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 *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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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

DISCLOSURE STATEMENT

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INTEREST OF *AMICUS CURIAE*[1]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. Founded in 1977, WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law.

To that end, WLF often appears as *amicus curiae* in cases raising the proper scope of the federal securities laws. *See, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021); *China Agritech*, *Inc. v. Resh*, 138 S. Ct. 1800 (2018); *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2054 (2017) (citing *amicus curiae* brief of WLF). And WLF's Legal Studies Division regularly publishes articles on the faithful interpretation of the federal securities laws and related topics. *See, e.g.*, Doug Greene, et al., *Private Securities Litigation: Making the 1995 Reform Act's "Safe Harbor" Safer*, WLF Working Paper (Nov. 16, 2018), https://bit.ly/2Ylugdm.

WLF is concerned that the district court's application of *Goldman* erodes important litigation protections for generic statements about corporate values and internal controls in the securities filings of nearly every public company. WLF believes, given its potential impact, the district court's opinion should be reversed.

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[1] No counsel for a party authored any part of this brief, in whole or in part, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. All parties consent to the filing of WLF's brief.

SUMMARY OF ARGUMENT

Companies foster their values and ambitions through public statements to their stakeholders. In recent years, investors and securities regulators have encouraged companies to do this even more, particularly on environmental, social justice, and corporate governance issues. In *Goldman*, the Supreme Court provided comfort that companies can speak candidly without fear they later will become targets of a securities-fraud class action if they fail to meet their aspirational statements. The district court's application of *Goldman*, however, converts nearly any generic statement into a launching pad for a future securities-fraud class action following the public disclosure of any shortcoming that even remotely relates to the statement.

The district court's application of *Goldman* misses the mark as both a matter of law and public policy. It renders *Goldman*'s "mismatch" test virtually meaningless because it endorses an unreasonably loose connection between generic, front-end statements and the purported back-end corrective disclosures. And it pushes the boundaries of the "inflation-maintenance theory" so far beyond pre-existing understandings that it implicitly creates affirmative disclosure duties that this Court previously has rejected.

Moreover, the district court's decision undermines the public-policy considerations *Goldman* serves. It discourages, rather than facilitates, corporate communications that securities markets and stakeholders want public companies to make. If upheld, it would chill beneficial corporate speech and undermine congressional policy aimed at limiting meritless securities class actions and coercive settlements.

This Court should not permit the application of *Goldman* to stray so far from its legal and public-policy principles and should reverse the district court's decision.

ARGUMENT

I. The district court's application of *Goldman* defeats the legal principles *Goldman* serves.

A. *Goldman* introduced "new ideas" to help courts and litigants assess price impact and the applicability of the *Basic* presumption.

Price impact is a critical component of a securities fraud class action because it supports a rebuttable presumption of class-wide reliance. *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (the "presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, [is] that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market"). Most securities class action plaintiffs rely on the *Basic* presumption to satisfy Rule 23(b)(3)'s predominance requirement. *See Halliburton Co. v. Erica P. John Fund Inc.*, 573 U.S. 258, 281-82 (2014) ("[W]ithout the presumption of reliance . . . [e]ach plaintiff would have to prove reliance individually, so common issues would not 'predominate' over individual ones."). To invoke the *Basic* presumption, a plaintiff must show: "(1) the alleged misrepresentations were publicly known, (2) they were material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between the time that the misrepresentations were made and when the truth was revealed." *Id.* at 268 (citing *Basic*, 485 U.S. at 248 n.27). These showings, however, are merely an "indirect proxy for price impact," which is "*Basic*'s fundamental premise." *Id.* at 281, 283. A defendant can rebut an inference of price impact with "[a]ny showing that severs the link" between the alleged misstatement and the security's price. *Id.* at 269. If the defendant succeeds, the plaintiff cannot rely on the *Basic* presumption, and class certification must be denied. *Id.* at 281.

