No. 18-3667

United States Court of Appeals for the Second Circuit

ARKANSAS TEACHER RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT MANAGEMENT BOARD, PLUMBERS AND PIPEFITTERS PENSION GROUP,
Plaintiffs-Appellees,

(Caption continued on inside cover)

Appeal from the United States District Court
for the Southern District of New York
(No. 1:10-cv-03461)

BRIEF FOR PLAINTIFFS-APPELLEES

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Consolidated-Plaintiffs,

v.

GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN,
DAVID A. VINIAR, GARY D. COHN,
Defendants-Appellants,
SARAH E. SMITH,
Consolidated-Defendant.

CORPORATE DISCLOSURE STATEMENT

Lead Plaintiffs Arkansas Teacher Retirement System, West Virginia Investment Management Board, and Plumbers and Pipefitters Pension Group are not corporations. They do not issue stock and are not controlled by any publicly held corporation.

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STATEMENT OF THE CASE

In 2010, Defendant Goldman Sachs agreed to pay the Securities and Exchange Commission (SEC) $550 million to settle the agency's claim that Goldman had engaged in unlawful conflicts of interests with its investor clients by concealing that the investments it sold them had been designed to fail in order to enrich another client that intended to short the same securities. That investigation, and others by the SEC and the Department of Justice, disclosed that Goldman was also structuring other deals in order to profit from the losses of clients kept in the dark about Goldman's adverse financial interests. That reality conflicted with Goldman's repeated public representations that it was committed to avoiding such conflicts, had systems in place to identify and appropriately deal with conflicts, and had no incentive to engage in such conflicts because it realized that betraying its customers in that way would have devastating effects on its reputation, which was a critical factor in the firm's success. When markets learned that these representations were false and misleading, Goldman's stock price fell precipitously.

To ultimately prevail in this securities fraud class action, Plaintiffs will have to prove that Goldman's challenged statements were, in fact, false and material, points Goldman vigorously denies. The only question in this appeal, however, is whether those questions should be resolved on a class-wide basis. More specifically, the only question is whether the district court erred in finding that Goldman failed to satisfy its burden of proving that its challenged statements had no impact on its stock price. The court committed no such error.

I. Factual Background

A. Goldman And The Mortgage Market Crash

Goldman Sachs is a large financial firm involved in investment banking, securities, and investment management. One of its lines of business involves creating complex securities for its clients to invest in. During the times relevant to this litigation, this included creating synthetic collateralized debt obligations (CDOs),[1] which are securities that pool assets, such as mortgages and mortgage derivatives that

[1] A synthetic CDO is a CDO that invests in credit default swaps or other noncash assets to obtain an exposure to a portfolio of fixed income assets.

produce a cash flow. Investors who believe the underlying assets will perform well can purchase the securities as "long" investments, expecting the CDOs to produce income. Others who believe the underlying assets may perform poorly can take "short" positions on the CDOs and make money if the reference assets fail.

In addition to creating and selling securities, Goldman also invests its own money, including in CDOs. Goldman may also take short positions on its CDOs, putting it in a position to profit if the underlying assets perform poorly, even while its clients who bought the CDOs are losing money. Of course, betting against the performance of securities it is selling to its clients puts the firm in a position where its own financial interests are adverse to its clients'. That creates client-relations problems, potential legal exposure, and ultimately reputational issues, therefore requiring scrupulous disclosure of the conflicts and the associated risks.

B. Goldman's Statements

Goldman recognized that its business practices created substantial risks and, therefore, it acknowledged in its Form 10-K filings that "[c]onflicts of interest are increasing and a failure to appropriately

identify and deal with conflicts of interest could adversely affect our businesses." JA5716. Violations of conflict-of-interest rules would not only create potential liability with respect to the specific investments involved. It would also diminish Goldman's reputation and credibility with its clients across the breadth of its operations, a reputation that Goldman affirmed was "one of our most important assets." *Id*. Indeed, analysts repeatedly explained that Goldman's stock traded at a premium compared to its peers because of the firm's reputation for integrity and its ability to manage conflicts among its various departments. *See, e.g.*, JA3220 (Merrill Lynch, Mar. 13, 2007); JA8008 (Buckingham Research Group, June 17, 2008).

Goldman sought to reassure its stockholders that these conflict-related risks were limited and well-controlled. First, and most importantly, it claimed in its Form 10-K that it has "extensive procedures and controls that are designed to identify and address conflicts of interest." JA5716. Second, it represented in its Annual Reports that "[o]ur clients' interests always come first," JA93, conveying that it would never intentionally subordinate its clients' financial interests to its own.

Instead, it insisted, "[i]ntegrity and honesty are at the heart of our business." *Id*.

C. Goldman's Undisclosed Conflicts

These statements were false and misleading. Starting in 2006, the firm engaged in a series of egregious violations of its clients' trust, creating CDOs that were designed to benefit only one of Goldman's favored clients or were designed to reduce Goldman's "long" exposure to the subprime mortgage market by allowing it to short securities at its clients' expense, all while concealing and misrepresenting those facts to its clients who purchased the securities.

Abacus CDO. In mid-to-late 2006, Goldman was asked by a favored client, hedge fund Paulson & Co., to structure a transaction that would allow Paulson to short certain residential mortgage-backed securities (RMBS). JA58. Goldman allowed Paulson to select underlying assets for the Abacus portfolio that Paulson believed were particularly unlikely to perform. JA60-63. Goldman then maneuvered to conceal that critical fact by appointing a third party, ACA Capital Management (ACA), as the nominal portfolio selection agent, and later convinced ACA to become the largest investor in Abacus. JA61. Goldman deceived ACA

about Paulson's short position in Abacus, leading it to believe that Paulson was investing in the Abacus equity and thus had aligned interests with ACA in the CDO. JA61, JA66-67. And in marketing the resulting CDO to other investors, Goldman did not disclose Paulson's involvement in picking assets, much less that Paulson made those selections while intending to short Abacus. JA66.

When, as expected, the underlying securities failed catastrophically, Goldman's customers lost more than $1 billion, while Paulson, as the CDO's sole short, reaped a corresponding profit of the same amount. JA67.

Hudson CDO. Around the same time, Goldman instructed its mortgage department to massively reduce its long position on the subprime mortgage market. In response, the firm created the Hudson CDO as a vehicle for its "structured exit" from some of its troubled investments. JA99. Goldman used the CDO to short $1.2 billion of mortgage-related assets from its own inventory, as well as another $800 million in other subprime RMBS securities. *Id*. Goldman then proceeded to sell the long side of the security to its clients without revealing its purpose and structure was to reduce Goldman's proprietary risk. *Id*. In

fact, Goldman represented that the CDO "was sourced from the Street," and was "not a Balance Sheet CDO," implying Goldman had obtained the assets from third parties, when, in truth, the assets were entirely from Goldman's own inventory. JA206 Goldman's marketing booklet then represented that "Goldman Sachs has aligned incentives with the Hudson program by investing in a portion of equity," without disclosing that its $6 million long position was a mere fig leaf, representing only 1/300th the size of its short position. JA101.

Goldman ultimately pocketed nearly $1.7 billion in gross revenues from its short position in Hudson at the direct expense of its client investors. JA106. In 2015, a FINRA arbitration panel found that Goldman made "material omissions and misstatements in the marketing materials" for Hudson, which "*masked a significant conflict of interest*." *Nat'l Austl. Bank Ltd. v. Goldman, Sachs & Co.*, 2015 FINRA Arb. LEXIS 455 (May 7, 2015) (emphasis added).

Timberwolf CDO. In the summer of 2006, Goldman created another CDO to reduce its exposure to a subprime market it had decided would crash. The Timberwolf CDO's marketing materials publicized that Goldman was purchasing 50% of the equity tranche, while again failing

to disclose that Goldman was simultaneously taking a much-larger short position. JA115.

While Goldman aggressively sold Timberwolf to its clients, a senior Goldman executive acknowledged internally to Goldman's Mortgage Department head, *"boy that [T]imberwo[l]f was one shitty deal."* JA125-26. Indeed, after Timberwolf lost *almost 80 percent* of its value in six months after closing, the Goldman trader responsible for structuring it dubbed the day that the CDO closed as a "*day that will live in infamy.*" JA129 (emphasis added). Timberwolf resulted in huge losses for Goldman's clients, but $330 million in revenues for Goldman. *Id*.

Anderson CDO. The Anderson CDO followed the same pattern. Although the opposite was true, Goldman falsely told potential purchasers that it was "comfortable" with the referenced securities. JA113. It further instructed its sales force to tell potential investors that Goldman was buying up to 50% of the equity tranche, worth about $21 million, and had, therefore, "aligned" its interests with the purchasers', without disclosing that it was taking 40% of the short side of the CDO, worth about $135 million. JA113-14; ECF No. 170-8 ¶91 & n.98 (Neuberger Report, Ex. 8 to Defs' MSJ).

As in Hudson, Goldman again told investors that the assets were "sourced from the Street," when in fact a significant portion originated from Goldman's own balance sheet. Neuberger Report ¶91 & n.99.

In the end, Goldman's clients lost virtually their entire investment in the Anderson CDO, while Goldman earned more than $100 million through its undisclosed short position. JA113.

