

IN THE
United States Court of Appeals

FOR THE EIGHTH CIRCUIT

Case No. 18-8013

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 Rule 23(f) Petition Challenging Order Granting Class Certification
by the United States District Court for the District of Nebraska
Civil Action No. 8:14-cv-00396 (Judge Joseph F. Bataillon)

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-
PETITIONERS' RULE 23(F) PETITION**

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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

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTi

TABLE OF AUTHORITIES iii

STATEMENT REGARDING CONSENT.....1

IDENTITY AND INTEREST OF AMICUS AND SUMMARY OF
ARGUMENT.....1

ARGUMENT3

I. To Certify A Class, The Court Must Find That A Mechanism Actually
Exists For Resolving The Case On A Classwide Basis.....3

II. Class Litigation Should Not Proceed Via Trial-By-Algorithm.....8

CONCLUSION10

TABLE OF AUTHORITIES

CASES

Comcast Corp. v. Behrend, 569 U.S. 27 (2013)5, 6

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), *superseded by*
rule as stated in, Microsoft Corp. v. Baker, 137 S. Ct. 1702 (2017).....7

OTHER AUTHORITIES

Fed. R. Civ. P. 23(b)(3).....8

STATEMENT REGARDING CONSENT

Neither Plaintiffs nor Defendants oppose *amicus curiae*'s motion for leave to file this amicus brief.

IDENTITY AND INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

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. The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation’s business community, including amicus briefs at the Rule 23(f) stage. *See, e.g., Ferreras v. American Airlines, Inc.*, No. 18-8023 (3d Cir. Mar. 20, 2018); *McArdle v. AT&T Mobility LLC*, No. 18-80102 (9th Cir. Aug. 27, 2018).

Businesses are almost always the defendants in class action litigation, and businesses—and indirectly the customers, employees, and communities that depend on them—have a strong interest in the proper application of the rules restricting class certification. Here, the District Court certified a class despite the absence of any finding that Plaintiffs had actually put forth a mechanism for resolving the case on a classwide basis. Plaintiffs claim to have described an

algorithm that purportedly could resolve individualized injury inquiries classwide in one fell swoop. But when Defendants pointed to defects in that algorithm, Plaintiffs did not address those flaws or develop a new algorithm—instead, they provided a vague roadmap that they claim might fix the problems Defendants identified. The Court nonetheless certified the class on the ground that Plaintiffs’ algorithm “can be refined.”

The District Court’s decision contradicts the Supreme Court’s decisions establishing rigorous standards for class certification. The District Court’s approach to class certification is inconsistent with the Supreme Court’s decisions requiring plaintiffs to *prove* that a class should be certified, rather than merely suggesting that their approach, if subsequently refined, could allow for classwide resolution. Further, even if Plaintiffs’ algorithm were refined, classwide resolution would still be inappropriate. Economic loss is an intensely individualized inquiry for each class member; the fact that Plaintiffs have developed an algorithm that could purportedly conduct that individualized inquiry for each class member does not make this case appropriate for classwide resolution. The Chamber and its members have a strong interest in ensuring that federal district courts comply with those standards, and in encouraging the federal courts of appeals to correct lower court decisions that stray from the clear dictates of the Supreme Court.

ARGUMENT

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

The Chamber agrees with TD Ameritrade that the District Court erred in certifying the class. The Chamber submits this brief to explain why this case presents broader questions concerning class action practice that warrant the exercise of jurisdiction under Rule 23(f).

The first question presented by this case is whether, to certify a class, a district court must find that the requirements of Rule 23 are satisfied *at the time of certification*, or whether a class can be certified based on the prediction that an algorithm, *if subsequently refined*, can allow the case to be adjudicated on a classwide basis. Plaintiffs contend, and the District Court found, that even if the algorithm they actually developed for determining economic loss is insufficient to establish that Rule 23's requirements are satisfied, their prediction that the algorithm can be refined suffices to warrant class certification. Defendants, by contrast, argue that such predictive judgments are improper; the class certification decision must be based on the record as it stands at the time of certification, not by speculative modifications that may happen later. The resolution of this dispute is of great importance to the class action bench and bar.

Plaintiffs contend that Defendants engaged in securities fraud by failing to seek "best execution" of securities orders. According to Plaintiffs, Defendants

improperly routed securities orders to market centers that paid Defendants for those orders. Even if Defendants committed failed to seek best execution on customers' stock orders (which is sharply disputed), the determination of economic injury, and ultimately damages, would be highly individualized. For every trade by every plaintiff, injury would turn on whether a better price was reasonably available in the market at the time of execution, which, in turn, will depend on numerous contextual factors—including market conditions at the precise moment the trade occurred and the number of shares traded by each individual member of the class.

