Case No. 18-_____

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TD AMERITRADE HOLDING CORPORATION,
TD AMERITRADE, INC., AND FREDRIC TOMCZYK,
Defendants-Petitioners

v.

RODERICK FORD, on behalf of himself and all similarly situated,
Plaintiff-Respondent

On appeal from the United States District Court for the
District of Nebraska,
(Case No. 8:14-cv-00396)
(Judge Joseph F. Bataillon)

DEFENDANTS-PETITIONERS' PETITION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Local Rule 26.1A, Defendant-Petitioners TD Ameritrade Holding Corporation and TD Ameritrade, Inc. (collectively, with Defendant-Petitioner Fredric Tomczyk, "TD Ameritrade") make the following disclosures: TD Ameritrade, Inc. is a wholly owned subsidiary of TD Ameritrade Holding Corporation. TD Ameritrade Holding Corporation is a publicly traded corporation with no parent company. The Toronto-Dominion Bank, a publicly held entity, owns more than 10 percent of TD Ameritrade Holding Corporation's stock.

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INTRODUCTION

Plaintiff asserts that TD Ameritrade ("Ameritrade") engaged in securities fraud by falsely promising to seek "best execution" of its customers' equity securities orders. Plaintiff claims that the way Ameritrade routed customers' orders to market centers for execution resulted in less than the best price available in the market. This assertion of "economic loss," an essential element of Plaintiff's claim, is highly contextual. Determining whether and at what price market centers could have filled particular orders for particular securities at any given moment depends on numerous factors including rapid changes in market conditions. Given the overwhelming number of order-by-order issues involved in determining economic loss, *every* court considering best execution claims has refused to certify a class.

This is the first case to rule otherwise. The ruling warrants this Court's immediate review to develop the law regarding two recurring legal issues.

First, the District Court ruled that Plaintiff's promise to create a computer algorithm means that common issues predominate. The algorithm will not rely on evidence common to every class member or extrapolate from the named Plaintiff's data to reach class-wide conclusions. Instead, as the District Court understood, the algorithm supposedly will process individual order-by-order data from *each* of the class members' hundreds of millions of orders to determine which, if any, sustained economic loss. The ruling is radical, and unsettles not only securities class action law, but class action law generally. Computing power alone cannot substitute for the

common evidence needed to meet the predominance standard of Rule 23(b)(3). Some questions are unavoidably individualized, not merely because of the mass of data involved, but because, like the unique market circumstances of each order at each moment, no formula can decide what data to examine and how to evaluate the data for each of hundreds of millions of transactions. Indeed, the District Court certified a class without regard to whether a substantial number of class members even incurred a loss, further unsettling class action law.

The District Court's ruling is a dangerous mutation in class action law, one that risks being repeated given the increasing pervasiveness of data processing technology. This Court should clarify when and how algorithmic analysis provides class-wide proof.

Second, the District Court applied the presumption of reliance recognized in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), which applies to claims based on misleading *omissions*, not express misrepresentations. The District Court ruled reliance may be presumed whenever the alleged misrepresentations relate to a "course of conduct." Under that novel rule, any distinction between misrepresentations and omissions collapses; *every* misrepresentation case would merit the presumption. This Court should clarify that when affirmative misrepresentations are alleged, the presumption does not apply.

This case is precisely why Rule 23(f) exists. "'Permission is most likely to be granted … when the certification decision turns on a novel or unsettled question of

law, or when the decision on certification is likely dispositive of the litigation.'" *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1710 (2017). The proposed class here potentially includes millions of orders over a three-year class period. That creates large potential exposure and huge litigation costs that impose enormous pressure to settle even meritless claims. Settlements frustrate the development of class action law that is sorely needed to improve their efficient administration and resolution. *See id.* at 1713; *Elizabeth M. v. Montenez*, 458 F.3d 779, 784 (8th Cir. 2006).

When the Third Circuit received a 23(f) petition regarding class treatment of a best execution claim raising similar economic loss issues, it accepted review. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162-68 (3d Cir. 2001) ("*Newton II*"). This Court has twice previously granted Rule 23(f) petitions to determine whether different presumptions of individual reliance could apply in fraud and misrepresentation cases. *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775, 779, 782 (8th Cir. 2016) ("*Best Buy*"); *In re St. Jude Med., Inc.*, 522 F.3d 836, 838-40 (8th Cir. 2008). This petition presents the opportunity to develop important principles of class action law that will frequently recur but rarely be litigated to final judgment. The District Court's ruling is wrong, establishes bad precedent on a matter of importance to the financial services industry, and merits immediate correction.

