UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SJUNDE AP-FONDEN, individually and on behalf all others similarly situated,

Plaintiff,

v.

THE GOLDMAN SACHS GROUP, INC., LLOYD C. BLANKFEIN, and GARY D. COHN,

Defendants.

Case No. 1:18-cv-12084

ORAL ARGUMENT REQUESTED

[**REDACTED VERSION**]

DEFENDANTS' BRIEF IN OPPOSITION
TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

The claims in this case do not lend themselves to a class action. The complaint alleges that Defendants made sporadic misstatements between 2014 and 2018 that deceived purchasers of Goldman Sachs stock about the firm and its work with 1MDB. Some of those statements related in some way to 1MDB; others were nothing more than generic statements about business principles. Lead Plaintiff Sjunde AP-Fonden ("AP7") contends that this diverse set of statements over a period of four years impacted Goldman's stock price by "maintaining" artificial inflation, which dissipated on two dates in late 2018, when press reports "corrected" the allegedly misstated facts. But the evidence does not support that theory. Indeed, *Defendants have affirmatively disproved it*. Without that theory, class members are not entitled to a presumption of reliance and must prove they were defrauded on a purchaser-by-purchaser basis. For that reason (and others), class certification should be denied.

For starters, AP7 has failed to carry its burden of proof with respect to market efficiency, as is required to trigger the presumption of reliance. And even if AP7 had carried that burden, Defendants have rebutted the presumption by proving that the alleged misstatements had no impact on stock price. Again, this is an "inflation maintenance" case; AP7's theory relies on alleged corrective disclosures on November 9, 2018 and December 17, 2018 (and a corresponding "back-end" price drop on those dates) to draw an inference that the alleged misstatements impacted the price at the front end. But for the November 9 disclosure, the evidence shows that the price dropped for *other* reasons—*not* because of any corrective disclosure. And on December 17, there was no statistically significant price drop at all. As a matter of common sense, it is no surprise that the market did not respond in any significant way to either of these disclosures, given how late they came in the 1MDB story—after news reports,

corporate disclosures, indictments, and a best-selling full-length book put 1MDB on the front page of financial papers all over the world.

AP7 also has failed to demonstrate that there is any way to isolate damages caused by the alleged misstatements from losses caused by something else. AP7's expert has conceded that his methodology may not be able to disaggregate any price impact from the alleged misstatements from the impact of other, "confounding" information. As a result, AP7 has not established that damages are capable of measurement on a classwide basis, as required by Supreme Court precedent. This failure likewise defeats class certification.

In any event, AP7 is ill-suited to represent the class. [redacted] [redacted], coupled with its unusual trading patterns—including many "in and out" trades, as well as large purchases of Goldman stock after the alleged fraud was revealed—subject it to unique defenses that would inevitably be a central focus of this case. These defenses would consume substantial time and resources, and they undercut AP7's ability to show predominance, adequacy, and typicality. The Court can and should deny the motion on that basis as well.

BACKGROUND

I. The Public Collapse of 1MDB and the Ensuing Investigations

This case arises out of three 1MDB bond offerings that Goldman underwrote in 2012 and 2013. SAC ¶ 2.[1] By 2016, the U.S. Department of Justice ("DOJ") had filed the largest civil forfeiture proceeding ever, detailing the misappropriation of bond proceeds by 1MDB officials, and various press outlets reported that the DOJ and other authorities were reviewing Goldman's dealings with 1MDB. *Id.* ¶¶ 1, 275.

[1] References to "SAC" are to Plaintiff's Second Amended Class Action Complaint (ECF No. 63). References to "Ex." are to the exhibits attached to the Declaration of John E. Schreiber, filed today. Unless otherwise stated, all internal quotations and citations are omitted, and all emphasis is added.

Beginning in August 2016, Goldman told its shareholders that it was subject to investigations by "various governmental and regulatory bodies . . . related to [1MDB]." Ex. 2 at 92 (Q2 2016 10-Q). In August 2018, Timothy Leissner (the firm's former Head of Investment Banking for Southeast Asia) pleaded guilty to conspiracy to violate the Foreign Corrupt Practices Act and to commit money laundering in connection with the 1MDB bond offerings. SAC ¶ 37. Two months later, Roger Ng, a former managing director for Goldman in Singapore, was also indicted on charges related to 1MDB (*id.* ¶ 38), as was Low Taek Jho ("Low")—a Malaysian national who allegedly acted as an intermediary in connection with the bond deals. *Id.* ¶ 43. The indictments against Leissner, Ng, and Low were first made public on November 1, 2018. *Id.* ¶¶ 281–83. In its Form 10-Q filed the next day, Goldman disclosed this information and the contents of Leissner's plea, adding that the investigations (by DOJ and others) "could result in the imposition of significant fines, penalties and other sanctions against the firm." Ex. 3 at 89 (Q3 2018 10-Q). In October 2020, Goldman and certain subsidiaries entered into agreements to resolve several investigations pertaining to 1MDB, including a Deferred Prosecution Agreement with the DOJ. ECF No. 102, Order on Motion to Dismiss ("Order") at 42–43.

II. The Alleged Misstatements and Corrective Disclosures

The complaint alleges that Defendants made a series of misstatements between late 2014 and mid-2018 that impacted Goldman's stock price, and when the truth was revealed, it "wip[ed] out billions in market capitalization and directly caus[ed] damages" to AP7 and the class. SAC ¶¶ 25–26. The alleged misstatements remaining in the case fall in two categories: (i) statements related to 1MDB and/or Low (the "1MDB Statements"), and (ii) generic statements about business principles (the "Business Principles Statements"). The complaint

also pled "corrective disclosures" supporting AP7's theory of price inflation and damages.

