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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  
 corporation, and DOES 1 to 100,

19 Defendants.

No. C 07 2852 MJJ

Judge Martin J. Jenkins

**DECLARATION OF ETHAN  
 PRESTON IN SUPPORT OF  
 PLAINTIFFS' OPPOSITION TO  
 DEFENDANT TD AMERITRADE,  
 INC.'S MOTION FOR EXTENSION  
 OF TIME**

1 Pursuant to 28 U.S.C. § 1746, I, Ethan Preston, hereby declare and state as follows:

- 2 1. I am an attorney admitted to practice in the state of Illinois, and represent  
3 Plaintiffs in the above-titled action. I am entering this declaration pursuant to  
4 Civil L.R. 6-3(c) in support of Plaintiffs' Opposition to Defendant's Motion For  
5 Extension of Time to File Opposition to Plaintiffs' Motion for Preliminary  
6 Injunction and Class Certification. This declaration is based upon my personal  
7 knowledge, except where expressly noted otherwise.
- 8 2. No earlier than 12 pm CST (or 10 pm PST), I received an email from Mr.  
9 Rubin, TD Ameritrade's counsel in this proceeding, that indicated he wished to  
10 speak with me.
- 11 3. I was first able to speak with Mr. Rubin around 1:30 pm CST (i.e., 11:30 PST),  
12 August 22, 2007. In that phone call, Mr. Rubin indicated that TD Ameritrade  
13 had made a significant discovery and/or breakthrough in its internal  
14 investigation relevant to this case, and indicated that Ameritrade sought  
15 Plaintiffs' consent to a two week extension with respect to Plaintiffs' pending  
16 motion for preliminary injunction.
- 17 4. In the 1:30 pm phone call, I offered to Mr. Rubin, in the alternative, that the  
18 parties would at least attempt to keep to the current briefing schedule, but that  
19 Plaintiffs would stipulate to Ameritrade having leave to file whatever amended  
20 pleadings that would be appropriate. Mr. Rubin ultimately declined this offer.
- 21 5. In the 1:30 pm phone call, I inquired why Ameritrade's discovery would  
22 require an extension, but Mr. Rubin indicated that Ameritrade had instructed  
23 him not to provide any information about the discovery. Mr. Rubin further  
24 indicated that this was to prevent representation that might later turn out to be  
25 inaccurate.
- 26 6. Plaintiffs have been negotiating a protective order with Ameritrade for over a  
27 week. I am not directly involved in those negotiations, but my understanding is  
28 that the parties had achieved a final draft order that was ready to be filed. I

1 asked Mr. Rubin whether Ameritrade could provide more detailed information  
2 if the protective order was filed.

3 7. Mr. Rubin indicated that the filing of the protective order “just wasn’t  
4 happening” today and pressed for Plaintiffs’ consent to the extension. Further,  
5 Mr. Rubin informed me that Ameritrade had set a 5 pm CST (3 pm PST)  
6 deadline for Plaintiffs to consent to the extension. I concluded the 1:30 phone  
7 call by indicating that I would consider the extension and would respond to the  
8 request for an extension by the 5pm CST deadline set by Ameritrade.

9 8. I sent an email to Mr. Rubin at 3:56 pm CST which requested that Mr. Rubin  
10 state in writing, in as much detail his client and time would allow, “a) what  
11 steps Ameritrade will be taking in the proposed extension, and b) what changes  
12 or alterations Ameritrade expects to made as a result of the proposed extension”  
13 so that Plaintiffs’ counsel could adequately evaluate the request for an  
14 extension. This email is attached as Exhibit 1 to this Declaration.

15 9. Mr. Rubin responded by email at 4:30 pm CST. Mr. Rubin’s response indicated  
16 only that “there was a significant development in TD AMERITRADE’s ongoing  
17 internal investigation of possible unauthorized acquisition of customer e-mail  
18 addresses from TD Ameritrade’s computer systems” that might “significantly  
19 affect the company’s arguments in response to Plaintiffs’ pending motion.” Mr.  
20 Rubin’s reply also stated that if he did not “receive a definitive response from  
21 [me] by 3 pm PDT, we will represent to the court that we notified you and  
22 conferred but never received a response one way or the other.” This email is  
23 attached as Exhibit 2 to this Declaration.

24 10. I replied by email at 4:58 pm CST. I indicated my belief to Mr. Rubin that “it  
25 would be most appropriate for [him] to attach our correspondence to any  
26 motion on the extension.” I also stated that we “reluctantly decline[d] to  
27 consent to any extension” as “we do not believe that acceding to another  
28 extension while there is ongoing harm to the class given [the level of detail

1 provided by Ameritrade] would . . . be consistent with our fiduciary obligations  
2 to the class.” This email is attached as Exhibit 3 to this Declaration.

