

**SUPERIOR COURT**  
(Class Actions)

CANADA  
PROVINCE OF QUEBEC  
DISTRICT OF MONTREAL

No: 500-06-000686-143

DATE: May 28, 2018

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**PRESIDED BY THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.**

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**EVAN ZUCKERMAN**  
Plaintiff

v.

**TARGET CORPORATION INC.**  
Defendant

And

**FONDS D'AIDE AUX ACTIONS COLLECTIVES**  
Mise en cause

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**JUDGMENT**

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**INTRODUCTION**

[1] On March 13, 2014, the Plaintiff Evan Zuckerman filed a Motion to Authorize the Bringing of a Class Action and to Ascribe the Status of Representative which was amended on November 14, 2014 with the Court's approval (hereinafter the "Amended Application for Authorization") against Defendant Target Corporation Inc., pursuant to Articles 1003 and following (now Articles 575 and following) of the *Code of Civil Procedure*.

[2] The proposed class action related to a breach of Target's computer network in the United States by unknown hackers between November 27, 2013 and December 15, 2013. It was alleged that the payment card data and/or personal information of persons who had provided their personal information to Target in the United States before

December 15, 2013 and/or had shopped at a Target store in the United States between November 27, 2013 and December 15, 2013, had been lost or stolen.

[3] On January 18, 2017, the Court granted in part the Amended Application for Authorization and authorized the Plaintiff to bring a class action against Target.<sup>1</sup>

[4] The Parties participated in a Judicial Settlement Conference presided by Justice Louisa Arcand of the Superior Court on August 3, 2017 and arrived at an agreement in principle to settle the class action.

[5] On March 23 and 26, 2018, the Parties executed the Settlement Agreement, Transaction and Release (hereinafter the "Settlement Agreement") as a full and final settlement of the class action.<sup>2</sup>

[6] The Court is now seized with the Application for Approval of a Settlement and for Approval of Class Counsel Fees (hereinafter the "Application"), whereby, pursuant to Section 3 of the Settlement Agreement, the parties jointly request that this Court approve the Settlement Agreement.

[7] The Fonds d'aide aux actions collectives was duly notified of this Application. The Fonds does not oppose the Application, save for one issue which will be discussed below.

[8] Except as otherwise specified in, or modified by, this Judgment, capitalized terms used herein shall have the meaning ascribed in the Settlement Agreement.

## **SETTLEMENT AGREEMENT**

[9] The Plaintiff and Target have agreed to the terms of the Settlement Agreement, the whole subject to the approval of the Court, without any admission of liability whatsoever by Target and for the sole purpose of resolving the dispute between the parties.

[10] The following is a summary of the key terms of the Settlement Agreement.

[11] The Settlement Agreement provides that Target will pay an amount not exceeding \$345,000 (the "Cap") which will be used to pay an amount of up to \$5,000 to each Class Member who provided documentary evidence of his or her losses and up to \$50 to each Class Member without such evidence.

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<sup>1</sup> 2017 QCCS 110.

<sup>2</sup> Exhibit R-1.

[12] Target will separately pay the fees of the Claims Administrator Rust Consulting Inc. and the costs related to the notice program,<sup>3</sup> the Class Counsel's Fees of \$150,000 plus taxes, and the Plaintiff's claim in the amount of \$4,999.99.

[13] Should the Cap be reached, all undocumented claims will be reduced on a pro-rata basis. The amount of the actual payments will therefore depend on the total monetary amount of valid and approved claims received.

[14] To receive a payment, each Class Member will have to submit a valid and timely Claim Form (Schedule D of the Settlement Agreement) either by mail or electronically. There is a process to resolve any contested claims.

[15] In exchange, the Class Members will grant a full and final release and discharge to Target for all events surrounding this issue, pursuant to section 6 of the Settlement Agreement.

