No. 18-3689

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

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

Plaintiff,

and

RODERICK FORD,

Plaintiff-Appellee,

v.

TD AMERITRADE HOLDING CORPORATION;
TD AMERITRADE, INC.; FREDERIC J. TOMCZYK,

Defendants-Appellants.

*On Appeal from the United States District Court
for the District of Nebraska–Omaha
No. 8:14-cv-00396 (Hon. Joseph F. Bataillon)*

**BRIEF FOR THE SECURITIES INDUSTRY
AND FINANCIAL MARKETS ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT
OF APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae* Securities Industry and Financial Markets Association certifies that it has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

STATEMENT OF AUTHORITY TO FILE

Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(D), all parties have consented to the filing of this amicus brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the capital markets. On behalf of the securities industry's nearly one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry-coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA is the U.S. regional member of the Global Financial Markets Association. SIFMA regularly files *amicus curiae* briefs before the Supreme Court of the United States and federal circuit courts in cases such as this one that raise issues of vital concern to securities industry participants.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), undersigned counsel certify that: no party's counsel authored this brief in whole or in part; and no party, party's counsel, or any other person, other than *amicus curiae* or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

This case involves important issues concerning class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry. SIFMA filed an *amicus curiae* brief in the leading case governing the standards for class certification in the "best execution" context, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (*Newton II*), 259 F.3d 154 (3d Cir. 2001). SIFMA and its members have a substantial interest in the proper application of settled class certification law to the highly-individualized determinations required to analyze a best execution case under the federal securities laws.

SUMMARY OF ARGUMENT

This appeal was granted pursuant to Rule 23(f) of the Federal Rules of Civil Procedure to review the District Court's decision to certify a sprawling class covering millions of TD Ameritrade investors who made approximately 180 million trades and additional orders over a three-year period.[2] The court departed from nearly twenty years of precedent uniformly holding that, where a plaintiff alleges violations of the duty of "best execution," fact-intensive inquiries into the essential issue of injury (i.e., economic loss) preclude class certification. Such inquiries require examinations of highly-individualized proof, inconsistent with class-wide treatment.

No court prior to the District Court's decision in this case had ever certified a best execution class precisely because the determination of whether an individual was actually injured is not amenable to proof common across the putative class. Simply put, even if one plaintiff could show that a single trade executed by a broker resulted in economic injury, that does not suggest, much less demonstrate, that the same plaintiff suffered economic injury on any other trade, let alone that *another plaintiff* suffered economic injury arising from the execution of an entirely different trade amidst entirely different market dynamics. Thus, the class representative's

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[2] Although this *amicus* brief is limited to these arguments, SIFMA supports the appellants' opening brief in its entirety.

trades cannot be used to determine whether absent class members are entitled to relief. Rather, millions of mini-trials would be required to establish—on a trade-by-trade basis—whether each investor suffered economic injury.

The District Court justified its departure from decades of precedent based on Plaintiffs' promise of an algorithm that could be applied, they claimed, on an order-by-order basis to determine whether an individual was injured by TD Ameritrade's routing practices. Plaintiffs postulated that the algorithm could substitute for common proof. But the algorithm actually requires individualized proof for each of the 180 million orders at issue based on a broad array of market data points, thereby requiring countless individual—not common—calculations. In all events, the algorithm envisioned by Plaintiffs here, like all computer algorithms, could never account for all of the relevant subjective factors (such as an individual's trading strategy, which will require testimony from every putative class member) or an untold number of unusual market factors. Whether performed by a computer or individual, there is simply no way to avoid the conclusion that determining whether a putative class member suffered any economic loss will require an individualized inquiry of each order placed by each class member.

