

No. 08-1621

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TELCO GROUP, INC.,
Plaintiff-Appellant,

v.

AMERITRADE, INC., ADVANCED CLEARING, INC., and
AMERITRADE HOLDING CORPORATION,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nebraska
Case No. 8:05CV387
The Honorable Joseph F. Bataillon

BRIEF OF DEFENDANTS-APPELLEES

Robert J. Kriss
Joshua D. Yount
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Counsel for Defendants-Appellees

SUMMARY OF THE CASE

In this appeal, Plaintiff Telco Group, Inc. (“Telco”) seeks to challenge the district court’s denial of class certification. But Telco’s individual claims were dismissed with prejudice for failure to prosecute when Telco did not initiate a contractually required arbitration after the denial of class certification. Under Eighth Circuit precedent, that dismissal for failure to prosecute precludes Telco from challenging the class certification decision. It also renders Telco’s class certification challenge moot.

In any event, the district court did not abuse its discretion in refusing to certify a class to litigate Telco’s claims that Defendants did not provide “best execution” on orders by Telco and other customers to trade securities. Like every other court asked to certify a best execution class action, the district court denied class certification principally because the relevant legal standards require trade-by-trade individual analysis to determine whether a particular customer received best execution on a particular trade. Telco’s position that the district court should have used Telco’s legally invalid theory of liability to judge the need for individual analysis is contrary to Eighth Circuit law. Class certification was correctly denied.

Although Eighth Circuit precedent forecloses Telco’s class certification arguments and bars Telco from making them, Defendants request a 15-minute oral argument to ensure that they have a chance to answer questions from the Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees Ameritrade, Inc., Advanced Clearing, Inc., and Ameritrade Holding Corporation offer the following corporate disclosure statement:

The entity named Ameritrade, Inc., as of the date of the complaint (April 19, 2005), is now named TD AMERITRADE Clearing, Inc., and TD AMERITRADE, Inc. is Ameritrade, Inc.'s successor in interest with respect to any liability arising from Ameritrade, Inc.'s introducing broker business. There was no entity named Advanced Clearing, Inc. as of April 19, 2005. Prior to January 2002, there was an entity named Advanced Clearing, Inc., and it is now named TD AMERITRADE Clearing, Inc. The entity named Ameritrade Holding Corporation, as of April 19, 2005, is now named TD AMERITRADE Holding Corporation.

TD AMERITRADE, Inc. and TD AMERITRADE Clearing, Inc. are wholly owned subsidiaries of TD AMERITRADE Online Holdings Corp., which itself is a wholly owned subsidiary of TD AMERITRADE Holding Corporation, a publicly held corporation. TD AMERITRADE Holding Corporation has no parent corporation, and the Toronto-Dominion Bank is the only publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	2
STATEMENT OF THE CASE.....	4
STATEMENT OF FACTS	5
A. The Processing And Execution Of Orders Placed With TD Ameritrade.....	5
B. The Duty Of Best Execution	8
C. Telco’s Relationship With TD Ameritrade	11
D. Proceedings In The District Court.....	14
1. Telco’s Claims	14
2. The Denial Of Class Certification	16
3. The Dismissal For Failure To Prosecute.....	19
SUMMARY OF ARGUMENT	20
ARGUMENT	22
I. Telco Cannot Appeal The Denial Of Class Certification.....	22
II. Telco’s Challenge To The Denial Of Class Certification Is Moot.....	27
III. The District Court Did Not Abuse Its Discretion In Denying Class Certification	28
A. The District Court Properly Considered The Merits Of Telco’s Liability Theory	29
B. Common Issues Do Not Predominate Over Individual Ones In This Case	35
1. Best Execution.	36

TABLE OF CONTENTS

(continued)

	Page
2. Other Individual Questions	43
C. Class Litigation Is Not Superior To Other Methods For Resolving The Claims In This Case	47
D. Telco’s Claims Are Not Typical Of The Claims Of Other Putative Class Members	49
IV. SLUSA Prevents This Case From Proceeding As A Class Action	51
CONCLUSION	56

TABLE OF AUTHORITIES

	Page
Cases	
<i>Al-Torki v. Kaempfen</i> , 78 F.3d 1381 (9th Cir. 1996).....	24
<i>Baer v. Fahnestock & Co.</i> , 565 F.2d 261 (3d Cir. 1977).....	27
<i>Baum v. Great W. Cities, Inc., of N.M.</i> , 703 F.2d 1197 (10th Cir. 1983)	49
<i>Baye v. Airlite Plastics Co.</i> , 618 N.W.2d 145 (Neb. 2000).....	45
<i>Behlen v. Merrill Lynch</i> , 311 F.3d 1087 (11th Cir. 2002).....	54, 55
<i>Blades v. Monsanto Co.</i> , 400 F.3d 562 (8th Cir. 2005).....	3, 21, 30-33, 35, 43
<i>Bowe v. First of Denver Mortgage Investors</i> , 613 F.2d 798 (10th Cir. 1980)	2, 24, 25
<i>Broussard v. Meineke Discount Muffler Shops, Inc.</i> , 155 F.3d 331 (4th Cir. 1998)	34, 44
<i>Caridad v. Metro-North Commuter R.R.</i> , 191 F.3d 283 (2d Cir. 1999)	33
<i>Chaffin v. Rheem Mfg. Co.</i> , 904 F.2d 1269 (8th Cir. 1990)	31
<i>Coleman v. Watt</i> , 40 F.3d 255 (8th Cir. 1994).....	49
<i>Combined Ins. v. Shurter</i> , 607 N.W.2d 492 (Neb. 2000)	46
<i>Cooper v. E*Trade Group, Inc.</i> , No. CV 770328 (Cal. Super. Ct. June 1, 1999).....	37
<i>Coopers & Lybrand v. Livesay</i> , 437 U.S. 463 (1978)	22
<i>Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 395 F.3d 25 (2d Cir. 2005), <i>rev'd on other grounds</i> , 547 U.S. 71 (2006)	53
<i>Drake v. Sw. Bell Tel. Co.</i> , 553 F.2d 1185 (8th Cir. 1977).....	23

TABLE OF AUTHORITIES
(continued)

	Page
<i>DuBose v. Minnesota</i> , 893 F.2d 169 (8th Cir. 1990).....	2, 20, 23, 24, 25, 27
<i>Dudek v. Prudential Sec., Inc.</i> , 295 F.3d 875 (8th Cir. 2002)	1, 3, 52, 54, 55
<i>Eisen v. Carlisle & Jacquelin</i> , 417 U.S. 156 (1974)	32
<i>Elizabeth M. v. Montenez</i> , 458 F.3d 779 (8th Cir. 2006)	31, 32, 33
<i>Fair v. Norris</i> , 480 F.3d 865 (8th Cir. 2007).....	27
<i>Gariety v. Grant Thornton, LLP</i> , 368 F.3d 356 (4th Cir. 2004).....	33
<i>Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 903 F.2d 176 (2d Cir. 1990).....	26
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000).....	40
<i>Gene & Gene LLC v. Biopay LLC</i> , No. 07-30195, 2008 WL 3511766 (5th Cir. Aug. 14, 2008)	41, 43
<i>Glover v. Standard Fed. Bank</i> , 283 F.3d 953 (8th Cir. 2002)	3, 30, 31, 32, 43
<i>Goldberg v. Kidder Peabody & Co., Inc.</i> , 991 F. Supp. 215 (S.D.N.Y. 1997).....	45
<i>Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.</i> , 198 F.3d 685 (8th Cir. 1999).....	28
<i>Heerwagen v. Clear Channel Commc'ns</i> , 435 F.3d 219 (2d Cir. 2006)	33
<i>Hefti v. Commissioner</i> , 899 F.2d 709 (8th Cir. 1990)	23, 24
<i>Hoang v. E*Trade Group, Inc.</i> , 784 N.E.2d 151 (Ohio Ct. App. 2003).....	37
<i>Huey v. Teledyne, Inc.</i> , 608 F.2d 1234 (9th Cir. 1979)	2, 23, 25
<i>Hughley v. Eaton Corp.</i> , 572 F.2d 556 (6th Cir. 1978)	3, 28

TABLE OF AUTHORITIES
(continued)

	Page
<i>In re Initial Pub. Offerings Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006)	32, 33
<i>James v. McDonald’s Corp.</i> , 417 F.3d 672 (7th Cir. 2005)	27
<i>John’s Insulation, Inc. v. L. Addison & Assocs., Inc.</i> , 156 F.3d 101 (1st Cir. 1998)	2, 24, 25, 28
<i>Karlen v. Ray E. Friedman & Co. Commodities</i> , 688 F.2d 1193 (8th Cir. 1982)	46
<i>Kase v. Salomon Smith Barney, Inc.</i> , 218 F.R.D. 149 (S.D. Tex. 2003)	37
<i>Knoll v. AT&T Co.</i> , 176 F.3d 359 (6th Cir. 1999)	24
<i>Kurz v. Fidelity Mgmt. & Research Co.</i> , No. 07-CV-709, 2008 WL 2397582 (S.D. Ill. June 10, 2008)	54, 55
<i>Kutten v. Bank of Am., N.A.</i> , 530 F.3d 669 (8th Cir. 2008)	3, 54
<i>Lange Indus., Inc. v. Hallam Grain Co.</i> , 507 N.W.2d 465 (Neb. 1993)	44
<i>Lincoln Commodity Servs. v. Meade</i> , 558 F.2d 469 (8th Cir. 1977)	45
<i>In re Linerboard Antitrust Litigation</i> , 305 F.3d 145 (3d Cir. 2002)	39
<i>Little v. Gillette</i> , 354 N.W.2d 147 (Neb. 1984)	44
<i>Love v. Turlington</i> , 733 F.2d 1562 (11th Cir. 1984)	33
<i>Marshall & Co., Inc. v. Duke</i> , 114 F.3d 188 (11th Cir. 1997)	48
<i>Marshall v. Sielaff</i> , 492 F.2d 917 (3d Cir. 1974)	25
<i>Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit</i> , 547 U.S. 71 (2006)	51, 52
<i>In re Milk Prods. Antitrust Litig.</i> , 195 F.3d 430 (8th Cir. 1999)	29, 50, 51

TABLE OF AUTHORITIES
(continued)

	Page
<i>Modern Settings, Inc. v. Prudential-Bache Sec., Inc.</i> , 936 F.2d 640 (2d Cir. 1991)	45
<i>Morris v. Morgan Stanley & Co.</i> , 942 F.2d 648 (9th Cir. 1991).....	27
<i>Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.</i> (<i>Newton I</i>), 135 F.3d 266 (3d Cir. 1998).....	8, 9, 10, 36, 53, 54
<i>Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> (<i>Newton II</i>), 259 F.3d 154 (3d Cir. 2001)	3, 11, 18, 33, 37-40, 48
<i>Nichols v. Mobile Bd. of Realtors, Inc.</i> , 675 F.2d 671 (5th Cir. Unit B 1982)	25
<i>In re NYSE Specialists Sec. Litig.</i> , 405 F. Supp. 2d 281 (S.D.N.Y. 2005).....	54, 55
<i>Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.</i> , 339 F.3d 1001 (8th Cir. 2003).....	31, 43
<i>P.A.C.E. v. Sch. Dist. of Kan. City</i> , 312 F.3d 341 (8th Cir. 2002)	22, 23
<i>Parke v. First Reliance Standard Life Ins. Co.</i> , 368 F.3d 999 (8th Cir. 2004)	3, 49
<i>Pearce v. UBS PaineWebber, Inc. (Pearce I)</i> , C/A No. 3:02-2409- 17, 2003 WL 25518056 (D.S.C. Nov. 4, 2003)	54, 55
<i>Pearce v. UBS PaineWebber, Inc. (Pearce II)</i> , C/A No. 3:02-2409- 17, 2004 WL 5282962 (D.S.C. Aug. 13, 2004)	37, 38, 40, 51
<i>In re Popkin & Stern</i> , 196 F.3d 933 (8th Cir. 1999).....	27
<i>Prager v. Knight/Trimark Group, Inc.</i> , 124 F. Supp. 2d 229 (D.N.J. 2000)	54
<i>Poulos v. Caesars World, Inc.</i> , 379 F.3d 654 (9th Cir. 2004)	44

