No. 22-8016

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

GERALD KLEIN,
on behalf of himself and all similarly situated
RODERICK FORD,

Plaintiff-Respondent,

v.

TD AMERITRADE HOLDING CORPORATION, TD AMERITRADE, INC.,
and FREDRIC TOMCZYK.,

Defendants-Petitioners,

.

On Appeal from an Order of the United States District Court for the District of Nebraska Granting Plaintiffs' Motion for Class Certification No. 8:14-cv-00396 (Hon. Joseph F. Bataillon)

BRIEF FOR THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *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.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Class Certification Order Conflicts with the Settled Law in Defining Economic Loss...5

II. Churning Cases Are Inapplicable To Best Execution Claims.........................9

CONCLUSION 11

Appellate Case: 22-8016 Page: 13 Date Filed: 10/11/2022 Entry ID: 5206708

TABLE OF AUTHORITIES

Page(s)

Cases

Davis v. Merrill Lynch Pierce, Fenner & Smith, Inc.,
906 F.2d 1206 (8th Cir. 1990) 10

Ford v. TD Ameritrade Holding Corp.,
995 F.3d 616 (8th Cir. 2021) ....*passim*

Forsythe v. Hales,
255 F.3d 487 (8th Cir. 2001) 11

In re Goldman Sachs Group, Inc.,
579 F. Supp. 3d 520 (S.D.N.Y. 2021), *appeal filed*, No. 22-484 (2d Cir. Mar. 9, 2022) 2

Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System,
594 U.S. __, 141 S.Ct. 1951 (2021)..2

Klein v. TD Ameritrade Holding Corp.,
No. 14-cv-00396, 2022 WL 4355607 (D. Neb. Sept. 20, 2022) 3, 6, 9, 10

McGinn v. Merill Lynch, Pierce, Fenner & Smith, Inc.,
736 F.2d 1254 (8th Cir. 1984) 10

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001) ....*passim*

Pearce v. UBS PaineWebber, Inc.,
No. 02-cv-02409-17, 2004 WL 5282962 (D.S.C. Aug. 13, 2004)...................5, 9

Telco Grp., Inc. v. Ameritrade, Inc.,
No. 05-cv-00387, 2007 WL 203949 (D. Neb. Jan. 23, 2007)..........................5, 9

In re Thomas McKinnon Secs., Inc.,
191 B.R. 976 (Bankr. S.D.N.Y. 1996)..11

Other Authorities

Black's Law Dictionary (11th ed. 2019) 9

Appellate Case: 22-8016 Page: 15 Date Filed: 10/11/2022 Entry ID: 5206708

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 our industry's nearly one million employees, we advocate 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 in cases such as this one that raise issues of vital concern to securities industry participants.

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* briefs the last time the United States Eighth Circuit Court of Appeals ("Eighth Circuit") heard an appeal in this case, *Ford v. TD Ameritrade Holding*

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

Corp., 995 F.3d 616 (8th Cir. 2021) and in support of the previous Rule 23(f) petition, *see* No. 18-8013 (8th Cir. Oct. 22, 2018). And, more recently, SIFMA filed *amicus curiae* briefs in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. __, 141 S.Ct. 1951 (2021) and *In re Goldman Sachs Group, Inc.,* 579 F. Supp. 3d 520 (S.D.N.Y. 2021), *appeal filed*, No. 22-484 (2d Cir. Mar. 9, 2022), concerning class certification for securities fraud claims. SIFMA and its members have a substantial interest in the proper application of the federal securities laws concerning best execution cases, and more specifically in securities class actions.