In support of its class certification decision, the District Court noted that the Securities and Exchange Commission (the "SEC"), the Financial Industry Regulatory Authority ("FINRA"), and the Department of Justice (the "DOJ") may

use comparable algorithms. That observation, however, is simply beside the point here because putting aside whether their algorithms are effective and reliable to analyze complex market dynamics typically in administrative cases that settle without contesting the algorithms, those regulators are not subject to the requirements of Rule 23 of the Federal Rules of Civil Procedure. In other words, regulators are not using algorithms to try to satisfy Rule 23(b)(3)'s predominance requirement. The fact that regulators may use algorithms as an expedient to sift through large amounts of data purportedly to aid their surveillance and enforcement programs does not mean that a private plaintiff can rely on an algorithm to satisfy Rule 23's predominance requirement in a best execution case. An algorithm does not magically transform individualized issues of proof into common issues; rather, it simply provides an automated tool for sifting through individualized evidence. Whether that evidence is reviewed by an individual expert or analyzed with the aid of an algorithm, the nature of the underlying evidence remains individualized.

The promise of an algorithm to address the individualized issues related to economic loss in purported best execution class actions is not new. Rather, attempts to use algorithms to address economic loss issues in best execution cases date back almost twenty years. This ineffectual method was rejected by the Third Circuit in 2001 and should be rejected now. In this case, an algorithm cannot turn the millions of individualized inquires that would need to be made at trial into something that is

susceptible to common proof. Accordingly, the District Court's class certification order should be reversed and the class decertified.

Reversing the District Court's class certification will not leave the duty of best execution unenforced, contrary to the District Court's apparent concern. The SEC and FINRA regularly bring enforcement actions involving issues related to the duty of best execution. Accordingly, broker-dealers can rely on four decades' worth of regulatory guidance, thus helping to ensure the predictability that the financial markets require. The District Court's decision threatens to undermine the ability of broker-dealers to rely on this regulatory guidance and industry standards, and affirming its decision would subject brokers-dealers to highly uncertain liability theory governing injury relating to best execution issues that would be impossible to apply within the context of unique, individualized transactions. Permitting the District Court's decision to stand would subject broker-dealers to liability based on litigation-driven algorithms that may differ from case to case.

ARGUMENT

I. FINRA, with Oversight by the SEC, Is Best Suited to Enforce the Duty of Best Execution.

A. The Duty of Best Execution Is Subject to an Extensive Regulatory Regime

The federal regulatory obligations regarding order execution arose out of the 1975 amendments to the Securities Exchange Act of 1934. Thus, over four decades,

the SEC has considered, regulated, and approved rules regarding best execution obligations. The SEC has studied the potential conflicts of interest raised by payment for order flow, but rather than banning the practice, the SEC chose to regulate it through the process of mandated disclosures and an emphasis on "regular and rigorous" review of execution quality. *See* Payment for Order Flow, Exchange Act Release No. 34,902 (Oct. 27, 1994), 59 Fed. Reg. 55,006, 55,010 (Nov. 2, 1994). Moreover, the SEC has long recognized that payment for order flow can result in benefits for retail investors, including in the form of "lower commission charges to investors, more expeditious executions and enhanced services." Payment for Order Flow, Exchange Act Release No. 33,026 (Oct. 6, 1993), 58 Fed. Reg. 52,934, 52,939-40 (Oct. 13, 1993); *see also* Payment for Order Flow, 59 Fed. Reg. at 55,009-10. Here, Plaintiffs' claim is based on payment for order flow, which the regulatory regime governing best execution allows subject to achieving best execution.

To achieve best execution, broker-dealers must "endeavor, using due diligence, to obtain the best execution possible *given all facts and circumstances*." Payment for Order Flow, 59 Fed. Reg. at 55,008 n.26 (emphasis added) (citation omitted); *see Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.* (*Newton I*), 135 F.3d 266, 271 (3d Cir. 1998) (requirement of best execution "require[s] a factual inquiry into all of the surrounding circumstances...."). Obtaining the absolute best

price on every order is not the standard for determining whether a broker has met its best execution obligations.

