

1 Alan Himmelfarb
 LAW OFFICES OF ALAN HIMMELFARB
 2 2757 Leonis Blvd
 Los Angeles, CA 90058
 3 Telephone: (323) 585-8696
 Fax: (323) 585-8198
 4 consumerlaw1@earthlink.net

5 Scott A. Kamber
 Ethan Preston
 6 KAMBER & ASSOCIATES, LLC
 11 Broadway, 22d Floor
 7 New York, NY 10004
 Telephone: (212) 920-3072
 8 Fax: (212) 202-6364
 skamber@kolaw.com
 9 epreston@kolaw.com

10 *Counsel for Plaintiffs*

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

PLAINTIFFS' OPPOSITION TO
DEFENDANT TD AMERITRADE,
INC.'S MOTION FOR EXTENSION
OF TIME

1 **PLAINTIFFS' OPPOSITION TO THE MOTION TO DISMISS**

2 Plaintiffs Matthew Elvey (“Elvey”) and Gadgetwiz, Inc. (“Gadgetwiz”), respectfully
3 file this Opposition to TD AMERTRADE, Inc. (“Ameritrade”) Motion for Extension of Time
4 to File Opposition to Plaintiffs’ Motion for Preliminary Injunction and Class Certification.

5 As Plaintiffs’ counsel expressed to Ameritrade’s counsel during their negotiations over
6 the extension, Plaintiffs’ counsel are “loathe to refuse any reasonable extension of time.”

7 (Preston Decl. Ex. 1.) Indeed, Plaintiffs already agreed to extend Ameritrade’s time to oppose
8 the Motion for Preliminary Injunction from July 24, 2007 to August 23, 2007 to accommodate
9 counsel’s scheduling conflicts.¹ (Court Order, dated July 26, 2007.) In principle, Plaintiffs do
10 not object to additional extensions of time. However, Plaintiffs must oppose *this* extension of
11 time, because

- 12 1. While the Motion for Preliminary Injunction is urgent, Ameritrade has provide only
13 the vaguest possible justification for its extension from which it is impossible for
14 Plaintiffs to determine whether the extension is, in fact, necessary;
- 15 2. Plaintiffs’ Motion for Preliminary Injunction sought to address exactly this refusal by
16 Ameritrade to provide any meaningful information concerning its ongoing security
17 breach; and
- 18 3. Ameritrade omits from its Motion significant details concerning its efforts to obtain
19 this extension, and its arguments for an extension distort Elvey’s actions.

20 **I. Basis for Plaintiffs’ Opposition**

21 Ameritrade seeks to discredit the Motion for Preliminary Injunction’s urgency,
22 asserting that “Plaintiffs will not be unfairly prejudiced as a result of a two-week continuance
23 in the hearing” because Elvey delayed in filing his lawsuit. The Motion for Preliminary
24 Injunction seeks to protect not only Elvey but also other members of the class. Ameritrade’s
25 argument downplays the threats of irreparable harm to the class which Plaintiffs’ Motion for
26 Preliminary Injunction addresses. These threats are amply discussed in Plaintiffs’ Motion for
27 Preliminary Injunction and are not recounted here except to say that 1) Ameritrade’s ongoing
28 security breach continues to disclose accountholder email addresses and potentially other
personal information, like Social Security numbers, and 2) that Ameritrade continues to

¹ As a technical matter, Ameritrade’s Motion for Extension of Time is deficient because it omits to mention this prior stipulation, required under Civil L.R. 6-3(a)(5). This deficiency is not the basis for this Opposition.

1 induce accountholders to provide it with personal information without disclosing the security
 2 breach in the Privacy Statement , and 3) class members do not have an adequate legal remedy
 3 for the spam or identity theft they suffer as a result of Ameritrade’s ongoing security breach.
 4 (Pl.s’ Mot. Prelim. Injunc. 7-11.) The potential harms of Ameritrade’s sought-after delay to
 5 both class members and to our justice system are real. (Pl.s’ Mot. Prelim. Injunc. 11-13,
 6 describing economic costs of spam and burden of prosecuting identity theft on legal system.)
 7 Agreeing to the extension of time sought by Ameritrade, in light of the limited information it
 8 has provided, would not be consistent with Plaintiffs’ fiduciary obligations as class
 9 representatives.

