UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-3667 Caption [use short title] In re Goldman Sachs Group, Inc. Securities Litigation

Motion for: Leave to File Brief of Amici Curiae Securities Industry and Financial Markets Association and Bank Policy Institute in Support of Defendants-Appellants

Set forth below precise, complete statement of relief sought:

Seeking leave to file an amicus curiae brief in support of Defendants-Appellants

MOVING PARTY: Security Industry and Financial Markets Association and Bank Policy Institute ☐ Plaintiff ☐ Defendant ☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiffs-Appellees

MOVING ATTORNEY: Jonathan K. Youngwood

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Court-Judge/Agency appealed from: The Honorable Paul A. Crotty, U.S. District Court, Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Jonathan K. Youngwood **Date:** February 22, 2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

18-3667

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION

MOTION OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE BANK POLICY INSTITUTE FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS

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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 and the Bank Policy Institute hereby certifies that they have no parent corporation and that no publicly held corporation owns 10% of their stock.

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Securities Industry and Financial Markets Association ("SIFMA") and Bank Policy Institute ("BPI" and, together with SIFMA, the "Amici") respectfully request leave to file the attached Brief as *Amici Curiae* in support of Defendants-Appellants. The Amici contacted the parties to obtain consent to file the brief, and Defendants-Appellants consented. Plaintiffs-Respondents informed Amici that they do not oppose this motion, but reserve the right to respond.

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.

BPI is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, BPI's members employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine of financial innovation and economic growth.

The district court's ruling granting class certification is contrary to this Court's precedents and threatens to nullify defendants' opportunity to rebut price impact in opposition to motions for class certification. First, the general aspirational statements challenged in this case by Plaintiffs and found actionable by the district court, as a matter of law, cannot affect the price of stock so cannot form a basis for securities claims. Similar statements are ubiquitous in the market and among financial institutions, and this Court has held multiple times that such statements are not actionable. Second the district court did not properly apply the preponderance of the evidence standard as instructed by this Court in *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc*., 879 F.3d 474, 486 (2d Cir. 2018). Instead, the district court accepted Plaintiffs' mere allegation of a stock price impact, and failed to credit Defendants' extensive evidence showing that there was none. The ability to present evidence to rebut price impact is a key gating factor to financial institutions that are often named in securities cases.

The district court's decision poses a financial threat to Amici's members, many of which make or have made general statements regarding their business practices and principles and which, from time to time, experience stock drops following the announcement of unforeseen events such as government investigations. If the decision stands, it risks leading to runaway liability for countless companies, including members of Amici, who could face near-automatic

class certification following a regulatory announcement that allegedly conflicts with some enunciated business principle.

Accordingly, the Amici respectfully request leave to file the attached brief as *amici curiae* in support of Defendants-Appellants.

Dated: February 22, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing Motion of the Securities Industry and Financial markets Association and the Bank Policy Institute for Leave to File *Amici Curiae* Brief in Support of Defendants-Appellants of the Securities Industry and Financial Markets Association and Bank Policy Institute was filed with the Clerk using the appellate CM/ECF system on February 22, 2019. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

In addition, I caused the following parties to be served by electronic mail on February 22, 2019:

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18-3667

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees

(*Caption Continued on the Reverse*)

PURSUANT TO DECEMBER 11, 2018 ORDER GRANTING PERMISSION TO APPEAL FROM AN ORDER GRANTING CERTIFICATION OF CLASS 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

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND BANK POLICY INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS

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PENSION FUNDS, ILENE RICHMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

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

Consolidated-Plaintiffs,

v.

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

Defendants-Appellants

SARAH E. SMITH,

Consolidated-Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Securities Industry and Financial Markets Association and the Bank Policy Institute hereby certifies that they have no parent corporation and that no publicly held corporation owns 10% of their stock.

Dated: New York, New York
February 22, 2019

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

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. 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. As with the prior Rule 23(f) review in this case, this appeal involves important issues concerning standards for class certification in private securities actions, which are directly relevant to SIFMA's members and to its mission of promoting fair and efficient markets and a strong financial services industry.

The Bank Policy Institute ("BPI" and, together with SIFMA, the "Amici") is a nonpartisan public policy, research, and advocacy group, representing the nation's leading banks and their customers. BPI's members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively,

[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 the Amici or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

BPI's members employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine of financial innovation and economic growth.

SUMMARY OF ARGUMENT

The district court's decision to certify a class based on Plaintiffs' allegation that general and aspirational statements in the public filings of Goldman Sachs Group, Inc. ("Goldman") served to artificially maintain unspecified "inflation" in the price of Goldman stock ignores this Court's precedents and threatens to nullify defendants' opportunity to rebut price impact to oppose class certification. Such a precedent risks unduly burdening financial institutions, including members of the Amici, and their shareholders with meritless claims in which there is no evidence of price impact.

