No. 21-845

In the
Supreme Court of the United States

DAVID PITLOR,
Petitioner,

v.

TD AMERITRADE, INC.,
CHARLES SCHWAB & CO., INC.
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID L. PITLOR., P.E.
Professional Mechanical Engineer
State of Nebraska License No. E-17959
2001 South 60TH Street
Omaha, NE 68106
(531) 375-1392
pitlor@gmail.com

Petitioner

December 3, 2021

QUESTIONS PRESENTED

QUESTION #1:

Does res judicata preclude a cause of action for conspiracy that arises after a Complaint was filed, but prior to that initial claim's dismissal, if the new claims *could have* been introduced via supplement to an earlier pleading?

QUESTION #2:

When a signatory's provision of services has been interfered with by a stranger to the parties' arbitration agreement, does this issue concern "the making of the arbitration agreement" as specified by 9 U.S.C. § 4 of the Federal Arbitration Act, such that the alleged conspiracy must be tried before the district court?

PARTIES TO THE PROCEEDING

Petitioner David Pitlor was the Appellant-Plaintiff below.

Respondents TD Ameritrade, Inc. ("TD") and Charles Schwab & Co., Inc. ("Schwab") were the Appellees-Defendants below. Kutak Rock LLP was an Appellee-Defendant to the proceedings below (Claim #1) but is not a respondent to this Petition which concerns the other causes of action.

CORPORATE DISCLOSURE STATEMENT

Petitioner David Pitlor hereby states that he does not own 10% or more of any publicly held corporation.

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PETITION FOR WRIT OF CERTIARI

Virtually any dispute can be subject to an arbitration agreement. "Unless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all their disputes —including disputes about the validity of their broader contract—to arbitration." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019). Furthermore, "parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Ctr. v. Jackson*, 561 U.S. 63, 68-69 (2010) (quotation marks omitted). But the Federal Arbitration Act ("FAA") explicitly sets aside for judicial determination those issues which call into question "the making of the arbitration agreement":

> If **the making of the arbitration agreement** or the failure, neglect, or refusal to perform **be in issue**, the court shall proceed summarily to the trial thereof.
>
> Excerpt from 9 U.S.C. § 4 (**emphasis added**)

When Petitioner David Pitlor ("Pitlor") opened his Schwab Account, he agreed to arbitrate any dispute that could arise from his relationship with Respondent Schwab. "The making" of that arbitration agreement, however, was corrupted thereafter by Schwab's collusion with Respondent TD.[1] Moreover, the Respondents' ultra vires acts

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[1] As discussed further herein, this petition focuses on RICO Claims #4 and #5 (18 U.S.C. 1962(a) and 18 U.S.C. 1962(c), respectively) which concern the theft from Pitlor's Schwab Account in 2018. The scheme operated by interposing Pitlor's

could justify invoking the FAA's savings clause.[2] Yet, even if Schwab's arbitration agreement remains enforceable, the provisions which delegate authority to the arbitrator to resolve claims involving third-party service providers have been irreparably confounded and must be severed from the agreement.

The Respondents' collusion has never previously been *in issue*. Nevertheless, Respondent TD's culpability for this alleged conspiracy was deemed precluded by the res judicata determination applicable to Claim #1. But that cause of action concerned only Pitlor's TD Ameritrade Account, altogether separate from the claims involving Respondent Schwab, as set forth by Claims #2, #3, #4, #5, and #6 and which correspond to later events involving Pitlor's Schwab accounts. The district court recognized that Pitlor's newfound allegations set forth "new evidence in support of his claims, of events after his previous lawsuit was filed." App.8. Still, all claims against Respondent TD were barred—even concerning the Schwab Account—because Pitlor "*could* have presented [the new allegations] to the Court the first time around, but didn't." *Id.*

The district court went on to conclude that res judicata precludes relitigating arbitrability (App.9)

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closed TD account to comingle funds with and extract assets from the Schwab Account.

[2] *See* 9 U.S.C. § 2: "A written provision . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

and proceeded to "dismiss these claims with direction that Pitlor, should he wish to pursue them, do so through arbitration." App.10. But that ruling skips litigating the *issue* of arbitrability altogether and operates as a ruling on the merits of the *claims*—through the back door no less. The Federal Arbitration Act ("FAA") directs the district court to "proceed summarily to the trial thereof" those matters in dispute which concern "the making of the arbitration agreement." 9 U.S.C. § 4. The FAA was never consulted though, so these critical threshold issues were never addressed.

The FAA's explicit instructions were disregarded due to the district court's drastic departures from this Court's binding authorities regarding claim and issue preclusion. The Eighth Circuit summarily affirmed the dismissal and thereby erred for failing to intervene. This case is the rare occasion whereby a district court "so far departed from the accepted and usual course of judicial proceedings" and a Court of Appeals "sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *Supreme Court Rule 10.*

Due process warrants further proceedings. This petition should be granted.

OPINIONS BELOW

The Court of Appeals for the Eighth Circuit's unpublished opinion is reproduced at App.1 (Case No. 0:2021-CV-1797).

The district court of Nebraska's Memorandum and Order is reproduced at App.2–19. (Case No. 8:20-CV-267-JMG, filing 36).

JURISDICTION

The Eighth Circuit issued its opinion on September 7, 2021. This Petition was sent via U.S.P.S. certified mail on December 3, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The most relevant provisions of 18 U.S.C. § 1029 – *Fraud and related activity in connection with access devices*, are reproduced at Appendix C, App.20-21.

The most pertinent sections of the Federal Arbitration Act, 9 U.S.C. § 2 and 9 U.S.C. § 4, are reproduced at Appendix D, App 22-23.

STATEMENT OF THE CASE

A. The alleged conspiracy entails claims *and* issues that have never been litigated.

1. The Instant Action is preceded by three other lawsuits, the first which was filed in 2017 regarding activity in Pitlor's TD Ameritrade account in 2016 and 2017.[3] That suit was dismissed for failure to state a claim in 2018.

The two previous suits against Respondent Schwab were brought in 2018 and 2019. Both were stayed and ordered to arbitration, then later dismissed for failure to prosecute in 2020—*after* the

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[3] The Operative Pleading for Pitlor's suit against Kutak Rock LLP and Respondent TD Ameritrade was filed on November 17th 2017. *See Pitlor v. TD Ameritrade*, No. 8:17-CV-359, 2018 WL 3997118 (D. Neb. April 19, 2018), *aff'd sub non. Pitlor v. T.D. Ameritrade,* 749 F. App'x 479 (8th Cir. 2019).

Amended Complaint was filed for this Instant Action.[4]

The Instant Action is the first to allege a conspiracy claim against the Respondents as codefendants. "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). And of course, "if the second case be upon a different cause of action, the prior judgement or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgement or decree judgment or decree was rendered." *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 319 (1927).

Notwithstanding the finality of the previous rulings, Schwab's recent acquisition of TD does not grant privity retroactively for events that transpired while the Respondents were separate, rival firms. "[T]he general rule that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008)(internal quotation marks omitted)

2. Crucial evidence was fraudulently concealed, but Pitlor eventually figured out how his Schwab Account was exploited. In 2020, he exposed the pernicious scheme, finally, by formulating

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[4] *See Pitlor v. Charles Schwab and Co.* Nos: 8:18-CV-196-JFB and 8:19-CV-95-JFB, 2020 WL 5593906 (D. Neb. Sept. 18, 2020).

mathematical proof of damages. Those numerical analyses revealed, unexpectedly, that his closed TD Account played an integral role in perpetrating the theft and money laundering from his Schwab Account, and the proof of damages thereby implicates Respondent TD Ameritrade's joint and several liability for the pattern of racketeering activities set forth by RICO Claims #4 and #5. "When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). The self-concealing nature of the scheme ostensibly justifies an exception to res judicata for fraud, but this petition is argued on other grounds.

In addition to the mathematical proof, the clearly documented pattern of fraud and related activities in connection with access devices further affirms this conclusion[5]: Pitlor's closed TD account was secretly linked to his Schwab Account. "And precluding an issue that was not actually litigated—*i.e.* , not raised, contested, and submitted for determination—does not conserve judicial resources or facilitate reliance on the earlier judgment because resources were not expended on the issue in the first place." *Janjua v. Neufeld*, 933 F.3d 1061, 1067 (9th Cir. 2019). "Unreflective invocation of collateral estoppel . . . could freeze doctrine in areas of the law where responsiveness to changing patterns of conduct or social mores is critical." *Montana v. United States*,

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[5] *See* Predicate Counts #10C and #18. *See also* Appendix C (setting forth the most relevant statutory provisions of 18 U.S.C. § 1029).

440 U.S. 147, 163 (1979). "Even if an issue is not explicitly raised, if it is necessary to the ultimate determination, it is 'necessarily decided.' But if an issue is actually litigated if it was implicitly raised, the requirement of actually litigated is rendered meaningless." *Janjua*, 933 F.3d at 1066.

B. RICO Claims #4 and #5 are the primary focus of this Petition.

1. The Amended Complaint sets forth three RICO causes of action: Claims #1, #4, and #5.[6] Claim #1 alleges a violation of 18 U.S.C. 1962(c) for the theft from Pitlor's TD account in 2016 and 2017. As set forth by Predicates #1–#9, the association-in-fact enterprise included Respondent TD Ameritrade and its third-party service providers. *See* App.46–48. The district court barred Claim #1 after finding the same nucleus of operative facts to be in issue against the same defendants as his original suit brought in 2017. *See* App.6-8. This petition does not challenge the lower courts' determinations insofar as they concern RICO Claim #1.

RICO Claims #4 and #5 allege that Pitlor's closed TD Ameritrade account was covertly linked to his Schwab brokerage account in 2018 to facilitate the theft and money laundering that occurred. These

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[6] Pitlor's appeal to the Eighth Circuit did not challenge the dismissal of Claim #2— *Civil Action for deprivation of rights*, Claim #3 — *Conspiracy to Interfere with Civil Rights*, nor the antitrust Claims #6A and 6B. Those pleadings do, however, set forth facts and evidence that are relevant to RICO Claims #4 and #5. Pitlor proposed a Second Amended Complaint to consolidate the pertinent materials. *See Appellant Brief* at 63–65 (Eighth Circuit Case No. 21-1797, Filing ID # 5048869, (5/24/2021))

causes of action, pursuant to § 1962(a) and § 1962(c), respectively, both correspond to the racketeering activities set forth by Predicates #10–#18. *See* App.48–51. Execution of this scheme critically required deprivation of Pitlor's rights under the color of federal law, 12 CFR § 220 ("Reg T"). *See Claim #2.* "It involves deliberate plotting to subvert the laws . . And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). While RICO Claims #4 and #5 claims stand on their own accord as distinguishable causes of action, they may also constitute the expansion and continuation of the enterprise and pattern of racketeering activities set forth by Claim #1.

Proof of damages in the Schwab Account required analysis of official records issued *after* the dismissal of original suit (which pertained only to his TD Ameritrade account). Therefore, even according to the broadest definition of "could have", still there was no way Pitlor *could have* introduced RICO Claims #4 and #5 prior to the original action's dismissal, and res judicata "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Lawlor v. Nat'l Screen Serv.*, 349 U.S. 322, 328 (1955).

2. In 2018, the Respondents conspired to facilitate unauthorized access to Pitlor's accounts and devices through manipulation of their electronic services and mobile applications. *See Predicate #18* which describes a pattern of fraud and related

activities in connection with access devices prohibited by 18 U.S.C. § 1029[7]. The existence of their *unlawful agreement* is definitively established by the error logs generated by the Respondents' mobile applications on Pitlor's smartphone:[8]

> The *unlawful agreement* contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all.
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> *Pinkerton,* 328 U.S. at 647 (1946) (emphasis added)

The district court took notice of TD's involvement, (albeit in rejecting the antitrust "tying" allegations set forth by Claim #6B):

> Pitlor's claim seems to be premised on a claim that Charles Schwab provided services but *secretly* processed those services in conjunction with TD. Filing 8 at 104. But because he wasn't *forced* to separately purchase any

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[7] *See also* Predicate #7 (alleging access-device fraud occurring in 2017 pertaining to Claim #1). *Amended Complaint* at 48–51.

