

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

Russell D. Knowles, individually and as attorney in fact for Bernard A. Knowles, and Bernard A. Knowles, through his attorney-in-fact Russell D. Knowles, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TD Ameritrade Holding Corporation; TD Ameritrade, Inc.; TD Ameritrade Clearing, Inc.; and TD Ameritrade Investment Management, LLC,

Defendants.

Case No. \_\_\_\_\_

**CLASS ACTION COMPLAINT**  
**(JURY TRIAL DEMANDED)**

Plaintiffs Russell D. Knowles, individually and as attorney in fact for Bernard A. Knowles, Bernard A. Knowles, through his attorney-in-fact Russell D. Knowles, on behalf of themselves and on behalf of all others similarly situated, by and through their undersigned counsel, complaining in their Class Action Complaint of the Defendants TD Ameritrade Holding Corporation; TD Ameritrade, Inc.; TD Ameritrade Clearing, Inc.; and TD Ameritrade Investment Management, LLC, allege and state as follows:

**JURISDICTION AND VENUE**

1. Plaintiffs invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1332(d).
2. The unlawful practices and acts alleged herein, on information and belief, were committed in Douglas County, Nebraska, within the District of Nebraska. The Client Agreement

between Plaintiffs and Defendants is governed by Nebraska law. The Client Agreement provides that venue for all disputes arising out of or relating to the Client Agreement will be in the courts of Nebraska.

### **PARTIES**

3. Plaintiff Russell D. Knowles is a resident of the state of South Carolina and a client who has a joint taxable brokerage account with Defendants pursuant to the standard Client Agreement. Plaintiff Russell D. Knowles additionally holds a power of attorney and is the attorney-in-fact for his father, Plaintiff Bernard A. Knowles.

4. Plaintiff Bernard A. Knowles is a resident of the state of South Carolina, and a client who has a joint taxable brokerage account with Defendants pursuant to the standard Client Agreement.

5. Defendant TD Ameritrade Holding Corporation, on information and belief, is the parent corporation and sole equity holder of TD Ameritrade, Inc., with its principal place of business at 200 South 108th Avenue, Omaha, Nebraska 68154.

6. Defendant TD Ameritrade, Inc. (“TD Ameritrade”), on information and belief, is a wholly-owned subsidiary of TD Ameritrade Holding Corporation, with its principal place of business at 200 South 108th Avenue, Omaha, Nebraska 61854. TD Ameritrade is a financial services company which acts as a broker-dealer for clients nationwide. TD Ameritrade is engaged in the trading of stocks and bonds for itself and more than 11 million clients. TD Ameritrade has more than \$1.3 trillion in assets and places an average of about 800,000 client trades per day. TD Ameritrade’s annual net revenue in fiscal year 2018 was \$5.5 billion.

7. Defendant TD Ameritrade Clearing, Inc., on information and belief, is an indirect wholly owned subsidiary of TD Ameritrade Holding Corporation, with its principal place of

business at 200 South 108th Avenue, Omaha, Nebraska 61854. TD Ameritrade Clearing, Inc. provides trade execution and clearing services to TD Ameritrade, Inc., and its brokerage clients nationwide.

8. Defendant TD Ameritrade Investment Management, LLC (“TDAIM”), on information and belief, is a wholly-owned subsidiary of TD Ameritrade Holding Corporation, with its principal place of business at 200 South 108th Avenue, Omaha, Nebraska 61854. TDAIM provides investment advisory and management services to TD Ameritrade, Inc., and its brokerage clients nationwide.

### **FACTUAL ALLEGATIONS**

9. Defendant TD Ameritrade, Inc. is a financial services firm which, among other things, provides brokerage services to individual clients nationwide.

10. Defendant TD Ameritrade Clearing, Inc. provides trade execution and clearing services to TD Ameritrade, Inc., and its brokerage clients nationwide.

11. Defendant TDAIM provides investment advisory and management services to TD Ameritrade and its brokerage clients nationwide, including to clients who hold assets in the “Essential Portfolios” and “Selective Portfolios.”

