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10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

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

16 Plaintiffs,

17 v.

18 ART.COM, INC., a California Corporation; and  
DOES 1 through 50, inclusive,

19 Defendant.

Case No.: 3:16-cv-00768-WHO

**PLAINTIFF'S RESPONSE TO TARASEN  
OBJECTION (ECF No. 77)**

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

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

1 **I. INTRODUCTION**

2 Plaintiff files this Response to the Objection of Nicholas W. Tarasen, which was filed on  
3 the docket of this action on August 2, 2017 (ECF No. 77). Like other objectors, Mr. Tarasen  
4 makes vague allegations that the Settlement is collusive and self-serving with no analysis of  
5 the circumstances under which the Settlement was reached or the merits of Plaintiff's claims.  
6 Mr. Tarasen's characterization of the Settlement is incorrect, as set forth in Plaintiff's Motion  
7 for Final Approval of Class Action Settlement (ECF No. 76) and as further discussed below.

8 In response to Mr. Tarasen's specific objections:

- 9 • Class notice was adequate and his main complaint regarding the inconsistency of  
10 the service requirements as to objections is moot;
- 11 • The Settlement provides substantial value to class members in the form of:  
12 (1) Vouchers that may be redeemed for thousands of products with no  
13 requirement of an additional purchase; and (2) substantial non-monetary relief.
- 14 • The amount of the Vouchers is proportionate to the average number and size of  
15 purchases by Class members;
- 16 • The release is standard for class action settlements as the Settlement only releases  
17 claims related to the issues raised in Plaintiff's First Amended Complaint; and
- 18 • The lodestar method is an appropriate method of calculating attorneys' fees here  
19 and nothing in *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) is to  
20 the contrary.

21 **II. ARGUMENT**

22 **A. The Settlement is Fair, Reasonable, and Adequate in Light of the Method by**  
23 **Which it Was Reached, the Merits of Plaintiff's Claims, and the Cost of**  
24 **Providing Monetary Relief to Class Members**

25 The Settlement here was reached after a full-day, arms-length mediation session with an  
26 experienced mediator, David A. Rotman. Declaration of Jason H. Kim in Support of Plaintiff's  
27 Motion for Final Approval of Class Action Settlement (ECF No. 76-6), ¶¶ 5-8; Declaration of

1 David A. Rotman in Support of Plaintiff's Motion for Final Approval of Class Action  
2 Settlement (filed with this Response).

3 While Plaintiff and Class counsel believe in the merits of Plaintiff's claims, the  
4 Settlement was reached based on careful consideration of the various obstacles to prevailing on  
5 the merits and obtaining substantial restitutionary and injunctive relief for the Class. *See*  
6 *generally* Art.com's Statement in Support of Final Approval of Class Action Settlement (ECF  
7 No. 79). The theory of this case raises fairly novel or at least uncertain issues as to which  
8 courts have reached contrary conclusions. *See, e.g., Chowning v. Kohl's Department Stores,*  
9 *Inc.*, No. CV 15-08673, 2016 WL 1072129, at \*12 (C.D. Cal. Mar. 15, 2016) (denying class  
10 certification because the plaintiff failed to present a viable damages model in false perpetual  
11 sale case) *and Spann v. J.C. Penney Corp.*, 307 F.R.D. 508, 530 (C.D. Cal. 2015) (granting  
12 class certification at least in part on the basis that the plaintiff had presented a viable way to  
13 prove restitution in false perpetual sale case). The parties also considered Art.com's ability and  
14 willingness to bear the substantial cash outlay that would be involved in paying any cash to the  
15 almost two million Class members here. *See* Declaration of Moe Keshavarzi in Support of  
16 Art.com's Statement in Support of Final Approval, ¶ 2 (ECF No. 79-1); Declaration of Teresa  
17 Y. Sutor in Support of Plaintiff's Motion for Final Approval of Class Action Settlement, ¶ 13  
18 (ECF No. 76-1).

19 In light of the detailed record and rationale provided by the parties and the mediator in  
20 support of this Settlement, Mr. Tarasen's unsupported speculation about a self-serving  
21 settlement should be rejected. As he admits, factors such as the novelty of the issues and the  
22 defendant's financial condition are highly relevant to evaluating a settlement. Tarasen  
23 Objection, p. 11. The parties considered these very factors and they support the Settlement  
24 reached here.

1           **B. Class Notice Was Adequate**

2           The Class Notice was approved by this Court (ECF No. 61). Despite this, Mr. Tarasen  
3           claims the Class Notice was inadequate, citing the provisions governing service of objections  
4           and the description of the release.

5           Mr. Tarasen’s objection based on the service provisions for objections is moot. Plaintiff  
6           has not, and will not, argue that any objection filed with the Court is invalid due to failure to  
7           serve the objection on counsel for the parties or the Settlement Administrator. Filing of the  
8           objection on the Court’s ECF system is adequate service for all parties.