First, as this Court has made clear multiple times, the general aspirational statements challenged by Plaintiffs in this case, as a matter of law, can no more "maintain" stock price than cause inflation in the first place because no reasonable investor relies on them. Indeed, such statements are ubiquitous in the market and have been for a long time. It is undisputed that the statements challenged here did not inflate Goldman's stock price when they were made, and no evidence was presented as to whether any supposed inflation arose. While Plaintiffs allege (without evidence) that the statements maintained Goldman's stock price,

Goldman's general aspirational statements are not equivalent to the types of concrete, specific misrepresentations this Court has found are necessary to support price maintenance claims.

Second, the district court did not properly apply the preponderance of the evidence standard as instructed by this Court in *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 486 (2d Cir. 2018). Instead, the district court accepted Plaintiffs' mere allegation of a stock price impact, and failed to credit Defendants' extensive evidence showing that there was none. The ability to present evidence to rebut price impact is a key gating mechanism to financial institutions that are often named in securities cases. If mere allegations of price maintenance could trump evidence showing to the contrary, the rebuttable presumption of price impact articulated in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (*Halliburton II*) and *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018) would be unrebuttable. This is not the law.

The district court's dramatic expansion of the price maintenance theory in this case poses a financial threat to the Amici's members, many of which make or have made general statements regarding their business practices and principles and which, from time to time, experience stock drops following the announcement of unforeseen events such as government investigations. If the decision stands, it risks leading to runaway liability for countless companies, including members of the Amici, which

could face near-automatic class certification following a regulatory announcement that allegedly conflicts with some enunciated business principle. Indeed, under this rubric, it is hard to imagine a regulatory announcement from which class certification would not follow. This result is not consistent with the Supreme Court's instruction in *Halliburton II* or this Court's instruction in *Goldman*, 879 F.3d at 486.

ARGUMENT

I. DEFENDANTS' GENERAL AND ASPIRATIONAL STATEMENTS CANNOT MAINTAIN STOCK PRICE

A. Aspirational Statements Like Those Challenged In This Case Are Customary in the Financial Industry, And Are Not Actionable

Plaintiffs are investors in Goldman common stock who allege Goldman made certain false statements in its Annual Reports and Form 10-Ks published between 2007 and 2010. Plaintiffs advance the theory that the statements maintained Goldman's stock price at artificially inflated levels until price drops upon three "corrective disclosure" events.

The statements at issue include the following generalized remarks about Goldman's business principles:

- "Our clients' interests always come first."
- "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us."
- "Integrity and honesty are at the heart of our business."

- "Our reputation is one of our most important assets."
- "We have extensive procedures and controls that are designed to identify and address conflicts of interest."

As discussed below, there are variations of these types of statements in materials provided by countless companies and institutions in securities filings.

This Court has held multiple times that "general statements about reputation, integrity, and compliance with ethical norms are inactionable." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014). This is for good reason. Such statements are "too general to cause a reasonable investor to rely upon them." *Id.* (quoting *ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009)). They are vague and general, and do not refer to any particular product line or transaction or any particular procedure or practice.

The challenged statements are also aspirational. Many are contained in the introductory "Business Principles" portion of Goldman's Annual Reports, and are accompanied by explanatory text emphasizing that the principles are aspirations and not guarantees. *See* JA-5781 ("Integrity and honesty are at the heart of our business. We *expect* our people to maintain high ethical standards in everything they do, both in their work for the firm and in their personal lives."). The others, which concern potential conflicts of interest, are in the "Risk Factors" section of Goldman's Form

10-K. The statements make no guarantee that Goldman will be able to avoid or resolve all conflicts of interest. Rather, the statements expressly disclose that the conflicts of interest involved in Goldman's business are a risk of investing because, as with any institution of that size, any one conflict can be difficult to identify and manage. *See* JA-5716 ("We have extensive procedures and controls that are *designed* to identify and address conflicts of interest . . . However, *appropriately identifying and dealing with conflicts of interest is complex and difficult*, and *our reputation . . . could be damaged . . . if we fail, or appear to fail, to identify and deal appropriately with conflicts of interes*t.") (emphasis added).

There is little dispute that companies and financial institutions commonly make general aspirational statements such as those challenged here as a normal part of their business and their securities disclosures. Similar aspirational statements regarding general business standards are made by companies across the market. *See* JA-5049 ("Apple's principles of business [include] . . . Honesty. Demonstrate honesty and high ethical standards in all business dealings." . . . "At Dow, we believe our success depends on maintaining the highest ethical and moral standards everywhere we operate." . . . "One of [Walt Disney Company's] greatest assets is our reputation. We're known for operating with high ethical standards everywhere we do business.").

