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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES WALTERS, MICHELLE DIXON,
DEANA POLCARE and CHARLES
POWELL, on behalf of themselves and all
others similarly situated,

Plaintiffs,

vs.

TARGET CORP.,

Defendant.

CASE NO. 3:16-cv-1678-L-MDD

**ORDER (1) GRANTING FINAL
APPROVAL OF CLASS
SETTLEMENT; (2) GRANTING IN
PART AND DENYING IN PART
APPLICATION FOR ATTORNEYS'
FEES, COSTS AND CLASS
REPRESENTATIVE SERVICE
AWARDS; AND (3) JUDGMENT**

Judge: Hon. M. James Lorenz

Pending before the Court are Class Counsel’s unopposed motions for final approval of class action settlement (Doc. 171) and application for Class Counsel’s attorneys’ fees, costs, and litigation expenses, as well as Class Representatives’ awards (Doc. 165). The Court has considered the motions, the file in this matter and . For the reasons stated below the motion for final approval of class action settlement is granted, and the application for Class Counsel’s attorneys’ fees, costs, and litigation expenses, as well as Class Representatives’ awards is granted in part and denied in part.

1 **I. PROCEDURAL BACKGROUND**

2 This case is a putative class action focused on Defendant Target Corp.'s ("Target")
3 alleged breach of the Target Debit Card ("TDC") Agreement and allegedly deceptive
4 marketing of the TDC which resulted in consumers being assessed Returned Payment Fees
5 ("RPFs") by Target when their TDC transactions are returned unpaid by their bank.
6 Plaintiffs, James Walters, Michelle Dixon, Deana Polcare and Charles Powell ("Plaintiffs"),
7 allege that Target "omits and misrepresents the risks of using the TDC," resulting in
8 cardholders suffering significant fee penalties when the checking account linked to their
9 TDC has insufficient funds. (Doc. 170.) Plaintiffs further allege that the TDC card
10 agreements fail to properly describe how the TDC operates on a slower Automated
11 Clearinghouse Network, unlike other debit card networks, causing customers to incur fees
12 for insufficient funds as the TDC does not transmit requests to consumers' banks for days
13 after a purchase. (*Id.*)

14 A significant amount of pretrial activity followed in the California Action. Target
15 moved to dismiss the California Action under Federal Rule of Civil Procedure 12(b)(6), on
16 the basis that the Amended Complaint failed to state a cause of action (Doc. 8). This Court
17 agreed in part and disagreed in part, and dismissed some of the causes of action. (Doc. 13).
18 Target moved for reconsideration, seeking dismissal of further counts (Doc. 30), which this
19 Court granted in part and denied in part (Doc. 32). Target answered and then amended its
20 answer to the First Amended Complaint, asserting 14 affirmative defenses. (Doc. 59).

21 Thereafter, the Parties engaged in extensive fact and class discovery. Target produced
22 nearly 5,000 pages of documents that Class Counsel reviewed. Target deposed Plaintiff
23 Walters. Class Counsel took eight depositions of Target's corporate representatives and
24 employees, and of the third parties involved in processing TDC transactions. The Parties
25 also retained experts and exchanged expert reports.

1 After the close of fact discovery, Target filed a Motion for Summary Judgment, which
2 Plaintiff Walters opposed and remained pending at the time the parties agreed to the
3 Settlement. (Docs. 90). Plaintiff Walters filed a Motion for Class Certification, which Target
4 opposed and also remained pending at the time of the Settlement. (Docs. 98, 130).

5 On September 12, 2018, Plaintiffs Dixon and Powell filed the Minnesota Action
6 alleging wrongdoing by Target similar to that alleged in the California Action. (D. Minn.
7 Case No. :18-cv-02660-PAM-DTS, Doc. 1). An Amended Complaint in the Minnesota
8 Action on January 22, 2019, added Plaintiff Polcare and a count for violating New York
9 General Business Law § 349. (D. Minn. Case No. :18-cv-02660-PAM-DTS, Doc. 19).

10 On March 14, 2019, the Parties mediated the Action in Los Angeles, California, with
11 Robert J. Meyer, Esq. The case did not settle that day, but with Mr. Meyer's assistance, the
12 Parties continued negotiations over the next several weeks, agreeing to the Settlement's
13 material terms in April of 2019. On April 29, 2019, the Parties filed a Notice of Settlement
14 advising the Court that the Parties had reached an agreement to settle the Action. (Doc.
15 148). The Parties also filed a Notice of Settlement in the Minnesota Action, resulting in an
16 order staying that case pending the settlement approval process in this case. (Minnesota
17 Action Docs. 30, 31). On June 14, 2019, the Parties signed the Agreement.

