# 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 *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS' BRIEF

U.S. Chamber Litigation
Center
Steven P. Lehotsky
1615 H Street, NW
Washington, D.C. 20062
Telephone: (202) 463-5337

Cleary Gottlieb Steen &
Hamilton LLP
Lewis J. Liman
Jared M. Gerber
Lina Bensman
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
*Counsel for Amicus Curiae*

February 22, 2019

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.*

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

*Amicus curiae* the Chamber of Commerce of the United States of America hereby certifies that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

## TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

**Statutes & Rules**

**Other Authorities**

## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae*, the Chamber of Commerce of the United States of America (the "Chamber"), submits this brief pursuant to Federal Rule of Appellate Procedure 29. The Chamber is the Nation's largest business federation. It directly represents 300,000 members and indirectly represents the interests of over 3 million business, trade, and professional organizations of every size, in every sector, and from every region of the United States. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts.

Many of the Chamber's members are companies subject to U.S. securities laws who would be adversely affected if the decision below is permitted to stand. Further, the Chamber has long been concerned about the costs that securities class actions impose on the American economy. To that end, the Chamber regularly files *amicus curiae* briefs in various securities class action appeals, including in Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) ("Halliburton II") and in this case when it was previously before this Court.

---

[1] No party is opposed to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for the Chamber states that no counsel for a party authored this brief in whole or in part, and no person—other than the Chamber, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

In January 2018, this Court vacated the district court's first ruling on Plaintiffs' motion for class certification, noting that it was "unclear . . . whether the court required more of defendants than a preponderance of the evidence" and criticizing the district court's erroneous confusion of materiality and price impact. Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474, 485 (2d Cir. 2018) ("Ark. Teachers Ret. Sys."). In its second attempt, plainly influenced by its preconception that it was "only natural" for Plaintiffs' alleged corrective disclosures to have negatively affected Goldman Sachs' stock price, 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) ("In re Goldman"), the district court again allowed that belief to decide a different question—whether Goldman Sachs' aspirational statements made as much as three years earlier had had a price impact—and again held Defendants to a higher standard than a mere preponderance, disregarding their substantial direct evidence of a lack of price impact and instead accepting allegations and assertions made by the Plaintiffs, who did not introduce competing evidence of their own.

The Supreme Court has repeatedly directed that even when Plaintiffs have invoked the Basic presumption to satisfy their initial burden, Defendants must be afforded a meaningful opportunity to rebut it at the class certification stage. See Basic Inc. v. Levinson, 485 U.S. 224, 248 (1988); Halliburton II, 573 U.S. at 269.

In the decision below, the district court effectively deprived Defendants of that opportunity, first by allowing Plaintiffs to invoke the price maintenance theory in connection with alleged misstatements too general to sustain it, then by misapplying the preponderance of the evidence standard (in spite of the previous direction of this Court).

Having first deprived Defendants of the powerful evidence that their alleged misstatements had no price impact (as the price maintenance theory makes the absence of price movement following an alleged misstatement irrelevant), the district court then failed to actually weigh the evidence proffered by Defendants, dismissing the lack of price movement after 36 previous reports of Goldman Sachs' conflicts while actually addressing only four of the 36 (in a footnote) and waving away the rest. Moreover, the district court held Defendants' other evidence to an impossible standard, betraying, through its criticisms of Defendants' event study, a misunderstanding of the capabilities of event studies that operated to raise the bar for Defendants higher than any defendant can reach.

The practical effect of the district court's ruling would be to excuse plaintiffs from proving price impact at the class certification stage and permit them to proceed with a potentially ruinous class action lawsuit whenever they can allege a link (however attenuated) between negative news and some earlier statement (however general). In essence, the district court held that class certification is warranted whenever three elements are present: (1) a company makes general, aspirational statements of business principles—as every company regulated by the SEC does—which are not followed by any price movement; (2) the company later becomes subject to a non-public government investigation—which is not required to be disclosed; and (3) the company's stock price drops following the filing of an enforcement action or press reports of the investigation's existence.