TABLE OF AUTHORITIES
(continued)

	Page
<i>In re Prempro Prods. Liab. Litig.</i> , 230 F.R.D. 555 (E.D. Ark. 2005).....	44
<i>Prof'l Mgmt. Assocs., Inc. Employees' Profit Sharing Plan v. KPMG LLP</i> , 335 F.3d 800 (8th Cir. 2003).....	3, 53, 55
<i>Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.</i> , 571 N.W.2d 64 (Neb. 1997)	46
<i>Rifkin v. McDonnell Douglas Corp.</i> , 78 F.3d 1277 (8th Cir. 1996)	2, 28
<i>Rodgers v. Curators of Univ. of Mo.</i> , 135 F.3d 1216 (8th Cir. 1998)	27
<i>Rowinski v. Salomon Smith Barney, Inc.</i> , 398 F.3d 294 (3d Cir. 2005)	52, 53, 54, 55
<i>S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.</i> , 320 F.3d 838 (8th Cir. 2003).....	35, 41
<i>Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.</i> , 319 F.3d 205 (5th Cir. 2003).....	44
<i>Sere v. Bd. of Trs. of Univ. of Ill.</i> , 852 F.2d 285 (7th Cir. 1988).....	24, 25
<i>Shannon v. General Elec. Co.</i> , 186 F.3d 186 (2d Cir. 1999).....	25, 27
<i>Shearson/Am. Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987)	48
<i>St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig.</i> (<i>St. Jude I</i>), 425 F.3d 1116 (8th Cir. 2005)	31
<i>St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig.</i> (<i>St. Jude II</i>), 522 F.3d 836 (8th Cir. 2008).....	44
<i>Sullivan v. Pac. Indem. Co.</i> , 566 F.2d 444 (3d Cir. 1977).....	2, 24, 25
<i>Szabo v. Bridgeport Machs., Inc.</i> , 249 F.3d 672 (7th Cir. 2001)	33, 34
<i>Tardiff v. Knox County</i> , 365 F.3d 1 (1st Cir. 2004).....	33

TABLE OF AUTHORITIES
(continued)

	Page
<i>Unger v. Amedisys Inc.</i> , 401 F.3d 316 (5th Cir. 2005)	33
<i>Union Ins. Co. v. Land & Sky, Inc.</i> , 568 N.W.2d 908 (Neb. 1997)	39
<i>Wegner v. West</i> , 100 N.W.2d 542 (Neb. 1960)	46
<i>Zannini v. Ameritrade Holding Corp.</i> , Doc. 975, No. 975 (Neb. Dist. Ct. Aug. 13, 2004)	37
 Statutes and Legislative History	
15 U.S.C. § 77p(b)	1, 3, 52
15 U.S.C. § 78bb(f)(1)	1, 3, 52
28 U.S.C. § 1291	22
28 U.S.C. § 1332(d)(2)(A)	1
28 U.S.C. § 2072(b)	34
H.R. Conf. Rep. No. 105-803 (1998)	51
Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1601 <i>et seq.</i>	14, 44
Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227	51, 52
 Rules	
Fed. R. Civ. P. 23	5, 21, 28, 29, 33, 34
Fed. R. Civ. P. 23(b)(3)	35, 47
Fed. R. Civ. P. 23(f)	22, 26
Fed. R. Civ. P. 23(f) adv. comm. notes, 1998 Amends.	26
Fed. R. Civ. P. 41(b)	20, 27

TABLE OF AUTHORITIES
(continued)

	Page
Regulatory Authorities	
Disclosure of Order Execution and Routing Practices, SEC Release No. 34-43590, 65 Fed. Reg. 75,414 (Nov. 17, 2000).....	8, 9, 10, 39, 40
Div. of Mkt. Reg., SEC, <i>Market 2000</i> (1994)	8, 11, 39, 53, 54
Arthur Levitt, SEC Chairman, Best Execution (Nov. 4, 1999), http://sec.gov/news/speech/speecharchive/1999/spch315.htm	9, 10
NASD Rule 2320(a).....	11
NASD Rule 10302	48
NASD Rule 10308	48
NASD Rule 10316	48
NASD Rule 10321	48
NASD Rule 10322	48
NASD Rule 10330	48
NYSE Information Memo No. 97-8 (Feb. 5, 1997)	11
Order Extending a De Minimis Exemption for Transactions in Certain Exchange-Traded Funds, SEC Release No. 34-47950, 68 Fed. Reg. 33,748 (June 5, 2003).....	16
Regulation NMS, SEC Release No. 34-51808, 70 Fed. Reg. 37,496 (June 29, 2005)	8, 9, 53
SEC, Trade Execution, http://sec.gov/investor/pubs/tradexec.htm	8, 39
Laura S. Unger, SEC, <i>On-Line Brokerage</i> (1999).....	11

TABLE OF AUTHORITIES
(continued)

	Page
Other Authorities	
Robert W. Lowry, <i>The Elements of Best Execution</i> , in <i>Securities Arbitration 2001</i> , at 403 (PLI Corp. Law & Practice Course Handbook Series No. B0-0158, 2001)	41

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1332(d)(2)(A), which grants original jurisdiction over putative class actions in which at least \$5 million is in controversy and “any member of a class of plaintiffs is a citizen of a State different from any defendant.” Telco alleged that \$5 million was in controversy. Compl. ¶ 8 (A20).¹ The putative class of Ameritrade customers was not limited to citizens of Delaware and Nebraska, the states in which Defendants were incorporated and had their principal places of business when this suit was filed. *Id.* ¶ 23 (A23); Answer ¶¶ 5-6 (A32-33). Subject matter jurisdiction also existed by virtue of the “complete preemption” of Telco’s class claims under the Securities Litigation Uniform Standards Act, which applies here for reasons we explain more fully below (*see pp. 51-56, infra*). *See* 15 U.S.C. §§ 77p(b), 78bb(f)(1); *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 877 & n.5 (8th Cir. 2002).

This Court does not have jurisdiction over this appeal. Telco appeals only the district court’s interlocutory denial of class certification. Pl.’s Br. at 9. Under Eighth Circuit precedent, that interlocutory order did not merge with the

¹ The parentheticals following cited record documents indicate the referenced pages of Telco’s Appendix, when they begin with “A,” or the referenced pages of Defendants’ Appendix, when they begin with “DA.” Also note that Defendants’ Appendix (at DA173-84) reproduces the original color versions of Exhibits 4 and 7-14 to the Kleidon Affidavit, which are not entirely legible in Telco’s appendix (at A329-32, A335-42).

subsequent final order dismissing Telco's suit with prejudice for failure to prosecute (2/13/08 Order (DA172)). *See DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990). As we explain more fully below (*see pp. 22-27, infra*), the class certification ruling thus remains an unappealable interlocutory order. Accordingly, this appeal should be dismissed for lack of jurisdiction. *See Bowe v. First of Denver Mortgage Investors*, 613 F.2d 798, 800-02 (10th Cir. 1980) (dismissing class certification appeal in similar circumstances); *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445-46 (3d Cir. 1977) (same).

STATEMENT OF ISSUES

1. May Telco challenge the district court's interlocutory order denying class certification where the district court subsequently dismissed the case for failure to prosecute? *DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990); *Bowe v. First of Denver Mortgage Investors*, 613 F.2d 798, 800-02 (10th Cir. 1980); *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1239 (9th Cir. 1979); *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445-46 (3d Cir. 1977).

2. Now that Telco has waived any challenge to the dismissal with prejudice of its individual claims, is its challenge to the district court's order denying class certification moot? *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1283 (8th Cir. 1996); *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*,

156 F.3d 101, 107 (1st Cir. 1998); *Hughley v. Eaton Corp.*, 572 F.2d 556, 557 (6th Cir. 1978).

3. Did the district court abuse its discretion in denying class certification where it followed this Court's instruction to address merits disputes concerning the applicable legal standard in order to assess whether individual issues would predominate in class litigation, it reached the same conclusion as every court that has ruled on class certification in a best execution case, and it heeded this Court's typicality precedents? *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005); *Glover v. Standard Fed. Bank*, 283 F.3d 953 (8th Cir. 2002); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Newton II)*, 259 F.3d 154 (3d Cir. 2001); *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1004-05 (8th Cir. 2004).

4. Does the Securities Litigation Uniform Standards Act of 1998 preclude a class action here because Telco brings state law claims and alleges fraud in connection with the purchase and sale of covered securities? 15 U.S.C. §§ 77p(b), 78bb(f)(1); *Kutten v. Bank of Am., N.A.*, 530 F.3d 669, 670-71 (8th Cir. 2008); *Prof'l Mgmt. Assocs., Inc. Employees' Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003); *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 879-80 (8th Cir. 2002).

STATEMENT OF THE CASE

Although Telco challenges only the district court's denial of class certification, this case is on appeal by virtue of a February 13, 2008 order dismissing Telco's suit with prejudice for failure to prosecute. 2/13/08 Order (DA172). The district court entered that dismissal because Telco failed to initiate the contractually required arbitration of its individual claims, even after being warned that a failure to commence arbitration would result in such a dismissal. *See* 3/12/07 Order (DA147); 7/30/07 Order (DA158); 2/13/08 Order (DA172). Telco has now waived any argument that the district court erred in dismissing this case with prejudice for failure to prosecute. Telco nonetheless improperly seeks to challenge the district court's prior interlocutory order denying class certification.

Telco also mistakenly contends that the district court abused its discretion in denying class certification. Telco sought class certification on its claims that Defendants allegedly failed to provide best execution on securities trades in violation of contractual, common-law, and state statutory duties. Compl. ¶¶ 1-2, 23, 43-62 (A17-18, A23, A28-30). It advanced a theory, at odds with applicable law, that a failure to meet certain execution time and price benchmarks proves a failure to provide best execution. 11/6/06 Rep. & Rec. at 1-3 (A491-93).

In November 2006, Magistrate Judge Thalken issued a report and recommendation in favor of denying class certification, concluding that the

proposed class action did not satisfy the typicality, predominance, and superiority requirements of Fed. R. Civ. P. 23. *Id.* at 12, 15-16 (A502, A505-06). In accord with the unanimous precedent on the subject, Judge Thalken correctly reasoned that class-wide proof was not possible because the law governing best execution makes any determination of liability turn on the unique facts and circumstances of individual trades rather than arbitrary time and price benchmarks of the kind proposed by Telco. *Id.* at 11-12, 14-15 (A501-02, A504-05). On January 23, 2007, over Telco's objections, District Judge Bataillon adopted the report and recommendation in its entirety, acting well within his discretion to deny class certification. 1/23/07 Mem. & Order (A523-24).

STATEMENT OF FACTS

A. The Processing And Execution Of Orders Placed With TD Ameritrade.

TD Ameritrade, Inc. ("TD Ameritrade," the successor to Defendant Ameritrade, Inc.) is a securities brokerage firm. It processes orders to trade securities placed by its customers. 9/03 Terms & Conditions at AMTD 17 (A217).

Order processing begins when TD Ameritrade receives an order—most often, via the internet. After the order is received, TD Ameritrade determines whether the order can be forwarded to a market center for execution by checking the requirements for processing of the order, the risk to TD Ameritrade from the order, and the customer's funds and margin credit. Acct. Handbook at 16 (A256);

Kleidon Aff. ¶ 6 (A291).² For most orders, this validation process is automated and is completed within seconds. For large or unusual orders, the validation process must be done manually, which takes more time. The amount of time depends on the circumstances, including the characteristics of the order, market conditions, and other factors. Kleidon Aff. ¶ 6 (A291).