FINRA (as the primary industry regulator) and the SEC (as overseer) have provided guidance regarding the duty of best execution for broker-dealers. FINRA requires broker-dealers to "use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions." FINRA Rule 5310. The Rule provides a *non-exhaustive* list of factors a broker-dealer should consider when ensuring it meets its duty:

> (A) the character of the market for the security (*e.g.*, price, volatility, relative liquidity, and pressure on available communications);
>
> (B) the size and type of transaction;
>
> (C) the number of markets checked;
>
> (D) accessibility of the quotation; and
>
> (E) the terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.

Id. Determining best execution "necessarily involves a 'facts and circumstances' analysis." FINRA Regulatory Notice 15-46, 3 (Nov. 2015),

http://www.finra.org/sites/default/files/notice_doc_file_ref/Notice_Regulatory_15-46.pdf.[3]

FINRA requires that a broker-dealer "make every effort to execute a marketable customer order that it receives fully and promptly." FINRA Rule 5310 Supplementary Material ¶ .01. FINRA further instructs that it construes the terms "market" and "markets" broadly, thereby "inform[ing] broker-dealers as to the breadth of the scope of venues that must be considered in the furtherance of their best execution obligations..." *Id.* ¶ .02. If a particular market has "limited pricing information or quotations available," the broker-dealer must "generally seek out other sources of pricing information or potential liquidity, which may include obtaining quotations from other sources...." *Id.* ¶ .06. If a customer provides a specific instruction for a trade, however, the broker-dealer "is not required to make

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[3] Similarly, the SEC has stressed the importance of execution price and speed, although it concedes that these "are not the sole relevant factors in obtaining best execution of investor orders." Disclosure of Order Execution and Routing Practices, Exchange Act Release No. 43,590 (Nov. 17, 2000), 65 Fed. Reg. 75,414, 75,418 (Dec. 1, 2000). The SEC has identified "other factors [that] may be relevant," such as:

> (1) the size of the order, (2) the trading characteristics of the security involved, (3) the availability of accurate information affecting choices as to the most favorable market center for execution and the availability of technological aids to process such information, and (4) the cost and difficulty associated with achieving an execution in a particular market center.

Id.

a best execution determination beyond the customer's specific instruction," but the broker-dealer is "still required to process that customer's order promptly and in accordance with the terms of the order." *Id.* ¶ .08

B. The Duty of Best Execution Is Actively Enforced by Regulators

FINRA, as the dominant securities self-regulatory organization, actively audits and reviews broker-dealer execution practices with SEC oversight.[4] Neither the SEC nor FINRA has neglected the enforcement of the duty of best execution. Indeed, they have brought many enforcement actions for violations of this regulatory framework. *See, e.g.*, *Geman v. SEC*, 334 F.3d 1183, 1186-87 & n.5, 1190 (10th Cir. 2003) (affirming SEC finding that broker-dealer violated its duty of best execution by failing to disclose that its method of executing orders deprived customers of the possibility of getting a price better than the National Best Bid and

[4] FINRA is the largest securities self-regulating organization, or SRO. *See* 15 U.S.C. § 78s (establishing the requirements for SROs). SROs include organizations registered with the SEC, such as national securities exchanges, securities associations, or clearing agencies. *Id.* § 78s(a)(1). SROs develop rules and regulations for the securities industry, subject to SEC approval, and enforce compliance with those rules. *Id.* § 78s(g). Although FINRA is the primary regulator of the securities markets, it is worth noting that every SRO, including the national securities exchanges, requires its members to adhere to the duty of best execution. *See, e.g.*, NASDAQ Rule 5310A ("Nasdaq members shall comply with FINRA Rule 5310 [regarding best execution] as if such Rule were part of Nasdaq's Rules."); NYSE Chicago Art. 17, Rule 3(d)(1) (requiring institutional brokers handling market orders to "use due diligence to execute the order[s] at the best price or prices available").

