18-3667-cv

IN THE
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)

PURSUANT TO DECEMBER 11, 2018 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

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

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August 10, 2021

PENSION FUNDS, ILENE RICHMAN, Individually and on behalf of all others similarly situated,

Plaintiffs,

HOWARD SORKIN, Individually and on behalf of all others similarly situated, TIKVA BOCHNER, On behalf of herself and all others similarly situated, DR. EHSAN AFSHANI, LOUIS GOLD, Individually and on behalf of all others similarly situated, THOMAS DRAFT, Individually and on behalf of all others similarly situated,

Consolidated-Plaintiffs,

—against—

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

Defendants-Appellants,

SARAH E. SMITH,

Consolidated-Defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellant The Goldman Sachs Group, Inc. ("Goldman Sachs" or the "Firm") does not have a parent corporation, and no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

After clarifying the law, the Supreme Court directed this Court to "reassess the District Court's price impact determination." *Goldman Sachs Grp., Inc.* v. *Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958 (2021). As this Court instructed, Defendants summarize below "all evidence in the record relating to the price impact of the corrective disclosures in this case, including the generic nature of Goldman's alleged misrepresentations." (ECF 322.) Considering (1) the exceptionally generic nature of the alleged misstatements, (2) the clear "mismatch" between those generic statements and Plaintiffs' three claimed "corrective" disclosures, *Goldman*, 141 S. Ct. at 1961, (3) Defendants' substantial expert evidence of no price impact, and (4) Plaintiffs' failure to present any evidence that any stock price drops were caused by correction of the statements, this Court should conclude that Defendants have proven, by at least a preponderance of the evidence, that the challenged statements had no price impact.

1. The alleged misrepresentations' generic nature is compelling evidence that those statements had no price impact.[1] The challenged Goldman Sachs Business Principles (*e.g.*, "[i]ntegrity and honesty are at the heart of our business" and

[1] There is no basis for Plaintiffs' claim that Defendants waived their arguments about the generic nature of the statements. (*See* ECF 319 at 3.) The Supreme Court directed that this Court consider "*all* evidence," including the nature of the statements, in "reassess[ing] the District Court's price impact determination." *Goldman*, 141 S. Ct. at 1958, 1961. In any event, Defendants repeatedly urged this Court to consider this evidence (*see*, *e.g.*, ECF 62 at 47-48; ECF 222 at 25; June 26, 2019 Oral Arg. 1:34-2:20, 4:44-5:05, 5:15-5:53, 8:40-9:35, 28:51-30:40), as confirmed by Judge

"[o]ur clients' interests always come first") were exceptionally generic, aspirational statements of corporate values. (JA5781.) The challenged general disclosure in Goldman Sachs' annual SEC filings about the risks of conflicts of interest, far from guaranteeing that the Firm had no conflicts in any particular transaction, expressly warned that conflicts were "increasing," and that, although the Firm had "extensive procedures and controls" that were "designed to" manage conflicts, doing so "is complex and difficult," and the Firm might "fail, or appear to fail," which could "give rise to litigation or enforcement actions." (JA5716.)[2]

As the Supreme Court recognized, "a more-general statement will affect a security's price less than a more-specific statement." *Goldman*, 141 S. Ct. at 1960. Here, the alleged misrepresentations plainly sit at the most generic end of the spectrum. Defendants' expert, Dr. Laura Starks, corroborated the significance of the exceptionally generic nature of the alleged misstatements by demonstrating that such statements are pervasive in the market,[3] and that "[stock] analysts did not view the

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Sullivan's dissent pointing out the evidentiary importance of the statements themselves. *Ark. Tchr. Ret. Sys.* v. *Goldman Sachs Grp., Inc.*, 955 F.3d 254, 275 n.25 (2d Cir. 2020) (Sullivan, J., dissenting).

[2] Prompted by Plaintiffs' mischaracterization (*see* ECF 187 at 66), this Court's prior decision erroneously described this warning as a representation that Goldman Sachs was "conflict free." *Goldman Sachs*, 955 F.3d at 278.