SUMMARY OF ARGUMENT

This is the second time that this Court has been asked to intervene in this putative "best execution" case due to class certification of a class contravening the well-established rules governing class certification. The first time, in 2018, this Court granted Petitioners' Federal Rule of Civil Procedure 23(f) petition and then reversed the District Court's grant of class certification, *Ford v. TD Ameritrade Holding Corp.,* 995 F.3d 616 (8th Cir. 2021) ("*Ford I*"), where the class involved hundreds of thousands of putative class members who had engaged in hundreds of millions of securities trades over the course of several years, and the District Court sought to allow economic loss on those trades to be determined by an algorithm developed by Plaintiff's expert. The prior District Court decision was the first

federal court order certifying a best execution class action, because the determination of whether any single investor suffered economic injury due to a broker-dealer's trade order routing practices necessarily turns upon highly individualized proof. While unsuitable to determine the highly-individualized proof required in a best execution class action, the Plaintiff's proposed algorithm in the original iteration of this case at least *attempted* to calculate economic loss that a putative class member suffered.

After his first failed attempt at certifying his proposed class, Plaintiff turned to a different route, to do away with determining economic loss altogether, instead alleging that any payment of authorized commissions constitutes economic loss. The District Court again certified a class action, and became the first federal court to find that commissions can constitute the economic loss element for a best execution claim. *Klein v. TD Ameritrade Holding Corp.*, No. 14-cv-00396, 2022 WL 4355607, at *5-6 (D. Neb. Sept. 20, 2022) ("*Klein II*"). If the certification of a putative best execution class based on the payment of commissions is allowed to stand, it will create uncertainty and potentially lead to further degradation of the well-settled world of securities law claims, directly harming our members.

In order to have a claim for securities fraud based on an alleged misrepresentation of the duty to seek "best execution," a plaintiff must have sustained "economic loss" caused by the alleged fraud, and that loss is the

"difference between the price at which [customers'] trades were executed and the 'better' price allegedly available from an alternative trade." *Ford I*, 995 F.3d at 621 (citation omitted). Commissions that every customer of a particular broker paid cannot obviate the need to engage in individualized economic loss analysis this Court requires. Indeed, a trader pays a commission irrespective of whether the trade at issue was executed at the same or better price. Therefore, the use of the payment of commission, as conceptualized as the Plaintiff here, to justify class certification reads the economic loss element out of the federal securities law.

Permitting the payment of commissions to replace the economic loss inquiry will make class certification nearly automatic in future best execution class actions. Logically, this change in standards will open the door to an undue, and previously unmeritorious, flood of litigation against our members and any other broker that charges commissions.

The theory on which the district court certified is essentially a state law breach of fiduciary duty or breach of contract claim—not a federal securities fraud claim. The focus on commissions is an attempt to shoehorn the proposed class members' claims into a class action that is inherently unsuitable to class-wide disposition.

This Court should therefore grant the petition to appeal and reverse the District Court's certification decision. Otherwise, the District Court's class certification decision may never face appellate scrutiny and the decision will remain in conflict

Appellate Case: 22-8016 Page: 19 Date Filed: 10/11/2022 Entry ID: 5206708

with the current law, creating incentives for forum shopping by opportunistic plaintiffs with unmeritorious claims and upsetting the certainty of the regulatory regime on which SIFMA members rely.

ARGUMENT

I. The Class Certification Order Conflicts with the Settled Law in Defining Economic Loss

This Court should grant Petitioners' petition because the District Court's class certification order stand in conflict with every other putative securities fraud class action involving "best execution." Prior to the 2018 decision in this case that originally certified a class, courts uniformly refused to certify classes in best execution cases. *See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187, 193 (3d Cir. 2001) ("*Newton II*"); *Telco Grp., Inc. v. Ameritrade, Inc.*, No. 05-cv-00387, 2007 WL 203949, at *8 (D. Neb. Jan. 23, 2007), *aff'd on other grounds*, 552 F.3d 893, 893-94 (8th Cir. 2009) (per curiam); *Pearce v. UBS PaineWebber, Inc.*, No. 02-cv-02409-17, 2004 WL 5282962, at *10-11 (D.S.C. Aug. 13, 2004). The uniformity of these rulings is explained by the impediments to proving injury on a class-wide basis with common evidence. *Newton II*, 259 F.3d at 187 (a lead plaintiff has to present "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.").