3  
4 11. I was first contacted by Mr. Elvey regarding the matters alleged in the First  
5 Amended Complaint on April 25, 2007. Between that time and May 30, I  
6 investigated Mr. Elvey’s representations on those matters, reviewed the  
7 evidence he had collected, conducted other investigations into the matter by  
8 reading various accounts of those matters and contacting potential witnesses,  
9 prepared a retainer letter for Mr. Elvey, drafted CLRA correspondence to TD  
10 Ameritrade, and drafted a complaint when I realized that Ameritrade was  
11 directing class members to destroy evidence after reading a story on a  
12 prominent online forum for technology and technology policy news on May 30,  
13 2007. I directed the filing of Elvey’s complaint the next day, May 31.

14 Pursuant to Section X of the Northern District of California's General Order No. 45 on  
15 electronic case filing and 28 U.S.C. § 1746, in lieu of Ethan Preston’s signature on this  
16 declaration, Alan Himmelfarb attests that Ethan Preston is the signatory of this declaration,  
17 and that Ethan Preston concurred to this declaration on August 22, 2007.

18 DATE: August 23, 2007

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27  
28  
/s/Alan Himmelfarb  
ALAN HIMMELFARB

# Exhibit 1

**From:** [ep@eplaw.us](mailto:ep@eplaw.us)

**To:** [LRubin@mayerbrownrowe.com](mailto:LRubin@mayerbrownrowe.com)

**Cc:** [skamber@kolaw.com](mailto:skamber@kolaw.com)

**Subject:** Extension for time to oppose Plaintiff's Motion for Preliminary Injunction

**Date:** Wed, 22 Aug 2007 16:03:47 -0500 (CDT)

Lee,

You called me around 10am PST to initiate the discussion on the extension for the opposition to Plaintiff's motion for preliminary injunction. In our conference at 1pm CST, you indicated that Ameritrade had made a momentous discovery and/or breakthrough in its internal investigation into the source of the spam at issue in the FAC, and indicated that Ameritrade sought a two week extension.

I initially offered (and I continue to offer) in the alternative that we would at least attempt to keep to the current briefing schedule, but that we would be happy to stipulate to Ameritrade having leave to file whatever amended pleadings as would be appropriate. You did not reject that offer, but pressed with the extension. I asked some questions about why Ameritrade's discovery would require an extension, but you indicated that Ameritrade had instructed you not to say anything about the discovery (lest whatever representations you made turned out to be inaccurate).

You indicated, in our 1pm CST conference, that I had a 3 pm PST deadline to stipulate to the extension, or not.

These are the facts as I understand them. I am writing 1) to confirm that we agree on these facts, and 2) so that we can adequately evaluate Ameritrade's request, to ask you please state in writing, in as much detail as your client and time allow, a) what steps Ameritrade will be taking in the proposed extension, and b) what changes or alterations Ameritrade expects to make as a result of the proposed extension?

Please understand that once we have this information, we would be favorably inclined to grant it -- we are loathe to refuse any reasonable extension of time -- but that we would be hard pressed to grant it given the limited information Ameritrade has provided at the current time.

Thanks,

Ethan

## Exhibit 2

**From:** Rubin, Lee H. <[LRubin@mayerbrownrowe.com](mailto:LRubin@mayerbrownrowe.com)>

**To:** [ep@eplaw.us](mailto:ep@eplaw.us)

**Subject:** RE: Extension for time to oppose Plaintiff's Motion for Preliminary Injunction

**Date:** Wed, 22 Aug 2007 14:30:37 -0700 (16:30 CDT)

Ethan -- What I can tell you now is what we intend to tell the court in our motion: That this past Sunday, August 19, 2007, there was a significant development in TD AMERITRADE's ongoing internal investigation of possible unauthorized acquisition of customer e-mail addresses from TD Ameritrade's computer systems; that TD AMERITRADE is currently in the midst of evaluating the newly discovered information and intends to confer with its regulators regarding the matter and that the results of these efforts may significantly affect the company's arguments in response to Plaintiffs' pending motion.

