APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-3667

August Term 2018

Argued: June 26, 2019

Decided: April 7, 2020

ARKANSAS TEACHER RETIREMENT SYSTEM,
West Virginia Investment Management Board,
Plumbers and Pipefitters Pension Group,
Plaintiffs-Appellees,

Pension Funds, Ilene Richman, Individually and on
behalf of all others similarly situated,
Plaintiffs-Appellees,

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 simi-
larly situated, Thomas Draft, individually and on behalf
of all others similarly situated,
Consolidated Plaintiffs-Appellees

v.

GOLDMAN SACHS GROUP, INC., Lloyd C. Blankfein,
David A. Viniar, Gary D. Cohn,
Defendants-Appellants,

Sarah E. Smith,
Consolidated Defendant-Appellant

Before: WESLEY, CHIN, and SULLIVAN, Circuit Judges.

This is a class action lawsuit brought by shareholders of Defendant-Appellant Goldman Sachs Group, Inc. The shareholders allege that Goldman and several of its executives committed securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder by misrepresenting Goldman's freedom from, or ability to combat, conflicts of interest in its business practices. The shareholders argue that several high-profile government fines and investigations revealed the truth of Goldman's flawed conflicts management to the market thereby reducing its share price.

Several years ago, the United States District Court for the Southern District of New York (Crotty, *J.*) certified a shareholder class under Federal Rule of Civil Procedure 23(b)(3). In 2018, we vacated the class certification order, holding that the district court had failed to apply the "preponderance of the evidence" standard for determining whether Goldman had rebutted a legal presumption, known as the *Basic* presumption, that the shareholders relied on Goldman's alleged misstatements in purchasing its stock at the market price. We remanded for the court to apply the correct standard and to consider Goldman's evidence intended to rebut the *Basic* presumption.

On remand, the district court certified the class once more. Goldman argues on legal and evidentiary grounds that this decision was an abuse of discretion. On the law, Goldman contends that the court misapplied the inflation-maintenance theory for demonstrating price impact. It also argues that we should modify the theory to exclude what it terms "general statements." On the evidence, Goldman argues that the court erroneously rejected its

rebuttal evidence in holding that it failed to rebut the *Basic* presumption.

The district court applied the correct legal standard and we find no abuse of discretion in its weighing of Goldman's rebuttal evidence. We **AFFIRM**. Judge Sullivan dissents in a separate opinion.

OPINION

WESLEY, Circuit Judge.

This is the second time this securities class action has arrived at our doorstep on a Rule 23(f) appeal. The first time we took the case, the United States District Court for the Southern District of New York (Crotty, *J.*) had certified under Rule 23(b)(3) a shareholder class suing Goldman Sachs Group, Inc. and a handful of its executives (collectively, "Goldman") for securities fraud. We vacated the class certification order, holding that the district court did not apply the "preponderance of the evidence" standard for determining whether Goldman had rebutted a legal presumption, known as the *Basic* presumption, that the shareholders relied on Goldman's allegedly material misstatements in choosing to purchase its stock at the market price. *See Ark. Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.* (*ATRS I*), 879 F.3d 474, 484–85 (2d Cir. 2018); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 245–48, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988). We also held that the court erroneously declined to consider some of Goldman's evidence of "price impact"—that is, the question of whether the revelation that Goldman's statements were false affected its share price. *See ATRS I*, 879 F.3d at 485–86.

On remand, the district court ordered additional briefing and held an evidentiary hearing. After concluding that

Goldman failed to rebut the *Basic* presumption by a preponderance of the evidence, the court certified the class once more. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757 (S.D.N.Y. Aug. 14, 2018). We again granted Goldman's petition for permission to appeal under Rule 23(f).

The question before us is whether the district court abused its discretion by certifying the shareholder class, either on legal grounds or in its application of the *Basic* presumption. For the following reasons, we hold that it did not.

BACKGROUND

I. FACTUAL BACKGROUND

The facts giving rise to this lawsuit are discussed at length in our prior opinion. *See ATRS I*, 879 F.3d at 478–82. All that is required here is an abridged version.

Between 2006 and 2010, Goldman made the following statements about its business practices:

> Our reputation is one of our most important assets. As we have expanded the scope of our business and our client base, we increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client. . . .
>
> We have extensive procedures and controls that are designed to identify and address conflicts of interest. . . .
>
> Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow. . . .

> We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard. . . .
>
> Most importantly, and the basic reason for our success, is our extraordinary focus on our clients. . . .
>
> Integrity and honesty are at the heart of our business.

J.A. 87–88, 93 (alterations omitted). The Plaintiffs-Appellees ("shareholders")—individuals and institutions holding shares of Goldman's common stock—allege that these statements were false because Goldman made them while knowing that it was riddled with undisclosed conflicts of interest.

The conflicts at issue here surround several collateralized debt obligation ("CDO") transactions involving subprime mortgages. Chief among them is the Abacus 2007 AC-1 ("Abacus") transaction. Publicly, Goldman marketed Abacus as an ordinary asset-backed security, through which investors could buy shares in bundles of mortgages that the investors, and presumably Goldman, hoped would succeed. But behind the scenes, Goldman purportedly allowed the hedge fund Paulson & Co. to play an active role in selecting the mortgages that constituted the CDO. And Paulson, which bet against the success of the Abacus investment through short sales, chose risky mortgages that it "believed would perform poorly or fail." *Id.* at 59. The alleged plan worked, and Paulson made roughly $1 billion at the expense of the CDO investors (who are not the plaintiffs here). Goldman ultimately admitted that it failed to disclose Paulson's role in the portfolio selection, and it reached a $550 million settlement with the SEC—the largest-ever penalty paid by a Wall Street firm at the time. *See generally* Press Release,

SEC, *Goldman Sachs to Pay Record $550 Million to Settle SEC Charges Related to Subprime Mortgage CDO* (July 15, 2010), https://www.sec.gov/news/press/2010/2010-123.htm. Goldman allegedly engaged in similar conduct with respect to three other CDOs. At times, Goldman allegedly represented to its investors that it was aligned with them when it was in fact short selling against their positions.

II. EARLY LITIGATION HISTORY

In 2011, the named plaintiffs filed a class action complaint in the United States District Court for the Southern District of New York, seeking under Federal Rule of Civil Procedure 23(b)(3) to represent a class of all individuals and entities that acquired shares of Goldman's common stock between February 5, 2007 and June 10, 2010. They alleged that Goldman and several of its directors violated § 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b–5. The crux of their claim is that Goldman's representations about being conflict free artificially maintained an inflated stock price and that the revelations of Goldman's conflicts, such as those presented by the SEC in its complaint against Goldman concerning the Abacus deal, were "corrective disclosures" that caused the market to devalue their Goldman shares.[1] They noted, for example, that Goldman's share price dropped 13% when the SEC filed a securities-fraud complaint against Goldman in connection with the Abacus transaction, and that it dropped even further on two later dates when news

[1] A "corrective disclosure" is an announcement or series of announcements that reveals to the market the falsity of a prior statement. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005).

broke that several federal agencies were investigating Goldman for its role in the other conflicted transactions. In the shareholders' view, these announcements revealed to the market that Goldman had created "clear conflicts of interest with its own clients" by "intentionally packag[ing] and s[elling] . . . securities that were designed to fail, while at the same time reaping billions for itself or its favored clients by taking massive short positions" in the same transactions. J.A. 49. They claim that they lost over $13 billion as a result of Goldman's fraud.

Goldman moved to dismiss the complaint under Federal Rules of Civil Procedure 9(b) and 12(b)(6). It argued that the alleged misstatements were not, as the securities law requires, "material."[2] This was because, in Goldman's view, the statements were too general and vague for a reasonable shareholder to have relied on them in determining the value of Goldman's stock. Thus, Goldman argued, the statements had no impact on its stock price, and any loss the shareholders suffered was due to something other than the corrective disclosures. The district court largely disagreed, holding that most of Goldman's statements presented an actionable question of materiality. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 276, 280 (S.D.N.Y. 2012). The court did, however, agree with Goldman that some of its statements were immaterial as a matter of law; it dismissed the complaint to the extent it relied upon those statements. *See id.* at 274. The

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[2] The six elements of securities fraud are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008).

court subsequently denied Goldman's motions for reconsideration of, and an interlocutory appeal from, the order denying the motion to dismiss. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2014 WL 2815571, at *6 (S.D.N.Y. June 23, 2014) (reconsideration); *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2014 WL 5002090, at *3 (S.D.N.Y. Oct. 7, 2014) (appeal).

III. CLASS CERTIFICATION AND THE FIRST APPEAL

Following discovery, the shareholders moved for class certification. To certify a class under Rule 23 of the Federal Rules of Civil Procedure, the named plaintiffs must demonstrate (1) that the class is so numerous that joinder is impracticable, (2) that at least one question of law or fact is common to the class, (3) that the class representatives' claims are typical of the classwide claims, and (4) that the class representatives will be able to fairly and adequately protect the interests of the class. *See* Fed. R. Civ. P. 23(a). Goldman did not contest that these requirements were met. Instead, it focused on an additional prerequisite for classes primarily seeking money damages, found in Rule 23(b)(3), that common questions of law or fact predominate over individual questions that pertain only to certain class members. *See id.* 23(b)(3).

Facially, securities fraud appears to be a bad fit for the predominance requirement because the key question is whether each individual shareholder relied on a defendant's misstatement in choosing to purchase its stock. But under *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L.Ed.2d 194, courts may presume reliance on a classwide basis if the plaintiffs "establish certain prerequisites—namely, that [the] defendants' misstatements were publicly known, their shares traded in an efficient market,

and [the] plaintiffs purchased the shares at the market price after the misstatements were made but before the truth was revealed." *ATRS I*, 879 F.3d at 481; *see Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258, 268, 134 S. Ct. 2398, 189 L.Ed.2d 339 (2014).[3] The idea behind *Basic* is that investors presume that theoretically efficient markets, such as the New York Stock Exchange or Nasdaq, incorporate all public information—including material misstatements—into a share price. *See* 485 U.S. at 246, 108 S. Ct. 978; *see generally* 7 William B. Rubenstein, *Newberg on Class Actions* §§ 22:16, 22:81 (5th ed.).

Plaintiffs seeking to invoke the *Basic* presumption need not *directly* prove that the defendant's statements had price impact—that is, an effect on its share price. *See Halliburton II*, 573 U.S. at 278–79, 134 S. Ct. 2398. They may instead rely on the requirements for invoking the *Basic* presumption as an "indirect proxy" for a showing of price impact. *See id.* at 281, 134 S. Ct. 2398. "But an indirect proxy should not preclude . . . a defendant's direct, more salient evidence showing that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply." *Id.* at 281–82, 134 S. Ct. 2398; *see also Basic*, 485 U.S. at 248, 108 S. Ct. 978 (noting that "[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will

[3] Materiality is also a prerequisite for *Basic*, but class members need not prove it prior to class certification. *See Halliburton II*, 573 U.S. at 276, 134 S. Ct. 2398.

be sufficient to rebut the presumption of reliance" because "the basis for finding that the fraud had been transmitted through market price would be gone").

Goldman attempted to rebut the *Basic* presumption in several ways. It introduced an event study designed to show that its alleged misstatements had no impact on its share price.[4] It also argued that the market did not react on several dozen occasions before the corrective-disclosure dates when media outlets reported on its alleged conflicts of interest; and, thus, the market was indifferent to this information when it appeared in the corrective disclosures. Under Goldman's theory, its share price declined solely because of new information contained in the corrective disclosures: that several federal agencies were enforcing the securities laws against Goldman with investigations and fines for the same allegedly fraudulent trading practices.

The district court rejected Goldman's theory and certified the class. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461 (PAC), 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015). We vacated this decision on appeal. *See ATRS I*, 879 F.3d at 478. We began our analysis

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[4] An event study isolates the stock price movement attributable to a company (as opposed to market-wide or industry-wide movements) and then examines whether the price movement on a given date is outside the range of typical random stock price fluctuations observed for that stock. If the isolated stock price movement falls outside the range of typical random stock price fluctuations, it is statistically significant. If the stock price movement is indistinguishable from random price fluctuations, it cannot be attributed to company-specific information announced on the event date. *See* Mark L. Mitchell & Jeffry M. Netter, *The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities and Exchange Commission*, 49 Bus. Law. 545, 556–69 (1994); *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 253–56 (2d Cir. 2016).

by noting Goldman's concession that the shareholders successfully invoked the *Basic* presumption. *Id.* at 484. But as to the rebuttal stage, we found that the district court failed to apply the "preponderance of the evidence" standard, which our Court had clarified in an intervening decision. *Id.* at 485 (citing *Waggoner v. Barclays PLC*, 875 F.3d 79, 101 (2d Cir. 2017)). We also found that, in making this determination, the court mistakenly concluded that certain price-impact evidence Goldman had sought to introduce was irrelevant under Rule 23. *Id.* at 486. We remanded for the court to reconsider, under the correct standard and with this additional evidence, whether Goldman could rebut the *Basic* presumption. *Id.* We offered no views on the merits of that question or the sufficiency of Goldman's rebuttal evidence. *Id.*

IV. PROCEEDINGS ON RECORD

On remand, the district court accepted supplemental briefs from the parties and held an evidentiary hearing and oral argument. It framed the issue as whether Goldman could "demonstrate[ ], by a preponderance of the evidence, that the alleged misstatements had no price impact." *In re Goldman*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *2.

Although Goldman bore the burden of persuasion, the district court first looked to the shareholders' evidence intended to show the shortcomings of Goldman's rebuttal argument. It characterized the shareholders' claims as resting on an "inflation-maintenance" theory: that "the misstatements themselves did not inflate the stock price, [but] allegedly served to maintain an already inflated stock price." *Id.*[5] The court credited evidence from

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[5] This theory is sometimes referred to as the "price-maintenance theory," and what we term "inflation-maintaining statements" are

Dr. John D. Finnerty, the shareholders' expert who testified at the evidentiary hearing, "that the news of Goldman's conflicts on the . . . corrective disclosure dates negatively impacted Goldman's stock price." *Id.* at *4. It 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." *Id.*

The district court then turned to evidence presented by two of Goldman's experts to rebut the *Basic* presumption. The first expert, Dr. Paul Gompers, cited news articles published on thirty-six dates prior to the corrective disclosures discussing aspects of Goldman's conflicts. Asserting that the content of the reports was no different than the content of the corrective disclosures, and noting that Goldman's share price did not meaningfully move on the dates of the reports, Dr. Gompers concluded that the market was indifferent to the news of Goldman's conflicts. The court found this evidence was "not persuasive." *Id.* Although it agreed (as did Dr. Finnerty) that Goldman's stock price did not move on the thirty-six dates, it found that "[t]he absence of price movement, . . . in and of itself, is not sufficient to sever the link between the first corrective disclosure and the subsequent stock price drop." *Id.* This was because "the [Abacus] complaint was the first to expose hard evidence of Goldman's client conflicts" by its inclusion of "direct quotes from damning emails . . . [and] internal memoranda, disclosing hard evidence that Goldman had indeed engaged in conflicts to its own ad-

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sometimes called "price-maintaining statements." We use the "inflation" language because it is more precise and the phrase "price-maintenance" also has currency in antitrust law. *See also Vivendi*, 838 F.3d at 258 (dubbing this doctrine the "inflation-maintenance theory").

vantage." *Id.* at *5. The court found that this hard evidence and other "material information" about "the nature and extent of Goldman's client conflicts" "had not been described in any of the 36 more generic reports on conflicts." *Id.* at *4.[6] It found that Dr. Gompers did not "credibly explain[ ] how such hard evidence did not contribute to the price decline following the first corrective disclosure." *Id.* at *5.

The district court was similarly unpersuaded by Goldman's second expert, Dr. Stephen Choi. Dr. Choi presented an event study concluding that, because "the conflicts were reported on 36 separate occasions with no price movement, the . . . price drops [following the corrective disclosures] must have been due exclusively to the news of enforcement activities [such as the Abacus complaint]." *Id.* at *3 (citation omitted). Dr. Choi identified three "factors" descriptive of the Abacus complaint: it was not accompanied by a concurrent resolution, it included scienter-based allegations, and it charged an individual defendant in addition to Goldman. *Id.* He used a data set of 117 enforcement actions and identified four involving these same factors. The average share price decline following those four enforcement events was 8.07%. Because Goldman's share price declined by 9.27% following the Abacus disclosure, and Dr. Choi found that the 1.2% difference was not statistically significant, he opined that the entire

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[6] The court noted that the articles "vary significantly" and that, while some "suggest possible or theoretical conflicts[,] . . . others appear to be a *cri de couer* from sworn enemies . . . [or] not damaging or revelatory, but rather commendatory . . . prais[ing] Goldman for managing its conflicts and still outperforming competitors." *Id.* at *4 n.6.

price drop was due to the news of the enforcement action, rather than the revelation of Goldman's conflicts.

