APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FIYYAZ PIRANI, *Plaintiff-Appellee*, v. SLACK TECHNOLOGIES, INC.; STEWART BUTTERFIELD; ALLEN SHIM; BRANDON ZELL; ANDREW BRACCIA; EDITH COOPER; SARAH FRIAR; JOHN O'FARRELL; CHAMATH PALIHAPITIYA; GRAHAM SMITH; SOCIAL +CAPITAL PARTNERSHIP GP II L.P.; SOCIAL+CAPITAL PARTNERSHIP GP III LTD.; SOCIAL+CAPITAL PARTNERSHIP GP III LP.; SOCIAL+CAPITAL PARTNERSHIP GP III LTD.; SOCIAL+CAPITAL PARTNERSHIP OPPORTUNITIES FUND GP L.P.; SOCIAL+CAPITAL PARTNERSHIP OPPORTUNITIES FUND GP LTD.; ACCEL GROWTH FUND IV ASSOCIATES L.L.C.; ACCEL GROWTH FUND INVESTORS 2016 L.L.C.; ACCEL LEADERS FUND ASSOCIATES L.L.C.; ACCEL LEADERS FUND INVESTORS 2016 L.L.C.; ACCEL X ASSOCIATES L.L.C.; ACCEL INVESTORS 2009 L.L.C.; ACCEL XI ASSOCIATES L.L.C.; ACCEL INVESTORS 2013 L.L.C.; ACCEL GROWTH FUND III ASSOCIATES	No. 20-16419 D.C. No. 3:19-cv-05857-SI OPINION

L.L.C.; AH EQUITY PARTNERS I
L.L.C.; A16Z SEED-III LLC,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Susan Illston, District Judge, Presiding

Argued and Submitted May 13, 2021
San Francisco, California

Filed September 20, 2021

Before: Sidney R. Thomas, Chief Judge, Eric D. Miller,
Circuit Judge, and Jane A. Restani,* Judge.

Opinion by Judge Restani;
Dissent by Judge Miller

* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY[**]

Securities Law

The panel affirmed the district court's order denying in part a motion to dismiss and ruling that Fiyyaz Pirani had standing to sue Slack Technologies, Inc., and individual defendants under §§ 11 and 12(a)(2) of the Securities Act of 1933 based on shares issued under a new rule from the New York Stock Exchange allowing companies to make shares available to the public through a direct listing.

Pirani alleged that Slack's registration statement was inaccurate and misleading under §§ 11 and 12(a)(2). Sections 11 and 12 refer to "such security," meaning a security issued under a specific registration statement. The panel held that, even though Pirani could not determine if he had purchased registered or unregistered shares in a direct listing, he had standing to bring a claim under §§ 11 and 12 because his shares could not be purchased without the issuance of Slack's registration statement, thus demarking these shares, whether registered or unregistered, as "such security" under §§ 11 and 12.

The panel held that because standing existed for Pirani's § 11 claim against Slack, standing also existed for a dependent § 15 claim against controlling persons. The panel concluded that statutory standing existed under §§ 11 and 15, and under § 12(a)(1) to the extent it paralleled § 11.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Dissenting, Judge Miller wrote that he would reverse the district court's order and remand with instructions to grant the motion to dismiss in full because Pirani could not prove that his shares were issued under the registration statement that he said was inaccurate, and he therefore lacked statutory standing.

COUNSEL

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OPINION

RESTANI, Judge:

This case involves an interlocutory appeal from a dispute between Plaintiff-Appellee Fiyyaz Pirani (Pirani) and Defendants-Appellants Slack Technologies, Inc. (Slack) regarding whether Pirani had standing to sue under Section 11 and Section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77*l*(a)(2), based on shares issued under a new rule from the New York Stock Exchange (NYSE) that allows companies to make shares available to the public through a direct listing. *See* Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 34-82627, 83 Fed. Reg. 5650, 5653–54 (Feb. 2, 2018) ("SEC Approval 2018"). Slack challenges the district court's ruling that Pirani had standing to sue under Section 11 and Section 12(a)(2) even though Pirani could not determine if he had purchased registered or unregistered shares in the direct listing. We conclude that Pirani had standing to bring a claim under Section 11 and Section 12(a)(2) because Pirani's shares could not be purchased without the issuance of Slack's registration statement, thus demarking these shares, whether registered or unregistered, as "such security" under Sections 11 and 12 of the Securities Act. We do not resolve the issue of whether Pirani has sufficiently alleged the other elements of Section 12 liability. The decision of the district court is affirmed.

BACKGROUND

Typically, large companies who want to list their stock on a public exchange for the first time do so in a firm commitment underwritten initial public offering (IPO). In an IPO listing, a company issues new shares under a registration statement that registers those shares with the Securities and Exchange Commission (SEC). 15 U.S.C. § 77e(c). An investment bank then helps the company market these shares and, if necessary, commits to purchasing the new shares at a pre-determined price. Because the bank wants to ensure that the stock price remains stable, it typically insists on a lock-up period, a months-long period during which existing shareholders may not sell their unregistered shares. *See* 24 William M. Prifti et al., *Securities: Public and Private Offerings* § 4:7 (2d ed. 2021). If someone purchases a share of the company's stock during the lock-up period, the shares are necessarily registered because no unregistered shares can be sold during that period. This period, however, is not required by law. In addition, companies can make subsequent offerings of registered shares tied to new or updated registration statements. *See In re Century Aluminum Co. Sec. Litig.,* 729 F.3d 1104, 1106 (9th Cir. 2013) (involving a company issuing a prospectus supplement in connection with a secondary offering of the company's stock).

In 2018, the NYSE introduced a rule, later approved by the SEC, that allows companies to go public (i.e. sell their shares on a national exchange) through a Selling Shareholder Direct Floor Listing (direct listing). *See* SEC Approval 2018, 83 Fed. Reg. at 5653-54; *NYSE Listed Company Manual—Section 102.01B Footnote E,* NEW YORK STOCK EXCHANGE (Aug. 26, 2020), https://nyseguide.srorules.com/

listed-company-manual ("*NYSE, Section 102.01B, Footnote E*"). Unlike in an IPO, in a direct listing the company does not issue any new shares and instead files a registration statement "solely for the purpose of allowing existing shareholders to sell their shares" on the exchange.[1] SEC Approval 2018, 83 Fed. Reg. at 5651; *NYSE, Section 102.01B, Footnote E.* The company must register its pre-existing shares before they can be sold to the public unless the shares fall within one of the registration exceptions enumerated in SEC Rule 144.17 C.F.R. § 230.144. Another important distinction between an IPO and a direct listing is that a direct listing allows a company to list "without a related underwritten offering" from a bank. *NYSE, Section 102.01B, Footnote E.* Shares made available by a direct listing are sold directly to the public and not through a bank. *See id.* Therefore, there is no lock-up agreement restricting the sale of unregistered shares. Thus, from the first day of a direct listing, both unregistered and registered shares may be available to the public.

On June 20, 2019, Slack went public through a direct listing, releasing 118 million registered shares and 165 million unregistered shares into the public market for purchase. Pirani purchased 30,000 Slack shares that day and went on to purchase another 220,000 shares over several months. The initial offering price for Slack shares was $38.50. Over the

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[1] In 2020, the NYSE amended its rule to create a second type of direct listing, a Primary Direct Floor Listing, which allowed a company itself to sell shares to the public instead of or in addition to existing shareholders selling their shares. *See NYSE, Section 102.01B, Footnote E; see also* Order Approving a Proposed Rule Change To Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 34-90768, 85 Fed. Reg. 85,807, 85,808 n.15 (Dec. 22, 2020).

next few months, Slack experienced multiple service disruptions that caused the share price to drop below $25. On September 19, 2019, Pirani brought a class action lawsuit against Slack, as well as its officers, directors, and venture capital fund investors, on behalf of himself and all other persons and entities who acquired Slack stock pursuant and/or traceable to the Company's registration statement and prospectus issued in the direct listing.

Pirani brought claims against Slack for violations of Section 11, Section 12(a)(2), and Section 15(a) of the Securities Act of 1933. Pirani alleges that Slack's registration statement was inaccurate and misleading because it did not alert prospective shareholders to the generous terms of Slack's service agreements, which obligated Slack to pay out a significant amount of service credits to customers whenever the service was disrupted, even if the customers did not experience the disruption. Nor did it disclose, according to Pirani, that these service disruptions were frequent in part because Slack guaranteed 99.99% uptime.[2] Finally, Pirani alleges that the statement downplayed the competition Slack was facing from Microsoft Teams at the time of its direct listing. Slack challenges whether Pirani has statutory standing to sue under Section 11 and Section 12(a)(2) because he cannot prove that his shares were registered under the allegedly misleading registration statement.

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[2] Uptime refers to the time when a computer service is available to users without disruptions. Slack guarantees that 99.99% of the time, users will experience no service disruptions.

PROCEDURAL HISTORY

On January 21, 2020, Slack moved to dismiss the class action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). On April 21, 2020, the district court granted the motion in part and denied the motion in part.

The district court held that Pirani had standing under Section 11 because he could show that the securities he purchased, even if unregistered, were "of the same nature" as those issued pursuant to the registration statement. The district court adopted a broad reading of "such security" within Section 11 to account for the difficulty of distinguishing between registered and unregistered shares when both are sold simultaneously in a direct listing. The district court concluded that Pirani had standing to sue under Section 11 even though he did not know whether the shares he purchased were registered or unregistered.

The district court also held that Pirani had standing under Section 12(a)(2) to sue the individual defendants.[3] As with Section 11, the district court read Section 12(a)(2)'s requirement that the plaintiff purchase "such security" from a defendant who "offers or sells a security . . . by means of a prospectus," 15 U.S.C. § 77*l*(a)(2), to include registered or unregistered securities offered in the direct listing. The district court also held that Pirani had pled sufficient facts to support that the individual

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[3] The individual defendants are: Stewart Butterfield (Chief Executive Officer of Slack), Allen Shim (Chief Financial Officer of Slack), Brandon Zell (Chief Accounting Officer of Slack), and Andrew Braccia, Edith Cooper, Sarah Friar, John O'Farrell, Chamath Palihapitiya, and Graham Smith (Directors of Slack's Board).

defendants had solicited Pirani's purchase of Slack shares by preparing and signing the offering materials while they were financially motivated to encourage sales of Slack shares. The district court dismissed the Section 12(a)(2) claim against Slack because Slack had not issued any new shares in the offering.

Finally, because Pirani had stated a claim against Slack under Section 11, the district court ruled that he had standing under Section 15 to sue the individual and venture capital defendants[4] for secondary liability.

On June 5, 2020, at the Defendants' request, the district court certified its April 21, 2020, order (regarding the motion to dismiss), for interlocutory appeal "because the question of whether shareholders can establish standing under Sections 11 and 12(a)(2) in connection with a direct listing is one of first impression on which fair-minded jurists might disagree." On July 23, 2020, we granted Slack's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b).

JURISDICTION & STANDARD OF REVIEW

We granted Slack's petition for interlocutory appeal on July 23, 2020, and thereby have jurisdiction under 28 U.S.C. § 1292(b) over the entire order. *See Yamaha Motor Corp., U.S.A. v. Calhoun,* 516 U.S. 199, 205 (1996) (holding "the appellate court may

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[4] The venture capital defendants are three venture capital firms and the board members that they appointed to Slack's Board of Directors: Accel and Andrew Braccia, Andreessen Horowitz and John O'Farrell, and Social+Capital and Chamath Palihapitiya

address any issue fairly included within the certified order").

We review a district court's decision to grant or deny a motion to dismiss under Rule 12(b)(6) *de novo. See Dougherty v. City of Covina,* 654 F.3d 892, 897 (9th Cir. 2011); *Hertzberg v. Dignity Partners, Inc.,* 191 F.3d 1076, 1079 (9th Cir. 1999). In deciding a motion to dismiss, "[t]he facts alleged in a complaint are to be taken as true and must 'plausibly give rise to an entitlement to relief.'" *Dougherty,* 654 F.3d at 897 (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009)). A complaint must "state a claim to relief that is plausible on its face[.]" *Iqbal,* 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

DISCUSSION

I. Section 11 Standing

Section 11 of the Securities Act of 1933 states:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not mis-leading, any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue—(1) every person who signed the registration statement . . . .