The 1MDB Statements. The complaint claims that "Defendants falsely downplayed the bank's involvement with 1MDB and individuals connected to the fund, denied any wrongdoing, and misrepresented that its work with the fund was legitimate and that its compensation for such work was fair." SAC ¶ 336. In support of this claim, it points to certain statements in 2014, 2015, and mid-2018 regarding the fees Goldman earned in the 1MDB transactions (*id.* ¶¶ 337, 340, 358, 362) and a handful of statements between 2016–18 in which Goldman denied knowing about any diversion of funds from 1MDB or any involvement by Jho Low in the transactions (*id.* ¶¶ 344–45, 354–55, 348, 351, 360, 364). The complaint also points to a 2018 comment by former Goldman CEO Lloyd Blankfein—more than one month after he stepped down as CEO—saying he was "not aware" of red flags related to 1MDB. *See id.* ¶ 367.

The Business Principles Statements. The complaint also points to a series of generic statements about the company's "commitment to reputation, integrity, and complying with the letter and spirit of all applicable laws"—statements that the complaint asserts were allegedly false or misleading by omission. SAC ¶ 382. They are as follows:

Alleged False/Misleading Statement	Date
Annual Reports: "Our assets are our people, capital and reputation. If any of these is ever diminished, the last is the most difficult to restore. 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. […] Integrity and honesty are at the heart of our business." SAC ¶ 383.	2014-2017
Proxy Statements: "Effective risk management underpins everything that we do, and compensation is carefully designed to be consistent with the safety and soundness of our firm." *Id.* ¶ 385.	2015-2018

At an investor conference, Goldman COO Gary Cohn stated: "While returns are important, there are other factors that we also consider in our assessment. Our business decisions aren't binary, and management's judgment is crucial. We look at every transaction in the context of our broader client relationships. Our goal is to build strong, enduring relationships over time. Additionally, operational and reputational risks are critical considerations when we evaluate new business opportunity." *Id.* ¶ 388.	May 2016

The Alleged Corrective Disclosures. To support its theory of causation and damages, the complaint alleged that press reports on six dates in November and December 2018 revealed "new," previously concealed information and "caused foreseeable declines in the price of Goldman common stock by removing portions of the artificial inflation in the price of Goldman common stock[.]" SAC ¶ 396. Against the extensive backdrop of 1MDB-related press coverage and company disclosures up to that time, the Court held that four of the six alleged disclosures were not "corrective," leaving only two such disclosures in the case. Order, 35–40.

The first of these disclosures was on November 9, 2018, when "multiple news sources reported that Blankfein met with Low" and Malaysian Prime Minister Najib in 2013. SAC ¶¶ 397–98. According to the complaint, this news prompted a 3.90% drop in Goldman's stock price. *Id.* This meeting took place in September 2013—several months *after* the last 1MDB offering closed—and was attended by around 20 Goldman clients. *Id.* ¶¶ 288, 397. As discussed below, however, at the time of the November 9 disclosure, an earlier meeting that included both Blankfein and Low already had been disclosed, and Goldman's share price did not decline in the wake of that news. Moreover, the November 9 disclosure was accompanied by a host of other information that negatively impacted Goldman stock, such as President Trump's public excoriation of Goldman and Wall Street as "unpaid foreign agents" that could undermine negotiations over a proposed trade deal with China.

The second of these disclosures was on December 17, 2018—three days after the Class

Period ends—when the *New York Times* reported that the Malaysian government planned to pursue criminal charges against the firm in connection with 1MDB. SAC ¶¶ 288, 406–07. The complaint alleges that Goldman's stock price dropped 2.75% on that day. *Id.* The Court found it a "close call" whether the market was already aware of these purportedly "new" facts, ultimately declining to make that decision at the pleading stage. Order, 39. As discussed below, expert analysis shows that the abnormal return for Goldman's stock price following this news was not statistically significant—which is no surprise, given the extent of 1MDB reporting to that point.

III. AP7's Unusual Trading Practices and Suspicious Conduct

Lead Plaintiff AP7 is a Swedish public pension fund that manages over $50 billion in assets. SAC ¶ 31. AP7 engaged in no less than 60 trades of Goldman stock during the Class Period (affecting more than 250,000 shares) and even more after the Class Period ended. These trades included numerous "in and out" trades on which AP7 often profited, as well as multiple purchases—including its largest purchase of Goldman stock—made *after* the November 9, 2018 "corrective disclosure" supposedly revealed a massive fraud on investors. *See* ECF No. 63-1, Sch. A to the SAC (Lead Plaintiff Certification). [REDACTED] Ex. 4, Grottheim 30(b)(6) Dep. Tr. 22:4–6; 122:12–14. Unfortunately, discovery into AP7's investment strategy [REDACTED]

[REDACTED]. *See infra* at 22–23.

ARGUMENT

A class action is an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). To invoke this mechanism, a party must "affirmatively demonstrate" its compliance

with Rule 23. *Id.*; *see Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014) ("*Halliburton II*") (plaintiffs "must actually *prove*—not simply plead—that their proposed class satisfies each requirement of Rule 23"). This means that a plaintiff must "not only be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation" but also "satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 569 U.S. at 33. Here, AP7 invokes Rule 23(b)(3), which requires it to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" This Court may grant certification only if it "is satisfied, after a rigorous analysis," that the requirements of Rule 23 have been met. *Comcast*, 569 U.S. at 33. The Court must "make a definitive assessment of [these] requirements, notwithstanding their overlap with merits issues . . . and must find that each requirement is established by at least a preponderance of the evidence." *In re U.S. Foodservice, Inc. Pricing Litig.*, 729 F.3d 108, 117 (2d Cir. 2013).

