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

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

15 Plaintiff,

17 v.

18 ART.COM, Inc., a California corporation; and  
DOES 1 through 50, inclusive,

19 Defendants.

CASE NO.: 3:16-cv-00768-WHO

[Honorable William H. Orrick]

**DECLARATION OF JASON H. KIM IN  
SUPPORT OF PLAINTIFF'S RENEWED  
MOTION FOR ATTORNEYS' FEES AND  
COSTS AND CLASS REPRESENTATIVE  
SERVICE AWARD; EXHIBITS 1-5**

Date: October 3, 2018  
Time: 2:00 p.m.  
Courtroom: 2

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

**DECLARATION OF JASON H. KIM**

1  
2 I, Jason H. Kim, hereby declare:

3 1 I am a member in good standing of the California State Bar, and am a partner at  
4 Schneider Wallace Cottrell Konecky Wotkyns LLP (“SWCKW”), counsel of record for Plaintiff  
5 and the Class in this action. The facts set forth herein are personally known to me, and I have  
6 personal knowledge of the same.

7 2. I make this declaration in support of Plaintiff’s Renewed Motion for Attorneys’  
8 Fees and Costs.

9 3. I am associated with the SWCKW office in Emeryville, California but live in Los  
10 Angeles, California.

11 4. On August 22, 2017, the Court filed an order granting final approval of the  
12 settlement and authorizing payment of the class representative service award and Class Counsel’s  
13 litigation costs. See ECF No. 82; *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 838 (N.D. Cal.  
14 Aug. 22, 2017). Therefore, pursuant to the Court’s Order, Art.com has paid \$61,242 to Class  
15 Counsel for their litigation costs and \$5,000 to the Named Plaintiff for a service award.

16 5. After this Court’s final approval of the Settlement, the Settlement Administrator  
17 carried out the terms of the Settlement.

18 6. On October 3, 2017, the Settlement Administrator distributed emails with a unique  
19 voucher code to approximately two million identified Class members that could be used towards  
20 purchases from various websites operated by Art.com, in an amount up to \$10.

21 7. Plaintiff separately contracted with the Settlement Administrator for a second email  
22 distribution on February 10, 2018 to remind Class members about the vouchers, at a cost of  
23 \$22,858. A true and correct copy of the invoice from the Settlement Administrator for this second  
24 email distribution is attached as Exhibit “A.”

25 8. I graduated from Harvard Law School in 1998 and have been engaged in the  
26 practice of civil litigation since then, with the exception of one year in which I served as a Deputy  
27 Prosecuting Attorney for the City and County of Honolulu. Thus, I have twenty years of legal  
28 experience. Most of my legal experience has been in complex and class action litigation. During

1 my career, I have worked at two leading law firms with nationally-recognized litigation practices,  
2 Hogan & Hartson (now Hogan Lovells) and O’Melveny & Myers.

3 9. I am the attorney at SWCKW primarily responsible for this matter. My billing rate  
4 is \$775 per hour.

5 10. Todd M. Schneider also works on this matter. Mr. Schneider has been practicing  
6 for over 25 years and is one of the leading plaintiff class action attorneys in California. He has  
7 been named as a Trial Lawyer of the Year in California and a two-time finalist for Consumer  
8 Attorney of the Year. He is also a past President and serves on the Board of Directors of the San  
9 Francisco Trial Lawyers Association. Mr. Schneider’s billing rate is \$835 per hour.

10 11. Kyle G. Bates is the associate staffed on this matter. Mr. Bates has been practicing  
11 in class action litigation for four years. Mr. Bates’ billing rate is \$625 per hour. For purposes of  
12 this motion, I have reduced his rate to \$425 per hour so it is commensurate to the rate sought by  
13 co-counsel Aubry Wand.

14 12. Various paralegals and law clerks at SWCKW also worked on this matter:  
15 Elizabeth Cheung, Eugenia Gueorguieva, Michelle Lim (a law school graduate who at the time she  
16 worked on this matter had not been admitted to the California bar), and Sam Marks. Their billing  
17 rates range from \$250 to \$300 per hour. Other attorneys and paralegals at SWCKW worked on  
18 this matter but their time has been excluded as set forth in paragraph 16.

19 13. All attorneys and paralegals / law clerks at SWCKW input their time into a  
20 computerized time-keeping system at or near the time when they perform tasks.

