IN THE

# United States Court of Appeals

FOR THE EIGHTH CIRCUIT

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Case No. 18-3689

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GERALD J. KLEIN, on behalf of himself and all similarly situated,
Plaintiff,

RODERICK FORD,
Plaintiff-Appellee

v.

TD AMERITRADE HOLDING CORPORATION; TD AMERITRADE, INC.;
FREDERIC J. TOMCZYK,
Defendants-Appellants

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

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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## CORPORATE DISCLOSURE STATEMENT

*Amicus curiae* certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

/s/ Adam G. Unikowsky

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No party opposes the filing of this amicus brief.[1]

## IDENTITY AND INTEREST OF AMICUS

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. One of the Chamber's most important responsibilities is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Because businesses are almost always the defendants in class action litigation, they have a strong interest in the proper application of the rules restricting class certification. The Chamber has a vital interest in this case because the district court's application of those rules here was plainly improper. The court certified a class without finding that Plaintiff had actually put forth a workable mechanism for resolving the case on a classwide basis. And even Plaintiff's hypothesized mechanism—a purportedly more refined version of his expert's algorithm—rests on

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

fundamental misunderstandings about when class litigation is and is not appropriate. Because the Chamber's members depend on courts properly applying "a rigorous analysis" before certifying a class, *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013), the Chamber has a strong interest in seeing the district court's error corrected.

## SUMMARY OF ARGUMENT

The Chamber submits this brief to explain three critical errors in the district court's class-certification decision that are of particular concern to its members. First, the district court relieved Plaintiff of the burden of actually *proving*, based on the record at the class-certification stage, that class treatment is warranted. Second, the district court adopted a new and dangerous conception of what it means for questions "common to class members" to predominate for purposes of Rule 23(b)(3). Third, because of the same failure to grapple with the extraordinary factual variation in class members' claims, the district court certified a class that lacks an adequate representative and is afflicted with serious intra-class conflicts of interest. Each of these errors requires reversal.[2]

**1.** The district court's first critical error is simple. Rule 23 does not impose a mere pleading standard, but rather requires the plaintiff to prove—based on the

[2] TD Ameritrade identifies several other grounds for reversal as well, and the Chamber has no disagreement with any of those arguments.

existing record at the time of the certification decision—both that common questions "predominate over any questions affecting only individual members," and that "a class action is superior to other methods" for resolving the case. Fed. R. Civ. P. 23(b)(3). But rather than putting Plaintiff to his proof on those issues, the district court simply accepted his speculative assurances that his expert's algorithm for determining economic loss could somehow be "refined" in the future to cure its acknowledged deficiencies. That dramatic lowering of the bar for certification is both wrong and dangerous. If a promissory note for an as-yet undeveloped method of classwide adjudication is enough, a plaintiff can easily bluff his way to a favorable class certification decision—thereby creating immense pressure toward settlement—based on a mythical algorithm that very likely could never have been built. And indeed, that is exactly what happened here; the defects in Plaintiff's algorithm are fundamental and very likely incurable.

**2.** Even if Plaintiff's algorithm could somehow be refined to deliver on Plaintiff's promises—and even if Plaintiff had that hypothetical refined algorithm in hand now—classwide resolution would still be inappropriate. Nobody disputes that economic loss is an intensely "individualized" inquiry for each class member in the traditional sense: namely, it depends on an assessment of numerous case-specific facts that vary from one customer's order to the next, with the answer in one instance saying nothing about the answer in any other. The computing power to perform all

of those intensely individualized inquiries *rapidly* does not make them any less individualized for purposes of Rule 23(b)(3). Critically, Plaintiff's proposal is not to generate a single, common answer to a question raised by millions of separate claims, but rather to generate millions of individualized answers to case-specific questions in rapid succession—and to do so using a model that, of necessity, will ill-fit countless particular cases. Allowing the litigation to proceed in that manner will prejudice TD Ameritrade, by denying it a full opportunity to meet each particular case on its own factual terms. In short, even Plaintiff's hypothetical algorithm could not supply the *underlying factual cohesion* that the predominance inquiry demands.

