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11 **IN THE UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
13 **SAN FRANCISCO DIVISION**

14 MATTHEW ELVEY, an individual, and  
GADGETWIZ, INC., an Arizona corporation,  
15 on their own behalf and on behalf of all  
others similarly situated,

16 Plaintiffs

17 v.

18 TD AMERITRADE, INC., a New York  
19 corporation, and DOES 1 to 100,

20 Defendants.

No. C 07 2852 MJJ

Judge Martin J. Jenkins

**NOTICE OF MOTION; MOTION FOR  
PRELIMINARY INJUNCTION AND  
CLASS CERTIFICATION**

Date: August 14, 2007

Time: 9:30 a.m.

Location: Courtroom 11, 19th Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

21 **PLAINTIFFS' MOTION FOR**  
22 **PRELIMINARY INJUNCTION AND CLASS CERTIFICATION**  
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**NOTICE OF MOTION**

NOTICE IS HEREBY GIVEN that Matthew Elvey and Gadgetwiz, Inc. will move the Court for a preliminary injunction in the above referenced proceedings, pursuant to Federal Rule of Civil Procedure 65(a) on August 14, 2007, at 9:30 a.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, CA 94102, in Courtroom 11, before the Honorable Martin Jenkins.

This Motion is based on this Notice of Motion and Motion, the Brief in Support of the Motion to Intervene and the authorities cited therein, oral argument of counsel, and any other matter that may be submitted at the hearing. Through this Motion, Plaintiffs seek the following equitable remedies:

To the extent Ameritrade is deliberately leaking email addresses to spammers, it must be enjoined from doing so. The evidence before Plaintiffs suggests, however, the disclosure of email addresses is the result of an ongoing security breach at Ameritrade. The Motion seeks an order that Ameritrade disclose all material information about the leaks to prospective and current accountholders and for an accounting of the record systems which contain accountholders' personal information, so that Plaintiffs' counsel can identify reasonable steps which Ameritrade can take to protect this information (or require Ameritrade to sequester these systems and their data).

Second, Ameritrade is California Resident Class's stock broker. The spam resulting from the Ameritrade leaks are exclusively stock spam – the spam touts thinly-traded stocks which can be easily manipulated as part of the spammers' pump-and-dump scheme against the spam recipients. Ameritrade knows or could easily determine which stocks are thus being touted, and could prevent its accountholders from purchasing those stocks in the wake of the spam. At a minimum, Ameritrade should fully disclose to prospective purchasers of touted stocks that the stock's value is being manipulated by spammers.

Lastly, the Motion seeks to prevent Ameritrade from telling accountholders to destroy evidence. There is evidence that Ameritrade encouraged accountholders to delete spam when communicating about the leak. These communications promote the destruction of evidence to

1 the prejudice of the FAC’s CAN SPAM Class (which has claims for statutory damages based  
2 on each spam sent). These communications are tantamount to spoliation, and this Motion  
3 seeks to prohibit Ameritrade from continuing this spoliation.  
4

5 In sum, this Motion seeks an Order from this Court against TD AMERITRADE, Inc.  
6 that:

- 7 1. Certifies the action as a class action and designating Plaintiffs as  
8 representatives of the CAN SPAM Class and Kamber & Associates, LLC as  
9 Class counsel under Rule 23(b)(2) and Rule 23(c)(4) to the extent necessary for  
10 the preliminary injunction sought herein.
- 11 2. Prohibits TD AMERITRADE, Inc. from instructing, directing, or suggesting  
12 that its accountholders destroy copies of spam which promotes stocks.
- 13 3. Certifies the action as a class action and designating Elvey as representative of  
14 the California Resident Class and Kamber & Associates, LLC as Class counsel  
15 under Rule 23(b)(2) and Rule 23(c)(4) to the extent necessary for the  
16 preliminary injunction sought herein.
- 17 4. Prohibits TD AMERITRADE, Inc. from disclosing its accountholders’ personal  
18 information (including its email addresses) to third parties in a manner  
19 inconsistent with its February 2007 Privacy Statement.
- 20 5. Requires TD AMERITRADE, Inc. to detect spam sent to its accountholders  
21 and to identify stocks touted by such spam.
- 22 6. Requires TD AMERITRADE, Inc. to display the following disclosure to  
23 California Resident Class members (Ameritrade’s accountholders in California)  
24 who attempts to purchase a stock which has been touted by spam detected by  
25 Ameritrade:

**ALERT: THIS STOCK SHOULD BE PURCHASED ONLY  
WITH EXTREME CAUTION. THIS STOCK HAS  
RECENTLY BEEN TOUTED IN UNSOLICITED  
COMMERCIAL EMAIL. IT IS LIKELY THAT THE PERSONS  
SENDING THESE EMAILS ARE MANIPULATING THE  
VALUE OF THIS STOCK AS PART OF A FRAUDULENT  
INVESTMENT SCHEME. THIS SCHEME MAY CAUSE ANY  
INVESTMENT IN THIS STOCK TO LOSE ITS VALUE,  
NOTWITHSTANDING THE COMPANY’S FINANCIAL  
PERFORMANCE.**

26 and require the purchaser to affirmatively indicate that the purchaser has read  
27 this warning, before executing any such purchase in such a time period for any  
28 California Resident Class members.

- 29 7. Requires TD AMERITRADE, Inc. to provide Plaintiffs and their counsel with  
30 an accounting of any of its records systems which store Plaintiffs’ personal  
31 information or personal information of any members of the California Resident  
32 Class.
- 33 8. Requires TD AMERITRADE, Inc. to prominently disclose in its Privacy

Statement and in emails or other individual disclosures to its accountholders:

**ALERT: AMERITRADE’S INFORMATION SYSTEMS ARE NOT NECESSARILY SECURE AND WE CANNOT ASSURE THE SECURITY OF YOUR PERSONAL INFORMATION.** THERE IS EVIDENCE THAT SOME ACCOUNTHOLDERS’ EMAIL ADDRESSES HAVE LEAKED FROM AMERITRADE’S COMPUTER SYSTEMS TO SPAMMERS. AMERITRADE HAS AN ONGOING INVESTIGATION INTO THIS SITUATION. **YOUR NAME, SOCIAL SECURITY NUMBER, AND YOUR EMAIL ADDRESS MAY HAVE BEEN LEAKED AS WELL.**

We recommend that you place a fraud alert on your credit file. A fraud alert tells creditors to contact you before they open any new accounts or change your existing accounts. Call any one of the three major credit bureaus. As soon as one credit bureau confirms your fraud alert, the others are notified to place fraud alerts. All three credit reports will be sent to you, free of charge, for your review. You can contact Equifax (800-685-1111), Experian (888-397-3742), or TransUnionCorp (800-680-7289).

Even if you do not find any suspicious activity on your initial credit reports, the Federal Trade Commission (FTC) recommends that you check your credit reports periodically. Victim information sometimes is held for use or shared among a group of thieves at different times. Checking your credit reports periodically can help you spot problems and address them quickly.

If you find suspicious activity on your credit reports or have reason to believe your information is being misused, call [insert contact information for law enforcement] and file a police report. Get a copy of the report; many creditors want the information it contains to absolve you of the fraudulent debts. You also should file a complaint with the FTC at [www.consumer.gov/idtheft](http://www.consumer.gov/idtheft) or at 1-877-ID-THEFT (877-438-4338). Your complaint will be added to the FTC’s Identity Theft Data Clearinghouse, where it will be accessible to law enforcers for their investigations.

You can obtain a copy of Take Charge: Fighting Back Against Identity Theft, a comprehensive guide from the FTC to help you guard against and deal with identity theft at: <http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idtheft04.htm>

and to further publish to current and former accountholders a report to be drafted by Plaintiffs’ counsel and approved by the Court upon completion of the accounting in Paragraph 7.

- 9. Requires TD AMERITRADE, Inc. to take such reasonable measures to protect the security of California Resident Class members’ personal information drafted by Plaintiffs’ counsel and approved by the Court upon completion of the accounting in Paragraph 7.

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1                                   **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**  
 2                                   **AND CLASS CERTIFICATION**

3           Plaintiffs Matthew Elvey (“Elvey”) and Gadgetwiz, Inc. (“Gadgetwiz”), respectfully  
 4 files this Brief in Support of its Motion for Preliminary Injunction and Class Certification  
 5 under Federal Rule of Civil Procedure 65.