9           The Class Notice provided sufficient information to the Class about the effect of the  
10          release. The Class Notice summarized the operative release language from the Settlement  
11          Agreement in an accessible format, informing Class members that the release covered all  
12          known or unknown claims arising from the facts underlying the claims alleged in this action or  
13          Art.com’s conduct that gave rise to this action (ECF No. 53-1). The Class Notice also directed  
14          Class members to a website where the entire Settlement Agreement was available for review.  
15          *Id.*

16          The class notice is only required to provide sufficient detail “to alert those with adverse  
17          viewpoints to investigate and to come forward and be heard.” *In re Online DVD-Rental*  
18          *Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (“*Online DVD*”) (overruling objection to  
19          class notice where it “provides simple and straightforward information about the class action  
20          .... about what action class members may take in either case, and ... the need to check the  
21          website for more detail”). Here, the Class Notice provided Class members with an accurate  
22          description of the release and directed them to a website for more detail, including the entire  
23          Settlement Agreement. Thus, the Class Notice was sufficient to “alert those with adverse  
24          viewpoints to investigate” and therefore adequate and valid.

1           **C.     The Settlement Provides Valuable Consideration to Class Members**

2                   1.     The Vouchers

3           The \$10 Vouchers can be used to purchase one or more of approximately 100,000  
4 products, inclusive of shipping and handling. Declaration of Gary Takemoto in Support of  
5 Motion for Preliminary Approval, ¶ 5 (ECF No. 54). Mr. Tarasen does not dispute this. He in  
6 fact states that of the 48 best-selling items on the website, seven were available for less than  
7 \$10. Tarasen Objection, p. 9. This observation supports the real value of the Vouchers, as it  
8 shows that a substantial number (roughly 14.6%) of Art.com’s most popular items are available  
9 for the Voucher amount. And the fact that Art.com has not provided the proportion of the items  
10 available that are under \$10 is irrelevant. It is the number of available items, and not the  
11 percentage, that matters. The Ninth Circuit in *Online DVD*, for example, did not analyze what  
12 percentage of items available on the Walmart.com website were available for the \$12 voucher  
13 there.<sup>1</sup> Rather, it noted that class members could “choose from a large number of potential  
14 items to purchase.” *Online DVD*, 779 F.3d at 951. So too here. Class members may choose  
15 from a wide variety of items in several categories and can obtain those items with no further  
16 cash outlay on their part.

17           Mr. Tarasen also argues that the Vouchers advance Art.com’s business interests and act  
18 as a promotional effort for Art.com, contrary to the purpose of this action. This argument  
19 misunderstands the nature of Plaintiff’s claims. Plaintiff has no objection to Art.com offering  
20 sales so long as those sales comply with the law requiring purported sales to be based on actual  
21 prices rather than fictitious ones. Nothing about the distribution of the Vouchers is contrary to  
22 the claims alleged here.

23           Art.com is not obtaining a benefit from this Settlement. Rather, it will be required to offer  
24 potentially \$20 million worth of merchandise for free and will be required to change its

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25  
26 <sup>1</sup> To the extent a percentage is relevant, the percentage of products class members could  
27 purchase in whole using the voucher in *Online DVD* appears to be only around 2.1% (class  
28 members could purchase roughly 800,000 items in whole out of approximately 38 million  
products). See ECF No. 74, p. 9.

1 business practices. Art.com has the emails of Class members and would be free to offer them  
2 sales or discounts at any time via email. The distribution of the Vouchers does not offer  
3 Art.com any promotional advantage it would not otherwise have. Finally, the argument that  
4 Art.com is gaining business publicity by mailing Vouchers to the Class pursuant to a settlement  
5 of a lawsuit based on deceptive sales strains credulity.

6 2. Non-Monetary Relief

7 In addition to the Vouchers, Plaintiff also obtained substantial non-monetary relief.  
8 Art.com agrees that any regular price to which Art.com refers in any advertising will be the  
9 actual, bona fide price at which the item was openly and actively offered for sale, for a  
10 reasonably substantial period of time, in the recent, regular course of business, honestly and in  
11 good faith. Furthermore, Art.com will implement a compliance program that will consist of  
12 periodic (no less than once a year) monitoring, training and auditing to ensure compliance with  
13 relevant laws, for a period of at least four (4) years from the Effective Date of the Settlement.  
14 Settlement Agreement, ¶ 5.1 (ECF No. 53-1).

15 The first part of this non-monetary relief is modeled on a Former Price Comparison  
16 Guide by the Federal Trade Commission (“FTC”) published at 16 C.F.R. § 233.1(a), which  
17 provides in relevant part that “[i]f the former price is the actual, bona fide price at which the  
18 article is offered to the public on a regular basis for a reasonably substantial period of time, it  
19 provides a legitimate basis for the advertising of a price comparison.” The fact that this  
20 provision of the Settlement is based on FTC guidance is significant for two reasons.

