21-03105

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In Re Goldman Sachs Group

FROM AN ORDER GRANTED CLASS CERTIFICATION ENTERED ON DECEMBER 8, 2021
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, BANK POLICY INSTITUTE, AMERICAN BANKERS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITION OF DEFENDANTS-PETITIONERS FOR LEAVE TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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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, Bank Policy Institute, American Bankers Association, Chamber of Commerce of the United States of America, and American Property Casualty Insurance Association, hereby certify that they have no parent corporation and that no publicly held corporation owns 10% of their stock.

Dated: New York, New York
December 29, 2021

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.

The Bank Policy Institute ("BPI") is a nonpartisan policy, research, and advocacy group that represents the nation's leading banks and their customers. BPI's member banks employ nearly two million Americans, make 68% of the nation's loans and nearly half of the nation's small business loans, and serve as an engine for financial innovation and economic growth.

American Bankers Association (the "ABA") is the principal national trade association of the financial services industry in the United States. ABA members

[1] The parties have consented to the filing of this *amici curiae* brief. See Fed. R. App. P. 29(a)(2). 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, their members, or their counsel, contributed money that was intended to fund the preparation or submission of this brief.

are located in each of the fifty States and the District of Columbia, and include financial institutions of all sizes and types, both large and small.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of approximately 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

American Property Casualty Insurance Association ("APCIA" and, together with SIFMA, BPI, the ABA, and the Chamber, the "Amici") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

This petition involves important issues concerning standards for class certification in private securities actions, which are directly relevant to the *Amici's* members and missions.

SUMMARY OF THE ARGUMENT

The district court's decision on remand again certifying the plaintiffs' class misconstrued clear guidance from the Supreme Court. *Goldman Sachs Group, Inc. v. Arkansas Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021). The decision below failed to properly consider whether supposedly corrective disclosures made by Goldman Sachs Group, Inc. ("Goldman") matched the generic and vague statements made years earlier in Goldman's SEC filings. Further, the district court's decision misinterpreted *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d. 223 (2d Cir. 2016), by premising the price impact of an alleged misstatement on a hypothetical alternative statement that is far more detailed and substantive than the statement actually made.

Many companies make generic statements about their aspirational business principles or other goals which provide investors with no specific information on which to make an investment decision. If allowed to stand, the district court's decision would effectively impose new affirmative disclosure obligations on such companies. If a company's stock price declines following a negative announcement, under the district court's approach, the announcement could almost always be found to implicate the same subject matter as generic statements the company previously made. In order to avoid a near-certain finding of price impact and, resultantly, class certification, companies may have to resort to affirmatively disclosing any potentially negative information or conduct that is even arguably implicated by broad generic statements made in their SEC filings.

Review is necessary to avoid widespread legal uncertainty and undue settlement pressure in this Circuit through the district court's significant doctrinal expansion.

ARGUMENT

I. The Challenged Statements Are General And Aspirational, Of The Kind Commonly Made Across Different Industries

Plaintiffs proceed under the inflation maintenance theory. They argue that certain general, aspirational statements made by Goldman in its annual reports and Form 10-K filings fooled the market into overvaluing its stock price until these statements were revealed to be false, and the revelation of that falsity caused a decline in stock price.

The statements at issue here, which supposedly maintained Goldman's inflated stock price, are generic, aspirational statements. They do not refer to any particular product line, transaction, or practice. For example, Goldman stated "[o]ur clients' interests always come first." (A-233.) The Supreme Court itself directly referred to the statements as "generic" multiple times, *see Goldman*, 141 S. Ct. at 1957-59, 61, 63.

Statements akin to Goldman's regarding reputation are commonly made across the business communities including among the *Amici's* membership.

Examples from annual reports and Form 10-Ks of financial institutions and Fortune 500 companies 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." (A-345.)

Companies frequently make similar generic statements in other contexts as well, often speaking generally and aspirationally regarding codes of conduct, social responsibility, data security, and more. These statements, like Goldman's, are akin to statements previously found inactionable as a matter of law because "[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).

As discussed below, because the generic statements challenged here are like those made by countless other companies, the district court's holding threatens legal consequences far beyond the confines of this case.

