

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JAMES WALTERS, on behalf of himself
12 and all others similarly situated,

13 Plaintiff,

14 v.

15 TARGET CORP.,

16 Defendant.

Case No.: 3:16-cv-1678-L-MDD

**AMENDED ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND
CERTIFICATION OF
SETTLEMENT CLASS [Doc. 155]**

17
18 Pending before the Court is the Plaintiffs James Walters' and the proposed class
19 members' (together "Plaintiffs") unopposed motion for preliminary approval of class
20 action settlement [ECF No. 155]. In the instant motion, Plaintiffs request the Court
21 pursuant to Federal Rule of Civil Procedure 23 to do the following: (1) grant preliminary
22 approval of the settlement, (2) certify the class for settlement purposes, (3) appoint James
23 Walters as class representative, (4) approve the notice program as contemplated in the
24 settlement agreement ("Agreement") and approve the form and content of the settlement
25 notices, (5) approve and order the opt-out and objection procedures set forth in the
26
27
28

1 Agreement, (6) stay the California Action¹ pending final approval, (7) appoint Class
2 Counsel as listed in the Agreement², and (8) schedule a final approval hearing. Upon
3 consideration of the instant motion, the Court hereby **GRANTS** Plaintiffs’ motion as
4 follows.

5 **I. Background**

6 On June 29, 2016, Plaintiff Walters filed the California action against Target seeking
7 monetary damages, restitution, and injunctive relief for Target’s alleged breach of the
8 Target Debit Card (“TDC”) Agreement (“TDC” Agreement”) and California law. *See* Doc.
9 1. On August 15, 2016, Plaintiff Walters filed a First Amended Complaint (“FAC”)
10 asserting the following causes of action: (1) breach of contract, including the implied
11 covenant of good faith and fair dealing; (2) unjust enrichment; (3) unconscionability; (4)
12 conversion; (5) violation of the “unfair” prong of California Unfair Competition Law
13 (“UCL”), Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (6) violation of the “fraudulent prong
14 of the UCL; (7) violation of the “unlawful” prong of the UCL; and (8) violation of the
15 Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code §§ 1750 *et seq.* *See* Doc. 3.
16 Between September 14, 2016 and March 8, 2018, the parties engaged in motion practice
17 from which Plaintiff’s FAC claims were limited, and Target eventually filed its Amended
18 Answer to the FAC. *See* Docs. 13, 29, 32, 33, 59. Subsequently, the parties engaged in
19 fact discovery, depositions, and exchanged expert reports. *See* Doc. 155-3 at 4. After the
20

21
22 ¹ The California Action encompasses the putative action filed by Plaintiff Walters against Defendant
23 Target Corporation (“Target”), on June 29, 2016, claiming the Target Debit Card (“TDC”) is deceptively
24 marketed. *See* Doc. 155-2 at 2. On September 12, 2018, Plaintiffs Dixon and Powell (“the Minnesota
25 plaintiffs”) filed a similar action against Target in Minnesota (“the Minnesota Action”). *Id.* at 3. On
26 January 22, 2019, the Minnesota plaintiffs filed a first amended complaint against Target, alleging similar
27 conduct as alleged in the California action and adding Plaintiff Polcare as another named plaintiff. *Id.*
28 All parties have agreed that the pending settlement serves as full settlement of both the California and
Minnesota actions, subject to final approval. *See* Doc. 155-2 at 2.

² In the memorandum in support of the instant motion, Plaintiffs request the Court “appoint as Class
Counsel the law firms listed in Section 1.7 of the Agreement[.]” Doc. 155-1 at 32. However, Class
Counsel is listed in Section 1.5 of the Settlement Agreement’s (“Settlement”). Doc. 155-2 at 4. The Court
finds that this is merely a editorial oversight and appointment of Class Counsel shall be discussed herein.

1 close of discovery, Target filed a motion for summary judgment, and Plaintiff filed a
2 motion for class certification.³ Docs. 90, 98.