15 U.S.C. § 77k(a) (emphasis added). The meaning that has been applied in this circuit is that "such security" in Section 11 means a security issued under a specific registration statement, not some later or

earlier statement. *See Hertzberg,* 191 F.3d at 1080 (holding that "such security" under Section 11 "means that the person must have purchased a security issued under that, rather than some other, registration statement"); *Century Aluminum,* 729 F.3d at 1106 (holding that "[p]laintiffs need not have purchased shares in the offering made under the misleading registration statement . . . [purchasers in the aftermarket] have standing to sue provided they can trace their shares back to the relevant offering"). Past cases in this and other circuits have dealt with successive registrations, whereby a company issues a secondary offering to the public such that there are multiple registration statements under which a share may be registered, and other tracing challenges stemming from an IPO. *See e.g., Century Aluminum*, 729 F.3d at 1106; *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 972 (8th Cir. 2002); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 491, 496-97 (5th Cir. 2005). In those cases, the court has interpreted "any person acquiring such security" in Section 11 to mean "that the person must have purchased a security issued under that, rather than some other, registration statement." *Hertzberg*, 191 F.3d at 1080. When "all the stock ever publicly issued by [a company] was sold in the single offering at issue . . . . [t]he difficulties of tracing stock to a particular offering present in some cases are [] not present." *Id.* at 1082.

The district court is correct that this is a case of first impression. The issue before the court today is: what does "such security" mean under Section 11 in the context of a direct listing, where only one registration statement exists, and where registered and unregistered securities are offered to the public at the same time, based on the existence of that one registration statement? The words of a statute do not

morph because of the facts to which they are applied. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005). Thus, we do not adopt, as the district court did, the broad meaning of Section 11 that Judge Friendly rejected in *Barnes v. Oscfsky*, 373 F.2d 269, 271, 273 (2d Cir. 1967). Instead, to answer this question we look directly to the text of Section 11 and the words "such security."

Slack was listed for the first time on the NYSE via a direct listing. The SEC declared Slack's registration effective on June 7, 2019, and Slack began selling shares on June 20, 2019. Per the NYSE rule, a company must file a registration statement in order to engage in a direct listing. *See NYSE, Section 102.01B, Footnote E* (allowing a company to "list their common equity securities on the Exchange *at the time of effectiveness of a registration statement* filed solely for the purpose of allowing existing shareholders to sell their shares") (emphasis added); *see also* SEC Approval 2018, 83 Fed. Reg. at 5651. The SEC interprets this reference to a registration statement in the rule as an effective registration statement filed pursuant to the Securities Act of 1933. *See* Order Approving a Proposed Rule Change To Modify the Provisions Relating to Direct Listings, Exchange Act Release No. 34-90768, 85 Fed. Reg. 85,807, 85,808 n.15 (Dec. 22, 2020) ("SEC Approval 2020"). As indicated, in contrast to an IPO, in a direct listing there is no bank-imposed lock-up period during which unregistered shares are kept out of the market. Instead, at the time of the effectiveness of the registration statement, both registered and unregistered shares are immediately sold to the public on the exchange. *See NYSE, Section 102.01B, Footnote E*. Thus, in a direct listing, the same

registration statement makes it possible to sell both registered and unregistered shares to the public.

Slack's unregistered shares sold in a direct listing are "such securities" within the meaning of Section 11 because their public sale cannot occur without the only operative registration in existence. Any person who acquired Slack shares through its direct listing could do so only because of the effectiveness of its registration statement.

Because this case involves only one registration statement, it does not present the traceability problem identified by this court in cases with successive registrations. *See Hertzberg*, 191 F.3d at 1082; *Century Aluminum*, 729 F.3d at 1106 ("When all of a company's shares have been issued in a single offering under the same registration statement, this 'tracing' requirement generally poses no obstacle.").[5]

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[5] Counsel for Slack raised for the first time in oral argument that Slack issued two registration statements in its direct listing, a Form S-1 (the traditional registration statement) and a Form S-8 (registering sales of shares to employees through their compensation packages). Both forms went into effect on the same day. The record before this court does not include the Form S-8. Rather, counsel pointed the court to the page in the S-1 that references the S-8. In any case, the court takes judicial notice of Slack's Form S-8, filed June 7, 2019, and available at https://sec.report/Document/0001628280-19-007750/. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (SEC filings subject to judicial notice). In addition, the S-8 explicitly incorporates the S-1 by reference, meaning that any allegedly misleading statements in the S-1 are necessarily present in the S-8, and that these two forms are part of the same registration package. Finally, to the extent that Slack is arguing that Pirani's shares could have been registered under a different registration statement (presenting the same exact traceability conundrum as in past cases), this factual scenario is not present here and is speculative.

All of Slack's shares sold in this direct listing, whether labeled as registered or unregistered, can be traced to that one registration.

The legislative history of Section 11 supports this interpretation. The Securities Act of 1933 was motivated in part by the stock market crash of 1929, with a goal of "throw[ing] upon originators of securities a duty of competence as well as innocence which the history of recent spectacular failures overwhelmingly justifies." H.R. Rep. No. 73-85, at 9 (1933) (Conf. Rep.). The House Conference Report explained that "[f]undamentally, [Sections 11 and 12] entitle the buyer of securities sold *upon a registration statement* including an untrue statement or omission of material fact, to sue for recovery . . ." *Id.* (emphasis added). The drafters noted "it is the essence of fairness to insist upon the assumption of responsibility for the making of these statements" when the "connection between the statements made and the purchase of the security is clear[.]" *Id.* at 10. Here, both the registered and unregistered Slack shares sold in the direct listing were sold "upon a registration statement" because they could only be sold to the public at the time of the effectiveness of the statement. *See NYSE, Section 102.0IB, Footnote E.* The connection between the purchase of the security and the registration statement is clear.

Slack argues that past cases in this circuit and others limit the meaning of "such security" in Section 11 to only registered shares. Slack asks that the court apply Section 11 to direct listings in the same way it has in cases with successive registration statements, requiring plaintiffs to prove purchase of *registered* shares pursuant to a particular registration statement. *See Century Aluminum*, 729 F.3d at 1106;

Barnes, 373 F.2d at 273; *Lee*, 294 F.3d at 976. To interpret Section 11 in this way would undermine this section of the securities law.

In a direct listing, registered and unregistered shares are released to the public at once. There is no lock-up period in which a purchaser can know if they purchased a registered or unregistered share. Thus, interpreting Section 11 to apply only to registered shares in a direct listing context would essentially eliminate Section 11 liability for misleading or false statements made in a registration statement in a direct listing for both registered and unregistered shares. While there may be business-related reasons for why a company would choose to list using a traditional IPO (including having the IPO-related services of an investment bank), 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.[6] Moreover, companies would be incentivized to file overly optimistic registration statements accompanying their direct listings in order to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements.[7] This

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[6] This is particularly true now that the NYSE rule has been amended to allow a company to sell its own shares and raise capital through a Primary Direct Floor Listing. *See supra* note 2.

[7] The court notes that some SEC commissioners also voiced concerns about the Primary Direct Floor Listing rule. *See* Allison H. Lee, Caroline A. Crenshaw, *Statement on Primary Direct Listings*, SECURITIES AND EXCHANGE COMMISSION (Dec. 23,

interpretation of Section 11 would create a loophole large enough to undermine the purpose of Section 11 as it has been understood since its inception.[8]

As indicated, most importantly, interpreting Section 11 in this way would contravene the text of the statute. Slack's shares offered in its direct listing, whether registered or unregistered, were sold to the public when "the registration statement . . . became effective," thereby making any purchaser of Slack's shares in this direct listing a "person acquiring such security" under Section 11. 15 U.S.C. § 77k(a). Pirani has pled facts sufficient to establish statutory standing under Section 11 and the court affirms the district court's denial of Slack's motion to dismiss with respect to Pirani's Section 11 claim.

2020), https://www.sec.gov/news/public-statement/lee-crenshaw-listings-2020-12-23 (noting that the "NYSE has not met its burden to show that [] the proposed rule change is consistent with the Exchange Act"). Given the dearth of law on the subject, and the opportunity for manipulation, *see supra* note 6, the concern might be well-taken

[8] The SEC must approve changes to NYSE rules to confirm that they are consistent with Section 6(b)(5) of the Exchange Act including ensuring that the rules "are designed to prevent fraudulent and manipulative acts and practices[.]" 15 U.S.C. § 78f(b)(5); *see* SEC Approval 2020, 85 Fed. Reg. 85,810. In its order approving the NYSE's direct listing rule, the SEC noted that while the direct listing rule "may present tracing challenges," it did not "expect any such tracing challenges . . . to be of such magnitude as to render the proposal inconsistent with the Act." *Id*. at 85,816. In fact, the SEC cited the district court opinion in this case to demonstrate how the judge-made traceability doctrine might evolve, and as evidence that there was no "precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims." *Id*. at 85,816 & n.112.

II. Standing under Section 12

Section 12(a)(2) of the Securities Act of 1933 provides that:

> Any person who . . . *offers or sells a security* . . . by the use of any means or instrument of transportation or communication in interstate commerce or of the mails, *by means of a prospectus* or oral communication, which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements , . . . shall be liable . . . *to the person purchasing such security from him,* who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

15 U.S.C. § 77*l*(a)(2) (emphasis added). Under Section 12(a)(2), liability falls on a person who "offers or sells a security" to the public by means of a false or misleading prospectus or oral communication. *See Pinter v. Dahl*, 486 U.S. 622, 641-47 (1988). The Supreme Court has determined that "the word 'prospectus' is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." *See Gustofson v. Alloyd Co., Inc.*, 513 U.S. 561, 584 (1994); *see also Century Aluminum*, 729 F.3d at 1106 (noting that a "prospectus . . . is treated as part of the company's registration statement for purposes of § 11").

For the purposes of our analysis, Section 12 liability (resulting from a false prospectus) is

consistent with Section 11 liability (resulting from a false registration statement). 15 U.S.C. §§ 77k, 77*l*; *see Hertzberg*, 191 F.3d at 1081 ("Section 12 . . . permits suit against a seller of a security by prospectus"). It follows from the analysis of "such security" in Section 11, that the shares at issue in Slack's direct listing, registered and unregistered, were sold "by means of a prospectus" because the prospectus was a part of the offering materials (i.e. the registration statement and prospectus) that permitted the shares to be sold to the public. As previously determined, neither the registered nor unregistered shares would be available on the exchange without the filing of the offering materials. *See NYSE, Section 102.01B, Footnote E.* Thus, Pirani has satisfied part of the statutory standing analysis under Section 12(a)(2) because all of Slack's shares in this direct listing were sold "by means of a prospectus."

Section 12 also includes an express privity requirement between the seller and the purchaser that is not present in Section 11. *See Hertzberg*, 191 F.3d at 1081 (noting that the text of Section 12 "'the person purchasing such security from him,' thus specif[ies] that a plaintiff must have purchased the security directly from the issuer of the prospectus"). Slack raises this issue in its briefing to the court, challenging Pirani's standing under Section 12(a)(2), asserting that none of the individual defendants are statutory sellers within the meaning of Section 12. Pirani does not challenge the district court's dismissal of his Section 12(a)(2) claim against Slack. On an interlocutory appeal, the court *may* reach any issues fairly raised in the certified district court order. *See Yamaha Motor*, 516 U.S. at 205 (holding "the appellate court may address any issue fairly included

within the certified order"). This particular aspect of standing under Section 12(a)(2), however, does not appear to have motivated the district court's certification for interlocutory appeal and does not raise a novel issue or "involve[] a controlling question of law as to which there is substantial ground for difference of opinion[.]" 28 U.S.C. § 1292(b). The dispute is heavily fact dependent and we decline to address it at this juncture.

III. Section 15 Claims

Section 15 of the Securities Act of 1933 provides that "[e]very person who . . . controls any person liable under sections [Section 11 and 12] of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable[.]" 15 U.S.C. § 77*o*(a). Because standing exists for Pirani's Section 11 claim against Slack, standing exists for the dependent Section 15 claim against controlling persons. 15 U.S.C. § 77*o*(a). The district court's determination that Pirani has pled sufficient facts to plausibly allege that the individual defendants and the venture capital defendants[9] are controlling persons under Section 15 is not challenged before us.[10]

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[9] The individual defendants do not argue that they are not controlling persons

[10] The SEC defines control to be "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405. "The standards for liability as a controlling person under § 15 are not materially different from the standards for determining controlling person liability under § 20(a)."

CONCLUSION

For the reasons stated above, we affirm the district court's partial denial of Slack's motion to dismiss. Statutory standing exists under Sections 11 and 15, and under Section 12(a)(2) to the extent it parallels Section 11. **AFFIRMED.**

Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568 n.4 (9th Cir. 1990). Under Section 20(a) (and therefore under Section 15) whether a party is a controlling person "is an intensely factual question." *Paracor Finance, Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996) (citation omitted).

MILLER, Circuit Judge, dissenting:

This case involves the application of sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*, to a direct listing of shares on a stock exchange. Although the factual setting of the case may be novel, the legal issues it presents are not. The interpretation of sections 11 and 12 has been settled for decades, and applying that interpretation, I would reverse the district court's order and remand with instructions to grant the motion to dismiss in full.

In a traditional initial public offering (IPO), a company seeking to go public files a registration statement and then sells shares issued under that registration statement. Typically, the investment bank underwriting the offering insists on what is known as a "lock-up period," during which existing shareholders—such as the company's employees or its early investors, who may hold shares that were issued under an exemption to the registration requirement—may not sell their unregistered shares. Anyone purchasing shares on the stock exchange during the lock-up period can therefore be certain that the shares were issued under the registration statement.

