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 ART.COM, INC.

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

13 JAMES KNAPP, individually and on
 behalf of all others similarly situated,
 14
 Plaintiff,

15 v.

16 ART.COM, INC., a California corporation;
 17 and DOES 1 through 50, inclusive,
 18 Defendants.

Case No. 16-cv-00768-WHO

[Hon. William H. Orrick]

**ART.COM'S STATEMENT IN
 SUPPORT OF FINAL APPROVAL OF
 CLASS ACTION SETTLEMENT**

Date: August 9, 2017
 Time: 2:00 p.m.
 Courtroom: 2

Complaint Filed: February 16, 2016
 Trial Date: January 8, 2018

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1 **I. INTRODUCTION**

2 After litigating this case for over a year, Defendant Art.com, Inc. (“Art.com”) and
3 Plaintiff James Knapp (“Plaintiff”) (collectively referred to as the “Parties”) reached a
4 settlement agreement through mediation with David Rotman. On April 26, 2017, the
5 Court preliminarily approved the Parties’ proposed settlement. The settlement is fair,
6 reasonable and adequate given the considerable weakness of Plaintiff’s claims, it provides
7 real value via a \$10 voucher automatically sent to every Class member, and it is the best
8 settlement available because a cash settlement is not feasible. In addition to the reasons set
9 forth in Plaintiff’s Motion for Final Approval, Art.com requests that the Court overrule the
10 objections and approve the settlement for the following reasons:

11 ***Plaintiff faces insurmountable obstacles in proving liability and certifying a class.***

12 The objectors completely ignore the fact that absent settlement, there was a very
13 substantial likelihood that Plaintiff and the Class would recover nothing for several
14 reasons, including the following:

15 **First**, Plaintiff’s theory of the case is simply wrong. Contrary to Plaintiff’s
16 allegations, Art.com routinely offers and sells items at the regular, undiscounted price. For
17 each item, the Court will have to determine whether the regular price was misleading or
18 not. The individualized questions created by this issue overwhelm any common questions.

19 **Second**, neither Plaintiff nor the Class is entitled to any restitution. In late 2015, the
20 California Court of Appeal decided the case of *In re Tobacco Cases II*, 240 Cal.App.4th
21 779 (2015), which held that, in an Unfair Competition Law/False Advertising Law class
22 action, when the plaintiff alleges that false advertising induced his/her purchase, the *only*
23 measure of restitution is the difference, if any, between the value of the product at the time
24 of purchase, and the amount the plaintiff paid. If that difference is zero, then the plaintiff
25 is not entitled to any restitution. Here, Plaintiff testified in deposition that he believes the
26 framed art print he purchased is worth at least the price he paid. Under *In re Tobacco*
27 *Cases II*, this admission forecloses any attempt by Plaintiff to recover restitution. The
28 same is true of all other items Art.com sold during the class period.

1 ***The settlement provides real value.***

2 Several objectors complain that the settlement only provides \$10 vouchers to Class
3 members. But this is real value and no purchase is required for Class members to redeem
4 the voucher. The vouchers will be automatically distributed to each member of the Class
5 and can be used to purchase any of Art.com’s products. Further Art.com sells
6 approximately 100,000 products that cost less than \$10, inclusive of shipping and
7 handling, meaning that Class members can choose from a wide array of products without
8 having to expend any of their own money.

9 ***A cash settlement is not a real option.***

10 Some objectors also complain that the settlement does not provide for cash
11 payments. What the objectors ignore – and what Plaintiff considered before settling based
12 on information provided to Plaintiff from Art.com – is that Art.com is financially unable to
13 agree to a cash settlement because of the millions of dollars that would be required just to
14 mail checks to each Class member. Such a large cash outlay is not feasible for Art.com
15 regardless of the value of the settlement amount. Art.com could not agree to such a
16 settlement and would be forced to litigate this case through trial creating considerable risk
17 for the Class members given the weakness of Plaintiff’s claims. Therefore, the proposed
18 settlement is the best option available for the Class.

19 For these reasons, the Court should approve the proposed settlement.

20 **II. ARGUMENT**

21 To evaluate whether a settlement is “fair, reasonable, and adequate.” Courts will
22 consider the following factors: (1) the strength of the plaintiff’s case; (2) the risk, expense,
23 complexity, and likely duration of further litigation; (3) the risk of maintaining class action
24 status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
25 completed and the stage of the proceedings; (6) the experience and views of counsel; (7)
26 the presence of a governmental participant; and (8) the reaction of the class members to the
27 proposed settlement. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th
28 Cir. 2015). Plaintiff’s Motion for Final Approval (Dkt. No. 76) addressed how each of

1 these factors supports final approval here. Below, in support of final approval, Art.com
 2 highlights: (1) the weakness of Plaintiff’s case and considerable risk of continued
 3 litigation for the Class (2); the settlement provides real value for Class members; and (3)
 4 the current settlement is the best settlement available for the Class given the exorbitant
 5 administrative costs of a cash settlement.