After the order is validated, TD Ameritrade routes the order to an appropriate market center for execution. 9/03 Terms & Conditions at AMTD 17 & ¶ 90 (A217, A223); Kleidon Aff. ¶ 6 (A291). Again, most orders are routed automatically in a matter of seconds, but some large or unusual orders are routed manually by TD Ameritrade personnel. TD Ameritrade informs customers in advance that their orders may be manually processed. 9/03 Terms & Conditions ¶ 91 (A223).

Once TD Ameritrade routes an order to a market center (such as the New York Stock Exchange or NASDAQ), it has no direct control over the execution of the order, which is handled entirely by the market center. 9/03 Terms & Conditions at AMTD 17 (A217); Kleidon Aff. ¶ 6 (A291). Different market

² TD Ameritrade is at risk on orders such as short sales, where a customer sells shares it does not own but must borrow and later return by making buys-to-cover. If the customer cannot make a necessary buy-to-cover, TD Ameritrade may have to do so at its own expense. Kleidon Aff. ¶ 10 (A293). The term “market center” encompasses all entities that execute securities transactions including exchanges, electronic communications networks (“ECNs”), and market makers. *Id.* ¶¶ 11-13 (A293-94).

centers have different procedures for executing orders, which can result in different execution speeds. Kleidon Aff. ¶¶ 11-13 (A293-94).

Order size, too, can affect the speed of execution and the price obtained for an order. The National Best Bid and Offer (“NBBO”) prices are promised only for stated quantities of securities (“sizes”). *Id.* ¶ 15 (A295).³ Consequently, an order exceeding the quoted size often will be executed at a price less favorable than the prevailing NBBO and over a longer time period than a smaller order. *Id.* ¶¶ 19, 35, 39 (A296-97, A303-05); Kleidon Supp. Aff. ¶ 6 (A402).

What is more, NBBO prices and sizes can change rapidly, up to several times a second. That means there is no guarantee that NBBO prices and sizes quoted when a customer places an order will remain available when the market center receives or executes the order. Kleidon Aff. ¶ 40 (A305); Kleidon Supp. Aff. ¶ 6 (A402); Acct. Handbook at 18 (A258). The amount of time that is reasonable for execution of a particular trade depends on many factors and changes with market conditions. Kleidon Aff. ¶¶ 20-21 (A297-98).

After the market center executes an order, it sends a notice to TD Ameritrade. TD Ameritrade, in turn, sends a trade confirmation to its customer. Acct. Handbook at 1-2 (A241-42).

³ NBBO prices and sizes, which vary by security, consist of a National Best Bid (“NBB”) relevant to customer sales and a National Best Offer (“NBO”) relevant to customer purchasers.

B. The Duty Of Best Execution.

Like all firms that handle securities transactions, TD Ameritrade has a duty of best execution in processing its customers' orders. Regulation NMS, SEC Release No. 34-51808, 70 Fed. Reg. 37,496, 37,537 (June 29, 2005). That duty requires TD Ameritrade to "seek to obtain for its customer orders the most favorable terms reasonably available under the circumstances." *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Newton I)*, 135 F.3d 266, 270 (3d Cir. 1998). Best execution is necessarily a matter of the "facts and circumstances" surrounding each transaction. Disclosure of Order Execution and Routing Practices, SEC Release No. 34-43590, 65 Fed. Reg. 75,414, 75,431-32 (Dec. 1, 2000); Div. of Mkt. Reg., SEC, *Market 2000 V-2-V-3* (1994) (A117-18); Kleidon Aff. ¶ 20 (A297).

There is no set period of time within which all types of orders under all types of market conditions must be executed. SEC, Trade Execution, <http://sec.gov/investor/pubs/tradexec.htm> (A112) ("No SEC regulations require a trade to be executed within a set period of time."); Kleidon Aff. ¶ 20 (A297). And the "best execution" is not always the best price available or the fastest execution available—partly because there often is a trade-off between price and speed. Div. of Mkt. Reg., *Market 2000, supra*, at V-2-V-3 (A117-18) ("brokers have not been held by the [SEC], the [SROs] or the courts to an absolute requirement of

achieving the most favorable price on each order”); Arthur Levitt, SEC Chairman, Best Execution (Nov. 4, 1999), <http://sec.gov/news/speech/speecharchive/1999/spch315.htm> (A143) (“It goes without saying that, at some point, a customer will sacrifice some chance of a better price for speed and visa versa.”).

Moreover, “execution price and speed are not the sole relevant factors in obtaining best execution of investor orders.” Disclosure of Order Execution and Routing Practices, 65 Fed. Reg. at 75,418; *see also* Kleidon Aff. ¶ 20 (A297). Instead, a broker must use reasonable efforts to locate for its customers the best balance of execution terms available. *Newton I*, 135 F.3d at 270-71 & n.2; Kleidon Aff. ¶¶ 20-22 (A297-98). That duty requires TD Ameritrade—which does not buy securities from or sell securities to its customers, but only processes their orders—to forward orders to market centers within a reasonable period of time (based upon the characteristics of the orders) and to make reasonable efforts to route orders to market centers that are likely to provide the “most beneficial terms for their customer orders.” Regulation NMS, 70 Fed. Reg. at 37,538.

The factors relevant in selecting an appropriate market center for execution include, among others:

- available prices;

- opportunity for price improvement;⁴
- execution speed;
- order size;
- likelihood of limit order execution;
- the likelihood of price disimprovement;
- market center liquidity;
- type of security;
- availability of market center quotations;
- access to competing market centers;
- costs of accessing market centers and their quotations;
- market center reliability and error rates;
- ability of a market center to promptly display limit orders;
- quality of market center help desk and other services;
- market center execution policies and procedures;
- anonymity of traders;
- customer needs and expectations.

See, e.g., Newton I, 135 F.3d at 270-71 & n.2; Disclosure of Order Execution and Routing Practices, 65 Fed. Reg. at 75,418, 75,432; Levitt, Best Execution, *supra*

⁴ Price improvement occurs when the execution price is better for the customer than the current NBBO. Price disimprovement occurs when the execution price is worse than the current NBBO. *See Kleidon Aff.* ¶ 16 n.1 (A295).

(A139); Laura S. Unger, SEC, *On-Line Brokerage* 35-36, 41, 44 (1999) (A146-47, A152, A155); Div. of Mkt. Reg., *Market 2000, supra*, at V-2–V-3 (A117-18); NASD Rule 2320(a) (A157); NYSE Information Memo No. 97-8 (Feb. 5, 1997) (A160); Kleidon Aff. ¶ 20 (A297). Those same myriad factors, consequently, would have to be evaluated in determining whether a customer received best execution on a particular order. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Newton II)*, 259 F.3d 154, 187 (3d Cir. 2001).

C. Telco’s Relationship With TD Ameritrade.

Telco opened its account with TD Ameritrade in October 2003. Acct. Applic’n (A204). In doing so, it agreed to a set of Terms & Conditions governing its relationship with TD Ameritrade. Acct. Applic’n at AMTD 5 (A208). The agreed-to Terms and Conditions state:

Orders are routed to the marketplace as promptly as possible in view of prevailing market conditions. However, there can be delays in the processing of orders related to the security being traded, market conditions, manual entry or discretionary order review procedures. I understand that the price at which an order executes in the marketplace may be different from the prices quoted at the time of order entry.

9/03 Terms & Conditions ¶ 91 (A223); 3/05 Terms & Conditions ¶ 83 (A234).

The Terms and Conditions further provide that “[s]tatements of accounts shall be conclusive and binding upon me unless I submit a written objection within ten days after Ameritrade has sent the statement of account to me by mail or

otherwise” (9/03 Terms & Conditions ¶ 27 (A219); 3/05 Terms & Conditions ¶ 27 (A230)) and that “[l]egal trade confirmations for the execution and/or processing of orders are conclusive if I do not submit a written objection within two days after Ameritrade has sent them by mail or otherwise” (9/03 Terms & Conditions ¶ 28 (A219); 3/05 Terms & Conditions ¶ 28 (A230)). Telco never sent to TD Ameritrade a single written objection to the execution of any order until it filed this lawsuit, over a year after it stopped trading through TD Ameritrade. Vihstadt Aff. ¶ 8 (A202); Pl.’s Resp. to Defs.’ 1st Set of Interrogs., No. 1 (A189); Pl.’s Resp. to Defs.’ 2d Set of Interrogs., No. 1.d. (A196).

The Terms and Conditions also provide that “[a]ll controversies concerning (a) any transaction, (b) the construction, performance or breach of this or any other agreement, whether entered into prior to, on or after the date of this Agreement, or (c) any other matter which may arise between Ameritrade and me shall be determined by arbitration in accordance with the rules of the National Association of Securities Dealers, Inc.” 9/03 Terms & Conditions ¶ 100 (A224); 3/05 Terms & Conditions ¶ 92 (A234). That arbitration agreement, however, can be enforced against a customer, as to claims encompassed by a putative class action, only after class certification is denied, the class is decertified, or the court excludes the customer from the class. 9/03 Terms & Conditions ¶ 99(f) (A224); 3/05 Terms & Conditions ¶ 91(f) (A234).

Between October 8, 2003 and January 29, 2004, Telco placed hundreds of orders to trade securities through TD Ameritrade. 4Q03 Acct. Stmt. (A265); 1Q04 Acct. Stmt. (A274). Many were quite large, involving tens or hundreds of thousands of shares (and millions of dollars) and requiring execution in multiple parts at different times and prices. *See, e.g.*, Kleidon Aff., Ex. 4 (A329-32). All but a few were limit orders, which call for execution at a price better than or equal to a limit price chosen by the customer and can involve delayed executions if the market price does not currently meet the limit price. 7/14/06 Br. at 16 (DA53); Kleidon Aff. ¶ 9 (A292). Others were market-on-close orders, which call for execution at the end of the day at the market closing price and will necessarily involve delayed execution if placed before the market close. Kleidon Aff. ¶¶ 9, 54 (A292, A311). Only a handful were market orders, which call for execution at prevailing market prices and to which Telco eventually confined its claims. *Id.* ¶ 8 & Ex. 4 (A292, A332); MSI Rep. at AMTD 651 (A65); Pl.'s Br. at 3.

TD Ameritrade routed virtually all of Telco's orders to market centers in two seconds or less. *See, e.g.*, Kleidon Aff., Ex. 4 (A329-32); MSI Rep. (A64-79). The few orders with longer routing times—which never exceeded 2 minutes, 30 seconds—were multi-million dollar short sales and buys-to-cover that required manual validation, routing, or both. *See, e.g.*, Kleidon Aff. ¶¶ 31, Ex. 4 (A302, A329-32); MSI Rep. at AMTD 650-52 (A64-66). The execution times that Telco

mentions in its brief (at 5) occurred on limit and market-on-close orders that could not be fully executed until the limit price became available in sufficient size or the market closed. Kleidon Aff. ¶¶ 54, 56-60, 63 (A311-15, A317). No market order—almost all of which approached or exceeded 100,000 shares—was executed more than 4 minutes, 15 seconds after receipt by TD Ameritrade. *See, e.g.*, Kleidon Aff., Ex. 4 (A332); MSI Rep. at AMTD 650-53 (A64-67).

D. Proceedings In The District Court

1. Telco's Claims

In April 2005, Telco filed a putative class action against Defendants, charging that TD Ameritrade did not properly process orders to trade securities and order cancellations submitted by Telco and a proposed class of TD Ameritrade customers. Compl. ¶ 1-2 (A17-18). Telco pleaded five causes of action—breach of contract, violation of the Nebraska Consumer Protection Act (“NCPA”), breach of best execution duties, negligence, and breach of fiduciary duties—all based on TD Ameritrade’s allegedly “fraudulent” failure to supply best execution on certain individual trades. *Id.* ¶¶ 43-62 (A28-30).

