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): 21-_____

Caption [use short title]

In re Goldman Sachs Group, Inc. Sec. Litig.

Motion for: Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f)

Set forth below precise, complete statement of relief sought:

Petition for permission to appeal order granting class certification pursuant to Fed. R. Civ. P. 23(f).

MOVING PARTY: The Goldman Sachs Group, Inc., et al.

OPPOSING PARTY: Arkansas Teachers Retirement System, et al.

☐ Plaintiff ☑ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

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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 INJUCTIONS PENDING APPEAL:

Has this 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/ Robert J. Giuffra, Jr. **Date:** December 22, 2021 Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

21-__________

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION

FROM AN ORDER GRANTING CERTIFICATION OF CLASS 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

DEFENDANTS' PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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December 22, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Petitioner The Goldman Sachs Group, Inc. does not have a parent corporation, and no publicly held company owns 10 percent or more of its stock.

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Defendants-Petitioners respectfully petition under Federal Rule of Civil Procedure 23(f) to appeal from the December 8, 2021 Order of the United States District Court for the Southern District of New York certifying a class pursuant to Federal Rule of Civil Procedure 23(b)(3).

QUESTIONS PRESENTED

1. Whether, on remand, the district court misconstrued the Supreme Court's decision requiring that, under the inflation-maintenance theory of securities fraud, alleged misstatements and "corrective disclosures" must match in their level of specificity and content, not merely implicate the same general subject matter.

2. Whether the district court impermissibly expanded the inflation-maintenance theory, in contravention of this Court's precedent, to presume price impact from a company's non-disclosure of uncharged misconduct.

INTRODUCTION

For the third time, the district court has erroneously certified a shareholder class in this case. That class seeks billions of dollars in damages based solely on generic, commonplace statements about Goldman's business principles and conflicts controls. After the district court's prior certification order, the Supreme Court instructed that the "generic nature" of such statements "often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory" of securities fraud. *Goldman Sachs Grp.* v. *Arkansas Teacher Ret. Sys.*, 141 S. Ct. 1951, 1961 (2021). The Supreme Court further cautioned that the inflation-maintenance theory "starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure," particularly when the misrepresentation is "generic" and the corrective disclosure "specific." *Id.*

In recertifying the class on remand, the district court committed at least two legal errors: *First*, it interpreted the Supreme Court's "mismatch" framework to require a finding that the purported "corrective disclosures" merely "implicate" the same subject matter as the asserted misrepresentations. (A-27.) Because of that error, the district court failed to compare the contents of *any* of the challenged statements with the "corrective disclosures." *Second*, the district court departed from this Court's holding in *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223 (2d Cir. 2016), that a specific misstatement that maintains a company's stock price can still have price impact if a truthful version of that statement would have decreased the stock price. The district court instead held that generic statements about a company's business principles and conflicts controls can have inflation-maintaining impact if disclosures of specific misconduct would have decreased the company's stock price. (A-21.)

The district court's legal errors will cause confusion among public companies and securities litigants in this Circuit about the Supreme Court's "mismatch" framework. Price impact will be nearly automatic in inflation-maintenance cases because plaintiffs can simply point to a back-end stock drop following news of any discrete failure to comply with a company's aspirational principles or internal controls. And, to avoid a finding of price impact, companies will be forced to disclose specific uncharged conduct, notwithstanding this Court's precedent that such conduct need not be disclosed.

The Court has already granted two Rule 23(f) petitions in this case, and Defendants do not lightly file a third. But as both this Court (in granting the two prior petitions) and the Supreme Court (in granting certiorari) have recognized, this case, in which Plaintiffs seek billions of dollars in damages, raises important questions. The standard for Rule 23(f) review is readily met because of the district court's misconstruction of the Supreme Court's decision; the case's significance; and this Court's recognition that orders certifying classes in securities cases are "likely to escape effective review after entry of final judgment," *Hevesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (citation omitted). In *Erica P. John Fund, Inc.* v. *Halliburton Co.*, the Fifth Circuit granted Rule 23(f) review three times (and the Supreme Court granted certiorari twice) before the case was resolved. *See* No. 08-40 (Dec. 18, 2008); No. 12-90007 (May 22, 2012); No. 15-

90038 (Nov. 4, 2015). This case raises similarly critical issues for securities litigants and warrants this Court's intervention.