QUESTIONS PRESENTED FOR REVIEW

1. Does a computer algorithm that purportedly will determine economic loss order-by-order for hundreds of millions of orders (a) substitute for common evidence

of class-wide proof, and (b) satisfy the ascertainability requirement even though members of the class will be determined only after assessing every putative class member's individualized trading data?

2. Does the *Affiliated Ute* presumption of reliance apply in a case alleging misrepresentations because the plaintiff asserts that the statements related to a "course of conduct"?

STATEMENT OF FACTS

I. Plaintiff's Claim.

Ameritrade is the nation's third largest discount broker, offering lower commissions than full-service brokers but fewer types of personalized investment advice. Docket Entry ("D.E.") 75 ¶ 23. Ameritrade's low-cost structure attracts customers with a variety of investment strategies, including long-term retail investors, active traders, and investment advisors. D.E.88-10 at 3.

Ameritrade customers trade stocks by submitting buy or sell orders specifying the stock and number of shares. An order can be a market order, which does not specify a price, or limit order, which does. Limit orders may be "marketable," *i.e.*, executable at the current market price, or non-marketable.

Ameritrade does not execute orders. It routes orders to numerous market centers, *e.g.*, stock exchanges or market-makers. Generally, quoted prices show which market centers are, at any moment, offering to buy and sell a particular stock. The National Best Bid and Offer (NBBO) is the highest bid to buy and the lowest offer to

sell a particular security. An order might be for more shares than are currently available at the NBBO. Thus, an order may execute at a price worse than the NBBO (a "trade-through") just because fewer shares were quoted and available at the NBBO at the time. An order also may be executed at a price better than the NBBO ("price improvement").

This case concerns the duty to seek "best execution" of customers' orders. That duty "requires 'that a broker-dealer seek to obtain for its customer orders the most favorable terms reasonably available under the circumstances.'" *Zola v. TD Ameritrade, Inc.*, 172 F. Supp. 3d 1055, 1071 (D. Neb. 2016). Courts and regulators agree that price is but one consideration relevant to seeking best execution. *See, e.g., Newton II*, 259 F.3d at 187. This duty involves considering multiple facts and circumstances, including order size, speed of execution, transaction costs, and challenges of executing in a particular market. *Zola*, 172 F. Supp. 3d at 1071.

Plaintiff, suing on behalf of a class of Ameritrade customers, claims that Ameritrade violated Section 10(b) of the Securities Exchange Act of 1934 when it expressly represented that it would seek best execution of customer orders. D.E.75 ¶¶ 36-42. Plaintiff asserts that Ameritrade routes customer orders to the market center that pays Ameritrade the most for the orders it sends (which is called "payment for order flow" or "maker" rebates, collectively "PFOF") instead of the market center that will achieve best execution. *Id.* ¶ 2. It is undisputed that Ameritrade receives PFOF—this is disclosed in SEC filings—and that receipt of PFOF, by itself, is not a

violation of a broker's duty to seek best execution. *See Payment For Order Flow*, Exchange Act Release No. 34902, 57 SEC Docket 2315, 1994 WL 587790, at *3, 6 (Oct. 27, 1994).

Plaintiff alleges that, because Ameritrade breached its duty by routing customer orders contrary to its express representations, he suffered "economic loss due to [his] orders going unfilled, underfilled, filled at a suboptimal price, and/or filled in a manner which adversely affects the order's performance post-execution." D.E.75 ¶ 13. Plaintiff further alleges that, but for Ameritrade's promises, Plaintiffs would have placed orders through a different broker-dealer. *Id.* ¶ 45.

II. The Class Certification Record.

Economic loss and reliance, two Section 10(b) elements, were the focus of class certification. Even if Ameritrade's order routing violated its duty of best execution (a merits question Ameritrade vigorously disputes), no customer would have a claim unless economic loss resulted. *See, e.g., Newton II*, 259 F.3d at 188-89. Likewise, an investor who did not rely on Ameritrade's representation that it seeks best execution cannot recover. *See, e.g., St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 562 F.2d 1040, 1048-50 (8th Cir. 1977). To show that common issues predominate over individualized issues, Plaintiff argued that he could prove economic loss through an algorithm, and that he could invoke a presumption of reliance.

