15-3179

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

IN RE GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION

(Caption Continued on the Reverse)

FROM AN ORDER GRANTING CERTIFICATION OF CLASS ENTERED ON SEPTEMBER 24, 2015
BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
MASTER FILE NO. 1:10 CIV. 03461 (PAC)
THE HONORABLE PAUL A. CROTTY

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRYAND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITION OF DEFENDANTS FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
Charles E. Davidow
2001 K Street, N.W.
Washington, D.C. 20006
(202) 223-7300
Marc Falcone
Robyn Tarnofsky
1285 Avenue of the Americas
New York, NY 10019

SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION
Ira D. Hammerman
Kevin M. Carroll
1101 New York Ave., N.W.
Washington, D.C. 20005
(202) 962-7382

Counsel for Amicus Curiae

Dated: October 15, 2015

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP,

Lead Plaintiffs - Respondents,

ILENE RICHMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PABLO ELIZONDO,

Plaintiffs - Respondents,

HOWARD SORKIN, INDIVIDUALLY & ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, TIKVA BOCHNER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, EHSAN AFSHANI, LOUIS GOLD, INDIVIDUALLY & ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, THOMAS DRAFT, INDIVIDUALLY & ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Consolidated Plaintiffs - Respondents,

PENSION FUNDS,

Plaintiff,

v.

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants - Petitioners,

SARAH E. SMITH,

Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for Securities Industry and Financial Markets Association hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% of its stock.

Dated: October 15, 2015

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
By: /s/ Charles E. Davidow
Charles E. Davidow
2001 K Street, NW
Washington, D.C. 20006
(202) 223-7300

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INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers.[1] Its mission is to support a strong financial industry, while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. SIFMA is the United States regional member of the Global Financial Markets Association. It regularly files *amicus curiae* briefs in cases raising issues of vital concern to securities industry participants.[2] This case involves important issues concerning standards for class certification in private securities actions, which are directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

BACKGROUND AND SUMMARY OF ARGUMENT

The District Court's opinion granting class certification applied erroneous legal standards that effectively deprived Defendants of the right, established by *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398

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[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned counsel certify that no party's counsel authored this brief in whole or in part; no party or party's counsel, or any other person, other than amici or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

[2] These cases include *Halliburton Co*. v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014), and *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

(2014) ("*Halliburton II*"), to rebut the presumption of reliance created in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988). The District Court erred because:

- It mistakenly accepted a theory of false disclosure premised on vague aspirational statements about Goldman's business principles and conflict of interest controls that is precluded by this Court's repeated dispositive holdings that such statements would not be relied upon by reasonable investors.[3] Those disclosures accordingly could not have had an impact on Goldman's stock price under *Halliburton II* as a matter of law, and there should have been no need to resort to an empirical rebuttal.
- It judged Defendants' empirical rebuttal of the *Basic* presumption using a standard of proof unknown to civil litigation—requiring "conclusive" evidence demonstrating "a complete absence of price impact"—while giving the Plaintiffs the benefit of conjecture unsupported by record evidence.
- It rejected evidence of an absence of price impact because that evidence was also relevant to the merits, despite repeated binding rulings that such evidence must be considered where, as here, the issues overlap.

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[3] *ECA & Local 134 IBEW Joint Pension Trust of Chi.* v. *JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009); *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014); *Carpenters Pension Trust Fund of St. Louis* v. *Barclays PLC*, 750 F.3d 227 (2d Cir. 2014).

- It excused flaws in Plaintiffs' damages methodology by wrongly holding that Defendants, not Plaintiffs, bear the burden of disaggregating price declines due to matters unrelated to the alleged misstatements.

If the District Court's erroneous ruling is not corrected, and the legal standards on which it relies are applied in other cases, the ruling will dramatically alter the standards governing class certification, giving securities plaintiffs a largely unchallengeable path through the class certification process and driving up the already substantial costs of settlement. The correction should come now, as this case satisfies the standards of Fed. R. Civ. P. 23(f) for an immediate appeal. *See Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 75–76 (2d Cir. 2004). A denial of class certification would effectively end the case, and the legal standards the District Court used are inconsistent with governing law.

ARGUMENT

I. THE DISTRICT COURT WRONGLY HELD THAT DEFENDANTS FAILED TO REBUT THE *BASIC* PRESUMPTION

In *Halliburton II*, the Supreme Court held that a defendant must be allowed during class certification proceedings to rebut the presumption of reliance established by *Basic*, which is pivotal to Plaintiffs' certification motion here. A defendant may do so with "[a]ny showing that severs the link between the alleged misrepresentation and … the price received (or paid) by the plaintiff" if that evidence disposes of "the basis for finding that the fraud had been transmitted through market price." 134 S. Ct. at 2415–16, *quoting Basic*, 485 U.S. at 248. This showing is made when the defendant demonstrates that (1) the plaintiffs did not rely or would not have relied on the alleged misrepresentation, or (2) the alleged misrepresentation had no impact on the stock price. *Halliburton II*, 134 S. Ct. at 2408. Here, Defendants satisfied both criteria. The District Court applied incorrect legal standards in rejecting their showing. The effect of its holding is to render the *Basic* presumption effectively irrebuttable, contrary to the holding of *Halliburton II*.