BACKGROUND

A. Defendants' generic statements

Plaintiffs' invocation of the inflation-maintenance theory rests solely on "generic statements from Goldman's SEC filings and annual reports." *Goldman*, 141 S. Ct. at 1959.

Specifically, Plaintiffs challenge certain of Goldman's aspirational "Business Principles" in its annual reports from 2007 to 2010:

- "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." (A-233.)

Plaintiffs also challenge Goldman's generic warnings about client conflicts in the mandatory "Risk Factors" section of its annual Form 10-K filings from 2007 to 2010:

> *Conflicts of interest are increasing* and a failure to appropriately identify and deal with conflicts of interest *could adversely affect our businesses* . . . .
>
> 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 and the willingness of clients to enter into transactions in which such a conflict might arise may be affected *if we fail, or appear to fail*, to identify and deal appropriately with conflicts of interest. In addition, *potential or perceived conflicts could give rise to litigation or enforcement actions*.

(A-167 (emphasis altered).)

None of the challenged statements referred to any particular transaction or business. Nor did those generic statements guarantee that each of Goldman's 30,000 employees would always follow its business principles, or that the company would always avoid or successfully manage conflicts. To the contrary, the conflicts warning "suggest[ed] caution (rather than confidence) regarding the extent of [Goldman's] compliance." *Singh* v. *Cigna Corp.*, 918 F.3d 59, 64 (2d Cir. 2019).

B. The alleged "corrective disclosures"

Plaintiffs allege that Defendants' generic statements about Goldman's business principles and conflicts controls were false because those statements were inconsistent with conflicts in four collateralized debt obligations (CDOs) that Goldman sold to sophisticated investors in 2006 and 2007. (A-81-82; *see* A-66.) Plaintiffs claim that three supposed "corrective disclosures" revealed the falsity of Defendants' generic statements:

- ***April 16, 2010:*** The SEC filed an enforcement action alleging that Goldman committed fraud by not disclosing to potential investors in the Abacus CDO that a hedge fund with a substantial short position had "played an active and determinative role in the asset selection process." (A-52-53, A-132-133, A-236.)

- ***April 30, 2010:*** *The Wall Street Journal* reported a rumor that the Department of Justice was investigating Goldman over unspecified "mortgage trading." (A-139-140, A-259.)

- ***June 10, 2010:*** The press "reported that the SEC was investigating whether[,] in connection with the Hudson CDO, Goldman profited by" selling the CDO to clients when it knew the CDO would decline in value. (A-136, A-264.)

C. Procedural history

1. Prior certification decisions

Plaintiffs moved to certify a class of purchasers of Goldman stock between February 5, 2007, and June 10, 2010. They invoked the presumption of classwide reliance recognized in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), and the inflation-maintenance theory of price impact.

Defendants submitted extensive economic evidence that their generic statements had no impact on Goldman's stock price, either when made or when the "truth" supposedly was revealed. Defendants offered three experts: (i) Dr. Paul Gompers, who presented evidence that Goldman stock had not declined after widely publicized reports of alleged conflicts on 36 dates before Plaintiffs' purported "corrective disclosures," (A-267-272, A-436); (ii) Dr. Stephen Choi, who showed that news of government enforcement, not revelations of any departure from the challenged statements, explained the stock-price declines on the three "corrective disclosure" dates, (A-405-408); and (iii) Dr. Laura Starks, who presented evidence that generic statements like Defendants' are pervasive and irrelevant to investment decisions, as buttressed by 880 analyst reports on Goldman that did not mention the challenged statements, (A-299-324). In response, Plaintiffs presented one expert, Dr. John Finnerty, who principally opined that the stock declines on the three "corrective disclosure" dates were statistically significant, and otherwise disputed the methods and opinions of Defendants' experts. (A-9-10, A-13-15.)

After the district court certified the class, this Court granted Rule 23(f) review and vacated. *Arkansas Teachers Ret. Sys.* v. *Goldman Sachs Grp.*, 879 F.3d 474, 485 (2d Cir. 2018) (*Goldman I*). The district court recertified the class, and this Court again granted Rule 23(f) review. The Court affirmed in a divided opinion. *Arkansas Teachers Ret. Sys.* v. *Goldman Sachs Grp.*, 955 F.3d 254, 271 (2d Cir. 2020) (*Goldman II*), *vacated,* 141 S. Ct. 1951 (2021). Judge Sullivan dissented, observing that "no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based." *Id.* at 278.