6 **A. The Settlement is Fair in Light of the Weakness of Plaintiff’s Case**

7 The fundamental starting point for analyzing a proposed settlement, one ignored by
 8 the objectors, is the strength of the plaintiff’s case. “Basic to [analyzing a proposed
 9 settlement] in every instance, of course, is the need to compare the terms of the
 10 compromise with the likely rewards of litigation.” *Yeagley v. Wells Fargo & Co.*, 2008
 11 U.S. Dist. LEXIS 5040, *11 (N.D. Cal. Jan. 18, 2008), *rev’d on other grounds*, 365 F.
 12 App’x 886 (9th Cir. 2010); *see also Browning v. Yahoo! Inc.*, 2007 U.S. Dist. LEXIS
 13 86266, *16 (N.D. Cal. Nov. 16, 2007) (approving settlement and noting that “perhaps most
 14 importantly, [the] objections do not sufficiently consider . . . the considerable risks
 15 involved with continued litigation”).

16 Here, the terms of the proposed settlement are fair and reasonable in light of the
 17 considerable weakness of Plaintiff’s claims. Specifically, under governing authorities
 18 Plaintiff and the Class are not entitled to *any* restitution, the *only* form of monetary relief
 19 they seek.

20 **1. Plaintiff and the Class Cannot Recover Restitution Because They**
 21 **Cannot Show That the Items Purchased Are Worth Less Than the**
 22 **Prices Paid**

23 **a. *In re Tobacco II* Requires Application of a “Price/Value**
 24 **Differential” Measure of Restitution**

25 Plaintiff’s FAC contains causes of action for violation of California’s Unfair
 26 Competition Law (“UCL”), False Advertising Law (“FAL”) and Consumer Legal
 27 Remedies Act (“CLRA”) and unjust enrichment/common law restitution. Restitution and
 28 injunctive relief are the only remedies available under the UCL and FAL. *Korea Supply*

1 *Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1144 (2003); *Mazza v. Am. Honda Motor*
2 *Co.*, 666 F.3d 581, 591 (9th Cir. 2012).

3 Restitution is a limited remedy¹ and must seek only to “restor[e] . . . the status quo
4 ante,” *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163, 177 (2000), and hence
5 “operate[] only to return to a person those *measurable amounts* which are *wrongfully*
6 *taken* by means of an unfair business practice.” *Day v. AT&T Corp.*, 63 Cal.App.4th 325,
7 339 (1998).

8 In a false advertising case like this where plaintiff has unquestionably received a
9 benefit in exchange for his/her money, *the only* proper measure of restitution is the
10 “price/value differential” measure, i.e. the difference, if any, between the value of the
11 product received and the amount plaintiff paid for it. *See Chowning v. Kohl’s Dep’t*
12 *Stores, Inc.*, 2016 U.S. Dist. LEXIS 37261, *14, *15 (C.D. Cal. Mar. 15, 2016).

13 Restitution is simply “the return of the excess of what the plaintiff gave the defendant over
14 the value of what the plaintiff received.” *Cortez*, 23 Cal.4th at 174. As the *Chowning*
15 court observed, this “price/value differential” method represents the “traditional,” and
16 “most straightforward application” of restitution, returning the difference between the
17 price paid and the value received, *if any*. *Chowning*, 2016 U.S. Dist. LEXIS 37261, *14,
18 *15.

19 *In re Tobacco II* demonstrates why the “price/value differential” method is the
20 appropriate measure under the circumstances here. In that case, the trial court found that
21 defendant falsely advertised Marlboro Lights as healthier than other Marlboro cigarettes.
22 It also determined that plaintiffs benefitted from the product apart from the deceptive
23 advertising of Marlboro Lights as healthier. As a result, it held that plaintiffs needed to
24 base restitution on the difference between the prices they paid and the value they received.

25 _____
26 ¹ The limitations imposed on UCL, FAL and CLRA restitution are identical. *See Colgan*
27 *v. Leatherman Tool Group, Inc.*, 135 Cal.App.4th 663, 694 (2006) (“There is nothing to
28 suggest that the restitution remedy provided under the CLRA should be treated differently
than the restitution remedies provided under the [FAL] or [UCL].”). For brevity,
references to restitution under the UCL include restitution under the FAL and CLRA.

