

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

TRUC Q. HOANG, individually and on)	CASE NO. 378530
behalf of all similarly situated persons,)	
Plaintiff,)	JUDGE A.O. CALABRESE, JR.
)	
vs.)	<u>ORDER AND OPINION</u>
)	
E*TRADE GROUP, INC., and)	
E*TRADE SECURITIES, INC.)	
)	
Defendants.)	

Judge Anthony O. Calabrese, Jr.:

This court heard oral arguments in a class certification hearing in the case of Truc Q. Hoang vs. E*Trade Group, Inc., et. al. on April 23, 2002. The Court, having considered the facts and the evidence finds that Plaintiff has met her burden in satisfying all of the seven requirements of Ohio R. Civ. P. 23. Consequently, Plaintiff's Motion for Class Certification is granted.

I. FACTS

This case began on November 23, 1998 when the plaintiff, Truc Q. Hoang, opened an on-line account with E*Trade with an initial investment of \$ 1,000¹. Plaintiff then proceeded to trade on-line over the next few months and experience various computer system interruptions².

¹ The facts of this case are set forth in detail in (1) Plaintiffs' Motion for Class Certification and Memorandum in Support at 4 and in (2) the Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification at 4

II. LAW AND ANALYSIS

A. Rigorous Analysis

Rule 23 of the Ohio Rules of Civil Procedure governs whether a case may be certified as a class action. In order to maintain a class, the requirements of Civ.R.23 must be met. The Ohio Supreme Court has stated that trial courts must “carefully apply the class action requirements [of Civ.R.23] and conduct a rigorous analysis into whether the prerequisites of Civ.R.23 have been satisfied” before deciding whether to certify a class action. *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St.3d 67, 70; *Accord Gen. Tel. Co. of the Southwest v. Falcon* (1982), 457 U.S. 147, 160-61; *Gulf Oil Co. v. Bernard* (1981), 452 U.S. 89, 100; *Sprague v. GMC* (6th Cir 1998), 133 F.3d 388, 397 (“a district court may not certify any class without ‘rigorous analysis’ of the requirements of Rule 23”); *In re American Medial Systems, Inc.* (6th Cir. 1996), 75 F.3d 1069 (mandating that District Courts conduct a “rigorous analysis” into whether the prerequisites of Rule 23 are met)³

Both of the parties and this Court have conducted a very “rigorous analysis” of this case regarding class certification. The parties have produced and submitted massive and thorough briefs. These briefs taken together with exhibits total well over a thousand pages⁴. The Plaintiff and Defendants have engaged in discovery over the course of years involving boxes of information and thousands of potential plaintiffs. Furthermore, this Court conducted a comprehensive class certification hearing on April 23, 2002, after which an extensive evaluation was conducted. Based on the massive and thorough briefing, extensive exhibits, lengthy and

² The exact dates of the systems interruptions are as follows: November 27 and 30, 1998; February 3 through 5, 1999; March 19, 1999; July 9, 1999; August 10, 1999; November 23 through December 3, 1999; January 25, 2000; March 2, 2000; April 3, 2000; May 3, 2000; and October 18, 2000.

³ Due to the fact that Ohio Civil Rule 23 and Rule 23 Fed.R.Civ.P. are nearly identical, Ohio courts have traditionally looked to federal case law for interpretation of the Ohio rule. See *Marks v. C.P. Chemical Co., Inc.* (1987), 31 Ohio St.3d 200, 201; *Schmidt v. Avco Corp.*, *infra* at 83.

⁴ Plaintiff submitted three massive binders totaling well over a thousand pages for the class certification hearing alone.

complex discovery, and comprehensive class certification hearing this Court can only come to the conclusion that the rigorous analysis requirement has been more than met.

B. Prerequisites to a Class Action

The prerequisites to a Civ.R.23(B)(3) class action are established through the seven-part analytical test prescribed by the Ohio Supreme Court in *Warner v. Waste Management, Inc.*, 36 Ohio St.3d 91 (1988). In *Hamilton*, the Ohio Supreme Court reiterated the requirements that must be satisfied before an action may be maintained as a class action pursuant to Civil Rule 23 as follows:

“The following seven requirements must [all] be satisfied before an action may be maintained as a class action under Civ.R.23: (1)an identifiable class must exist and the definition of the class must be unambiguous; (2)the named representatives must be members of the class; (3)the class must be so numerous that joinder of all members is impracticable; (4)there must be a question of law or fact common to the class; (5)the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6)the representative parties must fairly and adequately protect the interest of the class; and (7)one of the three Civ.R.23(B) requirements must be met.”