2. The Supreme Court's vacatur

In vacating this Court's decision, the Supreme Court clarified in two critical respects the standard for considering Defendants' price-impact defense to Plaintiffs' invocation of the inflation-maintenance theory.

First, the Supreme Court explained that "[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory." *Goldman*, 141 S. Ct. at 1961. That is because "a more-general statement will affect a security's price less than a more-specific statement on the same question." *Id.* at 1960 (citation omitted).

Second, the Supreme Court held that plaintiffs invoking the inflation-maintenance theory cannot simply speculate that a stock drop after a negative disclosure equals "the amount of inflation maintained by [an] earlier misrepresentation." *Id.* at 1961. To the contrary, the inference "that the back-end price drop equals front-end inflation[] starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Id.* Such a mismatch occurs "when the earlier misrepresentation is generic . . . and the later corrective disclosure is specific." *Id.*

This Court recognized that both points were "new ideas" and instructed the district court on remand to "apply the legal standard as supplemented by the Supreme Court." *Arkansas Teachers Ret. Sys.* v. *Goldman Sachs Grp.*, 11 F.4th 138, 143-144 (2d Cir. 2021) (*Goldman III*).

3. The district court's recertification decision

On remand, the district court reinstated its certification of the class. (A-28.) It concluded that no significant "mismatch" existed between Goldman's generic statements and Plaintiffs' purported "corrective disclosures," because those statements were not "boundless[ly]" or "exceedingly more generic" than the "corrective disclosures." (A-26, A-28.) The court acknowledged that the generic statements and "corrective disclosures" "do not present *equivalent* levels of genericness," but reasoned that it was sufficient that they "implicate[d] the[] same conflicts and Goldman's infrastructure for managing them." (A-27.) The court also accepted Dr. Finnerty's speculation that "truthful, contrary substitutes for the alleged misstatements *would* have impacted investors' subsequent decision-making." (A-21.) In doing so, the court presumed that such truthful statements would have specifically revealed "the details and severity of Goldman's misconduct." (*Id.* (citation omitted).)

ARGUMENT

Review is warranted to address the district court's two fundamental legal errors. *First*, the district court misconstrued the Supreme Court's direction that courts should consider any "mismatch" in specificity and content between a challenged statement and a corrective disclosure. *Goldman*, 141 S. Ct. at 1961. That "mismatch" framework is critical to determining whether a specific disclosure "actually corrected [a] generic misrepresentation." *Id.* Here, however, the district court downplayed the importance of the Supreme Court's direction—disparaging Defendants' emphasis on it as "greatly overstate[d]" and "warped." (A-26, A-27 n.19.) Instead, the district court assessed only whether Goldman's generic statements and purported "corrective disclosures" "implicated" the same subject matter. (A-24, A-27.) Tellingly, the district court inaccurately described the contents of Goldman's generic statements, never identified what new information the "corrective disclosures" revealed, and failed to compare any newly disclosed details with those generic statements.

Second, the district court expanded the inflation-maintenance theory that this Court recognized in *Vivendi*. The district court premised its price-impact finding on the impact of disclosures about Goldman's mortgage trading and marketing of two CDOs that were far more specific than Goldman's statements about its aspirational business principles or company-wide conflicts controls. As a result, the court effectively rendered a finding of price impact automatic whenever a defendant makes generic statements about its integrity, reputation, or internal controls, as virtually every company does. Under the district court's reasoning, a defendant that makes such generic statements can avoid a finding of price impact only by undertaking an affirmative duty to disclose uncharged misconduct—a duty that this Court has repeatedly disavowed.

The Court should grant this Rule 23(f) petition to correct both legal errors, just as it corrected the district court's adoption of an incorrect legal standard in the first class-certification appeal. *See Goldman I*, 879 F.3d at 485. Certification under Rule 23(f) is appropriate if either (i) "the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable," *or* (ii) "the certification order implicates a legal question about which there is a compelling need for immediate resolution." *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001). Both alternatives are satisfied here. Under the former, this Court has recognized that orders certifying securities classes are "likely to escape effective review after entry of final judgment," because "very few securities class actions are litigated to conclusion." *Hevesi*, 366 F.3d at 80 (citations omitted). And the district court's decision is, at best, "questionable." Under the latter, the appropriate analysis of price impact in an inflation-maintenance case is an important legal question. *See id.* at 77 ("The application of the fraud-on-the-market doctrine in a novel context can have a significant effect on the law of class actions.”). There is also a compelling need for immediate resolution before the district court’s decision creates confusion in this Circuit.