[8] Other evidence also supports that Pitlor's closed TD Ameritrade account was covertly revived and then linked to his newly opened Schwab account, which thereby established the illicit conduit through which funds were illicitly converted. *See Predicate* #10C (conspiracy to commit money laundering). *Amended Complaint* at 172-175.

> services from TD, there wasn't anything to tie together, much less "two distinct products".
>
> Memorandum and Order
> App.15a

"A 'conspiracy' is an illegal agreement. There is, of course, a difference between the question whether an agreement is illegal and the question whether an admittedly illegal agreement gives rise to a cause of action for damages." *Beck v. Prupis*, 529 U.S. 494, 507 (2000) (Justice Stevens, dissenting). Here, the Respondents manipulated their mobile applications via debugging and other customized commands to gain unauthorized access to Pitlor's accounts and devices. *Id.* (Predicate #18). The digital trespassing entails issues apart from, but nonetheless firmly buttresses the mathematical formulations and other evidence that necessarily implicate the critical role of Pitlor's closed TD Account—a different species of "unauthorized access device" qualified by 18 U.S.C. § 1029(e)(3) (includes any access device that is "expired, revoked, canceled, or obtained with intent to defraud"). App.20.

In *Beck*, this Court ruled that § 1962(d) liability did not arise from acts that furthered the objectives of a conspiracy but were not alleged to have proximately caused the damages. While a §1962(d) claim is not at issue here, allegations of conspiracy to commit money laundering and wire fraud predicate the §1962(a) and § 1962(c) causes of action. Respondent TD Ameritrade's involvement is inseparable from the analytical proof that a series of illicit conversions were executed via Mutual Funds Purchases (Predicate #10B).

"[T]o bring a claim under § 1962(a), a plaintiff must allege an injury from the use or investment of the racketeering income that is separate and distinct from injuries allegedly caused by the defendant's engaging in the predicate acts." *Fogie v. Thorn Americas*, 190 F.3d 889, 896 (8th Cir. 1999). And in this case, the contrivances that actually concealed cash value, misrepresented the account balances, and manipulated the official records were distinguishable acts apart from the conversion transactions themselves (*see* Predicates #11–#18). At the very least, the unreported transaction fees that were determined to have been assessed should qualify as an "investment injury" for the purposes of §1962(a).[9]

The *Amended Complaint* demonstrates how damages were caused by a potent, multi-faceted, open-ended scheme. The parameters were satisfied to qualify causes of actions pursuant to both §1962(a) and § 1962 (c). "And, of course, if petitioner were already harmed by conduct covered by one of those provisions, he would hardly need to use § 1962(d)'s conspiracy provision to establish a cause of action." *Beck v. Prupis*, 529 U.S. 494, 512 (2000).

C. The cause of action for conspiracy was genuinely discovered.

1. The Instant Action for conspiracy is substantiated by precisely calculated damages that herald the involvement of Pitlor's TD Ameritrade account. Pitlor's two previous suits against

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[9] The relevance of Key Value $224.80 is explained further herein. *See also* Appendix E at App.25.

Respondent Schwab were ordered to arbitration, but Respondent TD was not a party to those actions.[10] In late 2019, as Pitlor prepared to arbitrate his dispute against Schwab, he was not seeking to prove the existence of a conspiracy. Nor was he interested in relitigating the issue of arbitrability. His goal was to formulate exact damages calculations so to definitively prove that injury occurred.

The flawed account data was investigated comparably to (but millions of times slower than) how a computer organizes, classifies, and performs operations with numerical functions and mathematical abstractions to glean knowledge from information. Live data is supposed to corroborate the historical account data; these datasets are also supposed to be corroborated by the official records (e.g., Brokerage Statements, 1099-B tax filings). Pitlor tediously juxtaposed cash balances, total account values, and gain/loss figures from the various sources. Key Values were enumerated by identifying the instances where those datasets fail to corroborate each other.

The official record was subtly altered to eliminate or otherwise misrepresent the incriminating data. *Predicate #11.* Historical account data was also manipulated after the fact to eliminate evidence. But as his understanding progressed, Pitlor worked out the mechanics of how cash balances were targeted, concealed, and secretly converted—ultimately relying upon illegitimate restrictions

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[10] *See Jackson v. Lou Cohen, Inc.*, 618 N.E.2d 193, 196(Ohio Ct. App. 1992)(res judicata was found to not bar a buyer's claim regarding a tampered odometer because she did not suspect it had been tampered with at the time of the first suit.)

having been imposed under the color of federal law, 12 CFR § 220 ("Reg T").[11] *See* Claim #2.

While the account was supposedly frozen, a suspicious series of anomalies occurred whereby *Mutual Funds Buying Power* was inexplicably populated with value (while all other *Buying Power* was set to $0). *Predicate #10B.* Proving that these anomalous values correspond to actual damages was an especially formidable task because Pitlor had been unlawfully restricted from accessing account records and other information.[12,13]

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[11] As set forth in detail by *Claim #2:*

1.) Total account value was understated due to erroneous cash accounting (coinciding with bogus *Settled Cash Upfront* restrictions imposed under the color of 12 CFR § 220).

2.) Targeted values were converted via *Mutual Funds Buying Power* (while account was frozen due to "Pattern Day Trader" restriction, also imposed illegitimately under the guise of compliance with 12 CFR § 220)

(The unlawfully converted assets were presumably delivered to Pitlor's "closed" TD Account so that the beneficial ownership of assets could be usurped in clandestine fashion via same mechanisms evidenced by *Claim #1 – Predicate #7* (18 U.S.C. § 1029)).

[12] When Pitlor notified Schwab of the erroneous accounting relating to his Futures Account, Schwab denied that any errors occurred. *See* Amended Complaint at 81. By the next day, however, the futures account was closed without any prior notice or explanation thereafter. Weeks later, access to his brokerage account was also abruptly, unlawfully shuttered several days prior to the date that had been specified in writing by Schwab. *Id.* at 71. Pitlor's previous actions against Schwab emphasized these issues.

[13] Schwab blatantly violated the Electronic Funds Transfer Act 15 U.S.C. § 1693c.(b) (requiring a financial institution to furnish notice "in writing at least twenty-one days prior to the effective date of any change in any term of condition" "if such a change would result in . . . decreased access to the consumer's

2. After unreported *Mutual Funds* purchases were suspected to have occurred, Pitlor's understanding rapidly progressed. But exact solutions remained elusive; The calculations were consistently off by a few dollars and cents. Close indeed, but *almost* does not suffice as "mathematical proof."

Pitlor had previously recognized some similarities to the erroneous margin accounting in his TD Account. By happenstance, Pitlor noticed some irregularities indicating some changes to his "closed" TD Ameritrade account—which still had a balance of $3.51. *See Amended Complaint* at 172–175 (Predicate #10C). Soon thereafter he revealed a shocking discovery: Once $3.51 was inducted into the analysis, a multitude of relationships amongst the Key Values could be precisely enumerated—including exact derivations of the total damages, $82,864.25. *See* Appendix E: *Mathematical Formulations* (App.24). The table on the following page is one example out of the several corroborating derivations that are presented throughout *Amended Complaint*:

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account"). Furthermore, Pitlor notified Schwab of their erroneous accounting and requested explanations, but they refused to furnish "reproductions of all documents which the financial institution relied on to conclude that such error did not occur." 15 U.S.C. § 1693f.(d). EFTA claims were the primary focus of Pitlor's 2019 action against Schwab.

DAMAGES IN THE SCHWAB ACCOUNT

KEY VALUE	DESCRIPTION [nature of error]
$13,768.61	Sweep to Futures [erroneous cash/margin accounting]
$51,698.63	Sweep to Futures [erroneous cash/margin accounting)
$10,982.00	Funds Due (illegitimate debt)
$3,404.57	Futures Margin Call [unaccounted]
$2,702.27	Disallowed Wash Sale Losses [illegitimate]
$224.80	***Transaction Fees* [unreported]**
$54.28	Interest Paid to Schwab [error uncertain]
$29.54	*Balance Subject to Interest* [unreported]
$2.29	Cash Discrepancy
– $3.51	**TD Ameritrade Account Balance**
$82,864.25	**TOTAL**

Predicate Count #10C at 191

Pitlor determined that illicit conversions via Mutual Funds purchases *must have* occurred. Then he solved that transaction fees were charged for the illicit, unreported conversions (Key Value $224.80),[14]

[14] $224.80 is especially relevant because—also unique to Key Value $3.51—it was identified by introducing external data into

and finally derivations such as the foregoing could be formulated. "There is nothing to prevent anyone from writing down some arbitrary list of postulates and proceeding to prove theorums from them. But the chance of those theorums having any practical applications [is] slim indeed." App.33 (*Abstraction in Mathematics and Mathematical Learning,* Michael Mitchelmore, Proceedings of the 28th Conference of the International Group for the Psychology of Mathematics Education, Vol 3-22: pp 329–336 (2004) (referenced further hereto as "Appendix F"))

$3.51, the balance that remained in Pitlor's dormant TD Account, necessarily factors into the derivations of damages in the Schwab Account. Also, many *Key Values* are equal to be the sum of other *Key Values*. The cash accounting was contorted in tandem with separate contrivances targeting the gain/loss accounting, hence the

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the analysis of the Schwab account and, consequently, Pitlor was then able to iterate a coherent set of equations amidst an otherwise chaotic set of numerical terms. The source of $3.51 is the TD Ameritrade account—a new operative fact—and $224.80 was inducted from Schwab's contractual terms and conditions. 4 x $49.95 fee for Mutual Funds Purchases, plus $25 for a transfer fee, equals $224.80 (While there are six documented *Mutual Funds Buying Power* anomalies, Mutual Funds transactions occur once each day, at settlement). Subsequently, equations were derived that support damages consistent with the following:

$82,864.25 + $224.80 = $83,089.05, implying that $224.80 was perhaps initially accounted for but then concealed separately. *See* Predicate Counts #17B and 17C ($83,089.05 calculated directly). On the other hand, the Respondents have repeatedly insisted that 'no errors exist.' Certainly, this is a genuine factual dispute which goes directly to the proof of damages and the notion of conspiracy and thus should be resolved by the lower courts.

remarkable complexity of the data manipulations and numerical calculations. Apparently, the intent was to conceal the intercedence of the TD Ameritrade account by ensuring that $3.51 could not be readily resolved from the historical data.

3. Theft from Pitlor's Schwab Account was secretly facilitated via transactions with his closed TD Account. Given the interwoven numerical relationships amongst the Key Values and $3.51, no other explanations for erroneous data appear to be plausible. *See* Appendix E for a few examples of the mathematical formulations.

The Respondents have categorically refused to engage except to describe the entirety of the allegations as unintelligible and frivolous. These pejorative labels can only speak to the identification and relevance of the Key Values, though, because the veracity of the numerical relationships can be readily affirmed by simple arithmetic. The district court aptly recognized that Pitlor's mathematical formulations depend "epistemic closure." App.11. The analysis conclusive demonstrates that that the official records offer neither a complete nor accurate representation of the cash balances or transactional accounting.[15] The proof of damages and conspiracy, however, relies on a system of equations whereby "the mathematical image of the system ensures that contradictions cannot occur in the system" as explained further by renowned physicist Werner Heisenberg:

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[15] The errors in Schwab's brokerage statements are subtle, but the official record is definitively impeached exclusively through analysis of that "official record" alone. *See* Predicate #12 (Key Values: $45,236.01, $16,870.41, $5795.11, and $3092.84).