Offer ("NBBO")); *In re Scottrade, Inc.*, Exchange Act Release No. 58012, 2008 WL 2510611, at *1–2 (June 24, 2008) (settled action finding that retail broker violated its duty of best execution because, contrary to representations to its clients, it did not have "written policies and procedures to assess liquidity at the market opening provided by market centers" to which it routed NASDAQ pre-open orders and therefore did not consider the availability of executions that may have been "superior to the NBBO" for those orders); Press Release, SEC, Credit Suisse Agrees to Pay $10 Million to Settle Charges Related to Handling of Retail Customer Orders (Sept. 28, 2018), https://www.sec.gov/news/press-release/2018-224 (censuring and fining a company for a best execution violation); FINRA, *Disciplinary and Other FINRA Actions*, 2–3 (Nov. 2018) http://www.finra.org/sites/default/files/publication_file/November_2018_Disciplinary_Actions.pdf (censuring and fining a company and ordering restitution for a best execution violation); FINRA, *Disciplinary and Other FINRA Actions*, 2 (May 2018) https://www.finra.org/sites/default/files/publication_file/May_2018_Disciplinary_Actions.pdf. (same).

Both FINRA and the SEC have offices dedicated to enforcing securities laws and regulations and investigating suspected wrongdoing. *See, e.g.*, *Office of Compliance Inspections & Examinations*, SEC, https://www.sec.gov/ocie (last visited Mar. 5, 2019); *Office of Fraud Detection and Market Intelligence (OFDMI)*,

FINRA, http://www.finra.org/industry/ofdmi (last visited Mar. 5, 2019). Both organizations also permit investors to file individual complaints against broker-dealers who violate securities laws and regulations. *See, e.g.*, *Report Center*, FINRA, http://www.finra.org/industry/report-center (last visited Mar. 5, 2019); *Report Suspected Securities Fraud or Wrongdoing*, SEC, https://www.sec.gov/tcr (last visited Mar. 5, 2019). Moreover, unlike with private suits, "in an enforcement action, civil or criminal, there is no requirement that the government prove injury...." *SEC v. Apuzzo*, 689 F.3d 204, 212 (2d Cir. 2012). Thus, there is no concern that "each individual claim is so small that only a class action will provide a remedy." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (*Newton II*), 259 F.3d 154, 191 (3d Cir. 2001).

Moreover, the SEC and FINRA require broker-dealers to conduct "regular[] and rigorous[]" reviews of their execution practices. Order Execution Obligations, Exchange Act Release No. 37,619A (Sept. 6, 1996), 61 Fed. Reg. 48290, 48322–23 (Sept. 12, 1996) ("In conducting the requisite evaluation of its internal order handling procedure, a broker-dealer must regularly and rigorously examine quality likely to be obtained from different marker or market makers trading a security."); FINRA Rule 5310 Supplementary Material ¶ .09 (mandating that broker-dealers "compare, among other things, the quality of the executions the member is obtaining via current order routing and execution arrangements (including the internalization

of order flow) to the quality of the executions that the member could obtain from competing markets"). "Regular and rigorous review" is a retrospective analysis of executions, which is used to inform routing decisions prospectively. Broker-dealers must typically conduct this regular and rigorous review on a quarterly basis, minimum, unless circumstances dictate more frequent reviews. FINRA Regulatory Notice 15-46, at 4. Firms that internalize orders must analyze best execution on an order-by-order basis. *Id.* As Plaintiffs concede in their amended complaint, however, TD Ameritrade does not internalize orders but instead routs customer orders externally to other broker-dealers, and is therefore subject to the ordinary regular and rigorous review requirements. The fact that TD Ameritrade must conduct this periodic (as opposed to instantaneous) review further undermines the District Court's decision treating best execution as a real-time algorithmic exercise instead of the prospective analysis that is actually required.

II. The District Court's Reliance on an Incomplete Algorithm Does Not Transform Individualized Evidence Regarding Economic Loss Common Proof.

