RICHARD J. SULLIVAN, *Circuit Judge*, dissenting:

It is difficult to criticize the majority's cogent and highly logical opinion, except to suggest that it perhaps misses the forest for the trees. In my view, the district court misapplied the *Basic* presumption in its analysis of price impact, essentially turning the presumption on its head. Because Defendants offered persuasive and uncontradicted evidence that Goldman's share price was unaffected by earlier disclosures of Defendants' alleged conflicts of interest – thereby severing the link that undergirds the *Basic* presumption – I would reverse the lower court's ruling and decertify the class.

As an initial matter, I agree with the majority's conclusion in Section I that the district court did not misapply the inflation-maintenance theory of price impact. Whatever the merits or flaws of that theory, it is clearly the law of this circuit and not for this panel to revisit. *See In re Vivendi Sec. Litig.*, 838 F.3d 223, 258 (2d Cir. 2016). Nevertheless, I believe that the majority uncritically accepted the district court's conclusions regarding what rebuttal evidence is necessary to overcome the *Basic* presumption. Though the *Basic* standard is well-established, it bears repeating: "[I]f a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is

entitled to a presumption that the misrepresentation affected the stock price;" moreover, "if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's representation." *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258, 279 (2014). Once the *Basic* presumption has been invoked, however, a defendant may then rebut it "through '*any showing* that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price.'" *Waggoner v. Barclays PLC*, 875 F.3d 79, 95 (2d Cir. 2017) (emphasis added) (quoting *Halliburton II*, 573 U.S. at 269).

In support of its initial opposition to class certification, Goldman did not dispute that Plaintiffs were able to *invoke* the *Basic* presumption. *See Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.* (*ATRS I*), 879 F.3d 474, 484 (2d Cir. 2018). Instead, Goldman argued that it was able to *rebut* the presumption with evidence demonstrating the lack of price impact following earlier disclosures of the alleged conflicts. *Id.* The district court found that Goldman had not rebutted the presumption; we vacated and remanded, directing the district court to "determin[e] whether defendants established by a preponderance of the evidence

that the misrepresentations did not in fact affect the market price of Goldman stock." *Id.* at 486.

On remand, the district court held an evidentiary hearing at which Goldman offered the testimony of two experts to demonstrate that the alleged misstatements did not affect the stock price. The first, Dr. Paul Gompers, testified that 36 news reports – including stories on the front pages of *The New York Times* and *The Wall Street Journal* -- had in fact already revealed the supposed falsity of the alleged misrepresentations prior to the three "corrective disclosure" dates, with no discernible impact on the price of Goldman's shares. The second, Dr. Stephen Choi, testified that the stock price declined on the corrective disclosure dates entirely due to the news that the SEC and Department of Justice had commenced *enforcement actions* against the company – not due to the revelation that Goldman had allegedly misrepresented its approach to conflicts of interest, which, as Dr. Gompers demonstrated, had already been revealed to the market. Plaintiffs called one expert, Dr. John Finnerty, to refute Defendants' experts' testimony. Although Dr. Finnerty principally testified that the market for Goldman stock was efficient – a point that Defendants did not dispute – Dr. Finnerty also conclusorily asserted that the 36 earlier news reports did not impact the share price because some of the

reports included "denials" from Goldman, while others were less detailed than the three corrective disclosures alleged in the complaint.

Based on this testimony and the experts' reports, the district court concluded that Goldman had again failed to rebut the *Basic* presumption and certified the class. In particular, the district court relied on Dr. Finnerty's testimony, such as it was, to announce that "[t]he absence of price movement [following the earlier disclosures] . . . is not sufficient to sever the link between the first corrective disclosure [alleged in the complaint] and the subsequent stock price drop." *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10-cv-3461 (PAC), 2018 WL 3854757, at *4 (S.D.N.Y. Aug. 14, 2018). I disagree.

First, the district court, and Dr. Finnerty, relied primarily on the "efficient market" theory, which alone is insufficient to refute persuasive rebuttal evidence regarding the lack of price impact. As set forth in his January 30, 2015 report, Dr. Finnerty was retained to determine whether Goldman's stock traded in an efficient market – a necessary precursor to Plaintiff's invocation of the *Basic* presumption. But Defendants never disputed the efficiency of the market; they presumed as much. Rather, they presented evidence of 36 earlier news reports that revealed the falsity of the misstatements alleged in the complaint and yet never moved the

stock price. They argued, without contradiction, that the lack of movement in the share price – in an efficient market – proved that the later drop was caused by something *other* than the disclosure of the alleged conflicts of interest. Neither Dr. Finnerty nor the district court could refute that conclusion or explain the lack of price movement from the earlier disclosures.[1]

Second, Dr. Finnerty made no serious attempt to refute Dr. Choi's analysis, let alone his conclusion that the stock drop was caused by the announcement of the SEC and DOJ enforcement actions rather than the underlying factual allegations. Instead of differentiating between the price impact of the conflict disclosures and the price impact of the enforcement actions, Dr. Finnerty did his best to conflate them, arguing that the two were inextricably intertwined. In the words of Dr. Finnerty:

> My analysis demonstrates that the description of Goldman's conduct embodied in those three regulatory actions is inextricably tied to the actions themselves. To put it at a very simple level, if you were telling my students what the take-away is, is you can't have a fraud charge without the fraud – without the behavior – and particularly, the SEC

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[1] Dr. Finnerty's attempt to differentiate the 36 news reports from the three corrective disclosures by saying that the news reports were accompanied by "denials" from Goldman was equally conclusory and unpersuasive, particularly since many of the news reports did not include denials at all. *See* Joint App'x at 5284 –5437; *see also id.* at 3146–96 (Plaintiffs' Summary of News Reports); *id.* at 2951–57 (Defendants' Summary of News Reports).

