IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 18-2557

In re Goldman Sachs Group, Inc. Securities Litigation	From an Order Granting Class Certification by the United States District Court for the Southern District of New York (Crotty, J.)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF OF SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-PETITIONERS

Pursuant to Federal Rule of Appellate Procedure 29, the Securities Industry and Financial Markets Association ("SIFMA") respectfully requests leave to file the attached Brief as *Amicus Curiae* in support of Defendants-Petitioners. SIFMA contacted the parties to obtain consent to file the brief, and Defendants-Petitioners consented. Plaintiffs-Respondents take no position on this motion.

SIFMA is a securities industry trade association representing the interests of hundreds of securities firms, banks, and asset managers. 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. This appeal 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.

The District Court's ruling granting class certification misapplied the letter and spirit of this Court's January 2018 interlocutory decision and vacatur of the District Court's previous class certification decision. *See Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474 (2d Cir. 2018). Rather than determine whether Defendants had "established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock," *id.* at 486, the District Court simply credited Plaintiffs' allegations of price inflation and impact. If the District Court's erroneous ruling is not corrected, and its reasoning

is followed in other cases, the ruling could lead to near-automatic certification of a securities class action following any regulatory announcement concerning a company. This brief will assist the Court in determining the proper legal standards governing class certification in private securities actions.

Accordingly, SIFMA respectfully requests leave to file the attached brief as amicus curiae in support of Defendants-Petitioners.

Dated: September 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Leave to File Brief of Amicus Curiae of *amicus curiae* Securities Industry and Financial Markets Association was filed with the Clerk using the appellate CM/ECF system on September 4, 2018. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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18-2557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re Goldman Sachs Group, Inc. Securities Litigation

BRIEF OF *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PETITION OF DEFENDANTS-PETITIONERS FOR LEAVE TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

FROM AN ORDER GRANTING CLASS CERTIFICATION ENTERED ON AUGUST 14, 2018
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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, 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.

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September 4, 2018

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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. 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.

SUMMARY OF ARGUMENT

The District Court's decision on remand certifying a class purportedly misled by Defendant's aspirational statements misapplied the letter and spirit of this Court's January 2018 interlocutory decision and vacatur of the District Court's previous class certification decision. *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.* ("*Goldman*"), 879 F.3d 474 (2d Cir. 2018). Rather than determine

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel, or any other person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

whether Defendants had "established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock," *id.* at 486, the District Court simply credited Plaintiffs' allegations of price impact. In so doing, the District Court erred because:

1) Defendants' aspirational statements regarding their business principles could not create or maintain inflation in Goldman's stock price. The aspirational statements here are nothing like the specific representations this Court has previously accepted on a price maintenance theory. Instead, they are "general statements about reputation, integrity, and compliance with ethical norms" that this Court deems "inactionable 'puffery.'" *City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014).
2) The District Court misapplied the "preponderance of the evidence" standard by crediting, despite Defendants' detailed expert evidence, Plaintiffs' bare assertion that the aspirational statements "*allegedly* served to maintain an already inflated stock price." A-4 (emphasis added). The preponderance standard required the District Court to weigh the *evidence* from Defendants against the (lack of) *evidence* from Plaintiffs.

If this decision stands, it risks leading to runaway liability for countless companies, including members of SIFMA, who could face near-automatic class certification following a regulatory announcement. Indeed, under this rubric, it is hard to imagine a regulatory announcement from which class certification *would not* follow. Put differently, if the announcement of an enforcement action causes Goldman's stock price to drop, and if generic, aspirational statements about Goldman's conflicts controls and business interests were sufficient to constitute affirmative misrepresentations that created and maintained an inflated stock price, then every company is one allegation of wrongdoing away from facing a similar securities class action lawsuit. That is not the law.

Review by this Court is urgently needed because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1708 (2017). Indeed, because many cases settle on the probability of class certification, this Court may not soon have the opportunity to review a similar case again. In the interim, absent review, plaintiffs will inevitably seek to improperly certify more securities class actions on a price maintenance

theory, creating widespread legal uncertainty — and undue settlement pressure — in this Circuit.

ARGUMENT

I. DEFENDANTS' ASPIRATIONAL STATEMENTS CANNOT MAINTAIN THE PRICE OF A STOCK

A. Defendants' Aspirational Statements Were Puffery, and Puffery Cannot Maintain an Inflated Stock Price

Plaintiffs contend that Defendants made false statements concerning their business practices and conflicts of interests, including: "Our reputation is one of our most important assets"; "Our clients' interests always come first"; and "Integrity and honesty are at the heart of our business." *Goldman*, 879 F.3d at 478-79. Plaintiffs allege that in conjunction with Goldman's practices relating to four collateralized debt obligation transactions, these aspirational statements concealed Defendants' true conflicts, creating inflation in Goldman's stock price and maintaining the inflated value until a series of alleged "corrective disclosures" were made relating to the announcement of enforcement actions against the bank.

