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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

14
15 In re TD AMERITRADE ACCOUNTHOLDER
16 LITIGATION

Master File No.

C 07 2852 VRW

**TD AMERITRADE INC.'S
MEMORANDUM IN SUPPORT OF
FINAL APPROVAL OF
SETTLEMENT**

Chief Judge Vaughn R. Walker

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT	2
I. The Fairness Of The Settlement To The Class Should Be Evaluated First And Separately From Plaintiffs’ Fee Petition	2
II. The Settlement Is Fair, Reasonable And Adequate	3
A. Strength Of Plaintiffs’ Case	3
B. The Risk, Expense, Complexity, And Likely Duration Of Further Litigation	8
C. The Risk Of Maintaining Class Action Status Throughout The Trial.....	8
D. The Amount Offered In Settlement	9
E. The Extent Of Discovery Completed And The Stage Of The Proceedings.....	10
G. The Presence Of A Governmental Participant	11
H. The Reaction Of Class Members To The Proposed Settlement.....	12
I. The Procedure By Which The Settlement Was Reached.....	12
III. The Objections To The Settlement Do Not Justify Rejection Of The Settlement	13
<i>Matthew Elvey’s Objections</i>	13
A. Benefits	13
B. Scope of Release.....	14
C. Class Notice.....	15
D. Evidentiary Record in the Case	16
E. Plaintiffs’ Attorneys’ Fees	17
F. Elvey’s Compensation	17
<i>Richard Holober’s Additional Objections</i>	18
<i>Elli Weinstein’s Additional Objection</i>	19
<i>Brad Richards and Theodore Frank’s Additional Objections</i>	19
<i>Jonathan Lee Riches and Richard Holober’s Motions To Intervene Should Be Denied.</i>	21
CONCLUSION	22

TABLE OF AUTHORITIES

Cases	<u>Page(s)</u>
<i>Acosta v. Trans Union, LLC</i> , 243 F.R.D. 377 (C.D. Cal. 2007)	8
<i>Cherny v. Emigrant Bank</i> , 604 F. Supp. 2d 605 (S.D.N.Y. 2009)	4
<i>Cobell v. Kempthorne</i> , 455 F.3d 301 (D.C. Cir. 2006).....	5
<i>Devlin v. Scardelletti</i> , 536 U.S. 1 (2002)	15
<i>Gordon v. Virtumundo</i> , __F.3d__, 2009 WL 2393433 (9th Cir. 2009).....	6
<i>In re Cendant Corporation Litigation</i> , 264 F. 3d 201 (3d Cir. 2001)	15
<i>In re General Motors Corporation Engine Interchange Litigation</i> , 594 F.2d 1106 (7th Cir. 1979).....	3
<i>In re Hannaford Bros. Co. Customer Data Security Breach Litigation</i> , 613 F. Supp. 2d 108 (D. Maine 2009)	4
<i>In re Initial Public Offering Securities Litigation</i> , 226 F.R.D. 186 (S.D.N.Y. 2005).....	10
<i>In re Mego Financial Corp. Securities Litigation</i> , 213 F.3d 454 (9th Cir. 2000).....	7, 12
<i>In re Portal Software, Inc. Securities Litigation</i> , No. C-03-5138, 2007 WL 4171201 (N.D. Cal. Nov. 26, 2007).....	13
<i>In re Prudential Insurance Company of America Sales Practices Litig.</i> , 962 F. Supp. 450 (D.N.J. 1997).....	10
<i>In re Tableware Antitrust Litigation</i> , No. C-04-3514 VRW, 2007 WL 4219394 (N.D. Cal. Nov. 28, 2007)	3
<i>Jaffe v. Morgan Stanley & Co.</i> , No 06-3903, 2008 WL 346417 (N.D. Cal. Feb. 7, 2008).....	23
<i>Linney v. Cellular Alaska Patnership</i> , 151 F.3d 1234 (9th Cir. 1998).....	12
<i>National Super Spuds v. New York Mercantile Exchange</i> , 660 F.2d 9 (2d Cir. 1981).....	16
<i>O'Keefe v. Mercedes-Benz United States, LLC</i> , 214 F.R.D. 266 (M.D. Pa. 2003).....	10
<i>Olden v. LaFarge Corp.</i> , 472 F.Supp.2d 922 (E.D. Mich. 2007).....	15
<i>Pisciotta v. Old National Bancorp</i> , 499 F.3d 629 (7th Cir. 2007)	4
<i>Ruiz v. Gap, Inc.</i> , __F. Supp.2d__, 2009 WL 941162 (N.D. Cal. 2009)	4
<i>Serventi v. Bucks Technical High School</i> , 225 F.R.D. 159 (E.D. Pa. 2004).....	16

1 *Shafran v. Harley-Davidson, Inc.*, No. 07 Civ. 01365, 2008 WL 763177
 (S.D.N.Y. Mar. 20, 2008).....5

2

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 2007).....9

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 2007).....23

5

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 18, 2008).....22

7 **Statutes, Rules and Regulations**

8 California Civil Code § 1798.82(e)7

9 CAN SPAM Act, 15 U.S.C. § 7701 *et seq.*.....6

10 Class Action Fairness Act, 28 U.S.C. § 1711 *et seq.*..... 14, 23, 24

11 Federal Rule of Civil Procedure 24(a), (b).....25

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seq.7

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14 **Other Authority**

15 Senate Report No. 108-1026

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INTRODUCTION

1
2 Plaintiffs, customers of TD Ameritrade, Inc. (“TD Ameritrade” or the “Company”),
3 brought this purported class action in May 2007 after receiving spam e-mail promoting stock
4 purchases. Before the suit was filed, the Company had received customer complaints about
5 stock spam and was investigating a possible breach of its information security system. Several
6 months after the suit was filed, the Company discovered and eliminated the cause of the breach
7 and gave notice of the breach to its customers and other persons potentially affected. After the
8 Company gave notice of the breach in September 2007 and had its chief information security
9 officer deposed, the parties commenced settlement negotiations and eventually entered into a
10 settlement of this dispute.

