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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re: TD Ameritrade Account Holder Litigation	Case No. C 07-2852 VRW **CLASS ACTION** **NOTICE OF APPEARANCE AND OBJECTION TO PROPOSED SETTLEMENT** Judge: Vaughn R. Walker Date: September 10, 2009 Time: 10:00 a.m. Courtroom: 6

INTRODUCTION

Plaintiffs, after bringing suit against Ameritrade based on an attenuated and apparently meritless theory of injury, now propose a coupon settlement that has an attenuated theory of benefit, as well as exorbitant fees that cannot be justified given the early procedural posture of the case.

The fairness of the settlement can only be judged based on the redemption rate of the coupons, and by comparing the class benefits to the attorneys' fees to be awarded to the multiple law firms involved in the case. Yet objections are due a full two months before the fairness hearing. If this coupon settlement has the typical 1% redemption rate for coupons, the requested fees far outstrip the benefits to the class. This is apparently a meritless lawsuit where the "class device had been used to obtain leverage" for attorneys' fees. *Murray v. GMAC*, 434 F.3d 948, 952 (7th Cir. 2006). In approving this settlement, this court noted that it had "serious misgivings" about its fairness. Dkt. No. 93 at 7-8. Those misgivings from the Court's first impression were valid. To give teeth to Rule 23(e)(2) requires this court to reject the settlement.

In the alternative, given the apparent falsity of the lawsuit's original allegations regarding injury, and the huge fees plaintiffs' attorneys seek in this case, the Class Attorneys' self-serving actions should be deterred, rather than rewarded; the court should not award attorneys' fees, or, at the very least, limit attorneys' fees to a nominal amount.

The Objectors represent the millions of class members who view the coupon as worthless and who will receive no benefit from the proposed settlement. The Objectors believe that class action settlements that largely benefit the attorneys hurt consumers, and that courts should use their Rule 23 oversight powers to prevent such extortionate settlements from occurring in the first place.

These objections also serve as notice that counsel Theodore H. Frank intends to appear at the July 6 approval hearing on behalf of both himself and Mr. Richards.

I. The Objectors Are Members Of The Class.

Brad Richards (Entfelderstrasse 7, 5012 Schönenwerd, Switzerland, +41-79-598-

6331) is a United States citizen domiciled in Texas who has been a customer of Ameritrade from 2002, when Ameritrade purchased Datek, to the present. Richards received notice of the settlement in the mail from Ameritrade. Richards uses Windows and Linux operating systems.

Theodore H. Frank (1718 M Street, No. 23-6, Washington DC 20036, 703-203-3848) is a United States citizen domiciled in Virginia who created an Ameritrade account on September 30, 2005, and provided e-mail and physical address information at that time, though he never deposited money in his Ameritrade account. Frank uses Windows operating systems.

The putative settlement class is defined as "All persons who are or were account holders or prospective account holders of the Company on or before September 14, 2007." Both objectors therefore have standing to object.

II. The Settling Parties Have Failed To Carry Their Burden To Show That The Settlement Is Fair.

Under the settlement, the six million class members receive a coupon for anti-virus software; Ameritrade makes a small *cy pres* payment to charity; and Ameritrade repeats one more time its earlier fruitless investigations into whether identity theft has occurred from its data breach. Settlement ¶ IV.A. This relief is largely illusory and does not justify the likely request for $1.87 million in attorneys' fees.

A. Coupon Redemption Will Likely Be Low And Low-Value.

To use a coupon, class members will have to remember that they have received a claim code, save the email with the small-print claim code for several months, and go to a dedicated website for the download.

The low redemption rate for class action coupons is well-known, and was one of the motivating factors behind the Class Action Fairness Act. *See* 28 U.S.C. § 1711 note § 2(a)(3)(A). The rule of thumb is that a redemption rate for a coupon without a secondary market is between 1% and 3%. *See generally* James Tharn & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443

(2005). But even that figure may be an overestimate. *See, e.g., In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139 (S.D.N.Y. 2008) (only 2676 claimants out of 10 million class members); *Moody v. Sears*, 2007 NCBC 13 (N.C. Bus. Ct. May 7, 2007) (337 redemptions in 1.5 million-member class); *Union Life Fidelity Ins. Co. v. McCurdy*, 781 So. 2d 186, 188 (Ala. 2000) (113 redemptions in 104,000-member class).