In this case, Slack Technologies, Inc., went public through a direct listing, with no underwriters and no lock-up period. It did not issue any new shares; it simply filed a registration statement so that the shares already held by employees and early investors could begin to be traded publicly on the New York Stock Exchange. On the first day of the offering, 118 million registered shares and 165 million unregistered shares were available for purchase on the exchange, and Fiyyaz Pirani purchased 30,000 shares. He now asserts that the registration statement contained material omissions. But because

brokers generally do not keep track of which shares were issued when, Pirani cannot prove that his shares were issued under the registration statement that he says was inaccurate.

That failure of proof is significant and, as I will explain, outcome-determinative. Sections 11 and 12 impose strict liability for any "untrue statement of a material fact or [omission of] a material fact" in a "registration statement" or "prospectus," respectively. 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Strict liability is strong medicine, so the statute tempers it by limiting the class of plaintiffs who can sue. Section 11 provides statutory standing only to "any person acquiring such security," *id.* *§* 77k(a), while section 12 similarly provides standing only "to the person purchasing such security," *id.* § 77*l*(a). In that respect, both provisions are unlike section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, which allows a broad class of plaintiffs to sue for false statements in connection with the sale of a security, but only if the defendant acted with scienter. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551* U.S. 308, 318-19 (2007).

I begin with section 11. As noted, that provision allows a suit only by a "person acquiring such security." 15 U.S.C. § 77k(a). Because the phrase "such security" has no antecedent in section 11, the statute is ambiguous as to what sort of security a plaintiff must acquire to have standing.

More than 50 years ago, the Second Circuit resolved that ambiguity in a landmark decision authored by Judge Friendly. *Barnes v. Osofsky,* 373 F.2d 269 (2d Cir. 1967). In *Barnes,* the defendants had conducted a secondary offering—that is, the company's stock was already publicly traded under a previously filed registration statement, and the

company filed a new registration statement so that it could sell more stock. *Id.* at 270. The plaintiffs purchased shares during the secondary offering, and they sought to bring a section 11 action based on inaccuracies in the new registration statement. *Id.* The Second Circuit held that they could not do so because they could not prove that the shares they purchased had been issued under the new registration statement rather than the earlier one. *Id.* at 271-72. In reaching that conclusion, the court noted that the phrase "any person acquiring such security" lent itself to both a "narrower reading—'acquiring a security issued pursuant to the registration statement" and "a broader one—'acquiring a security of the same nature as that issued pursuant to the registration statement,'" and it adopted the narrower reading, which it described as a "more natural" interpretation of the text. *Id.*

Until today, every court of appeals to consider the issue, including ours, has done the same. *See Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.,* 632 F.3d 762, 768 & n.5 (1st Cir. 2011); *Rosenzweig v. Azurix Corp.,* 332 F.3d 854, 873 (5th Cir. 2003); *Lee v. Ernst & Young, LLP,* 294 F.3d 969, 975-78 (8th Cir. 2002); *Hertzberg v. Dignity Partners, Inc.,* 191 F.3d 1076, 1080 (9th Cir. 1999); *Joseph v. Wiles,* 223 F.3d 1155, 1159-60 (10th Cir. 2000), *abrogated on other grounds by California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.,* 137 S. Ct. 2042 (2017); *APA Excelsior III L.P. v. Premiere Techs., Inc.,* 476 F.3d 1261, 1271 (11th Cir. 2007). In *Hertzberg,* we held that "such security" requires the plaintiff to "have purchased a security issued under that, rather than some other, registration statement." 191 F.3d at 1080. And in *In re Century Aluminum Co. Securities Litigation,* 729 F.3d 1104, 1106 (9th Cir. 2013), we

reiterated that "such security" means that the shares were "issued under the allegedly false or misleading registration statement."

That principle ought to resolve this case. Because Pirani cannot show that the shares he purchased "were issued under the allegedly false or misleading registration statement," he lacks statutory standing to bring a section 11 claim. *Century Aluminum,* 729 F.3d at 1106. (The same reasoning also forecloses Pirani's claim under section 15, 15 U.S.C. § 77*o*, which is derivative of his section 11 claim.)

But the court declines to follow our precedent. In this, it follows the district court, which believed that the issue presented here "appears to be one of first impression" because prior section 11 cases arose in the context of successive registrations in IPO listings, while this case involves a direct listing. But nothing in the reasoning of the cases suggests that the distinction should matter. In cases involving successive registrations, we did not invent a requirement that a plaintiff's shares must have been issued under the registration statement because we thought it seemed like a good idea; we interpreted the statutory text to impose that requirement. The Supreme Court has reminded us that a statute is not "a chameleon, its meaning subject to change" based on the varying facts of different cases. *Clark v. Martinez,* 543 U.S. 371, 382 (2005). If "such security" means that plaintiffs must have purchased shares "issued under the allegedly false or misleading registration statement" in successive-registration cases, *Century Aluminum,* 729 F.3d at 1106, then that is also what it means in direct-listing cases.

The court says that it is not adopting "the broad meaning of Section 11 that Judge Friendly rejected."

But neither is it adopting the narrow reading that Judge Friendly accepted, or else it would have to reverse the district court. So what does "such security" mean? The court says that it "look[s] directly to the text of Section 11 and the words 'such security'" to determine what "such security" means in the context of a direct listing. But the court never analyzes the text. Instead, it turns to the rules of the New York Stock Exchange. Because those rules did not allow Slack to sell its unregistered shares until the registration statement was filed, the court concludes that "such security" in section 11 must encompass any security whose "public sale cannot occur without the only operative registration in existence." That definition has no basis in the statutory text, which, as construed in *Barnes,* gives standing only to those "acquiring a security issued pursuant to the registration statement." 373 F.2d at 271. And although the court asserts that "[a]ll of Slack's shares sold in this direct listing, whether labeled as registered or unregistered, can be traced to that one registration," it does not suggest that all of the shares were issued under that registration statement. It cannot do so, given that most of the shares that began trading on the day of the listing had been issued well before the registration statement was filed.

Nor does the legislative history support the court's interpretation. To the contrary, the House Report explains that section 11 "entitle[s] the buyer of securities *sold upon a registration statement* . . . to sue for recovery." H.R. Rep. No. 73-85, at 9 (1933) (emphasis added). As the Second Circuit recognized, the phrase "securities sold upon a registration statement" plainly refers to registered securities. *Barnes,* 373 F.2d at 273. It does not refer to unregistered securities, even if those securities must

wait until a registration statement becomes effective before they can be sold on an exchange.

What appears to be driving today's decision is not the text or history of section 11 but instead the court's concern that it would be bad policy for a section 11 action to be unavailable when a company goes public through a direct listing. That policy concern is neither new nor particularly concerning. The plaintiffs in *Barnes* made precisely the same point about section 11 liability for secondary offerings, where, as they pointed out, it would be "impossible to determine whether previously traded shares are old or new." 373 F.2d at 272. The court acknowledged the point but concluded that it did not compel a broader interpretation of section 11 when such a "reading would be inconsistent with the over-all statutory scheme." *Id.* After all, in that context, as in this one, a company that can avoid strict liability under section 11 for inadvertent omissions or misleading statements in its registration statement will remain subject to liability under section 10(b) of the Securities Exchange Act for materially false statements made with scienter. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 382 (1983).

More importantly, whatever the merit of the policy considerations, they are no basis for changing the settled interpretation of the statutory text. If we "alter our statutory interpretations from case to case, Congress [has] less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair." *Neal v. United States,* 516 U.S. 284, 296 (1996). Instead, "[t]he place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock v. Clayton Cnty.,* 140 S. Ct. 1731, 1753 (2020).

For similar reasons, I also would hold that Pirani lacks standing under section 12. Section 12(a)(2) provides that any person who "offers or sells a security . . . by means of a prospectus" can be held liable for any untrue statements or omissions of material fact in the prospectus. 15 U.S.C. § 77*l*(a)(2). Just like section 11, section 12 limits standing to those who have "purchas[ed] such security." *Id.* § 77*l*(a).

We have not previously considered whether the phrase "purchasing such security" in section 12 requires plaintiffs to show that they purchased shares issued under the registration statement they are challenging. But the text of the statute resolves that question. Section 12 differs from section 11 because "such security" in section 12 has a clear antecedent: It is a security "offer[ed] or s[old] . . . by means of a prospectus." 15 U.S.C. § 77*l*(a)(2). "Prospectus," in turn, "is a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder." *Gustafson v. Alloyd Co.,* 513 U.S. 561, 584 (1995). The unambiguous meaning of a security offered or sold "by means of a prospectus" is therefore a registered security sold in a public offering.

The court concludes otherwise because, as with section 11, it bases its interpretation on the rules of the New York Stock Exchange instead of the text that Congress enacted. In the court's view, securities sold "by means of a prospectus" include unregistered shares in a direct listing because those shares cannot be sold publicly until a registration statement is filed. But for a security to be offered or sold "by means of a prospectus," the registration statement must be the means through which the security is offered to the public. That is true only of registered securities. Even

if the filing of the registration statement determines *when* an unregistered security can be offered to the public in a direct listing, the registration statement does not apply to the unregistered security and therefore is not the means through which it is offered or sold. Because the text of section 12 requires a plaintiff to have purchased a registered security to have standing, Pirani may not bring a section 12 claim.

"[N]o amount of policy-talk can overcome a plain statutory command." *Niz-Chavez v. Garland,* 141 S. Ct. 1474, 1486 (2021). Both sections 11 and 12 require a plaintiff to show that he purchased a security issued under the registration statement he is challenging. Whether or not that is good policy in the context of a direct listing, our role is to interpret statutes as they are—not to shape them into what we wish they could be. *See Bostock,* 140 S. Ct. at 1738. Because Pirani cannot show that he purchased a registered security, I would hold that he lacks standing to bring claims under sections 11, 12, or 15 of the Securities Act.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FIYYAZ PIRANI, Plaintiff, SLACK TECHNOLOGIES, INC., *et al.*, Defendants.	Case No. 19-cv-05857-SI ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND GRANTING LEAVE TO AMEND Re: Dkt. No. 52 Apr. 21, 2020

Before the Court is defendants' motion to dismiss the Amended Class Action Complaint ("ACAC") filed by lead plaintiff Fiyyaz Pirani. Pursuant to Civil Local Rule 7-1(b) and General Order 72, the Court finds this matter appropriate for resolution without oral argument. Having considered the papers submitted and for good cause shown, the motion is GRANTED in part and DENIED in part, and plaintiff is GRANTED leave to amend. If plaintiff wishes to amend the complaint, he shall do so by **May 6, 2020**.

BACKGROUND

I. The Parties and the Direct Listing

This securities class action is brought by lead plaintiff Fiyyaz Pirani ("plaintiff") against Slack Technologies, Inc. ("Slack") and other named defendants. Plaintiff purchased 30,000 shares of Slack's Class A common stock at $40/share on June 20, 2019, the first day of Slack's public listing, and

approximately another 220,000 shares at various prices from June 21 to September 9, 2019. Holleman Decl. in Supp. of Mot. to Appoint Lead Pl., Ex. A (Dkt. No. 26-1). Plaintiff brings this case "on behalf of a class consisting of all persons and entities that purchased or otherwise acquired Slack common stock pursuant to and/or traceable to the Offering Materials." ACAC ¶ 38 (Dkt. No. 42).

Slack is a San Francisco-based software company "that offers a cloud-based collaboration and productivity platform" for workspace computing. *Id.* ¶ 2. Other named defendants include CEO Stewart Butterfield, CFO Allen Shim, and CAO Brandon Zell; and Board of Directors ("Board") members Andrew Braccia, Edith Cooper, Sarah Friar, John O'Farrell, Chamath Palihapitiya, and Graham Smith (collectively "Individual Defendants"). *Id.* ¶¶ 19-29.

The complaint also names as defendants three venture capital firms: Accel, which appointed defendant Braccia to the Board; Andreessen Horowitz, which appointed defendant O'Farrell to the Board; and Social+Capital, which appointed defendant Palihapitiya to the board (collectively "VC Defendants"). *Id.* ¶¶ 22, 25, 26, 30-33. The VC Defendants "collectively held more than 47% of the Company's voting power and included 3 members of the Board at the time of the Offering." *Id.* ¶ 34. They "caused Slack to effectuate the Offering." *Id.* They also "caused [Slack] to indemnify them from any liabilities arising from the Securities Act [of 1933] and the Securities Exchange Act of 1934" and "to obtain and maintain a directors and officers insurance policy for them." *Id.* Upon Slack's listing, the VC Defendants "sold more than 12.5 million shares for gross proceeds of more than $484 million." *Id.*

Slack's Class A common stock shares began trading on the New York Stock Exchange ("NYSE") on June 20, 2019 under the ticker symbol "WORK." *Id.* ¶ 4. Slack did not take the traditional route of an Initial Public Offering ("IPO"), in which "a company will offer a certain amount of new and/or existing shares to the public . . . [to] help raise additional capital for company operations and expansion." *Id.* ¶¶ 66-67. Instead, Slack opted for a direct listing: no new shares were issued, but insiders and early investors of the company were able to sell their preexisting shares to the public. *Id.* ¶¶ 66, 69.[1] Because these shares were not subject to a lockup period as in an IPO, they were available for sale immediately upon Slack's listing. *Id.* ¶ 70.