11 As a result of its investigation, TD Ameritrade learned that an unauthorized person had
12 obtained e-mail addresses of TD Ameritrade customers and that those addresses had been used to
13 send stock-touting spam. There is no evidence that any members of the settlement class have
14 suffered identity theft as a result of the data breach. Four analyses conducted between
15 September 2007 and June 2008 by ID Analytics, Inc. (“ID Analytics”), a leading security firm,
16 found no instances of identity theft associated with the data breach.

17 The proposed settlement is fair, reasonable and adequate and should be approved. It
18 provides significant benefits to the class that most likely could not be achieved through
19 continued litigation on the merits. The only injuries alleged by plaintiffs are receipt of spam,
20 increased risk of identity theft and alleged loss of benefit of the bargain. Courts uniformly have
21 dismissed claims for monetary damages and injunctive relief based upon these types of alleged
22 injuries. Moreover, class certification has been denied for claims alleging actual identity theft.
23 We have found no precedent (and objectors have cited none) for granting monetary or injunctive
24 remedies in this kind of action once a company has given notice of a data breach to potentially
25 affected parties. In short, if this settlement were not approved, further litigation would likely not
26 yield any benefits to the class.

27 In contrast, the proposed settlement provides significant benefits that address plaintiffs’

1 stated concerns. First, TD Ameritrade will retain an independent expert acceptable to plaintiffs
 2 who will conduct penetration tests to determine whether TD Ameritrade's information security
 3 system has any vulnerabilities. If any material vulnerabilities are discovered, they will be
 4 remedied. This component of the settlement is designed to provide class members with
 5 additional objective evidence that TD Ameritrade's system is secure and that their information is
 6 safe.

7 Second, TD Ameritrade will retain ID Analytics to conduct another analysis to determine
 8 whether the data breach may have resulted in identity theft for any members of the settlement
 9 class. This analysis, which will be performed more than two years after customers were notified
 10 of the data breach, will provide additional information indicating whether the data breach may
 11 have led to identity theft. If any potential victims of identity theft are identified, TD Ameritrade
 12 has agreed to provide special assistance to them and an alternative dispute resolution procedure.

13 Third, TD Ameritrade will offer internet security software at no charge that provides
 14 protection against spam and identity theft. Finally, the proposed settlement provides class
 15 members with additional information regarding spam, identity theft and the dangers of trading
 16 based upon stock-touting spam and obligates TD Ameritrade to make certain contributions to
 17 organizations involved in promoting internet security for consumers.

18 Because the settlement provides significant benefits that likely exceed what class
 19 members could obtain through further litigation, the Court should approve the settlement as fair,
 20 reasonable and adequate.¹

21 ARGUMENT

22 **I. The Fairness Of The Settlement To The Class Should Be Evaluated First And Separately From Plaintiffs' Fee Petition**

23 As explained in *In re Tableware Antitrust Litigation*, No. C-04-3514 VRW, 2007 WL
 24 4219394, at *3 (N.D. Cal. Nov. 28, 2007), the first step in determining whether to approve a
 25 settlement is to consider the fairness of the settlement to the class:

26 In assessing whether a settlement is 'fair reasonable and adequate' under [Federal

27 ¹ TD Ameritrade takes no position as to plaintiffs' fee petition.

1 Rule of Civil Procedure 23], the court is to consider several factors:

2 (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely
3 duration of further litigation; (4) the risk of maintaining class action status
4 throughout the trial; (5) the amount offered in settlement [presumably in
5 comparison to comparable cases]; (6) the extent of discovery completed and the
6 stage of the proceedings; (7) the experience and views of counsel; (8) the
7 presence of a governmental participant; and (8) the reaction of class members to
8 the proposed settlement.

9 To these factors, the court adds (9) the procedure by which the settlements were
10 arrived at.

11 (internal citations omitted and second set of brackets in original); *see also In re Gen. Motors*
12 *Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 n.44 (7th Cir. 1979) ("The most important
13 factor relevant to the fairness of a class action settlement is the strength of plaintiff's case on the
14 merits balanced against the amount offered in the settlement.").

15 If the Court concludes that the settlement is fair, reasonable and adequate to the class
16 after applying these factors, then the Court should approve the settlement and proceed to
17 determine what attorneys' fee award is reasonable in light of the settlement. *In re Tableware*
18 *Antitrust Litig.*, 2007 WL 4219394 at *4 ("The settlement amount having been found to be fair,
19 the court turns to class counsel's request for expenses.").

20 The settlement is not contingent upon the Court approving any specific amount of fees.
21 If the Court approves the settlement as fair, reasonable and adequate to the class, then the
22 settlement is final as to the class and TD Ameritrade, and the Court can make whatever fee
23 award it believes is reasonable up to the maximum amount specified in the settlement agreement.

24 **II. The Settlement Is Fair, Reasonable And Adequate.**

25 The factors to be considered in assessing the fairness of the settlement decisively weigh
26 in favor of approving the settlement.

27 **A. Strength Of Plaintiffs' Case**

28 If this case were not settled, plaintiffs most likely would not obtain any monetary or
injunctive relief. In private class action litigation of data breach cases, the vast majority of the
courts that have addressed the issue have dismissed these actions where, as here, plaintiffs' only

