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13 **UNITED STATES DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA

14 JAMES WALTERS, on behalf of himself
 15 and all others similarly situated,

16 Plaintiff,

17 vs.

18 TARGET CORP.,

19 Defendant.

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

**MEMORANDUM OF POINTS
 AND AUTHORITIEIS IN
 SUPPORT OF PLAINTIFF'S
 UNOPPOSED MOTION FOR
 PRELIMINARY APPROVAL OF
 CLASS SETTLEMENT AND FOR
 CERTIFICATION OF
 SETTLEMENT CLASS**

Judge: Hon. M. James Lorenz
 Place: Courtroom 5B
 Hearing Date: July 29, 2019 10:30 am
 NO ORAL ARGUMENT WILL BE
 HELD UNLESS REQUESTED BY
 COURT

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1 **I. INTRODUCTION**

2 Plaintiff, James Walters (“Plaintiff” or “Plaintiff Walters”), respectfully moves for
 3 Preliminary Approval of the Settlement Agreement and Release (“Settlement” or
 4 “Agreement”),¹ attached as ***Exhibit 1***, which if finally approved, will resolve all claims
 5 against Target Corp. (“Target” or the “Defendant”) in the above-captioned action, as well
 6 as the related action captioned *Michelle Dixon et al. v. Target Corp.*, Case No.: 18-cv-02660-
 7 PAM-DTS. pending in the United States District Court for the District of Minnesota
 8 (collectively “Actions”).² Preliminary Approval should be granted because the Settlement
 9 provides meaningful monetary and non-monetary relief for the Settlement Class. The
 10 Settlement terms are well within the range of reasonableness and consistent with applicable
 11 case law. The monetary relief consists of a \$5,000,000 cash fund and debt reduction of
 12 \$3,222,330. The non-monetary relief includes: (a) modification to the TDC disclosures to
 13 provide additional information to the TDC account holders on how they may incur fees
 14 in connection with the use of the TDC; (b) an increase in the minimum transaction amount
 15 before assessing an RPF; and (c) a commitment that RPFs shall not exceed the amount of
 16 the transaction that incurred the fee irrespective of the maximum fee Target could charge
 17 under the TDC Agreement. Consequently, and for the reasons stated below, this Court
 18 should grant Preliminary Approval of this Settlement.

19 **II. STATEMENT OF FACTS**

20 **A. Background**

21 This case is a putative class action focused on Target’s alleged breach of the TDC
 22 Agreement and deceptive marketing of the TDC which resulted in consumers being
 23

24 ¹ All capitalized terms used throughout this memorandum have the same meanings as
 25 those found in the Agreement.

26 ² Should the Court enter Preliminary Approval, the Parties intend on moving to amend
 27 the First Amended Complaint to add the Minnesota Plaintiffs as plaintiffs in this case to
 28 bring them before the Court for the purpose of making them Class Representatives. The
 Parties request that should the Effective Date not come to pass for any reason, the Court
 will find that then operative Second Amended Complaint, required by Section 2.3 of the
 Agreement, shall be void, and the First Amended Complaint become the operative
 complaint in this case.

1 assessed RPFs to Target when their transactions get returned unpaid by their bank.

2 In both actions, Plaintiffs allege that Target processes TDC transactions unlike a
3 traditional bank-issued debit card. While a true bank-issued debit card immediately
4 approves or denies transactions based on available account balances, withdraws or holds
5 funds for approved purchases, and has no fee penalties for declined insufficient funds
6 transactions—the TDC has none of those properties. Indeed, the TDC does not even
7 attempt funds deduction or notify consumers’ banks for one to two days after a purchase,
8 at minimum, and sometimes as many as five days or more. Plaintiffs allege that Target
9 omits and misrepresents the risks of using the TDC, resulting in Plaintiffs and reasonable
10 consumers’ surprise that use of the card can cause massive fee penalties when the checking
11 account to which the TDC is linked has insufficient funds.

12 Plaintiffs allege that Target misrepresents the nature of TDC by the product’s very
13 name and in its marketing materials. Further, they allege that the card agreements fail to
14 properly describe how the TDC functions, including that the card operates on the slower
15 Automated Clearinghouse Network (“ACH Network”), not the debit card networks,
16 causing customers to incur fees that are impossible for consumers to incur with a true
17 “debit card.”

18 Consequently, Plaintiff Walters alleges that Target breached the TDC Agreement
19 and violated the UCL and CLRA by its misleading marketing. This Court partially agreed
20 that Plaintiff Walters stated a claim and denied in part Target’s Motion to Dismiss.
21 However, Target’s Motion for Summary Judgment and Plaintiff Walters’ Motion for Class
22 Certification remain pending at the time of settlement, highlighting the risk to both parties.

23 **B. History of the Litigation**

24 On June 29, 2016, Plaintiff Walters filed the California Action seeking monetary
25 damages, restitution and injunctive relief from Target, based on its alleged breach of the
26 TDC Agreement and California law. [DE # 1]. Walters alleges that the TDC is deceptively
27 marketed. Walters further alleges that Target breaches the TDC Agreement, as well as the
28 duty of good faith and fair dealing by the manner in which Target processes TDC

1 Transactions and assesses RPFs on consumers. *See Id.* On August 15, 2016, an Amended
2 Complaint was filed alleging claims for: (I) Breach of Contract, including the Implied
3 Covenant of Good Faith and Fair Dealing; (II) Unjust Enrichment; (III)
4 Unconscionability; (IV) Conversion; (V) Violation of the “Unfair” Prong of the UCL; (VI)
5 Violation of the “Fraudulent” Prong of the UCL; (VII) Violation of the “Unlawful” Prong
6 of the UCL; and (VIII) Violation of the Consumers Legal Remedies Act. [DE # 3].

7 On September 14, 2016, Target moved to dismiss the California Action under
8 Federal Rule of Civil Procedure 12(b)(6), on the basis that the Amended Complaint failed
9 to state a cause of action, which motion was granted in part and denied by the Court on
10 February 14, 2017. [DE # 13]. Plaintiff’s UCL, CLRA, and breach of the implied covenant
11 of good faith and fair dealing claims survived. *Id.* On June 26, 2017, Target filed a Motion
12 for Reconsideration of the Court’s order on its Motion to Dismiss. [DE # 30]. On October
13 19, 2017, the Court issued an order granting in part and denying in part the Motion for
14 Reconsideration, further limiting the scope of the good faith and fair dealing count. [DE
15 # 32] On March 8, 2018, Target filed its Amended Answer to the First Amended
16 Complaint, asserting fourteen affirmative defenses. [DE #59].

17 The Parties engaged in extensive fact and class discovery. Target produced nearly
18 5,000 pages of documents that Class Counsel reviewed. *See* Joint Declaration of Class
19 Counsel Jeff Ostrow, Jeffrey Kaliel, and Hassan Zavareei (“Joint Decl.”) ¶8, attached as
20 **Exhibit 2**. Target deposed Plaintiff Walters and Class Counsel took eight depositions of
21 Target’s corporate representatives and employees, and of the third parties involved in
22 processing TDC transactions. Joint Decl. ¶8. The Parties also retained experts and
23 exchanged expert reports. Joint Decl. ¶9.