1 It found, however, that Plaintiffs failed to submit competent evidence showing any
2 differential. *In re Tobacco II*, 240 Cal.App.4th at 788-89.

3 The Court of Appeal considered if alternative restitution measures might also apply.
4 After considering other possible measures, including the full purchase price or defendant's
5 profits, the Court of Appeal held that because plaintiffs obtained value from the Marlboro
6 Lights, the price/value differential measure "sets forth *the* proper measure of restitution."
7 *Id.* at 794 (emphasis added). Because plaintiffs failed to establish any differential between
8 the price paid and the value received, the court held that the trial court "lacked discretion
9 to award restitution." *Id.* at 802.

10 *In re Tobacco II* rests on a fundamental insight: Restitution requires a valuation
11 method that identifies the "loss" to plaintiff and measures that loss. *See id.* at 801
12 ("Obviously, restitution without proof of any loss to any plaintiff cannot be characterized
13 as *restitutionary*) (emphasis in original). Accordingly, in instances where a plaintiff
14 actually obtains benefits from the purchase, any properly measured "loss" requires a
15 measure that can isolate and account for that value. Plaintiff bears the burden of
16 identifying such a measure. *See id.* at 793.

17 The principles identified in *In re Tobacco II* apply equally to claims like Plaintiff's
18 here. Indeed, in *Chowning*, the court applied *In re Tobacco II* to claims almost identical to
19 Plaintiff's. 2016 U.S. Dist. LEXIS 37261, *18. Plaintiffs, purchasers of dresses and other
20 products, claimed Kohl's compared its sale prices to fictitious "original" prices that caused
21 them to believe they were receiving significant discounts. Plaintiff's restitution expert in
22 *Chowning* was Brian Bergmark, the same expert Plaintiff used here. In granting summary
23 judgment for defendants, the district court, adhered to the restitution principles articulated
24 in *In re Tobacco II* and only considered one of plaintiffs' proposed methods viable: The
25 "price/value differential" method. The Court ultimately rejected plaintiffs' measure of
26 restitution because it found that plaintiffs' expert's opinion on the differential was too
27 speculative. *See Chowning*, 2016 U.S. Dist. LEXIS 37261, *32-37.

28

1 Like in *Chowning, In re Tobacco II* controls the question of the appropriate
 2 restitution method here. Plaintiff and the Class unquestionably received value in their
 3 transactions with Art.com. Plaintiff admits this. (Keshavarzi Decl. in Support of Motion
 4 for Summary Judgement, Dkt. No. 47-1, Ex. 1, Knapp Depo., p. 22:23-25 (“Q. Why were
 5 you looking for wall art? A. There was a space in my room that was empty and I wanted
 6 to get a piece of art to put there.”); p. 48:14-17 (“Q. So despite the fact that you believe
 7 Art.com had engaged in false advertising, you liked the poster and you wanted to keep it?
 8 A. That’s correct.”); p. 50:10-13 (“Q. And if Art.com offered to take your item back right
 9 now, you wouldn’t want to give it back, you like it and want to keep it? A. That’s
 10 correct.”)). Of course, if it was “inherently implausible” for plaintiffs in *In re Tobacco II*
 11 to deny the non-health benefits of Marlboro Lights, the value of the art print at issue in this
 12 case is beyond question. It follows from *In re Tobacco II* that any restitution measure
 13 must account for that value so as to restore only the “loss” attributable to the alleged
 14 violation. Hence, just as in *In re Tobacco II*, the traditional, price/value differential is “*the*
 15 proper measure of restitution.” *In re Tobacco II*, 240 Cal.App.4th at 794.

16 **b. Discovery Relating to the Item Plaintiff Purchased**
 17 **Confirms That He and the Putative Class Are Not Entitled**
 18 **to Restitution**

19 Discovery surrounding Plaintiff’s purchase demonstrates the absence of restitution
 20 in microcosm. First, Plaintiff admits the value he received when he purchased the artwork
 21 was at least the same as the amount he paid. (Keshavarzi Decl. in Support of Motion for
 22 Summary Judgement, Dkt. No. 47-1, Ex. 1, Knapp Depo., p. 41:21-24 (“Q. And you
 23 thought you paid a good price for [the framed art]? A. Correct. Q. You thought you got a
 24 deal? Q. I thought I did.”); p. 40:3-5 (“Q. It is also not your position in this case that you
 25 overpaid for the framed Le Mans poster, correct? A. Correct.”); p. 45:24-3 (“Q.
 26 Okay . . . it is certainly not your position in this case that the framed Le Mans poster is
 27 worth less than the \$133.00 you paid for it, correct? A. Correct.”)).