> [T]hey form what one may call a 'closed system.' Each concept can be represented by a mathematical symbol, and the connections between the different concepts are then represented by mathematical equations expressed by means of the symbols. **The mathematical image of the system ensures that contradictions cannot occur in the system.** In this way the possible motions of bodies under the influence of the acting forces are represented by the possible solutions of the equations. The system of definitions and axioms which can be written in a set of mathematical equations is considered as describing an eternal structure of nature, depending neither on a particular space nor on particular time. The connection between the different concepts in the system in so close that one could generally not change any one of the concepts without destroying the whole system.
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> *Physics and Philosophy: The Revolution in Modern Science*, Werner Heisenberg (1958) pp. 67–68 (**emphasis added**)

The relationships amongst the Key Values denote an abstract significance, similar to how words convey meaning using letters. Just as each word has a meaning apart from the definitions of its constituent letters, the individually quantified *Key Values* have a higher-ordered significance relating to proof of damages and conspiracy—apart from their representing mere instances of error.

First, patterns of erroneous data were recognized. Then, the logical structures could be built with the *Key Values*, and finally a constructed system emerged constituting proof. Perhaps more than $82,864.25 was stolen. But not a penny less. That much is certain. This is consistent with the *Schwartz-Hershkowitz-Dreyfus Nested RBC (Recognizing, Building with, and Constructing) Model of Abstraction* which defines mathematical abstraction as:

> "an activity of vertically reorganizing previously constructed mathematics into a new mathematical structure. New mathematical objects are constructed by the establishment of connections, such as inventing mathematical generalizations, proof, or a new strategy of solving problem."
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> Appendix F at App.40

And moreover:

> An abstract mathematical object takes its meaning only from the system within which it is defined . . . [and] includes ignoring certain features of the underlying system while featuring others. But it is crucial that the new objects be related to each other in a consistent system which can be operated on without reference to their previous meaning. **Thus, self-containment is paramount.**"
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> Appendix F at App.31
> **(emphasis added).**

D. The conspiracy was pled with the requisite particularity

Pitlor's TD Account was covertly linked to his Schwab Account. The scheme featured complex layers of transactions beneath the surface of, but nonetheless intricately relating to the data that ultimately became enshrined as the official record. Rather than admitting that mistakes occurred and rectifying the damages, the Respondents instead reacted by unlawfully restricting Pitlor's access to information. Thereby, they aligned their interests with those who were unjustly enriched by the scheme. Even in their responses to inquiries from the SEC and FINRA, the Respondents refused to acknowledge any errors in the accounting or data.[16]

The lower courts were unconvinced, but whether the Court believes that Pitlor has set forth conclusive proof of Respondent TD's joint and several liability for the theft from Pitlor's Schwab account is, respectfully, a different question than whether a plausible claim for relief has been set forth. "At this stage of the proceedings, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Jackson v. Birmingham Bd.*, 544 U.S. 167, 184 (2005).

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[16] Both Respondents answered inquiries from the authorities with objectively false statements and misrepresentations to reject Pitlor's assertions of error . *See Amended Complaint* at 59–62, 85. Schwab's final act in furtherance of the conspiracy was the letter sent to both FINRA and Pitlor in July 2019 after the final order compelling Pitlor's dispute with Schwab to arbitration. *Id* at 85.

"[A] party must state with particularity the circumstances constituting fraud or mistake." F.R.C.P. 9(b). Therefore, the veracity of each *Key Value* was required to be independently established on its own merits, resulting in a rather lengthy pleading. Every error asserted is validated by separate evidence and detailed explanation because, otherwise, the so-called proof of damages given by abstract mathematical formulations would be insufficiently supported akin to "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The manipulative alterations of historical account data are especially troubling because 17 CFR § 240.17(a)-3 and § 240.17(a)-4 require account data to be stored in a non-rewritable, non-erasable format. These regulations appear to have been overtly disobeyed or strategically avoided, presumably enabled by the digital trespassing activities and other fraud in connection with the access device in violation of 18 U.S.C. § 1029. Record keeping errors—standing alone—do not substantiate a private right of action. But here, Pitlor was able to prove that the unrelenting patterns of record-keeping errors in fact correspond to the accrual and concealment of sums precisely targeted for theft, thereby revealing the ascertainable structure of the Respondents' conspiracy. Moreover, Pitlor was unlawfully prohibited from accessing account data and other information that would likely facilitate a more simplified proof of damages, and "[i]n enacting the Securities Exchange Act, Congress sought to substitute a philosophy of full disclosure for the philosophy of *caveat emptor.*" *New Prime Inc.*, 139 S.

Ct. at 544 (Justice GINSBURG, concurring) (quotation mark omitted).

REASONS FOR GRANTING THE PETITION

I. The making of Pitlor's arbitration agreement with Respondent Schwab is *in issue.*

1. The Respondents' collusion has confounded the delegation of authority to the arbitrator. In 2018, TD Ameritrade had no lawful capacity to be a third-party service provider to Schwab. The Respondents' clandestine partnership has thus spawned a controversy regarding which parties and disputes are eligible to be covered by Schwab's agreement. Fundamentally, "the question whether a person is a party to an arbitration agreement . . . is included within the statutory issue of the making of the arbitration agreement." *McAllister Bros. v. a S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980)(quotation marks omitted).

Respondent TD was a stranger to Pitlor's business relationship with Respondent Schwab. Clearly, Schwab's arbitration agreement has no capacity—intra vires—to entail anything involving TD Ameritrade:

> Arbitration Agreement. **Any controversy or claim arising out of or relating to** (i) this Agreement, any other agreement with Schwab, an instruction or authorization provided to Schwab or the breach of any such agreements, instructions, or authorizations;

> (ii) the Account, any other Schwab account or Services; (iii) transactions in the Account or any other Schwab account; (iv) or in any way arising from the relationship with Schwab, its parent, subsidiaries, affiliates, officers, directors, employees, agents or **service providers ("Related Third Parties"), including any controversy over the arbitrability of a dispute, will be settled by arbitration.**
>
> This arbitration agreement will be binding upon and inure to the benefit of the parties hereto and their respective representatives, attorneys-in-fact, heirs, successors, assigns and any other persons having or claiming to have a legal or beneficial interest in the Account, including court-appointed trustees and receivers. **This arbitration agreement will also inure to the benefit of third-party service providers that assist Schwab in providing Services ("Third-Party Service Providers")** and such Third-Party Service Providers are deemed to be third-party beneficiaries of this arbitration agreement.
>
> From Schwab One Account Agreement (2018) Section 26: Arbitration **(emphasis added)**

As concerns the "transactions in the Account or any other Schwab account... or in any way arising from the relationship with Schwab" (*Id.*), any decision on the merits inexorably requires consideration of TD's electronic services, the role of Pitlor's closed TD account, and the integral role of each with respect to Schwab's provision of services.

Thus, the cogency of the contractual agreements that Pitlor *made* with Schwab are *in issue*, and therefore the district court must adjudicate *that* dispute. *See* 9 U.S.C. § 4.

"[T]he invalidity of one provision *within an arbitration agreement* does not necessarily invalidate its other provisions, [so there must not exist any] magic bond between arbitration provisions that prevents them from being severed from each other." *Rent-A-Ctr.*, 561 U.S. at 72 n.3. But after the confounding provisions pertaining to "Related Third Parties" and "Third-Party Service Providers" are severed from Schwab's arbitration agreement, the surviving provisions cannot conceivably delegate authority to the arbitrator to decide claims against Respondent TD. Perhaps the arbitrator has no jurisdiction to adjudicate claims against Schwab whereby Respondent TD's electronic services or Pitlor's TD Ameritrade account are at issue, although that would seem to require invocation of the savings clause pursuant to 9 U.S.C. § 2, a separate matter altogether.

An unrelated third party's collusion with a signatory can spoil *the making* of an arbitration agreement even after the contract was signed. When Congress intends to impose strict parameters according to an actual *time*, the statute will include that explicit requirement. For example, see 28 U.S.C. § 1500 (barring jurisdiction of Federal Claims Court when other suits are pending "at the time when the cause of action in such process or suit arose."). The FAA contains no parallel instruction that limits "the making" to entail only those facts and circumstances in existence at the *time* the contract was signed. *See*

Ross v. American Exp. Co., 547 F.3d 137, 146 (2d Cir. 2008)(finding that an arbitration agreement could not be enforced because "a third party allegedly attempt[ed] to subvert the integrity of the cardholder agreements").

2. Schwab's arbitration agreement covers any prospective controversy that involves a third-party service provider, but "arbitration under the Act is a matter of consent, not coercion" and "we give effect to the contractual rights and expectations of the parties." *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). When Pitlor opened his Schwab brokerage account, there was no conceivable basis to expect that TD Ameritrade could be party to any controversy concerning his contractual agreements with Schwab. Several months earlier, Respondent TD had explicitly declared that their decision to terminate their business relationship with Pitlor was final.[17] Clearly, it was not reasonable to anticipate that his closed TD Ameritrade account could ever be significant to anything concerning his relationship with Schwab.

"It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is *contemplated* and that the defendants conformed to the *arrangement*." *United States v. Paramount Pictures*, 334 U.S. 131, 142 (1948)(emphasis added). The "arrangement" here was "contemplated" by the Respondents' coordinated digital trespassing that facilitated access and

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[17] *See Amended Complaint at 57* (TD Ameritrade's letter from 8/28/2017 informing Pitlor of "the decision to terminate our business relationship" and further instructing him to "not attempt to open a new TD Ameritrade account in the future.")

modification of mobile application data pertaining to Schwab account activity, balances, and transaction data. *See Predicate #18.* This evidence of the Respondents' implied agreement substantiates Pitlor's ultra vires contract defense:

> A contract of a corporation, which is ultra vires, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization . . . is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.
>
> *Hummel v. Warren Steel Casting Co.*, 5 F.2d 451, 452 (8th Cir. 1925).

In accordance with *Hummel,* justice may require restoring the parties to their respective positions at the first documented instance of TD Ameritrade's interference on March 1, 2018. Such an argument, however, is beyond the scope of this petition.

3. While claims against TD cannot be arbitrated pursuant to the contractual agreement made between Pitlor and Schwab, arbitrable claims against Respondent Schwab could yet proceed—conceivably. But first, the arbitrability of the alleged conspiracy must be determined by the district court because that ***issue*** pertains to the making of the arbitration agreement.

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same **be in issue**, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such **issue**. Where such an **issue** is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such **issue**, and upon such demand the court shall make an order referring the **issue or issues** to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose."
>
> Excerpt from 9 U.S.C. § 4:
> (**emphasis added**)

Indeed, 9 U.S.C. § 4 frequently refers to *issue(s)*. The FAA mandates that the court "shall proceed summarily to the trial thereof" those "matters in dispute" that concern "the making of the arbitration agreement." *Id.* Whether a claim for conspiracy exists against Respondent TD is most certainly ***in issue*** and concerns ***the making*** of Pitlor's agreement to arbitrate with Respondent Schwab.

4. The arbitrability issue is inextricably intertwined with res judicata. In the Instant Action, Pitlor asserts claims against the Respondents as codefendants. Previous determinations of arbitrability in 2018 and 2019, regarding claims not involving TD Ameritrade, were nonetheless carried over and held applicable so to preclude the

evaluation of arbitrability with respect to the Instant Action. But the district court did not order this dispute to arbitration. The Instant Action was dismissed, thereby operating as a ruling on the merits that *the making* of Schwab's arbitration agreement is not *in issue*—even though Pitlor's ultra vires defense was never considered. Additionally, this is profoundly flawed because "[w]hen the parties' contract assigns a matter to arbitration, a court may not resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019). Therefore, a ruling on the merits is improper unless it has been determined that the making of the arbitration agreement ***is*** in issue.