A. Plaintiff's Algorithm.

Ameritrade produced 41 different categories of data on more than 10,000

equity orders (over 470,000 pieces of individualized data) placed by Plaintiff and a former lead plaintiff who withdrew (Kwok Shum). *See* D.E.142 at 4. Haim Bodek, a former high-frequency options trader, fed the data into a purported "algorithm" to analyze whether Plaintiff and Shum suffered any economic loss from Ameritrade's supposed failure to seek best execution.

Bodek asserted his algorithm would assess "TD Ameritrade's transaction data and historical market data [] to conduct [an] order-by-order analysis." D.E.229 at 105:1-5. For each order, he would consider "over 100 fields of derived or enhanced data," including the stock, the time of the order and execution, other prices available, and more. D.E.189-2 (Ex. 2.A) at 2-5. Plaintiff's and Shum's orders would demonstrate Bodek's method, but would not be representative of absent class members. Instead, Bodek's algorithm would, as he described it, present order-by-order results at trial *for every trade by every member of the class*. *See* D.E.229 at 105:1-106:18. This is necessary because, even though Plaintiffs and Bodek assert that Ameritrade's order routing always violated its duty of best execution, they acknowledge that this did not harm every individual order. *Infra* p. 9.

Defendants' expert, Allan Kleidon, discovered numerous errors in Bodek's algorithm, including the failure to account for many reasons why trades Bodek flagged might have resulted in economic loss *completely independent of any failure to seek best execution by Ameritrade* (*i.e.*, irrespective of where it *routed orders*). Bodek conceded that each order requires analysis of many "exclusions, exceptions, or exemptions."

D.E.229 at 107:20-24. For example, Bodek agreed that his algorithm should exclude orders when not enough shares were available at the NBBO ("oversized orders"), orders not subject to U.S. securities laws, and orders outside of regular market hours. *Id.* at 110-3:11.

Notably, Bodek admitted that orders routed during "unusual market conditions" should be excluded. D.E.189-2 (Ex. 2.C) at 12. Plaintiff's other expert, Shane Corwin, conceded that there is no limiting definition of "unusual market conditions," that even he and Bodek may have different definitions, and that each set of circumstances claimed to be "unusual" would have to be studied to determine whether it qualifies. D.E.229 at 58:17-61:23. Kleidon testified that some issues cannot be measured by algorithm, including customer trading strategies and unusual market conditions not captured by codes uniformly applied across market centers. *Id.* at 118:16-127:12.

In rebuttal, Bodek asserted that he would fix the flaws in his algorithm revealed by Kleidon's painstaking analysis of Plaintiff's and Shum's individual orders. Bodek explained his algorithm is still "evolving," and he is unsure whether his list of exclusions is complete. A37.[1] As Kleidon testified, there is no reason to doubt that the same individualized analysis will "apply with a vengeance when you're looking at hundreds of millions of trades across many years," as would be required for trial.

[1] Citations to "A__" refer to Ameritrade's accompanying appendix.

D.E.229 at 122:21-22. Indeed, Bodek admits "[t]here's no regulation that provides a definitive list of these exclusions" (*id.* at 46:13-16), thus whether a particular exclusion should be included in the algorithm will itself be subject to dispute.

Bodek also admitted that his algorithm cannot incorporate customer trading strategies. D.E.229 at 109:12-15. This is significant: some orders were intended as substitutes for original orders that did not execute, and the customer benefitted when substitute orders executed at a better price. Plaintiff testified that, because of his particular trading strategies, some of his orders benefitted from Ameritrade's routing, and to understand his goal concerning a particular order required examining each individual order. *See*, *e.g.*, D.E.197-4 at 122:16-21.

Bodek abandoned his algorithm's original outputs regarding Plaintiff and Shum. D.E.229 at 107:20-24; 108:24-109:4. Yet he never modified his algorithm to correct the flaws, nor provided substitute outputs reflecting his rebuttal report's methodology. *Id.* Instead, in a self-described "forensic reconstruction" he prepared manually, Bodek purported to address on an order-by-order basis whether 17 particular orders were harmed; he found at least 12 were not (and Kleidon found that none of the 17 were harmed). D.E.189-2 (Ex. 2.A) at 53-78; D.E.197-14 at 27-39. Ultimately, Bodek could not identify economic loss as a result of Ameritrade's order routing practices by either of the two customers whose trades he reviewed.

