22-484-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ARKANSAS TEACHERS RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP,

Plaintiffs-Appellees,

(Caption continued on inside cover)

PURSUANT TO MARCH 9, 2022 ORDER GRANTING PERMISSION TO APPEAL
FROM AN ORDER GRANTING CERTIFICATION OF CLASS
BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
MASTER FILE NO. 1:10 CIV. 03461 (PAC)
THE HONORABLE PAUL A. CROTTY

BRIEF OF *AMICI CURIAE* SECURITIES 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 DEFENDANTS-APPELLANTS

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PENSION FUNDS, ILENE RICHMAN, Individually and on behalf of all others similarly situated, PABLO ELIZONDO, THOMAS DRAFT, 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,

Consolidated-Plaintiffs,

—against—

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, DAVID A. VINIAR, GARY D. COHN,

Defendants-Appellants,

SARAH E. SMITH,

Consolidated-Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Securities Industry and Financial Markets Association, 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
May 18, 2022

Respectfully submitted,

/s/ Jonathan K. Youngwood

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John Browne & Adam Hollander, *Investor Class Cert. Win Offers Post-Goldman Insight*, Law360 (2021) https://www.blbglaw.com/news/publications/2021-12-10-investor-class-cert-in-offers-post-goldman-insight-by-john-c-browne-and-adam-hollander-published-in-em-law360-em/_res/id=Attachments/index=0/Investor%20Class%20Cert.%20Win%20Offers%20Post-Goldman%20Insight%20-%20Law360.pdf...12

U.S. Chamber's Center for Capital Markets Competitiveness, Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation, 3 (2014), https://www.centerforcapitalmarkets.com/wp-content/uploads/2014/07/CCMC_Disclosure_Reform_Final_7-28-20141.pdf...17

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. 21

INTEREST OF AMICI CURIAE[1]

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA").

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%

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[1] The parties have consented to the filing of this *amici curiae* brief. *See* Fed. R. App. P. 29(a)(2). 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.

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 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 more than 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.

SUMMARY OF ARGUMENT

In certifying the plaintiffs' class for a third time on remand based on generic and aspirational statements, the district court misconstrued clear guidance from the Supreme Court. *Goldman Sachs Group, Inc. v. Arkansas Teacher Ret. Sys.*, 141 S. Ct. 1951 (2021). The Supreme Court instructed that when applying the presumption established in *Basic v. Levinson*, 485 U.S. 224 (1988), the generic nature of alleged misstatements bear heavily on whether those statements actually had a price impact. Further, the Supreme Court held that the logic behind the inflation-maintenance theory—in particular that a back-end price drop is equal to the amount of inflation maintained by a front-end statement—"starts to break down" where the front-end statement is highly generic and the subsequent disclosure alleged to "correct" the front-end statement is far more specific. *Goldman*, 141 S. Ct. at 1961.

In this case, the district court misconstrued that guidance, understated the generality of the alleged misstatements made by Goldman Sachs Group, Inc. ("Goldman"), and did not properly consider whether narrow disclosures made years later "mismatched" the generic and aspirational front-end statements at issue. In fact, the statements and disclosures could hardly match *less* in content or specificity. The alleged false statements made by Goldman are vague, generic, firm-wide statements not specific to any product line, of a kind made with incredible frequency by the business community (i.e., "Integrity and honesty are at the heart of our

business"). JA97. On the other hand, the subsequent disclosures alleged to have corrected them involved detailed allegations regarding a specific business line (i.e., an SEC enforcement action alleging that Goldman committed fraud by not disclosing that, in the Abacus collateralized debt obligation ("CDO"), a hedge fund with a substantial short position had an active role in the asset selection process). JA66, 146-147, 3581.

Further, the district court applied *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d. 223 (2d Cir. 2016) far beyond its bounds and in a way that threatens to impose new, affirmative disclosure obligations on companies that are contrary to this Court's precedent. In *Vivendi* this Court held that a misstatement can have a price impact by maintaining an inflated stock price if a truthful statement made in its place would have decreased the stock price. But the district court expanded this approach to hold that an alleged generic misstatement can maintain an inflated stock price if a truthful highly specific disclosure would impact the stock price. This would effectively impose new affirmative disclosure obligations on companies—something this Court has repeatedly made clear is *not* required. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) (holding that companies do not have an affirmative duty to "disclose uncharged, unadjudicated wrongdoing.") (quoting *Ciresi v. Citicorp*, 782 F.Supp. 819, 823 (S.D.N.Y.1991)).