AP7 has failed to carry its burden for at least three reasons: (i) it cannot invoke the *Basic* presumption, so individual issues of reliance will predominate; (ii) it has not established that damages are capable of proof on a classwide basis; and (iii) [REDACTED] and unusual trading patterns subject it to unique defenses that defeat any suggestion that it is adequate or typical (or that common issues predominate). Any one of these flaws is enough to defeat class certification.

I. Individual issues of reliance will predominate in this case.

AP7 concedes this case cannot proceed as a class action without the *Basic* presumption of reliance. *See Basic v. Levinson*, 485 U.S. 224 (1988). The "fundamental premise" of this theory is "that an investor presumptively relies on a misrepresentation so long as it was

reflected in the market price at the time of his transaction." *Goldman Sachs Grp., Inc. v. Ark. Teacher Ret. Sys.*, 141 S. Ct. 1951, 1958 (2021). The *Basic* presumption is central in securities fraud cases, because without it, "individualized issues of reliance ordinarily would defeat predominance and preclude certification . . . ." *Id.* at 1959. Among other things, a plaintiff invoking the *Basic* presumption must prove that the stock traded in an efficient market. *Id.* at 1958. A defendant can then rebut the presumption through "[a]ny 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." *Id*. Here, AP7 has failed to carry its burden to invoke this presumption, and even if the presumption applied, Defendants have rebutted it.

A. Plaintiff's "proof" contradicts a finding of market efficiency.

To prove market efficiency, AP7 attempts to satisfy the so-called *Cammer* factors, including through an event study that purports to show a "cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price" during the class period—a requirement known as *Cammer* 5. *See* ECF No. 142-1, Mason Rep. ¶¶ 48–49.[2] As the Second Circuit has observed, "[w]ithout the demonstration of such a causal relationship, it is difficult to presume that the market will integrate the release of material information about a security into its price." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc.*, 546 F.3d 196, 207 (2d Cir. 2008). For this reason, courts in this Circuit have recognized *Cammer* 5 as "the most important" factor for market efficiency. *Id.* ("the essence of an efficient market"); *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Sec. Litig.*, 281 F.R.D. 174, 182 (S.D.N.Y. 2012) ("the critical factor—the *sine qua non* of efficiency").

[2] The *Cammer* factors include: (i) average weekly trading volume; (ii) number of securities analysts reporting on the stock; (iii) extent to which market makers and arbitrageurs trade in the stock; (iv) issuer's eligibility to file SEC registration Form S-3; and (v) a cause-and-effect relationship between unexpected, material disclosures and changes in stock prices. *Cammer v. Bloom*, 711 F. Supp. 1264, 1286–87 (D.N.J. 1989).

The only evidence put forward by AP7 on this "causal relationship" factor is an event study by its expert, Dr. Joseph R. Mason. If anything, however, Dr. Mason's event study suggests the opposite conclusion. His study considers sixteen days on which Goldman released quarterly and/or annual financial results. Mason Rep. ¶ 52. For eight of these sixteen "Release Days," he concludes that Goldman's stock price experienced statistically significant "abnormal returns"—that is, a movement in share price that cannot be attributed to market or industry factors. *Id.* ¶ 64. Ordinarily, Dr. Mason then would (as he has done in other cases) "check that the statistically significant abnormal returns . . . were *directionally appropriate* (*i.e.*, increased on positive news and decreased on negative news)." Ex. 5, Mason Acuity Rep. ¶ 68 (emphasis added); Ex. 6, Mason Dep. Tr. 68:25–69:6.

Inexplicably, Dr. Mason chose not to undertake that critical step here. Mason Dep. Tr. 112:3–21; *see also* Ex. 1, Kothari Rep. ¶ 17(a). This is a "serious error[]." *In re Home Loan*, 281 F.R.D. at 179 (referring to expert's failure to consider directional consistency).[3] As Dr. Mason himself has explained, one generally expects the price of a stock in an efficient market to "increase[] on positive news and decrease[] on negative news." Mason Acuity Rep. ¶ 68; Mason Dep. Tr. 64:19–65:5; *see also Waggoner v. Barclays PLC*, 875 F.3d 79, 97 n.28 (2d Cir. 2017) (explaining that evidence of "cause-and-effect" under *Cammer* 5 often seeks to demonstrate that "the stock price moves in the *direction* that it would be expected to move in light of the new information"). Here, on most of the Release Days, it did the opposite.

Defendants have presented a report by Dr. S.P. Kothari, who performed a directional analysis using a well-known metric known as an "earnings surprise," which reflects the

[3] Dr. Mason also failed to test the robustness of his event study (*e.g.*, by expanding his analysis to include pre-Class Period timeframes), despite admitting that it is "common" to do so and that he himself has done so in other cases. Mason Dep. Tr. 84:4–89:2; *compare* Mason Acuity Rep. ¶ 54.

difference between a company's reported earnings on a given Release Day and the earnings expectations of securities analysts (*i.e.*, the "consensus" estimate). Kothari Rep. ¶ 52. For a given Release Day, Dr. Kothari's study deemed the earnings surprise "positive" when Goldman's reported earnings-per-share was higher than the consensus estimate, and "negative" when it was lower. *Id.* ¶ 53. Dr. Kothari found that for at least six of the eight Release Days on which Dr. Mason claimed statistically significant abnormal returns—that is, at least *75%* of the time—those returns were directionally *inconsistent* with the earnings surprises. *Id.* ¶ 54 & Table 4.[4] In other words, for six of those eight days, the movement of the stock price contradicts Dr. Mason's conclusion that the market was efficient.[5]

Contemporaneous analysts' reports further support this analysis. For instance, Dr. Mason identified statistically significant *negative* abnormal returns on both October 17, 2017 and April 17, 2018. But on both of those days, at least three of the analyst reports cited by Dr. Mason noted a *positive* earnings surprise. Kothari Rep. ¶ 55.

