

Supreme Court's *Slack Technologies* Decision Clarifies Application of Section 11 to Direct Listings

June 1, 2023

On Thursday, June 1, 2023, in a highly anticipated decision, the U.S. Supreme Court unanimously held in *Slack Technologies v. Pirani* that, in order to state a claim for a violation of Section 11 of the Securities Act of 1933, plaintiffs who purchased shares in a direct listing must be able to plead and prove that they bought shares registered under the registration statement that they claim is misleading. See No. 22-200, 2023 WL 3742580 (U.S. June 1, 2023). The Court expressly reserved judgment on the question of whether this standing requirement applies equally to Section 12(a)(2) of the Securities Act of 1933 and remanded for reconsideration of that question in light of the Supreme Court's decision. See *id.* at *6 n.3. The ruling provides clarity on the standing requirements of Section 11, which the Ninth Circuit's decision had called into question, but creates uncertainty regarding Section 12(a)(2) claims that may make them a greater focus of the plaintiff's bar.

The litigation arose from the 2019 direct listing of Slack Technologies ("Slack"). In contrast to a traditional IPO, in which company shares (whether newly issued or resold on behalf of existing stockholders) are underwritten by one or more banks and then resold to a "book" of investors, a direct listing facilitates the direct sale into the market of any and all shares held by preexisting shareholders (whether or not specifically identified in the registration statement relating to the direct listing). As a result, there was no way for purchasers in the Slack direct listing to determine whether they bought shares subject to the registration statement for the direct listing or shares otherwise available in the market for sale.

Plaintiff Fiyaz Pirani, who purchased shares on the day that Slack went public, filed a lawsuit alleging that Slack violated Sections 11 and 12 on the basis that the registration statement and prospectus for its direct listing purportedly contained various misstatements. Section 11(a) refers to false or misleading statements in a registration statement and permits a suit by anyone who acquired "such security." Section 12(a)(2) imposes liability on anyone who offers or sells shares pursuant to a prospectus and oral communication that includes false or misleading statements and allows recovery by anyone who purchases "such security."

Slack moved to dismiss, arguing that the plaintiff could not bring claims under Section 11 or 12 because he would be unable to prove that he bought the registered shares specified in the company's allegedly misleading registration statement. The district court denied Slack's motion to dismiss, but certified its ruling for interlocutory appeal. A divided panel of the Ninth Circuit Court of Appeals affirmed. Finding that Slack's interpretation of Section 11 would "create a loophole large enough to undermine the purpose of [the statute]," the Ninth Circuit held that purchasers could sue under Sections 11 and 12 regardless of whether they could prove that they bought shares covered by the registration statement.

The Supreme Court reversed the Ninth Circuit's decision in a unanimous ruling. Writing for the Court, Justice Gorsuch stated that to state a claim under Section 11, "a plaintiff must plead and prove that he purchased shares traceable to the allegedly defective registration statement." The Supreme Court remanded to the Ninth Circuit the question of whether the plaintiff's complaint states a cognizable claim under Section 11(a) "as properly construed."

The Supreme Court expressly took no position on whether its ruling applies equally to Section 12(a)(2). At oral argument, questions from some justices suggested that they were not convinced that—or at a minimum were open to questioning whether—the standing requirements of the two provisions are co-extensive, with some justices suggesting that the scope of Section 12(a)(2) may be broader because it may apply outside the context of a registration statement. The Court's decision expressly notes that "the two provisions contain distinct language that warrants careful consideration." Further decisions in this case and others, perhaps including a second trip to the Supreme Court, will be required to clarify this point.

Finally, the Supreme Court noted that the parties had litigated the case "based on the premise that Slack was not required to register all of the shares sold in its direct listing." *Id.* at *4 n.1. The Court expressly stated that it did not examine or rule upon that question.

While this decision should provide a strong defense to Section 11 claims in the direct listing context because of the impossibility of determining whether a particular purchaser acquired shares subject to the registration statement or shares otherwise available in the markets, issuers may still face claims arising from direct listings under Section 12(a)(2), depending on the outcome of future litigation regarding standing. In addition, issuers may face liability arising from direct listings under Section 10(b) of the Exchange Act, although those claims require proof of scienter and are subject to heightened pleading requirements that do not apply to Securities Act claims.

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