3 On September 12, 2018, Plaintiffs Powell and Dixon commenced the Minnesota
4 Action.

5 In both actions, Plaintiffs allege that Target “omits and misrepresents the risks of
6 using the TDC,” resulting in cardholders suffering significant fee penalties when the
7 checking account linked to their TDC has insufficient funds. Doc. 155-1 at 9. Plaintiffs
8 further allege that the TDC card agreements fail to properly describe how the TDC operates
9 on a slower Automated Clearinghouse Network (“ACH Network”), unlike other debit card
10 networks, causing customers to incur fees for insufficient funds as the TDC does not
11 transmit requests to consumers’ banks for days after a purchase. *Id.*

12 On March 14, 2019, the Parties mediated both actions in Los Angeles, California.
13 *See* Doc. 155-3 at 5. Although the Parties did not settle that day, the progress made during
14 mediation laid the foundation to facilitate the Parties reaching settlement after several
15 weeks of negotiation. *See id.* On April 29, 2019, the parties filed a Notice of Settlement
16 and signed the Settlement on June 18, 2019. *See* Docs. 155-2 at 22-25; 155-3 at 5.

17 **II. Settlement**

18 Plaintiff proposes the Settlement class be an opt-out class under Rule 23(b)(2) and
19 (3) of the Federal Rules of Civil Procedure with the following definition:

20 All TDC holders in the United States who, within the Class Period, incurred
21 at least one [Returned Payment Fee (“RPF”)] RPF in connection with their
TDC, that was not refunded or waived.

22 Doc. 155-2 at 6. The Settlement defines the Class Period as the period between June 29,
23 2012 and the date this order is filed. *Id.* at 4.

24 The Settlement has a total cash value of \$8,222,330, consisting of the Cash
25 Settlement Amount of \$5,000,000 payable by Target to establish the Settlement Fund and
26

27
28 ³ Upon the filing of the instant motion, the Court denied as moot both motions. *See* Doc. 156.

1 the Debt Reduction Cash Amount of \$3,222,330. *See* Docs. 155-1 at 12; 155-2 at 4. The
2 Cash Settlement is earmarked to pay: (1) Settlement Class Member Cash Payments; (2)
3 any Court awarded attorneys’ fees and litigation costs; (c) any Court awarded Class
4 Representative Service Awards; and any Administrative Costs. *See* Doc. 155-2.
5 Settlement class members will not have to submit claims to receive benefits under the
6 Settlement. Doc. 155-1 at 12. Instead, the Settlement Administrator will automatically
7 distribute Settlement Class Member Cash Payments⁴ and Debt Reduction Cash Amounts⁵
8 to the Settlement Class. *Ibid.* To the extent any funds remain in the Settlement Fund
9 Account after the distributions, those funds will: “(a) be distributed to Settlement Class
10 Members who cashed their checks via a secondary distribution, if economically feasible;
11 or (b) through a residual *cypres* program benefitting the National Endowment for Financial
12 Education.” Doc. 155-1 at 13; *see* doc. 155-2 at 15. Under no circumstance will the funds
13 revert to Target, except where the Settlement is terminated according to its terms. *Id.*

14 The Settlement Agreement also provides three forms of non-monetary relief. First,
15 “Target agrees not to implement or assess RFP [*sic*] or any equivalent fee, in connection
16 with TDC transactions that are less than \$7.00, for a period of two years[.]” *See* Doc. 155-
17 2 at 7. Second, “Target agrees that any RFP [*sic*] charged will be the lesser of the RFP
18 [*sic*] as disclosed by the TDC Agreement or the amount of the TDC transaction that was
19 returned unpaid, for a period of two years[.]” *Ibid.* Third, the Parties will collaborate until
20 final approval of the Settlement to inform TDC holders about how use of the TDC could
21 cause RPFs due to non-sufficient funds or overdraft fees from the customer’s banking
22 institution(s). *Ibid.*

23
24
25 ⁴ “[T]he Net Settlement Fund will be divided by the number of Settlement Class Members who paid at
26 least one RPF that was not refunded or waived.” Doc. 155-1 at 12.

27 ⁵ “The Debt Reduction Cash Amount shall be used by Target to make Debt Reduction Payments toward
28 the outstanding balance on the Settlement Class Member’s TDC account in an amount of 25% of the first
RPF that was assessed not paid. Doc. 155-1 at 12.

1 **III. Legal Standard**

2 “[I]n the context of a case in which the parties reach a settlement agreement prior to
3 class certification, courts must peruse the proposed compromise to ratify both the propriety
4 of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938,
5 952 (9th Cir. 2003). The Court first weighs whether the proposed class meets the
6 certification requirements and next whether the proposed settlement is “fundamentally fair,
7 adequate, and reasonable.” *Id.* Rule 23(a) provides the four prerequisites for class
8 certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Fed. R.
9 Civ. P. 23(a). Under Rule 23(b)(3), a class action can exist if “the court finds the questions
10 of and fact common to class members predominate over any questions affecting only
11 individual members, and that a class action is superior to other available methods of fairly
12 and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). A class action can
13 also be maintained under Rule 23(b)(2) if “the party opposing the class has acted or refused
14 to act on grounds that apply generally to the class, so that final injunctive relief or
15 corresponding declaratory relief is appropriate respecting the class as a whole[.]” Fed. R.
16 Civ. P. 23(b)(2).