Moreover, statements similar to Goldman's concerning the existence of procedures to manage conflicts of interest are commonplace in the financial sector. Examples identified by Defendants' expert include:

- "[P]otential conflicts can occur when there is a divergence of interests between us and a client, among clients, or between an employee on the one hand and us or a client on the other. We have policies, procedures and controls that are designed to address potential conflicts of interests."[2]
- "Company attempts to manage legal and compliance risk through policies and procedures reasonably designed to avoid litigation claims and prevent or detect violations of applicable legal and regulatory requirements. These procedures address issues such as business conduct and ethics . . . ."[3]
- "As we have expanded the scope of our businesses and our client base, we increasingly have to address potential conflicts of interest, including those relating to our proprietary activities. . . . We have

[2] *See* JA 5174.

[3] *Id.* at JA-5171.

extensive procedures and controls that are intended to ensure that any potential conflicts of interest are appropriately addressed."[4]

- "Fiduciary risk is the potential for financial or reputational loss through breach of fiduciary duties to a client. . . . The Company attempts to manage this risk by establishing procedures to ensure that obligations to clients are discharged faithfully and in compliance with applicable legal and regulatory requirements."[5]

As courts have found, the general aspirational statements are "ubiquitous" and "numbingly familiar in the marketplace." *Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944 (6th Cir. 2009). "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.

Indeed, in innumerable other instances, statements made by financial institutions which are similar to Goldman's challenged statements have been held to be inactionable. For example:

[4] *Id.* at JA-5173.

[5] *Id.* at JA-5166.

- Statements by Level 3 Communications that "[w]e are equally focused on insuring that the excellent reputation that [we have] earned over the years for customer service does not get degraded" and that "this year is really focused on integration and getting synergies from all those acquisitions" were "*vague (if not meaningless) management-speak* upon which no reasonable investor would base a trading decision."[6]
- Statements by JP Morgan Chase that it "set the standard for best practices in risk management techniques" were "so general that . . . [n]o investor would take such statements seriously . . . *for the simple fact that almost every investment bank makes these statements*."[7]
- Statements by SAIC regarding its "culture of high ethical standards, integrity, operational excellence, and customer satisfaction" and "reputation for upholding the highest standards of personal integrity and business conduct" were inactionable.[8]

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

[7] *ECA*, 553 F.3d at 206 (emphasis added).

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

- Statements regarding Wachovia's "'conservative' underwriting standards and credit risk management" did not give rise to securities violations."[9]
- Statements by the Australia & New Zealand Banking Group that "ANZ recognises the importance of effective risk management to its business success," its "[m]anagement is committed to achieving a strong risk control, resulting in 'no surprises' and a distinctive risk management capability," and that its Audit Committee maintained "a robust process for ensuring prompt resolution of audit issues" were inactionable.[10]

In previous cases, this Court has rightly "decline[d] to broaden the scope of securities laws" in such a way that would "bring within the sweep of federal securities laws . . . routine representations made by investment institutions." *ECA*, 553 F.3d at 206. The district court erred by departing from this settled law.

B. Defendants' General Aspirational Statements Could Not And Did Not Affect The Share Price

The district court's ruling that Plaintiffs may certify a class based on Goldman's general aspirational statements is particularly inappropriate because

[9] *In re Wachovia Equity Sec. Litig.*, 753 F. Supp.2d 326, 354 (S.D.N.Y. 2011) (quoting *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009).

[10] *In re Australia and New Zealand Banking Grp. Ltd. Sec. Litig.*, No. 08 Civ. 11278 (DLC), 2009 WL 4823923, at *8-12 (S.D.N.Y. Dec. 14, 2009).

Plaintiffs seek to certify a class based on a fraud-on-the-market theory. "The fraud-on-the-market theory rests on the premise that certain well developed markets are efficient processors of public information. In such markets, the 'market price of shares' will 'reflec[t] all publicly available information.'" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds,* 133 S. Ct. 1184, 1192 (2013). In well-developed markets, market professionals "rely on facts in determining the value of a security," not on "expressions of optimism" or "projections of future performance not worded as guarantees." *Raab v. Gen. Physics Corp*., 4 F.3d 286, 290 (4th Cir. 1993); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 869 (5th Cir. 2003); *Elliott Assocs., L.P. v. Covance, Inc.*, No. 00 Civ. 4115 SAS, 2000 WL 1752848, at *9 (S.D.N.Y. Nov. 28, 2000) (same). As such, as a matter of law, Goldman's general aspirational statements could not affect the market price, including to "maintain" inflation.

