25-2280-cv

United States Court of Appeals

for the

Second Circuit

THE GOLDMAN SACHS GROUP, INC.,
LLOYD C. BLANKFEIN, GARY D. COHN,

Petitioners,

– v. –

SJUNDE AP-FONDEN, individually and
on behalf of all others similarly situated,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE AN *AMICUS* BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

JEREMY DUNBAR
WHITE & CASE LLP
609 Main Street, Suite 2900
Houston, Texas 77002
(832) 786-6189

KUFERE LAING
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, D.C. 20005
(202) 626-3600

JONATHAN D. POLKES
ADAM B. BANKS
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL
MARKETS ASSOCIATION
1099 New York Avenue, N.W.
Washington, D.C. 20005

Attorneys for Amicus Curiae Securities Industry
and Financial Markets Association

COUNSEL PRESS (800) 4-APPEAL • (385945)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, *Amicus Curiae*, the Securities Industry and Financial Markets Association certifies that it is a non-profit corporation. It has no parent company and no publicly held corporation owns 10% or more of its stock.

ARGUMENT

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Securities Industry and Financial Markets Association ("SIFMA") moves for leave to file the accompanying amicus brief in support of Defendants-Petitioners Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f). Defendants-Petitoners consent to this motion. Plaintiffs-Respondents do not oppose.

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 financial markets. SIFMA often appears as an amicus curiae before federal appellate courts over the proper scope of the federal securities laws. *E.g.*, *Goldman Sachs Grp., Inc. v. Akransas Tchr. Ret. Sys.*, 594 U.S. 113 (2021) (*"Goldman"*); *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 77 F.4th 74 (2d Cir. 2023) ("*ATRS*"). SIFMA has a substanital interest in the issues presented in this case because the district court's decision risks runaway class certification.

SIFMA's proposed amicus brief elaborates on three reasons why the Court should grant Defendants' Rule 23(f) Petition, drawing from the perspective and expertise of its members who often face securities class actions, including those, like this one, that proceed on inflation-maintenance theories. First, the district court's decision did not apply the strict limitations on inflation-maintenance claims that the Supreme Court and this Court articulated in *Goldman* and *ATRS*. Second, this Court's review is needed to reaffirm that *Goldman* and *ATRS* must be strictly applied to limit nuisance class actions. Third, the district court's decision provides a roadmap for plaintiffs to evade *Goldman* and *ATRS* and invites runaway class certification that has deep implications for SIFMA's members and the economy more broadly. It is important that this Court review these issues to provide district courts with guidance in applying *Goldman* and *ATRS* going forward.

SIFMA thus respectfully moves for leave to file the accompanying amicus brief.

Dated: September 25, 2025 Respectfully submitted,

KEVIN CARROLL
SECURITIES INDUSTRY
AND FINANCIAL MARKETS
ASSOCIATION
1099 New York Avenue, N.W.
Washington, D.C. 20005

/s/ Jonathan Polkes
JONATHAN POLKES
ADAM B. BANKS
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 819-8333
jonathan.polkes@whitecase.com

KUFERE LAING
WHITE & CASE LLP
701 Thirteenth Street NW
Washington, D.C. 20005

JEREMY W. DUNBAR
WHITE & CASE LLP
609 Main Street, Suite 2900
Houston, TX 77002

Attorneys for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on September 25, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals using the CM/ECF system. I further certify that service upon all counsel of record was accomplished by electronic via the CM/ECF system.

Dated: September 25, 2025

/s/ Jonathan Polkes
JONATHAN POLKES

25-2280-cv

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JEREMY DUNBAR
WHITE & CASE LLP
609 Main Street, Suite 2900
Houston, Texas 77002
(832) 786-6189

KUFERE LAING
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, D.C. 20005
(202) 626-3600

JONATHAN D. POLKES
ADAM B. BANKS
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200

KEVIN CARROLL
SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, N.W.
Washington, D.C. 20005

Attorneys for Amicus Curiae Securities Industry and Financial Markets Association

COUNSEL PRESS (800) 4-APPEAL • (385945)

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INTEREST OF AMICUS 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 financial markets. SIFMA has a substanital interest in the issues presented in this case because the district court's decision risks runaway class certification.

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[1] No counsel for a party authored this brief in whole or in part and no person other than amicus curiae, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court's decision granting plaintiff's class-certification motion threatens to unleash runaway securities class actions by diluting the carefully drawn limits that the Supreme Court and this Court imposed on inflation-maintenance cases. Under an inflation-maintenance theory, plaintiffs seek to identify a negative disclosure followed by a stock price decline and allege that the disclosure "corrected" an earlier misstatement that had caused the stock to trade at inflated prices. Most recently, the Supreme Court in *Goldman* and this Court in *ATRS* imposed careful constraints on this theory, rejecting any claim where "there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113, 123 (2021) ("*Goldman*").[2] In such cases, "there is less reason to infer front-end price inflation … from back-end price drop," undermining the foundation of the inflation-maintenance theory. *Id.*

[2] *See also Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 77 F.4th 74, 89 (2d Cir. 2023) ("*ATRS*").