The district court's ruling gives investors an insurance policy against investment losses. Every company makes general statements about ethics, codes of conduct, or similar topics; indeed, the SEC requires every company that it regulates to file a copy of its code of ethics with the Commission and make it available to the public, either by posting it online or otherwise. 17 C.F.R. § 229.406. There can be no real question that virtually every piece of bad news later announced by a company can be alleged to be linked in some attenuated way to such earlier, *required* general statements. Section 10(b) of the Exchange Act is intended to provide a remedy to an investor who purchased securities whose price was inflated as a result of a misstatement, see Halliburton II, 573 U.S. at 286, not to an investor who bought stock in a company that was subsequently confronted with challenges. Unless the district court's ruling is reversed, defendants faced with similar allegations will have no practical means to hold plaintiffs to their burden to show reliance, and the purposes of the federal securities laws will be subverted.

## ARGUMENT

### I. THE CERTIFICATION DECISION IMPROPERLY EXPANDS THE SCOPE OF THE "PRICE MAINTENANCE" THEORY

The district court based its certification decision on a novel and dangerously expansive application of the price maintenance theory that lacks support in either this Court's precedent or sound policy. As a general matter, this Court has recognized that, in the absence of evidence of actual reliance, plaintiffs must submit evidence that "the alleged misrepresentations affected the market price in the first place." In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 257 (2d Cir. 2016) ("Vivendi") (quoting Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 814 (2011) ("Halliburton I") (quoting Basic, 485 U.S. at 244, 247)). Absent such evidence, "there is 'no grounding for any contention that investors indirectly relied on those misrepresentations through their reliance on the integrity of the market price.'" Id. (quoting Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 473 (2013)).

This Court nonetheless has held that, in limited circumstances, plaintiffs can rely on a "price maintenance" theory to establish price impact. Id. at 256. But, to invoke this theory, a statement must have the capacity to "prevent[] preexisting inflation in a stock price from dissipating." Id. at 258 (quoting FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1317 (11th Cir. 2011)). Thus, this Court has applied the price maintenance theory only in limited circumstances where the statement unquestionably was one on which a reasonable investor could rely. Id. at

245 (company statement that it had excess cash and was performing "ahead of market consensus" despite internal signs of liquidity crunch); Waggoner v. Barclays PLC, 875 F.3d 79, 87, 89 n.16 (2d Cir. 2017) (distinguishing between statements specific to safeguards for a particular platform and "inactionable puffery" about doing "business in the right way"). Were it otherwise, securities fraud liability could be established without "a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'" Vivendi, 838 F.3d at 256 (citing Halliburton I, 563 U.S. at 810 (quoting Basic, 485 U.S. at 243)).

This Court also has held that "general statements about reputation, integrity, and compliance with ethical norms" are "too general" for a reasonable investor to rely on. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014) (such statements are "inactionable puffery"). Indeed, this Court has warned that accepting such general statements as the basis for reliance would "bring within the sweep of federal securities laws many routine representations made by investment institutions" that "no investor would take . . . seriously in assessing a potential investment. . . ." ECA, Local 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 205–06 (2d Cir. 2009) (rejecting liability for statements that company had "risk management processes [that] are highly disciplined and designed to preserve the integrity of the risk management process" and that it "set the standard for integrity").

The district court ignored these well-accepted precepts. It refused even to consider that the statements at issue not only included that Goldman Sachs had "extensive procedures and controls" that were designed to address conflicts of interest but also described "conflicts of interest" as a risk. (Joint Appendix ("JA") 5716).[2] The alleged misstatements did not refer to any particular business or transaction or guarantee the absence of conflicts. To the contrary, they are precisely of the type that this Court repeatedly has stated are too general to instill reliance. Notably, the district court did not identify any evidence that there was preexisting inflation that the alleged misstatements supposedly maintained. In sum, if an actionable statement must be one on which the market could have relied in making investment decisions, and if generalized statements such as these are not ones on which the market can rely, then it follows that plaintiffs cannot be relieved of showing price inflation based on such generalized statements by virtue of the price maintenance theory. Despite Plaintiffs' attempt to make the required showing of price impact by uttering the words "price maintenance," "that theory provide[s] no *evidence* that refute[s] [D]efendants' overwhelming evidence of no price impact." IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775, 782–83 (8th Cir. 2016) (emphasis added).

[2] In fact, Goldman Sachs warned that conflicts were "increasing" and "could adversely affect [their] businesses." In re Goldman, 2018 WL 3854757, at *6.