**3.** For much the same reason, Plaintiff is not an adequate and typical representative of the millions of putative class members. Because the factual circumstances of customers' orders vary widely, different sets of class members will have sharply different interests with respect to the variables that are included in Plaintiff's algorithm and the weights that they are assigned. There can be no serious claim that the orders by one named plaintiff are or could be representative of the kaleidoscopic variety reflected in many millions of orders—and the district court made no such finding. That lack of representativeness, and the intra-class conflicts of interest that follow, should have precluded class certification as well.

## ARGUMENT

### I. To Certify A Class, The Court Must Find That A Mechanism Actually Exists For Resolving The Case On A Classwide Basis.

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Rather, "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). The district court broke with that requirement when it openly rested class certification on the *prediction* that an adequate algorithm, although not yet in existence, will prove "feasible" because Plaintiff's method "can be refined." Add. 21. Simply put, it was not possible for Plaintiff "to prove that there are *in fact*" common questions that predominate over individual ones here—and that class litigation is *in fact* a superior vehicle— without proffering any algorithm *in fact* capable of determining economic loss on a classwide basis. *Dukes*, 564 U.S. at 350.

It is undisputed that Plaintiff never did offer any such algorithm. To establish that class certification was appropriate, Plaintiff's expert, Bodek, presented certain mathematical formulas that he claimed could individually analyze every one of the hundreds of millions of orders that were placed and determine whether there was economic loss arising out of each order. In response, Defendants' expert, Kleidon, demonstrated numerous flaws in those formulas, which established that Bodek's

purported algorithm "does not determine whether there's economic loss for everybody in the class, in the putative class, or by how much." Add. 10. Critically, Bodek did not defend the original formulas that he had designed or their outputs. Instead, in his rebuttal report, he argued that his algorithm could be—but had not yet been—further complicated in ways that would allegedly improve it.

The district court specifically acknowledged that the "criticisms" of the expert's existing methodology for conducting order-by-order analysis were "valid." Add. 21. But it predicted that Bodek's "methodology can be refined," given that Bodek "concede[d] that Kleidon's criticisms effectively improve his methodology." *Id.* Although the court acknowledged that Bodek "did not complete a finalized damages model" (Add. 12),[3] it accepted his prediction that a "full and complete damages model *can be built off of* the current algorithm approach to calculate specific, economic harm across the class." *Id.* (quoting Filing No. 189-2, Ex. 2.C, Expert Rebuttal Report of Haim Bodek at 23) (emphasis added).

By taking this self-serving prediction as proof of predominance, the court effectively converted the requirement to *prove* predominance into a requirement to *plead* it. As explained above, it is axiomatic that "certification is proper only if the

[3] The court erred in characterizing the issue as a matter of damages, rather than liability. Economic loss is an essential element of Plaintiff's claim, and the question is thus not simply how *much* loss a class member suffered but whether he or she suffered any at all. *See* TD Ameritrade Br. 36 n.5.

trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) *have been satisfied*." *Behrend*, 569 U.S. at 33 (quotation marks omitted; emphasis added); *see Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (Rule 23(b)(3) "requires that, before a class is certified under that subsection, a district court must find that 'questions of law or fact common to class members predominate over any questions affecting only individual members.'"). The court must conduct such a rigorous analysis even if the analysis "entail[s] overlap with the merits of the plaintiff's underlying claim." *Behrend*, 569 U.S. at 33-34 (internal quotation marks omitted). "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 34 (internal quotation marks omitted). Thus, the class certification stage is not like the motion-to-dismiss stage, in which a case may proceed so long as it is merely plausible that the plaintiff will be entitled to relief. To certify a class, it is not enough that the court find that the prerequisites of Rule 23 *plausibly will* be satisfied; the court must find that the prerequisites of Rule 23 *actually are* satisfied.

Thus, even assuming that an algorithm that *works* could support class certification—*but see infra* Part II—an algorithm that *does not yet work* cannot, because it does not suffice to carry a plaintiff's burden under Rule 23. No district court would enter a final judgment based on an expert's testimony that his model does not currently work but "can be refined." By the same token, a district court should not

certify a class based on an expert's testimony that a model "can be refined" to prove that class certification is warranted.