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. Often these statements are included in portions of the companies' mandatory SEC filings, such as statements about risk factors or a description of the companies' business principles. In the event of a disclosure or announcement of any alleged corporate misconduct or failing resulting in a stock price decline, the district court would allow plaintiffs to tie that disclosure to even the most tenuously related generic statements made in years prior by the same company, and those generic statements will likely be found to have a price impact. Under the district court's ruling, the *Basic* presumption could be nearly impossible for defendants to rebut, and companies would be pressured into undue settlements that bestow an unwarranted windfall upon plaintiffs and their lawyers. As a practical matter, to avoid this 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.

This standard cannot be what the Supreme Court intended in *Goldman* and is clearly inconsistent with the Supreme Court's prior ruling in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2414 (2014) (*Halliburton II*) when it determined that defendants may rebut the *Basic* presumption through "evidence that the asserted misrepresentation (or its correction) did not affect the market price of

the defendant's stock." And in previous cases, this Court has rightly "decline[d] to broaden the scope of securities laws" in such a way that would "bring within the sweep of federal securities laws . . . routine representations made by investment institutions." *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009); *see also Singh v. Cigna* Corp., 918 F.3d 57, 60 (2d Cir. 2019) (stating that "generic statements do not invite reasonable reliance" and plaintiffs cannot "point to banal and vague corporate statements affirming the importance of regulatory compliance; next, point to significant regulatory violations; and *voila*, . . . have alleged a prima facie case of securities fraud[.]")

The district court's ruling risks unduly burdening companies and their shareholders with meritless claims. Class de-certification 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

A. Aspirational Statements Like Those Challenged In This Case Are Customary in the Financial Industry And Cannot Have Price Impact

Plaintiffs are investors in Goldman common stock who allege Goldman made certain false statements in its Annual Reports and Form 10-Ks published between

2007 and 2010. Plaintiffs advance the theory that the statements maintained Goldman's stock price at artificially inflated levels until price drops upon three "corrective disclosure" events.

The statements at issue, which supposedly maintained Goldman's inflated stock price, are generic, aspirational pronouncements. They do not refer to any particular product line, transaction, or practice. The Supreme Court referred to the statements as "generic" multiple times. *See Goldman*, 141 S. Ct. at 1957-59, 61, 63. These generic statements include the following generalized remarks about Goldman's business principles:

- "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."
- "Our reputation is one of our most important assets."
- "We have extensive procedures and controls that are designed to identify and address conflicts of interest." *Id.*; *see also* JA97-98.

The challenged statements are also aspirational. Many are contained in the introductory "Business Principles" portion of Goldman's Annual Reports and are accompanied by explanatory text emphasizing that the principles are aspirations and not guarantees. *See* JA54, 1122 ("Integrity and honesty are at the heart of our

business. We *expect* our people to maintain high ethical standards in everything they do, both in their work for the firm and in their personal lives."). The others, which concern potential conflicts of interest, are in the "Risk Factors" section of Goldman's Form 10-K. The statements make no guarantee that Goldman will be able to avoid or resolve all conflicts of interest. Rather, the statements expressly disclose that the conflicts of interest involved in Goldman's business are a risk of investing, including because any one conflict can be difficult to identify and manage. *See* JA91-92 ("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 . . . if we fail, or appear to fail, to identify and deal appropriately with conflicts of interest*.") (emphasis added).

Statements akin to Goldman's regarding reputation are commonly made throughout the broader business community, including in those sectors in which the *Amici's* members participate. 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." JA-2609-2611.

Generic statements like these are common in other contexts as well, such as when companies speak generally and aspirationally regarding codes of conduct, social responsibility, data security, and more. *See Indiana State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 944 (6th Cir. 2009) (general and aspirational statements are "ubiquitous" and "numbingly familiar in the marketplace"). The fact that these sorts of statements are incredibly common in the business community gives the district court's ruling the potential to have legal consequences far beyond the confines of this matter.

This Court has previously found statements similar to the Goldman statements at issue incapable of influencing investment decisions 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,* 553 F.3d at 206. Indeed, the Supreme Court in vacating the district court's prior class certification held that the "generic nature" of a misrepresentation is "important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory" because "a more-general statement will affect a security's price less than a more-specific statement." *Goldman*, 141 S. Ct. at 1960-61.

II. THE DISTRICT COURT DID NOT PROPERLY INTERPRET THE SUPREME COURT'S DECISION

In certifying the Plaintiff class for a third time on remand, the district court improperly applied the Supreme Court's guidance on how generic statements should be considered under a price impact analysis. Plaintiffs proceed under an inflation-maintenance theory, alleging that Goldman made false statements that had a stock price impact by maintaining an inflated stock price, and that subsequent disclosures related to alleged conflicts of interests in two collateralized debt obligations led to a decline in Goldman's stock price because those disclosures revealed that the front-end false statements were false. *Basic* established a rebuttable presumption of classwide reliance on public statements for plaintiffs petitioning for class certification, where a company's stock is traded on an efficient market reflecting public information including material misrepresentations. *Basic v. Levinson*, 485 U.S. 224 (1988). The *Basic* presumption can be rebutted by any showing that "severs the link" between the alleged false statement and the price; that is, by a showing that the statement did not have a price impact. *Basic*, 485 U.S. at 248; *Halliburton II,* 134 S. Ct. at 281.