The implications of the district court's ruling are radical. As this Court has recognized, and as Defendants' evidence below established, Defendants' statements are of the type that virtually every company makes. See (JA5049) ("every company" examined by Defendants' expert "made public statements analogous to" Goldman Sachs' statements). Virtually every company says: "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"; and "Integrity and honesty are at the heart of our business." (JA93). And any publicly traded company whose business includes the potential for conflicts of interest will—and, as required by law, must—disclose that it has "procedures and controls . . . designed to identify and address conflicts of interest." (JA5716); 17 C.F.R. § 229.406. The import of the holding below is that companies now make those statements at their own peril. If a company makes a generalized statement such as that made by Goldman Sachs (even if it does not cause any inflation), and some negative news is later released that results in a stock drop, every enterprising plaintiffs' counsel will be able to allege a link between the generalized statement and the later bad news and thus impose on the company's current shareholders the costs not only of responding to the bad news, but also of reimbursing past shareholders for losses supposedly incurred by purchasing inflated stock. The securities laws will become a "broad insurance against market losses." Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 345 (2005).

## II. THE DISTRICT COURT MISAPPLIED THE PREPONDERANCE OF THE EVIDENCE STANDARD

The district court committed a second error, repeating the mistakes of its prior class certification decision, by failing to faithfully apply a preponderance of the evidence standard and ignoring or improperly disregarding Defendants' powerful evidence that the alleged misstatements did not have any price impact.

Halliburton II stressed that, although plaintiffs can satisfy their initial burden of price impact at the class certification stage with "indirect" evidence that the market was efficient, the "presumption" is "just that"—it is not conclusive evidence of the ultimate fact of price impact—and defendants have a right to present evidence to rebut the inference of price impact by "showing that the alleged misrepresentation did not actually affect the stock's price," Halliburton II, 573 U.S. at 263–64, before a class is certified. Id. at 284. Recognizing that the Basic presumption established reliance only through an "indirect proxy," the Supreme Court directed lower courts not to "ignore a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the Basic presumption does not apply." Id. at 282. If defendants' evidence demonstrates a lack of price impact, "Basic's fraud-on-the-market theory and presumption of reliance collapse." Halliburton II, 573 U.S. at 278. After all, in the end, a securities case may proceed (whether individually or on a class basis) only if there is proof of reliance—i.e., "a proper connection between a defendant's misrepresentation and a plaintiff's injury." Amgen, 568 U.S. at 461 (citation omitted).

Thus, in its prior decision in this case, this Court held that the district court "erred in declining to consider defendants' evidence" that "the misrepresentations did not in fact affect the market price of Goldman stock," and ordered the district court to consider that evidence on remand. Ark. Teachers Ret. Sys., 879 F.3d at 486. The district court failed to do so, and instead improperly ignored and disregarded that evidence. In so doing, it rendered Halliburton II a dead letter.

### A. THE DISTRICT COURT AGAIN IMPROPERLY DISREGARDED DEFENDANTS' REBUTTAL EVIDENCE

Defendants offered powerful evidence to rebut the Basic presumption. That evidence included the generalized nature of the alleged misstatements, as well as the absence of front-end price movement. It also included evidence of the absence of any price movement on the 36 prior dates when information about Goldman Sachs' conflicts was disseminated, revealing (under Plaintiffs' theory) that Goldman Sachs did not always avoid conflicts of interest, keep its "clients' interests . . . first," or "comply[] . . . with the letter and spirit of the laws, . . . and ethical principles." (JA93). It further included expert analysis showing that the price drops that followed the alleged corrective disclosures were attributable to the announcement of enforcement activity, not to any revelation about Defendants' ethical commitments. In rejecting Defendants' evidence, the district court misconstrued the import of

Defendants' showing and, in effect, held Defendants to the same standard that this Court previously held was error.

### 1. The District Court Failed To Properly Consider Defendants' Powerful Evidence Of Lack Of Price Movement Following 36 Prior Reports Of Conflicts

The district court discarded evidence that the 36 prior reports concerning Defendants' conflicts of interest did not cause a stock drop on the theory that the three subsequent disclosures that Plaintiffs claimed were "corrective" contained "new material information." See In re Goldman, 2018 WL 3854757, at *4. In so doing, however, the district court elided the critical question of whether the new material information that caused the drop in Goldman Sachs' stock price was that which revealed the alleged falsity of the prior representations or the more significant news of an SEC enforcement action, and thus set up a standard that is both error and would be virtually impossible to meet in practice.