18 On June 19, 2019, Plaintiff Walters filed a Motion for Preliminary Approval of Class
19 Settlement and Certification of Settlement Class. (Doc. 155). This Court granted Preliminary
20 Approval on December 2, 2019, and thereafter amended its order on December 6, 2019
21 (Docs. 161, 162).

22 On February 14, 2020, pursuant to the Court's Amended Order Granting Preliminary
23 Approval, Class Counsel filed its Application for Attorneys' Fees and Costs, and Service
24 Awards. (Doc. 165). Pursuant to the Terms of the Settlement Agreement, Plaintiff Walters
25 filed an Unopposed Motion for Leave to File Second Amended Complaint adding Plaintiffs
26 Dixon, Polcare and Powell to this action, which the Court has granted. (Docs. 166, 169).

1 Plaintiffs move unopposed for certification of a settlement class, final approval of the
2 settlement, final approval of attorneys' fees and costs award, and final approval of incentive
3 awards for named plaintiffs.

4 **II. SETTLEMENT AGREEMENT**

5 In exchange for the release of class members' claims, the settlement agreement
6 ("Agreement" [Doc. 155-2]) provides four forms of consideration:

- 7 1. Target will provide monetary relief in the amount \$8,222,330.00 ("Settlement
8 Value") consisting of a Cash Settlement Amount of \$5,000,000.00 and Debt
9 Reduction Cash Amount of \$3,222,330.00. Agreement ¶2.2(b)(1)-(2). The
10 \$8,222,330.00 is all for the direct benefit of the Settlement Class Members – there
11 will be no reversion back to Target. *Id.* at ¶2.2(b)(7). Class members who did not
12 opt-out will receive their payment automatically.
- 13 2. Target agrees not to implement or assess RPFs, or any equivalent fee, in
14 connection with TDC transactions that are less than \$7.00, for a period of two
15 years after the Effective Date. Agreement *Id.* at ¶2.2(a)(1).
- 16 3. Beginning on or before the Effective Date, and for a minimum of two years,
17 Target agrees that any RPFs charged will be the lesser of the RPF as disclosed by
18 the TDC Agreement or the amount of the TDC transaction that was returned
19 unpaid. *Id.* at ¶2.2(a)(2).
- 20 4. The Parties have worked collaboratively to amend the TDC Agreement to provide
21 additional information to TDC holders regarding how they may incur RPFs from
22 Target and non-sufficient funds or overdraft fees from their banks or credit unions
23 in connection with the use of the TDC. *Id.* at ¶2.2(a)(3).

24 If there is any residual in the Settlement Fund after the first distribution, the residue is
25 to be distributed to the class by way of a secondary distribution, if economically feasible.
26 Otherwise, the residue is to be distributed as a *cy pres* award to the National Endowment for
27

1 Financial Education (<https://www.nefe.org>), a nonprofit national foundation “dedicated to
2 inspiring empowered financial decision making for individuals and families.”

3 A combination of email and physical mail notices were distributed to 1,027,448 class
4 members. (Doc. 171-4 ¶¶ 10, 11, 13 .) No class members objected and seven class members
5 opted-out. (*Id.* at p. 80.)

6 **III. SETTLEMENT CLASS CERTIFICATION**

7 Plaintiffs seek settlement only class certification under Fed. R. Civ. P. 23(a) and (b)(2)
8 & (b)(3) of the same settlement class the Court preliminarily certified: “All TDC holders in
9 the United States who, within the Class Period, incurred at least one RPF in connection with
10 their TDC, that was not refunded or waived.” Agreement ¶2.1(a). “Class Period” means the
11 period between June 29, 2012, and the date of the Preliminary Approval Order. *Id.* at ¶1.6.

12 “The class action is ‘an exception to the usual rule that litigation is conducted by and
13 on behalf of the individual named parties only.’” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,
14 348 (2011). “A party seeking class certification must satisfy the requirements of Federal Rule
15 of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule
16 23(b).” *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 832 (9th Cir. 2013).