The district court found that "Dr. Choi's conclusion [was] not supported by his event study." *Id.* at *5. To begin, it noted that Dr. Choi looked only at the Abacus complaint and did not examine the other corrective disclosures; the court found there was "no good reason to extend [his] findings" to those disclosures. *Id.* The court also found Dr. Choi's three "factors" were "arbitrary characteristics," emphasizing that Dr. Choi conceded "he was the first person to use [the factors] together" and that the factors "are not generally accepted in the field." *Id.* The court then explained that the four enforcement events from Dr. Choi's study were different than the Abacus event because they did not involve allegations of mismanagement of conflicts of interest or companies with comparable size or operations to Goldman. The court further found the event study did not account for the misconduct allegations underlying each event. It also noted that Dr. Choi's study did not produce statistically significant results because it looked to the average price decline of only four events (out of a population of 117) with a large variance: declines of 3.34%, 3.73%, 8.13%, and 17.09%. Finally, the court faulted Dr. Choi for comparing the Goldman price decline to the four events using a two-sample t-test, which some authorities have explained "is not appropriate for small samples drawn from a population that is not [statistically] normal." *Id.* at *6 (quoting *Butt v. United Bhd. of Carpenters & Joiners of Am.*, 2016 WL 3365772, at *1 (E.D. Pa. June 16, 2016) (quoting Federal Judicial Center, Reference Manual on Scientific Evidence (3d ed.))).

In light of Goldman's deficient evidence, and reaffirming that "Dr. Finnerty's opinion demonstrate[ed] the

price impact of [the] alleged misstatements," the district court held that Goldman "failed to rebut the *Basic* presumption by a preponderance of the evidence." *Id.* at *6. It certified the class. *Id.* We granted Goldman's petition for interlocutory appeal.

DISCUSSION

"[W]e review the [district court's] grant of class certification for an abuse of discretion, and the legal conclusions underlying that decision *de novo*." *ATRS I*, 879 F.3d at 482 n.7. "When a case involves the application of legal standards, we look at whether the [district court's] application 'falls within the range of permissible decisions.'" *Id.* (quoting *Waggoner*, 875 F.3d at 92).

Goldman argues for reversal on two general grounds. *First*, it contends that the district court misapplied the inflation-maintenance theory, which it asks us to modify. *Second*, based largely on the court's evidentiary findings, Goldman argues that the court abused its discretion by holding that Goldman failed to rebut the *Basic* presumption by a preponderance of the evidence.

I. THE DISTRICT COURT CORRECTLY APPLIED THE INFLATION-MAINTENANCE THEORY, AND WE REJECT GOLDMAN'S INVITATION TO NARROW IT.

In the classic § 10(b) case, a corporation's shareholders allege that a corporation, in financial statements or through its officers, made false statements that caused them to overvalue its stock. As noted above, the question of whether the statements actually affected the market price is called "price impact." We have held that two types of false statements can have price impact. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 257 (2d Cir. 2016). The first category is inflation-introducing statements.

Shareholders relying on an inflation-introduction theory claim that the corporation's false statements "introduced" inflation into its share price because the market believed them to be true and reacted accordingly. *See id.*

The second category is inflation-maintaining statements. These statements have price impact not because they introduce inflation into a share price, but because they "maintain" it. *See id.* Imagine, for example, that major media outlets report a false rumor that a record label plans to sell a secretly recorded Beatles album containing a dozen unreleased songs. Although the record company played no role in starting or spreading this rumor, its share price increases from $60 to $70 because the market believes the rumor and thinks the album will be profitable. Not wanting to disappoint the public, the company's CEO confirms the rumor even though she knows it is false. While the CEO's misstatement does not move the record company's share price—which stays at $70 because the market has already incorporated the album's predicted profits—the statement is fraudulent because it maintains the artificial inflation. Had the CEO told the truth, the share price would have returned to $60. The "inflation-maintenance" theory allows shareholders to claim they relied on statements like these when suing for securities fraud.

Our original case on the inflation-maintenance theory is *Vivendi*, 838 F.3d 223. There, we joined the Seventh and Eleventh Circuits in holding that "theories of 'inflation maintenance' and 'inflation introduction' are not separate legal categories." *Id.* at 259 (quoting *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408, 418 (7th Cir. 2015), and citing *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1316 (11th Cir. 2011)). On that basis, we held, "securities-fraud defendants cannot avoid liability for an

alleged misstatement merely because the misstatement is not associated with an uptick in inflation." *Id.*

Goldman raises two objections to the district court's application of the inflation-maintenance theory: (A) in its view, the theory applies only when alleged misstatements prop up "fraud-induced inflation" and the court failed to make a finding to this effect; and (B) the court erred by finding that what Goldman describes as "general statements" can ever satisfy the inflation-maintenance theory.

A. The Inflation-Maintenance Theory Does Not Require Proof of Fraud-Induced Inflation, and the District Court Applied the Correct Standard in Concluding that Goldman's Share Price Was Inflated.

It should be apparent that a statement cannot maintain price inflation unless the price is already inflated. *See id.* at 255. Accordingly, a court allowing plaintiffs to claim inflation maintenance must make a finding of price inflation. The parties agree on this basic principle. But Goldman would add that the price inflation must have been "fraud-induced." It draws this putative rule from *Vivendi*.[7]

Vivendi said no such thing. In fact, the sentence from which Goldman plucks "fraud-induced" contradicts Goldman's claim. "*Artificial inflation is not necessarily fraud-induced*, for a falsehood can exist in the market (and thereby cause artificial inflation) for reasons unrelated to

[7] Appellant Br. 29 ("Although a stock's price can be inflated for any number of reasons, the securities laws are concerned only with 'fraud-induced' inflation, *Vivendi*, 838 F.3d at 256, which is 'the difference between the stock price and what the price would have been if the defendants had spoken truthfully,' *Glickenhaus*, 787 F.3d at 418.").

fraudulent conduct." *Id.* at 256 (emphasis added). Accordingly, "the question of . . . . liability for securities fraud . . . . does [not] rest on whether the market originally arrived at a misconception about the model's safety on its own, or whether the company led the market to that misconception in the first place." *Id.* at 259.[8]

Thus, the actual issue is simply whether Goldman's share price was inflated. Goldman argues that the district court made no finding to this effect. We disagree. This Court, like every Court of Appeals that has adopted the inflation-maintenance theory, has held that if a court finds a disclosure caused a reduction in a defendant's share price, it can infer that the price was inflated by the amount of the reduction. *See id.* 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)).

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[8] The *Vivendi* defendant made essentially the same argument as Goldman in opposing the adoption of the inflation-maintenance theory. In rejecting it, we explained its inconsistency with the theory.

> [I]t is hardly illogical or inconsistent with precedent to find that a statement may cause inflation not simply by *adding* it to a stock, but by maintaining it. Were this not the case, companies could eschew securities-fraud liability whenever they actively perpetuate (*i.e.*, though affirmative misstatements) inflation that is already extant in their stock price, as long as they cannot be found liable for whatever originally introduced the inflation. Indeed, under Vivendi's approach, companies (like Vivendi) would have every incentive to maintain inflation that already exists in their stock price by making false or misleading statements.

Vivendi, 838 F.3d at 258.

The district court found that "[t]he inflation was demonstrated on [the corrective-disclosure] dates, when the falsity of the misstatements was revealed." *In re Goldman*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *2. It also credited Dr. Finnerty's testimony that "the price declines following these corrective disclosures were caused by the news of Goldman's conflicts." *Id.* We find no abuse of discretion in the court's finding that the inflation maintained by Goldman's statements equaled the price drop caused by the corrective disclosures.

B. We Decline Goldman's Request to Narrow the Inflation-Maintenance Theory.

Although these findings satisfy the inflation-maintenance doctrine, Goldman asks us to narrow the doctrine's focus. Under Goldman's proposed revision, what it terms "general statements" would be legally insufficient as evidence of price impact. Plaintiffs relying on such statements would be unable to invoke the *Basic* presumption of classwide reliance and would therefore be unable to demonstrate under Rule 23(b)(3) that classwide issues (*i.e.*, reliance on the defendant's misstatements) predominate over individual issues.

Goldman's theory is as follows. In its view, "[c]ourts have applied the narrow price maintenance theory only in two 'special circumstances.'" Appellant Br. 35 (citation omitted).[9] The first is "'unduly optimistic statement[s]'

[9] Although Goldman repeatedly frames inflation maintenance as a "narrow" alternative to inflation introduction, this is incorrect. In the wake of the Supreme Court's 2014 decision in *Halliburton II*, securities plaintiffs invoked the inflation-maintenance theory in 20/28 (71%) of federal district court cases involving a defendant's attempt to rebut the *Basic* presumption. *See* Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 Harv. L. Rev. 1067,

about specific, material financial or operational information made to 'stop[] a [stock] price from declining." *Id.* (quoting *Schleicher v. Wendt*, 618 F.3d 679, 683 (7th Cir. 2010)). The second is statements "falsely 'convey[ing] that the company ha[s] met market expectations' about a specific, material financial metric, product, or event." *Id.* (quoting *In re Scientific-Atlanta, Inc. Sec. Litig.*, 571 F. Supp. 2d 1315, 1340–41 (N.D. Ga. 2007)). Unsurprisingly, Goldman argues that neither special circumstance accounts for the alleged misstatements at issue here.

In effect, what Goldman has done is surveyed nationwide inflation-maintenance cases (some Rule 23 decisions, some not), claimed that each case fits one of its special circumstances, and thereby concluded that these are the *only* permissible applications of the theory. The problem for Goldman is that none of these cases held that the inflation-maintenance theory applies so narrowly, at the Rule 23 stage or otherwise. Nor do they distinguish "general" statements from "specific" ones. They simply apply the theory, which every Court of Appeals to adopt it has held covers all material misstatements, to the facts before them.[10]

1077 (2019). In all twenty of those cases, the district court held that the defendant failed to rebut the *Basic* presumption. *Id.*

[10] It is unsurprising that Goldman's survey of Rule 23 cases did not uncover ones involving truly general statements. As explained below, courts regularly dismiss securities claims predicated on such statements under Rule 12(b)(6) because they are too immaterial to induce reliance. Because courts virtually never entertain contested Rule 23 motions prior to the conclusion of the pleading stage, class certification opinions rarely involve what Goldman deems to be impermissibly general statements. Put differently, Rule 12(b)(6) weeds out unmeritorious cases before they ever get to the Rule 23 stage.

Goldman concedes that *ATRS I* "did not address whether general statements, like those challenged here, are capable of maintaining inflation in a stock price as a matter of law" for the purpose of class certification. *Id.* at 48. It characterizes the issue as one of "first impression in this Circuit." *Id.* In its view, we should adopt this rule because the Supreme Court's decision in *Halliburton II* allows lower courts to consider evidence of price impact at the Rule 23 stage, and so-called general statements like those at issue here "are incapable of maintaining inflation in a stock price for the same reasons that those statements are immaterial as a matter of law (as well as fact)." *Id.* (citing *Halliburton II*, 573 U.S. at 283).

We reject Goldman's proposed revision of our inflation-maintenance doctrine.

As noted earlier, one of the elements a securities plaintiff must prove to succeed on her claim is that the defendant's misstatements were "material" enough to induce the reliance of reasonable shareholders. But "materiality . . . . is not an appropriate consideration at the class certification stage." *ATRS I*, 879 F.3d at 486. "Because a failure of proof on the issue of materiality . . . . does not give rise to any prospect of individual questions overwhelming common ones, materiality need not be proved prior to Rule 23(b)(3) class certification." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 474 (2013).[11]

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[11] Goldman argues that it can challenge materiality at the Rule 23 stage. In its view, *Amgen* held only that Rule 23 courts "*need not*" consider materiality, not that they *may not* do so. To whatever extent *Amgen* is ambiguous, *Halliburton II* is clear that Rule 23 courts *may not* consider materiality. *See* 573 U.S. at 282 ("[M]ateriality . . . . *should be left to the merits stage*, because it does not bear on the predominance requirement of Rule 23(b)(3)." (emphasis added)). And *ATRS I* conclusively settled the matter in this circuit.

Goldman is not formally asking for a materiality test. But its "special circumstances" test would commandeer the inflation-maintenance theory by essentially requiring courts to ask whether the alleged misstatements are, in Goldman's words, "immaterial as a matter of law." Appellant Br. 48. This is the precise question posed by materiality.[12]

Goldman's authority for what constitutes an impermissibly "general statement" provides further evidence that its "special circumstances" test is really a means for smuggling materiality into Rule 23. Its brief contains a table of nearly a dozen cases holding that "general statements . . . . about business principles and conflicts controls are too general to cause a reasonable investor to rely upon them." *Id.* at 43–46 (quotation marks and citation omitted). But every one of these cases is the dismissal of a securities claim under Rule 12(b)(6) on the ground that the alleged misstatements were too general to be material.[13] None of them concern the issue here of whether so-called general statements that made it past the pleading stage can survive under Rule 23.

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[12] *See, e.g.*, *United States v. Litvak*, 808 F.3d 160, 175 (2d Cir. 2015) ("Where the misstatements are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance, we may find the misstatements *immaterial as a matter of law*." (emphasis added, quotation marks and citation omitted)).

[13] *See, e.g.*, *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at *36 (S.D.N.Y. Sept. 28, 2012) (holding on a motion to dismiss that "the statements are non-actionable puffery and do not constitute material misstatements"), *aff'd sub nom.*, 752 F.3d 173 (2d Cir. 2014); *Indiana Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 97–98 (2d Cir. 2016) (holding on a motion to dismiss the challenged statements do not "ris[e] to the level of materiality required to form the basis for assessing a potential investment").

Of course, just because something looks like materiality does not mean it is materiality. Price impact also resembles materiality, but defendants may attempt to disprove it at class certification. *See Halliburton II*, 573 U.S. at 282. But here, we need not elevate function over form. There are three compelling reasons for rejecting Goldman's argument.

First, and most fundamentally, Goldman's proposed rule is difficult to square with Rule 23(b)(3). Whether alleged misstatements are too general to demonstrate price impact has nothing to do with the issue of whether common questions predominate over individual ones. While Goldman's test might weed out potentially unmeritorious claims, Rule 23 is not a weed whacker for merits problems. As the Supreme Court explained in *Amgen*:

> Although we have cautioned that a court's class-certification analysis must be "rigorous" and may "entail some overlap with the merits of the plaintiff's underlying claim," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (internal quotation marks omitted), *Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage*. Merits questions may be considered to the extent—*but only to the extent*—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.

568 U.S. at 465–66 (emphasis added).[14] This is why materiality is irrelevant at the Rule 23 stage. Win or lose, the issue is common to all class members. *Id.* at 468.

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[14] *See also, e.g.*, *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 81 (2d Cir. 2015) (applying *Amgen*'s rule); *Fezzani v. Bear, Stearns & Co. Inc.*, 777 F.3d 566, 569–70 (2d Cir. 2015) (same).

The same is true here, in no small part because Goldman's test is materiality by another name. If general statements cannot maintain price inflation *because* no reasonable investor would have relied on them, then the question of inactionable generality is common to the class. For that reason, "the class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry." *Id.* at 460.

Second, Goldman's formulation of the inflation-maintenance theory is at odds with *Vivendi*. That opinion, relying on the Seventh and Eleventh Circuits whose doctrine it adopted, noted that "theories of 'inflation maintenance' and 'inflation introduction' are not separate legal categories.'" *Vivendi*, 838 F.3d at 259 (quoting *Glickenhaus*, 787 F.3d at 418).[15] Goldman's proposed rule, by applying only to inflation-maintaining statements, would make inflation maintenance and inflation introduction "separate legal categories." Goldman points to no authority holding that "general statements" like those supposedly at issue here are legally insufficient to establish inflation introduction.

Third, this Court has implicitly rejected Goldman's "special circumstances" test. *Waggoner*, a Rule 23(f) appeal allowing shareholder plaintiffs to invoke the inflation-maintenance theory, involved claims that a high-ranking Barclays trader told a magazine that it "monitored activity in [a certain high-frequency exchange] and

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[15] *See also Vivendi*, 838 F.3d at 259 (quoting *FindWhat*, 658 F.3d at 1316, for the proposition that "[t]here 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").

would remove traders who engaged in conduct that disadvantaged [its] clients." 875 F.3d at 87. The trader elsewhere stated that the high-frequency system was "built on transparency" and "had safeguards to manage toxicity, and to help its institutional clients understand how to manage their interactions with high-frequency traders." *Id.* (citation, quotation marks, and brackets omitted).