21 First, there is no private right of action under the FTC Act. *Carlson v. Coca-Cola Co.*,  
22 483 F.2d 279, 280 (9th Cir. 1973). FTC rules only become enforceable by way of incorporation  
23 into state law, for example California’s Unfair Competition Law. *See, e.g., Davis v. HSBC*  
24 *Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). Here, this non-monetary relief will  
25 benefit a nationwide class and not only those Class members residing in California.

26 Furthermore, 16 C.F.R. § 233.1 is not binding. Rather, as the preamble to the FTC’s  
27 Guides makes clear, the industry guides such as Section 233.1 are “administrative

1 interpretations of laws administered by the Commission for the guidance of the public in  
2 conducting its affairs in conformity with legal requirements” and thus “provide the basis for  
3 voluntary and simultaneous abandonment of unlawful practices by members of industry.”  
4 Note, C.F.R. T. 16, Ch. I, Subch. B, Pt. 17. *See also State v. Amoco Oil Co.*, 293 N.W. 2d 487  
5 (Wis. 1980) (the FTC “Guides, unlike substantive rules, do not have the force and effect of  
6 law”).

7 Thus, the non-monetary relief secured by the Settlement Agreement provides a  
8 substantial benefit to Class members by: (1) applying California law to a nationwide class; and  
9 (2) requiring Art.com to comply with FTC guidance that would otherwise not be legally  
10 enforceable. Mr. Tarasen does not make any argument to the contrary.

11 Rather, Mr. Tarasen cites the fact that he has continued to receive emails from Art.com  
12 with site-wide sales. Tarasen Objection, p. 10-11. This is not relevant to the value of the non-  
13 monetary relief obtained by the Settlement, however, because Art.com is not obliged to change  
14 its business practices pursuant to the Settlement Agreement until it is finally approved.<sup>2</sup>

15 **D. The Voucher Amount is Proportionate to Class Members’ Average Purchase**  
16 **Value**

17 The \$10 Voucher amount is proportionate to the average value of purchases by Class  
18 members during the Class period, which was \$23.80. To be sure, this is an average and some  
19 Class members spent more. This does not, however, render the Settlement unfair to such Class  
20 members. Calculating the amount of the Vouchers to be proportionate to each Class member’s  
21 spending would: (1) entail significant administrative costs to calculate this amount for each  
22 Class member; and (2) leave Class members who had relatively small purchases with a  
23 Voucher in such a small amount that the Voucher would not provide those Class members with  
24 free merchandise. A fixed amount of consideration for each Class member is fair in this  
25

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26  
27 <sup>2</sup> Moreover, Mr. Tarasen has not demonstrated that any sales offered to him by Art.com are of  
28 a perpetual or deceptive nature.

1 context. *See Online DVD*, 779 F.3d at 943-44 (approving settlement that provided for \$12  
2 voucher to each class member).

3 **E. The Release is Not Overly Broad**

4 Mr. Tarasen also objects that the release is overly broad. In fact, the release only covers  
5 known or unknown claims “arising out of the alleged facts, circumstances, and occurrences  
6 underlying: (i) the claims set forth in the Action, or (ii) Art.com’s conduct with respect to the  
7 Action.” Settlement Agreement, ¶ 7.3 (ECF No. 53-1). This Action involved only a narrow  
8 part of Art.com’s business activities: its use of certain types of sales on its websites. The  
9 release applies only to those activities and no others. For example, it does not apply to claims  
10 that a product purchased from Art.com was defective or dangerous, as such claims would not  
11 arise out of the facts alleged in the First Amended Complaint or Art.com’s conduct with  
12 respect to those facts. Thus, the release is entirely consistent with the “identical factual  
13 predicate” test used by the Ninth Circuit (and other circuits) to circumscribe the preclusive  
14 effect of class action settlements. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010)  
15 (under this test, “we have held that federal district courts properly released claims not alleged  
16 in the underlying complaint where those claims depended on the same set of facts as the claims  
17 that gave rise to the settlement”).