B. Reliance.

Plaintiff chose to trade with Ameritrade for reasons independent of the

company's statements about best execution, including negotiating discounted fees. *See* D.E.197-4 at 26:9-15; 67:4-68:22; 86:7-13; 111:3-114:4-20. Plaintiff continued trading through Ameritrade because of its low commissions even after he learned of Ameritrade's purported misrepresentations. *Id.* at 141:7-142:20.

III. The Class Certification Ruling.

Magistrate Judge Bazis heard live testimony from Bodek, Corwin, and Kleidon. In a detailed report, she recommended that certification be denied because individualized issues predominate. Proving economic loss "would require a trade-by-trade analysis and would vary from member to member." A36 (quoting *Newton II*). The R&R found that Bodek's proposed algorithm does not obviate the need for "order-by-order inquiries necessary to determine whether each individual customer actually sustained an economic loss." A37-38. The R&R also found "aspects necessary to evaluate economic loss in a best execution case that simply cannot be captured through algorithmic analysis," including an individual's trading strategy. A38. The Magistrate Judge saw no reason to deviate from the uniform views of other courts that have rejected class certification of claims for failure to seek best execution. A36 (quoting *Newton II*).

The District Judge rejected the R&R and certified a class under Rule 23(b)(3). *See* A27-28 (reserving ruling on (b)(2) certification). The court acknowledged that prior cases had refused to certify class claims indistinguishable from Plaintiff's, but concluded that "[t]hose cases involved different proof than that presented in this

case." A23. Bodek's evolving algorithm supposedly transformed what other courts had uniformly recognized as an individual issue into a common one.[2]

The District Judge validated Kleidon's criticisms of Bodek's methodology, but reasoned that Bodek could "refine[]" his algorithm to address its flaws. A21. The court concluded that, because regulators and brokers use algorithms to route trades and "analyze execution quality" in a non-class action context, it follows that experts can also develop an algorithm to determine on a class-wide basis whether customers suffered economic loss from a broker's order routing. A22.

The District Court also presumed reliance across the class. The court observed that the presumption applies in "cases 'involving primarily a failure to disclose [material facts] . . . ." A19 (quoting *Affiliated Ute*, 406 U.S. at 153). The court did not explain why *this* case involved "primarily" a failure to disclose material facts, given Plaintiff's claim that Ameritrade expressly misrepresents that it seeks best execution. A19-20 (analogizing to "a potentially fraudulent common course of conduct from which reliance can be presumed.") (quotation omitted). The court noted that there is a fraud-on-the-market presumption in some securities cases (A19), but did not rule it applies here. Plaintiff has never argued for it.

[2] Ameritrade challenged Bodek's method as inadmissible expert testimony, a challenge the District Court rejected in a prior ruling. Ameritrade has always maintained that class certification should be denied even if Bodek's analysis is considered. D.E.194 n.29.

REASONS FOR ALLOWING THE APPEAL

Rule 23(f) aids the development of class action law when pressures to settle are great and the chance for review after final judgment is unlikely. *Elizabeth M.*, 458 F.3d at 784. That is especially true here: "very few securities class actions are litigated to conclusion, so review of [a] novel and important legal issue may be possible only through the Rule 23(f) device." *West v. Prudential Secs. Inc.*, 282 F.3d 935, 937 (7th Cir. 2002). This Court recently used Rule 23(f) to aid the development of the law regarding reliance and class certification in securities cases. *See Best Buy*, 818 F.3d at 779, 782. As in *Best Buy*, the decision below presents an important development regarding when reliance can be presumed in a securities fraud case to support class certification. Indeed, the ruling here presents novel and important developments in securities class litigation and beyond. Immediate review is warranted.

I. This Court Should Provide Guidance Regarding the Use of Algorithmic Analysis to Overcome Individualized Issues of Economic Loss.