I. The district court misconstrued the Supreme Court’s “mismatch” framework.

In direct response to the parties’ dispute here, the Supreme Court held that any inference of price impact in an inflation-maintenance case “starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure.” *Goldman*, 141 S. Ct. at 1961. The district court erroneously interpreted that direction to require only a general match in overall *subject matter* (absent a “boundless[] gap in genericness,” (A-28)), while the Supreme Court made clear that a misstatement and a corrective disclosure must match in both *content* and *level of specificity*.

A. The district court adopted an incorrect legal standard.

On remand, the district court misapprehended the Supreme Court’s “mismatch” framework in several ways. *First*, the district court repeatedly understated the genericness of Goldman’s asserted misstatements. The court characterized the conflicts-related statements as “not so generic” and “substantially less generic” than the Supreme Court’s example. (A-20, A-27.) In contrast, the Supreme Court characterized Goldman’s alleged misstatements as “generic” no fewer than seven times, *see Goldman*, 141 S. Ct. at 1957-1961, 1963, and this Court echoed that characterization in its remand decision, *see Goldman III*, 11 F.4th at 142-143. Indeed, this Court has repeatedly held that statements akin to those here are "generic statements" that "do not invite reasonable reliance." *Singh*, 918 F.3d at 60; *see id.* at 63-64. The district court thought that relying on the rationale of that settled caselaw could permit materiality to "slither" into its price-impact analysis, (A-8; *see* A-22 n.17), even though the Supreme Court held that courts should consider the nature of the alleged misstatement "regardless whether the evidence is also relevant to a merits question like materiality," *Goldman*, 141 S. Ct. at 1960.

Second, the district court erected an unjustifiably high bar for determining that a mismatch precludes a finding of price impact. The court called Defendants' emphasis on mismatch "greatly overstate[d]" and "warped." (A-26, A-27 n.19.) But the Supreme Court clearly instructed that the inflation-maintenance theory "starts to break down" in the face of a mismatch, and that defendants may rebut price impact by identifying meaningful discrepancies between a generic alleged misstatement and a claimed corrective disclosure. *Goldman*, 141 S. Ct. at 1961. Despite acknowledging the discrepancy in the specificity of the alleged misstatements and "corrective disclosures" here, (A-27), the district court determined that misstatements must be "*exceedingly* more generic" than corrective disclosures, or that there must be a "*boundless[]* gap in genericness" to establish a mismatch that undermines price impact, (A-26, A-28 (emphasis added)). The district court's heightened standards conflict with the Supreme Court's "mismatch" framework. *See Goldman*, 141 S. Ct. at 1961.

Third, and perhaps most critically, the district court *never compared* the actual contents of Goldman's alleged misstatements and Plaintiffs' three purported "corrective disclosures." The court inaccurately characterized Goldman's conflicts-related statements as promising "that Goldman had sufficient conflicts procedures in place" (presumably, in the district court's unstated view, "sufficient" to prevent all conflicts), and revealing "Goldman's specific approach to conflicts management." (A-23, A-26-27.) The statements did neither. (*See* A-167.) Meanwhile, the district court characterized Plaintiffs' claimed "corrective disclosures" at a high level of abstraction, noting only that they "implicate[d] the[] same conflicts and Goldman's infrastructure for managing them." (A-27; *see* A-24 (disclosures "implicated the substance of the alleged misstatements"); A-27 n.19 (dismissing discrepancies in scope of "corrective disclosures").) But the Supreme Court required this Court, and thus the district court on remand, to scrutinize the actual contents of each generic misrepresentation and each claimed "corrective disclosure" to discern whether the more specific "corrective disclosures" "actually corrected the generic misrepresentation." *Goldman*, 141 S. Ct. at 1961. The district court failed to do so here.