It is true that Barclays' statements were about a specific high-frequency exchange, while Goldman's challenged statements were more generally about its controls for handling conflicts of interest. But Goldman's alleged lack of, or disregard for, these controls is the specific problem that led to the corrective disclosures. *See, e.g.*, J.A. 5716 (quoting Goldman as alleging to have "extensive procedures and controls that are designed to identify and address conflicts of interest"). That Barclays mentioned a specific exchange does little to distinguish its statements from those at issue here; each is an alleged misrepresentation about general business practices.

* * *

We are not blind to the widespread understanding that class certification can pressure defendants into settling large claims, meritorious or not, because of the financial risk of going to trial. *See, e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, *J.*). Rule 23's *in terrorem* effect is the reason Congress authorized interlocutory appeals under Rule 23(f). *See* Fed R. Civ. P. 23 advisory committee's note (1998).

Referencing these legitimate policy concerns, Goldman argues that rejecting its theory would open the floodgates to unmeritorious litigation by allowing courts to certify classes that it believes should lose on the merits. Specifically, it argues that "[i]f allegations of misconduct caused a stock to drop, then investor plaintiffs could just

point to any general statement about the company's business principles or risk controls and proclaim 'price maintenance.'" Appellant Br. 52–53.

This would indeed be troubling. But our law already beats back this parade of horribles in three meaningful ways.

First, materiality challenges are fair game under Rule 12(b)(6). Dismissal at that early stage of the litigation prevents the case from ever reaching Rule 23. As Goldman's table of materiality cases demonstrates, courts regularly dismiss securities complaints because the challenged statements were too general to have induced reliance. In fact, the district court *in this case* dismissed some of the alleged misstatements for this very reason. *See Richman*, 868 F. Supp. 2d at 274. As to the statements before us now, the court rejected Goldman's materiality challenge, holding that the shareholders plausibly stated a claim for securities fraud. *Id.* at 279–80. Right or wrong, we lack the authority to review that decision at this time.[16] Rule 23 does not give defendants a do-over on materiality.[17]

Second, the Federal Rules of Civil Procedure do offer securities defendants a do-over on materiality prior to trial: summary judgment. Goldman has already moved for summary judgment in the court below. *See* District Court Docket, ECF No. 168 (Nov. 6, 2015). One of its arguments is that the alleged misstatements are immaterial as a matter of law. *See id.* at 15–17.

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[16] We express no opinion on whether the misstatements at issue here are material.

[17] Defendants may also, as Goldman did here, seek a district court's permission to take an interlocutory appeal from decisions denying motions to dismiss on materiality grounds.

Third, even though defendants may not challenge materiality at the Rule 23 stage, they may present evidence to disprove price impact when seeking to rebut the *Basic* presumption. Here, for example, Goldman presented event studies and testimony from multiple experts. The district court found this evidence insufficient—a finding we turn to momentarily. But in appropriate cases, courts will decline to certify classes on this ground.

In sum, while securities class action defendants have numerous avenues for challenging materiality, Rule 23 is not one of them. The inflation-maintenance theory does not discriminate between general and specific misstatements.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY HOLDING THAT GOLDMAN FAILED TO REBUT THE *BASIC* PRESUMPTION BY A PREPONDERANCE OF THE EVIDENCE.

Goldman's second argument is that the district court abused its discretion in holding that Goldman failed to rebut the *Basic* presumption. To the extent a "ruling on a Rule 23 requirement is supported by a finding of fact, that finding is reviewed under the 'clearly erroneous' standard." *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 480 (2d Cir. 2008), *abrogated on other grounds by Amgen*, 568 U.S. 455.

The plaintiff bears the initial burden of demonstrating that the prerequisites for the *Basic* presumption are met. *Waggoner*, 875 F.3d at 95. The prerequisites a plaintiff must prove prior to class certification are "that [the] defendants' misstatements were publicly known, their shares traded in an efficient market, and [the] plaintiffs

purchased the shares at the market price after the misstatements were made but before the truth was revealed." *ATRS I*, 879 F.3d at 481; *see Halliburton II*, 573 U.S. at 268, 276. Goldman conceded in the prior appeal that these prerequisites are met here. *ATRS I*, 879 F.3d at 484.

Once the plaintiff makes this showing, § 10(b)'s reliance requirement is presumptively satisfied. *Waggoner*, 875 F.3d at 95. At that point, the burden shifts to the defendant to rebut the presumption. *Id.* at 101–03. It may do so by showing, by a preponderance of the evidence, that the entire price decline on the corrective-disclosure dates was due to something other than its alleged misstatements. "[M]erely suggesting that another factor *also* contributed to an impact on a security's price does not establish that the fraudulent conduct complained of did not also impact the price of the security." *Id.* at 105.[18] The plaintiff may also, as the shareholders did here, present evidence of price impact to demonstrate the shortcomings of the defendant's rebuttal evidence. But it bears repeating that to invoke *Basic*, the shareholders need not prove price impact directly. *See Halliburton II*, 573 U.S. at 277–79.

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[18] Although this rule places a heavy burden on defendants, a more relaxed alternative would be illogical under *Basic*. If a corrective disclosure decreases a defendant's share price on a given date, the plaintiffs have a claim for securities fraud. That other events may have also decreased the share price on that date does not change this fact; it simply complicates the task of determining the effect of the corrective disclosure by creating a need to isolate it from the effects of the other events. By presuming reliance when its prerequisites are satisfied, *Basic* places the burden of untangling these events on the defendant. Thus, for a defendant to erase the inference that the corrective disclosure had price impact—*i.e.*, that it played some role in the price decline—it must demonstrate under the preponderance-of-the-evidence standard, using event studies or other means, that the other events explain the entire price drop.

As outlined above, the district court applied the preponderance standard, credited the shareholders' expert's theory, and rejected the theories of Goldman's experts. Goldman argues that the court (A) erroneously construed Goldman's rebuttal evidence and (B) misapplied the preponderance standard in holding that Goldman failed to rebut the *Basic* presumption.

A. The District Court Did Not Misconstrue Goldman's Evidence in Holding that It Failed to Rebut the *Basic* Presumption.

Because the *Basic* presumption applies, Goldman bears the burden of rebutting it. It must show by a preponderance of the evidence that the entire price decline on the corrective-disclosure dates was due to something other than the corrective disclosures. *See Waggoner*, 875 F.3d at 105. Goldman challenges the district court's finding that its evidence was insufficient to satisfy this burden.

1. Goldman's primary contention is that the district court clearly erred by "ignor[ing] the substance of [the] press reports" preceding the corrective disclosures that touched on its conflicts. Appellant Br. 62. In Goldman's view, the market's nonreaction to these reports proved that it was indifferent to the revelation that Goldman's statements about being conflict free were untrue.

The district court reviewed each of the news reports and concluded by a preponderance of the evidence that "[t]he absence of price movement [on these dates], ... in and of itself, is not sufficient to sever the link between the first corrective disclosure and the subsequent stock price drop." *In re Goldman*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *4. This was because the disclosures, and par-

ticularly the initial Abacus complaint, "included new material information that had not been described in any of the 36 more generic reports on conflicts." *Id.* This newly revealed "hard evidence of Goldman's client conflicts" included "direct quotes from damning emails . . . . [and] internal memoranda," as well as details about "the manner in which Goldman . . . . hid[] Paulson's role in asset selection." *Id.* at *4–5. The court also noted that because these details were "disclosed by a federal government agency," they were "obviously . . . . more reliable and credible than any of the 36 media reports, especially in the presence of the denials and rebuttals that accompanied some of the reports." *Id.* at *4. The court further found that some of the reports "were not damaging or revelatory, but rather commendatory" praise of Goldman's risk management. *Id.* at *4 n.6.

We find no clear error in the district court's weighing of the evidence. The court applied the correct legal standard and reasonably concluded by a preponderance of the evidence that the corrective disclosures revealed new and material information to the market. Goldman has no persuasive response to the court's findings that the "hard evidence" first revealed in the corrective disclosures moved the market in a way that the news reports did not.

Although it is possible that Goldman's price declined *in part* because the market feared that Goldman would be fined, this is not enough to rebut the *Basic* presumption. Moreover, there are good reasons to believe that the corrective disclosures were more significant than Goldman makes them out to be. Because the inflation-maintenance theory asks "what would have happened if [the defendant] had spoken *truthfully*," *Vivendi*, 838 F.3d at 258, Goldman's burden is to show that the market would not have

reacted had Goldman told the truth about its alleged failure to manage its conflicts. It is difficult to imagine that Goldman's shareholders would have been indifferent had Goldman disclosed its alleged failure to prevent employees from illegally advising clients to buy into CDOs that were built to fail by a hedge fund secretly shorting the investors' positions. It is therefore reasonable to assume that this disclosure would have harmed Goldman's reputation, causing at least some of its clients and potential clients to seriously reconsider trusting Goldman with their money. This lost revenue would have reduced Goldman's bottom line and caused the market to devalue its share price accordingly. These adverse consequences have nothing to do with the threat of enforcement actions, and everything to do with how Goldman managed its conflicts of interest.

2. Goldman also argues that the district court did not "address the generality of [the corrective disclosures other than the Abacus complaint]." Appellant Br. at 62–63. In its view, these disclosures were "far less detailed than the press reports of client conflicts." *Id.* at 63.

It is true that the district court focused largely on the Abacus complaint. But so did Goldman. As the court found, Dr. Choi "performed no event study concerning stock price declines following the [other] corrective disclosures." *In re Goldman*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *5. The burden of rebutting the *Basic* presumption was on Goldman, not the district court. The court's finding that the Abacus disclosure had a price impact suffices at this stage for the reasons noted above.

3. Finally, Goldman makes a one-paragraph argument that the district court misconstrued Dr. Choi's event study. As noted above, the court found extensive flaws

with Dr. Choi's study and gave little weight to his conclusions.

Goldman does not meaningfully engage with the district court's detailed rejection of Dr. Choi's report. Its most substantial argument is that the court erroneously found that Dr. Choi's opinion rested on "the premise that the first price decline is *consistent* with price declines that four other companies previously experienced upon the news of similar enforcement events." *Id.* Goldman argues that Dr. Choi actually concluded that the price declines were "*not statistically significantly different.*" Appellant Br. 67. Even if the court mistakenly referred to consistency rather than a lack of statistically significant difference—and elsewhere it used the "statistically different" terminology, *see In re Goldman*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *3—the difference is splitting hairs. Goldman does not clearly explain how this subtle difference in terminology renders clearly erroneous the court's extensive reasons for rejecting Dr. Choi's conclusions. Nor do Goldman's remaining arguments point to an abuse of discretion.

B. The District Court Correctly Applied the Preponderance Standard in Weighing the Evidence of Price Impact.

Although Goldman bears the burden of persuasion, it focuses heavily on the supposed lack of evidence the shareholders introduced to undermine its contention that its statements had no price impact.[19]

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[19] That Goldman focuses on the shareholders' evidence, and the district court began its analysis with this evidence, should not obscure the fact that Goldman bears the burden of persuasion at this stage. Once the shareholders successfully invoke *Basic*, which happened

1. Goldman first contends that the shareholders "submitted no evidence of fraud-induced inflation in Goldman Sachs' stock price that the challenged statements maintained." Appellant Br. 55. Thus, Goldman argues, the district court's finding that the shareholders invoked *Basic* rested on *allegations*, rather than evidence. As explained above, we reject Goldman's contention that the shareholders were required to submit evidence of "fraud-induced" inflation. We therefore take Goldman's argument as one that the shareholders failed to submit any evidence of price inflation.

We noted in Part I that "[t]he 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." *Vivendi*, 838 F.3d at 255 (quoting *Glickenhaus*, 787 F.3d at 415). This is precisely what the district court did:

> The Court accepts Dr. Finnerty's [the shareholders' expert] opinion that the news of Goldman's conflicts on the . . . . corrective disclosure dates negatively impacted Goldman's stock price. It is only natural that "economically significant negative news," such as these, would at least contribute to the stock price declines. Defendants attempt to undermine Dr. Finnerty's opinion, claiming in part that the underlying damages model is "completely made up." That overstates the matter. *Dr. Finnerty's model, at the very*

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here, the question is not which side has better evidence, but whether the defendant has rebutted the presumption.

> *least, establishes a link between the news of Goldman's conflicts and the subsequent stock price declines.* That is sufficient.

In re Goldman, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *4 (emphasis added, citations omitted).

We thus find no merit in Goldman's contention that the district court accepted Dr. Finnerty's model at face value or that it credited mere allegations.[20] The court reviewed the evidence, traced the price declines back to Goldman's alleged misstatements, and credited Dr. Finnerty's report. For Goldman's argument to have any force, it would need to show that the court clearly erred by accepting

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[20] In critiquing the district court's purported lack of findings, Goldman homes in on the word "allegedly" in the following passage:

> [The shareholders] claim that the alleged misstatements had impact on Goldman's stock price. Although the misstatements themselves did not inflate the stock price, they allegedly served to maintain an already inflated stock price. The inflation was demonstrated on [several] dates, when the falsity of the misstatements was revealed . . . .

In re Goldman, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at *2. This language leads Goldman to conclude that the "[district court] gave no indication that it actually weighed competing evidence or found facts," and instead "accepted at face value [the shareholders'] and their expert's '*alleg[ation]*' that the challenged statements 'served to maintain an already inflated stock price." Appellant Br. 55 (citation omitted). But Goldman misreads the district court's opinion. The language it quotes unremarkably lacks factual conclusions because it is from an impartial summary of the shareholders' evidence—what one might call the facts section of the opinion. The court saved its conclusions for the analysis section, where, as we have found, it made the necessary findings.

Dr. Finnerty's findings. Goldman has failed to make this showing.[21]

2. Goldman also argues that the news of its alleged conflicts could not have caused its share price to decline on the corrective-disclosure dates because its alleged misstatements were "consistent" with the later-revealed fact that it had significant conflicts of interest. Specifically, Goldman contends that statements such as "potential or perceived conflicts could give rise to litigation or enforcement actions," J.A. 5716, "expressly warned" the market that it might have conflicts, meaning the market should not have been surprised to learn that Goldman was in fact conflicted, Appellant Br. 61. This is doubtful. In effect, Goldman is arguing that a reasonable investor would have believed its vague statement was "consistent" with the revelation that it allegedly failed to prevent its employees from colluding with hedge funds to trick investors into buying risky securities. The district court did not abuse its discretion by rejecting that theory.

Goldman is free to make its merits arguments at summary judgment or trial. The issue here is simply whether the district court abused its discretion by finding that Goldman failed to rebut the *Basic* presumption by a preponderance of the evidence. We find no abuse of discretion in the court's reasonable conclusion that Goldman failed to meet this burden.

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[21] Goldman additionally asserts that Dr. Finnerty's testimony implied that on one date, "*70%* of Goldman Sachs' *$20.6 billion* market capitalization was 'inflation' maintained by [the alleged misstatements]." Appellant Br. 58. The shareholders accuse Goldman of cherry picking this data point using a date from the height of the financial crisis. We find no clear error in the district court's decision to choose one reasonable interpretation of the evidence over another.

III. THE DISSENT

Our colleague Judge Sullivan disagrees with our ultimate conclusion. In his view, Goldman and its co-defendants "offered persuasive and uncontradicted evidence that Goldman's share price was unaffected by earlier disclosures of Defendants' alleged conflicts of interest." Dissent Op. at 1. But the issue before us is not whether Judge Sullivan was persuaded; that task fell to Judge Crotty who conducted the hearing, heard the testimony, carefully reviewed all the evidence and analyzed the conclusions of the experts. Unlike Judge Sullivan, Judge Crotty was not persuaded. Judge Crotty was clear in his reasoning and we have reviewed it at length in our opinion through the lenses of clear error, abuse of discretion and Goldman's burden. *See supra* at 15–19, 36–46.

We also disagree with our colleague's characterization that Goldman's evidence was "uncontradicted." Goldman bore the burden of rebutting the *Basic* presumption. Judge Crotty concluded that Goldman's proffer simply came up short. The shareholders pointed out, through their expert and through comparisons of the news stories on which Goldman tied its fate here, that the conclusions of Goldman's experts were wanting if there were not equivalencies between the news stories and the "corrective disclosures."[22] Judge Crotty agreed with the shareholders; his opinion reflects his reasoning in this regard.

