UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-2557-cv

Caption [use short title]

Motion for: Leave to File Brief as Amici Curiae

In re Goldman Sachs Group, Inc. et al., Petitioners

-v-

Arkansas Teachers Retirement System et al., Respondents

Set forth below precise, complete statement of relief sought:

Movants seek leave to file an amici curiae brief in support of defendants-petitioners and the petition for leave to appeal.

MOVING PARTY: Amici curiae Colombo, Cosenza, Grundfest, Lorne, Mahoney, and Painter

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Plaintiffs-Respondents Arkansas Teachers Retirement System et al.

MOVING ATTORNEY: Todd G. Cosenza

OPPOSING ATTORNEY: Thomas A. Dubbs

[name of attorney, with firm, address, phone number and e-mail]

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Court-Judge/Agency appealed from: Hon. Paul A. Crotty; United Stated District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):

☑ Yes ☐ No (explain):

Opposing counsel's position on motion:

☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:

☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: Todd G. Cosenza **Date:** September 4, 2018 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

18-2557-cv

United States Court of Appeals

for the

Second Circuit

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

Petitioners,

– v. –

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

Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF FORMER SEC OFFICIALS AND LAW PROFESSORS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL

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Ronald J. Colombo, Elizabeth Cosenza, Joseph A. Grundfest, Simon Lorne, Paul G. Mahoney, and Richard W. Painter respectfully move under Federal Rule of Appellate Procedure 29(b) for leave to file a brief as *amici curiae* in support of the petition for leave to appeal in this case. A copy of the proposed brief is an exhibit to this motion. Defendants-Petitioners have consented to this motion; Plaintiffs-Respondents take no position on it.

Amici curiae are a group consisting of former officials of the United States Securities and Exchange Commission (the "SEC"), as well as law professors whose scholarship and teaching focuses on the federal securities laws. In alphabetical order, *amici curiae* are:

- Ronald J. Colombo – professor of law and dean for distance education at the Maurice A. Deane School of Law at Hofstra University;
- Elizabeth Cosenza – Associate Professor and Area Chair, Law and Ethics, at Fordham University;
- The Honorable Joseph A. Grundfest – William A. Franke Professor of Law and Business at Stanford Law School, and Commissioner of the SEC from 1985 to 1990;
- Simon Lorne – General Counsel of the SEC from 199 to 1996, and Vice Chairman and Chief Legal Officer of Millennium Management LLC.

- Paul G. Mahoney – the David and Mary Harrison Distinguished Professor of Law, at the University of Virginia School of Law, and dean of the same from 2008 to 2016; and
- Richard W. Painter – the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

Given their focus on the federal securities laws, the *amici* have a strong interest in the questions presented here. This case raises the question of whether a defendant's right to rebut *Basic Inc. v. Levinson*'s ("Basic") fraud-on-the-market presumption set forth in that case and in *Haliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("Halliburton II"), can coexist with an expansion of the "price maintenance" theory to sustain class certification under Federal Rule of Civil Procedure 23(b)(3) in securities fraud class actions based on generic statements of corporate or business principles.

The *amici*'s proposed brief reflects their consensus that these are important and recurring questions that deserve this Court's immediate review, and that the district court's resolution of those questions is contrary to the Supreme Court's established precedent in both *Basic* and *Halliburton II*. The *amici* believe that the authorities and arguments presented in this brief will assist the Court in deciding whether to grant the Defendants-Petitioners' petition for leave to appeal.

It is respectfully submitted that this motion for leave to file the attached *amici curiae* brief should be granted.

