18-2557

United States Court of Appeals
for the Second Circuit

IN RE GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION

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

Petitioners,

– v. –

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

Respondents.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-PETITIONERS' PETITION SEEKING PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(F)

FROM AN ORDER GRANTING CLASS CERTIFICATION ENTERED ON AUGUST 14, 2018
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

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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.

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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., 134 S. Ct. 2398 (2014) ("Halliburton II") and in this case when it was previously before this Court.

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[1] 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

The decision below creates a rule of federal securities and class action law that—if left uncorrected—threatens potentially disastrous consequences for every publicly traded U.S. company. 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 virtually every business does—which cause no price movement when made; (2) the company then becomes subject to a non-public government investigation—which is not required to be disclosed; and (3) the company's stock drops following filing of an enforcement action or press reports of the investigation's existence. Under that ruling, a company could make such generalized statements only at its peril. If at some later date, a negative event takes place that can be alleged to be related to those statements, the company will not only have to confront that negative event but will be faced with a potentially ruinous class action from investors claiming that the aspirational statements—which had no price impact themselves—somehow maintained an inflated price, requiring the company to pay in damages the difference between the stock price before and after the negative event. That result—which would give investors an "insurance policy" against a bad investment—is contrary to Supreme Court and Second Circuit precedent and warrants this Court's review.

In January, this Court vacated the district court's prior certification order, holding that it erred in two respects: (1) requiring Defendants to rebut price impact with more than a preponderance of the evidence—erroneously requiring that Defendants "'conclusively' prove a 'complete absence of price impact,'" and (2) refusing to consider evidence that there was no "accompanying decline in the price of Goldman stock"—i.e, no price impact—on 34 earlier dates when news reported Goldman's alleged conflicts of interest, the subject of the alleged misstatements at issue. Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc., 879 F.3d 474, 485 (2d Cir. 2018) ("Goldman").

On remand, the district court once again certified a class despite the absence of any evidence of price impact—this time attempting to substitute Plaintiffs' mere *allegation* that the supposed misstatements "maintained" preexisting inflation in the stock price and contributed to investors' losses for any actual evidence of price impact. The court acknowledged that the statements at issue did not inflate the stock price when made. (A-4.) It also failed to identify any evidence that the stock price was "inflated" prior to the statements being made, or that the decline that occurred when the government announced its enforcement actions reflected anything more than the announcement of the enforcement actions themselves—not the corrective disclosure of the alleged misstatements. Despite all this, and despite this Court's admonition to weigh the evidence under the preponderance standard, the court accepted at face value Plaintiffs' allegation that

Goldman's generic, aspirational statements of business principles (see Petition 8-9) "*maintain[ed]* an already inflated stock price" (A-4 (emphasis added)) and "contribute[d] to the stock price declines" (A-7).

In re-certifying the class on this theory, the district court made two fundamental errors. First, it held that evidence that the alleged misstatement had no price impact was insufficient to rebut the presumption of reliance based on the "price maintenance" theory. But this Court has accepted that theory only in very limited circumstances involving material misstatements on which investors could reasonably rely when investing. See In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 232, 253-60 (2d Cir. 2016); Waggoner v. Barclays PLC, 875 F.3d 79, 100 (2d Cir. 2017). This Court has repeatedly held that statements of the sort that Defendants made are immaterial as a matter of law and "too general" for reasonable investors to rely on them. See, e.g., City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183-86 (2d Cir. 2014). It follows necessarily that these statements are not sufficient to inflate and then "maintain" a price and to permit Plaintiffs to pursue a securities class action in the absence of any evidence of price impact. Were it otherwise, the reliance element would effectively be written out of the federal securities laws.

Second, the court rejected Defendants' evidence of the lack of price impact on Plaintiffs' chosen disclosure dates because, in the court's view, "[i]t is only *natural*"—despite the absence of any evidence—that the revelation of conflicts of interest on the corrective disclosure dates "would at least contribute to the stock price declines" (A-7) (emphasis added). But Defendants put on evidence that that there were 36 earlier dates on which—on Plaintiffs' theory—the falsity of the alleged misstatements was publicly revealed and "Goldman's stock price did not move on any of the[m]" (A-7). Even on the alleged corrective disclosure dates, Defendants submitted evidence of "an alternative explanation for the stock price declines"—the announcement of enforcement actions (A-5). Plaintiffs offered no affirmative evidence of their own to rebut that showing. If the evidence offered by Defendants is insufficient to satisfy the preponderance standard, then in effect Defendants would have to offer "conclusive" evidence of no price impact, and the "opportunity" to rebut the Basic presumption that Halliburton II requires would be rendered a hollow shell. 134 S. Ct. at 2416-17 (Defendants "must be afforded an opportunity" to rebut presumption at class certification stage by "showing that an alleged misrepresentation did not actually affect the stock's market price.").

The Court should therefore grant the Petition for review.