6           The gist of the allegations in Plaintiffs’ First Amended Complaint (“FAC”) is that TD  
 7 AMERTRADE, Inc. (“Ameritrade”) is disclosing, either deliberately or as a result of a  
 8 security breach, its accountholders’ email addresses to spammers. The FAC states claims for  
 9 accountholders residing in California (“California Resident Class”) and domain name/email  
 10 service providers for Ameritrade accountholders which received spam because of  
 11 Ameritrade’s disclosure (“CAN SPAM Class”). Plaintiffs’ evidence indicates that Ameritrade  
 12 has disclosed the email addresses of its accountholders. Although Plaintiffs do not have access  
 13 to evidence which directly shows *how* the disclosures occurred, the fact that the disclosures  
 14 *occurred at all* is evidence that “[s]omething is rotten in the state of Denmark” sufficient to  
 15 justify Plaintiffs’ injunction. William Shakespeare, *The Tragedy of Hamlet, Prince of*  
 16 *Denmark*, act 1, sc. 4.<sup>1</sup>

17 **I. Plaintiffs’ Evidence Mandates Urgent Action**

18           The Ninth Circuit has provided two tests for preliminary injunctive relief under  
 19 Federal Rule 65. The traditional criteria are 1) likelihood of success on the merits, 2) risk of  
 20 irreparable injury without a preliminary injunction, 3) a balance of hardships favoring the  
 21 movant, and 4) advancement of the public interest. *Save Our Sonoran, Inc. v. Flowers*, 408  
 22 F.3d 1113, 1120 (9th Cir. 2005). Alternatively, the movant may demonstrate “*either a*  
 23 *combination of probable success on the merits and the possibility of irreparable injury or that*

24 <sup>1</sup> “A preliminary injunction is customarily granted on the basis of procedures that are less  
 25 formal and evidence that is less complete than in a trial on the merits. A party thus is not  
 26 required to prove his case in full at a preliminary-injunction hearing . . .” *Univ. of Tex. v.*  
 27 *Camenisch*, 451 U.S. 390, 394-95 (1981) . “The urgency of obtaining a preliminary injunction  
 28 necessitates a prompt determination and makes it difficult to obtain affidavits from persons  
 who would be competent to testify at trial. The trial court may give even inadmissible  
 evidence some weight. . . .” *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984)  
 (quoted by *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) ). *See also*  
*Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 475 F. Supp. 2d 995, 1000 n.1 (C.D. Cal.  
 2007) (inadmissible hearsay was evidentiary ground for preliminary injunction).

1 serious questions are raised and the balance of hardships tips sharply in his favor.” *Id.*  
2 (emphasis in original, citations omitted). “These two formulations represent two points on a  
3 sliding scale in which the required degree of irreparable harm increases as the probability of  
4 success decreases. They are not separate tests but rather outer reaches of a single continuum.”  
5 *Id.* This brief establishes that Elvey is likely to succeed on his claims, that there is a risk of  
6 irreparable harm without the sought preliminary injunction, that the absence of the requested  
7 relief prejudices Elvey and the California Resident Class worse than the relief will prejudice  
8 Ameritrade, and that the public interest favors the injunctive relief sought.

9  
10 **A. Ameritrade Disclosed Its Accountholders’ Email Addresses to Spammers**

11 It is apparent that Ameritrade has disclosed its accountholders’ email addresses to  
12 spammers. Elvey and one of Gadgetwiz user’s, Joel Griffiths (“Griffiths”), are accountholders  
13 at Ameritrade. (Elvey Decl. ¶ 1; Griffiths Decl. ¶ 1.) Elvey and Griffiths provided a series of  
14 email addresses to Ameritrade, and subsequently received spam at these email addresses.  
15 (Elvey Decl. ¶¶ 2, 3; Griffiths Decl. ¶¶ 2, 3.) These spam are exclusively stock spam  
16 (authenticated, redacted copies are attached as Exhibits A and B): the spam encourages its  
17 recipients to purchased the stock of touted companies. Elvey and Griffiths should not have  
18 received this spam. The persons who sent the spam could have only obtained their email  
19 addresses from Elvey and Griffiths, or Ameritrade, and neither Elvey nor Griffiths disclosed  
20 these email addresses any person other than Ameritrade (except their counsel). (Elvey Decl. ¶  
21 2; Griffiths Decl. ¶ 2.) However, as discussed below, the disclosure of Elvey and Griffiths’  
22 email addresses by Ameritrade violates the February 2007 Privacy Statement published at  
23 Ameritrade’s website (attached as Exhibit C) which purports to be the authoritative statement  
24 on Ameritrade’s practices with respect to accountholders’ personal information.

25 Elvey and Griffiths’ situation is not unique. On May 30, Plaintiffs’ counsel found an  
26 article (a copy of which is attached as Exhibit D) on Slashdot (a prominent online forum for  
27 technology and technology policy news) indicating that many other Ameritrade  
28 accountholders had received spam at unique emails provided only to Ameritrade. (Ex. D 1-3,  
6, 11, 19-20.) *See* Slashdot, *Who’s Trading Your E-mail Addresses?*, at

1 <http://yro.slashdot.org/yro/07/05/30/1444236.shtml> (May 30, 2007). Subsequently, Plaintiffs'  
 2 counsel's performed several Internet searches which located other reported accounts (copies  
 3 of which are attached as Exhibits E, F and G) which are consistent with Elvey and Griffiths'  
 4 declarations. *See* Bill Katz, *TD Ameritrade data definitely compromised*, at  
 5 <http://www.billkatz.com/node/77> (last modified May 31, 2007), news.admin.net-abuse.email,  
 6 *Ameritrade Spam Again*, at [http://groups.google.com.fj/group/news.admin.net-](http://groups.google.com.fj/group/news.admin.net-abuse.email/browse_thread/thread/de64222d0929c6b4/a402bc49558f7330)  
 7 [abuse.email/browse\\_thread/thread/de64222d0929c6b4/a402bc49558f7330](http://groups.google.com.fj/group/news.admin.net-abuse.email/browse_thread/thread/de64222d0929c6b4/a402bc49558f7330) (July 28, 2006),  
 8 and NetworkWorld, *Ameritrade leaks and more Wi-Fi theft*, at  
 9 <http://www.networkworld.com/columnists/2007/053107-backspin.html> (May 31, 2007). As  
 10 more accountholders report disclosing unique email addresses to Ameritrade and receiving  
 11 spam at those email addresses, the probability that Ameritrade is not responsible for the  
 12 disclosure of these email addresses approaches zero. At this point, it is extremely implausible  
 13 that spammers independently obtained each of the email addresses involved in the public  
 14 reports described above.<sup>2</sup>

15  
 16 **B. Ameritrade Has Been Unable or Unwilling to Explain How It Disclosed  
 Email Addresses to Spammers**

17 The only remaining alternative is that Ameritrade has disclosed the email addresses of  
 18 Elvey, Griffiths, and the other Ameritrade accountholders. Ameritrade's communications  
 19 buttress this conclusion. The Slashdot article links to a forwarded email (a copy of which is  
 20 attached as Exhibit H) from Ameritrade responding to an accountholder's inquiry about spam  
 21 and indicates that response was identical to Ameritrade's response the Slashdot author's own  
 22 inquiry. (Ex. D 2.) Ameritrade's response to accountholder inquiries regarding spam states:

23 We understand your concern and frustration over the spam e-mail you've  
 24 received, and we want you to know that we take your privacy and security  
 25 seriously. We will continue to do all we can to protect both. *Our investigation  
 into this issue is ongoing. We've recently expanded the directions in which*

26 <sup>2</sup> Preliminary injunctions have been entered on similar hearsay evidence, where the applicable  
 27 evidentiary standards are less demanding. *See Metro Publ'g, Inc. v. Surfmet, Inc.*, No. 02-  
 28 01833, 2002 U.S. Dist. LEXIS 26232, at \*10-11 & n.4 (N.D. Cal. July 3, 2002) (preliminary  
 injunction based on declarations, overruled admissibility objections); *Burnham v. Rohnert  
 Park*, No. 92-1439, 1992 U.S. Dist. LEXIS 8540, at \*2 n.2 (N.D. Cal. May 18, 1992)  
 (preliminary injunction based on declaration, overruled objections to hearsay, incompetence,  
 or opinion).



1 *we're investigating, and have doubled our efforts in both internal and external*  
 2 *investigations. We're looking at our own systems, and working closely with our*  
*vendors to examine theirs. . . .*

3 (Ex. H 1) (emphasis added). Ameritrade has acknowledged that it is conducting an ongoing  
 4 investigation into the possibility of a information security breach. Such an investigation would  
 5 necessarily consider both rogue insiders (such as employees or partner firms), as well as  
 6 outside intruders.

7 Collectively, the evidence available to Plaintiffs strongly suggests that Ameritrade is  
 8 unable to control or prevent the disclosure of accountholder email addresses. The alternative is  
 9 that Ameritrade has deliberately and willfully disclosed email addresses. While Plaintiffs  
 10 cannot discount this explanation without discovery, Plaintiffs and their counsel are operating  
 11 on the assumption that there is an ongoing, systematic security breach at Ameritrade.

12 **C. Unauthorized Disclosure of Plaintiff Elvey's Email Address Creates a**  
 13 **Likelihood that He Will Prevail on His Claims, Irrespective of Whether the**  
**Disclosure Was Deliberate or Unintentional**

14 Elvey is likely to prevail on his claims under California's Consumer Legal Remedies  
 15 Act ("CLRA") (Cal. Civ. Code § 1782(a)) and Unfair Competition Law ("UCL") (Cal. Bus. &  
 16 Prof. Code § 17203), and for breach of fiduciary duty.