Moreover, all evidence presented to the district court shows that the challenged statements did not have any effect on the market price. Goldman presented uncontroverted evidence that the statements did not inflate the stock price when they were made. Additionally, while Plaintiffs seek to invoke price maintenance theory, there was no evidence presented that the price of Goldman shares was inflated or that the statements maintained the price of the Goldman shares.

The generality and aspirational nature of the challenged statements in this case render it wholly different than the two previous cases in which this Court found plaintiffs could proceed on a price maintenance theory. In both *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016) and *Waggoner*, 875 F.3d 79, the challenged statements were specific representations made against the backdrop of a particular concern about the companies and related specifically to that concern. This Court therefore found the statements could serve to maintain the price of the stock. *See Vivendi*, 838 F.3d at 245 (statements that the company "posted RECORD–HIGH NET INCOME, and ha[d] cash available for investing," and "[t]he results produced by Vivendi Universal in the second quarter are well ahead of market consensus" were found actionable when made against the backdrop of the company's liquidity crisis and potential bankruptcy); *Waggoner*, 875 F.3d at 87 (Bank made numerous statements assuring it had safeguards in place to protect against high-frequency traders on its "LX" market, when instead, plaintiffs alleged, it did not, and actually favored high frequency traders).

Notably, in *Waggoner*, the Court contrasted the specific statements about protections in place for the "LX" market—which were found actionable—with other alleged misrepresentations related to Barclays' "general business practices," which as a matter of law could not affect the stock price. *See* 875 F.3d at 86-89, n.7 & 16 (noting that the district court dismissed claims challenging statements that "Barclays

was changing its values to conduct its 'business in the right way'" and that Barclays was committed to enacting certain business practices aimed at providing transparency). Here, the district court erred by finding similar statements made by Goldman could affect stock price. Its decision certifying a class based on vague and common statements without any evidence of inflation, maintenance or price impact is an unprecedented expansion of the price maintenance theory.

II. THE DISTRICT COURT'S DECISION DID NOT PROPERLY CONSIDER DEFENDANTS' EVIDENCE REBUTTING THE *BASIC* PRESUMPTION AND, IF ALLOWED TO STAND, WOULD GUT *HALLIBURTON II*

The Supreme Court recognized in *Basic Inc. v. Levinson*, 108 S. Ct. 978 (1988), that in certain circumstances plaintiffs bringing securities fraud claims are entitled to a presumption of reliance based on the theory that the market price of shares at which investors bought and sold securities will reflect all publicly available information and hence any material misrepresentations. In *Halliburton II*, 134 S. Ct. at 2415-16, the Supreme Court reaffirmed that the *Basic* presumption is rebuttable and held that defendants are entitled to present and have considered "direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price." This Court holds that the *Basic* presumption is rebutted if defendants "demonstrate a lack of price impact by a preponderance of the evidence." *Waggoner*, 875 F.3d at 101. The preponderance standard is the "lowest

standard of proof" and "no more than a tie-breaker." *U.S. v. Gigante*, 94 F.3d 53, 55-56 (2d Cir. 1996).

Here, Defendants presented substantial evidence showing that the alleged misrepresentations had no effect on the stock price. Plaintiffs claimed that the alleged falsity of the challenged statements was revealed on three dates in 2010 when certain government investigations and an enforcement action concerning Goldman were announced and Goldman's stock price dropped. Defendants showed, however, that the drops in stock price were not due to revelation of any concealed conflicts of interest, but rather were entirely due to the news that the government was investigating Goldman and bringing an enforcement action.

First, Defendants showed that prior to the announcement of any government actions, the existence and risks of the Goldman conflicts at issue were publicized in dozens of press reports. (JA-2952-57, 5284-437). Yet Goldman's stock did not drop on any of the dates the reports were published, meaning the challenged statements could not have artificially maintained Goldman's stock price. This was precisely the evidence this Court directed the district court to consider on remand. *Goldman*, 879 F.3d at 486.

Second, Defendants submitted evidence demonstrating that there was no statistically significant difference between the stock price decline following the alleged corrective disclosures and declines following similar announcements of SEC

enforcement actions against other firms. (JA-4962-73, 8133-34). This analysis was further supported by a review of 880 analyst reports, which attributed the price decline to the enforcement activity rather than to a revelation that Goldman's challenged statements were false. (JA-5054-56).