17 **A. Rule 23(a)**

18 Rule 23(a) ensures that the named plaintiffs are appropriate representatives of the
19 class whose claims they wish to litigate. “The Rule’s four requirements – numerosity,
20 commonality, typicality, and adequate representation – effectively limit the class claims to
21 those fairly encompassed by the named plaintiff’s claims.” *Dukes*, 564 U.S. at 349 (internal
22 quotation marks and citations omitted).

23 **1. Numerosity**

24 The numerosity element is met if “the class is so numerous that joinder of all
25 members is impracticable.” Fed. R. Civ. P. 23(a)(1). Here, there are hundreds of thousands
26 of class members. The numerosity element is clearly satisfied.

2. Commonality

Under Rule 23(a)(2), Plaintiffs must demonstrate that there are “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). The Supreme Court has held that plaintiffs must demonstrate “the capacity of a class wide proceeding to generate common answers” to common questions of law or fact that are “apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350 (internal citations and quotations marks omitted). However, “[a]ll questions of fact and law need not be common to satisfy this rule.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). “The common contention . . . must be of such a nature that . . . its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* “The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.” *Id.* A single common question is sufficient to satisfy the commonality element. *Dukes*, 564 U.S. at 359. Here, the common, dispositive issue of whether Target breached the TDC Agreement in the way it processed TDC transactions satisfies the commonality element.

3. Typicality

The typicality requirement of Rule 23(a)(3) focuses on the relationship of facts and issues between the class and its representatives.

The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.”

Dukes, 564 U.S. 338, 349 n.5, (internal quotation marks and citation omitted).

“[R]epresentative claims are ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d at 1020 (internal citations and quotation marks omitted). “The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique

1 to the named plaintiffs, and whether other class members have been injured by the same
2 course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal
3 citations and quotation marks omitted).

4 Here, the named plaintiffs are typical of the class they seek to represent. They suffered
5 the same injury from the same course of conduct as did unnamed members. To wit, like the
6 unnamed members, Target charged them with RPFs. Named plaintiffs therefore meet the
7 criteria of Rule 23(a)(3).

8 **4. Adequacy**

9 To serve as class representative, one must “fairly and adequately protect the interests
10 of the class.” Fed. R. Civ. P. 23(a)(4). This requirement is aimed at protecting the due
11 process rights of absent members who will be bound by a class action judgment. *Hanlon*, 150
12 F.3d at 120; *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 801 (1996). “Resolution of two
13 questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any
14 conflicts of interest with other class members and (2) will the named plaintiffs and their
15 counsel prosecute the action vigorously on behalf of the class?” *Hanlon*, 150 F.3d at 120
16 (citation omitted).

17 As is more fully discussed below, the named plaintiffs and Class Counsel have
18 demonstrated their ability to vigorously prosecute this action on behalf of the class. Further,
19 the Court finds no conflict of interest between named plaintiffs and the class as a whole that
20 would render named plaintiffs inadequate representatives.

21 **B. Rule 23(b)(2)**

22 Certification pursuant to Rule 23(b)(2) is warranted. Certification under that rule is
23 appropriate where the defendant has “acted or refused to act on grounds that apply generally
24 to the class, so that final injunctive relief or corresponding declaratory relief is appropriate
25 respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). “In other words, Rule 23(b)(2)
26 applies only when a single injunction or declaratory judgment would provide relief to each
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1 member of the class.” *Dukes*, 564 U.S. at 360. “These requirements are unquestionably
2 satisfied when members of a putative class seek uniform injunctive or declaratory relief from
3 policies or practices that are generally applicable to the class as a whole That inquiry
4 does not require an examination of the viability or bases of the class members’ claims for
5 relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like
6 predominance test, and does not require a finding that all members of the class have suffered
7 identical injuries.” *Parsons v. Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (citing *Rodriguez v. Hayes*,
8 591 F.3d 1105, 1125 (9th Cir. 2010)).

9 Here, Target’s policies and procedures have been applied and continue to be applied
10 uniformly to the Settlement Class. Target has agreed, subject to Final Approval, to change its
11 business practices in a manner to be applied uniformly to the Settlement Class.

12 **C. Rule 23(b)(3)**

13 Plaintiffs seek class certification under Rule 23(b)(3). Where, as here, the requirements
14 of Rule 23(a) are met, class certification is proper under Rule 23(b)(3) if “the court finds that
15 the questions of law or fact common to class members predominate over any questions
16 affecting only individual members, and that a class action is superior to other available
17 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3);
18 *Wang*, 709 F.3d at 832. Here, there is no dispute as to the fact that the legal question of
19 whether Target is breaching the TDC Agreement predominates and a class action is the
20 superior method by which to resolve this common question. Accordingly, the Court certifies
21 for settlement purposes only the class as defined in paragraph 2.1(a) of the Settlement
22 Agreement.