24 On September 7, 2018, after the close of fact discovery, Target filed a Motion for
25 Summary Judgment, which Plaintiff Walters opposed and remains pending. [DE # 90,
26 118]. On September 12, 2018, Plaintiff Walters filed a Motion for Class Certification,
27 which Target opposed and remains pending. [DE # 98, 130].

28 On September 12, 2018, Plaintiffs Dixon and Powell filed the Minnesota Action

1 alleging similar wrongdoing by Target with counts for: (I) violation of the Minnesota
 2 Consumer Fraud Act; (II) the Minnesota False Statements in Advertising Act; (III) Breach
 3 of Contract; (IV) Violations of the Florida Deceptive and Unfair Trade Practices Act on
 4 behalf of Plaintiff Dixon and a Florida Subclass; and (V) Violation of the North Carolina
 5 Consumer Protection Law on behalf of Plaintiff Powell and a North Carolina Subclass.
 6 [Minnesota Action DE # 1]. An Amended Complaint in the Minnesota Action on January
 7 22, 2019 added Plaintiff Polcare and a count for violating New York General Business
 8 Law § 349. [Minnesota Action DE # 19].

9 On March 14, 2019, the Parties mediated the Action in Los Angeles, California with
 10 Robert J. Meyer, Esq., a well-respected neutral. Joint Decl. ¶13. The case did not settle
 11 that day, but the Parties continued negotiations over the next several weeks, with Mr.
 12 Meyer's assistance, agreeing to the Settlement's material terms in April 2019. *Id.* at ¶13-15.

13 On April 29, 2019, the Parties filed a Notice of Settlement advising the Court that
 14 the Parties had reached an agreement to settle the Action. [DE #148]. The Parties also
 15 filed a Notice of Settlement in the Minnesota Action, resulting in an order staying that case
 16 pending the settlement approval process in this case. [Minnesota Action DE # 30, 31]. On
 17 June 14, 2019, the Parties signed the Settlement Agreement.

18 **C. Summary of the Settlement Terms.**

19 The following is a summary of the material terms of the Settlement.

20 **1. The Settlement Class.**

21 The Settlement Class is an opt-out class under Rule 23(b)(2) and (3) of the Federal
 22 Rule of Civil Procedure. The Settlement Class is defined as:

23 All TDC holders in the United States who, within the Class Period,
 24 incurred at least one RPF in connection with their TDC, that was not
 refunded or waived.

25 Agreement ¶2.1(a). "Class Period" means the period between June 29, 2012, and the date
 26 of the Preliminary Approval Order. *Id.* ¶1.6.

27 **2. Relief for the Benefit of the Settlement Class.**

28 **a. *Monetary Relief and Allocation and Distribution of Benefits***

1 The Settlement Value consists of the Cash Settlement Amount of \$5,000,000 and
2 the Debt Reduction Cash Amount of \$3,222,330. Agreement ¶2.2(b)(1)-(2). The collective
3 \$8,222,330 is for the direct benefit of the Settlement Class Members – there will be no
4 reversion back to Target. *Id.* at ¶2.2(b)(7).

5 The Cash Settlement Amount will be used to pay: (a) Settlement Class Member
6 Cash Payments; (b) any Court awarded attorneys’ fees and litigation costs; (c) any Court
7 awarded Class Representative Service Awards; and (d) any Administrative Costs. *Id.* at
8 ¶2.2(b)(5); 2.5(a); 3.1; 3.2. Target is required to establish the Settlement Fund within 15
9 days of Preliminary Approval.

10 Settlement Class Members do not have to submit claims or take any other
11 affirmative step to receive relief benefits under the Settlement. Instead, Target and the
12 Settlement Administrator will automatically distribute the Settlement Class Member Cash
13 Payments and the Debt Relief Payments to Settlement Class Members. Joint Decl. ¶19.

14 Each Settlement Class Member who paid at least one RPF, that was assessed during
15 the Class Period and not refunded or charged off, shall be entitled to receive a *pro rata*
16 share of the first paid RPF from the Net Settlement Fund based on the dollar amount of
17 the first RPF paid by the Settlement Class Member. Agreement ¶2.2(b)(5). To determine
18 the exact amount of the Settlement Class Member Cash Payment, the Net Settlement Fund
19 will be divided by the number of Settlement Class Members who paid at least one RPF
20 that was not refunded or waived. Joint accountholders shall each be entitled to their *pro*
21 *rata* share of a single Settlement Class Member Cash Payment. *Id.* Payments to Settlement
22 Class Members from the Net Settlement Fund shall be by check mailed by the Settlement
23 Administrator. *Id.* ¶2.7(b).

24 For each Settlement Class Member who incurred an RPF during the Class Period,
25 but has not yet paid it at the time the Settlement Class Member Cash Payments are to be
26 distributed, the Debt Reduction Cash Amount shall be used by Target to make Debt
27 Reduction Payments toward the outstanding balance on the Settlement Class Member’s
28 TDC account in an amount of 25% of the first RPF that was assessed and not paid. *Id.*

1 ¶2.2(b)(6). No Debt Reduction Payment shall be considered an admission by any
2 Settlement Class Member that the underlying debt is valid. *Id.*

3 In the event there are any funds remaining in the Settlement Fund Account after
4 the distributions required by the Settlement Agreement are completed, said funds shall: (a)
5 be distributed to Settlement Class Members who cashed their checks via a secondary
6 distribution, if economically feasible; or (b) through a residual *cy pres* program benefitting
7 the National Endowment for Financial Education. *Id.* ¶2.2(b)(7); 3.4.

8 **b. Practice Changes**

9 Target has agreed to make three practice changes. Each will provide benefits to the
10 Settlement Class and future customers. First, Target agrees not to implement or assess
11 RFPs, or any equivalent fee, in connection with TDC transactions that are less than \$7.00,
12 for a period of two years after the Effective Date. Agreement *Id.* ¶2.2(a)(1). Second,
13 beginning on or before the Effective Date, and for a minimum of two years, Target agrees
14 that any RFPs charged will be the lesser of the RFP as disclosed by the TDC Agreement
15 or the amount of the TDC transaction that was returned unpaid. *Id.* ¶2.2(a)(2). Third, the
16 Parties will work collaboratively to amend the TDC Agreement to provide additional
17 information to TDC holders regarding how they may incur RPFs from Target and non-
18 sufficient funds or overdraft fees from their banks or credit unions in connection with the
19 use of the TDC, with Target maintaining final discretion regarding the amended
20 disclosures. *Id.* ¶2.2(a)(3).

21 **c. Settlement Administrator and Administration Costs**

22 The Settlement Administrator is Epiq Systems. Epiq is a leading class action
23 administration firm in the United States. All Administrative Costs shall be paid from the
24 Settlement Fund. The Settlement Administrator will oversee the provision of notice to
25 Settlement Class members and Settlement administration. The Administration Costs are
26 estimated to be under \$600,000. Joint Decl. ¶34.

27 **3. Settlement Class Member Release.**

28 In exchange for the benefits conferred by the Settlement, all Settlement Class

1 Members will be deemed to have released Target from claims relating to the subject matter
2 of the Actions. The detailed release language can be found in the Agreement. In addition,
3 the named Plaintiffs will provide a general release to Target.

