

**JUNE 6, 2023**

For more information,
contact:

Warren Pope
+1 404 572 4897
wpope@kslaw.com

Brian Barnes
+1 404 572 3528
bbarnes@kslaw.com

King & Spalding

Atlanta
1180 Peachtree Street, NE
Atlanta, Georgia 30309-3521
Tel: +1 404 572 4600

U.S. Supreme Court Unanimously Rules On Standing Requirements For Section 11 Claims In Direct Listings

On June 1, 2023, the United States Supreme Court unanimously held that a stockholder bringing claims under Section 11 of the Securities Act of 1933 must plead and prove that they purchased shares traceable to the allegedly defective registration statement. *See Slack Technologies, LLC v. Pirani*, No. 22-200, 2023 WL 3742580 (U.S. June 1, 2023). This standing requirement applies not only to traditional public offerings, but also to direct listings, including those where registered and unregistered shares are listed for sale simultaneously. The court's holding clarifies that direct listings are subject to the same traceability requirements as traditional offerings, thereby providing a standing-based defense to companies and their directors and officers engaging in direct listings. Consequently, absent an intervening development, companies that list unregistered shares concurrently with a registered offering should face reduced exposure to claims under Section 11, because plaintiffs who purchase in the open market will be unable to trace their shares to those registered in the offering documents.

CASE BACKGROUND

On June 20, 2019, the common stock of Slack Technologies, Inc. ("Slack" or the "Company") began publicly trading following a direct listing of the Company's shares on the New York Stock Exchange. In its registration statement filed with the United States Securities and Exchange Commission, Slack specified that it intended to register a number of shares for sale through the direct listing. In addition, Slack stated that other preexisting Slack shareholders would be allowed to sell their unregistered shares to the public upon the listing of the registered shares. In this respect, Slack's direct listing was different than a typical IPO where an underwriter might require preexisting company shareholders to enter



“lockup” agreements to prevent the sale of unregistered shares for a period of time. Ultimately, Slack’s direct listing involved 118 million registered and 165 million unregistered shares.

A few months after Slack’s direct listing, the Company’s stock price declined, and a stockholder filed a putative securities class action lawsuit against the Company, certain of its officers and directors, and certain venture capital firms that sold stock in the direct listing. The stockholder alleged that he purchased shares on June 20, 2019 (the first day of Slack’s direct listing) and that he purchased additional shares over the following months. He alleged violations of Sections 11, 12, and 15 of the Securities Act of 1933 (“1933 Act”), 15 U.S.C. § 77a, *et seq.*, based upon alleged misstatements and omissions in Slack’s registration statement.

THE DISTRICT COURT AND NINTH CIRCUIT OPINIONS

The defendants moved to dismiss, arguing in relevant part that the plaintiff had not, and could not, plead standing to bring his 1933 Act claims, citing case law requiring the plaintiff to “trace” his shares back to the challenged registration statement. In a traditional IPO, where registered shares are sold first, and unregistered shares are subject to lockup agreements for a period of time, a plaintiff might be able to trace purchases of shares that were made during the lockup period back to the registration statement. But in Slack’s direct listing, “the impossibility of tracing beg[an] on the very first day of listing due to the simultaneous offering of unregistered and registered shares.” *See Pirani v. Slack Technologies, Inc.*, 445 F. Supp. 3d 367, 379 (N.D. Cal. 2020).

The district court considered this “unique circumstance” to present an issue of “first impression—whether an investor who purchases a security in a direct listing in which registered and unregistered shares are made publicly tradeable at the same time may bring a Section 11 claim[.]” *See id.* at 379–81. The court answered this question in the affirmative, reasoning that a “broader reading” of Section 11 was required. *See id.* at 381. The court held that, under these circumstances, Section 11 liability applies not just to securities issued “pursuant to” a registration statement, but also to securities “of the same nature as that issued pursuant to the registration statement.” *See id.* (citation omitted). The court also analyzed standing for the Section 12 claims “in accordance with [its] construction of Section 11[.]” *See id.* at 383. Recognizing that its holding broke “new ground,” the court granted the defendants’ request to certify an interlocutory appeal of this question to the Ninth Circuit. *See Pirani v. Slack Technologies, Inc.*, No. 19-CV-05857-SI, 2020 WL 7061035, at *2 (N.D. Cal. June 5, 2020).