12. Plaintiffs Russell D. Knowles and Bernard A. Knowles at all relevant times held a joint taxable brokerage account at TD Ameritrade in a managed portfolio known as the “Essential Portfolios.”

13. Plaintiffs entered into a contract and brokerage agreement with Defendants pursuant to the standard Client Agreement, attached as EXHIBIT A.

14. Pursuant to the Client Agreement, Defendants TD Ameritrade and TD Ameritrade Clearing, Inc., agreed to provide brokerage services, including the execution of orders and trades.

15. Defendant TDAIM provided investment advisory services through a computerized trading system for Plaintiffs in a managed portfolio known as the “Essential Portfolios.”

16. The client authorized TDAIM to exercise discretionary trading authority over assets held in accounts in Essential and Selective Portfolios that are dedicated to the client’s selected strategy. The client selects an overall investment strategy, ranging from “Conservative” to “Aggressive,” and TDAIM allocates assets in that account according to that strategy.

17. The discretionary authority allows TDAIM to buy, sell, or otherwise trade recommended and approved assets in the client’s strategy or previously recommended TDAIM securities without prior client approval of each transaction.

18. The Essential Portfolios are offered electronically via the Internet as the primary channel of interaction with TDAIM and may be referred to as a robo-advisory service. The Essential Portfolios service uses exchange-traded funds (“ETFs”) as the sole investment vehicles. ETFs generally seek to match the performance of a specific market index, asset class, or sector. They usually have lower annual expenses than mutual funds as they require little if any manager oversight and are passively managed. They generally are more tax-efficient than mutual funds.

19. The Selective Portfolios are offered using either mutual funds or ETFs.

20. ETFs are investment companies that are registered under the Investment Company Act of 1940, typically as open-end funds or unit investment trusts (“UITs”). They have the flexibility of trading intraday. Most ETFs are passively managed and may provide investors with diversification, cost and tax efficiency, liquidity and marginability. ETFs sell and redeem their shares at net asset value (“NAV”) only in large blocks of shares (such as 50,000) called “Creation Units” and track specific domestic and foreign market indices. Institutional

investors create or redeem the Creation Units. After creation, the ETF shares trade between investors like a stock. Because ETF shares trade freely and continuously, the market determines prices, and investors can buy or sell shares at any time the markets are open.

21. “Essential Portfolios” can be opened with TDAIM with an initial investment of \$5,000.00 and “Selective Portfolios” can be opened with an initial investment of \$25,000.00.

22. On information and belief, on or about November 15, 2017, TDAIM began offering its clients a “tax-loss harvesting feature” in certain portfolios.

23. The tax-loss harvesting feature is a computerized trading feature utilized by Defendants that is designed to sell securities at a loss to offset potential capital gains.

24. The tax-loss harvesting feature is currently in taxable accounts utilizing the Essential Portfolios or Selective Portfolios services, which use ETFs as the investments.

25. The tax-loss harvesting feature uses a computerized trading algorithm designed to automatically review the client’s account each trading day for any investments that have unrealized losses. Specifically, the program looks at the individual tax lot to identify investment losses meeting or exceeding a specified loss threshold. If the threshold is met, that tax lot is supposed to be sold and then shares of a replacement security that is closely correlated to the sold security are purchased to help maintain the client’s asset allocation and risk characteristics.

26. The “wash sale rule,” as codified at 26 U.S. Code § 1091 and interpreted in regulations promulgated by the Internal Revenue Service at 26 C.F.R. § 1.109-1, et. seq., prohibits an investor from claiming a tax loss if an investor repurchases the same security (or a substantially identical security) either 30 days before or 30 days after selling a security for a loss. Defendants’ automated tax-loss harvesting computer program was designed to avoid violations of the wash sale rule.

27. The Essential Portfolios are managed by TDAIM investment professionals who make trading decisions such as adding or removing an investment from the client's portfolio, or by adjusting exposure to a particular asset class.