The requirement that an expert complete his work before certifying a class is not a mere technicality. In creating a computer model, the devil is in the details. If Bodek actually implemented his refinements, TD Ameritrade would almost certainly identify defects in those refinements that establish that his model still does not work. Indeed, as TD Ameritrade explains, there are numerous variables that bear on whether TD Ameritrade's actual routing of a particular order benefited or injured a trader relative to a hypothetical alternative. *See, e.g.*, TD Ameritrade Br. 30-32. Bodek has responded only with boilerplate assurances that he will simply keep on adding variables to the model, or excluding orders from it, until the model "fits" to his satisfaction. But whether Bodek can realistically devise any adequate model for these purposes—given the millions of trades at issue, each potentially implicating a different set of unique circumstances—is doubtful at best. Among other problems, the same adjustments that make the model *more* accurate as to one set of cases may make it *less* accurate as to others, by assigning weight to considerations relevant in the former set of cases but not in the latter. At a minimum, TD Ameritrade should have been afforded the opportunity to challenge Bodek's *actual* proposed model—and to demonstrate its continuing inadequacy to the district court—before, not after, class certification.

The district court's ruling, if followed by other courts, would unsettle class action jurisprudence. No longer would plaintiffs have to do the work of *proving* the case could be adjudicated on a classwide basis; a mere prediction that this *could be proved* would be enough to warrant certification. Of course, the plaintiff could not actually recover damages until the plaintiff's expert completed his work, but that is of cold comfort to class-action defendants. "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see, e.g.*, *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 723 (7th Cir. 2011) ("Certification as a class action can coerce a defendant into settling on highly disadvantageous terms regardless of the merits of the suit."). Because of the *in terrorem* effect of class certification, plaintiffs must show that Rule 23 is satisfied *before* class certification. And if that rule is to have any meaning, such a showing cannot rest on an optimistic assurance that an exceedingly complex algorithm that is up to the job will somehow be developed in the future—particularly when the first and only attempt thus far was an undisputed failure.

## II. Plaintiff's Hypothesized Algorithm Could Not Make Common Questions Predominate Over Individual Ones.

Even if Bodek had completed work on his algorithm and achieved all he hoped, class certification would still be unwarranted. In certifying the class based

on Bodek's algorithm, the district court committed a fundamental error: It held that Plaintiff could satisfy the predominance requirement merely by showing that a multitude of individualized inquiries could be resolved by a computer. That holding reflects a basic misunderstanding of the predominance inquiry.

To establish that a class can be certified, Plaintiff bears the burden of proving that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). Here, Plaintiff cannot make that showing because the court must literally make hundreds of millions of individualized inquiries to establish the element of economic loss. As both parties agree, every single one of the hundreds of millions of trades that occurred must be individually analyzed in order to establish any injury associated with that trade. For every single trade, the court will have to determine whether, based on all prevailing circumstances, a better price was available at a different market center at that precise moment in time. The analysis for every trade will differ, because the selection of the market center depends on market conditions and other variables that vary from second to second. Thus, it is impossible for the court to analyze injury arising from multiple trades on a genuinely *common* basis; every trade will have to be analyzed separately.

The district court did not hold otherwise. It did not conclude that there was some mechanism to resolve in a single analysis the purported injury associated with

multiple trades; nor did it dispute that hundreds of millions of individualized inquiries would be necessary. Instead, it held that class certification was appropriate because those hundreds of millions of individualized inquiries could be conducted by applying an exceedingly complex computer model—purporting to take into account all of the circumstances that could matter in a particular case—rather than manually. *See* Add. 8-9, 21. But that reasoning does not speak to either of the relevant questions actually posed by Rule 23. Plaintiff's resort to a computer model does not show economic loss to be a "common" rather than "individual" question; and it does not show that genuinely common questions in the case will predominate over individual ones, such as economic loss.