28 Independent evidence confirms Plaintiff received value that is at least the same as
 what he paid. Plaintiff paid Art.com \$133.06 for the framed art bundle consisting of the

1 Le Mans Print, the frame and framing services. (*See* FAC, Figure 16, p. 49). Yet, as of
2 July 4, 2016, a retail frame store near where plaintiff lives, Aaron Brothers, West
3 Hollywood, priced and sold two of the components of Mr. Knapp’s bundle, the frame and
4 framing services, for **\$260.00** (before sales tax). (Hejazi Decl. in Support of Motion for
5 Summary Judgement, Dkt. No. 47-2, ¶ 2, Ex. A, Aaron Brothers Invoice). This price was
6 a discounted price after application of \$199.00 in discounts offered by Aaron Brothers.
7 (*Id.*). Aaron Brothers’ regular non-discounted price was \$459.00. (*Id.*). At his deposition,
8 Mr. Knapp was shown the Aaron Brothers’ framed Le Mans Print and admitted that it is
9 the same as the item he purchased. (Keshavarzi Decl. in Support of Motion for Summary
10 Judgement, Dkt. No. 47-1, Ex. 1, Knapp Depo., p. 74:22-24).

11 As the uncontroverted evidence shows, the value Plaintiff obtained from his
12 purchase far exceeded the price he paid, and Plaintiff does not contend otherwise. As a
13 result, the appropriate measure of restitution in this case—the “price/value differential”
14 method—yields no restitution award.

15 2. Plaintiff’s Theory of the Case is Wrong and Individualized Issues 16 Predominate

17 Plaintiff’s central theory in this case is that Art.com “perpetually” offers coupons
18 and never offers items at full price, thus leading customers to believe they are receiving a
19 bargain when they are not. Based on this theory Plaintiff asserts claims under the UCL,
20 FAL and CLRA.

21 Here, the settlement is fair and reasonable because discovery before the mediation
22 confirmed that Plaintiff’s theory of the case is simply wrong. Data Art.com produced in
23 discovery before the parties’ settlement confirmed that contrary to Plaintiff’s allegations,
24 Art.com routinely offers items for sale at the regular price. Not only is this fact a death
25 knell to Plaintiff’s false advertising theory, but it also renders class certification virtually
26 impossible. Art.com sells millions of items. For *each* one of the millions of items Art.com
27 offered for sale and *each* one of the millions of transactions during the class period,
28 Plaintiff must show that the item’s specific advertised regular or original price was

1 misleading. It is axiomatic that common questions of fact do not predominate if, as is the
2 case here, an “individualized case” must be made to establish a defendant’s liability to
3 each class member. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir.
4 2012).

5 **B. The Settlement Provides Real Value to the Class**

6 To evaluate the fairness of a settlement, the Court must assess the settlement value
7 in comparison to the strength of Plaintiff’s case. *Yeagley*, 2008 U.S. Dist. LEXIS 5040,
8 *11; *Dunleavy v. Nadler*, 213 F.3d 454, 459 (9th Cir. 2000). Where a plaintiff’s claims are
9 questionable, federal courts will even approve settlements that provide very limited
10 benefits to the class. *Yeagley*, 2008 U.S. Dist. LEXIS 5040, *7 (“while the settlement
11 offers little of value to the class, plaintiff’s case is weak and the class could not do better if
12 the Court rejected the settlement”); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 (3d Cir.
13 1993) (approving settlement that provided no monetary relief given the defendants’ strong
14 defenses to liability).

15 Here, the proposed settlement offers real value to Class members. Once the
16 settlement is approved, the class administrator will distribute \$10 vouchers to each
17 member of the class. Class members will not have to fill out a claim form to receive the
18 settlement benefit. Further, the vouchers have real monetary value. They can be used
19 towards a purchase of *any* of Art.com’s thousands of home décor products.

20 But the vouchers also do not require class members to make an outlay of their own
21 money to benefit from the settlement. Art.com sells approximately 100,000 products for
22 less than \$10, inclusive of shipping and handling. (Takemoto Decl. in Support of Motion
23 for Preliminary Approval, Dkt. No. 54, ¶ 5). These items include posters, photographs, art
24 prints, calendars and other wall décor. (*Id.*). Thus, the vouchers provide class members
25 with a choice of a wide variety of products which they can receive for free, inclusive of
26 shipping and tax.

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