23 **D. Notice**

24 A prerequisite to final approval is a finding of adequate notice to the class. Fed. R.
25 Civ. P. 23(e). In the preliminary approval order, the Court approved the form, content, and
26 method of providing notice proposed by the Parties. The Settlement Class Notices were
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1 thereafter distributed to members of the Settlement Class pursuant to the terms of the
 2 Amended Preliminary Approval Order. (Doc. 162). The Court has determined that the Class
 3 Notices given to Settlement Class members fully and accurately informed Settlement Class
 4 members of all material elements of the proposed Settlement and constituted valid, due, and
 5 sufficient notice to Settlement Class members consistent with all applicable requirements.
 6 The Court further finds that the Notice Program satisfies due process and has been fully
 7 implemented.

8 IV. SETTLEMENT FAIRNESS

9 "[S]ettlement of class actions present[s] unique due process concerns for absent class
 10 members [in part because] class counsel may collude with the defendants, tacitly reducing the
 11 overall settlement in return for a higher attorney's fee." *In re Bluetooth Headset Prod. Liability*
 12 *Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (internal quotation marks and citations omitted); *see*
 13 *also Evans v. Jeff D.*, 475 U.S. 717, 733 (1986) (noting the possibility of tradeoff between merits
 14 relief and attorneys' fees often implicit in class action settlement negotiations.) The Court's
 15 role in reviewing class action settlements "is to police the inherent tensions among class
 16 representation, defendant's interests in minimizing the cost of the total settlement package,
 17 and class counsel's interest in fees." *Staton v. Boeing Co.*, 327 F.3d 938, 972 n.22 (9th Cir. 2003);
 18 *see also Bluetooth*, 654 F.3d at 946.

19 In determining whether a class action settlement is fair, adequate, and reasonable, the
 20 Court considers whether:

- 21
- 22 (A) the class representatives and class counsel have adequately represented the class;
 - 23 (B) the proposal was negotiated at arm's length;
 - 24 (C) the relief provided for the class is adequate, taking into account:
 - 25 (i) the costs, risks, and delay of trial and appeal;
 - 26 (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - 27 (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - 28 (iv) any agreement required to be identified under Rule 23(e)(3); and
 - (D) the proposal treats class members equitably relative to each other.

1 Fed. R. Civ. Proc. 23(e)(2). Subsection (e)(2) was added to Rule 23 as a part of the 2018
2 amendments. Fed. R. Civ. Proc. 23, Advisory Comm. Notes. Prior to the amendment, the
3 analysis was guided by the *Churchill* factors:

4
5 (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and
6 likely duration of further litigation; (3) the risk of maintaining class action status
7 throughout the trial; (4) the amount offered in settlement; (5) the extent of
8 discovery completed and the stage of the proceedings; (6) the experience and
9 views of counsel; (7) the presence of a governmental participant; and (8) the
10 reaction of the class members of the proposed settlement.

11
12 *Bluetooth*, 654 F.3d at 946 (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th
13 Cir. 2004); other citation omitted). The goal of the 2018 amendment "was not to displace any
14 factor, but rather to focus . . . on the core concerns . . . that should guide the decision whether
15 to approve the propos[ed settlement]." Fed. R. Civ. Proc. 23, Advisory Comm. Notes. Several
16 of the *Churchill* factors were incorporated into Rule 23(e)(2) as amended.

17 On balance, the Court finds that the relevant factors support a finding that the
18 proposed Settlement is fair, adequate, and reasonable.

19
20 **A. The Class Representatives and Class Counsel Have Adequately
21 Represented the Class**

22 The Court has already found that the Class Representatives and Class Counsel have
23 adequately represented the Class. *See supra* § III.A.4. Based on the submissions made in
24 support of the Attorneys' Fee Motion and Final Approval Motion, as well as the docket in
25 this case, the Class Counsel had sufficient information to negotiate a fair Settlement and had
26 adequately prosecuted this action with Plaintiffs' assistance.