Assessing price impact may be straightforward when a false statement "causes a stock's price to rise, [and] the price [falls] when the truth comes to light." *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010). But this Court has recognized the "inflation-maintenance" theory, which allows a plaintiff to invoke the *Basic* presumption when the complaint alleges that a misstatement prevented the price from falling, thereby maintaining the price at an inflated level. *In re Vivendi, S.A. Secs. Litig.*, 838 F.3d 223, 255 (2d Cir. 2016).[2]

In inflation-maintenance cases, plaintiffs often assert that the drop in the price of a security after correction of the alleged misstatement "is equal to the amount of inflation maintained by the earlier misrepresentation." *Goldman*, 141 S. Ct. at 1961.

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[2] In *Goldman*, the Court expressly declined to address the validity of the inflation-maintenance theory. 141 S. Ct. at 1959 n.1.

Still, it is *not* enough for a plaintiff to simply point to a stock price drop. *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 605 (7th Cir. 2020) ("A sharp drop in share price alone is not enough for a class to be certified."); *Schleicher*, 618 F.3d at 684 ("Fraud depends on the state of events when a statement is made, not on what happens later."). After all, there is a stock price drop in every securities-fraud class action, so a stock price drop does nothing to distinguish cases in which an alleged misrepresentation impacted the stock price from those cases where it did not. The Supreme Court has repeatedly affirmed that no matter the underlying price-impact theory, if the alleged misstatement itself "had no price impact, then *Basic*'s fundamental premise 'completely collapses, rendering class certification inappropriate.'" *Goldman*, 141 S. Ct. at 1959 (quoting *Halliburton*, 573 U.S. at 283).

Goldman supplemented existing case law with "new ideas" to aid parties and courts in assessing price impact, particularly in cases premised on inflation maintenance. *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 11 F.4th 138, 143 (2d Cir. 2021) (citing *Goldman*, 141 S. Ct. at 1960). One of these "new ideas" is that an inference of price impact "break[s] down" when "there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Goldman*, 141 S. Ct. at 1961. The Supreme Court specifically warned that this "may occur when the earlier misrepresentation is generic . . . and the later corrective disclosure is specific." *Id.* Accordingly, "[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact" because "it is less likely that the specific disclosure actually corrected the generic misrepresentation, which means that there is less reason to infer front-end price inflation—that is, price impact—from the back-end price drop." *Id.*

For context, the Supreme Court offered an example of just such a mismatch: an alleged misrepresentation "we have faith in our business model" and an alleged corrective disclosure "our fourth quarter earnings did not meet expectations." *Id.* Even though the alleged misrepresentation and corrective disclosure bear some subject matter relation to one another (the company's financial performance), the pairing fails the "mismatch" test on two levels: specificity and content. As for specificity, the corrective disclosure covers a specific time frame, while the alleged misrepresentation is a general sentiment about the business without regard to time. As to content, the corrective disclosure deals with quarterly earnings, while the alleged misrepresentation pertains to the overall business model.

B. The district court applied *Goldman* in a way that all but guarantees a finding of price impact and strips a defendant of the ability to rebut the *Basic* presumption.

The district court did not properly apply *Goldman*'s "mismatch" test and did not appear to understand the impetus behind it. The key question should be whether an alleged misrepresentation and corrective disclosure so closely match that it is reasonable to infer that a post-disclosure price decline reflects pre-disclosure price inflation sustained by the misrepresentation. Otherwise, a court risks finding price impact based on the announcement of bad news alone.[3] But the district court held the test is satisfied when back-end corrective disclosures merely "implicate" the same subject matter as the alleged front-end misrepresentations. SA27. Such a cursory analysis does not help determine if a post-disclosure loss can be fairly tied to inflation maintenance from the alleged misrepresentation. There is no reason to presume, for example, that general and aspirational corporate statements have a price impact inversely correlated to corrective disclosures to which they only loosely relate.