17 The disclosure of accountholder email addresses violates the Privacy Statement  
 18 published at Ameritrade's website. The Privacy Statement states "TD AMERITRADE does  
 19 not sell, license, lease or otherwise disclose your personal information to any third party for  
 20 any reason" subject to certain exceptions not applicable here.<sup>3</sup> (Ex. C. 3.) This statement is not  
 21 consistent with an ongoing security breach at Ameritrade in which third parties regularly  
 22 obtain accountholders' email addresses, and such a security breach renders the Privacy

23 <sup>3</sup> The Privacy Statement indicates that Ameritrade may share personal information "with  
 24 affiliates if the information is required to provide the product or service [accountholders] have  
 25 requested or to provide [accountholders] the opportunity to participate in the products or  
 26 services our affiliates offer." (Ex. C. 2.) Also, the Privacy Statement also indicates that  
 27 Ameritrade may share information in "partnerships and alliances, which may include joint  
 28 marketing agreements, with other companies who offer high-quality products and services  
 that might be of value to our clients" in order "to ensure that these products and services meet  
 [accountholders'] needs and are delivered in a manner that is useful and relevant." (*Id.* 2.)  
 With respect Ameritrade's affiliates, alliances and partners, the Privacy Statement indicates  
 that Ameritrade "require[s] that it be identified that an offer is being extended because of the  
 relationship with us." (*Id.* 2-3.) The spam does not indicate that the spammers have a  
 relationship with Ameritrade. (*Cf.* Exs. A, B.)



1 Statement false and misleading.

2 As the representations in the Privacy Statement are false and misleading, they are a  
3 sufficient basis for Elvey's CLRA and UCL claims, irrespective of whether it was  
4 unintentional, inadvertent, or deliberate. Elvey's claim under the UCL only requires "that  
5 members of the public are likely to be deceived." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 951, 45  
6 P.3d 243, 250 (2002) (citations omitted). "The UCL imposes strict liability [on] conduct that  
7 constitutes an unfair business practice." *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.  
8 4th 163, 181, 999 P.2d 706, 717 (2000). "Allegations of actual deception, reasonable reliance,  
9 and damage are unnecessary" for UCL claims. *Comm. on Children's TV v. General Foods*  
10 *Corp.*, 35 Cal. 3d 197, 211, 673 P.2d 660, 668 (1983). The liability standard applicable to  
11 UCL claims also applies to claims under the CLRA. *Consumer Advocates v. Echostar*  
12 *Satellite Corp.*, 113 Cal. App. 4th 1351, 1360, 8 Cal. Rptr. 3d 22, 29 (Cal. Ct. App. 2003)  
13 (cited by *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 680, 38 Cal. Rptr. 3d  
14 36, 46 (Cal. Ct. App. 2006)). "Conduct that is 'likely to mislead a reasonable consumer' thus  
15 violates the CLRA." *Colgan*, 135 Cal. App. 4th at 680, 38 Cal. Rptr. 3d at 46.

16 Ameritrade is liable for disclosing the California Class members' email addresses even  
17 without regard to the Privacy Statement. As a stock broker, Ameritrade is a fiduciary of its  
18 accountholders. *Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 1534-35, 751-52 (Cal. Ct. App.  
19 1989) (cited by *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal. 4th 394, 425-26, 926 P.2d 1061,  
20 1080 (1996) ); *Twomey v. Mitchum, Jones & Templeton, Inc.*, 262 Cal. App. 2d 690, 708-09,  
21 69 Cal. Rptr. 222, 235-36 (Cal. Ct. App. 1968). One of Ameritrade's fiduciary duties is to "not  
22 to use or communicate confidential information of the principal for the agent's own purposes  
23 or those of a third party." *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 416, 58 Cal. Rptr. 3d  
24 527, 540 (Cal. Ct. App. 2007) (quoting Restatement of Agency (Third) § 8.05 (2006)). See  
25 also *Balboa Ins. Co. v. Trans Global Equities*, 218 Cal. App. 3d 1327, 1344 & n.20, 267 Cal.  
26 Rptr. 787, 797 & n.20 (Cal. Ct. App. 1990) (elements of breach of confidence); *Bank of Am.*  
27 *Nat'l Trust & Sav. Assoc. v. Ryan*, 207 Cal. App. 2d 698, 706, 24 Cal. Rptr. 739, 744 (Cal. Ct.  
28 App. 1962) (fiduciary "who acquires confidential information in the course of his employment

1 . . . has a duty not to use it to the disadvantage of the principal”); *Stevens v. Marco*, 147 Cal.  
 2 App. 2d 357, 372-74, 305 P.2d 669, 678-79 (Cal. Ct. App. 1956) (breach of fiduciary duty by  
 3 disclosure of confidential information).

4 Likewise, the Privacy Statement represents that:

5 All third parties with which we share personal information are required to  
 6 protect personal information in a manner similar to the way we protect personal  
 7 information. . . We have made a significant investment in leading-edge security  
 8 software, systems, and procedures to offer you a safe and secure trading  
 9 environment and protect your personal, financial and trading information.  
 While no security system is absolutely impenetrable, we are constantly  
 reviewing, refining and upgrading our security technology, as new tools become  
 available.

10 (Ex. A 3-4.) These statements are misleading inasmuch as the Privacy Statement omits  
 11 mention of Ameritrade’s investigation into the possibility of an ongoing security breach. The  
 12 UCL and CLRA prohibit misleading omissions of material facts, not just affirmative  
 13 misrepresentations. *Kasky*, 27 Cal. 4th at 951, 45 P.3d at 250 (UCL prohibits representations  
 14 which “although true, is either actually misleading or which has a capacity, likelihood or  
 15 tendency to deceive or confuse the public”); *Outboard Marine Corp. v. Superior Court*, 52  
 16 Cal. App. 3d 30, 38, 124 Cal. Rptr. 852, 857 (Cal. Ct. App. 1975) (CLRA prohibits omission  
 17 of material facts, cited by *Bardin v. DaimlerChrysler Corp.*, 136 Cal. App. 4th 1255, 1276, 39  
 18 Cal. Rptr. 3d 634, 648 (Cal. Ct. App. 2006)). *See also Chamberlan v. Ford Motor Co.*, 369 F.  
 19 Supp. 2d 1138, 1144-46 (N.D. Cal. 2005) (omitted disclosure of defects in non-metal  
 20 manifolds could violate UCL, CLRA).

21 Finally, Ameritrade’s receipt of personal information from accountholders violates its  
 22 fiduciary duties to its accountholders, inasmuch as 1) it is even now investigating the  
 23 possibility of an ongoing security breach and 2) the Privacy Statement fails to disclose either  
 24 the investigation or the possible security breach. Ameritrade’s fiduciary duties include

25 full disclosure of all material facts within [its] knowledge relating to the  
 26 transaction in question and any concealment of material facts [by a fiduciary] is  
 27 a fraud. . . . Where there is [such] a duty to disclose, the disclosure must be full  
 and complete, and any material concealment or misrepresentation will amount  
 to fraud sufficient to entitle the party injured thereby to an action.

28 *Estate of Sanders*, 40 Cal. 3d 607, 616, 710 P.2d 232, 237 (1985) (citations, punctuation

1 omitted). “An agent has a fiduciary duty to the principal to disclose all information in the  
2 agent's possession relevant to the subject matter of the agency.” *L. Byron Culver & Assocs. v.*  
3 *Jaoudi Indus. & Trading Corp.*, 1 Cal. App. 4th 300, 304, 1 Cal. Rptr. 2d 680, 682 (Cal. Ct.  
4 App. 1991) (citing *Sierra Pac. Indus. v. Carter*, 104 Cal. App. 3d 579, 581-83, 163 Cal. Rptr.  
5 764, 766 (Cal. Ct. App. 1980)). *See also Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120,  
6 129, 271 Cal. Rptr. 146, 150 (1990) (fiduciary has “duty to disclose all information material to  
7 the patient's decision,” citing, e.g., *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 634, 178 Cal. Rptr.  
8 167, 172 (Cal. Ct. App. 1981)).

9 Elvey and the California Resident Class are also entitled to disclosure of all material  
10 facts on the purchase of stocks that Ameritrade knows have been touted by spam. The fact that  
11 spammers are seeking to inflate the value of stock is material to the accountholders’ decision  
12 to purchase the stock, and Ameritrade plainly has a duty to disclose such material facts. *It is*  
13 *important to remember that Ameritrade earns commissions on trades induced by this stock*  
14 *spam.*

15 The misleading statements and omissions in the Privacy Statement (and the material  
16 omission that spammers have manipulated particular spammed stocks) are sufficient basis to  
17 conclude that Elvey will prevail in his claims.