II. The District Court Did Not Properly Interpret the Supreme Court's Decision

Because plaintiffs bringing claims premised on the inflation maintenance theory need not show any change in the stock price at the time of the alleged misstatement, the doctrine has the potential to spawn runaway class litigation and impose unjustified costs on companies that make public statements, including the *Amici's* members. The Supreme Court imposed guardrails to prevent the inflation maintenance theory from becoming a free pass to class certification for speculative theories.

The district court's class certification decision effectively nullifies those guardrails. As a result, the decision below threatens the *Amici's* members and other companies with the specter of near-certain class certification, with its inherent settlement pressure, when disclosure of economically negative news results in a decline in share price, because this decline could almost always be tied in some way to a prior generic statement made by the company. This result is not lost on others in the plaintiffs' bar. It has recently been remarked that the district court's decision showed that the Supreme Court's ruling in this case "did not materially change the standards governing class certification, which the vast majority of securities fraud class actions readily meet."[2] Or, more colorfully,

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[2] John Browne, Adam Hollander, Investor Class Cert. Win Offers Post-Goldman Insight, Law360, Dec. 10, 2021,

"[c]ontrary to the dire predictions of some, the district court's decision made clear that the new rules applicable post-Goldman are best summarized by Pete Townshend's famous lyrics: 'Meet the new boss, same as the old boss.'"[3]

A. The district court erred in its interpretation of the Supreme Court's "mismatch" framework

The Supreme Court set out a commonsense approach to evaluating inflation maintenance claims. It held that where there is a "mismatch between the contents of the misrepresentation and the corrective disclosure," then it is less likely that the later disclosure actually matched the misrepresentation's contents, meaning "there is less reason to infer front-end price inflation" from the stock price drop. *Goldman*, 141 S. Ct. at 1961. This principal particularly applies when, as is the case here, the alleged "misrepresentation is generic" and the "latter corrective disclosure is specific," as it does not follow that a more specific subsequent disclosure can be said to actually "correct" the earlier statement as opposed to merely *introducing* bad news to the market that negatively impacts stock price. *Goldman*, 141 S. Ct. at 1961.

The district court did not sufficiently consider the contents of the generic representations as they compared to the contents of the alleged specific disclosures.

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https://www.law360.com/articles/1447625/investor-class-cert-win-offers-post-goldman-insight-

[3] *Id.*

Rather the district court merely found that the representations and disclosures "implicate [the] same conflicts." (A-27.) The Supreme Court's "mismatch" framework requires more than a finding that disclosures broadly implicate the same subject matter as a supposed misstatement, *i.e.*, conflicts of interest generally.

This is made clear by the Supreme Court's example illustrating an illogical inflation maintenance scenario. The Supreme Court presented a hypothetical where an initial misrepresentation ("we have faith in our business model") "mismatched" a later less generic disclosure ("our fourth quarter earnings did not meet expectations"), and so it was less likely that the disclosure matched to the misstatement even though both arguably implicated a company's financial performance. *Goldman*, 141 S. Ct. at 1961.

The Supreme Court required an analysis of the specific contents of the challenged representations and disclosures to determine whether the claimed disclosures actually matched the generic misrepresentation. The district court did not properly undertake that analysis.

B. The district court erred in its interpretation of *Vivendi*

The district court compounded its error by construing *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d. 223, 258 (2d Cir. 2016) in a way that fails to consider the "mismatch between the contents of the misrepresentation and the corrective disclosure."

In *Vivendi*, this Court held that the price impact inquiry should compare the price following an alleged misstatement to what the price would have been if the defendant's statement had instead been truthful. *Id*. In considering the price impact "if [Goldman] spoke truthfully" the district court theorized the effect had Goldman made highly specific disclosures about its alleged conflicts of interests. That is, if rather than making the alleged misstatements (i) *e.g.*, "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest," Goldman stated (ii) that it "fail[ed] to prevent employees from illegally advising clients to buy into CDOs that were built to fail by a hedge fund secretly shorting the investors' positions." (A-21.) However, that a detailed disclosure about a specific issue may impact stock price does not indicate generic statement had any inflation-maintaining impact itself. The district court's interpretation of *Vivendi* compounded the mismatch problem identified by the Supreme Court between generic alleged misstatements and detailed subsequent alleged disclosures.