Without those important guiderails, the inflation-maintenance theory allows plaintiffs to identify statements contemporaneous with any stock drop and retroactively link them to any vaguely-related earlier alleged misrepresentations. When combined with the *Basic* presumption, which permits a class-wide presumption of proof of reliance, this approach becomes a recipe for undue class certification, the expansion of vast potential exposure for issuers, and the coercive settlement pressure that comes with it.

That is exactly what happened here. The district court did not take the alleged misstatements and disclosures *as written* but instead filled in gaps between them to create a match. That approach evades the *Goldman* and *ATRS* standards and creates an easy roadmap for plaintiffs to circumvent the safeguards designed to protect against abusive class-action litigation. Review is essential to restore those limits and to guard against the cost, risk, and nuisance litigation that unchecked inflation-maintenance theories would otherwise impose.

ARGUMENT

I. *Goldman* and *ATRS* provided much needed limitations on inflation-maintenance claims.

For a long time, the *Basic* presumption and inflation-maintenance claims operated together to create a glidepath for class certification in securities fraud cases. From 2014-2020, for example, twenty securities plaintiffs "invoked the inflation-maintenance theory." *Arkansas Teacher Retirement Sys. v. Goldman Sachs Group*, 955 F.3d 254, 266 n.9 (2d Cir. 2020). And in "all twenty of those cases, the district court held that the defendant failed to rebut the *Basic* presumption." *Id.* That result was hardly surprising, given the ease with which the *Basic* presumption and inflation-maintenance theories allow plaintiffs to get over the class-certification hurdle.

Start with the *Basic* presumption. It allows courts to presume that investors have relied on a "material misrepresentation" based solely on the stock price and changes to it. *ATRS*, 77 F.4th at 80. Add to that the inflation-maintenance theory. It allows courts to presume that "inflation [] is already built into the stock price," and the misrepresentation prevented the "preexisting inflation … from dissipating." *Id.* at 80. Together, this "overly expansive" version of the inflation-maintenance theory allowed claims to proceed upon a showing of a "back-end price drop" coupled with a "truth-revealing corrective disclosure." *Id.* at 80, 97–98. This lenient standard went "well beyond" precedent. *Id.*

The Court thus established a backstop in *Vivendi* and *Waggoner*: A "strong link between misrepresentation and corrective disclosure provide[s] sturdy ground to use the back-end price drop as a proxy for front-end inflation." *Id.* at 98.[3] The Court blessed the theories in those cases only because they "presented a tight fit" between the front- and back-end statements—both involved disclosures that "*expressly* implicat[ed]" or "identified" the prior misstatements. *Id.* But opportunistic plaintiffs continued to stake inflation-maintenance theories on shakier ground. *Id.*

Thus, in 2021, the Supreme Court intervened and imposed a concrete limitation. *Goldman*, 594 U.S. at 120 n.1. *Goldman* explained that "the back-end price drop equals front-end inflation" theory "starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Id.* at 123. "Under those

[3] *See In re Vivendi, S.A. Secs. Litig.*, 838 F.3d 223 (2d Cir. 2016); *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017).

circumstances," *Goldman* continued, "it is less likely that the specific disclosure actually corrected the generic misrepresentation, which means that there is less reason to infer front-end price inflation—that is, price impact—from back-end price drop." *Id.*

ATRS provided further guidance: It instructed courts to undertake "a searching price impact analysis" and evaluate (1) the "gap in front-end–back-end" disclosures and (2) consider whether the "corrective disclosure" directly refers "to the alleged misstatement." *ATRS*, 77 F.4th at 102. "The central focus … is ensuring that the front-end disclosure and back-end event stand on equal footing; a mismatch in specificity between the two undercuts plaintiff's theory that investors would have expected more from the front-end disclosure." *Id.* This test imposed critical limitations on the inflation-maintenance theory that, in turn, revived defendants' ability to rebut the *Basic* presumption.