1 alleged injury is receipt of spam, increased risk of identity theft or loss of benefit of the bargain.
2 *See, e.g., Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 639-40 (7th Cir. 2007) (dismissing all
3 claims arising from financial institution's data breach: "Without more than allegations of
4 increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is
5 prepared to remedy. Plaintiffs have not come forward with a single case or statute, from any
6 jurisdiction, authorizing the kind of action they now ask this federal court, sitting in diversity, to
7 recognize as a valid theory of recovery under Indiana law."); *In re Hannaford Bros. Co.*
8 *Customer Data Sec. Breach Litig.*, 613 F. Supp. 2d 108, 132 (D. Maine 2009) (dismissing all
9 contract, tort and statutory claims for damages and injunctive relief based upon a merchant's data
10 breach where purported class members claimed only increased risk of identity theft); *Ruiz v.*
11 *Gap, Inc.*, __F. Supp.2d__, 2009 WL 941162, at *4-*6 (N.D. Cal. 2009) (dismissing all claims
12 for damages based upon a merchant's data breach where purported class members claimed only
13 increased risk of identity theft); *Cherny v. Emigrant Bank*, 604 F. Supp. 2d 605, 609 (S.D.N.Y.
14 2009) ("dismissing all claims arising from financial institutions data breach: "The receipt of
15 spam by itself, however, does not constitute a sufficient injury entitling [the plaintiff] to
16 compensable relief;" also rejecting as too speculative the theory that social security numbers
17 were likely stolen and used because they were in the same data base as the e-mail addresses
18 used to send spam); *Shafran v. Harley-Davidson, Inc.*, No. 07 Civ. 01365, 2008 WL 763177, at
19 *3 (S.D.N.Y. Mar. 20, 2008) (dismissing all claims arising from a data breach: "Courts have
20 uniformly ruled that the time and expense of credit monitoring to combat an increased risk of
21 future identity theft is not, in itself, an injury that the law is prepared to remedy. Plaintiff has not
22 presented any case law or statute from any jurisdiction, indicating otherwise."); *Cobell v.*
23 *Kemphorne*, 455 F.3d 301, 325 (D.C. Cir. 2006) (vacating preliminary injunction in data breach
24 case that imposed judicial supervision of an organization's information technology system where
25 the only alleged injury was increased the risk of identity theft: "The inherently imperfect nature
26 of IT security means that if we granted injunctive relief here, based only on [the Department of]
27 Interior's security vulnerabilities and not on a showing of some imminent threat or specific

1 reason to be concerned that IITD is a target, we would essentially be justifying perpetual judicial
 2 oversight of Interior's computer system. . . . Moreover, nearly any system administrator who
 3 maintains data for private trusts could be in danger of facing similar claims for relief, as only the
 4 unreachable goal of perfect security would be sufficient to counter general fears of data
 5 tampering by internal threats or external hackers.”).

6 Congress has addressed the problem of spam by enacting the CAN SPAM Act, 15 U.S.C.
 7 § 7704(a)(1) (2009). But plaintiffs here have no cause of action under the CAN SPAM Act.
 8 Standing to sue under the Act is limited to internet access providers that suffer a material adverse
 9 effect to their service as a result of the receipt of spam. Consumers, like plaintiffs here, who
 10 suffer the ordinary inconvenience of spam do not have standing to sue under the Act. *See*
 11 *Gordon v. Virtumundo*, __F.3d__, 2009 WL 2393433, at *9 (9th Cir. 2009). In addition, the Act
 12 imposes liability on spammers, not companies, like TD Ameritrade, that were the targets of
 13 hackers who subsequently used stolen e-mail addresses to send spam.²

14 Plaintiffs filed a motion for preliminary injunction requiring TD Ameritrade to give
 15 notice of the data breach to those persons whose personal information may have been accessed
 16 by unauthorized persons. TD Ameritrade provided such notice in September 2007 once it
 17 determined that a data breach had occurred and it eliminated the cause of the breach.³ (A copy

18 ² Only parties that intentionally initiate, originate or procure others to initiate spam are liable
 19 under the Act. *See* 15 U.S.C. § 7704(a)(1) (makes it unlawful for a person to “initiate the
 20 transmission, to a protected computer, of a commercial electronic message” with certain
 21 qualities); § 7702(9) (defining “initiate” as “to originate or transmit such message or to procure
 22 the origination or transmission of such message”); § 7702(12) (defining “procure” as
 “intentionally to pay or provide other consideration to, or induce, another person to initiate such
 a message on one’s behalf”); *see also* U.S.C. §§ 7701(a)(10), 7703(b)(2), 7704(b)(1)(A)
 (targeting those who take e-mail addresses from online services); S. Rep. No. 108-102, at 2-4
 (describing spammers targeted by statute).

23 ³ Most states have enacted statutes requiring companies to notify their customers if they have
 24 reason to believe that an unauthorized person has obtained sensitive customer information, such
 25 as social security numbers, which could be used to commit identity theft. Most of these statutes
 26 do not treat e-mail addresses as the type of sensitive information that triggers an obligation to
 27 notify customers of a data breach. *See, e.g.*, Cal. Civ. Code § 1798.82(e) (2009) (triggering
 notification upon acquisition of name plus one or more of social security number, driver’s
 license number or account number in combination with any required password that would permit
 access to a financial account). TD Ameritrade and its consultant found no evidence that the
 unauthorized persons obtained sensitive customer information such as social security numbers

1 of the notice is attached hereto as Exhibit A.) Plaintiffs sought, and Elvey continues to demand,
2 a notice that provides detailed information about the nature and cause of the breach. But no state
3 data breach notice statute requires disclosure of such information, and there is no precedent
4 under any other governing laws or regulations for requiring such disclosures. Indeed, disclosing
5 such details to the public could facilitate hackers' attempts to breach the system again and
6 affirmatively harm class members. Whether or not required, TD Ameritrade's notice complied
7 with existing state law notice statutes and was sufficient to put the potentially affected persons
8 on notice that there was a risk of identity theft so that they could monitor their accounts. There is
9 no precedent for requiring TD Ameritrade to provide any other public disclosures regarding the
10 data breach. Objectors have cited no authority to support their position.

11 In addition, there are other checks in place to ensure that customers' interests are
12 protected. TD Ameritrade is subject to SEC regulations⁴ covering privacy and security, and both
13 the SEC and FINRA periodically conduct compliance reviews. Notably, regulators have never
14 sanctioned TD Ameritrade for any alleged failure of its privacy policies or security systems to
15 meet government standards.

16 Furthermore, companies like TD Ameritrade have an economic incentive to prevent data
17 breaches to protect their business reputations. Here, TD Ameritrade had an additional economic
18 incentive to maintain a secure IT environment as the Company provides its customers with an
19 asset protection guarantee covering losses of customers' assets in accounts with the Company
20 arising from unauthorized activity including identity theft if it occurred through no fault of the
21 customer. Information security is a high priority for TD Ameritrade because it is important to its
22 customers and because TD Ameritrade offers its customers its asset protection guarantee.