It is settled law that "general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery' . . . 'too general to cause a reasonable investor to rely upon them.'" *Pontiac*, 752 F.3d at 183.[2] Puffery is "ubiquitous" — the kind of "rosy affirmation commonly heard from corporate

[2] Unless otherwise indicated, all quotations omit internal quotation marks, ellipses, brackets, and citations.

managers and numbingly familiar to the marketplace." *Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944 (6th Cir. 2009).

The statements at issue in this case are classic puffery and are strikingly similar to statements deemed inactionable:

- "We are equally focused on insuring that the excellent reputation that [we have] earned over the years for customer service does not get degraded."[3]
- "[We] set the standard for integrity."[4]
- "[We have a] culture of high ethical standards, integrity, operational excellence, and customer satisfaction."[5]
- "[We] provide a special relationship of trust and confidence wherein the financial interests of the client come first."[6]

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[3] *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1340 (10th Cir. 2012).

[4] *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009).

[5] *Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 97 (2d Cir. 2016), *cert. dismissed*, 138 S. Ct. 2670 (2018).

[6] *DeBlasio v. Merrill Lynch & Co., Inc.*, 2009 WL 2242605, at *5 (S.D.N.Y. July 27, 2009); *see also In re Marsh & McLennan Cos., Inc. Sec. Litig.*, 2006 WL 2789860, at *2 (S.D.N.Y. Sept. 27, 2006) ("commitment to client service and professional standards" and "culture of high ethical standards and commitment to compliance" were puffery).

"No investor would take such statements … seriously in assessing a potential investment, for the simple fact that almost every investment bank makes these statements." *ECA*, 553 F.3d at 206. If no reasonable investor would rely upon puffery, then it cannot possibly impact — whether by inflating or maintaining — the price of a stock.[7]

B. Defendants' Aspirational Statements Do Not Fit the Price Maintenance Theory

The District Court certified a class on a theory that Defendants' aspirational statements were untrue and, "[a]lthough the misstatements themselves did not inflate the stock price, they allegedly served to maintain an already inflated stock price." A-4. This Court, however, has never held that statements like those in this case can "maintain an already inflated stock price." Indeed, consistent with the law of puffery, the two price maintenance cases this Court has considered indicate they cannot.

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[7] Because no reasonable investor takes puffery seriously, *ECA*, 553 F.3d at 206, puffery negates both materiality and price impact. As this Court explained in its prior decision, price impact matters at class certification because "[i]f a defendant shows that an alleged misrepresentation did not, for whatever reason, actually affect the market price of defendant's stock, there is no grounding for any contention that the investor indirectly relied on that misrepresentation through his reliance on the integrity of the market price." *Goldman*, 879 F.3d at 486. Moreover, because "the plaintiff must plausibly allege . . . that the claimed misrepresentations were material" in order to invoke the *Basic* presumption, *Connecticut Ret. Plans & Tr. Funds v. Amgen Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011), *aff'd*, 568 U.S. 455 (2013), a plaintiff relying on puffery is not entitled to the *Basic* presumption in the first instance.

In *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 232 (2d Cir. 2016), this Court considered a company's "numerous representations to the market suggesting that the course ahead for the company was smooth sailing," when, in fact, the company was near bankruptcy. For example, the company stated that it had "posted RECORD–HIGH NET INCOME" and "had cash available for investing." *Id.* at 245. This Court explained because the company's assurances were made against the backdrop of impending bankruptcy, they could have prevented the market from discovering the truth and thereby "prevent[ed] the preexisting inflation in [the] stock price from dissipating." *Id.* at 258. In that context, the company's misstatements could affect the stock price, and were not mere puffery, because they "were not so general that a reasonable investor could not have relied upon them in evaluating whether to purchase [the company's] stock." *Id.* at 245.

In the second price maintenance case, *Waggoner v. Barclays PLC*, 875 F.3d 79, 87 (2d Cir. 2017), this Court considered statements made by a bank seeking to assuage its clients' fears of interacting with high-frequency traders on the bank's "LX" trading platform. For example, the bank stated its platform "was 'built on transparency' and had 'safeguards to manage toxicity, and to help its institutional clients understand how to manage their interactions with high–frequency traders.'" *Id.* at 87. This Court accepted the plaintiffs' theory that the bank's "purported

misstatements regarding LX" could maintain inflation in the bank's stock price. *Id.* at 104. Notably, however, this Court contrasted these alleged misstatements with the more general statements rejected by the district court as "inactionable puffery," such as the bank's statement that it "was changing its values to conduct its 'business in the right way.'" *Id.* at 89 n.16.

Vivendi and *Barclays* illustrate why the statements in this case do not fit the price maintenance theory. *First*, like the "inactionable puffery" in *Barclays*, the aspirational statements here are general statements about Defendants' integrity and values. They do not speak to Defendants' income or liquidity, like in *Vivendi*, or to a specific product line, like in *Barclays*. They are "ubiquitous" statements "commonly heard from corporate managers and numbingly familiar to the marketplace," *Omnicare*, 583 F.3d at 944, upon which no investor would reasonably rely. *Second*, the aspirational statements in this case were not made against the backdrop of bankruptcy or some specific client concern. Accordingly, there is no suggestion that Defendants made their aspirational statements in order to provide false comfort to the market, thereby "prevent[ing] the preexisting inflation in [the] stock price from dissipating." *Vivendi*, 838 F.3d at 258.