27
28 **B. The Proposal Was Negotiated at Arm's Length**

Plaintiffs and the Settlement Class, by and through their counsel, have sufficiently
investigated the facts and law relating to the matters alleged in the Second Amended
Complaint, including through discovery and dispositive motion practice, legal research as to
the sufficiency of the claims, an evaluation of the risks associated with continued litigation,
trial, and/or appeal. The Settlement was reached as a result of arm's length negotiations

1 between Class Counsel and counsel for Target, which occurred as a result of mediation
2 before a neutral mediator.

3 **C. The Relief Provided for the Class Is Adequate**

4 The Settlement confers substantial benefits upon the Settlement Class, without the
5 costs, uncertainties, delays, and other risks associated with continued litigation, trial, appeal,
6 and is fair, adequate, and reasonable. Plaintiffs faced substantial risks in proceeding including
7 rulings on the pending Motion for Summary Judgment and Motion for Class Certification,
8 and assuming Plaintiffs could overcome these obstacles, likely trial and appeals in the event
9 of a class certification order or Plaintiffs' verdict.

10 Target has vigorously opposed Plaintiff Walter's Motion for Class Certification and
11 could have challenged class certification on appeal. *See Rodriguez v. West Pub. Corp.*, No.
12 CV05-3222, 2007 WL 2827379, at *8 (C.D. Cal. Sept. 10, 2007) (finding the likelihood that a
13 certification decision would be appealed meant this factor weighed in favor of approval),
14 *rev'd on other grounds*, 563 F.3d 948 (9th Cir. 2009). The Parties would expend significant
15 resources in further litigation. This Settlement provides substantial relief without further
16 delay.

17 Analyzing Target's class wide data, Class Counsel estimates that the best-case scenario
18 is that damages would be approximately \$25,000,000.00. Target, on the other hand, would
19 argue that damages, if not zero, would be no more than 50% of Plaintiffs' calculation.
20 Taking into account the Cash Settlement Amount of \$5,000,000.00 alone, the Settlement
21 Class is recovering approximately 20% or 40% (depending on the parties' opposing damage
22 models) of estimated damages, without further risks attendant to litigation. When also taking
23 into account the Debt Reduction Cash Amount, the Settlement Class receives approximately
24 33% or 66% of its most probable damages, without the further risks of litigation. The
25 Settlement Class is also obtaining the benefit of fewer RPFs during the two-year period that
26 Target has agreed to bind itself to the practice change. Furthermore, the upcoming changes
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1 to the TDC Agreement will help Settlement Class Members and other customers avoid
2 future RPFs because they will better understand how the TDC operates. *Id.* Accordingly,
3 the settlement amount is fair and adequate.

4 The monetary relief will be distributed to Settlement Class Members by direct
5 distribution or by a direct credit on their TDC Account. Thus, the proposed method of
6 distribution is sufficiently effective.¹

7 **D. The Proposal Treats Class Members Equitably Relative to Each**
8 **Other**

9 The apportionment of relief among Settlement Class Members treats them equitably.
10 Each Settlement Class Member who paid at least one RPF assessed during the Class Period
11 and not refunded or charged off is to receive a *pro rata* share of the first paid RPF from the
12 Net Settlement Fund based on the dollar amount of the first RPF paid by the Settlement
13 Class Member. For each Settlement Class Member who incurred an RPF during the Class
14 Period, but has not yet paid it at the time the Settlement Class Member Cash Payments are
15 to be distributed, the Debt Reduction Cash Amount is to be used by Target to make Debt
16 Reduction Payments toward the outstanding balance on the Settlement Class Member's
17 TDC account in an amount of 25% of the first RPF that was assessed and not paid.

18 Because each Settlement Class Member is getting a *pro rata* share of the cash or the
19 same percentage of debt forgiveness, they are treated equitably relative to each other.

20 **V. ATTORNEYS' FEES**

21 In their Application for Fees and Costs, Class Counsel request \$2,466,699.00 in fees,
22 which equates to 30% of the Settlement Value of \$8,222,330.00. In granting preliminary
23 approval, the Court required Class Counsel to submit their Application for Attorneys' Fees

24 _____
25 ¹ The method of processing claims and any agreement required to be identified under Rule 23(e)(3) are not
26 relevant factors as there will be no claim submission process. Settlement Class Members will receive their
27 relief automatically without making a claim. The counsel represent that they have entered into no side
28 agreements. The terms of any proposed award of attorneys' fees, including timing of payment are discussed
below.