A. Plaintiffs Would Not Have Relied on the Alleged Misstatements

Defendants showed that, as a matter of law, the alleged misrepresentations—general aspirational disclosures about Defendants' business principles and policies and procedures for dealing with conflicts of interest—are the types of "general statements about reputation, integrity, and compliance with ethical norms [that] are inactionable puffery, meaning that they are too general to cause a reasonable investor to rely upon them." *City of Pontiac Policemen's & Firemen's Ret. Sys.* v. *UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014) (internal quotation marks omitted). This showing alone rebutted Plaintiffs' claim of classwide reliance, the focus of *Halliburton II*, because by definition, such inactionable statements could not have impacted the company's stock price.

The District Court rejected this argument as inappropriate because it had rejected it at the motion to dismiss stage (A-12 n.5), but it is not: the District Court's error in failing to dismiss the case on this basis earlier is no excuse for compounding the error by certifying a class. Indeed, if statements such as the alleged misrepresentations at issue here are deemed to be capable of affecting a company's stock price, then virtually any comments by companies, no matter how imprecise or aspirational, might serve as the predicate for certification of a securities class action, further magnifying the burden on the economy.

B. The Alleged Misrepresentations Did Not Affect the Stock Price

Defendants demonstrated that the alleged misrepresentations had no effect on Goldman's stock price by showing empirically that (1) the stock price did not react when the statements at issue were made, (2) the stock price drops on the dates of the purported "corrective disclosures" were attributable to other causes (*i.e.*, the high-profile legal proceedings against Goldman that were announced on those dates), and (3) the purportedly withheld information—that Goldman allegedly had conflicts of interest that it did not adequately address—had been disclosed on many earlier occasions and caused no price movements.

The District Court did not find that Plaintiffs had disproven any of these showings. Rather, it erred by using an invented evidentiary standard to assess whether Defendants had rebutted the presumption, requiring Defendants to demonstrate with "conclusive evidence" a "complete absence of price impact." (A-13.) The proper standard, as articulated by the Supreme Court, is less stringent: the *Basic* presumption is rebutted through "[*a*]*ny showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff." *Basic*, 485 U.S. at 248 (emphasis added).[4] Instead, the District Court dismissed Defendants' showing as not "conclusive," speculating that the statements might have maintained the price of Goldman stock. (A-13.) The effect of that erroneous and inflated standard was to deny Defendants the rebuttal opportunity required by *Halliburton II*.

Defendants made an uncontested showing that the allegedly misleading disclosures, when first published in 2007, had no impact on stock price, thus rebutting the presumption.[5] The District Court discarded this showing as "insignificant," instead accepting Plaintiffs' bare contention that the "misstatements simply served to maintain an already inflated stock price." (A-11.) But rejecting evidence in favor of *ipse dixit*, as the District Court did, would render futile efforts under *Halliburton II* to rebut the presumption.

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[4] *See also Fogarazzo* v. *Lehman Bros., Inc.*, 263 F.R.D. 90, 103 (S.D.N.Y. 2009) (presumption of reliance rebuttable by a preponderance of the evidence); *In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 314 (S.D.N.Y. 2010) (same).
[5] *See In re Moody's Corp. Sec. Litig.*, 2013 WL 4516788, at *9 (S.D.N.Y. Aug. 23, 2013) (presumption rebutted if statements caused no price increase).

Defendants also demonstrated by a preponderance of the evidence that the 2010 stock price drops were caused by factors other than the alleged corrective disclosures regarding Goldman's business principles and conflicts controls. Each of the purported "corrective disclosures" on which Plaintiffs relied involved reports of significant legal proceedings against or investigations of Goldman; it was the revelation of these proceedings or investigations that, according to Defendants' experts, caused a price decline. In response, Plaintiffs' expert claimed that he would—at some later point in the proceedings "when he submits a damages report"—estimate the amount of inflation due to the alleged misrepresentations first made in 2007, as distinct from price movements caused by the litigation that was being disclosed. (A-10.) The District Court held that Defendants had "merely marshal[led] evidence which suggests a price decline for an alternate reason, but [did] not provide conclusive evidence that no link exists between the price decline and the misrepresentation." (A-12–13.) This holding violates *Halliburton II*. There is no such thing as a "conclusive evidence" standard of proof, nor can a showing by a preponderance of the evidence be trumped by a promise of a future response.

Finally, the District Court improperly disregarded expert testimony that the purported "corrective disclosure" regarding Goldman's handling of conflicts was old news that had caused no price declines when first disclosed.