A. Certain Individual Issues Cannot Be Overcome By Algorithms.

Courts have uniformly refused to certify as class actions claims against brokers for failing to seek best execution of customer trades. That is because, irrespective of any alleged failure to seek best execution (*i.e.*, breach of duty), proof of economic loss on a particular trade (*i.e.*, harm) is unavoidably individualized. *See, e.g., Newton II*, 259 F.3d at 177-88; *Telco Grp. Inc. v. Ameritrade, Inc.*, No. 05-387, 2007 WL 203949, at *10 (D. Neb. Jan. 23, 2007), *aff'd on other grounds*, 552 F.3d 893 (8th Cir. 2009); *Pearce v.*

UBS PaineWebber, Inc., No. 02-2409, 2004 WL 5282962, at *11 (D.S.C. Aug. 13, 2004); *Hoang v. E*TRADE Grp., Inc.*, 151 Ohio App. 3d 363, 369-71 (Ohio Ct. App. 2003). As the Third Circuit held, "[w]hether a class member suffered economic loss from a given securities transaction would require proof *of the circumstances surrounding each trade*, the available alternative prices, and the state of mind of each investor at the time the trade was requested." *Newton*, 259 F.3d at 187 (emphasis added). According to the Third Circuit, this inquiry is not susceptible to treatment by formula: "even if plaintiffs could present a viable formula for calculating damages . . . , defendants could still require individualized proof of economic loss." *Id.* at 188. The District Court decided that Bodek's proposed algorithm will do what the Third Circuit has ruled no formula can: transform the unavoidably individualized nature of economic loss, which depends on endlessly variable market circumstances at the time of each order, into a common question capable of class-wide proof.

The importance of the supposed technological solution to the predominance problem could not be starker here: this same judge previously *refused* to certify a claim for alleged failure to seek best execution, *Telco*, 2007 WL 203949, at *9-10, but now concluded that Plaintiff's experts have devised a technological solution. The District Court relied on a case where a computer algorithm identified economic losses. A22 (citing *In re NYSE Specialists Secs. Litig.,* 260 F.R.D. 55 (S.D.N.Y. 2009)). But *NYSE Specialists* involved individuals "trading ahead" of customer orders, which is not a best execution claim. NYSE floor specialists prioritized trades for their own accounts in

violation of a rule requiring priority for customer trades, allowing them to misappropriate customer opportunities. The SEC and NYSE developed an algorithm, later modified by plaintiffs, to match each priority-rule-violating trade with a customer order. There, it was a simple matter of matching readily identifiable trades and comparing their prices. *Specialists*, 260 F.R.D. at 76-77.

Here, the proposed algorithm must do something categorically different. It is not simply processing a closed set of readily identifiable data. Indeed, the potential for "unusual market conditions" affecting the execution of orders that must be considered is nearly unlimited. Kleidon's review of some orders from just two customers demonstrated that there are many potential individualized explanations for why an order that appears to have incurred harm from Ameritrade's order-routing in fact has not. Bodek's "forensic reconstruction" did the same. And Bodek promised more adjustments as he (potentially as prodded by Kleidon) studies the circumstances of *all* of Ameritrade's customers' hundreds of millions of orders.

Critically, the District Court disputed none of these facts. Instead, it concluded as a matter of law that a plaintiff can satisfy predominance through an expert who (i) admits that he will be running through a computer an order-by-order analysis of hundreds of millions of orders submitted by millions of putative class members, and (ii) represents that he will continue adjusting his algorithm for whatever unique market circumstances emerge in his individualized review of customer orders. A8 (advances in "modern computing could handle all the data involved in this litigation").

The District Court also departed, without explanation, from the Third Circuit when it ruled that an investor's trading strategy may never be considered in evaluating economic loss. *Compare* A22-23, *with Newton II,* 259 F.3d at 187 (citing "the state of mind of each investor at the time the trade was requested"). The District Court nowhere disputes that *if* investor trading strategy is relevant, no algorithm can capture that information and the claim is predominantly individualized. Bodek conceded the point. D.E.229 at 109:12-15.

To be sure, it may be true in some cases that computer-aided representative sampling "is a permissible method of proving classwide liability." A17. But this is not statistical sampling. Bodek will examine *every single order* and the market conditions at the time of each order by means of an algorithm, then submit to the factfinder a bulk report on hundreds of millions of orders. D.E.229 at 105:1-5. The District Court's novel ruling, directly at odds with the Third Circuit's conclusion that no algorithm can overcome the individualized nature of the economic loss inquiry, is a major shift in class action law and undermines the uniformity in best execution cases that has prevailed for more than 15 years.

It is also an issue that is likely to recur given advances in computing power and technology. Of course, computer algorithms can automate massive data-processing tasks, increasing the efficiency with which aspects of complex litigation are administered. But whether the *building* of the algorithm itself unavoidably involves

individualized inquiries, and whether certain inquiries can never be automated, present important questions warranting this Court's immediate review.