Hamilton v. Ohio Savings Bank, 82 Ohio St.3d 67 (1998).

This Court evaluated the seven factors mentioned above at great length when evaluating this motion for class certification. The seven factors are evaluated in greater detail below.

C. Application of Class Action Requirements: Civ.R.23(A)

Identifiable Class

The first requirement is that the class definition must be precise enough “to permit identification within a reasonable effort.” *Warner, supra*, 36 Ohio St.3d 91 at 96, 521 N.E.2d at 1096. An example of a class that is not identifiable because it is ambiguous is one composed of “all people who have been or may be harassed by the police.” *Id.* The proposed class in this case is defined as follows: All qualified customers of E*Trade that suffered compensable damages

during the class period. For purposes of defining the proposed class, the terms “qualified customers”, “compensable damages”, and “class period” have the following meanings:

- a) “qualified customers” means all persons residing in Ohio that had a trading account with E*Trade;
- b) “compensable damages” means all damages incurred by a qualified customer as a result of E*Trade’s breach of its statutory, contractual or common-law duties to its customers;
- c) “class period” means the time period i) beginning the date E*Trade commenced on-line trading or the date any limitations period applicable under governing law applies, whichever is later, and ii) ending the date a class is certified in this action.

This class is carefully and narrowly defined. The membership of the class is not left open to the subjective, state-of-mind vagaries of individual class members (i.e., all who have been or may be subjected to police harassment, *supra*). It is therefore this Court’s opinion that the first prerequisite, an identifiable class is satisfied.

D. Class Membership

The class member prerequisite requires that the class representative is a member of the class they seek to represent. *Warner*, 36 Ohio St.3d at 96. The second prerequisite is satisfied. Plaintiff Truc Hoang opened a trading account with E*Trade while she was a resident of Ohio, and she suffered direct financial loss due to her inability to access her trading accounts. Therefore, she was a “qualified customer” of E*Trade. If E*Trade is found to be liable, she will have suffered “compensable damages.” Given that she filed this action within weeks of her losses, there can be little doubt that her losses were incurred during the “class period”, regardless of the particular limitations period or periods that may apply to her claims.

E. Impracticality or Numerosity

The Civ.R.23(A)(1) “numerosity” prerequisite tests whether “the class is so numerous that joinder of all members is impracticable.” The Ohio Supreme court has offered the following guidance in applying this requirement:

In construing Civ.R.23(A)(1), known as the numerosity requirement, courts have not specified numerical limits for the size of a class action. This determination must be made on a case-by-case basis. Professor Miller, however, has indicated: “[i]f the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking; if the class has between twenty-five and forty, there is no automatic rule * * * .”

Warner, supra, 36 Ohio St.3d at 97, 521 N.E.2d at 1097. In *Warner*, the numerosity requirement was deemed satisfied because there were more than 500 potential class members. *Warner*, 36 Ohio St. 3d at 97.

The class in this case will clearly consist of more than forty potential members. As of August 16, 2000, E*Trade had approximately 89,000 customers who listed an Ohio address⁵. All of these Ohio customers are potential members of the class, thereby satisfying the numerosity prerequisite.

F. Commonality

Civ.R.23(A)(2) requires the presence of “questions of law or fact common to the class.” Courts generally give this requirement a permissive application. It is not necessary that all the questions of law or fact raised in the dispute be common to all the parties. If there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied. *Marks v. C.P. Chemical Co.*, 31 Ohio St.3d 200 (1987) at 202. *Warner, supra*, 36 Ohio St.3d 91, 521 N.E.2d. 1091, paragraph three of the syllabus. The issue of whether there are any additional

⁵ See E*Trade's response to Plaintiff's No. 20 and Plaintiffs' Motion for Class Certification and Memorandum in Support.

questions affecting only individual class members does not enter the class certification analysis until the Civ.R.23(B)(3) requirement of predominance and superiority is applied. *Marks, supra*, 31 Ohio St. 3d at 202.

The existence of the main question of whether E*Trade is liable under its contractual, statutory or common-law duties, to the members of the class satisfies the commonality prerequisite. The extensive motion practice that has already occurred in this case demonstrates that there are numerous questions of law and fact that remain to be determined. These common questions of law and fact are identified in Plaintiff's amended complaint⁶. All of the issues identified in Plaintiff's complaint raise questions of law and fact that are common to each member of the proposed class.