During the course of class certification proceedings, Telco dropped its cancellation allegations and changed its proposed class definition three times in a futile effort to avoid the need for trade-by-trade best execution determinations. *See* 1/8/07 Br. at 1-3 (DA96-98). The last proposal it advanced below envisions a class

of all TD Ameritrade customers who, since April 1, 2000, (1) have entered market orders to trade (2) securities listed on the New York Stock Exchange, securities traded on the NASDAQ National Market System, or certain derivative securities traded on the American Stock Exchange (3) that were not executed by a market center within four minutes after being received by TD Ameritrade and (4) that were executed at a price worse for the customer than the NBBO at the time TD Ameritrade received the order. Pl.'s Br. at 6.

The only Telco trade that meets the proposed class definition is a January 6, 2004 market order to sell short 300,000 shares of the NASDAQ-100 Index exchange-traded fund (which then went by the symbol QQQ). *See* Kleidon Aff. ¶ 61 (A315-16); Kleidon Supp. Aff. ¶ 12 (A405). TD Ameritrade received this order at 11:40:25 a.m., when the NBB was \$37.12 for 9,500 shares. Over the next two minutes, TD Ameritrade manually validated the order. It located the numerous shares Telco had to borrow for the transaction and assessed whether Telco had sufficient financial resources to cover the \$11 million short sale (on which TD Ameritrade was at risk if the QQQ price rose after the sale and Telco could not meet margin calls). During the brief time it took TD Ameritrade to accomplish these tasks, the NBB improved so that when TD Ameritrade routed the order to the Philadelphia Stock Exchange (at 11:42:36 a.m.) the NBB was \$37.13 for 18,000 shares. At 11:44:20 a.m., an exchange specialist executed the first 100,000 shares

of the order at \$37.13, a penny better than the NBB when TD Ameritrade received the order. Eighteen seconds later the specialist executed the remaining 200,000 shares at \$37.11. Only the second execution—which occurred 4 minutes, 13 seconds after TD Ameritrade received the order and at one cent below the NBBO at order receipt—fits the proposed class definition.⁵

2. The Denial Of Class Certification.

In light of the uniform precedent against class actions in best execution cases and the parties' agreement to arbitrate disputes not part of a class action, Defendants sought an early class certification ruling. Defendants thus promptly answered Telco's complaint and communicated their position on class certification to Magistrate Judge Thalken. Answer (A32); Rule 26(f) Rep. at 14 (DA14). Judge Thalken then set a schedule for class certification discovery and briefing. 10/19/05 Order (DA15-16). Over the next eight months, the parties conducted mutual discovery. Disc. Certs. of Serv. (DA17-31).

In May 2006, Telco moved for class certification arguing that certain time and price benchmarks of its own invention would allow class-wide proof of alleged best execution failures on particular trades. 5/19/06 Mot. (A46); 5/19/06 Br.

⁵ Significantly, this trade falls under the SEC's *de minimis* rule for Exchange Traded Funds (like QQQ), which deems an execution price within three cents of the prevailing NBBO price at the time of execution to be best execution. See Kleidon Aff. ¶¶ 44, 61 (A307, A315-16); Kleidon Supp. Aff. ¶ 12 (A405); Order Extending a De Minimis Exemption for Transactions in Certain Exchange-Traded Funds, SEC Release No. 34-47950, 68 Fed. Reg. 33,748 (June 5, 2003).

(A49). Offering abundant evidence to the contrary—including a report from best execution expert Dr. Allan Kleidon—Defendants showed that Telco’s benchmarks were at odds with the relevant law and did not eliminate the need for individual best execution determinations. 7/14/06 Br. (DA32); Index of Evid. (A96). For that reason and several others, Defendants maintained that class certification had to be denied. Telco tried to rehabilitate its motion with an expert report from Robert Lowry agreeing with Telco’s benchmarks, but nothing in that report refuted that best execution law forbids such benchmarks or explained why the benchmarks were appropriate measures of best execution. 9/8/06 Reply (A343); 9/18/06 Surreply at 1-5 (A379-83). Judge Thalken heard argument in September 2006. 9/25/06 Tr. (A410).

In November 2006, Judge Thalken issued a Report and Recommendation concluding that Telco’s motion for class certification should be denied. 11/16/06 Rep. & Rec. at 16 (A506). Following this Court’s instructions that the plaintiff “has the burden of showing that the class should be certified and that the requirements of Rule 23 are met” and that a trial court “must conduct a rigorous analysis to ensure that the prerequisites of Rule 23 are satisfied” (*id.* at 2-3 (A492-93)), Judge Thalken found that Telco had not demonstrated the typicality of claims, predominance of common issues, and superiority of class litigation necessary to certify a class action. *Id.* at 12, 15, 16 (A502, A505-06).

Typicality was absent, Judge Thalken reasoned, “because there are widely varying circumstances for each trade,” which would make “each claim of the putative class . . . subject to varying proof” under the acknowledged legal definition of best execution. *Id.* at 11-12 (A501-02). The same problem precluded common-issue predominance, according to Judge Thalken, just as in the materially indistinguishable *Newton II* decision. *Id.* at 14-15 (A504-05). Because the applicable legal standard requires a reasonableness inquiry into all of the circumstances surrounding a trade, Judge Thalken found that Telco’s arbitrary time and price benchmarks “alone cannot be exclusively used to determine liability against the defendants” and “the harm complained of cannot be determined by use of blanket analysis on putative class member’s accounts.” *Id.* at 14 (A504). Instead, “[t]he court would have to make a trade-by-trade analysis of each putative class member’s account to determine liability for failure to execute trades at the best reasonably available price.” *Id.* at 15 (A505). The need for such individualized analyses also led Judge Thalken to conclude that a “class action is not a superior method of resolution of the issues compared to individual arbitration or litigation.” *Id.* at 16 (A506).

In January 2007, District Judge Bataillon adopted the report and recommendation in its entirety, after making “a de novo review of the record and of all objections made by the plaintiff.” 1/23/07 Order at 1 (A523). He wrote,

“The court finds that the magistrate has done an excellent job analyzing the facts and applying the appropriate law on this issue.” *Id.* at 1-2 (A523-24). Judge Bataillon consequently denied Telco’s motion to certify a class. *Id.* at 2 (A524).

3. The Dismissal For Failure To Prosecute.

With class certification denied, Defendants promptly moved to stay litigation of Telco’s individual claims pending completion of the arbitration agreed to in the Terms and Conditions. 2/2/07 Mot. (DA144). Finding that the parties’ suit was subject to a valid and enforceable arbitration agreement, Judge Thalken stayed Telco’s suit pending completion of arbitration proceedings. 3/12/07 Order (DA147-48). Judge Thalken also ordered the parties to file a joint status report by June 29, 2007 and every 90 days thereafter. *Id.*

Telco did not initiate arbitration. Nor did it participate in the preparation of the required June 29 status report, which Defendants alone filed after unsuccessfully soliciting Telco’s input. 6/29/07 Status Rep. (DA149). Judge Thalken therefore ordered Telco to show cause why its suit should not be dismissed, without prejudice, pending arbitration in light of its “failure to comply with court orders or initiate arbitration.” 7/3/07 Order (DA152). Telco responded that it had no objection to a dismissal without prejudice, but it was not waiving its purported appeal rights. 7/13/07 Ltr. (DA153). After Defendants pointed out that such a dismissal would allow Telco to circumvent the limits on interlocutory

appeals (7/17/07 Resp. (DA154-56)), Judge Bataillon, on July 30, 2007, decided to leave the stay pending arbitration in effect and ordered that if Telco did not initiate arbitration and so inform the court within 90 days, its suit would be dismissed with prejudice for failure to prosecute. 7/30/07 Order (DA158).

Ninety days came and went without Telco initiating arbitration or submitting anything to the district court. In November 2007, Defendants moved to dismiss Telco's suit with prejudice for failure to prosecute. 11/2/07 Mot. (DA159). In response, Telco repeated its request for a dismissal without prejudice. 11/5/07 Mem. (DA163). On February 13, 2008, Judge Bataillon dismissed Telco's suit with prejudice, pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. 2/13/08 Order (DA172). Judge Bataillon noted that Telco had not cited a single case supporting its plea for a dismissal without prejudice and that its arguments for that disposition lacked merit. *Id.*

SUMMARY OF ARGUMENT

Telco cannot appeal the district court's order denying class certification. Its claims were dismissed for failure to prosecute. Under this Court's decision in *DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990), that dismissal bars review of the earlier class certification denial. As *DuBose* and similar decisions from many other circuits explain, allowing plaintiffs to use a dismissal for failure

to prosecute in order to appeal prior orders would encourage abuse of the judicial process and defeat the policy against piecemeal appeals.

Even if Telco could appeal the class certification denial, its challenge to that order is moot. The district court dismissed Telco's claims with prejudice, and Telco does not offer, and thus has waived, any argument against that dismissal. Whether the district court properly denied class certification or not, Telco's case is over because Telco cannot now argue that it was improper for the district court to dismiss its claims with prejudice.

Telco's challenge to the denial of class certification is meritless, in any event. Telco contends that the district court made a "merits" determination that the established legal standards for a best execution claim, rather than Telco's arbitrary time and price benchmarks, controlled the nature of the evidence needed to prove Telco's claims. But in *Blades v. Monsanto Co.*, 400 F.3d 562, 567, 575 (8th Cir. 2005), and other decisions, this Court has held that a proper class certification analysis requires a district court to make precisely that kind of "merits" determination. The district court did not decide whether Telco received best execution; it merely decided what the law would require Telco to prove, which in turn controlled whether Telco could proceed on class-wide evidence.

As for the district court's ultimate ruling that Telco did not show that this suit met the Fed. R. Civ. P. 23 predominance, superiority, and typicality

requirements, the evidence is overwhelming that a need for trade- and customer-specific inquiries to judge best execution claims precludes common-question predominance, makes class litigation inferior to individual arbitration, and renders Telco atypical of the putative class. The district court certainly did not abuse its discretion in denying class certification. Indeed, the district court reached the same conclusion as every court asked to certify a best execution class action.

Finally, the Securities Litigation Uniform Standards Act independently precludes a class action here. That statute bars class actions based on state law that allege fraud in connection with the purchase or sale of covered securities. Telco seeks just such a class action.

In short, Telco's appeal should be dismissed. But if it is not dismissed, the denial of class certification should be affirmed.

ARGUMENT

I. Telco Cannot Appeal The Denial Of Class Certification.

A denial of class certification is an interlocutory order. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-68 (1978). It therefore is not independently appealable as of right. *Id.* at 468-70, 477; *P.A.C.E. v. Sch. Dist. of Kan. City*, 312 F.3d 341, 342-43 (8th Cir. 2002). Unless the court of appeals permits an interlocutory appeal pursuant to Fed. R. Civ. P. 23(f), a class certification denial cannot be appealed until it merges with a final order appealable under 28 U.S.C.

§ 1291. *P.A.C.E.*, 312 F.3d at 342-43; *Huey v. Teledyne, Inc.*, 608 F.2d 1234, 1240 (9th Cir. 1979).