17 Additionally, the proposed settlement must be fair, consistent with counsel’s
18 fiduciary obligations to the class, and not the product of collusion, even if the proposed
19 terms are not ideal. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). A
20 court must balance the following factors in evaluating a proposed settlement:

21 [T]he strength of the plaintiffs’ case; the risk, expense, complexity, and likely
22 duration of further litigation; the risk of maintaining class action status
23 throughout the trial; the amount offered in settlement; the extent of discovery
24 completed and the stage of the proceedings; the experience and views of
25 counsel; the presence of a governmental participant; and the reaction of the
26 class members to the proposed settlement. *Id.* at 1026 (citations omitted).

27 ///

28 ///

 ///

 ///

1 **IV. Discussion**

2 **A. Class Certification**

3 When evaluating a class action settlement, courts must pay “undiluted, even
4 heightened attention” to the class certification requirements. *Amchem Prods., Inc. v.*
5 *Windsor*, 521 U.S. 591, 620 (1997).

6 1. Numerosity

7 If “the class is so large that joinder of all members is impracticable[.]” the
8 numerosity requirement is satisfied. Fed. R. Civ. P. 23(a)(1). Here, the numerosity
9 requirement is satisfied as the proposed Settlement Class consists of thousands of TDC
10 holders and joinder of all class members is impracticable.

11 2. Commonality

12 “The crux of . . . commonality [is] the rule requiring a plaintiff to show that ‘there
13 are questions of law or fact common to the class.’” *Wal-Mart Stores, Inc. v. Dukes*, 564
14 U.S. 338, 349 (2011). The common contention “must be of such a nature that it is capable
15 of classwide resolution—which means that determination of its truth or falsity will resolve
16 an issue that is central to the validity of each one of the claims in one stroke.” *Id.* at 350.
17 Plaintiffs point out the following questions of law and fact common to the class: (1)
18 whether Target’s TDC processing practices violate the TDC Agreement; and (2) whether
19 the TDC Agreement and allegedly deceptive TDC marketing injured all Settlement Class
20 members through imposition of RPFs. Doc. 155-1 at 30. The Court finds that
21 determination of the truth or falsity of Target’s TDC processing or marketing mechanisms
22 would necessarily determine the validity of these questions for each class member.
23 Accordingly, the commonality requirement is satisfied.

24 3. Typicality

25 Typicality requires “the claims or defenses of the representative parties [to be]
26 typical of the claims or defenses of the class[.]” Fed. R. Civ. P. 23(a)(3). The Ninth Circuit
27 has found the typicality requirement satisfied when the named plaintiffs do not set forth
28 different claims or subject a defendant to setting forth unique defenses from those brought

1 by any other class member. *See e.g., Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1463
2 (9th Cir. 1995). Plaintiffs contend the typicality requirement is satisfied because “[The
3 named] Plaintiffs’ claims are reasonably coextensive with those of the absent [class]
4 members[.]” Doc. 155-1 at 30. The Court agrees, and, moreover, the named plaintiffs here
5 suffered the same injuries due to the same practices as the absent class members. As such,
6 the typicality requirement is satisfied.

7 4. Adequacy

8 Adequacy evaluates whether “the representative parties will fairly and adequately
9 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). A named plaintiff adequately
10 represents a class if the plaintiff “does not have conflicts of interest with the proposed
11 class” and is “represented by qualified and competent counsel.” *See Wal-Mart Stores, Inc.*,
12 564 U.S. at 350 n.5. Here, the Court agrees with Plaintiffs’ contention that their interests
13 coexist with the absent class members in that both have the same interest in the Settlement’s
14 relief, relief from TDC fees. The Court also finds that class counsel is competent due to
15 class counsel’s purported experience in litigation, certification, trial and settlement of
16 nationwide class action cases. *See* Doc. 155-3 at 3. Accordingly, the adequacy
17 requirement is satisfied.

18 Therefore, Plaintiffs satisfied each Rule 23(a) class certification prerequisite.

19 5. Type of Class Action

20 Plaintiff contend that certification is appropriate here because “questions of law or
21 fact common to members of the Settlement Class predominate over any questions affecting
22 only individual members,” and the superior method of fairly and efficiently adjudicating
23 the action is through class action. Doc. 155-1 at 31 (citing Fed. R. Civ. P. 23(b)(3)).