10 **II. Defects In Ameritrade’s Motion**

11 The paucity of detail in Ameritrade’s explanation results in several substantive defects
 12 to the Ameritrade’s Motion under Civil L.R. 6-3(a). Civil L.R. 6-3(a)(1) requires that
 13 Ameritrade’s Motion “[i]dentifies the substantial harm or prejudice that would occur if the
 14 Court did not change the time.” Ameritrade’s Motion fails to identify *any* harm or prejudice to
 15 Ameritrade if the extension is not granted. Further, Civil L.R. 6-3(a)(1) requires that
 16 Ameritrade’s motion “[s]et[] forth with particularity[] the reasons for the requested
 17 enlargement or shortening of time.” Ameritrade’s Motion says only that there was “a
 18 significant development in [Ameritrade’s internal security breach] investigation” on which it
 19 will “confer with its regulators,” and that “these efforts may significantly affect the company’s
 20 arguments in response to Plaintiffs’ pending motion.” (Lee Decl. ¶¶ 4, 5.) Ameritrade’s
 21 deliberately vague explanation does not rise to the level particularity required. To borrow from
 22 Rule 9(b) jurisprudence, particularity “means the who, what, when, where, and how: the first
 23 paragraph of any newspaper story.” *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.
 24 1990). Ameritrade’s Motion falls far short of that standard.

25 Plaintiffs have no information identifying the matters on which Ameritrade intends to
 26 confer with its regulators, and no information as to why those conferences could alter its
 27 arguments. ***Most importantly, Plaintiffs do not know whether the possible changes to***
 28 ***Ameritrade’s arguments justify extending the potential harms of a two week delay.*** Without

1 this information, Plaintiffs are obliged to take Ameritrade's word for that the extension is not
 2 simply a way of delaying the Motion for Preliminary Injunction. Indeed, the Motion for
 3 Preliminary Injunction seeks an equitable accounting, in part, to correct the dearth of
 4 information from Ameritrade. (Pl.s' Mot. Prelim. Injunc. 15-16.)

5 **III. Motion for Extension of Time**

6 Ameritrade's Motion for Extension of Time conveys two misleading and damaging
 7 impressions of Plaintiffs and their case: 1) that Plaintiffs' decision not to consent to the
 8 extension of time was unreasonable, and 2) that the delay in bringing Elvey's suit reflect a
 9 lack of diligence or urgency. Addressing these misimpressions is at least as important to
 10 Plaintiffs as the substantive relief sought in this Opposition.

11 First, Plaintiffs' decision not to consent to the extension of time was reasonable under
 12 the circumstances. Ameritrade's "significant development" occurred on August 19, 2007, but
 13 Ameritrade did not contact Plaintiffs' counsel until August 22, 2007 – the day before its
 14 deadline – *and gave Plaintiffs' counsel a deadline of three and a half hours to decide whether*
 15 *to consent to Ameritrade's extension request.* (Lee Decl. ¶ 4; Preston Decl. ¶¶ 4, 7.) In that
 16 three and one half hour window, Plaintiffs' counsel twice requested (verbally and by email)
 17 more detailed information about why the extension was necessary. (*Id.* ¶¶ 5, 8 & Ex. 1.)
 18 Ameritrade rebuffed Plaintiffs' counsel both times.² Ameritrade's counsel told Plaintiffs'
 19 counsel that would not disclose any more information than what it intended "to tell the court
 20 in our motion." (*Id.* ¶¶ 5, 9 & Ex. 2.) Ameritrade also stated that, if Plaintiffs' counsel did not
 21 provide a "definitive response" by its deadline, "*we will represent to the court that we notified*
 22 *you and conferred but never received a response one way or the other.*" (*Id.* ¶ 9 & Ex. 2)
 23 (emphasis added). Plaintiffs' counsel replied that "it would be most appropriate for
 24 [Ameritrade's counsel] to attach our correspondence to any motion on the extension" -- which
 25 request Ameritrade did not honor. (*Id.* ¶ 10 & Ex. 3.)