[3] Dr. Starks identified more than 30 companies that made statements indistinguishable from Goldman Sachs' Business Principles and conflicts warning, including JP Morgan, Wells Fargo, Citigroup, Merrill Lynch, and Morgan Stanley. (JA5156-75.) *See ECA* v. *JPMC*, 553 F.3d 187, 206 (2d Cir. 2009) ("[n]o investor would take such statements seriously" when "almost every investment bank makes [them]").

statements as containing information pertinent to an investment decision-making process." (JA5065.) Indeed, she showed that not one of the over 800 analyst reports on Goldman Sachs during the class period even mentioned the statements. (JA5054-71.) Plaintiffs' expert, Dr. Finnerty, agreed that "stock analyst reports are ... a pretty good indication of what the market investors would regard is important." (JA409.)

Dr. Starks, along with another of Defendants' experts, Dr. Gompers, also opined more broadly that the alleged misrepresentations "are not types of statements that investors find to be pertinent to making investment decisions" (JA5036, 8076-78), because they "lack [the] information content" that allows "investors [to] determin[e] the future financial performance or value of a company" (JA5051). Dr. Finnerty agreed that "[i]nformation regarding earnings relative to street consensus, changes in company forecast[s] and ... other critical corporate events" are the types of information that "cause statistically significant price movements." (JA575-76.)

Importantly, the Supreme Court directed that courts use "common sense" in assessing the generic nature of alleged misstatements. *Goldman*, 141 S. Ct. at 1960. It would defy common sense to conclude that generic statements that this Court has recognized on thirteen occasions "do not invite reasonable reliance" impacted Goldman Sachs' stock price here. *Singh* v. *Cigna Corp.*, 918 F.3d 57, 60 (2d Cir. 2019). The Supreme Court's ruling makes clear that this Court need not ignore the common-sense rationale underpinning those decisions. As the Supreme Court

recognized, "the generic nature of a misrepresentation often is important evidence of price impact … even though it also may be relevant to materiality." *Goldman*, 141 S. Ct. at 1958-60.[4] This Court should now closely examine Defendants' generic statements, apply its common-sense judgment regardless of the materiality overlap, and conclude that the statements' generic nature is compelling evidence that they did not impact Goldman Sachs' stock price.[5]

2. There is a stark mismatch between Defendants' generic statements and Plaintiffs' three claimed "corrective" disclosures. There is no dispute that Defendants' generic statements "did not cause an increase in Goldman's stock price" when made. (JA4820, 8213-14.) Plaintiffs' theory of price impact thus relies solely on the opinion of their expert, Dr. Finnerty, that the statements maintained stock price inflation that was revealed by stock price declines following three supposedly "corrective" disclosures: (i) the SEC's April 16, 2010, complaint alleging that the Firm

[4] In its earlier decision affirming class certification, this Court held that the generic nature of the alleged misstatements was "not an appropriate consideration at the class certification stage," reasoning that substantive consideration of the statements' generic nature would impermissibly "smuggl[e] materiality into Rule 23" in contravention of *Amgen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013). *Goldman Sachs*, 955 F.3d at 267-68.

[5] After determining that it was "fair for this court to consider the nature of the alleged misstatements," Judge Sullivan applied a common-sense evaluation, concluding that "the obvious explanation for" Defendants' economic evidence of no price impact "is that no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based." *Goldman Sachs*, 955 F.3d at 278 (Sullivan, J., dissenting).

did not disclose to investors in the ABACUS CDO that a hedge fund involved in selecting the portfolio for that CDO had a short position in the CDO; (ii) an April 30, 2010, Wall Street Journal report on a rumor that the DOJ was investigating unspecified mortgage trading by the Firm; and (iii) June 10, 2010, press reports that the SEC was investigating the Hudson CDO. (*See* JA142-50, 567, 4629-32, 4674-79.)