First, there can be no doubt that the issue of economic loss is "an individual question" for purposes of Rule 23, because it undisputedly will receive a different answer from plaintiff to plaintiff based on facts about their particular orders. "What matters to class certification is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (quotation marks and alteration omitted). There is plainly no common *answer* to the question whether class members suffered economic loss, an essential ingredient of each plaintiff's claim. So that is an individualized, not a common, issue. Indeed, the Supreme Court has defined "[a]n individual question" as "one where members of a proposed

class will need to present evidence that varies from member to member." *Tyson Foods, Inc.*, 136 S. Ct. at 1045 (internal quotation marks omitted). Because the question of economic loss will turn on different evidence in each case—namely, the data and market circumstances pertaining to the particular plaintiff's orders, which may include the plaintiff's specific strategy as to each order—it is by definition "an individual question" for purposes of Rule 23.

Second, Plaintiff's hypothetical computer model also does not show that genuinely common issues in this case (such as scienter) predominate over the indisputably individual question of economic loss. To the contrary, the adequacy of Plaintiff's proposed means of resolving the individual question of economic loss has been and will remain at the heart of this case. By attempting the Herculean task of anticipating every relevant factual circumstance bearing on this individualized, fact-bound issue, Plaintiff simply proposes to *relocate* the debate over those circumstances from individual proceedings, where they would naturally belong, to one macro-debate about an ever-more-convoluted "model" that purports to incorporate all of the complexity to be found in each of millions of fact-patterns. But relocating and reframing the same set of debates does not make them any less central. To the contrary: Whether or not it is artificially recast as a debate over a model, the debate over the particular factual circumstances bearing on specific orders or types of orders, and over the significance each potential variable should bear in determining

whether a plaintiff suffered a loss, will plainly be the overwhelming focus of the litigation. *See, e.g.*, TD Ameritrade Br. 42-51 (offering examples of the various and mounting order-specific complications that Plaintiff's "common" model would need to accommodate in order to carry out the relevant individualized inquiry).

At most, Plaintiff's computer model might expedite the actual, case-by-case determination of economic loss once all of the relevant debates—recast as debates about the "model"—have already been had. But even if this amounted to a time-saving measure on balance, it is well-settled that "[t]he determination of which issues predominate *should not turn on the amount of time it will take* to litigate the common or individual issues." 2 William B. Rubenstein, *Newberg on Class Actions* § 4:51 (5th ed. 2012) (emphasis added); *see* 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1778, at 120 (3d ed. 2005) ("[C]lockwatching is not very helpful in ascertaining whether class-action treatment would be desirable in a particular case."). The speed of computer technology is thus beside the point. What matters is that, with respect to a pivotal issue in each plaintiff's case—whether the plaintiff was actually injured—no factual glue joins the class members together at all. For that reason, Plaintiff's proposed algorithm could not satisfy his burden to show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3).

As with the district court's failure to hold Plaintiff to the proper standard of proof, *see supra* at 8, the legal error here is far from a technicality. "The Rule 23(b)(3) predominance inquiry tests whether [a] proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997). When that cohesion is lacking because critical questions are individualized—as the economic loss question is here—the need to litigate those questions in gross can quickly become profoundly prejudicial.

This is a case in point. The extraordinary complexity of the proposed "model" means that TD Ameritrade will inevitably be put to myriad tactical choices—most importantly, about which arguments to make and which to de-emphasize or forgo—that it would surely make differently in confronting a particular plaintiff's case on its own terms. A fundamental purpose of Rule 23's predominance inquiry is to prevent a defendant from being forced to litigate through triage in this way. That is, the rule bars plaintiffs from using a class action to compel defendants to choose or emphasize only arguments that apply to the largest number of class members, while de-emphasizing meritorious arguments that pertain only to some. Plaintiff's proposal to force TD Ameritrade to litigate all the relevant particularized disputes at once—through the fiction that the parties are simply debating a common "model" fitted to the variable factual circumstances of millions of different cases—does nothing to redress the fairness concern underlying the rule. Because Plaintiff has not proved

that genuinely common issues will predominate over the individual ones in any meaningful sense, class certification was improper.

### III. The Extraordinary Factual Variety In The Millions Of Orders At Issue Also Precludes A Finding Of Adequacy Or Typicality.

The same essential point underlying the predominance concern also demonstrates that Plaintiff is not an adequate and typical class representative. *See* TD Ameritrade Br. 64 (arguing that Plaintiff "failed to prove he is a typical and adequate representative"). Indeed, the absence of factual glue connecting the millions of claims of economic loss all but guarantees serious intra-class conflicts of interest with respect to both the design of the promised algorithm and Plaintiff's defense of that design at trial. Those defects independently preclude class certification.