Besides missing the point, the district court's decision failed to faithfully apply *Goldman*'s guidance. The district court employed a subject-matter test rather than compare the specificity and content of the alleged misrepresentations and corrective disclosures. The district court reasoned that "narrower corrective disclosures" could "poke targeted, meaningful holes in overarching impressions reinforced through broader prior statements." SA27 n.19. But that is the very reasoning the Supreme Court *rejected* in its "business model" and "fourth quarter

[3] The district court committed that error in this case. Rather than focus on the impact the alleged misrepresentations may have had on Goldman's stock price, it focused on the impact of the specific details released in the alleged corrective disclosures. Special Appendix for Defendants-Appellants (SA) 26-28. The district court should have addressed the impact of the purported misrepresentation compared to an alternative statement at the same level of generality as the alleged misrepresentation.

earnings" example. A company missing fourth-quarter earnings can equally undermine "in a targeted, meaningful" way the "overarching impressions" created by the company saying that it has faith in its business model. But the Supreme Court has already found that this type of correlation cannot support a finding of price impact.

The practical effect of the district court's erroneous holding is significant. Without a requirement that the content and specificity of the alleged front-end misrepresentation mirror that of the purported back-end corrective disclosure, class certification will pose no real challenge for two reasons.

First, plaintiffs will have a long menu of purported front-end misrepresentations at their disposal given the volume of generic statements that "implicate" the same subject matter as news that typically leads to a decrease in a security's price. Creative plaintiffs' counsel will work their way backwards. After unfavorable news leads to a meaningful decrease in a security's price, counsel will identify past generic corporate statements about values, aspirations, or risks that generally "implicate" the same subject matter as the purported corrective disclosure. Then, they will allege the generic statements were rendered false or misleading by the company's failure to disclose either the existence of the circumstances lowering the security's price or the company's vulnerability to such an event. *See infra* § II.

Second, under an inflation-maintenance theory, plaintiffs will be able to proceed without showing the generic front-end statement affected the security's price. Instead, the price decrease resulting from the bad news will always serve as a proxy for alleged front-end inflation.[4] The Supreme Court introduced the "mismatch" framework to counter this very scenario. *See Goldman*, 141 S. Ct. at 1961 ("But that final inference—that the back-end price drop equals front-end inflation—starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure.").

Under the district court's interpretation, *Goldman* effectively (but silently) will have nullified the Court's reaffirmation of a defendant's right to rebut the *Basic* presumption through "[a]ny showing that severs the link between the alleged misrepresentation" and the alleged effect on the security's price. *Goldman*, 141 S. Ct. at 1962 (quoting *Basic*, 485 U.S. at 248). That could not have been the Supreme

[4] Defendants often rely on event studies to prove lack of price impact. "[W]hen there are multiple pieces of firm-specific news on a given date, as is often the case on days with significant price movement, event studies cannot easily isolate the effect of any individual piece of news." Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067, 1075 (2019). In this case, there were multiple pieces of firm-specific news on the alleged corrective dates, including news of SEC enforcement activity. The district court acknowledged that the enforcement activity contributed to the price declines identified by Plaintiffs, but held that Defendants could not show "the *entirety* of the decline is so attributable." SA19. But "defendants usually cannot convincingly show that none of the drop was related to the corrective disclosure, and the price-maintenance theory—if valid—has made it next to impossible for defendants to rebut the presumption, even in meritless cases." Note, *supra*, at 1075.

Court's intent.

C. The district court applied *Goldman* in a way that implicitly creates affirmative disclosure duties that this Court has rejected.

This Court has approved the inflation-maintenance theory when the alleged misstatements concerned a particular financial metric, product, or assurance and those misstatements were directly contradicted by a subsequent alleged corrective disclosure. *E.g.*, *Vivendi*, 838 F.3d at 258-59 (citing example of a car company falsely stating that a new car has passed all safety tests and later discloses that the new car failed the safety tests causing a stock price decline); *Waggoner v. Barclays PLC*, 875 F.3d 79, 88 (2d Cir. 2017) (affirming class certification where "contrary to its assertions, 'Barclays did not in fact protect clients from aggressive high frequency trading activity, did not restrict predatory traders' access to other clients' and did not 'eliminate traders who continued to behave in a predatory manner.'"); *see also Schleicher*, 618 F.3d at 683-84 (citing example of a company that "says that it lost $100 million, when it actually lost $200 million" and the actual number is disclosed later causing a stock price decline). After all, the inference of price impact due to inflation maintenance only makes sense when the "lie's positive effect on the share price" is the "the additive inverse of the truth's negative effect." *Vivendi*, 838 F.3d at 255. In other words, an equal but opposite price impact exists only when a misstatement misleads in an equal but opposite way from the truth. If the alleged misstatement does not mirror the corrective disclosure, then the premise for using back-end price change as a proxy for front-end price impact collapses.