Perhaps cognizant of this weakness, AP7 points out that in *Waggoner*, the Second Circuit held that "direct evidence of price impact under *Cammer* 5 is not always necessary." Pls. Mem. 20 (citing 875 F.3d at 96–97). But this is not a situation like *Waggoner*, where the plaintiff's event study was merely inconclusive. *See Strougo v. Barclays PLC*, 312 F.R.D. 307, 320 n.82 (S.D.N.Y. 2016) (plaintiffs' study was characterized by defendants as providing "no evidence of cause and effect"), *aff'd*, 875 F.3d 79 (2d Cir. 2017); *see also In re Petrobras Sec. Litig.*, 862 F.3d 250, 277–78 (2d Cir. 2017) (plaintiff presented "limited evidence of

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[4] As Dr. Mason concedes, there was no abnormal price movement in Goldman stock—in either direction—on the other eight Release Days.

[5] For one additional Release Day, Dr. Kothari found the analysis inconclusive. Kothari Rep. ¶ 54 n.91. That means that the directional analysis supported Dr. Mason's conclusion for only *one out of eight* relevant Release Days.

directionality"). Rather, the plaintiff here has put forward an event study that *affirmatively contradicts* the hypothesis of market efficiency.[6] As one court aptly put it: "The very purpose of requiring market efficiency before applying the fraud-on-the-market presumption is severely undercut by ignoring the direction of price movement in response to new information." *Bell v. Ascendant Solutions, Inc.*, 2004 WL 1490009, at *4 (N.D. Tex. 2004), *aff'd*, 422 F.3d 307 (5th Cir. 2005).

In short, AP7's proof of market efficiency falls short of the mark. This is enough by itself to defeat class certification.

B. Even if AP7 had carried its burden on market efficiency, the evidence adduced by Defendants rebuts the *Basic* presumption because it disproves any front-end price impact.

Defendants can rebut the *Basic* presumption "in a number of ways," including by showing that the alleged misstatement had no price impact. *Halliburton II*, 573 U.S. at 263–64. As the Supreme Court recently emphasized, the price impact analysis is flexible and holistic, and "courts should be open to *all* probative evidence on that question—qualitative as well as quantitative—aided by a good dose of common sense." *Ark. Teacher*, 141 S. Ct. at 1960.

AP7's theory of liability in this case is one of "inflation maintenance." Like the plaintiff in *Arkansas Teacher*, AP7 asserts that the alleged misstatements caused Goldman's stock price "to *remain* inflated by preventing preexisting inflation from dissipating from the stock price." *Id.* at 1959. Under this theory, "once the market learn[s] the truth" about the alleged misstatement via a corrective disclosure, the inflation dissipates, "causing the price to drop and shareholders to suffer losses"—which is referred to as a "back-end price drop." *Id.* at 1959–61.

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[6] The magnitude of the results here also distinguishes this case from those like *In re Teva Securities Litigation*, in which the district court concluded that a "small number of directionally mismatched dates" (5 out of 17) was "relatively unimportant" to the market efficiency analysis. 2021 WL 872156, at *29 (D. Conn. Mar. 9, 2021).

Under AP7's theory, the only way to determine whether the alleged misstatements had a front-end price impact is by looking for evidence of a back-end price drop attributable to a "correction" of the alleged misinformation. *Id.*; Mason Rep. ¶¶ 90–91.

Here, *there was no price impact*. Dr. Kothari's analysis proves this by applying the same regression equation used by Dr. Mason in his event study. As his report explains, Dr. Kothari used the same equation and the same four industry indices hand-picked by Dr. Mason, as well as a "Proxy Peer Index" comprised of Goldman's competitors (and thus better able to control for industry and market factors). *See* Kothari Rep. ¶¶ 81, 83–84. He then verified the robustness of his results by performing sensitivity analyses that looked at additional industry indices, estimation windows, and release dates. *Id.* ¶ 89. Next, he examined potentially confounding events around the two alleged corrective disclosure dates and used the intraday price movement of Goldman stock to assess whether the timing of the drop in share price corresponds to the timing of the alleged corrective disclosure. *Id.* ¶¶ 100, 124 & Figure 2. Finally, Dr. Kothari analyzed the connection (or lack thereof) between the alleged misstatements and the corrective disclosures. *Id.* ¶ 127. This work shows that there is *no* reason to infer that the alleged misstatements had any front-end impact on Goldman's stock price. Defendants have thus rebutted any presumption of reliance.

1. The November 9, 2018 "corrective disclosure" did not move the stock price, so it provides no basis to infer front-end price impact.

The first alleged "corrective disclosure" is a November 9, 2018 *Wall Street Journal* report that Blankfein and Low had both attended a meeting in September 2013. That "meeting" was actually a dinner attended by around 20 Goldman clients (including Prime Minister Najib) and took place several months *after* the last 1MDB transaction closed. SAC ¶¶ 288, 397. This was the second such meeting; the first (back in 2009) had already been disclosed.

Although Goldman's stock price did move on November 9, 2018, it was because of *other* information, not any "correction" of prior misstatements about Low. Dr. Kothari has concluded that the real drivers of the price movement were (i) the potential for a trade war between the U.S. and China, with then-President Trump's excoriation of Goldman as an "unpaid foreign agent[]" that could undermine negotiations over a proposed trade deal with China; (ii) the potential for Brexit to impact Goldman; (iii) new capital requirement regulations expected to disproportionately affect Goldman; (iv) the decline of Goldman's trading revenues; and (v) the release of Leissner's guilty plea transcript. Kothari Rep. ¶¶ 31, 121. These news items featured far more prominently in contemporaneous analyst reports than any discussion of a 2013 dinner attended by Blankfein and Low. *See id.* ¶¶ 121–22.