24 Predominance weighs “whether proposed classes are sufficiently cohesive to
25 warrant adjudication by representation.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022
26 (9th Cir. 1998). “Rule 23(b)(3) requires a showing that questions common to the class
27 predominate.” *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S.
28 455, 459 (2013). The predominance requirement is satisfied as questions of fact and law

1 common to the Settlement Class, such as class members’ contractual relationship with
2 Target via the TDC Agreement or Target’s liability for the RPF fees, outweigh any
3 individual issues that may arise. Despite Plaintiffs’ failure to assert any viable contention
4 that class action is superior to other available methods, it plainly evident to the Court that
5 class action is the superior method for fair and efficient adjudication here. *See* Doc. 155-
6 1 at 31-32; Fed. R. Civ. P. 23(b)(3)(A)-(D). As such, the Court could certify the Settlement
7 Class under Rule 23(b)(3).

8 Notwithstanding, Plaintiffs also pursued conditional certification under Rule
9 23(b)(2). A class action can be maintained under Rule 23(b)(2) if “the party opposing the
10 class has acted or refused to act on grounds that apply generally to the class, so that final
11 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a
12 whole[.]” Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2)’s requirements “are unquestionably
13 satisfied when members of a putative class seek uniform injunctive or declaratory relief
14 from policies or practices that are generally applicable to the class as a whole. *Parsons v.*
15 *Ryan*, 754 F.3d 657, 688 (9th Cir. 2014) (citation omitted). The Court finds that the
16 imposition of and relief from Target’s RPF fees related to its TDC is ground that applies
17 generally to the class. Here, the Parties have agreed that Target will change its business
18 practices as it pertains to RPFs associated with its TDC in a manner which applies
19 uniformly to the Settlement Class. As such, Rule 23(b)(2) is satisfied and the Court
20 certifies the class under this rule.

21 For the above-mentioned reasons, the Settlement Class defined as “All TDC holders
22 in the United States who, within the Class Period, incurred at least one RPF in connection
23 with their TDC, that was not refunded or waived[.]” is certified for settlement purposes.

24 **B. Settlement Terms**

25 The Ninth Circuit maintains a “strong judicial policy” that favors the settlement of
26 class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The
27 court’s responsibility at the preliminary approval stage is to determine whether the
28 settlement falls “within the range of possible approval.” *See* Manual for Complex

1 Litigation, Fourth § 21.632 (FJC 2004). If “the proposed settlement appears to be the
2 product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does
3 not improperly grant preferential treatment to class representatives or segments of the class,
4 and falls within the range of possible approval[,]” then preliminary approval the settlements
5 should granted. *In re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal.
6 2007) (quoting Manual for Complex Litigation, Second § 30.44 (FJC 1985)).

7 1. Product of Non-collusive Negotiations

8 “Settlements reached with the help of a mediator are likely non-collusive.” *Barbosa*
9 *v. MediCredit, Inc.*, at *6 (C.D. Cal. May 1, 2015) (citing *Satchell v. Fed. Express Corp.*,
10 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) (“The assistance of an experienced
11 mediator in the settlement process confirms that the settlement is non-collusive.”)). The
12 Parties here engaged in formal mediation before an experienced mediator for a full day,
13 after completing discovery. The Parties thereafter continued their settlement discussions
14 for several weeks, following mediation, with the mediator’s assistance. As such, the Court
15 finds that this settlement was the product of arm’s-length negotiation. Accordingly, the
16 Court finds this factor weighs in favor of approval.

17 2. No Obvious Deficiencies

18 “[S]ettlement avoids the risks of extreme results on either end, *i.e.*, complete or no
19 recovery. Thus, it is plainly reasonable for the parties at this stage to agree that the actual
20 recovery realized, and risks avoided here outweigh the opportunity to pursue potentially
21 more favorable results through full adjudication.” *Dennis v. Kellogg Co.*, 2013 WL
22 6055326, at *3 (Nov. 14, 2013). The Court concludes that no obvious deficiencies to the
23 settlement exists here. The Settlement includes monetary relief of a \$5,000,000 cash fund
24 and \$3,222,230 in debt reduction funds and non-monetary relief consisting of modification
25 of TDC disclosures, an increase in minimum transaction amount before assessing an RPF,
26 and a commitment that RPFs will not exceed the transaction mount that incurred the fee.
27 *See* Doc. 155-2 at 7. Depending on the damages model referenced, Plaintiffs contend the
28 \$5,000,000 cash settlement alone provides the Settlement Class approximately 20%-40%

1 of their probable damages, without the attendant risk of further litigation. Doc. 155-1 at
2 23. The Parties agree that settlement prevails over the risk of continued litigation. *See*
3 Doc. 155-3 at 7-8. Continued litigation could prove to be difficult, expensive, time
4 consuming, and possibly fruitless as motions for class certification and summary judgment
5 were contested and pending prior to settlement. Thus, this factor tilts in favor of approval.