B. Certifying A Class That Includes Numerous Uninjured Class Members Violates The Ascertainability Requirement, Even If An Algorithm Supposedly Will Later Exclude Them.

The class the District Court certified will, as the court recognized, include some large number of uninjured class members. The District Court viewed the inclusion of uninjured customers in the class as merely a matter of administration to be handled by algorithm later in the litigation. A16-18. That ruling implicates a developing area of class action law that warrants this Court's review.

This Court requires that a Rule 23(b)(3) class be "adequately defined and clearly ascertainable" by reference to "objective criteria." *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996-97 (8th Cir. 2016) (quotes omitted). This Court and several other circuits recognize that class certification should be denied when "not every member of the proposed classes can prove with common evidence that they suffered" a loss from the alleged wrong. *See*, *e.g.*, *Blades v. Monsanto Co.*, 400 F.3d 562, 571-74 (8th Cir. 2005); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (requiring some injury to "every class member"). After the Supreme Court affirmed this Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016), this Court reviewed a district court's class certification in a WARN Act case in which 449 employees who lost their jobs were included as members of the class and three employees who had been included were later excluded. The Court observed that a

class may be certified when *some* putative class members will be uninjured, so long as common proof of injury predominates, and the process of determining who is uninjured is simple. *Day v. Celadon Trucking Servs.*, 827 F.3d 817, 833-34 (8th Cir. 2016).

The District Court took that narrow exception to the general rule and transformed it into a major change in the law that substantially complicates class action litigation. According to the District Court, the identification of class members can be outsourced to an algorithm that does not use common proof but instead will determine loss on an order-by-order basis for hundreds of millions of orders by all putative class-members. It ruled that this is permissible as long as the order-by-order inquiry ultimately yields a "discrete" group of uninjured individuals. A18.

The prospect of substantial exclusions is not idle speculation. Bodek's original "net" analysis of Plaintiff's and Shum's trades showed that, compared to the NBBO, Plaintiff benefitted overall from having his trades routed through Ameritrade, and that the "vast majority" of Plaintiff's and Shum's orders received price improvement. *See* D.E.189-2 (Ex. 2.A) at 11, 19-20 & Tables 8 & 15; D.E.189-2 (Ex. 2) ¶¶ 24-27; D.E.189-2 (Ex. 2.B) ¶ 93; D.E.189-2 (Ex. 3.A) ¶ 81 & Table 6. Thus, there may be a substantial number of uninjured class members, and Lead Plaintiff Ford may be unable to represent the class. *Shapiro v. Midwest Rubber Reclaiming Co.,* 626 F.2d 63, 71 (8th Cir. 1980). If the court plans to later narrow the class to exclude everyone like Plaintiff—who was uninjured—this would be a "fail-safe" class defined only by those entitled to relief. That would be contrary to the rule that class litigation entails not only the potential benefit

of recovery for class members, but also the potential risk of an adverse judgment. *See Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *McCaster v. Darden Rests., Inc.*, 845 F.3d 794, 799 (7th Cir. 2017). This Court should address the standard for defining the class to include uninjured members, subject to later exclusion. *See* A23 n.6 (claiming that "Eighth Circuit has not weighed in on this debate").

The District Court did not deny the problem; rather, it said the issue concerned merely variance in the calculation of the *amount of damages* class members should recover, which is not necessarily a bar to class certification. *See* A16-17, 25-26; *Day*, 827 F.3d at 833-34. But that rests on the District Court's view that the "outcomes" of individual customers' trades were irrelevant because a breach of duty to seek best execution satisfies an investor's need to prove that she suffered harm/economic loss. A26 n.7. That is as novel as it is erroneous. Economic loss is an independent element of a valid securities law claim that is not satisfied by proof that the defendant breached a duty owed to investors. *See Newton II*, 259 F.3d at 180, 188. Showing a uniform (wrongful) policy by the defendant is not a substitute for common proof that members of the putative class were injured by that policy. *See, e.g., Webb v. Exxon Mobil Corp.*, 856 F.3d 1150, 1156 (8th Cir. 2017); *Glover v. Standard Fed. Bank*, 283 F.3d 953, 964-65 (8th Cir. 2002). The District Court's error regarding class certification law led it to sow confusion concerning the law governing the entire industry.

