'Goldman Sachs': Aspirational Statements, Inflation-Maintenance and Remand

By Anthony Michael Sabino

Hollywood has its sequels, and the legal world has its remands. Both extend the arc of the original narrative, and both come with no assurance that they shall be the last chapter.

In like fashion, previously we featured the origin story of *Goldman Sachs Group v. Arkansas Teacher Retirement System*, 594 U.S. ___ (June 21, 2021) (*Arkansas Teacher*), the U.S. Supreme Court's newest securities law landmark. Today we continue the saga, under the slightly different title of *In re Goldman Sachs Group Securities Litigation*, ___ F. Supp. 3d ___ (No. 10 Civ. 3461) (S.D.N.Y. Dec. 8, 2021) (*Goldman*).

Once more, the defendant needs no introduction. Structured as a traditional partnership for its first 130 years, in 1999 the financial powerhouse transformed itself into a publicly held corporation, with the corresponding need to issue annual reports, SEC filings, and frequent public pronouncements describing its operations.

Like its peers, the investment bank has, of late, inserted in these disclosures so-called "aspirational statements," i.e., robust declarations of the company's devotion to maintaining the highest ethical standards. Specifically, the financial titan unequivocally attested that "[o]ur reputation is one of our most important assets," that "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest," that "[o]ur clients' interests always come first," and that "honesty and integrity are at the heart of our business."

Yet at the same time that Goldman was publicizing its allegiance to these noble sentiments, it was also creating and marketing investment vehicles constructed around tranches of collateralized debt obligations, the now-infamous "CDOs." The investment bank delegated the selection of each fund's underlying mortgages to a hedge fund, which then allegedly populated the Goldman vehicles with debt obligations thought likely to underperform or fail outright. The hedge fund then actively bet against the funds' success ("shorted," in Wall Street vernacular).

This led to public accusations that, at the same time it was publicly trumpeting its robust controls against conflicts, the venerable investment bank was irredeemably at odds with its own clients. Understandably, the market reacted by punishing Goldman's price per share.

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Infuriated shareholders commenced an action premised on the theory of "inflation-maintenance," a species of federal securities fraud perpetrated by issuing misleading statements with the intent to perpetuate an already inflated share price. The measure of damages for such malfeasance is the "price impact" wrought, in other words, the amount the stock's price would have declined had the entity spoken truthfully in its public utterances.

Reviewing these largely unaltered contentions for the second time, Southern District of New York jurist Paul A. Crotty introduced his decision on the remand by cataloguing the controversy's upward mobility to the U.S. Supreme Court, as well as its intermediate stops at the Second Circuit Court of Appeals. But for its first substantive task, the lower court took stock of the fresh guidance issued by the nation's highest court less than six months prior in *Arkansas Teacher*.

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Second, but apparently no less important in the lower court's estimation, was the high tribunal's extensive description of how the narrative of the inflation-maintenance theory cannot withstand a "mismatch" between generalized misstatements and more precise subsequent corrective disclosures. Evident here is *Goldman*'s determination to apply the letter of the Justices' latest pronouncements.

Third and last is *Arkansas Teacher*'s admonition that the trial courts employ a heaping dose of common sense as they consider *all* evidence probative of price impact when adjudicating claims of this variety.

There followed an incisive and, some might even say (and we would agree), unforgiving analysis of the voluminous expert testimony proffered in the initial proceedings. Indeed, demonstrating fine attention to detail, a succinct parenthetical duly noted that, since the parties had already "fully addressed" all factual issues, supplemental evidence had not been invited.

The district court now characterized the "sole dispute" remaining for adjudication was whether Goldman had met its burden to refute the *Basic* presumption by demonstrating that the allegedly false statements lacked any price impact. Guided by the precepts announced in *Arkansas Teacher*, District Judge Crotty » Page 8

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Remand

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opined that it is the task of the trial court to determine if the generic nature of alleged misstatements "fatally undermine[s]" the bond between subsequent corrective disclosures and a decline in market valuation on the one hand, and the initializing purported misrepresentations which are alleged to have maintained price inflation on the other, the "mismatch" expounded upon by the Supreme Court only months before.

