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9
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 MOTION
FOR APPROVAL OF ATTORNEYS'
FEES AND COSTS AND CLASS
REPRESENTATIVE SERVICE AWARD;
EXHIBITS 1-5**

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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DECLARATION OF JASON H. KIM

I, Jason H. Kim, hereby declare:

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

5 2. I make this declaration in support of Plaintiff’s Motion for Approval of Attorneys’
6 Fees and Costs and Class Representative Service Award.

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

9 4. I graduated from Harvard Law School in 1998 and have been engaged in the
10 practice of civil litigation since then, with the exception of one year in which I served as a Deputy
11 Prosecuting Attorney for the City and County of Honolulu. Thus, I have nineteen years of legal
12 experience. Most of my legal experience has been in complex and class action litigation. During
13 my career, I have worked at two leading law firms with nationally-recognized litigation practices,
14 Hogan & Hartson (now Hogan Lovells) and O’Melveny & Myers.

15 5. I am the attorney at SWCKW primarily responsible for this matter. My billing rate
16 is \$775 per hour.

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

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

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

6 9. Pursuant to the Settlement Agreement in this case, the parties agreed that Plaintiff
7 would seek an award of attorneys' fees and costs of \$745,000. This amount was not calculated or
8 negotiated as a percentage of the total value of the settlement to the class. Rather, it was calculated
9 and negotiated based on: (1) the attorneys' fees and costs that had actually been incurred by
10 Plaintiff's counsel at the time; (2) an estimate of the additional attorneys' fees and costs that
11 would be incurred from the settlement in principle to the conclusion of this matter; and (3) a
12 lodestar enhancement.

13 10. Class Counsel negotiated with Art.com to reach an agreed-upon fee amount that
14 they regarded as reasonable based on the benefits achieved for the Class and applicable legal
15 principles, and did so only after they reached agreement on the other key deal terms – namely, the
16 classwide injunctive and monetary relief.

17 11. The amount of attorneys' fees and costs, like the other terms of the settlement, was
18 agreed upon under the auspices and with the assistance of David Rotman, an experienced, well-
19 respected mediator.

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

22 13. This matter was opened on the computerized time-keeping system on or about
23 February 17, 2016, the day after the initial Complaint was filed. Prior to that time, Mr. Schneider
24 and I incurred a considerable amount of time revising and commenting on the various drafts of the
25 Complaints prepared by Mr. Wand, conferring with Mr. Wand about this action, researching and
26 analyzing the underlying legal and factual issues, and engaging in an intensive investigation as to
27 the likelihood of success of this matter, including but not limited to researching the key rulings
28 and outcomes of similar cases. For purposes of this motion, we have estimated the total of this pre-

1 filing work that occurred before the matter was opened on our system. Based on the information
2 recorded in that system (which includes entries for the estimate described in this paragraph),
3 SWCKW incurred \$ 245,597 in attorneys' fees at the rates set forth above.

4 14. Attached as Exhibit "1" is a detailed time listing from SWCKW's timekeeping
5 system showing the tasks performed, the length of the task, the date of the task, the person
6 performing the task, and the value of that timekeeper's time based on the rates set forth above as
7 well as an omnibus entry for the pre-filing work referenced in paragraph 13 above.

8 15. I have exercised billing judgment with respect to the time reflected in Exhibit "1"
9 and SWCKW does not seek reimbursement for time incurred by individuals who had a *de minimis*
10 role in this case. Furthermore, I have reduced Mr. Bates' hourly rate as set forth above. Finally, I
11 have excluded time from this week relating to this motion. The results are reflected in the attached
12 Exhibit "2," which is a summary of time by timekeeper after adjustment. Thus, SWCKW's
13 lodestar as adjusted is \$226,014.

14 16. The amounts evidenced by Exhibits "1" and "2" do not include the additional time
15 that Class Counsel will spend seeking approval of, and implementing, the Settlement, including
16 assisting Class members with claims and overseeing settlement administration generally. Based on
17 previous experience, these tasks will require a substantial number of hours of work by Class
18 Counsel over the coming months.

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

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

27 19. The drafting process of the complaint was time-consuming, but the filing of a
28 detailed and comprehensive complaint was, in Class Counsel's opinion, critical to surviving the

1 motion to dismiss filed by Art.com. Class Counsel expended significant time and energy
2 conducting legal research in opposing the arguments advanced by Art.com – primarily, that
3 Plaintiff had failed to state a claim under Cal. Bus. & Prof. Code § 17501. These efforts proved
4 worthwhile, as the Court largely denied Art.com’s motion to dismiss.

5 20. Thereafter, the parties conducted extensive discovery into the merits of Plaintiff’s
6 claims and class certification issues. Plaintiff sat for deposition on July 14, 2016. The parties
7 exchanged thousands of pages of documents, including sales data, Art.com’s internal documents
8 concerning its advertising, pricing, and promotional practices, and actual advertisements
9 disseminated to consumers. Plaintiff’s discovery was highly focused on developing a sufficient
10 factual record to enable Plaintiff to prevail at class certification (while at the same time avoiding
11 extraneous and duplicative work). To that end, Plaintiff served tailored discovery and agreed to
12 further narrow the scope of certain discovery requests after comprehensive meet and confer efforts
13 with opposing counsel. After reviewing and analyzing this documentary evidence, Class Counsel
14 took the deposition of Art.com’s Rule 30(b)(6) designee on August 24, 2016 relating to Art.com’s
15 sales and advertising practices. The testimony elicited from the witness was crucial in establishing
16 the existence if systemic policies and practices that Art.com had engaged in classwide sales
17 practices.

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

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

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

11 24. SWCKW's hourly rates for 2016 have been recently approved by other federal
12 courts, including two in this district. *See Villalpando v. Exel Direct, Inc.*, 12-cv-04137, 2016 WL
13 7740854, *1 (N.D. Cal. Dec. 12, 2016) and *Winans v. Emeritus Corp.*, 13-cv-03962, 2016 WL
14 107574, *8 (N.D. Cal. May 25, 2016).

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

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

25 27. This action was particularly risky given the various defenses available to Art.com
26 and several unsettled legal issues. Art.com contests liability, as well as the propriety of class
27 certification (absent this Settlement), and it is prepared to oppose certification and to defend
28 against the merits of Plaintiff's claims, if the action is not settled. Art.com's pending motion for

1 summary judgment, if granted, would essentially eviscerate all of Plaintiff's claims and remedies,
2 leaving a class of approximately two million people with nothing. While Plaintiff disagrees with
3 the arguments raised in Art.com's motion for summary judgment, Class Counsel cannot ignore the
4 serious risk that the Court may agree with Art.com.

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

8 29. SWCKW has skilled and experienced attorneys who have had considerable success
9 in class action litigation. *See* attached Exhibit "4."

10 30. The time devoted to this case precluded work on other potential matters that may
11 have generated attorneys' fees.

12 31. SWCKW advanced litigation costs in this case, totaling \$32,826. All expenses
13 incurred by SWCKW are recorded in a computerized system as invoices and requests for expense
14 reimbursement supported by receipts are received and paid. Attached as Exhibit "5" is a summary
15 of the expenses advanced by SWCKW in this matter. The underlying invoices and receipts are
16 available for the Court's review upon the Court's request.

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

19 Executed on June 30, 2017 at Los Angeles, California.

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21 /s/ Jason H. Kim
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