

1 Sean Reis (SBN 184044)
 sreis@edelson.com
 2 EDELSON MCGUIRE, LLP
 30021 Tomas Street, Suite 300
 3 Rancho Santa Margarita, California 92688
 4 Telephone: (949) 459-2124

5 Counsel for Plaintiffs
 [additional counsel appear on signature page]

6
 7 Whitty Somvichian (SBN 194463)
 wsomvichian@cooley.com
 8 COOLEY LLP
 101 California Street, 5th Floor
 9 San Francisco, California 94111
 Telephone: (415) 693-2000
 10 Facsimile: (415) 693-2222

11 Counsel for Defendant
 12 [additional counsel appear on signature page]

13
 14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **SAN FRANCISCO DIVISION**

17 JOSEPH ROLING and ALEXANDER
 18 LANDVATER, individuals and on behalf of
 all others similarly situated,

19 Plaintiffs,

20 v.

21 E*TRADE SECURITIES LLC, a Delaware
 22 limited liability company, and DOES 1-50,
 inclusive,

23 Defendant.
 24

Case No. 3:10-cv-00488-MHP

**~~PROPOSED~~ REVISED DISCOVERY
 PLAN**

1 In accordance with this Court's Order of August 10, 2010 (Dkt. 53), on August 26,
2 2010, counsel for the Parties engaged in a meet and confer regarding the substance and scope
3 of discovery in this matter, a putative class action challenging E*TRADE's practice of
4 charging its customers "inactivity fees." As a result of the meet and confer, the Parties
5 jointly submitted a Proposed Discovery Plan that was filed with the Court on September 15,
6 2010 (Dkt. 55). The Court has not, at this time, entered the original discovery plan. The
7 Parties agree that additional time is necessary to complete discovery and, accordingly, submit
8 the following Proposed Revised Discovery Plan pursuant to that agreement:

9 **A. General Overview of Discovery Schedule**

10 E*TRADE has proposed that discovery should proceed in phases, with the first phase
11 of discovery limited to issues pertaining to class certification, and the second phase of
12 discovery limited to the merits. Plaintiffs do not object to bifurcation in this matter between
13 class and merits issues. In the first phase of discovery, the Parties will limit discovery to (1)
14 the individual claims of the named Plaintiffs and (2) factual issues relevant to Rule 23.
15 E*TRADE has indicated that certain information regarding the named Plaintiffs' claims
16 depend on electronic information approximately 10 years old. Accordingly, the Parties
17 anticipate that 11 months is a reasonable time to search for, assemble, extract and process the
18 electronic information that might be necessary, as well as to contact potential fact witnesses
19 who might no longer be employed by E*TRADE.

20 Plaintiffs will file their Rule 23 motion for class certification no later than one month
21 following the completion of such discovery. The Parties agree that E*TRADE shall have
22 approximately 40 days thereafter to file its Opposition brief, and Plaintiffs another 30 days to
23 file their Reply brief.

24 If the Court grants the Plaintiffs' Rule 23 motion, discovery would proceed to the
25 second phase, wherein the Parties may engage in discovery related to the calculation of class-
26 wide damages and information required for class notification purposes. The Parties propose
27
28

1 3 months time for this second phase.

2 In addition, Plaintiffs propose the following addition to the briefing schedule below
3 (the "Proposal"):

4 (1) That the Court allow Plaintiffs to file an initial motion for class certification by
5 June 1, 2011 (the "Initial Class Motion"). Plaintiffs believe the Initial Class Motion would
6 serve to focus discovery (including expert reports) in the first phase of discovery;

7 (2) E*TRADE would not file an opposition to, nor would the Court rule on, the
8 Initial Class Motion;

9 (3) Plaintiffs would finalize and supplement the Initial Class Motion by December 1,
10 2011; and

11 (4) Briefing, including E*TRADE's opposition brief and Plaintiffs' reply brief, any
12 argument, and Court decision, would follow according to the below schedule.

13 E*TRADE takes no position on Plaintiffs' Proposal.

14 Thus, the Parties propose the following discovery plan (brackets indicate the
15 proposed schedule if the Court permits Plaintiffs to file the Initial Class Motion described
16 above):

17 [Plaintiff's Initial Motion for Class Cert]: No later than June 1, 2011

18 First Phase Discovery Cutoff: Dec. 1, 2010 – November 1, 2011

19 Designation of Class Experts: September 9, 2011

20 Plaintiffs' [Supplemental] Motion for Class
21 Certification: December 1, 2011

22 E*TRADE's Opposition to Class Cert: January 12, 2012

23 Plaintiffs' Reply in Support of Class Cert: February 9, 13, 2012

24 Second Phase Discovery Cutoff: May 10, 2012 or 3 months following
25 ruling on Class Cert., whichever is later

26 Deadline for Dispositive Motions: July 13, 2012 or 60 days following close
27 of merits discovery, whichever is later.