D. Initial Press Suspicions And Goldman's False Denials

Because of its dramatically reduced long position on the mortgage market, Goldman survived, even thrived, while the housing market crashed and its competitors lost billions. Some in the press began to raise questions about Goldman's business practices, wondering how Goldman could sell its clients securities the firm was shorting with its own money. Goldman responded by assuring the market that it had undertaken no undisclosed or otherwise improper conflicts with its clients. For example, one of the challenged statements in this case came in response to a *New York Times* article about Goldman's profitable shorting of the mortgage market. *See* JA82-84, JA89 (Complaint ¶¶123-26, 139-42). The firm issued a press statement falsely representing, among other things, that its short position was "fully disclosed and well known to investors." JA83.

In the absence of any concrete evidence that these denials were false, Goldman's stock price remained buoyed.

E. Disclosure Of The Truth

Beginning in April 2010, however, reports of government lawsuits and investigations revealed that Goldman's representations about its conflict systems and policies were materially false and misleading, and contained material omissions.

First, on April 16, 2010, the SEC filed a civil lawsuit charging Goldman with securities fraud in relation to the Abacus CDO. *See* JA68. The 22-page complaint provided detailed allegations that had not previously been reported and supporting evidence, such as internal emails, that had previously been undisclosed. *See* JA6024-45. Goldman would later settle the suit for $550 million and admit to misconduct – namely, that its representations regarding Abacus and Paulson's role were "incomplete" and "a mistake." JA3064; *see* JA69. In addition, in its Consent Decree with the SEC, Goldman specifically linked the April 16, 2010 corrective disclosure to its misstatements regarding its conflicts and business principles, acknowledging that as part of its corporate reforms stemming from the lawsuit it was conducting a "firmwide review of its

business standards," and an "evaluation of [its] *conflict management*." JA3069 (emphasis added). Meanwhile, a senior Goldman vice president, Fabrice Tourre, went to trial and was found liable on six of the SEC's seven counts of securities fraud, *including aiding and abetting Goldman's fraud* in connection with Abacus. *See* Verdict, *SEC v. Tourre*, No. 10-cv-3229, ECF No. 439 (S.D.N.Y. Aug. 1, 2013).

The day the SEC's suit was revealed, Goldman's stock price fell by 12.79%. JA4651. Analysts and others explained that the revelation affected Goldman's worth not simply because the suit could result in substantial costs and penalties. As one market observer wrote, the "greatest penalty for Goldman is not the financial damages – Goldman is enormously wealthy – but the reputational damage." JA5466. That said, the extent of the damage was limited at first. Goldman strongly denied the charges and emphasized that they only related to a single CDO. *See* JA4651. A number of analysts accepted Goldman's suggestion that this could be an isolated incident whose fallout could be contained. *See* JA4653-54 (expert report collecting cites).

It was not. On April 30, 2010, *The Wall Street Journal* reported that the Department of Justice had opened a criminal investigation into

whether Goldman had committed securities fraud in connection with its mortgage trading. JA6056-57; *see* JA149-50. The story stated that the investigation was prompted by a referral from the SEC, but involved different evidence, pointing toward new problems with yet other transactions. JA6056-57. Indeed, a few days earlier, Goldman employees were questioned at a congressional hearing about other CDOs, including Hudson, Anderson, and Timberwolf. *See* JA5484; JA7115-20. Accordingly, the market had reason to believe that Goldman's illegal conflicts of interest were both broader and more serious than the SEC's civil suit initially suggested. The day after the disclosures, Goldman's stock fell another 9.39%. JA4666. Citibank analysts, discussing the charges, again noted that because "Goldman's reputation is one of the firm's greatest assets," the revelations "could have significant detrimental effect across all of the firm's business." JA4668.

On June 10, 2010, reports of another SEC investigation, this time into Hudson, led to another stock price decline, this time by 4.52%. JA45, JA4671, JA4676.

II. Procedural Background

Plaintiffs subsequently brought this litigation, alleging violations of Sections 10(b) (15 U.S.C. § 78j(b)) and 20(a) (15 U.S.C. § 78t(a)) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (15 U.S.C. § 78a *et seq.*), and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5).

A. Denial of Motion to Dismiss

On June 21, 2012, the district court denied Goldman's motion to dismiss in relevant part. JA167-74. Of greatest relevance here, the court rejected Goldman's objection that its challenged statements were immaterial. JA172-74. In denying Goldman's request for reconsideration, the court pointed out that "Goldman's representations about its purported controls for avoiding conflicts" were definite and specific, and easily disprovable. JA188. While touting the existence of those systems, the court explained, "Goldman is alleged to have sold financial products to clients despite clear and egregious conflicts of interest." *Id.* "Particularly in light of Goldman's statements" regarding its "'aligned incentives' with its clients," the court could not say "as a matter of law no reasonable investor would have relied on the statements above in making an investment decision." *Id.*

Goldman asked the district court to certify its decision for interlocutory appeal, but the court declined. JA190.

B. Initial Class Certification and Appeal

Subsequently, the district court granted Plaintiffs' motion to certify a class of investors who purchased Goldman shares during the relevant period. JA2871-72. Goldman appealed. This Court rejected Goldman's argument that the district court should not have certified the class because the alleged misstatements were immaterial and, therefore, incapable of impacting prices. *See Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 481 n.6 (2d Cir. 2018) (*Goldman I*) (refusing to consider argument). It also rejected Goldman's claim that it bore only the burden of production to rebut the presumption of reliance afforded by *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). *See Goldman I*, 879 F.3d at 484-85. The Court explained that a decision handed down during the pendency of the appeal had held that "defendants seeking to rebut the *Basic* presumption of reliance must do so by a preponderance of the evidence." *Id*. at 485 (citing *Waggoner v. Barclays PLC*, 875 F.3d 79, 85 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018)). Because it was unclear whether the district court had applied that standard, the Court

vacated and remanded for reconsideration of Goldman's price-impact evidence. *See id.*

C. Remand

On remand, the district court permitted Goldman to supplement its evidence, entertained two rounds of additional briefing, and held a full-day evidentiary hearing, including testimony of three experts, followed by another day of oral argument. SPA2. Afterwards the court issued an opinion fully reconsidering Goldman's price-impact rebuttal but concluding again that Goldman had failed to satisfy its burden of proof. SPA1-11. (Plaintiffs discuss the details of the court's rationale in the relevant parts of the Argument section of this brief below).

This appeal followed.

SUMMARY OF ARGUMENT

The district court faithfully followed this Court's instructions on remand. It examined the evidence, applied the correct burden of proof, and concluded that Goldman had not shown a lack of price impact by a preponderance of the evidence. Goldman's assertions of error are unfounded.

First, the district court properly allowed Plaintiffs' price-maintenance theory. This Court and others have repeatedly rejected Goldman's claim that price-maintenance is limited to cases involving "fraud-induced" inflation. Goldman also argues that the theory cannot apply here because the allegedly price-maintaining statements were not material. But this Court rejected that attempt to defeat class certification on materiality grounds in the last appeal, explaining that "materiality . . . is common to the class and does not bear on the predominance requirement of Rule 23(b)(3)." *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 481 n.6 (2d Cir. 2018) (citing *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466-67 (2013)). That rejection is law-of-the case, and plainly correct. Goldman's other attempts to create special limitations for price-maintenance theory run into the same problems: they are irreconcilable with the decisions of this Court and other circuits, which recognize that there is no relevant legal difference between frauds that cause stock prices to rise and frauds that prevent prices from falling.

Second, turning to Goldman's evidence on price impact, the district court applied the correct legal standard, weighed the parties' competing

evidence, and reasonably concluded that Goldman failed to satisfy its burden of proof. Goldman barely defends its event study, which the district court found unreliable on multiple grounds, many of which Goldman does not even address. The district court also committed no clear error in rejecting Goldman's alternative argument based on news reports. The court correctly observed that those reports failed to disclose the falsity of Goldman's challenged statements with the kind of credibility, specificity, and hard evidence needed to move markets. Particularly given Goldman's repeated denials of improper conflicts, the market's failure to react to the news reports Goldman cites far more likely reflects that investors were withholding judgment, rather than demonstrates that the market did not care whether Goldman was profiting from improper conflicts of interests with its clients.

Even if Goldman's press articles suggested a lack of price impact (which they do not), the district court reasonably concluded that Plaintiffs' event study and other evidence of price impact were more persuasive. Plaintiffs' expert conducted exactly the kind of event study this Court's precedents require, showing that the market's response to the corrective disclosures was statistically significant, unexplainable by

any other cause, and confirmed by contemporaneous analyst reports. The district court did not clearly err in crediting that analysis over Goldman's.