[16] Finally, the parties have confirmed that the claims of any Class Members in the Province of Quebec will be reduced by the percentage payable to the Fonds d'aide aux actions collectives in accordance with the *Act respecting the Fonds d'aide aux actions collectives*<sup>4</sup> and the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*.<sup>5</sup>

## CLASS NOTICE

[17] On March 6, 2018, in accordance with the Settlement Agreement, the Court approved a Class Notice and a Notice Program for disseminating the Class Notice to potential Class Members. The Claims Administrator proceeded to disseminate the Class Notice in accordance with the Notice Program.<sup>6</sup>

[18] The Class Notice and all of the materials disseminated and made available to Class Members, as well as any and all future information to be disseminated, are in both French and in English.

[19] The Class Notice explained to the potential Class Members the steps that they needed to take to be excluded from the class or to oppose the Settlement Agreement. The Claims Administrator did not receive any requests for exclusion or any oppositions

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<sup>3</sup> See Exhibit R-6. The Claims Administrator has billed US\$55,608.46 through April 2018, not including the cost of publishing the notices of US\$36,016.18. The Claims Administrator estimates that its fees for the balance of its work through October 2018 will be US\$30,000-US\$40,000, for a total of US\$120,000-US\$130,000.

<sup>4</sup> CQLR, c. F-3.2.0.1.1.

<sup>5</sup> CQLR, c. F-3.2.0.1.1, r.2.

<sup>6</sup> Exhibit R-2.

to the Settlement Agreement.<sup>7</sup> Further, no one came to the hearing to ask for exclusion or to oppose the Settlement Agreement.

### SETTLEMENT APPROVAL

[20] Under Article 590 C.C.P., a transaction is valid only if it is approved by the Court. The Court must consider the following factors before approving the Settlement Agreement:

- les probabilités de succès du recours;
- l'importance et la nature de la preuve administrée;
- les termes et les conditions de la transaction;
- la recommandation des procureurs et leur expérience;
- le coût des dépenses futures et la durée probable du litige;
- la recommandation d'une tierce personne neutre, le cas échéant;
- le nombre et la nature des objections à la transaction;
- la bonne foi des parties;
- l'absence de collusion.<sup>8</sup>

[21] These factors ought not to be applied in a formulaic manner and not all nine factors need to be satisfied. Instead, the Court should look at the totality of these factors in light of the specific circumstances involved.<sup>9</sup>

[22] In the present matter, the Court finds that:

- (i) Continued litigation in this class action would be complex, lengthy, and expensive. The trial would include expert witnesses and witnesses coming from the United States on the issue of fault and would involve many more hours of attorney time. Moreover, given the right to appeal, the trial would not necessarily end the litigation;
- (ii) The outcome of the class action is not a foregone conclusion. Although the data breach is admitted by Target, there is an issue as to whether Target was at fault in the way in which it stored the data prior to the breach or the

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<sup>7</sup> Exhibits R-2 and R-5.

<sup>8</sup> *9085-4886 Quebec inc. c. Visa Canada Corporation*, 2015 QCCS 5921, par. 24; *Richard c. Volkswagen Group Canada inc.*, 2012 QCCS 5534, par. 45.

<sup>9</sup> *Comité d'environnement de Ville-Émard (CEVE) c. Stodola*, 2016 QCCS 1834, par. 18.

way in which it responded to the data breach. Moreover, Target also contested whether the stress and inconvenience allegedly suffered by Class Members was compensable in damages and whether this was an appropriate case for punitive damages. The prior case law is not clear on these issues;