1
2 The deadline for dispositive motions described above is a cutoff date, not a due date.
3 E*TRADE's position is that it should be allowed to file a dispositive motion at any time,
4 including before class certification. E*TRADE maintains that such briefing may help
5 streamline the issues for class certification. Plaintiffs' position is that Plaintiffs should also
6 be allowed to file a dispositive motion at any time without implicating the one-way
7 intervention rule or similar concerns.

8 **B. *Scope of Bifurcation***

9 E*TRADE has informally indicated to Plaintiffs' counsel that E*TRADE charged or
10 collected inactivity fees each quarter from hundreds of thousands of customers. E*TRADE
11 maintains that it would be unduly burdensome and costly for E*TRADE, prior to a decision
12 certifying this case as a class action, to be required to produce the personal files for each and
13 every putative class member who either had the fees at issue charged to their account or
14 whose accounts were liquidated, either in whole or in part, to satisfy the payment of such
15 fees. Plaintiffs understand E*TRADE's position. The Parties therefore propose that in the
16 event that Plaintiffs request information that is relevant (as that term is understood in the
17 context of discovery) and not privileged, that can only be obtained through a review of
18 individual customer accounts, the Parties agree to meet and confer to discuss potential
19 production solutions including, without limitation and by way of example only, sampling the
20 class members. In the event the Parties are unable to agree on an appropriate solution, they
21 shall submit their dispute to the Court for resolution.

22 **C. *Disclosure and Production of Electronically Stored Information***

23 The Parties acknowledge and agree that much of the evidence in this case was
24 generated and may be available as electronically stored information ("ESI"). Without
25 prejudice to either Party's rights to object to specific discovery requests, and without either
26 Party conceding that any items listed below are discoverable, examples of types of ESI that
27 might be subject to discovery may include:
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. E*TRADE’s websites, and website agreements, along with relevant changes to those agreements (or the ability to access those agreements) and notice of such changes;
2. E*TRADE’s generation, management, and maintenance of its customers’ online web accounts;
3. E*TRADE’s records and systems related to the charging, imposition, and collection of “inactivity” or similar fees;
4. E-mails, or other non-privileged electronic communications regarding E*TRADE’s decision to charge, and the actual charging of, “inactivity” or similar fees;
5. E*TRADE’s electronic records and systems related to the liquidating of customer accounts or the selling of customer stock to pay for “inactivity” or similar fees allegedly incurred by E*TRADE’s brokerage account customers;
6. Any and all databases or other computer programs regarding, generating, holding or otherwise evidencing E*TRADE’s charging, imposing, and collecting “inactivity” or similar fees;
7. Any and all other computers, networks, and systems relating to E*TRADE’s charging, imposing, and collecting “inactivity” or similar fees or E*TRADE’s purported right to charge and collect such fees;
8. Recorded telephone conversations or other records of communications between class members and E*TRADE’s customer service representatives regarding inactivity or similar fees;
9. Relevant metadata;
10. Any and all computers, cell phones, internet-devices, or other electronic means used by Plaintiffs to access the E*TRADE website or their E*TRADE accounts at any time;
11. Any and all electronic records in Plaintiffs’ possession or control related to their E*TRADE accounts, including but not limited to account statements, email messages, electronic communications, archived data, metadata, and cookies; and
12. Any and all storage media containing any electronically-stored information relevant to Plaintiffs’ claims or E*TRADE’s defenses, including internal and external hard drives, USB or other flash-based storage devices, CD-ROMS, DVD-ROMS, and/or internet-based storage solutions.

The Parties propose that, where the requesting Party requests that electronically stored information be produced in native format but the producing Party objects and believes it is more efficient or productive to produce in non-native format, the Parties will meet and confer. During the meet and confer, the burden will be on the producing Party to provide justification for why the particular information sought should be more reasonably produced in non-native format. The Parties may have their respective technology experts attend any

1 such meet and confer. In the event the Parties are unable to agree on an acceptable format
2 for the production, the Parties shall take their dispute to the Court.

3 In the alternative, if both Parties agree, prior to the initiation of class discovery, the
4 Parties, along with their respective technology experts, may meet and confer to discuss: (1)
5 the identification of relevant and discoverable ESI, (2) the scope of discoverable ESI to be
6 preserved and produced by the Parties, (3) the formats for preservation and production of
7 ESI, (4) the potential for conducting discovery in phases or stages as a method for reducing
8 costs and burden, (5) the procedures for handling inadvertent production of privileged
9 information and other privilege waiver issues under Rule 502 of the Federal Rules of
10 Evidence, (6) any other relevant ESI issues involved in the case. The Parties may then
11 attempt to craft an appropriate stipulation governing the production of electronic evidence for
12 the Court's approval prior to the initiation of class discovery. Under this proposal, the
13 suggested dates for class discovery and certification briefing would be enlarged accordingly.