The lower courts decided that "res judicata precludes relitigating arbitrability," but no legal standard was explicitly stated or followed, and "crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards." *Taylor*, 553 U.S. at 901 (citation omitted). The district court did cite an instance wherein issue preclusion righteously applied (App.9), but in that case "[t]he legal issue presented to the district court in the [previous] action...[was] the same as that presented to the district court in [the following action]" *City of Bismarck v. Toltz, King, Duvall*, 767 F.2d 429, 431 (8th Cir. 1985). Accordingly, the Eighth Circuit found—in that case—that "because the parties have had a full and fair opportunity to litigate the issue, the parties should not be allowed to relitigate the proper interpretation of the arbitration clause of the contract" *Id.* at 431.

This case is decidedly different because the Respondents' conspiracy entails legal issues that have never been litigated previously. Respondent TD is ineligible to be bound by Schwab's arbitration agreement; Their interference has thus birthed a controversy which concerns "the making" of Schwab's arbitration agreement. The FAA explicitly sets aside these disputes to be resolved by the district court, not the arbitrator. 9 U.S.C. § 4. Certainly, Pitlor's ultra vires contract defense could constitute "grounds...for the revocation on any contract." 9 U.S.C. § 2. No such inquiries were conducted, however, because this case was decided without consulting the FAA at all.

II. This Court's binding authority was betrayed by the lower courts having precluded claims that "*could have*" supplemented an earlier pleading.

1. The opportunity to supplement a pleading is not an obligation. The district court found that Pitlor *could have* set forth the conspiracy allegations prior to the dismissal of the original 2017 Action, but because of the "actually litigated" requirement unique to issue preclusion, "[an argument] that the issue should be foreclosed because it was *implied* or *ought* to have been raised... is precisely the sort of preclusion reserved for *claim* preclusion, not issue preclusion." *Janjua*, 933 F.3d at 1067 (9th Cir. 2019). And critically—"[i]f the arbitrator lacked authority to entertain the matters advanced in the later litigation, claim preclusion does not apply." *Lenox Maclaren Surgical Corp. v. Medtronic, Inc.*, 847 F.3d 1221, 1245 (10th Cir. 2017).

The district court barred all claims against Respondent TD, including those arising after his original 2017 suit was filed, because "Pitlor could have presented them the first time around, but didn't." App.8a. Even presuming that to be a true statement,[18] it would still be wrong as a matter of law. The governing principle was recently reaffirmed by this Court:

> Events that occur after the plaintiff files suit often give rise to new "[m]aterial operative facts" that "in themselves, or taken in conjunction with the antecedent facts," create a new claim to relief.
>
> *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S. Ct. 1589, 1596 (2020) (quoting Restatement (Second) § 24, Comment *f*, at 203)

Every Circuit Court of Appeals has universally adopted the same posture. [*See Wedow v. City of Kansas*, 442 F.3d 661, 669 (8th Cir. 2006) ("Res judicata . . . does not apply to claims that did not exist when the first suit was filed."); *See Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008) ("The filing of a suit does not entitle the defendant to continue or repeat the unlawful conduct with immunity from further suit"); *See also Manego v. Orleans Board of Trade*, 773 F.2d 1, 6 (1st Cir. 1985) ("There will be situations where the factual bases for separate

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[18] The mathematical proof of damages rely on Key Values that could not be identified until the April Statement was issued in May 2018—after the 4/19/2018 dismissal of the original action against TD Ameritrade, et al: Case No. 8:17-CV-359.

causes of action are different but intertwined and joining them together is both possible and convenient. A failure to do so, however, will not justify the application of *res judicata.*"). *See Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) ("[T]he existence of the doctrine of res judicata does not make the filing of supplements mandatory.") And moreover "because plaintiffs have no duty to amend or supplement their pleadings, normally res judicata does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Hammond v. Krak*, 20-1850, at *1 (3d Cir. Aug. 30, 2021) (quotation marks omitted). *See also Curtis v. Citibank*, 226 F.3d 133, 139 (2d Cir. 2000) ("The crucial date is the date the complaint was filed. The plaintiff has no continuing obligation to file amendments to the complaint to stay abreast of subsequent events; plaintiff may simply bring a later suit on those later-arising claims.") *See also Welsh v. Fort Bend Indep. Sch. Dist.*, 860 F.3d 762, 766 (5th Cir. 2017) (res judicata does not bar claims accruing after filing of first suit and further that there is no obligation to amend); Additionally, "an action need include only the portions of the claim due at the time of commencing that action, because the opportunity to file a supplemental complaint is not an obligation." *Rawe v. Liberty Mutual Fire* Insurance, 462 F.3d 521, 530 (6th Cir. 2006) (quotation marks omitted). "*Res judicata* does not bar parties from bringing claims based on material facts that were not in existence when they brought the original suit." *Apotex, Inc. v. Food Drug Admin*, 393 F.3d 210, 218 (D.C. Cir. 2004)].

The Fourth and Tenth Circuits seem to embrace a slightly different standard, but there is no disagreement regarding the core tenets applicable to new claims that are substantiated by unique operative facts. [*See Lenox Maclaren Surgical Corp.*, 847 F.3d at 1244 (10th Cir. 2017) ("[C]laim preclusion does not bar subsequent litigation of new claims based on facts the plaintiff did not and could not know when it filed its complaint."; "[T]he instant subsequent claims arise from operative facts that are separate and distinct from those underlying [the] initial claims, and therefore constitute new causes of action." *Union Carbide Corp. v. Richards*, 721 F.3d 307, 315 (4th Cir. 2013)].

Insofar as Schwab's Client Agreement specifies the contract to be interpreted according to California state law, *See Allied Fire Protection v. Diede Construction, Inc.*, 127 Cal.App.4th 150, 155 (Cal. Ct. App. 2005): "'The scope of litigation is framed by the complaint at the time it is filed.' Res judicata is not a bar to claims that arise after the initial complaint is filed." (quoting *Los Angeles Branch NAACP v. L.A. Unified Sch. Dist.* 750 F.2d 731, 739. (9th Cir. 1984))

2. Even by a strict "same evidence" test, res judicata is not eligible to bar RICO Claims #4 and #5 against Respondent TD. The district court found that the dismissal of Pitlor's previous lawsuit against Respondent TD, pertaining exclusively to activity in his ***TD Ameritrade account in 2016 and 2017***, nonetheless precluded claims against TD concerning activity in his ***Schwab Account in 2018***. *See* App.7–8. But res judicata precludes only those

claims that "arise out of one and the same act or contract":

> The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. The test for identity is: Would the same evidence support and establish both the present and the former cause of action?
>
> *U.S. v. Tohono O'Odham Nation*, 563 U.S. 307, 316 (2011) (cleaned up).

Claim #1 was determined to be the same cause of action brought in 2017, and therefore claim preclusion was deemed applicable. The causes of action against Respondent TD for RICO Claims #4 and #5 must not be precluded, however, since different parties, time periods, enterprises, and damages are at issue. "The defendants by winning [the preceding lawsuit] did not acquire immunity in perpetuity..." *Harkins Amusement Enterprises, Inc. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989).

The chart on the following page compares RICO Claim #1 to RICO Claims #4 and #5:

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COMPARISON OF RICO CAUSES OF ACTION

ISSUES	CLAIM #1 (TD Account)	CLAIMS #4 and #5 (Schwab Account)
Defendant	1. TD, 2. Kutak Rock	1. Schwab, 2. TD
Years Active	2016-2017	2018
Entities Relevant to the Enterprise	1. TD, 2. Gainskeepers, LLC. 3. Third Party Vendors and service providers (unnamed)	1. Respondents 2. Google 3. Meta ("Facebook") 4. Amazon 5. Pitlor's TD Account
Pattern of Racketeering Activities	fraud involving access devices, 18 U.S.C. § 1029; Various additional wire fraud and money; laundering predicates (including conspiracy)	
Continuity	Open or Closed	Open (or Closed if Claim #1 issues are included)
Total Calculated Damages	$91,401.05	$82,864.25
Additional Unjust Enrichment	Unknown	$9,999,999.00

3. Nor could res judicata justifiably preclude the *issue* of TD's interference with Schwab's provision of services. Pitlor's previous actions against Respondent Schwab included no claims against TD Ameritrade. Still, Schwab could have posited "***as an***

affirmative defense but failed to do so" that Respondent TD unlawfully infiltrated its systems and interposed his closed TD Ameritrade account to carry out a scheme without their knowledge or consent. Of course, Respondent Schwab is not barred from raising that affirmative defense. Nor can Pitlor be estopped from raising the issue of Respondent TD's involvement to establish his cause of action for conspiracy:

> *See* Restatement (Second) of Judgments § 27, cmt. (e) (1982) (A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. [. . .] **An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so. . .)**
>
> *Janjua* at 1066 (**emphasis added**) (quotation mark omitted)

III. Due process requires further proceedings to determine the arbitrability of the matters in dispute.

1. The importance of this case as concerns fundamental rules of law cannot be overstated. For the Federal Arbitration Act to operate as it was written, the arbitrability of disputes that involve "the making of an arbitration agreement" must be litigated before the district court. If the dismissal stands, it is questionable whether Pitlor even *could* arbitrate his claims because dismissal for failure to state a claim operates on the merits and now covers every issue entailed by the Instant Action. At any rate, the FAA's explicit instructions set forth by 9

U.S.C. § 4 were *disregarded*. "Due process is denied by judicial decision (as distinguished from mere error) whenever fundamental principles are *disregarded* or vested rights acquired under settled rules of local law are divested by reversal of such settled rules, or by a decision in violation thereof." *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 123 (1912) (*emphasis added*). The Supreme Court should intervene to ensure that the Federal Arbitration Act is not cast aside due to erroneous rules of law fashioned for res judicata.

2. New issues comprise the Instant Action arising from genuinely discovered facts—that have never been at issue previously. Pitlor respectfully asserts that his mathematical formulations constitute verifiable, simultaneous proof of both damages and conspiracy. *See* Appendix E (App.24-28). The argument that Pitlor merely 'added a defendant and claimed conspiracy'—as the Respondents argued—should at least address the merits of the evidence purporting to show otherwise. After all, res judicata is an affirmative defense that must be proven. *See* F.R.C.P 8(c).

The lower courts appear to have doubts regarding the significance of the arithmetic. Yet the district court recognized that, "[t]he Court must assume the truth of the plaintiff's factual allegations, and a well-pleaded complaint may proceed, even if it strikes a savvy judge that actual proof of those facts is improbable, and the recovery is very remote and unlikely." App.3 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Pitlor's should have the opportunity to address any questions regarding the

veracity of his mathematical formulations either via a hearing or if necessary, by amending his pleading.[19] But to date his identification of the Key Values and the accompanying mathematical formulations stand uncontested, so the burden should be on the Respondents to answer.

Pitlor's brokerage accounts were targeted by elaborate, multi-faceted schemes over the course of several years. The Respondents concealed their regulatory failures rather than correcting known instances of error. Wrongdoing of the sort underlying the allegations here, respectfully, should be more potently deterred especially since proof is so elusive and difficult to come by. In *New Prime Inc. v. Oliveira*, the Supreme Court evoked that, "'[t]he development of' 'concepts' regarding 'the limits of the relationship and continuity concepts that combine to define a Racketeer Influenced and Corrupt Organizations pattern' 'must await future cases....'" *Id.* 139 S. Ct. at 544 (citing from *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243 (1989). If schemes can evade the law due to their sheer complexity, then the unchecked threats posed by our rapidly advancing technology are certain to result in significant harm to others in the future.

When wrongdoers get caught, they ought to be held to answer, and "[b]y including a private right of action in RICO, Congress intended to bring the

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[19] There have been no hearings for this Instant Action or for any of the preceding suits.

pressure of private attorneys general...'" *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 283 (1992) (quotation marks omitted).

CONCLUSION

Further proceedings are warranted. The Court should grant the petition.