Appellate Case: 22-8016 Page: 20 Date Filed: 10/11/2022 Entry ID: 5206708

This Court joined that litany of prior decisions in *Ford I* by holding that "individual evidence and inquiry [are] still required to determine economic loss for each class member" and that these "individualized inquires preclude[ ] class certification under Rule 23(b)(3)." *Ford I*, 995 F.3d at 623. In an effort to circumvent proving actual economic loss, Plaintiff has focused on the mere payment of commissions in connection with trades, claiming any such payment as common evidence of loss. *Klein II* is the first time that a federal court has held that commissions can satisfy a best execution claim's economic loss requirement. 2022 WL 4355607, at *5-6.

The District Court's opinion claimed that there was no authority that commissions do not qualify to satisfy economic loss for a best execution claim. *Klein II*, 2022 WL 4355607, at *5. However, the opinion overlooked the fact that, under controlling law, commissions cannot satisfy the demanding and highly-individualized economic loss element of a best execution claim. In *Ford I*, this Court held that economic loss is the "difference between the price at which [customers'] trades were executed and the 'better' price allegedly available from an alternative trade." 995 F.3d at 621; *see Newton II*, 259 F.3d at 178. The payment of commissions is not relevant to the determination of whether there was economic loss under *Ford I*. Moreover, the District Court's decision overlooks that best execution cases predating *Ford I* also involved situations where

commissions had been paid and not one of those cases even suggested that the payment of commissions was even relevant—let alone—outcome determinative as to the element of economic loss.

Section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission's Rule 10b-5 require a plaintiff to prove, among other things, economic loss. *Ford I,* 995 F.3d at 621 (citation omitted). By allowing justified paid-commissions to constitute economic loss, plaintiffs would no longer have to meet this element of a federal securities claim. Every member of the proposed class had paid commissions, by virtue of the proposed class's definition, no matter if the customer suffered any actual harm. If the payment of commissions is sufficient to establish economic loss here, economic loss is established in every case where the broker charged a commission or fee for its services, subjecting our members and other broker-dealers to a flood of litigation. The explosion in litigation would have unintended consequences as business would take steps to limit potential litigation exposure, including, but not limited to, brokers pulling back from certain areas as a way to reduce potential litigation, which in turn would reduce access of individual investors to the securities markets and result in higher trading costs.

Allowing commissions to satisfy economic loss results in an over-inclusive class because only where defendants did not charge a commission or fee would

Appellate Case: 22-8016 Page: 22 Date Filed: 10/11/2022 Entry ID: 5206708

there be no economic loss. Thus, investors that suffered no actual harm and may even be better off, are part of the class because they paid commissions in connection with their trades. *See Ford I*, 995 F.3d at 623 (acknowledging "a substantial majority [of Ford's trades] were executed at a price better than or equal to the [National Best Bid and Offer] price") (alterations added). This approach is contrary to this Court's statement in *Ford I* that "a violation of the duty of best execution [does not] necessarily cause a customer economic loss." *Id*. at 624 (alteration added). Plaintiff's proposed class's claims are in the realm of regulators, not self-deputized private litigants.

Ford I and *Newton II* confirm that whether the Plaintiffs suffered economic loss as a result of Defendants' purported breach requires proof regarding the highly individualized circumstances of each customer's specific trades. Commissions paid by investors have nothing to do with whether "a 'better' price was obtainable for each executed trade." *Newton II*, 259 F.3d at 178. The payment of commission in connection with a trade does not remove the need to show the individualized circumstances of each customer's specific trades.

The District Court's decision introduces unpredictability into an area of law that was settled almost two decades ago in *Newton II*. This departure from well-settled jurisprudence is particularly troublesome in the best execution context, which deeply affects our members and the entire financial services industry. *See Newton*

Appellate Case: 22-8016 Page: 23 Date Filed: 10/11/2022 Entry ID: 5206708

II, 259 F.3d at 177-88; *Telco Grp. Inc.*, 2007 WL 203949, at *7-8, *10; *Pearce*, 2004 WL 5282962, at *10-11. Accordingly, this Court should accept Petitioners' Rule 23(f) petition.