The disclosures on the 36 prior dates reported in great detail—in widely read and highly regarded sources—the very facts later repeated in Plaintiffs' alleged corrective disclosures, including the following:

- A December 3, 2007 New York Times article, reporting that "as Goldman was peddling C.M.O.'s, it was also shorting the junk on a titanic scale through index sales – showing . . . how horrible a product it believed it was selling . . . [T]he recent unhappiness about mortgages and Goldman's connection with them are not examples of sterling conduct. It is bad enough to have been selling this stuff. It is far worse when the sellers were, in effect, simultaneously shorting the stuff they were selling, or making similar bets . . . Maybe it's time for an investigation of just what Wall Street and Goldman did to make money." (JA5300);

- A December 11, 2007 Dow Jones Business News article, reporting that "New York Attorney General Andrew Cuomo has already subpoenaed Wall Street. Next: Congress, the SEC and other state regulators will demand answers, such as why was Goldman shorting the SIVs they were selling, many of which quickly went into default? What did they fail to disclose? Sounds like a massive conflict of interest with major liabilities." (JA5308);

- A November 11, 2008 Los Angeles Times article, reporting that "[s]ome experts said [Goldman Sachs'] action, while not illegal, might be inappropriate. 'That's not a good way to do business.' . . . 'They've got a conflict of interest and they're acting against the interests of their customers." (JA5328);

- A June 24, 2009 Rolling Stone article, reporting that "even as it was [selling CDOs and mortgage-backed securities], it was taking short positions in the same market, in essence betting against the same crap it was selling. Even worse, Goldman bragged about it in public . . . In other words, the mortgages it was selling were for chumps. The real money was in betting against those same mortgages . . . 'It's exactly securities fraud,' he says. 'it's the *heart* of securities fraud.'" (JA5342);

- A November 2, 2009 front page Wall Street Journal article, reporting that "[Mr. Paulson] met with bankers at . . . Goldman Sachs[] and other firms to ask if they would create . . . CDOs . . . that Paulson & Co. could wager against . . . Goldman Sachs[] didn't see anything wrong with Mr. Paulson's request and agreed to work with his team." (JA5358-60);

- A December 24, 2009 front page New York Times article, reporting that "Goldman kept a significant amount of the financial bets against securities in Hudson, so it would profit if they failed," thereby "put[ting] the firm[] at odds with [its] own clients' interests . . . How these disastrously performing securities were devised is now the subject of scrutiny by . . . Congress [and] the [SEC] . . . [which] appear to be looking at whether securities law or rules of fair dealing were violated." (JA5382-83); and

- A December 29, 2009 New York Times article, reporting that, "[a]ccording to industry experts interviewed, [Goldman Sachs'] bets put the firms' interests clearly at odds with their clients' interests." (JA5386).

The district court in a footnote questioned whether certain of the 36 reports of conflicts were of a different "tenor and quality" than others. But the four disclosures the district court subjected to criticism were no different in either tenor or quality than those that courts repeatedly have held sufficient to be corrective when so alleged by plaintiffs.[3] Plaintiffs routinely prosecute claims based on just such press reports. And, even if four of the disclosures were not sufficiently robust to be corrective, that still left 32 disclosures that the district court did not criticize but simply disregarded. That was error. The evidence with respect to those disclosures demonstrates the lack of price impact of Goldman Sachs' original alleged misstatements. If, as Defendants showed, Goldman Sachs' stock price did not move on any of the 36 (or even 32) prior occasions when the purported falsity of its prior alleged misstatements was

[3] "Dura did not set forth any requirements about the quality, form, [] precision," or source of a "corrective disclosure." Sapssov v. Health Mgmt. Assocs., Inc., 608 F. App'x 855, 866 (11th Cir. 2015). "[B]esides a formal corrective disclosure by a defendant followed by a steep drop in the price of stock, the market may learn of possible fraud from a number of sources," including "analysts' questioning financial results" and "newspapers and journals." In re Enron Corp. Sec., Derivative & ERISA Litig., No. MDL–1446, 2005 WL 3504860, at *16 (S.D. Tex. Dec. 22, 2005). See also Matthew L. Fry, Pleading and Proving Loss Causation in Fraud–on–the–Market–Based Securities Suits Post–Dura Pharmaceuticals, 36 Sec. Reg. L.J. 31, 64–71 (2008) ("A corrective disclosure can come from any source, and can take any form from which the market can absorb [the information] and react.").

revealed, that is powerful evidence that those prior alleged misstatements did not inject or maintain inflation in Goldman Sachs' stock price in the first instance. It was incumbent on the district court not simply to ignore the disclosures but to weigh them against any contrary evidence proffered by plaintiffs and—in the absence of evidence that would lead to a different conclusion—to find that the presumption was rebutted.