21 14. This matter was opened on the computerized time-keeping system on or about  
22 February 17, 2016, the day after the initial Complaint was filed. Based on the information  
23 recorded in that system, SWCKW incurred \$267,114 in attorneys’ fees at the rates set forth above.  
24 This excludes a substantial amount of time incurred by SWCKW before the Complaint was filed.

25 15. Attached as Exhibit “B” is a detailed time listing from SWCKW’s timekeeping  
26 system showing the tasks performed, the length of the task, the date of the task, the person  
27 performing the task, and the value of that timekeeper’s time based on the rates set forth above.

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1           16. I have exercised billing judgment with respect to the time reflected in Exhibit “B”  
2 and SWCKW does not seek reimbursement for time incurred by individuals who had a *de minimis*  
3 role in this case. Furthermore, I have reduced Mr. Bates’ hourly rate as set forth above. Finally, I  
4 have excluded time relating to this motion and the previous motion for attorneys’ fees and costs.  
5 The results are reflected in the attached Exhibit “C,” which is a summary of time by timekeeper  
6 after adjustment. Thus, SWCKW’s lodestar as adjusted is \$252,552.

7           17. All of the time that Class Counsel devoted to litigating this case was reasonable and  
8 served to directly benefit the Class.

9           18. Class Counsel conducted an extensive investigation before commencing this action.  
10 Specifically, Class Counsel monitored Art.com’s website every day for a period of several months  
11 to confirm the theory that Art.com continuously advertised site-wide sales. Class Counsel also  
12 conducted substantial research into theories of perpetual sales in the context of violations of  
13 California consumer protection laws such as the False Advertising Law and Consumer Legal  
14 Remedies Act. After this investigation, Class Counsel filed the complaint on February 16, 2016.

15           19. The drafting process of the complaint was time-consuming, but the filing of a  
16 detailed and comprehensive complaint was, in Class Counsel’s opinion, critical to surviving the  
17 motion to dismiss filed by Art.com. Class Counsel expended significant time and energy  
18 conducting legal research in opposing the arguments advanced by Art.com – primarily, that  
19 Plaintiff had failed to state a claim under Cal. Bus. & Prof. Code § 17501. These efforts proved  
20 worthwhile, as the Court largely denied Art.com’s motion to dismiss.

21           20. Thereafter, the parties conducted extensive discovery into the merits of Plaintiff’s  
22 claims and class certification issues. Plaintiff sat for deposition on July 14, 2016. The parties  
23 exchanged thousands of pages of documents, including sales data, Art.com’s internal documents  
24 concerning its advertising, pricing, and promotional practices, and actual advertisements  
25 disseminated to consumers. Plaintiff’s discovery was highly focused on developing a sufficient  
26 factual record to enable Plaintiff to prevail at class certification (while at the same time avoiding  
27 extraneous and duplicative work). To that end, Plaintiff served tailored discovery and agreed to  
28 further narrow the scope of certain discovery requests after comprehensive meet and confer efforts

1 with opposing counsel. After reviewing and analyzing this documentary evidence, Class Counsel  
2 took the deposition of Art.com's Rule 30(b)(6) designee on August 24, 2016 focusing on  
3 Art.com's sales and advertising practices. The testimony elicited from the witness was crucial in  
4 establishing the existence of Art.com's systemic policies and sales practices.

5       21. Class Counsel also retained and engaged in numerous conversations and meetings  
6 with two highly qualified experts in the fields of marketing and accounting. These experts  
7 ultimately submitted reports in support of Plaintiff's motion for class certification. On October 14,  
8 2016, Plaintiff filed a motion for class certification. In support, Plaintiff relied on interrogatory  
9 responses obtained from Art.com, deposition testimony from Plaintiff and Art.com's Rule  
10 30(b)(6) designee, expert reports, and documents showing Art.com's promotional sales history  
11 and the actual advertised sales on its e-commerce websites during the Class period. Preparing the  
12 motion for class certification was a formidable task that demanded the coordinated efforts of Class  
13 Counsel. It encompassed an array of work tasks, including legal research, review of numerous  
14 documents, and a multi-step drafting process.

15       22. Finally, Class Counsel obtained preliminary and final approval of the settlement,  
16 which involved filing two motions and appearing at two hearings. Class Counsel also participated  
17 in class notice and other administrative tasks, and communicated with class members.