As the Supreme Court held, when the contents of an alleged misrepresentation and a "corrective" disclosure "mismatch," the "inference" that "the back-end price drop [on a corrective disclosure date] equals front-end inflation [] starts to break down." *Goldman*, 141 S. Ct. at 1961. Following the Supreme Court's decision, some "link" or "connection" between generic alleged misstatements and claimed corrective disclosures is insufficient, contrary to the position of Plaintiffs and their expert in this Court (ECF 187 at 65-66; JA5217), and the District Court's findings, *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2018 WL 3854757 (S.D.N.Y. Aug. 14, 2018). The Supreme Court's examples of a generic statement—"'we have faith in our business model'"—and corrective disclosure—"'our fourth quarter earnings did not meet expectations'"—could be similarly connected, but that connection is insufficient to support an inference of inflation maintenance because of the informational "mismatch." *Goldman*, 141 S. Ct. at 1961. Here, the mismatch between the statements and "corrective disclosures" is even more glaring. As in the Supreme Court's example, Defendants' statements were classically generic: none referenced CDOs,

mortgages, or any Goldman Sachs business line. By contrast, Plaintiffs' three "corrective" disclosures *all* concern actual or rumored government enforcement over CDOs or mortgages.[6]

As a result of the mismatch, Plaintiffs' claimed "corrective" disclosures did not "actually correct[] the generic misrepresentation[s]." *Id.* Take the generic statement that Goldman Sachs had "extensive procedures and controls that are designed to identify and address conflicts of interest." (JA5716.) Plaintiffs do not and cannot claim that any disclosure revealed that Goldman Sachs did not in fact have such procedures and controls. Rather, Plaintiffs rely on disclosures of allegations of isolated conflicts in one part of the Firm's mortgage business. Far from contradicting the conflicts warning, "news of Goldman's conflicts" in two CDOs, *Goldman*, 2018 WL 3854757, at *4, was consistent with the general disclosure that conflicts were "increasing" across the Firm's businesses, that the conflicts were "complex and difficult" to manage, and that "enforcement actions" could result if the controls "fail[ed]" (JA5716). Similarly, allegations of misconduct in two among tens of thousands of transactions across the Firm did not "correct"

[6] In *Waggoner* v. *Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), the alleged misstatements and corrective disclosures actually did match. *See id.* at 104-05. The Supreme Court's "mismatch" test does not permit this Court's earlier conclusion that it makes "little" difference that "Barclays' statements were about a specific high-frequency exchange, while Goldman's challenged statements were more generally about its controls for handling conflicts." *Goldman*, 955 F.3d at 269.

Goldman Sachs' general principles of how it strives to do business. (JA5044-45.)

Further, even assuming that "news of Goldman's conflicts" could "correct" generic statements of aspirational values or a warning of "increasing" conflicts, none of Plaintiffs' claimed "corrective" disclosures actually revealed any new conflict allegations. The vague report of a rumored DOJ criminal investigation (which never resulted in any DOJ action) did not mention a conflict or any wrongful acts. (JA6056-59.) The rumors of an SEC investigation of the Hudson CDO said nothing about any specifics, which the New York Times had detailed in an earlier front page article that did not move the Firm's stock price. (JA5382-83.) Neither the District Court nor this Court analyzed how either of these two "disclosures" revealed any new information that "corrected" the generic statements. Even as to the SEC's earlier ABACUS complaint, the only "new" disclosures were emails mentioned in the complaint, which did not relate to an undisclosed Firm conflict but rather a failure to disclose to investors the short position of the client that had participated in selecting the portfolio for the CDO. (JA4832-33, 8104.) As Dr. Gompers showed, press reports had made the same allegations months before. (JA4832-33.) More broadly, Dr. Gompers analyzed news reports on 36 dates prior to the first purported "corrective" disclosure that contained allegations of conflicts and found that they had no discernible impact on Goldman Sachs' stock price. (JA4824-34.)

Contemporaneous market commentary further evidences the mismatch between the alleged misstatements and Plaintiffs' three "corrective" disclosures. Dr. Gompers and Dr. Starks collectively reviewed more than 50 analyst reports and 2,000 press articles following the disclosures and found not one mention of any of the statements, but they did find numerous instances of analysts attributing the price declines to government enforcement activity. (JA3999-4010, 4796-97, 5061-71.)[7] This evidence is consistent with the opinion of Defendants' third expert, Dr. Choi, that reports or rumors of enforcement actions cause stock prices to fall—a prototypical common-sense observation that he supported with analysis of a database of SEC enforcement actions—and that the reports and rumors of enforcement actions here accounted for the full amount of the drops. (*See* JA4962-83.)[8]

3. Plaintiffs have failed to produce any evidence of price impact. The

[7] After years of discovery, Plaintiffs could locate only a single AP op-ed referencing the Business Principles. (JA7248-50.) That op-ed did not attribute any stock drop to a revelation that those statements were false. Rather, it characterized the Business Principles as "a sales pitch that few Wall Street firms always live up to." (JA7249, 4796-97.) Nor do articles on the reputational harm caused by the SEC lawsuit evidence a "correction"; they only reinforce that Goldman Sachs' "reputation is one of [its] most important assets," as the generic statements said. (JA5716.)