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[22] The dissent is quite critical of Judge Crotty's (and our) "failure to engage" with Dr. Choi's analysis. *See* Dissent Op. at 6. Our colleague must have overlooked our description of Judge Crotty's concerns about Dr. Choi's data—Dr. Choi examined only one of three disclosures—and Dr. Choi's employment of factors in his analysis that Dr. Choi himself conceded were not "generally accepted in the field." *In re Goldman*, No. 10 Civ. 3461 (PAC), 2018 WL 3854757, at

The majority opinion reviews that reasoning and finds it to have a firm basis in the facts of the record. Our dissenting friend points to no inaccuracies or misstatements of the evidence to support his view that the district court's conclusions were so clearly erroneous that they require appellate correction. It might well be that were one of us given the same task as that of the district judge we would conclude otherwise; but we cannot say there can only be one conclusion from the record presented.

Lastly, our colleague seems exceptionally eager to take on "the generic statements on which [the shareholders'] claims are based." Dissent Op. at 8. His assertion that those statements are too general as a matter of law seems to endorse Goldman's view that price maintenance cases are limited to more specific statements related to performance or corporate expectations. We disagree and have explained why in our opinion.[23]

What the dissent really wants to do is to revisit the question of whether the statements are too general as a matter of law to be deemed material. Judge Sullivan would inject materiality into our Rule 23 analysis in the name of limiting the types of statements that can be considered for price maintenance.[24] The question of whether

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*5–6. Judge Crotty had other concerns with the value of Dr. Choi's analysis as set forth above. *See supra* at 17–19.

[23] *See supra* Section I.B.

[24] The fact is that this argument is just a redux of Goldman's unsuccessful Rule 12(b)(6) argument to dismiss and its motion to reconsider that loss in the district court. "[T]he Court cannot say that Goldman's statements that it complies with the letter and spirit of the law and that its success depends on such compliance, its ability to address 'potential' conflict of interests, and valuing its reputation, would be so obviously unimportant to a reasonable investor." *Richman*, 868 F.

the statements on which plaintiffs rely were not material as a matter of law will be addressed by the district court at an appropriate time. But for now, the procedural posture of the case and our understanding of binding precedent from this Court and the Supreme Court preclude reaching the matter. If acknowledging that limitation while further recognizing that ***some (but perhaps not all)***[25] will view the merits of the shareholders' claim through our colleague's lens is "tiptoeing," *see* Dissent Op. at 8–9, then so be it. Careful footwork is often required in intricate judicial tasks.

CONCLUSION

We **AFFIRM** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

Supp. 2d at 280; *see also In re Goldman*, No. 10 Civ. 3461 (PAC) 2014 WL 2815571 at *2–6.

[25] One wonders if the folks who bought Goldman shares, thinking that Goldman assiduously guarded against conflicts of interests in its dealings with those it advised on financial matters, would be concerned not only with the fines the SEC and DOJ had in mind once specific details of Goldman's fiduciary failures came to light, but also with the financial implications to Goldman's bottom line once those who took Goldman's advice knew it was tainted and had cost them millions or billions of losses in worthless Goldman-endorsed investments. Goldman's specific assertions that it was conflict free might be seen as connected to a decision to buy, or hold on to, Goldman stock. *See supra* at 40–41.

SULLIVAN, Circuit Judge, dissenting.

It is difficult to criticize the majority's cogent and highly logical opinion, except to suggest that it perhaps misses the forest for the trees. In my view, the district court misapplied the *Basic* presumption in its analysis of price impact, essentially turning the presumption on its head. Because Defendants offered persuasive and uncontradicted evidence that Goldman's share price was unaffected by earlier disclosures of Defendants' alleged conflicts of interest – thereby severing the link that undergirds the *Basic* presumption – I would reverse the lower court's ruling and decertify the class.

As an initial matter, I agree with the majority's conclusion in Section I that the district court did not misapply the inflation-maintenance theory of price impact. Whatever the merits or flaws of that theory, it is clearly the law of this circuit and not for this panel to revisit. *See In re Vivendi Sec. Litig.,* 838 F.3d 223, 258 (2d Cir. 2016). Nevertheless, I believe that the majority uncritically accepted the district court's conclusions regarding what rebuttal evidence is necessary to overcome the *Basic* presumption. Though the *Basic* standard is well-established, it bears repeating: "[I]f a plaintiff shows that the defendant's misrepresentation was public and material and that the stock traded in a generally efficient market, he is entitled to a presumption that the misrepresentation affected the stock price;" moreover, "if the plaintiff also shows that he purchased the stock at the market price during the relevant period, he is entitled to a further presumption that he purchased the stock in reliance on the defendant's representation." *Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), 573 U.S. 258, 279 (2014). Once the *Basic* presumption has been invoked, however, a defendant may then rebut it "through '*any showing* that severs the link

between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price.'" *Waggoner v. Barclays PLC*, 875 F.3d 79, 95 (2d Cir. 2017) (emphasis added) (quoting *Halliburton II*, 573 U.S. at 269).

In support of its initial opposition to class certification, Goldman did not dispute that Plaintiffs were able to *invoke* the *Basic* presumption. *See Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.* (*ATRS I*), 879 F.3d 474, 484 (2d Cir. 2018). Instead, Goldman argued that it was able to *rebut* the presumption with evidence demonstrating the lack of price impact following earlier disclosures of the alleged conflicts. *Id.* The district court found that Goldman had not rebutted the presumption; we vacated and remanded, directing the district court to "determin[e] whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock." *Id.* at 486.

On remand, the district court held an evidentiary hearing at which Goldman offered the testimony of two experts to demonstrate that the alleged misstatements did not affect the stock price. The first, Dr. Paul Gompers, testified that 36 news reports – including stories on the front pages of *The New York Times* and *The Wall Street Journal* -- had in fact already revealed the supposed falsity of the alleged misrepresentations prior to the three "corrective disclosure" dates, with no discernible impact on the price of Goldman's shares. The second, Dr. Stephen Choi, testified that the stock price declined on the corrective disclosure dates entirely due to the news that the SEC and Department of Justice had commenced *enforcement actions* against the company – not due to the revelation that Goldman had allegedly misrepresented its approach to conflicts of interest, which, as Dr. Gompers

demonstrated, had already been revealed to the market. Plaintiffs called one expert, Dr. John Finnerty, to refute Defendants' experts' testimony. Although Dr. Finnerty principally testified that the market for Goldman stock was efficient – a point that Defendants did not dispute – Dr. Finnerty also conclusorily asserted that the 36 earlier news reports did not impact the share price because some of the reports included "denials" from Goldman, while others were less detailed than the three corrective disclosures alleged in the complaint.

Based on this testimony and the experts' reports, the district court concluded that Goldman had again failed to rebut the *Basic* presumption and certified the class. In particular, the district court relied on Dr. Finnerty's testimony, such as it was, to announce that "[t]he absence of price movement [following the earlier disclosures] . . . . is not sufficient to sever the link between the first corrective disclosure [alleged in the complaint] and the subsequent stock price drop." *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10-cv-3461 (PAC), 2018 WL 3854757, at *4 (S.D.N.Y. Aug. 14, 2018). I disagree.

First, the district court, and Dr. Finnerty, relied primarily on the "efficient market" theory, which alone is insufficient to refute persuasive rebuttal evidence regarding the lack of price impact. As set forth in his January 30, 2015 report, Dr. Finnerty was retained to determine whether Goldman's stock traded in an efficient market – a necessary precursor to Plaintiff's invocation of the *Basic* presumption. But Defendants never disputed the efficiency of the market; they presumed as much. Rather, they presented evidence of 36 earlier news reports that revealed the falsity of the misstatements alleged in the complaint and yet never moved the stock price. They argued, without contradiction, that the lack of movement in

the share price – in an efficient market – proved that the later drop was caused by something *other* than the disclosure of the alleged conflicts of interest. Neither Dr. Finnerty nor the district court could refute that conclusion or explain the lack of price movement from the earlier disclosures.[1]

Second, Dr. Finnerty made no serious attempt to refute Dr. Choi's analysis, let alone his conclusion that the stock drop was caused by the announcement of the SEC and DOJ enforcement actions rather than the underlying factual allegations. Instead of differentiating between the price impact of the conflict disclosures and the price impact of the enforcement actions, Dr. Finnerty did his best to conflate them, arguing that the two were inextricably intertwined. In the words of Dr. Finnerty:

> My analysis demonstrates that the description of Goldman's conduct embodied in those three regulatory actions is inextricably tied to the actions themselves. To put it at a very simple level, if you were telling my students what the take-away is, is you can't have a fraud charge without the fraud – without the behavior – and particularly, the SEC enforcement action does lay out the behavior that is the basis for the fraud charge.

Joint App'x at 8196. But this failure to engage with Dr. Choi undermined the very purpose of the evidentiary

[1] Dr. Finnerty's attempt to differentiate the 36 news reports from the three corrective disclosures by saying that the news reports were accompanied by "denials" from Goldman was equally conclusory and unpersuasive, particularly since many of the news reports did not include denials at all. *See* Joint App'x at 5284-5437; *see also id.* at 3146-96 (Plaintiffs' Summary of News Reports); *id.* at 2951-57 (Defendants' Summary of News Reports).

hearing, which was designed to "determin[e] whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock." *ATRS I*, 879 F.3d at 486. Although the district court was at times highly critical of Dr. Choi's studies, it accepted Dr. Finnerty's opinions at face value when it concluded that "[i]t is only natural that economically significant negative news, such as [the conflicts reiterated in the enforcement actions], would at least contribute to the stock price declines." *In re Goldman*, 2018 WL 3854757, at *4 (internal quotation marks omitted). But in addition to being wholly conclusory, that observation was largely beside the point, since it offered no clear explanation for why the market only moved after the 37th recital of fraud allegations.

Of course, the majority correctly notes, as we held in *Waggoner v. Barclays*, that Plaintiffs were not required to prove that news of enforcement actions had no effect on price. 875 F.3d at 104–05. In *Waggoner*, the plaintiffs – who were also proceeding under a price-maintenance theory – invoked the *Basic* presumption, prompting the defendants to argue that the stock price decline "was due to potential regulatory action and fines, *not* the revelation of any allegedly concealed truth." *Id.* at 104 (internal quotation marks omitted). The district court disagreed, and we affirmed, finding that the "record support[ed] the district court's conclusion that such a concern was merely a contributing factor to the decline." *Id.* In particular, we noted that the defendants' expert conceded that the "corrective disclosure .... *may* have had a bigger impact on .... price .... due to the announcement of the New York Attorney General's lawsuit and that *some* of the price reaction was independent of the specific allegations." *Id.* (alterations and internal quotation marks omitted).

But the key difference between this case and *Waggoner* is that Defendants here have demonstrated that the prior disclosures – as set forth in 36 separate news reports over as many months – had *no* impact on Goldman's stock price. Indeed, as the district court expressly acknowledged, "Dr. Finnerty *concede[d]* that Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed to the public." *In re Goldman*, 2018 WL 3854757, at *4 (emphasis added). Thus, unlike the defendants in *Waggoner*, Goldman introduced hard evidence that "sever[ed] the link between the alleged misrepresentation and . . . . the price . . . . paid by the plaintiff." *Waggoner*, 875 F.3d at 95 (quoting *Halliburton II,* 573 U.S. at 269). If such evidence can be neutralized by the mere assertion that the SEC's repackaging of those disclosures must have "at least contribute[d] to the stock price declines," *In re Goldman*, 2018 WL 3854757, at *4, then the *Basic* presumption is truly irrebuttable and class certification is all but a certainty in every case.

Finally, I think it's fair for this court to consider the nature of the alleged misstatements in assessing whether and why "the misrepresentations did not in fact affect the market price of Goldman stock." *ATRS I*, 879 F.3d at 486. Although the majority concedes that "[p]rice impact . . . . resembles materiality" and may be "disprove[n] . . . . at class certification," it then strains to avoid looking at the statements themselves for fear that such a review amounts to "smuggling materiality into Rule 23." Maj. Op. at 29, 30. I disagree.

Candidly, I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact. Here, the obvious explanation for why the share price didn't move after 36 separate news stories on the

subject of Goldman's conflicts is that no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based. The majority tiptoes around this fact, noting on the one hand that "courts regularly dismiss securities complaints [at the motion to dismiss stage] because the challenged statements were too general to have induced reliance," while tepidly insisting that "[w]e express no opinion on whether the misstatements at issue here are material," since "[r]ight or wrong, we lack the authority to review [the district court's materiality findings] at this time." *Id.* at 34 & n.16. I don't believe that such rigid compartmentalization is possible, much less required by *Amgen, Halliburton II,* or *ATRS I.* Once a defendant has challenged the *Basic* presumption and put forth evidence demonstrating that the misrepresentation did not affect share price, a reviewing court is free to consider the alleged misrepresentations in order to assess their impact on price. The mere fact that such an inquiry "resembles" an assessment of materiality does not make it improper.

Here, the generic quality of Goldman's alleged misstatements, coupled with the undisputed fact that "Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed to the public," *In re Goldman*, 2018 WL 3854757, at *4, clearly compels the conclusion that the stock drop following the corrective disclosures was attributable to something *other* than the misstatements alleged in the complaint. The most obvious explanation, consistent with Dr. Choi's report, is that the drop was caused by news that the SEC and DOJ were pursuing enforcement actions against Goldman. But even without Dr. Choi's testimony, the fact remains that Plaintiffs offered no hard evidence, expert or otherwise, to refute Goldman's proof severing the link between the alleged misrepresentation and the

price paid by Plaintiffs for Goldman shares. It therefore seems clear that Defendants "established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock." *ATRS I*, 879 F.3d at 486.

Accordingly, I would reverse the finding of the district court with respect to the *Basic* presumption and decertify the class.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE GOLDMAN SACHS GROUP, INC.,
SECURITIES LITIGATION

No. 10 Civ. 3461

Filed: August 14, 2018

OPINION & ORDER

CROTTY, United States District Judge.

Lead Plaintiffs allege that Goldman Sachs Group, Inc. ("Goldman") and some of its senior executives (collectively, "Defendants") violated Section 10(b) and Rule 10b-5; and Section 20(a) of the Exchange Act by making misstatements about Goldman's conflicts of interest policies and business practices, revealed to be false by three reports of government investigations into Goldman's conflicted role in certain collateralized debt obligation ("CDO") transactions.

Previously, the Court (1) granted Defendants' motion to dismiss claims regarding their failure to disclose Goldman's receipt of Wells notices from the Securities and Exchange Commission ("SEC"), but (2) denied the motion with respect to claims that Goldman had made misstatements about its conflicts of interest. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261 (S.D.N.Y.

2012). The Court also denied the Defendants' motion for partial reconsideration of the motion to dismiss, *see In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2014 WL 2815571 (S.D.N.Y. Jun. 23, 2014), and to certify for interlocutory appeal the Court's denial of reconsideration, *see In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2014 WL 5002090 (S.D.N.Y. Oct. 7, 2014). Subsequently, Plaintiffs moved for class certification, and on September 24, 2015, the Court certified the following class:

> All persons or entities who, between February 5, 2007, and June 10, 2010, purchased or otherwise acquired the common stock of The Goldman Sachs Group, Inc. ('Goldman' or the 'Company'), and were damaged thereby.

See In re Goldman Sachs Grp., Inc. Sec. Litig., 2015 WL 5613150, at *1 (S.D.N.Y. 2015).

Defendants took an interlocutory appeal. The Second Circuit agreed with the Court that Plaintiffs had satisfied the four requirements of Rule 23(a), and that Plaintiffs had "established the preliminary elements to invoke the *Basic* presumption of reliance," *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc. ("Arkansas Teachers")*, 879 F.3d 474, 482, 484 (2d Cir. 2018). The Second Circuit, however, vacated the class certification and remanded the case for further proceedings. The Second Circuit directed the Court to reconsider whether Defendants have rebutted the *Basic* presumption by a preponderance of the evidence and "encourage[d] the court to hold any evidentiary hearing or oral argument it deems appropriate under the circumstances." *Id.* at 485–86.[1]

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[1] The Court assumes familiarity with the prior decisions on this matter. *Richman*, 868 F. Supp. 2d at 261; *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2014 WL 2815571; *In re Goldman Sachs Grp., Inc.*

On remand, both parties submitted supplemental briefs, and the Court held an evidentiary hearing and heard oral argument on July 24 and 25, 2018, respectively. At the evidentiary hearing, Defendants called two experts—Dr. Gompers and Dr. Choi—who testified that the alleged misstatements had no price impact and that the price declines following the alleged corrective disclosures were due entirely to the news of enforcement actions. Plaintiffs called one expert—Dr. Finnerty—who disputed the methods and conclusions of Defendants' experts.

Upon due consideration of arguments and evidence before the Court, the Court determines that Defendants have not rebutted the *Basic* presumption by a preponderance of the evidence. Accordingly, the motion for class certification is GRANTED.