STANDARD OF REVIEW

The district court's decision to certify a class action is reviewed for abuse of discretion. *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008). "To the extent that a ruling on a Rule 23 requirement is supported by a finding of fact, that finding is reviewed under the 'clearly erroneous' standard." *Id.* "This is especially so when the trial court's findings involve issues of credibility or the weight to be given to testimony, expert or otherwise." *Pampillonia v. Concord Line, A/S*, 536 F.2d 476, 477 n.2 (2d Cir. 1976); *Cifra v. Gen. Elec. Co.*, 252 F.3d 205, 213 (2d Cir. 2001) (court of appeals is "not allowed to second-guess either the trial court's credibility assessments or its choice as to which of competing inferences to draw") (citation omitted). Conclusions of law are reviewed de novo. *Salomon*, 544 F.3d at 480. And "to the extent the ruling involves an application of law to fact," this Court reviews for "abuse of discretion." *Id.*

ARGUMENT

The only question in this appeal is whether Goldman sustained its burden of proving by a preponderance of the evidence that its allegedly false and misleading statements and omissions had no impact on the price of its stock. *Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 484-85 (2d Cir. 2018) (*Goldman I*). After giving Goldman an opportunity to supplement its evidence, holding an evidentiary hearing, and carefully evaluating the parties' submissions, the district court found that Goldman failed to meet its burden. SPA7. Recognizing that the court's factual conclusions are not clearly erroneous, Goldman attempts to revive the materiality objections this Court rightly refused to consider in the last appeal, shift the burden of proof to Plaintiffs, and repackage its fundamentally factual objections as legal error. Those efforts fail. The district court applied the correct legal standards and reached factual conclusions that are clearly correct, not clearly erroneous.

I. The District Court Rightly Accepted Plaintiffs' Price-Impact Theory.

Goldman begins by arguing that the district court committed legal error by allowing Plaintiffs to proceed on a price-maintenance theory. Br. § I. That argument is meritless.

A. Plaintiffs Can Show Price Impact By Demonstrating That Fraud Maintained Artificial Inflation In A Stock Price, Without Also Having To Show That The Initial Inflation Was Fraud-Induced.

Goldman first argues that the "District Court erred in applying the price maintenance theory because there was no evidence of any *fraud-induced* inflation in Goldman Sachs' stock price that Defendants' challenged statements maintained." Br. 32 (emphasis added). That is, Goldman claims that the price-maintenance theory requires proof of *two* frauds: one that initially inflated a stock's price and another that maintained that "'fraud-induced' inflation." *Id.* 29. The only authority it cites for that claim is the Seventh Circuit's decision in *Glickenhaus & Co. v. Household International, Inc.*, 787 F.3d 408, 418 (7th Cir. 2015), and this Court's decision *In re Vivendi, S.A. Securities Litigation*, 838 F.3d 223, 259 (2d Cir. 2016). *See* Br. 29. This is surprising because both cases hold the opposite.

In *Glickenhaus*, the Seventh Circuit did acknowledge that in a price-maintenance case, "[b]efore the first false statement is made, there is 'actual inflation' in the stock price but no 'fraud-induced inflation' because although the stock is overpriced, misrepresentations are not the cause." 787 F.3d at 418. But the court held that "*[h]ow the stock became inflated in the first place is irrelevant* because each subsequent false statement prevented the price from falling to its true value and therefore caused the price to remain elevated." *Id*. (emphasis added). In other words, "as soon as the first false statement is made, fraud-induced inflation becomes equal to actual inflation." *Id*. If a plaintiff can prove "that the defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful," then "[t]hat is enough." *Id*. at 419.

This Court embraced the same analysis in *Vivendi*, aligning itself with the Seventh and Eleventh Circuits in declaring that "[d]efendants who commit fraud to prop up an already inflated stock price do not get an automatic free pass under the securities laws." 838 F.3d at 259 (citing *Glickenhaus*, 787 F.3d at 418; *FindWhat Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1317 (11th Cir. 2011)). Under the contrary rule, this

Court observed, firms "would have every incentive to maintain inflation that already exists in their stock prices by making false or misleading statements." *Vivendi*, 838 F.3d at 258. Accordingly, the Court explained that a company's liability does not "rest on whether the market originally arrived at a misconception . . . *on its own, or whether the company led the market to that misconception in the first place*." *Id*. at 259 (emphasis added).

The Eleventh Circuit has rejected Goldman's argument as well. In *FindWhat*, the court "h[e]ld that the securities laws prohibit corporate representatives from knowingly peddling material misrepresentations to the public—regardless of whether the statements introduce a new falsehood to the market or merely confirm misinformation already in the marketplace." 658 F.3d at 1290.

Indeed, Goldman's theory would have precluded applying the *Basic* presumption in *Basic* itself, for the misrepresentations in that case (denial of any merger discussions) simply maintained the artificial undervaluation in a stock that arose because of undisclosed merger negotiations, not any fraud. *See Basic Inc. v. Levinson*, 485 U.S. 224, 227-28 (1988).

B. Defendants' Repackaged Materiality Objections Are No Ground For Declining To Recognize Plaintiffs' Price-Maintenance Theory.

Goldman next suggests that Plaintiffs cannot show any pre-statement inflation at all (fraud-induced or not) because "the stock price declines on Plaintiffs' three 'corrective disclosure' dates . . . did not 'correct' the challenged general statements." Br. 33. This is so, Goldman says, because its statements about conflicts were not materially false. *See id*. 33-34 (statements were true); *id*. 34 (statements were too general to arise "to the level of materiality") (citation omitted). Goldman then raises materiality again a few pages later. It asserts that the price-maintenance theory is limited to cases involving "specific, *material* financial or operational information" or "a specific, *material* financial metric, product or event." *Id*. 35. It then claims that Plaintiffs' case fails that standard because the statements here are "too general to cause a reasonable investor to rely upon them." *Id*. 43 (quoting *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014)). Goldman's repeated attempts to turn a materiality objection into a price-impact defense are barred by Supreme Court precedent and law-of-the-case.

The Supreme Court has been emphatic that a defendant cannot oppose class certification by contesting the materiality or falsity of its alleged misrepresentations. *See Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469-70 (2013) (Plaintiffs are "not required to prove the materiality of [a defendant's] alleged misrepresentations and omissions at the class-certification stage."); *id*. at 475 ("[T]his Court has held that . . . the falsity or misleading nature of the defendant's alleged statements or omissions are common questions that need not be adjudicated before a class is certified."). That is because a defendant's assertion that a statement is not material or is not fraudulent, if accepted, will defeat the claims of *all* class members – a point in favor of class adjudication, not against it. *Id*. at 467-68. Accordingly, Goldman's materiality arguments are not precluded because they "overlap with the merits." Br. 47 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013)). They are precluded because they overlap with a specific *kind* of merits issue – *i.e.*, one that is outcome-determinative for the entire class.[2]

[2] Goldman suggests that *Amgen* simply held that the plaintiff need not *prove* materiality at class certification, but left open whether a defendant could defeat certification by showing that materiality was not adequately *pleaded*. Br. 48-49. Nothing in the opinion suggests that

Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258 (2014) (*Halliburton II*), did not effectively overrule *Amgen* when it allowed defendants a limited opportunity to defeat class certification by showing a lack of price impact. To the contrary, that decision reaffirmed *Amgen*'s holding that a defendant cannot oppose certification on the ground that its statements were immaterial. *See id.* at 282. The Court then reached a contrary conclusion about price impact because "[p]rice impact is different." *Id*. at 283. Materiality provides *in*direct evidence of price impact. *See id*. at 278 (materiality is "at best an imperfect proxy for price impact"). The price-impact defense *Halliburton II* allows, in contrast, requires defendants to produce "*direct*, more salient evidence" to show that the predicted price impact did not, in fact, occur. *Id*. at 282 (emphasis added); *see also Nathenson v. Zonagen Inc*., 267 F.3d 400, 418 (5th Cir. 2001) ("Materiality thus looks to likely potential" as opposed to "what *actually* happened"). Having allowed defendants to disprove price

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possibility and, in any event, whether the complaint adequately pleads materiality is also a question common to the class. Moreover, the argument is barred by law-of-the-case because Goldman raised, and this Court necessarily rejected, the same assertion in the last appeal. *See Goldman I* Op. Br. 39-40, *available at* 2016 WL 11583403; *infra* at 27-28.

impact because that showing "is different" from disputing materiality (because it provides "direct" evidence on price-impact), the Court necessarily precluded defendants from attempting to disprove price impact *indirectly* by showing the statements were immaterial.

Goldman tries to get around this settled precedent by casting its materiality challenge as going toward the availability of the price-maintenance theory, rather than directly contesting *Basic*'s materiality prerequisite. *See, e.g.*, Br. 40, 46. But there is no principled basis for allowing materiality objections to defeat class certification in price-maintenance cases, but not price-inflation cases. Indeed, this Court has rejected the claim that the two kinds of cases fall into "separate legal categories." *See Vivendi*, 838 F.3d at 259 (quoting *Glickenhaus*, 787 F.3d at 418).

Goldman's attempted evasion of *Amgen* would also sidestep limits on this Court's jurisdiction. The district court's denial of Goldman's motion to dismiss for lack of materiality is interlocutory and not subject to appeal unless certified by the district court under 28 U.S.C. § 1292(b). *See, e.g.*, *Papilsky v. Berndt*, 503 F.2d 554 (2d Cir. 1974). Because the district court denied certification, this Court lacks jurisdiction to review

the motion to dismiss decision either directly or in the course of deciding an appeal from class certification under Federal Rule of Civil Procedure 23(f). *See, e.g.*, *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 38 n.4 (2d Cir. 2009) (rejecting assertion that Rule 23(f) appeal permits examination of denial of motion to dismiss).