Dated: New York, New York
September 4, 2018

WILLKIE FARR & GALLAGHER LLP

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Proposed *Amici Curiae* Brief

18-2557-cv

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TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF AMICI CURIAE....................................1

ARGUMENT 3

I. THE "PRICE MAINTENANCE" THEORY IS LIMITED IN SCOPE AND ONLY APPLIED BY COURTS IN NARROW CIRCUMSTANCES. 3

II. THE DISTRICT COURT IMPROPERLY EXPANDED THE "PRICE MAINTENANCE" THEORY BEYOND THE NARROW APPROACH TAKEN IN PRIOR CASES. 6

III. IMMEDIATE JUDICIAL INTERVENTION IS NECESSARY TO AVOID THE RADICAL IMPLICATIONS OF THE DISTRICT COURT'S CLASS CERTIFICATION DECISION.....................................10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342 (3d Cir. 2009) 5

Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013) 9

Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.,

879 F.3d 474 (2d Cir. 2018) 3-4, 6

Basic Inc. v. Levinson 485 U.S. 224 (1988) 1, 3, 10, 11

City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG,

752 F.3d 173 (2d Cir. 2014) 9

ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.,

553 F.3d 187 (2d Cir. 2009). 9

FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282 (11th Cir. 2011) 5-6

Glickenhaus v. Household Int'l, Inc., 787 F.3d 408 (7th Cir. 2015) 5

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398 (2014)............. passim

In re Goldman Sachs Group, Inc. Securities Litigation,

2018 WL 3854757 (Aug. 14, 2018) 7, 8

In re Merck & Co., Inc. Sec. Litig., 432 F.3d 261 (3d Cir. 2005) 6

In re Vivendi, S.A. Sec. Litig., 838 F.3d 223 (2d Cir. 2016).................................4, 5

Ind. Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85 (2d Cir. 2016)...................................9

Nathenson v. Zonagen Inc., 267 F.3d 400 (5th Cir. 2001) 5, 7

Waggoner v. Barclays PLC, 875 F.3d 79 (2d Cir. 2017) 5

Rules

Fed. R.Civ. P. 23(b)(3)... 1, 3, 9

INTRODUCTION AND INTEREST OF AMICI CURIAE[1]

This case – which was previously subject to this Court's interlocutory review – continues to raise the question of whether the fraud-on-the-market presumption created in *Basic Inc. v. Levinson* 485 U.S. 224 (1988) ("Basic"), can be rebutted on a motion for class certification, as required by both *Basic* and *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ("Halliburton II"), or whether the promise of those cases is merely illusory.

Following remand from this Court, the district court recertified a plaintiff class based on generic statements of corporate principles and risk controls that virtually all major financial institutions make as a matter of course. This class certification ruling warrants immediate intervention because it is not only incorrect, but if followed, would eviscerate the right of defendants in securities fraud class actions (as set forth in *Halliburton II*) to "defeat the presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price." *Id.* at 2414.

In holding that generic statements of corporate principles and risk factors can create and then maintain an inflated stock price over a multi-year period, the district court has countenanced a radical and unsupported expansion of

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, contributed money to fund its preparation or submission. Amici submit this brief with a motion for leave to file, as to which petitioners have consented and respondents have taken no position.

the "price maintenance" theory to sustain class certification under Fed. R. Civ. P. 23(b)(3). Additionally, the district court's decision runs afoul of established precedent in the Second Circuit that such statements cannot, as a matter of law, form the basis of a securities fraud claim. Finally, if followed, the district court's decision would effectively deprive securities fraud class action defendants of the ability to rebut the *Basic* presumption at the class certification stage in direct contravention of *Halliburton II*. Therefore, immediate appellate review by this Court is needed once again to reverse numerous errors that could have broad policy implications on securities fraud class actions.

The *amici curiae* are a group of individuals who have a strong interest in these issues: former officials of the United States Securities and Exchange Commission (the "SEC"), and law professors whose scholarship and teaching focuses on the federal securities laws. Although each individual amicus may not endorse every statement made herein,[2] this brief reflects the consensus of the amici that the petition for permission to appeal presents important questions on the fraud-on-the-market presumption and a defendant's right to rebut the same, that the district court's resolution of these issues was incorrect and threatens to eviscerate that right, and that therefore, judicial review and intervention by this Court is necessary. In alphabetical order, the *amici curiae* are:

[2] In addition, the views expressed by amici here do not necessarily reflect the views of the institutions with which they are or have been associated.