27 ² The parties have negotiated or virtually negotiated a protective order: when Plaintiffs'
 28 counsel asked in its initial phone conference with Ameritrade's counsel whether Ameritrade
 could provide more information if a protective order was filed, Ameritrade indicated it would
 not file the protective order before its 5 pm CST deadline passed. (Preston Decl. ¶¶ 6, 7.)

1 Finally, Ameritrade argues “according to the First Amended Complaint, Plaintiffs
2 became aware of spamming events in October 2006, but did not file the original Complaint
3 until May 2007.” (Def.’s Mot. 1.)³ This argument discounts Elvey’s diligence in investigating
4 his cause of action and Ameritrade’s own role in delaying Elvey’s resort to the legal system.
5 Elvey first reported spam at his unique Ameritrade email address to Ameritrade on or about
6 November 11, 2006. (Elvey Decl. ¶ 3.) Ameritrade responded on November 15, 2006 by
7 indicating that Ameritrade was “conducting a thorough investigation into this matter” and that
8 “we sincerely appreciate your cooperation and patience as we work to get to the source of
9 this.” (Elvey Decl. Ex. 1.) *In light of Ameritrade’s email, Elvey waited for Ameritrade to*
10 *resolve the situation until February 2007.* (Elvey Decl. ¶ 5.) Elvey received another email
11 from Ameritrade indicating that its investigation was continuing, but that it did not at that that
12 “have any further details into the investigation.” (Elvey Decl. Ex. 2.) As the First Amended
13 Complaint expressly alleges, at that time Elvey prepared a separate hard drive with a separate
14 operating system for the exclusive purpose of logging into Ameritrade’s website and checking
15 email from Ameritrade “[t]o ensure that he was not responsible for leaking” his email
16 addresses. (FAC ¶ 24. *See* Elvey Decl. ¶¶ 6-7.) ***Elvey and the class should not be penalized***
17 ***because of Elvey’s due diligence in investigating his cause of action before seeking legal***
18 ***representation.*** Moreover, Elvey did not immediately seek legal representation because he did
19 not recognize that he had legal claims. (*Id.* ¶ 13.) *Cf. Demitropoulos v. Bank One Milwaukee,*
20 *N.A.*, 915 F. Supp. 1399, 1418-19 (N.D. Ill. 1996) (in class action, “it is not at all uncommon”
21 for attorneys to educate their clients about the full range of their potential legal claims).
22 Finally, Elvey required some time to arrange legal assistance. Elvey twice sought assistance
23 from non-profit organizations in November 2006 and February 2007, but did not receive any
24 response until February 15, 2007. (*Id.* ¶¶ 4, 10.) Elvey also spent at least some time looking
25 for legal counsel who would take his case. (*Id.* ¶¶ 14-15.) Moreover, the delay in the filing of
26 Elvey’s complaint between April 25 and May 31 was attributable to counsel’s due
27

28 ³ This is not an accurate representation of the First Amended Complaint, which alleges that Elvey did not receive spam at his unique Ameritrade accounts until “on or about November 15, 2006.” (FAC ¶ 23. *But see* Elvey Decl. ¶ 2, first spam received on November 11, 2006.)

1 investigation of Elvey's claims. (Preston Decl. ¶ 11.) In comparison, Ameritrade is a massive
2 corporation with virtually instantaneous access to counsel and legal advise on an hourly fee
3 arrangement. Its criticism on the delay of filing Mr. Elvey's lawsuit does not reflect the
4 realities of consumer class action litigation, which depends on private citizens with limited
5 resources to investigate malfeasance or misfeasance in the marketplace.

6 Dated: August 23, 2007

7
8 By: /s/Alan Himmelfarb

9 Alan Himmelfarb
10 LAW OFFICES OF ALAN
11 HIMMELFARB
12 2757 Leonis Blvd
13 Los Angeles, CA 90058
14 Telephone: (323) 585-8696
15 Fax: (323) 585-8198
16 consumerlaw1@earthlink.net

17 Scott A. Kamber
18 Ethan Preston
19 KAMBER & ASSOCIATES, LLC
20 11 Broadway, 22d Floor
21 New York, NY 10004
22 Telephone: (212) 920-3072
23 Fax: (212) 202-6364
24 skamber@kolaw.com
25 epreston@kolaw.com
26
27
28