G. Typicality and Adequate Representation

The requirement of typicality is met where there is no express conflict between the class representatives and the class. Similarly, a representative is deemed adequate so long as his or her interest is not antagonistic to that of other class members. *Warner, supra*, 36 Ohio St.3d at 98, 521 N.E.2d at 1097. Plaintiff in this case is seeking to pursue the same claims on

⁶ The items are as follows: (i) whether, E*Trade had sufficient capacity to process the trades that it knew, or should have know, it would need to process; (ii) whether E*Trade's system failures were the result of its own negligence or, conversely, the result of outside cause beyond its control; (iii) whether E*Trade had adequate back-up systems to handle customer needs when its computer systems failed; (iv) whether, because of E*Trade's insufficient capabilities, class members have been unable to access E*Trade's on-line or telephone services; (v) whether, because of E*Trade's insufficient capabilities, class members have regularly or from time to time had the execution of their trades delayed; (vi) whether E*Trade engaged in a course of conduct designed to entice consumers to join its on-line electronic stock brokerage service by means of advertising and/or other marketing efforts, asserting that E*Trade would provide fast, reliable, efficient and convenient executions of stock trades; (vii) whether E*Trade breached its express and/or implied contractual obligations to its customers; (viii) whether E*Trade breached its fiduciary obligations (if any) to its customers; (ix) whether E*Trade actions constitute unfair trade practices in violation of the Ohio Revised code; (x) whether E*Trade has been unjustly enriched by virtue of the conduct complained of herein; (xi) whether E*Trade is liable to Plaintiff and members of the class for negligence and/or negligent misrepresentation; (xii) whether E*Trade made its marketing representations in knowing, reckless or negligent disregard of the fact that its processing capacity was insufficient; (xiii) if E*Trade breached any of its statutory, contractual or common-law duties to its Ohio customers, what is the appropriate measure of damages.

her own behalf as she is seeking to pursue on behalf of the members of this class. To the extent Plaintiff proves her claims, she will thereby probe the claims of all remaining members of the class. There is therefore no actual or apparent conflict between Plaintiff and the proposed class members. The typicality prerequisite is therefore satisfied.

Civ.R.23(A)(4) requires that the class representatives "will fairly and adequately protect the interests of the class." This "adequacy" prerequisite is divided into two sub-parts: adequacy of the named plaintiffs/class representatives and adequacy of counsel for the putative class. *Warner*, 36 Ohio St.3d at 98. Both sub-parts of the Civ.R.23(A)(4) adequacy prerequisite are satisfied.

A class representative is adequate "so long as [her] interest is not antagonistic to that of other class members." *Warner*, 36 Ohio St. 3d at 98. The Plaintiff in this case is adequate, largely for the same reasons she is typical. She harbors no interest that is or conceivably could be antagonistic with any other member of this putative class. Her claims are narrowly focused on proving the identical claim held by each remaining absent plaintiff. And again, there is no real or apparent conflict between Hoang and the members of the putative class. Counsel is likewise adequate as the attorneys in the firm have the required experience in complex commercial and class litigation. (See Affidavit of David B. Webster, Esq., attached to Plaintiff's Motion for Class Certification and Memorandum in Support).

H. Application of Civ.R.23(B)(3)

As noted above, a class is properly certified if the implied and express Civ.R. 23(A) prerequisites are satisfied, and if any one of the three Civ.R.23(B) provisions is satisfied. In this case, plaintiffs seek certification pursuant to Civ.R.23(B)(3), the so-called 'damage' action.

“Rule 23(B)(3) requires two findings by the court: that the common questions predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Professor Miller states, ‘[t]he key should be whether the efficiency and economy of common adjudication outweigh the difficulties and complexity of individual treatment of class members’ claims.’” *Warner*, 36 Ohio St.3d at 95. The following analysis demonstrates that the prerequisites of “predominance” and “superiority” are satisfied.

1. Questions of Law or Fact Common to the Members of the Class Predominate Over Questions Affecting Only Individual Class Members

The Civ.R.23(B)(3) “predominance” prerequisite is satisfied where “questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . .” Civ.R.23(B)(3). The predominance prerequisite requires only that common questions of law or fact predominate. *See* Civ.R.23(B)(3). There is, to be sure, no requirement that each and every question in every phase of the case be completely identical, nor even that all important questions receive class-wide treatment. *Wright, Miller & Kane, Federal Practice and Procedure*, § 1778, at 528-30.