- (iii) The benefits offered in the Settlement Agreement are fair and adequate, provide significant compensation to the Class Members, and are worthy of approval:
- a) Class Members can receive \$50 by simply completing a Claim Form without providing any documentation in support of their damages. The Court considers this amount to be fair and adequate for Class Members who have suffered only stress or inconvenience. The simplified procedure for making a claim and immediate payment are clearly benefits to the Class Members;
  - b) Class Members who believe that they have suffered losses greater than \$50 can claim a greater amount and they will be compensated for their actual proven losses up to a cap of \$5,000 each. This seems fair in that they would be required eventually to prove their claims if the matter went to Court. The cap of \$5,000 is unlikely to cause any prejudice to any Class Member because, more than four years after the fact, no Class Member has alleged a loss which could exceed \$5,000;
  - c) The overall Cap of \$345,000 is unlikely to cause any prejudice to the Class Members. It would require 6,900 Class Members claiming \$50 each, or 69 Class Members claiming \$5,000 each, or some combination, to reach the Cap. To date, only 29 claims at the \$50 level have been filed;<sup>10</sup>
- (iv) The Settlement Agreement compares favourably to the settlement agreement negotiated in the U.S. consumer class action arising from the same data breach. In the U.S. settlement, a settlement fund of US\$10 million (plus attorney's fees of US\$6.75 million) was created for the benefit of a class estimated at 100 million people.<sup>11</sup> In the present matter, the Court estimated that there are 60,000 Class Members,<sup>12</sup> who could share \$345,000;

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<sup>10</sup> Exhibit R-5.

<sup>11</sup> Settlement Agreement and Release dated March 9, 2015. This Agreement has been approved by the trial judge but an appeal is pending.

<sup>12</sup> *Supra* note 1, par. 90.

- (v) Even if the Class Members could potentially recover a larger judgment after a trial, the additional delay and risks would, in light of the time value of money, make future recoveries less valuable than this current recovery. The Settlement Agreement provides an immediate benefit to Class Members and avoids unnecessary expense and delay;
- (vi) The Settlement Agreement was reached by experienced, fully-informed counsel after arm's length negotiations, in the context of a settlement conference presided by a judge of the Superior Court. Moreover, counsel, who have extensive expertise in the area of class actions and who are most closely acquainted with the facts of the underlying litigation, are recommending the Settlement Agreement;
- (vii) No Class Member has filed an objection to the Settlement Agreement or request for exclusion from the Class;
- (viii) There is no evidence to suggest that the parties are not in good faith or that the parties are colluding with each other.

[23] At the hearing of the Application, the Court raised the issue that the Settlement Agreement provides for individual recovery payable by Target up to a maximum of \$345,000 and not collective recovery of \$345,000. This means that Target is only responsible to pay the Class Members who file Claim Forms, up to the maximum amount, as opposed to paying the full amount of \$345,000 to the Claims Administrator with no right to receive back the undistributed balance. In other words, under the Settlement Agreement, Target keeps the unclaimed portion of the \$345,000. If the take-up rate is very low, Target will have settled this matter and obtained a release very cheaply. From a legal point of view, the issue is whether such a settlement achieves the goal of behavior modification which has been identified as one of the goals of class actions.

[24] After considering the arguments raised by the parties, the Court is satisfied that its concern about the amount that Target might pay is not a sufficient ground to refuse to approve the Settlement Agreement.

[25] First, the Court notes that this is a case where individual recovery appears to be appropriate. At this stage at least, the evidence does not allow a sufficiently precise determination of the total claim amount. In any case where there is individual recovery, there is a risk of a low take-up rate and therefore a low payment by the defendant. If the amounts paid to the Class Members in this case end up not being substantial, it will be because the Class Members did not bother to file Claim Forms.

[26] In any event, Target will pay a substantial amount. In addition to whatever amounts are claimed by the Class Members up to the Cap of \$345,000, Target will pay

\$4,999.99 to the Plaintiff, \$150,000 plus taxes to Class Counsel and US\$120,000-US\$130,000 to the Claims Administrator.

[27] Further, it is important to view this class action in context. Target is a U.S. corporation that does not carry on business in Canada. The data breach occurred in the United States. Canadians were affected only if they shopped at Target in the United States or if they provided personal information to Target in the United States. There were a number of class actions taken against Target in relation to the data breach, including the U.S. consumer class action and the U.S. financial institutions class action. In the settlement agreement for the U.S. consumer class action, Target has undertaken to take certain steps to better protect in the future the information that it receives from customers, thereby arguably satisfying the goal of behaviour modification.

