18-3667-cv

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 inside cover)

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

—against—

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
May 19, 2020

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. This petition for rehearing or rehearing en banc 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

[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.

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.

SUMMARY OF ARGUMENT

In a divided decision, the Panel affirmed certification of a class based on general, aspirational statements made by Goldman Sachs Group, Inc. ("Goldman") by ignoring uncontroverted evidence—including the very nature of the statements themselves—and multiple Second Circuit precedents demonstrating that the statements had no effect on stock price as a matter of fact or law. If left to stand, the decision threatens to make the *Basic* presumption effectively irrebuttable and burden financial institutions, including members of Amici and their shareholders, by certifying classes bringing clams based on generic statements that have no price impact. This is an issue of exceptional importance warranting rehearing.

The majority erred in at least two respects. *First*, the majority declined to consider the general and aspirational nature of the statements in assessing whether defendants had met their burden under *Basic* to show the alleged misstatements did not affect stock price, essentially donning blinders to this Court's numerous precedents holding similar disclosures inactionable. The majority suggested such inquiry would veer too close to a materiality review that is inappropriate for class certification. But, as explained by the dissent, a court should be "free to consider the alleged misrepresentations in order to assess their impact on price." *Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 278 (2d Cir. 2020) (Sullivan, J., dissenting).

Second, the majority improperly applied an insurmountable standard when it affirmed the district court's decision that Defendants failed to rebut the *Basic* presumption. By finding that Plaintiffs' assertions could defeat Defendants' evidence, the decision threatens to make the *Basic* presumption a hurdle that cannot be overcome. This is inconsistent with the law that a defendant may rebut *Basic* through "any showing" that severs the link between the misrepresentation and the stock price drop, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 269 (2014) ("Halliburton II"), and that the preponderance standard is "no more than a tie-breaker." *U.S. v. Gigante*, 94 F.3d 53, 55-56 (2d Cir. 1996).

* * *

Should the holding stand, it risks leading to increased litigation for the countless companies which also make general, aspirational corporate statements that could be converted into inflation-maintenance claims and classes following any negative corporate announcement causing a stock price drop. If defendants are not provided a legitimate opportunity to rebut the *Basic* presumption, there will be near-automatic class certification, even on meritless claims. The decision threatens to make the *Basic* presumption "truly irrebutable" and class certification "all but a certainty in every case." Dissent, 955 F.3d, at 278.

ARGUMENT

I. THE DISSENT CORRECTLY FOUND THAT A COURT CAN CONSIDER THE NATURE OF A COMPANY'S STATEMENTS IN ASSESSING WHETHER *BASIC* HAS BEEN REBUTTED

A. The Challenged Statements Are General And Aspirational, Of The Kind Commonly Made In The Financial Industry

Plaintiffs advance the theory that certain general, aspirational statements made by Goldman in its Annual Reports and Form 10-K filings served to fool the market into overvaluing its stock, thus maintaining an inflated stock price until these statements were revealed to be false. The statements challenged by Plaintiffs do not refer to any particular product line, transaction, or practice and would be unimportant to any reasonable investor. For example, Goldman stated "[o]ur clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow. . . ." *See* JA-87–88, 93.

Similar aspirational statements are commonly made across the business and financial communities including among the Amici's membership. Examples from annual reports and Form 10-Ks include the following:

- "[W]e believe our success depends on maintaining the highest ethical and moral standards everywhere we operate";
- "Our brand and reputation are key assets of our Company";
- "Our . . . reputation and experience are among this company's strongest advantages."

JA-5047-49.

Likewise, statements similar to Goldman's concerning the existence of procedures to manage conflicts of interest are commonplace in the financial sector. Because of their ubiquity, generality, and aspirational nature, these statements are unimportant to the market. As this Court has said, "[n]o investor would take such statements seriously in assessing a potential investment, for the simple fact that almost every investment bank makes these statements." *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (addressing statement that firm "set the standard for best practices in risk management techniques").[2] "[G]eneral statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery' . . . 'too general to cause a reasonable investor to rely upon them.'" *City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014). Such statements are "rosy affirmation[s] commonly heard from corporate 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).

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[2] *See also Singh v. Cigna Corp.*, 918 F.3d 57, 63 (2d Cir. 2019); *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Companies, Inc.*, 75 F.3d 801, 811 (2d Cir. 1996)*; Lasker v. New York State Elec. & Gas Corp.*, 85 F.3d 55, 59 (2d Cir. 1996).