The district court's truncated analysis cannot be squared with the Supreme Court's paradigmatic example of a mismatch. The Supreme Court described a generic misrepresentation that "we have faith in our business model" and a specific corrective disclosure that "our fourth quarter earnings did not meet expectations," and explained that the mismatch between the specificity of those two statements undermined any inference of price impact. *Id.* Yet under the district court's flawed reasoning, it was sufficient that both statements "implicated" the same "substance": the company's current financial performance. The district court's focus on general subject matter, rather than actual content and level of specificity, thus overrode the Supreme Court's important guardrails on the inflation-maintenance theory.

Fourth, the district court's failure to identify the contents of Plaintiffs' three purported "corrective disclosures" was particularly problematic because, as the court acknowledged, (A-10, A-16), the existence of potential conflicts in the Abacus and Hudson CDOs *had already been disclosed to Goldman investors*. In rejecting Dr. Gompers's testimony that the three "corrective disclosures" merely repeated earlier information that had no price impact, the district court reasoned that the "corrective disclosures" "were colored with inflammatory and granular detail, and substantiated with evidence from inside Goldman itself." (A-16; *see* A-13, A-17-18.) But in applying the Supreme Court's "mismatch" framework, the district court did not compare the generic statements about Goldman's business principles and conflicts controls to any details added in the three "corrective disclosures." Instead, the district court found it sufficient that the "corrective disclosures" "implicate[d] the[] same conflicts and Goldman's infrastructure for managing them." (A-27.) Toggling back and forth allowed the court to characterize Plaintiffs' three claimed "corrective disclosures" both as extremely specific (in rejecting Dr. Gompers's testimony) and as reasonably general (in finding a sufficient match with Goldman's generic statements). If the "corrective disclosures" in fact added only specific details to investors' existing knowledge, that specificity should have factored into the district court's mismatch analysis. It did not.

B. Applying the correct legal standards, the district court would have been compelled to find no price impact.

The district court's legal error was outcome-determinative. The generic nature of the asserted misstatements and the resulting mismatch with Plaintiffs' purported "corrective disclosures" was "the heart of the parties' post-appeal dispute." (A-19.) Had the district court followed the Supreme Court's direction, it could not have dismissed the obvious parallels between the various statements alleged here and the Supreme Court's example of a fatal mismatch. Nor could the district court have countenanced a "comfortable . . . gap in genericness," (A-28), without requiring Plaintiffs to present weighty economic evidence of price impact.

The gap between Goldman's generic statements and the purported "corrective disclosures" is at least as wide here as in the Supreme Court's example, *see Goldman*, 141 S. Ct. at 1961:

Challenged Statements	"Corrective Disclosures"
Supreme Court's Example: "[W]e have faith in our business model."	"[O]ur fourth quarter earnings did not meet expectations."
Business Principles: "Integrity and honesty are at the heart of our business." "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." (A-233.) **Conflicts Warning:** "*Conflicts of interest are increasing* and a failure to appropriately identify and deal with conflicts of interest could adversely affect our businesses . . . . We have extensive procedures and controls that are designed to identify	**(i)** SEC enforcement action alleging that Goldman committed fraud by not disclosing to potential Abacus CDO investors that a hedge fund with a short position had "played an active and determinative role in the asset selection process." (A-52; *see* A-236.) **(ii)** Report of rumor that "Goldman was the subject of a criminal investigation by the Department of Justice" into unspecified mortgage trading. (A-135; *see* A-259.) **(iii)** Report about rumored SEC investigation of the Hudson CDO, which provided no new information about alleged conflicts in that CDO—the details of which *The New York Times* had reported six months earlier on its front page, without any price impact. (A-264, A-279.)

and address conflicts of interest . . . . However, appropriately identifying and dealing with conflicts of interest is complex and difficult" and "*could give rise to litigation or enforcement actions*." (A-167 (emphasis added).)	

Although the district court did not identify which of Plaintiffs' three "corrective disclosures" it was analyzing or what details each added, the court's references to conflicts, (*e.g.*, A-16, A-21-22), suggest that it relied on the first and third disclosures, as the second said nothing about conflicts. The first at most added "granular" evidentiary details, (A-16), to previous disclosures about the Abacus CDO, (A-274), while the third added only that the SEC was investigating previously disclosed allegations of conflicts involving the Hudson CDO, (A-279). Neither new disclosure matched, let alone contradicted, Goldman's warning that conflicts of interests were increasing and complex. (A-167.)