Although the mismatch in *Goldman* and *ATRS* concerned different degrees of "specificity" between the misstatement and corrective disclosure, *see ATRS*, 77 F.4th at 103, the core principles requiring a "searching" inquiry apply whenever the alleged misstatements and corrective disclosures are meaningfully misaligned. That is, a "gap in specificity is not the *only* way there could be a mismatch between the two statements." *In re Kirkland*, 2024 WL 1342800, at *11 (S.D.N.Y. Mar. 29, 2024) (emphasis added). Rather, *any* "mismatch between the contents of the misrepresentation and the corrective disclosure" severs the logic of inflation maintenance. *Goldman*, 594 U.S. at 123. Without a close fit between front-end misstatements and back-end disclosures—regardless of their specificity—there is no valid basis to infer that the disclosure corrected the misstatement or that the price drop reflected the dissipation of inflation.

II. *Goldman* and *ATRS* must be strictly applied to limit nuisance class actions.

This Court's review is warranted to insist that the core principles underlying *Goldman* and *ATRS* are consistently applied to prevent significant harm to amicus and the economy more broadly. Indeed, the strict limitations that *Goldman* and *ATRS* imposed on class certification in inflation-maintenance cases reflect an effort to curb well-documented abuses of the class-action device to secure settlement leverage.

Over half a century ago, Judge Friendly warned that unchecked Rule 10b-5 litigation could "lead to large judgments, payable … 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). The Supreme Court echoed this "widespread" concern in *Blue Chimp Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975), when it first authorized private actions under Section 10(b). The Supreme Court recognized that the "very pendency" of securities lawsuits "may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit." *Id.* at 740. And many of the lawsuits have a "settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Id.* This Court, too, has recognized that in many securities suits the goal is "to exact large settlement recoveries," *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000), the size of which "can be divorced from the parties' underlying legal positions." *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004).

Finding such issues had "become rampant" thanks to the "class-action device," which "was being used to injure the entire U.S. economy," Congress passed the Private Securities Litigation Reform Act of 1995 (PSLRA). *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (citing H.R. Conf. Rep. 104–369, pp. 31–32). Its goal was "to deter or at least quickly dispose of those suits whose nuisance value outweighs their merits." *Id.* at 82; *see also Amgen Inc. v. Conn. Retirement Plans and Trust Funds*, 568 U.S. 455, 475–76 (2013) (Congress enacted the PSLRA was enacted to limit the "extraction of extortionate settlements of frivolous claims.") (cleaned up). Just a few years later, the Judicial Conference promulgated Rule 23(f), recognizing that certification orders "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) Advisory Committee Note to 1998 amendment.

All told, both the federal courts and Congress have understood that private securities fraud actions, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007); *see also City of Hialeah Employees' Retirement Sys. v. Peloton Interactive, Inc.*, 2025 WL 2457758, at *12 & n.7 (2d Cir. Aug. 27, 2025) (Newman, J., dissenting) (citing courts' and commentators' longstanding recognition of "the heavy pressure often felt to settle a class action securities fraud case").

Even after *Goldman*, experts have documented an increase in "event-driven" securities litigation, where plaintiffs file actions in the wake of negative press, often on an inflation-maintenance theory. Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331, 1335 (2022). These cases continue to command striking settlement payments: in the first six months of 2025 alone, plaintiffs have procured $1.8 billion in just 34 settlements. *See* Edward Flores, Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: H1 2025 Update* NERA (July 29, 2025), https://tinyurl.com/NERACS25. And that is no outlier. In 2024, federal securities class action settlements totaled $3.8 billion, and in 2023, the total was $3.9 billion. *Id.* These settlement amounts do not include "the burden of expensive discovery [that] falls overwhelmingly on defendants." Strauss, *supra*, at 1351.

And, notwithstanding *Goldman* and *ATRS*, plaintiffs continue to pursue inflation-maintenance theories and courts have adopted varying approaches in evaluating them. For example, faithful to the core principles underlying *Goldman*'s limitations, the court in *Kirkland* held that a generic-versus-specific mismatch—the particular circumstances of *Goldman* itself—was one way, but critically, "not the only way" to show a mismatch between misstatements and corrective disclosures. *Kirkland*, 2024 WL 1342800, at *7. But the court in *In re Nio, Inc. Secs. Litig.*, 2023 WL 5048615, at *15 (E.D.N.Y. Aug. 8, 2023), much like the district court here, expressly declined to follow *Goldman* because the alleged misstatement was more specific than in *Goldman*, even though it was "not a perfect match" with the corrective disclosure. This Court's review is warranted to make clear that any meaningful mismatch undercuts the *Basic* presumption.

III. The district court's decision provides a roadmap to evading *Goldman* and *ATRS* and invites runaway class certification.

The decision below revives the "overly expansive" version of the inflation-maintenance theory that went "well beyond" this Court's precedents. *ATRS*, 77 F.4th at 97. Far from insisting on a tight match between the alleged misstatements and corrective disclosures, the district court provided a workaround for plaintiffs by rewriting the alleged misrepresentation and then matching the rewritten statement with a corrective disclosure. This approach seriously dilutes the protections *Goldman* and *ATRS* imposed, including that "any gap among the front- and back-end statements *as written* be limited." *Id.* at 99 (emphasis added).