The Ninth Circuit affirmed in a divided opinion, but on different grounds than the district court. *See Pirani v. Slack Technologies, Inc.*, 13 F.4th 940 (9th Cir. 2021). The court concluded that Slack’s unregistered shares were subject to Section 11 liability “because their public sale cannot occur without the only operative registration in existence.” *See id.* at 947. “Any person who acquired Slack shares through its direct listing could do so only because of the effectiveness of its registration statement.” *See id.* The court was concerned that the defendants’ position would result in a “loophole” because, “from a liability standpoint it is unclear why any company, even one acting in good faith, would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing.” *See id.* at 948. The court also reasoned that, for purposes of its analysis, Section 12 liability “is consistent with Section 11 liability[.]” *See id.* at 949. In a dissenting opinion, one of the judges asserted that prior precedent controlled and required the plaintiff to trace his shares back to the challenged registration statement, which the plaintiff was unable to do in this context. *See id.* at 952 (Miller, J., dissenting).

THE SUPREME COURT’S UNANIMOUS HOLDING

On June 1, 2023, the Supreme Court vacated the Ninth Circuit’s judgment and unanimously held that a plaintiff alleging violations of Section 11 of the 1933 Act must “plead and prove that he purchased shares traceable to the allegedly defective registration statement,” including in the context of a direct listing where registered and unregistered shares are simultaneously offered for sale to the public. *See Slack Technologies, LLC v. Pirani*, No. 22-200, 2023 WL 3742580, at



*6 (U.S. June 1, 2023). Accordingly, the court remanded for the lower courts to decide in the first instance whether the plaintiff's pleadings satisfied that requirement.

The court reasoned that "contextual clues" in the 1933 Act suggested that the "narrower reading" of Section 11 liability was the correct one. See *id.* at *5 (citation omitted). The court rejected the plaintiff's policy-based argument for expanded liability that would (in the plaintiff's view) "better accomplish the purpose of the 1933 Act." See *id.* at *6. As the Supreme Court observed, the 1933 Act "imposes strict liability on issuers for material falsehoods or misleading omissions in the registration statement," whereas the separate Securities Exchange Act of 1934 "requires ongoing disclosures for publicly traded companies" and "allows suits involving any sale of a security," but "only on proof of scienter." See *id.* It was "equally plausible that Congress sought a balanced liability regime that allows a narrow class of claims to proceed on lesser proof but requires a higher standard of proof to sustain a broader set of claims." See *id.*

The Supreme Court expressly declined, however, to extend its standing analysis to Section 12 of the 1933 Act. Instead, the court observed that Sections 11 and 12 do not "necessarily travel together," and "caution[ed] that the two provisions contain distinct language that warrants careful consideration." See *id.* at *6 n.3. The Supreme Court left the lower courts to reconsider the Section 12 standing arguments on remand.

KEY TAKEAWAYS

The Supreme Court's opinion in the *Slack Technologies* case confirms that a plaintiff alleging Section 11 claims following a public offering must be able to trace the purchased shares back to the challenged registration statement, including in direct listings where registered and unregistered shares are listed simultaneously. This holding should provide a formidable standing defense to defendants facing Section 11 claims following direct listings. It remains to be seen whether the availability of this defense will lead more companies to engage in direct listings rather than traditional IPOs (and whether any legislative or regulatory action will be taken in response). Importantly, however, the Supreme Court declined to extend its holding to Section 12 of the 1933 Act, and instead left the scope of Section 12 liability in the direct listing context subject to future litigation.



ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