18  
19 **D. Disclosure of Accountholders’ Personal Information Threatens Irreparable Harm**

20 As a matter of California law, Ameritrade’s continued violation of the CLRA and UCL  
21 – by disclosing email addresses to spammers, failing to disclosing its investigation or the  
22 possible security breach, or manipulation of stock value by spammers – constitutes irreparable  
23 harm. “[P]laintiffs are not required to wait until they have suffered actual harm before they  
24 apply for an injunction, but may seek injunctive relief against the threatened infringement of  
25 their rights.” *Maria P. v. Riles*, 43 Cal. 3d 1281, 1292-93, 743 P.2d 932, 938 (1987); *S.*  
26 *Christian Leadership Conference v. Al Malaikah Auditorium Co.*, 230 Cal. App. 3d 207, 224,  
27 281 Cal. Rptr. 216, 227 (Cal. Ct. App. 1991). Further, a presumption of irreparable injury  
28 applies when there is a “substantial showing of prospective violation of California statutes”

1 such as the UCL and CLRA. *Cal. Ass'n of Dispensing Opticians v. Pearle Vision Ctr.*, 143 Cal.  
2 App. 3d 419, 434, 191 Cal. Rptr. 762, 772 (Cal. Ct. App. 1983). *See also Vision Sports, Inc. v.*  
3 *Melville Corp.*, 888 F.2d 609, 612 n.3 (9th Cir. 1989) (in unfair competition actions, “once the  
4 plaintiff establishes a likelihood of confusion, it is ordinarily presumed that the plaintiff will  
5 suffer irreparable harm if injunctive relief is not granted”).

6 Plaintiffs do not rely solely on formulaic points of law. When email addresses are  
7 leaked to spammers, the damage is irreparable: once accountholders’ email addresses are  
8 known to spammers, those email addresses will never again be spam-free. Moreover, in most  
9 situations, accountholders will not be able successfully identify the spammers – let alone  
10 successfully claim damages from them in a lawsuit. S. Rep. No. 108-102, at 5 (2003)  
11 (Congressional testimony that 90 percent of all of the spam sent worldwide is “untraceable”  
12 to its actual source). *See also* U.S. Dep’t of Justice, *Former Officer of Internet Company*  
13 *Sentenced in Case of Massive Data Theft from Acxiom Corporation*, at  
14 <http://www.usdoj.gov/criminal/cybercrime/levineSent.htm> (Feb. 22, 2006) (defendant stole  
15 more than one billion records containing names, physical and e-mail addresses, as well as  
16 phone numbers from data broker, and resold some data to another broker for use in an ad  
17 campaign).<sup>4</sup> Thus, most accountholders will be unable trace particular spam back to  
18 Ameritrade’s disclosure of their email address, and hence unable to calculate their damages  
19 from Ameritrade’s disclosure. Where “[t]here is no way to calculate the value of” of the  
20 movant’s damages, a movant for preliminary injunction has no adequate legal remedies and  
21 irreparable harm exists. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). “[W]here the  
22 threat of injury is imminent and the measure of that injury defies calculation, damages will  
23 not provide a remedy at law.” *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991). *See*  
24 *also Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603  
25 (9th Cir. 1991) (where “damages would be difficult to valuate,” they “constituted possible  
26

27 <sup>4</sup> *Westpac Audiotext, Inc. v. Wilks*, 756 F. Supp. 1267, 1268-69 (N.D. Cal. 1991), *vacated on*  
28 *other grounds*, 804 F. Supp. 1225 (N.D. Cal. 1992) (under loosened evidentiary standards  
applicable in preliminary injunction, legislative history was evidentiary grounds for  
preliminary injunction).

1 irreparable harm”). This is especially true where much of the damages from spam are non-  
2 economic. Cal. Bus. & Prof. Code § 17529(e) (2007) (“spam . . . discourages people from  
3 using e-mail”); *Ferguson v. Friendfinders*, 94 Cal. App. 4th 1255, 1267, 115 Cal. Rptr. 2d 258,  
4 267 (Cal. Ct. App. 2002) (spam consumes the time of recipients “required to sort, read,  
5 discard and attempt to prevent future” spam).

6 More critically, however, Ameritrade collects not only email addresses from  
7 accountholders, but other, more sensitive personal information. It unlikely that Ameritrade  
8 failed to protect accountholders’ email addresses from disclosure but managed to protect their  
9 names and Social Security numbers. Certainly, Ameritrade has not offered any evidence to  
10 Plaintiffs to support this inference. Consequently, an ongoing security breach at Ameritrade  
11 threatens accountholders with a much more grave irreparable harm than spam – the risk of  
12 identity theft. Like email addresses, Social Security numbers can be traded and retraded  
13 among identity thieves once they are disclosed:

14 [O]rganized criminals have increasingly turned to computer crime to engage in  
15 identity theft and financial fraud. . . . The criminal organizations traffic this  
16 information through underground websites on the Internet, creating a black  
17 market in cyberspace for stolen personal and financial information. Some of  
18 these identity thieves advertise that they have access to literally millions of  
19 stolen credit card and bank records for sale. . . . A year-long Secret Service  
20 investigation of the “Shadowcrew” organization led to the indictment of 27  
21 U.S. and foreign persons involved in an organized identity theft and financial  
22 fraud ring. According to government estimates, the members of the  
23 Shadowcrew organization trafficked in at least 1.5 million stolen credit and  
24 bank card numbers, and caused an estimated \$40 million in losses. A recent  
25 investigation by U.S. and U.K. authorities of the website “carderplanet.net”  
26 revealed that the site boasted nearly 7,000 members and served as a  
27 marketplace for millions of stolen bank and credit card accounts.

28 H.R. Rep. No. 109-522, at 5-6 (2006). Where an “intruder copies digital information” the  
privacy invasion may be the “most salient harm”; “where a hacker sells identity information  
on the black market. . . .the severity of the harm increases dramatically.” See Richard W.  
Downing, *Thinking Through Sentencing in Computer Hacking Cases: Did the U.S. Sentencing  
Commission Get It Right?*, 76 Miss. L.J. 923, 937-38 (2007) (citing U.S. Dep’t of Justice, *Six  
Defendants Plead Guilty in Internet Identity Theft and Credit Card Fraud Conspiracy*, at  
<http://www.cybercrime.gov/mantovaniPlea.htm> (Nov. 17, 2005), which describes an black

1 market for misappropriated identity documents, credit and bank card numbers, and email  
2 addresses). The threat of identity theft is so prevalent and foreseeable that at least one court  
3 has imposed a duty of care on data brokers which disclose personal information to clients.

4 *Remsburg v. Docusearch, Inc.*, 149 N.H. 148, 153-55, 816 A.2d 1001, 1006-08 (2003). Social  
5 Security numbers are vastly more difficult to change than email addresses, and the potential  
6 costs of misappropriation of Social Security number are correspondingly greater:

7  
8       The extent of the threat to individual privacy is readily apparent when  
9       considering that the SSN is used as an identification code that brings  
10       individuals into contact for everyday communication with databases containing  
11       a wide range of financial, medical, educational, and credit information. Once  
12       obtained by an identity thief, the SSN opens practically every door related to a  
13       person's identity and personal history and completely compromises an  
14       individual's personal privacy. . . . Identity theft occurs when an individual steals  
15       another individual's personal identifying information and uses it fraudulently. It  
16       is a crime that can affect all Americans. SSNs and other personal information,  
17       for example, are used to fraudulently obtain credit cards, open utility accounts,  
18       access existing financial accounts, commit bank fraud, file false tax returns,  
19       and falsely obtain employment and government benefits. The SSN plays an  
20       important role in identity theft because it is used as breeder information to  
21       create additional false identification documents . . .

22 John K. Webb, *Prosecuting Social Security Number Misuse: Attacking Identity Theft at its*  
23 *Source*, 53 U.S. Att'ys Bull. 1, 1-2 (Jan. 2005), available at  
24 [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5301.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5301.pdf). Again, it will typically be  
25 impossible for accountholders to trace any particular instance of identity theft back to  
26 Ameritrade's disclosure of their personal information, and therefore their legal remedy is  
27 inadequate because they will generally not be able to calculate their damages. *Stollenwerk v.*  
28 *Tri-West Healthcare Alliance*, No. 03-0185, 2005 U.S. Dist. LEXIS 41054, at \*15-21 (D. Ariz.  
Sept. 28, 2005) (evidence of six instances of identity theft against plaintiff beginning six  
weeks after defendant suffered security breach was not sufficient to survive motion for  
summary judgment). Indeed, someone used Elvey's name and Social Security number to open  
a cellular phone account and incurred \$2,500 in charges in 2006. (Elvey Decl. ¶ 4.) Elvey has  
no adequate legal remedy for this claim, because he has no way to prove that his information  
was obtained from Ameritrade. (*Id.*) Like spam, identity theft imposes significant non-  
monetary damages on its victims, including denial of credit or other financial services, time



1 lost to resolve the problems, harassment by creditors, and even criminal investigation, arrest,  
2 or conviction. U.S. General Accounting Office, Identity Theft: Prevalence and Cost Appear to  
3 be Growing 55 (GAO-02-363 2002). Further, other members of the California Resident Class  
4 may be victims of identity theft due to personal information obtained from Ameritrade – but  
5 not even know it. Plainly, these accountholders cannot have an adequate legal remedy if they  
6 do not even know their claim exists.