Because the mismatch between Goldman's alleged misstatements and Plaintiffs' claimed "corrective disclosures" is at least as substantial as in the Supreme Court's example, "important evidence of a lack of price impact" weighed strongly in Defendants' favor. *Goldman*, 141 S. Ct. at 1961. Only the most overwhelming economic evidence of price impact could have overcome that mismatch, and Plaintiffs offered none. Plaintiffs relied solely on Dr. Finnerty, who testified that stock declines on the three "corrective disclosure" dates were statistically significant. (A-9-10); *see Goldman II*, 955 F.3d at 276 (Sullivan, J., dissenting). He offered no economic evidence to disaggregate the impact of news of government enforcement from the impact of the supposed revelation that the challenged statements were false, nor did he perform his own analysis of the critical issues of the statements' generic nature or their mismatch with the "corrective disclosures." (A-410.)

By contrast, Dr. Starks provided further evidentiary support for the "common sense" conclusion that the challenged statements and "corrective disclosures" did not match. *Goldman*, 141 S. Ct. at 1960. She explained the ubiquity of such generic statements and why those statements did not affect Goldman's stock price—as underscored by 880 analyst reports on Goldman that never referred to the statements. (A-299-324.) Although "credit[ing]" Dr. Starks's testimony, the district court deemed it of "limited usefulness" because, even if investors did not find Goldman's generic statements relevant, they might have found relevant the "details and severity" of specific alleged misconduct. (A-21; *see* A-13-14.) But as shown *infra* at 20-25, the district court improperly used specific "corrective disclosures" as its baseline for price impact. Regardless, under a proper construction of the Supreme Court's "mismatch" framework, the glaring mismatch here was sufficient on its own to rebut price impact.

II. The district court expanded the inflation-maintenance theory in contravention of this Court's precedent.

As this Court has construed the inflation-maintenance theory, price impact turns on the difference between the price following an alleged inflation-maintaining statement and what the price would have been had that statement been truthful. *See Vivendi*, 838 F.3d at 258. That rule already represents the broadest reaches of the inflation-maintenance theory, the "validity" of which the Supreme Court did not endorse. *Goldman*, 141 S. Ct. at 1959 n.1.[1] But the district court broadened the theory further: It glossed over the significant mismatch between the generic misstatements and the claimed "corrective disclosures" and assessed the price impact of a hypothetical truthful statement as specific as the *"corrective disclosures,"* rather than as general as the supposedly *inflation-maintaining*

[1] Although not addressing the question directly, the Supreme Court assumed that the correct standard for assessing price impact from inflation-maintenance is what would have occurred had the defendant *said nothing*. *See Goldman*, 141 S. Ct. at 1961 (asking whether "the stock's price would have fallen 'without the false statement'") (citation omitted). That standard—which Defendants urge is correct, but which *Vivendi* did not adopt—would have been dispositive here, as Dr. Finnerty testified that he "d[idn't] know" whether Goldman's stock price would have fallen "[i]f Goldman had not made the [challenged] statements." (A-422.) Even applying *Vivendi*'s truthful-substitute standard, this Court's prior observations on what might constitute a substitute truthful statement in this case did not have the benefit of the Supreme Court's "clarifications of the legal standard," including the mismatch framework. *Goldman III*, 11 F.4th at 143. Accordingly, the Court should consider the issue further in light of the Supreme Court's decision.

misstatements. That result conflicts with Second Circuit precedent rejecting a duty to disclose uncharged misconduct and with Supreme Court precedent guaranteeing defendants a meaningful opportunity to rebut price impact.

In *Vivendi*, the company made statements about its liquidity, including that it would meet aggressive cash-flow targets. 838 F.3d at 234-235. In reality, executives feared that the company was "running out of cash" and "nearing bankruptcy." *Id.* at 235. Yet Vivendi continued to assure (concerned) investors that it had "strong free cash flow" and "cash available for investing," until credit downgrades and asset sales revealed its liquidity problems. *Id.* at 236-237, 245; *see id.* at 251-252. Thus, the alleged misstatements, made to assuage investor concerns, directly matched the corrective disclosures. When this Court considered the price impact of a hypothetical truthful statement—"not a rosy picture of [Vivendi's] liquidity state, but the misgivings its executives were sharing behind the scenes"—that substitute statement involved the same content and level of specificity as the original misstatements. *Id.* at 258.