In the case at bar, the trial judge deemed credible the putative class representative's allegations that the financial house had "deliberately bet against its own clients," while in stark counterpoise unabashedly disparaged the testimony of at least one of the investment bank's expert witnesses, criticizing his analytical approach as novel and unreliable. In sum, District Judge Crotty found the evidence compelled a ruling that Goldman's purported misstatements "in fact impacted [its] stock price."

Turning next to what the lower court characterized as "the heart" of the parties' disagreement, that being the "genericness" of the alleged untruths, and their corresponding price impact, if any, the Southern District jurist highlighted the global titan's insistence that the public utterances in question were not merely generalizations, but "'exceptionally generic'" statements, bereft of specific, factual or concrete information.

Yet no matter how strident the financial behemoth was in these assertions, they were nonetheless unavailing. Considering them on the remand, the trial court rejected these arguments out of hand, ruling, seriatim, that the allegedly fraudulent statements "were not so generic" as to render them incapable of being a direct cause of inflation-maintenance, that there was "strong evidence of price impact," and that the purportedly misleading statements "*did* in fact maintain price inflation in this instance."

Notably, the district court opined further that while certain of these alleged misrepresentations "may present as platitudes when read in isolation, others are significantly more substantive." Indeed, at this point District Judge Crotty extrapolated the teachings of *Arkansas Teacher* somewhat, declaring that even generalizations, "when read in conjunction with each other ... may reinforce misconceptions" as to a security's true value. For these reasons, it is therefore imperative for the finder of fact to deliberate upon such generic statements as a complete whole, and not consider them in isolation from each other.

The lower court then turned to resolve the investment bank's penultimate contention, paraphrased by the trial bench as "if everyone [meaning publicly held corporations] is saying these things, and everyone [referring now to investors] expects us to say these things too, how can it make any difference when we do so?" Giving but short shrift, District Judge Crotty decreed that such arguments "fall flat."

The trial court proclaimed to the contrary that "the fact that similar companies have made similar statements does not per se render a statement incapable of maintaining pre-existing price inflation." Unrestrained in his skepticism of the claim that "everybody does it," the district judge asked how could such generic utterances have "achieved such ubiquity in the first place" if they were incapable of influencing or, as relevant here, maintaining a corporation's price per share?

For its final argument, the financial powerhouse urged the lower court not to link any of its generic alleged misstatements with price impact, asserting that these utterances posed a "'glaring ... mismatch'" with the investment bank's subsequent corrective disclosures. This contention likewise enjoyed no traction.

After first chiding both sides for putting forward "slanted construction[s] of the Supreme Court's guidance" for gauging a purported mismatch in the "genericness" between alleged misrepresentations and follow-up corrections, District Judge Crotty interpreted *Arkansas Teacher* as establishing "a *sliding* scale," not a binary question. The fresh emanations from the Supreme Court do not insist upon equivalency; rather, they contemplate "differing levels of abstraction between misstatement and disclosure."

Now applying that rubric to the matter at hand, the trial court concluded that the purported misstatements at issue "are not so exceedingly more generic that the corrective disclosures that they vanquish the otherwise strong inference of price impact" already evident in the factual record. The investment bank having failed to meet its burden to "demonstrate a complete lack of price impact attributable to the alleged misstatements," class certification was granted.

For our closing, we laud this brand new decision by New York's Southern District, primarily for two reasons. First, it faithfully applied the Supreme Court's latest wisdom on the pivotal issues of aspirational statements, price impact, and the inflation-maintenance theory. Second, it added its own imprimatur, exemplified by its crucial holdings that generic utterances must be viewed as a whole, not individually, and that the question of divining a "mismatch" between aspirational statements and subsequent corrective disclosures must be measured on a "sliding scale."

Yet, we have no doubt that the district court's holdings shall, once more, travel the appellate track, and might even be reviewed by the Supreme Court. Likewise, we are equally confident that the articulations of *Goldman* shall be either joined or disputed in similar cases in other venues. For those reasons, we await the sequel or even sequels to this epic tale.

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