28. The tax-loss harvesting program for Essential and Selective Portfolios analyzes the client's portfolio daily, searching for opportunities to initiate tax-loss harvesting. When such opportunity arises, Defendants' program automatically sells the position for the client.

29. The tax-loss harvesting program is designed to offset taxes on capital gains and also up to \$3,000, per year, on taxable income. After turning the tax-loss harvesting program on, it is supposed to check daily for tax-loss harvesting opportunities while keeping the client's money in the market.

30. The tax-loss harvesting program is designed to sell a position held in an ETF when the value of a client's account drops by a specified percentage, thereby locking in the capital loss, and then promptly purchasing an equivalent position in a similar, but not substantially identical, ETF. The following illustration is contained on the website<sup>1</sup>:

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<sup>1</sup> <https://www.tdameritrade.com/investment-guidance/investment-management-services/tax-loss-harvesting/tax-loss-harvesting-wash-sales.page> (accessed on Jan. 21, 2019).

## Benefits of Tax Loss Harvesting



You invest \$100,000 in **ETF A** and **ETF B**.

ETF A: \$60,000  
ETF B: \$40,000



**ETF B** has realized gains of \$10,000. **ETF A** has unrealized losses of \$7,000.

ETF A: \$53,000  
ETF B: \$50,000

Without tax-loss harvesting

With tax-loss harvesting



At the end of the year you have a realized gain of \$10,000 from **ETF B**.



You can offset part of the \$10,000 gain from **ETF B** with the loss from **ETF A**, resulting in a taxable gain of \$3,000.



**Potential tax bill of \$1,500.**  
(15% x \$10,000 = \$1,500)



**Potential tax bill of \$450.**  
(15% x \$3,000 = \$450)

**In this example, tax-loss harvesting reduced the tax liability by \$1,050** – a substantial savings you can invest back into your portfolio, use to maximize IRA contributions, pay off debt, or spend as you please.

31. As part of the daily process of reviewing the client's account for potential tax-loss harvesting sales, Defendants agree to sell the investment that has a loss and purchase a replacement security to help the client maintain an asset allocation consistent with their investment goals while benefiting from the potential tax savings.

32. Clients are required to opt in to the automatic tax-loss harvesting feature by affirmatively activating it on their account.

33. Plaintiffs opted in to the tax-loss harvesting feature by affirmatively activating it on their account held in the Essential Portfolios.

34. On information and belief, Defendants were responsible for ensuring that sufficient, appropriate investment options were available for proper operation of the tax-loss harvesting feature when that feature has been activated by Plaintiffs and Class members who held taxable assets in the Essential and Selective Portfolios, or in the alternative, ensuring that a client's assets are not sold when an alternative ETF is not available for purchase.

35. On or about October 5, 2018, Defendants purchased a position on Plaintiff's behalf in the iShares S&P 500 Index Fund ETF ("ITOT ETF").

36. On or about October 12, 2018, pursuant to the automatic tax-loss harvesting feature, Defendants sold Plaintiff's position in the ITOT ETF and, five minutes later, purchased an equivalent position on Plaintiff's behalf in the Vanguard Total Stock Market ETF ("VTI ETF").

37. On or about December 17, 2018, pursuant to the automatic tax-loss harvesting feature, Defendants sold Plaintiffs' position in the VTI ETF and, thirty minutes later, purchased an equivalent position on Plaintiffs' behalf in the ITOT ETF.

38. On or about December 24, 2018, pursuant to the automatic tax-loss harvesting feature, Defendants sold Plaintiff's position in the ITOT ETF, but did not promptly and in the required timely manner purchase an equivalent position in a similar, but not substantially identical, broadly based US stock market ETF.

39. On or about January 11, 2019, purportedly pursuant to the automatic tax-loss harvesting feature, Defendants purchased a position on Plaintiffs' behalf in the Spyder Portfolio Total Stock Market ETF ("SPTM ETF").