23 In short, the case law and public policy considerations are squarely against plaintiffs'
24 claims in this case. None of the objectors has cited any authority that suggests they could obtain

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26 and date of birth. Nor was there any evidence that passwords to accounts were taken.
27 Nevertheless, TD Ameritrade decided to give notice to its customers of the data breach it had
28 discovered.

⁴ Regulation S-P: Privacy of Consumer Financial Information, 17 C.F.R. § 248.1 *et seq.* (2009).

1 any of the remedies that they argue should be part of the settlement by continuing to litigate this
2 case on the merits. In light of the weight of authority that is against them, plaintiffs' chances of
3 recovery would be very low. The weak nature of plaintiffs' claims militates heavily in favor of
4 approving the proposed settlement. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th
5 Cir. 2000) (finding that the district court properly approved a class action settlement where "[t]he
6 plaintiffs' case was weak and the risk, expense, and complexity of trial weighed against them.");
7 *Yeagley v. Wells Fargo & Co.*, No. C 05-03403, 2008 WL 171083, at *5 (N.D. Cal. Jan. 18,
8 2008) (quoting *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 392 (C.D. Cal. 2007)) ("the limited
9 settlement benefits are fair and reasonable. In other words, plaintiff's prospects for prevailing in
10 this litigation are 'so bleak as to render this a good value for a relatively weak case.'" (internal
11 citation and quotations omitted)).

12 Tellingly, Elvey's counsel, after examining the applicable law and reviewing the
13 transcript of the deposition of TD Ameritrade's chief information security officer, advised the
14 Court at the hearing on preliminary approval of the settlement that, although Elvey was objecting
15 to the settlement, they had no interest in assuming representation of the class in continued
16 litigation against TD Ameritrade.⁵ Moreover, Objectors Brad Richards and Theodore Frank,
17 counsel from the Center for Class Action Fairness, expressly acknowledged that plaintiffs'
18 claims are extremely weak. In a section of Richards and Frank's submission, captioned "The
19 Underlying Lawsuit is Meritless and Harms Class Members' Interests," they state that: (1)
20 "[t]here is no evidence of monetary damage as a result of receiving the spam in question"; (2)
21 there is "no evidence that the breach resulted in any instances of identity theft"; (3) "increased
22 risk of identity theft is not a compensable injury"; and (4) increased risk of identity theft "is [not]
23 . . . the type of action where common issues predominate over individual ones." Richards and

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25 ⁵ Elvey's counsel, Gregory Beck, states in his submission on behalf of Elvey that TD
26 Ameritrade did not give him access to the deposition of its chief information security officer.
27 That statement is mystifying. TD Ameritrade personally delivered a copy of the unredacted
28 transcript to Mr. Beck, and in a subsequent e-mail, Mr. Beck thanked TD Ameritrade's counsel
for "accommodating" him. (A copy of the communications between counsel regarding the
transcript review is attached as Ex. B.)

1 Frank Objections, Doc. No. 150 at 8.

2 For the reasons discussed above, the weakness of plaintiffs' claims on the merits supports
3 approval of the settlement.

4 B. The Risk, Expense, Complexity, And Likely Duration Of Further Litigation

5 As explained above, there is a substantial risk that plaintiffs would not obtain any
6 recovery if this case were litigated on the merits. In addition, class members who were
7 customers of TD Ameritrade would be at risk if the information TD Ameritrade was required to
8 produce to plaintiffs or their counsel during discovery and that might be disclosed in public
9 hearings and trial would facilitate illegal actions by unauthorized persons to evade TD
10 Ameritrade's information security system and acquire customer personal information without
11 authorization.

12 If the Court did not dismiss plaintiffs' claims for failure to state a cause of action,
13 discovery, discovery motions, dispositive motions, trial and appeal in a case of this type
14 involving multiple legal theories, complex information technology and six million class members
15 would likely be very complex, time-consuming and expensive.

16 For these reasons, the risk, expense, complexity and likely duration of further litigation
17 support approval of the settlement.

18 C. The Risk Of Maintaining Class Action Status Throughout The Trial

19 Our research has not found any cases where a court has granted class certification in a
20 data breach case involving spam, alleged increased risk of identity theft or actual identity theft;
21 the objectors have cited no such cases either. At least one court has denied class certification in
22 a data breach case involving alleged identity theft on the ground that individual issues of
23 causation and damages would predominate. *TJX Companies Retail Sec. Breach Litig.*, 246
24 F.R.D. 389, 397 (D. Mass. 2007) ("Given that there are a myriad of ways in which fraud losses
25 can occur, as well as the fact that the [p]laintiffs themselves have admitted the difficulty of
26 attributing any particular loss to the data breach, evidence of general causation will not suffice to
27 prove the element of causation with regard to fraud-related losses on a class-wide basis. Instead,

1 causation will have to be determined loss-by-loss, bank-by-bank, further rendering certification
 2 inappropriate.”(internal citation omitted)). At the very least, there is substantial doubt that a data
 3 breach case involving spam, actual identity theft or increased risk of identity theft could be
 4 maintained as a class action on the merits.

5 D. The Amount Offered In Settlement

6 The reasonableness of the amount offered in settlement should be assessed in relation to
 7 the recovery that might be obtained through litigation, discounted by the probability of recovery.
 8 *See, e.g., In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d at 1132 n.44. As
 9 discussed above, plaintiffs most likely would obtain no recovery if this case were litigated on the
 10 merits. In contrast, the proposed settlement provides significant benefits to the class.