[28] As a result, this appears to be a case where it is appropriate for the Québec Court to focus more on issues of compensation to the Québec Class Members than on behavior modification of a U.S. defendant that did not carry on business in Canada.

[29] The Court therefore approves the Settlement Agreement as fair, reasonable and in the best interest of the Class Members.

#### **CLASS COUNSEL'S FEES APPROVAL**

[30] The Court must review Class Counsel's Fees in light of sections 7, 101, and 102 of the *Code of Professional Conduct of Lawyers*,<sup>13</sup> in the context of a class action.<sup>14</sup>

[31] Section 102 of the *Code of Professional Conduct of Lawyers* states:

**102.** The fees are fair and reasonable if they are warranted by the circumstances and proportionate to the professional services rendered. In determining his fees, the lawyer must in particular take the following factors into account:

- (1) experience;
- (2) the time and effort required and devoted to the matter;
- (3) the difficulty of the matter;
- (4) the importance of the matter to the client;
- (5) the responsibility assumed;
- (6) the performance of unusual professional services or professional services requiring special skills or exceptional speed;

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<sup>13</sup> CQLR, c. B-1, r.3.1.

<sup>14</sup> 9085-4886 *Quebec Inc. c. Visa Canada Corporation*, 2015 QCCS 5921.

(7) the result obtained;

(8) the fees prescribed by statute or regulation; and

(9) the disbursements, fees, commissions, rebates, extrajudicial costs or other benefits that are or will be paid by a third party with respect to the mandate the client gave him.

[32] In particular, the Court makes the following findings with respect to the amount of Class Counsel Fees provided for in the Settlement Agreement:

- (i) The Plaintiff entered into a Professional Mandate & Attorney's Fee Agreement (hereinafter the "Fee Agreement") with Class Counsel on March 3, 2014.<sup>15</sup> The Fee Agreement provides that Class Counsel will be paid its disbursements plus the higher of (1) 33% of the amount recovered, or (2) 3.5 times the straight docketed time;
- (ii) Pursuant to this Fee Agreement, Class Counsel assumed all of the financial risks associated with initiating, financing, and maintaining the litigation. Class Counsel invested a substantial amount of time and money to prosecute this case without any guarantee of compensation and would have received no compensation or even reimbursement of its expenses had this case not had a successful outcome;
- (iii) The amount of the Class Counsel's Fees is equal to a maximum of 30% of the total amount recovered, as opposed to the 33% in the Fee Agreement, and could be as low as 22 or 23%;<sup>16</sup>
- (iv) The straight docketed time to date is \$313,055 plus taxes and the disbursements to date are \$5,385 plus taxes. The multiplier is therefore 0.47, as opposed to 3.5 in the Fee Agreement, and it will be even lower once the remaining work is taken into account;
- (v) No Class Member has objected to the Class Counsel's Fees;
- (vi) The action involves complex legal issues and, in the absence of a settlement, would involve lengthy proceedings with an uncertain resolution and possible appeals;

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<sup>15</sup> Exhibit R-3.

<sup>16</sup> The total amount recovered is calculated on the basis that every Class Member makes a claim, and is therefore equal to \$345,000 (the Cap) + \$4,999.99 (Plaintiff's claim) + \$150,000 plus taxes (Class Counsel Fees). The Plaintiff argues that it should also include the fees of the Claims Administrator and the cost related to the Notice Program, which represent another US\$120,000-US\$130,000 and would reduce the percentage recovery to 22-23%.



- (vii) Class Counsel has proved the ability to adequately, vigorously and competently prosecute this action and the favorable settlement is attributable at least in part to the hard work, determination, diligence and reputation of Class Counsel, who developed, litigated and successfully negotiated the Settlement Agreement to provide substantial relief to Class Members.