Class action lawsuits are inappropriate vehicles to challenge best execution because questions of economic loss are highly individualized. In order for a court to determine the existence of injury (i.e., economic loss) in a best execution case, every single order at issue must be analyzed to determine whether, based on then-prevailing market circumstances and other conditions, the order could have been

executed at a better price. That analysis will require varying inputs for each order, such as market conditions, an understanding of any trading strategy, order price, order type, order time, order size, and market center availability. Such inquiries are simply not susceptible to resolution on a common basis and will require individual analysis of the hundreds of millions trades executed during the multiyear class period. That is why courts, prior to the District Court's decision in this case, had uniformly refused to certify putative class actions involving the duty of best execution on the grounds that demonstrating economic loss requires individualized proof. *See, e.g.*, *Newton II*, 259 F.3d at 178, 187 (noting that the detail-oriented analysis must proceed on a member-by-member and trade-by-trade basis); *Pearce v. UBS PaineWebber, Inc.*, No. 3:02-2409-17, 2004 WL 5282962, at *11 (D.S.C. Aug. 13, 2004).

In this case, the District Court sought to sweep aside individualized issues of proof by relying on the promise of an undisclosed and incomplete algorithm. That algorithm cannot substitute for common proof on the key question of economic loss. Rule 23(b)(3) permits certification of a class only when "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). If "members of a proposed class will need to present evidence that varies from member to member," the class may not be certified. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted).

That is exactly the case here because Plaintiffs' incomplete algorithm conducts individualized inquiries into all 180 million orders at issue in the case.

The District Court appeared to confuse injury (*i.e.*, economic loss) with the amount of damages. When the District Court declared that "[t]he presence of individualized damages issues does not defeat the predominance of questions common to the class," it cited to cases that addressed the determination of the *amount* of damages, not whether the plaintiff had suffered economic loss in the first instance. *Klein v. TD Ameritrade Holding Corp.*, 327 F.R.D. 283, 293 (D. Neb. 2018) (citing cases). For example, in one of the cited cases, the circuit court held that "the district court could preserve the class action model in the face of individualized damages, ... such as by limiting the class action to liability issues." *Menocal v. GEO Grp.*, 882 F.3d 905, 923 (10th Cir. 2018) (citation omitted). In this case, however, the District Court failed to realize that whether an investor suffered economic loss is an *element of liability* and the existence of economic loss—not the measure of damages—is the obstacle to class certification. "Proof of injury (whether or not an injury occurred at all) must be distinguished from calculation of damages (which determines the actual value of the injury)." *Newton II*, 259 F.3d at 188.

The District Court also erred by accepting the assertion of Plaintiffs' expert that his algorithm could substitute for common proof of loss on a class-wide basis. Despite the expert's contention, the algorithm is not even functional (much less fully

function). Nonetheless, the expert maintains that his incomplete algorithm can take into account all the necessary factors to determine whether TD Ameritrade satisfied its duty of best execution. He has already conceded, however, that his algorithm cannot determine loss on a class-wide basis but will rather "identify harm on . . . an order-by-order basis." A892 (105:21–25); A895 (107:14-19). Plaintiffs' expert intends to run his algorithm at trial on every single class member's order, which will require varying inputs as to each class member and trade, such as liquidity (number of shares available at varying prices), market conditions, order price, order type, order time, order size, and market center availability. In other words, the algorithm will perform an individualized, order-by-order inquiry. As this Court has recognized, a class should not be certified if injury is an element that must be proven for liability and proof of injury is particular to each plaintiff. *See Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 479–80 (8th Cir. 2016); *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1004–05 (8th Cir. 2004) (holding that a class should not be certified if liability depends on a "case-by-case determination") (citation omitted).