18       22. Class Counsel worked closely and in cooperation with one another to divide tasks,  
19 ensure efficient case management, and prevent duplicative work. Tasks were reasonably divided  
20 among law firms to ensure avoid replicating work. Further, tasks were delegated appropriately  
21 among partners, associate attorneys, paralegals, and other staff according to their complexity such  
22 that the attorneys with higher billing rates billed time only where necessary.

23       23. The hourly rates at SWCKW as reflected above are set through a process of  
24 continual monitoring of prevailing market rates charged by both defense and plaintiffs' law firms,  
25 for individuals with similar levels of skill and experience who are doing comparable work as  
26 SWCKW's attorneys and staff. SWCKW gathers this information from surveys, the review of  
27 other fee applications, and conversations with attorneys in the relevant billing market.

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1           24. SWCKW's hourly rates have been approved by other federal courts, including two  
2 in this district. *See Villalpando v. Exel Direct, Inc.*, 12-cv-04137, 2016 WL 7740854, \*1 (N.D.  
3 Cal. Dec. 12, 2016) and *Winans v. Emeritus Corp.*, 13-cv-03962, 2016 WL 107574, \*8 (N.D. Cal.  
4 May 25, 2016).

5           25. Attached as Exhibit "D" is a Declaration from Richard Pearl, submitted in support  
6 of a motion for attorneys' fees SWCKW filed in *Saravia v. Dynamex Operations West, LLC*, Case  
7 No. 3:14-cv-05003-WHA (N.D. Cal.). Some parts of that Declaration relate specifically to the  
8 work performed in that case and are not applicable here. But the Declaration contains detailed data  
9 about attorneys' fees charged and awarded in Northern California which is applicable here.

10           26. Class Counsel prosecuted this matter on a purely contingent basis, agreeing to  
11 advance all necessary expenses and knowing that they would only receive a fee if there was a  
12 recovery. Class Counsel expended these resources despite the real risk that they would never  
13 receive any compensation.

14           27. This action was particularly risky given the various defenses available to Art.com  
15 and several unsettled legal issues. Art.com contested liability, as well as the propriety of class  
16 certification (absent this Settlement), and was prepared to oppose certification and to defend  
17 against the merits of Plaintiff's claims if the action were not settled. Art.com's pending motion for  
18 summary judgment, if granted, would essentially eviscerate all of Plaintiff's claims and remedies,  
19 leaving a class of approximately two million people with nothing. While Plaintiff disagreed with  
20 the arguments raised in Art.com's motion for summary judgment, Class Counsel could not ignore  
21 the serious risk that the Court may agree with Art.com.

22           28. Even if Plaintiff were to prevail at class certification and summary judgment, there  
23 was the risk of losing a jury trial. And even if Plaintiff prevailed at trial, any recovery could be  
24 delayed for years by an appeal.

25           29. The time devoted to this case precluded work on other potential matters that may  
26 have generated attorneys' fees.

27           30. Since this Court's previous award of litigation costs, SWCKW advanced litigation  
28 costs in this case totaling \$1,858.43 (excluding the costs of the reminder email addressed

1 separately above). All expenses incurred by SWCKW are recorded in a computerized system as  
2 invoices and requests for expense reimbursement supported by receipts are received and paid.  
3 Attached as Exhibit “E” is a summary of the expenses advanced by SWCKW in this matter that  
4 were not included in the previous application for litigation costs. The underlying invoices and  
5 receipts are available for the Court’s review upon the Court’s request.

6 32. After this Court disqualified the National Consumer Law Center as the *cy pres*  
7 recipient in this action, Class Counsel and counsel for Art.com conferred to reach agreement on a  
8 substitute *cy pres* recipient. They agreed that each party would designate one recipient and that, if  
9 either recipient were disqualified, the other one would receive the entire *cy pres* distribution.

10 33. Plaintiff has designated the Public Justice Foundation (“Public Justice”) as its *cy*  
11 *pres* recipient. Public Justice is a 501(c)(3) non-profit charity dedicated to advancing the public  
12 interest and is affiliated with Public Justice, P.C., a national public interest law firm. Public Justice  
13 operates nationwide and has officers in Washington, D.C. and California. Public Justice has done  
14 substantial work to protect consumers from unfair and deceptive practices, including representing  
15 the plaintiff class in *Tamayo v. Brainstorm USA*, 154 Fed. Appx. 564 (9th Cir. 2005).

