



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

November 13, 2008

The Honorable Chief Judge Vaughn R. Walker *VIA CMRRR# 7180 6780 7890 0000 5998*
United States District Court
For the Northern District of California
San Francisco Division
450 Golden Gate Avenue
San Francisco, CA 94102

RE: Case No. 3:07-cv-02852-VRW; *In re TD Ameritrade Accountholder Litigation*
 (N.D. Cal. - San Francisco)

Dear Judge Walker:

Pursuant to the Class Action Fairness Act (CAFA), the State of Texas wishes to object to the proposed Class Action Settlement Agreement in the above-captioned case. Approximately 415,089 Texans are included in the Settlement Class and stand to be affected by the proposed settlement. The State has several concerns about the proposed settlement, which are discussed in detail below.

The Proposed Settlement Agreement Provides No Meaningful Relief to the Class Members

First, the settlement will confer minimal, if any, value to Class Members. The proposed Settlement Agreement will result in zero monetary recovery for the class. Rather, under the terms of the settlement, Defendant has agreed to:

1. Post a warning at its Web site about stock spam;
2. Engage in limited penetration testing and email account seeding;
3. Provide class members with the equivalent of a coupon for a one-year subscription (or renewal) for one of two types of anti-virus, anti-spam internet security products (Trend Micro Internet Security Pro for PCs and Intego Internet Security Barrier XS for Macs); and

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4. Potentially provide a limited subgroup labeled "Identified Class Members" with the option of requesting direct compensation for costs incurred as a result of identity theft, which Defendant will consider paying.

On its face, the Settlement Agreement purports to provide at least some relief to class members, but, in fact, the sum of the components provide little or no value to class members. For example, the type of "warning" regarding stock spam that Defendant proposes to include on its Web site is already widely available on numerous other Web sites. And except for four weeks out of the year, the information will be wholly buried in "The Security Center" portion of Defendant's Web site, which is unlikely to be visited by the type of consumers most vulnerable to stock spams.

Further, the penetration testing and account seeding measures are security practices in which any reputable company should engage, even if not the subject of litigation resulting from a security breach. In fact, even absent the present litigation and proposed settlement, Defendant is required by law to adopt policies and procedures reasonably designed to ensure the security and confidentiality of customer records and information and to protect against any anticipated threats or hazards to the security or integrity of customer records and information. Such policies should include the very types of measures which Defendant is "agreeing" to carry out pursuant to the settlement.

The coupon for security software is also likely of little value to consumers. As noted in the objection of Plaintiff Matthew Elvey, the security software (or its equivalent) is often available through retail promotions at little or no cost. Moreover, the vast majority of Internet users have access to free subscriptions to similar security software through their Internet Service Provider. Therefore, it is unlikely that any significant portion of the class will realize any value from the coupon for security software.

The Lack of Meaningful Relief to the Class Members Is Particularly Inappropriate Where Class Counsel Stands To Receive \$1.87 Million in Attorneys' Fees

The dearth of actual benefit to the class members is especially troubling when the relief granted to class members (zero monetary recovery) is compared to the proposed attorneys' fee award for class counsel (\$1.87 million). CAFA calls for heightened judicial scrutiny in circumstances where counsel is awarded large fees and class members are left with coupons or other awards of little or no value; in fact, CAFA was enacted, in part, to address this sort of disparity in recovery.

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The Proposed Settlement Agreement Does Not Adequately Address the Potential Harm to the Class Members From Identity Theft

The relief afforded to Class Members who are identity theft victims is vague and, as written, the proposed Settlement Agreement unfairly limits the ability of class members to qualify. For example, only claims determined to be the result of “organized misuse” by ID Analytics (retained by Defendant) are eligible, but the phrase “organized misuse” is not defined.

Defendant has agreed to extend the opportunity for such Class Members to submit claims for costs incurred as a result of identity theft directly to Defendant. However, this submission must be within 30 days of notification of possible misuse by Defendant. (This time limit appears to assume that the Class Members at issue will be able to discover and confirm that their identity has been stolen and also incur any related damages . . . all within 30 days.)