Similarly, in *Waggoner* v. *Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), this Court applied the inflation-maintenance theory to a direct match between the alleged misstatements and the corrective disclosures. There, Barclays assured investors that its trading platforms were "safe from" aggressive trading practices. *Id.* at 87. The New York Attorney General later filed a complaint revealing that

Barclays's representations about those trading platforms were false. *Id.* at 88. Thus, as in *Vivendi*, any hypothetical truthful statement that would have had price impact in *Barclays* would have tracked the original misrepresentations.

On remand, the district court significantly expanded *Vivendi*. A core premise of the *Basic* presumption is that a misrepresentation "actually affect[ed] the market price of the stock." *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 284 (2014). Here, the challenged statements indisputably did not increase Goldman's stock price when made. (A-354; *see* A-7.) The inflation-maintenance theory articulated in *Vivendi*, however, allowed Plaintiffs to claim that a substitute truthful statement would have decreased Goldman's stock price. The district court went further: It did not require Plaintiffs to show that investors would have behaved differently if Defendants had replaced a general misstatement with a similarly general truthful statement—*e.g.*, "Goldman has imperfect controls for avoiding conflicts of interests," or "Goldman has extensive conflicts controls, but not every business and employee always follows them." In fact, like those hypothetical statements, Goldman's challenged conflicts warning did not promise perfect performance, but warned that the company's conflicts procedures could fail. (A-167.) Ignoring what Goldman's challenged warning actually said, the district court determined that a truthful statement about a far more specific issue—that Goldman had supposedly "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 (quoting *Goldman II*, 955 F.3d at 271))—would have decreased its stock price. That final step cannot be reconciled with *Basic*'s foundational premise of price impact or with the Supreme Court's more recent concern about mismatch in inflation-maintenance cases.

The district court's expansion of *Vivendi* to infer price impact from specific disclosures that do not match alleged misstatements is irreconcilable with two other strands of precedent. *First*, the district court's decision would, in practical effect, impose a new legal duty on public companies. Most companies make generic statements about their aspirational business principles. (A-300-301, A-325-339; *see* A-23-24.) And the SEC *requires* companies to make the sort of "concise[]" statements about "risk factors" that appeared in Goldman's 10-K, 17 C.F.R. § 229.105, and to disclose whether the company has adopted a code of ethics for certain officers, 17 C.F.R. § 229.406. Because all companies make statements about guiding principles or compliance risks, a finding of price impact (and class certification) would become virtually automatic whenever possible misconduct is disclosed. Companies could avoid such a finding only by assuming an affirmative duty to disclose *all* uncharged misconduct. But this Court has made clear that "disclosure is not a rite of confession," and that "companies do not have a 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) (brackets and internal quotation marks omitted); *see Plumber & Steamfitters Local 773 Pension Fund* v. *Danske Bank A/S*, 11 F.4th 90, 98-99 (2d Cir. 2021). Requiring companies who have made aspirational statements or company-wide risk disclosures (*i.e.*, *all* companies) to affirmatively disclose uncharged misconduct to avoid certification of securities class actions would effectively compel such a legally unwarranted duty.

Second, the district court's decision would impermissibly limit defendants' ability to rebut price impact. According to the Supreme Court, defendants may rebut price impact by "show[ing] that *the alleged misrepresentation* did not . . . actually affect the market price," *Halliburton*, 573 U.S. at 269 (emphasis added). But the district court's standard does not turn on the effect of the allegedly inflation-maintaining statement itself, or on the effect of any reasonably comparable truthful substitute. Instead, it turns on the price effect of news of any specific failure in corporate controls inconsistent with the company's aspirational principles or control warnings. If the revelation of individual instances of alleged misconduct becomes the benchmark for price impact, then companies will face a nearly insurmountable burden to show that their original statements lacked price impact, as this case illustrates. That result conflicts with the Supreme Court's guarantee that defendants must have a meaningful "opportunity . . . to defeat the [*Basic*] presumption at the class certification stage." *Id.* at 279.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant this Petition.

Respectfully,

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December 22, 2021

CERTIFICATE OF COMPLIANCE

This Petition complies with the type-volume limitation of FED. R. APP. P. 5(c) because the brief contains 5,198 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). This Petition 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 the Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

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Dated: December 22, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2021, I caused true and accurate copies of the foregoing Petition of Defendants for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) and accompanying Appendix and Motion Information Statement to be served by e-mail, as well as by FedEx, upon the following counsel:

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