40. On information and belief, as a result of the eighteen-day delay by Defendants in purchasing a position in a similar, but not substantially identical, broadly based US stock market ETF after automatically selling Plaintiffs' position in the ITOT ETF, Plaintiffs' assets, intended to be continually invested in a broadly-based stock market ETF, substantially decreased in value. Plaintiffs' assets, which had dropped in value when sold on December 24, 2018, did not benefit from the subsequent market recovery and increase in value, thereby causing the investment to be worth substantially less as of January 11, 2019, when the funds finally were re-invested in a similar, but not substantially identical, broadly based stock market ETF.

41. On information and belief, Defendants, by virtue of the automatic tax-loss harvesting feature which did not operate as intended, are liable for causing Plaintiffs' loss in the value of their account.

42. On information and belief, Defendants failed to promptly and in the required timely manner purchase a position in a similar, but not substantially identical, broadly based stock market ETF after automatically selling Plaintiffs' position in the ITOT ETF because Defendants had failed to cause a sufficient number of similar, but not substantially identical,

broadly based stock market ETFs to be made available to their clients, or in the alternative did not prevent the ETFs from being sold when there was no repurchase option available.

43. On information and belief, on December 24, 2018, when Defendants automatically sold Plaintiff's position in the ITOT ETF in a tax-loss harvesting sale, the IRS's wash sale rule prevented the assets from being promptly invested in the VTI ETF (as had occurred previously in tax-loss harvesting sales) because only seven days had passed since Plaintiff's position in the VTI ETF had been sold in a tax-loss harvesting sale.

44. On information and belief, Plaintiffs have suffered a financial loss as a result of Defendants' failure to have sufficient, appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, including, but not limited to, a failure to have more than two broad US Stock Market ETFs available for investment by account holders in the Essential Portfolios and the Selective Portfolios, or in the alternative to have a "stop" feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

45. On information and belief, an unknown but substantial number of Defendants' customers have suffered a similar loss as a result of Defendants' unlawful acts and omissions with regard to the automatic tax-loss harvesting function as described herein. Defendants have admitted that:

This has become a client concern that has been exposed with our Tax Loss Harvesting feature especially from the last quarter and the terrible down side it had. With Tax Loss Harvesting, as you know, when a position takes a 5% loss we will sell the position to realize a loss and if an alternative is available we will purchase the replacement position to keep invested. Unfortunately with multiple trades from the big loss from that quarter we did not have enough alternatives to buy back into. While the Tax Loss Harvesting is doing exactly what it is supposed to, you are not completely out of options. At this time we do not have another option to purchase a position, and as soon as we can we will use the funds to get invested back

into the market for you.

EXHIBIT B, Electronic Message dated 1/9/19 from Paul Bradford of TD Ameritrade Investment Management Services.

46. Plaintiffs do not allege that Defendants made any misrepresentation or omission of material fact in connection with the purchase or sale of a security or with the management and administration of the automatic tax-loss harvesting feature in the Essential and Selective portfolios. Defendants simply failed to perform the automatic tax-loss harvesting due to Defendants' failure to have sufficient, appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, or in the alternative to have a "stop" feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

47. Plaintiffs do not allege that Defendants used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a security or with the management and administration of the automatic tax-loss harvesting feature in the Essential and Selective portfolios. Defendants simply failed to perform the automatic tax-loss harvesting due to Defendants' failure to have sufficient, appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, or in the alternative to have a "stop" feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

#### **CLASS ACTION ALLEGATIONS**

48. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated herein verbatim.

49. Plaintiffs bring this suit individually and as a class action under Rule 23 of the Federal Rules of Civil Procedure, for the purpose of asserting the claims alleged in this

Complaint on a common basis. Plaintiffs bring this action on behalf of themselves and all other similarly situated persons as members of the following class comprised of:

For the period of November 15, 2017, until the present date and continuing during the pendency of this action, a class consisting of all of Defendants' clients who have taxable brokerage accounts in which the client has activated the automatic tax-loss harvesting feature in managed portfolios known as the Essential and Selective Portfolios, and whose account experienced an automatic tax-loss harvesting sale at any time in which a position in a similar, but not substantially identical, ETF was not promptly and in the required timely manner purchased, thereby resulting in a loss of value in the client's account. (Excluded from the Class are the officers, directors and employees of Defendants.)