11 In assessing the fairness of a settlement, the value of the benefits to the class is the proper
 12 test, not the defendants’ cost of providing those benefits. *See O’Keefe v. Mercedes-Benz United*
 13 *States, LLC*, 214 F.R.D. 266, 304 (M.D. Pa. 2003) (settlements should be valued according to
 14 their “benefit to the class and not the cost to the defendant.”); *In re Prudential Ins. Co. of Am.*
 15 *Sales Practices Litig.*, 962 F. Supp. 450, 557 (D.N.J. 1997) (“[t]he cost of the relief to [the
 16 defendant] is not the measure of class member benefit. . . [t]he value of the relief to the Class is
 17 what matters;” *In re Initial Public Offering Sec. Litig.*, 226 F.R.D. 186, 197 n. 63 (S.D.N.Y.
 18 2005) (same). Nonetheless, it should be noted that TD Ameritrade has paid more than \$6 million
 19 for the right to distribute Trend Micro Internet Security (“TIS”) Pro software to all settlement
 20 class members.⁶ *See* Thomas Decl., Doc. No. 67, Ex. 3 ¶ 11.

21 The benefits offered by the proposed settlement are of significant value to class members.
 22 They address every aspect of plaintiffs’ complaint. An independent penetration test will give
 23 class members another objective basis to have confidence that TD Ameritrade’s information
 24 security system is sound. An analysis by ID Analytics⁷ will update class members as to whether

25 ⁶ TD Ameritrade entered into the agreement with Trend Micro after entering into an agreement
 26 in principle with plaintiffs.

27 ⁷ The methodologies used by ID Analytics in analyzing potential data breaches are described in
 the Declaration of the company’s co-founder and Chief Operating Officer, Mike Cook. *See* Doc.

1 they might be victims of identity theft as a result of the data breach, and the Company will
2 provide special assistance to anyone who is identified as a potential victim by ID Analytics. Free
3 internet security software will reduce spam e-mail and provide additional protection against
4 identity theft that can arise from a customer's use of his or her computer. Finally, additional
5 information provided by TD Ameritrade about stock-touting spam and identity theft for all class
6 members will assist them in avoiding injury.

7 As discussed above, TD Ameritrade most likely would not be required to provide any of
8 these benefits if the case were litigated. Furthermore, TD Ameritrade does not provide these
9 benefits in the ordinary course of its business and would not be providing these benefits but for
10 the settlement. Before the settlement, the Company never sought approval from class members
11 in selecting experts to perform penetration tests. Similarly, the Company's contract with ID
12 Analytics covered four analyses and expired in September 2008. An additional analysis is an
13 added benefit made available only by the settlement. Also, TD Ameritrade was under no
14 obligation to provide internet security software at no cost.

15 In short, the proposed settlement provides significant benefits to class members that are
16 the result of this litigation and are substantially greater than the benefits they likely would obtain
17 through continued litigation. Even if the Court were to conclude that the benefits provided to the
18 class under the proposed settlement are limited, "plaintiff's prospects for prevailing in this
19 litigation are so bleak as to render this a good value for a relatively weak case." *Yeagley*, 2008
20 WL 171083, at *5 (internal quotations omitted). The amount offered in the settlement supports
21 its approval.

22 E. The Extent Of Discovery Completed And The Stage Of The Proceedings

23 The settlement of this case was entered into after the parties briefed TD Ameritrade's
24 motion to dismiss the complaint and plaintiffs' motion for preliminary injunction, and after TD
25 Ameritrade gave notice to class members of the data breach and had its chief information
26 security officer deposed. By this point in the litigation, it was apparent, without the need to take

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No. 67, Ex. 2.

1 additional discovery, that plaintiffs had a very low probability of achieving any monetary or
2 injunctive remedies through continued litigation because they had suffered no legally cognizable
3 injury and applicable law provided them no basis for seeking damages or injunctive relief. In
4 addition, as mentioned above, objector Elvey's counsel reviewed the deposition of TD
5 Ameritrade's chief information security officer and when asked by the Court whether they were
6 willing assume representation of the class, they declined to do so. In sum, all discovery and
7 other steps necessary to make an informed decision to settle this case at the current stage in the
8 proceeding were taken. *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459 (recognizing that
9 formal discovery is not necessary when the parties have sufficient information to make an
10 informed decision about settlement); *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th
11 Cir. 1998) (same). This factor also supports approval of the settlement.

12 F. The Experience And Views Of Counsel

13 Counsel on both sides of this case are experienced in class action litigation and believe
14 that the settlement is fair, reasonable and adequate. Furthermore, as mentioned above, counsel
15 for objector Elvey advised the Court that they had no interest in representing the class in further
16 litigation against TD Ameritrade. Actions speak louder than words.

17 G. The Presence Of A Governmental Participant

18 TD Ameritrade sent notices under the Class Action Fairness Act ("CAFA"), 28 U.S.C. §
19 1711 *et seq.*, disclosing the terms of the settlement to the Attorney General's Offices of the fifty
20 states, the District of Columbia and Puerto Rico. Only the Texas Attorney General's Office
21 submitted an objection in response to the notice, and that office withdrew its objection after
22 counsel for the parties explained the litigation and settlement to them, and agreed to modify the
23 settlement and notices in certain respects. The final settlement agreement and notices to the class
24 were served on the Texas Attorney General's Office at the same time they were submitted to the
25 Court for preliminary approval. This factor also supports approval of the settlement.

1 H. The Reaction Of Class Members To The Proposed Settlement

2 The size of the settlement class is approximately 6 million persons. Only 239 persons
3 (less than 0.01% of the class) timely requested to be excluded from the class. Only 44 persons
4 (less than 0.001% of the class) filed objections to the settlement. Of the objectors, four are
5 represented by counsel and submitted objections that cite legal authorities. None of the objectors
6 pointed to any authority showing a class recovering damages or obtaining injunctive relief in a
7 data breach case or even the certification of a class to pursue such claims on the merits. The opt-
8 out and objection rates in this case are much lower than many other cases where class action
9 settlements have been approved. *See, e.g., In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138,
10 2007 WL 4171201, at *4 (N.D. Cal. Nov. 26, 2007) (observing that class actions have been
11 approved where 1% or more of the class disapproved). The fact that less than one one-hundredth
12 of a percent of the class objected or opted-out to the proposed settlement also supports approval
13 of the settlement.