Regrettably, even if a Class Member is able to satisfy the conditions above, compensation of one’s damages is far from guaranteed—in fact, not even promised. Defendant has agreed only to provide “dedicated customer support assistance” (also not defined) and to consider “all relevant facts and circumstances” in determining an “appropriate” settlement offer. In short, Defendant would enjoy complete and unfettered discretion to determine what a “reasonable” amount an identity theft victim is entitled to for his or her damages, and the victim’s only avenue for disputing the outcome is binding arbitration.

The Proposed Release Is Unduly Broad

The State is also concerned about the overly broad release in the proposed Settlement Agreement. The definition of “Released Parties” should be amended to clarify that the entities or individuals who engaged in the unauthorized access (“Defendant Does” in Plaintiff’s First Amended Complaint) are not “Released Parties,” even if such individuals or entities would otherwise fall within the expansive definition of the group. Nor should they be considered “third party beneficiaries” of the Settlement Agreement.

Moreover, one provision purports to release future claims that may be brought by a “government entity.” Similarly, the definition of Releasing Parties includes not only Class Members, but his or her “representative of any kind,” which could be interpreted to include Attorneys General and other law enforcement officers or regulators who are authorized to bring claims on behalf of consumers. The Texas Attorney General is not a party in this case, has causes of action that are

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separate and distinct from the causes of action available to class members, and has separate and distinct interests in bringing claims, even when seeking relief on behalf of individuals. Therefore, any settlement in this matter should not purport, claim, or attempt to bar future claims by a government entity.

For the reasons described above, the State of Texas is concerned about the fairness and propriety of the proposed Settlement Agreement in this case and, accordingly, objects.

Sincerely,



LESLI GATTIS GINN
Assistant Attorney General
Financial Litigation Division
TEL: (512) 936-0538
FAX: (512) 477-2348
ALT FAX: (512) 480-8327

C. BRAD SCHUELKE
Assistant Attorney General
Section Chief, Internet Enforcement
Consumer Protection Division
TEL: (512) 463-1269
FAX: (512) 473 8301

LGG/CBS/lb

cc: Counsel of Record *(via U.S. Mail)*
(see attached list)

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Counsel of Record:

Gregory A. Beck
Public Citizen
1600 20th Street N.W.
Washington, DC 20009
*representing **Matthew Elvey** (Plaintiff)*

Mark Andrew Chavez
Chavez & Gertler LLP
42 Miller Avenue
Mill Valley, CA 93941
*representing **Matthew Elvey** (Plaintiff)*

Matthew Elvey
1819 Polk-PACER-SMD St #133
San Francisco, CA 94109
*representing **Matthew Elvey** (Plaintiff)*

Scott A Kamber
Kamber & Associates, LLC
11 Broadway, 22nd Floor
New York, NY 10004
*representing **Matthew Elvey** (Plaintiff)*

Shirish Gupta
Flashpoint Law, Inc.
3 Waters Park Drive, Ste 224
San Mateo, CA 94403
*representing **TD Ameritrade, Inc.** (Defendant)*

Robert J. Kriss
Mayer Brown & Platt
190 So LaSalle St
Chicago, IL 60603
*representing **TD Ameritrade, Inc.** (Defendant)*

Lee H. Rubin
Mayer Brown LLP
Two Palo Alto Square, Suite 300
3000 El Camino Real
Palo Alto, CA 94306-2112
*representing **TD Ameritrade, Inc.** (Defendant)*

Alan Himmelfarb
KamberEdelson, LLC
2757 Leonis Blvd
Vernon, CA 90058
*representing **Gadgetwiz.com, Inc.** and
Matthew Elvey (Plaintiffs)*

Ethan Mark Preston
KamberEdelson, LLC
350 North LaSalle Avenue, Suite 1300
Chicago, IL 60654
*representing **Gadgetwiz.com, Inc.** (Plaintiff)*

David Christopher Parisi
Parisi & Havens LLP
15233 Valleyheart Drive
Sherman Oaks, CA 91403
*representing **Brad Zigler** (3rd party plaintiff)*

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