> enforcement action does lay out the behavior that is the basis for the fraud charge.

Joint App'x at 8196. But this failure to engage with Dr. Choi undermined the very purpose of the evidentiary hearing, which was designed to "determin[e] whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock." *ATRS I*, 879 F.3d at 486. Although the district court was at times highly critical of Dr. Choi's studies, it accepted Dr. Finnerty's opinions at face value when it concluded that "[i]t is only natural that economically significant negative news, such as [the conflicts reiterated in the enforcement actions], would at least contribute to the stock price declines." *In re Goldman*, 2018 WL 3854757, at *4 (internal quotation marks omitted). But in addition to being wholly conclusory, that observation was largely beside the point, since it offered no clear explanation for why the market only moved after the 37th recital of fraud allegations.

Of course, the majority correctly notes, as we held in *Waggoner v. Barclays*, that Plaintiffs were not required to prove that news of enforcement actions had no effect on price. 875 F.3d at 104–05. In *Waggoner*, the plaintiffs – who were also proceeding under a price-maintenance theory – invoked the *Basic* presumption, prompting the defendants to argue that the stock price decline "was due to

potential regulatory action and fines, *not* the revelation of any allegedly concealed truth." *Id.* at 104 (internal quotation marks omitted). The district court disagreed, and we affirmed, finding that the "record support[ed] the district court's conclusion that such a concern was merely a contributing factor to the decline." *Id.* In particular, we noted that the defendants' expert conceded that the "corrective disclosure . . . *may* have had a bigger impact on . . . price . . . due to the announcement of the New York Attorney General's lawsuit and that *some* of the price reaction was independent of the specific allegations." *Id.* (alterations and internal quotation marks omitted).

But the key difference between this case and *Waggoner* is that Defendants here have demonstrated that the prior disclosures – as set forth in 36 separate news reports over as many months – had *no* impact on Goldman's stock price. Indeed, as the district court expressly acknowledged, "Dr. Finnerty *concede[d]* that Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed to the public." *In re Goldman*, 2018 WL 3854757, at *4 (emphasis added). Thus, unlike the defendants in *Waggoner*, Goldman introduced hard evidence that "sever[ed] the link between the alleged misrepresentation and . . . the price . . . paid by the plaintiff." *Waggoner*, 875 F.3d

at 95 (quoting *Halliburton II,* 573 U.S. at 269). If such evidence can be neutralized by the mere assertion that the SEC's repackaging of those disclosures must have "at least contribute[d] to the stock price declines," *In re Goldman*, 2018 WL 3854757, at *4, then the *Basic* presumption is truly irrebuttable and class certification is all but a certainty in every case.

Finally, I think it's fair for this court to consider the nature of the alleged misstatements in assessing whether and why "the misrepresentations did not in fact affect the market price of Goldman stock." *ATRS I*, 879 F.3d at 486. Although the majority concedes that "[p]rice impact . . . resembles materiality" and may be "disprove[n] . . . at class certification," it then strains to avoid looking at the statements themselves for fear that such a review amounts to "smuggling materiality into Rule 23." Maj. Op. at 29, 30. I disagree.

Candidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact. Here, the obvious explanation for why the share price didn't move after 36 separate news stories on the subject of Goldman's conflicts is that no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based. The majority tiptoes around this fact, noting on the one hand that "courts regularly

dismiss securities complaints [at the motion to dismiss stage] because the challenged statements were too general to have induced reliance," while tepidly insisting that "[w]e express no opinion on whether the misstatements at issue here are material," since "[r]ight or wrong, we lack the authority to review [the district court's materiality findings] at this time." *Id.* at 34 & n.16. I don't believe that such rigid compartmentalization is possible, much less required by *Amgen*, *Halliburton II*, or *ATRS I.* Once a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price. The mere fact that such an inquiry "resembles" an assessment of materiality does not make it improper.

Here, the generic quality of Goldman's alleged misstatements, coupled with the undisputed fact that "Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed to the public," *In re Goldman*, 2018 WL 3854757, at *4, clearly compels the conclusion that the stock drop following the corrective disclosures was attributable to something *other* than the misstatements alleged in the complaint. The most obvious explanation, consistent with Dr. Choi's report, is that the drop was caused by news that the SEC

and DOJ were pursuing enforcement actions against Goldman. But even without Dr. Choi's testimony, the fact remains that Plaintiffs offered no hard evidence, expert or otherwise, to refute Goldman's proof severing the link between the alleged misrepresentation and the price paid by Plaintiffs for Goldman shares. It therefore seems clear that Defendants "established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock." *ATRS I*, 879 F.3d at 486.

Accordingly, I would reverse the finding of the district court with respect to the *Basic* presumption and decertify the class.