In this particular case, virtually every computer user sophisticated enough to trade on Ameritrade has anti-virus and other internet security software already installed on their system, often on a subscription model, and are unlikely to switch to a different brand rather than renewing the service they have. According to the leading industry statistics source, Gartner, Trend Micro's market share of internet security software in 2008 was only 7.0%, about half of what it was in 2005. Gartner, *Market Share: Security Market, Worldwide 2008* (2009). Especially sophisticated computer users are aware of the numerous high-quality free Internet security programs, such as PC Tools, available on the Internet. Because of the availability of shareware, freeware, and easy market entry given the possibility of Internet distribution, the market share of the top three programs has declined from 86% to 40% since 2005. *Id.*

Given the existence of free internet security software, the only explanation for the success of similarly-performing software priced at $50 to $80 is that most computer users are paying for the convenience of avoiding search costs, and are simply renewing the annual license to the pre-installed software on their machine. Such users are unlikely to monitor a website for the possibility of using a coupon for a different brand. For the 7% of users who already use Trend Micro software, the redemption rate is likely to be slightly higher—if they remember by the 2010 deadline that they received a coupon in mid-2009.

Moreover, a number of members of the class use operating systems other than Windows or Macintosh, such as Linux, and will have no use for the incompatible antivirus software. Another fraction of class members will have recently subscribed to a brand of antivirus software and will have no need to purchase another year's subscription. Still another fraction of class members will be only using the Internet from their work

computer, where they will not have the authority to download a different antivirus software.

Putative Class Representatives concede that the value to plaintiffs who use the coupons is at most ten dollars. Dkt. No. 66 at 16. If so, then the 1% to 3% redemption rate suggests a value to the class of the settlement of between $600,000 and, generously, $1.8 million. But standard economics tells us the value to the class is far less. The opportunity cost of using a coupon to purchase Trend Micro free for a year is not obtaining other high-quality free software, or not using the antivirus software that is already paid for and installed on their machine. Thus, for most class members, the value of the coupon is zero or less.

B. The Injunctive Relief Is Illusory.

Since it discovered the data breach, Ameritrade has performed several tests for organized identity theft and engaged in account seeding. Yet the settlement attempts to take credit for this policy. An injunction "requiring" Ameritrade to do what it was doing voluntarily anyway is plainly worthless—especially when those tests have repeatedly been fruitless, without any evidence of identity theft or other problems beyond spam.

Ameritrade's offer of assisting customers for identity theft (Settlement § IV.A.7) is similarly valueless, because it does not commit Ameritrade to any action other than a promise to evaluate a claim made against it—something it would necessarily do anyway. That a class member will have the option of arbitrating a claim against Ameritrade after the settlement hardly grants improved benefits: it was already true that class members had that relief available to them.

Finally, there is no evidence that Ameritrade's willingness to warn customers about stock spam (in the context of warning customers about similar Internet problems) adds value, or that Ameritrade would not have engaged in those warnings voluntarily.

As such, the injunctive relief is irrelevant to this class action, and cannot be used as support for the fairness of the settlement or attorneys' fees.

C. The Charitable Award Cannot Be Justified As *Cy Pres*, As A Benefit To

The Class, Or As A Ground For Attorneys' Fees.

The $55,000 charitable payment by defendants to two third-party organizations is hardly worth mentioning. But it is important to recognize that these tax-deductible donations for which Ameritrade will take credit is not a *cy pres* award, because it does not benefit the class directly or indirectly. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). But even if the charitable payment were characterized as a *cy pres* award, it should not be used to justify the fairness of the settlement or the award of attorneys' fees.

In *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the Second Circuit addressed the distribution of *cy pres* awards, rejecting as an abuse of discretion the trial court's awarding a common fund to third parties. The Second Circuit suggests that *cy pres* should be limited "to circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim." *Id.* at 436. Here, class members have not been given a full opportunity to make a claim; instead, plaintiffs have simply excluded over a million class members from recovery.

The lessons of the Class Action Fairness Act ("CAFA") do not apply "only to coupons." As CAFA itself states, Congress enacted the statute out of concern over abuses of the class action device that "harmed" class members, "such as where … counsel are awarded large fees, while leaving class members with coupons ***or other awards of little or no value***." Pub.L. 109-2, § 2(a)(3)(A) (emphasis added); *Synfuel Tech. v. DHL Indus., Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); Jeffrey S. Jacobson, *Defining "Coupon" Under the Class Action Fairness Act*, Product Liability Law 360, Jan. 15, 2008. This case, offering a settlement of zero value to the class, is squarely within the concern of CAFA. It is perfectly appropriate to omit noncash compensation to the class when considering the fairness of the settlement or the calculation of a reasonable fee. *E.g.*, *Silberblatt v. Morgan Stanley*, 2007 WL 4145403 (S.D.N.Y. Nov. 19, 2007).