4 **4. The Notice and Settlement Administration Program.**

5 The Settlement Administrator's notice division is Hilsoft Notifications. Hilsoft is
6 one of the leading notice administration firms in the United States. Joint Decl. ¶35. The
7 proposed notice program is designed to provide the best notice practicable and is tailored
8 to take advantage of the information Target has available about the Settlement Class. *Id.*
9 ¶36. The notice program has three parts: (1) email notice to those Settlement Class
10 members that Target maintains email addresses for ("Email Notice"); and (2) direct mail
11 postcard notice to all members of the Settlement Class for whom Target has not provided
12 an email address ("Postcard Notice"); and (3) Long Form Notice containing more detail
13 than the Email Notice and Postcard Notice, which will be available on the Settlement
14 website and via U.S. mail upon request. Agreement ¶2.5 and Exhibits A-C.

15 Among the additional information provided, the Long Form notice will describe
16 the procedure Settlement Class members must follow to opt-out or object to the
17 Settlement or to Class Counsel's application for attorneys' fees and expenses, and for
18 Service Awards to the Plaintiffs. *Id.* Specifically, all opt-outs or objections must be
19 postmarked within 60 days after Notice is complete. Agreement ¶4.1. For an objection to
20 be valid, it must include: the case name and case number; the objector's name, address,
21 and telephone number; an explanation of the nature of the objection and citation to any
22 relevant legal authority; the number of times the objector has objected to a class action
23 settlement in the past five years and the caption for any such case(s); the name of any
24 counsel representing the objector; a statement indicating whether the objector will appear
25 at the Final Approval; and the objector's signature. *Id.* ¶2.6(b)(1).

26 The notice program (Email Notice and Postcard Notice, including any re-mailing
27 required under the Agreement) shall be completed no later than 70 days after the entry of
28 the Preliminary Approval Order. *Id.* ¶4.1.

1 **5. Class Representative Service Awards.**

2 Class Counsel will seek Class Representative Service Awards for the Plaintiffs for
3 their participation in the Actions and their service to the Settlement Class. *Id.* ¶3.1. Based
4 on their respective levels of participation, Plaintiff Walters shall be entitled to apply for an
5 award in an amount not to exceed \$10,000, and Plaintiffs Dixon, Powell, and Polcare shall
6 be entitled to apply for an amount not to exceed \$3,000 each. *Id.*

7 If approved, the awards will be paid from the Settlement Fund in addition to the
8 other benefits the Plaintiffs will be entitled to under the Settlement. *Id.* These awards will
9 compensate the Class Representatives for their time and effort in the Actions and for the
10 risks they assumed. Joint Decl. ¶21. Specifically, they provided assistance enabling Class
11 Counsel to successfully prosecute the Actions and reach the Settlement, including: (1)
12 submitting to interviews with Class Counsel; (2) locating and forwarding responsive
13 documents and information; (3) providing discovery documents [Plaintiff Walters]; (4)
14 sitting for deposition [Plaintiff Walters]; and (5) participating in conferences with Class
15 Counsel. *Id.* In so doing, the Plaintiffs were integral to the case. *Id.* Target shall not oppose
16 or appeal awards that do not exceed these amounts. Agreement ¶3.1.

17 **6. Attorneys' Fees and Costs.**

18 Class Counsel may request attorneys' fees of up to 30% of the Settlement Value,
19 and reimbursement of litigation expenses incurred in the Actions. *Id.* ¶3.2. The Parties
20 negotiated and agreed as to attorneys' fees and expenses only after agreeing on all material
21 terms of the Settlement. Joint Decl. ¶20.

22 **III. ARGUMENT**

23 **A. The Legal Standard for Preliminary Approval.**

24 The Ninth Circuit maintains a strong judicial policy that favors the settlement of
25 class actions. *Cohorst v. BRE Props.*, No. 3:10-CV-2666-JM-BGS, 2011 U.S. Dist. LEXIS
26 151719, at *33 (S.D. Cal. Nov. 9, 2011) (citing *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373,
27 378 (9th Cir. 1995); *Dyer v. Wells Fargo Bank, N.A.*, No. 13-cv-02859-JST, 2014 WL
28 1900682, at *5 (N.D. Cal. May 12, 2014) (quoting *Class Plaintiffs v. Seattle*, 955 F.2d 1268,

1 1276 (9th Cir.1992)). “Voluntary conciliation and settlement are the preferred means of
2 dispute resolution in complex class action litigation.” *Dennis v. Kellogg Co.*, 09-CV-1786-L
3 (WMc), 2013 U.S. Dist. LEXIS 64577, at *4 (S.D. Cal. May 3, 2013) (Lorenz, J.) (citations
4 omitted) (preliminary approval order).

5 “Courts generally employ a two-step process in evaluating a class action settlement.
6 First, courts make a ‘preliminary determination’ concerning the merits of the settlement
7 and, if the class action has settled prior to class certification, the propriety of certifying the
8 class.” *Dyer*, 2014 WL 1900682 at *5 (citing Manual for Complex Litigation, Fourth
9 (“MCL, 4th”) § 21.632 (FJC 2004)). “The initial decision to approve or reject a settlement
10 proposal is committed to the sound discretion of the trial judge.” *Dyer*, 2014 WL 1900682
11 at *5 (quoting *Class Plaintiffs*, 955 F.2d at 1276). “Where the parties reach a class action
12 settlement prior to class certification, courts apply ‘a higher standard of fairness and a
13 more probing inquiry than may normally be required under Rule 23(e).” *Dyer*, 2014 WL
14 1900682 at *5 (quoting *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012)). “Courts
15 ‘must be particularly vigilant not only for explicit collusion, but also for more subtle signs
16 that class counsel have allowed pursuit of their own self-interests and that of certain class
17 members to infect the negotiations.” *Dyer*, 2014 WL 1900682 at *5 (quoting *In re Bluetooth*
18 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

19 “The Court’s task at the preliminary approval stage is to determine whether the
20 settlement falls ‘within the range of possible approval.’” *Dyer*, 2014 WL 1900682 at *5
21 (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007)
22 (internal citation omitted)). *See also* MCL, 4th § 21.632 (courts “must make a preliminary
23 determination on the fairness, reasonableness, and adequacy of the settlement terms and
24 must direct the preparation of notice of the certification, proposed settlement, and date of
25 the final fairness hearing.”). “Second, courts must hold a hearing pursuant to Federal Rule
26 of Civil Procedure 23(e)(2) to make a final determination of whether the settlement is ‘fair,
27 reasonable, and adequate.’” *Dyer*, 2014 WL 1900682 at *5. *See also Hanlon v. Chrysler Corp.*,
28 150 F.3d 1011, 1026 (9th Cir. 1998); *Coborst*, 2011 U.S. Dist. LEXIS 151719, at *33-34.

1 This Motion concerns the first step, and the Court need not review the settlement in detail
2 at this juncture. *Dennis*, 2013 U.S. Dist. LEXIS 64577, at *5-6.