Furthermore, even if any one of the disclosures taken alone did not disclose the entire truth, that is not the appropriate standard. A disclosure need not disclose the entire truth to be corrective. See Dura, 544 U.S. at 342 (recognizing that loss causation can be established when "the relevant truth begins to leak out"); In re Vivendi Universal, S.A. Sec. Litig., 605 F. Supp. 2d 570, 599–600 (S.D.N.Y. 2009) (same); In re Bristol Myers Squibb Co. Sec. Litig., 586 F. Supp. 2d 148, 165 (S.D.N.Y. 2008) ("[A] corrective disclosure need not take the form of a single announcement, but rather, can occur through a series of disclosing events."). That on the later three occasions there was stock movement is just cherry-picking. At most, it establishes—as the district court stated—that the stock moved in response to "economically significant negative news." In re Goldman, 2018 WL 3854757, at *4. It does not show that the news to which the stock reacted "reveal[ed] to the market the falsity of the prior" alleged misrepresentation, Lentell v. Merrill Lynch & Co., 396 F.3d 161, 175 n.4 (2d Cir. 2005), or that it was anything more than new news that Goldman Sachs previously could not have disclosed. Indeed, even if some new information was contained in the SEC complaint, the fact that there was no statistically significant stock price movement on each of the prior 36 dates—all of which, under Plaintiffs' theory, would have revealed to the market the falsity of the prior alleged misrepresentation—was powerful evidence that such alleged misrepresentation had no price impact.

### 2. The District Court Improperly Disregarded Defendants' Evidence That The Stock Drops Resulted From News Of Enforcement Activity

Defendants also offered evidence from Dr. Stephen Choi, a law professor at New York University with a PhD in economics from Harvard, that the stock price movement on each of the three alleged corrected disclosure dates was the result, not of the removal of any prior inflation injected into Goldman Sachs' stock price by the alleged misrepresentations, but of the news of government enforcement actions. Defendants also offered evidence from a study of 880 analyst reports demonstrating that analysts and investors attributed the stock price declines to the new news of the government enforcement action. (JA8047-48).[4] The court peremptorily and improperly rejected Dr. Choi's evidence and entirely ignored the study of the analyst reports. Its reasoning, if upheld, would dramatically reduce plaintiffs' burden in

[4] The district court failed to weigh this evidence, and indeed does not even discuss it in its certification decision.

prosecuting securities fraud cases and alter the nature of the Section 10(b) cause of action.

The court rejected Dr. Choi's expert opinions because he only performed an event study analysis of the first of the three alleged corrective disclosures. But Dr. Choi explained his rationale for not including the other two corrective disclosures, which the court rejected with nary an explanation other than the cursory statement that his reasons were not "good reason[s]." In re Goldman, 2018 WL 3854757, at *5.[5] The court failed to explain why, if the first of the three alleged corrective disclosures resulted in price movement attributable solely to the new news of enforcement activity (and not the removal of inflation), the same result would not also follow for the other two similar statements.

The court's additional basis for dismissing Dr. Choi's study reveals the fundamental error in its thinking. The court held that the study failed to satisfy Defendants' burden because Dr. Choi was able to find only four enforcement events (out of the 117 he considered in his event study) that were sufficiently comparable. (At the same time, the court indicated that the four events were over-inclusive

[5] The district court simply ignored Dr. Choi's opinion that the other two corrective disclosure dates were ones on which no new information was introduced (instead, only rumors were reported, and without much detail), with the consequence that designing an event study around those disclosures would require "a lot of subjective judgment calls there which I think would make an objective study difficult, if not impossible." (JA8139).

because Dr. Choi supposedly did not take into account the underlying allegations in each enforcement action to ensure they were similar.) The court was mistaken. That there were only four comparable events is not a function of cherry-picking—the court never suggested that other comparable events had been wrongly excluded. Rather, it was a function of the fact that the critical factors in this case—an enforcement action that was not accompanied by a settlement, that included scienter-based charges, and that charged the company and an individual—were unusual. Of the 117 SEC enforcement actions brought by the SEC over a period of four years, only four others had the features that the action against Goldman Sachs had. See (JA7652, 8237).[6] The court's apparent conclusion that an event study with four observations should be disregarded is inconsistent with other district court decisions. Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC, 310 F.R.D. 69, 88 (S.D.N.Y. 2015). Moreover, if, as the district court seemed to hold, no defendant can rebut the presumption of price impact created by market efficiency with evidence drawn from a study based on a small number of observations, then few if any defendants will ever be able to rebut the presumption and plaintiffs will never be required to put on any affirmative direct evidence of their own of any price impact. Disclosure events not infrequently are idiosyncratic and do not generate