To apply *Vivendi* as the district court did could essentially require companies to make prompt public disclosure, in detail, of any uncharged wrongdoing of which they become aware, or else face likely class certification unless they somehow meet the district court's stringent test. Such an implication is in direct conflict with this Court's settled precedent. Disclosure is not a "rite of confession" and issuers have no "duty 'to disclose uncharged, unadjudicated wrongdoing.'" *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014).

III. The District Court's Expansion of the Inflation Maintenance Theory Threatens to Render the *Basic* Presumption Irrebuttable and to Foster Runaway Securities Class Certification in This Circuit

The district court's decision acknowledged that the statements at issue are generic and the allegedly corrective disclosures are more detailed, but that nonetheless the presumption of price impact cannot be overcome. The implications of this holding are highly significant for *Amici*'s members and others. Statements such as those made by Goldman are pervasive among publicly traded companies, including the *Amici's* membership. Following any event negatively impacting a public company's stock price a plaintiff will simply point to a company's earlier vague, aspirational statements as fraudulent assertions that artificially maintained the company's share price. The district court's decision suggests these claims can proceed so long as a plaintiff can identify vague statements that implicate the same general topic as the later detailed disclosures—*e.g.*, conflicts of interest, sales targets.

The *Basic* presumption in inflation maintenance cases threatens to become a ticket to automatic class-certification, with little regard for the mismatch between how vague the supposedly inflation-maintaining statements are as compared to a disclosure that results in a stock price drop. The formula for enterprising plaintiffs (and their lawyers) to manufacture future successful inflation maintenance cases could not be more clear. They will wait for a company to announce negative news resulting in a decline in the stock price, scour the company's prior SEC filings for any statement vaguely related, no matter how generic—such as "Our Company always puts our customers first"—and assert that this statement implicated the same subject matter and thus maintained the inflated stock price. Importantly, companies are obligated by SEC regulations to make a host of disclosures around the "general development of the business," "risk factors," and much more, *see* 17 C.F.R. §§ 229.101, 229.105, which ensure plaintiffs always have statements to tie to later disclosures.

The district court's decision threatens to make it nearly impossible for defendants to rebut this assertion. As the district court has applied *Vivendi*, while plaintiffs would be entitled to a presumption that the vague statements had a price impact, defendants would have to show that the "stock price would have held fast" if, instead of making a generic and aspirational statement of the kind endemic to the business world, they made a highly-detailed affirmative disclosure outlining alleged wrongdoing by company personnel. It is difficult to conceive of how defendants could avoid this predicament, unless they immediately disclosed any uncharged allegations of wrongdoing in detail, so that no generic statements could be dredged up to populate a complaint as statements that "maintained" an inflated price. This would impose de facto legal duties on public companies that this Court has previously found do not exist. *See Pontiac*, 752 F.3d at 184 ("companies do not have a duty to disclose uncharged, unadjudicated wrongdoing").

Once a class is certified, defendants face "hydraulic pressure" to settle and "avoid[] the risk, however small, of potentially ruinous liability," regardless of the burden on the plaintiff to ultimately prevail on the merits. *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004). Studies indicate that less than 1% of securities class action filings are litigated to a verdict. Cornerstone Research, Securities Class Action Filings 2020 Year in Review, 18 (2021), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review. Suits are regularly settled with little benefit to investors and substantial payments to plaintiffs' lawyers. US Chamber Institute for Legal Reform, An Update on Securities Litigation, 2 (2020), https://instituteforlegalreform.com/wp-content/uploads/2020/10/ILR_Briefly_Update_on_Securities_Litigation_March_2020.pdf. This is of ever greater significance as the inflation maintenance theory gains prominence in securities litigation. In *Arkansas Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 266 n.9 (2d Cir. 2020) this Court noted that following *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 573 U.S.

258 (2014), more than two-thirds of securities fraud plaintiffs in federal district courts invoked the inflation-maintenance theory when defendants tried to rebut the *Basic* presumption.

Should the district court's decision stand, it is difficult to imagine how a court could ever find *Basic* to be rebutted and decline to certify a class alleging inflation maintenance.

IV. CONCLUSION

The standard implemented by the district court is inconsistent with the Supreme Court's clear guidance and is likely to lead to runaway class certifications. The petition should be granted.

Dated: December 29, 2021

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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 2,593 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.

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