B. A Court Should Be Permitted To Consider The Nature Of The Alleged Misrepresentations When Evaluating Whether The Defendant Has Rebutted The *Basic* Presumption

In *Basic*, the Supreme Court ruled that classwide reliance may be presumed if the plaintiffs demonstrate (1) the alleged misrepresentations were publicly known, (2) the stock traded in an efficient market, and (3) the plaintiff traded the stock between the time the alleged misrepresentations were made and the truth was revealed. 485 U.S. 224, 246-28 n.27 (1988). Defendants can rebut this presumption at the class certification stage with evidence that the alleged misstatements had no impact on the price at which plaintiffs bought their shares. *Halliburton II*, 573 U.S. at 269.

Thus, at the class certification stage, a court is to consider whether the evidence provided by defendants severs the link between the statements alleged to have maintained an inflated share price, and the share price itself. *See Halliburton II* at 281-82. Here, the majority erred by refusing to consider the nature of the alleged misstatements at issue when evaluating whether Defendants rebutted the *Basic* presumption, thereby also ignoring the numerous Circuit precedents holding that similar disclosures are inactionable therefore cannot impact price as a matter of law.

The majority suggested that permitting a court to consider the statements (and, by extension, this Circuit's legal precedents on actionability) would equate to

a materiality consideration, which is inappropriate at the class certification stage. But class certification analysis may "entail some overlap with the merits of plaintiff's underlying claim." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011). Review of the challenged statements requires such overlap.

As found by the dissent, "[o]nce a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price. The mere fact that such an inquiry 'resembles' an assessment of materiality does not make it improper." Dissent, at 278.

Although consideration of the nature of the statements may touch upon materiality, the ultimate question is not whether the statements under review are material. Nor is the examination of the statements here a relitigation of defendants' Rule 12(b)(6) motion. Rather, the court would consider the statements themselves in conjunction with the other evidence offered by defendants for the purpose of assessing whether those statements indeed had any impact on share price—a legitimate issue for the class certification stage, and indeed an examination the Supreme Court in *Halliburton II* explicitly provided for at this stage. Here as discussed below, consideration of the alleged misstatements further

shows that the district court erred in finding Defendants did not rebut the *Basic* presumption.

II. THE DISSENT CORRECTLY FOUND THAT DEFENDANTS REBUTTED THE *BASIC* PRESUMPTION

Halliburton II made clear that a defendant can rebut the Basic presumption by showing "the misrepresentation did not in fact affect the stock price." 573 U.S. at 279. More specifically, a defendant may rebut "through 'any showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price.'" *Waggoner v. Barclays PLC*, 875 F.3d 79, 95 (2d Cir. 2017) (citation omitted). Defendants need only make this showing by a preponderance of the evidence. *See Id. at* 97.[3] The preponderance standard is the "lowest standard of proof" and "no more than a tie-breaker." *Gigante*, 94 F.3d, at 55-56 (2d Cir. 1996). Defendants met that standard here.

Plaintiffs' expert, Dr. Finnerty found that Goldman's stock price declined following disclosures concerning an SEC complaint filed against Goldman and DOJ investigations into Goldman regarding the Paulson & Co. hedge fund's role in certain collateralized debt obligation transactions. Dr. Finnerty opined that the

[3] The majority also erred by suggesting that Goldman faced a "heavy burden" in rebutting *Basic*. Majority, at 270 n.18. The preponderance standard is not a heavy burden.

stock drops occurred because of the revelation that Goldman's earlier statements regarding its conflicts management and business principles were fraudulent. Yet, Dr. Finnerty did not present any evidence connecting the alleged misstatements to the stock price. Indeed he conceded that "the market did not react" when such statements were made (JA-4489) and that he did not know whether "the stock price [would] have fallen" had Goldman not made the statements. (JA-8224). Nor did Dr. Finnerty present any evidence that the stock drops following the announcements of the enforcement actions were caused by the market learning that Goldman's challenged statements were false, as opposed to other factors, such as the market learning about enforcement actions. (JA-3027).

By contrast, Goldman presented substantial evidence showing that the alleged misrepresentations had no effect on the stock price. Defendants' expert, Dr. Gompers, identified 36 news reports, including front page stories in leading newspapers, publicizing the existence and risk of conflicts of interest at Goldman before any of the alleged corrective disclosures. Goldman's share price did not meaningfully move following any of these 36 disclosures.

Defendants presented further evidence in the form of an event study by Dr. Choi demonstrating no statistically significant difference between the decline in Goldman's share price following the alleged corrective disclosures and declines

following similar announcements of SEC and DOJ enforcement actions against other firms. (JA-4962-73, 8133-34).