The district court's incorrect application of *Goldman*, however, expands inflation maintenance far beyond existing understandings.[5] If ratified, any generalized statement about a company could sustain a securities fraud class action by merely implicating the same subject matter as an alleged corrective disclosure. Indeed, the district court's decision effectively precludes a company from making any broad, positive statement about the company without also disclosing any specific negative information that could ever conceivably fit under the same umbrella.

That result would directly contradict past decisions within this circuit rejecting such an implied duty. "[T]he law is clear that companies need not depict facts in a negative or pejorative light or draw negative inferences to have made adequate disclosures." *Singh v. Schikan*, 106 F. Supp. 3d 439, 448 (S.D.N.Y. 2015); *accord Solow v. Citigroup, Inc.*, 2012 WL 1813277, at *4 (S.D.N.Y. May 18, 2012) ("[A defendant is] not obligated to characterize its performance or future outlook in

[5] Not only has the Supreme Court declined to address the validity of the inflation-maintenance theory (*see supra* note 2), but there also is an active circuit split over the issue. Three circuits have adopted the theory. *See Vivendi*, 838 F.3d at 260, *Allstate*, 966 F.3d at 612; *Local 703, I.B. of T. Grocery and Food Emps. Welfare Fund v. Regions Fin. Corp.*, 762 F.3d 1248, 1259 (11th Cir. 2014). Two have rejected the theory. *See Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 665-66 (5th Cir. 2004); *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 782-83 (8th Cir. 2014). The theory itself is ripe for *en banc* or Supreme Court review and the existence of this split would appear to caution against applying the theory any more expansively than current Second Circuit precedent would support.

negative terms, speculate on future negative results or paint themselves in the most unflattering light possible."), *aff'd*, 507 F. App'x 81 (2d Cir. 2013); *Harrison v. Rubenstein*, 2007 WL 582955, at *13 (S.D.N.Y. Feb. 26, 2007) ("[A company is] under no duty to 'to direct conclusory accusations at itself or to characterize its behavior in a pejorative manner' in its public disclosures.").

And this Court also has assured companies that "'[d]isclosure is not a rite of confession,' and they do not have a duty 'to disclose uncharged, unadjudicated wrongdoing.'" *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) (citation omitted). But under the district court's interpretation of *Goldman*, a company could hardly say anything positive without exposing itself to securities fraud claims capable of class certification, unless it also speaks to any negative counterpoint or potential "uncharged, unadjudicated wrongdoing."

Moreover, this Court has made clear that statements like those at issue here are too generic to induce reliance by a reasonable investor and thus are not actionable as a matter of law. *Plumber & Steamfitters Local 773 Pension Fund v. Danske Bank A/S*, 11 F.4th 90, 104 (2d Cir. 2021) ("No reasonable investor . . . would weigh these generic statements [about AML compliance protocols] in its investment calculus"); *City of Pontiac*, 752 F.3d at 183 ("[G]eneral statements about reputation, integrity, and compliance with ethical norms . . . are too general to cause a reasonable investor to rely upon them."); *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.*, 553 F.3d 187, 205-06 (2d Cir. 2009) (statements about risk management practices were held "too general to cause a reasonable investor to rely upon them"). That is true no matter the alleged corrective disclosure or the information the company purportedly failed to disclose.