To establish that class certification was nonetheless appropriate, Plaintiffs' expert, Bodek, described 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." A10.

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—improved. As the District Court pointed out, Bodek

“did not complete a finalized damages model.” A12. But his rebuttal report stated that Kleidon’s criticisms “improve[] [his] methodology by providing clearly defined and algorithmically implementable conditions.” *Id.* Bodek predicted 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). He explained how the current injury model “can be modified,” and “once the methodology is fully tailored, the entire model would be automated.” *Id.* (quoting Filing No. 189-2, Ex. 2.C, Expert Rebuttal Report of Haim Bodek at 23).

Even though Bodek had not actually completed the model that would allow for classwide adjudication, the District Court nonetheless certified the class. It acknowledged that the “criticisms” of the expert’s methodology were “valid.” But it predicted that Bodek’s “methodology can be refined,” given that Bodek “concede[d] that Kleidon’s criticisms effectively improve his methodology.” A21.

The District Court’s decision is gravely wrong. It is axiomatic that “certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) *have been satisfied.*” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks omitted; emphasis added). The court must conduct such a rigorous analysis even if the analysis “entail[s] overlap with the merits of the plaintiff’s underlying claim.” *Id.* 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.

Yet here, the District Court certified the class based on the mere prediction that Bodek *could* come up with a methodology that would allow Rule 23’s requirements to be satisfied. Although the District Court agreed with Defendants that Bodek’s algorithm, as it stood, could not determine whether each order incurred economic loss, it nonetheless certified the class based on the prediction that Bodek’s “methodology can be refined.” A21. That holding was incorrect. Even assuming that an algorithm that *works* could support class certification—which the Chamber disputes, *see infra* Part II—an algorithm that *does not yet work* cannot. 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 frequently in the details. If Bodek actually implemented his refinements, Defendants might well identify defects in those refinements that establish that his model still does not work. Defendants should have been afforded the right to do so 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), *superseded by rule as stated in, Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). Because of the *in terrorem* effect of class certification, plaintiffs must show that

Rule 23 is satisfied *before* class certification. The District Court’s reasoning would allow courts to evade that bedrock rule.

II. Class Litigation Should Not Proceed Via Trial-By-Algorithm.

Even if Bodek had completed work on his algorithm, class certification would still be unwarranted—and the District Court’s error would warrant review under Rule 23(f). In certifying the class based on Bodek’s algorithm, the District Court committed a fundamental error. The District Court improperly held that Plaintiffs could satisfy the predominance requirement merely by showing that a multitude of individualized inquiries could be resolved by a computer.

To establish that a class can be certified, Plaintiffs bear 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). Plaintiffs cannot make that showing because the court must literally make hundreds of millions of individualized inquiries to establish injury and ultimately damages. 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 a better price was reasonably 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

which vary from second to second. Thus, it is impossible for the court to analyze damages 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 for the purported injury associated with multiple trades to be resolved in a single analysis; 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 a computer model, rather than manually.

This conclusion has no basis in the text of Rule 23, which requires common issues to predominate over individualized issues. If individualized issues predominate, a class cannot be certified, regardless of whether those individualized issues can be resolved rapidly via a computer. This does not mean that a computer algorithm's efficiency is *irrelevant* to class certification: it may be relevant to Rule 23(b)(3)'s distinct requirement that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy." But to establish class certification, a plaintiff must independently satisfy the predominance inquiry, regardless of whether the individualized inquiries are conducted by computer or by pen and paper.

Review under Rule 23(f) is warranted because the District Court did not merely err in applying the law to the facts of this case. Rather, it committed a conceptual error regarding Rule 23's requirements: It confused the superiority requirement, which requires an analysis of whether individualized issues can be resolved efficiently, with the distinct requirement that common questions predominate over individualized questions. That reasoning, if adopted by other courts, will have pernicious effects. It would effectively allow multiple lawsuits with few, if any, common questions to be aggregated in a class action so long as a computer program can be designed for resolving each individual lawsuit rapidly. That would be antithetical to Rule 23's function of allowing courts to resolve *common* questions on a classwide basis.

CONCLUSION

The petition for leave to appeal should be granted.

October 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

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