The timing of the news and price movements confirms this conclusion. The news of the September 2013 meeting came out at 11:02 a.m. EST on November 9, and Goldman's stock price movements remained consistent with its peers. Kothari Rep. ¶ 30 & Table 3. Goldman's stock price did not depart from those of its peers until later in the day, when some of the other pieces of news hit the market. *Id.* ¶ 30 & Figure 1. Courts have relied on this type of timing evidence to reject any inference of stock price inflation. *See, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 309 F.R.D. 251, 269–75 (N.D. Tex. 2015) (examining timing evidence and denying certification as to five corrective disclosures based on the absence of statistically significant price reactions, reasoning in part that an efficient market "is said to digest or impound news into the stock price in a matter of minutes").

Moreover, there is a fundamental "mismatch" between the contents of the November 9 disclosure and the alleged misstatements themselves. In *Arkansas Teacher*, the Supreme Court cautioned that plaintiffs invoking the inflation-maintenance theory cannot simply speculate that

a stock drop after a negative disclosure reveals "the amount of inflation maintained by [an] earlier misrepresentation." 141 S. Ct. at 1961. The inference "that the back-end price drop equals front-end inflation[] starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure." *Id.* For both categories of alleged misstatements, there is just such a mismatch here.

Business Principles Statements. The Business Principles Statements do not match the November 9 "corrective disclosure" in terms of content or specificity. While the latter relates to an event in 2013 attended by Blankfein and Low, the former reflects Goldman's general "commitment to reputation [and] integrity" and to "complying fully with the letter and spirit of . . . laws, rules, and ethical principles." *See, e.g.*, SAC ¶¶ 382–83; *supra* at 4. None of the challenged Business Principles Statements—made routinely by public companies[7]—related to any particular transaction. They were aspirational principles setting forth expectations, not guarantees that the firm would always avoid contact with individuals who later face government or regulatory scrutiny. And, tellingly, not a single analyst discussing Goldman on or immediately after November 9 referred to any of the Business Principles Statements as having been rendered false by the disclosure of the 2013 meeting. This is not surprising: there is simply no relationship between the generic, aspirational Business Principles Statements and the very specific November 9 *Wall Street Journal* report. That mismatch precludes any inference of front-end inflation caused by those alleged misstatements. *Ark. Teacher*, 141 S. Ct. at 1961 ("when the earlier misrepresentation is generic (*e.g.*, 'we have faith in our business model') and the later corrective disclosure is specific (*e.g.*, 'our fourth quarter earnings did not meet

[7] Indeed, Dr. Kothari identified approximately 11 similar statements made by members of Goldman's Proxy Peer group over the class period. Kothari Rep. ¶ 132 n.216 & Exhibit 7.2.

expectations') . . . it is less likely that the specific disclosure actually corrected the generic misrepresentation").

In this critical respect, this case is markedly different from *Vivendi* and *Waggoner*, both of which involved direct matches between the alleged misstatements and the purported corrective disclosures. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 254–55 (2d Cir. 2016) (alleged misstatements touting confidence in meeting cash flow targets matched purported corrective disclosure of cash-flow problems); *Waggoner*, 875 F. 3d at 87–88 (Barclays' assurance that its trading platforms were "safe from" aggressive trading practices was "corrected" by later news revealing that those representations were false when made).

It is not enough that such generic misstatements and purported "corrective disclosures" tangentially implicate the same subject matter.[8] If that were the case, a finding of price impact would be virtually automatic whenever a company makes generic statements about its commitment to integrity, reputation, and legal compliance (as all do), but—for whatever reason—its controls fail, or it is otherwise scrutinized by regulators. Companies could avoid such a finding only by assuming an affirmative duty to disclose *all* uncharged potential misconduct. The Second Circuit has made clear that "disclosure is not a rite of confession" and that "companies do not have a duty to disclose uncharged, unadjudicated wrongdoing." *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014).

1MDB Statements. There is likewise a "mismatch" between the November 9 "corrective disclosure" and the 1MDB Statements. The Supreme Court made clear that a misstatement and a corrective disclosure must match in both *content* and *level of specificity*.

[8] On remand, the district court in *Arkansas Teacher* recently granted class certification despite defendants' argument that there was a "mismatch" between the generic alleged misstatements in that case and the purported "corrective disclosures," and thus no price impact. Defendants respectfully submit that this was error. Goldman recently filed a petition for permission to appeal the district court's order to the Second Circuit, which petition remains pending.

See Ark. Teacher, 141 S. Ct. at 1961. As to the statements about Goldman's fees and commissions, nothing in the November 9 *Wall Street Journal* article even mentions them. And as to the two other alleged misstatements—one related to Goldman's awareness of Low's involvement in the 1MDB transactions, and one related to Blankfein's awareness of "red flags" about 1MDB—there is still some mismatch, although it is not as conclusive a mismatch as with the Business Principles Statements. But even that less-conclusive degree of mismatch helps to rebut the inference of price impact, and it is bolstered by overwhelming economic evidence.

Moreover, even if there were a content-and-specificity "match" between these latter two alleged misstatements and the November 9 disclosure, information about the 2013 meeting between Blankfein and Low was at best cumulative of prior disclosures. In its November 2, 2018 Form 10-Q, Goldman included the contents of Leissner's guilty plea and disclosed that "any proceedings by the DOJ or other governmental or regulatory authorities could result in the imposition of significant fines, penalties and other sanctions against the firm." Ex. 3 at 89 (Q3 2018 10-Q). That same day, news outlets reported that a "high-ranking executive" had attended meetings with Low in 2009 and 2013. Ex. 7, Bloomberg Article (Nov. 2, 2018). Six days later, on November 8, the executive who had attended the 2009 meeting was identified as Blankfein—a disclosure that had *no* statistically significant impact on Goldman's stock price that day. *See* Kothari Rep. ¶¶ 27, 73, 114. There is no reason to think that the *next* day's reporting about a second meeting—one that took place *after* the 1MDB bond deals had closed, involved other clients, and, unlike the 2009 meeting, is not alleged to have involved *any* discussion of 1MDB—resulted in a statistically significant price movement.