APPLICABLE LAW

Plaintiffs bringing a securities fraud claim under Section 10(b) of the Exchange Act must demonstrate that defendants made a material misrepresentation and that the plaintiffs relied on it. *In re Insys Therapeutics, Inc. Sec. Litig.*, 2018 WL 2943746, at *3 (S.D.N.Y. 2018). Plaintiffs seeking class certification under Fed. R. Civ. P. 23(b)(3) must demonstrate: (i) that questions of law or fact common to class members predominate over any questions affecting only individual members, and (ii) that a class action is superior to other available methods.

Plaintiffs bringing a securities fraud claim as a class are entitled to a presumption (the "*Basic* presumption") that all plaintiffs relied on the defendants' misrepresentation—establishing commonality of the reliance element—

Sec. Litig., 2014 WL 5002090; *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2015 WL 5613150; and *Arkansas Teachers*, 879 F.3d at 474.

"so long as [the misrepresentation] was reflected in the market price [of securities] at the time of [the] transaction." *Basic v. Levinson*, 485 U.S. 224, 247 (1988); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 813 (2011) ("*Halliburton I*"). The *Basic* presumption, however, can be rebutted at the class certification stage with evidence that the defendants' misrepresentation had no price impact. *Halliburton Co. v. Erica P. John Fund, Inc. ("Halliburton II")*, 134 S. Ct. 2398, 2414 (2014). Defendants "bear the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence." *Arkansas Teachers*, 879 F.3d at 478 (citing *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017)). Defendants "must demonstrate that the misrepresentation did not in fact affect the stock's price." *Id.* at 484.

DISCUSSION

There is no dispute "that [P]laintiffs [have] established the preliminary elements to invoke the *Basic* presumption of reliance." *Arkansas Teachers*, 879 F,3d at 484. The parties "also agree that [Defendants] may submit rebuttal evidence of a lack of price impact at the class certification stage," *id.*; but Defendants "bear the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence," *id.* at 478. The question for the Court then is rather simple and straight forward: have Defendants demonstrated, by a preponderance of the evidence, that the alleged misstatements had no price impact? For the reasons set forth below, the Court concludes that Defendants have not rebutted the *Basic* presumption by a preponderance of the evidence.

I. EVIDENCE OF PRICE IMPACT

Plaintiffs claim that the alleged misstatements had impact on Goldman's stock price. Although the misstatements themselves did not inflate the stock price, they allegedly served to maintain an already inflated stock price. The inflation was demonstrated on three dates, when the falsity of the misstatements was revealed: (i) April 16, 2010, when the SEC filed a lawsuit against Goldman for sponsoring the ABACUS CDO without disclosing to potential CDO investors that a hedge fund, Paulson & Co. Inc., "played an active and determinative role in the asset selection process," Compl. ¶¶ 63–65, 307; (ii) April 30, 2010, when the press reported that the Department of Justice ("DOJ") was investigating Goldman's mortgage-related matters, *id.* ¶¶ 318, 319, 334; and (iii) June 10, 2010, when the press reported that the SEC was investigating Goldman's alleged conflicts in the Hudson CDO, *id.* ¶¶ 322, 335.[2] Dr. Finnerty, Plaintiffs' expert, stated that the price declines following these corrective disclosures were caused by the news of Goldman's conflicts. ECF 193-11 ("1/30/2015 Finnerty Decl.") ¶¶ 52–63, 68–80.

II. DEFENDANTS' REBUTTAL EVIDENCE

Defendants label the Plaintiffs' price impact theory "preposterous." Tr.[3] at 232:9. According to Defendants, (1) the lack of stock price movement on 36 dates when published reports commented on Goldman's conflicts—all before the three corrective disclosures—demonstrates

[2] The alleged misstatements and the corresponding corrective disclosures are detailed in the Court's September 24, 2015 order. *See In re Goldman Sachs Grp., Inc. Sec. Litig., 2015 WL 5613150, at *1–*2*

[3] Tr. refers to the transcript of the evidentiary hearing and oral argument held on July 25 and 26, 2018.

that the alleged misstatements did not cause any price inflation; and (2) the price declines following three alleged corrective disclosures were due *entirely* to the news of enforcement actions, not the reports of Goldman's conflicts.

Defendants' arguments rely heavily on two experts who testified at the July 24, 2018 evidentiary hearing: Drs. Paul Gompers and Stephen Choi. Dr. Gompers reported that Goldman's stock price did not move in response to articles published on 36 dates regarding Goldman's conflicts, including the ABACUS, Hudson and other CDO deals, all of which occurred before the three corrective disclosure dates. *See* ECF 193-4 ("4/6/2015 Gompers Decl.") ¶¶ 48–60, Exs. 5 & 6; ECF 193-6 ("7/2/2015 Gompers Decl.") ¶¶ 48–76, Exs. 2 & 3. This lack of price movement supposedly proves that the misstatements had no price impact. 4/6/2015 Gompers Decl. ¶¶ 48–60. It also allegedly proves that the revelation of client conflicts did not contribute to the stock price declines that followed the three corrective disclosures. *Id.* ¶¶ 61–95; ECF 193-5 ("6/23/2015 Gompers Decl.") ¶¶ 13–18; 7/2/2015 Gompers Decl. ¶¶ 80–124.

Dr. Choi builds off of Dr. Gompers' opinion and provides an alternative explanation for the stock price declines that followed the three corrective disclosures. Since the conflicts were reported on 36 separate occasions with no price movement, *see* 4/6/2015 Gompers Decl. ¶¶ 48–60, the three price drops must have been due exclusively to the news of enforcement activities. ECF 193-8 ("7/2/2015 Choi Decl.") ¶¶ 24–56, 66–81. The basis for Dr. Choi's opinion is an event study[4] he conducted concerning the

[4] An event study is a standard statistical technique that is used to test whether a security's price reaction to a news announcement (or some other event) is statistically significant. *See* 1/30/2015 Finnerty Decl. ¶ 32.

first corrective disclosure on April 16, 2010: the ABACUS enforcement action. The ABACUS enforcement action was purportedly unusual because it: (1) was not accompanied by concurrent resolution (usually SEC complaints are settled at the time of announcement of the enforcement action); (2) included scienter-based charges; and (3) charged not only Goldman itself, but also an individual (Mr. Tourre). *See id.* ¶ 30. Dr. Choi used these characteristics (which he denominated as the "severity factors") to identify four other enforcement events (from a group of 117) that are similar to the ABACUS enforcement action, and concluded that the *average* price decline of -8.07% following these four enforcement events[5] was driven entirely by the "severity factors" specifically tied to the news of enforcement events. *Id.* ¶¶ 31–38. Further, because the average price decline of -8.07% is not statistically different from the price decline of -9.27% that Goldman experienced following the ABACUS enforcement action, Dr. Choi concluded that the entirety of the -9.27% price drop was due to the news of the enforcement event itself, rather than the revelation of Goldman's client conflicts. *Id.* ¶¶ 24–42.

III. INSUFFICIENT EVIDENCE OF LACK OF PRICE IMPACT

Under *Barclays* and *Arkansas Teachers*, the *Basic* presumption can be rebutted by Defendants' demonstration, by a preponderance of the evidence, that the alleged

[5] The price declines associated with the four enforcement events had large variance: -3.34%, -3.73%, -8.13%, and -17.09%. The average of -8.07% could only be achieved by including an outlier enforcement event that had a price drop of -17.09%.

misstatements did not contribute to any of the price declines that followed the three corrective disclosures, that is, the statements had no price impact.

Upon due consideration of the parties' briefs, expert reports, their testimony, and oral argument, the Court concludes that Defendants have failed to establish, by a preponderance of the evidence, that the alleged misstatements had no price impact. Defendants have failed to tip the scale in their favor on this issue.

A. Link Between News of Goldman's Conflicts and Stock Price Declines

The Court accepts Dr. Finnerty's opinion that the news of Goldman's conflicts on the three corrective disclosure dates negatively impacted Goldman's stock price. *See* 1/15/2015 Finnerty Decl. ¶¶ 62, 63, 74, 75, 79, 80. It is only natural that "economically significant negative news," such as these, would at least contribute to the stock price declines. *Id.* ¶ 62. Defendants attempt to undermine Dr. Finnerty's opinion, claiming in part that the underlying damages model is "completely made up." Tr. 233:20. That overstates the matter. Dr. Finnerty's model, at the very least, establishes a link between the news of Goldman's conflicts and the subsequent stock price declines. That is sufficient.

B. Lack of Price Movement Following 36 Reports of Conflicts

Defendants' attempts to demonstrate the misstatements' complete lack of price impact are not persuasive. Dr. Gompers claims, and Dr. Finnerty concedes, that Goldman's stock price did not move on any of the 36 dates on which the falsity of the alleged misstatements was revealed to the public. 4/6/2015 Gompers Decl. ¶¶ 48–60;

8/7/2015 Finnerty Decl. ¶ 19; Tr. at 209:22–210:6. According to Defendants, this lack of price movement demonstrates that: (1) the alleged misstatements did not support any price inflation; and (2) the price declines following the three corrective disclosures could not have been caused by the news of Goldman's conflicts.

The absence of price movement, however, in and of itself, is not sufficient to sever the link between the first corrective disclosure and the subsequent stock price drop. The first corrective disclosure included new material information that had not been described in any of the 36 more generic reports on conflicts.[6] The first corrective disclosure (*i.e.*, the SEC's ABACUS complaint) detailed the nature and extent of Goldman's client conflicts for the first time, Although there had been reports and commentaries suggestive of Goldman's conflicts in the ABACUS deal, the ABACUS complaint was the first to detail it. *Compare S.E.C. v. Goldman Sachs & Co.*, Case No. 10 Civ. 3229, ECF 1 ("ABACUS Compl.") ¶¶ 15–51 *with* ECF 193-34; 193-36. The details, such as the manner in

[6] The Court notes that the tenor and quality of 36 reports vary significantly. Some of the reports suggest possible or theoretical conflicts. *See, e.g.*, ECF 193-21 ("But there is no evidence that Goldman did wrong by . . . conversing with Mr. Paulson about financial conditions, if it actually did the latter."). But others appear to be a *cri de coeur* from sworn enemies. *See, e.g.*, ECF 193-30 ("The world's most powerful investment bank is a great vampire squid wrapped around the face of humanity, relentlessly jamming its blood funnel into anything that smells like money."). Still others were not damaging or revelatory, but rather commendatory: they praised Goldman for managing its conflicts and still outperforming competitors. *See, e.g.*, ECF 193-20 (an article entitled "Goldman's risk control offers right example of governance"); ECF 193-26 ("Goldman's happier outcome was not only a matter of being on the right side of the trade. It is generally conceded that the firm had a better handle on its risk than most other investment banks.").

which Goldman engaged ACA to hide Paulson's role in asset selection, disclosed by a federal government agency, obviously rendered the ABACUS complaint more reliable and credible than any of the 36 media reports, especially in the presence of the denials and rebuttals that accompanied some of the reports. 5/15/2015 Finnerty Decl. ¶¶ 183–86.

Moreover, the ABACUS complaint was the first to expose hard evidence of Goldman's client conflicts. It included direct quotes from damning emails between Mr. Tourre (a former Goldman employee) and others, and from Goldman's internal memoranda, disclosing hard evidence that Goldman had indeed engaged in conflicts to its own advantage. *See* ABACUS Compl. ¶¶ 17, 18, 21, 23, 24, 28–34, 43. This was the first time that any hard evidence of Goldman's conflicts was reported. *See, e.g.*, Tr. at 82:6–7 (Dr. Gompers testifying: "I am unaware of any of those e-mails being public prior to the publication or the filing of the SEC complaint."). Neither Dr. Gompers nor Dr. Choi credibly explains how such hard evidence did not contribute to the price decline following the first corrective disclosure.[7]

[7] Dr. Gompers testified that "the internal e-mails [disclosed in the ABACUS complaint] didn't have a price impact" because the Senate's disclosure of additional internal e-mails on April 26, 2010 had no price impact. *See* Tr. at 92:17–93:4. The Court rejects this testimony. The Senate's disclosure of e-mails occurred on April 26, 2010, *after* the filing of the ABACUS complaint on April 16, 2010 and presumably *after* the dissipation of price inflation that had been sustained by the e-mail evidence in the ABACUS complaint. The lack of price movement subsequent to the Senate's e-mail disclosures has no bearing on whether the e-mails in the ABACUS complaint sustained inflation.

C. Dr. Choi's Event Study

Defendants put a significant emphasis on Dr. Choi's opinion that the stock price declines following the three corrective disclosures were due entirely to the news of enforcement actions.

As a threshold matter, Dr. Choi's conclusion is not supported by his event study. Yes, Dr. Choi performed an event study concerning the stock price decline following the first corrective disclosure (the "first price decline"). But he has performed no event study concerning stock price declines following the second and third corrective disclosures (the "second price decline" and the "third price decline", respectively).[8] There is no good reason to extend Dr. Choi's findings on the first price decline to those second and third price declines; Dr. Choi's opinion should be limited to the first price decline that he actually analyzed.

Dr. Choi's opinion, even with respect to the first price decline, may not be reliable. It is wholly predicated on the premise that the first price decline is *consistent* with price declines that four other companies previously experienced upon the news of similar enforcement events. This observation of consistency is unreliable for four reasons.

First, Dr. Choi selected four enforcement events (from the pool of 117) using three arbitrary characteristics which he denominated as "severity factors." He concedes that he was the first person to use these "severity factors" together, and that these "severity factors" are not generally accepted in the field. *See* Tr. at 142:6-143:11.

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[8] Dr. Choi claimed that it was impossible to design a reliable event study for the second and third price declines. Tr. at 116:19–117:9; 119:17–120:7. His claim was not supported by any authority or literature.

Accordingly, his use of the "severity factors" casts doubt on his opinion, especially because the selected enforcement events (1) did not involve allegations concerning mismanagement of conflicts of interest, as here, and (2) did not involve companies that were similar to Goldman in terms of business operations and size. *See* ECF 193-14 ("8/7/2015 Finnerty Decl.") ¶¶ 95–97.

Second, Dr. Choi's event study does not account for the allegations of misconduct underlying the four selected enforcement events. Tr. at 137:10-138:4. Previously, he has stated that the underlying allegations would impact the stock price. *See* Choi, S., A. Wiechman, and A. Pritchard, *Scandal Enforcement at the SEC: The Arc of the Option Backdating Investigations*, 15 Am. L. & Econ. Rev., pp. 542–77 (2013) ("the market response to an announcement of an option backdating issue is less than the market response to an accounting issue").[9]

Third, Dr. Choi quantified the consistency of price declines by comparing the first price decline with the *average* price decline of *four* selected enforcement events. But 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 samples is large, as here. *See* 8/7/2015 Finnerty Decl. ¶¶ 99–104.

Fourth, Dr. Choi compared the first price decline with the average price decline using a two-sample t-test. But "[a] *t*-test is not appropriate for small samples drawn from a population that is not normal." *Butt v. United Bhd. of Carpenters & Joiners of Arn.*, 2016 WL 3365772, at *1 (E.D. Pa. June 16, 2016) (quoting Reference Manual on

[9] Available at https://ideas.repec.org/a/oup/amlawe/v15y2013i2p542-577.html (last visited Aug. 14, 2018).

Scientific Evidence, Third Edition from the Federal Judicial Center). Dr. Choi fails to demonstrate that the *t*-test based on two samples is reliable, or that the samples were drawn from a population that follows a normal distribution. *See* Tr. at 176:18–177:3.

As discussed above, the Second Circuit directed the Court to determine whether Defendants have demonstrated, by a preponderance of the evidence, that the alleged misstatements had no price impact. 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. There is insufficient evidence to conclude otherwise. Accordingly, the motion for class certification is granted.

At various points, Defendants hint at previously rejected arguments: that the alleged misstatements are not actionable and that the loss causation cannot be demonstrated here. *See* ECF 192 at 5 n.2; Tr. at 232:2–11; 233:21–234:3; 251:11–252:11; 263:2–266:4. The Court rejects them again. *See Richman*, 868 F. Supp. 2d at 277–83; *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2014 WL 2815571, *5–*6.

CONCLUSION

For the reasons set forth above, the Court concludes that Defendants have failed to meet their burden of proof: the *Basic* presumption is not rebutted and the motion for class certification is granted. The Clerk of Court is directed to terminate the pending motion at ECF 135.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
OF APPEALS FOR THE SECOND CIRCUIT

No. 16-250

August Term 2016

Argued: March 15, 2017

Decided: January 12, 2018

ARKANSAS TEACHERS RETIREMENT SYSTEM, West Virginia Investment Management Board, Plumbers and Pipefitters Pension Group, Ilene Richman, Individually and on Behalf of All Others Similarly Situated, Pablo Elizondo, Howard Sorkin, Individually and on Behalf of All Others Similarly Situated, Tivka Bochner, Ehsan Afshani, Louis Gold, Thomas Draft, Individually and on Behalf of All Others Similarly Situated,
Plaintiffs–Appellees,

v.