6 3. No Preferential Treatment

7 “Although [the Ninth Circuit] ha[s] approved incentive awards for class
8 representatives in some cases, [it has instructed] district courts to scrutinize carefully the
9 awards so that they do not undermine the adequacy of the class representatives.” *Radcliffe*
10 *v. Experian Solutions Inc.*, 715 F.3d 1157, 1163 (9th Cir. 2013) (reversing the district
11 court’s class action settlement approval). In *Radcliffe*, the court questioned, but did not
12 determine, “whether class representatives could be expected to fairly evaluate awards
13 ranging from \$26 to \$750 is a fair settlement value when they would receive \$5,000
14 incentive awards.” *Id.* at 1165. The Ninth Circuit in *In re Online DVD-Rental Antitrust*
15 *Litigation*, 779 F.3d 934 (9th Cir. 2015) revealed that it examines the following factors
16 when evaluating incentive awards: “the number of named plaintiffs receiving incentive
17 payments, the proportion of the payments relative to the settlement amount, and the size of
18 each payment.” *Id.* at 947 (citing *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)).

19 Here, the class representative service awards amounts are reasonable in light of the
20 time, effort, and risk each class representative assumed. Plaintiff Walters will apply for an
21 award not exceeding \$10,000⁶, and Plaintiffs Dixon, Powell, and Polcare will apply for an
22 award not exceeding \$3,000. Doc. 155-1 at 15. Using the *Staton* factors, each named
23 plaintiff is receiving an incentive award under the Settlement Agreement, the maximum
24 amount of incentive awards, collectively, would equate to less than one percent of the total
25

26
27 ⁶ In the Long Form Notice, the Parties represent that Class Counsel will request Class Representative
28 Service award not to exceed \$7,500 for Plaintiff Walters. Doc. 155-2 at 37. The Court will evaluate the
amount and reasoning supporting the request for Plaintiff Walters’ Class Representative Service Award
before final approval is granted.

1 settlement amount, and each payment is capped at a modest amount. These awards merely
2 compensate the class representatives for the risk they assumed and the successful assistance
3 they provided in this case. For example, the class representatives submitted to interviews
4 with Class Counsel, located and forwarded responsive documents and information, and
5 participated in conferences with Class Counsel. Doc. 155-3 at 6-7. Specifically, Plaintiff
6 Walters provided discovery documents and sat for deposition. *Id.* The Court finds the
7 class representatives adequately represent the class in light of their levels of participation
8 in a complicated case in which the absent class members will receive favorable monetary
9 and non-monetary relief without any effort. Accordingly, this factor favors approval.

10 4. Effectiveness of Distribution of Class Relief

11 The Court finds the method of processing and distributing class-member claims is
12 adequate. Here, the Settlement Class members do not have to submit claims to receive
13 relief benefits because the settlement administrator will automatically distribute the
14 Settlement Class Member Cash Payments and the Debt Relief Payments. Doc. 155-3 at 6.
15 In fact, the Settlement Administrator will distribute the Net Settlement Fund to the
16 Settlement Class within 30 days following the Effective Date, as contemplated in the
17 Settlement Agreement. *Id.*; Doc. 155-2 at 4. The Settlement Administrator will mail check
18 payments to the Settlement Class from the Net Settlement Fund. Doc. 155-2 at 13. Within
19 15 business days of this order, Target will provide the Settlement Administrator with the
20 following Settlement Class members' information:

21 “(i) name; (ii) last known e-mail address if available; (iii) last known mailing
22 address; (iv) TDC Account Number or some sort of unique identifier that can
23 be used to identify each separate Settlement Class member; (v) the date and
24 amount of the first RPF incurred by each Settlement Class member during the
25 Class Period that has not been refunded or waived; and (vii) [*sic*] for each RPF
26 in item number (v), an identifier that distinguishes whether the RPF was paid
27 by the customer or remains due and owing. The Settlement Administrator
shall use the data provided by Target to make the calculations required by the
Settlement, and the Settlement Administrator shall share the calculations with
Class Counsel.”