14 I. The Procedure By Which The Settlement Was Reached

15 As discussed above, the settlement was reached at an appropriate time in the development
16 of the case when the legal and factual issues central to assessing the plaintiffs' likelihood of
17 success in further litigation were understood. Over a period of several months, the parties
18 negotiated the terms of the settlement at arms' length. The parties reached agreement on terms
19 that would provide benefits to the class that are directed to the alleged harms. Only after
20 agreement was reached on the terms of the settlement was the issue of attorneys' fees was
21 addressed. The parties negotiated the settlement provisions on attorneys' fees through mediation
22 before retired Judge Richard Neville. Under the settlement agreement, the fee award is left to the
23 discretion of the Court up to a maximum amount specified in the agreement. As also discussed
24 above, an independent government agency initially objected to the initial settlement agreement,
25 but withdrew its objection after learning more about the issues in the case and after certain
26 modifications were made to the settlement agreement and the notices to the class. These
27

1 procedures demonstrate well-informed, arms-length negotiations and independent assessment of
2 fairness by a government agency. The procedure by which the settlement was reached supports
3 approval of the settlement.

4 * * *

5 For all the reasons discussed above, the Court should approve the settlement as fair,
6 reasonable and adequate. TD Ameritrade will separately address the objections to the settlement
7 below.

8 **III. The Objections To The Settlement Do Not Justify Rejection Of The Settlement**

9 We will address the objections of Mathew Elvey, and then address objections asserted by
10 other objectors that were not asserted by Elvey.

11 *Matthew Elvey's Objections*

12 A. Benefits

13 Elvey's principal objection⁸ is that the settlement does not provide sufficient benefits to
14 the class. Among other things, he would like to see TD Ameritrade pay hundreds of millions of
15 dollars in damages to the class, provide details to the public concerning the nature and cause of
16 the data breach and its remedial measures, and change the Company's information security
17 system to meet his standards. The short answer to all of his objections is that, for the reasons
18 discussed above, he could not achieve his objectives if he continued to litigate with TD
19 Ameritrade on the merits. Elvey does not cite a single data breach case that supports his position
20 with respect to any of the relief he is demanding. This objection is groundless.

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24 ⁸ Elvey has both objected to the settlement and indicated that he wishes to exclude himself if the
25 settlement is approved. He is not permitted to do both. *See Devlin v. Scardelletti*, 536 U.S. 1,
26 10-11 (2002) (recognizing that the petitioner who objected to the approval of a class action
27 settlement at the fairness hearing was bound by the settlement); *Olden v. LaFarge Corp.*, 472
28 F.Supp.2d 922, 931 (E.D. Mich. 2007) ("If an absent class member (or even a class
representative) desires to affect the settlement by filing objections, then the objector must abide
the result and be bound by the consequences").

1 this case has consistently been construed by courts to have precisely that meaning. If such
2 releases were not valid, it would be difficult to achieve a final settlement of a dispute since new
3 legal theories might be asserted based upon the same core facts alleged in the complaint.

4 Elvey's objection to the release including individual actions for injunctions also is
5 without merit. An individual action for an injunction could have the same adverse impact on TD
6 Ameritrade as a class action seeking an injunction. Accordingly, TD Ameritrade has required a
7 release of individual claims for injunctions. Elvey has not argued that the release language is
8 unclear. If a class member did not want to provide the required release, he had the right to
9 exclude himself from the settlement.

10 As Elvey acknowledges, the Texas Attorney General's Office paid careful attention to the
11 release language and requested certain modifications to the language which the parties made. As
12 with all other aspects of the settlement, the Texas Attorney General's Office found the scope of
13 the release, as revised according to its suggestions, to be fair and reasonable.

14 C. Class Notice

15 Elvey's objections to the class notice are essentially the same as he made at the time of
16 the preliminary approval hearing and should be rejected for the same reasons that the Court
17 preliminarily approved the settlement and authorized that the notices be given to the class.

18 Elvey's principal objection to the notices is that they do not adequately notify class
19 members that the suit included claims related to identity theft so that class members would not
20 have been alerted that they might be releasing such claims. As Elvey acknowledges, the Texas
21 Attorney General's Office focused on this aspect of the notices, and the language was modified
22 to satisfy the Attorney General's office. The notices now state: "The Complaint seeks monetary
23 and injunctive relief for any alleged injuries arising from the data breach, including alleged
24 receipt of spam and identity theft, if it were to occur." The notices adequately informed class
25 members that the suit involved allegations relating to identity theft and that the release, therefore,
26 would include such claims, except individual claims for damages caused by identity theft.

27 Elvey also asserts that the summary notice did not advise class members that if they did

1 not exclude themselves from the settlement, they would be releasing claims if the settlement
2 were approved. Elvey’s assertion is false. The summary notice states: “Upon final approval of
3 the settlement by the Court, if you are a member of the Settlement Class and have not validly
4 excluded yourself, your claims against Defendant and its affiliates, their predecessors and
5 successors will be released. . . .”

6 D. Evidentiary Record in the Case

7 Elvey’s objection states: “Here, Ameritrade has kept most aspects of the breach secret
8 and has refused the request of undersigned counsel to view the only discovery in the case—the
9 single deposition of Ameritrade’s security chief. The lack of any information about the breach
10 other than Ameritrade’s self-serving assertions prevents Elvey and other class members from
11 evaluating key aspect of the case that bear on their decision whether to settle.”

12 It is incredible that Elvey’s counsel makes this assertion. As discussed above, TD
13 Ameritrade delivered to Gregory Beck, Elvey’s counsel, a copy of the unredacted transcript of
14 the deposition of its chief information officer. After reading that deposition, Mr. Beck stated at
15 the preliminary approval hearing that he was not interested in representing the class in continued
16 litigation against TD Ameritrade.