- Ronald J. Colombo – professor of law and dean for distance education at the Maurice A. Deane School of Law at Hofstra University;
- Elizabeth Cosenza – Associate Professor and Area Chair, Law and Ethics, at Fordham University;
- The Honorable Joseph A. Grundfest – William A. Franke Professor of Law and Business at Stanford Law School, and Commissioner of the SEC from 1985 to 1990;
- Simon Lorne – General Counsel of the SEC from 199 to 1996, and Vice Chairman and Chief Legal Officer of Millennium Management LLC.
- Paul G. Mahoney – the David and Mary Harrison Distinguished Professor of Law, at the University of Virginia School of Law, and dean of the same from 2008 to 2016; and
- Richard W. Painter – the S. Walter Richey Professor of Corporate Law at the University of Minnesota Law School.

ARGUMENT

I. THE "PRICE MAINTENANCE" THEORY IS LIMITED IN SCOPE AND ONLY APPLIED BY COURTS IN NARROW CIRCUMSTANCES.

In *Basic*, the Supreme Court established the fraud-on-the-market presumption of reliance in securities fraud class actions. 485 U.S. 224, 246-47 (1988). As this Court stated in a prior decision in this case – which vacated the

district court's prior ruling certifying a plaintiff class under Rule 23(b)(3) – the fraud-on-the-market presumption holds that "the market price of shares traded on [a] well-developed market[ ] reflects all publicly available information, and, hence, any material misrepresentations." *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 483 (2d Cir. 2018). In *Halliburton II*, the Supreme Court confirmed what it had already stated in *Basic*: namely, that defendants in securities fraud class actions "must be afforded an opportunity *before class certification* to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock." 134 S. Ct. 2398, 2417 (2014) (emphasis added). The Supreme Court's holding in *Halliburton II* reinforces that *Basic*'s fraud-on-the-market presumption carries with it a requirement of showing price impact as an "essential precondition." *Id.* at 2416.

In *In re Vivendi, S.A. Sec. Litig.*, this Court recognized the "price maintenance" theory for the first time, holding that some statements *may* have a price impact by maintaining inflation in a stock price if "but for" those statements, there would have otherwise been a decline in the price. 838 F.3d 223, 256 (2d Cir. 2016) (holding, "statements that merely maintain inflation already extant in a company's stock price, but do not add to that inflation, nonetheless affect a company's stock price" and may still trigger the fraud-on-the-market presumption). The circumstances in which the "price maintenance" theory can be

applied have been addressed by appellate courts across the country. In these decisions, the "price maintenance" theory's application has been limited to situations where the challenged statements are squarely directed to preventing a stock price's decline that otherwise would have occurred. These cases include:

- *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 234-35 (2d Cir. 2016) – price maintenance theory applied where the challenged statements related to and focused on EBITDA and the company's confidence that it had "very strong . . . results with outstanding growth," and would meet market expectations for its growth prospects;

- *Waggoner v. Barclays PLC*, 875 F.3d 79, 87 (2d Cir. 2017) – price maintenance theory applied where the challenged statements related to Barclays's dark pool trading systems being free from manipulative trading practices and were intended to maintain Barclays's stock price in light of the past LIBOR scandal, and only after the district court had dismissed claims based on generic statements of corporate principles;

- *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 352 (3d Cir. 2009) – price maintenance theory applied where the challenged statements involved a false disclosure of positive drug study results where "the market was expecting that the results of the study would be positive, and plaintiffs have presented evidence indicating precisely that";