[8] This conclusion is also consistent with Plaintiffs' abandonment of their fourth "corrective" disclosure—Congress's release of internal Goldman Sachs emails that supposedly showed additional conflicts (JA44)—because it "caused no statistically significant movement in the price of Goldman's stock." *Ark. Tchr. Ret. Sys.* v. *Goldman Sachs Grp., Inc.*, 879 F.3d 474, 480 n.2 (2d Cir. 2018). Tellingly, this disclosure was the only one of Plaintiffs' four original "corrective" disclosures that "did not contain news of government enforcement activities." *Id.*

Supreme Court held that a "court's task is simply to assess all the evidence of price impact—direct and indirect—and determine whether it is more likely than not that the alleged misrepresentations had a price impact." *Goldman*, 141 S. Ct. at 1963. The allocation of the burden of persuasion "will have bite only when the court finds the evidence in equipoise—a situation that should rarely arise." *Id.*

Here, in the face of exceptionally generic statements and a stark "mismatch" between the alleged misrepresentations and the "corrective" disclosures, Plaintiffs' side of the evidentiary scale is entirely empty. Plaintiffs' sole expert, Dr. Finnerty, ignored the generic nature of the challenged statements in his analysis. Indeed, he admitted that he "was asked to assume the allegations in the complaint" with respect to the supposedly inflationary impact of the alleged misstatements, and that he did not "do any work to assess" how and when the inflation purportedly entered the stock price as a result of those unquestionably generic statements. (JA8210.)

Dr. Finnerty also did not analyze whether the statements "matched" the alleged "corrective" disclosures, making only the bare assertion that the disclosures were "connect[ed] with" the statements. (JA5217.)[9] In reality, as Dr. Finnerty conceded, his analysis showed only that there were statistically significant stock drops

[9] Plaintiffs have speculated that Goldman Sachs' "stock traded at a premium compared to its peers because of the firm's reputation for integrity and its ability to manage conflicts" (ECF 187 at 4; *see id.* at 34), and that this alleged "reputational 'premium' [] 'dissolved' upon revelation of Goldman's conflicts in the corrective disclosures" (Pls. Br. at 29 n.15, *Goldman*, 141 S. Ct. at 1963). Dr. Finnerty did no

on Plaintiffs' "corrective" disclosure dates. (*See* JA537-58, 8197.) He made no attempt to analyze whether any portion of those declines resulted from the market learning that the statements were supposedly false, despite acknowledging that "[w]hen enforcement actions are announced, they are almost always met with a strong negative [market] reaction." (JA6090.)

The preponderance of the evidence tilts even more decisively in Defendants' favor once their own expert testimony is weighed in the balance. Dr. Gompers' study showing that prior disclosures of alleged conflicts had no price impact, *supra* 7, established that the stock drops were not due to conflict revelations. Dr. Choi's analysis, *supra* 8, established what did cause those drops—reports of government enforcement activity. And Dr. Starks, *supra* 8, corroborated Dr. Choi's findings.

* * *

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

analysis to support Plaintiffs' speculation, and neither Dr. Finnerty nor Plaintiffs sought to establish that Goldman Sachs' stock traded at a premium relative to its peers *because* the Firm made generic statements about corporate values and the risks of conflicts virtually identical to statements made by its peers, *supra* 2 n.3, 9.

Respectfully submitted,

/s/ *Robert J. Giuffra, Jr.*

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August 10, 2021

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order dated July 27, 2021 (ECF 322), because the brief is 10 pages, excluding the parts of the brief exempted by FED. R. APP. P. 32(f). 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ *Jacob E. Cohen*
Jacob E. Cohen

Dated: August 10, 2021