Finally, Dr. Kothari's review of contemporaneous analyst reports provides yet more evidence that the market did not consider the news regarding the September 2013 meeting to be

value-relevant information.[9] Although certain reports published between October 1, 2018 and January 31, 2019 referred generally to 1MDB, *none* specifically mentioned news of the second meeting attended by Blankfein and Low. In fact, there were only two reports that referred even obliquely to Blankfein's 1MDB-related meetings—one regarding the previously-disclosed 2009 meeting (discussed above), and another that simply reported a "meeting" between Blankfein and Low without any further detail. This suggests that the analysts who deemed 1MDB-related information to be worth mentioning by late 2018 either did not notice the November 9 disclosure or did not find it "value-relevant." *See* Kothari Rep. ¶ 119.

In sum, the expert evidence—"aided by a good dose of common sense" (*Ark. Teacher*, 141 S. Ct. at 1960)—shows that the alleged misstatements had no front-end price impact. This showing rebuts the presumption of reliance. And without that presumption, class certification must be denied.

2. There was no statistically significant price drop on December 17 at all, so the disclosure on that day provides no basis to infer front-end price impact.

The evidence also shows that the December 17 "corrective disclosure" did not remove any front-end inflation from the stock price. In particular, the abnormal return that Dr. Kothari calculated for that date (using Dr. Mason's regression model, both "as is" and adjusted for more appropriate indices) showed no statistical significance at the 95% confidence level. Kothari Rep. ¶¶ 35, 101–03; Mason Rep. ¶ 92 (price impact can be inferred only "where the abnormal return following a curative disclosure is statistically significant").[10] This finding alone means

[9] Dr. Mason himself indicated that he would consider analyst reports in apportioning the impact of an alleged corrective disclosure on Goldman's share price. ECF No. 142-1, Mason Rep. ¶ 93.

[10] As Dr. Mason acknowledges (Mason Dep. Tr. 109:19–110:11), the 95% confidence level is widely accepted as the industry standard for econometric analyses, and it has been recognized in this Circuit and others as the appropriate standard in the securities class action context. *See, e.g.*, *AIG*, 265 F.R.D. at 187; *Moody's*, 274 F.R.D. at 493 n.11.

that the proposed class cannot include any purchasers allegedly impacted solely by the December 17 disclosure. As a result—and at a minimum—the class period must be shortened. *See, e.g.*, *In re Am. Int'l Grp. Inc. Sec. Litig.*, 265 F.R.D. 157, 187–89 (S.D.N.Y. 2010) (modifying class definition to exclude investors impacted by corrective disclosures shown to lack statistically significant price movement at 95% confidence interval); *In re Moody's Corp. Sec. Litig.*, 274 F.R.D. 480, 493 (S.D.N.Y. 2011) (denying class certification in the absence of a statistically significant abnormal return).

Common sense explains the lack of significant market reaction: not only had there been longstanding, widespread coverage of the possibility that Goldman might face severe penalties as a result of its involvement with 1MDB, but Goldman *itself* had affirmatively disclosed that risk well before December 17. *See* Kothari Rep. ¶¶ 104–06 (citing prior disclosures, *e.g.*, Goldman's Q3 2018 Form 10-Q dated Nov. 2, 2018; a Nov. 14, 2018 *Reuters* article; and a Nov. 26, 2018 *Financial Times* article). The market had already "priced in" the news. *In re Signet Jewelers Ltd. Sec. Litig.*, 2019 WL 3001084, at *19 (S.D.N.Y. 2019) ("courts are required to cut off the class period on the date of a statement or event that cures the market").

In short, this second corrective disclosure did not produce any statistically significant price drop, so it does not show that the price was inflated in the first place. This too requires denying class certification—or, at a minimum, changing the Class Period to exclude anyone who purchased Goldman stock after November 9.

II. AP7 has not shown that damages can be calculated on a classwide basis.

Class certification should also be denied on an independent but related basis: AP7 has not shown that its proposed damages methodology is "consistent with the classwide theory of liability." *In re U.S. Foodservice*, 729 F.3d at 123 n.8 (citing *Comcast*, 569 U.S. at 34–35). As

the Supreme Court explained in *Comcast*, if a proposed damages model cannot "isolate" and measure "*only* those damages attributable" to the plaintiff's theory of liability, then the plaintiff "cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." 569 U.S. at 35 (rejecting notion that "at the class certification stage *any* method of measurement is acceptable so long as it can be applied classwide").

As noted above, AP7's "sole theory of liability" is that shareholders suffered losses when inflation maintained by the alleged misstatements "was released from the stock price following the disclosure of information revealing the fraud." Pls. Mem. 22. Dr. Mason suggests that, at some later stage, he could determine the amount of "share price inflation" attributable to each alleged misstatement "by analyzing the impact" of the two remaining corrective disclosures through an event study. Mason Rep. ¶¶ 88–96. This analysis, he acknowledges, would require him to determine whether "information unrelated to the alleged fraud (*i.e.*, 'confounding information') was released at or about the same time as the curative disclosures" and "whether such confounding information is responsible for all or some of the abnormal stock price return." *Id.* ¶ 92. In other words, he would need to "'disaggregate' the price impact of such confounding information from the price impact of the fraud-related information." *Id.*; *accord Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2022 WL 151302, at *2 (2d Cir. Jan. 18, 2022) ("[P]roof of loss causation requires that plaintiffs disaggregate losses caused by disclosures of the truth behind the alleged misstatements from losses that result from other factors, such as changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events.").