In addition, the algorithm cannot possibly take into account *subjective* factors, like an investor's state of mind or trading strategy, as Plaintiffs' expert concedes, and thus would require testimony from each member of the class. *See Newton II*, 259 F.3d at 187 (listing "the state of mind of each investor at the time the trade was requested" as a factor to consider); A897 (109:12–15) (the expert's concession that

his algorithm cannot account for an investor's state of mind); *see also* FINRA Regulatory Notice 15-46 at 4 (recommending that broker dealers consider, among other factors, "customer needs and expectations" in evaluating execution quality); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 292 (2014) (Thomas, J., concurring in the judgment) ("Other investors trade for reasons entirely unrelated to price—for instance, to address changing liquidity needs, tax concerns, or portfolio balancing requirements.") (citation omitted).

Accordingly, Plaintiffs' algorithm will need to be run on every single class member's order and will require discovery as well as testimony from each putative member of the class. This approach will result in millions of mini-trials for each order at issue, which will also serve to determine whether the individual is a member of the class or not. This is not litigation by a representative plaintiff with representative claims that can establish all elements of liability utilizing common proof. Indeed, the evidence regarding the named Plaintiff cannot be used to determine economic loss of absent class members. This action simply is not representative litigation.

The District Court appeared to justify its adoption of the algorithm by Plaintiffs' expert because the SEC, FINRA, and the DOJ have sometimes used algorithms in their course of conducting investigations and enforcement actions. The fact that these regulators have used algorithms does not mean that the District

Court may permit private claimants to use this unwieldy method to certify a class action, thereby obfuscating the millions of individual inquiries the algorithm will conduct. The District Court's reference to the use of algorithms by regulators ignores that regulators are not using those algorithms to certify a class action. FINRA and the SEC need not rely on common proof when surveilling and enforcing the duty of best execution. The regulators are not purporting to use an algorithm to satisfy Rule 23(b)(3)'s predominance requirement, and typically their algorithms are expedients used in settled contexts in which they are not ultimately tested even for their ostensible purposes.[5] The fact that the plaintiff proposes for individualized inquiries to be conducted by a computer algorithm instead of a person does not change the fact that they are individualized inquiries and thus cannot satisfy Rule 23's predominance requirement, which no regulator needs to satisfy.

[5] Although the difference in how regulators have used algorithms and how Plaintiffs attempt to use their algorithm here is crucial, by no means is SIFMA endorsing the regulators' use of algorithms as part of enforcement programs or conceding their effectiveness and/or reliability. Unlike with private suits, "in an enforcement action, civil or criminal, there is no requirement that the government prove injury." *Apuzzo*, 689 F.3d at 212. Rather, the regulators have sometimes used algorithms to calculate penalties. Often, the broker-dealer does not contest these penalties and merely pays them without admitting liability, as was the scenario in the only case on which the District Court relied for its algorithm holding. *See Klein*, 327 F.R.D. at 296 (citing *In re NYSE Specialists Sec. Litig.*, 260 F.R.D. 55, 66–69 (S.D.N.Y. 2009)). The mere fact that regulators may sometimes employ algorithms without objection by the regulated party for a limited purpose hardly establishes a foundation on which plaintiffs may base a class action.

It is clear that the District Court erred in certifying the class action. It should have declined to entertain this "Trial by Formula." *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011). Plaintiffs' algorithm is no different than the algorithm in *Newton II* in utilizing highly individualized proof.

III. Enforcement of Class Certification Requirements Is Critical to U.S. Financial Markets.

The District Court's decision to read the predominance requirement out of Rule 23 because a computer program could potentially be designed to analyze millions of individual orders on an order-by-order basis would turn class certification into the rule rather than the exception. Indeed, under the District Court's approach, all a plaintiff needs is an expert who is willing to testify that a model could be created and subsequently refined in response to criticism to adjudicate the case on a class wide basis to satisfy the predominance requirement rendering the model virtually unchallengeable at the class certification stage. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues."). While defendants could ultimately challenge the model after class certification, that is unlikely to save defendant financial institutions and their shareholders from paying out meritless claims. After class certification, it is well-established that defendants face enormous settlement pressure, even when they have