There is not post-CAFA Ninth Circuit precedent on *cy pres* awards. Even under the

pre-CAFA precedent, the settling parties' initial submission to the court did not provide "evidence that proof of individual claims would be burdensome or that distribution of damages would be costly." *Molski*, 318 F.3d at 954-55. *Cy pres* awards are therefore inappropriate. *Id.* But even if the court permitted the late submission of such proof, the awards would still be inappropriate.

Cy pres awards to third parties are poor public policy, create conflicts of interest and unseemly political lobbying of judges by third-party charities, and are a means for plaintiffs' attorneys to exaggerate the benefit to the class. Theodore H. Frank, *Cy Pres Settlements*, Class Action Watch, March 2008 at 1, available at http://www.fed-soc.org/publications/pubid.887/pub_detail.asp. As such, the determination of whether a settlement is fair, adequate, or reasonable settlement under Rules 23(e) and 23(h) should not include attorneys' fees based on *cy pres* awards to third parties except when explicitly authorized by the legislature. *Id.*

While *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990), approves of the use of *cy pres*, that case predates both CAFA and the Seventh Circuit precedent rejecting the use of such settlements. *Six Mexican Workers* should be understood as abrogated by CAFA. If the Court disagrees, then to the extent this court reads Ninth Circuit precedent as requiring a court to use a *cy pres* award to a third party to justify the reasonableness of the settlement and of the attorneys' fees, even when the *cy pres* award does not benefit the class, there is a circuit split, as the Seventh Circuit has repeatedly explicitly held that *cy pres* awards are not to be construed as a benefit to the class except in a situation where money intended for the class would otherwise be reverted to the defendant. *Murray v. GMAC*, 434 F.3d at 952; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) ("There is no indirect benefit to the class from the defendant's giving the money to someone else."); *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000).

D. The Settlement Therefore Cannot Survive Judicial Scrutiny

A "district court ha[s] a fiduciary responsibility to the silent class members." *Grant*

v. Bethlehem Steel Corp., 823 F.2d 20, 23 (2d Cir. 1987). "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004). Where a court is confronted with a settlement-only class certification, the court must look to factors "designed to protect absentees." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003). "Settlements that take place prior to formal class certification require a higher standard of fairness." *Molski*, 318 F.3d at 953 (*quoting Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000)).

"These concerns warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998).

Though plaintiffs claimed to represent and seek to bind a six-million-member class, they have recovered cash for only themselves and their attorneys. Even if one were to improperly credit the charitable pseudo-*cy pres* award to unrelated third parties as a benefit to the class, plaintiffs have recovered for the class $55,000 and miscellaneous software for a claim that they had alleged was worth hundreds of million of dollars plus punitive damages. If we generously assume a $10 value and 1% redemption rate for the software, plaintiffs brought a billion-dollar lawsuit that they are settling for $655,000, a less-than 0.1% success rate. Meanwhile, the representative class members receive "bonus" payments worth many times any compensable damages despite shutting out all of the unrepresented class members.

In *Murray*, a 1% ratio of recovery to alleged damages and a high ratio of representative-to-individual recovery was enough to call the settlement untenable: "if the reason other class members get relief worth about 1% of the minimum statutory award is

that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny?" 434 F.3d at 952. Here, the "success" of plaintiffs is similar to the failure criticized in *Murray*. Plaintiffs are either breaching their fiduciary duties by selling the class short or are bringing an extortionate "strike suit" for their own selfish benefit. Neither should be condoned by approving the settlement or attorneys' fees.

The fact that the settlement permits class members to pursue claims for identity theft, that there is *cy pres* relief to charitable organizations, and has ostensible injunctive relief is insufficient to proclaim the settlement fair. The settlement in *Molski* offered all of those remedies, and was still proclaimed "unfair, inadequate, and unreasonable" as a matter of law.

III. The Underlying Lawsuit Is Meritless And Harms Class Members' Interests.

Plaintiffs allege that they received stock touting spam as a result of a breach in TD Ameritrade's information systems. There is no evidence of monetary damage as a result of receiving the spam in question, and no evidence that the breach resulted in any instances of identity theft. Plaintiffs only assert that "exposure of accountholders' personal information subjects the accountholders to spam and increased risk of identity theft." (Consolidated Complaint at ¶ 30.)