Goldman instructs courts to "use their common sense" and consider the "generic nature" of a statement in assessing price impact. *Goldman*, 141 S. Ct. at 1960-61 ("[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact" regardless of any overlap with merits issues like materiality). If a reasonable investor would not rely on statements like those at issue here given their generic nature, it makes little sense to conclude those same statements impacted the stock price and then presume class-wide reliance at the class certification stage on that basis. But in the district court's erroneous view, companies cannot make generic statements like those at issue without exposing themselves to new disclosure duties or liability on a class-wide basis.

II. The district court's application of *Goldman* defeats the public-policy considerations *Goldman* serves.

The district court's application of *Goldman* has far-reaching policy implications because the types of disclosures at issue are ubiquitous among public companies. A recent study by scholars from several universities found that all 249 publicly traded companies included in the study made these types of "value statements," and about 85 percent published generic statements about commitments to corporate integrity and legal compliance. Mussie Tessema et al., *Analysis of Corporate Value Statements: An Empirical Study*, 10 Int. J. Corp. Governance 149, 161 (2019), https://bit.ly/34c69nB. Likewise, Defendants' expert, Dr. Laura Starks, conducted a comprehensive study and found analogous statements in securities filings and other public communications from every S&P 500 company she examined. *In re Goldman Sachs Grp., Inc. Secs. Litig.*, No. 10-cv-3461 (S.D.N.Y. Nov. 6, 2015) ECF 170-3, ¶ 45 ("Starks Report").

Generic statements like these lack the specificity needed to materially impact the price of a security. Companies make these types of statements because they serve other beneficial functions. For example, "[a] publicly accessible and authentic corporate value statement can positively impact employee recruitment and retention . . . form an ethical foundation for the company . . . [and] improve employee engagement." Tessema, *supra*, at 154. Likewise, Dr. Starks noted that "[t]hese types of aspirational statements are used for a variety of purposes, including creation and promotion of organizational culture, employee motivation, and corporate brand formation." Starks Report, ¶ 30. Empirical evidence has shown a "link between corporate rhetoric and conduct," suggesting that public statements of commitment or aspiration, even generic ones like those here, "can have a powerful impact on corporate behavior." Lisa M. Fairfax, *Easier Said Than Done? A Corporate Law*

Theory for Actualizing Social Responsibility Rhetoric, 59 Fla. L. Rev. 771, 817-18 (2007).

Even so, these types of statements increasingly are the source of securities litigation. There is a growing trend of "event-driven" securities lawsuits that hinge on "tenuous" arguments about alleged corporate misstatements. Elisa Mendoza & Jeffrey Lubitz, *Event-Driven Securities Litigation: The New Driver in Class Action Growth*, Institutional Shareholder Services (Dec. 2020), at 2-3, https://bit.ly/3mFv9dl (noting that "the new trend of event-driven securities class action litigation is on the rise" and that the number of event-driven securities class action cases increased 38% from 2019 to 2020). These are cases based on external events, such as data breaches, sexual harassment allegations, investigations, or enforcement actions, which have begun displacing traditional securities-fraud claims based on corporate financial disclosures. Even if event-driven securities fraud claims typically rest on shaky ground, the nature of these claims can exert undue settlement pressure, particularly if a defendant believes it lacks a viable means to defeat class certification. Emily Strauss, *Is Everything Securities Fraud?* U.C. Irvine L. Rev. (forthcoming) (manuscript at 18), https://bit.ly/3pEusmr ("[T]he pressure to settle even claims with a low probability of success is compounded in event-driven cases" in part because "the application of 10b-5 jurisprudence in event-driven securities cases has been inconsistent, leading to great uncertainty for defendants."). "The difficulties associated with terminating event-driven securities litigation at the motion to dismiss or class certification stage, coupled with the costs of discovery and extremely large potential damage awards typical in this sort of litigation, means that the risk of vexatious litigation is high." Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 Wash. U. L. Rev. 1821, 1852-53 (2021).[6]

And there is every reason to believe that the trend of increasing event-driven securities litigation will continue. Investors and regulators alike have encouraged companies to make more public disclosures about ESG issues.[7] ESG disclosures often include commitments on topics like climate change, sustainability, diversity and inclusion, socially responsible behavior, and effective monitoring and oversight, among other things. *See* Hazen, *supra*, at 742-47. Nevertheless, as ESG disclosures have become more commonplace, so too have "ESG event-driven security class

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[6] *See also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163-64 (2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."); *Schleicher*, 618 F.3d at 682-83 ("[C]ertification substantially increases the settlement value of a securities suit.").