7       Where accountholders’ legal claims with respect to Ameritrade’s disclosure of email  
8 addresses or other personal information face insurmountable barriers, those legal claims are  
9 inadequate – and the accountholders face irreparable harm. Consequently, it is critical that  
10 Ameritrade act to protect accountholders – by disclosing its internal investigation and the  
11 possibility of a security breach, providing an accounting of California Resident Class  
12 members’ personal information and implementing reasonable security measures (or  
13 sequestering that information). The disclosure of the possible security breach is imperative  
14 because it will give California Resident Class members the opportunity to place a security  
15 freeze on their credit report – which will hamper any efforts at identity theft. *See* Cal. Civ.  
16 Code § 1785.11.2 (2007) (identity freeze legislation). Further, accountholders who purchase  
17 spammed stocks also face irreparable harm, because they will generally be unable to calculate  
18 the damage caused by Ameritrade’s failure to disclose that particular stocks were manipulated  
19 by spammers.

20  
21       **E. Balance of Hardships and Public Interest Favor Relief Sought in Motion**

22       The balance of hardships between Ameritrade, and Plaintiffs, the California Class  
23 Members and the public interest, tips sharply in favor of the injunction. Ameritrade should not  
24 be heard to complain of the costs of either complying with its Privacy Statement or amending  
25 the Privacy Statement so that it is not misleading, and the relief sought in the Motion imposes  
26 few out-of-pocket costs on Ameritrade. Ceasing any voluntary disclosure of accountholder  
27 email addresses will not burden Ameritrade at all. Ameritrade’s out-of-pocket costs for  
28 disclosing its investigation into a possible ongoing security breach, or alerting accountholders  
who try to purchase stock that is being manipulated by spam, are negligible. Ameritrade’s own

1 internal investigation should subsume the costs involved in setting up token email addresses to  
2 detect stock spam sent to its accountholders, and many or most of the costs associated with  
3 providing an accounting of the California Resident Class members' personal information and  
4 Ameritrade's information systems.

5  
6 Conversely, many parties, not just accountholders, face potentially grave burdens if the  
7 injunction does not issue. Without the injunction, it is plain that Ameritrade will continue to  
8 contribute (whether intentionally or not) to the societal problems spam imposes.

9 Spam imposes significant economic burdens on ISPs, consumers, and  
10 businesses. Left unchecked at its present rate of increase, spam may soon  
11 undermine the usefulness and efficiency of e-mail as a communications tool.  
12 Massive volumes of spam can clog a computer network, slowing Internet  
13 service for those who share that network. ISPs must respond to rising volumes  
14 of spam by investing in new equipment to increase capacity and customer  
15 service personnel to deal with increased subscriber complaints. ISPs also face  
16 high costs maintaining e-mail filtering systems and other antispam technology  
17 on their networks to reduce the deluge of spam. Increasingly, ISPs are also  
18 undertaking extensive investigative and legal efforts to track down and  
19 prosecute those who send the most spam, in some cases spending over a million  
20 dollars to find and sue a single, heavy-volume spammer.

21 S. Rep. No. 108-102, at 6. The Senate report cites two studies: one estimated that spam costs  
22 Internet subscribers worldwide \$9.4 billion annually, and the other estimated that anti-spam  
23 efforts increase the cost of an individual's Internet access service by an average of \$2 per  
24 month. *Id.* Still another study cited by the Senate report estimated that spam cost U.S.  
25 businesses over \$10 billion in 2003 from lost productivity, network system upgrades,  
26 unrecoverable data, and increased personnel costs, and that the employee productivity losses  
27 from sifting through and deleting spam accounted for nearly \$4 billion alone. *Id.* at 7.

28 If Ameritrade has disclosed personal information besides email addresses, the potential  
burdens imposed by the lack of an injunction become still more grave. One detailed study  
indicates that the average identity theft victim estimated he or she spent 175 hours and \$100 in  
costs on resolving their identity theft-related problems, and suffered a loss of \$808. U.S.  
General Accounting Office, Identity Theft: Prevalence and Cost Appear to be Growing 60-61.  
Identity theft imposes a high cost on the rest of society, as well. The majority of bank  
respondents to a American Bankers Association survey regarded identity theft as one of the



1 top three threats against deposit accounts and spend significant sums of money to prevent  
2 identity theft-related fraud. *Id.* at 41-42, 46-47. The Secret Service estimated its average cost  
3 for investigating an incident of identity theft was \$15,000. *Id.* at 65. The Executive Office for  
4 U.S. Attorneys estimated the average cost of prosecuting white-collar criminals was \$11,443.  
5 *Id.* at 66. Plainly, identity theft imposes high costs on our financial institutions and our justice  
6 system, and the public interest favors the mitigation of identity theft to the greatest extent  
7 possible.

8           Nonetheless, this Motion presents an unusual set of equities to the Court. Ameritrade's  
9 counsel has stated to Plaintiffs' counsel that Ameritrade is investigating these matters, and has  
10 asserted that this investigation might be prejudiced if it were disclosed publicly. Although  
11 counsel held several phone conferences that have been largely productive, Ameritrade has not  
12 yet provide adequate evidence to support this assertion. Elvey cannot simply take Ameritrade  
13 at its word and delay until Ameritrade deems its investigation complete (especially where  
14 Ameritrade has already publicly disclosed the fact of the internal investigation). (*See* Exs. D,  
15 E, F, G, and I.) As it stands, the parties have not been able to complete a Rule 26(f)  
16 conference, and so Plaintiffs have not propounded any discovery to test Ameritrade's claims.  
17 *See* Fed. R. Civ. P. 26(d). However, Elvey and the other California Resident Class members  
18 have as much interest in Ameritrade's investigation concluding successfully as Ameritrade  
19 itself, and Elvey does not dispute that Ameritrade may yet present persuasive evidence that its  
20 investigation (or certain aspects of the investigation) require or will benefit from a degree of  
21 confidentiality. Elvey and his counsel have repeatedly indicated they would enter into an  
22 appropriate confidentiality agreement if Ameritrade presented such evidence (as related in an  
23 email to Ameritrade's counsel, attached as Exhibit I)). (Ex. I 1.) Ultimately, Plaintiffs may  
24 alter or narrow the remedies sought in the Motion as Ameritrade produces more information  
25 in its response.

26  
27           **F. The Court Should Impose No Bond or a Minimal Bond**

28           Federal Rule of Civil Procedure 65(c) requires that a movant for a preliminary  
injunction give "security . . . in such sum as the court deems proper" before any preliminary

1 injunction issues. Fed. R. Civil P. 65(c). Rule 65(c) “invest[s] the district court with discretion  
 2 as to the amount of security required, if any.” *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237  
 3 (9th Cir. 1999) (citing three other circuit court cases); *Justin v. City of Los Angeles*, No. 00-  
 4 12352, 2000 U.S. Dist. LEXIS 17881, at \*6-7 (C.D. Cal. Dec. 5, 2000) (bonds under Rule  
 5 65(c) have “been dispensed with entirely where there was no proof of likelihood of harm to  
 6 the party enjoined”). Consequently, the Ninth Circuit boasts “long-standing precedent that  
 7 requiring nominal bonds is perfectly proper in public interest litigation.” *Save Our Sonoran*,  
 8 408 F.3d at 1126. *See also Walker v. Pierce*, 665 F. Supp. 831, 843-44 (N.D. Cal. 1987)  
 9 (waiving bond requirement for class representative). Elvey’s status as class representative, his  
 10 inability to absorb the expenses of a massive commercial empire like Ameritrade, and the  
 11 public interest features of the relief sought all weigh in favor of a minimal bond, or no bond at  
 12 all. (*Cf.* Elvey Decl. ¶ 5) (Elvey cannot afford a bond over \$1,000) *with Barahona-Gomez*, 167  
 13 F.3d at 1237 (affirming district court’s discretion to require only nominal bond of \$1,000);  
 14 *Justin*, 2000 U.S. Dist. LEXIS 17881, at \*38 (where injunction on constitutional claim  
 15 “pose[d] no risk of pecuniary injury . . . from being restrained and enjoined,” class  
 16 representative exempted from bond).

17  
 18 **II. The Preliminary Injunction Sought Is Carefully Tailored to Address the Ongoing  
 Harm to the California Resident Class**

19 Elvey seeks for himself and the California Resident Class a preliminary injunction that  
 20 addresses the harms arising from the disclosure of email addresses and potential security  
 21 breach. The injunction accounts for two alternative possibilities: that the disclosure of email  
 22 addresses is deliberate, or that the disclosure of email addresses is unintentional and is the  
 23 result of a security breach at Ameritrade.