28 Doc. 155-2 at 10 ¶ 2.5 (b).

1 The Settlement Agreement provides the Settlement Administrator fair and clear
2 instructions on how to process each Settlement Class members' claim. For each class
3 member who has paid all or part of their first RPF incurred during the Class Period, a Cash
4 Payment will be distributed equal to that class member's *pro rata* share of the Net
5 Settlement Fund⁷ based on the dollar amount of the first RPF that class member paid. *See*
6 *id.* at 8 ¶ 2.2(b)(5). Alternatively, for each class member who has not paid their first RPF
7 incurred during the Class Period at the time Cash Payments are to be distributed, "the Debt
8 Reduction Cash Amount will be used by Target to reduce such outstanding RPF by twenty-
9 five percent [(25%)]." *Id.* at ¶ 2.2(b)(6).

10 The Court finds the effectiveness of the proposed method for processing and
11 distributing the class relief adequate because of its clear processing guidelines and
12 automatic distribution to absent class members. Therefore, this consideration also favors
13 approval.

14 5. Attorneys' Fee Award and Timing of Payment

15 In order to determine the fairness and adequacy of a settlement, "a district court must
16 carefully assess the reasonableness of a fee amount spelled out in a class action settlement
17 agreement." *Staton*, 327 F.3d at 963. "In a certified class action, the court may award
18 reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties'
19 agreement." Fed. R. Civ. P. 23(h). "[C]ourts have an independent obligation to ensure
20 that the award, like the settlement itself, is reasonable, even if the parties have already
21 agreed to an amount." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th
22 Cir. 2011) (citations omitted).

23 In a common fund case, district courts may use either the percentage-of-the-fund
24 method or the lodestar method to calculate an appropriate attorneys' fee award. *Viciano v.*
25

26
27 ⁷ The Net Settlement Fund will be divided by the number of Settlement Class members who paid at least
28 one RPF that was not refunded or waived to determine the specific Cash Payment amount. Doc. 155-1 at
12.

1 *Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002); *In re Wash. Pub. Power Supply Sys.*
2 *Sec. Litig.*, 19 F.3d 1291, 1295 (9th Cir. 1994). “The typical range of acceptable attorneys’
3 fees in the Ninth Circuit is 20% to 33 1/3% of the total settlement value[.]” *Vasquez v.*
4 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010). When applying the
5 percentage-of-the-fund method, an attorneys’ fee award of “twenty-five percent is the
6 ‘benchmark’ that district courts should award.” *In re Pac. Enters. Sec. litig.*, 47 F.3d 373,
7 379 (9th Cir. 1995) (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d
8 1301, 1311 (9th Cir. 1990)). Court “may adjust the benchmark when special circumstances
9 indicate a higher or lower percentage would be appropriate.” *In re Pac. Enters. Sec. Litig.*,
10 47 F.3d at 379 (citing *Six (6) Mexican Workers*, 904 F.2d at 1311). The following factors
11 have been used as grounds to adjust the percentage upward or downward: (1) the results
12 achieved; (2) the risks of litigation; (3) the skill required and the quality of the work; (4)
13 the contingent nature of the fee; (5) the burdens carried by the class counsel; and (6) the
14 awards in similar cases. *Monterrubio v. Best Buy Stores, LP*, 291 F.R.D. 443, 455 (E.D.
15 Cal. 2013) (citation omitted); *Craft v. San Bernardino*, 624 F.Supp.2d 1113, 1116-17 (C.D.
16 Cal. 2008). Any class member must be allowed an opportunity to object to the fee motion
17 itself, aside from any objection the class member may have to the preliminary notice that
18 such a motion will be filed. *See In re Mercury Interactive Corp. Sec. Litig.* 618 F.3d 988,
19 993-95 (9th Cir. 2010).

20 Under the Settlement Agreement, the Parties have agreed that Class Counsel can
21 apply for an award from the Settlement not to exceed 30% (\$2,466,699) of the Settlement
22 Value. Doc. 155-2 at 14. Class Counsel is also entitled to “apply for reimbursement for
23 costs and expenses incurred in the Actions.” *Ibid.* The Settlement Administrator is
24 required to pay Class Counsel from the Settlement Fund within 10 days of the Effective
25 under the Settlement Agreement. *Id.* at 15. The Court will scrutinize Class Counsel’s
26 request for an award of Class Counsel’s attorneys’ fees, costs, and expenses upon filing of
27 the motion for final approval of class action settlement. At this point, the Court finds the
28

1 Class Counsel’s award provision reasonable because of its language that Class Counsel
2 may *apply* for an award *not to exceed* 30% of the Settlement value.