As explained below, in reviewing and vacating the district court's previous certification of this class, the Supreme Court imposed guard rails to prevent the inflation-maintenance theory from becoming an irrebuttable path to class certification in securities actions. The Supreme Court cautioned that the logic

underlying the inflation-maintenance theory broke down where there was a "mismatch" between a generic front-end statement and a more specific back-end disclosure. *Goldman*, 141 S. Ct. at 1961.

On remand, the district court misinterpreted the "mismatch" standard to require only that the two statements implicate the same general subject matter in order for the disclosure to have "corrected" the prior generic statement. Under this standard, one struggles to conceive of an event-driven stock price decline that a plaintiff's lawyer *cannot* connect to the same "general subject matter" as some generic statement from public materials in years prior.

The district court's class certification decision may all but eliminate rebuttability from the *Basic* rebuttable presumption, and effectively nullifies the Supreme Court's guard rails on the inflation-maintenance theory. The business community, including the *Amici's* members and constituents, is faced with the specter of near-certain class certification following a disclosure of economically negative news that results in a decline in share price.

The Supreme Court vacated this Court's decision and then provided guidance for how to analyze the mismatch issue on remand. However, given that the district court's application of the "mismatch analysis" would be satisfied in nearly every securities fraud case, the district court's decision threatens to render the Supreme Court's decision meaningless. This is well noted by the plaintiffs' bar. According

to a plaintiffs' bar's colorful news alert, "[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.'"[2]

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 "there is less reason to infer front-end price inflation" from the stock price drop. *Goldman*, 141 S. Ct. at 1961. This principle applies with particular force when, as is the case here, the alleged "misrepresentation is generic" and the "latter corrective disclosure is specific." The mere fact that a specific statement, announcement, or other disclosure regarding corporate misconduct or a failure of corporate controls is met with a drop in stock price should not be sufficient to infer that the specific statement "corrected" an earlier generic representation about firm activity; rather, the most logical

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[2] John Browne & Adam Hollander, Investor Class Cert. Win Offers Post-Goldman Insight, Law360 (2021), https://www.blbglaw.com/news/publications/2021-12-10-investor-class-cert-in-offers-post-goldman-insight-by-john-c-browne-and-adam-hollander-published-in-em-law360-em/_res/id=Attachments/index=0/Investor%20Class%20Cert.%20Win%20Offers%20Post-Goldman%20Insight%20-%20Law360.pdf.

explanation is that the specific statement *introduced* bad news to the market that negatively impacted stock price. *Goldman*, 141 S. Ct. at 1961. The Supreme Court said that where there is such a "mismatch" between the generic front-end statement and the narrow, specific back-end disclosure, the logic of the inflation-maintenance theory is at its weakest. *Id*. Nonetheless, the district court granted class certification for a third time under just such a scenario.

The district court did not meaningfully consider the contents of the generic representations as they compared to the contents of the alleged specific disclosures. Rather, the district court merely found that the representations and disclosures "implicate [the] same conflicts." *In re Goldman Sachs Grp., Inc. Sec. Litig*., No. 10 CIV. 3461 (PAC), 2021 WL 5826285, at *14 (S.D.N.Y. Dec. 8, 2021). 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 clear from the example the Supreme Court gave to illustrate its point. The Supreme Court presented a hypothetical where an initial misrepresentation—"we have faith in our business model"—was "mismatched" with 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. *Goldman*, 141 S. Ct. at 1961. These two statements implicate the same subject matter—the company's

financial performance—but the Supreme Court nonetheless considered them to exemplify a "mismatch" between a generic front-end statement and a more specific back-end disclosure.

As an example of the importance of the "mismatch" analysis, consider a generic statement made by a manufacturing company that it has "rigorous product safety and quality standards," and consider that an issue with one of the products produced by that company arises later. If the "mismatch" standard is incorrectly applied, as it was by the district court, any announcement of a product-specific defect or issue leading to a stock price decline could be said by plaintiffs to have "corrected" the inflation-maintaining statement about quality standards, with the generic statement being ascribed a price impact and rendering the *Basic* presumption irrebuttable for all manufacturing companies.