Goldman's materiality defense is further barred by law-of-the-case and circuit law established in *Goldman I*. Goldman raised substantially the same materiality arguments in the last appeal. *Compare* Br. 43-46, *with Goldman I* Op. Br. 35-37. Goldman says that this Court "did not address" those arguments, Br. 48, but that is incorrect. Citing *Amgen*, the Court held that "the District Court correctly held that plaintiffs need not prove the materiality of defendants' misstatements at the class certification stage, *and we do not consider it on appeal*." 879 F.3d at 481 n.6 (emphasis added). The Court's holding that Goldman's materiality objections are irrelevant to class certification is law-of-the-case. *See, e.g.*, *N. River Ins. Co. v. Phila. Reinsurance Corp.*, 63 F.3d 160, 165 (2d Cir. 1995) ("A court should be 'loathe' to revisit an earlier decision 'in the absence of extraordinary circumstances. . . .'") (quoting *Christianson v.*

Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988)).[3] Moreover, the published decision in *Goldman I* established as law of this circuit that materiality cannot be raised to disprove price impact. That precedent cannot be revisited absent rehearing en banc or an intervening decision of the Supreme Court. *See, e.g.*, *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010).[4]

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[3] The Court's prior holding unambiguously precludes the argument in Section I.B.2 of Goldman's present brief. It also fairly encompasses Goldman's attempts to recast its materiality objection as going to the applicability of the price-maintenance theory. *See, e.g.*, Br. 33-34, 40. Goldman made the same argument in the last appeal. *See Goldman I* Op. Br. 45 (price-maintenance theory cannot be based on "general statements, like those challenged here, that are 'too open-ended and subjective' for 'an investor to reasonably rely on [them] as a guarantee of some concrete fact or outcome'") (citation omitted). This Court did not address that assertion other than by declining to hear any materiality argument. It is implausible that the Court intended for the issue to remain open on remand and available for a future appeal – the purely legal claim, if accepted, would have ended the case, obviating the need for the Court to address the various issues the Court nonetheless proceeded to decide and making a remand unnecessary. *But see* 879 F.3d at 484-85 (addressing burden of proof); *id.* at 485-86 (ordering remand and addressing truth-on-the-market question relevant to remand).

[4] In the prior appeal, Plaintiffs explained why Goldman's materiality arguments fail on the merits. *See Goldman I* Resp. Br. 39-47, *available at* 2016 WL 4426834. Because the Court clearly held that those arguments are not cognizable at this stage of the case, Plaintiffs do not repeat that showing here or otherwise address the merits of Goldman's improper materiality arguments.

Goldman rails against these adverse precedents on policy grounds, Br. 49-53, but to no avail. It says that allowing price-maintenance claims in a case like this will "render class certification automatic," and *Halliburton II* "meaningless," because it will be impossible to rebut price impact. *Id.* 49, 51. That's an odd claim for a brief that elsewhere asserts that "Defendants presented overwhelming evidence . . . rebutting the presumption of classwide reliance . . . as authorized by the Supreme Court in *Halliburton [II].*" *Id.* 3.

In fact, disproving price impact is no more difficult in a price-maintenance case than a price-inflation case. In an inflation case, the defendant's expert uses event studies and other methods to show that the price change observed at the time of the false statement was the result of things other than the statement. *See, e.g.*, *Halliburton II*, 573 U.S. at 280. In a price-maintenance case, the defendant's expert can conduct the same kind of study at the time of the corrective disclosure, as Goldman tried to do in this case. *See, e.g.*, *Waggoner v. Barclays PLC*, 875 F.3d 79, 104 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 1702 (2018); *Vivendi*, 838 F.3d at 254-255; *infra* §II.C.1. Goldman offers no reason why this analysis

should fail to dispose of meritless cases premised upon immaterial misstatements.

C. Goldman's Other Price-Maintenance Objections Are Meritless.

Goldman raises other objections to Plaintiffs' price-maintenance theory, but they are meritless as well.

1. Goldman argues that courts have limited price-maintenance theory to cases involving only two categories of statements: (1) "unduly optimistic statements about specific, material financial or operational information made to stop a price from declining," and (2) statements that "falsely conveyed that the company had met market expectations about a specific, material financial metric, product, or event." Br. 35 (citations and some internal punctuation omitted). It then argues that Plaintiffs' case falls outside these categories, mostly because the statements at issue are not material. *Id*. 40-49.

To the extent Goldman's point is that price-maintenance cases, like all securities-fraud cases, require a *material* misrepresentation or omission, that's obviously true, but irrelevant for the reasons already discussed.

If Goldman is claiming that courts have limited price-maintenance theory to some *subset* of cases alleging material misrepresentations or omissions, the claim is simply wrong. The cases Goldman cites say nothing to indicate that the specific factual circumstances Goldman describes were *necessary* to their result. To the contrary, the circuits generally reject creating any special distinction between price-inflation and price-maintenance cases.[5] All the law requires is that the defendant's statement maintained artificial inflation in a stock price.[6]

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[5] *Vivendi*, 838 F.3d at 259 ("[W]e join in the Seventh and Eleventh Circuits' conclusion that theories of 'inflation maintenance' and 'inflation introduction' are not separate legal categories.") (citations omitted); *Glickenhaus*, 787 F.3d at 418 ("More fundamentally, theories of 'inflation maintenance' and 'inflation introduction' are not separate legal categories."); *FindWhat*, 658 F.3d at 1316 ("There is no reason to draw any legal distinction between fraudulent statements that wrongfully prolong the presence of inflation in a stock price and fraudulent statements that initially introduce that inflation."); *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010) (price inflation and price maintenance are "just a mirror image of the situation for the same figures in black ink, rather than red").

[6] *See Vivendi*, 838 F.3d at 259 ("Defendants who commit fraud to prop up an already inflated stock price do not get an automatic free pass under the securities laws.") (citation omitted); *Glickenhaus*, 787 F.3d at 419 ("In short, what the plaintiffs had to prove is that the defendants' false statements caused the stock price to remain higher than it would have been had the statements been truthful."); *FindWhat*, 658 F.3d at 1317 ("Defendants whose fraud *prevents* preexisting inflation in a stock

Nor does Goldman even attempt to explain why some materially false statements and omissions should be actionable if they cause stock prices to rise, but not if they simply prevent the price from falling.

In any event, in *Barclays* this Court applied price-maintenance theory in a case much like this one. There, the plaintiffs alleged that Barclays "made numerous statements asserting that" its private system for trading securities "was safe from" high-frequency trading "and that Barclays was taking steps to protect traders" in that market. 875 F.3d at 87. Barclays had stated, for example, that it had a "sophisticated surveillance framework that protects clients from predatory trading activity." *Id.*[7] If that counts as a statement about "specific . . .

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price from dissipating are just as liable as defendants whose fraud introduces inflation into the stock price in the first instance."); *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 352 (3d Cir. 2009) (affirming price-maintenance theory where "the market was *expecting*" the results the defendant falsely announced, given "the market's negative reaction" when the truth was revealed).

[7] *See also* 875 F.3d at 87 (challenged statements also included claims that Barclays' system "was built on transparency," and "underscores Barclays' belief that transparency is not only important, but that it benefits [] our clients") (citation omitted).

operational information" then so must Goldman's statements regarding its system for avoiding conflicted (rather than high-frequency) trading.

2. Goldman complains that the district court "never addressed whether there was any inflation 'already extant' in Goldman Sachs' stock price when the statements were made." Br. 32. That is untrue. The district court expressly found that the "inflation was demonstrated on three dates, when the falsity of the misstatements was revealed," resulting in "price declines" that Plaintiffs' expert demonstrated "were caused by the news of Goldman's conflicts." SPA4.

Goldman acknowledges that this is an entirely appropriate way of detecting inflation, explaining that *Vivendi* held that "if the stock price declines when a subsequent disclosure corrects an earlier misstatement, this 'dissipat[ion]' can support an inference that the earlier misstatement fraudulently maintained inflation in the stock price." Br. 29 (quoting *Vivendi*, 838 F.3d at 255).

Contrary to Goldman's objection, the inflation detected by the event study of Plaintiffs' expert Dr. John Finnerty was necessarily in the stock price before the relevant price-maintaining statements were made. Goldman's stock became overvalued when the firm engaged in conflicted

trades that were incompatible with its reputation for integrity and managing conflicts, a reputation that Goldman acknowledged was essential to its valuation. As discussed, prior to the Class Period, Goldman's stock commanded a premium because it was viewed as having systems in place to navigate the potential conflicts of interests its business model created. *See supra* at 4; *see also infra* at 41-42. When Goldman abandoned the practices that had earned it that reputation, the justification for that premium evaporated. And even setting aside Goldman's special premium, its value was reduced by its conduct in the same way any other firm's would be – when the truth became known, fewer customers would be willing to do business with it, given its proven lack of trustworthiness. At the start of the Class Period, however, that truth was unknown to the market, so its price remained unaffected – which is to say, inflated.

That inflation became fraud-maintained when Goldman falsely reaffirmed that it was committed to using its allegedly extensive systems for identifying and dealing with conflicts, rather than revealing the truth that would have caused the inflation to dissipate.