24 **A. Plaintiff Elvey Seeks To Enjoin Disclosure of Accountholder Email  
 25 Addresses**

26 The Motion seeks an injunction prohibiting Ameritrade from disclosing its  
 27 accountholders’ personal information in a manner inconsistent with its Privacy Statement.  
 28 Although the deliberate disclosure of accountholder email addresses would be reprehensible,  
 remedying it is a simple matter. Injunctive relief under Elvey’s CLRA and UCL claims is a

1 statutory matter. Cal. Civ. Code § 1780(a)(2) (2007) (relief available under CLRA includes  
2 “order enjoining the methods, acts, or practices” violative of the CLRA); Cal. Bus. & Prof.  
3 Code 17203 (2007) (authority to enjoin persons engaged in unfair competition). Prohibiting  
4 Ameritrade from violating its Privacy Statement certainly falls within the UCL’s broad  
5 authorization “to prevent, deter, and compensate for unfair business practices.” *Cortez*, 23 Cal.  
6 4th at 176, 23 Cal. 4th at 176. *See also Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.  
7 4th 1134, 1146-1148, 63 P.3d 937, 945-947 (2003) (statutory analysis suggests that  
8 “deterrence of unfair practices” was “an important goal” of UCL); *Herr v. Nestlé U.S.A., Inc.*,  
9 109 Cal. App. 4th 779, 135 Cal. Rptr. 2d 477 (Cal. Ct. App. 2003) (injunction under UCL  
10 prohibiting age discrimination as unfair competition).

11 Any inability to stop the disclosure of email addresses purported by Ameritrade does  
12 not militate against Elvey’s injunctive relief. “A party’s inability to comply with a judicial  
13 order constitutes a defense to a charge of civil contempt.” *FTC v. Affordable Media, LLC*, 179  
14 F.3d 1228, 1239 (9th Cir. 1999) (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983)).  
15 If Ameritrade claims it is unable to stop the disclosure, it bears the burden of proving  
16 “categorically and in detail” that is the case. *Id.* at 1241. Ameritrade’s proof that it is unable to  
17 stop the disclosure would have the important judicial economy of definitively establishing  
18 whether or not there is a security breach or not – although remedying a security breach is far  
19 more problematic than remedying the voluntary disclosure of email addresses.

20  
21 **B. The Injunction Sought Requires Ameritrade to Mitigate the Security Breach**

22 California law also authorizes the injunction remedies which are aimed at addressing a  
23 security breach (requiring the disclosure of Ameritrade’s internal investigation, and the  
24 possibility of a security breach, and notification when accountholders try to purchase stocks  
25 known to Ameritrade to have been touted by spammers). California courts recognize that the  
26 CLRA authorizes mandatory corrective disclosures. *Colgan*, 135 Cal. App. 4th at 672-73,  
27 677-78, 38 Cal. Rptr. 3d at 41, 44-45 (affirming injunction requiring corrective advertising) .

28 Also, Elvey seeks an accounting of the California Resident Class members’ personal

1 information and Ameritrade's information systems as an equitable remedy for his breach of  
2 fiduciary duty claim. Equitable remedies for breach of fiduciary duty are available as a  
3 preliminary injunction. *Huong Que, Inc.*, 150 Cal. App. 4th at 400-19, 58 Cal. Rptr. 3d at 527-  
4 42 (preliminary injunction to prohibit competition on breach of loyalty claim); *Heckmann v.*  
5 *Ahmanson*, 168 Cal. App. 3d 119, 135-38, 214 Cal. Rptr. 177, 188-90 (Cal. Ct. App. 1985)  
6 (granting constructive trust as preliminary injunction). Where a breach of fiduciary duty is  
7 established, "the burden then shifts to the fiduciary to render an accounting." *In re Niles*, 106  
8 F.3d 1456, 1461 (9th Cir. 1997) (citing *Paramount Mfg. Co. v. Mohan*, 196 Cal. App. 2d 372,  
9 16 Cal. Rptr. 417, 421 (Cal. Ct. App. 1961)). An accounting requires Ameritrade to prove that  
10 it has performed its duties (including its duty of confidentiality) properly:

11           the action for account render compels the fiduciary to explain the books under  
12 oath. . . . the fiduciary was under a duty to render an account that should show  
13 in detail the items expended and show when, to whom, and for what purposes  
14 the payments were made so the beneficiaries can make a reasonable test of the  
15 accuracy of the accounts. The accounts should be clear and accurate and if they  
16 are not, all presumptions are against the trustee and all obscurities and doubts  
17 are to be taken adversely to him.

18 *Id.* at 1461 n.4 (citations, punctuation omitted). The common law evolves in step with the  
19 advance of technology and society; the scope of an accounting now encompasses information  
20 held by the fiduciary and the fiduciary's information technology systems. *See Cobell v.*  
21 *Norton*, 391 F.3d 251, 254-56 (D.C. Cir. 2004) (recounting breach of fiduciary duty claim  
22 against Department of Interior and accounting remedy against information technology  
23 insecurities). *See also* Cal. Bus. & Prof. Code § 17203 (2007) (providing for appointment of  
24 receiver). Here, Elvey seeks an accounting of Ameritrade's accounting of the personal  
25 information of California Resident Class members held by Ameritrade and the information  
26 technology systems on which Ameritrade stores such information.

27 **C. Ameritrade Should Be Prohibited From Instructing Its Accountholders to  
28 Spoliate Evidence**

Plaintiffs seek a court order prohibiting Ameritrade from directing its accountholders  
to delete stock spam received at the email addresses provided to Ameritrade. Ameritrade's  
response to customer inquiries regarding such spam directs accountholders to "[p]lease be

1 sure to delete any spam you might receive, then empty your e-mail's trash so that it's no  
2 longer kept there, either." (Ex. H 1) Such spam may be critical to proving CAN SPAM Class  
3 members damages. CAN SPAM Class members' claim for damages under the CAN SPAM  
4 Act provides for statutory damages calculated by

5  
6 multiplying the number of violations (with each separately addressed unlawful  
7 message that is transmitted . . . over the facilities of the provider of Internet  
8 access service, or that is transmitted or attempted to be transmitted to an  
9 electronic mail address obtained from the provider of Internet access service in  
10 violation of section 7704(b)(1)(A)(i) of this title, treated as a separate violation)

11 15 U.S.C. § 7706(g)(3)(A) (2007). Plainly, the elimination of evidence that such spam were  
12 transmitted to the CAN SPAM Class members' users will diminish their recovery. Ameritrade  
13 has indicated through counsel that it has stopped advising customers to discard the spam and  
14 instead simply asked the customer to send a copy of the spam to Ameritrade. While this  
15 assurance partly addresses Plaintiffs' concerns, Plaintiffs and their counsel would be remiss in  
16 their duties to the CAN SPAM Class if they settled for an unsworn representation by counsel  
17 who does not have personal knowledge of the matter.

18 The Court has the power to prevent Ameritrade from spoliating evidence proving the  
19 CAN SPAM Class's damages. Rule 23(d) vests the Court "with the authority and discretion to  
20 protect the interests and rights of class members . . . A district court has both the duty and the  
21 broad authority to exercise control over a class action and to enter appropriate orders  
22 governing the conduct of counsel and parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025  
23 (9th Cir. 1998) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981), punctuation  
24 omitted). The Court's authority and discretion extends to prohibiting misleading or prejudicial  
25 communications by defendants. *Wang v. Chinese Daily News, Inc.*, 236 F.R.D. 485, 487-89  
26 (C.D. Cal. 2006) (invalidating class member opt-outs under Rule 23(d) where the court found  
27 "that the opt outs were procured through fraud, duress, or other improper conduct" by  
28 defendant). *See also Pollar v. Judson Steel Corp.*, No. 82-6833, 1984 U.S. Dist. LEXIS 19765  
(N.D. Cal. Feb. 3, 1984). Courts have recognized that "it is obviously in defendants' interest  
to diminish the size of the class and thus the range of potential liability by soliciting exclusion  
requests." *Id.* at 488 (citing *Kleiner v. First Nat'l Bank*, 751 F.2d 1193, 1202 (11th Cir. 1985)).

1 Likewise, it is plainly in defendants' interest to eliminate evidence that supports class  
 2 members' claims for damages. "Such conduct reduces the effectiveness of the 23(b)(3) class  
 3 action for no reason except to undermine the purposes of the rule." *Kleiner*, 751 F.2d at 1202.  
 4 "Unsupervised, unilateral communications with the plaintiff class sabotage the goal of  
 5 informed consent by urging exclusion on the basis of a one-sided presentation of the fact,  
 6 without opportunity for rebuttal. The damage from misstatements could well be irreparable."  
 7 *Id.* at 1203. Further, the Court can prevent further spoliation of evidence under its "inherent  
 8 power . . . to levy sanctions in response to abusive litigation practices . . ." *Leon v. IDX Sys.*  
 9 *Corp.*, 464 F.3d 951, 958 (9th Cir. 2006).