14 **D. Evidence Preservation**

15 Plaintiffs' counsel has sent a preservation notice to E*TRADE. E*TRADE confirms
16 that it has taken and continues to take all steps necessary to properly preserve all potentially
17 relevant information and evidence relevant to this litigation. Plaintiffs likewise confirm that
18 they have taken and continue to take all steps necessary to properly preserve potentially
19 relevant information and evidence relevant to this litigation, including electronically-stored
20 information, in their possession or control, if any.

21 **E. Protective Order:**

22 The Parties agree to work cooperatively to draft an appropriate protective order for
23 the Court's approval. Prior to the entry of the protective order, any materials produced shall
24 be treated as having been designated as being suitable for "attorneys eyes only." Such
25 presumed designation will be lifted, where appropriate, following the entry of the protective
26 order.

1 **F. *Discovery from experts:*** The Parties plan to offer expert testimony as to the
2 following subject matter(s):

3 Plaintiffs anticipate potentially offering expert testimony as to the damages suffered
4 by the class, as well as to other issues pertaining to class certification.

5 **G. *Initial Disclosures:***

6 The Parties have exchanged initial disclosures pursuant to Federal Rule of Civil
7 Procedure 26(a)(1).

8
9 /s/ Rafey S. Balabanian
10 Jay Edelson (Admitted *Pro Hac Vice*)
11 Rafey S. Balabanian (Admitted *Pro Hac Vice*)
12 Steven L. Woodrow (Admitted *Pro Hac Vice*)
13 Michael Aschenbrener (Admitted *Pro Hac Vice*)
14 Edelson McGuire, LLC
15 350 North LaSalle Street, Suite 1300
16 Chicago, Illinois 60654
17 Tel: 312/589-6370

/s/ Douglas P. Lobel
Douglas P. Lobel (Admitted *Pro Hac Vice*)
David A. Vogel
Cooley LLP
11951 Freedom Drive
Reston, Virginia 20171
Tel: (703) 456-8000

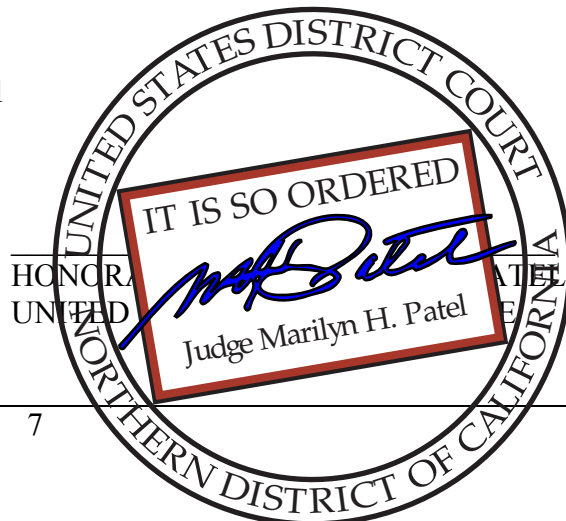
15 Sean P. Reis
16 Edelson McGuire, LLP
17 30021 Tomas Street, Suite 300
18 Rancho Santa Margarita, California 92688
19 Tel: (949) 459-2124

Whitty Somvichian
Cooley LLP
101 California Street, 5th Floor
San Francisco, California 94111
Tel: (415) 693-2000

20 The foregoing [Proposed] Discovery Plan is adopted by this Court as the Case
21 Management Order in this action in accordance with Civ. L.R. 16 and other applicable Local
22 Rules, and shall govern all further proceedings in this action.

23 **IT IS SO ORDERED.**

24 Dated this 1st day of February, 2011



CERTIFICATE OF SERVICE

I, Rafey S. Balabanian, an attorney, certify that on January 31, 2011, I served the above and foregoing ***[Proposed] Revised Discovery Plan***, by causing true and accurate copies of such paper to be filed and transmitted to the persons shown below via the Court's CM/ECF electronic filing system, on this the 31st day of January, 2011.

Whitty Somvichian
wsomvichian@cooley.com
Cooley LLP
101 California Street, 5th Floor
San Francisco, California 94111

Douglas Lobel
dlobel@cooley.com
Cooley LLP
One Freedom Square
Reston Town Center
11951 Freedom Drive
Reston, Virginia 2019-5656

/s/ Rafey S. Balabanian