No such merger occurs, however, where (as here) the final order is a dismissal for failure to prosecute. As this Court held in *DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir. 1990), “a dismissal for failure to prosecute bars review of earlier entered interlocutory rulings.” The *DuBose* Court reasoned that “[t]o hold otherwise would leave the way open for an abuse of the judicial process” by plaintiffs who try to “circumvent the policy against piecemeal litigation and review” by forcing a dismissal for failure to prosecute so that they can try to appeal an otherwise unappealable interlocutory ruling. *Id.* “The failure to prosecute a claim should carry no such reward.” *Id.* Applying that rule, the *DuBose* Court refused to review an order granting partial summary judgment when (as here) a later order dismissed the plaintiff’s suit with prejudice for failure to prosecute. *Id.*⁶

This Court reaffirmed *DuBose* in *Hefti v. Commissioner*, 899 F.2d 709 (8th Cir. 1990). The *Hefti* Court deemed “the rule that interlocutory orders do not merge into dismissals for failure to prosecute” to be “sound” and “a good one for standard civil disputes.” *Id.* at 711. In the tax case before it, however, the Court decided to review an interlocutory summary judgment order that preceded a

⁶ *DuBose* thus supersedes *Drake v. Southwestern Bell Telephone Co.*, 553 F.2d 1185, 1187 (8th Cir. 1977), to the extent *Drake* suggests a different rule. In any event, *Drake* would be irrelevant here because the class certification order did not deprive Telco of all meaningful relief.

dismissal for failure to comply with Tax Court orders. But it did so with “trepidation” and only because the appeal arose from the Tax Court (where a dismissal is akin to a default judgment) and presented a substantial legal issue on a case dispositive matter—unusual circumstances not present here. *Id.* at 711-12. The *Hefti* Court emphasized, moreover, that it had “carved no real exception from the principle *DuBose* announced.” *Id.*

DuBose places the Eighth Circuit with the overwhelming majority of circuit courts to have considered the appealability of interlocutory orders that precede a dismissal for failure to prosecute. Six other circuits forbid appeals from such interlocutory orders. *John’s Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 107 (1st Cir. 1998); *Sullivan v. Pac. Indem. Co.*, 566 F.2d 444, 445 (3d Cir. 1977); *Knoll v. AT&T Co.*, 176 F.3d 359, 366 (6th Cir. 1999); *Sere v. Bd. of Trs. of Univ. of Ill.*, 852 F.2d 285, 288-89 (7th Cir. 1988); *Al-Torki v. Kaempfen*, 78 F.3d 1381, 1386 (9th Cir. 1996); *Bowe v. First of Denver Mortgage Investors*, 613 F.2d 798, 800-02 (10th Cir. 1980). Like this Court, those circuits maintain that a contrary rule would encourage abuse and piecemeal litigation:

If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge’s interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the [interlocutory order] is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to

undermine the ability of trial judges to achieve the orderly and expeditious disposition of cases.

Marshall v. Sielaff, 492 F.2d 917, 919 (3d Cir. 1974); *see also Sere*, 852 F.2d at 288-89 (same); *Huey*, 608 F.2d at 1239-40 (same). Some courts have also rightly emphasized that, as a means to secure an appeal, a dismissal for failure to prosecute “needlessly wastes the time and resources of all parties involved.”

John’s Insulation, 156 F.3d at 107.⁷

No less than any other interlocutory order, a denial of class certification is not appealable when a case ends with a dismissal for failure to prosecute. Indeed, the Third, Ninth, and Tenth Circuits have expressly refused to hear challenges to class certification denials in cases dismissed for failure to prosecute. Those courts consider such challenges to be impermissible efforts to circumvent the firm rule against an as-of-right interlocutory appeal of a class certification order. *Bowe*, 613 F.2d at 800-02; *Huey*, 608 F.2d at 1239-40; *Sullivan*, 566 F.2d at 445-46.⁸

⁷ The Second Circuit stands alone in the minority on this issue. It has recognized “narrow exceptions to the more general rule that interlocutory orders do not properly merge with a final judgment dismissing an action for failure to prosecute,” where an interlocutory order effectively stops the action or is not subject to revision. *Shannon v. General Elec. Co.*, 186 F.3d 186, 192-93 (2d Cir. 1999). But the Second Circuit has questioned the continued vitality of even those narrow exceptions given the rule adopted in other circuits. *Id.* at 193. The Fifth Circuit has reviewed an interlocutory order in the wake of a dismissal for failure to prosecute, but it did so without considering the merger issue. *See Nichols v. Mobile Bd. of Realtors, Inc.*, 675 F.2d 671, 675 (5th Cir. Unit B 1982).

⁸ Notably, this Court cited *Huey* with approval in *DuBose*. 893 F.2d at 171.

That reasoning is even more compelling now that Rule 23(f) allows an interlocutory class certification appeal by permission. Rule 23(f) vests in the courts of appeals, not a disappointed litigant, the discretion to decide whether an appeal should come before a decision on the merits of the case or afterward. Fed. R. Civ. P. 23(f) adv. comm. notes, 1998 Amends. (court of appeals has “sole” and “unfettered discretion” to permit appeal). A plaintiff usurps that discretion when it (like Telco) seeks to use a dismissal for failure to prosecute in order to appeal a denial of class certification. Moreover, by expressly granting plaintiffs a chance to obtain immediate review of a class certification denial, Rule 23(f) resolves any concern that a plaintiff will have no opportunity to challenge an allegedly erroneous denial. Especially where (as here) a plaintiff does not even file a Rule 23(f) petition, there is no reason for a court to allow the plaintiff to manufacture a class certification appeal. If anything, courts should be especially vigilant in preventing plaintiffs from appealing class certification denials in cases dismissed for failure to prosecute. Indeed, since the adoption of Rule 23(f), no court appears to have allowed a plaintiff whose claims were dismissed for failure to prosecute to challenge a denial of class certification.⁹

⁹ The only decision to ever allow such an appeal—*Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990)—not only predates Rule 23(f), it also underestimates the likelihood that plaintiffs will take strategic dismissals for failure to prosecute (given their usual desire to

In sum, Telco seeks to appeal an interlocutory class certification order, even though its case was dismissed for failure to prosecute. *DuBose* expressly prohibits such an appeal, in accord with good practice and decisions from an overwhelming majority of other courts of appeals. Telco's appeal therefore should be dismissed.

II. Telco's Challenge To The Denial Of Class Certification Is Moot.

In its opening brief, Telco did not challenge the district court's dismissal of its individual claims with prejudice for failure to prosecute. Pl.'s Br. at 9, 32 (appealing and seeking reversal of class certification decision only).

Consequently, Telco has waived any argument that the district court erred in dismissing its claims. *Fair v. Norris*, 480 F.3d 865, 869 (8th Cir. 2007)

(arguments not raised in opening brief are waived).¹⁰ Telco's claims against Defendants have been extinguished.

litigate as a class or not at all). And, as noted, the Second Circuit has cast doubt on the continued vitality of *Gary Plastic*. *Shannon*, 186 F.3d at 193.

¹⁰ Any claim of error would have been futile. The district court did not remotely abuse its wide discretion in dismissing Telco's suit with prejudice for failure to prosecute. *See Rodgers v. Curators of Univ. of Mo.*, 135 F.3d 1216, 1219 (8th Cir. 1998) (Rule 41(b) dismissal reviewed for abuse of discretion). Telco's "wilful disobedience of a court order" and "persistent failure to prosecute a complaint" (*In re Popkin & Stern*, 196 F.3d 933, 938 (8th Cir. 1999)) warranted a dismissal for want of prosecution. *See pp. 19-20, supra*. And that is so even though Telco's failure to prosecute was a refusal to arbitrate, as several of this Court's sister circuits have held. *James v. McDonald's Corp.*, 417 F.3d 672, 681 (7th Cir. 2005); *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991); *Baer v. Fahnstock & Co.*, 565 F.2d 261, 263 (3d Cir. 1977). The district court also correctly refused to dismiss *without* prejudice, for doing so would have allowed "a clear evasion of the judicial and statutory limits on appellate jurisdiction" and a

No ruling on Telco's class certification arguments can resurrect its dismissed claims. Whether class certification was properly denied or not, Telco's claims will remain dismissed with prejudice. As the First Circuit has put it, "if a complaint was correctly dismissed for failure to prosecute, the fact that earlier interlocutory rulings may have been erroneous is irrelevant." *John's Insulation*, 156 F.3d at 107. Indeed, "any rulings which preceded [a dismissal for failure to prosecute] are thus rendered moot." *Hughley v. Eaton Corp.*, 572 F.2d 556, 557 (6th Cir. 1978). This Court has applied similar reasoning to find challenges to class certification denials moot when the plaintiff has lost on its individual claims. *E.g.*, *Rifkin v. McDonnell Douglas Corp.*, 78 F.3d 1277, 1283 (8th Cir. 1996) ("the district court's denial of class certification is moot as appellant's claims fail on the merits").

Under these authorities, Telco's challenge to the class certification denial is moot. For this reason, too, Telco's appeal should be dismissed.

III. The District Court Did Not Abuse Its Discretion In Denying Class Certification.

The district court denied class certification because Telco did not carry its burden to prove that the proposed class action satisfied the typicality, predominance, and superiority requirements of Fed. R. Civ. P. 23. 11/16/06 Rep. & Rec. at 12, 15-16 (A502, A505-06). The court properly determined that, under

violation of "the strong policy that parties must raise all claims of error in a single appeal following final judgment on the merits." *Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 688 (8th Cir. 1999).

the applicable legal standards, any assessment of liability on Telco's best execution claims would turn on the unique circumstances of individual trades and thus would require trade-by-trade analysis for each putative class member. *Id.* at 11-12, 14-15 (A501-02, A504-05). The district court's denial of class certification, as an exercise of its "broad discretion" under Rule 23, "will not be overturned absent a showing that it abused its discretion." *In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 436 (8th Cir. 1999).

A. The District Court Properly Considered The Merits Of Telco's Liability Theory.

Telco argues for a reversal principally because the district court examined the merits of Telco's theory of liability in judging whether Telco could prove its claims with class-wide evidence. Pl.'s Br. at 4, 8, 28-31. According to Telco, the district court should have simply accepted Telco's theory that a trade did not receive best execution if it did not meet Telco's arbitrary time and price benchmarks, even though the law is clear that best execution determinations require trade-specific analysis of all relevant facts and circumstances. Telco is seriously mistaken. This Court's precedents required the district court to resolve the parties' dispute over the applicable legal standard for proving a best execution claim because that standard controls whether this case could be tried on class-wide evidence.

In *Blades v. Monsanto Co.*, 400 F.3d 562, 567 (8th Cir. 2005), this Court expressly held that “[t]he preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case.” Merits disputes must be resolved, the *Blades* Court explained, where a “resolution is necessary to determine the nature of the evidence that would be sufficient, if the plaintiff’s general allegations were true, to make out a prima facie case for the class.” *Id.* Indeed, the *Blades* Court specifically rejected precisely the argument that Telco makes here:

Appellants argue on appeal that the district court improperly resolved disputes between the parties’ experts that go to the merits of the case. We have stated that in ruling on class certification, a court may be required to resolve disputes concerning the factual setting of the case. This extends to the resolution of expert disputes concerning the import of evidence concerning the factual setting—such as economic evidence as to business operations or market transactions.

Id. at 575. The *Blades* plaintiffs’ proposal to use five expert-developed benchmarks to prove injury from an alleged antitrust conspiracy therefore did not eliminate a need for individual inquiries because plaintiffs failed to “show” that their benchmark method “could work to prove classwide injury with common evidence.” *Id.*

Blades is no outlier. On many occasions, this Court has examined merits questions to determine whether a plaintiff seeking class certification could successfully proceed on classwide evidence. In *Glover v. Standard Federal Bank*,

283 F.3d 953, 966 (8th Cir. 2002), for instance, the Court reversed class certification after resolving a dispute over whether yield spread premiums always violated a ban on referral fees in real estate transactions. The *Glover* Court deemed that merits dispute “dispositive” and resolved it because a negative answer would mean that “the inquiry in each case must necessarily be made on a loan-by-loan basis, therefore eliminating class treatment.” *Id.* at 960; *see also Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006) (examining substantive due process law); *St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig. (St. Jude I)*, 425 F.3d 1116, 1121 (8th Cir. 2005) (reversing because court did not resolve conflict-of-laws question); *Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1012 (8th Cir. 2003) (considering causation and damages requirements); *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269, 1276 (8th Cir. 1990) (finding it “appropriate” to analyze statistical evidence).