As I explained, in light of the current circumstances, we believe we need additional time to formulate our response and therefore intend to ask the court for the two week extension and for a two week continuance in the other briefing dates. I assume from your email below that you do not consent to this extension, but please provide me with a formal yes or no. As I mentioned, we believe it is necessary to file this motion by 3 pm and you said that you would be in a position to respond to our request by that time. If I do not receive a definitive response from you by 3 pm PDT, we will represent to the court that we notified you and conferred but never received a response one way or the other. Thanks, Lee

-----Original Message-----

From: [ep@eplaw.us](mailto:ep@eplaw.us) [mailto:[ep@eplaw.us](mailto:ep@eplaw.us)]

Sent: Wednesday, August 22, 2007 2:04 PM

To: Rubin, Lee H.

Cc: [skamber@kolaw.com](mailto:skamber@kolaw.com)

Subject: Extension for time to oppose Plaintiff's Motion for Preliminary Injunction

Lee,

You called me around 10am PST to initiate the discussion on the extension for the opposition to Plaintiff's motion for preliminary injunction. In our conference at 1pm CST, you indicated that Ameritrade had made a momentous discovery and/or breakthrough in its internal investigation into the source of the spam at issue in the FAC, and indicated that Ameritrade sought a two week extension.

I initially offered (and I continue to offer) in the alternative that we would at least attempt to keep to the current briefing schedule, but that we would be happy to stipulate to Ameritrade having leave to file amended pleadings as would be appropriate. You did not reject that offer, but pressed with the extension. I asked some questions about why Ameritrade's discovery would require an extension, but you indicated that Ameritrade had instructed you not to say anything about the discovery (lest whatever representations you made turned out to be inaccurate).

You indicated, in our 1pm CST conference, that I had a 3 pm PST deadline to stipulate to the extension, or not.

These are the facts as I understand them. I am writing 1) to confirm

that

we agree on these facts, and 2) so that we can adequately evaluate Ameritrade's request, to ask you please state in writing, in as much detail as your client and time allow, a) what steps Ameritrade will be taking in the proposed extension, and b) what changes or alterations Ameritrade expects to made as a result of the proposed extension?

Please understand that once we have this information, we would be favorably inclined to grant it -- we are loathe to refuse any reasonable extension of time -- but that we would be hard pressed to grant it given the limited information Ameritrade has provided at the current time.

Thanks,

Ethan

IRS CIRCULAR 230 NOTICE. Any advice expressed above as to tax matters was neither written nor intended by the sender or Mayer, Brown, Rowe & Maw LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed under U.S. tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then (i) the advice was written to support the promotion or marketing (by a person other than Mayer, Brown, Rowe & Maw LLP) of that transaction or matter, and (ii) such taxpayers should seek advice based on the taxpayers particular circumstances from an independent tax advisor.

This email and any files transmitted with it are intended solely for the use of the individual or entity to whom they are addressed. If you have received this email in error please notify the system manager. If you are not the named addressee you should not disseminate, distribute or copy this e-mail.

## Exhibit 3

From: [ep@eplaw.us](mailto:ep@eplaw.us)

To: Rubin, Lee H. <[LRubin@mayerbrownrowe.com](mailto:LRubin@mayerbrownrowe.com)>

Subject: RE: Extension for time to oppose Plaintiff's Motion for Preliminary Injunction

Date: Wed, 22 Aug 2007 16:58:41 -0500 (CDT)

Lee,

I believe it would be most appropriate for you to attach our correspondence to any motion on the extension. Given the paucity of definitive information advanced by Ameritrade at this time, we must reluctantly decline to consent to any extension. We had sought a detailed explanation of the reasons for the extension; Ameritrade has responded by claiming there is some undefined "significant development" that "may significantly affect the company's arguments in response to Plaintiffs' pending motion." Unfortunately, we do not believe that acceding to another extension while there is ongoing harm to the class given this level of detail would not be consistent with our fiduciary obligations to the class.