At his deposition, however, Dr. Mason effectively conceded that he might not be able to

accomplish this. He repeatedly stated that dealing with such confounding information would be "a very, very complex exercise" and that it would be "very difficult to disentangle" the effect on share price of various bits of information. Mason Dep. Tr. 135:15–20; *see also id.* at 122:2–123:5 ("[M]y opinion is that this is really hard to untangle . . . I wouldn't go so far as to say it can't be done, but it's an incredibly hard list.").[11] He suggested that this would be especially true for a company like Goldman, which, in Dr. Mason's words, issued "thousands of 8-Ks" during the class period (Mason Dep. Tr. 75:24–77:20) and was the focus of countless news reports regarding a variety of topics, including (among others) Brexit, the U.S.-China trade war, and myriad issues relating to its business segments and operations. *See supra* at 13. In other words, Dr. Mason—who, from the outset of his deposition, expressed confusion over the very notion of classwide damages (despite using the term in his report)[12]—provides no details about how he would perform the critical but "incredibly hard" task of disentangling the price impact of one piece of purportedly "value relevant" news from another.

Indeed, even if Dr. Mason could isolate any alleged abnormal returns attributable solely to the two alleged "corrective" disclosures, he would still need to determine the amount of price inflation attributable to each of the numerous separate misstatements alleged—which vary in nature, specificity, and timing—and measure the corresponding share price inflation, if any, for each day of the four-year Class Period. Dr. Mason does not say how he would do any of this. Mason Dep. Tr. 143:24–145:15 ("I have not analyzed the specific misstatements," nor "undertaken any additional analysis to classify these or treat them in any other way."); *id.* at

[11] Although Dr. Mason's testimony on this point was provided in the context of defending his decision not to check whether the statistically significant abnormal returns he identified in this case were "directionally appropriate," the same "very, very complex" exercise he describes would apply to any attempt to "disentangle" the price impact of "confounding information from the price impact of the fraud-related information." Mason Rep. ¶ 92.

[12] Mason Dep. Tr. 32:6–34:9 ("I would say in a general sense no, I would not claim to know exactly what you mean [by classwide damages], because again I'm not the attorney in this room.").

140:25–143:7 (admitting that he has not considered how his contemplated methodology would measure daily price inflation). Other courts have expressed "serious concerns" regarding a plaintiff's ability to satisfy *Comcast* where the "severity and nature of the alleged misrepresentations changed [over time] . . . the information was disclosed at different times in multiple alleged corrective disclosures . . . [and] there were multiple alleged misrepresentations unfolding simultaneously—some of which may have been materially misleading and some of which may not have been." *Loritz v. Exide Techs.*, 2015 WL 6790247, at *24 (C.D. Cal. July 21, 2015) (refusing to certify damages class). The same "serious concerns" exist here.

In that same vein, AP7 has not satisfied *Comcast*'s requirement that it "provide sufficient detail about [its] proposed [damages] methodology to permit a court to determine whether the methodology is suitable to the task at hand." *Jensen v. Cablevision Sys. Corp.*, 372 F. Supp. 3d 95, 126 (E.D.N.Y. 2019); *see, e.g.*, *Hughes v. Ester C. Co., et al.*, 320 F.R.D. 337, 342–43 (E.D.N.Y. 2017) (denying certification where none of plaintiffs' proffered damages models "isolate[d] the premium attributable to Plaintiffs' theory of the case"); *In re BP Sec. Litig.*, 2013 WL 6388408, at *17 (S.D. Tex. Dec. 6, 2013) (denying class certification absent "a more complete explication of how Plaintiffs propose to use an event study to calculate class members' damages").[13] Its failure to do so precludes class certification.

III. AP7 is subject to unique defenses that threaten to become the focus of the litigation.

Finally, class certification is inappropriate for the additional reason that AP7 "is subject to unique defenses which threaten to become the focus of the litigation." *Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 180 (2d Cir. 1990) (noting that this defeats

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[13] The Second Circuit's observations in *Roach v. T.L. Cannon* (cited in Pls. Mem. 23) do not compel a different conclusion. While the "fact that damages may have to be ascertained on an individual basis is not sufficient to defeat class certification," it remains the case that "a model for determining classwide damages . . . must actually measure damages that result from the class's asserted theory of injury . . . ." 778 F.3d 401, 405–07 (2d Cir. 2015).

both typicality and adequacy); *George v. China Auto. Sys., Inc.*, 2013 WL 3357170, at *1 (S.D.N.Y. July 3, 2013) (same). Importantly, it is the *threat* that matters: the simple fact that the class representative would be required to devote significant time and resources to rebut these defenses, potentially prejudicing absent class members, warrants denial of class certification. *See In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 481 (S.D.N.Y. 2002); *Landry v. Price Waterhouse Chartered Accts.*, 123 F.R.D. 474, 476 (S.D.N.Y. 1989). AP7's [REDACTED] and its unusual trading patterns present such defenses.

A. AP7's [REDACTED] stock gives rise to unique defenses.

At the corporate deposition of AP7, its CEO, Richard Grottheim, [REDACTED] Grottheim 30(b)(6) Dep. Tr. 66:13–17; 68:16–25. This means that [REDACTED]

When pressed [REDACTED]. *Id.* at 68:9–69:3; 73:4–14; 74:3–6; 92:25–93:5. This is particularly troubling considering that, over the four-year Class Period, [REDACTED] Worse, [REDACTED]

AP7 refused.[14] Besides prejudicing Defendants,[15] this conduct casts doubt on AP7's credibility and adequacy to serve as class representative. *See, e.g.*, *Kline v. Wolf*, 702 F.2d 400, 401–03 (2d Cir. 1983) (affirming denial of class certification based, *inter alia*, on lead plaintiff's failure to comply with discovery obligations).