Rule 23 permits certification "only if" the court finds that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Supreme Court has explained, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625.[4] In order to be adequate, the putative class representative "must be part of the class and possess *the same interest*"

[4] "The adequacy-of-representation requirement tends to merge with the ... typicality" requirement of Rule 23(a)(3). *Amchem*, 521 U.S. at 626 n.20 (internal quotation marks and alterations omitted). Here, Plaintiff's inadequacy as a representative is interwoven with the fact that his situation is not "typical" of many class members; indeed, there *is* no "typical" situation for the millions of different orders. Thus, the same point can be made under either rubric.

as those he seeks authority to represent. *Id.* at 625-26 (quotation marks omitted; emphasis added); *see also Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982) (inquiring whether the named plaintiffs' "interest in procuring their rightful [relief] will be at the expense of other class members or will, in any other way, be antagonistic to the class' interests"). Thus, "if the representative or counsel have conflicting interests [with those of class members], representation will not be adequate." 3 William B. Rubenstein, *Newberg on Class Actions* § 7:31 (5th ed. 2013); *see, e.g.*, *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("[A] class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class.").

The district court devoted all of two sentences to the typicality and adequacy analysis in this case. *See* Add. 24-25. It reasoned that because Plaintiff "traded securities during the relevant time period, his trades were routed and executed pursuant to TD Ameritrade's order-routing procedures, he [allegedly] suffered economic harm[,] and his claims are based on the same alleged wrongful conduct as other putative class members' claims," it follows that his interests must be "identical to the interests of the class." *Id.* But that list of shared characteristics omits all of the myriad factual circumstances that, as Plaintiff's expert agrees, will determine whether a particular plaintiff, based on order-by-order analysis of all her orders, is

found to have suffered economic loss under the proposed algorithm. And, in fact, choices about which of those factors to include and how to account for them will inevitably benefit some plaintiffs—who will be "modeled" as suffering an economic loss, or a larger one, as a result—while harming others, who will be "modeled" as suffering no economic loss, or a smaller one, as a result.[5]

Take, for example, the exclusion of orders routed during "unusual market conditions." *See* TD Ameritrade Br. 17-18 (discussing the difficulty and subjectivity of defining "unusual market conditions"). Plaintiff's expert agreed that trades during these periods should be excluded from any assessment of economic loss, but that there is no pre-existing, objective definition of what constitutes an "unusual" condition or when they have occurred. *See id.* Apart from making the hypothesized model simply unworkable, this problem gives rise to an obvious conflict of interest: Any definition or determination of the excluded periods will help some class members but hurt others, because it will lead to the exclusion of orders from which some class members will have gained and others will have suffered losses. In addition to all of its other problems, therefore, Plaintiff's trial-by-algorithm approach flouts vital procedural protections for absent class members. By failing to "uncover" this glaring

[5] That issue is posed especially sharply here because, as TD Ameritrade explains, Bodek's own analysis originally classified Plaintiff as having enjoyed a net *gain* on account of Defendants' challenged practices. *See* TD Ameritrade Br. 69-70. That powerfully demonstrates any given plaintiff's inevitable self-interest in constructing the model one way rather than another.

conflict of interest, *Amchem*, 521 U.S. at 625, the district court defaulted on its "independent obligation to decide whether an action brought on a class basis is to be so maintained," *Kasalo v. Harris & Harris, Ltd.*, 656 F.3d 557, 563 (7th Cir. 2011) (quoting 7AA Charles Alan Wright, et al., *Federal Practice & Procedure* § 1785, at 360-61 (3d ed. 2005)).

## CONCLUSION

The class-certification decision should be reversed.

March 8, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it is proportionally spaced, has a typeface of 14 point Times New Roman, and contains **4,339** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with Circuit Rule 28A(h) because the files have been scanned for viruses and are virus-free.

/s/ Adam G. Unikowsky

## CERTIFICATE OF SERVICE

I, hereby certify that on March 8, 2019, I caused the foregoing **Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America** to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam G. Unikowsky