3 “Preliminary approval of a settlement is appropriate if ‘the proposed settlement
4 appears to be the product of serious, informed, non-collusive negotiations, has no obvious
5 deficiencies, does not improperly grant preferential treatment to class representatives or
6 segments of the class, and falls within the range of possible approval.’” *Dyer*, 2014 WL
7 1900682 at *6 (quoting *In re Tableware*, 484 F. Supp. 2d at 1079) (internal citation omitted)).
8 *See also Manual for Complex Litigation, Second* § 30.44 (FJC 1985). “The proposed settlement
9 need not be ideal, but it must be fair and free of collusion, consistent with a plaintiff’s
10 fiduciary obligations to the class.” *Dyer*, 2014 WL 1900682 at *6 (citing *Hanlon*, 150 F.3d
11 at 1027 (“Settlement is the offspring of compromise; the question we address is not
12 whether the final product could be prettier, smarter or snazzier, but whether it is fair,
13 adequate and free from collusion.”)).

14 The Ninth Circuit has adopted the following eight-factor test for determining
15 whether a settlement is fair, reasonable, and adequate:

16 (1) the strength of plaintiffs’ case; (2) the risk, expense, complexity, and likely
17 duration of further litigation; (3) the risk of maintaining class action status
18 throughout the trial; (4) the amount offered in settlement; (5) the extent of
19 discovery completed; (6) the experience and views of counsel; (7) the
20 presence of a governmental participant; and (8) the reaction of the class
21 members to the proposed settlement.

22 *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, No. 16-CV-0182 H BLM, 2017 U.S. Dist. LEXIS
23 170982, at *15 (S.D. Cal. Oct. 16, 2017). *See also Officers for Justice v. Civil Service Com.*, 688
24 F.2d 615, 625 (9th Cir. 1982); *Dennis*, 2013 U.S. Dist. LEXIS 64577 at *12. “The proposed
25 settlement must be ‘taken as a whole, rather than the individual component parts’ in the
26 examination for overall fairness.” *Dyer*, 2014 WL 1900682 at *6 (quoting *Hanlon*, 150 F.3d
27 at 1026). “Courts do not have the ability to ‘delete, modify, or substitute certain provisions’
28 because the settlement ‘must stand or fall in its entirety.’” *Dyer*, 2014 WL 1900682 at *6
(quoting *Hanlon*, 150 F.3d at 1026).

But because the Court cannot fully assess many of these factors prior to
notice and an opportunity for objection, the Court need not conduct a full

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settlement fairness appraisal before granting preliminary approval; rather, the proposed settlement need only fall within “the range of possible approval.” *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. 2008). “Essentially, the court is only concerned with whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys.” *Id.*

Dennis, 2013 U.S. Dist. LEXIS 64577 at *13.

B. This Settlement Satisfies the Criteria for Preliminary Approval.

Each of the relevant factors weighs in favor of Preliminary Approval of this Settlement. First, the Settlement was reached in the absence of collusion, and is the product of good-faith, informed and arm’s length negotiations by competent counsel, in conjunction with an experienced mediator, Robert J. Meyer, Esq. Furthermore, a preliminary review of the factors related to the fairness, adequacy and reasonableness of the Settlement demonstrates that the Settlement warrants Preliminary Approval.

Any settlement requires the parties to balance the merits of the claims and defenses asserted against the attendant risks of continued litigation and delay. Plaintiffs believe their claims are meritorious and that they would prevail if this matter proceeded to trial. Target argues that Plaintiffs’ claims are unfounded, denies any potential liability, and up to the point of settlement has indicated a willingness to litigate those claims vigorously. Plaintiff Walters faces the challenge of the Motion for Summary Judgment as well as Target’s opposition to class certification in the California Action. The Minnesota Plaintiffs would likely face the same challenges in the Minnesota Action were it to continue in litigation.

Plaintiffs concluded that the benefits of settling outweigh the risks and uncertainties of continued litigation, as well as the attendant time and expenses associated with contested class certification proceedings and possible interlocutory appellate review, the risk that this Court granted summary judgment for Target, completing expert discovery, pretrial motion practice, trial, final appellate review. Joint Decl. ¶ 22-25.

1. This Settlement Is the Product of Good Faith, Informed and Arm’s-Length Negotiations.

The Settlement is the result of intensive, arm’s-length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and

1 factual issues of the Actions. *Id.* ¶4. The Parties engaged in a full day formal mediation
2 before an experienced and respected mediator, Robert J. Meyer, Esq. of JAMS, only after
3 completing fact discovery and receiving data from Target to adequately estimate potential
4 damages. *Id.* ¶11. Although the Parties did not settle that day, much progress was made
5 laying the foundation to the eventual resolution of these Actions. *Id.* ¶13. The Parties
6 continued their settlement discussion for many weeks with Mr. Meyer’s assistance. *Id.* ¶15.

7 “The assistance of an experienced mediator in the settlement process confirms that
8 the settlement is non-collusive.” *Adams v. Inter-Con Sec. Sys. Inc.*, No. C-06-5428 MHP, 2007
9 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007). *See also Cohorst*, 2011 U.S. Dist. LEXIS
10 151719, at *35 (“[V]oluntary mediation before a retired judge in which the parties ‘reached
11 an agreement-in-principle to settle the claims in the litigation’ are ‘highly indicative of
12 fairness’ ‘We put a good deal of stock in the product of an arms-length, non-collusive,
13 negotiated resolution.’”). Moreover, “[t]here is a presumption of fairness when a proposed
14 class settlement, which was negotiated at arm’s-length by counsel for the class, is presented
15 for Court approval.” *Newberg on Class Actions*, § 11.41 (4th Ed. 2007).

16 Furthermore, Class Counsel is particularly experienced in the litigation, certification,
17 trial, and settlement of nationwide class action cases. Joint Decl. ¶4. In negotiating this
18 Settlement, Class Counsel had the benefit of years of experience and a familiarity with the
19 facts of this case as well as with cases involving bank and credit union overdraft and NSF
20 fees, which are very similar to the TDC fees at issue. *Id.* This understanding of the
21 intricacies of consumer banking practices and related laws provided Class Counsel with
22 the needed tools and perspective to achieve the legal victories they did in the California
23 Action—and prepared them to fight the Actions to their conclusion in this Court, the
24 District of Minnesota, the Eighth and Ninth Circuits, and Supreme Court if necessary. *Id.*

25 Before filing the initial Complaint, Class Counsel spent many hours investigating
26 the claims of several potential plaintiffs against Target. *Id.* ¶5. Class Counsel interviewed a
27 number of customers and potential plaintiffs to gather information about Target’s conduct
28 and its impact upon consumers. *Id.* This information was essential to Class Counsel’s

1 ability to understand Target’s conduct, the language of the TDC Agreement, and potential
2 remedies. *Id.* In addition, Class Counsel also expended significant resources researching
3 and developing the legal claims at issue and then actually litigating them in the California
4 Action. *Id.* ¶6.