In preparation for the direct listing, Slack filed a Form S-1 resale shelf registration statement (the "Registration Statement") and a Form 424B4 prospectus (the "Prospectus") (collectively the "Offering Materials") with Securities Exchange Commission ("SEC"). *Id.* ¶¶ 71-75. Slack with defendants Butterfield and Shim, also "hosted an 'investor day' in New York City to generate investor interest" on May 13, 2019. *Id.* ¶ 72. The contents of the Offering Materials applied to "up to 118,429,640" shares offered for resale to the public. *Id.* ¶ 4; *see* Kahn Decl. in Supp. of Mot. to Dismiss, Ex. A (Dkt. No. 54-1).[2] The Offering Materials noted that

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[1] The regulatory changes that enabled Slack's direct listing are discussed in greater detail *infra*.

[2] Defendants request judicial notice of several documents, including Exhibit A, which is the Registration Statement filed with the SEC and incorporated by reference into the ACAC. Dkt. No. 53. Plaintiff does not object except to the extent that

additional shares were available for resale and exempt from registration pursuant to SEC Rule 144[3]: "approximately 164,932,646 shares of common stock immediately after [Slack's] registration." Kahn Decl. Ex. A at 164; *see* ACAC ¶ 4.

II. The Offering Materials

Plaintiff alleges that he and other class members suffered losses to the value of their purchased shares as a result of misstatements or omissions of material facts in the Offering Materials. *Id.* ¶¶ 11-12. These include statements regarding service outages and Slack's Service Level Agreements ("SLAs") in the case of such outages; competition from Microsoft Teams; scalability and purported key benefits; and growth and growth strategy. *Id.* ¶ 76.

Regarding outages, Slack disclosed that it had "service level commitments to [its] paid customers" in the event of service disruptions and noted that if Slack failed to meet those commitments, it "could be obligated to provide credits for future service . . . which could harm [its] business, results of operations, and financial condition." *Id.* ¶ 95 (emphasis removed). However, Slack did not disclose alleged

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defendants rely on the documents for the truth of the matters asserted. Pl's Opp'n at 1 n.2. The Court GRANTS defendants' request for judicial notice without "assum[ing] the truth of [the] incorporated document if such assumptions only serve to dispute facts stated in a well pleaded complaint." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 998, 1003 (9th Cir. 2018)

[3] SEC Rule 144 is an administrative rule adopted "to establish specific criteria for determining whether a person is not engaged in a distribution." 17 C.F.R. § 230.144. This in turn determines whether a securities transaction is exempt, pursuant to Section 4(a)(1) of the Securities Act of 1933, from certain registration requirements. 15 U.S.C. § 77d(a)(1).

vulnerabilities it was already suffering that "caused severe service disruptions," including a failure to meet its uptime guarantee for "7 out of 12 months" in 2018 alone. *Id.* ¶ 96. Slack also failed to disclose that its service level commitment was "highly unusual and punitive." *Id.* "[W]hile most competitors guaranteed uptime of three-nines (99.9%), Slack guaranteed four-nines (99.99%)." *Id.* ¶ 63. Failure to meet that guarantee would require a refund or credit payout of "100 times what the customer would have paid during the downtime as opposed to the actual cost of service lost during the downtime," automatically and regardless of whether or not specific customers actually experienced the downtime or requested the credit. *Id.*

Regarding competition, the Offering Materials identified Microsoft as its primary competitor but stated that "we are uniquely positioned to more rapidly innovate and respond to new technologies and customer requirements than our competitors." *Id.* ¶¶ 83-84. Defendants allegedly "downplayed the impact" of these competitors, including "the impact . . . Microsoft in particular[] was already having on [Slack's] expansion into enterprise customers prior to the Offering." *Id.* The competitor product Microsoft Teams launched in March 2017; in December 2017, defendant Butterfield acknowledged in a Business Insider interview that "Microsoft is the main competitor. They're the third largest company in the world and if they start channeling all their resources against you, that's a lot to compete with." *Id.* ¶¶ 52-53. In 2018, when Microsoft Teams introduced a free tier and a feature for adding people outside of an organization, it began "to compete head-to-head with Slack's freemium model." *Id.* ¶ 52. That same year, Slack acquired intellectual property from another

software company, Atlassian, and announced a close partnership between them. *Id*. ¶¶ 54-55. *PCMag.com* reported: "What went unsaid in both [Slack's and Atlassian's] statements is that they're partnering up to take on an even bigger competitor in Microsoft Teams." *Id*. ¶ 57.

Plaintiff alleges that the Offering Materials touted various "key benefits to users, teams, and organizations" and that Slack built its "technology infrastructure using a distributed and scalable architecture on a global scale," and that these statements "implied that the Slack App was a market leader with unique advantages over its competitors and that the Company possessed the ability to scale up its services to reach more lucrative enterprise customers." *Id*. ¶¶ 91-93 (emphasis removed). Slack also stated that it had a "[d]ifferentiated go-to-market strategy," comprised of a customer engagement model and expansion within larger organizations, and implied this was responsible for "'rapid[]' growth . . . high customer engagement . . . [and] revenue growth and decreasing net losses from 2017 through 2019." *Id*. ¶¶ 77-78. But Slack's "growth was slowing down in several aspects, including its key metric, [daily active users]." *Id*. ¶ 82.

III. Performance After the Direct Listing

On the first day of trading, June 20, 2019, shares began selling at $38.50. *Id*. ¶ 4. On June 28, 2019, Slack experienced a service outage of approximately fifteen hours affecting customers in the United States and Europe; the outage received attention from the media, with reporting by such news outlets as *Newsweek*. *Id*. ¶¶ 99-102. Another large-scale service outage occurred on July 29, affecting customers in the United States, Japan, and Europe. *Id*. ¶ 106. In a

conference call on September 4, defendant Butterfield admitted that the outages were caused by "scaling . . . we continue to hit limits that we didn't realize were built into the system." *Id.* ¶ 111 (emphasis removed). He also admitted that the uptime guarantee reflected policies that "are outrageously customer-centric," "exceptionally generous," and "unusual." *Id.* ¶¶ 109-112.

By July 11, 2019, Microsoft Teams had reached 13 million daily active users, surpassing Slack in this metric. *Id.* ¶ 107. On November 20, 2019, *MarketWatch* reported that "Microsoft Teams, which grew 54% since July to more than 20 million daily active users, is on a trajectory to double Slack's customer base by early next year as more corporations adopt group chat." *Id.* ¶ 90.

On September 4, 2019, Slack reported second-quarter fiscal 2020 results, including that "[r]evenue was negatively impacted by $8.2 million of credits related to service level disruption in the quarter"; that "GAAP operating loss was $363.7 million, or 251% of total revenue, compared to a $33.7 million . . . or 37% of total revenue" loss in the second quarter of the previous year; and "[n]et cash provided by operations was $0.3 million, or 0% of total revenue, compared to cash provided by operations of $1.5 million, or 2% of total revenue, for the second quarter of fiscal year 2019." *Id.* ¶ 108.

After the September 4, 2019 earnings announcement, share prices dropped to below $25, going as low as $19.53. *Id.* ¶¶ 9-10. At the time this action commenced, the price was $25.72 per share; at the time the ACAC was filed, the price was $22. *Id.* ¶¶ 10 & 10 n.2.

Plaintiff brings this action under the Securities Act of 1933, asserting claims under Sections 11, 12(a)(2), and 15. Defendants move to dismiss all claims under Fed. R. Civ. P. 12(b)(6).

LEGAL STANDARD

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and a complaint that fails to do so is subject to dismissal pursuant to Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff to allege facts that add up to "more than a sheer possibility that a Defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 544, 555. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id*.

In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in the complaint and draw all reasonable inferences in favor of the plaintiff. See *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, a district

court is not required to accept as true "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig*., 536 F.3d 1049, 1055 (9th Cir. 2008).

As a general rule, courts may not consider materials beyond the pleadings when ruling on a Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). However, the incorporation-by-reference doctrine "permit[s] district courts to consider material outside a complaint" in order to "prevent[] plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken-or doom-their claims." *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988, 998, 1002 (9th Cir. 2018). There are also instances, albeit rare, where the court may review a document when assessing the sufficiency of a claim at the pleading stage. *Id*. at 1002 (citing *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (affirming the incorporation of materials that the complaint did not reference at all because the claim "necessarily depended on them")).

If the Court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

Defendants argue that plaintiff cannot plead standing under Section 11 because of the case law interpreting that statute holding that a plaintiff's purchased shares must be traced to the defective registration statement, which is impossible to do here. Defendants further argue that Section 11 damages cannot be established in the case of a direct listing, that plaintiff lacks standing under the stricter privity requirement of Section 12, and that failure to state a claim under either Sections 11 or 12 necessarily obviates standing under Section 15. Lastly, defendants argue that plaintiff has failed to allege material misstatements or omissions.

Plaintiff argues that, because of the unique regulatory framework of Slack's direct listing, this case "presents a matter of first impression that, if decided in Defendants' favor, will provide a blueprint for companies to evade liability under Section 11 for filing a misleading registration statement." Pl.'s Opp'n at 1 (Dkt. No. 63). Plaintiff contends that by structuring the Offering such that registered and unregistered shares became publicly tradeable at the same time, "Defendants attempt to take unfair advantage of the judge-made 'traceability' requirement that arose out of cases involving successive offerings in which plaintiffs must show that they bought their shares in the specific offering at issue." *Id*. at 2. Plaintiff contends that there is only one interpretation of Section 11 that makes sense in the context of a direct offering: where a company offers its shares for public trading through a direct listing or otherwise by filing a registration statement as required by the federal securities laws, and non-registered shares also become publicly traded in the

same offering, any person who acquires shares—which could be sold on a public exchange only when and because the registration statement was filed—may sue those responsible under Section 11 where the registration statement contains material misstatements and omissions.

I. Section 11 Standing

A. "Such security"

Section 11 of the Securities Act of 1933 (the "Securities Act") provides a strict liability cause of action for violations of certain registration requirements. The statute reads in relevant part: "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue . . ." 15 U.S.C. § 77k.

The Second Circuit was the first to interpret the phrase "such security." *See Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967). In *Barnes*, shares were issued pursuant to registration statements issued in 1961 and 1963, and purchasers filed shareholder class actions alleging claims under Section 11 that the 1963 registration statement and prospectus contained material misstatements and omissions. The district court approved a settlement limited to purchasers who could establish that they had purchased securities issued under the 1963 registration statement. Objectors to the settlement, who could not trace their purchases to the 1963 registration statement, appealed. Writing for the court, Judge

Friendly[4] found "the difficulty, presented when as here the registration is of shares in addition to those already being traded, is that 'such' has no referent." *Id*. at 271. Judge Friendly weighed two possible readings of the phrase: a narrower reading, "acquiring a security issued pursuant to the registration statement"; and a broader reading, "acquiring a security of the same nature as that issued pursuant to the registration statement." *Id*. Of the broader reading, Judge Friendly noted that it "would not be such a violent departure from the words that a court could not properly adopt it if there would good reason for doing so." *Id*. Judge Friendly adopted the narrower reading after a review of the overall statutory scheme[5]; language from the legislative

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[4] "Judge Friendly, without a doubt, did more to shape the law of securities regulation than any judge in the country." Louis Loss, *In Memoriam: Henry J. Friendly*, 99 Harv. L. Rev. 1722, 1723 (1986).

[5] Reasoning that Section 11's "stringent penalties are to insure full and accurate disclosure through registration," Judge Friendly observed that "under §§ 2(1) and 6, only individual shares are registered." *Id*. at 272. By contrast, the antifraud sections 12(2) and 17 "are not limited to the newly registered shares." *Id*. Furthermore, the damages and liability limitations in sections 11(g) and 11(e) suggested that standing should be limited "to purchasers of the registered shares, since otherwise their recovery would be greatly diluted when the new issue was small in relation to the trading in previously outstanding shares." *Id*.

history[6]; dicta from within the Second Circuit[7]; and a treatise and amicus brief from the SEC. *Id*. at 272-73. The Ninth Circuit has followed suit in its interpretation: "Clearly, this limitation [on 'any person'] only means that the person must have purchased a security issued under that, rather than some other, registration statement." *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) (citing *Barnes*, 373 F.2d 269).