1 and Costs well in advance of the Motion for Final Approval to give all Settlement Class
2 members the opportunity to review Class Counsel's fee and cost request prior to the opt-out
3 and objection deadline and respond accordingly. Class Counsel did so, filing the Application
4 for Attorney Fees and Costs, and Service Awards on February 14, 2020. (Doc. 165). No
5 Settlement Class Members objected.

6 In common fund cases such as this, the Court has discretion to employ either the
7 percentage of the fund method or the lodestar method to calculate a proper fee award. *In re*
8 *Bluetooth Headset Prods. Liab. Lit.*, 654 F.3d 935, 942 (9th Cir. 2011). In determining fees,
9 "[r]easonableness is the goal, and mechanical or formulaic application of either method,
10 where it yields an unreasonable result, can be an abuse of discretion." *Fischel v. Equitable Life*
11 *Assur. Soc'y of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002).

12 Under the percentage of the fund method, the Court awards some specific percentage
13 of the fund as fees. When selecting the percentage, courts in the Ninth Circuit use 25% as
14 the "bench mark" percentage for the fee award," which may be adjusted upward or
15 downward to account for the circumstances of the case. *Paul, Johnson, Alston & Hunt v.*
16 *Graulty*, 886 F.2d 268, 272 (9th Cir. 1989). Here, Class Counsel requests a 5% upward
17 departure from the benchmark from the common fund, which includes the Cash Settlement
18 Amount (\$5,000,000.00) and Debt Reduction Cash Amount (\$3,222,830.00) relief
19 ("denominator"). Courts consider both cash and cash equivalents such as debt forgiveness
20 when determining the denominator. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934
21 (9th Cir. 2015). The application of the bench mark in this case would result in an award of
22 \$2,0555,707.50 in attorneys' fees.

23 Class Counsel argue that the 5% upward departure is warranted, amongst other
24 reasons, because of the injunctive relief. When the non-cash relief portion of a settlement
25 can be reliably valued, courts often include the value of this relief in the common fund and
26 award class counsel a percentage of the total, but when it cannot be, courts should consider
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1 the value as a relevant circumstance that could warrant an upward departure from the
2 benchmark. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 974 (9th Cir. 2003) (“[W]here the value to
3 individual class members of benefits deriving from injunctive relief can be accurately
4 ascertained . . . courts [may] include such relief as part of the value of a common fund for
5 purposes of applying the percentage method . . . When this is not the case, courts should
6 consider the value of the injunctive relief obtained as a ‘relevant circumstance’ in
7 determining what percentage of the common fund class counsel should receive as attorneys’
8 fees, rather than as part of the fund itself.”).

9 Class Counsel also contend that the factors enumerated in *Vizcaino v. Microsoft Corp.*,
10 290 F.3d 1043, 1048 (9th Cir. 2002), also support an increase. The factors courts commonly
11 consider include the result obtained; the reaction of the class; the effort, experience, and skill
12 of counsel; complexity of issues; risks of nonpayment assumed by class counsel; and
13 comparison with counsel’s lodestar. *Ruiz v. Xpo Last Mile, Inc.*, 2017 WL 6513962 * 7 (S.D.
14 Cal. 2017) (internal citations and quotations omitted.). As explained above under the
15 settlement fairness analysis, the Settlement will undoubtedly benefit the Class not only
16 monetarily but also by forcing Target to agree to limit the RPFs and amend its TDC
17 Agreement to help make the document easier for customers to understand. It is undisputed
18 that Class Counsel achieved this result through tenacity and skill in presenting novel and
19 complex legal issues. This action presented the novel issue whether Target breached the
20 TDC Agreements in the context where the debit card was “decoupled.” Given the novelty
21 of the issue and the fact that the case was undertaken by Class Counsel on a contingent
22 basis, they faced a risk of nonpayment. The Settlement Class Members have reacted
23 favorably with no objections and only seven opt-outs.

24 The Court looks to the lodestar method as a cross check to determine whether the
25 attorneys' fee request is reasonable. *Bluetooth*, 654 F.3d at 942 (stating “[w]here a settlement
26 produces a common fund for the benefit of the entire class, courts have discretion to
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1 employ either the lodestar method or a percentage-of-recovery method); *In re Google Referrer*
2 *Header Privacy Litig.*, 869 F.3d 737, 748 (9th Cir. 2017) (stating “[a]lthough not required to do
3 so, the district court took an extra step, cross checking this result by using the lodestar
4 method.”)

