representative in commencing suit, both financial
27 and otherwise; 2) the notoriety and personal difficulties encountered by the class
28 representative; 3) the amount of time and effort spent by the class representative;
4) the duration of the litigation and; 5) the personal benefit (or lack thereof)
enjoyed by the class representative as a result of the litigation. These “incentive
awards” to class representatives must not be disproportionate to the amount of
time and energy expended in pursuit of the lawsuit.

1 (*Cellphone Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1394-1395, quotation marks,
2 brackets, ellipses, and citations omitted.)

3 Prior to the final approval hearing, the class representatives shall submit declarations
4 detailing their participation in the action.

5 The court also has an independent right and responsibility to review the requested attorneys'
6 fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles*
7 *Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) Plaintiffs' counsel will seek
8 attorneys' fees of \$3,217,500 (33% of the total settlement fund). While approximately one-third
9 of the common fund for attorneys' fees is generally considered reasonable, Plaintiff's counsel
10 should submit lodestar information (including hourly rates and hours worked) prior to the final
11 approval hearing in this matter so the court can compare the lodestar information with the
12 requested fees.

13 **D. Conditional Certification of Class**

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

23 The “community-of-interest” requirement encompasses three factors: (1) predominant
24 questions of law or fact; (2) class representatives with claims or defenses typical of the class;
25 and, (3) class representatives who can adequately represent the class. (*Sav-On Drug Stores, Inc.*
26 *v. Superior Court, supra*, 34 Cal.4th at p. 326.) “Other relevant considerations include the
27 probability that each class member will come forward ultimately to prove his or her separate
28 claim to a portion of the total recovery and whether the class approach would actually serve to

1 deter and redress alleged wrongdoing.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)
2 The plaintiff has the burden of establishing that class treatment will yield “substantial benefits”
3 to both “the litigants and to the court.” (*Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d
4 381, 385.)

5 As explained by the California Supreme Court,

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

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

14 Plaintiffs assert thousands of Powerbeats 2 units were sold, so there are many class members.
15 Class members can be ascertained from proofs of purchase. There are common issues in this
16 case because all class members purchased headphones sharing the same alleged defect and
17 marketed using the same allegedly misleading advertisements. Typicality is satisfied because
18 Plaintiffs purchased Powerbeats 2 headphones and were subjected to the same advertisements as
19 other class members. Adequacy is met because Plaintiffs have no conflicts with the class and
20 have hired qualified counsel. In sum, the court finds that the proposed class should be
21 conditionally certified.

22 **E. Class Notice**

23 The content of a class notice is subject to court approval. “If the court has certified the
24 action as a class action, notice of the final approval hearing must be given to the class members
25 in the manner specified by the court.” (Cal. Rules of Court, rule 3.769(f).)

26 Plaintiffs propose a notice plan that includes email notice, postcard notice, and
27 publication notice. (Settlement Agreement, § 4.2.) The parties will also have the settlement
28 administrator establish a settlement website and a toll-free number with recorded information.
(*Id.* at §§ 4.3.1 and 4.3.3.) The email notice will be sent to all class members for which
Defendant has provided an email address. (*Id.* at § 4.2.1.) It will be presumed the notice was

1 received if there is no hard-bounce-back message. (*Ibid.*) A detailed notice will be posted on the
2 website and will be mailed or emailed to any class member who requests a copy. (*Id.* at
3 §§ 4.3.1-4.3.2.)

4 The detailed notice generally complies with the requirements for class notice. (See
5 Settlement Agreement, Ex. 2.) It provides basic information about the settlement, including the
6 settlement terms, and procedures to object or request exclusion. However, while the notice states
7 class members may appear at the final approval hearing to object, the notice indicates objections
8 should be made in writing and sent to the settlement administrator and that this is required for
9 any class member who intends to appear at the final approval hearing through counsel. The
10 notice shall be modified to make clear that objections are not required to be made in writing;
11 class members may appear at the final approval hearing to make objections without providing
12 any prior notice or objection. Additionally, both the detailed notice and email notice must be
13 amended to provide the correct court department and judge's name.

14 With regard to appearances at the final fairness hearing, the notices shall be further
15 modified to instruct class members as follows:

16 Due to the COVID-19 pandemic, hearings before the judge overseeing this case
17 are currently being conducted remotely with the assistance of a third-party service
18 provider, CourtCall. If that remains the case at the time of the final fairness
19 hearing, class members who wish to appear at the final fairness hearing should
20 contact class counsel to arrange a telephonic appearance through CourtCall, at
at least three days before the hearing if possible. Any CourtCall fees for an
appearance by an objecting class member shall be paid by class counsel.

21 With these modifications, the notices are approved.

22 23 **IV. CONCLUSION**

24 The motion for preliminary approval of class settlement is GRANTED, subject to the
25 modifications to the notices. The final approval hearing is set for **January 15, 2021**, at 9:00 a.m.

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in Department 1.

IT IS SO ORDERED.

Dated: August 7, 2020



Honorable Brian C. Walsh
Judge of the Superior Court