This narrower reading became the basis for case law requiring plaintiffs to "trace their shares back to the relevant offering" in order to plead standing under Section 11. *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013). In the Ninth Circuit, this means plaintiffs must either have "purchased shares in the offering made under the misleading registration statement," or purchased shares in the aftermarket "provided they can trace their shares back to the relevant offering." *Id*. The difficulty arises when there are multiple registration statements, in which case the plaintiff must prove

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[6] The identical House and Senate versions of the statute contained the language, "every person acquiring any securities specified in such statements," and "any persons acquiring any securities to which such statement relates." *Id*. (citing S. 875, 73d Cong. § 9 (1st Sess. 1933); H.R. 4314, 73d Cong. § 9 (1st Sess. 1933)).

[7] In *Barnes*, Judge Friendly gave particular weight to Judge Frank's dictum in *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 786 (2d Cir. 1951) (noting, in the context of holding that proof of fraud or deceit is not required for Section 11 claim, that a Section 11 claim "may be maintained only by one who comes within a narrow class of persons i.e. those who purchase securities that are the direct subject of the prospectus and the registration statement") because of Judge Frank's role as "a leading member of the SEC in its early days." *Barnes*, 373 F.2d at 273.

that the purchased shares were issued under the allegedly false or misleading one, "rather than some other registration statement." *Id.*; *Hertzberg*, 191 F.3d at 1080. "Courts have long noted that tracing shares in this fashion is 'often impossible,' because 'most trading is done through brokers who neither know nor care whether they are getting newly registered or old shares,' and 'many brokerage houses do not identify specific shares with particular accounts but instead treat the account as having an undivided interest in the house's position.'" *Century Aluminum*, 729 F.3d at 1107 (quoting *Barnes*, 373 F.2d at 271-72). Nevertheless, courts have deferred to Congress to amend the statute. *See Century Aluminum*, 729 F.3d at 1107 ("this tracing requirement is the condition Congress has imposed for granting access to the 'relaxed liability requirements' § 11 affords"); *Barnes*, 373 F.2d at 273 ("the time may have come for Congress to reexamine these two remarkable pioneering statutes in the light of thirty years' experience").[8] Lower courts in this and other jurisdictions have imposed the same requirement where unregistered shares entered the market following the issue of registered shares; these

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[8] The American Law Institute's model code for comprehensive reform included eliminating the tracing requirement by giving "a right of action to a person who proves— (1) that, in the case of an offering statement, he bought a security of a class covered by the offering statement after its effectiveness; or (2) that, in the case of a registration statement or report, he bought or sold a security of the registrant after the effectiveness of the registration statement or the filing of the report." Fed. Sec. Code § 1704(c)(2) (Am. Law Inst. 1980). In the only amendment to the Securities Act since the 1930s, a provision for joint liability was added at § 11(f), but the relevant language discussed here remained unchanged. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 201(b), 109 Stat. 737.

courts have resolved the tracing requirement by limiting claims to certain factual circumstances or time periods. *See, e.g.*, *Lilley v. Charren*, 936 F. Supp. 708, 716 (N.D. Cal. 1996) (granting leave to amend for plaintiffs to "identify the purchasers of the unregistered shares" that entered market prior to registered shares or other "specific dates and facts that establish . . . standing"); *In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. 65, 118-119 (S.D.N.Y. 2004) (cutting off plaintiff class period "at the time when unregistered shares became tradeable"), *vacated on other grounds by* 471 F.3d 24 (2d Cir. 2006).

The precise issue before this Court appears to be one of first impression. This is because Slack's direct listing on the NYSE is the result of a new regulatory development approved by the SEC in 2018. *See* Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 34-82627, 83 Fed. Reg. 5650 (Feb. 2, 2018). The SEC approved changes to the NYSE Listed Company Manual in order to "provide a means for a category of companies with securities that have not previously been traded on a public market and that are listing only upon effectiveness of a selling shareholder registration statement, without a related underwritten offering, and without recent trading in a Private Placement Market, to list on the Exchange." *Id*. at 5654. Most significantly for this case, the rule change allows a company to (1) enter the public market for the first time on a major public listing (2) without issuing *new* shares as in an IPO; but the company is still (3) subject to the registration requirements of the Securities Act and thus (4) subject to Section 11

liability.[9] Because no new shares are issued, insiders holding preexisting shares are not subject to the typical "'lock-up period' of 90 to 180 days where they cannot sell their shares." ACAC ¶ 70. In other words, shares of Slack common stock became available for purchase on the NYSE immediately on June 20, 2019, from two simultaneous entry points: under the Securities Act registration statement and under the SEC Rule 144 exemption from registration. *See* 17 C.F.R. § 230.144. In a traditional IPO, the registered shares would be sold first, and the unregistered shares would become available for sale after the lockup period; a plaintiff pleading Section 11 standing for purchases made *after* the availability of unregistered shares would likely be unsuccessful because the market would be so diluted as to make tracing "virtually impossible." *See In re Initial Pub. Offering Sec. Litig*., 227 F.R.D. at 118. In a direct listing, the impossibility of tracing begins on the very first day of listing due to the simultaneous offering of unregistered and registered shares.

Plaintiff argues that to follow the standard tracing analysis here "would eviscerate the rights afforded by Section 11 and allow companies to eliminate Section 11 liability by releasing non-registered shares into the market at the same time as registered shares." Pl.'s Opp'n at 2 (Dkt. No. 63). Defendants acknowledge that "Slack's direct listing was only the second significant direct listing ever to

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[9] The proposal's previously withdrawn Amendment No. 2 envisioned no Section 11 liability whatsoever; the proposed rule "would have allowed a company to list immediately upon effectiveness of an Exchange Act [of 1934] registration statement only, without any concurrent IPO or Securities Act of 1933 ('Securities Act') registration." *Id*. at 5651 fn.11.

take place" and that cases analyzing the tracing requirement have involved successive rather than simultaneous stock offerings; nevertheless, defendants assert the same principles of tracing apply. Defs.' Reply at 4 (Dkt. No. 66).

Because this case presents a question of apparent 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—the Court finds it instructive to return to the statutory text. If the text is ambiguous, the Court "may [also] use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076, 1084 (9th Cir. 2019) (citation omitted). The Court is "guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). "The 1933 and 1934 Acts are remedial legislation, among the central purposes of which is full and fair disclosure relative to the issuance of securities." *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 480 (9th Cir. 1973) (citing *Tcherepnin*, 389 U.S. at 336); *see also SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) ("These exemptions [from Section 5's registration requirements] must be narrowly viewed because, as remedial legislation, the Securities Act is entitled to a broad construction."). The Supreme Court "itself has construed securities law provisions 'not technically and restrictively, but flexibly to effectuate [their] remedial purposes.'" *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972)).

The canon, however, "should not be 'treated . . . as a substitute for a conclusion grounded in the statute's text and structure.'" *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019) (citation omitted).

As discussed above, the phrase "any purchaser acquiring such security" is susceptible of at least two meanings. 15 U.S.C. § 77k. The second, broader meaning—"acquiring a security of the same nature as that issued pursuant to the registration statement"—has yet to be examined. *Barnes*, 373 F.2d at 271. Judge Friendly remarked only that it "would not be such a violent departure from the words that a court could not properly adopt it if there were good reason for doing so." *Id*. Here, the Court finds good reason for doing so.

The statutory scheme of the Securities Act provides for remedial penalties (Sections 11, 12, 15) where its registration requirements have been violated (Sections 5 through 7). 15 U.S.C. §§ 77k-77*l,* 77*o,* 77e-77g. Pursuant to Section 4 and Rule 144, certain transactions are exempted from the registration requirement, and those exempt transactions are not subject to the remedial penalties.[10] Ordinarily, as discussed in the tracing cases above, transactions subject to the registration requirements and those that are exempt from such requirements occur at different time periods. *See, e.g.*,

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[10] Section 4(a)(1) exempts from registration certain classes of transactions, including those "by a person other than an . . . underwriter." 15 U.S.C. § 77d(a)(1). Section 2(a)(11) defines an underwriter as "any person who has purchased from the issuer with a view to . . . distribution." *Id*. § 77b(a)(11). And Rule 144, an SEC administrative rule, was adopted "to establish specific criteria for determining whether a person is not engaged in a distribution." 17 C.F.R. § 230.144.

Lilley, 936 F. Supp. at 715-16 (80,000 unregistered shares entered market prior to IPO and preferred stock offering). In Slack's direct listing, however, both types of transactions originated and occurred simultaneously. Applying the narrower reading of "such security" in the context of Slack's direct listing would cause the exemption provision of Section 4 to completely obviate the remedial penalties of Sections 11, 12 and 15.

Moreover, "[c]ourts must interpret a congressional act, if possible, in a manner that gives each section its due effect without inconsistency or repugnancy." *In re Sheehan*, 253 F.3d 507, 514 (9th Cir. 2001) (citation omitted). Whereas the narrow reading would cause exemption from registration to obviate liability for a defective registration, the broader reading makes it "possible to interpret [Section 11] and [Section 4] without conflict, while giving meaning to both rules, [making this] the correct interpretation." *Id*. The Court also finds persuasive that an interpretation need not be adopted if it would lead to "absurd or futile results . . . plainly at variance with the policy of the legislation as a whole." *EEOC v. Commercial Office Prod. Co*., 486 U.S. 107, 120 (1988) (Marshall, J.) (plurality opinion) (rejecting an interpretation that would result in "the preclusion of any federal relief for an entire class of discrimination claims"); *see also Wenger v. Lumisys, Inc*., 2 F. Supp. 2d 1231, 1242 (N.D. Cal. 1998) (rejecting interpretation of safe harbor provision in Private Litigation Reform Act where interpretation would lead to absurd results). The elimination of civil liability under the Securities Act, "among the central purposes of which is full and fair disclosure relative to the issuance of securities," would certainly lead to a futile result at variance with the policy of this

remedial legislation. *Glenn W. Turner Enters., Inc.*, 474 F.2d at 480.

Therefore, this Court finds that in this unique circumstance—a direct listing in which shares registered under the Securities Act become available on the first day simultaneously with shares exempted from registration—the phrase "such security" in Section 11 warrants the broader reading: "acquiring a security of the same nature as that issued pursuant to the registration statement." *Barnes*, 373 F.2d at 271. Accordingly, the Court DENIES defendants' motion to dismiss for lack of Section 11 standing.

B. "Offered to the public"/Damages

Defendants also contend that plaintiff's Section 11 claim fails as a matter of law because plaintiff has not and cannot allege an offering price from the direct listing, and therefore cannot establish damages. Defendants argue that a necessary predicate for establishing damages under Section 11 is the existence of a price at which a "security was offered to the public." 15 U.S.C. § 77k(g); *see also id.* § 77k(e) (damages "shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public)" and various determinations of the security's value before, at, or after the time of suit). Defendants argue that unlike an IPO in which the initial offering price is established by the company and the underwriters, here the NYSE established a reference price for Slack's shares one day prior to the commencement of trading and a designated market maker set the opening trading price without coordination from

Slack.[11] Defendants argue that because Slack's direct listing did not involve a public offering price, plaintiff cannot recover damages under Section 11.

Plaintiff argues that he is not required to establish damages at the pleadings stage, and that a purported lack of damages is an affirmative defense upon which defendants have a heavy burden. Plaintiff also asserts that he has adequately alleged an opening public price of $38.50 on the first day of trading, and also that under a "value-based Section 11 damages theory" plaintiff "can show, at a later stage, that the stock's price at the time of the Offering should have been lower if not for the omissions and misrepresentations." Pl.'s Opp'n at 13 (citing *In re Snap Inc. Sec. Litig.*, Case No. 2:17-cv-03679-SVW-AGR, 2018 WL 2972528, at *8-9 (denying motion to dismiss Section 11 claim and holding that the

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[11] Because Slack went public with a direct listing and not an IPO, there was a "lack of an initial public offering price." Kahn Decl. Ex. A at 172. The SEC-approved changes to the NYSE Listed Company Manual included changes to Rule 15(c)(1), which specifies a security's Reference Price and thus informs pre-opening indications; and Rule 104(a)(2), which provides for the facilitation of openings and reopenings for securities. Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 34-82627, 83 Fed. Reg. 5650, 5652 (Feb. 2, 2018). The rule changes provided an alternative means for determining the Reference Price in a direct listing without an IPO: "a price determined by the Exchange in consultation with a financial advisor to the issuer of such security." *Id*. The rule changes also required the Designated Market Maker who facilitates openings to consult with the issuer's financial advisor, a requirement "based in part on Nasdaq Rule 4120(c)(9), which requires that a new listing on Nasdaq that is not an IPO have a financial advisor willing to perform the functions performed by an underwriting in connection with pricing an IPO on Nasdaq." *Id*. & fn.33.

plaintiff's argument that "Snap's actual stock price at IPO overestimated the true value of the stock at that time because of the alleged material omissions and misrepresentations . . . is a valid theory of damages"), and *In re Fortune Sys. Sec. Litig.*, 680 F. Supp. 1360, 1370 (N.D. Cal. 1987) (granting summary judgment in favor of defendants where after "full and fair discovery" the "plaintiffs have failed to present any evidence indicating that the price of Fortune stock on June 15 differed at all from its 'value.'").