Goldman notes that it had made similar statements in the past. Br. 57. But that makes no difference – companies frequently say their earnings are on target to meet expectations, but that does not defeat a price-maintenance claim when the tenth such statement prevents the market from learning that, this time, the firm is not meeting expectations. *See Schleicher*, 618 F.3d at 683-84. Repeating that false statement then continues to maintain the inflated price, when telling the truth would have caused it to fall. *Id.* Indeed, the fact that Goldman had made similar statements in the past only made things worse – those statements conditioned the market to accept as true the nearly identical statements even though Goldman's recent fraudulent conduct had made them false.

3. Goldman faults Plaintiffs' expert for failing to say what would have happened if Goldman had simply stayed silent. Br. 32-33, 41. But this Court rejected the same objection in *Vivendi*, holding that "once a company chooses to speak, the proper question for purposes of our inquiry into price impact is not what might have happened had a company remained silent, but what would have happened if it had spoken *truthfully*." 838 F.3d at 258; *see also Glickenhaus*, 787 F.3d at 417 (same).

II. The District Court Properly Found That Goldman Failed To Rebut The Inference Of Price Impact.

That leaves Goldman's evidence. The district court found, "[u]pon due consideration of arguments and evidence before the Court," that "Defendants have not rebutted the *Basic* presumption by a preponderance of the evidence." SPA2. Goldman does not claim that this intensely factual determination was clearly erroneous. *See* Br. 53. Instead, it argues that the "District Court misapplied the preponderance [of the evidence] standard and misconstrued Defendants' evidence." *Id.* Those allegations of analytical error are unfounded. Moreover, to the extent Goldman invites the Court to review a sufficiency-of-the-evidence claim it never actually makes, the Court should reject it.

A. The District Court Applied The Correct Legal Standard.

The district court conducted exactly the analysis this Court's prior decision ordered.

The court's opinion repeatedly and unambiguously acknowledged the correct legal standard, explaining that "the *Basic* presumption can be rebutted by Defendants' demonstration, by a preponderance of the evidence, that the alleged misstatements did not contribute to any of the

price declines that followed the three corrective disclosures, that is, the statements had no price impact." SPA6; *see also* SPA2, SPA3-4; SPA11. It also reviewed, and addressed the objections to, each party's evidence, including Goldman's news articles and expert reports. *See* SPA4-5 (Plaintiffs' evidence); SPA6-11 (Goldman's evidence).

Goldman nonetheless asserts that the district court erred in relying on Plaintiffs' "allegations and speculation" and failing to "weigh competing evidence." Br. 54. But that charge is plainly false.

The district court did not rely on Plaintiffs' and their "expert's say-so." Br. 60. After describing Plaintiffs' "allegation[s]," *id.* 55 (quoting SPA4), the court expressly found that the relevant "inflation was *demonstrated* on three dates" on which corrective disclosures were made. SPA4 (emphasis added). Rather than simply "accept[ing] at face value" Plaintiffs' allegations, *id.*, the court cited specific paragraphs of Plaintiffs' expert's declaration, which explained why "the price declines following th[e] corrective disclosures were caused by the news of Goldman's conflicts." SPA4. Having reviewed that event study and considered the live testimony of both sides' experts, the court reasonably concluded that "Dr. Finnerty's model, at the very least, establishes a link between the

news of Goldman's conflicts and the subsequent stock price declines." SPA7.

The court then weighed this evidence against Goldman's. The court first described in detail Goldman's "Rebuttal Evidence." SPA5-6. It then explained why that evidence was "not sufficient to sever the link between the first corrective disclosure and the subsequent price drop." SPA7; *see* SPA7-11. Specifically, the court found that Goldman's news reports had not fully and credibly disclosed the falsity of Goldman's prior representations regarding its conflict policies and practices, particularly given the lack of hard evidence in the articles and Goldman's contemporaneous denials of the allegations. SPA8. The court then explained why Goldman's claim that "the stock price declines . . . were due entirely to the news of enforcement actions" was "not supported by [the] event study" conducted by Goldman's expert, Dr. Choi. SPA9; *see* SPA9-11 (discussing four major flaws in Dr. Choi's analysis).

The court concluded by expressly weighing the competing evidence: "In view of Dr. Finnerty's opinion demonstrating the price impact of alleged misstatements, and the deficiencies inherent in the opinions of Drs. Gompers and Choi, the court concludes that Defendants have failed

to rebut the *Basic* presumption by a preponderance of the evidence." SPA11.

B. The District Court Did Not Clearly Err In Finding Goldman's Evidence Failed To Establish A Lack Of Price Impact.

Although Goldman bore the burden of proving a lack of price impact, it devotes only a few pages to its own evidence, tucked away at the end of its brief. *See* Br. 62-67. This is understandable, for the district court had ample ground to conclude that this evidence was uninformative, unreliable, and insufficient.

It bears pausing on the facial implausibility of Goldman's price-impact claim. In a price-maintenance case, "the proper question for purposes of our inquiry into price impact is not what might have happened had a company remained silent, but what would have happened if it had spoken *truthfully*." *Vivendi*, 838 F.3d at 258. Goldman thus was required to prove that the market would have been indifferent had Goldman told the truth when it chose to discuss its conflict practices and policies – *i.e.*, that despite its awareness of the injuries the firm would suffer if it failed to avoid inappropriate conflicts of interest, the company had repeatedly undertaken to profit at its clients' expenses in

transactions rife with concealed, improper conflicts. Showing that the market would have shrugged off such a disclosure is a tall order, made even more difficult because Goldman cannot simply show that Plaintiffs have overestimated the *extent* of the price impact; it must show that the alleged misrepresentations had *no* price impact *at all*. *See Barclays*, 875 F.3d at 105.

If the market did not care about Goldman's self-enriching conflicts, it would be truly shocking. Goldman itself had publicly acknowledged that "failure to appropriately identify and deal with conflicts of interests could adversely affect our business." JA5716. At the same time, it is uncontested that the market reacted dramatically when the SEC filed its securities-fraud action against Goldman, alleging improper conflicts of interest. *See Goldman I*, 879 F.3d at 479. And Goldman does not contend that this reaction was caused by anything other than the disclosure of the government charges and investigations.

Instead, Goldman tries to explain away this market response by asserting that investors were reacting exclusively to the existence of "government enforcement activity" and the attendant "resolution costs, increased regulatory scrutiny, and new regulatory restrictions." Br. 16

(citations and internal quotation marks omitted). The market, Goldman thus claims, cared not a whit about the underlying misconduct or its other collateral consequences, such as damage to the firm's reputation for integrity. That is, again, wildly implausible.[8] At the start of the Class Period, analysts repeatedly discussed the importance of Goldman's effective management of its conflicts of interest to its reputation and the overall value of the firm. For example, a March 13, 2007 Merrill Lynch report noted: "[T]he consistency with which the firm has avoided crossing the line and damaging its reputation is such that it must be doing something right. *The conflict management process is clearly taken extremely seriously at the firm. . . . Goldman manages conflicts*, rather than simply avoiding them, in order to maximize the value of its franchise." JA3220 (emphasis added). One of Goldman's own experts, Mr. Porten, agreed that Goldman's failure to adequately manage its conflicts would have reputational consequences that would impact its

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[8] This Court encountered a similar claim in *Barclays*, but rejected it because the defendants' evidence showed, at most, that "investor concern regarding regulatory action and potential fines" was "merely a contributing factor to the decline," which is not enough. 875 F.3d at 104-05.

share price. JA2673-74, JA2677. That assessment was confirmed when the truth of Goldman's conflicts came to light. As one *Wall Street Journal* columnist wrote:

> [T]he premium [in Goldman's stock price] has dissolved because the market is worried, *not about lawsuits* or politics, but about Goldman's core business. The Abacus affair has highlighted the conflicts intrinsic to the investment banking business. But historically Goldman has managed those conflicts well. . . . This [CDOs] territory is especially dangerous for Goldman because of the perception that it is an elite adviser and an elite trader that can do both simultaneously while managing the conflicts to the satisfaction of its clients. That's why its stock carries a premium to its peers in bull markets. *Conversely, evidence of poorly managed conflicts is especially dangerous to Goldman. Some damage has already been done.*

JA7251-52 (emphasis added).

It is no surprise, then, that Goldman's evidence did not substantiate its implausible price-impact claims.

1. *The District Court Properly Rejected Defendants' Expert Evidence As Unreliable And Unpersuasive.*

The most straightforward way to show lack of price impact in a price-maintenance case is to conduct an event study of the market's reaction when the truth comes out. *See Vivendi*, 838 F.3d at 254-55; *Glickenhaus*, 787 F.3d at 415-16. Goldman attempted such an analysis, but the district court rightly judged it a failure.

a. To conduct his study, Goldman's expert, Dr. Choi, started with a data set of 117 SEC "enforcement events." He then selected a subgroup of purportedly similar cases based on three "severity factors" that whittled the comparators down from 117 cases to just *four*. SPA5-6. The results in those cases varied enormously: the stock price fell in one case by 3.34%, by 3.73% in another, more than doubling to an 8.13% decrease in the third, before more than doubling again to a 17.09% decrease in the final example. SPA6 n.5. Undeterred, Dr. Choi averaged the four declines, and came up with a benchmark decrease of 8.07%, which, he claimed, was not statistically significantly different from the decline in Goldman's stock price after the first corrective disclosure. SPA6. From this, he concluded that all of the market reaction was attributable solely to concerns about the law enforcement actions themselves. *Id.*

The district court found this analysis "unreliable for four reasons." SPA9. First, Dr. Choi's selection criteria were "arbitrary" and "not generally accepted in the field." SPA9-10. Especially troubling was Dr. Choi's disregard for whether his alleged comparator incidents involved "mismanagement of conflicts of interests" or companies "similar to Goldman in terms of business operations and size." SPA10.