GOLDMAN SACHS GROUP, INC., Lloyd C. Blankfein, David A. Viniar, Gary D. Cohn,
Defendants–Appellants.

Before: WESLEY, CABRANES, Circuit Judges, and SESSIONS, District Judge.

OPINION

WESLEY, Circuit Judge.

Investors in a securities fraud class action traditionally have a problem proving that "questions of law or fact common to class members predominate over . . . questions affecting only individual members" under Federal Rule of Civil Procedure 23(b)(3). The presumption established in *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L.Ed.2d 194 (1988), addressed that problem by allowing courts to presume that the price of stock traded in an efficient market reflects all public, material information—including misrepresentations—and that investors rely on the integrity of the market price when they choose to buy or sell stock. *Basic* also established, however, that defendants may rebut the presumption, and therefore defeat class certification, by showing the misrepresentations did not actually affect the price of the stock. The question presented in this case is what defendants must do to meet that burden.

In light of this Court's recent pronouncement that defendants bear the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence, *see Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), and for the additional reasons stated herein, we VACATE the September 24, 2015 Order of the United States District Court for the Southern District of New York (Crotty, *J.*) granting plaintiff's motion for class certification and REMAND for further proceedings consistent with this opinion.

BACKGROUND

Plaintiffs-appellees acquired shares of common stock in The Goldman Sachs Group, Inc. ("Goldman") between February 5, 2007 and June 10, 2010. In July 2011, they

commenced a securities fraud action in the District Court against Goldman and several of its directors (collectively, "defendants"), for violating section 10(b) of the Securities Exchange Act and Rule 10b–5 promulgated thereunder. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b–5.

I. PLAINTIFF'S ALLEGATIONS OF FRAUD

In their consolidated class action complaint, plaintiffs alleged that defendants made material misstatements about Goldman's efforts to avoid conflicts of interest, causing the value of their stock to decline.[1] Specifically, they alleged that defendants made the following statements in Goldman's Form 10–K filings and Annual Report, as well as in shareholder conference calls:

> Our reputation is one of our most important assets. As we have expanded the scope of our business and our client base, we increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict, or are perceived to conflict, with the interest of another client. . . .
>
> We have extensive procedures and controls that are designed to identify and address conflicts of interest. . . .

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[1] Plaintiffs also alleged defendants failed to disclose Goldman's receipt of "Wells Notices," which are sent by the SEC in order to inform a firm that the SEC intends to bring an enforcement action against it. The District Court dismissed that cause of action and it is not at issue in this appeal. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F.Supp.2d 261, 269, 275 (S.D.N.Y. 2012).

> Our clients' interests always come first. Our experience shows that if we serve our clients well, our own success will follow. . . .
>
> We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard. . . .
>
> Most importantly, and the basic reason for our success, is our extraordinary focus on our clients. . . .
>
> Integrity and honesty are at the heart of our business. . . .

Joint App'x 81–87.

Plaintiffs claimed that these statements about Goldman's efforts to avoid conflicts of interest were false and misleading because Goldman acted in direct conflict with the interests of its clients in at least four collateralized debt obligation ("CDO") transactions involving subprime mortgages between 2006 and 2007, most notably the Abacus 2007 AC–1 ("Abacus") transaction involving hedge-fund client Paulson & Co. Plaintiffs alleged that Goldman permitted Paulson, its client, to play an active role in the asset selection process for Abacus, without revealing to institutional investors that Paulson held the sole short position and thus chose particularly risky mortgages that it hoped "would perform poorly or fail." Plaintiffs claimed that Goldman's role in Abacus, which ultimately resulted in a $550 million settlement with the SEC, "allow[ed] a favored client to benefit at the expense of Goldman's other clients," creating a conflict of interest at odds with the company's public statements.

The complaint asserted that Goldman created similar conflicts of interest in three other CDO transactions in-

volving subprime mortgages: Hudson Mezzanine Funding 2006–1 ("Hudson"), Anderson Mezzanine Funding 2007–1 ("Anderson"), and Timberwolf I ("Timberwolf"). Goldman allegedly contributed equity to the portfolios in those transactions and told investors it was "aligned" with them, while simultaneously holding substantial short positions opposite their investments.

Although plaintiffs invested in Goldman—but not any of the CDOs described above—they claimed Goldman's conflicted roles in the transactions revealed that the company did not have "extensive procedures and controls . . . designed to identify and address conflicts of interest" and that it was not "dedicated to complying fully with the letter and spirit of the laws," as its public statements had suggested.

Plaintiffs alleged that news of government enforcement actions against Goldman on three occasions in mid-2010 revealed the falsity of defendants' statements and caused the company's share prices to decline. On April 16, 2010, the SEC filed a securities fraud action against Goldman and one of its employees regarding the Abacus transaction, for failing to disclose to potential investors that Paulson played a significant role in the asset selection process. Following the announcement, the company's stock price declined 13% from $184.27 to $160.70 per share on April 16, 2010. On April 30, 2010, the company's share price dropped another 9% from $160.24 to $145.20 after the *Wall Street Journal* reported that Goldman was under investigation by the Department of Justice for its purported role in the CDOs. And on June 10, 2010, the press

reported that the SEC was investigating Goldman's conduct in the Hudson CDO, which resulted in a further 2% decline in the price of Goldman stock.[2]

According to plaintiffs, these three "corrective disclosures"[3] revealed to the market the falsity of defendants' statements regarding Goldman's efforts to avoid conflicts of interest. Plaintiffs claimed that, on April 16, April 30, and June 10, 2010, the market learned for the first time that Goldman had created "clear conflicts of interest with its own clients" by "intentionally packag[ing] and s[elling] . . . securities that were designed to fail, while at the same time reaping billions for itself or its favored clients by taking massive short positions" in the same transactions. Plaintiffs alleged that defendants made the misstatements with the intent to defraud Goldman's shareholders, and that they lost, in total, over $13 billion as a result of defendants' fraud.

Defendants initially moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), arguing the alleged misstatements were too general and vague to be actionable as a matter of law. The District Court denied defendants' motion, holding that

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[2] The Complaint identified a fourth corrective disclosure on April 26, 2010, but plaintiffs have abandoned any reliance on that disclosure, which did not contain news of government enforcement activities and caused no statistically significant movement in the price of Goldman's stock.

[3] A "corrective disclosure" is an announcement or series of announcements that reveals to the market the falsity of a prior statement. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005)

plaintiffs sufficiently pleaded all six elements of a securities fraud action.[4] *See Richman,* 868 F.Supp.2d at 271–72, 279. The District Court subsequently denied defendants' motions for reconsideration and interlocutory appeal. *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2014 WL 2815571, at *6 (S.D.N.Y. June 23, 2014); *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2014 WL 5002090, at *3 (S.D.N.Y. Oct. 7, 2014).

II. PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiffs then moved to certify a class consisting of "[a]ll persons or entities who, between February 5, 2007 and June 10, 2010, purchased or otherwise acquired the common stock of The Goldman Sachs Group, Inc. . . . and were damaged thereby." Plaintiffs argued (and defendants did not dispute) that they satisfied the requirements for class certification under Federal Rule of Civil Procedure 23(a): The class was sufficiently numerous, there were common issues of law or fact, the claims of the representative parties were typical of the claims of the class, and the representative parties would fairly and adequately protect the interests of the class.

Plaintiffs also argued they satisfied Rule 23(b)(3) because common issues of law or fact predominated over issues affecting only individual members and a class action was the superior method of adjudicating the controversy. *See* FED. R. CIV. P. 23(b)(3). To establish the predomi-

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[4] Those elements are "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Stoneridge Inv. Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L.Ed.2d 627 (2008).

nance of class-wide issues with respect to the reliance element of their securities fraud claim, plaintiffs argued they were entitled to a presumption that all class members relied on defendants' misstatements in choosing to buy Goldman stock. The presumption derives from *Basic*, 485 U.S. 224, 108 S. Ct. 978, and is based on the theory "that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246, 108 S. Ct. 978. If plaintiffs in a securities fraud class action establish certain prerequisites—namely, that defendants' misstatements were publicly known, their shares traded in an efficient market, and plaintiffs purchased the shares at the market price after the misstatements were made but before the truth was revealed—the court presumes the market price reflected the misstatements and that all class members relied on that price when they chose to buy or sell shares. *See Halliburton Co. v. Erica P. John Fund, Inc.* (*Halliburton II*), —— U.S. ——, 134 S. Ct. 2398, 2413, 189 L.Ed.2d 339 (2014).

Defendants opposed class certification by attempting to rebut the *Basic* presumption. They presented evidence in the form of declarations and sworn affidavits that Goldman stock experienced no price increase on the dates the statements were made, and no price decrease on 34 occasions before 2010 when the press reported Goldman's conflicts of interest in the Abacus, Hudson, Anderson, and Timberwolf transactions.[5] For example, as early as De-

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[5] Both plaintiffs' and defendants' experts used "event studies" to determine whether an event or news report caused a statistically significant change in the price of Goldman's stock. An event study isolates the stock price movement attributable to a company (as opposed to market-wide or industry-wide movements) and then examines whether the price movement on a given date is outside the range of

cember 6, 2007, the *Financial Times* ran a story suggesting that "Goldman's Glory May [B]e Short-lived," due to numerous accusations that it "behave[ed] unethically and perhaps [broke] the law" in taking massive short positions in the U.S. housing market. The article questioned Goldman's ability to "manage conflicts," noting that "Goldman ha[d] been more aggressive than any other bank" in "advis[ing] a company on a transaction, financ[ing] it and invest[ing] its own money." Approximately one week later, the *Dow Jones Business News* reported that Goldman had been subpoenaed for its role in various CDO transactions that presented a "massive conflict of interest with major liabilities." Defendants' expert presented evidence that Goldman's stock experienced no price decline in response to these or similar reports about Goldman's conflicts in the CDOs.

Because the market did not react to defendants' misstatements on the dates they were made or on the dates defendants claim the truth about Goldman's conflicts was revealed, defendants argued the misstatements did not affect the price of Goldman stock and plaintiffs could not have relied on them in choosing to buy shares at that price.[6]

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typical random stock price fluctuations observed for that stock. If the isolated stock price movement falls outside the range of typical random stock price fluctuations, it is statistically significant. If the stock price movement is indistinguishable from random price fluctuations, it cannot be attributed to company-specific information announced on the event date. *See* Mark L. Mitchell & Jeffry M. Netter, *The Role of Financial Economics in Securities Fraud Cases: Applications at the Securities & Exchange Commission*, 49 BUS. LAW. 545, 556–69 (1994).

[6] Defendants challenged the materiality of the misstatements again in their opposition to the motion for class certification. Although ma-

Without holding an evidentiary hearing or oral argument, the District Court rejected defendants' arguments and certified the class. *See In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015). It concluded plaintiffs met all four elements of Rule 23(a) and established predominance under Rule 23(b)(3) by invoking the *Basic* presumption of reliance. *Id.* at *3, 7. Although the court acknowledged that defendants may rebut the *Basic* presumption by a "preponderance of the evidence," *id.* at *4 n.3, it held that defendants failed to do so in this case because they "d[id] not provide conclusive evidence that no link exists between the price decline [of Goldman stock] and the misrepresentation[s]." *Id.* at *7.

The District Court rejected defendants' evidence that the price of Goldman stock did not increase on the dates the misstatements were made, because it determined they could have served to maintain an already inflated stock price. *See id.* at *6. It also rejected defendants' evidence concerning a lack of price impact when the news reported Goldman's conflicts in the CDOs, because, in its view, defendants' evidence was either "an inappropriate truth on the market defense" or an argument for materiality that the court "w[ould] not consider" at the class certification stage. *Id.* at *6 (internal quotation marks omitted). Even if it were to consider the evidence, the court held it did not rebut the *Basic* presumption of reliance because it "failed to conclusively sever th[e] link" between defendants'

teriality is "an essential predicate of the fraud-on-the-market theory," it is common to the class and does not bear on the predominance requirement of Rule 23(b)(3). *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 568 U.S. 455, 466–67, 133 S. Ct. 1184, 185 L.Ed.2d 308 (2013). Therefore, 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.

statements and the market price of Goldman stock. *Id.* at *7. Accordingly, the court held plaintiffs were entitled to the presumption of reliance and certified the class. *Id.* We granted defendants' petition for leave to appeal pursuant to Federal Rule of Civil Procedure 23(f).

DISCUSSION

No one disputes that plaintiffs satisfy the four requirements of Rule 23(a). The battle is joined over whether plaintiffs can meet the predominance requirement of Rule 23(b)(3), with respect to the reliance element of their securities fraud claim.[7]

I. RULE 23(B)(3) AND THE *BASIC* PRESUMPTION OF RELIANCE

Reliance in a 10b–5 action ensures "a proper connection between a defendant's misrepresentation and a plaintiff's injury." *Erica P. John Fund, Inc. v. Halliburton Co.* (*Halliburton I*), 563 U.S. 804, 810, 131 S. Ct. 2179, 180 L.Ed.2d 24 (2011) (internal quotation marks omitted). "The traditional (and most direct) way a plaintiff can demonstrate reliance is by showing that he was [personally] aware of a company's statement" and purchased shares based on it. *Id*. But requiring that kind of proof in a securities fraud class action "place[s] an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Basic*, 485 U.S.

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[7] The burden of proving compliance with Rule 23 rests with the party moving for class certification. *See Levitt v. J.P. Morgan Sec., Inc.*, 710 F.3d 454, 465 (2d Cir. 2013). On appeal, we review the District Court's grant of class certification for an abuse of discretion, and the legal conclusions underlying that decision *de novo*. *See Barclays*, 875 F.3d at 92. When a case involves the application of legal standards, we look at whether the District Court's application "falls within the range of permissible decisions." *Id.*

at 245, 108 S. Ct. 978. If every plaintiff had to prove she relied on a misrepresentation in choosing to buy stock, it would effectively prevent investors from proceeding as a class; individual issues of reliance would overwhelm common ones and make certification under Rule 23(b)(3) inappropriate in every case.

The Supreme Court in *Basic* sought to alleviate that concern by permitting securities fraud plaintiffs to satisfy Rule 23(b)(3) by invoking a rebuttable presumption of reliance. The presumption derives from the "fraud-on-the-market" theory, which holds that "the market price of shares traded on [a] well-developed market[ ] reflects all publicly available information, and, hence, any material misrepresentations." *Id.* at 246, 108 S. Ct. 978. As the Court in *Basic* explained:

> The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements.

Id. at 241–42, 108 S. Ct. 978 (internal quotation marks omitted).

"If a market is generally efficient in incorporating publicly available information into a security's market price," the fraud-on-the-market theory assumes investors rely on that price as an "unbiased assessment of the security's value in light of all public information," including any material misrepresentations. *Amgen*, 568 U.S. at 462, 133 S. Ct. 1184.

Basic endorsed the fraud-on-the-market theory and applied it to class action lawsuits for securities fraud. It

held that if plaintiff-investors prove that a company's misstatement was public, the company's stock traded in an efficient market, and the plaintiffs purchased the stock after the misstatement was made but before the truth was revealed, they are entitled to a presumption that the misstatement affected the stock price and that they purchased stock in reliance on the integrity of that price. *Basic*, 485 U.S. at 247, 248 n.27, 108 S. Ct. 978. Under the *Basic* presumption, individual class members need not prove they actually relied upon (or even knew about) the misstatement giving rise to their claim; "anyone who buys or sells the stock at the market price may be considered to have relied on th[e] misstatement[ ]." *Halliburton II*, 134 S. Ct. at 2405.

The *Basic* presumption does not eliminate the predominance requirement of Rule 23(b)(3) or the reliance element of a 10b–5 action for fraud. It simply provides an alternative means of satisfying those requirements, enabling class action litigation of securities fraud claims where none previously could have survived. *See id.* at 2414. Accordingly, defendants opposing class certification may rebut the presumption of reliance "through evidence that the misrepresentation did not in fact affect the stock price." *Id.*

The "fundamental premise" underlying the fraud-on-the-market theory is "that an investor presumptively relies on a misrepresentation" that "was reflected in the market price at the time of his transaction." *Halliburton I*, 563 U.S. at 813, 131 S. Ct. 2179. If defendants "sever[ ] the link" between the misrepresentation and the market price—by showing, for example, that the misrepresentation was not public, the shares did not trade in an efficient market, or "the misrepresentation in fact did not lead to a distortion of price"—both the theory and the presumption

collapse. *Basic*, 485 U.S. at 248, 108 S. Ct. 978. "[T]he basis for finding that the fraud had been transmitted through market price would be gone," and plaintiffs are no longer entitled to the presumption. *Id.* Instead, each plaintiff must prove she *actually* relied on defendants' misrepresentations when choosing to buy or sell stock, which dooms the predominance of class-wide issues under Rule 23(b)(3) and defeats class certification. *See Halliburton II*, 134 S. Ct. at 2416.