On the other hand, Plaintiffs presented no evidence that the challenged statements artificially maintained the stock price and no evidence that the declines were caused by revelation of client conflicts (as opposed to revelation of government investigations and an enforcement action). Plaintiffs' expert merely *claimed* that the alleged misstatements impacted Goldman's stock price. Yet the district court elected to credit the assertion of Plaintiffs' expert that "news of Goldman's conflicts in the corrective disclosure dates negatively impacted Goldman's stock price" because, according to the court, "[i]t is only natural that 'economically negative news' such as these, would at least contribute to the stock decline."

The district court's crediting of Plaintiffs' *ipse dixit* over Defendants' evidence was not a proper application of the preponderance of the evidence standard articulated by this Court in *Goldman*, 879 F.3d 474. Under the preponderance standard, a decision must be based on evidence, not allegations. "[T]he preponderance standard goes to how convincing the *evidence* in favor of a fact must be in comparison with the *evidence* against it." *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (emphasis added); *see also Int'l Gateway Exch. v. W. Union*

Fin. Servs., 333 F.Supp.2d 131, 142 (S.D.N.Y. 2004) ("[S]peculation is not evidence."); *U.S. v. Beard*, 542 F.App'x. 529, 530 (7th Cir. 2013) ("[W]hen a dispute will be decided based on a preponderance of the evidence . . . a party who shuns the opportunity to present evidence is almost assured of losing."). The district court therefore erred by accepting Plaintiffs' assertions over Defendants' evidence.

Moreover, if the district court's analysis were allowed to stand, the *Basic* presumption would be unrebuttable in price maintenance cases. In a price maintenance case, the operative question for purposes of the *Basic* presumption is whether a price drop was due to an alleged misrepresentation being revealed or other factors. Invariably, the price drop will follow a negative announcement about the company in the market (*e.g.*, a regulatory investigation, an unfavorable earnings report, or a struggling business unit). If—despite all evidence being to the contrary—courts conclude, as the district court did here, that "it is only natural" that some portion of the price decline must have been due to an alleged fraud being revealed as opposed to the future implications of the negative announcement, then the *Basic* presumption could not be rebutted.

Notably, this case is markedly different from *Waggoner*, the only previous price maintenance case in which this Court considered whether a defendant rebutted the *Basic* presumption. In *Waggoner*, where a price drop coinciding with announcement of a government action was also at issue, defendants presented no

evidence showing the price drop was due to the potential negative implications of the regulatory action as opposed to the revelation of an allegedly concealed truth. *Id.* at 104. The *Waggoner* defendants offered only the *ipse dixit* of their expert unsupported by any quantitative analysis. *Id.* Moreover, in *Waggoner*, defendants' expert opined only that the regulatory announcement was a contributing factor to the price drop—as opposed to the sole cause. *Id.* This Court therefore found the district court did not err in concluding that class certification was proper. *Id.* at 100-101. Here, however, the situation is reversed. Defendants presented significant evidence that the price drops were entirely due to the negative future implications of the announced government actions, and Plaintiffs presented no evidence that the price drops were due to an allegedly revealed truth (other than the *ipse dixit* of Plaintiffs' expert). The Court should make clear that in these circumstances, the *Basic* presumption has been rebutted.

III. THE DISTRICT COURT'S DECISION THREATENS NEAR-AUTOMATIC CLASS CERTIFICATION IN PRICE MAINTENANCE THEORY CASES

The district court's errors in this case are particularly worrisome for members of the Amici because, in combination, they threaten to open a floodgates of classes bringing meritless price maintenance claims. As discussed above, general aspirational statements like those challenged here are ubiquitous among publicly traded companies and the Amici's membership. If this ruling stands, enterprising

plaintiffs may use everyday occurrences as grist for price maintenance claims. Namely, without any evidence, plaintiffs could allege that a general aspirational statement like those challenged here—*e.g.*, "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us"—was a misrepresentation which was revealed when the stock dropped following an unfavorable announcement.

While a class would ultimately have to prove the elements of its case at trial, these burdens are unlikely to save defendant financial institutions and their shareholders from paying out meritless claims. Once a class is certified, defendants face "hydraulic pressure" to settle and "avoid[] the risk, however small, of potentially ruinous liability." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low."). A recent study indicates that less than 1% of putative class actions are litigated to a verdict. *See* Cornerstone Research, Securities Class Action Filings 2018 Year in Review, 16 (2019), http://securities.stanford.edu/research-reports/1996-2018/Cornerstone-Research-Securities-Class-Action-Filings-2018-YIR.pdf. Thus, the district court's expansion of price maintenance theory threatens to financially burden company shareholders with paying claims to plaintiffs who have suffered no loss.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the district court's certification order and decertify the class.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,053 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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