5
6 The lodestar figure is calculated by multiplying the number of hours the
7 prevailing party reasonably expended on the litigation (as supported by adequate
8 documentation) by a reasonable hourly rate for the region and for the experience
9 of the lawyer.

10 *Bluetooth*, 654 F.3d at 941.

11 Class Counsel sufficiently supported their attorneys’ fee request with declarations of
12 counsel summarizing the tasks and time devoted to the prosecution of this case. The total
13 number of hours, 2,059.25 is reasonable given the procedural background of the case. The
14 average billing rate of approximately \$582 is also reasonable, given the complexity of the
15 case. Accordingly, the lodestar is \$1,198,050. The lodestar is presumptively reasonable.
16 *Bluetooth*, 654 F.3d at 941-42 & n.7.

17 In light of the lodestar, Class Counsel request for \$2,466,699.00 is unreasonably high.
18 Awarding \$2,055,707.50 based on the bench mark of 25% provides sufficient compensation
19 for the benefit conferred on the Settlement Class, including monetary and injunctive relief,
20 novelty of the legal issues, skill in prosecuting the case, and the risk of nonpayment. Class
21 Counsel’s application for attorneys’ fees is granted to the extent of **\$2,055,707.50**.

22 **VI. COSTS AND INCENTIVE AWARDS**

23 Class Counsel seeks \$55,192.78 in costs and litigation expenses. Upon review of the
24 itemized lists, the Court finds the request reasonable under the circumstances of the present
25 case.

26 Class Representatives request incentive awards of \$10,000.00 for Plaintiff Walters and
27 \$3,000.00 each for Plaintiffs Dixon, Powell, and Polcare. The Class Notice disclosed Plaintiff
28 Walters would request \$7,500 as his award. No explanation is provided why he requests a

1 higher amount. Further, none of the Class Representatives provided affidavits in support of
2 their requests to inform the Court of the approximate amount of time they devoted to
3 assisting Class Counsel and participating in discovery.

4 Incentive awards such as this "are discretionary and are intended to compensate class
5 representatives for work done on behalf of the class, [and] to make up for financial or
6 reputational risk undertaken in bringing the action . . ." *Rodriguez v. West Publ'g Corp.*, 563 F.3d
7 948, 958-59 (9th Cir. 2009). The amount of the award should be related to the actual service
8 or value the class representative provides to the class. *See id.* at 960. Although incentive awards
9 are "fairly typical in class actions," *id.* at 958, they "should not become routine practice," lest
10 the representatives be "tempted to accept suboptimal settlements at the expense of the class
11 members whose interests they are appointed to guard." *Radcliffe v. Experian Information Solutions*
12 *Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013) (internal quotation marks and citations omitted).

13 In the absence of declarations, \$3,000 awards each to Plaintiffs Dixon, Powell, and
14 Polcare, who became involved in this action more than two years after Plaintiff Walters, is
15 reasonable, given that they publicly disclosed their financial difficulties for the benefit of the
16 class. An award of \$7,500 to Plaintiff Walters is reasonable given that, in addition to publicly
17 disclosing his financial difficulties, he also sat for a deposition.

18 For the foregoing reasons, Plaintiffs' application for is \$55,192.78 in costs and expenses
19 of litigation is granted. Their application for incentive awards is granted to the extent of \$7,500
20 to Plaintiff Walters and \$3,000 each to Plaintiffs Dixon, Powell, and Polcare.

21 **VII. CONCLUSION AND ORDER**

22 For the foregoing reasons, Plaintiffs' motion for final approval of class action
23 settlement is GRANTED. Class Counsel's application for attorneys' fees, costs and
24 expenses of litigation, and Class Representatives' incentive awards is GRANTED IN PART
25 AND DENIED IN PART. Class Counsel's application for attorneys' fees is granted to the
26 extent of **\$2,055,707.50** and their request for costs and litigation expenses for **\$55,192.78** is
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1 granted in full. The Class Representatives' application for incentive awards is granted to the
2 extent of **\$7,500** to Plaintiff Walters and **\$3,000** each to Plaintiffs Dixon, Powell, and
3 Polcare.