### 10 **III. Plaintiffs Seek Class Certification Under Rule 23(b)(2) and Rule 23(c)(4) to the** 11 **Extent the Court Deems Class Certification Necessary to Obtain the Preliminary** 12 **Injunction**

13 Plaintiffs may not need class certification to obtain the preliminary injunction sought.  
 14 Ample authority supports the entry of preliminary injunctions to protect the class prior to  
 15 class certification. *See Washington v. Reno*, 35 F.3d 1093, 1104 (6th Cir. 1994) (class  
 16 certification sometimes unnecessary preliminary injunctions that provide class relief).<sup>5</sup> To the  
 17 extent that the requested injunction exceeds the Court's equitable powers as to Plaintiffs'  
 18 individual claims, they seeks class certification for the narrow purpose of effectuating the  
 19 preliminary injunction. *Cf.* Fed. R. Civ. P. 23(c)(4) (an action may be maintained as a class  
 20 action "with respect to particular issues"). The instant Motion seeks certification *exclusively*  
 21 for the purpose of obtaining the injunctive relief sought therein. Because the parties have not  
 22 been able to complete a Rule 26(f) conference, Plaintiffs have not taken the discovery that  
 23 typically precedes class certification. When due discovery is taken, Plaintiffs will file another  
 24 motion to certify the class's claims for permanent relief under Rule 23(b)(3). *Cf.* Fed. R. Civ.  
 25 P. 23(c)(1)(4) (order on class certification can be "altered or amended before final judgment").

26 Rule 23(c)(4) provides more than enough flexibility to certify classes "with respect to

27 <sup>5</sup> *See also Howe v. Varity Corp.*, No. 88-1598, 1989 U.S. Dist. LEXIS 17521, at \*52-53 (S.D.  
 28 Iowa July 14, 1989), *rev'd on other grounds*, 896 F.2d 1107 (8th Cir. 1990) (listing cases);  
*Bowman v. Nat'l Football League*, 402 F. Supp. 754, 755 (D. Minn. 1975). *But see Entm 't*  
*Software Assn'n v. Foit*, No. 06-431, 2006 U.S. Dist. LEXIS 67290, at \*11-12 (M.D. La. Aug.  
 24, 2006) (citing cases).



1 particular issues” (and not other issues). “It is within the discretion of the trial judge, under  
 2 Rule 23(c)(4), to limit the issues in a class action to those parts of a lawsuit which lend  
 3 themselves to convenient use of the class action motif.” *Soc’y for Individual Rights, Inc. v.*  
 4 *Hampton*, 528 F.2d 905, 906 (9th Cir. 1975) (quotation marks, citation omitted, certification  
 5 of class only for prospective injunctive relief was proper). For instance, “[a] court may certify  
 6 a Rule 23(b)(3) class for certain claims, allowing class members to opt out, while creating a  
 7 non-opt-out Rule 23(b)(1) or (b)(2) class for other claims.” Manual for Complex Litigation §  
 8 21.24 (4th ed. 2004).

9  
 10 [Rule 23(c)(4)] is particularly helpful in enabling courts to restructure complex  
 11 cases to meet the . . . requirements for maintaining a class action. . . . [Rule  
 12 23(c)(4)] is designed to give the court maximum flexibility in handling class  
 actions, its proper utilization will allow a Rule 23 action to be adjudicated that  
 otherwise might have had to be dismissed or reduced to a nonrepresentative  
 proceeding because it appears to be unmanageable.

13 *In re Activision Sec. Litig.*, 621 F. Supp. 415, 438 (N.D. Cal. 1985) (certification on single  
 14 issue related to liability). *See also In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124,  
 15 1139 (9th Cir. 2002) (remanding with recommendation that the trial court consider “[class]  
 16 certification only for questions of generic causation common to plaintiffs who suffer from the  
 17 same or a materially similar disease”); *Cent. Wesleyan College v. W.R. Grace & Co.*, 6 F.3d  
 18 177, 184-87 (4th Cir. 1993) (certification on certain issues related to asbestos liability);  
 19 *Santiago v. Philadelphia*, 72 F.R.D. 619, 629 (E.D. Pa. 1976) (deferring certification, but  
 20 stating “it is possible that a 23(b)(3) class action might be pursued for certain issues” if class  
 21 could not be certified under Rule 23(b)(2)). Indeed, many courts have already granted the  
 22 limited certification sought here: certification of a class for injunctive relief now under Rule  
 23 23(b)(2), while deferring the certification of a damages class under Rule 23(b)(3).<sup>6</sup>

24 <sup>6</sup> *Fraser v. Major League Soccer, LLC*, 180 F.R.D. 178, 182 (D. Mass. 1998) (certification of  
 25 only claims for injunctive and declaratory relief is “an appropriate limitation”); *Guckenberger*  
 26 *v. Boston Univ.*, 957 F. Supp. 306, 326 n. 17 (D. Mass. 1997); *Schreiber v. NCAA*, 167 F.R.D.  
 27 169, 176-77 (D. Kan. 1996) (where plaintiffs did not have sufficient evidence to support  
 28 certification under Rule 23(b)(3) because of defendants failure to comply with discovery  
 deadlines, class certification nonetheless appropriate for injunctive relief only under Rule  
 23(b)(2)), *amended by Law v. NCAA*, No. 94-205, 1998 U.S. Dist. LEXIS 6608 (D. Kan. Apr.  
 17, 1998) (class certification under 23(b)(3) ultimately granted, motion to decertify denied);  
*Morgan v. UPS of Am.*, 169 F.R.D. 349, 358 (E.D. Mo. 1996) (certification under Rule  
 23(b)(2) only on liability and injunctive relief, certification for damages remedy under Rule

1           **A. Members of Both Classes Are So Numerous That Joinder Is Impractical**

2           Members of both the California Resident Class and the CAN SPAM Class are  
3 numerous enough to support certification under Rule 23(a)(1). Ameritrade’s latest Form 10-K  
4 filed with the SEC indicates it has 6,191,000 accountholders. TD AMERITRADE Holding  
5 Corp., Form 10-K 31 (Dec. 12, 2006), *available at*

6 <http://edgar.sec.gov/Archives/edgar/data/1173431/000095013706013345/c10549e10vk.htm>.

7 It is reasonable to infer that this massive number of accountholders supports numerosity for  
8 both Classes. The U.S. Census Bureau estimates California contained more than 12% of the  
9 U.S. population in 2006. *See* U.S. Census Bureau, *California QuickFacts from the U.S.*

10 *Census Bureau*, at <http://quickfacts.census.gov/qfd/states/06000.html> (May 7, 2007).

11 Assuming that Ameritrade’s accountholders are distributed evenly across the US population,  
12 there are approximately 740,000 Ameritrade accountholders residing in California. This is a  
13 sufficient basis to infer numerosity. *L.H. v. Schwarzenegger*, No. 06-2042, 2007 U.S. Dist.

14 LEXIS 18728, at \*28-29 (E.D. Cal. Feb. 28, 2007) (class of learning disabled parolees

15 sufficiently numerous, where population of parolees was 4,000, a DOJ study indicated that

16 50% of parolees were learning disabled, and 25% percent of parolees “registered with Special  
17 Education”); *Nat’l Ass’n of Radiation Survivors v. Walters*, 111 F.R.D. 595, 599 (N.D. Cal.

18 1986), *rev’d on other grounds sub nom., Walters v. Nat’l Ass’n of Radiation Survivors*, 473

19 U.S. 305 (1985) (class of disability claimants drawn from population of 233,000 veterans

20 exposed to radiation was numerous, despite “no way to determine the number of future

21 claimants” and “long latency period of many radiation-related diseases”). Elvey does not have

22 to prove numerosity with absolute certainty but only present “sufficient material to allow [the

23  
24 \_\_\_\_\_  
25 23(b)(3) deferred until liability established); *Wakefield v. Monsanto Co.*, 120 F.R.D. 112, 117-  
26 18 (E.D. Mo. 1988) (“recommended procedure” in employment cases is to certify a class on  
27 liability issues and injunctive relief, and if liability is found, “to certify the damage phase as a  
28 Rule 23(b)(3) class action”). *See also Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200-  
01 (6th Cir. 1974) (“even if a plaintiff may be unable to state a sub-class for monetary  
damages with the proper specificity, it may be possible to specify a class for injunctive relief,”  
citing *Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972)); *Cason v. Nissan Motor  
Acceptance Corp.*, 212 F.R.D. 518, 520-23 (M.D. Tenn. 2002) (denying class certification  
under Rule 23(b)(2) for disgorgement remedy, but granting certification on purely injunctive  
and declaratory relief).



1 Court to make an] informed judgment” that the California Resident Class is sufficiently  
 2 “numerous that joinder of all members is impracticable” under Rule 23(a)(1). *Blackie v.*  
 3 *Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975). *See also Gay v. Waiters’ & Dairy*  
 4 *Lunchmen’s Union*, 549 F.2d 1330, 1332 n.5 (9th Cir. 1977) (with respect to numerosity  
 5 determinations “a judge may consider reasonable inferences drawn from facts before him at  
 6 that stage of the proceedings”); *Lynch v. Rank*, 604 F. Supp. 30, 36 (N.D. Cal. 1984), *aff’d*,  
 7 747 F.2d 528 (9th Cir. 1984) (“a court may draw a reasonable inference of class size from the  
 8 facts before it”).