Whether Telco’s time and price benchmarks can prove that particular trades by particular TD Ameritrade customers did not receive best execution goes directly to the “nature of the evidence that will suffice” to establish Telco’s claims. *Blades*, 400 F.3d at 566-67. If Telco were right that any order executed more than four minutes after receipt by TD Ameritrade at a price less favorable than the NBBO at the time of order receipt did not receive best execution and resulted in customer injury, then class member claims might be susceptible to common proof. But if

Defendants are right that the applicable legal standard requires instead trade-specific analysis of all relevant facts and circumstances surrounding each trade, then individual issues will dominate adjudication of class member claims.

Under *Blades*, therefore, the district court properly determined that Telco failed to show that its benchmark method could work to prove classwide failures to provide best execution with common proof. 400 F.3d at 575. And under *Glover*, the district court properly determined that the applicable legal standard requires liability inquiries to be made on a trade-by-trade basis. 283 F.3d at 960, 966. *Blades*, *Glover*, and the similar Eighth Circuit decisions thus totally foreclose Telco’s argument that the district court erred in resolving the parties’ dispute over whether Telco’s arbitrary time and price benchmarks reflect the legal standard that governs best execution claims.

It is surprising, therefore, to see Telco contend that such merits inquiries are “not proper under existing case law.” Pl.’s Br. at 8. While the Eighth Circuit cases Telco cites to support that contention—*Elizabeth M.* and *Blades*—warn against merits inquiries unrelated to the nature of the evidence needed to prove a plaintiff’s claims, those cases recognize that merits inquiries related to the nature of required evidence are necessary and appropriate.¹¹ The very excerpts from *Elizabeth M.*

¹¹ Such avoidance of merits questions unrelated to class certification inquiries is all that *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974), requires, contrary to Telco’s suggestion (at 10). See *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d

and *Blades* quoted by Telco instruct that “the ‘rigorous analysis’ under Rule 23 must involve consideration of what the parties must prove” (*Elizabeth M.*, 458 F.3d at 786) and that some merits disputes “must be resolved in order to determine the nature of the evidence the plaintiff would require” (*Blades*, 400 F.3d at 567).

Here, the district court did not decide whether Telco received best execution or opine on any other merits question unrelated to Rule 23. It limited its inquiry to determining whether Telco’s claims required individual or class-wide evidence.

11/16/06 Rep. & Rec. at 11-12, 14-15 (A501-02, A504-05).

Telco’s other principal authorities are two Second Circuit decisions—*Heerwagen v. Clear Channel Commc’ns*, 435 F.3d 219 (2d Cir. 2006), and *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999)—that have been disapproved to the extent they limited the class certification inquiry. *Initial Pub. Offerings*, 471 F.3d at 42. Indeed, seven other courts of appeals have now agreed with this Court that relevant merits disputes must be resolved in ruling on class certification. *Tardiff v. Knox County*, 365 F.3d 1, 4-5 (1st Cir. 2004); *Initial Pub. Offerings*, 471 F.3d at 41-42; *Newton II*, 259 F.3d at 166; *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004); *Unger v. Amedisys Inc.*, 401 F.3d 316, 321-22 (5th Cir. 2005); *Szabo*, 249 F.3d at 676; *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

24, 33-34 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 677 (7th Cir. 2001).

Case law aside, Telco’s position that the district court should have simply accepted Telco’s benchmark theory of liability—no matter how inconsistent with the governing legal standards—is nonsense. That rule would allow a plaintiff to wish away any legal standards requiring individual proof. In a best execution case, for instance, a plaintiff could adopt a theory that any order executed more than 60 seconds, or 30 seconds, or 10 seconds, or any arbitrary time after receipt did not receive best execution.

Certifying a class without testing the plaintiff’s theory of liability impermissibly “moves the court’s discretion” to certify a class “to the plaintiff’s attorneys.” *Szabo*, 249 F.3d at 677. It also tramples the fundamental principle that “the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members.” *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *see also* 28 U.S.C. § 2072(b) (rules of procedure “shall not abridge, enlarge or modify any substantive right”). Courts thus must look to the established law governing a claim, rather than the plaintiff’s theory alone, in determining whether proof will be class-wide or individualized.

Indeed, resolving the “merits” of a dispute over the legal standard controlling the type of proof needed to prevail on a claim—as the district court did here—is particularly appropriate. The court only has to look to the relevant legal authorities and decide what the law requires. It does not have to decide which

party is correct on the facts by weighing evidence or choosing between competing expert reports. Although they may be relevant to understanding a case's context and the parties' positions, expert opinions cannot change the law. *See S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 842 (8th Cir. 2003) (matters of law are for trial judge, not expert). In short, the district court did not err in resolving the parties' dispute over the correct legal standard for deciding best execution claims.

B. Common Issues Do Not Predominate Over Individual Ones In This Case.

Telco claims that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” (Fed. R. Civ. P. 23(b)(3)) because its time and price benchmarks eliminate any need to consider the individual circumstances of particular trades in determining whether putative class members received best execution. As the district court found, however, Telco’s benchmarks “cannot be exclusively used to determine liability against the defendants.” 11/16/06 Rep. & Rec. at 14 (A504). Under the relevant legal standard, any liability determination would turn on a host of trade- and customer-specific issues. Because “the members of [the] proposed class will need to present evidence that varies from member to member,” common questions do not predominate in this case. *Blades*, 400 F.3d at 566.

1. Best Execution.

Legal Standard. For each of Telco’s causes of action, the central liability questions are whether TD Ameritrade provided best execution and whether any failure to do so injured Telco. To prevail on those questions, Telco first would have to show that, on balance, a dozen or more execution quality factors—available prices, price improvement opportunities, execution speed, order size, market center liquidity, order type, security type, costs of market center access, and market center reliability and error rates, among others—indicated a better execution was available for its order. It then would have to show that TD Ameritrade acted unreasonably under the “facts and circumstances” in not securing the available, better execution. Finally, it would have to show that an available, better execution would have resulted in a better price or otherwise saved Telco from injury.

These requirements are not the invention of Defendants. They come directly from SEC pronouncements and judicial decisions regarding best execution. *See* pp. 8-11, *supra*. Those authorities establish a legal standard for judging best execution claims that demands “a factual inquiry into all of the surrounding circumstances” of a particular trade. *Newton I*, 135 F.3d at 270.

In light of that legal standard, every court asked to certify a class challenging the quality of order processing or execution has refused class certification on

predominance grounds. *See Newton II*, 259 F.3d at 187-90 (failure to route orders to alternative market centers); *Pearce v. UBS PaineWebber, Inc. (Pearce II)*, C/A No. 3:02-2409-17, 2004 WL 5282962, at *10-*11 (D.S.C. Aug. 13, 2004) (failure to execute block trades at NBBO); *Kase v. Salomon Smith Barney, Inc.*, 218 F.R.D. 149, 159-60 (S.D. Tex. 2003) (failure to follow execution instructions); *Cooper v. E*Trade Group, Inc.*, No. CV 770328, slip op. at 1 (Cal. Super. Ct. June 1, 1999) (delayed executions and blocked on-line access) (A199); *Zannini v. Ameritrade Holding Corp.*, Doc. 975, No. 975, slip op. at 5 (Neb. Dist. Ct. Aug. 13, 2004) (delayed executions and on-line access difficulties) (A110); *Hoang v. E*Trade Group, Inc.*, 784 N.E.2d 151, 154-57 (Ohio Ct. App. 2003) (on-line brokerage service interruptions).

The leading case is the Third Circuit's *Newton II* decision, which involved a securities fraud claim that brokers breached their best execution duties by not investigating market maker and ECN alternatives to execution through NASDAQ. The *Newton II* court determined that such a claim could not be certified as a class action because trade-by-trade inquiries were necessary to determine if a better execution at a better price was available, such that an allegedly mishandled trade resulted in economic loss. 259 F.3d at 187-90. The court reasoned:

Th[e] factors [relevant to best execution] would appear to vary from class member to class member and, for each class member, from trade to trade. Whether a class member suffered economic loss from a given securities transaction would require proof of the circumstances

surrounding each trade, the available alternative prices, and the state of mind of each investor at the time the trade was requested. This Herculean task, involving hundreds of millions of transactions, counsels against finding predominance.

Id. at 187; *Pearce II*, 2004 WL 5282962, at *11 (“to show injury, class members must show that a better price than the one they received was available from other sources at that time for the number of shares they traded”). In distinguishing the types of cases amenable to class litigation, the *Newton II* court further observed: “The alleged injuries [here] arise out of the execution of hundreds of millions of trades, not a single act of fraudulent conduct. The distinct facts among the hundreds of thousands of plaintiffs involving hundreds of millions of trades will determine whether securities violations occurred.” 259 F.3d at 190. As a result, “the putative class fail[ed] to satisfy the predominance requirement.” *Id.*

Judge Thalken correctly recognized that, for purposes of class certification, Telco’s claims are no different from the claims considered in *Newton II*. 11/16/06 Rep. & Rec. at 14 (A504). Both rest on allegations that the defendants mishandled orders and thereby deprived customers of best execution. As the *Newton II* court explained, such allegations cannot be tested on a class-wide basis, but rather require the kind of individual inquiries inconsistent with class litigation.

Telco's Time and Price Benchmarks. Telco tries to dodge *Newton II* by claiming that its price and time benchmarks eliminate the need for individual analysis to judge whether a customer received best execution.¹² Telco is wrong.

The SEC has specifically dismissed the idea of fixed time and price standards for evaluating best execution. *See* SEC, Trade Execution, *supra* (A112) (“No SEC regulations require a trade to be executed within a set period of time.”); Div. of Mkt. Reg., *Market 2000*, *supra*, at V-2–V-3 (A117-18) (“brokers have not been held by the [SEC], the [SROs] or the courts to an absolute requirement of achieving the most favorable price on each order”). Indeed, the SEC has expressly cautioned that price and time statistics “by themselves, do not demonstrate whether or not broker-dealers have complied with their legal duties to their customers, and to conclude otherwise would be contrary to the Commission’s prior statements . . . about the duty of best execution.” Disclosure of Order Execution and Routing Practices, 65 Fed. Reg. at 75,420.

¹² Telco also seeks refuge (at 26-27) in the rule that a reasonable approximation of damages suffices once injury is proven. But that rule does not obviate a plaintiff’s obligation to prove injury with certainty in order to establish liability. *See Union Ins. Co. v. Land & Sky, Inc.*, 568 N.W.2d 908, 911 (Neb. 1997) (“[u]ncertainty as to the fact of whether damages were sustained at all is fatal to recovery”). Telco’s further suggestion (at 23, 26) that *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002), somehow limits *Newton II*’s relevance to this case is equally misguided. *Linerboard* distinguished *Newton II* because *Newton II* involved millions of transactions and not every putative class member was injured under the legal standard governing best execution claims. *Id.* at 157-58. Those same circumstances are present here.