5 As detailed herein, Class Counsel thoroughly investigated and analyzed Plaintiffs’
6 claims and engaged in extensive briefing on Target’s Motion to Dismiss followed by the
7 Motion for Reconsideration. *Id.* ¶7. Class Counsel took extensive fact discovery, including
8 reviewing thousands of pages of documents produced by Target and taking and defending
9 multiple depositions. *Id.* ¶8. Class Counsel engaged a data expert to conduct an analysis of
10 Target’s sample data to determine whether a class could be ascertained and support the
11 Motion for Class Certification. *Id.* ¶9. Class Counsel expended significant resources
12 researching and briefing the Motion for Class Certification and opposing Target’s Motion
13 for Summary Judgment. *Id.* ¶10. Class Counsel was also well-positioned to evaluate the
14 strengths and weaknesses of Plaintiffs’ claims, and the appropriate basis upon which to
15 settle them, as a result of their litigating similar claims in courts across the country. *Id.*

16 **2. The Facts Support a Preliminary Determination That the Settlement**
17 **Is Fair, Adequate and Reasonable.**

18 A preliminary review of the below factors support that the Settlement falls within
19 the “range of reason,” such that notice to the Settlement Class and a Final Approval
20 Hearing as to the fairness, adequacy, and reasonableness of the Settlement are warranted.

21 **a. *The Strength of Plaintiffs’ Case.***

22 Confident in the strength of their case, Plaintiffs and Class Counsel are pragmatic
23 regarding Target’s various class certification and merits defenses and recognize the risks
24 inherent to litigation of this magnitude. *Id.* ¶23. Plaintiff Walters faced the risk on Target’s
25 Motion for Summary Judgment, his Motion for Class Certification, at trial, or on a
26 subsequent appeal based on Target’s various theories and defenses advanced. *Id.* The same
27 risks would be present in the Minnesota Action were it to proceed. *Id.*

28 Each risk, by itself, could have impeded Plaintiffs’ and the Settlement Class’

1 successful prosecution of these claims at trial and in an eventual appeal—resulting in zero
 2 benefit to the Settlement Class. *Dennis v. Kellogg Co.*, 09-CV-1786-L (WMc), 2013 U.S. Dist.
 3 LEXIS 163118, at *9 (S.D. Cal. Nov. 14, 2013) (Lorenz, J.) (“[T]he settlement avoids the
 4 risks of extreme results on either end, i.e., complete or no recovery. Thus, it is plainly
 5 reasonable for the parties at this stage to agree that the actual recovery realized and risks
 6 avoided here outweigh the opportunity to pursue potentially more favorable results
 7 through full adjudication”). Under the circumstances, Plaintiffs and Class Counsel
 8 appropriately determined that the Settlement outweighs the gamble of continued litigation.
 9 *Id.* ¶22; 24; 27. Moreover, even if Plaintiffs prevailed at trial, any recovery could be delayed
 10 for years by an appeal. *McPhail v. First Command Fin. Plan., Inc.*, No. 05cv179-IEG-JMA,
 11 2009 U.S. Dist. LEXIS 26544, at *13 (S.D. Cal. Mar. 30, 2009) (likelihood that appellate
 12 proceedings could delay class recovery favors settlement approval). This Settlement
 13 provides substantial relief without further delay. *Id.* ¶24.

14 **b. *The Risk, Expense, Complexity, and Likely Duration of Further***
 15 ***Litigation.***

16 The traditional means for handling claims like those at issue here would tax the
 17 court system, require a massive expenditure of public and private resources, and—given
 18 the relatively small value of the claims of the individual members of the Settlement Class—
 19 could be impracticable. *Id.* ¶25. No doubt continued litigation here would be difficult,
 20 expensive, and time consuming. *Id.* Recovery by any means other than settlement would
 21 likely require additional years of litigation in this Court, the District of Minnesota, and the
 22 Circuit Courts of Appeals for the Eighth and Ninth Circuits. *Id.*; *See McPhail*, 2009 U.S.
 23 Dist. LEXIS 26544, at *12-13 (noting potential complexity and possible duration of trial
 24 weighs in favor of granting final approval, and that post-judgment appeal would require
 25 many years to resolve and delay payment to class members). The Settlement provides
 26 immediate and substantial benefits to hundreds of thousands of Target customers. Joint
 27 Decl. ¶28. The proposed Settlement is the best vehicle for the Settlement Class to receive
 28 the relief to which they are entitled in a prompt and efficient manner.

1 c. ***The Risk of Maintaining Class Action Status Throughout Trial.***

2 Whether the Actions would have been tried as a class action is also relevant in
3 assessing the Settlement's fairness. As the Court had not yet certified a class when the
4 Agreement was executed, it is unclear whether certification would have been granted. *Id.*
5 ¶29. Target has vigorously opposed Plaintiff Walters's Motion for Class Certification, and
6 "would surely [have] challenge[d] class certification on appeal" in the event of an adverse
7 judgment. *Rodriguez v. West Pub. Corp.*, No. CV05-3222, 2007 WL 2827379, at *8 (C.D. Cal.
8 Sept. 10, 2007) (finding the likelihood that a certification decision would be appealed
9 meant this factor weighed in favor of approval), *rev'd on other grounds*, 563 F.3d 948 (9th Cir.
10 2009). The Parties would expend significant resources in further litigation. Joint Decl. ¶29.
11 Accordingly, this factor weighs in favor of preliminary approval.

12 d. ***The Amount Offered in the Settlement.***

13 The Settlement is squarely within the range of appropriateness for approval. As
14 discussed above, the Settlement is the product of arm's-length negotiations conducted by
15 the Parties' experienced counsel and initially under the supervision of a reputable and
16 skilled mediator. As a result of these negotiations, the Parties have reached a Settlement
17 that Class Counsel believes to be fair, reasonable, and in the Settlement Class' best interest.
18 Class Counsel's assessment in this regard is entitled to considerable deference.

19 In light of the risks faced here, the \$8,222,330 Settlement Value itself is a great
20 result. When considering the practice changes and Target's commitment to modify the
21 TDC Agreement disclosures, the result is even better. These benefits are especially
22 valuable given the complexity of the litigation and the significant barriers that would loom
23 in the absence of settlement, including rulings on the Motion for Summary Judgment and
24 Motion for Class Certification, and assuming Plaintiffs could overcome these obstacles,
25 likely trial and appeals in the event of a Plaintiffs' verdict.

26 Analyzing Target's classwide data, Class Counsel estimates that the best-case
27 scenario is that damages would be approximately \$25,000,000. Target, on the other hand,
28 would argue that damages are no more than 50% of Plaintiff's calculation. Joint Decl. ¶26.