Respectfully Submitted,

David Pitlor 12/03/2021

DAVID L. PITLOR., P.E.
Professional Mechanical Engineer
State of Nebraska License No. E-17959
2001 S. 60th St.
Omaha, Nebraska 68106
(531) 375-1392
pitlor@gmail.com

Petitioner
December 1, 2021

TABLE OF APPENDICES

APPENDIX A

United States Court of Appeals For the Eighth Circuit

No. 21-1797

David Pitlor
Plaintiff – Appellant
v.
T.D. Ameritrade, Inc.; Charles Schwab & Co., Inc.; Kutak Rock LLP
Defendants - Appellees

Appeal from United States District Court for the District of Nebraska – Omaha

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Submitted: September 1, 2021
Filed: September 7, 2021
[Unpublished]

Before SHEPHERD, GRASZ, and KOBES, Circuit Judges.

PER CURIAM.

David Pitlor appeals the district court's[1] dismissal of his pro se complaint. Following a careful review, we conclude that the district court did not err in dismissing the case. See *Plymouth Cnty. v. Merscorp, Inc.*, 774 F.3d 1155, 1158 (8th Cir. 2014) (de novo review). Accordingly, we affirm. See 8th Cir. R. 47B.

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[1] The Honorable John M. Gerrard, Chief Judge, United States District Court for the District of Nebraska.

Document Cover Sheet

Pitlor, David v. TD Ameritrade Inc., et al.

Appendix
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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DAVID PITLOR,

Plaintiff,

vs.

TD AMERITRADE, INC. et al.,

Defendants.

8:20-cv-267

MEMORANDUM AND ORDER

The plaintiff, David Pitlor, is suing TD Ameritrade and Kutak Rock LLP for the second time, and Charles Schwab & Co. for the third time, alleging once again that each of them is engaged in a complex criminal enterprise. *See Pitlor v. TD Ameritrade,* No. 8:17-CV-359, 2018 WL 3997118 (D. Neb. Apr. 19, 2018), *aff'd sub nom. Pitlor v. TD Ameritrade,* 749 F. App'x 479 (8th Cir. 2019); *Pitlor v. Charles Schwab & Co.*, Nos 8:18-CV-196 & 8:19-CV-95, 2020 WL 559 3906 (D. Neb. Sept. 18, 2020. Pitlor's theories and pleadings, however, remain unintelligible, and his claims have been disposed of before. The Court will, accordingly, grant the defendants' motions to dismiss his complaint.

APPENDIX B

I. STANDARD OF REVIEW

A complaint must set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P 8(a)(2). This standard does not require detailed factual allegations, but it demands more than an unadorned accusation. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The complaint need not contain detailed factual allegations, but must provide more than labels and conclusions; and a formulaic recitation of the elements of a cause of action will not suffice. *Bell Atl. Corp. v. Twombly,* 550 U.S. 554, 555 (2007). For the purposes of a motion to dismiss the Court must take all of the factual allegations in the complaint as true, but it is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.*

And to surivive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must also contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal,* 556 U.S. at 678. Determining whether a complaint states a plausible claim for relief will require the reviewing court to draw on its judicial experience and common sense. *Id.* The Court must assume the truth of the plaintiff's factual allegations, and a well-pleaded complaint may proceed, even if it strikes a savvy judge that actual proof of those facts is improbably, and that recovery is remote and unlikely. *Twombly,* 550 U.S. at 545.

But the facts must raise a reasonable expectation that discovery will reveal evidence to substantiate the necessary elements of the plaintiff's claim. *Id. at*

545. A claim has factual plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal,* 556 U.S. at 678. Where the well-pleaded facts do not permit the Court to infer more than the mere possibility of misconduct, the complaint has alleged—but has not shown—that the pleader is entitled to relief. *Id.* at 679.

II. DISCUSSION

Pitlor's allegations are, loosely described, premised on what might charitably be described as a "careful" reading of the data he extracted from sources such as account statements and transaction records, website and mobile app screen captures, and even logs from the defendants' mobile apps. *See* filing 8. From the clues he "discovered" there, he claims to have unwound a conspiracy to defraud him and launder money for purposes unknown. *See* filing 8.

On that premise, Pitlor asserts three claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.,* two constitutional civil rights claims, and a claim under the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* See filing 8 at 8-10. Specifically, he accuses TD Ameritrade and Kutak Rock of violating RICO, TD Ameritrade and Charles Schwab of violating RICO twice, Charles Schwab of violating his civil rights under color of state law, TD Ameritrade and Charles Schwab of conspiring to violate his Equal Protection

rights, and TD Ameritrade and Charles Schwab of acting in restraint of trade. See filing 8 at 8-10.

1. SHORT AND PLAIN STATEMENT OF THE CLAIM

To begin with, the defendants argue that Pitlor's complaint should be dismissed pursuant to Fed. R. Civ. P. 8(a)(2), which requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." See filing 14 at 17-18, filing 19 at 12-13. The Court agrees. The purpose of Rule 8(a) is to give the defendant fair notice of what the claim is and the grounds on upon which it rests. *Twombly*, 550 U.S. at 555. Pitlor's complaint does neither, and he should know that, because the Court has previously told him that "fair notice may be denied, not just by failing to set forth enough facts, but by burying a defendant in an avalanche of disjointed allegations." *TD Ameritrade*, 2018 WL 3997118, at *4.

Rule 8 is both a floor and a ceiling: it can be violated by a complaint that pleads too little and by a complaint that pleads too much. *Anderson v. Nebraska*, No. 4:17-CV-3073, 2019 WL 3557088, at *8 (D. Neb. Aug. 5, 2019) (citing *Residential Funding Co., LLC v. Acad. Mortg. Corp.*, 59 F. Supp. 3d 935, 947 (D. Minn. 2014)), *aff'd*, No. 20-2751 (8th Cir. Mar. 3, 2021). So, it's the plaintiff's burden to plead his claims concisely and clearly so that a defendant can readily respond to them and a court can readily resolve them. *TD Ameritrade*, 2018 WL 3997118, at

*4 (citing *Gurman v. Metro Hous. & Redevelopment Auth.*, 842 F. Supp. 2d 1151, 1153 (D. Minn. 2011)).

Pitlor hasn't met that burden here: his pleadings, including the attachments, contain 572 pages of factual allegations, evidence, argument, legal conclusions, and overheated rhetoric, with little attempt to distinguish among those categories. There's no clear explanation of how he purports to get from his mathematical analysis to multiple conspiracies, and nothing resembling a set of coherent factual allegations that any defendant could be expected to admit or deny. *See* Rule 8(b)(2). This is simply not a pleading susceptible to a reasoned or informed answer, and the Court won't require one.

2. RES JUDICATA

TD Ameritrade and Kutak Rock also argue, correctly, that Pitlor's claims against them are precluded by the Court's previous judgment. The claim preclusion principle of res judicata prevents the relitigation of a claim on grounds that were raised or could have been raised in the prior suit. *Banks v. Int'l Union Elec., Elec., Tech., Salaried & Mach. Workers*, 390 F.3d 1049, 1052 (8th Cir. 2004); see *Brownback v. King,* 141 S. Ct. 740, 747 n.3 (2021). A threepart inquiry is undertaken to determine whether res judicata applies: (1) whether the prior judgment was rendered by a court of competent jurisdiction; (2) whether the prior judgment was a final judgment on the merits; and (3) whether the same cause of action and the same parties or their privies were involved in both cases.

Banks, 390 F.3d at 1052. The first two requirements are clearly met. See *Brownback*, 141 S. Ct. at 748 (ruling under Rule 12(b)(6) that plaintiff has no cause of action is ruling on the merits).

With regard to the third requirement of res judicata, the Restatement (Second) of Judgments provides that when a judgment extinguishes the plaintiff's claim, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. *Banks*, 390 F.3d at 1052. What factual grouping constitutes a "transaction," and what groupings constitute a "series," are determined pragmatically, giving weight to factors such as whether the facts are related in time, space, origin, or motivation; whether they form a convenient trial unit; and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. *Id.* In short, a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim. *Id.; see Brownback*, 141 S. Ct. at 747 n.3; *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1594–95 (2020); *see also United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011).

Pitlor argues that his current claims arise from a different nucleus of operative facts from his 2017 lawsuit. See filing 24 at 6. But that argument doesn't survive even a cursory examination of his operative pleading, which relies extensively on

events that occurred before then and were alleged in his 2017 lawsuit. It is true, as Pitlor points out, that he's alleged new evidence in support of his claims, of events after his previous lawsuit was *filed*—but that's not the same as evidence arising after his previous lawsuit was *dismissed*, and to the extent that the Court can make sense of his pleading, it seems as if most if not all of the new allegations on which he's relying arose after the April 2018 dismissal of his first lawsuit. E.g. filing 8 at 100. So, he *could* have presented them to the Court the first time around, but didn't.

And more broadly, the gist of his complaint isn't that he discovered a new conspiracy different from the one he claims to have discovered in 2017. Rather, his argument is that the conspiracy he discovered in 2017 was bigger than he thought. He's added Charles Schwab to the conspiracy, and he's presenting what he says is additional evidence, but it's fundamentally the same scheme— that is, fundamentally grounded in the same "nucleus of operative facts"—and the extent to which his present claims still depend on the same events he alleged in 2017 demonstrates that conclusively. *See Magee v. Hamline Univ.*, 775 F.3d 1057, 1059 (8th Cir. 2015); *see also Midwest Disability Initiative v. JANS Enters., Inc.*, 929 F.3d 603, 610 (8th Cir. 2019).

3. ARBITRATION CLAUSE

For its part, Charles Schwab contends that Pitlor's claims against it are, like his previous claims, subject to binding arbitration. Filing 19 at 6-

10. Again, the Court agrees. To begin with, Pitlor's present claims against Charles Schwab arise out of the same nucleus of operative facts as his previous claims, the primary difference simply being that all the malfeasance he claimed in 2018 and 2019, he now claims was actually part of a RICO enterprise. *Compare* Charles Schwab & Co., 2020 WL 5593906, at *1, *with* filing 8. And res judicata precludes Pitlor from relitigating the arbitrability of the dispute. *See City of Bismarck v. Toltz, King, Duvall, Anderson & Assocs., Inc.,* 767 F.2d 429, 430- 31 (8th Cir. 1985).

Pitlor argues that while he agreed to arbitrate disputes arising from his relationship with Charles Schwab, his current claims are actually based in disputes arising from Charles Schwab's relationship with TD Ameritrade. Filing 24 at 44. But Pitlor's only suing Charles Schwab based on that relationship because of his relationship with Charles Schwab, and his claims all rest substantially on that relationship and transactions in that account, in addition to activity in his TD Ameritrade account. Pitlor can't escape arbitration just by adding a defendant and claiming a conspiracy. *See JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 175 (2d Cir. 2004); *see also PRM* Energy Sys., Inc. v. Primenergy, L.L.C., 592 F.3d 830, 836-37 (8th Cir. 2010); *Daisy Mfg. Co. v. NCR Corp.*, 29 F.3d 389, 396 (8th Cir. 1994).[2]

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[2] That includes Pitlor's so-called civil rights claims. As will be explained below, those claims are wholly frivolous. But even if colorable, they would be subject to arbitration: Pitlor says he

Pitlor's claims against Charles Schwab, yet again, belong in arbitration. Charles Schwab asks the Court to dismiss the claims as a result. Filing 26 at 9. The Court has considered whether the entire controversy between the parties can be resolved by arbitration, and whether Pitlor might be prejudiced by dismissal rather than a stay of these proceedings. *See Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 770 (8th Cir. 2011). Under the unique circumstances of this case, however, those considerations aren't precisely implicated—there is no reason to believe an arbitration is likely to occur. Indeed, Pitlor has previously been ordered to arbitrate, and those cases were dismissed because of Pitlor's failure to prosecute them. *See Charles Schwab & Co.*, 2020 WL 5593906, at *3. Given Pitlor's recalcitrance, the Court sees no benefit to the same pointless exercise, and will dismiss these claims with direction that Pitlor, should he wish to pursue them, do so through arbitration.