[7] *See* Caitlin Reilly, *Securities Exchanges Report Growing Investor Demand for ESG Disclosure*, CQ Roll Call (July 17, 2020) (Reporting that "[a]lmost 90 percent of the exchanges said they perceived some investor demand for more disclosure of ESG factors, up from 70 percent two years ago"); Thomas L. Hazen, *Social Issues in the Spotlight: The Increasing Need to Improve Publicly-Held Companies' CSR and ESG Disclosures*, 23 U. Pa. J. Bus. L. 740, 764 (2020-2021) ("In recent years, the SEC has become increasingly interested in CSR and ESG disclosures in particular.").

actions," which are "are increasing in number, and capturing a broad range of global brands on a number of different topics." Subodh Mishra, *ESG as the Driving Factor in Multi-Country Class Action Cases*, Harvard Law School Forum on Corporate Governance (Oct. 7, 2021), https://bit.ly/39odbrK.

The Supreme Court's adoption of the "mismatch" test in *Goldman* was supposed to buttress protections at the class certification stage for generic statements of aspiration, commitment, and risk and limit meritless event-driven securities litigation. But as applied by the district court, *Goldman* would make these statements a potential basis for a securities-fraud class action anytime the company does not achieve its stated aims, even if in an isolated or specific context. This increases the perceived risk of liability for issuing generic statements about things like ESG commitments and chills the types of beneficial, voluntary disclosures that the federal securities laws should facilitate, not hinder. *See* Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. Chi. L. Rev. 1313, 1334 (2018) (explaining why potential exposure to liability even for a "truthful statement" creates "little upside" for "disclosing more than that which is required" and chills disclosure). Indeed, liability concerns "cause companies to overinvest in precautionary measures" and "damage the efficiency of the market in allocating resources by incentivizing companies to 'reduce disclosure of truthful information.'" Note, *supra*, at 1081-82.

The district court's decision has already raised eyebrows. Following the decision, a flurry of articles by legal observers have cautioned companies about making broad ESG disclosures.[8] As one article notes, "[t]he decision provides a cautionary tale to companies making ESG pronouncements in their public disclosures." Wilson & Ashley, *supra*. The authors point out that most ESG disclosures are voluntary and advise that companies "should be mindful of an irony presented by the [district] court's decision: [they] need not say anything at all on these matters." *Id.* In other words, the district court's decision, if upheld, will result in fewer voluntary disclosures that are both truthful and desired due to a fear of liability. [9]

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[8] *E.g.*, David Wilson and Jurgita Ashley, *Class Certification in Long-Running Securities-Fraud Suit a Cautionary Tale for Public ESG Pronouncements*, WLF Legal Pulse (Jan. 6, 2022), https://bit.ly/3OYCVeV; Keith Blackman, et al., *Generic ESG Statements Remain Under Fire: Class Certification Granted for the Third Time as the Saga of the Goldman Sachs Securities Litigation Continues*, National Law Review (Dec. 15, 2021), https://bit.ly/3LaM0Ot ("[T]he district court's discussion of the potential impact of generic ESG statements should be considered when companies make disclosures and other public-facing ESG statements to investors."); Rachel Goldman et al., *More Focus on ESG Means More Scrutiny, Litigation and Enforcement, Too*, Corporate Compliance Insights (Mar. 1, 2022), https://bit.ly/3woTurX ("The lesson of *Goldman* is that companies should be mindful of the risks associated with ESG statements, even if they appear generic or aspirational in nature.").