1 Taking into account only the Cash Settlement Amount of \$5,000,000, the Settlement Class
2 is recovering approximately 20% or 40% (depending upon the opposing damage models)
3 of their most probable damages, without further risks attendant to litigation. *Id.* The
4 Settlement Class is also obtaining the benefit of fewer RPFs during the two-year period
5 that Target has agreed to bind itself to the practice change. Furthermore, the potential
6 changes to the TDC Agreement will help Settlement Class Members and other customers
7 avoid future RPFs because they will better understand how the TDC operates. *Id.*

8 Even without the prospective relief benefit in this case, courts in this Circuit
9 routinely grant final approval to settlements providing between 5-10% of maximum
10 potential damages. “It is well-settled law that a cash settlement amounting to only a
11 fraction of the potential recovery does not per se render the settlement inadequate or
12 unfair.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 628 (9th Cir. 1982). *See also*
13 *Bravo v. Gale Triangle, Inc.*, 2017 WL 708766, *10 (C.D. Cal. Feb.16, 2017) (approving a
14 settlement where net recovery was approximately 7.5% of the projected maximum
15 recovery amount); *Roberti v. OSI Sys.*, No. CV-13-09174 MWF (MRW), 2015 U.S. Dist.
16 LEXIS 164312, at *12-13 (C.D. Cal. Dec. 8, 2015) (approving settlement of 8.8% of
17 maximum potential recovery); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 256 (N.D.
18 Cal 2015) (approving settlement where gross recovery to the class was approximately 8.5%
19 of maximum recovery amount); *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-00350-JST, 2014
20 U.S. Dist. LEXIS 87180, at *13-14 (N.D. Cal. June 24, 2014) (noting courts have held
21 recovery of only 3% of maximum potential recovery is fair and reasonable in face of real
22 possibility of recovering nothing absent settlement); *In re Omnivision Techs.*, 559 F. Supp. 2d
23 1036, 1042 (N.D. Cal. 2007) (approving settlement of 9% of maximum potential recovery).

24 These are all significant achievements considering the obstacles that Plaintiffs faced
25 in the litigation. *See Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 THE, 2008 WL 346417,
26 at *9 (N.D. Cal. Feb. 7, 2008) (“a sizeable discount is to be expected in exchange for
27 avoiding uncertainties, risks, and costs that come with litigation a case to trial. Again, the
28 issue is not whether the settlement “could be better,” but whether it falls within the range

1 of appropriate settlements. *Hanlon*, 150 F.3d at 1027.”).

2 The \$8,222,330 Settlement Value and significant savings from the practice changes
3 are fair and reasonable in light of Target’s defenses, and the challenging and unpredictable
4 litigation path Plaintiffs would have faced absent settlement.

5 **e. *The Extent of Discovery Completed and Stage of the Proceedings.***

6 “In regards to class action settlements, ‘formal discovery is not a necessary ticket to
7 the bargaining table where the parties have sufficient information to make an informed
8 decision about settlement.’ *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir.
9 1998) (internal quotation marks omitted).” *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-
10 CV-1290 BEN (NLS), 2013 U.S. Dist. LEXIS 15731, at *14-15 (S.D. Cal. Feb. 4, 2013)
11 (noting parties engaged in exchange of informal discovery between class counsels’
12 consultants and Wells Fargo’s IT professionals in addition to formal written discovery).
13 Here, the Parties completed fact discovery in the California Action and were in the expert
14 discovery phase when settlement was reached. Joint Decl. ¶11. As noted above, the review
15 and analysis of the information provided during the extensive discovery phase positioned
16 Class Counsel to confidently evaluate the strengths and weaknesses of Plaintiffs’ claims
17 and prospects for success at class certification, summary judgment, and trial. *Id.* ¶12.

18 In addition, the Parties briefed motions to dismiss, for reconsideration, class
19 certification, and summary judgment. Thus, the Settlement was reached after considerable
20 investigation and careful consideration and discussions. The Parties were fully aware of
21 the issues and risks associated with the respective claims and defenses. The record provides
22 sufficient information to determine that the Settlement is fair and appropriate at this stage
23 of the litigation; consequently, this factor also weighs in favor of Preliminary Approval.

24 **f. *The Experience and Views of Counsel.***

25 Class Counsel possesses extensive knowledge of and experience in prosecuting class
26 actions in courts throughout the United States including this one. *Id.* ¶31-32. Class Counsel
27 has successfully litigated and resolved many other consumer class actions against major
28 corporations, including those against over 50 financial institutions related to improper fee

1 assessments, recovering hundreds of millions of dollars for those classes. *Id.* Class
2 Counsels' experience, resources and knowledge is extensive and formidable. *Id.*

3 Here, Class Counsel's expertise allowed it to build a novel case that has not been
4 attempted before. *Id.* ¶33. Because Class Counsel has litigated many complex consumer
5 cases involving financial services, credit cards, debit cards, including working extensively
6 with experts to uncover the methodologies behind the assessment of fees, they were able
7 to successfully litigate and settle this matter. *Id.* Employing this experience and skill, Class
8 Counsel aggressively and swiftly worked to litigate, then resolve, this case in an efficient
9 manner. Class Counsel is qualified to represent the Settlement Class and will, along with
10 the Class Representatives, vigorously protect the interests of the Settlement Class. *Id.*

11 A great deal of weight is accorded to the recommendation of counsel, who are the
12 most closely acquainted with the facts of the underlying litigation. *In re Immune Response Sec.*
13 *Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007); *Nat'l Rural Telecomm. Coop. v. DirectTV,*
14 *Inc.*, 221 F.R.D. at 528 (C.D. Cal. Jan. 5, 2004). Through the lens of its significant
15 experience litigating class claims and familiarity with this case, Class Counsel is of the
16 opinion that the Settlement in this case is fair and reasonable. Joint Decl. ¶30.

17 ***g. The Presence of a Governmental Participant.***

18 No governmental actor is relevant to this Action, rendering this factor immaterial
19 to the settlement approval process.

20 ***h. The Reaction of the Class Members to the Proposed Settlement.***

21 The Court must wait until the Final Approval Hearing and the expiration of the
22 Opt-Out Period to determine the reaction of the Settlement Class.

23 **C. The Court Should Approve the Proposed Notice Program**

24 The Parties have devised a program for providing notice to the Settlement Class
25 ("Notice Plan") that will ensure that virtually all Settlement Class members, whether
26 current or former TDC holders, will receive individual notice within 70 days of this Court's
27 Preliminary Approval of the Settlement.

28 **1. The Notice Program**

1 Here, the Notice Program is reasonably calculated to apprise the Settlement Class
 2 of the following: a description of the Settlement’s material terms; a date by which members
 3 of the Settlement Class may exclude themselves from the Settlement Class; a date by which
 4 Settlement Class members may object to the Settlement; the Final Approval Hearing date;
 5 and the Settlement Website address at which the Settlement Class may access the
 6 Agreement and other related documents and information. Agreement ¶2.5(c) and Exhibits
 7 A-C thereto. This will ensure virtually all Settlement Class members will receive
 8 individualized notice. The Settlement Class Notice and Notice Program constitute
 9 sufficient notice, satisfying all applicable requirements of law, including, but not limited
 10 to, Fed. R. Civ. P. 23 and constitutional due process. Joint Decl. ¶36-38.