18 **F. Calculating Attorneys’ Fees Pursuant to the Lodestar is Not Inconsistent**  
19 **with *In re HP Inkjet Printer Litig.***

20 *In re HP Inkjet Printer Litig.*, 716 F.3d 1173 (9th Cir. 2013) (“*HP Inkjet*”), does not  
21 preclude the use of the lodestar method here. As the dissent in that case by Judge Berzon notes,  
22 the majority opinion did not address the effect of statutory fee shifting provisions in its  
23 analysis. *Id.* at 1189 (“There are no statutory fees at issue here, as there are in some civil rights  
24 class actions. So the attorney’s payment had to come from a constructive or ‘putative’ common  
25 fund.”)<sup>3</sup> Where statutory fee shifting provisions are involved, the lodestar method remains the

26  
27 <sup>3</sup> The complaints in *HP Inkjet* did raise claims under California consumer protection statutes  
28 but the district court eventually held in denying class certification that the plaintiffs had not  
substantiated their claim that California law could apply to a nationwide class. *In re HP Inkjet*



1 presumptively proper method for calculating attorneys' fees. *See in re Bluetooth Headset*  
2 *Products Liability Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). As the Ninth Circuit noted in that  
3 case, "[t]he 'lodestar method' is appropriate in class actions brought under fee-shifting statutes  
4 ... where the relief sought—and obtained—is often primarily injunctive in nature and thus not  
5 easily monetized, but where the legislature has authorized the award of fees to ensure  
6 compensation for counsel undertaking socially beneficial litigation." *Id.*

7 Here, the California consumer protection statutes which are Plaintiff's predominant  
8 claims are precisely the sort of claims described above, in that they: (1) have injunctive relief  
9 as their primary goal and (2) provide for statutory attorneys' fees so litigants act as private  
10 attorneys' general. *See Kwikset Corp. v. Super Court*, 51 Cal. 4th 310, 337, 246 P.3d 877, 895  
11 (Cal. 2011) ("Injunctions are the primary form of relief available under the UCL to protect  
12 consumers from unfair business practices while restitution is a type of ancillary relief.")  
13 (Internal quotation omitted.); *Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 600, 101  
14 Cal. Rptr. 3d 697, 711 (Cal. App. Ct. 2009) ("If a plaintiff prevails in an unfair competition law  
15 claim, it may seek attorney fees as a private attorney general pursuant to Code of Civil  
16 Procedure section 1021.5.") (internal quotation omitted); Cal. Civ. Code § 1780 (granting  
17 attorneys' fees to a prevailing plaintiff in Consumer Legal Remedies Act ("CLRA") actions).  
18 Furthermore, the very purpose of the fee shifting provisions in such consumer protection laws  
19 is to encourage prosecution of lawsuits even where the damages are modest, *i.e.* where the  
20 reasonable value of attorneys' fees incurred may be greater than the ultimate recovery.  
21 *Graciano v. Robinson Ford Sales, Inc.*, 144 Cal. App. 4th 140, 150 & 164, 50 Cal. Rptr. 3d  
22 273, 281 & 293 (Cal. App. Ct. 2006) (reversing trial court for reducing prevailing plaintiff's  
23 attorney fee award under the CLRA to be proportional to the damages obtained: "the

24  
25  
26 *Printer Litig.*, No. C 05-3580 JF, 2008 WL 2949265, \*6 (N.D. Cal. July 25, 2008). Perhaps for  
27 this reason, the district court's fee order reversed by the Ninth Circuit made no reference to  
28 California law: rather it relied solely on Fed. R. Civ. Proc. 23(h). *In re HP Inkjet Printer Litig.*,  
No. 5:05-cv-3580, 2011 WL 1158635, \*8 (N.D. Cal. March 29, 2011).

1 legislative policies are in favor of Graciano’s recovery of all attorney fees reasonably  
2 expended, without limiting the fees to a proportion of her actual recovery”).

3 Under California law, a prevailing party entitled to attorneys’ fees is one who obtains a  
4 “net monetary recovery” or “realized its litigation objectives including pursuant to a settlement  
5 agreement.” *Gonzales v. CarMax Auto Superstores, LLC*, 845 F.3d 916, 918 (9th Cir. 2017)  
6 (Internal quotation and citation omitted.) Here, Plaintiff is a prevailing party entitled to  
7 attorneys’ fees under California law even if only the non-monetary relief obtained by the  
8 Settlement is considered. *Gonzalez*, 845 F.3d at 918 (plaintiff seeking only injunctive relief  
9 pursuant to CLRA may be prevailing party). Thus, the lodestar method provides the  
10 appropriate method for calculating attorneys’ fees.

11 **III. CONCLUSION**

12 For the reasons set forth above, Plaintiff respectfully requests that the Court overrule Mr.  
13 Tarasen’s objection and grant final approval of the Settlement.

14

15 DATED: August 7, 2017

SCHNEIDER WALLACE COTTRELL KONECKY  
WOTKYNS LLP

16

17 By: /s/ Jason H. Kim  
JASON H. KIM

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*Attorneys for Plaintiff*

19

20 **CERTIFICATE OF SERVICE**

21 I hereby certify that a true copy of the above including the referenced attachments was  
22 sent this 7th day of August 2017 via ECF to all ECF participants of record and that all counsel  
23 of record are ECF participants.

24 /s/ Jason H. Kim

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