In particular, courts deem class representatives inadequate when they have "exhibited a disregard or inability to comply with discovery requests." *Koss v. Wackenhurt Corp.*, 2009 WL 928087, at *7 (S.D.N.Y. Mar. 30, 2009). For example, in *Rocco v. Nam Tai Elecs., Inc.*, 245 F.R.D. 131 (S.D.N.Y. 2007), the court denied class certification because defendants alleged that the lead plaintiff had failed to comply with discovery requests, which "could impact [lead plaintiff's] credibility if this information were brought before the jury at trial." *Id.* at 136–37. Here, as in *Rocco*, the "unique defenses that would arise during trial from such accusations against [AP7] would pose a problem to the rest of the class in making [these] unique defenses the focus of the litigation." *Id.* at 137.

B. AP7's unusual trading patterns also gives rise to unique defenses.

In addition, AP7's unusual and apparently opportunistic trading patterns raise questions regarding its reliance on the alleged misstatements and provide "fodder for defendants to argue that [AP7] relied on its own valuation of [Goldman] securities, and not on their market price." *In re Petrobras Sec. Litig.*, 104 F. Supp. 3d 618, 623 (S.D.N.Y. 2015). These issues too stand

[14] [redacted]

[15] For instance, Mr. Grottheim testified that [redacted] *Id.* at 50:2–9. This and other information relevant to [redacted] and could bear on questions of reliance, typicality and adequacy in this case. *See, e.g.*, *In re Critical Path, Inc. Sec. Litig.*, 156 F. Supp. 2d 1102, 1109–10 (N.D. Cal. 2001) ("Short sales raise the question of whether the seller was actually relying on the market price" and the "class is not served by its representative coming under such scrutiny").

in the way of AP7's ability to satisfy Rule 23.

As noted above, AP7 engaged in no less than 60 trades of Goldman stock during the Class Period (40 purchases and 20 sales affecting more than 250,000 shares). Grottheim 30(b)(6) Dep. Tr. 111:19–23; 112:14–20; ECF No. 63-1, Sch. A to the SAC. These transactions included numerous "in and out" trades on which AP7 often profited and multiple, large post-corrective disclosure purchases. For instance, on November 8, 2018—one day before the first alleged "corrective disclosure"—AP7 bought more than 9,800 Goldman shares in two separate tranches, before also selling 2,200 shares in a third transaction that same day. Then, on November 26 and December 12, 2018— following what AP7 now claims was the "revelation" of Goldman's alleged fraud—AP7 *bought nearly 25,000 additional shares*, [REDACTED] Grottheim 30(b)(6) Dep. Tr. 121:13–25. [REDACTED] *Id.* at 122:2–5.[16]

A plaintiff that increases its holdings after the revelation of an alleged fraud "is subject to the defense that the alleged misstatements or omissions were really not a factor in the purchasing decision but rather that other investment considerations drove the decision." *China Auto.,* 2013 WL 3357170, at *6; *Rocco*, 245 F.R.D. at 135–36 (denying class certification where lead plaintiff's "post-class purchases indicate . . . that he was relying not on the market, but on his own assessment of the value of the stock"). AP7's "in and out" trades likewise subject it to "unique inquiries" regarding its trading patterns, including "whether the fraud was in fact irrelevant to [its] purchasing and sale decisions, and whether on individual trades [it] profited." *China Auto*, 2013 WL 3357170, at *7; *accord IBEW Local 90 Pension Fund v.*

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[16] [REDACTED] *Id.* at 22:4–6; 122:12–14.

Deutsche Bank AG, 2013 WL 5815472 at *22 (S.D.N.Y. Oct. 29, 2013); *In re IMAX Sec. Litig.*, 272 F.R.D. 138, 147, 155, 160 (S.D.N.Y. 2010).[17] Here, too, AP7's individualized issues threaten to become the focus of this litigation.

Indeed, AP7's counsel in this case has challenged the adequacy of proposed lead plaintiffs on these precise grounds. In one recent case, Kessler Topaz successfully argued that a lead plaintiff's "highly unusual trading pattern" (which, like AP7's here, included "in and out" trades and post-corrective disclosure purchases) rendered that shareholder "atypical and subject to unique defenses." Mem. of Law filed by Kessler Topaz at 12–15, *Plymouth Cty. Ret. Sys. v. Apache Corp*., 2021 WL 4726510 (S.D. Tex. Oct. 6, 2021). The *Plymouth* court agreed.

In the end, it does not matter whether AP7 believes it has good-faith explanations for its trading patterns and document destruction. The "point is that the parties will spend significant time and resources" litigating these issues, thus "overwhelming common issues." *China Auto.*, 2013 WL 3357170, at *3. For this reason too, class certification should be denied.

CONCLUSION

For all these reasons, class certification should be denied. And at a minimum, the class period should end on November 9, 2018 (because the December 17, 2018 alleged corrective disclosure provides no basis to infer price inflation) and the class should exclude any investors who sold all their shares of Goldman stock prior to that date.

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[17] *See also In re Puda Coal Sec. Inc. Litig.*, 2013 WL 5493007 (S.D.N.Y. Oct. 1, 2013) (excluding in-and-out purchasers from class); *Bensley v. FalconStor Software, Inc.*, 277 F.R.D. 231, 237–41 (E.D.N.Y. 2011) (refusing to appoint in-and-out investor as lead plaintiff because it was subject to unique defenses); *In re Bally Total Fitness Sec. Litig.*, 2005 WL 627960, at *6 (N.D. Ill. Mar. 15, 2005) (same).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Robert Y. Sperling
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