Class certification in this case will result in the entire range of expensive and time-consuming pre-trial procedures, document production, depositions, interrogatories, pre-trial and trial motions, being conducted only once. Especially relevant in this case is that the anticipated use of discovery and proof concerning the basis of E*Trade’s contractual, statutory, and common-law duties to Plaintiffs. E*Trade’s knowledge of its limitations, the basis for its advertising and marketing claims, and the causes of E*Trade’s computer failures will be conducted, assembled, presented, and resolved just one proceeding.

In addition to the increased effectiveness of class certification mentioned above this case involves two main aspects that make it appropriate for class treatment under Civ.R.23(B)(3). First, one of the bases for E*Trade's liability is the existence of a standard, uniform customer agreement. Second, E*Trade's actions in this case are actions directed toward, or having a uniform impact upon, all plaintiffs in this case. There are no individual contracts or questions involving E*Trade's actions toward any specific individuals that would fracture the class. The predominance prerequisite is satisfied because the singular contention of each and every plaintiff is that E*Trade engaged in a common course of conduct which had a single objective, explosive growth, thereby resulting in a negative impact on existing customers. Each plaintiff within this class asserts the same claims against E*Trade, grounded on the same facts.

2. A Class Action Is Superior to Other Available Methods for the Fair and Efficient Adjudication of this Controversy

A class action in this situation is superior to other available methods for the fair and efficient adjudication of this controversy. The class in this situation is clearly bound together by a mutual interest in resolving common questions to a far greater extent than it may be divided by individual interests. In addition, none of the questions in this case affecting only individual members rises to the level necessary to defeat class certification. Certifying the class in this situation will result in the reduction and elimination of what would be substantial duplicative efforts regarding discovery, motions, briefs, and countless other labors.

III. Conclusion

It is this Court's opinion that there has been a more than "rigorous analysis" in the above mentioned case. The class certification order in this case was issued only after substantial

discovery, pre-trials, and a class certification hearing. The discovery in this case took place over the last few years and involved an extensive amount of material, which the plaintiff has disseminated into an accurate and manageable customer list. Furthermore this Trial Court's Certification Order was issued only after the class certification issue had been fully briefed and supplemented by both sides. In addition to the massive and extensive briefing conducted in this case the Trial Court held several pre-trials and a full class certification hearing on April 23, 2002. The class certification hearing involved exhibits, documents, slides, computer disks, binders, and other information relating to the class certification. In addition to the rationale discussed in detail above, Plaintiff has met the seven requirements that must be satisfied before an action may be maintained as a class action.

It is the finding of this Court that this matter should be and is certified as a class action under Ohio Civ. R. 23(B)(3). Plaintiff has moved for certification of the following class:

All Ohio residents who had a trading account with E*Trade on the following dates: November 27 and 30, 1998; February 3 through 5, 1999; March 19, 1999; July 9, 1999; August 10, 1999; November 23 through December 3, 1999; January 25, 2000; March 2, 2000; April 3, 2000; May 3, 2000; and October 18, 2000

Having reviewed the papers submitted, having heard the evidence presented at the hearing, and having considered the authorities cited in favor of and in opposition to the motion, the Court finds that:

1. The class consists of thousands of individuals whose identities are available from Beta Systems, which maintains the books and records of E*Trade. As set forth in Plaintiffs' Exhibit 9 (Bates Nos. EO 001541 through EO 007662 – "Open Ohio Accounts"; and EO 007663 through EO 009352 – "Closed Ohio Accounts"), E*Trade

has identified approximately 89,000 Ohio customers who had, or continue to have, trading accounts with E*Trade.