4 The Court further orders as follows:

- 5 • The Second Amended Complaint (Doc. 170) is dismissed with prejudice.
- 6 • The seven class members who opted-out and are listed on *Exhibit 1* to this Order, are
7 not bound by the settlement agreement.
- 8 • Provided it is economically feasible, should any funds remain after the initial
9 distribution of the class member awards, the parties shall do a second distribution to
10 Settlement Class Members who received their class member awards, and negotiated
11 their checks. Should residual funds remain following a second distribution, or in the
12 event a second distribution is not economically feasible, the Parties shall distribute the
13 remaining funds, if any, to *cy pres* recipient, National Endowment for Financial
14 Education.
- 15 • Upon the Effective Date, Plaintiffs and each Settlement Class Member, including any
16 present, former, and future spouses, as well as the present, former, and future heirs,
17 executors, estates, administrators, representatives, agents, attorneys, partners,
18 successors, predecessors, and assigns of each of them, shall release, waive, and forever
19 discharge Target and each of its present, former, and future parents, predecessors,
20 successors, subsidiaries, assigns, assignees, affiliates, conservators, divisions,
21 departments, subdivisions, owners, partners, principals, trustees, creditors,
22 shareholders, joint venturers, co-venturers, officers, and directors (whether acting in
23 such capacity or individually), attorneys, vendors, insurers, accountants, nominees,
24 agents (alleged, apparent, or actual), representatives, employees, managers,
25 administrators, and each person or entity acting or purporting to act for them or on
26 their behalf (collectively, "Target Releasees") from any and all claims that: (a) arise
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1 from or relate to the conduct alleged in the Actions; (b) arise out of, relate to, or are in
2 connection with the TDC or any fees assessed in connection with the TDC; or (c)
3 arise out of, relate to, or are in connection with the administration of the Settlement
4 (“Released Target Claims”).

- 5 • With respect to the Released Target Claims, Plaintiffs and the Settlement Class
6 Members shall be deemed to have, and by operation of the Settlement shall have,
7 expressly waived and relinquished, to the fullest extent permitted by law, the
8 provisions, rights and benefits of Section 1542 of the California Civil Code (to the
9 extent it is applicable, or any other similar provision under federal, state or local law to
10 the extent any such provision is applicable), which reads:

11 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE**
12 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT**
13 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING**
14 **THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD**
15 **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
16 **THE DEBTOR OR RELEASED PARTY.**

17 Thus, subject to and in accordance with this Agreement, even if the Plaintiffs and/or
18 Settlement Class Members may discover facts in addition to or different from those
19 which they now know or believe to be true with respect to the subject matter of the
20 Released Target Claims, Plaintiffs and each Settlement Class Member shall be deemed
21 to have and by operation of this Order, shall have, fully, finally, and forever settled
22 and released all of the Released Target Claims. This is true whether such claims are
23 known or unknown, suspected, or unsuspected, contingent or non-contingent,
24 whether or not concealed or hidden, which now exist, or heretofore have existed
25 upon any theory of law or equity now existing or coming into existence in the future,
26 including, but not limited to, conduct which is negligent, intentional, with or without
27 malice, or a breach of any duty, law, or rule, without regard to the subsequent
28 discovery or existence of such different or additional facts.

- 1 • In addition to the releases made by Plaintiffs and the members of the Settlement Class
2 above, Plaintiffs Walters, Dixon, Powell, and Polcare, including each and every one of
3 their respective agents, representatives, attorneys, heirs, assigns, or any other person
4 acting on their behalf or for their benefit, and any person claiming through them,
5 makes the additional following general release of all claims, known or unknown, in
6 exchange and consideration of the Settlement set forth in this Agreement. The
7 Plaintiffs agree to a general release of the Target Releasees from all claims, demands,
8 rights, liabilities, grievances, demands for arbitration, and causes of action of every
9 nature and description whatsoever, known or unknown, pending or threatened,
10 asserted or that might have been asserted, whether brought in tort or in contract,
11 whether under state or federal or local law.
- 12 • The Court retains jurisdiction over implementation and enforcement of the
13 Agreement.
- 14 • The Court finds that no just reason exists for delay in entering Final Judgment and,
15 accordingly, the Clerk is hereby directed to enter Final Judgment forthwith.

16 **IT IS SO ORDERED.**

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18 Dated: October 26, 2020

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20 Hon. M. James Lorenz
21 United States District Judge
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EXHIBIT 1

Walters v. Target Corp.
Case No.: 3:16-v-1678-L-MDD

Excluded Settlement Class members
1. Sharmallee K. Rezendes
2. Julie Soria
3. Brenda A. Wagner
4. Barbra A. Greve
5. Brittany J. Delahut
6. Linda A. Corrigan
7. Robin C. Yates