4. FAILURE TO STATE A CLAIM

The defendants also argue, in the alternative, that Pitlor's complaint should be dismissed for

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was discriminated against with the conduct alleged in his other claims, and was denied rights under federal law through the defendants' administration of his accounts. Filing 8 at 69-85. Recasting arbitrable claims with spurious civil rights theories won't evade arbitration either. In the context of employment, civil rights claims can be subjected to arbitration, *McNamara v. Yellow Transp., Inc.*, 570 F.3d 950, 957 (8th Cir. 2009), and the Court sees no reason to treat financial services differently.

failure to state a claim. See filing 13; filing 18. For the sake of completeness, the Court agrees.

(a) RICO claims

Much of the Court's reasoning was explained in its 2018 decision. *See TD Ameritrade*, 2018 WL 3997118, at *5-8. Specifically, to begin with, Pitlor's RICO claims continue to be predicated on fraud allegations that haven't been pled with the requisite particularity. *Id.*, at *5-6. To plead fraud, Pitlor ought to be able to at least clearly allege something as simple as what funds he deposited, what he purchased and sold, and what happened to his assets and funds as a result of the alleged fraud. But while the Court can make out that Pitlor apparently deposited $28,000 with Charles Schwab, and borrowed additional funds on margin, the rest gets lost.

Part of the problem is that Pitlor seems to interpret fleeting instances of the transaction logs as value which, because it was there for a moment, became his. But he hasn't shown how he was prejudiced by any errors. And there is a logical fallacy central to his claims: the "discrepancies" he claims to have found only exist with reference to the same documentation, so he's attempting to prove fraud by relying on documents that, at the same time, he's arguing are unreliable. There are no external sources, as simple as a bank record, to establish a reliable frame of reference. Instead, Pitlor's argument depends on epistemic closure. But to show something was stolen, he needs to connect

the transaction summaries he's describing to *actual assets* that he provably owned.

The Court can't find that in the complaint, and not for lack of trying. It's impossible to parse because Pitlor's theories explained by completely eliding distinctions between funds on deposit, margin equity, buying power, profits and losses, wash sale losses,[3] etc.—and because buying on margin includes borrowing, eliding those distinctions means eliding the difference between money Pitlor owned and credit he didn't. The "key values" upon which Pitlor depends, see filing 8 at 100, are as best the Court can tell just numbers that appear in more than one place, suggesting to Pitlor that they must be related even if it's not evident how.

And as the Court previously explained, even the non-fraud predicates for Pitlor's RICO allegations are insufficient: he has alleged only one purported scheme, concerning one alleged victim, which doesn't establish a pattern of racketeering activity. *TD Ameritrade*, 2018 WL 3997118, at *6. And more fundamentally, Pitlor's allegations of predicate criminal activity are simply not plausible. *Id.* at *7. His theory, apparently, is that the defendants were engaged in extremely subtle and elaborate financial sleight of hand to cover up evidence of wrongdoing on *their own account statements*—statements that were

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[3] Wash sale losses are different for tax purposes, but that's all. A $50 loss on a sale is just a $50 loss, whether or not it's designated a wash sale. *See* 26 U.S.C. § 1091. It's not clear—very little is—but it seems like perhaps Pitlor believes otherwise. See filing 8 at 39-40.

allegedly falsified (when they contradict Pitlor's theory) and yet also scrupulously accurate (when they support Pitlor's theory). Even if there were mistakes—and that's far from obvious—there's nothing to bootstrap them into federal crimes, as opposed to state-law torts at most.

(b) Civil Rights Claims

Pitlor's civil rights claims are also insufficient, as the Court previously explained. A claim under 42 U.S.C. § 1983 requires the defendants to act under color of state law, which they didn't. *See TD Ameritrade*, 2018 WL 3997118, at *7. And a claim under 42 U.S.C. § 1985(3) requires class-based invidious discrimination, which he hasn't alleged facts to support. *See TD Ameritrade*, 2018 WL 3997118, at *7-8. It's questionable whether the "class-of-one" theory Pitlor relies on is even cognizable under § 1985(3). *See, e.g., Overcash v. Shelnutt*, 753 F. App'x 741, 746 (11th Cir. 2018); *Royal Oak Ent., LLC v. City of Royal Oak*, Michigan, 205 F. App'x 389, 399 (6th Cir. 2006); *Abreu v. Farley* No. 6:11-CV-06251, 2019 WL 1230778, at *28 (W.D.N.Y. Mar. 15, 2019); *Higgins v. Saavedra*, No. 17-CV-234, 2017 WL 3052774, at *6 (D.N.M. June 15, 2017); *Kolstad v. Cty. of Amador*, No. 2:13-CV-1279, 2013 WL 6065315, at *9 (E.D. Cal. Nov. 14, 2013); *Potter v. City of Tontitown*, No. 06-5194, 2007 WL 9728823, at *8 (W.D. Ark. Aug. 13, 2007), *aff'd sub nom. Potter v. Tontitown, City of*, 307 F. App'x 18 (8th Cir. 2009); *McCleester v. Dep't of Lab. & Indus.*, No. 3:06-CV-120, 2007 WL 2071616, at *15 (W.D. Pa. July 16, 2007); *Brewer v. Comm'r, Internal Revenue*,

435 F. Supp. 2d 1174, 1179 (S.D. Ala. 2006). But even if it was, it would require Pitlor to identify a favored class and "provide a specific and detailed account" of their preferred treatment, which he hasn't. *See Robbins v. Becker*, 794 F.3d 988, 996 (8th Cir. 2015); *see also Barstad v. Murray Cty.*, 420 F.3d 880, 884 (8th Cir. 2005).

(c) Antitrust Claim

Finally, Pitlor's antitrust claim is also insufficient.[4] Under the Sherman Antitrust Act, it is unlawful to contract or form a conspiracy "in restraint of trade or commerce among the several States," 15 U.S.C. § 1, or to "monopolize or attempt to monopolize any part of the trade or commerce among the several States," 15 U.S.C. § 2; *see Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 596 (8th Cir. 2009). Pitlor claims to assert both a horizontal restraint of trade and an anti-competitive tying arrangement as per se violations of the Sherman Act. Filing 8 at 102-105.

But a horizontal restraint of trade is an agreement among competitors on the way in which they will compete with one another. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 104 S. Ct. 2948, 2959 (1984). In the absence of plausible allegations of an agreement, this claim

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[4] TD Ameritrade and Charles Schwab have merged. *See* Henry Cordes, *TD Ameritrade-Schwab merger becomes final on Tuesday*, Omaha World-Herald, Oct. 1, 2020, https://bit.ly/3r1GUdb. Briefing in this case was complete before the merger was.

fails. *See Reg'l Multiple Listing Serv. of Minnesota, Inc. v. Am. Home Realty Network, Inc.*, 960 F. Supp. 2d 958, 980 (D. Minn. 2013). Nor is there anything to suggest that the goal of any agreement was to restrain competition. *See ES Dev., Inc. v. RWM* Enterprises, Inc., 939 F.2d 547, 556 (8th Cir. 1991). In fact, while Pitlor contends that the agreement "specifically intended to harm Pitlor's ability to freely and fairly participate," filing 8 at 102, the question "Participate in what?" is unanswered.

And an invalid "tying" arrangement is the sale of an item on the condition that the buyer purchase a second item—the "tied product"—from the same source. *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467, 473 (8th Cir. 1985). Pitlor's claim seems to be premised on a claim that Charles Schwab provided services but *secretly* processed those services in conjunction with TD Ameritrade. Filing 8 at 104. But because he wasn't *forced* to separately purchase any services from TD Ameritrade, there wasn't anything to tie together, much less "two distinct products." *See Marts v. Xerox, Inc.*, 77 F.3d 1109, 1112 (8th Cir. 1996).

Generally speaking, Pitlor's failure to present credible allegations establishing concerted action among the defendants, and his failure to coherently explain his damages, is fatal to all his claims, and they are subject to dismissal under Rule 12(b)(6).

APPENDIX B

5. SANCTIONS

Finally, the defendants ask for sanctions: an award of attorney's fees and expenses, and an injunction against further filings. Filing 27; filing 30. The Court will grant those motions in part and deny them in part.

First, the defendants seek monetary sanctions under Fed. R. Civ. P. 11(c), because Pitlor's complaint is frivolous. Filing 28 at 6; filing 31 at 6. The primary purpose of Rule 11 sanctions is to deter attorney and litigant misconduct. *Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1490 (8th Cir. 1994)*; see Cooter v. Gell & Hartmarx Corp.*, 496 U.S. 384, 392-93 (1990). Sanctions may be warranted when a pleading contains allegations or factual contentions that lack evidentiary support. See Rule 11(b); *Clark v. United Parcel Serv., Inc.*, 460 F.3d 1004, 1008 (8th Cir. 2006). And in determining whether a pleading was frivolous, the Court must apply a standard of objective reasonableness. *Pulaski Cty. Republican Comm. v. Pulaski Cty. Bd. of Election Comm'rs*, 956 F.2d 172, 173 (8th Cir. 1992).

Pro se complaints are to be read liberally, but they still may be frivolous if filed in the face of previous dismissal involving the exact same parties under the same legal theories. *Kurkowski v. Volcker*, 819 F.2d 201, 204 (8th Cir. 1987). Even if the plaintiff is acting in subjective good faith, that does not objectively excuse his actions. *Id.* And sanctions have been repeatedly approved when plaintiffs attempt to evade the clear preclusive effect of earlier judgments.

Meyer v. U.S. Bank Nat. Ass'n, 792 F.3d 923, 927 (8th Cir. 2015).

The Court agrees with the defendants that Pitlor's complaint is frivolous, and recognizes its authority to impose a financial sanction pursuant to Rule 11(c). The Court declines to do so. Pitlor's filings make plain that he's laboring under burdens that, thankfully, most people can't imagine. It would be inhumane for the Court to add to his troubles by fining him.

Injunctive relief, on the other hand, is appropriate. There is no right of access to the courts to prosecute a frivolous action, and defendants have a right to be free from harassing, abusive, and meritless litigation. *In re Tyler*, 839 F.2d 1290, 1293 (8th Cir. 1988)*; see Whitaker v. Superior Ct. of California, San Francisco Cty.*, 115 S. Ct. 1446, 1447 (1995); *Akins v. Nebraska Ct. of Appeals*, 607 F. App'x 606, 607 (8th Cir. 2015); *Stilley v. James*, 48 F. App'x 595, 597 (8th Cir. 2002); *Wickenkamp v. Smith*, 475 F. Supp. 3d 979, 986 (D. Neb. 2014). Not to mention that Pitlor himself apparently needs help to stop wasting money on filing fees for frivolous lawsuits. *See Stilley*, 48 F. App'x at 597. And enough of this Court's attention has been spent dealing with him.

Accordingly, Pitlor will be enjoined from filing any further lawsuits[5] in this Court or Nebraska state

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[5] The Court has considered whether this injunction should be limited to lawsuits related to his business relationships with TD Ameritrade or Charles Schwab, or to claims he hasn't

courts against TD Ameritrade, Kutak Rock, or Charles Schwab, or any corporate parent, corporate subsidiary, or employee of the same, unless the pleadings are either signed by a duly-admitted member of the court's bar or the court has authorized the filing of the pleadings in advance. Any failure to abide by the terms of this order may result in further sanctions, or Pitlor being held in contempt of this Court. But nothing in this order should be construed as precluding Pitlor from pursuing arbitration of his claims against Charles Schwab, as Charles Schwab has requested and the Court has previously ordered.

IT IS ORDERED:

1. The defendants' motions to dismiss (filing 13 and filing 18) are granted.

2. The defendants' motions for sanctions (filing 27 and filing 30) are granted in part and in part denied.

3. The plaintiff's complaint is dismissed.

4. The plaintiff is enjoined from filing any further lawsuits in this Court or Nebraska state courts against TD Ameritrade, Kutak Rock, or Charles Schwab, or any corporate parent, corporate subsidiary, or employee of the same, unless the

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previously raised. *See Dixon v. Deutsche Bank Nat. Tr. Co.*, 360 F. App'x 703, 704 (8th Cir. 2010)*; see also Wickenkamp*, 475 F. Supp. 3d at 986. But the Court isn't persuaded that Pitlor would be able to recognize or respect such a limit.

pleadings are either signed by a duly-admitted member of the court's bar or the court has authorized the filing of the pleadings in advance.