- *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 419 (5th Cir. 2001) – recognizing that price maintenance theory can be applied where, "[f]or example, if the market believes the company will earn $1.00 per share and this belief is reflected in the share price, then the share price may well not change when the company reports that it has indeed earned $1.00 a share even though the report is false in that the company has actually lost money";

- *Glickenhaus v. Household Int'l, Inc.*, 787 F.3d 408, 413 (7th Cir. 2015) – price maintenance theory applied where the challenged statements related to the company's disclosure of particular financial metrics used to gauge the quality of its loan portfolios, which the company was using to mask increased delinquency rates in its loans, thereby preventing a decline in stock price that might otherwise have occurred; and

- *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1292-93 (11th Cir. 2011) – price maintenance theory applied where the challenged statements lulled investors into a false belief that the company was aggressively policing click fraud in order to maintain an inflated share price that was brought about precisely through click fraud techniques.

In summary, courts around the country permit the "price maintenance" theory to form the basis of class certification using the fraud-on-the-market presumption *only* where the challenged statements are intended to counteract negative news in the market or to convey to investors that the defendants had met financial targets. In other words, courts do not permit a class to be certified based on the mere incantation of the words "price maintenance." Were courts to do so, the "price maintenance" theory would become little more than a catch-all to explain why the misrepresentation at issue had no discernible price impact – a requirement of the fraud-on-the-market presumption under *Halliburton II*. *See* 134 S. Ct. at 2416.[3]

II. THE DISTRICT COURT IMPROPERLY EXPANDED THE "PRICE MAINTENANCE" THEORY BEYOND THE NARROW APPROACH TAKEN IN PRIOR CASES.

Here, there is no evidence that either of the narrow circumstances in which the "price maintenance" theory is applied is present. Instead, the crux of

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[3] This is significant because in an efficient market – the basis of the fraud-on-the-market presumption, *see Arkansas Teachers Ret. Sys.*, 879 F.3d at 483 – the absence of price movement is evidence that challenged statements are not material and have no price impact. *In re Merck & Co., Inc. Sec. Litig.*, 432 F.3d 261, 274 (3d Cir. 2005) (holding "in efficient markets materiality is defined as 'information that alters the price of the firm's stock.'").

Plaintiffs' claim is that a conflicts risk factor warning in 10-K reports and certain generic, anodyne statements found in Goldman Sachs's "Business Principles" – published in its Annual Reports from 2007 through 2010 – such as, "[o]ur clients' interests always come first" and "[i]ntegrity and honesty are at the heart of our business" (A-64-66) created and then maintained an artificially inflated stock price, and should thereby give rise to liability based on a presumption of fraud-on-the-market. Plaintiffs posit that investors were misled because these statements were inconsistent with Goldman Sachs's purportedly undisclosed conflicts of interest relating to certain mortgage-backed securities products it structured and sold to institutional investors. (A-64-65.)

Troublingly, the district court simply accepted the plaintiffs' allegations that an inflated stock price had been fraudulently maintained, *see In re Goldman Sachs Group, Inc. Securities Litigation*, 2018 WL 3854757, at *2 (Aug. 14, 2018), even though the challenged statements did not concern "information which is important to the value of [Goldman Sachs's] stock." *Nathenson*, 267 F.3d at 419. Indeed, the district court applied the "price maintenance" theory only by making the unwarranted assumption – in the face of contrary evidence presented by Defendants – that the drop in Goldman Sachs's stock price at the end of the alleged class period was linked to revelations of the supposed falsity of the generic statements of corporate principles at issue. (*See* A-8.)

Further, the district court's acceptance of the plaintiffs' allegations of an inflated stock price (as well as the fraudulent maintaining of that price) makes little sense here given that plaintiff offered no evidence at the class certification phase that shows the alleged misstatements had any impact on Goldman Sachs's stock price, or describing how the alleged misstatements inflated the stock price during the class period. In contrast, Defendants introduced substantial evidence that the drop in Goldman Sachs's stock price was due to disclosure of government enforcement activity against Goldman Sachs, and was thus unrelated to the purported falsity of the challenged statements throughout the class period. (A-468-86, 532-53, 558-66.) The district court effectively dismissed this evidence, stating that it was "only natural that 'economically significant negative news,' . . . would at least contribute to the [Goldman Sachs] stock price declines." *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2018 WL 3854757, at *4.