50. Plaintiffs reserve the right to modify or amend the definitions of the Class after they have had an opportunity to conduct discovery.

51. **Rule 23(a)(1) Numerosity:** The members of the Class are so numerous that their individual joinder is impracticable. Defendants have more than 11 million client accounts. Plaintiffs are informed and believe that the proposed Class contains at least thousands and possibly far more of Defendants' clients who have been damaged by Defendants' conduct as alleged herein. Record owners and other members of the Class may be identified from records maintained by Defendants and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in class actions.

52. **Rule 23(a)(2) Existence of Common Questions of Law and Fact:** This action involves common questions of law and fact, which include, but are not limited to, the following:

- a. Whether a contract existed between Defendants and members of the Class;
- b. Whether Defendants failed to properly create and establish the automatic tax-loss harvesting feature in the Essential and Selective Portfolios as described;
- c. Whether Defendants failed to properly manage and administer the

automatic tax-loss harvesting feature in the Essential and Selective Portfolios as described;

- d. Whether Defendants failed to promptly re-invest Plaintiffs' and Class members' funds upon the tax-loss harvesting sale of a position in a given ETF held in the Essential and Selective Portfolios in a similar, but not substantially identical, ETF, or in the alternative, prevent Plaintiffs' and Class members' assets from being sold when there are no suitable alternative ETFs available for purchase, so that Plaintiffs' and Class members' assets remained invested as directed and desired by them;
- e. Whether Defendants caused Plaintiffs' and Class members to incur investment losses and decreases in the value of assets held in the Essential and Selective Portfolios due to delays in the reinvestment of Plaintiffs' and Class members' assets in a similar, but not substantially identical, ETF following a tax-loss harvesting sale; or in the alternative, due to Defendants' failure to prevent Plaintiffs' and Class members' assets from being sold when another suitable ETF was not available for purchase;
- f. Whether Defendants failed to ensure that a sufficient number and appropriate selection of ETF investment options in the Essential and Selective Portfolios were available to Plaintiffs and Class members for investment purposes and the operation of the tax-loss harvesting feature at all necessary times, or in the alternative, failed to prevent Plaintiffs' and Class members' assets from being sold when another suitable ETF was not available for purchase; and

g. Whether Plaintiffs and Class members are entitled to damages.

53. **Rule 23(a)(3) Typicality:** Plaintiffs and all members of the Class have been subject to and affected by the same conduct and omissions by Defendants. The claims alleged herein are based on the same violations by Defendants that harmed Plaintiffs and members of the Class. By automatically selling positions in an ETF held in the Essential and Selective Portfolios pursuant to the tax-loss harvesting feature, and not promptly purchasing an equivalent position in a similar, but not substantially identical ETF, Plaintiffs and all members of the Class were subjected to the same wrongful conduct and losses caused by Defendants' acts and omissions. Plaintiffs' claims are typical of the Class's claims and do not conflict with the interests of any other members of the Class. Defendants' unlawful acts and omissions concern the same tax-loss harvesting feature described herein irrespective of where they occurred or were experienced.

54. **Rule 23(a)(4) Adequacy:** Plaintiffs will fairly and adequately protect the interests of the members of the Class. Plaintiffs have retained counsel experienced in complex consumer class action litigation, and Plaintiffs intend to prosecute this action vigorously. Plaintiffs have no adverse or antagonistic interests to those of the Class.

55. **Rule 23(b)(1) Prosecuting Separate Actions:** Prosecuting separate actions by or against individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the Class.