Second, "Dr. Choi's event study does not account for allegations of misconduct underlying the four selected enforcement events." SPA10. The court noted that Dr. Choi himself had previously written that the nature of the SEC's allegation would have an important effect on the market response. SPA10 (citing Stephen J. Choi et al., *Scandal Enforcement at the SEC: The Arc of the Option Backdating Investigations*, 15 Am. L. & Econ. Rev. 542-77 (2013) ("the market response to an announcement of an option backdating issue is less than a market response to an accounting issue")).

Third, "it is well understood that an average is an unreliable metric when the average is computed based on a small number of samples and especially where the variance among the underlying sample is large, as here." SPA10. In fact, the court noted, Dr. Choi's "average of -8.07% could only be achieved by including an outlier enforcement event that had a price drop of -17.09%." SPA6 n.5.

Fourth, Dr. Choi concluded that there was no statistical difference between Goldman's price drop and the sample average using a two-sample t-test, even though a "*t*-test is not appropriate for small samples drawn from a population that is not normal" and Dr. Choi failed to show

that "the samples were drawn from a population that follows a normal distribution." SPA10-11 (citation omitted).

Finally, even setting all that aside, the court found that as "a threshold matter, Dr. Choi's conclusion is not supported by his event study" because his study did not conduct *any* analysis of the second and third price declines and Dr. Choi had given "no good reason to extend [his] findings on the first price decline to those second and third price declines." SPA9.[9]

b. Goldman responds to almost none of this. Instead, over the course of six sentences, it asserts only that the district court "misconstrued" Dr. Choi's analysis in three ways. Br. 66-67.

First, Goldman complains that the district court described Dr. Choi as claiming only that Goldman's price decline was "consistent" with the declines in his sample, when he actually made the stronger claim that Goldman's experience was "not statistically significantly different."

[9] Accordingly, Goldman did not even discharge its burden of production, let alone the ultimate burden of persuasion, as to showing lack of price impact as to those two drops.

Br. 66-67 (citations omitted). Initially, this is not true. *See* SPA6 (recognizing that Dr. Choi claimed that the "average price decline of -8.07% is not *statistically different* from the price decline of -9.27% that Goldman experienced") (emphasis added). Moreover, the court did not reject the analysis for lack of statistical significance; instead, it found Dr. Choi's methodology was so flawed that it could not reliably identify *any* kind of relationship, statistically significant or not. SPA9-10. Moreover, Goldman offers no response to the court's finding that Dr. Choi's claim of statistical significance was, in itself, "unreliable" because of his unjustified use of a two-sample *t*-test for statistical significance. SPA10.

Second, Goldman says that Dr. Choi *did* "account" for differences in the allegations of misconduct and the size of the companies involved, insofar as he testified that "those factors had 'no correspondence' under his analysis." Br. 67 (citing JA3465, JA8132-33). That is just word play. Dr. Choi did not dispute that he based his conclusions on the average price decline for four events chosen without regard to company size or the nature of the misconduct alleged. He simply testified as to why he thought controlling for those factors was unnecessary. *See* JA8132-33.

The district court did not credit Dr. Choi's explanation, SPA10, a judgment call Goldman does not challenge here.

Third, Goldman says Dr. Choi did not use a four-event "sample," as the district court described, but instead based his analysis "on the *entire population* of SEC enforcement actions and subsets of that population meeting specified criteria." Br. 67 (internal punctuation and citation omitted). That is again just semantics. The court fully understood that Dr. Choi started with a larger population, narrowed it down to four events based on his "severity factors," and then took an average of the price drops for those four events. SPA5-6. The court's criticism was that this group of four events – some might say, this "sample" – was selected through criteria that were "arbitrary" and "not generally accepted in the field." SPA9-10. Goldman does not contest that conclusion.

Finally, none of this matters because Goldman does not dispute the district court's finding that Dr. Choi made no attempt to analyze the second and third disclosures. SPA9. Given that "threshold" failure, *id.*, there would be no ground to reverse class certification even if this Court rejected all of the district court's other objections regarding Dr. Choi's analysis. Goldman was required to show lack of any price-impact at all,

which it cannot do if it failed to analyze the market's reaction to the second and third corrective disclosures. *Id.*

2. *The District Court Did Not Clearly Err In Rejecting Goldman's Reliance On Prior News Reports.*

Unable to show lack of price impact through its event study, Goldman proposes a novel alternative. It claims that it showed the market was indifferent to whether Goldman told the truth about its conflicts by collecting news reports allegedly disclosing that Goldman's statements were false without provoking any market reaction. Br. 62. The district court, which indicated at the evidentiary hearing that it had personally read all 39 articles,[10] did not clearly err in rejecting that argument as unsupported by the evidence. SPA7-9.

For Goldman's theory to succeed, it must point to reports that disclose the falsity of its challenged statements with sufficient detail, support, and credibility, and yet did *not* prompt a market response. *Cf. Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 167 (2d Cir. 2000) ("truth on the market" defense requires showing that information was "conveyed to the public with a degree of intensity and credibility sufficient to counter-

[10] *See* JA8234.

balance effectively any misleading information created by the alleged misstatements") (internal quotation marks omitted). Simply pointing to evidence that raises suspicions of wrongdoing is not enough. After all, the market may fail to react to such reports not out of indifference to whether Goldman was engaging in improper conflicts, but out of doubts about the reports' accuracy.

The vast majority of Goldman's reports disclose, at best, evidence of trading that would be unobjectionable with adequate disclosures, and no evidence that the required disclosures were withheld or that investors were otherwise deceived. To the extent a handful even suggested wrongdoing, Goldman vociferously denied the suggestions and the articles included no hard, credible evidence to rebut those denials. The market's first real exposure to the truth came with the corrective disclosures, which conveyed the critical details for the first time with a credibility lacking in any prior report.

Goldman deems only five of its 39 articles worthy of discussion its brief. *See* Br. 15, 63-65. Presumably, Goldman thinks those are its best evidence, so Plaintiffs address each in what follows.[11]

a. Generic Reports Of Possible Conflicts To Be Managed: Wall Street Journal *(Dec. 14, 2007) and* Financial Times *(Dec. 6, 2007)*

The district court explained that most of the articles contained "generic reports on conflicts" that might "suggest possible or theoretical conflicts" but contained no proof of improper conflicts that Goldman had failed to manage appropriately. SPA8 & n.6. That describes, for example, a *Wall Street Journal* article Goldman cites from 2007. Br. 15. That article reports that Goldman was shorting the subprime market while selling other customers long positions on the same bets. JA5310. But the article also noted that there was nothing necessarily illegal or

[11] Goldman suggests that if the Court finds its five cited articles unpersuasive, it should rummage through Goldman's trial-court exhibits looking for something better. *See* Br. 14. The Court should reject that suggestion as unfair to it and to Plaintiffs. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1999) (per curiam) ("Judges are not like pigs, hunting for truffles buried in briefs."). If, however, the Court elects to go beyond the briefing, it can find Plaintiffs' extended refutations at JA3146-96.

improper about that. *See* JA5313. So long as Goldman disclosed its adverse interests and avoided otherwise misleading its clients about the CDOs, Goldman could engage in such trades without running afoul of conflict rules or contradicting its public statements about its conflict principles and systems.[12] And nothing in the article showed that Goldman failed to disclose its adverse interests or otherwise deceived anyone.

The same is true of the 2007 piece in the *Financial Times*. *See* Br. 64 (citing JA5305). The article reports that Goldman took large short positions in the slumping housing market, but does not identify any of those transactions as entailing improper conflicts. While the article noted some *other* columnists' allegations that Goldman had engaged in *other* forms of misconduct (insider trading and market manipulation), the author made clear that there is "no evidence that Goldman did wrong" and "I do not believe that Goldman broke insider trading laws." JA5305. In a section of the article discussing Goldman's "edge," he says the "real question is whether Goldman *bends* Wall Street's rules in its favor." *Id.*

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[12] *See, e.g.*, *Holtz v. JPMorgan Chase Bank, N.A.*, 846 F.3d 928, 932 (7th Cir. 2017) , *cert. denied*, 138 S. Ct. 170 (2017).