[9] The response to the district court's decision also could prompt *too much* disclosure that hurts both companies and their investors. For instance, in a recent event-driven securities litigation involving a data breach affecting Marriott International, the Fourth Circuit noted that "Marriott certainly could have provided more information to the public about its experience with or vulnerability to

Liability concerns also have had an impact on ongoing debates over proposals for SEC-mandated ESG disclosures, where commentators have been closely monitoring developments in this case. *See, e.g.*, Rose, *supra*, at 1853-54 (discussing this case, analyzing potential liability relating to generic ESG disclosures, and asserting that "[a]ny serious discussion regarding the adoption of a broad SEC-mandated ESG disclosure regime cannot ignore these concerns"); Virginia Harper Ho, *Modernizing ESG Disclosure*, 2022 U. Ill. L. Rev. 277, 307 (2022) ("Concerns about the increased litigation risk associated with expanded disclosure deserve consideration from the SEC and Congress"). A recent Wall Street Journal article accurately summarized the concerns created by the combination of increased ESG disclosure requirements and a permissive class certification regime. *See* Richard Vanderford, *SEC Climate Disclosure Proposal Looms as Litigation Risk*, Wall St. J. (March 26, 2022), https://on.wsj.com/3MvVVQ0. The article states that an SEC "proposal that would mandate strict climate reporting from public companies could dramatically increase the exposure of these businesses to costly securities litigation." *Id.* The "underlying premise is simple: Make a company talk more—on the record,

cyberattacks," but "the SEC advises companies against 'mak[ing] detailed disclosures that could compromise [their] cybersecurity efforts—for example, by providing a 'roadmap' for those who seek to penetrate a company's security protections.'" *In re Marriott Int'l, Inc.*, 31 F.4th 898 (4th Cir. 2022) (quoting SEC Statement and Guidance on Public Company Cybersecurity Disclosures, 83 Fed. Reg. 8166, 8169 (Feb. 26, 2018)).

in their mandatory disclosures like annual reports—and you are more likely to catch it in a mistake that could prove lucrative for the aggressive plaintiffs' lawyers that earn a living suing companies after bad news." *Id.* For example, the article then notes, if a wildfire destroys a corporate facility, "investors could claim they were misled about the company's climate risk management." *Id.*

The district court's application of *Goldman* makes generic statements about aspirations, commitments, or risks easy targets for vexatious, event-driven securities class actions. Instead, *Goldman* should be applied in a way that supports Congress's intent to restrain the proliferation and *in terrorem* effect of meritless cases. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 276 (2010) (Section 10(b) "area of law is replete with judge-made rules, which give concrete meaning to Congress' general commands") (quotation omitted); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (warning against "permit[ting] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope"). Proper application of *Goldman* is particularly important to achieving this goal in the context of cases premised on inflation maintenance, lest class certification become virtually automatic. Note, *supra*, at 1083 ("[T]he price-maintenance theory allows classes with very little merit to be certified if they survive dismissal. And Plaintiffs know that once they get past the certification hurdle, defendants have an enormous incentive to settle and avoid the uncertain crucible of a securities-fraud trial.”).[10] The district court’s improper application of *Goldman,* if left undisturbed, will lead to more meritless cases, with a corresponding drag on companies and the economy.

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[10] Indeed, Congress passed the Private Securities Litigation Reform Act of 1995 “to restrict abuses in securities class-action litigation, including . . . the practice of filing lawsuits against issuers of securities in response to any significant change in stock price, regardless of defendants’ culpability.” *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 531 (3d Cir. 1999) (citing H.R. Conf. Rep. No. 104-369, at 28 (1995), reprinted in 1995 U.S.C.A.A.N. 679, 748).

CONCLUSION

The district court's interpretation of *Goldman* is untenable. Given its potential far-reaching impact beyond this case, the Court should reverse to ensure that the application of *Goldman* does not stray from the Supreme Court's intent or the public policy goals of the federal securities laws that *Goldman* supports.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 5(c), 29(d) and 32(a)(7)(B)-(C), the undersigned counsel certifies as follows:

1. This brief complies with the type-volume limitation under Fed. R. App. 29 because this brief contains, according to the word count of the word processing system used to prepare this brief, 5,115 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(f).

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

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