56. **Rule 23(b)(3) Predominance and Superiority of Class Action:** Questions of law or fact common to the Class predominate over any questions affecting only individual members and a class action is superior to other methods for the fast and efficient adjudication of this controversy, for at least the following reasons:

- a. Absent a class action, members of the Class as a practical matter will be unable to obtain redress. Defendants' violations of their legal obligations will continue without remedy, additional clients will be harmed, and Class members will not be reimbursed for losses caused by Defendants' acts or omissions with regard to the automatic tax-loss harvesting feature;
- b. It would be a substantial hardship for most individual members of the Class if they were forced to prosecute individual actions;
- c. When the liability of Defendants has been adjudicated, the Court will be able to determine the claims of all members of the Class;
- d. A class action will permit an orderly and expeditious administration of each Class member's claims and foster economies of time, effort, and expense;
- e. A class action regarding the issues in this case does not create any problems of manageability;
- f. Defendants have acted on grounds generally applicable to the members of the Class, making class-wide monetary relief appropriate;
- g. By pursuing a uniform course of conduct with regard to its automatic tax-loss harvesting feature, Defendants have caused investment losses to all members of the Class; and
- h. As a result of Defendants' acts or omissions with regard to the automatic tax-loss harvesting feature, each member of the Class has suffered damages to an extent within the peculiar knowledge of Defendants.

57. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

58. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated herein verbatim.

59. Plaintiffs and Class members entered into a written contract and agreement with Defendants for financial services, including the proper management of a taxable brokerage account. Implied in that contract is a duty or covenant of good faith and fair dealing.

60. The terms and conditions of the contract between Plaintiffs and Class members are set forth in the Client Agreement, as described herein.

61. Defendants promised to properly create, establish, manage and administer the taxable brokerage accounts of Plaintiffs and Class members, including the proper management and administration of the tax-loss harvesting feature as described herein when activated by Plaintiffs and Class members.

62. Plaintiffs and Class members performed all conditions precedent to faithful performance of the contract by Defendants.

63. Defendants, by their acts and omissions as described herein, failed to perform such contract and breached the same, including, but not limited to, a breach of their duty to ensure that the automatic tax-loss harvesting feature maintained the value of Plaintiffs' and Class

members' position in a given category of investment held in the Essential and Selective Portfolios and kept funds invested as directed and desired by Plaintiffs and Class members.

64. Defendants breached their duty in contract in one or more of the following ways:

- a. By failing to properly create and establish the automatic tax-loss harvesting feature in the Essential and Selective Portfolios as intended;
- b. By failing to properly manage and administer the automatic tax-loss harvesting feature in the Essential and Selective Portfolios as intended;
- c. By failing to ensure the algorithm for the tax-loss harvesting program worked as intended;
- d. By failing to promptly re-invest Plaintiffs' and Class members' funds upon the tax-loss harvesting sale of a position in a given ETF held in the Essential and Selective Portfolios in a similar, but not substantially identical, ETF, or in the alternative, prevent the sale of Plaintiffs' position in an ETF when no other suitable option is available for purchase, so that Plaintiffs' and Class members' assets remained invested as directed and desired by them;
- e. By causing Plaintiffs' and Class members to incur investment losses and decreases in the value of assets held in the Essential and Selective Portfolios due to delays in the reinvestment of Plaintiffs' and Class members' assets in a similar, but not substantially identical, ETF following a tax-loss harvesting sale;
- f. By failing to ensure that a sufficient number and appropriate selection of ETF investment options in the Essential and Selective Portfolios were

available to Plaintiffs and Class members for investment purposes and the operation of the tax-loss harvesting feature at all necessary times, including but not limited to a sufficient number of broad US Stock Market ETF's; or

g. In other ways to be discovered in the course of this action.

65. As a direct and proximate result of Defendants' acts and omissions, Plaintiffs and Class members have suffered actual damages, including, but not limited to, financial losses incurred from the improper management and administration of tax-loss harvesting sales. Plaintiffs are informed and believe that they are entitled to compensation from these Defendants, jointly and severally, for such actual damages.