Regards,

Ethan

> Ethan -- What I can tell you now is what we intend to tell the court in  
> our motion: That this past Sunday, August 19, 2007, there was a  
> significant development in TD AMERITRADE's ongoing internal  
> investigation of possible unauthorized acquisition of customer e-mail  
> addresses from TD Ameritrade's computer systems; that TD AMERITRADE is  
> currently in the midst of evaluating the newly discovered information  
> and intends to confer with its regulators regarding the matter and that  
> the results of these efforts may significantly affect the company's  
> arguments in response to Plaintiffs' pending motion.  
>  
> As I explained, in light of the current circumstances, we believe we  
> need additional time to formulate our response and therefore intend to  
> ask the court for the two week extension and for a two week continuance  
> in the other briefing dates. I assume from your email below that you do  
> not consent to this extension, but please provide me with a formal yes  
> or no. As I mentioned, we believe it is necessary to file this motion  
> by 3 pm and you said that you would be in a position to respond to our  
> request by that time. If I do not receive a definitive response from  
> you by 3 pm PDT, we will represent to the court that we notified you and  
> conferred but never received a response one way or the other. Thanks,  
> Lee  
> -----Original Message-----  
> From: [ep@eplaw.us](mailto:ep@eplaw.us) [<mailto:ep@eplaw.us>]  
> Sent: Wednesday, August 22, 2007 2:04 PM  
> To: Rubin, Lee H.  
> Cc: [skamber@kolaw.com](mailto:skamber@kolaw.com)  
> Subject: Extension for time to oppose Plaintiff's Motion for Preliminary  
> Injunction  
>  
> Lee,  
>  
> You called me around 10am PST to initiate the discussion on the  
> extension  
> for the opposition to Plaintiff's motion for preliminary injunction. In  
> our conference at 1pm CST, you indicated that Ameritrade had made a  
> momentous discovery and/or breakthrough in its internal investigation  
> into  
> the source of the spam at issue in the FAC, and indicated that  
> Ameritrade

> sought a two week extension.  
>  
> I initially offered (and I continue to offer) in the alternative that we  
> would at least attempt to keep to the current briefing schedule, but  
> that  
> we would be happy to stipulate to Ameritrade having leave to file  
> whatever  
> amended pleadings as would be appropriate. You did not reject that  
> offer,  
> but pressed with the extension. I asked some questions about why  
> Ameritrade's discovery would require an extension, but you indicated  
> that  
> Ameritrade had instructed you not to say anything about the discovery  
> (lest whatever representations you made turned out out be inaccurate).  
>  
> You indicated, in our 1pm CST conference, that I had a 3 pm PST deadline  
> to stipulate to the extension, or not.  
>  
> These are the facts as I understand them. I am writing 1) to confirm  
> that  
> we agree on these facts, and 2) so that we can adequately evaluate  
> Ameritrade's request, to ask you please state in writing, in as much  
> detail as your client and time allow, a) what steps Ameritrade will be  
> taking in the proposed extension, and b) what changes or alterations  
> Ameritrade expects to made as a result of the proposed extension?  
>  
> Please understand that once we have this information, we would be  
> favorably inclined to grant it -- we are loathe to refuse any reasonable  
> extension of time -- but that we would be hard pressed to grant it given  
> the limited information Ameritrade has provided at the current time.  
>  
> Thanks,  
>  
> Ethan  
>  
> IRS CIRCULAR 230 NOTICE. Any advice expressed above as to tax matters was  
> neither written nor intended by the sender or Mayer, Brown, Rowe & Maw LLP  
> to be used and cannot be used by any taxpayer for the purpose of avoiding  
> tax penalties that may be imposed under U.S. tax law. If any person uses  
> or refers to any such tax advice in promoting, marketing or recommending a  
> partnership or other entity, investment plan or arrangement to any  
> taxpayer, then (i) the advice was written to support the promotion or  
> marketing (by a person other than Mayer, Brown, Rowe & Maw LLP) of that  
> transaction or matter, and (ii) such taxpayers should seek advice based on  
> the taxpayers particular circumstances from an independent tax advisor.  
>  
> This email and any files transmitted with it are intended solely for the  
> use of the individual or entity to whom they are addressed. If you have  
> received this email in error please notify the system manager. If you are  
> not the named addressee you should not disseminate, distribute or copy  
> this e-mail.  
>

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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

**DECLARATION OF MATTHEW  
ELVEY IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
DEFENDANT TD AMERITRADE,  
INC.'S MOTION FOR EXTENSION  
OF TIME**