16 34. Public Justice has been approved as an appropriate *cy pres* recipient in numerous  
17 class actions, many of which involved allegations of deceptive consumer practices. In California  
18 alone, Public Justice has been approved as a *cy pres* recipient in *Andrews v. First Interstate Bank*  
19 *of California* (San Francisco County Super. Ct. No. 953575); *Greenberg v. E-Trade Fin. Corp.*  
20 (Los Angeles Super. Ct. No. BC360152); *Hitz v. First Interstate Bank* (San Francisco County  
21 Super. Ct. No. 870897); *In re: Cellphone Termination Fee Cases*, 186 Cal. App. 4th 1380 (2010);  
22 *In re: Gibb, LLC Cases* (Los Angeles Super. Ct. JCCP No. 4657); *In re: iPod Nano Cases* (Los  
23 Angeles Super. Ct. JCCP No. 4469); *Lind v. Fireside Bank*, 187 Cal. App. 4th 1120 (2010);  
24 *Moultrie v. Nissan Motor Acceptance Corp.* (San Francisco Super. Ct. No. 302601); *Patterson v.*  
25 *ITT Consumer Financial Corp.* (San Francisco Super Ct. No. 936818); *Rand v. American Nat. Ins.*  
26 *Co.*, (N.D. Cal. No. CV-09-0639-SI); *Rockers v. EBay, Inc.* (Santa Clara County Super. Ct. No. 1-  
27 05-CV-035930); *Van Ettta v. Capitol One Auto Finance, Inc.* (Alameda County Super. Ct. No.  
28 RG04182823); and *Wilson v. Airborne, Inc.* (C.D. Cal. No. EDCV 07-770-VAP).

1           35. Public Justice is not co-counsel with either of Class Counsel in any pending  
2 matters. SWCKW was co-counsel with Public Justice just once in a long-concluded matter, a  
3 gender discrimination case against Lawrence Livermore that ended in 2004. No Class Counsel (or  
4 partner of Class Counsel) serves or has ever served as a director or officer of Public Justice.  
5 Certain attorneys at SWKWCW have been members of Public Justice from time to time, which  
6 involves only an annual donation. The firm as a whole is currently a benefactor of Public Justice,  
7 which involves a pledge of monthly donations to Public Justice, and has also from time to time  
8 donated additional funds to Public Justice as part of specific fundraising campaigns.

9           36. Art.com has designated Public Counsel as its *cy pres* recipient. Public Counsel is  
10 the nation's largest public interest law firm and is headquartered in Los Angeles, California.  
11 Among other services, Public Counsel has a Consumer Law Project, which assists with a wide  
12 variety of consumer matters, including consumer fraud and unfair business practices.

13           37. Counsel for Art.com, Moe Keshavarzi, currently serves on the Board of Directors  
14 for Public Counsel. The Board has 78 board members, representing among other entities many (if  
15 not most) of the largest law firms operating in Los Angeles, including Mr. Keshavarzi's firm,  
16 Sheppard Mullin Richter & Hampton LLP; DLA Piper LLP; Skadden, Arps, Slate, Meagher &  
17 Flom LLP; Paul Hastings LLP; Gibson, Dunn & Crutcher LLP; Greenberg Traurig, LLP; Irell &  
18 Manella LLP; Sidley Austin LLP; Pillsbury Winthrop Shaw Pittman LLP; Wilson Elser  
19 Moskowitz Edelman & Dicker LLP; Arnold & Porter Kaye Scholer LLP; Alston & Bird LLP;  
20 Kirkland & Ellis LLP; Reed Smith LLP; Holland & Knight LLP; Morrison & Foerster LLP;  
21 Winston & Strawn LLP; Manatt, Phelps & Phillips, LLP; Mayer Brown LLP; Akin Gump Strauss  
22 Hauer & Field LLP; Latham & Watkins LLP; Morgan, Lewis & Bockius LLP; O'Melveny &  
23 Myers LLP; Dentons US LLP; Munger, Tolles & Olson LLP; Simpson Thacher & Bartlett LLC;  
24 Loeb & Loeb LLC; Jenner & Block; and K&L Gates LLP.

25           38. I understand from Mr. Keshavarzi that Art.com selected Public Counsel because it  
26 is headquartered in Los Angeles, where Plaintiff resides, and because as part of its mission it  
27 works on matters that broadly benefit consumers in California and nationwide.

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39. Immediately upon the filing of Plaintiff's Renewed Motion for Attorneys' Fees and Costs, I will cause the motion and all supporting documents to be posted on the website established for this matter.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on August 28, 2018 at Los Angeles, California.

/s/ Jason H. Kim