3 Class Counsel offers no contentions about the fees it will seek at this point.
4 Notwithstanding, the Court advises that circumstances necessitating an attorneys’ fee
5 award that exceeds the 25% benchmark are not obvious here. *See Six (6) Mexican Workers*,
6 904 F.2d at 1311 (affirming a twenty-five percent award where “the litigation lasted more
7 than 13 years, obtained substantial success, and involved complicated legal and factual
8 issues”). For that reason, the Court suggests Class Counsel file a thorough fee award
9 motion prior to the Final Approval Hearing that details the hours reasonably spent
10 representing Plaintiffs in this action. Class Counsel must also address each of the 25%
11 benchmark adjustment factors identified above.

12 **C. Notice Program**

13 For a Rule 23(b)(2) class, the court may direct appropriate notice. Fed. R. Civ. P.
14 23(c)(2)(A). In the class action settlement context, “[t]he parties must provide the court
15 with information sufficient to enable it to determine whether to give notice of the proposal
16 to the class.” Fed. R. Civ. P. 23(e)(1)(A). “[T]he mechanics of the notice process are left
17 to the discretion of the court subject only to the broad ‘reasonableness’ standards imposed
18 by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.3d 114, 120 (8th Cir. 1975)
19 (see citing 7A C. Wright and A. Miller, *Federal Practice and Procedure*, Civil s 1797 at 237
20 (1972)).

21 The Court approves the Notice Program pursuant to the modifications discussed
22 below. Here, the notice consists of three layers: (1) email notice to Settlement Class
23 members for whom Target maintains their email addresses (Email Notice”); (2) direct mail
24 postcard notice to all Settlement Class members for whom Target does not have an email
25 address (“Postcard Notice”); and (3) Long Form Notice (“Long Form”) containing further
26 settlement details, available via the settlement website and via U.S. mail upon request. *See*
27 *Doc. 155-2 at 27-39*. The Long Form informs each class member that they can “object to
28 any part of the Settlement, the Settlement as a whole, Class Counsel’s requests for fees and

1 expenses and/or Class Counsel’s request for Service Awards for the Class
2 Representatives.” *See* Doc. 155-2 at 37. The Long Form and the Settlement agreement,
3 as currently drafted, demand that any objection by a class member be made, by letter,
4 including the following to be valid: (1) the case name and number; (2) the objector’s name,
5 address, telephone number, and signature; (3) an explanation of the nature of the objection;
6 (4) citation to any legal authority supporting the proposed objection; (5) the number of
7 times the objector has objected to a class action settlement in the past five years and the
8 caption of the caption for any such case(s); (6) the name of any counsel representing the
9 objector; and (7) a statement indicating whether the objector will appear at the Final
10 Approval hearing. *See* Doc. 155-2 at 12, 37. However, the Court finds these objection
11 requirements to be too onerous on a potential objector in light of the requirements set forth
12 in Rule 23(e)(5)(A). *See* Fed. R. Civ. P. 23(e)(5)(A) (“[O]bjection must state whether it
13 applies only to the objector, to a specific subset of the class, or to the entire class, and also
14 state with specificity the grounds for the objection.”). As such, the Court instructs the
15 Parties to eliminate objection requirements (5) and (7) from the above-mentioned list.

16 Additionally, the Court instructs the Parties to strike, from section 15 of the Long
17 Form, the sentence reading, “The Parties have the right to take discovery, including
18 subpoenas and depositions, from any objector.” Doc. 155-2 at 37. Upon the Court’s
19 reading, the sentence’s tone and placement generates sentiments of intimidation. The
20 Court also seeks to put the Parties and any potential objector on equal footing at this point
21 in the litigation. As such, the Parties will not be granted an absolute right to discovery
22 through this Notice language as it is understood that “[c]lass members who object . . . do
23 not have an absolute right to discovery[.]” *Hemphill v. San Diego Ass’n of Realtors, Inc.*,
24 225 F.R.D. 616, 619 (S.D. Cal. 2005) (compiling cases). With that in mind, if a party seeks
25 to engage in discovery related to an objection, the Parties or any objector shall file a motion
26 for leave to engage in discovery setting forth: (1) the nature and amount of previous
27 discovery; (2) whether there is a reasonable basis for the discovery requests; and (3) the
28 interests of the discovery-seeking party. *Id.* at 620.