C. Plaintiffs Should Not Be Permitted to Convert an Inactionable Omissions Case Into a Viable Price Maintenance Action

The reason why the statements at issue in this case so poorly fit the price maintenance theory is easily explained: this is not a price maintenance action at all.

Rather, in Plaintiffs' words, "This is an omissions case." A-1880. Given Defendants' express disclosure of the risk of conflicts, *e.g.*, A-1763 ("Conflicts of interest are increasing and a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses."), Plaintiffs appear to contend that Defendants should have disclosed the specific alleged conflicts that ultimately led to actual and potential government enforcement action. *See, e.g.*, A-2028, 2031. But under settled law, Defendants had no duty to disclose the specific alleged conflicts. *Pontiac*, 752 F.3d at 184 ("As we have explained, disclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing.").[8]

Unable to plausibly allege *omissions*, Plaintiffs take the same underlying conduct and allege *misstatements*, pointing to generic statements of corporate integrity made by virtually all firms. If the gambit succeeds, companies — including members of SIFMA — could face near-automatic class certification following a regulatory announcement on the theory that the generic statement, necessarily proven false by the regulatory announcement, kept the stock price artificially high. This Court should not permit Plaintiffs to misapply the price

[8] Plaintiffs previously alleged another omissions theory that Defendants failed to disclose certain "Wells Notices," but this was dismissed by the District Court. *Goldman*, 879 F.3d at 478 n.1.

maintenance theory, adopted for an unusual and wholly inapposite fact pattern, to greatly expand class liability in securities law.

II. THE DISTRICT COURT DID NOT APPLY THE PREPONDERANCE OF THE EVIDENCE STANDARD INSTRUCTED BY THIS COURT

This Court instructed the District Court to consider on remand "whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock." *Goldman*, 879 F.3d at 486. Although the District Court recited the correct standard, its cursory analysis did not evince actual weighing of the evidence. Instead, the District Court appears to have disregarded the extensive evidence put forth by Defendants and credited Plaintiffs' bare allegation of price impact.

In its section identifying "Evidence of Price Impact," the District Court included just two sentences connecting the alleged misstatements (*i.e.*, Defendants' aspirational statements) with any price impact: "Plaintiffs claim that the alleged misstatements had impact on Goldman's stock price. Although the misstatements themselves did not inflate the stock price, they allegedly served to maintain an already inflated stock price." A-4. These are allegations, not evidence.[9]

[9] In its lone citation to Plaintiffs' evidence, the District Court wrote: "Dr. Finnerty, Plaintiffs' expert, stated that the price declines following these corrective disclosures were caused by the news of Goldman's conflicts." A-4. Even if Dr. Finnerty's unsupported "statement" is taken at face value, it merely connects regulatory enforcement activity with price drops. It does not establish that

Defendants, by contrast, put forward substantial expert evidence that, among other things, "the lack of stock price movement on 36 dates when published reports commented on Goldman's conflicts — all before the three corrective disclosures — demonstrates that the alleged misstatements did not cause any price inflation." A-5. Defendants also submitted expert evidence that, based on a detailed event study, the average price decline following the purported corrective disclosures was in line with price declines following similar enforcement announcements in other cases. A-6. Accordingly, "the stock price declines following the three corrective disclosures were due entirely to the news of enforcement actions," and not any alleged misstatements. A-9.

The District Court declined to credit *any* of the evidence put forth by Defendants and instead accepted Plaintiffs' bare allegation of price impact. At a minimum, the District Court should have seriously grappled with the complete lack of evidence put forth by Plaintiffs. *See United States v. Zajac*, 62 F.3d 145, 150 (6th Cir. 1995) ("Application of a preponderance of the evidence standard requires a fact-finder to weigh the *evidence* on both sides of a contested issue." (emphasis added)); *cf. Parr v. Jackson*, 2006 WL 1381874, at *1 (S.D. Ala. May 16, 2006) ("Since the plaintiff elected to provide no evidence at all concerning the amount in

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Defendants' prior aspirational statements — the alleged misstatements — maintained an inflated price.

controversy, State Farm's evidence constitutes a preponderance."). While the defendant bears the burden of persuasion to rebut the *Basic* presumption, *Goldman*, 879 F.3d at 485, the burden cannot be so heavy that the presumption is unrebuttable. Absent review by this Court, the District Court's summary disposal of all Defendants' evidence in favor of Plaintiffs' allegation would make the rebuttable presumption of *Basic* unrebuttable indeed.

CONCLUSION

The standard applied by the District Court, if uncorrected, could lead to a bevy of improperly certified "price maintenance" class actions, saddling shareholders of any company against which an enforcement event is announced with the added financial burden of near-automatic class certification. Given the hydraulic pressures of settlement, it is unclear when another opportunity for review will come before the Court again. The petition should be granted.

Dated: New York, New York
September 4, 2018

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,600 words, excluding the parts of the brief exempted by Rule 32(f).

2. This motion complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

Dated: New York, New York
September 4, 2018

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