(emphasis added). And while noting that others have made unspecified "accusations of conflicts of interests," he reports that Goldman insists that it manages those conflicts. *Id*. The author does not question that claim. Instead, his assessment is simply that Goldman's business model "regularly puts Goldman in delicate spots" and causes some clients to "grumble." *Id*. This client-relations problem, he predicts, will *someday* "blow up in its face." *Id*. With respect to its *past* conduct, however, the author says that "Goldman's skill, luck and edge have combined this year to produce its great escape." *Id*. That conclusion hardly suggests the author has just disclosed illegal behavior that will be punished by both the market and the Government.[13]

[13] This Court cited the *Financial Times* article in its last opinion. *See Goldman I*, 879 F.3d at 481. It also cited a 2007 opinion piece in *Dow Jones Business News* that Goldman does not rely on in this appeal. *See id*. Like the other articles discussed here, the *Dow Jones* piece contained no credible evidence of improper conflicts, only speculation based on nothing more than the fact that Goldman had made money shorting mortgage-backed CDOs. JA5308. The author simply urged Congress to investigate *whether* there was an improper conflict of interest. *Id*. More generally, the article is a rambling polemic the market would not have viewed as a credible source for factual insight into Goldman's trading. *See, e.g.*, JA5306 (referring to President Bush and other officials, asking "[w]hat are [they] still smoking?").

So why does Goldman include such articles? At times, it appears Goldman may be suggesting that because it made statements about "conflicts" generally – as opposed to *undisclosed*, *improper*, or otherwise *illegal* conflicts – all it has to show to prove a lack of price impact is that the market did not react to news of "conflicts" understood in the very colloquial sense of having adverse interests to its clients, even if those adverse interests were fully disclosed. *See* Br. 62. That is nonsense. First, Goldman does not actually claim that its challenged statements conveyed that it had systems in place to prevent it from shorting the CDOs it created; it was telling the market that it would "address" and "deal with" the potential conflicts created by that strategy (*e.g.*, by fully disclosing its adverse interests and being honest about the other details of the transaction with its clients). JA5716; *see also, e.g.*, JA5383 (Goldman official denying trades were improper because buyers "were advised that Goldman was placing large bets against the securities"). All Goldman's generic articles show is that there were possible conflicts to deal with, not that Goldman was refusing to deal with them appropriately.

Second, even if Goldman's statements were understood as undertaking to avoid the kind of manageable "conflicts" described in these articles, Goldman also plainly represented that it had systems to manage the kinds of conflicts that "could give rise to litigation or enforcement actions." JA5716 (Goldman Form 10-K). To show that its statements had no price impact, Goldman must demonstrate that the market would not have reacted if Goldman had told the truth about both kinds of conflicts. *See Vivendi*, 838 F.3d at 255.[14]

b. *Articles Merely Suggesting Wrongdoing While Lacking Credible Hard Evidence:* Wall Street Journal *(Oct. 31, 2009) and* New York Times *(Dec. 5, 2009)*

To the extent a handful of articles may have *suggested* Goldman might have engaged in undisclosed or otherwise improper conflicts, those few articles lacked the "hard evidence," details, and credibility necessary for the market's lack of reaction to demonstrate that investors were

[14] An example illustrates the point: suppose a car maker stated that "our new model received five-star ratings in all categories," when in truth, it got a four-star rating for side collisions and a one-star rating for head-on collisions. The firm could not prove lack of price impact simply by showing that the market did not react when the truth about the side-collision test came out, particularly if the market later reacted dramatically when the truth about the one-star rating was disclosed.

indifferent to whether Goldman was engaged in improper conflicts with its clients. SPA8.

Goldman claims, for example, that "[o]n December 6, 2009, *The New York Times* reported that" Goldman created CDOs for Paulson to short but "nobody told the suckers—er, investors—who bought those C.D.O.'s that they were designed to help a man who wanted the most toxic mortgages imaginable so he could profit when they went sour." Br. 15 (quoting JA5381). One could be forgiven for assuming, from Goldman's description, that this is a piece of investigative journalism. But it is a book review. JA5381 (reviewing Gregory Zuckerman, *The Greatest Trade Ever* (2009)). And the reviewer's passing comment cites no source for the claim, while its flamboyant language suggests this is the reviewer's take, not the book's. Indeed, the reviewer acknowledges that the book "depicts Mr. Paulson as a hero," *id.*, not as Goldman's co-conspirator in a massive fraud. Readers would understandably be reluctant to draw conclusions from this passing sentence in that context.

Goldman's reliance on excerpts from the underlying book fare no better. Citing an October 31, 2009 *Wall Street Journal* article adapted from the book, Goldman purports to quote the author as stating that

"[Goldman Sachs would] be selling the deals[] to investors, without telling them that a bearish hedge fund was the impetus for the transaction." Br. 63 (quoting JA5360; alterations in original). The brackets around "Goldman Sachs" are Goldman's, however, and they are very misleading: the actual sentence reported how a *Bear Stearns* trader perceived a proposal for how *Bear Stearns* would have offered a CDO at Paulson's request. *See* JA5360.

To the extent that sentence suggested that one particular Bear Stearns trader understood Paulson to propose keeping purchasers in the dark, there was other information in the article indicating that Goldman and others did not agree to any such proposal. For example, the author casually observes that "Paulson & Co. wasn't doing anything new," JA5360, hardly a suggestion that the hedge fund was looking for someone willing to deceive CDO buyers. And the article specifically notes that "other bankers," including Deutsche Bank as well as Goldman, "didn't see anything wrong with Mr. Paulson's request and agreed to work with his team." *Id.* The article also quotes Josh Birnbaum, a top Goldman trader, explaining why there would be no need to hide the fact that Paulson intended to short the CDO. Specifically, the article reported that

"[n]ot only were Mr. Birnbaum's clients eager to buy some of the mortgages that Paulson & Co. was betting against, but Mr. Birnbaum was, too" because "Mr. Birnbaum and his clients expected the mortgages . . . to hold their value." *Id.* And like the other articles Goldman cites, the book excerpts fail to reveal that Paulson was allowed to pick particularly toxic securities and that Goldman's claim that the reference assets were picked by a third party was false.[15]

c. Goldman's Denials: New York Times *(Dec. 24, 2009)*

The final article cited in Goldman's brief is a December 24, 2009 *New York Times* account of early-stage investigations into Goldman's and several other firms' trading. Br. 64 (citing JA5382-83). Similar to the articles noted above, this report lacked firm, actionable information. The report emphasized that the "investigations are in the early phases" and that "authorities *appear* to be *looking at* whether securities laws" were broken. JA5382 (emphasis added). It provided no insight into what the

[15] As discussed next, this report also was published against the backdrop of Goldman's repeated, specific, and vociferous denials of wrongdoing.

investigation would find and did not reveal any of the central facts that made Goldman's trades unlawful. *Id*.

The article does, however, include a specific, unqualified denial from a Goldman spokesman, who insisted that "clients knew Goldman might be betting against mortgages linked to the securities, and that the buyers of synthetic mortgage C.D.O.'s were large, sophisticated investors." JA5383. Later on, the article reports that a "Goldman salesman said that C.D.O. buyers were not misled because they were advised that Goldman was placing large bets against the securities. 'We were very open with all the risks that we thought we sold.'" *Id.* Moreover, later that same day, Goldman issued a press release – which is specifically alleged as a misstatement in the complaint, *see* JA82-84, JA89 – further denying any improper conduct in its CDOs, insisting that its short positions were "fully disclosed" to CDO investors, JA83.

This is just one of many times Goldman publicly insisted that it kept its clients informed and engaged in no improper conflicts. SPA8. For example, when reports of Goldman's profits from its shorting the subprime market first emerged in 2007, Goldman unequivocally denied any wrongdoing: "The Goldman Sachs spokesman said that the company

routinely shorts the securities it underwrites and said that this is disclosed." JA5300 (*N.Y. Times*, Dec. 2, 2007). Others reported that "Goldman asserts that it did nothing wrong" and "emphatically says its short sales and similar trades were normal hedging operations." JA5318 (*N.Y. Times*, Dec. 23, 2007). One journalist reported that "[a]fter talking to Goldman, I was very impressed with how sure it is of its position." *Id*.

Later articles are likewise replete with denials. In November 2009, a Goldman spokesman told reporters that Goldman's trades were proper hedges, sold to "sophisticated investors" to whom "Goldman made all the required disclosures about risks." JA5365 (*McClatchy Wash. Bureau*, Nov. 1, 2009); *see also, e.g.*, *id.* (Goldman spokesman claimed "investors were fully informed"); JA5340 (*Rolling Stone*, July 9, 2009) ("Goldman . . . has denied wrongdoing"); JA5389 (*McClatchy Wash. Bureau*, Dec. 30, 2009) (Goldman spokesman "dismissed as 'untrue' any suggestion that the firm had mislead" investors); JA5434 (*N.Y. Times*, Mar. 10, 2010) (Goldman "said it saw no conflicts in its various roles").