"Damages are not an element" of a Section 11 claim. *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1168 n.40 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983)). Courts have treated Section 11's damages measure as an affirmative defense. *See id*. at 1169; *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1258, 1261 (N.D. Cal. 2000). "For a complaint to be dismissed because the allegations give rise to an affirmative defense 'the defense clearly must appear on the face of the pleading.'" *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1219 (9th Cir. 1990) (citation omitted), *superseded by rule on other grounds as recognized in Konarski v. Rankin*, 603 F. App'x 544, 546 (9th Cir. 2015); *see, e.g.*, *In re Broderbund/Learning Co. Sec. Litig.*, 294 F.3d 1201, 1203-04 (9th Cir. 2002) (affirming Rule 12(b)(6) dismissal of Section 11 claim where it was indisputable that all class members profited from the sale of the relevant securities).

The Court concludes that defendants have not met their burden at the pleading stage to show that plaintiff cannot recover damages as a matter of law. Courts have held that "[a] plaintiff is required (1) to allege that he purchased the relevant securities; and

(2) to allege facts creating the reasonable inference that the value of the securities on the presumptive damages date—that is, either the value at the time the plaintiff sold the securities; or the value at the time of suit, if the plaintiff still holds the securities—is *less* than the purchase price." *In re Countrywide*, 588 F. Supp. 2d at 1169-70 (emphasis in original). Plaintiff has done that.

Defendants make much of the "Not applicable" answer on the Registration Statement's cover page, in the table for "Proposed Maximum Offering Price Per Share." Kahn Decl. Ex. A. They also emphasize the Registration Statement's explanation that the "opening public price of [Slack shares] on the NYSE will be determined by buy and sell orders collected by the NYSE from various broker-dealers and will be set based on the [Designated Market Maker's] determination" in consultation with "Morgan Stanley and [Slack's] other financial advisors" but, "in each case, without coordination with [Slack]." *Id*. at 171. But the same explanation in the Registration Statement describes how a pre-opening indication may be published in anticipation of the opening public price, based on buy-and-sell orders on the NYSE, "[s]imilar to how a security being offered in an underwritten initial public offering would open on the first day of trading." *Id*. at 172. In the NYSE rule changes as well as in the Slack Registration Statement, the unique direct listing process is accommodated by analogy to the traditional IPO pricing process. Defendants' reliance on an overly narrow reading of Section 11's "price at which the security was offered to the public" is thus unavailing. Further, as plaintiff asserts in his opposition, plaintiff may pursue a value-based theory of damages, which

is a fact-intensive inquiry that is not appropriate for resolution at the pleadings stage.

Accordingly, the Court DENIES defendants' motion to dismiss for lack of damages under Section 11.

II. Section 12(a)(2)

Next, defendants argue that plaintiff cannot plead standing under Section 12(a)(2) because defendants are not statutory sellers within the scope of Section 12. Section 12(a)(2) provides that any person who "offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading . . . shall be liable . . . to the person purchasing such security from him." 15 U.S.C. § 77*l*(a)(2). In the case of registered shares and exempted shares becoming available simultaneously on the first day of a direct listing, this Court reads "such security" in accordance with the construction of Section 11 discussed above. Therefore, the Court rejects defendants' argument that Section 12 liability in this case extends only to shares directly traceable to those registered under the prospectus. That does not end the analysis, however. As both parties indicate, "purchasing . . . from him" introduces a privity requirement not present in Section 11.

The Supreme Court has provided two ways to establish that someone is a statutory "seller" under Section 12: (1) by directly passing title or (2) by actively soliciting the sale. *See Pinter v. Dahl*, 486 U.S. 622, 642-44 (1988). "Soliciting" does not include "urg[ing] another to make a securities purchase . . .

merely to assist the buyer" or "the giving of gratuitous advice, even strongly or enthusiastically." *Id*. at 647. "[L]iability extends only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." *Id*. In rejecting a "substantial factor" test, the Supreme Court emphasized that liability under Section 12 requires more than "mere participation" because the language of the statute "focuses on the defendants' relationship with the plaintiff-purchaser." *Id*. at 651. The Ninth Circuit has not yet elaborated on what facts constitute more than "mere participation," and district courts have adopted different approaches. *See In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D. 534, 549-50 (N.D. Cal. 2009) (citing divided lower court cases, and finding sufficient allegations of signing a registration statement and actively participating in marketing events), *with In re Harmonic, Inc., Sec. Litig.*, No. C 00-2287 PJH, 2006 WL 3591148 at *13 (N.D. Cal. Dec. 11, 2006) (citing divided lower court cases, and finding insufficient allegations of signing a registration statement or prospectus).

Plaintiff contends that defendants are statutory sellers because:

> [T]he Individual Defendants signed the Offering Materials (*see, e.g*., [ACAC] ¶ 20), actively solicited buyers through the Investor Day (*see, e.g*., ¶ 72), sold significant amounts of shares (*see, e.g.*, ¶ 20), and were financially motivated by a desire to serve their own financial interests (*see, e.g*., ¶¶ 23, 69-75). Further, Plaintiff also adequately alleges privity with his sellers. As opposed to traditional underwritten IPOs, this was a

> direct offering in which Defendants sold Slack shares directly to Plaintiff and other purchasers. ¶¶ 69-70.

Pl.'s Opp'n at 12.

Defendants rely on district courts cases holding that signing a registration statement is insufficient to establish solicitation. *See In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1080, 1101 (C.D. Cal. 2003); *Harmonic*, 2006 WL 3591148, at *10; *Welgus v. TriNet Grp., Inc.*, Case No. 15-cv-03625 BLF, 2017 WL 167708, at *19 (N.D. Cal. Jan. 17, 2017). As to participation in marketing activities such as a roadshow presentation, the IPO equivalent of the Investor Day here, some courts have held this is also insufficient. *See Infonet*, 310 F. Supp. 2d at 1101 (even if oral misrepresentations at roadshow presentations were not protected by bespeaks caution doctrine, "Plaintiffs do not allege that Defendants . . . personally or directly solicited any of the named Plaintiffs"); *In re CytRx Corp. Sec. Litig.*, Case No. CV 14-1956-GHK (PJWx), 2015 WL 5031232, at *15 (C.D. Cal. July 13, 2015) ("participation of some directors in a road show . . . is insufficient"); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP (MANx), 2011 WL 4389689, at *9 (C.D. Cal. May 5, 2011) (same).

Plaintiff relies primarily on *Charles Schwab*, which also notes the absence of Ninth Circuit guidance and the split in district court opinions. 257 F.R.D. at 549. Finding support in district court cases from within the Ninth, Second, and Seventh Circuits, the court in *Charles Schwab* found that "[a]lthough the act of signing a registration statement, alone, may not always suffice, it is at least suggestive of solicitation activity." *Id*. & fn.3 (citing, *e.g.*, *In re Nat'l*

Golf Props., Inc., No. CV 02-1383 GHK (RZX), 2003 WL 23018761 (C.D. Cal. 2003); and *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2006 WL 2385250, at *4 (N.D. Cal. 2006)); *see also In re Keegan Mgmt. Co. Sec. Litig.*, Civ. No. 91-20084 SW, 1991 WL 253003, at *8 (N.D. Cal. Sept. 10, 1991) ("To one who studies corporate filings and news releases before purchasing via a dealer on an impersonal and anonymous market, the corporation, its officers and directors, and other promoters of the stock appear to be the true 'sellers.'"). Moreover, the plaintiffs in *Charles Schwab* also alleged that "certain defendants were involved in marketing the fund. Whether or not defendants actually solicited plaintiffs' sales is a factual question which should generally be left to the jury; at this stage plaintiffs need only satisfy Rule 8(a)'s lenient pleading standards." *Id*. at 550.

The Court concludes that plaintiff has alleged enough facts to support an active solicitation theory against the Individual Defendants.[12] Plaintiff alleges that all of the Individual Defendants signed the Offering Materials, that certain defendants solicited sales at the Investor Day, and that all of the Individual Defendants were financially motivated to solicit sales. The Court finds *Charles Schwab* involved similar allegations and that Court agrees

[12] The parties' briefing focuses largely on whether the Individual Defendants can be held liable as statutory sellers under Section 12. It is not clear to the Court how plaintiff contends that Slack is a statutory seller. However, to the extent plaintiff contends that Slack sold shares directly to plaintiff and the class members, the Court is not persuaded because, *inter alia*, the company did not issue new shares in the direct listing. If plaintiff wishes to pursue a Section 12 claim against Slack, the amended complaint shall articulate the basis of that claim.

that the solicitation question is "a factual question which should generally be left to the jury." *Id*.

Accordingly, the Court DENIES defendants' motion to dismiss for failing to state a claim under Section 12.

III. Material Misstatement or Omission

To survive a motion to dismiss the Section 11 and Section 12(a)(2) claims, the complaint must plead that the Offering Materials contained (1) a materially untrue statement or omitted a material fact (2) required to be stated or (3) necessary to make the statements not misleading. 15 U.S.C. §§ 77k(a), 77*l*(a)(2). Items 105 and 303 of SEC Regulation S-K require to be stated, respectively, "a discussion of the most significant factors that make an investment in the registrant or offering speculative or risky," and a description of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. §§ 229.105, 229.303(3)(a)(ii). Allegations which state a claim under Item 303 also state a claim under Sections 11 and 12(a)(2). *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). For an omission to be misleading, "it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (citation omitted). A misrepresentation or omission is material if "it would have misled a reasonable investor about the nature of his or her investment." *In re Daou*, 411 F.3d at 1027 (citation omitted). Generally, whether a public statement is misleading, or whether adverse facts were adequately disclosed is a mixed question to

be decided by the trier of fact." *SEC v. Todd*, 642 F.3d 1207, 1220 (9th Cir. 2011) (citations and internal quotation marks omitted). "Accordingly, resolving an issue as a matter of law is only appropriate when the adequacy of the disclosure is 'so obvious that reasonable minds [could] not differ.'" *Id*. at 1220-21 (citations omitted).

Plaintiff alleges material misrepresentations or omissions in several sets of statements concerning Slack's: (A) outages and SLAs, (B) scalable architecture, (C) competition with Microsoft, (D) key benefits, and (E) growth and growth strategy.[13]

A. Outages and SLAs

Plaintiff alleges that the Offering Materials misled investors regarding known vulnerabilities related to outages and omitted to inform investors of the highly unusual and punitive SLAs the company had entered into with many of its customers. Slack disclosed in the Offering Materials that its

> continued growth depends, in part, on the ability of existing and potential organizations on Slack to access Slack 24 hours a day, seven days a week, without interruption or degradation of performance. We have in the past and may in the future experience disruptions, data loss, outages, and other performance problems. We may not be able to maintain the level of service uptime and

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[13] The parties' briefing organizes the alleged misstatements and omissions into five categories, which largely but not entirely align with the organization of the ACAC, which organizes the misstatements and omissions into four categories. The Court's order follows the parties' organization of the alleged misstatements and omissions into five separate categories.

> performance required by organizations on Slack, especially during peak usage times and as our user traffic and number of integrations increase. For example, we have experienced intermittent connectivity issues and product issues in the past, including those that have prevented many organizations on Slack and their users from accessing Slack for a period of time.

ACAC ¶ 95 (emphasis removed). Slack also disclosed, "We provide service level commitments under certain of our paid customer contracts. If we fail to meet these contractual commitments, we could be obligated to provide credits for future service, or face contract termination with refunds of prepaid amounts related to unused subscriptions, which could harm our business, results of operations, and financial condition." *Id*.

Plaintiff contends that these statements were misleading and that they omit information required by Items 105 and 303 because, *inter alia*, Slack's reliability problem was not simply hypothetical but a known issue to defendants and the company was automatically paying out significant amounts of service credits regardless of whether customers were affected or requested a refund. Plaintiff alleges that the Offering Materials did not disclose that the SLAs guaranteed an uptime of 99.99%, which is significantly stricter than the 99.9% promised by competitors; moreover, Slack did not disclose that the SLAs provided that failing to meet the guarantee would cost Slack a credit payout multiplier of 100 times what each customer paid, regardless of whether the customer complained or was even affected by the outage. *Id*. ¶¶ 63, 96, 109, 112, 120. Nor did the

Offering Materials disclose that during seven out of the twelve months of 2018, Slack had already failed to meet its uptime guarantee. *Id.* ¶ 121. Plaintiff alleges that this information is material because of the significant stock price drop following the September 4, 2019 conference call revealing the policies that Slack admitted were "outrageously customer-centric," "exceptionally generous," and not "in line with industry standards." *Id.* ¶¶ 6, 96, 109, 112, 99-125.