[33] The Class Counsel's Fees are substantially less than what was provided for in the Fee Agreement signed with the Plaintiff, reflecting a compromise arrived at by the parties. In dollars, they are less than half of the straight docketed time when the Fee Agreement provided for a multiplier of 3.5, and as a percentage, they are less than what was provided for in the Fee Agreement and fall within the range of 20% to 33 1/3% generally considered acceptable in Québec.<sup>17</sup>

[34] The Court therefore approves the Class Counsel's Fees as fair and reasonable in the circumstances.

#### **RECOVERY BY THE FONDS D'AIDE AUX ACTIONS COLLECTIVES**

[35] Finally, an issue arose as between the Plaintiff and the Fonds d'aide aux actions collectives as to whether the percentage payable to the Fonds should be withheld on payments to Class Members who are no longer resident in the Province of Québec.

[36] Section 42 of the *Act respecting the Fonds d'aide aux actions collectives* provides for the withholdings in favour of the Fonds:

**42.** In the case of a collective recovery of the claims, the Fonds shall withhold a percentage fixed by regulation of the Government on the balance established under articles 596 and 597 of the *Code of Civil Procedure* (chapter C-25.01); in other cases, the Fonds shall withhold a percentage fixed by regulation of the Government on every liquidated claim.

[37] The percentages are established in the *Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives*.

[38] The class is defined as follows in the judgment authorizing the class action and in the Settlement Agreement:

All persons in Quebec whose payment card data and/or personal information was lost by and/or stolen from Respondent as a result of the data breach that occurred between at least November 27, 2013 and December 15, 2013;

[39] Because the only basis for the Québec courts having jurisdiction over these claims was that damage was suffered in the Province of Québec, this definition was

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<sup>17</sup> *Dick c. Johnson & Johnson Inc.*, 2018 QCCS 2130, par. 60.

intended to cover persons who had suffered damages in Québec because they were resident in Québec when they suffered the damages.

[40] The Plaintiff raised the possibility that such a person may now be resident outside Québec, and the issue is whether such a person is subject to the withholding.

[41] The Fonds attended at the hearing to argue that all payments to Class Members should be subject to the withholding in favour of the Fonds, regardless of the Class Member's current residence. The Plaintiff recognizes that this class action is subject to the Act and the Regulation but pleads that only residents of Québec are subject to the withholding.

[42] The issue is purely theoretical at this point. So far, the Plaintiff and the 29 Class Members who have made claims are all Québec residents. Nevertheless, for the benefit of the Claims Administrator, the Court will address the issue.

[43] Neither the Act nor the Regulation provides expressly to which class actions they apply and which class members are subject to this withholding.

[44] The Court concludes that the Act and Regulations apply to all class actions instituted under the *Code of Civil Procedure*. Although that is not stated expressly in the Act or the Regulations, there are many references in the Act to the Code as well as two references in the Code to the Fonds. Further, nothing in the Act suggests that it does not apply to certain class actions instituted under the Code, and there is nothing in the Act that suggests that it applies to class actions instituted outside Québec.<sup>18</sup>

[45] On the issue of which members are subject to the withholding, nothing in the Act or Regulations makes any distinction between members of the class resident in Québec and those resident outside the province. It therefore seems reasonable to conclude that all members of the class in a class action instituted in Québec are subject to the withholding. However, that is not the practice of the Fonds in national class actions instituted in Québec. In those cases, the practice of the Fonds is not to withhold anything from members resident outside Québec. It is not necessary for the Court to comment on that practice. For the purposes of the present matter, it is sufficient for the Court to hold that all Class Members are subject to the withholding, regardless of where they are resident now.

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<sup>18</sup> The Court held in *Major c. Zimmer inc.*, 2016 QCCS 3093, the settlement of a multi-jurisdictional class action in Québec, Ontario and British Columbia, that the Act and the Regulation did not apply to Québec residents who had opted out of the Québec class to join the B.C. class. The Fonds had argued that it was entitled to withhold its percentage from all Québec residents.