Courts, too, have rejected proposed best execution benchmarks and formulas. In *Newton II*, the Third Circuit rejected the theory that “economic loss” could “be presumed by the purchase or sale of a security at the NBBO price” and dismissed the plaintiffs’ “effort to gloss over [the economic loss] requirement” with an expert’s “project[ion] that he could devise a formula” that would avoid the need for individual inquiries. 259 F.3d at 177-81, 187-88. And in *Pearce II*, the court rejected proposals for reliance and economic loss presumptions, including one that would presume injury from “the mere fact that a trade was ‘away’ from the NBBO.” 2004 WL 5282962, at *8-*11. Established best execution law thus thoroughly and definitively refutes Telco’s claim that its price and time benchmarks can conclusively identify best execution failures.¹³

Telco has never cited a single legal authority that blesses its benchmark approach. Telco instead invokes (at 26) its expert’s opinion that Telco’s price and time benchmarks identify trades that did not receive best execution and resulted in injury. *See* Lowry Rep. at 7, 9 (A358, A360). But that opinion is not based on any

¹³ Federal law would preempt any effort to impose under state law a best execution standard different from the “facts and circumstances” approach endorsed by the SEC. *See* Disclosure of Order Execution and Routing Practices, 65 Fed. Reg. at 75,420 (“the possibility of multiple, inconsistent standards in interpreting” execution price and time statistics “in relation to various state law claims could tend to frustrate the statutory objective of establishing and monitoring the development of a national market system and would undermine the Commission’s effort to assure the practicability of brokers achieving best execution”); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-74 (2000) (frustration of federal objectives requires preemption).

legal authority; indeed, Mr. Lowry has conceded that Telco’s approach is “distinguishe[d] . . . from most, if not all, academic and regulatory discussions on best execution” (Lowry Decl. ¶ 2 (DA85-86)), including his own publications.¹⁴ In any event, Mr. Lowry’s opinions cannot change the law governing best execution claims. *See S. Pine Helicopters*, 320 F.3d at 842. Nor can his opinions deprive Defendants of their right to defend against individual class member claims based on the unique circumstances of individual trades. *See Gene & Gene LLC v. Biopay LLC*, No. 07-30195, 2008 WL 3511766, at *5-*8 (5th Cir. Aug. 14, 2008) (right to present individual consent defense).¹⁵

Telco also claims (at 4) that TD Ameritrade itself uses execution times and NBBO prices to measure best execution. But nothing in the TD Ameritrade

¹⁴ A 2001 article by Mr. Lowry explains that best execution analysis requires one to “examine the particular transactions” and consider trade-specific factors, including the “character of the market for the security (e.g., price, volatility, relative liquidity, and pressure on available communications)” and the “size and type of transaction.” Robert W. Lowry, *The Elements of Best Execution*, in *Securities Arbitration 2001*, at 403, 408, 412 (PLI Corp. Law & Practice Course Handbook Series No. B0-0158, 2001) (A395, A397). The article does not mention Telco’s time and price benchmarks.

¹⁵ As a factual matter, moreover, a market order can receive best execution even if execution takes more than four minutes and occurs at a price worse than the NBBO when TD Ameritrade received the order, because of its size, its value, or market conditions. *Kleidon Aff.* ¶¶ 29-45 (A300-08); *Kleidon Supp. Aff.* ¶¶ 5-6 (A401-02). Indeed, the NBBO when TD Ameritrade receives an order is irrelevant because not even Mr. Lowry suggests that orders can be executed instantaneously upon receipt. Telco’s benchmarks also say nothing about whether TD Ameritrade, which routed the order, or the market center that executed the order is responsible for an offending execution. *Kleidon Aff.* ¶ 40 (A305).

documents suggests that any such statistic, much less either of Telco's invented benchmarks, is dispositive on the issue. The reported statistics only indicate median execution times and percentages of NBBO-or-better executions for certain types of smaller orders (as defined in the document); they do not purport to set a standard for best execution. 5/19/06 Br., Ex. E (A81, A84-85). To the contrary, the cited documents state "there is no single standard of what determines best execution." 5/19/06 Br., Ex. E (A83).

The only legally supported method for deciding a best execution claim is the multi-factor "facts and circumstances" standard articulated by the SEC and the courts. Thus, in the class action Telco proposed, a court would have to first determine for each putative class member how long a reasonable execution should have taken based on the order characteristics and market conditions.¹⁶ If a faster execution was warranted, the court would then have to determine what price would

¹⁶ At the class certification hearing, counsel for Telco illustrated the need for individualized inquiries when he tried to rebut Defendants' position that the 300,000-share short sale within the class definition received best execution:

We do not know, for example, what Mr. Kriss asserts is true, that it took two minutes to determine whether they can borrow the securities. We don't know whether it took two minutes or one second. We do not know whether it took two minutes to determine whether plaintiff's credit was sufficient. Presumably there was a credit limit on the account, and that took one second. We do know that it took two minutes for them to route the order. But we don't know that they had any excuse for that.

9/25/06 Tr. at 67-68 (A476-77).

have been obtained on that faster execution based on the order characteristics and market conditions. If that alternative price was better than the price actually obtained, the court would then have to determine if TD Ameritrade rather than the market center or someone else was responsible for the faulty execution.

As the district court correctly recognized and every court to consider the matter has held, the need to conduct such individual, trade-by-trade analyses causes individualized issues to predominate and precludes class certification. *See also Blades*, 400 F.3d at 573-74 (no predominance where “individualized market conditions” required price-by-price analysis); *Owner-Operator*, 339 F.3d at 1012 (no predominance where court had “to examine each individual class member’s account”); *Glover*, 283 F.3d at 966 (no predominance where legal standard required transaction-by-transaction analysis).

2. Other Individual Questions.

Proof that TD Ameritrade injured a customer by not providing best execution would not alone establish liability on Telco’s causes of action. Each cause of action has additional elements and is subject to myriad defenses that, just like best execution, depend on proof unique to each putative class member. Those elements and defenses thus further preclude common-question predominance. *See Gene & Gene*, 2008 WL 3511766, at *5-*8 (considering defenses in judging

predominance); *Broussard*, 155 F.3d at 342 (same). A brief sampling of such issues demonstrates the point.

Fraudulent Statements. Notwithstanding its claims to the contrary (at 25), Telco expressly bases its breach of contract and NCPA claims on allegations that Defendants made fraudulent statements regarding TD Ameritrade's order processing abilities and order execution speed. Compl. ¶¶ 45, 50 (A28-29). To prove those claims, Telco and other putative class members would have to show that they relied on the fraudulent statements (for the NCPA claim) and that the fraudulent statements caused their alleged injuries (for both claims). *See Lange Indus., Inc. v. Hallam Grain Co.*, 507 N.W.2d 465, 475 (Neb. 1993) (breach of contract requires proof of causation); *Little v. Gillette*, 354 N.W.2d 147, 149, 151-52 (Neb. 1984) (NCPA requires proof of reliance and other elements of common law fraud). Only individualized inquiries into the experiences of each class member can test whether such proof exists. *See St. Jude Med., Inc., Silzone Heart Valve Prods. Liab. Litig. (St. Jude II)*, 522 F.3d 836, 838-40 (8th Cir. 2008); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 567 (E.D. Ark. 2005). That is why this Court and others refuse to certify class actions to litigate fraud claims like Telco's. *See St. Jude II*, 522 F.3d at 838-40; *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 217-24 (5th Cir. 2003); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664-68 (9th Cir. 2004).

Written Objection Requirements. TD Ameritrade's customer contracts incorporate two provisions that make trade terms conclusive and binding if the customer does not submit to TD Ameritrade a timely, written objection. *See* pp. 11-12, *supra*. Courts routinely enforce such written objection provisions to bar suits over unobjected-to trades. *See, e.g., Modern Settings, Inc. v. Prudential-Bache Sec., Inc.*, 936 F.2d 640, 645-46 (2d Cir. 1991); *Goldberg v. Kidder Peabody & Co., Inc.*, 991 F. Supp. 215, 217-21 (S.D.N.Y. 1997); *see also Lincoln Commodity Servs. v. Meade*, 558 F.2d 469, 472 (8th Cir. 1977) (affirming finding of authority to trade based in part on failure to object per customer agreement). The written objection provisions in TD Ameritrade customer contracts thus may supply Defendants with a viable defense against many putative class members. But whether a particular class member submitted a written objection to a particular trade requires a trade-specific analysis. And the possibility that a class member may try to rebut the defense by arguing that it is an unsophisticated investor or that it did not receive the relevant confirmation or account statement creates the prospect of further individualized inquiries.

Estoppel, Waiver, and Ratification. Where a putative class member did not object to the trade at issue and continued to trade through TD Ameritrade in the weeks, months, or years that followed the trade at issue, Defendants can assert the overlapping defenses of estoppel, waiver, and ratification. *See, e.g., Baye v. Airlite*

Plastics Co., 618 N.W.2d 145, 150-51 (Neb. 2000) (estoppel); *Combined Ins. v. Shurter*, 607 N.W.2d 492, 499 (Neb. 2000) (ratification); *Wegner v. West*, 100 N.W.2d 542, 547, 549 (Neb. 1960) (waiver). For class certification purposes, the key elements of the defenses—lack of contemporaneous objection, continued trading through TD Ameritrade, and knowledge or notice of the alleged order processing and execution facts—all require class member-specific and order-specific inquiries. See *Karlen v. Ray E. Friedman & Co. Commodities*, 688 F.2d 1193, 1197-1201 (8th Cir. 1982) (considering ratification, waiver, and estoppel defenses to unauthorized trading claims under South Dakota law).

Limitation of Liability. TD Ameritrade’s customer contracts incorporate a number of provisions limiting Defendants’ liability to TD Ameritrade customers. One provision, for example, protects Defendants from liability “for any loss resulting from [the customer’s] use of the Web sites, including, but not limited to, failure of electronic or mechanical equipment or communication lines, [or] telephone or other interconnect problems.” 9/03 Terms & Conditions ¶ 59 (A221). Under that provision—which is only one of several such limitations of liability—Defendants have a complete defense if an execution received on a particular order was due to a systems failure. See *Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.*, 571 N.W.2d 64, 69-70 (Neb. 1997) (enforcing “limitation of liability clause”). But such a defense would apply only to the particular order at issue.

Whether it would extend to other orders depends on the unique circumstances of those orders.

* * *

In sum, class-wide adjudication of Telco's claims will require class member-by-class member and trade-by-trade inquiries into numerous liability issues. Those individualized inquiries far predominate over any common questions.

Accordingly, the district court did not abuse its discretion in denying class certification on predominance grounds.

C. Class Litigation Is Not Superior To Other Methods For Resolving The Claims In This Case.

Aside from saying (at 27) that the district court's superiority decision follows from its predominance decision, Telco does not challenge the district court's finding that "[a] class action is not a superior method of resolution of the issues compared to individual arbitration or litigation because of the individualized nature of the claims and defenses." 11/16/06 Rep. & Rec. at 16 (A506). That finding was not an abuse of discretion.

Among the key factors in judging whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" is the manageability of the proposed class litigation. Fed. R. Civ. P. 23(b)(3). The number and difficulty of the individualized issues in this suit would render any class action utterly unmanageable. Indeed, when faced with only one of the

individualized issues present here—best execution—the Third Circuit found superiority lacking in *Newton II*. 259 F.3d at 190-93. In language that easily fits this case, the *Newton II* court concluded:

In terms of efficiency, a class of this magnitude and complexity could not be tried. There are simply too many uncommon issues, and the number of class members is surely too large. Considered as a litigation class, then, the difficulties likely to be encountered in the management of this action are insurmountable.

Id. at 192 (internal quotation marks omitted).

Moreover, TD Ameritrade customers can pursue any best execution claims in the standard NASD (now FINRA) arbitration (*see* p. 12, *supra*)—a method by which broker-customer disputes have been resolved for decades, using procedures approved by the SEC. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232-34 (1987). Those arbitrations come before panels composed of one industry expert and two non-industry lay people, can be prosecuted *pro se*, can be conducted on written submissions for small claims, permit certain discovery, allow use of subpoena powers, authorize money awards, and can result in awards of attorneys’ fees to the prevailing party. *See* NASD Rule 10302 (simplified arbitration), 10308 (arbitrators), 10316 (representation by counsel), 10321 (discovery), 10322 (subpoena power), 10330 (money awards); *Marshall & Co., Inc. v. Duke*, 114 F.3d 188, 189-90 (11th Cir. 1997) (*per curiam*) (authority to award attorneys’ fees). With individual NASD/FINRA arbitrations available as an

effective and agreed-to alternative, there can be no doubt that the proposed class litigation is an inferior method of adjudication. *See Baum v. Great W. Cities, Inc., of N.M.*, 703 F.2d 1197, 1210 (10th Cir. 1983) (affirming decision that class litigation was not superior to arbitration).