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 "price maintenance" theory that lacks support in either this

Court's precedents 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.'" Vivendi, 838 F.3d at 257. 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. This Court has nonetheless held that, in limited circumstances, plaintiffs can rely on a "price maintenance" theory to establish price impact even where the statement did not increase price inflation. See id. at 232, 256. But, to satisfy this theory, a statement must be sufficiently material that it could "*prevent*[] preexisting inflation in a stock price from dissipating." Id. at 258. Thus, the Court has only applied the price maintenance theory in limited circumstances where the statement unquestionably was one on which a reasonable investor could rely. See id. at 232, 245 (company stated it had excess cash and was performing "ahead of market consensus" despite internal signs of liquidity crunch); Barclays, 875 F.3d at 87, 89 n.16 (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 "a proper 'connection between a defendant's misrepresentation and a plaintiff's injury.'" Vivendi, 838 F.3d at 256.

This Court has also held that "general statements about reputation, integrity, and compliance with ethical norms"—statements of the sort Defendants made here—are "too general" for a reasonable investor to rely on. UBS, 752 F.3d at 183 (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 Trust 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. If a statement must be one on which the market could have relied in making investment decisions, and if generalized statements of the type Defendants made 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. Moreover, Plaintiffs failed to explain how the alleged preexisting inflation that was supposedly maintained by Goldman's generalized statements was introduced in the first place.

The implications of the district court's contrary holding 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 A-620 ("every company" examined by Defendants' expert "made public statements analogous to" Goldman's business principles).) Virtually every company says that "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." (Petition 8.) And any enterprise whose business includes the potential for conflicts of interest will inevitably disclose its "procedures and controls . . . designed to identify and address conflicts of interest." (Petition 9.) These statements have never been sufficient to support a securities fraud claim. But the import of the holding below is that companies make those statements at their peril. If a company makes a generalized statement, and some negative news is released and is followed by a stock drop, the company will not only have to address the reported event (such as defending against an enforcement action), it also will face liability to all investors who purchased after the generalized statement, even absent any evidence that the generalized statement caused price inflation in the first place. That is nothing short of a policy of "broad insurance against market losses." Dura Pharm. Inc. v. Broudo, 544 U.S. 336, 345 (2005).

II. THE DECISION BELOW RENDERS HALLIBURTON II'S PROTECTIONS ILLUSORY

The court below made a second error worthy of this Court's review. Notwithstanding this Court's injunction that the court not hold Defendants to a standard of "conclusively" showing the absence of price impact, the court did just that. It rejected Defendants' evidence of no price impact because that evidence did not exclude the possibility that some undetermined portion of the stock drop was caused by removal of inflation allegedly maintained by the generalized statements, reasoning that Defendants failed to explain how the allegedly incremental disclosure of conflicts accompanying the enforcement actions "did *not* contribute to the price decline following the first corrective disclosure" (A-9) (emphasis added). Rather than apply the preponderance standard, the court required that Defendants rule out every conceivable basis for price impact that Plaintiffs alleged (but had not demonstrated from evidence)—effectively reinstituting *sub silentio* the "conclusive evidence" standard this Court rejected. Goldman, 879 F.3d at 485. In so doing, it rendered Halliburton II a dead letter.

Halliburton II stressed that while plaintiffs can satisfy their initial burden at the class certification stage by showing the prerequisites for the Basic presumption, thereby establishing a presumption of price impact indirectly, 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 presumption prior to class certification. 134 S. Ct. at 2414, 2417. Where defendants make this showing by a preponderance of the evidence, Goldman, 879 F.3d at 478, the presumption "completely collapses," and "a Rule 10b–5 suit cannot proceed as a class action." Halliburton II, 134 S. Ct. at 2416. In the end, securities class actions may proceed only if there is reliance—i.e., "a proper connection between a defendant's misrepresentation and a plaintiff's injury." Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 461 (2013).

The district court's decision violates these principles. Defendants submitted evidence, accepted by the district court, showing that "the misstatements themselves did not inflate the stock price" when made (A-4) and that "Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed" (A-7). Moreover, Defendants put forward evidence of "an alternative explanation" for the price declines on alleged corrective disclosure dates—demonstrating through an event study that the announcement of enforcement actions entirely accounted for the price drops (A-5-6).[2] The district court held this evidence was inadequate because it failed to eliminate the *possibility* that some

[2] Plaintiffs' only price impact evidence consisted of expert testimony that the price moved in response to news of enforcement actions on the "corrective" disclosure dates—without any showing that the movement was caused by corrective disclosure of Goldman's general business principles, and not the news of enforcement activities, without regard to any business principles. (See A-4 (district court opinion citing declaration); A-794-804 (declaration).)

portion of the stock drop was due to corrective disclosure of the alleged misstatements. Because no defendant will ever be able to rule out this possibility entirely, the decision below essentially renders certification automatic any time there is a stock drop and a finding of an efficient market.

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

As this Court has recognized, "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). 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, 163 (2008) (noting potential for "plaintiffs with weak claims to extort settlements from innocent companies" in securities cases).

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 grant the Petition.

Dated: September 4, 2018

Respectfully Submitted,

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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 2,600 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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