POUR CES MOTIFS, LE TRIBUNAL:	FOR THESE REASONS, THE COURT:
[46] <b>ACCUEILLE</b> la demande du Demandeur pour approbation d'une transaction et pour approbation des honoraires des procureurs du groupe;	<b>GRANTS</b> the Application by the Plaintiff for Approval of a Settlement Agreement and for Approval of Class Counsel's Fees;
[47] <b>DÉCLARE</b> que l'Entente de règlement, transaction et quittance à la pièce R-1 (incluant son préambule et ses annexes) (ci-après « l'Entente de règlement ») constitue une transaction au sens des articles 2631 et suivant du <i>Code civil du Québec</i> , obligeant toutes les parties et tous les Membres de l'action collective qui ne se sont pas exclus en temps opportun;	<b>DECLARES</b> that the Settlement Agreement, Transaction and Release at Exhibit R-1 (including its Preamble and its Schedules) (hereinafter the "Settlement Agreement") constitutes a transaction within the meaning of Articles 2631 and following of the <i>Civil Code of Quebec</i> , binding all parties and all Class Members who have not excluded themselves in a timely manner;
[48] <b>DÉCLARE</b> que l'Entente de règlement est valide, équitable et raisonnable, et qu'elle est dans le meilleur intérêt des Membres du Groupe, du Demandeur et de la Défenderesse;	<b>DECLARES</b> that the Settlement Agreement is valid, fair, reasonable and in the best interest of the Class Members, the Plaintiff and the Defendant;
[49] <b>APPROUVE</b> l'Entente de règlement conformément à l'article 590 du <i>Code de procédure civile</i> ;	<b>APPROVES</b> the Settlement Agreement in accordance with Article 590 of the <i>Code of Civil Procedure</i> ;
[50] <b>DÉCLARE</b> que l'Entente de règlement fait partie intégrante du jugement à intervenir;	<b>DECLARES</b> that the Settlement Agreement is an integral part of the judgment to be rendered;
[51] <b>ORDONNE</b> aux parties et aux Membres du Groupe, sauf ceux qui se sont exclus conformément à l'Entente de règlement et au présent jugement, de se conformer aux termes et conditions de	<b>ORDERS</b> the parties and the Class Members, with the exception of those who are excluded in accordance with the terms and conditions of the Settlement Agreement and with this judgment, to abide

l'Entente de règlement;	by the terms and conditions of the Settlement Agreement;
[52] <b>APPROUVE</b> le versement aux Procureurs du Groupe, Lex Group Inc., des honoraires extrajudiciaires de 150 000 \$ plus les taxes, tel que prévu à la clause 7.1 de l'Entente de règlement;	<b>APPROVES</b> the payment to Class Counsel, Lex Group Inc., of extrajudicial fees of \$150,000 plus taxes, as provided for at clause 7.1 of the Settlement Agreement;
[53] <b>DÉCLARE</b> que toute réclamation payable à un Membre du Groupe sera sujette au prélèvement par le Fonds d'aide aux actions collectives du pourcentage déterminé par le <i>Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives</i> , RLRQ, chapitre F-3.2.0.1.1, r. 2;	<b>DECLARES</b> that any claims payable to Class Members will be subject to the percentage withholding by the Fonds d'aide aux actions collectives in accordance with the <i>Regulation respecting the percentage withheld by the Fonds d'aide aux actions collectives</i> , CQLR, chapter F-3.2.0.1.1, r. 2;
[54] <b>LE TOUT</b> sans frais de justice.	<b>THE WHOLE</b> without legal costs.



STEPHEN W. HAMILTON, J.S.C.

Mtre David Assor  
LEX GROUP INC.  
For the Plaintiff Evan Zukerman

Mtre Sylvain Lussier  
Mtre Jessica Harding  
OSLER, HOSKIN & HARCOURT LLP  
For the Defendant Target Corporation Inc.

Mtre Beatriz Carou  
For the Mise en Cause Fonds d'aide aux actions collectives

Hearing date: May 23, 2018