II. REUTTAL OF THE *BASIC* PRESUMPTION

The parties agree that plaintiffs established the preliminary elements to invoke the *Basic* presumption of reliance: defendants' misrepresentations were public, Goldman's shares traded in an efficient market, and the putative class members purchased Goldman stock at the relevant time (after the misstatements were made but before the truth was revealed). The parties also agree that defendants in a securities fraud class action may submit rebuttal evidence of a lack of price impact at the class certification stage. The principal question on appeal is whether defendants bear the burden of production or persuasion to rebut the *Basic* presumption.

Relying on Rule 301 of the Federal Rules of Evidence and language in *Basic*, defendants argue they need only produce—*i.e.*, offer—evidence of a lack of price impact to rebut the presumption. Rule 301 states that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption," while the "burden of persuasion . . . remains on the party who had it originally." FED. R. EVID. 301. Because it is plaintiffs' burden to prove the predominance of class-wide issues and the reliance element of their securities fraud claim, defendants argue plaintiffs also bear the ultimate burden to persuade the court that the statements at issue affected

the market price of Goldman stock. According to defendants, that rule comports with the language in *Basic* that "[*a*]*ny showing* that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff" is sufficient to rebut the presumption of reliance. *Basic,* 485 U.S. at 248, 108 S. Ct. 978 (emphasis added). Defendants contend the District Court imposed an impermissibly high evidentiary burden by requiring them to rebut the *Basic* presumption with conclusive proof of a lack of price impact.

After the District Court granted plaintiffs' motion for class certification, another panel of this Circuit concluded that defendants in a securities fraud class action bear the burden of persuasion to rebut the *Basic* presumption, and that they must do so by a preponderance of the evidence. *See Barclays*, 875 F.3d at 99. The Court in *Barclays* examined "the development of the presumption and the burden the [Supreme] Court imposed on plaintiffs to invoke it at the class certification stage." *Id.* at 100. It determined that the language in *Basic* that "[a]ny showing that severs the link" between the misstatement and the market price places a burden of persuasion, rather than a burden of production, on defendants seeking to rebut the presumption, because it "requires defendants to do more than merely produce evidence that *might* result in a favorable outcome." *Id.* at 101. They must demonstrate that the misrepresentation did not in fact affect the stock's price. *Id.*; *see also Halliburton II,* 134 S. Ct. at 2405 ("[A] defendant c[an] rebut th[e] presumption in a number of ways, including by showing that the alleged misrepresentation did not actually affect the stock's price—that is, that the misrepresentation had no 'price impact.'").

The *Barclays* court also rejected the argument that Rule 301 of the Federal Rules of Evidence requires defendants only to produce "some" evidence to rebut the presumption. Rule 301 contemplates that a federal statute can alter the traditional rule that the burden of persuasion remains on the party who had it originally. *See* FED. R. EVID. 301 ("unless a federal statute or these rules provide otherwise . . . the burden of persuasion . . . remains on the party who had it originally"). Because the *Basic* presumption is a substantive doctrine of federal law that derives from the securities fraud statutes, *Barclays* determined it altered the default rule and imposed a burden of persuasion on defendants seeking to rebut it. *See Barclays*, 875 F.3d at 102–03.

That conclusion is consistent with the purpose of the presumption. As the *Barclays* court observed, the *Basic* presumption is essential in putative class actions involving securities fraud plaintiffs "who ha[ve] traded on an impersonal market." *Id.* at 101 (internal quotation marks omitted). It would be "of little value" if defendants could overcome it "by simply producing *some* evidence" of a lack of price impact. *Id.* at 100–01 (emphasis added). Accordingly, the panel concluded that *Basic* and its progeny require defendants seeking to rebut the *Basic* presumption to "demonstrate a lack of price impact by a preponderance of the evidence at the class certification stage rather than merely meet a burden of production." *Id.* at 101.

Barclays makes clear that defendants seeking to rebut the *Basic* presumption of reliance must do so by a preponderance of the evidence. *See id.* Although the District Court acknowledged that standard in a footnote its decision, *see In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2015 WL 5613150, at *4 n.3, it went on to find

that defendants failed to rebut the *Basic* presumption because they did not "conclusively" prove a "complete absence of price impact," *id.* at *7. Because the District Court concluded its findings with these words, it is unclear to us whether the court required more of defendants than a preponderance of the evidence. We therefore vacate the District Court's order and remand for it to reconsider defendants' evidence in light of the *Barclays* standard.

III. DEFENDANTS' PRICE IMPACT EVIDENCE

Because we are remanding to the District Court to reconsider defendants' evidence under the *Barclays* standard, one final issue regarding defendants' rebuttal evidence needs mention. In their opposition to class certification, defendants' expert presented evidence of 34 dates before 2010 in which various news sources reported Goldman's conflicts of interest in the Abacus, Hudson, Anderson, and Timberwolf transactions, without any accompanying decline in the price of Goldman stock. The District Court construed this evidence as "an inappropriate truth on the market defense" or as evidence of the statements' lack of materiality, neither of which the court thought it could consider at the class certification stage. *Id.* at *6 (internal quotation marks omitted). We agree with defendants that this was error.

The "truth on the market" defense attacks the timing of the plaintiffs' purchase of shares, not price impact. The theory is, essentially, that the market was already aware of the truth regarding defendants' misrepresentations at the time the class members purchased their shares, meaning the market price had already adjusted to the revelation of defendants' misstatements, and class members could not have relied on those misstatements in choosing

to buy stock. *See Amgen*, 568 U.S. at 482, 133 S. Ct. 1184; *see also Basic*, 485 U.S. at 248–49, 108 S. Ct. 978.

Contrary to the District Court's characterization of their evidence, defendants did not present a "truth on the market" defense. Defendants did not argue, for example, that Goldman's conflicts of interest were already known to the market at the time plaintiffs purchased their shares of Goldman common stock. Indeed, it was undisputed that plaintiffs purchased their shares after the misstatements were made but before the truth was revealed. Rather, defendants presented evidence that the market learned the truth about Goldman's conflicts of interests in the Abacus, Hudson, Anderson, and Timberwolf transactions on 34 occasions from 2007 to 2009, without any accompanying decline in the price of Goldman stock. Defendants used that evidence to show that their statements about Goldman's efforts to avoid conflicts of interest "did not actually affect the stock's market price." *Halliburton II*, 134 S. Ct. at 2416.

Although price impact touches on materiality, which is not an appropriate consideration at the class certification stage, it "differs from materiality in a crucial respect." *Id.* Price impact "refers to the effect of a misrepresentation on a stock price." *Halliburton I*, 563 U.S. at 814, 131 S. Ct. 2179. Whether a misrepresentation was reflected in the market price at the time of the transaction—whether it had price impact—"is *Basic*'s fundamental premise. It . . . has everything to do with the issue of predominance at the class certification stage." *Halliburton II*, 134 S. Ct. at 2416 (internal quotation marks and citation omitted). If a defendant shows that an "alleged misrepresentation did not, for whatever reason, actually affect the market price" of defendant's stock, "there is no grounding for any con-

tention that the investor indirectly relied on that misrepresentation through his reliance on the integrity of the market price"; the fraud-on-the-market theory underlying the presumption would "completely collapse[ ]." *Id.* at 2408, 2414 (internal quotation marks and brackets omitted).

Accordingly, the District Court erred in declining to consider defendants' evidence at this stage of the litigation. We espouse no views as to whether the evidence is sufficient to rebut the *Basic* presumption; we hold only that the District Court should consider it on remand, in determining whether defendants established by a preponderance of the evidence that the misrepresentations did not in fact affect the market price of Goldman stock. We encourage the court to hold any evidentiary hearing or oral argument it deems appropriate under the circumstances.

CONCLUSION

Defendants seeking to rebut the *Basic* presumption of reliance must do so by a preponderance of the evidence. *See Barclays,* 875 F.3d at 99. Because it is unclear whether the District Court applied the correct standard in this case, we **VACATE** the order of the District Court and **REMAND** for further proceedings consistent with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE GOLDMAN SACHS GROUP, INC.,
SECURITIES LITIGATION

No. 10 Civ. 3461

Filed: September 24, 2015

OPINION & ORDER

CROTTY, United States District Judge.

The facts of this case are fully set forth in *Richman v. Goldman Sachs*, 868 F.Supp.2d 261 (S.D.N.Y. 2012), and summarized in the Court's order of June 23, 2014 denying Defendants' motion for reconsideration, *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 2014 WL 2815571, at *1–2 (S.D.N.Y. June 23, 2014).

Lead Plaintiffs allege that Defendants violated section 10(b) and Rule 10b–5 promulgated thereunder, and section 20(a), of the Exchange Act by making misstatements about Goldman's conflicts of interest policies and business practices, revealed to be false by reports of government investigations into Goldman's conflicted role in certain collateralized debt obligation transactions.

Lead Plaintiffs now seek to certify the following class: "All persons or entities who, between February 5, 2007,

and June 10, 2010, purchased or otherwise acquired the common stock of The Goldman Sachs Group, Inc. ('Goldman' or the 'Company'), and were damaged thereby." Defendants object. Lead Plaintiffs also request that they be appointed as Class Representatives and that the Court approve the firms of Labaton Sucharow LLP and Robbins Geller Rudman & Dowd LLP as Class Counsel. For the following reasons, Plaintiffs' motions are granted.

BACKGROUND

Lead Plaintiffs' current claims arise out of "material misstatements and omissions" Goldman made about its business practices and conflicts of interest. *See Richman,* 868 F.Supp.2d at 276–80. Goldman made certain statements such as: "We have extensive procedures and controls that are designed to . . . address conflicts of interest;" "Our clients' interests always come first;" and "[W]e increasingly have to address potential conflicts of interest, including situations where our services to a particular client or our own proprietary investments or other interests conflict . . . with the interest of another client." Compl. ¶¶ 134, 154. Plaintiffs assert that these statements were revealed as untrue when information regarding Goldman's conflicts in certain CDO transactions reached the marketplace through SEC and DOJ announcements of investigations and enforcement actions against Goldman with respect to these transactions. *Id.* ¶¶ 324–37. Plaintiffs allege that when these "corrective disclosures" were made, putative class members were injured by a decline in Goldman's stock price triggered by the revelation that those statements were false. *Id.*

Plaintiffs allege four dates on which these alleged corrective disclosures took place. On Friday, April 16, 2010, the SEC sued Goldman and Fabrice Tourre, a Goldman vice president, for fraud in the structuring and marketing

of the Abacus CDO. Finnerty Decl. ¶ 52. In addition to an SEC Litigation Release, the *New York Times* published an article about the SEC complaint; analyst reports issued that same day commented on the SEC allegations; and Goldman committed to "vigorously contest[ing]" the charges. Finnerty Decl. ¶¶ 53–60. Plaintiffs' expert, Dr. Finnerty, found that Goldman's stock price decreased by 12.79% on that day, from $184.27 to $160.70, and experienced an abnormal return[1] of—9.27%. *Id*. ¶¶ 62–63. Dr. Finnerty found that this was a statistically significant decline. *Id.* ¶ 63.

On Friday, April 23, 2010, after the market closed for the week, Reuters announced the filing of two shareholder lawsuits against Lloyd Blankfein, Goldman's CEO, and other Goldman officials for breach of fiduciary duties, failure to exercise oversight, and failure to "ensure that Goldman did not represent conflicting interests related to the Abacus CDO transactions." *Id.* ¶ 64. The following day, the Senate Subcommittee on Investigations released internal Goldman documents which indicated that "Goldman made money betting against the CDOs it sold to its clients." *Id.* ¶ 65. Dr. Finnerty found a stock price decline of 3.41% on Monday, April 26, 2010, when the market reopened, and an abnormal return of—1.68%, which is not statistically significant.[2] *Id*. ¶ 67.

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[1] An abnormal return "is the difference between the security's actual return and its expected return. A security's expected return is the return one would expect based on general stock market price movements and industry-related factors that are unrelated to the specific event that is being examined." Finnerty Decl. ¶ 32.

[2] Plaintiffs appear to have abandoned their assertion that a corrective disclosure was made on April 26, 2010. *See* Reply at 2 (referring to April 16, April 30, and June 10, 2010 as the operative disclosure dates).

On Thursday, April 29, 2010, after the market closed for the night, the *Wall Street Journal* announced that federal prosecutors were conducting a criminal investigation into whether Goldman had committed securities fraud in its mortgage trading. *Id.* ¶ 69. The article stated that the criminal investigation concerned different evidence than the SEC's case, but did not speak to which of Goldman's deals were being investigated. *Id.* Standard and Poor's, Bank of America, and Buckingham Research Group all downgraded Goldman's stock after this announcement. *Id.* ¶¶ 71–73. When the market opened on Friday, April 30, 2010, Goldman's stock decreased 9.39% from $160.24 to $145.20, and experienced an abnormal return of—7.75%, which Dr. Finnerty found statistically significant. *Id.* ¶¶ 74–75.

After the market closed on June 9, 2010, it was revealed that an Australian hedge fund had sued Goldman for $56 million it had lost on the Timberwolf CDO and for $1 billion in punitive damages. *Id.* ¶ 76. Also that same evening, reports surfaced that Goldman's Hudson CDO was the target of an SEC investigation. *Id.* ¶ 77. Dr. Finnerty found that Goldman's stock price decreased 2.21% on Thursday, June 10, 2010, and experienced an abnormal return of—4.25%, which Dr. Finnerty found to be statistically significant. *Id.* ¶¶ 79–80.

Plaintiffs allege that these declines occurred, at least in part, because Goldman's conflicts and business practices statements were revealed to be untrue on these dates.

APPLICABLE LAW

Before certifying a class, a district court "must first ascertain whether the claims meet the preconditions of Rule 23(a)." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 201 (2d Cir. 2008).

This requires an analysis of four elements: (1) whether the class is so numerous that joinder of all members is impracticable; (2) whether there are questions of law or fact common to the class; (3) whether the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) whether the representative parties will fairly and adequately protect the interests of the class. *See* Fed.R.Civ.P. 23(a).

Once these requirements have been met, a party seeking certification under Fed.R.Civ.P. 23(b)(3) must demonstrate both that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for adjudicating the controversy. The party seeking class certification has the burden to establish by a preponderance of the evidence that the Rule 23 requirements have been met. *Myers v. Hertz Corp.,* 624 F.3d 537, 547 (2d Cir. 2010). The Court may not make a merits determination at the certification stage, but may consider merits issues "only to the extent" that they relate to the Rule 23 requirements. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,* 133 S. Ct. 1184, 1194 (2013).

ANALYSIS

I. RULE 23(a)

Defendants' opposition to certification is based solely on whether Plaintiffs have demonstrated predominance. Nonetheless, the Court has rigorously analyzed whether Rule 23(a)'s requirements have been satisfied. *See Simmons v. Author Sols., LLC,* 2015 WL 4002243, at *7 (S.D.N.Y. July 1, 2015) (quoting *Roach v. T.L. Cannon Corp.,* 778 F.3d 401, 405 (2d Cir. 2015)). The Court determines that the putative class meets the requirements of Rule 23(a): the class members are numerous; there are

common questions of law and fact; the claims of the representative parties are typical of the class; and the representative parties will fairly and adequately protect the interests of the class.

II. RULE 23(b)(3)

A. Applicable Law on Predominance and Price Impact

The Court turns now to the heart of the parties' dispute: does the proposed class meet the predominance requirement of Rule 23(b) (3). The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623 (1997), and the Court has a "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast Corp v. Behrend,* 133 S. Ct. 1426, 1432 (2013) (citations omitted).

"[A]s is typical with private securities fraud claims predicated on public statements, whether common issues predominate in this case depends on whether the issue of reliance will require individualized proof." *Aranaz v. Catalyst Pharms. Partners Inc.,* 302 F.R.D. 657, 667 (S.D. Fla. 2014). In a securities class action, plaintiffs are entitled to a presumption of reliance where they can demonstrate that "the alleged misrepresentations were publicly known . . . , that the stock traded in an efficient market, and that the relevant transaction took place 'between the time the misrepresentations were made and the time the truth was revealed.'" *Erica P. John Fund, Inc. v. Halliburton Co.,* 131 S. Ct. 2179, 2185 (2011) (quoting *Basic Inc. v. Levinson,* 485 U.S. 224, 248 n. 27 (1988)). The Court can presume that an investor relied "on a misrepresentation

so long as it was reflected in the market price at the time of his transaction." *Id.* at 2186.