[6] See (JA8127) ("I conducted 117 event studies.").

large numbers of comparable events. Plaintiffs should not receive a pass with respect to the issue of price impact because the disclosure event here involves an SEC enforcement action rather than an earnings miss or some other event that might have more analogues.

In sum, having already pre-judged that it was "only natural" for the Plaintiffs' alleged corrective disclosures to have had a price impact, In re Goldman, 2018 WL 3854757, at *4, the district court rejected all of the evidence of a lack of price impact presented by Defendants, and accepted instead the bare Basic presumption, treating it as having more weight than a lack of price movement following 36 prior disclosures (together, if not fully corrective, then at least partially so)[7] combined with an expert analysis and event study finding (perhaps to a lesser degree of certainty than the district court imagined was possible) that other factors accounted for the stock drop. If the evidence Defendants' presented was not sufficient to overcome the Basic presumption, it is difficult to see what evidence is.

### B. THE DISTRICT COURT'S DECISION IS INCONSISTENT WITH HALLIBURTON II

The Supreme Court held in Halliburton II that "price impact," not market efficiency, is the key to the presumption of reliance. Halliburton II, 573 U.S. at 283.

[7] The district court's failure to consider whether the 36 prior disclosures were at least partially corrective was also error, as this means it did not properly weigh the evidence.

"[M]arket efficiency and the other prerequisites for invoking the presumption constitute an indirect way of showing price impact." Id. at 281. "In the absence of price impact, Basic's fraud-on-the-market theory and presumption of reliance collapse[s]." Id. at 278. The Court also emphasized that the burden of showing reliance, as with the other elements of the Section 10(b) cause of action, rests on plaintiffs. Id. at 267.

The upshot of the district court's ruling is to dispense with those requirements and to relieve plaintiffs of that burden. Defendants here presented powerful "direct" evidence of the absence of price impact: (1) an alleged misstatement of the type this Court has held is insufficient to induce reliance; (2) the absence of front-end price impact; (3) the absence of any price movement after each of 36 reports of Goldman Sachs' conflicts; and (4) expert testimony explaining that the stock price drop on the three subsequent alleged disclosure dates was attributable not to the disclosure of the falsity of an earlier representation but to new news of government enforcement activity. The district court rejected all of that evidence and held that it did not satisfy the preponderance standard. It did so without weighing any contrary expert evidence that the stock price drops on the three subsequent dates was caused, even in part, by the disclosure of the falsity of the earlier alleged misrepresentation. Rather, it jumped from the claim that the stock price decline was attributable to "economically significant negative news'" to the conclusion that it was "only natural" that the stock price reacted at least in part to the portion of that negative news that revealed the falsity of an earlier statement, In re Goldman, 2018 WL 3854757, at *4, and not because of the more salient fact (and one that could not have been disclosed and was new news) that the SEC had sued Goldman Sachs and Goldman Sachs had not settled.

That leap-of-logic, which was error, illustrates the gravity of the district court decision. Event studies are designed to isolate variations in a company's stock price from market- or industry-wide movements. Vivendi, 838 F.3d at 253–54. They do so by modeling the normal movement of the company's stock price and, for relevant dates, comparing the actual price to the price predicted by the model. Id. at 254. If the difference between the predicted price and the actual price (the residual return) is statistically significant, the inference is that the price moved in response to news about that company. Id.