In response, Plaintiffs did not present any analyses to rebut those of Dr. Gompers and Dr. Choi. Yet, the district court nonetheless found that Defendants failed to sever the link between the alleged misstatements and Goldman's share price. The majority affirmed.

In doing so, the majority incorrectly applied the *Basic* presumption. Dr. Finnerty's model established only that the stock dropped on the dates of the alleged corrective disclosures. It did *not* establish any link between the drop and the statements that Plaintiffs allege were false. *See* Dissent, at 279 ("[T]he fact remains that Plaintiffs offered no hard evidence, expert or otherwise, to refute Goldman's proof severing the link between the alleged misrepresentation and the price paid by Plaintiffs for Goldman shares."). "[A]ccepting" Dr. Finnerty's opinion that the stock drop was connected to the alleged misstatements was nothing more than accepting his *ipse dixit*. Under the preponderance of the evidence standard, defendants' evidence should be sufficient to overcome Plaintiffs' say-so. *See, e.g.*, *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) ("[T]he preponderance standard goes to how convincing the evidence in favor of a fact must be in comparison with the evidence against it").

In looking past Defendants' evidence, the district court primarily relied on Dr. Finnerty's assertion that the 36 news reports identified by Dr. Gompers did not result in stock drops because they were "generic" and less detailed than the alleged corrective disclosures. *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 CIV. 3461 (PAC), 2018 WL 3854757, at *4 (S.D.N.Y. Aug. 14, 2018). But the alleged misstatements themselves were generic. Had these statements served to maintain fraudulent price inflation, one would expect price drops upon generic conflict reports, but none occurred until the later disclosure of government enforcement actions and the drops that did occur were to a similar degree as drops following announcement of enforcement actions against other firms. The best explanation for this evidence—which is all that is required to meet the preponderance standard—is that the stock drops were caused by the disclosure of the enforcement actions and not be revelation of alleged misstatements. As explained by the dissent, this is particularly the case when the nature of the alleged misstatements is considered.

III. THE MAJORITY'S DECISION WILL RESULT IN NEAR-CERTAIN CLASS CERTIFICATION WHERE THE PRICE MAINTENANCE THEORY IS ASSERTED

Defendants presented clear and uncontroverted evidence that the existence and possibility of conflicts was disclosed on dozens of prior dates, and that none of these numerous disclosures had any price impact. Nonetheless, the conclusion

drawn by the district court was that the proof severing the link between the alleged misstatements and share price was insufficient to rebut the *Basic* presumption that the price was linked to the statements.

The implications of this holding are highly significant for the members of the Amici and others. Statements such as those made by Goldman are pervasive among publicly traded companies and the Amici's membership. Following any event negatively impacting a public company's stock price—such as an unfavorable financial report, business development or regulatory investigation—a plaintiff will point to a company's earlier vague, aspirational statements as fraudulent and artificially maintaining share price. If despite all evidence showing otherwise, a court may conclude that "it is only natural" for some portion of the price decline to have been due to revelation of fraud and not the future implications of a negative announcement, the *Basic* presumption would be irrebuttable. The *Basic* presumption in inflation-maintenance will become a ticket to automatic certification of classes, irrespective of the presence of any price impact.

Notably the majority itself commented that in the wake of *Halliburton II*, more than two-thirds securities fraud plaintiffs in federal district courts invoked inflation-maintenance theories requiring defendants to rebut the *Basic* presumption; and in nearly every single case the court held that defendant failed to rebut the presumption.

It is of little matter that the plaintiff must ultimately prevail on the merits at trial or on summary judgment, as once a class is certified 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). Studies indicate that less than 1% of securities class action filings are litigated to a verdict. Cornerstone Research, Securities Class Action Filings 2019 Year in Review, 16 (2020), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review. As the majority acknowledges, "class certification can pressure defendants into settling large claims, meritorious or not." Majority, at 269

The majority also noted that, "in appropriate cases, courts will decline to certify classes" when defendants are able to show no price impact and rebut *Basic*. *Id*. at 270. However, if Goldman's evidence here was not enough to overcome the mere allegations put forward by Plaintiffs, then it is difficult to imagine where a court will ever find *Basic* is rebutted and decline to certify a class alleging inflation maintenance.

IV. CONCLUSION

For the foregoing reasons, the Amici respectfully request that the Court reverse the district court's certification order and decertify the class.

Dated: May 19, 2019

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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: New York, New York

May 19, 2019

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