2. There are questions of law and fact that are common to Plaintiff Truc Q. Hoang and to members of the class. Specifically, the Court finds the following questions of law and fact, among others, are common among all class members:
 - a. Whether E*TRADE had sufficient capacity to process the trades that it knew, or should have known, it would need to process;
 - b. Whether E*TRADE's system failures were the result of its own negligence or, conversely, the result of outside causes beyond its control;
 - c. Whether E*TRADE had adequate back-up systems to handle customer needs when its computer systems failed;
 - d. If E*TRADE's capacity was insufficient, whether this proximately caused its customers to be unable to access E*TRADE's on-line or telephone services;
 - e. If E*TRADE's capacity was insufficient, whether this proximately caused its customers to have the execution of their trades delayed;
 - f. Whether E*TRADE's actions constituted unfair trade practices in violation of the Ohio Revised Code;
 - g. Whether E*TRADE breached its express or implied contractual obligations to Plaintiff and members of the Class;
 - h. Whether E*TRADE breached its fiduciary obligations to its customers in failing to fill customer orders in a timely manner; and
 - i. Whether E*TRADE marketed its services with knowing, reckless or negligent disregard of the fact that its processing capacity was insufficient.

3. The common questions of law and fact predominate over any questions affecting only individual members in that: (1) the alleged bases of E*Trade's liability will be determined in large part upon the existence of a standard, uniform customer agreement; (2) E*Trade's alleged tortious actions and/or inactions in this case are directed toward, or will have a uniform impact upon, all plaintiffs in this case—*e.g.*,

whether E*Trade engaged in a common course of conduct which had, as Plaintiffs allege, the objective of uncontrolled and explosive growth at the expense of E*Trade's duties to its customers; (3) predominance is a test readily met in certain cases, as here, alleging consumer fraud, in that the allegations of common misrepresentations obviates the need to elicit individual testimony as to each element of a fraud or misrepresentation claim; (4) questions involving individual damages are not, in a case such as this, sufficient to defeat class certification on predominance grounds—in fact, evidence has been adduced that E*Trade on certain occasions has adjusted its customer accounts on a company-wide basis due to system interruptions in accordance with a common mathematical formula. (Plaintiffs' Exhibit 14, Deposition of James Autrey at pp. 74-75, 106-107).

4. The claims of Truc Q. Hoang for breach of contract (Count I), breach of fiduciary duty and unjust enrichment (Count II), fraud (Count III), unfair and deceptive trade practices (Count IV) negligence/intentional tort (Count V) and injunctive relief (Count VI) are typical of the claims of the class, and she will fairly and adequately protect the interests of the class.
5. Truc Q. Hoang has indicated both a willingness and an ability to represent the class members. She has engaged Webster & Webster LLP to represent her and the class in this matter. Counsel chosen by Plaintiff is competent to represent the class fairly and adequately in this litigation.
6. A class action is superior to other methods for the fair and efficient adjudication of this controversy because it is the vehicle that will best deliver justice — whether to E*Trade, if, as it maintains, it did no wrong, or to Plaintiffs.

Therefore,

IT IS ORDERED that:

1. This matter should be and is certified as a class action under Ohio Civ.R. 23(B)(3).
2. The action will proceed as a class that includes: "All Ohio residents who had a trading account with E*Trade on the following dates: November 27 and 30, 1998; February 3 through 5, 1999; March 19, 1999; July 9, 1999; August 10, 1999; November 23 through December 3, 1999; January 25, 2000; March 2, 2000; April 3, 2000; May 3, 2000; and October 18, 2000."
3. Counsel for all parties shall make proposals for the contents and manner of giving notice of the pendency of the class action under Ohio Civ.R. 23, and for the responsibility for paying for that notice. Those proposals must be filed with the Court, and served on all parties to the action who have appeared in the action to date.

IT IS SO ORDERED.

DATE: _____, 2002

ANTHONY O. CALABRESE, JR., JUDGE

CERTIFICATE OF SERVICE

COPIES OF THE FOREGOING HAVE BEEN SENT BY ORDINARY U.S. MAIL BY THE CLERK OF COURTS TO THE FOLLOWING PARTIES OR THEIR COUNSEL OF RECORD:

DAVID B. WEBSTER
Attorney for Plaintiff
Webster & Webster LLP
1220 West Sixth Street
Bradley Building, Suite 600
Cleveland, Ohio 44113
216-566-1144

CRAIG P. KVALE
Attorney for Plaintiff
Webster & Webster LLP
1220 West Sixth Street
Bradley Building, Suite 600
Cleveland, Ohio 44113
216-566-1144

MARK J. VALPONI
Attorney for Defendant
Taft, Stettinius & Hollister LLP
3500 BP Tower
200 Public Square
Cleveland, Ohio 44114-2302
216-241-2838

GREGORY A. MARKEL
Attorney for Defendant
Brobeck, Phleger & Harrison LLP
1633 Broadway, 47th Floor
New York, NY 10019
212-581-1600