11 Courts routinely approve notice programs involving either only email,
 12 combinations of email or First-Class mail, or combinations of email and published notice.
 13 *E.g., Hanlon v. Palace Entm’t Holdings, LLC*, No. 11-987, 2012 WL 27461, at *6 (W.D. Pa.
 14 Jan. 3, 2012) (approving email notice to defendant’s promotional database); *Berkson v. Gogo*
 15 *LLC*, 147 F. Supp. 3d 123, 133, 135, 139 (E.D.N.Y. Dec. 4, 2015) (approving email-only
 16 notice); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 499 (N.D. Ill. 2015) (rejecting objector’s
 17 argument that email notice is insufficient); *Noll v. eBay, Inc.*, 309 F.R.D. 593, 605 (N.D. Cal.
 18 2015) (approving email notice with mailed notice to persons with emails returned as
 19 undeliverable); *In re TD Ameritrade Account Holder Litig.*, No. C 07–2852 SBA, 2011 WL
 20 4079226, at *10 (N.D. Cal. Sept. 13, 2011) (approving email notice even where class
 21 members did not receive mailed notice “in cases where the delivery via email failed,” as
 22 “there is no requirement that notice be perfect”); *Lane v. Facebook, Inc.*, No. C 08-3845 RS,
 23 2010 WL 9013059, at *2 (N.D. Cal. Mar. 17, 2010) (even though some e-mail filtered
 24 through a SPAM e-mail filter and not all class members saw it, the notice was adequate);
 25 *Guy v. Casal Institute of Nevada, LLC*, No. 13-cv-02263, 2014 WL 1899006, at *7 (D. Nev.
 26 May 12, 2014) (“The Court in *Phelps* stated that there was no indication that service by first
 27 class mail or email would be ineffective or inadequate.”).

28 The Settlement Website (which will include hyperlinks to the Settlement

1 Agreement, the Long Form Notice, the Preliminary Approval Order and such other
 2 documents as Class Counsel and Target’s Counsel agree to post or that the Court orders
 3 posted on the Settlement Website) will be established following Preliminary Approval and
 4 prior to the commencement of the Notice Plan. Agreement ¶2.5(c)(3).

5 Settlement Class members will be provided with at least 60 days to submit any
 6 objections. That is more than sufficient under applicable case law. *See Maywalt v. Parker*
 7 *and Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995); *Torrissi v. Tucson Elec. Power Co.*,
 8 8 F.3d 1370, 1374–75 (9th Cir. 1993), *cert. denied sub nom*; *Reilly v. Tucson Elec. Power Co.*, 512
 9 U.S. 1220, 114 S. Ct. 2707, 129 L. Ed. 2d 834 (1994).

10 Upon Preliminary Approval, the Settlement Administrator will obtain from Target
 11 and Class Counsel the name and physical and email address information (to the extent it
 12 is reasonably available) for Settlement Class members, and to the extent necessary, verify
 13 and update the addresses received through the National Change of Address database, for
 14 mailing the Mailed Notice, and later mailing distribution checks to the Settlement Class
 15 Members receiving Settlement Class Member Cash Payments. The Settlement
 16 Administrator will also establish and maintain an automated toll-free telephone line for
 17 Settlement Class members to call with Settlement-related inquiries, answer the questions
 18 of members of the Settlement who call with or otherwise communicate such inquiries, and
 19 to accept requests for Long Form Notices to be sent in the mail. Agreement Exhibit C.

20 **2. The Court Should Direct That Notice Be Given**

21 “Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all
 22 class members who would be bound by a proposed settlement, voluntary dismissal, or
 23 compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or
 24 (b)(3).” *Manual for Compl. Lit.* § 21.312 (internal quotation marks omitted). The best
 25 practicable notice is that which is “reasonably calculated, under all the circumstances, to
 26 apprise interested parties of the pendency of the action and afford them an opportunity
 27 to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314
 28 (1950). “Rule 23 . . . requires that individual notice in [opt-out] actions be given to class

1 members who can be identified through reasonable efforts. Those who cannot be readily
 2 identified must be given the best notice practicable under the circumstances.” *Manual for*
 3 *Compl. Litig.*, § 21.311. In this Circuit, it has long been the case that a notice of settlement
 4 will be adjudged satisfactory if it “generally describes the terms of the settlement in
 5 sufficient detail to alert those with adverse viewpoints to investigate and to come forward
 6 and be heard.” *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004) (citing
 7 *Mendoza v. Tucson Sch. Dist. No.1*, 623 F.3d 1338, 1352 (9th Cir. 1980)).

8 The proposed Notice Program satisfies these content requirements. The Settlement
 9 Class Notice will properly inform Settlement Class members of the Settlement’s
 10 substantive terms and advise them of their options for opting-out of or objecting to the
 11 Settlement, and how to obtain additional information about the Settlement. The Notice
 12 Program is designed to reach a high percentage of the Settlement Class and exceeds the
 13 requirements of constitutional due process. Joint Decl. ¶¶36-38. Here, the Settlement
 14 benefits from the fact that Target maintains mailing address information for both its
 15 current and former TDC accountholders, and email address information for many of them
 16 as well. Therefore, the Court should approve the Notice Program and the form and
 17 content of the Settlement Class Notices.

18 **D. Notice Pursuant to the Class Action Fairness Act (CAFA)**

19 CAFA requires settling defendants give notice of a proposed class settlement to
 20 appropriate state and federal officials. 28 U.S.C. § 1715(b). The CAFA Notice of Proposed
 21 Settlement must supply the information and documents set forth in 28 U.S.C. § 1715(b)(1)-
 22 (8). The Settlement Administrator will serve the CAFA Notice, with a CD containing the
 23 required Section 1715(b) documents within ten days of Preliminary Approval.

24 **E. Certification of the Settlement Class Is Appropriate.**

25 Plaintiff Walters respectfully requests that the Court certify the Settlement Class.
 26 “Confronted with a request for settlement-only class certification, a district court need not
 27 inquire whether the case, if tried, would present intractable management problems . . . for
 28 the proposal is that there be no trial.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620

1 (1997). *See also Dandan Pan v. Qualcomm Inc.*, No. 16-cv-01885-JLS-DHB, 2017 U.S. Dist.
2 LEXIS 120150, at *17-18 (S.D. Cal. July 31, 2017) (citing *Anchem*).

3 Certifying the Settlement Class will allow notice of the proposed Settlement to issue
4 informing the Settlement Class of the existence and terms of the proposed Settlement, of
5 their right to be heard on its fairness, of their right to opt-out, and of the date, time and
6 place of the Final Approval Hearing. *See Manual for Compl. Lit.*, §§ 21.632, 21.633. For
7 purposes of this Settlement only, Target does not oppose class certification.³ For the
8 reasons set forth below, certification is appropriate under Rule 23(a), (b)(2) and (b)(3).

9 Certification under Fed. R. Civ. P. 23(a) requires that: (1) the class is so numerous
10 that joinder of all members is impracticable; (2) there are questions of law or fact common
11 to the class; (3) the claims or defenses of the representative parties are typical of the claims
12 or defenses of the class; and (4) the representative parties will fairly and adequately protect
13 the interests of the class. Under Fed. R. Civ. P. 23(b)(3), certification is appropriate if
14 questions of law or fact common to the members of the class predominate over individual
15 issues of law or fact and if a class action is superior to other available methods for the fair
16 and efficient adjudication of the controversy.

17 Rule 23(a)'s numerosity requirement is satisfied because the Settlement Class
18 consists of hundreds of thousands of TDC holders, and joinder of all such persons is
19 impracticable. Joint Decl. ¶39. *See* Fed. R. Civ. P. 23(a)(1). *See Gutierrez-Rodriguez*, 2017 U.S.
20 Dist. LEXIS 170982 at *10 (noting damages settlement class containing 61,939 satisfies
21 numerosity); *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 WHA, 2008 WL 4279550,
22 *14 (N.D. Cal. Sept. 11, 2008) (“Given the large number of checking account customers
23 at Wells Fargo, the numerosity requirement is met.”).