Those denials were convincing. In July 2009, for example, Nobel Prize-winning economist Paul Krugman wrote in the *New York Times* that Goldman's practices were "perfectly legal." JA5349. One analyst

gushed, "You would be hard-pressed to find a company of any size that has done a better of job of managing risk than Goldman Sachs." JA5352 (*Investor's Business Daily*, Aug. 4, 2009).

d. Emergence of the Truth

Given the lack of evidence in the media reports, and Goldman's repeated denials, it is understandable that the market withheld judgment until reports emerged of government enforcement actions that divulged dramatic new information about Goldman's conduct. As the district court found, the SEC's 22-page complaint "included new material information that had not been described in any of the" prior reporting. SPA8. For example, the initial corrective disclosure was the "first to detail" the critical facts that made the Abacus transactions unlawful, providing "details, such as the manner in which Goldman engaged ACA to hide Paulson's role in asset selection." *Id.* It also "included direct quotes from damning emails" among Goldman employees as well as information "from Goldman's internal memoranda, disclosing hard evidence that Goldman had indeed engaged in conflicts to its own advantage." *Id.* As the district court noted, Goldman's expert on its 39 articles agreed that this evidence was new. SPA8-9 (quoting Dr.

Gompers' testimony that "I am unaware of any of those e-mails being public prior to the publication or the filing of the SEC complaint."); *see also* JA7278 (same expert admitting in deposition that complaint revealed for the first time that Goldman had misled ACA). And Goldman does not identify anything like that kind of hard, direct evidence in any prior report.[16]

At the same time, while Goldman's denials could overcome unsubstantiated suggestions of improper conflicts from private sources, they predictably crumbled under the weight of detailed allegations from government enforcement agencies. SPA8.

C. Goldman's Criticism Of Plaintiffs' Evidence Is Unfounded.

Even if this Court believed that Goldman's evidence provided *some* basis for thinking its misrepresentations had no price impact, that would

[16] Goldman objects that the second and third disclosures were less detailed, Br. 62-63, but they were sufficient to convey to the market that the serious conflicts alleged regarding the Abacus CDO were not a one-off failure, as some initially believed; that similar conflicts infected the massive Hudson CDO as well; and that the breadth and severity of the conflicts were sufficient to warrant a *criminal* investigation. In any case, even standing alone, the market reaction to the first disclosure is sufficient to show that Goldman's misrepresentations had *some* price impact, which is the only question at this stage.

not be sufficient grounds to reverse. Goldman was still faced with Plaintiffs' event study and other evidence which unambiguously demonstrated price impact through the market's reaction when the truth was revealed. Unless Goldman can show that the district court was *compelled* to reject that evidence, there is no basis to reverse the district court's decision finding Plaintiffs' evidence more convincing than Goldman's. And as discussed next, Goldman cannot show the district court's acceptance of Plaintiffs' evidence was clearly erroneous.

1. Plaintiffs Provided Substantial Evidence Of Price Impact.

Plaintiffs presented ample proof of price impact, including an event study and market analyst and news reports attributing the decline in Goldman's stock price to the revelation that the firm had, despite its repeated denials, been engaged in serious improper conflicts of interest. *See* SPA4 (citing Finnerty declaration).

To conduct his event study, Dr. Finnerty calculated the "abnormal return" on Goldman's common stock applying the "Modified Fama-French Three-Factor Model" and found that there was "less than a 1 in 100 chance that" the observed decrease in Goldman's stock price after the first disclosure "happened by mere chance." JA4651-52 (¶77); *see also*

JA4666 (¶124) (same for abnormal return following the second disclosure); JA4671 (¶141) (finding abnormal return following the third disclosure "statistically significant at the 5% level"). Goldman does not challenge that conclusion in this Court.

Dr. Finnerty then reviewed the "other Goldman-specific news unrelated to the alleged fraud" issued that day and found it "was not economically significant." JA4654-56 (¶¶87-90); *see also* JA4668-70 (¶¶132-37) (same for second disclosure); JA4671-73 (¶¶144-47) (same for third disclosure). Goldman does not contest those conclusions either. From these findings, Dr. Finnerty reasonably concluded that the price decline after each corrective disclosure represented the amount of artificial inflation maintained by the falsehoods the disclosure revealed. JA4673 (¶¶148, 150-51).

This is precisely the analysis this Court and others have approved for detecting price impact in a price-maintenance case. *See Vivendi*, 838 F.3d. at 255 ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward, on the assumption that the lie's positive effect on

the share price is equal to the additive inverse of the truth's negative effect.") (quoting *Glickenhaus*, 787 F.3d at 415).

Dr. Finnerty furthermore confirmed the event study's conclusions by examining contemporaneous analyst reactions to the disclosures, which revealed serious concern for the damage Goldman's improper conflicts would do to its reputation and future business. *See, e.g.*, JA4653-54; *supra* at 4, 40-41.

2. *Goldman's Objections To Plaintiffs' Evidence Are Unfounded.*

Goldman's criticisms of Plaintiffs' evidence are unfounded.[17]

First, Goldman expresses skepticism about the findings in Dr. Finnerty's "Inflation Ribbon." Br. 56-58. But the chart simply describes in graphical form the method of proof approved by this Court in *Vivendi*. *See supra* at 62-64. While Goldman may complain about the specific figures in Dr. Finnerty's model,[18] they are beside the point at this stage

[17] Plaintiffs have already addressed some of Goldman's complaints elsewhere in this brief.

[18] Goldman reports incredulously that Finnerty "asserted that in November 2008, *70%* of Goldman Sachs' *$20.6 billion* market capitalization was 'inflation' maintained" by its misrepresentations. Br. 58. This dramatic claim is based on a cherry-picked date when

of the litigation. The question is not whether Dr. Finnerty overstated the amount of inflation maintained by fraud, but whether the district court clearly erred in finding that Goldman had failed to show that there was no price impact at all. *See Barclays*, 875 F.3d at 106.

Next, Goldman again attempts to reverse the burden of proof by arguing that Plaintiffs failed to establish a "link" between Goldman's statements and the price decline. Br. 60-61. But having found the *Basic* prerequisites established, the district court was compelled to presume "that the misrepresentation affected the stock price," *Halliburton II*, 573 U.S. at 279, unless *Goldman* severed the link. Goldman's only authority for putting that burden back on Plaintiffs is inapt or overruled.[19]

Goldman's stock bottomed out at the depth of the Great Recession before quickly rebounding. *See* Trading View, GS Stock Chart, https://www.tradingview.com/symbols/NYSE-GS/ (last visited Apr. 19, 2018) (select "All" to view historical data). At the time of the first false statement in February 2007, as well as at the time of the corrective disclosures, the inflation represented less than 20% of Goldman's stock price. *See id*. (price above $200 in February 2007); JA4651 (stock trading at $184.27 before first corrective disclosure). Given the severity of the misconduct, which drew into question whether anyone should be doing business with Goldman, the size of the market reaction is hardly implausible.

[19] Goldman cites this Court's decision in *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005), but the cited passage was

Furthermore, Goldman cannot dispute that the corrective disclosures were linked to its challenged statements, for they had an obvious relationship. For example, Goldman said it had systems to address conflicts, but the disclosures showed that Goldman did not actually have such systems and/or had elected to bypass or ignore those systems in order to profit from obviously improper conflicts. Rather than dispute that relationship, Goldman simply argues there is no link because its statements were true. Br. 61 (arguing the disclosures were "*consistent* with the challenged statements" because those statements "expressly warned that conflicts were 'increasing' and 'could give rise to

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discussing *loss causation* (not price impact) in reviewing a ruling on a motion to dismiss (which is not subject to the *Amgen* and *Halliburton* limitations). The other case Goldman cites, *Greenberg v. Crossroads Systems, Inc.*, 364 F.3d 657, 665 (5th Cir. 2004), was overruled by *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011) (*Halliburton I*). *See Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 265 (5th Cir. 2007) (characterizing *Greenberg* as "[e]ssentially . . . requir[ing] plaintiffs to establish loss causation in order to trigger the fraud-on-the-market presumption"); *Halliburton I*, 563 U.S. at 808-09 (citing, then overruling, *Oscar Private Equity*).

litigation or enforcement actions.").[20] But that, again, is a falsity argument that cannot defeat class certification. *See supra* at 24.

D. Goldman's Request For Appellate Decertification Is Baseless.

For the reasons discussed, the district court's judgment should be affirmed. However, were the Court to find some fault with the district court's analysis, there is no basis for granting Goldman's request (Br. 68-69) for appellate decertification of the class.

As discussed, even if the Court accepted that Goldman's articles showed that the market failed to react to a fulsome, credible disclosure of the firm's conflicts before the SEC's complaint, that would not justify decertification by this Court. It would, *at most*, show that there is conflicting evidence on whether Goldman's statements had a price impact: a suggestion of no impact based on the market's reaction to the articles, in conflict with strong evidence of price impact arising from the market's reaction to the corrective disclosures (as substantiated by Plaintiffs' event study). Goldman attempted to reconcile the two through

[20] Goldman notably ignores its statements regarding its systems for dealing with conflicts.

Dr. Choi's analysis, which purported to show that the reaction after the correct disclosures was exclusively due to concerns about the enforcement activities themselves. But as discussed, Dr. Choi's study suffered from numerous fatal methodological defects. As a result, at most, there could be a conflict in the evidence on price impact. That conflict would have to be sorted out in the first instance by the district court, *see* Br. 67, which has shown itself more than willing and capable of faithfully complying with this Court's mandate.

CONCLUSION

The judgments below should be affirmed.

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/s/ Kevin K. Russell
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I hereby certify that on April 19, 2019, I caused the foregoing document to be electronically filed with the Clerk of Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered users of that system and that service will be accomplished by that system.

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