Wholly aside from the fact that this case lies far outside the narrow confines of the "price maintenance" theory paradigm as applied by every other appellate court in this country (as discussed above), the district court's certification of a class on this basis ignores well-settled precedent in the Second Circuit that generic statements of corporate principles and risk factors are immaterial and cannot, *as a matter of law*, give rise to liability – or a presumption of fraud-on-the-market – because no reasonable investor could possibly rely on them as a

"guarantee of some concrete fact or outcome." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 185-86 (2d Cir. 2014). *See also, e.g.*, *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85 (2d Cir. 2016); *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187 (2d Cir. 2009).

It should be noted that nothing in the Supreme Court's decision in *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013) prevents this Court from considering whether statements are of a type that would be expected to inflate a company's stock price before applying the "price maintenance" theory. Looking to the nature of the challenged statements does not require consideration of evidence or proof of materiality – which is what the Supreme Court in *Amgen* stated is not required at the class certification stage. *Id.* at 459. Rather, as the Supreme Court held in *Amgen*, because "immaterial information, by definition, does not affect market price, it cannot be relied upon indirectly by investors who, as the fraud-on-the-market theory presumes, rely on the market price's integrity." *Id.* at 466-67. Because such generic statements are not actionable *as a matter of* law, they likewise cannot be the basis for certification of a class under Rule 23(b)(3).

This Court should make clear that when defendants introduce evidence that severs the link between the decline in a stock's market price and the

challenged statements, a district court cannot simply accept a plaintiff's unsupported allegation that "inflation" was created by the challenged statements, maintained by making similar statements during the class period, and that a link exists between those statements and a subsequent price decline.

III. IMMEDIATE JUDICIAL INTERVENTION IS NECESSARY TO AVOID THE RADICAL IMPLICATIONS OF THE DISTRICT COURT'S CLASS CERTIFICATION DECISION.

The policy implications of the radical and unprecedented expansion of the "price maintenance" theory by the district court are very troubling to the *amici*. As an initial matter, such an expansion would render *Basic*'s ***rebuttable*** presumption of fraud-on-the-market effectively unrebuttable. Because publicly traded companies commonly include general statements of corporate principle similar to those at issue here in their public filings as a matter of routine, a holding that allowed such statements to form the basis of the fraud-on-the-market presumption would likely result in nearly uniform and automatic class certification for putative securities fraud class actions across the board.

As a result, class action plaintiffs will be able to easily and successfully pass the threshold of class certification – often the critical point of inflection in putative securities fraud class actions that results in the matter either being dismissed or proceeding to a settlement favorable to plaintiffs – without offering any evidence of price impact at the class certification stage, and by merely

alleging the presence of a general statement of corporate principles coupled with a subsequent decline in stock price. Without immediate appellate review from this Court, the contours of the "price maintenance" theory in the Second Circuit will effectively swallow whole the long-standing Supreme Court precedents in *Basic* and *Halliburton II* that together mandate that defendants in securities fraud class actions be afforded an opportunity to rebut the fraud-on-the-market presumption. *See Basic*, 485 U.S. at 248; *Halliburton II*, 134 S. Ct. at 2417.

CONCLUSION

For the foregoing reasons, the *amici curiae* believe that the authorities and arguments support granting the Defendants-Petitioners' petition for leave to appeal.

Dated: New York, New York
September 4, 2018

WILLKIE FARR & GALLAGHER LLP

By: /s/ Todd G. Cosenza______________

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1) This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-Point font.

Dated: September 4, 2018
New York, NY

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