II. Churning Cases Are Inapplicable To Best Execution Claims

The District Court's decision erroneously relied on churning[2] cases to support its conclusion that commissions could serve as a form of economic loss; however, those cases simply have no relevance in the best execution context. In churning cases, commissions are economic loss because the trades are unauthorized. Here, there are no claims that the trades at issue are unauthorized. Rather, Plaintiff's claim is that the trades were routed in such a fashion that they did not receive the best price available in the market at a specific moment in time. The economic loss in such a case is the difference between the price paid and any better available price. The commissions would have been paid regardless of Defendants' best execution policy.

The District Court's decision relied on three Eighth Circuit decisions discussing damages in the context of churning that are simply inapplicable. *Klein II*, 2022 WL 4355607, at *4. In this case, the *existence* of injury (*i.e.*, economic loss)—an essential element of Plaintiffs' claim—is the obstacle for class certification, not the *measure* of damages. *See Newton II*, 259 F.3d at 188 ("Proof

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[2] Churning is "[a] stockbroker's excessive trading of a customer's account to earn more commissions rather than to further the customer's interests[.]" *Churning*, Black's Law Dictionary (11th ed. 2019).

Appellate Case: 22-8016 Page: 24 Date Filed: 10/11/2022 Entry ID: 5206708

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).”). It is fatal to class certification that proof of economic loss of a particular trade is, by necessity, an individualized inquiry. The fact that liability may potentially involve common questions or be resolvable on a class-wide basis does not relieve the Plaintiff from showing that it was actually injured.

The District Court’s decision’s discussion of *Davis v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206 (8th Cir. 1990) and *McGinn v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 736 F.2d 1254 (8th Cir. 1984), regarding commissions as damages in a churning case, is unpersuasive. *Klein II*, 2022 WL 4355607, at *4. *Davis*, for instance, involved “excess” commissions—excess because they were collected on unnecessary trading—that would not have been paid but for the churning. 906 F.2d at 1218. There are no such “excess” commissions at issue here. The availability of commissions as a remedy does not alleviate the requirement to show each element of liability, including economic loss, with common evidence. Relying on decisions addressing churning equates unjustified commissions, where the customer did not actually place the trade order, with the facts here, where it is undisputed that the customer did place the trade order but is now complaining about the price at which the trade was executed. *See In re Thomas McKinnon Secs., Inc.*, 191 B.R. 976, 987-88 (Bankr. S.D.N.Y. 1996) (holding that because damages from

unsuitability claims are not resultant to a broker's excessive trading, commissions are not appropriate measure of damages).

Similarly, the District Court's decision cites *Forsythe v. Hales*, 255 F.3d 487, 491 (8th Cir. 2001), which makes clear that churning standards can be applied to cases involving *conversion of securities.* This case does not involve any allegations of conversion.

If the payment of commissions is sufficient to establish economic loss, it will have far-reaching consequences as economic loss will no longer be a meaningful concept. From this change, our members—and others in the financial services industry—will face even greater challenges in running their businesses and supporting accessibility to the free and fair markets for both professional and retail investors. Thus, this Court's intervention at this juncture is once again necessary to restore the carefully drawn limitations imposed on best execution class action claims in *Ford I* and *Newton II*. *See Newton II*, 259 F.3d at 165 ("Certifying the class may place unwarranted or hydraulic pressure to settle on defendants").

CONCLUSION

Petitioners' petition should be granted and the certification order reversed.

Appellate Case: 22-8016 Page: 26 Date Filed: 10/11/2022 Entry ID: 5206708

Dated: October 11, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 5(c)(1) and 29(a)(5) because it contains 2,572 words, excluding parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

Finally, I certify that this brief complies with the requirements of Eighth Circuit Local Rule 28A(h)(2) because it has been scanned for viruses and is virus-free.

Dated: October 11, 2022

/s/ Justin J. Santolli
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