1 Other than these modifications, the Court finds the Notice Program to be
2 satisfactory. Upon the filing of this order, the Settlement Administrator, Epiq Systems,
3 shall: (1) obtain from Target and Class Counsel the names, physical addresses, or email
4 addresses of the Settlement Class members (to the extent reasonably available); (2) verify
5 and update the addresses (to the extent necessary); (3) establish and maintain an automated
6 toll-free telephone line for Settlement Class Members to call with settlement-related
7 inquiries, to answer the class member’s inquiries, and to accept requests for Long Forms
8 to be sent in the mail; (4) establish and maintain a website as contemplated in the Settlement
9 Agreement. *See* Doc. 155-2 at 10-11. As represented in the Settlement Agreement, the
10 Notice Program shall be completed no later than 70 days after the entry of this order. Doc.
11 155-2 at 16. Moreover, the Settlement Administrator shall serve CAFA notice on the
12 appropriate state and federal officials, with a compact disc containing all the documents
13 required by 28 U.S.C. § 1715(b)(1)-(8). *See id.* at 19. Thus, this consideration weighs in
14 favor of approval.

15 **D. Release of Claims**

16 “[A] federal court may release not only those claims alleged in the complaint, but
17 also a claim ‘based on the identical factual predicate as that underlying the claims in the
18 settled class action.’” *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th
19 Cir. 2006) (citing *Class Plaintiffs*, 955 F.2d at 1287)). “[W]hile a release need not slavishly
20 echo the claims in the complaint, it must appropriately track and not exceed them.” *Myles*
21 *v. AlliedBarton Sec. Servs., LLC*, 2014 WL 6065602, at *3 (N.D. Cal. Nov. 12, 2014)
22 (citation omitted). The proposed releases are written in a manner such that it appears to be
23 appropriately limited to claims arising out of the marketing of the TDC, the TDC
24 Agreement, its fees, Target’s actions alleged in the Actions, and the administration of this
25 Settlement. This consideration weighs in favor of approval.

26 **V. Conclusion**

27 For the reasons stated above, the Court hereby orders as follows:
28

1 1. The Court finds the settlement is preliminarily fair, reasonable, and adequate to
2 the proposed class;

3 2. The following settlement class is preliminarily certified for settlement purposes
4 under Rule 23(a) and Rule 23(b)(2):

5 All TDC holders in the United States who, between June 29, 2012 and **the**
6 **date below**, incurred at least one RPF [Returned Payment Fee] in connection
7 with their TDC, that was not refunded or waived.

8 3. Plaintiff James Walters is appointed as Class Representative in the California
9 Action, and Plaintiffs Michelle Dixon, Charles Powell, and Deana Polcare are
10 appointed as Class Representatives in the Minnesota Action;

11 4. The Notice Program is as set forth in the Settlement Agreement and modified by
12 this order is approved, the form and content of such notices should be modified
13 accordingly. The Court cautions the Parties to review both the Settlement
14 Agreement and the three notices for typographical, grammatical, and punctuation
15 errors before the Notice Program commences as the Court identified errors in
16 review of this motion. Notwithstanding, the following schedule shall govern the
17 filing deadlines for this settlement:

18 a. Notice shall be completed no later than **February 14, 2020**;

19 b. The Motion for Class Representative Service Awards and Fee and Expense
20 Application shall be filed no later than **February 14, 2020**;

21 c. Absent Settlement Class Members shall opt out or object to any part of the
22 Settlement, the Settlement as a whole, Class Counsel's requests for fees
23 and expenses, and/or Class Counsel's Request for Service Awards for the
24 Class Representatives, as instructed in the Settlement and Class Notices,
25 no later than **April 17, 2020**;

26 d. The Parties' deadline to file a Motion for Final Approval of Class Action
27 Settlement and to file a response to Absent Settlement Class Members'
28 objections is **May 22, 2020**; and

1 e. The Court shall hold a Final Approval of Class Action Settlement hearing
2 on **June 22, 2020** at **10:30 a.m.**

3 5. The opt-out and objection procedures as set forth in the Settlement Agreement
4 and modified by this order are approved;

5 6. The California Action is stayed pending final approval of the settlement; and

6 7. Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Kaliel PLLC, and Tycko &
7 Zavareei LLP are appointed as Class Counsel.

8 **IT IS SO ORDERED.**

9 Dated: December 5, 2019

10 
11 Hon. M. James Lorenz
12 United States District Judge