

# 16-0250-cv

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In The  
**United States Court of Appeals  
For the Second Circuit**

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PENSION FUNDS,

*Plaintiff,*

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,

*(Caption Continued on Inside Cover)*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
No. 1:10 CIV. 03461 (PAC)

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**BRIEF FOR AMICI CURIAE AARP AND AARP FOUNDATION IN SUPPORT OF PLAINTIFFS-  
APPELLEES ARKANSAS TEACHER RETIREMENT SYSTEM, WEST VIRGINIA INVESTMENT  
MANAGEMENT BOARD, ET AL., SEEKING AFFIRMANCE OF CLASS CERTIFICATION**

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August 25, 2016

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*[continuation from cover page]*

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TIKVA BOCHNER, EHSAN AFSHANI, LOUIS GOLD, THOMAS DRAFT, Individually & 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,*

SARAH E. SMITH,

*Defendant.*

## **CORPORATE DISCLOSURE STATEMENT**

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

Dated: August 25, 2016

/s/Barbara A. Jones  
Barbara Jones

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## INTEREST OF AMICI CURIAE<sup>1</sup>

AARP—with approximately 38 million members—is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people’s financial security, health, and well-being. AARP’s charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older to secure the essentials so that they do not fall into poverty during retirement. Through, among other things, participation as amicus curiae in state and federal courts,<sup>2</sup> AARP and AARP Foundation seek to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b) of the United States Court of Appeals for the Second Circuit, counsel for AARP and AARP Foundation state that no party’s counsel authored this brief either in whole or in part, and further, that no party or party’s counsel, or any person or entity other than amici, their members and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties consented to the filing of this brief.

<sup>2</sup> *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *Erica P. John Fund, Inc. v. Halliburton Co. (Halliburton I)*, 563 U.S. 804 (2011).

Investors over the age of fifty comprise a significant percentage of the investing public in United States markets. Older people are frequent targets of financial fraud because they often must look for investment opportunities that will supplement Social Security and other sources of retirement income. Their need to ensure that they do not “run out of money” in retirement, makes them particularly vulnerable. Amici are particularly concerned about the potential negative impact of conflicts of interest on the retirement security of AARP members and other older Americans. As a result, AARP and AARP Foundation have recognized the need to combat securities fraud and made this issue a high priority.

### **SUMMARY OF ARGUMENT**

Investment practices of both institutional and individual investors are built on the cornerstone that securities markets are fundamentally fair and that prices reflect available public information. As this Court recognized decades ago, “[t]he essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do.” *Charles Hughes & Co., v. SEC*, 139 F. 2d 434, 437 (2d Cir. 1943). The Complaint pleads actionable misrepresentations and omissions regarding Goldman Sachs’ (Goldman) conflict of interest and business practices.

Complex securities create considerable challenges for investors and fraud remains an enormous problem for all investors. Many investors, including pension

plan investors, are unable to guard against conflicts of interest. The market price of securities reflects public statements and investors are entitled to rely on statements in annual reports and other public documents. *See Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988). The District Court correctly certified this case as a class action, and that decision should be affirmed.

## **ARGUMENT**

### **I. THE COMPLAINT PLEADS ACTIONABLE MISREPRESENTATIONS AND OMISSIONS REGARDING GOLDMAN’S CONFLICT AND BUSINESS PRACTICES.**

In this case, Appellee shareholders (Plaintiffs) allege that Appellants (Defendants) made material misstatements and omissions regarding Goldman’s conflict of interest policies and business practices. The Complaint is full of factual details, including internal Goldman documents from the Senate-Subcommittee’s bipartisan report, that allege that Goldman repeatedly lied to investors when it claimed to have controls in place to prevent potential conflicts of interest, while creating actual conflicts of interest with its clients to make billions. The Complaint further alleges that while engaging in conflicted billion-dollar transactions, Goldman repeatedly assured its investors that it had “extensive procedures and controls that are designed to [identify and] address conflicts” Compl. ¶134. In every Annual Report from 2006-2010, Goldman advised investors that: “Our clients’ interest always comes first.” *Id.* ¶ 24. Recognizing the importance to

investors that their interests be protected from conflicts, Goldman still assures their clients' that their interests always comes first. *Goldman Sachs Business Principles* (2016), <http://www.goldmansachs.com/who-we-are/business-standards/business-principles/> (2016). As the Court in *Lapin v. Goldman Sachs Group, Inc.* noted: "it defies logic to suggest that . . . an investor would not reasonably rely on a statement, contained in what Defendants concede was a list of Goldman's business principles." 506 F. Supp. 2d 221, 239-40 (S.D.N.Y. 2006) (Karas, J).

The Complaint alleges that Goldman's Form 10-Ks for 2006 and 2007 respectively state:

Conflicts of interest are increasing and a failure to appropriately deal with conflicts of interest could adversely affect our businesses.

Our reputation is one of our most important assets. *As we have expanded the scope of our businesses 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 interests of another client . . . .*

\* \* \*

*We have extensive procedures and controls that are designed to [identify and] address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses. However, appropriately [identifying and] dealing with conflicts of interest is complex and difficult, and our reputation could be damaged and the willingness of clients to enter into transaction in which such a conflict might arise may be affected if we fail, or appear to fail, to [identify and] deal appropriately with conflicts of interest. In addition, potential or perceived conflicts could give rise to litigation or enforcement actions.*

Compl. ¶134 (emphasis in Complaint).

Goldman’s reassurance to clients of its “extensive procedures and controls” is not vague “puffery,” as Defendants suggest. The Complaint actually alleges that Goldman, and each individual defendant, actually knew about the pervasive conflicts, yet failed to disclose such material information to its investors. *Id.* ¶¶ 19, 36, 38-40, 92, 98, 137, 158, 235. The Complaint further alleges that each individual defendant participated in the issuance of false and misleading statements, including the preparation of the press releases and Securities and Exchange Commission (SEC) filings at issue. *Id.* The detailed factual allegations suggest that Goldman’s failure to disclose its known conflicts with clients, suggest a knowing effort to conceal, rather than a mere failure of oversight.

Such concealment is actionable, particularly where the Complaint alleges that the defendants were actually aware that misconduct had occurred, yet made material false public statements about that conduct. See *In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 271 (S.D.N.Y. 2010) (“By addressing the quality of a particular management practice, a defendant declares the subject of its representation to be material to the reasonable shareholder, and thus is bound to speak truthfully.”) (quoting *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 282 (3d Cir.).

In *Basic Inc. v. Levinson*, the Supreme Court agreed with numerous courts of appeals, and with the SEC, that there should be a rebuttable presumption that, in well-developed and open markets, (i) material public information is reflected in the market price of a security, and (ii) investors rely on the integrity of this market price in making investment decisions. 485 U.S. at 247. Investment practices of both institutional and individual investors are built on the cornerstone that securities markets are fundamentally fair and that prices reflect available public information. Unfortunately, the securities markets are not always fair. As this Court recognized decades ago, “[t]he essential objective of securities legislation is to protect those who do not know market conditions from the overreachings of those who do.” *Charles Hughes & Co. v. SEC*, 139 F.2d 434, 437 (2d Cir. 1943).

A material misrepresentation that reflects an unduly favorable view of a company, when disseminated to the investing public, will typically raise the price of the company's stock, because the price of a security traded in an efficient market ordinarily reflects all publicly available information. *Basic*, 485 U.S. at 241-49. The artificial inflation will not be reduced or eliminated until the market price reflects the true facts that had been concealed by the fraud.

The District Court noted that: “Goldman’s representations about its purported controls for avoiding conflicts were directly at odds with its alleged conduct.” *In re Goldman Sachs Group, Inc. Sec. Litig.*, 2014 U.S. Dist. LEXIS

85683 at \*15 (S.D.N.Y June 23, 2014). Further, the Complaint alleges that the statements were fraudulent causing Goldman’s stock to trade at an artificially high price, until the truth was revealed and the stock price dropped significantly. *E.g.*, Compl. ¶¶ 19, 36, 28-40, 92, 98, 137, 158, 235.

The District Court correctly held that at the class certification stage, Plaintiffs are entitled to a presumption of reliance on Goldman’s statements. *In re Goldman Sachs Group, Inc. Sec. Litig.*, 2015 U.S. Dist. LEXIS 128856 at \*11 (S.D.N.Y. Sept. 24, 2015); *see also In re Goldman Sachs Group, Inc. Sec. Litig.*, 2014 U.S. Dist. LEXIS 85683 at \*8 (“[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.” (*quoting Richman v. Goldman Sachs Grp. Inc.*, 868 F. Supp. 2d 261, 280 (S.D.N.Y. 2012))).

## **II. COMPLEX SECURITIES CREATE CONSIDERABLE CHALLENGES FOR INVESTORS.**

### **A. Fraud Remains an Enormous Problem, Especially for Older Investors.**

This era in the investment arena presents an unusually difficult environment for all investors. Defendants argue that the pension plan investors are “highly sophisticated.” Br. for Defendants-Appellants Seeking Reversal of Class

Certification 13. Unfortunately, both pension plan and individual investors often lack investment expertise and must rely on experts. Many investors, including plan investors, are unable to assess the quality of the expert's advice or guard against its conflicts of interest. U.S. Dep't of Labor, *Regulating Advice Markets*, at 3 (Apr. 2016), <https://www.dol.gov/ebsa/pdf/conflict-of-interest-ria.pdf>. Unfortunately, allegations of investment fraud are not limited to this case. Older investors, who now shoulder significant responsibility for making appropriate investment choices, are even targeted for investment fraud.<sup>3</sup>

The Supreme Court in *Basic* noted that underlying the adoption of extensive disclosure requirements in the 1934 Securities Act was a legislative philosophy that: "There cannot be honest markets without honest publicity." *Basic*, 485 U.S. at 230. As noted in Plaintiffs' brief, the Complaint alleges multiple examples of material misrepresentations and omissions violating the Act's philosophy of full disclosure. Br. for Pls. Appellees 2-6.

**B. An Increasing Number of Individuals Must Rely on Securities for a Secure Retirement.**

This Court's decision will impact both institutional and individual investors.

A recent Investment Company Institute (ICI), survey of the mutual fund industry

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<sup>3</sup> E.g., N. M. Reg. & Licensing Dep't Sec. Division, *Elder Investment Fraud and Financial Exploitation*, <http://www.rld.state.nm.us/securities-division/elder-investment-fraud-financial-exploitation-prevention-program-1.aspx>.

showed that a large number of investors are now individuals. In fact, the vast majority of the nearly 16 trillion in mutual fund assets are held by individuals (as opposed to financial institutions, nonprofits, and other institutional investors).<sup>4</sup> The decreased ability of retirees to rely on Social Security, or pensions, to replace wages has led more individuals to enter the securities markets. According to the latest public data, available from ICI, 53.6 million U.S. households, or about 43 percent, owned mutual funds in 2014.<sup>5</sup> The primary financial goal of investors is to fund their retirement.<sup>6</sup>

In the years to come, Social Security and pensions will provide proportionately less retirement income as a percentage of prior earnings compared to its role in earlier times.<sup>7</sup> For many individuals now saving for retirement through

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<sup>4</sup> ICI, *2016 Investment Company Fact Book* 29 (56th Ed. 2016), [http://www.icifactbook.org/deployedfiles/FactBook/Site%20Properties/pdf/2016\\_factbook.pdf](http://www.icifactbook.org/deployedfiles/FactBook/Site%20Properties/pdf/2016_factbook.pdf).

<sup>5</sup> Michael Bogdan & Daniel Schrass, *Profile of Mutual Fund Shareholders, 2015*, ICI Research Report 5 (Mar. 2016), [https://www.ici.org/pdf/rpt\\_16\\_profiles.pdf](https://www.ici.org/pdf/rpt_16_profiles.pdf).

<sup>6</sup> *Id.* at 8.

<sup>7</sup> Alicia H. Munnell, *The Declining Role of Social Security*, B.C. Ctr. for Retirement Res. No. JTF6 1 (Feb. 2003), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=556792](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=556792) (reporting that this replacement rate will continue to drop from 41.2% for a “medium earner” who retired at sixty-five in 2000 to 36.5% by 2030; see also Barbara A. Butrica et al., *This Is Not Your Parents’ Retirement: Comparing Retirement Income Across Generations*, 72 SSA Bull. No. 1, 37 (2012) (“[B]ecause postretirement incomes are not expected to rise as much as preretirement incomes, baby boomers and GenXers are less likely to have enough

their employer-sponsored 401(k) and other pension plans, the amount contributed and accumulated is critically important,<sup>8</sup> as it is often their only source of private retirement income.<sup>9</sup>

Defendants argue that the challenged statements were just “general statements” and that no reasonable investor would rely on the statements. The statements regarding conflicts of interest in this case were specific and significant. Moreover, Goldman’s statements that emphasize its reputation for integrity and ethical conduct are “clearly designed to distinguish the company from other specified companies in the same industry.” *See Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 98 (2d Cir. 2016).

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postretirement income to maintain their preretirement standard of living compared with current retirees.”).

<sup>8</sup> *See* James Poterba, et al., *Defined Contribution Plans, Defined Benefit Plans, and the Accumulation of Retirement Wealth*, Nat’l Bureau of Econ. Research Working Paper 12,597 (Oct. 2006), <http://www.nber.org/papers/w12597> (net-of-expense asset returns along with asset allocation and contribution rate determine account balance at retirement).

<sup>9</sup> U.S. Gov’t Accountability Office, GAO 15-419, *Retirement Security: Most Households Approaching Retirement Have Low Savings* 8 (May 2015), <http://www.gao.gov/assets/680/670153.pdf> (to the extent that households have savings, they are not significant outside of retirement accounts ); Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, EBRI ISSUE BRIEF NO. 383, at 5 (Feb. 2013), [http://www.ebri.org/pdf/briefs/pdf/ebri\\_ib\\_02-13.no383.incmeld.pdf](http://www.ebri.org/pdf/briefs/pdf/ebri_ib_02-13.no383.incmeld.pdf) (pensions and annuities are the second-most important source of income for most older households outside of Social Security).

## CONCLUSION

For the foregoing reasons, the District Court's class certification order should be affirmed.

Dated: August 25, 2016

Respectfully submitted,

/s/ Barbara Jones

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 2628 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: August 25, 2016

/s/ Barbara Jones  
Barbara Jones

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system on August 25, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Barbara Jones

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