17 Elvey’s counsel have substantial information to assess the fairness of the settlement. As
18 discussed above, the nature of the alleged injuries in this case are undisputed and Elvey concedes
19 —by failing to cite any analogous cases—that the law does not provide monetary or injunctive
20 remedies for the class claims being asserted. In addition, Elvey’s counsel received a copy of the
21 deposition of TD Ameritrade’s chief information security officer, presumably read it, and
22 decided they did not want to represent the class in continuing to litigate against TD Ameritrade.
23 None of the other materials Elvey seeks—ID Analytics reports, contracts with Trend Micro, Inc.
24 (“Trend Micro”), information about redemption rates for the anti-spam software (which
25 information does not exist since the software is not yet available to the class)—has any bearing
26 on assessing the fairness of the settlement. They do not address the central issue—are the
27 benefits of the settlement to the class as great as or greater than the benefits the class could likely

1 achieve if it continued litigating this case. Elvey and other class members have more than
2 enough information to address that issue.

3 E. Plaintiffs' Attorneys' Fees

4 Elvey objects to the attorneys' fees provision in the settlement agreement. Pursuant to
5 the settlement, TD Ameritrade takes no position on plaintiffs' petition for attorneys fees. Rather,
6 the question of attorneys' fees is completely in the Court's discretion (up to the maximum
7 amount set forth in the agreement), and plaintiffs' counsel has the burden of persuading the
8 Court that their fee petition is reasonable. At the time the agreement was signed, Plaintiffs'
9 counsel understood that if the settlement was deemed fair and reasonable as to the class, they
10 would have to accept whatever award of attorneys' fees the Court decided, subject to their right
11 of appeal. In other words, they could not block a settlement that was fair and reasonable to the
12 class based upon their interest in attorneys' fees. Accordingly, the maximum amount of
13 plaintiffs' attorneys' fees described in the settlement agreement could not have affected the
14 reasonableness of the settlement and raises no suspicions about the fairness of the other terms of
15 the agreement. The agreement essentially was for plaintiffs' counsel to accept whatever fees the
16 Court awarded, but in any event not more than the maximum amount specified in the settlement
17 agreement.

18 F. Elvey's Compensation

19 Finally, Elvey, who is arguing that the settlement should not be approved and litigation
20 should continue, complains that he will not receive a \$10,000 "incentive award" pursuant to the
21 initial settlement agreement that he signed and subsequently repudiated. Interestingly, this
22 "objection," which is discussed at the end of his submission, may really have been the first thing
23 on his mind after the Texas Attorney General withdrew its objection to the settlement. At that
24 time, Mr. Beck contacted TD Ameritrade's counsel and inquired whether TD Ameritrade would
25 agree to restore the \$10,000 award to Elvey. Mr. Beck said he needed this information to assess
26 whether to continue objecting to the settlement. (A copy of the communications between
27 _____
28 _____

1 counsel regarding the incentive award is attached as Exhibit C.) TD Ameritrade was not
2 prepared to agree to pay Elvey an “incentive award” after all the delay and needless cost Elvey
3 imposed by sabotaging a settlement agreement he signed and acting contrary to the interests of
4 the class. TD Ameritrade also was not going to allow itself to be put in a position where Elvey
5 or someone else might suggest that it “paid off” Elvey to drop his objections.

6 We respectfully submit that Elvey is not entitled to an incentive award.

7 * * *

8 For the reasons discussed above, Elvey’s objections do not warrant rejection of the
9 settlement.

10 *Richard Holober’s Additional Objections*

11 Objector Richard Holober has asserted several objections, most of which were asserted
12 by objector Elvey and are addressed above. In addition, Holober asserts that: (1) the Trend
13 Micro software is inferior to other products; (2) attorneys general of 41 states achieved a better
14 settlement in a data breach case involving TJX and (3) the proposed settlement attempts to place
15 unlawful requirements on objectors. None of these objections has merit.

16 First, Trend Micro software has been highly rated by several reputable consumer groups.
17 The fact that one reviewer, using a particular methodology, had a negative view of the product
18 does not make it dangerous or provide adequate grounds for withholding final approval of the
19 settlement. Trend Micro has submitted a declaration addressing the review at issue and
20 providing additional information, including other reviews regarding its product. (A copy of the
21 declaration is attached as Exhibit D).

22 It also should be noted that journals that review internet security software acknowledge
23 that Trend Micro has substantial value to consumers and typically cost more than \$30.00 to
24 purchase, although occasionally promotions result in lower prices. (Copies of *PC Magazine* and
25 *PC World* software reviews are attached as Exhibits E and F.)

26 Turning to the TJX settlement referenced by Holober, the settlement of an action brought
27 by 41 state attorneys general involving the theft of more than 45 million customer credit and

1 debit card numbers is not analogous to the settlement of this private class action in which no
2 state attorneys general joined or separately sued TD Ameritrade. The only state attorneys
3 general's office involved in this case (Texas) withdrew its objection to the settlement after the
4 parties made certain revisions that addressed its concerns.

5 Finally, the procedure of requiring written objections to be filed by a specified deadline is
6 standard practice in class actions. The case cited by objector Holober does not support his
7 objection. It holds only that a non-named member of the plaintiff class does not have to
8 intervene in a class action to preserve his right to appeal the approval of the settlement.
9 Holober's objections do not warrant rejection of the settlement.

10 *Elli Weinstein's Additional Objection*

11 Objector Elli Weinstein objects to the procedure under which he was required to object to
12 the settlement and plaintiffs' counsel's fee petition before counsel was required to file their final
13 fee petition. This objection should be disregarded. Weinstein and other class members had
14 sufficient information about the terms of the settlement and the amount of fees sought by
15 plaintiffs' counsel to decide whether to object, and a small number of class members have
16 objected to the settlement and fees sought by plaintiffs' counsel. Plaintiffs' counsel's fee
17 petition will be filed well in advance of the hearing and will be a public document. Objector
18 Weinstein can comment further on the petition at the fairness hearing, if he so desires. His
19 objection does not warrant disapproval of the settlement.