5. A separate judgment will be entered.

Dated this 18th day of March, 2021.

BY THE COURT:

s/John M. Gerrard
John M. Gerrard
Chief United States District Judge

APPENDIX C

18 U.S. Code § 1029 - Fraud and related activity in connection with access devices

(a) Whoever—

(1) knowingly and with intent to defraud produces, uses, or traffics in one or more counterfeit access devices;

(2) knowingly, and with intent to defraud, produces, traffics in, has control or custody of, or possesses device-making equipment;

(5) knowingly and with intent to defraud effects transactions, with 1 or more access devices issued to another person or persons, to receive payment or any other thing of value during any 1-year period the aggregate value of which is equal to or greater than $1,000;

(9) knowingly uses, produces, traffics in, has control or custody of, or possesses hardware or software, knowing it has been configured to insert or modify telecommunication identifying information associated with or contained in a telecommunications instrument so that such instrument may be used to obtain telecommunications service without authorization . . .

shall, if the offense affects interstate or foreign commerce, be punished . . .

(e) As used in this section—

(1) the term "access device" means any card, plate, code, account number, electronic serial number, mobile identification number, personal identification number, or

other telecommunications service, equipment, or instrument identifier, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument);

(2) the term "counterfeit access device" means any access device that is counterfeit, fictitious, altered, or forged, or an identifiable component of an access device or a counterfeit access device;

(3) the term "unauthorized access device" means any access device that is lost, stolen, expired, revoked, canceled, or obtained with intent to defraud;

(4) the term "produce" includes design, alter, authenticate, duplicate, or assemble;

(5) the term "traffic" means transfer, or otherwise dispose of, to another, or obtain control of with intent to transfer or dispose of;

(6) the term "device-making equipment" means any equipment, mechanism, or impression designed or primarily used for making an access device or a counterfeit access device;

(11) the term "telecommunication identifying information" means electronic serial number or any other number or signal that identifies a specific telecommunications instrument or account, or a specific communication transmitted from a telecommunications instrument.

APPENDIX D

9 U.S. Code § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

9 U.S. Code § 4 - Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the

parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

(July 30, 1947, ch. 392, 61 Stat. 671; Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)

APPENDIX E

Every number appearing in the derivations below is a Key Value—individually identified on its own merits and supported by distinct evidence and analysis set forth in the Amended Complaint.[6]

Instances of Mutual Funds Buying Power* (while account was frozen) *--See Predicate #10B--*	**Value**
3/23/2018	$2,481.61
3/26/2018	$51,698.63
3/27/2018 (3 separate instances)	$17,725.31 $8,245.23 $1,248.34
3/28/2018	$1,465.13
TOTAL =	**$82,864.25**

The official record reports no Mutual Funds transactions

1. $2,461.61 was the first of the series of values converted by Mutual Funds Buying Power. The errors that account for $2,461.81 are found in the data corresponding to times after the conversion was executed:

   $2,481.61= $1768 + $600 + $118 + $.06 – **$4.45**
   [EQ-16.5]

[6] *See* Key Values – *Amended Complaint* at 300–383

2. $51,698.63 (converted 3/26/2018) is also relevant to another combination of *Key Values* that sum to $82,864.25:

   $82,864.25 =

   $51,698.63+ 28,396.94 + $2,702.27 + $54.28 + $6.87 + $4.45 + $.77 + $.06

   Amended Complaint at 160.

   $51,698.63 is reported by the official record as corresponding to intra-account transfers amongst the Schwab brokerage account, futures account, and the (FDIC insured) Bank Sweep account. *See Amended Complaint* (filing 8-2 at 37–38)

   Predicate #14, *Bank Fraud,* demonstrating how a cash balance including $51,698.63 was concealed:

   $51,753.55 = **$51,698.53** + $54.28 + $.64
   Amended Complaint at 225–226.

3. Multiple other formulations also derive the total amount converted from Mutual Funds Buying Power, $82,864.25. $3.51 as a negative term represents a reduction in total damages, equivalent to a *credited* to the account:

   $82,864.25 =

   $51,698.63 + $13,768.61 + $10,982.00
   + $3,404.57 + $2,702.27 + **$224.80**
   + $54.28 + $29.54 + $2.29 + $.77
   – **$3.51.** Predicate Count #10C
   Amended Complaint filing 8 at 92, 191

4. Other relationships also depict $3.51 as a debt balance, such as the following derivation of $82,864.25:

$$\underline{\$82{,}864.25} = \$23489.95 + \$28396.94 + \$29256.75 + \$1768 + \mathbf{\$3.51} + \$3.38 - \underline{\$54.28}[7]$$

[EQ-14.8]
Amended Complaint at 233

Modeling $3.51 as a credit and debit implies that $3.51 was deposited into the account, and then later removed once or multiple times.

5. Key Values are also demonstrated to be compositions of other Key Values. The additional layers of complexity inherent to these relationships affirm the definitive significance of $3.51:

$3.51 as an unreported debt:

$$\underline{\$29.54} = \$22.67 + \mathbf{\$3.51} + \$3.38 - \$.02$$

[EQ-A.46]
Amended Complaint at 380

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[7] As reported by the March Statement, $54.28 was collected by Schwab at the end of March 2018 for interest fees accruing from margin loans (for the borrowing transactions that *actually were* reported by the official record). In some formulations $54.28 reflects 'cash value not stolen' for being legitimately collected by Schwab, as denoted by the negative sign in this derivation. *Amended Complaint* filing 8-2 at 37.

And *see Amended Complaint* at 108:

$4.45 = **$3.51** + $1 – $.06. [EQ–16.3]

$10,982.00 = $3,404.57 + $3,092.84
+ $2,702.27 + $1768 + $6.89
+ **$4.45** + $2.29 + $.77 – $.06
– $.02. [EQ–A.35(a)]

$10,979.71 = $3092.84 + $2702.27 + $1768
+ $1048.69 + $600 + $575
+ $494.54 + $309 + $118
+ $104.85 + $54.28 + $50
+ $29.54 + $22.67 + **$3.51**
+ $3.38 + $1.41 + $1 + $.66
+ $.06 + $.03 – $.02.
[EQ–A.35(b)]

$1768.00 = $1048.69 + $600.00 + $104.85
+ $6.87 + **$3.51** + $3.38 + $1.30
+ $.06 – $.66. [EQ–.A.38(f)]

$3618.00 = $1048.69 + $600.00 + $575.00
+ $494.54 + $309 + **$224.80**
+ $118.00 + $104.85 + $54.28
+ $50 + $29.54 + $7.16 + **$3.51**
+ $.06 – $1.43 [EQ–A.40]

$3.51 as a credit and a $4.45 as a debit.

$82,864.25 =

$74,594.84. + $3092.84 + $3404.57 + $1768
+ **$4.45** + $2.29 + $.77 – **$3.51**

Amended Complaint at 257.

APPENDIX F

Proceedings of the 28th Conference of the International Group for the Psychology of Mathematics Education, 2004 Vol 3 pp 329–336

ABSTRACTION IN MATHEMATICS AND MATHEMATICS LEARNING

Michael Mitchelmore - Macquarie University
Paul White - Australian Catholic University

It is claimed that, since mathematics is essentially a self-contained system, mathematical objects may best be described as abstract-apart. On the other hand, fundamental mathematical ideas are closely related to the real world and their learning involves empirical concepts. These concepts may be called abstract-general because they embody general properties of the real world. A discussion of the relationship between abstract-apart objects and abstract-general concepts leads to the conclusion that a key component in learning about fundamental mathematical objects is the formalisation of empirical concepts. A model of the relationship between mathematics and mathematics learning is presented which also includes more advanced mathematical objects.

This paper was largely stimulated by the Research Forum on abstraction held at the 26th international conference of PME. In the following, a notation like [F105] will indicate page 105 of the Forum report (Boero et al., 2002).

APPENDIX F

At the Forum, Gray and Tall; Schwarz, Hershkowitz, and Dreyfus; and Gravemeier presented three theories of abstraction, and Sierpinska and Boero reacted. Our analysis indicates that two different contexts for abstraction were discussed at the Forum: abstraction in mathematics and abstraction in mathematics learning. However, the Forum did not include a further meaning of abstraction which we believe is important in the learning of mathematics: The formation of concepts by empirical abstraction from physical and social experience. We shall argue that fundamental mathematical ideas are formalisations of such concepts.

The aim of this paper is to contrast abstraction in mathematics with empirical abstraction in mathematics learning. In particular, we want to clarify "the relation between mathematical objects [and] thinking processes" (Boero, [F138]).

ABSTRACTION IN MATHEMATICS

What does it mean to say that mathematics is "abstract"?

- Mathematics is a self-contained system separated from the physical and social world:
- Mathematics uses everyday words, but their meaning is defined precisely in relation to other mathematical terms and not by their everyday meaning. Even the syntax of mathematical argument is different from the

syntax of everyday language and is again quite precisely defined.

- Mathematics contains objects which are unique to itself. For example, although everyday language occasionally uses symbols like x and P, objects like x 0 and #(-1) are unknown outside mathematics.

- A large part of mathematics consists of rules for operating on mathematical objects and relationships. Sierpinska calls these "the rules of the game" [F132]. It is important that students learn to manipulate symbols using these rules and no others.

We claim that the essence of abstraction in mathematics is that mathematics is self contained: An abstract mathematical object takes its meaning only from the system within which it is defined. Certainly abstraction in mathematics∃at all levels∃includes ignoring certain features and highlighting others, as Sierpinska [F130] emphasises. But it is crucial that the new objects be related to each other in a consistent system which can be operated on without reference to their previous meaning. Thus, self-containment is paramount.

Historically, mathematics has seen an increasing use of axiomatics, especially over the last two centuries. For example, numbers were initially mathematical objects based on the empirical idea of quantity. Then mathematicians such as Dedekind and Peano

econceptualized numbers in axiom systems which were independent of the idea of quantity. Euclid, Hilbert, and others performed a similar task for geometry. But, as Kleiner (1991) states, "whereas Euclid's axioms are idealizations of a concrete physical reality ... in the modern view axioms are ... simply assumptions about the relations among the undefined terms of the axiomatic system" (p. 303). In other words, mathematics has become increasingly independent of experience, therefore more self-contained and hence more abstract.

To emphasise the special meaning of abstraction in mathematics, we shall say that mathematical objects are abstract-apart. Their meanings are defined within the world of mathematics, and they exist quite apart from any external reference.

So why is mathematics so useful?

Mathematics is used in predicting and controlling real objects and events, from calculating a shopping bill to sending rockets to Mars. How can an abstract-apart science be so practically useful?
One aspect of the usefulness of mathematics is the facility with which calculations can be made: You do not need to exchange coins to calculate your shopping bill, and you can simulate a rocket journey without ever firing one. Increasingly powerful mathematical theories (not to mention the computer) have led to steady gains in efficiency and reliability.

But calculational facility would be useless if the results did not predict reality. Predictions are

successful to the extent that mathematics models appropriate aspects of reality, and whether they are appropriate can be validated by experience. In fact, one can go further and claim that the mathematics we know today has been developed (in preference to any other that might be imaginable) because it does model significant aspects of reality faithfully. As Devlin (1994) puts it:

> How is it that the axiomatic method has been so successful in this way? The answer is, in large part, because the axioms do indeed capture meaningful and correct patterns. ... There is nothing to prevent anyone from writing down some arbitrary list of postulates and proceeding to prove theorems from them. But the chance of those theorems having any practical application [is] slim indeed. (pp. 54-55)

Many fundamental mathematical objects (especially the more elementary ones, such as numbers and their operations) clearly model reality. Later developments (such as combinatorics and differential equations) are built on these fundamental ideas and so also reflect reality∃even if indirectly. Hence all mathematics has some link back to reality.