D. Telco’s Claims Are Not Typical Of The Claims Of Other Putative Class Members.

Telco disputes the district court’s finding that it “failed to meet its burden of showing its claims are typical of those of the putative class because there are widely varying circumstances for each trade” (11/16/06 Rep. & Rec. at 12 (A502)) on the ground that its time and price benchmarks eliminate any need to consider those varying circumstances. We have already shown why that argument is wrong. As a matter of law, each trade’s particular “facts and circumstances” must be considered in determining whether it received best execution. *See pp. 36-43, supra*. Because liability thus is “dependent on the facts of the individual case” and requires “a case-by-case determination,” typicality is absent in this case. *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1004-05 (8th Cir. 2004); *see also Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994) (“widely varying circumstances” triggering challenged practice defeated typicality).

That Telco seeks recovery on a 300,000-share, \$11 million short sale and faces a written objection defense adds to the atypicality of Telco’s claims. The 300,000-share short sale is far larger than the usual trades placed by TD

Ameritrade customers, as Telco concedes (at 14), and would require a different best execution analysis because it was manually processed and exceeded the prevailing NBBO size. *See* Kleidon Aff. ¶¶ 31, 35, 39, 61 (A302-04, A315-16); Kleidon Supp. Aff. ¶¶ 5-6, 12 (A401-02, A405). Likewise, Telco very well could lose its case because it failed to make a written objection, regardless of whether it or any other putative class member received best execution. *See* p. 45, *supra*.¹⁷

Telco is in a position similar to the plaintiff that this Court found atypical in *In re Milk Products Antitrust Litigation*: a convenience store that, unlike the bulk of the proposed price-fixing class, made small purchases at list prices and was subject to an individual standing defense. 195 F.3d at 436-37. Unlike the bulk of the proposed class here, Telco made large purchases exceeding the NBBO size and is subject to an individual defense. Telco says (at 13-15) that *Milk Products* is distinguishable because it affirmed on standing grounds alone and it barred small purchasers, not large purchasers, from representing a class. But Telco is wrong on both counts. The *Milk Products* Court expressly affirmed on typicality grounds as well. 195 F.3d at 436. And *Milk Products* did not turn on the size of the plaintiff's purchases, but rather on whether those purchases were of the same size as those

¹⁷ The district court ruled that Telco's failure to make a written objection, although a unique defense, did not by itself defeat typicality. 11/16/06 Rep. & Rec. at 10-11 (A500-01). Defendants' argument, however, has always been that all of the unique circumstances of Telco's claims, together, make those claims atypical. Telco's futile effort to distinguish "unique defense" precedents from other circuits (at 15-19) thus is largely beside the point.

made by the bulk of the putative class. *Id.* at 437.¹⁸ *Milk Products* thus further confirms that Telco’s claims are atypical and unsuitable for class certification. The district court did not abuse its discretion in so holding.

IV. SLUSA Prevents This Case From Proceeding As A Class Action.

Even if the substantial predominance, superiority, and typicality problems described above did not preclude class certification, the class action that Telco has proposed could not be maintained. The Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) “denies plaintiffs the right to use the class-action device to vindicate” state-law securities fraud claims. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87 (2006). Telco’s state-law class-action claims fall squarely within SLUSA’s preemptive scope.

To prevent plaintiffs from circumventing the stringent, uniform requirements applicable to federal securities fraud actions, SLUSA amended the Securities Act of 1933 and the Securities Exchange Act of 1934 to preempt class-action securities fraud suits brought under state law. SLUSA, Pub. L. No. 105-353, § 101, 112 Stat. 3227, 3228, 3230; H.R. Conf. Rep. No. 105-803, at 13-15 (1998) (SLUSA’s purpose “is to prevent plaintiffs from seeking to evade the protections that Federal

¹⁸ Telco claims that *Pearce II*, 2004 WL 5282962, at *6, also supports its typicality arguments, but the *Pearce II* court mistakenly accepted the *Pearce II* plaintiff’s invented execution benchmarks for purposes of judging typicality and Telco mistakenly assumes that Defendants claim Telco is atypical because of its supposed sophistication as an investor.

law provides against abusive litigation”); *Dabit*, 547 U.S. at 82 (noting purpose); *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 877 (8th Cir. 2002) (same). Reading the law’s two preemption provisions together, SLUSA forbids (1) a “covered class action”; (2) based on state law; (3) by a private party; (4) that alleges the defendant made an untrue statement, misrepresentation, or omission of a material fact or used a manipulative or deceptive device or contrivance; (5) “in connection with the purchase or sale”; (6) of a “covered security.” 15 U.S.C. §§ 77p(b), 78bb(f)(1). In defining SLUSA’s preclusive scope, moreover, courts have been guided by the fact that “Congress envisioned a broad interpretation of SLUSA to ensure the uniform application of federal fraud standards.” *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 299 (3d Cir. 2005); *see also Dabit*, 547 U.S. at 86 (“A narrow reading of the statute would undercut the effectiveness of [the PSLRA] and thus run contrary to SLUSA’s stated purpose.”).

In the district court, the only SLUSA requirement in dispute was whether Telco alleged a fraud. Telco argued its claims do not require proof of fraud. 9/8/06 Pl.’s Reply at 6 (A348). Judge Thalken determined that SLUSA did not apply because Telco “disavowed” its fraud allegations. 11/06/06 Rep. & Rec. at 16 (A506). Judge Bataillon did not specifically address Defendants’ SLUSA arguments. 1/13/07 Order (A523).

Telco's complaint specifically alleges fraud. It states that Defendants "fail[ed] to disclose Ameritrade's true ability to process trades," "advertis[ed] false information on trade speed execution," and made "fraudulent statements." Compl. ¶¶ 45, 50 (A28-29). And it explicitly or implicitly invokes those allegations in support of each of Telco's causes of action. *Id.* ¶¶ 48, 52, 55, 61 (A29-30). In this Circuit and others, such express fraud allegations trigger SLUSA preclusion no matter how the plaintiff otherwise pleads its case. *Prof'l Mgmt. Assocs., Inc. Employees' Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003) (claims making or incorporating misrepresentation and omission allegations precluded); *Rowinski*, 398 F.3d at 296, 299-300 (similar); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 48 n.17 (2d Cir. 2005) (claim precluded where related claims alleged fraud), *rev'd on other grounds*, 547 U.S. 71 (2006).

Telco also implicitly alleged fraud by resting its claims on TD Ameritrade's alleged failure to provide best execution. A broker under a duty of best execution impliedly represents that it will exercise reasonable diligence to obtain the most advantageous terms for customer orders and assumes a duty to inform customers when it will not seek best execution. *See* Regulation NMS, 70 Fed. Reg. at 37,538; *Newton I*, 135 F.3d at 269, 273. Accordingly, the SEC and the Third Circuit have described the failure to provide best execution as securities fraud. *See* Regulation NMS, 70 Fed Reg. at 37,538; Div. of Mkt. Reg., *Market 2000, supra*, at V-1-V-2

& n.10 (A116-17, A131); *Newton I*, 135 F.3d at 274. And district courts have held that state-law claims based on supposed failures to supply best execution allege fraud for SLUSA purposes. *Kurz v. Fidelity Mgmt. & Research Co.*, No. 07-CV-709, 2008 WL 2397582, at *3-*4 (S.D. Ill. June 10, 2008); *In re NYSE Specialists Sec. Litig.*, 405 F. Supp. 2d 281, 306-08 (S.D.N.Y. 2005); *Pearce v. UBS PaineWebber, Inc. (Pearce I)*, C/A No. 3:02-2409-17, 2003 WL 25518056, at *13 (D.S.C. Nov. 4, 2003); *Prager v. Knight/Trimark Group, Inc.*, 124 F. Supp. 2d 229, 234-35 (D.N.J. 2000). Applying SLUSA to best execution claims is likewise consistent with this Court's rule that SLUSA is satisfied, even absent explicit fraud allegations, if the "target," "essence," or "substance" of complaint is a claim of fraud. *Dudek*, 295 F.3d at 879-80; *see also Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095-96 (11th Cir. 2002) (similar).

There is no merit to Telco's claim that SLUSA does not apply because the causes of action Telco asserts supposedly do not require proof of fraud. Just recently, this Court explained: "In determining whether SLUSA applies, we do not rely on the names of the causes of action that the plaintiff alleges. . . . SLUSA preemption is based on the conduct alleged, not the words used to describe the conduct." *Kutten v. Bank of Am., N.A.*, 530 F.3d 669, 670-71 (8th Cir. 2008); *see also Rowinski*, 398 F.3d at 300 (similar). Thus, this Court and others have applied SLUSA to each of Telco's causes of action. *Kutten*, 530 F.3d at 670 (breach of

contract and fiduciary duty); *Prof'l Mgmt. Assocs.*, 335 F.3d at 803 (breach of fiduciary duty, negligence, consumer fraud); *Dudek*, 295 F.3d at 879 (breach of fiduciary duty); *Rowinski*, 398 F.3d at 296, 299-300 (breach of contract and consumer protection); *Pearce I*, 2003 WL 25518056, at *13 (breach of best execution duties).

Telco's purported disavowal of its fraud allegations likewise does not save its class claims from SLUSA. To begin with, Telco never disavowed its fraud allegations. Those allegations remain in Telco's unamended complaint, and Telco reaffirmed at the class certification hearing that it intended to prove "that Ameritrade willfully misrepresented its execution speeds and the number of times it obtained best execution." 9/25/06 Tr. at 12 (A421). In any event, merely disavowing explicit fraud allegations does not grant SLUSA immunity. Indeed, this Court has held that even amending a complaint to delete all fraud allegations does not rescue a suit targeting alleged conduct that in substance remains unchanged after the amendments. *Dudek*, 295 F.3d at 879-80; *see also Behlen*, 311 F.3d at 1095-96 (same); *Kurz*, 2008 WL 2397582, at *3 (SLUSA applied where fraud allegations "disclaim[ed]"); *NYSE Specialists*, 405 F. Supp. 2d at 307 (same). That ruling controls here.

Not only does this suit meet SLUSA's requirements, it is also precisely the type of case Congress intended SLUSA to preclude. Telco wants to use Nebraska

law to hold TD Ameritrade to a best-execution standard utterly at odds with the one articulated by the SEC and applied under federal law. SLUSA exists to prevent such efforts to undermine federal standards with a hodgepodge of inconsistent state standards. *See pp. 50-51, supra.*

Telco's proposed class action thus warrants SLUSA preemption, both in letter and in spirit. Accordingly, if the Court reviews the denial of class certification and does not affirm on predominance, superiority, or typicality grounds, it should affirm under SLUSA.

CONCLUSION

For the foregoing reasons, Defendants respectfully ask that the Court dismiss this appeal for lack of jurisdiction or as moot. In the alternative, Defendants ask that the Court affirm the denial of class certification under Rule 23 or SLUSA.

September 15, 2008

Respectfully submitted,

s/ Joshua D. Yount

Robert J. Kriss

Joshua D. Yount

MAYER BROWN LLP

71 South Wacker Drive

Chicago, Illinois 60606

(312) 782-0600

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 14-point Times New Roman font.

An accompanying CD-ROM contains a digital version of this Brief in PDF format that can be searched and copied. The PDF file copied to the CD-ROM has been scanned for viruses and is virus-free.

s/ Joshua D. Yount

Counsel for Defendants-Appellees

CERTIFICATE OF FILING AND SERVICE

I caused ten copies of this Brief, three copies of the Appendix to this Brief, and a CD-ROM containing a digital version of this Brief to be placed with third-party commercial carrier United Parcel Service on September 15, 2008, for overnight delivery to:

Michael E. Gans, Clerk of Court,
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
Room 24.329
111 South 10th Street
St. Louis, MO 63102

I also caused two copies of this Brief, one copy of the Appendix to this Brief, and a CD-ROM containing a digital version of this Brief to be placed with third-party commercial carrier United Parcel Service on September 15, 2008, for overnight delivery to:

Max Folkenflik
FOLKENFLIK & MCGERITY
1500 Broadway, 21st Floor
New York, NY 10036

Joseph A. Ruta
RUTA & SOULIOS
1500 Broadway, 21st Floor
New York, NY 10036

s/ Joshua D. Yount

Counsel for Defendants-Appellees