But increased risk of identity theft is not a compensable injury, *see, e.g., Pisciotta v. Old National Bancorp*, 449 F.3d 629, 639-640 (7th Cir. 2007), nor is it the type of action where common issues predominate over individual ones. *See, e.g., TJX Companies Retail Security Breach Litigation*, 246 F.R.D. 389 (D. Mass. 2007).

When plaintiffs bring low-value litigation with little chance of success on relatively meritless claims, as they appear to have done here, they raise costs to defendants, who have to pay for legal fees and for the extensive and expensive class action notice requirements. Objectors, like the vast majority of class members, receive consumer surplus from their purchase and use of Ameritrade services. Self-dealing settlements like

those of Putative Class Attorneys raise the costs to the defendants of providing service, and raise prices to class members like Objectors without concomitant benefits, thus reducing their consumer surplus. Attorneys who bring such lawsuits that damage the class's long-term interests cannot meet the Rule 23(a)(4) requirement of "fairly and adequately protect[ing] the interests of the class." Consumer welfare would be improved if courts rejected such settlements and deterred socially inefficient rent-seeking litigation.

IV. If The Court Approves The Settlement, Any Attorneys' Fees Should Be Contingent Upon Meeting Specific Benchmarks In Coupon Redemption.

It is possible that the settling parties will present expert evidence claiming that the redemption rate will be unusually high in this case. *Cf.* 28 U.S.C. § 1712(d). Certainly, if the coupon redemption rate were 50 to 100%, there would be a sound argument for the fairness of the settlement, as it would show that the class viewed the coupons as a tangible benefit.

But if such representations are made, and the settlement is approved based upon a § 1712(d) claim that the redemption rate will be high, the Putative Class Attorneys should be required to put their money where their mouth is. If the actual redemption rate does not match the claimed redemption rate that the parties used to gain court approval, attorneys' fees should be denied. Without such a possibility of penalty, plaintiffs will have every incentive to exaggerate the likely redemption rate in order to gain settlement approval. But if Putative Class Attorneys know that they will not receive fees unless they make an accurate representation to the Court about the true value of the settlement, they will have the appropriate incentive to be truthful rather than engaging in a battle of the experts. And only then will the Court have the data it needs to determine whether the settlement is adequate.

V. Putative Class Attorneys Are Not Entitled To Costs.

A prevailing party is entitled to costs. Fed. R. Civ. Proc. 54(d)(1). It is within a court's discretion to deny costs to a prevailing party when that party's success is but a small fraction of the relief they originally sought and litigated. *Farrar v. Hobby*, 506 U.S.

103 (1992). Here, Putative Class Attorneys have obtained extraordinarily little in economic benefit for the class they purport to represent, when they originally claimed that their damages were effectively hundreds of millions of dollars plus punitive damages: they "asked for a bundle and got a pittance." *Id.* at 120 (O'Connor, J., concurring). This is the sort of *de minimis* nuisance settlement that should not be awarded more than nominal costs or fees. *Id.* at 121-22.

CONCLUSION

Given the likely redemption rate of the coupons that are the centerpiece of this settlement, the Putative Class Attorneys have brought either (1) a meritorious case that is being settled for a tiny fraction of the case's real value in a "sellout" of the attorneys' and class representatives' fiduciary duties to the class, or (2) a meritless lawsuit where the "class device had been used to obtain leverage for one person's benefit." *Murray*, 434 F.3d at 952. In either instance, the Putative Class Attorneys' actions should be deterred, rather than rewarded; the court should reject the settlement as failing to comply with the requirements of Rule 23(a)(4) and Rule 23(e).

But if the Court makes factual findings that the settlement is fair based on Putative Class Attorneys' representations about the redemption rate, any award of fees and costs should be contingent upon the Putative Class Attorneys' accuracy in those representations.

Dated: July 9, 2009

Respectfully submitted,

/s/ Theodore H. Frank

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PROOF OF SERVICE

I declare that:

I am employed in the District of Columbia. I am over the age of 18 years and not party to the within action; my office address is 1150 Seventeenth Street, NW, Washington, DC 20036.

On July 9, 2009, I served the attached:

NOTICE OF APPEARANCE AND OBJECTION TO PROPOSED SETTLEMENT

X By First-Class Mail in that I caused such envelope(s) to be delivered via First-Class Mail to the addressee(s) designated.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 9, 2009.

/s/ Sara Wexler
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re:	Case No. C 07-2852 VRW
TD Ameritrade Account Holder Litigation	**CLASS ACTION**
	LR 3-16 CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Pursuant to LR 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: July 9, 2009

Respectfully submitted,

/s/ Theodore H. Frank
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