II. This Court Should Clarify When *Affiliated Ute*'s Presumption of Reliance Applies.

In *Affiliated Ute*, the Supreme Court held that in cases "involving primarily a failure to disclose . . . positive proof of reliance is not a prerequisite to recovery." A19 (quoting *Affiliated Ute*, 406 U.S. at 153-54). The presumption applies to misleading omissions because of "the difficulty of proving reliance on the negative." *Vervaecke v. Chiles, Heider & Co.*, 578 F.2d 713, 717 (8th Cir. 1978). If something went *un*said, it would be onerous for a plaintiff to prove what would have happened had the defendant spoken.

But when the defendant makes affirmative statements, it is a matter of historical fact whether and how the plaintiff reacted. *Vervaecke*, 578 F.2d. at 717. Thus, the presumption does not apply in cases involving "primarily allege[d] affirmative misrepresentations." *In re Interbank Funding Corp. Secs. Litig.*, 629 F.3d 213, 219-20 (D.C. Cir. 2010) (collecting cases from Second, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits, noting "[n]o court of appeals has applied the *Affiliated Ute* presumption in a case involving a claim that primarily alleges affirmative misrepresentations"). This Court has said that *Affiliated Ute* applies only in cases of "material omissions when nothing is said" and not to "misrepresentations, and omissions in the nature of misrepresentations (misleading statements, half-truths)." *Vervaecke,* 578 F.2d at 717 n.2 (quotations omitted). In determining whether a case is primarily based on misrepresentations, a court must "carefully examine[] the

pleadings" and analyze the plaintiff's allegations, in light of the likely proof at trial to determine the "thrust" of the claim. *Id.* at 717-18.

Plaintiff here claims that Ameritrade affirmatively misrepresented that it would seek best execution. The complaint alleges misrepresentations on Ameritrade's website, in its standard client agreement, in a press release, in an SEC-filed annual report, on an earnings call, and in Senate testimony. D.E.75 ¶¶ 36-42. Bodek's expert declaration stated that "the gravamen" of the claim was Ameritrade's alleged failure to comply with its public statements regarding best execution; indeed, Bodek was instructed to assume investor reliance on Ameritrade's alleged misrepresentations. D.E.189-2 (Ex. 2) ¶¶ 12, 56. The District Court recognized the alleged misrepresentations. A25.

Nonetheless, the District Court relied on *Newton* and adopted a broad legal rule, analogizing the case to "'a securities dealer's failure to disclose its policy of overcharging investors.'" A19 (quoting *Newton II*, 259 F.3d at 177). But the allegations in *Newton* concerned non-disclosures, not public statements. *See Newton II*, 259 F.3d at 176-77 & n.17 (applying the presumption and stating "nothing is affirmatively represented in a nondisclosure case") (quotations omitted).

The District Court provided the most radical answer to the important question this Court should clarify: when a claim plainly is based on *some* alleged express misrepresentations, should the *Affiliated Ute* presumption apply? For the District Court, the answer is *always*, so long as the defendant can be accused of engaging in an

undisclosed "course of conduct." This would transform the *Affiliated Ute* presumption into a rule of law that shifts the burden regarding reliance onto defendants in securities fraud cases. This Court should accept review to clarify that that is not and should not be the law. *See Desai v. Deutsche Bank Secs. Ltd.*, 573 F.3d 931, 941 (9th Cir. 2009) (resisting efforts to eliminate "well-established distinction, for purposes of the *Affiliated Ute* presumption, between omission claims . . . and misrepresentation . . . claims").

Finally, even if the *Affiliated Ute* presumption applies, it is rebuttable. *See, e.g., St. Louis Union*, 562 F.2d at 1048-50. The District Court never considered how substantially that can impact class litigation on this record. Plaintiff is especially subject to rebuttal evidence: he testified that he traded through Ameritrade because of his familiarity with a platform it acquired, and he continued doing so because of its low commissions even after he learned of Ameritrade's purported misrepresentations. *Compare* D.E.75 ¶ 45, *with* D.E.197-4 at 86:7-13; 141:7-142:20. These concerns should be addressed before certifying a class, not after. *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014) ("defendants must be afforded an opportunity before class certification to defeat the presumption through evidence").

CONCLUSION

This Court should grant this Petition.

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CERTIFICATE OF COMPLIANCE

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Dated: September 28, 2018

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