Importantly, however, although an event study can show that it is very likely that the entirety of the stock drop resulted from one or all of the other simultaneous disclosures (as Defendants' event study did here),[8] no event study can entirely

---

[8] Indeed, though courts recognize the various limitations of event studies, see, e.g., Strougo v. Barclays PLC, 312 F.R.D. 307, 321–22 (S.D.N.Y. 2016) ("[T]he event study technique improves as the number of firms in the sample increase, as the number of days in the announcement window decrease, and as the alternative of a larger abnormal return is considered against the null hypothesis of zero abnormal return.") (quoting Sanjai Bhagat & Roberta Romano, Event Studies and the Law:

disaggregate the effects of multiple simultaneous disclosures. See Glickenhaus & Co. v. Household Int'l, Inc., 787 F.3d 408, 422 (7th Cir. 2015) (stating that it "may be very difficult, if not impossible, for any statistical model to . . . perfectly exclude, any firm-specific, nonfraud related factors that may have contributed to the decline in a stock price" and, on that basis, refusing to require plaintiffs' event studies to meet that standard); Frederick C. Dunbar & Arun Sen, Counterfactual Keys to Causation and Damages in Shareholder Class-Action Lawsuits, 2009 Wis. L. Rev. 199, 242 (2009) ("Although an event study can detect when a stock-price decline on such news is statistically significant, it cannot by itself determine which of simultaneous events caused the price drop."). But Halliburton II explicitly contemplated that defendants would have no lesser ability than plaintiffs to offer event study evidence as to price impact. 573 U.S. at 280.

Thus, to the extent that the court held that Defendants' evidence was not sufficient because its number of comparable events was small and it did not exclude entirely the possibility that the market reacted in some small portion to the revelation of a prior falsity, rather than to the SEC lawsuit, no defendant will ever be able to

---

Part I: Technique and Corporate Litigation, 4 Am. L. & Econ. Rev. 141, 148 (2002)), they nevertheless give plaintiffs latitude in using them to meet their various burdens. See, e.g., In re Petrobras Sec., 862 F.3d 250, 278–79 (2d Cir. 2017) (permitting plaintiffs to demonstrate market efficiency through an event study that suffered from serious directionality defects).

satisfy the district court's standard. The fulcrum (and sufficient showing) will be market efficiency, and Halliburton II will be a dead letter.

## III. IF LEFT INTACT, THE CERTIFICATION DECISION THREATENS TO INCREASE ABUSIVE SECURITIES CLASS ACTIONS AND UNNECESSARILY HARM BUSINESS

This Court has recognized that "class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability." Hevesi v. Citigroup Inc., 366 F.3d 70, 80 (2d Cir. 2004) (citation omitted). This risk is particularly acute in the securities class action context. See Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975) ("There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general."); Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 149 (2008) (noting potential for "plaintiffs with weak claims to extort settlements from innocent companies" in securities cases).

If even highly general statements that do not cause front-end price movement can give rise to a securities fraud class action, no company whose stock experiences a decline for any reason will be able to avoid opportunistic plaintiffs alleging fraud on a price maintenance theory and seeking to insure their investment losses. See Dura, 544 U.S. at 345 (The securities laws are not intended "to provide investors with broad insurance against market losses" in huge segments of our economy.).

Companies routinely make general statements. The more general the original statement, the greater the number of subsequent stock price drops that a creative plaintiff can argue relate back to it. To put it another way, nearly any time that a company's stock price drops following a disclosure, there will be some statement previously made by that company that is so general that it permits the argument to be made that it related to that disclosure. This is particularly acute when the general statements at issue concern values, ethics, or a company's commitment to legal compliance—arguably, *any* disclosure of a prior misstatement is "corrective" of a general affirmation about a company's ethics. Thus, if plaintiffs are permitted to satisfy their burden through nothing more than a stock price drop, a prior highly general statement, and the unsubstantiated invocation of the price maintenance theory, then securities fraud suits, and class certification, will become essentially automatic.

By eliminating Plaintiffs' burden to demonstrate that the alleged misstatements had any price impact when made, and thus Defendants' ability to rebut Plaintiffs' price impact allegations, the decision below exacerbates these concerns.

## CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision.

Dated: February 22, 2019

Respectfully Submitted,

By: /s/ Lewis J. Liman
Lewis J. Liman

Lewis J. Liman
Jared M. Gerber
Lina Bensman
Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
Facsimile: (212) 225-3999

U.S. Chamber Litigation Center
Steven P. Lehotsky
1615 H Street, NW
Washington, D.C. 20062
Telephone: (202) 463-5337
Facsimile: (202) 463-5346

*Counsel for* Amicus Curiae
*Chamber of Commerce of the United States of America*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 29 and FED. R. APP. P. 5(c) because the brief contains 5908 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 22, 2019

/s/ Lewis J. Liman
Lewis J. Liman

Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
Facsimile: (212) 225-3999