Start with the "Low Involvement" statement: In 2016, Goldman asserted that it had "found no evidence of involvement by Jho Low in the 1MDB bond transactions." A-0011. Plaintiffs rely on 2018 media reports as corrective disclosures where two publications reported that Lloyd Blankfein attended a meeting with Mr. Low and Malaysia's prime minister in 2009; and another separate meeting in 2013 with Mr. Low.

While acknowledging that these two statements were not a "precise match," A-0013, the district court nonetheless held that the front-end denial was sufficiently connected to the later disclosures because it hypothesized that Low and Blankfein would have had "no reason … to meet in the first place" if Blankfein was unaware of Low's involvement in the 1MDB bond transactions. A-0014. And because Goldman "earned exorbitant fees" from the 2012 bond offering, the district court inferred that it "strains credulity that the CEO and Chairman of Goldman met with Low in 2013" without Blankfein having evidence that "Low had any involvement in the 1MDB bond transactions." A-0013–14.

The district court's analysis accomplishes precisely what *Goldman* and *ATRS* seek to prevent. The Low Involvement statement and the alleged corrective disclosure are facially mismatched. The former statement says nothing about a meeting with Low or a discussion of 1MDB. And the latter disclosure does not address Low's involvement in 1MDB—at most, it states that Blankfein allegedly "met" with Low and discussed the transaction. The district court filled the gap between the statements with its own assumptions about why Blankfein met with Low and what must have been said at that meeting. *Id.* at 0014. But "[t]he question here—whether there is a basis to infer that the back-end price equals front-end inflation … requires a closer fit." *ATRS*, 77 F.4th at 99 n.11.

The district court's analysis of the Red Flag statement is even further afield. Plaintiffs allege that Mr. Blankfein stated at a New York Times DealBook conference: "I'm not aware of [red flags], but I'm not in a position to refute facts that I don't have a complete picture of and haven't been presented." The district court acknowledged *both* that there was not a "precise match" between that statement and an alleged corrective disclosure—which did not mention the "red flags"—*and* that the alleged corrective disclosure did not "directly render the No Red Flags statement false." A-0016.

To create a match, the district court *expressly* rewrote the alleged misstatement by imagining that "Blankfein's actual words" could be summarized as "he was not aware of red flags and he did not have a complete picture of the facts because he was not involved in the 1MDB transaction, *which was spearheaded by rogue employees*." A-0017 (emphasis added). The district court supposed that the (reimagined) statement would have thus been understood "as a disavowal of involvement in the 1MDB transaction." *Id*.

But "Blankfein's actual words" in the alleged misstatement said nothing about "rogue employees"; it was that he was not aware of "red flags." The district court nonetheless filled in the gap by importing the "rogue employee" gloss onto the misstatement. The reason it gave for doing so—that the "rogue employee" narrative was part of the "context in which the corrective disclosure came to light"— illustrates the problem. A-0015. Plaintiffs cannot use "context" surrounding the *corrective disclosure* to embellish the alleged misstatement to create a match. Allowing plaintiffs to do so fully undermines the tight fit that *Goldman* and *ATRS* required.

In short, the district court's gap-filling enables "securities plaintiffs [to] find a road to success in the rearview mirror" by encouraging the use of supposition to create a match out of any statements, "turning securities claims [back] into a game of litigation-by-hindsight." *ATRS*, 77 F.4th 101.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Rule 23(f) petition.

Dated: September 25, 2025

Respectfully submitted,

<u>/s/ Jonathan Polkes</u>
JONATHAN POLKES
ADAM B. BANKS
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020
Telephone: (212) 819-8333
jonathan.polkes@whitecase.com

KUFERE LAING
WHITE & CASE LLP
701 Thirteenth Street NW
Washington, D.C. 20005

JEREMY W. DUNBAR
WHITE & CASE LLP
609 Main Street, Suite 2900
Houston, TX 77002

KEVIN CARROLL
SECURITIES INDUSTRY
AND FINANCIAL MARKETS
ASSOCIATION
1099 New York Avenue, N.W.
Washington, D.C. 20005

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,600 words. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook font, type 14 point.

Dated: September 25, 2025

By: */s/ Jonathan Polkes*
JONATHAN POLKES

CERTIFICATE OF SERVICE

I certify that on September 25, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals using the CM/ECF system. I further certify that service upon all counsel of record was accomplished by electronic means via the CM/ECF system.

Dated: September 25, 2025

/s/ Jonathan Polkes
JONATHAN POLKES