The Court finds that plaintiff has plausibly pled that Slack's disclosures omitted material information as well as violations of Items 105 and 303. Although the disclosures do discuss the existence of Slack's SLAs, the unusual nature of the SLAs' terms is an omitted and "significant factor[] that make[s] an investment . . . risky." *See* 17 C.F.R. § 229.105. And although the question of whether the seven months of outages in 2018 constitute a "trend" is a factual inquiry for a later stage of these proceedings, it is plausibly pled that Slack was aware of those outages at the time of its disclosures, and that future outages would have an "unfavorable impact . . . on revenues" due to the SLA terms. *See* 17 C.F.R. § 229.303(3)(a)(ii).

At minimum, the adequacy of Slack's disclosures is not "so obvious that reasonable minds [could] not differ." *See SEC v. Todd*, 642 F.3d at 1220-21. The characterization of past outages as "intermittent" is technically true, and Slack "could be obligated to provide credits" per the SLAs; but omitting the considerable frequency of outages as well as their "exceptional[]" consequences out of line with industry standards could plausibly "mis[lead] a reasonable investor about the nature of his or her investment."

In re Daou, 411 F.3d at 1027. The nearly 12% drop in stock price to $27.38 immediately following the September 4 announcement about financial highlights, outages in the quarter, and the unusual uptime commitment—followed by another 8.98% drop to $24.92 the next trading day—indicate the materiality of this information to investors. *See Backe v. Novatel Wireless, Inc.*, 642 F. Supp. 2d 1169, 1183 (S.D. Cal. 2009) ("significance of this information is illustrated by," *inter alia*, "the market reaction to the alleged disclosures"). That the SLA terms were already publicly available on Slack's website does not make its omission from the Offering Materials less material. *See Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 887 (9th Cir. 2008) ("Ordinarily, omissions by corporate insiders are not rendered immaterial by the fact that the omitted facts are otherwise available to the public.").

Since the ultimate question of "whether adverse facts were adequately disclosed is a mixed question to be decided by the trier of fact" and there is room for reasonable disagreement here, *see SEC v. Todd*, 642 F.3d at 1220-21, the Court finds that plaintiff's challenge to statements regarding outages and the SLAs is adequate for the pleading stage.

B. Scalable Architecture

In a section of the Offering Materials describing Slack's business, Slack stated that it "built [its] technology infrastructure using a distributed and scalable architecture on a global scale." ACAC ¶ 92; *see also* Kahn Decl. Ex. A at 124. Plaintiff alleges that this statement was misleading because "Slack was facing difficulty in scaling globally and attaining enterprise customers . . . as evidenced by the Slack App's widespread downtime." *Id*. ¶ 94. Plaintiff also

alleges that this statement was misleading because in the September 4, 2019 earnings call, defendant Butterfield stated that the June and July 2019 outages were caused by "scaling . . . we continue to hit limits that we didn't realize were built into the system." *Id*. ¶ 111.

Defendants contend that there is nothing misleading about the statement that Slack "built [its] technology infrastructure using a distributed and scalable architecture," and they note that the Registration Statement discloses, in the section on risks, that "as we continue to expand . . . we may not be able to scale our technology to accommodate the increased capacity requirements, which may result in interruptions or delays in service." Kahn Decl. Ex. A at 29. Defendants also note that in the September 4, 2019 call, Butterfield also noted: "We have been successful in scaling . . . between 99.9% and 99.99% . . . every quarter and most quarters 99.99%." Kahn Decl. Ex. D at 14 (Dkt. No. 54-4).

The Court agrees with defendants that the challenged statement is not misleading. Although plaintiff contends that the 2018 and 2019 outages show that Slack was facing difficulty in scaling globally, that does not make the general statement that Slack "built [its] technology infrastructure using a distributed and scalable architecture," misleading, particularly when Slack disclosed that as the company grew "we may not be able to scale our technology to accommodate" increased requirements, leading to possible outages. Asserting the existence of a "scalable architecture" is not a representation that there have not been any problems with the infrastructure nor is it a promise that there will not be any future problems with scaling. *Compare In re*

Quality Sys., Inc. Sec. Litig., 865 F.3d 1130, 1143-44 (9th Cir. 2017) (finding actionable statements about a pipeline because "Plochocki and the others did not just describe the pipeline in subjective or emotive terms. Rather, they provided a concrete description of the past and present state of the pipeline. They repeatedly reassured investors during the class period that the number and type of prospective sales in the pipeline was unchanged, or even growing, compared to previous quarters."), *with In re Intel Corp. Sec. Litig.*, Case No. 18-cv-00507-YGR, 2019 WL 1427660, at *9-12 (N.D. Cal. Mar. 29, 2019) (holding various statements regarding chip security and performance to be too vague to be actionable). Moreover, the disclosures noted that Slack may be unable to maintain service uptime for exactly the reason stated in the September 4, 2019 call: "especially during peak usage times and as our user traffic and number of integrations increase." ACAC ¶ 95. The Court therefore GRANTS defendants' motion to dismiss on this ground.

C. Competition with Microsoft

Next, plaintiff challenges statements about the "strength of [Slack's] market leadership," and statements that "only vaguely described the existing competition and downplayed the impact the potential competitors may have on [Slack]." *Id*. ¶¶ 80, 83. Plaintiff alleges that Microsoft Teams had already eclipsed Slack as the market leader before the direct listing, and continued to do so after the listing; the pre-listing evidence of this is based on a *PCMag.com* analysis comparing the two companies, and the post-listing evidence is based on a Vox article graphing a comparison of the companies' daily active users. *Id*. ¶¶ 57-58, 86-88.

The Court finds these allegedly misleading statements immaterial because the competitive advantages of Microsoft were adequately disclosed. The Offering Materials expressly state, "Our primary competitor is currently Microsoft Corporation," and that "we expect competition to intensify in the future." Kahn Decl. Ex. A at 16. The Offering Materials also state that "[m]any of our existing competitors have . . . substantial competitive advantages," and list these advantages in detail, including: "greater brand name recognition and longer operating histories, larger sales and marketing budgets and resources, broader distribution, and established relationships with independent software vendors, partners, and customers, greater customer experience resources, greater resources to make acquisitions, lower labor, and development costs . . ." *Id*. at 17.

Moreover, Slack was under no duty to report the data and relative capacity of its competitors. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1406 (9th Cir. 1996) (rejecting proposition that defendant company "was obliged not only to report on its own product line and marketing plans, but to report on and make predictions regarding *Microsoft's* intentions," even if Microsoft had disclosed those intentions to the company). Although the pleadings plausibly demonstrate that Slack was in fierce competition with Microsoft before the direct listing, and that Slack had data on its own metrics, Slack did not omit material information by failing to include data or comparisons on Microsoft's metrics.

The Court therefore GRANTS defendants' motion on this ground.

D. Key Benefits

Plaintiff also challenges Slack's "Summary of Key Benefits," which contained such statements as: "People love using Slack and that leads to high levels of engagement"; "Slack increases an organization's 'return on communication'"; "Slack increases the value of existing software investment"; "An organization's archive of data increases in value over time"; "Slack helps achieve organizational agility"; and "Developers are better able to reach and deliver value to their customers." ACAC ¶ 91.[14] Plaintiff alleges that these statements "in combination with other statements in the Offering Materials . . . implied that the Slack App was a market leader with unique advantages over its competitors and that the Company possessed the ability to scale up its services to reach more lucrative enterprise customers." *Id.* ¶ 92. "However, the statements in [¶ 91] were materially false and/or misleading because: (1) Microsoft Teams had already overtaken Slack as the market leader at the time of the Offering; (2) the Slack App's reliability was regularly below the promised 99.99% uptime; and (3) Slack was facing difficulty in scaling globally and attaining enterprise customers due to problems in maintaining and expanding its infrastructure as evidenced by the Slack App's widespread downtime." *Id.* ¶ 94.

Defendants contend that plaintiff fails to plead that these statements are misleading because the statements about Slack's "key benefits" have nothing

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[14] These statements are the bolded statements within each bullet point paragraph quoted in Paragraph 91; the Court has not replicated the entirety of Paragraph 91, but the bolded statements are illustrative of the statements in the "Summary of Key Benefits."

to do with the allegedly omitted information about Microsoft Teams, outages, or scalability problems. Defendants also argue that the Registration Statement contained disclosures about these matters in other parts of the document.

The Court finds that the statements in the "Key Benefits" section are not actionable. Plaintiff does not allege that any particular statement is false or misleading. For example, one of the seven "key benefits" is:

> **An organization's archive of data increases in value over time**. As teams continue to use Slack, they build a valuable resource of widely accessible information. Important messages are surrounded by useful context and users can see how fellow team members created and worked with the information and arrived a decision. New employees can have instant access to the information they need to be effective whenever they join a new team or company. Finally, the content on Slack is available through powerful search and discovery tools, powered by machine learning, which improve through usage.

Id. ¶ 92. Plaintiff does not allege that there is anything false or misleading about this statement or any of the other statements found in the other six "key benefits." Instead, plaintiff claims that by touting its "key benefits" Slack "implied that the Slack App was a market leader with unique advantages over its competitors and that the Company possessed the ability to scale up its services to reach more lucrative enterprise customers," when in fact the company was experiencing problems due to competition, reliability

and infrastructure. *Id*. ¶¶ 92, 94. However, a review of the "Summary of Key Benefits" section does not reveal any explicit or implicit statements about Slack's market position, competition, the reliability of its technology, or its infrastructure. While the Court has concluded that plaintiff has sufficiently alleged that the risk disclosures omitted material information about the outages and the SLAs, the Court is not persuaded by plaintiff's contention that Summary of Key Benefits is false or misleading simply because it described, in very general terms, the company's strengths.

Further, the Court notes that most, if not all, of the statements quoted in Paragraph 91 would appear to be inactionable puffery. *See, e.g.*, *id*. ¶ 91 ("People love using Slack and that leads to high levels of engagement. Slack is enterprise software created with an eye for user experience usually associated with consumer products. We believe that the more simple, enjoyable, and intuitive the product is, the more people will want to use it. As a result, teams benefit from the aggregated attention that happens when all members of a team are engaged in a single collaboration tool."); *see Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014) (finding various challenged statements to be inactionable puffery).

The Court GRANTS defendants' motion to dismiss on this ground.

E. Growth and Growth Strategy

Lastly, plaintiff alleges that the Offering Materials contained materially false or misleading statements about Slack's "[d]ifferentiated go-to-market strategy" in three subsections of the

"Summary" part of the Registration Statement: "Our Business Model," "What Sets Us Apart," and "Growth Strategy." ACAC ¶¶ 77-81. Plaintiff alleges,

> The statements in ¶¶ 77-81 were materially false and/or misleading and omitted material facts at the time of the Offering because: (1) the Company's revenue growth was trending downward while marketing expenses were increasing due to increasing competition from Microsoft Teams; (2) the Slack App's reliability was compromised due to scaling its technology to meet enterprise-level customer needs; (3) the Company's financials were uniquely vulnerable due to its unique SLA which included an "exceptionally generous credit payout multiplier" of 100 times the price paid by the customer during the downtime, which the Company provided whether or not the customers were actually affected; and, (4) the Company's growth was slowing down in several aspects, including its key metric, DAUs.

Id. ¶ 82.

Defendants contend that these statements are not actionable because (1) they consist of optimistic puffery (for example, statements about Slack "offering an exceptional product," "[t]he strength of our market leadership" and "[c]ustomer love leading to stickiness and organic expansion", *id.* ¶¶ 79-80); (2) they are forward-looking statements that are not actionable under the "bespeaks caution" doctrine (for example, the statements in "Growth Strategy" such as "we will continue to expand our marketing and sales efforts to reach more users" and "We plan to continue to grow use and users within organizations on Slack by

increasing our investments in our direct sales force . . .", *id*. ¶ 81)[15]; (3) the allegedly omitted information is unrelated to Slack's discussion of its strategy; and (4) the disclosures are not misleading because the information was actually disclosed either in the challenged subsection (e.g., the slowing revenue growth numbers) or elsewhere in the Registration Statement (such as information about increasing sales and marketing expenses and numbers of users).

The Court agrees with defendants. As with the "Key Benefits" section, plaintiff does not allege that any particular statements are false or misleading. Instead, plaintiff claims that certain information was omitted, but as defendants note, information about revenue growth, sales and marketing expenses, and numbers of users was disclosed either in the Business Model section or elsewhere in the Registration Statement. To the extent plaintiff challenges statements in the "Growth Strategy" section, plaintiff has not explained how these forward-looking statements are actionable. Finally, although the Court has concluded that plaintiff has stated a claim that the risk disclosures were misleading by omitting information about the outages and unique vulnerabilities posed by the SLAs, the Court is not persuaded that a general summary of "What Sets Us

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[15] This section also states, *inter alia*, "We will continue a relentless focus on product design . . . We believe our market remains underpenetrated and we will continue to expand our marketing and sales efforts . . . We plan to continue to grow use and users . . . we believe adoption of [guest accounts and shared channels features] will grow significantly in the coming years . . . We intend to increase investments in marketing . . . We plan to open offices and hire sales and customer experience people . . ." *Id*.