1 Pursuant to 28 U.S.C. § 1746, I, Matthew Elvey, hereby declare and state as follows:

- 2 1. I am over the age of eighteen and am fully competent to make this declaration.  
3 I make this declaration based upon personal knowledge.
- 4 2. I provided Ameritrade with an unique email address in October 24, 2006, and  
5 received spam at that email address at November 11, 2006. From this, I  
6 determined that Ameritrade might be disclosing my email address to spammers.
- 7 3. I reported the incident to Ameritrade on or about November 11, 2006, and  
8 Ameritrade sent me email on November 15, 2006 which reassured me that it  
9 was investigating the matter and would deal with it appropriately. A copy of  
10 this email is attached as Exhibit 1.
- 11 4. I sought assistance from the Privacy Rights Clearinghouse in November 19,  
12 2006 and February 15, 2007. The Privacy Rights Clearinghouse did not respond  
13 until February 15, 2007, when it indicated it would not be able to assist me.
- 14 5. I waited for a resolution from Ameritrade from the date of its November 15,  
15 2006 email until February 2007.
- 16 6. In February 2007, I set up a separate hard drive with a separate operating  
17 system on my computer for the exclusive purpose of logging into Ameritrade's  
18 website and checking email from Ameritrade.
- 19 7. Afterwards, I provided Ameritrade with another unique email address on  
20 February 14, 2007. I followed this procedure for the express purpose of  
21 eliminating the possibility that I was somehow responsible for disclosing that  
22 second email address to spammers.
- 23 8. Nonetheless, I began to receive spam at that second email address, and  
24 conclusively determined that Ameritrade must have been responsible for  
25 disclosing that second email address to spammers.
- 26 9. I received a second email from Ameritrade on February 16, 2007 that indicated  
27 that its investigation into the disclosure of my email address was continuing,  
28 but that Ameritrade did not have anything further to report at that time. A copy

1 of this email is attached as Exhibit 2.

2 10. I sought assistance in February 15, 2007 from the ID Theft Resource Center.  
3 The ID Theft Resource Center never responded to my request for assistance.

4 11. I understood that Ameritrade's disclosure of my email address was a serious  
5 matter in November 2006, but I did not consider legal action at that time.

6 12. After November 2006, I gradually understood that Ameritrade, despite its  
7 reassuring emails, was not making adequate progress in addressing the problem  
8 and I became aware that there were other people who had determined that  
9 Ameritrade had disclosed their unique email addresses to spammers, and that  
10 my situation was not unique.

11 13. I did not consider legal action until April 2007, when I concluded that the  
12 problem was so serious that it would be appropriately dealt with in the legal  
13 system.

14 14. I emailed one class action firm on April 13, 2007 but did not receive any  
15 response.

16 15. I emailed Ethan Preston, my current counsel in this case, on April 25, 2007.

17 Pursuant to Section X of the Northern District of California's General Order No. 45 on  
18 electronic case filing and 28 U.S.C. § 1746, in lieu of Matthew Elvey's signature on this  
19 declaration, Alan Himmelfarb attests that Matthew Elvey is the signatory of this declaration,  
and that Matthew Elvey concurred to this declaration on August 23, 2007.

20 DATE: August 23, 2007

21 /s/Alan Himmelfarb  
22 ALAN HIMMELFARB  
23  
24  
25  
26  
27  
28

# Exhibit 1

**Subject:** Re: Internet security (KMM33822988I17490L0KM)  
**From:** TD AMERITRADE Client Services <clientservices@tdameritrade.com>  
**Date:** Wed, 15 Nov 2006 16:23:12 -0600 (CST)  
**To:** MATTHEW ELVEY <AMERITRADE5@matthew.elvey.com>

Mr. Elvey,

Thank you for reporting that you received spam e-mail at an e-mail address you use with TD AMERITRADE.

We take your privacy very seriously, and are conducting a thorough investigation into this matter.

To help us get to the source of the spam, we would appreciate it if you would reply to this message and provide the following:

- The date the e-mail was received
- The address the spam was sent to (your e-mail address)
- The e-mail source (the "from" address)
- Whether this was the first occurrence

We sincerely appreciate your cooperation and patience as we work to get to the source of this.

If you'd like to learn about general tips about privacy and security, you can visit the Security Center online. You'll find it after you log on, under the Client Services menu.

Thank you,

Donald S.  
Technology Support, TD AMERITRADE  
Division of TD AMERITRADE, Inc.

## Exhibit 2

**Subject:** Re: [Fwd: 04.1 Our investigation [\_\_\_\_\_]] (KMM35641335I17490L0KM)  
**From:** TD AMERITRADE Client Services <clientservices@tdameritrade.com>  
**Date:** Fri, 16 Feb 2007 08:47:27 -0600 (CST)  
**To:** Matthew Elvey <matthew@elvey.com>

Mr. Elvey:

Thank you for contacting us in regards to the spam e-mails you have received. We continue to investigate the spam reports. We are doing a thorough check of everything so we can find the root cause and work with the appropriate authorities to get it stopped. At this time we do not have any further details into the investigation. We appreciate your patience while we continue to investigate. Please contact us if you have any further questions or concerns.

Sincerely,

Chris B.  
Manager, Technology Support, TD AMERITRADE  
Division of TD AMERITRADE, Inc.

Original Message Excluded:

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