meritorious defenses. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("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."), *superseded on other grounds by rule as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Newton II*, 259 F.3d at 165 ("[C]ertifying the class may place unwarranted or hydraulic pressure to settle on defendants.").[6] A recent study indicates that less than 1% of putative class actions are litigated to a verdict. *See* Cornerstone Research, *Securities Class Action Filings: 2018 Year in Review*, 16 (2019), http://securities.stanford.edu/research-reports/1996-2018/Cornerstone-Research-Securities-Class-Action-Filings-2018-YIR.pdf.

Moreover, the basic question of who is and who is not part of the class will not be resolved until trial, where a determination would be made, customer by

[6] *See also Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("Class certification magnifies and strengthens the number of unmeritorious claims.") (citation omitted).

customer, and order by order, who has been injured.[7] Allowing the class to include those who have not suffered any injury "poses a substantial risk" to Rule 23's protections against class action abuse and by default makes the class "unmanageable." *Elizabeth M. v. Montenez*, 458 F.3d 779, 785 (8th Cir. 2006).[8] Thus, there are likely a significant number of the members of the putative class who benefited from these trades that allegedly violated the duty of best execution.[9] The District Court did not identify any way to sort uninjured plaintiffs from the class other than having a jury resolve whether each order placed by an individual state a claim. Defendants will be disadvantaged by their inability to estimate the scope of the class and face increased pressure to settle (although they would be unable to know which potential plaintiffs would be bound by the terms of the settlement).

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[7] The class certified by the District Court includes "[a]ll clients of TD Ameritrade between September 15, 2011 and September 15, 2014 who placed orders that did *not receive best execution*, in connection with which TD Ameritrade received either liquidity rebates or payment for order flow, and *who were thereby damaged....*" *Klein*, 327 F.R.D. at 299 (emphasis added).

[8] The District Court's approach, if left uncorrected, would mark a return to the days of "spurious class actions" and "one-way intervention," which the Federal Rules of Civil Procedure sought to eliminate in 1966. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) ("The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.").

[9] For example, Plaintiffs' expert found that one of the original lead plaintiffs who subsequently withdrew from the putative class action benefited from TD Ameritrade's routing. *See Klein v. TD Ameritrade Holding Corp.*, No. 8:14CV396, 2018 WL 3997126, at *5 (D. Neb. July 12, 2018).

Affirming the District Court's decision will not affect only best execution cases. Rather, using a computer algorithm to render the predominance requirement toothless in the best execution context will reverberate throughout the securities industry, resulting in widespread class action abuse. For instance, the plaintiffs' bar could obtain certification for a class action alleging fraud due to a broker-dealer's website going offline. *See, e.g.*, *Hoang v. E*Trade Grp.*, 784 N.E.2d 151, 156 (Ohio Ct. App. 2003) (reversing the trial court's certification of a securities fraud class on predominance grounds because "some of the plaintiffs have suffered damages as a result of E*Trade's system interruptions while others have not."). Plaintiffs may also begin attacking the securities exchanges themselves over the way they operate. *See, e.g.*, *City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36, 47-48 (2d Cir. 2017) (reversing the district court's extension of immunity to the exchange because the exchange was acting as a market operator instead of a regulator and remanding for further proceedings). It will not matter that any given member of the class may not have been injured and, in fact, may have profited from the alleged wrong. An affirmance here will essentially eliminate the economic loss element of the securities fraud claim and cause widespread disruption in the financial markets.

Given the "hydraulic pressure" of class certification on settlement, the watering down of the Federal Rules governing class certification will result in settlement of weak cases that will harm the company, innocent shareholders, and the

public, *see SEC v. Tambone*, 597 F.3d 436, 452-53 (1st Cir. 2010), while only serving the "benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975) (quoting *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring)).

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's class certification order.

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Dated: March 6, 2019

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