Apart"[16] or even a more specific and factual description of "Our Business Model" is rendered misleading by omitting unrelated information about risks.

Accordingly, the Court GRANTS this aspect of defendants' motion.

IV. Section 15 Standing

Section 15 imposes secondary liability upon "[e]very person who . . . controls any person liable under sections 77k [Section 11] or 77*l* [Section 12]." 15 U.S.C. § 77*o*. Plaintiff brings this claim against the Individual Defendants and the VC Defendants. Defendants move to dismiss this claim because of a failure to plead both an underlying violation and to adequately plead that the VC Defendants controlled Slack. Since the Court has found that plaintiff states an adequate claim for the underlying violations, only the second issue remains to be resolved.[17]

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[16] The "What Sets Us Apart" section contains numerous statements that the Court views as inactionable puffery, such as "Our development, design, partnerships, customer engagement, and investments are targeted at realizing the enormity and simplicity of Slack's mission: to make people's working lives simpler, more pleasant, and more productive"; "People love using Slack and many become advocates for wider use inside of their organizations"; and "As Slack usage increases inside an organization, more value is created for each additional user who might join, as well as for all existing users." Kahn Decl. Ex. A at 5; ACAC ¶ 80; *see Or. Pub. Emps. Ret. Fund*, 774 F.3d at 606 ("Feel good monikers" such as "good" and "well-regarded" are inactionable puffery).

[17] The Individual Defendants do not contend that they are not controlling persons.

Control is defined as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405; *see Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 n.9 (9th Cir. 2000).[18] "Whether [the defendant] is a controlling person is an intensely factual question, involving scrutiny of the defendant's participation in the day-to-day affairs of the corporation and the defendant's power to control corporate actions." *Howard*, 228 F.3d at 1065 (citation omitted). "[I]n order to make out a prima facie case, it is not necessary to show actual participation or the exercise of power." *No. 84 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003) (quoting *Howard*, 228 F.3d at 1065). "[A]t least some indicia of . . . control is a necessary element of 'controlling person' liability." *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1163 (9th Cir. 1996). "[T]raditional indicia" include a prior lending relationship with the accused company, ownership of its stock, and a seat on its Board. *Id*. at 1162.

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[18] "[T]he controlling person analysis is the same" for Section 15 claims under the Securities Act, as for Section 20(a) claims under the Securities Exchange Act. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990). Although Securities Exchange Act claims are typically analyzed under the heightened fraud pleading standard of 9(b), "district courts in the Ninth Circuit have concluded that because fraud is not a necessary element of a control person claim, the pleading of such a claim need only meet the requirements of Rule 8(a)." *In re Am. Apparel, Inc. S'holder Litig.*, 2013 WL 10914316, at *33 n.249 (C.D. Cal. Aug. 8, 2013) (citation omitted).

Plaintiff alleges that the three VC Defendants are controlling persons because they: infused capital into Slack before its direct listing; owned respectively 23.8%, 13.2%, and 10.1% of Slack's supervoting shares at the time of the direct listing; each had a director on the Board, who reviewed and signed the Offering Materials; "caused [Slack] to indemnify them from any liabilities arising from the Securities Act" and "to obtain and maintain a directors and officers insurance policy for them"; "caused Slack to effectuate the Offering" because they "wished to cash in their early investment and stake in [Slack] as soon as possible"; and sold their shares in the direct listing, respectively earning $329 million, $116 million, and $39.6 million. ACAC ¶¶ 22, 25, 26, 30-34, 45, 48, 73.

As an initial matter, the Court is not persuaded that being a beneficiary of the indemnity and insurance policies is relevant to allegations of control in relation to the violation at issue here, namely misrepresentations or omissions in the Offering Materials. *See Paracor*, 96 F.3d at 1158, 1161 (finding "evidence that [defendant lender] had a strong hand in Casablanca's debenture offering," on which bridge loan had been conditioned, unrelated to "indicia of control of Casablanca in a broader sense"). Thus, the Court turns to the other control allegations.

Defendants identify a line of cases within this district demonstrating that ownership of a minority of shares, a position on the Board, or a combination of both are insufficient to establish control. *See In re Gupta Corp. Sec. Litig.*, 900 F. Supp. 1217, 1243 (N.D. Cal. 1994) (no presumption of control from status as outside director, nor for minority shareholder with agent on Board); *In re Splash Tech. Holdings, Inc. Sec. Litig.*, No. C 99-00109 SBA, 2000 WL 1727405, at

*16 (N.D. Cal. Sept. 29. 2000) (no control for one defendant serving on Board, nor for another defendant owning a 20% amount of shares that declined through class period); *O'Sullivan v. Trident Microsys., Inc.*, No. C 93-20621 RMW (EAI), 1994 WL 124453, at *19 (N.D. Cal. Jan. 31, 1994) (no facts demonstrating exertion of control through 9.5% stock ownership or through agent placed on Board).[19]

Plaintiff responds with two lower court cases within this Circuit finding sufficient control allegations comparable to the facts here. *See Thomas v. Magnachip Semiconductor Corp.*, 167 F. Supp. 3d 1029, 1048-49 (N.D. Cal. 2016) (defendant lost majority shareholder status shortly after beginning of class period; placed designees on the Board, who signed the relevant documents; and "used its control of [company] to cash out its investments . . . at enormous profits"); *In re Am. Apparel, Inc. S'holder Litig.*, Case No. CV 10-06352 MMM (RCx), 2013 WL 10914316, at *34 (C.D. Cal. Aug. 8, 2013) (defendant held 20% ownership stake and designated two Board members who signed relevant report).

The Court concludes that plaintiff's pleading is sufficient under the lenient standard of 8(a). *See In re Glob. Crossing, Ltd. Sec. Litig.*, 2005 WL 2990646, at *8 (S.D.N.Y. Nov. 7, 2005) (under 8(a) standard, "even if the specific facts alleged by plaintiffs, taken alone, would not be enough to establish actual control . . . dismissal is improper as long as it is at least plausible

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[19] In *Golub v. Gigamon Inc.*, defendants had only a 15.3% ownership stake, and the alleged contractual agreements granted defendants no control over the company. 372 F. Supp. 3d 1033, 1053 (N.D. Cal. 2019). However, the court dismissed the Section 15 claim because there was no primary violation, and the control analysis is dicta.

that plaintiff could develop some set of facts that would pass muster") (discussed by *Am. Apparel*, 2013 WL 10914316, at *37 n.262). Here, in addition to the plaintiff's allegations of the traditional indicia of control, plaintiff also alleges that a direct listing primarily enables the resale of existing shares by insiders and early investors such as the VC Defendants. Plaintiff has alleged that the VC Defendants "caused Slack to effectuate" this unusual listing in order to cash out their shares. The Court concludes that it is plausible that a factual record of control can be developed through discovery here.

Accordingly, the Court DENIES defendants' motion to dismiss for lack of Section 15 standing.

CONCLUSION

For the foregoing reasons and for good cause shown, defendants' motion is GRANTED IN PART and DENIED IN PART. If plaintiff wishes to amend the complaint, he must do so by **May 6, 2020**.

IT IS SO ORDERED.

Dated: April 21, 2020 /s/ Susan Illston

SUSAN ILLSTON
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FIYYAZ PIRANI, Plaintiff, v. SLACK TECHNOLOGIES, INC., *et al.*, Defendants.	Case No. 19-cv-05857-SI **ORDER GRANTING DEFENDANTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL; AND CERTIFICATION** Re: Dkt. No. 76 June 5, 2020

Defendants' motion to certify this Court's April 21, 2020 order for interlocutory appeal is scheduled for a hearing on June 12, 2020. Pursuant to Civil Local Rule 7-1(b) and General Order 72-3, the Court VACATES the hearing on this matter. For the reasons set forth below, the Court GRANTS defendant's motion and CERTIFIES the standing analysis of the April 21, 2020 order for interlocutory appeal. The Court schedules an initial case management conference for **August 14, 2020** at **2:30 p.m**. If the Ninth Circuit accepts interlocutory appeal, the parties shall immediately notify the Court

and the Court will vacate the case management conference and stay this action.

DISCUSSION

Defendants seek certification for interlocutory appeal of this Court's ruling in the April 21, 2020 order that plaintiff has adequately pleaded standing under Sections 11 and 12(a)(2) of the Securities Act of 1933 even though plaintiff did not and cannot allege that he purchased shares registered under and traceable to Slack's Registration Statement. As set forth in the April 21, 2020 order, the Court held that an investor who purchases a security in the unique context of a direct listing, where registered and unregistered shares become publicly tradeable at the same time, may bring a claim under Section 11. The Court based its ruling on a "broader reading" of the words "such security" in Section 11 that permits standing where a shareholder "'acquir[ed] a security of the same nature as that issued pursuant to the registration statement.'" Order at 8-9 (quoting *Barnes v. Osofsky*, 373 F.3d 269, 271 (2d Cir. 1967)). The Court's order noted, *inter alia*, that applying the "narrow reading" of "such security" requiring tracing for Section 11 standing would result in the elimination of civil liability under the Securities Act for direct listings like Slack's, which would be "at variance with the policy of this remedial legislation." *Id*. at 12-13. The Court applied the same rationale to hold that plaintiff has standing under Section 12(a)(2). *Id*. at 17.

28 U.S.C. § 1292(b) permits a district court to certify an order for interlocutory appellate review where the order involves (1) "a controlling question of law;" (2) "as to which there is substantial ground for difference of opinion;" and (3) where "an immediate

appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Certification under § 1292(b) requires the district court to expressly find in writing that all three § 1292(b) requirements are met. *See In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981). Section 1292(b) is "to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id.* at 1026.

Defendants contend that all of the requirements for interlocutory appeal are met here. The Court agrees and finds that this is an exceptional situation warranting interlocutory appeal. Whether plaintiff has standing under the Securities Act is a controlling issue of law. *See Asis Internet Servs. v. Active Response Group*, No. C 07-6211 TEH, 2008 WL 4279695, at *3 (N.D. Cal. Sept. 16, 2008) ("Whether Plaintiffs have standing to bring the case is a controlling question of law."). Plaintiff asserts that the Court's standing ruling involved a mixed question of fact and law inappropriate for certification. However, plaintiff does not explain this assertion, and to the contrary, the standing issue here is purely legal as the operative facts regarding plaintiff's purchases in the direct listing and inability to trace are undisputed. The Ninth Circuit will be able to decide this question "quickly and cleanly without having to study the record . . . ." *Ahrenholz v. Bd. of Trustees of Univ. of Illinois*, 219 F.3d 674, 677 (7th Cir. 2000).

The second requirement is met because the question of whether shareholders can establish standing under Sections 11 and 12(a)(2) in connection with a direct listing is one of first impression on which fair-minded jurists might disagree. The Court

disagrees with plaintiff's characterization of the issue as "not difficult." No other court has addressed how Section 11 applies in the context of a direct listing, and the Court recognizes that its application of the "broader reading" of "such security" breaks new ground.

Finally, interlocutory review of the April 21 order is in the interest of judicial economy and will materially advance this litigation. If the Ninth Circuit agrees with defendants that plaintiff lacks standing, this case will be dismissed and the parties will avoid expending significant time and expenses on litigation.

CONCLUSION

Accordingly, the Court GRANTS defendant's motion to certify the April 21, 2020 order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and CERTIFIES for interlocutory appeal the portions of the Court's April 21, 2020 order finding that plaintiffs have standing to sue under Sections 11 and 12(a)(2) of the Securities Act of 1933. The Court schedules an initial case management conference for **August 14, 2020** at **2:30 p.m.** If the Ninth Circuit accepts interlocutory appeal, the parties shall immediately notify the Court and the Court will vacate the case management conference and stay this action.

IT IS SO ORDERED.

Dated: June 5, 2020

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIYYAZ PIRANI, Plaintiff-Appellee, v. SLACK TECHNOLOGIES, INC.; et al., Defendants-Appellants.	No. 20-16419 D.C. No. 3:19-cv-05857-SI Northern District of California, San Francisco ORDER May 2, 2022

Before: S.R. THOMAS and MILLER, Circuit Judges, and RESTANI,* Judge.

The panel has voted to deny appellants' petitions for rehearing. Judge S.R. Thomas has voted to deny the petition for rehearing and rehearing en banc. Judge Restani has voted to deny the petition for rehearing and recommends denial of the petition for rehearing en banc. Judge Miller has voted to grant the petition for rehearing and rehearing en banc.

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* The Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his

consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was

described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that

the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official

person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and

the value thereof as of the time such suit was brought: *Provided,* That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

15 U.S.C. § 77*l*. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who—

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

15 U.S.C. § 77*o*. Liability of controlling persons

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77*l* of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.