Defendants' expert identified 34 earlier press reports that, like the supposed corrective disclosures, alleged Goldman conflicts with clients, none of which caused a price decline—strong evidence that something other than the 2010 disclosure of the same information caused a price drop. The District Court rejected this unrebutted evidence because it is also relevant to materiality, a merits issue not before it on class certification. (A-11.) It thereby ran afoul of repeated holdings by the Supreme Court and this Court that courts cannot disregard arguments against certification because they overlap merits issues.[6]

II. THE CLASS CERTIFICATION ORDER SHOULD BE VACATED BECAUSE PLAINTIFFS' DAMAGES MODEL IS ARBITRARY

The District Court's class certification order is also inconsistent with the Supreme Court's decision in *Comcast.* Like the plaintiffs in *Comcast,* Plaintiffs here advanced a damages theory that is disconnected from their theory of liability: it failed to separate damages resulting from the allegedly misleading

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[6] *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432–33 (2013); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). The District Court also mischaracterized this argument as "an inappropriate 'truth on the market' defense" (A-11), misunderstanding the relevance of the evidence. Defendants proffered it to show that the price reaction in 2010 could not have been attributable to the alleged correction of earlier misstatements regarding conflicts, because the supposedly new information had previously been made public without a stock price reduction. *See Erica P. John Fund, Inc.* v. *Halliburton Co.*, 2015 WL 4522863, at *20 (N.D. Tex. July 25, 2015) (presumption rebutted when later disclosure allegedly causing price reaction had already been disclosed "to no price reaction").

statements from those that, as Plaintiffs conceded, resulted from other causes.[7] Under *Comcast*, class certification was therefore unavailable.[8]

The District Court disregarded the failure of Plaintiffs' model on two grounds: (1) that Plaintiffs need not proffer a methodology that isolates the price decline caused by Defendants' alleged misstatements, instead placing on Defendants the burden of showing that some amount of the price decline was *not* attributable to the alleged misstatements; and (2) that the issue would affect all class members in the same way. (A-13–14.) Both are mistaken.

First, in *Comcast*, the Supreme Court made clear that it is the *plaintiff's* burden of showing that the "plaintiff's damages case [is] consistent with its liability case" in order to satisfy the predominance requirement for 23(b)(3) class certification, and that a model that fails to separate recoverable damages from other losses is insufficient. 133 S. Ct. at 1433 (internal quotation marks omitted). Indeed, the rule that plaintiffs must disaggregate recoverable damages from other losses was well-established before *Comcast*.[9] *Comcast*

[7] *See* A-13 (Plaintiffs' expert testimony did not isolate price declines attributable to alleged misstatements from those attributable to other causes).
[8] *See also Ludlow* v. *BP, P.L.C.*, 2015 WL 5235010, at *9 (5th Cir. Sept. 8, 2015) (stating that if plaintiffs could not disaggregate non-recoverable losses from the damages model they would "travel to a place forbidden by *Comcast*").
[9] *See Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 342–43 (2005) (loss must result from the misstatements rather than other "factors affecting [stock] price"); *Lattanzio* v. *Deloitte & Touche LLP*, 476 F.3d 147, 157–58 (2d Cir. 2007).

added that, for purposes of class certification, Plaintiffs must show not only that they can meet this burden but that they can do so on a classwide basis. The District Court thus improperly gave plaintiffs a pass on their failure to show that their damages model "actually measure[s] damages that result from the class's asserted theory of injury." (A-13, *quoting Roach* v. *T.L. Cannon Mgmt. Corp.*, 778 F.3d 401, 407 (2d Cir. 2015) (emphasis omitted).)

Second, the Supreme Court held in *Comcast* that such a failure precludes class certification, even if the flaw in plaintiffs' damages model can be seen as a classwide issue—as the defect in *Comcast* (an improper baseline for calculating damages) was. 133 S. Ct. at 1433. The Supreme Court stated that certifying a class despite an "arbitrary" model of class damages and based on plaintiff's assurance that the disputed issues can be resolved on a classwide basis "would reduce Rule 23(b)(3)'s predominance requirement to a nullity." *Id.*

CONCLUSION

The costs of improperly certified securities class actions burden not only defendants, but the economy as a whole. These costs are "payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers." *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring). For the foregoing reasons, *Amicus Curiae* SIFMA respectfully urges this Court to grant Defendants' petition.

Dated: October 15, 2015

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP

By: /s/ Charles E. Davidow
Charles E. Davidow
2001 K Street, N.W.
Washington, D.C. 20006
(202) 223-7300
Marc Falcone
Robyn Tarnofsky
1285 Avenue of the Americas
New York, NY 10019
(212) 373-3000

SECURITIES INDUSTRYAND
FINANCIAL MARKETS
ASSOCIATION
Ira D. Hammerman
Kevin M. Carroll
1101 New York Ave., N.W.
Washington, D.C. 20005
(202) 962-7382

Counsel for Amicus Curiae SIFMA

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,452 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: October 15, 2015

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

By: /s/ Charles E. Davidow
Charles E. Davidow
2001 K Street, N.W.
Washington, D.C. 20006
(202) 223-7300