66. Plaintiffs do not allege that Defendants made any misrepresentation or omission of material fact in connection with the purchase or sale of a security or with the management and administration of the automatic tax-loss harvesting feature in the Essential and Selective portfolios. Defendants simply failed to perform the automatic tax-loss harvesting due to Defendants' failure to have sufficient, appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, or in the alternative to have a "stop" feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

67. Plaintiffs do not allege that Defendants used or employed any manipulative or deceptive device or contrivance in connection with purchase or sale of a security or with the management and administration of the automatic tax-loss harvesting feature in the Essential and Selective portfolios. Defendants simply failed to perform the automatic tax-loss harvesting due to Defendants' failure to have sufficient, appropriate investment options available for proper

operation of the automatic tax-loss harvesting feature, or in the alternative to have a “stop” feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

**SECOND CAUSE OF ACTION**  
**(Negligence)**

68. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated herein verbatim.

69. Defendants owed a duty to Plaintiffs and Class members to properly create and establish the tax-loss harvesting feature in the Essential and Selective Portfolios as intended.

70. Defendants owed a duty to Plaintiffs and Class members to properly manage and administer the tax-loss harvesting feature in the Essential and Selective Portfolios as intended.

71. Defendants owed a duty to offer and provide a sufficient number of appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, including, but not limited to, offering more than two broad US Stock Market ETFs available for investment by account holders in the Essential Portfolios and the Selective Portfolios, or in the alternative, to have a “stop” feature to prevent the sale of Plaintiffs’ position in an ETF when there are no other suitable options available for purchase within the program, in order to allow the tax loss harvesting service to perform its intended function while also permitting Plaintiffs and Class members to remain invested in the market in alternative ETFs which met their investment objectives while also complying with the wash sale rule.

72. Defendants were negligent in one or more of ways the described in paragraph 64 and as elsewhere alleged herein.

73. As a direct and proximate result of Defendants’ actions and omissions, Plaintiffs and Class members have suffered actual damages, including, but not limited to, financial losses

incurred from the improper management and administration of automatic tax-loss harvesting sales. Plaintiffs are informed and believe that they are entitled to compensation from these Defendants, jointly and severally, for such actual damages.

74. Plaintiffs do not allege that Defendants made any misrepresentation or omission of material fact in connection with the purchase or sale of a security or with the management and administration of the automatic tax-loss harvesting feature in the Essential and Selective portfolios. Defendants simply failed to perform the automatic tax-loss harvesting due to Defendants' failure to have sufficient, appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, or in the alternative to have a "stop" feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

75. Plaintiffs do not allege that Defendants used or employed any manipulative or deceptive device or contrivance in connection with purchase or sale of a security or with the management and administration of the automatic tax-loss harvesting feature in the Essential and Selective portfolios. Defendants simply failed to perform the automatic tax-loss harvesting due to Defendants' failure to have sufficient, appropriate investment options available for proper operation of the automatic tax-loss harvesting feature, or in the alternative to have a "stop" feature in the tax-loss harvesting program that would prevent the ETFs from being sold when there was no repurchase option available.

**DEMAND FOR JURY TRIAL**

Plaintiffs and Class members request a jury trial on all issues deemed triable to a jury. WHEREFORE, having fully set forth their Complaint, Plaintiffs and Class members

respectfully pray this Court to:

- a. On the First Cause of Action (Breach of Contract), make Plaintiffs and Class members whole by an award of actual damages, including, but not limited to, financial losses incurred from the improper management and administration of automatic tax-loss harvesting sales;
- b. On the Second Cause of Action (Negligence), make Plaintiffs and Class members whole by granting an award of actual damages, including, but not limited to, financial losses incurred from the improper management and administration of automatic tax-loss harvesting sales;
- c. The costs of this action; and
- d. Such other and further damages and relief as the Court deems appropriate.

DATED this 31st day of January, 2019.

Respectfully submitted,

s/Jason W. Grams  
Jason W. Grams, #24596  
Lamson Dugan & Murray, LLP  
10306 Regency Parkway Drive  
Omaha, NE 68114  
Telephone: (402) 397-7300  
Fax: (402) 397-7824  
Email: jgrams@ldmlaw.com  
*Attorneys for Plaintiffs*

#682272v4