24 “Commonality requires the plaintiff to demonstrate that the class members ‘have
25 suffered the same injury,’” and the plaintiff’s common contention “must be of such a
26

27 ³ If for any reason, the Settlement is not approved by the Court, Target reserves all its
28 defenses to class certification, and the Agreement provides that the stipulation for
certification will become null and void and may not be used for any purpose.

1 nature that it is capable of classwide resolution – which means that determination of its
2 truth or falsity will resolve an issue that is central to the validity of each one of the claims
3 in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350 (2011) (citation
4 omitted). “All questions of fact and law need not be common to satisfy the rule.” *Hanlon*,
5 150 F.3d 1019. However, “[t]he existence of shared legal issues with divergent factual
6 predicates is sufficient’ to meet the requirements of Rule 23(a)(2).” *Gutierrez*, 2008 WL
7 4279550 at *14 (quoting *Hanlon*, 150 F.3d at 1019). Here, the commonality requirement is
8 readily satisfied by multiple common questions of law and fact—centering on whether
9 Target’s systematic practices in processing TDC transactions violates the TDC agreement
10 and whether the TDC Agreement and the marketing of the TDC is deceptive—that are
11 alleged to have injured all Settlement Class members in the same way, and that would
12 generate common answers central to the claims’ viability were the Action to be tried.

13 For similar reasons, Plaintiffs’ claims are reasonably coextensive with those of the
14 absent members of the Settlement Class, such that the Rule 23(a)(3) typicality requirement
15 is satisfied. *See Gutierrez*, 2008 WL 4279550 at *15. The Ninth Circuit interprets typicality
16 permissively. *Hanlon*, 150 F.3d at 1020. It is sufficient for the named plaintiff’s claims to
17 arise from the same remedial and legal theories as the class claims. *Malta*, 2013 U.S. Dist.
18 LEXIS 15731, at *7; *Arnold v. United Artists Theater, Inc.*, 158 F.R.D. 439, 449 (N.D. Cal.
19 1994). Plaintiffs are typical of absent members of the Settlement Class because they were
20 subjected to the same practices and claim to have suffered from the same injuries, and
21 because they will benefit equally from the relief provided by the Settlement.

22 Plaintiffs and Class Counsel satisfy the Rule 23(a)(4) adequacy of representation
23 requirement, which “serves to uncover conflicts of the interest between named parties and
24 the class they seek to represent.” *Gutierrez*, 2008 WL 4279550 at *15. *See also Gutierrez-*
25 *Rodriguez*, 2017 U.S. Dist. LEXIS 170982 at *12-13 (noting no conflict of interest between
26 plaintiff and the purported class members, and plaintiff and class counsel’s vigorous
27 prosecution of the class’s interests). Adequacy requires that class representatives do not
28 have conflicts of interest with other class members and that the named plaintiffs and their

1 counsel will vigorously prosecute the action for the class. *Hanlon*, 150 F.3d at 1020. Here,
2 Plaintiffs’ interests are coextensive with, not antagonistic to, the Settlement Class’ interests
3 because Plaintiffs and the absent Settlement Class members have the same interest in the
4 relief the Settlement affords. Those absent members have no diverging interests. Further,
5 Plaintiffs’ qualified and competent counsel have extensive experience and expertise
6 prosecuting complex class actions, including consumer actions similar to the instant case.
7 Joint Decl. ¶40. Class Counsel has devoted substantial time and resources to the Actions
8 and will vigorously protect the interests of the Settlement Class. *Id.* ¶33.

9 Certification is further appropriate because the questions of law or fact common to
10 members of the Settlement Class predominate over any questions affecting only individual
11 members, and a class action is superior to other available methods for the fair and efficient
12 adjudication of the Action. *See* Fed. R. Civ. P. 23(b)(3). The “predominance inquiry tests
13 whether proposed class members are sufficiently cohesive to warrant adjudication by
14 representation.” *Hanlon*, 150 F.3d at 1022 (quoting *Amchem*, 521 U.S. at 623). *See also*
15 *Gutierrez*, 2008 WL 4279550 at *14 (predominance satisfied “when common questions
16 present a significant portion of the case and can be resolved for all members of the class
17 in a single adjudication”). Plaintiffs readily satisfy predominance because liability questions
18 common to all members of the Settlement Class substantially outweigh any possible issues
19 that are individual to each Settlement Class member. Joint Decl. ¶41. For example, each
20 Settlement Class member’s relationship with Target arises from an agreement that is the
21 same or substantially similar in all relevant respects to other Settlement Class members’
22 agreements. *Id.* Most importantly, each was subjected to the same marketing of the TDC
23 and the same policy and procedures for processing TDC transactions. *Id.*

24 Conditional certification pursuant to Rule 23(b)(2) is also warranted. Certification
25 under that rule is appropriate where the defendant has “acted or refused to act on grounds
26 that apply generally to the class, so that final injunctive relief or corresponding declaratory
27 relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). “In other
28 words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would

1 provide relief to each member of the class.” *Wal-Mart*, 564 U.S. at 360. “These
2 requirements are unquestionably satisfied when members of a putative class seek uniform
3 injunctive or declaratory relief from policies or practices that are generally applicable to
4 the class as a whole. . . . That inquiry does not require an examination of the viability or
5 bases of the class members’ claims for relief, does not require that the issues common to
6 the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that
7 all members of the class have suffered identical injuries.” *Parsons v. Ryan*, 754 F.3d 657, 688
8 (9th Cir. 2014) (citing *Rodriguez v. Hayes*, 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
11 its business practices in a manner to be applied uniformly to the Settlement Class.

12 Further, resolution of hundreds of thousands of claims in one action is far superior
13 to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See*
14 Fed. R. Civ. P. 23(b)(3). For these reasons, the Court should certify the Settlement Class.

15 **IV. CONCLUSION**

16 Based on the foregoing, Plaintiffs respectfully request that the Court: (1) grant
17 Preliminary Approval to the Settlement; (2) certify for settlement purposes the proposed
18 Settlement Class, pursuant to Rule 23(b)(2), (b)(3) and (e) of the Federal Rules of Civil
19 Procedure; (3) appoint James Walters as Class Representative; (4) approve the Notice
20 Program set forth in the Agreement and approve the form and content of the Settlement
21 Class Notices; (5) approve and order the opt-out and objection procedures set forth in the
22 Agreement; (6) stay the California Action pending Final Approval; (7) appoint as Class
23 Counsel the law firms listed in Section 1.7 of the Agreement; and (8) schedule a Final
24 Approval Hearing during the week of January 6, 2019 (or whenever is convenient for the
25 Court, but no sooner than 30 days after the Motion for Final Approval is filed. A
26 [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement
27 Class and setting forth the various deadlines referenced herein and outlined in the
28 Agreement is attached as *Exhibit 3*.

1 Dated: June 19, 2019

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3 Respectfully Submitted:

/s/ Jeff Ostrow

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