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 *Vivendi,* 838 F.3d. at 258 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*. But the district court, in examining this question, compared the generic front-end statements against far more specific back-end disclosures. That is, the district court considered the relevant examination to be whether there would have been a price impact 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 had instead 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." *Goldman Sachs*, 2021 WL 5826285, at *11. However, that a detailed disclosure about a specific issue may impact stock price does not indicate the generic statement had any inflation-maintaining impact itself; it only indicates that the back-end disclosure impacted price. The district court's interpretation of *Vivendi* therefore further 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 would essentially require companies to make prompt detailed public disclosure of any uncharged wrongdoing of which they become aware. If they do not do so, then they will operate indefinitely under

threat that any statement in their public filings, no matter how generic or aspirational, will eventually be used to support a securities class certification such as the one in this case. Plaintiffs would point to a generic representation and contend that if instead, the company had disclosed in great detail an event with negative implications, it is likely the stock price would have declined. In light of the district court's opinion, such a contention threatens to be nearly impossible to disprove. The only sure way to avoid this trap would be to affirmatively make such detailed disclosures. But this is in direct conflict with this Court's settled precedent. Issuers have no "duty 'to disclose uncharged, unadjudicated wrongdoing.'" *City of Pontiac,* 752 F.3d at 184.

Further, requiring companies to disclose every single detail about their company would result in significant burden and also harm. Disclosure of too much detail can lead to "information overload," making it difficult for an investor to evaluate the most important information and burdening investors with information that is repetitive or otherwise not useful.[3]

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[3] *See* U.S. Chamber's Center for Capital Markets Competitiveness, Corporate Disclosure Effectiveness: Ensuring a Balanced System that Informs and Protects Investors and Facilitates Capital Formation, 3 (2014), https://www.centerforcapitalmarkets.com/wp-content/uploads/2014/07/CCMC_Disclosure_Reform_Final_7-28-20141.pdf

Disclosure of uncharged alleged wrongdoing can also be detrimental from a business perspective. For instance, internal investigations could be distorted or upended by excess publicity. Companies need time to investigate alleged misconduct and assess its implications from both business and legal perspectives. Premature disclosures can create false alarms. Not only is it the law that "a government investigation, without more, does not trigger a generalized duty to disclose," *In re Lions Gate Ent. Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016), but it is also a matter of good public policy.

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 errors in this case are particularly worrisome for *Amici* because, in combination, they threaten to open a floodgate of securities plaintiffs bringing meritless price maintenance claims. As discussed above, general aspirational statements like those challenged here are ubiquitous among publicly traded companies and the *Amici's* memberships.

Companies are obligated to make certain types of disclosures by SEC regulations. Thus, companies routinely make a host of generic disclosures around the "general development of the business," "risk factors," and much more. *See* 17 C.F.R. §§ 229.101, 229.10. These statements frequently include language akin to

the challenged statements here—*e.g.*, "Our brand and reputation are key assets of our Company"—that are not false, but which under the district court's standard nonetheless open companies to potential liability upon any subsequent negative announcement.

If this ruling stands, enterprising plaintiffs may use everyday occurrences as grist for price maintenance claims. 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.

For example, consider a company that states in its public disclosures that the company has a strong commitment to developing innovative new products. Years later, a news article reports that the company failed to obtain regulatory approval to commercialize a new medical device, while the company's top rival did obtain such approval. A significant reduction in the company's stock price results. Under the district court's approach, putative class action plaintiffs will claim that the company's generic statement about making innovative products maintained an inflated stock price, and it was only because the market learned of that statement's supposed falsity after a corrective disclosure that "implicated" the same general

subject matter that the stock price declined. That is, under those plaintiffs' theory, the price decline was because the market learned through the corrective disclosure that the company's statement years earlier that it was committed to developing innovative products was false, not because it failed to obtain an important regulatory approval.

Or, alternatively, consider a company that stated in public disclosures that it prioritizes the health of its employees. Then, during the COVID-19 crisis, a manager at a company factory fails to properly implement safety precautions, and an influx of positive COVID cases forces the factory to shut down. The stock price then drops. The district court's standard will be applied by the plaintiffs' bar to construe a firm-wide generic statement about prioritizing the health of its workers as "corrected" by the disclosure of poor COVID-19 safety precautions by one manager, and will impute a price impact to an initial generic statement that had none. Indeed, it is abundantly clear that the stock decline was likely caused by the company's largest factory stopping production.

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 puts our customers first"—and assert that this statement implicated the same subject matter and thus maintained the inflated stock price.

While defendants may have good arguments at the merits stage that there was no fraud, 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, and of the cases that are not dismissed outright, nearly *all* cases are settled. Cornerstone Research, Securities Class Action Filings 2021 Year in Review, 18 (2022), https://www.cornerstone.com/wp-content/uploads/2022/02/Securities-Class-Action-Filings-2021-Year-in-Review.pdf. Suits are regularly settled with little benefit to investors and substantial payments to plaintiffs' lawyers. *See* 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 II* 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

For the foregoing reasons, this Court should reverse the district court's certification order and decertify the class.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Second Circuit Local Rule 29.1(c) because it contains 4,501 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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