The presumption, however, is rebuttable. "[A] securities-fraud defendant can 'defeat the [fraud-on-the-market] presumption at the class certification stage through evidence that the misrepresentation did not in fact affect the stock price.'" *McIntire v. China MediaExpress Holdings, Inc.,* 38 F.Supp.3d 415, 434 (S.D.N.Y.2014) (alterations in original) (quoting *Halliburton Co. v. Erica P. John Fund, Inc.,* 134 S. Ct. 2398, 2414 (2014)). Proving a lack of price impact differs from proving a lack of materiality—price impact refers to the circumstance where "a misrepresentation was reflected in the market price at the time of the transaction," and the burden of proving a lack of price impact falls on the defendant. *Halliburton,* 134 S. Ct. at 2416–17 (citation and internal quotation marks omitted). Where a defendant puts forth evidence[3] "that severs the link between the alleged misrepresentation and . . . the price," *City of Livonia Emps.' Ret. Sys. v. Wyeth,* 284 F.R.D. 173, 182 (S.D.N.Y. 2012) (alteration in original) (citations and internal quotation marks omitted), a plaintiff may not invoke the presumption of reliance.

B. Expert Evidence

Plaintiffs have submitted the report and rebuttal report of their expert, Dr. Finnerty. *See* Dkt. 137, 154. In his opening report, Dr. Finnerty examined the efficiency of the market for Goldman's common stock during the class period. Finnerty Decl. He concluded that the market was

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[3] Defendants must demonstrate a lack of price impact by a preponderance of the evidence. *See Aranaz v. Catalyst Pharm. Partners Inc.,* 302 F.R.D. 657, 670 (S.D. Fla. 2014) (citing *Basic,* 485 U.S. at 248); *In re Moody's Corp. Sec. Litig.,* 274 F.R.D. 480, 490 (S.D.N.Y. 2011).

"open, developed, and efficient during the Class Period," based on the five factors set out in *Cammer v. Bloom,* 711 F.Supp. 1264 (D.N.J.1989), and the supplemental tests outlined in *Krogman v. Sterritt,* 202 F.R.D. 467 (N.D. Tex. 2001). *Id.* ¶¶ 11–89. He performed additional tests, such as the put-call parity test and the random walk test, to gain further insight on the efficiency of the market, *id.* ¶¶ 90–105, and ran statistical sign tests, *id.* ¶¶ 106–08, and parametric tests, *id.* ¶ ¶ 109–15. He also submitted his methodology for the calculation of economic loss per share, which he asserts will directly calculate each class member's loss by means of a common methodology. *Id.* ¶¶ 116–17.

Defendants have submitted reports of three experts, Drs. Paul Gompers and Steven Choi, and Charles Porten, C.F.A. Dkts. 144, 145, 146. Dr. Gompers evaluated whether the alleged misstatements impacted Goldman's stock price, whether Dr. Finnerty's efficient market determination was reliable, and whether Dr. Finnerty's proposed damages methodology would effectively calculate classwide damages. *See* Gompers Decl. Dr. Gompers asserts that the alleged misrepresentations had no impact on Goldman's stock price when made, that the corrective disclosures had no negative impact on the stock price, that Dr. Finnerty's market efficiency conclusion was flawed, and that Dr. Finnerty's damages methodology is unreliable and incomplete, chiefly because it fails to account for inflation from the alleged misstatements. *Id.* Dr. Gompers applied his own regression model for determining price impact.[4] *Id.* ¶ 25.

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[4] Dr. Gompers found slightly different abnormal returns on the three alleged corrective disclosure dates, but the differences in these numbers are insignificant. Gompers Decl. ¶¶ 64, 79, 89.

Dr. Choi examined the connection between the stock price and the "regulatory activities disclosed on the three alleged corrective disclosure dates." Choi Decl. ¶ 14. Dr. Choi determined that the April 16, 2010 announcement regarding the SEC's enforcement action negatively impacted Goldman's stock price "due to the heightened market expectations of the direct costs of resolving the enforcement action, the increased risks and exposure to penalties, the stigma associated with facing a highly visible and unusually severe action, the signal of future regulatory changes which would have a disproportionate impact on Goldman's business, and the possibility of future civil and regulatory actions." *Id.* ¶ 66; *see also id.* ¶¶ 24–54. Dr. Choi's analysis determined that characteristics of the enforcement action against Goldman were associated with larger decreases in stock price, and that similar enforcement actions "are associated with" a decline of 8.07%, which is "consistent with the observed price decline of Goldman's stock price" on April 16, 2010, which Dr. Finnerty found was 9.27%. *Id.* ¶ 47.

Dr. Choi then determined that the decline on April 30, 2010 was due to "the increase in the perceived likelihood of criminal charges, heightened risks and exposure to penalties, signal of wider governmental resolve to target Goldman, anticipation of shifts in regulation with a disproportionate impact on Goldman's business, and the expectation of direct costs of resolving the possible DOJ investigation." *Id.* ¶ 67, *see also id.* ¶¶ 55–60. He also determined that the June 10, 2010 decline following the report of an SEC investigation into the Hudson transaction occurred because of "additional risk and exposure to penalties, the compliance costs associated with the investigation, as well as the increased perceived likelihood of future regulations with a disproportionate impact on Goldman compared to its peers," as well as the implication of "a

wider scope of expected additional regulatory and civil actions against Goldman." *Id.* ¶ 68.

Charles Porten examined securities analyst commentary to determine whether the misstatements impacted Goldman's stock price during the class period. *See* Porten Decl. He asserts that information that has an impact on a company's stock price will be discussed in analyst reports, that no analyst discussed Goldman's misstatements, and that analysts typically do not comment on the type of misstatements alleged here. *Id.* ¶ 12. Because of this finding, he concludes that the misstatements had no impact on Goldman's stock price. *Id.* ¶ 62.

Dr. Finnerty submitted a rebuttal declaration responding to Defendants' experts. Dr. Finnerty determined that, taking into account their criticisms and reevaluating his previous examination, the market for Goldman's stock was efficient and the company's common stock was artificially inflated during the class period and dropped on the corrective disclosure dates because of Defendants' false and misleading statements. Rebuttal Decl. ¶ 3. He also argues that Dr. Gompers failed to show the absence of price impact because he relied on Dr. Choi's allegedly incomplete opinion; failed to consider contemporaneous interest and breaches of business practices; and failed to consider that the extent of Goldman's misconduct was not known to investors until April 16, 2010. *Id.* ¶¶ 176–84. Dr. Finnerty also asserts that Dr. Choi did not "investigate the price impact of the revelation of Goldman's fraudulent conduct on the three alleged corrective disclosure dates," and that he was "unable to separate the stock price impact of the announcement of any of the three regulatory actions from the impact of the disclosure of the underlying allegedly fraudulent behavior." *Id.* ¶ 188. Fi-

nally, Dr. Finnerty argues that Mr. Porten applied an unreliable methodology to his examination. *Id.* ¶¶ 196–01. He also asserts that his own proposed damages methodology is reliable, because he will estimate the amount of inflation when he submits a damages report. *Id.* ¶¶ 207–08.

Finally, Dr. Gompers submitted a reply to Dr. Finnerty's rebuttal, responding to Dr. Finnerty's criticisms of Defendants' experts and asserting that Defendants' experts have demonstrated that the alleged misstatements had no impact either when made or on the corrective disclosure dates. *See* Reply Decl. of Paul Gompers.

C. Price Impact Analysis

Plaintiffs are correct that there is no real dispute concerning the market efficiency for Goldman's stock. Reply at 1 n.1. While Defendants take issue with Dr. Finnerty's evaluation of the fifth *Cammer* factor (the relationship between news events and stock price movements), Gompers Decl. ¶¶ 97–117, they do not otherwise suggest that the market for Goldman's stock was not efficient. The Court has reviewed Dr. Finnerty's examination of the *Cammer* factors, as well as his revised approach, and finds that he has adequately demonstrated that all five *Cammer* factors have been met. Goldman's stock experienced high weekly trading volumes, a large number of analysts reported on Goldman stock, a number of market makers traded in Goldman's stock, Goldman was eligible to file a Form S–3 registration, and Goldman's common stock reacted to new unexpected Goldman-specific information, all during the class period. *See Cammer v. Bloom,* 711 F.Supp.2d 1264, 1286–87 (D. N.J. 1989).

The Court determines that Defendants have failed to demonstrate a complete lack of price impact. Defendants cannot show that the total decline in the stock price on the

corrective disclosure dates is attributable simply to the market reaction to the announcement of enforcement actions and not to the revelation to the market that Goldman had made material misstatements about its conflicts of interest policies and business practices. First, that the misstatements had no impact on the stock price when made is insignificant. Plaintiffs' argument is that the misstatements simply served to maintain an already inflated stock price. Reply at 7–8; Rebuttal Decl. ¶¶ 204–05. Price impact "can be shown by a stock price reaction either at the time of the statement or at the time of the corrective disclosure, [and] analysis of price impact usually focuses on stock price movement at the time the truth is disclosed," Pl. Mem. at 16 (emphasis omitted) (citing cases), and so the fact that there was no stock price increase when the statements were made does not suggest a lack of price impact. *See, e.g., City of Livonia,* 284 F.R.D. at 182.

Next, Defendants' demonstration of 34 separate dates prior to April 16, 2010, which allegedly revealed that Goldman had acted against clients' interest and on which there was no movement in Goldman's stock price, does not show a lack of price impact. This is because the argument is an inappropriate "truth on the market" defense, which attempts to demonstrate that the " 'news of the [truth] credibly entered the market and dissipated the effects of [prior] misstatements,'" and is not appropriate at the class certification stage. Reply at 5–6 (quoting *Amgen,* 133 S. Ct. at 1204) (citation omitted). Defendants object to this characterization and argue instead that "the lack of investor reaction to prior allegations of Goldman Sachs' conflicts shows that there was no inflation to dissipate," Def. Sur Reply at 3 n.5, and that it demonstrates that "the market placed no detectable value on revelations that Goldman allegedly had conflicts of interest with its clients," Reply Decl. of Paul Gompers ¶ 4. But this speaks to the

statements' materiality and not price impact, and accordingly the Court will not consider this information at the current stage of the litigation. Even if the Court were to consider it, the lack of stock price reaction on dates where different forms and degrees of misstatements were revealed does not demand the conclusion that on the alleged corrective disclosure dates where there was a stock price reaction, it was due entirely to alternative causes.

Defendants argue that Dr. Gompers demonstrated the absence of price impact by analyzing the focus of market commentary on Goldman on the corrective disclosure dates and whether market commentary discussed the impact of revelations about misstatements on the stock price. But whether or not the market was focused to some degree on the impact the enforcement actions would have on the stock price does not mean that no decline in stock price is attributable to the revelation of misstatements. Dr. Gompers' analysis fails to demonstrate that no part of the decline was caused by the corrective disclosure.[5] Likewise, while Dr. Choi's report focuses on the fact that the announcements of enforcement actions would cause a level of decline, Dr. Choi fails to demonstrate that it would cause the entirety of the decline that occurred here. *See, e.g., Aranaz,* 302 F.R.D. at 672 ("[E]ven assuming *arguendo* that [an important company announcement] was substantially more important than the alleged misrepresentation . . . , it does not follow that the misrepresentation did not account for any of the 42% spike in stock price.").

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[5] Defendants repeatedly argue that the statements at issue are not actionable as a matter of law. Def. Mem. at 2–3 n. 1, 18–19; Def. Sur. Reply at 1 n.3. This argument is inappropriate at the class certification stage and in any event has been previously rejected by the Court.

Finally, Defendants argue that Plaintiffs "have produced no evidence . . . *linking* the challenged statements to the April and June 2010 declines on Goldman Sachs' stock price." Def. Sur Reply at 2. This is incorrect. Dr. Finnerty demonstrated that, on the corrective disclosure dates, information revealing the misstatements to the market was released, and the stock price dropped. The link is obvious, and Defendants have failed to conclusively sever this link. Defendants' attempt to demonstrate a lack of price impact merely marshals evidence which suggests a price decline for an alternate reason, but does not provide conclusive evidence that no link exists between the price decline and the misrepresentation. *See Aranaz,* 302 F.R.D. at 672 ("Because Defendants have the burden of showing an absence of price impact, they must show that price impact is *inconsistent* with the results of their analysis. Thus, that an absence of price impact is consistent with their analysis is insufficient.") (emphasis in original). *Halliburton II* grants Defendants the right to rebut Plaintiffs' invocation of *Basic's* presumption of reliance at the class certification stage. But here, where Defendants cannot demonstrate a complete absence of price impact, and where Plaintiffs have demonstrated an efficient market, the *Basic* presumption applies, and Plaintiffs have demonstrated classwide reliance and predominance.

D. Damages Methodology

Defendants argue that certification is inappropriate because "Plaintiffs' proffered classwide damages methodology does not measure damages resulting solely from Plaintiffs' theory of classwide injury." Def. Mem. at 23. Relying on the Supreme Court's decision in *Comcast,* 133 S. Ct. 1426 (2013), Defendants assert that Dr. Finnerty's proposed damages methodology "does not explain how

Plaintiffs would measure damages caused solely by their current theory of classwide injury-general statements about Goldman Sachs' business principles and conflict controls—as opposed to the SEC's lawsuit and related investigations." *Id.* at 24.

But at the class certification stage, Plaintiffs must only show that their damages model "actually measure[s] damages that result from the class's asserted *theory* of injury." *Roach,* 778 F.3d at 407 (emphasis added). Plaintiffs' model does that. The possibility that Defendants could prove that some amount of the price decline is not attributable to Plaintiffs' theory of liability does not preclude class certification. *Comcast* speaks to measuring damages stemming from the accepted theory of liability, and not the extent to which that liability can be proven. Moreover, any failure of the methodology to "disaggregate the losses purportedly attributable to disclosures about government enforcement activities from those that Plaintiffs attribute to the challenged statements," Def. Sur Reply at 5, would not defeat the class's predominance because it would affect all class members in the same manner. Finally, Dr. Finnerty asserts that his methodology will be able to account for any so-called inflation from the enforcement actions, Rebuttal Decl. ¶ 208, and Defendants have not suggested that such disaggregation would be impossible to determine.

III. RULE 23(g)

Lead Plaintiffs also move for Labaton Sucharow and Robbins Geller to be appointed class counsel under Rule 23(g) and for Lead Plaintiffs to be appointed Class Representatives. The Court must assess "the work counsel has done in identifying or investigating potential claims in the action; counsel's experience in handling class actions, other complex litigation, and the types of claims asserted

in the action; counsel's knowledge of the applicable law; and the resources that counsel will commit to representing the class." Fed.R.Civ.P. 23(g)(1)(A) (internal numerals omitted). Thus far, counsel have satisfied these requirements. *See In re Crude Oil Commodity Futures Litig.,* 2012 WL 569195, at *2 (S.D.N.Y. Feb. 14, 2012) (appointing co-lead counsel to address complexities of litigation yet keep costs to a minimum).

Accordingly, Labaton Sucharow and Robbins Geller are approved as class counsel, and Lead Plaintiffs are appointed Class Representatives.

CONCLUSION

For the foregoing reasons, the Court grants Plaintiffs' motion for class certification. The Court certifies a class of: "All persons or entities who, between February 5, 2007 and June 10, 2010, purchased or otherwise acquired the common stock of The Goldman Sachs Group, Inc . . . . and were damaged thereby." Labaton Sucharow LLP and Robbins Geller Rudman & Dowd LLP are approved as Class Counsel, and Lead Plaintiffs Arkansas Teacher Retirement System, Plumbers and Pipefitters National Pension Fund, and West Virginia Investment Management Board are appointed Class Representatives.

The Clerk of the Court is directed to close out the pending motion at Docket 135.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-3667

ARKANSAS TEACHER RETIREMENT SYSTEM,
West Virginia Investment Management Board,
Plumbers and Pipefitters Pension Group,
Plaintiffs-Appellees,

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 simi-
larly situated, Thomas Draft, individually and on behalf
of all others similarly situated,
Consolidated Plaintiffs

v.

GOLDMAN SACHS GROUP, INC., Lloyd C. Blankfein,
David A. Viniar, Gary D. Cohn,
Defendants-Appellants,

Sarah E. Smith,
Consolidated Defendant

Filed: June 15, 2020

ORDER

Appellants, Goldman Sachs Group, Inc., Lloyd C. Blankfein, David A. Viniar and Gary D. Cohn, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk