No. 24-____

United States Court of Appeals for the Second Circuit

STEPHEN BRAHMS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Petitioner,

v.

KIRKLAND LAKE GOLD LTD., ANTHONY P. MAKUCH,

Defendants-Respondents.

From an order denying certification of a class entered on March 29, 2024 by the U.S. District Court for the Southern District of New York (No. 1:20-cv-04953-JPO)
The Honorable J. Paul Oetken

PLAINTIFF'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Christian Levis
LOWEY DANNENBERG, P.C.
44 South Broadway
Suite 1100
White Plains, NY 10601
(914) 997-0500

Daniel Woofter
Kevin K. Russell
GOLDSTEIN, RUSSELL & WOOFTER LLC
1701 Pennsylvania Ave., NW
Suite 200
Washington, DC 20006
(202) 240-8433

Counsel for Plaintiff-Petitioner

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Plaintiff-Petitioner Stephen Brahms respectfully petitions under Fed. R. Civ. P. 23(f) to appeal from the March 29, 2024 Order of the U.S. District Court for the Southern District of New York (Oetken, J.) denying Plaintiff's motion to certify a class under Fed. R. Civ. P. 23(b)(3).

INTRODUCTION

This is one of the first cases construing and applying the "mismatch framework" announced in *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 77 F.4th 74, 81 (2d Cir. 2023) ("*Goldman IV*"). Because this case raises several important questions about that framework that won't be reviewed at the end of the case, this court should grant leave to appeal now.

In *Goldman IV*, this Court provided "[g]uidance moving forward" for courts considering class certification in securities fraud class actions asserting inflation-maintenance claims. 77 F.4th at 102. Specifically, it established the rules for "a searching price impact analysis" to apply when there is a "considerable gap in ... genericness" between an alleged misrepresentation and the corrective disclosure. *Ibid.* The Court, however, provided limited guidance on what counts as a "generic" statement and what degree of mismatch is enough to invoke this

heightened review. And it provided no guidance on how courts should treat price impact claims after the Supreme Court's decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113 (2021) ("*Goldman*"), when the district court determines there is no considerable gap in genericness.

Here, the District Court acknowledged that some of the alleged misstatements were substantially more specific "than the Supreme Court's prototype" in *Goldman* or "the more platitudinous statements as issue" in *Goldman IV*. ADD15. But it concluded that *Goldman IV*'s heightened analysis was still required. *Ibid.* The District Court further concluded that even though there was no significant mismatch with respect to the other alleged misstatement, *Goldman IV* still empowered the court to decide whether the statement was false to determine whether there was a "*substantive* mismatch" between the statement and the corrective disclosure. ADD21-22 (emphasis added).

Both holdings raise serious, recurring questions of general importance that this Court should resolve now. Indeed, *Goldman IV* predicted that "whatever analytical approaches might be warranted in

the future remains to be seen," and that the Court would "have work to do" in providing guidance moving forward. 77 F.4th at 105.

QUESTIONS PRESENTED

1. When a court determines that there is no "considerable gap in genericness" between an alleged misstatement and corrective disclosure, may it nonetheless decide the merits question of whether the alleged misstatement was false (and in the process resolve disputed issues of fact a jury would otherwise decide) in the guise of determining whether there is a "substantive mismatch" between the statement and corrective disclosure?

2. Were the "M&A Statements" in this case generic enough to invoke the "searching price impact analysis" framework announced in *Goldman IV*?

3. Did the District Court err when, in the course of applying *Goldman IV*, it found "that the record does not support Plaintiff's initially pleaded theory that Kirkland was actively negotiating with Detour at the time of the three alleged misstatements," without acknowledging the record evidence showing that Kirkland was actively courting *other* poorly performing mines at the time?

BACKGROUND

I. FACTUAL BACKGROUND

In this securities fraud class action, Plaintiff Stephen Brahms alleges that Kirkland Lake Gold Ltd. and its former CEO, Anthony P. Makuch, misled investors about the minimum performance standards that any potential acquisition target would have to satisfy even though they knew that Kirkland was actively considering acquisitions that did *not* meet those metrics. When Defendants later announced a merger with a company that didn't meet those minimum standards, Kirkland's market price plunged, leading to this securities fraud class action.

Kirkland, a gold-mining and exploration company, has long distinguished itself from other mining companies by focusing on mines with high reserve grades that allowed it to produce gold much more efficiently than its competitors. Doc.25¶22. As analyst RBC Capital Markets recognized as far back as October 2017, Kirkland's low-cost/high quality production metrics were the reason its stock traded "at a meaningful premium" over its competitors and was a "core holding" for institutional investors. Doc.69-3, at 11. Analyst Canaccord Genuity Capital Markets reported on January 21, 2019—at the time of the alleged

misstatements—that Kirkland's "management would need to be selective" regarding any potential acquisition "in order to retain the premium multiple, by evaluating potential *high-grade and low-cost* operations," in other words, by targeting "a fully-derisked, low-cost producer" for acquisition. Doc.106-3, at 18 (emphasis added).

To maintain that premium, Defendants misled investors into believing that Kirkland was focused on organically growing its existing high-grade/low-cost mines and would not achieve growth through acquisitions unless a high-quality target met its minimum criteria for grade and cost.

Thus, at an "Investor Day" meeting on January 14, 2019, Makuch responded to an analyst's question *about Kirkland's acquisition strategy*:

> So we're never going to not look if somebody has some noncore assets for sale. But you've got to recognize why are they for sale, and we have—we've set some standards in terms of Kirkland Lake Gold. Minimum production levels has to be over 100,000 ounces, it has to be meaningful level. I might even say more than 100,000 ounces but it's got to be meaningful level of production. Talk about cash cost of $650 an ounce or under you can get from that asset; and all-in sustaining cost of $950 an ounce or under. I mentioned that those two numbers are important because you can't let the cash cost get too high because you have to have money available to invest in new equipment, to invest in infrastructure, to invest in exploration—in sustainable exploration to maintain the business. So, that's important to

> us. And we need to see that. As we need to stay at $950 because we have to have a minimum return and minimum risk on the company and if we talk about a 15% hurdle rate, then we're kind of good to $1.050 gold.

ADD21 (cleaned up) (the "Minimum Standards Statement").

"Replying to an analyst's question about M&A" on February 21, 2019, Makuch said:

> Going forward, I mean, we still see some significant growth and we talk about going to [a] million ounces this year. So that's the number one driver of our growth instead of going out and trying to buy that kind of company. ... We want to continue to grow with development of our own assets and organically ... .

ADD15 (cleaned up); *see* ADD14 (quoting similar statement) (together, the "M&A Statements").

But these statements were false. Discovery shows that at the time Makuch made these statements, Kirkland was targeting *several* poorly performing gold mines that did not meet Makuch's expressed standards. *See* Doc.69-4 (summary of Kirkland's 2019 acquisition targets). The truth was revealed only when Kirkland announced on November 25, 2019, that it had acquired a poorly performing company—Detour—causing a nearly 18% drop in Kirkland's stock price. Plaintiff's expert, Dr. Feinstein,

conducted an event study and found no other cause for the statistically significant drop. Doc.69-1, at 117; *see also* Doc.107-1.

Defendants did not set forth any direct evidence to dispute Dr. Feinstein's event study. Indeed, their own economic expert did not dispute Dr. Feinstein's finding or criticize his analysis. *Compare* Doc.91-4. Nor did she conduct a price impact assessment of her own or assess whether nonfraud factors might have contributed to the decline. Doc.107-2, at 101:21-102:12; *see also* Doc.107-1¶¶45-49.

II. LEGAL BACKGROUND

"To recover damages" under the Securities Exchange Act of 1934 and its implementing regulations, "a private plaintiff must prove, among other things, a material misrepresentation or omission by the defendant and the plaintiff's reliance on that misrepresentation or omission." *Goldman*, 594 U.S. at 118.

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Supreme Court held that securities fraud plaintiffs can establish class-wide reliance on a misstatement by invoking "a rebuttable presumption of reliance based on the fraud-on-the-market theory," which "is premised on the theory that investors rely on the market price of a company's security, which in

an efficient market incorporates all of the company's public misrepresentations." *Goldman*, 594 U.S. at 117-18. Defendants can rebut the presumption by proving, by a preponderance of the evidence, that the allegedly misleading misstatements had *no* impact on the share price. *See id.* at 126.

In *Goldman*, the Supreme Court noted that in an inflation-maintenance case (a case in which a misleading statement is alleged to have *maintained* inflation in a stock price, rather than *created* it), courts should be attentive to the potential for a "mismatch between the contents of the misrepresentation and the corrective disclosure," which "may occur 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 expectations')." 594 U.S. at 123.

As this Court has explained, however, "*Goldman*'s mismatch framework requires careful trekking." *Goldman IV*, 77 F.4th at 81. Courts may not deny class certification simply because they believe the underlying claims lack merit. *See Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 474-80 (2013). Accordingly, "district courts must analyze the price impact issue without drawing what might appear to be

obvious conclusions for off-limits merits questions such as materiality." *Goldman IV*, 77 F.4th at 81. "Not easy stuff." *Id.* at 105.

III. PROCEDURAL HISTORY

A. Motion to Dismiss

At the motion to dismiss stage, the District Court considered the Minimum Standards Statement and M&A Statements together and held that Plaintiff sufficiently pleaded that Defendants "materially misled investors by not disclosing its potential acquisition of Detour" or "a company *like Detour*." ADD29 (emphasis added).

Makuch's public comments "on certain minimum, objective standards—like all-in sustaining costs—for any asset that Kirkland would acquire .... falsely contradicted what the company's present intentions were: Detour did not meet Makuch's expressed standards for an asset, yet Kirkland was actively considering acquiring Detour at the time of Makuch's statements." ADD29. The court rightly rejected Defendants' "alternative interpretations" as "elid[ing] both how the veracity of statements is measured in this context and the duty Makuch may have had to disclose Kirkland's active consideration of an acquisition." ADD30. "Makuch's comments on standards for acquisition,"

the court reasoned, "could reasonably be understood to bar the acquisition of Detour—a company whose mine did not meet these standards." ADD30-31.

"That Makuch never ruled out acquisitions in his comments about minimum standards and the company's preference for organic growth also does not undermine" Plaintiff's claims, the court continued, because he "did not stay silent on acquisitions." ADD7. "Makuch instead broached the topic of acquisitions yet failed to speak truthfully and completely—he downplayed acquisitions as an approach for the company to grow and failed to disclose that Kirkland was actively considering an acquisition." *Ibid.* (cleaned up). "So, it is a 'question for the trier of fact' whether his nondisclosure was materially misleading." *Ibid.* (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993)) (cleaned up); *see also* ADD32 (Plaintiff also met heightened pleading burden for alleging *scienter* because Makuch "allegedly knew" or "should have known" his statements "can reasonably be understood to further contribute to a then-known falsehood—that Kirkland would not consider acquiring a company *like Detour*" (emphasis added)).

B. Class Certification

At the class certification stage, the District Court did not consider the three statements about acquisitions together, as it had at the motion to dismiss stage. Instead, the court analyzed the Minimum Standards Statement in isolation from the M&A Statements, over Plaintiff's objection, and held that Defendants had proven by a preponderance of the evidence that neither influenced Kirkland's stock price.

Minimum Standards Statement. The District Court began by acknowledging that there was no gap in genericness between the Minimum Standards Statement and its corrective disclosure, so the stringent *Goldman IV* analysis was "inappropriate." *See* ADD21. Even so, the court concluded that it could decide whether there was a "substantive" mismatch and, in the process, resolve the parties' factual dispute over whether the alleged misstatement was false. ADD22.

"The *weight* of the evidence," the court found, "supports Defendants' interpretation" of the Minimum Standards Statement as "refer[ring] to future targets, rather than rigid requirements at the time of acquisition." ADD22-23 (emphasis added). On that view of the evidence, the statements were not false and thus there was a "substantive mismatch

between the alleged misrepresentation and the corrective disclosure," which, the court held, "'severed the link between back-end price drop and front-end misrepresentation.'" ADD24 (quoting *Goldman IV*, 77 F.4th 104) (cleaned up).

M&A Statements. As to the M&A Statements, the District Court recognized they were not nearly as generic as "the Supreme Court's prototype" in *Goldman* or "more platitudinous statements at issue" in *Goldman IV*. ADD15. But it still applied the *Goldman IV* framework for analyzing price impact when "there is considerable gap in front-end–back-end genericness." *Cf.* 77 F.4th at 102.

The District Court therefore asked "whether a truthful—but equally generic—substitute for the alleged misrepresentation would have impacted the stock price." ADD16 (quoting *Goldman IV*, 77 F.4th at 102). The court found "that the record does not support Plaintiff's initially pleaded theory that Kirkland was actively negotiating *with Detour* at the time of the three alleged misstatements in January and February 2019." *Ibid.* (emphasis added). Based on its determination that the statement was thus not false or misleading when made, because Kirkland was not pursuing Detour in particular at the time, the court believed "a truthful,

but equally generic, substitute for the M&A Statements would be: 'Although we are focused on delivering significant organic growth, we are also considering external growth through M&A." *Ibid.* The court concluded that Defendants had proven, "that [this] truthful, but equally generic, substitute for the M&A Statements would not have impacted the stock price." *Ibid.*

Accordingly, the District Court denied Plaintiff's motion for class certification. ADD24.

STANDARD

This Court grants leave to appeal under Federal Rule of Civil Procedure 23(f) when the petitioner demonstrates (I) "that the certification order implicates a legal question about which there is a compelling need for immediate resolution," or (II) "that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable." *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 139 (2d Cir. 2001).

ARGUMENT

I. THE DENIAL OF CERTIFICATION IMPLICATES LEGAL QUESTIONS ABOUT WHICH THERE IS A COMPELLING NEED FOR IMMEDIATE RESOLUTION.

A. The District Court Applied *Goldman IV*'s Considerable-Gap-in-Genericness Framework Despite Finding *No* Gap in Genericness Between the Minimum Standards Statement and the Corrective Disclosure.

This case presents the important, recurring question of the proper scope of the price impact analysis when there is *no* substantial mismatch in genericness and, in particular, whether courts may decide whether an alleged misstatement is, in fact, false to determine whether there is a "substantive mismatch" between the alleged misstatement and the corrective disclosure.

In considering the Minimum Standards Statement, the District Court acknowledged that the alleged misstatement was "quite specific," ADD21, such that the case did not meet the criteria for a "searching price impact" review under *Goldman IV*. It nonetheless viewed itself authorized to decide whether the statements were, in fact, false—a class-wide merits question that would otherwise be reserved for trial and a jury, *see Amgen*, 568 U.S. at 465-70—as part of an inquiry into whether

there was "a *substantive* mismatch" between the Minimum Standards Statement and the corrective disclosure. ADD22 (emphasis added).

That holding is a substantial departure from *Goldman IV*, effectively engaging in an even *more* searching evaluation of the evidence than this Court authorizes, even when the criteria for an unusually searching inquiry have not been met. If that dramatic incursion on the jury's responsibility is to be allowed, it should be based on this Court's considered judgment.

In fact, it should not be allowed. The Supreme Court and this Court have made clear that while courts may consider *evidence* that also goes to "'materiality or any other merits issue,'" *Goldman IV*, 77 F.4th at 103 n.15 (quoting *Goldman*, 594 U.S. at 124), courts cannot find a lack of price impact simply because they believe that the statements are immaterial or untrue. The Supreme Court directed that courts must "consider[] the generic nature" of the alleged misrepresentations, because they "must take into account *all* record evidence relevant to price impact, regardless whether that *evidence* overlaps with materiality or any other merits issue." *Goldman*, 594 U.S. at 123-24 (second emphasis added). But the "generic nature" of the alleged misrepresentations *is* the overlapping

evidence the Court was talking about. And it did not disturb its previous holdings "that loss causation and the falsity or misleading nature of the defendant's alleged statements or omissions are common questions that need not be adjudicated before a class is certified." *Amgen*, 568 U.S. at 475.

That is why this Court, on remand, explained that "class certification litigation following *Goldman* is likely to involve *evidence* that, at the summary judgment stage, might also be relevant to materiality." *Goldman IV*, 77 F.4th at 103 n.15 (emphasis added). Especially because there is competing record evidence on how to interpret the Minimum Standards Statement, it was improper to resolve the factual dispute of the meaning of the statement at the class certification stage.

B. The District Court Applied *Goldman IV*'s Mismatch Framework to the M&A Statements.

Immediate review is also warranted to clarify what counts as a sufficiently generic statement to trigger the "searching price impact analysis" required under *Goldman IV*. Drawing the right line is important because the analysis of *Goldman IV* is a significant departure

from the ordinary price impact analysis and puts a heavy thumb on the scale against a finding of price impact.

As *Goldman IV* acknowledged, the searching price impact analysis comes very close to the line of assessing merits questions reserved for the jury and therefore must be limited to the extraordinary cases in which "there is a *considerable gap* in front-end-back-end genericness." 77 F.4th at 102 (emphasis added). The District Court rightly found the misstatements substantially less generic than the example the Supreme Court gave or those this Court considered in *Goldman IV*. ADD15; *see Goldman*, 594 U.S. at 123 ("mismatch .... may occur when the earlier misrepresentation is generic (*e.g.*, 'we have faith in our business model')"); *Goldman IV*, 77 F.4th at 82 ("Integrity and honesty are at the heart of our business.").

For example, Makuch responded to a question from an analyst about potential *mergers and acquisitions* that "'we don't need to do that to grow,'" because "'we have the ability to grow by 275,000 ounces'" internally. ADD14. "'We have internal growth, and we're ... growing the company through diamond drill bit, through development, and through lowering unit cost and improvements.'" *Ibid.* He likewise represented

that *internal* growth was "'the number one driver of our growth instead of going out and trying to buy that kind of company.'" *See* ADD15. He then reiterated "'the diamond drill bit" business Kirkland was "'going to continue to grow.'" *Ibid.* "'We want to continue to grow with development of our own assets and organically.'" *Ibid.*

The District Court found a mismatch because even though the misstatements were much less generic than in *Goldman IV*, they were nonetheless "far more generic" than the detailed corrective disclosure. ADD15-16. In *Goldman IV*, however, this Court explained that the mismatch inquiry focuses on the "generic nature of the allege misrepresentation" because *that* is the source of the risk that the back-end reaction may not reflect inflation-maintenance by the front-end alleged misrepresentation. 77 F.4th at 102-03; *see also In re NIO, Inc. Sec. Litig.*, 2023 WL 5048615, at *15 (E.D.N.Y. Aug. 8, 2023) (*Goldman* "explicitly premised its conclusion on the generic nature of the initial disclosure"). Even when a front-end statement is quite specific, the back-end corrective disclosure will almost always be *more* specific. *Goldman IV*, 77 F.4th at 98. The need for a probing analysis arises from the prospect that the defendant's misstatement is *so generic* that there is

significant reason to believe investors would not rely on it, a hypothesis that is tested through the "searching price impact analysis." *Id.* at 102.

This Court forewarned that the mismatch framework is "complex" and that further elucidation of the "analytical approaches might be warranted in future cases." *Goldman IV*, 77 F.4th at 105; *see also ibid.* (noting "the difficult task of thinking about materiality but not ruling on it" is "[n]ot easy stuff," and that until the Supreme Court "revisit[s] the issue," this Court has "work to do"). These novel legal questions "compel immediate review" because the Court recognized in *Goldman IV* that they are "of fundamental importance to the development of the law of class actions." *See Sumitomo*, 262 F.3d at 140.

And they are "likely to escape effective review after entry of final judgment." *Sumitomo*, 262 F.3d at 140. This Court has long recognized that certification orders in securities cases implicating the *Basic* presumption are "'likely to escape effective review after entry of final judgment,'" because "'very few securities class actions are litigated to conclusion, so review of a novel and important legal issue concerning the scope of the *Basic* presumption may be possible only through the Rule 23(f) device." *See Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004)

(quoting *Sumitomo*, 262 F.3d at 140; *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002)).

II. FAILING TO GRANT THE PETITION WILL END THE CASE, AND THE DISTRICT COURT'S DECISION IS DEEPLY TROUBLING.

"[I]nterlocutory review is particularly appropriate" here because the certification order is the death knell of Plaintiff's case, and even if that were not true, granting the Rule 23(f) petition "promises to spare the parties and the district court the expense and burden of litigating the matter to final judgment only to have it inevitably reversed by this Court on appeal after final judgment." *Sumitomo*, 262 F.3d at 139 (quotation marks omitted).

First, it is practically infeasible for Plaintiff to continue this litigation as an individual suit given the extraordinary expense compared to the value of his personal damages claim. *Sumitomo*, 262 F.3d at 138 (Rule 23(f) appeal appropriate where certification sounds "death knell" because "the denial of certification makes the pursuit of individual claims prohibitively expensive").

Second, for the reasons given above, Plaintiff has made a "substantial showing" that the District Court's "decision is questionable,"

at the very least. *Sumitomo*, 262 F.3d at 138. The decision is wrong for other reasons as well.

To start, the District Court erred in siloing the Minimum Standards Statement and M&A Statements. In doing so, the court misconstrued the meaning of the M&A Statements.

As discussed above, Makuch established the minimum standards for any acquisition at the same time he also misled investors by communicating Kirkland's focus on internal, organic growth, downplaying the potential of relying on low-quality acquisitions to grow the business. Analysts understood these statements as linking the company's focus on organic growth to the minimum acquisition standards he articulated during the January 2019 Investor Day. Thus, news of the Detour acquisition was an equally corrective disclosure, with just as much specificity for the M&A Statements as the Minimum Standards Statement.

Plaintiff submitted evidence that *investors* considered the statements together and were misled in the precise manner Plaintiff argues—evidence the District Court failed to address. Commentary from analysts can help explain the "kind of information investors would rely

upon in making investor decisions—and therefore can serve as indirect evidence of price impact." *Goldman IV*, 77 F.4th at 104. Several analysts commenting on the January 2019 Investor Day linked the very M&A Statements about "organic growth" and Minimum Standards Statement that the District Court siloed.

RBC reported:

> With M&A topical ... , Kirkland Lake reiterated its focus on organic growth and noted that any external opportunities would need to compete with robust internal opportunities. Management discussed requirements for new projects to provide the company with meaningful annual production (+100 Koz), deliver cash costs and sustaining costs below $650/oz and $950/oz, respectively, and provide a return of 15%. Given the scarcity of assets meeting these requirements ... , Kirkland appears focused on delivering shareholder value through organic opportunities.

Doc.106-6, at 1.

Desjardins reported:

> M&A potential – never say never, but only if it meets criteria. ... The company indicated that it is primarily focused in Canada and Australia, and potential assets will need to meet its grade and cost criteria (total cash costs <US$650/oz and AISC <US$950/oz) for it to be interested. Management also highlighted the significant organic growth potential within the company, which precludes the need for immediate action.

Doc.106-5, at 1.

BMO Capital Markets reported:

> With precious metals M&A activity picking up in recent months, the first questions revolved around potential acquisitions. CEO Tony Makuch reiterated that KL Gold remains focused on organic growth projects, but if the right asset came along at the right price, management would be interested in taking a look. The prospective external project would still have to meet the following criteria: greater than 100koz Au annual production, less than $650/oz Total Cash Costs, and less than $950/oz AISC.

Doc.106-9, at 1.

The District Court drove a wedge between the M&A Statements and Detour announcement by incorrectly reframing Plaintiff's case as alleging that Makuch had misled investors by swearing off acquisitions altogether. ADD15 ("[N]either statement specifically ruled out considering acquisitions in the future."). That has never been Plaintiff's theory of the case, as the court correctly recognized at the motion to dismiss stage. ADD31 ("That Makuch never ruled out acquisitions in his comments about minimum standards and the company's preference for organic growth also does not undermine [Plaintiff]'s colorable claim here."). The District Court erred in finding that an equally generic yet truthful replacement for the M&A Statements "would be: 'Although we

are focused on delivering significant organic growth, we are also considering external growth through M&A." ADD16.

It then compounded its error by finding that this "truthful, but equally generic, substitute for the M&A Statements would not have impacted the stock price"—particularly because it found that the "most probative evidence on this question comes from a June 2019 statement in which Kirkland announced that it had opened a 'Deal Room' and invited potential acquisition candidates and partners to submit information through an online portal." ADD16. Because Plaintiff has never claimed that Defendants swore off acquisitions altogether, it is unsurprising that a generic announcement that Kirkland was interested in considering potential acquisitions had no impact on the stock price. That was old news.

Indeed, the market expected the company to consider acquisitions—but only if the target met Makuch's stated criteria, as analysts contemporaneously reported. The market took the announcement of the Detour deal to reveal that those criteria were false. The District Court's alternative "equally generic substitute" for the challenged statement is thus incomplete because it omits those criteria.

Had Makuch instead made the truthful statement "we're focused on organic growth, but are also actively considering growing the company by acquiring low-grade/high-cost mines that will affect our low-cost/high-grade metrics," the stock would have declined just like it did when Kirkland announced the Detour deal. *See, e.g.*, Doc.106-6, at 1 (RBC reporting on Makuch's statement that "Given organic production growth, robust free cash flow, a first-class balance sheet, and upcoming catalysts, we reiterate our positive outlook for Kirkland Lake shares in 2019").

The statements are all about the same subject—Kirkland's approach to acquisitions. The "representations, *taken together and in context*, would have misled a reasonable investor." *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co.*, 19 F.4th 145, 151 (2d Cir. 2021) (quotation marks omitted) (emphasis added). It is only inappropriate to consider different public statements together when they touch on *unrelated* subjects and are "separately disseminated to shareholders in separate reports at separate times," as in *Goldman IV*, where "the statements d[id] not obviously compl[e]ment or implicate the same topics." 77 F.4th at 94. In this case, the Minimum Standards Statement and M&A Statements were all made to analysts and investors within a few weeks of each other, and

even the District Court understood that they all related to the same topic. *See* ADD14.

This evidence also shows why the District Court's interpretation of the statements was wrong.

As discussed, the parties disputed whether Makuch, in giving the Minimum Standards Statement on January 14, 2019, intended to express standards that an acquisition must meet at the time of acquisition or, as Defendants argued, over the whole life of the mine. At the motion to dismiss stage, the District Court correctly noted that the question is not whether the statement was literally true, but how it would be interpreted by a reasonable investor. ADD30.

The court noted that these analysts "referred to the Minimum Standards Statement," but it found that "none of them indicated that it factored into their valuation of Kirkland's stock." ADD23. That ignores that one of the *same analysts*, RBC (among others), expressly noted that Kirkland's low-cost/high-grade production metrics were the reason for its stock premium. Doc.106-6, at 1; *see also supra* pp.4-5. And it minimized analysts' reactions to the Detour announcement *expressly referring* to the dilution of those metrics as the reason for downgrading Kirkland.

Eight Capital reported that "yesterday's announcement surprised us, as KL CEO Tony Makuch had continually stressed the company's low-cost profile as one of its main selling points." Doc.106-10, at 1. Canaccord called the deal a "head scratcher" and downgraded its rating and lowered its price target for Kirkland from C$67 to C$55, explaining that it had decreased its price multiplier from 1.5x to 1.0x P/NAV given the "increased cost profile that Detour will add to Kirkland's typically stable, high margin operations." Doc.106-12, at 1. Bloomberg also called the deal a "head scratcher," while CIBC "lowered KL CN to neutral from outperform and lowered PT to C$60 from C$73," explaining that "the deal was unexpected, as it takes KL CN current focus in high-grade underground mines to a lower grade open-pit deposit." Doc.69-20, at 1; *see* Doc.106-11, at 1. Investors on Seeking Alpha lamented that while "[m]any investors likely realized that an acquisition by Kirkland Lake Gold was inevitable ... I don't think that Detour Gold was on the top of anyone's list," given that the transaction "will likely take away the company's premium it enjoyed for its industry-leading cost profile." Doc.106-13, at 1-2.

This evidence dooms the District Court's finding that Defendants had proven *zero* price impact. Even if other aspects of the Detour deal may have caused *some* of the decline, Defendants have not established that the alleged misstatements did *no* work to prop up Kirkland's premium. In holding otherwise, the District Court prematurely conducted a loss-causation analysis the Supreme Court has long held is inappropriate for resolution at the class certification stage. *See Amgen*, 568 U.S. at 475.

CONCLUSION

This Court should grant the petition and set the case for briefing and argument.

Dated: April 12, 2024

Respectfully submitted,

/s/ Daniel Woofter

Daniel Woofter
Kevin K. Russell
GOLDSTEIN, RUSSELL & WOOFTER LLC
1701 Pennsylvania Ave. NW
Suite 200
Washington, DC 20006
(202) 240-8433

Christian Levis
LOWEY DANNENBERG P.C.
44 South Broadway
White Plains, NY 10601
(914) 997-0500

Attorneys for Plaintiff-Petitioner

CERTIFICATE OF COMPLIANCE

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Dated: April 12, 2024

/s/ Daniel Woofter
Daniel Woofter

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2024, I caused the above document to be electronically filed with the Clerk of Court of the U.S. Court of Appeals for the Second Circuit. I certify that in addition, I caused true and accurate copies of the forgoing petition and accompanying documents to be served by e-mail, as well as by FedEx, upon the Court and following counsel:

Audra S. Soloway
Joshua Hill Jr.
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064
Tel: (212) 373-3000
Fax: (212) 757-3990
Email: asoloway@paulweiss.com

Attorneys for Defendants-Respondents.

Dated: April 12, 2024 */s/ Daniel Woofter*

Daniel Woofter