9 Likewise, it is reasonable to infer that there are a sufficient number of CAN SPAM  
 10 Class members to satisfy Rule 23(a)(1), where the CAN SPAM Class members provide  
 11 service to approximately 6.2 million Ameritrade accountholders. *Cf. Jordan v. County of Los*  
 12 *Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982).  
 13 (classes with 39, 64, and 71 members sufficiently numerous) *with* ISP Planet, Top 21 U.S.  
 14 ISPs by Subscriber: Q4 2006, at <http://www.isp-planet.com/research/rankings/usa.html> (Apr.  
 15 12, 2007) (top 21 ISPs by subscriber base have 28.6 million users and control 30.1% of the  
 16 market). Plaintiffs do not need “to state the exact number of potential class members, nor is a  
 17 specific number of class members required for numerosity. . . . A court may make common  
 18 sense assumptions to support a finding that joinder would be impracticable.” *In re Rubber*  
 19 *Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D. Cal. 2005) (citation, quotation omitted).  
 20 *See also Sweet v. Pfizer*, 232 F.R.D. 360, 366 (C.D. Cal. 2005) (“where the exact size of the  
 21 class is unknown but general knowledge and common sense indicate that it is large, the  
 22 numerosity requirement is satisfied”) (citation, quotation omitted); *Moeller v. Taco Bell Corp.*,  
 23 220 F.R.D. 604, 608 (N.D. Cal. 2004) (same).

24  
 25 **B. The General Application of the Ameritrade Policies to Plaintiffs and the**  
 26 **Other Members of the Classes Establish Commonality, Typicality, and**  
 27 **Class Cohesion**

28 The Motion challenges Ameritrade’s policies which are generally applicable to the  
 members of either Class proposed in the Motion and FAC – the potential impact of these  
 policies on the members of each Class and the Class representatives satisfies both the

1 commonality and the typicality elements of Rule 23(a), as well as the common policy  
2 requirement of Rule 23(b)(2). Certification of the California Resident Class is appropriate  
3 because each member of the Class (including Elvey) is potentially affected by the policies  
4 which are challenged in the Motion – including the disclosure of their email addresses to  
5 spammers, and the failure to disclose Ameritrade’s internal investigation into the possibility of  
6 an security breach, and to notify Class members that spammers have manipulated particular  
7 stocks. Likewise, certification of the CAN SPAM Class is appropriate because each member  
8 of that class is potentially affected by Ameritrade’s policy of directing accountholders to  
9 eliminate evidence critical to their proof of damages.

10 “Although common issues must predominate for class certification under Rule  
11 23(b)(3), no such requirement exists under 23(b)(2).” *Walters*, 145 F.3d at 1047. Under Rule  
12 23(b)(2), it is sufficient that there is “a pattern or practice that is generally applicable to the  
13 class as a whole. Even if some class members have not been injured by the challenged  
14 practice, a class may nevertheless be appropriate.” *Id.* A class can be certified under Rule  
15 23(b)(2) where it is “composed of those who have not yet been injured by the allegedly  
16 defective policies, but that are or will in the future be exposed to a risk of harm as a result of  
17 the policies,” provided the class definition provides “definite boundar[ies]” between class  
18 members and non-class members. *Caroline C. v. Johnson*, 174 F.R.D. 452, 459-61 (D. Neb.  
19 1996). *See also Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (class claims  
20 under Rule 23(b)(2) “must be cohesive,” cited by *Sweet*, 232 F.R.D. at 374 (“a class under  
21 Rule 23(b)(2) must not be overrun with individual issues”). Distinguishing members of the  
22 California Resident Class from non-members is trivial and requires reviewing Ameritrade’s  
23 accountholder information to determine which accountholders live in California. Likewise,  
24 members of the CAN SPAM Class can be identified from the domain names incorporated in  
25 Ameritrade accountholders’ email addresses. Certification is appropriate under Rule 23(b)(2).

26  
27 Commonality exists where there are “shared legal issues with divergent factual  
28 predicates” or “a common core of salient facts coupled with disparate legal remedies within  
the class.” *Hanlon*, 150 F.3d at 1019. *See also Blackie*, 524 F.2d at 904 (commonality only

1 requires “a common issue of law or fact”); *O’Connor v. Boeing North Am., Inc.*, 180 F.R.D.  
 2 359, 370 (C.D. Cal. 1997) (sufficient commonality for class certification where relief “turn[s]  
 3 on questions of law applicable in the same manner to each member of the class”).

4 Commonality does not require class members to be identical and interchangeable: it tolerates  
 5 “divergent factual predicates” where there are “shared legal issues,” as well as “a common  
 6 core of salient facts coupled with disparate legal remedies within the class.” *Hanlon*, 150 F.3d  
 7 at 1019.

8 Typicality and commonality share many “underlying issue[s].” *Armstrong v. Davis*,  
 9 275 F.3d 849, 868 (9th Cir. 2001); *Smith v. Univ. of Wa. Law Sch.*, 2 F. Supp. 2d 1324, 1342  
 10 (W.D. Wash. 1998) (“Typicality turns on the defendant’s actions toward the plaintiff class, not  
 11 particularized defenses against individual class members.”). Under Rule 23(a)(3)’s  
 12 “permissive standards,” Plaintiffs are typical of their respective Classes because their claims  
 13 are “reasonably co-extensive with those of absent class members; [the claims] need not be  
 14 substantially identical.” *Hanlon*, 150 F.3d at 1020. Rule 23(a)(3) only requires “that the  
 15 unnamed class members have injuries similar to those of the named plaintiffs and that the  
 16 injuries result from the same, injurious course of conduct.” *Armstrong*, 275 F.3d at 869.<sup>7</sup>

17  
 18 **C. Class Representatives And Their Counsel Are Adequate to Represent the  
 Classes**

19 Lastly, Rule 23(a)(4) requires that Plaintiffs and their counsel fairly and adequately  
 20 protect the class's interests. The adequacy test has two elements: (1) are there conflicts  
 21 between the Class representatives or their counsel and the other Class members, and (2) will  
 22 the Class representatives and their counsel vigorously prosecute the class action? *See Hanlon*,

23  
 24 <sup>7</sup> Indeed, typicality under Rule 23(a)(3) lends class representatives enough flexibility to even  
 25 borrow absent class members’ standing. *See Gratz v. Bollinger*, 539 U.S. 244, 262-68 (2003)  
 26 (class representative denied undergraduate admission as freshman could represent class of  
 27 applicants denied undergraduate admission as transfers; use of race in transfer admissions  
 28 [did] not “implicate a significantly different set of concerns” than use of race in freshman  
 admissions); *Hicks v. Morgan Stanley & Co.*, No. 01-10071, 2003 U.S. Dist. LEXIS 11972, at  
 \*23 (S.D.N.Y. July 16, 2003) (analyzing *Gratz* and concluding that typicality requirement in  
 Rule 23(a)(3) sufficiently flexible that class representation with section 12 Securities Act  
 claim could represent class of section 11 claimants, citing 1 Alba Conte & Herbert B.  
 Newberg, *Newberg on Class Actions* § 2:9 (4th ed. 2002)); *In re WorldCom, Inc. Sec. Litig.*,  
 219 F.R.D. 267, 283 (S.D.N.Y. 2003) (similar).

1 150 F.3d at 1020. *See also Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003) (adequacy  
 2 “depends on the qualifications of counsel for the representatives, an absence of antagonism, a  
 3 sharing of interests between representatives and absentees, and the unlikelihood that the suit is  
 4 collusive”). Plaintiffs’ counsel are well qualified and highly experienced in litigating  
 5 consumer fraud actions. (Plaintiffs’ counsel’s resume is attached as Exhibit J.) Counsel will  
 6 advance the costs of litigation and will represent the Classes on a contingent fee basis, and  
 7 will provide representation to the class adequate pursuant to Rule 23(a)(4). Likewise, no  
 8 potential conflicts exist here: Plaintiffs share the precise same claims with their respective  
 9 Classes, and have an acute interest in the issuance of the preliminary injunction. “[C]ourts  
 10 have generally declined to consider conflicts . . . sufficient to defeat class action status at the  
 11 outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit.”  
 12 *Blackie*, 524 F.2d at 909. The burden is on the party opposing certification to show that the  
 13 named plaintiff will be an inadequate representative. *In re Data Access Systems Sec. Litig.*,  
 14 103 F.R.D. 130, 140 (D. N.J. 1984).

#### 15 **IV. Conclusion**

16 Plaintiffs need the preliminary injunction sought in the attached Motion to protect their  
 17 respective Classes from a variety of harms: the risk of disclosure of email addresses to  
 18 spammers and, worse, identity theft, lost investments on stocks manipulated by spammers,  
 19 and spoliation of evidence. All of these harms present irreparable injury to the respective  
 20 Classes and they are based on either incontestable breaches of Ameritrade’s fiduciary duties  
 21 and its Privacy Statement (for the California Resident Class) or spoliation of evidence (for the  
 22 CAN SPAM Class). The benefits of the relief sought will greatly outweigh any potential  
 23 harms to Ameritrade, so the Court should grant the relief requested.

24 Dated: July 10, 2007

25  
 26 By: /s/Alan Himmelfarb

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