20 *Brad Richards and Theodore Frank's Additional Objections*

21 Objectors Brad Richards and Theodore Frank complain that the proposed settlement is a
22 "coupon settlement" under CAFA, 28 U.S.C. § 1712, and ask the Court to reject the entire
23 settlement based simply on its attorneys' fee provision. These arguments miss the mark for two
24 reasons. *First*, the free internet security service that TD Ameritrade has agreed to provide to the
25 class is not a "coupon" and the proposed settlement is not a "coupon settlement" as that term is
26 used in CAFA. Although CAFA does not expressly define "coupon settlement," at least one
27 Northern District of California case has clarified the types of settlements that should properly be

1 treated as such. In *Yeagley*, 2008 WL 171083, at *6, the court recognized that the right to a free
2 tri-merged credit report under the settlement at issue was “unlike a coupon in that it does not
3 require a class member to do business with [the defendant] and it entitles the class member to a
4 whole product—a tri-merged credit report—rather than merely a discount.”¹⁰ The benefit TD
5 Ameritrade has agreed to provide under the proposed settlement is “unlike a coupon.” Like the
6 goods offered in *Yeagley*, the internet security services that TD Ameritrade will provide do not
7 require the class members to purchase anything from the Company (or anyone else) in order to
8 “realize the settlement benefit”—the products will be provided free of charge. Accordingly, the
9 proposed settlement should not be considered a coupon settlement under CAFA.¹¹

10 *Second*, while objectors Brad Richards and Theodore H. Frank recognize plaintiffs’
11 lawsuit as “low-value” and meritless,” they argue that the amount of attorneys’ fees being sought
12 by plaintiffs’ counsel is excessive and this, in turn, requires rejection of the settlement. The lack
13 of merit of plaintiffs’ claims is certainly a key factor supporting approval of the settlement, as
14 discussed above, but Richards and Frank are mistaken in suggesting that approval of the
15 settlement is linked to an award of fees. The proposed settlement is not contingent on the Court
16 approving any particular amount of attorneys’ fees. Rather, the amount of attorneys’ fees to be
17 awarded is left solely to the discretion of the Court and that determination is made only after the
18 Court determines—without consideration of the fee request—that the benefits to the class are
19 fair, reasonable and adequate. Indeed, this is precisely how the Court proceeded in *Yeagley*, first
20 finding that the settlement benefits were fair and reasonable based on the plaintiffs’ “bleak”
21 prospects for prevailing if the litigation continued and only then determining a reasonable
22 amount of attorneys’ fee to award plaintiffs’ counsel. 2008 WL 171083, at *4-*6. Based on the
23 foregoing, Richards and Frank’s objections do not warrant disapproval of the settlement.

24 ¹⁰ The court in *Yeagley* did not make a final determination as to whether the settlement at issue
25 was in fact a coupon settlement.

26 ¹¹ Even if the proposed settlement were to be considered a “coupon settlement” under CAFA,
27 section 1712 simply directs the Court to carefully consider the fee award based on certain criteria
28 and to hold a hearing to determine whether the settlement is fair, reasonable, and adequate,
which the Court is already doing. *See* 28 U.S.C. § 1712.

1 *Jonathan Lee Riches and Richard Holober's Motions To Intervene Should Be Denied.*

2 Objectors to a class action settlement and those who exercise the right to opt out of the
3 settlement may not intervene as a matter of right under Federal Rule of Civil Procedure 24(a) and
4 should not be allowed to intervene permissively under Rule 24(b) where there is no purpose
5 served by the intervention and where it would unduly delay or prejudice the adjudication of the
6 rights of the original parties. *See, e.g. Townes v. Trans Union, LLC*, No. 04-1488, 2007 WL
7 2457484, at *3 (D. Del. Aug. 30, 2007) (denying non-named class member's motion to intervene
8 to challenge settlement). Objectors do not have a right to review discovery taken in connection
9 with the approval of the settlement unless the court finds that it needs additional input based on
10 such discovery to determine the fairness and adequacy of the settlement. *See, e.g., Jaffe v.*
11 *Morgan Stanley & Co.*, No 06-3903, 2008 WL 346417, at *10-*11 (N.D. Cal. Feb. 7, 2008)
12 (denying class members' motion for discovery in connection with approval of settlement because
13 the court had sufficient facts before it to intelligently approve or disapprove of the settlement).
14 Allowing these objectors to intervene at this point would serve no purpose but could delay these
15 proceedings in their effort to gain access to highly confidential discovery materials that were
16 made available to class counsel and counsel for Matthew Elvey. TD Ameritrade vigorously
17 opposes such access. Expanding the number of people who have access to highly confidential
18 information concerning TD Ameritrade's information security systems would increase the risk
19 that sensitive information about its information security apparatus may be disclosed and is
20 completely unnecessary. Both class counsel and Elvey's counsel, after reviewing this
21 information, concluded that they did not wish to continue litigating this case on the merits
22 against TD Ameritrade. There is no reason to believe that the parties seeking intervention will
23 provide more useful input to the Court after reviewing the evidentiary materials than has already
24 been submitted. As discussed above, the undisputed facts concerning the nature of plaintiffs'
25 alleged injury and the case law applicable to their claims provide an adequate basis for the Court
26 to conclude that plaintiffs' claims are weak and that the benefits of the settlement likely exceed
27 any recovery plaintiffs could obtain through continued litigation on the merits. Accordingly,

1 objectors' motions to intervene and to review discovery should be denied.

2 **CONCLUSION**

3 The settlement is fair, reasonable and adequate. Plaintiffs' case is weak. They have no
4 viable claim for affirmative relief because there is no cognizable injury from receipt of spam or
5 from increased risk of identity theft. There is no valid basis for injunctive relief; the data breach
6 was discovered and remedied in August 2007, and a notice was given to class members.
7 Moreover, no one has submitted to the Court any tangible evidence of identity theft resulting
8 from the data breach. Even if a class member were to have a viable claim for identity theft, this
9 settlement does not prevent him or her from bringing an individual claim based on the identity
10 theft.

11 The objections offered by class members are simply unpersuasive and largely go to the
12 issue of the attorneys' fee award rather than approval of the settlement. The settlement provides
13 significant benefits to the class, which specifically address their alleged harms. It is highly
14 doubtful that the class would achieve a better result by continuing to litigate the case on the
15 merits. For the foregoing reasons, the settlement should be approved.

16 **MAYER BROWN LLP**

17 Dated: August 20, 2009

18 By: s/Lee H. Rubin

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