EMPIRICAL ABSTRACTION IN MATHEMATICS LEARNING

Learning fundamental mathematical ideas

Students learn about many fundamental, abstract mathematical objects in school. In this section, we

discuss the meaning of abstraction in this learning context. We begin by looking at some examples.

Addition. Between the ages of 3 and 6, most children learn that a given set of objects contains a fixed number of objects. A little later, they realise that two sets can be combined and that the number of objects in the combined set can be determined from the number of objects in each set∃a procedure which later becomes the operation of addition. Students learn these fundamental arithmetical ideas from counting experiences: They find that repeatedly counting a given set of objects always gives the same number, no matter how often it is done and in which order. As they recognise more and more patterns, counting a combined set is gradually replaced by "counting on" and eventually the use of "number facts" (Steffe, von Glasersfeld, Richards, & Cobb, 1983).

Angles. There is good evidence that, at the beginning of elementary school, students have already formed classes of angle situations such as corners, slopes, and turns (Mitchelmore, 1997). To acquire a general concept of angle, students need to see the similarities between them and identify their essential common features (two lines meeting at a point, with some significance to their angular deviation). Even secondary students find it difficult to identify angles in slopes and turns, where one or both arms of the angle have to be imagined or remembered (Mitchelmore & White, 2000).

Rate of change. The most fundamental idea in calculus is rate of change, leading to differentiation. A major reform movement over the last decade or so has been concerned with making this idea more meaningful by initially exploring a range of realistic rate of change situations. In this way, students build up an intuitive idea of rate of change before studying the topic abstractly. A leading US college textbook (Hughes-Hallett et al., 1994) devotes a whole introductory chapter to exploring realistic situations, and in Australia similar materials have been published for high school calculus students (Barnes, 1992).

Characteristics of empirical abstraction

The above examples show how fundamental mathematical ideas are based on the investigation of real world situations and the identification of their key common features. Hence, a characteristic of the learning of fundamental mathematical ideas is similarity recognition. The similarity is not in terms of superficial appearances but in underlying structure∃for example, in counting, space, and relationships. To get below the surface often requires a new viewpoint, as when a student imposes imaginary initial and final lines on a turning object in order to obtain an angle.

There is a leap forward when students recognise such a similarity: As students relate together situations which were previously conceived as disconnected, they become able to do things they were not able to do before. More than that, they form

new ideas (such as addition, angle, and rate of change) and are incapable of reverting to their previous state of innocence. In a sense, these new ideas embody the similarities recognised. Of course, single ideas rarely evolve in isolation; for example, the idea of angle is inextricable linked to ideas such as point, line, parallel, intersection and measurement which can also be traced to similarities students recognise in their environment.

This process of similarity recognition followed by embodiment of the similarity in a new idea is an empirical abstraction process. It is well described by Skemp (1986):

> *Abstracting* is an activity by which we become aware of similarities ... among our experiences. *Classifying* means collecting together our experiences on the basis of these similarities. An *abstraction* is some kind of lasting change, the result of abstracting, which enables us to recognise new experiences as having the similarities of an already formed class. ... To distinguish between abstracting as an activity and abstraction as its end-product, we shall ... call the latter a concept. (p. 21, italics in original)

Thus number, addition, angle and rate of change are all empirical concepts, and they take their place in students' learning alongside other empirical concepts such as colour, friend, and fairness.

Piaget (1977) made a distinction between abstraction on the basis of superficial characteristics of physical

objects (abstraction à partir de l'objet) and abstraction on the basis of relationships perceived when the learner manipulates these objects (abstraction à partir de l'action). But both are based on the child's physical and social experience, and in both similarity recognition is essential. In using the term empirical abstraction to cover both cases, we are making the distinction between abstraction on the basis of experience and what we shall call theoretical abstraction (see below).

EMPIRACAL ABSTRACTION AND MATHEMATICAL ABSTRACTION

From empirical concept to mathematical object

When students learn a fundamental mathematical idea in the way described above, three things happen: They learn an empirical concept, they learn about a mathematical object, and they learn about the relationship between the empirical concept and the mathematical object. Empirical concepts are often rather fuzzy and difficult to define. For example, the empirical concept of circle is that of a perfectly round object—but "perfect roundness" can only be defined by showing examples. A circle becomes a mathematical object only when it is defined as the locus of points equidistant from a fixed point: It is then clearly defined in terms of other mathematical objects. However, for this definition to be meaningful, an individual must see that the locus of points equidistant from a fixed point gives a perfectly round object and vice versa.

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We have already referred to mathematical objects as abstract-apart. To emphasise the distinction between abstraction in mathematics and mathematics learning, we shall call empirical concepts abstract-general: Each concept embodies that which is general to the objects from which the similarity is abstracted.

Gravemeier also focuses on how "formal mathematics grows out of the mathematical activity of the students" [F125], calling the process emergent modelling. The Realistic Mathematics Education movement, to which Gravemeier belongs, has previously called it vertical mathematisation (Treffers, 1987). We prefer to call this process formalisation, since its main purpose is to select abstract-apart relationships which capture the form of an abstract-general concept. (So "formal mathematics" is the study of mathematical forms.) For example, the locus definition of a mathematical circle precisely expresses the perfect roundness of an empirical circle.

Linking mathematical objects to empirical concepts

There is strong evidence that many student difficulties in learning mathematics can be traced to the fact that, when they learned about an abstract-apart mathematical object, they made no link to the corresponding abstract-general concept (Mitchelmore & White, 1995). Consider again the previous three examples.

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Addition. Many young students experience difficulty learning elementary arithmetic. One explanation is that they do not understand the empirical meaning of the operations: Symbols such as + and % are learned apart from the abstract-general concepts of addition and multiplication on which they are based. Early number research (Steffe et al., 1983; Wright, 1994) has led to projects such as Count Me In Too which have closely linked early arithmetic to students' counting experiences, with a measurable improvement in learning (Mitchelmore & White, 2003).

Angle. Many student difficulties with angles arise because the angle diagram is abstract-apart. Williams (2003) gives a particularly extreme example: Her case-study secondary school student successfully made a generalisation about the angle sum of a 3–334 PME28 – 2004 polygon, but he could not identify the angles of the triangles into which he had divided the polygon. In fact, it is quite possible to teach an abstract-general concept of angle as early as Grade 3, as White & Mitchelmore (2003) have shown.

Calculus. Calculus instruction based on abstract-apart differentiation leads to a manipulation focus (White & Mitchelmore, 1996). Students do not see symbols as representing anything, so they cannot use the manipulative techniques they have learned to solve contextual problems. Their concept of differentiation has been truly decontextualised and therefore impoverished, instead of being abstract-general and rich (Van Oers, 2001).

The preceding discussion emphasises the value of making a clear distinction between empirical concepts and mathematical objects.

MORE ADVANCED MATHEMATICS LEARNING

The learning of fundamental mathematical ideas is only one component of learning mathematics: More advanced ideas need to be developed out of the fundamental ideas. Some of these ideas (such as square roots) can be readily linked back to abstract-general concepts; others (such as a zero exponent) seem to have no counterpart in normal experience. In addition, students need to learn to operate within an abstract-apart system∃an aspect of mathematics learning which takes on increasing significance in university mathematics as the links to experience become thinner and thinner. But even professional mathematicians use empirical concepts as an aid to intuition (Boero, [F137]).

The formation of new ideas within mathematics is well described by the Schwarz-Hershkowitz-Dreyfus *Nested RBC Model of Abstraction*. They define abstraction as "an activity of vertically reorganizing previously constructed mathematics into a new mathematical structure" [F121]. New mathematical objects are constructed by "the establishment of connections, such as inventing a mathematical generalization, proof, or a new strategy of solving a problem" [F121]. This abstraction process is quite different from empirical abstraction, and is best

described as *theoretical abstraction.* Sierpinska's ignoring/highlighting process is another example of theoretical abstraction.

Gray & Tall's idea of a *procept*—"the amalgam of three components: a process which produces a mathematical *object*, and a *symbol* which is used to represent either process or object" [F117]—also clarifies the development of ideas within mathematics. The construction of a procept seems to us, however, to be more akin to formalisation than abstraction.

Historically, some more advanced mathematical objects have been constructed by a process similar to empirical abstraction. An example is group theory:

> The abstract concept of a group arose from different sources. Thus polynomial theory gave rise to groups of permutations, number theory to groups of numbers and of "forms" ... and geometry and analysis to groups of transformations. Common features of these concrete examples of groups began to be noted, and this resulted in the emergence of the abstract concept of a group in the last decades of the 19th century. (Kleiner, 1991, p. 302)

Other examples are rings, fields and vector spaces. Our arguments above would suggest that the learning of such mathematics would be most effective if it were based on a process of similarity recognition followed by formalisation.

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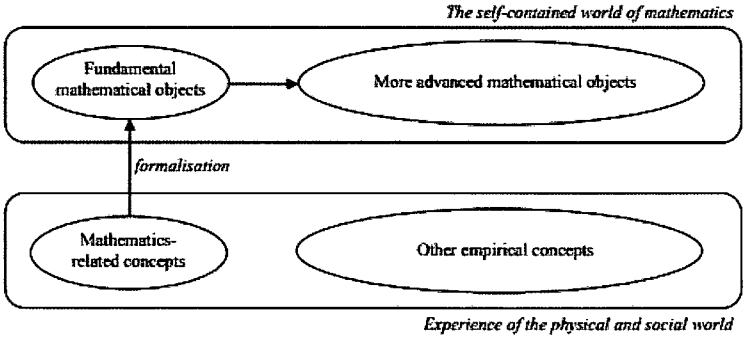
SUMMARY AND CONCLUSION

The term *abstraction* has different meanings in relation to mathematics and the learning of mathematics. Previous abstraction theorists have tended to focus on the process of developing ideas within mathematics. In this paper, we have tried to redress the balance by exploring the role of empirical abstraction in the formation of fundamental mathematical ideas. This is a crucial process, since many fundamental, abstract-apart mathematical objects need to be linked to abstract-general empirical concepts if their learning is to be meaningful.



Grossly over-simplified, we see the whole picture as follows:

In practice, the formation of mathematics-related empirical concepts and their formalisation into mathematical objects may occur simultaneously—especially in school learning. Also, more advanced mathematical objects may be linked directly to

empirical concepts and not only indirectly via fundamental objects.

Like Boero [F138], we believe that "we are still far from a comprehensive theoretical answer to the challenge of mathematical abstraction in mathematics education". A clear response to this challenge would be of great value to researchers and teachers alike. Examining and differentiating the different forms of abstraction involved in learning mathematics constitute one step along the path to this goal.

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Predicate Counts #11A & 11B
18 U.S.C. § 1341:
Brokerage Statements Physical Alterations
504–530 198–205

Predicate Counts #12A - #12G
18 U.S.C. § 1343:
Brokerage Statements Erroneous Values
531–577 206–221

Predicate Counts #13 -18 U.S.C. § 1343:
Missing cash value Concealed as
Understated Losses in live data.
578–587 221–225

Predicate Counts #14 – 18 U.S.C. § 1344:
FDIC Bank Sweep Feature balances targeted
for theft. 588–613 226–234

Predicate Counts #15 18 U.S.C. § 1343:
(or, 18 U.S.C. § 1348) Wire Fraud (or, .
Securities Fraud) Short Sales reported as
purchase transactions.
614–629 234–247

Predicate Counts #16 (16A – 16H)
18 U.S.C. § 1343:
Various instances of Inconsistent/Erroneous
Accounting conceals value
630–660 248–257

Predicate Counts #17 (#17A, #17B, #17C)
18 U.S.C. § 1343:
Schwab Spreadsheet Transaction Data direct
evidence of altered transaction data
661–680 258–267

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