No. 22-200

IN THE

Supreme Court of the United States

SLACK TECHNOLOGIES, LLC, FKA SLACK TECHNOLOGIES, INC., *et al.*,

Petitioners,

v.

FIYYAZ PIRANI,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF EVIDENCE AND CIVIL PROCEDURE SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are scholars in the field of evidence and civil procedure. They each teach, research, and write about the law of evidence and civil procedure at law schools across the country. Amici believe that the Petitioners' position --- that the Plaintiff must present proof of tracing after securities have been commingled --- when it was the Petitioners that were responsible for that commingling, is contrary to notions of procedural fairness. Amici also believe that case law supports the finding of a presumption of standing for pleading purposes, as well as a shift of the burden of proof at the proof stage that would require the defendant to show that the plaintiff purchased no registered shares when the defendant is responsible for commingling shares.

Amici are:

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[1] Pursuant to U.S. Sup. Ct. Rule 37.6, counsel for amici affirms that no party other than amici and its counsel authored this brief, in whole or in any part, and that no person or entity other than amici or its counsel has made a monetary contribution to the preparation and submission of this brief.

Jessica Berch, Senior Lecturer, Sandra Day O'Connor College of Law, Arizona State University

SUMMARY OF THE ARGUMENT

Amici take no position on the merits of the question presented:

> Whether Sections 11 and 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading.

For purposes of this amicus brief, amici assume that the correct answer to the question presented is "yes." But amici file this brief in support of Respondent because it is important that this case be remanded rather than dismissed, and it is important to determine the proper burdens of production and proof for tracing registered securities under Section 11.

Amici present two propositions to the Court, both of which are essential in their view for purchasers of securities to have a fair opportunity to seek a remedy for false statements contained in a prospectus that is filed when shares are registered with the Securities and Exchange Commission. The first proposition is that when a corporation deliberately decides -- notwithstanding NYSE Listed Company Manual—Section 102.01B Footnote E, NEW YORK STOCK EXCHANGE (Aug. 26, 2020), https://nyseguide.srorules.com/listed-company-manual[2] -- to register only some of its outstanding

[2] Amici take no position on the question whether the New York Stock Exchange manual actually requires all shares to be registered at the same time. Instead, amici focus solely on the

shares, with the result being that the commingling of registered and unregistered shares will make it difficult for plaintiffs to bring claims under Sections 11, 12, and 15 of the Securities Act of 1933, (a) a plaintiff who has purchased shares of that company at the offering price on the very first day that registered shares are lawfully sold should be presumed to have purchased at least one registered share, and (b) a defendant who files a motion to dismiss on the ground that the plaintiff lacks standing should be required to demonstrate that it is not possible for the plaintiff to have purchased a registered share. The second proposition is that when a corporation is fully aware that it has outstanding unregistered shares and makes no effort to register all shares simultaneously, a plaintiff should have to make only a prima facie showing at the proof stage as to which shares are traceable to a registration statement, and the burden should be placed on the company to prove that the plaintiffs' tracing is incorrect.

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fact that Slack could have registered all of its shares at once whether or not it was bound to do so.

ARGUMENT

I. When A Corporation Is Aware of the Number of Outstanding Shares It Has Issued But Not Registered and Deliberately Decides Not To Register All Outstanding Shares At The Same Time, An Individual Who Purchases A Registered Security At The Offering Price on the First Day It Is Sold Should Be Presumed To Have Standing

A. Background

The background of the registered shares at issue in the litigation is straightforward. On February 1, 2019, Defendants filed a confidential Form DRS registration statement with the SEC. After the SEC's feedback, Defendants filed a Form S-1 registration statement with the SEC and subsequently filed amendments to that Form. The SEC declared the registration statement effective on June 7, 2019, and on June 20, 2019, Defendants filed a prospectus on Form 424B4 and began to sell shares of Slack Class A common stock to the public. Joint Appendix at 3, 30-31, ¶¶ 3, 71,74.

Slack was aware that there were 283 million unregistered shares in the marketplace belonging to individual Defendants, venture capitalists, and employees that could be sold when the registered securities were sold in what was deemed a direct sale – *i.e.*, a sale that did not use IPO underwriters and instead had shares sold directly to the public. Joint

Appendix at ¶¶ 31, 71, 73. The registration statement that Slack filed registered only 118 million of those shares.

B. The Plaintiff

Lead plaintiff Fiyyaz Pirani ("Plaintiff"), along with other purchasers interested in purchasing Slack's securities knew on June 7th, when the SEC declared the registration statement effective, that he could purchase registered shares for the first time on June 20, 2019. Plaintiff did in fact purchase 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 (*i.e.*, as soon as they became available), 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). *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 372 (N.D. Cal. 2020).[3]

C. Slack's Decision to Register Only Some Shares

It is clear that Slack could have registered all 283 million shares at the same time, which would have made it easy for any purchaser to have standing to bring a claim under the '33 Act if offering documents contained false, misleading or fraudulent statements. By registering only 118 million shares and leaving the majority of shares unregistered, Slack

[3] These facts were not presented in the Complaint, which is found in the Joint Appendix at 1-81. As indicated above, they were contained in a subsequent declaration of counsel in support of a motion to appoint lead counsel and appear to have been adopted by the district court.

acted in a way that made it difficult for any purchasers to prove that the shares they purchased could be traced to the registration statement. Slack's decision to register a minority of the shares meant that they would be commingled with unregistered shares in the marketplace, with the result being that purchasers would be placed in a difficult position before discovery to establish standing to bring a claim based on the offering materials. This kind of commingling, in order to evade the requirements of Section 11, has been advocated by Boris Feldman, who joined an amicus brief for the Petitioners in this case. *See* Boris Feldman, *A Modest Strategy for Combatting Frivolous IPO Lawsuits*, Harv. Law Sch. F. on Corp. Governance and Fin. Reg. (March 13, 2015). Whether or not Slack explicitly adopted Feldman's suggestion, the fact is that by registering only a minority of its shares, Slack placed Plaintiff in precisely the position Feldman advocated.

D. THE UTILITY OF PRESUMPTIONS AND THE NEED FOR A PRESUMPTION IN THIS CASE

This Court has created presumptions when it has concluded that they further the intent of Congress and promote fairness in litigation. *See, e.g.*, *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 359 n.45 (1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof)."

In *Basic Inc. v. Levinson*, 485 U.S. 224, 245-46 (1988), this Court adopted the linchpin presumption of reliance on the market for class action securities fraud cases:

Presumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult. *See, e.g.*, D. Louisell & C. Mueller, Federal Evidence 541-542 (1977). The courts below accepted a presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of petitioners' material misrepresentations that price had been fraudulently depressed. Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed, *see Affiliated Ute Citizens v. United States*, 406 U. S., at 153-154, or if the misrepresentation had not been made, *see Sharp v. Coopers & Lybrand*, 649 F. 2d 175, 188 (CA3 1981), cert. denied, 455 U. S. 938 (1982), would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market.

* * *

Arising out of considerations of fairness, public policy, and

> probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties. *See* E. Cleary, McCormick on Evidence 968-969 (3rd ed. 1984); *see* also Fed. Rule Evid. 301 and notes. The presumption of reliance employed in this case is consistent with, and, by facilitating Rule 10b-5 litigation, supports, the congressional policy embodied in the 1934 Act. In drafting that Act, Congress expressly relied on the premise that securities markets are affected by information, and enacted legislation to facilitate an investor's reliance on the integrity of those markets:

A presumption that the Plaintiff purchased registered shares in a commingled market is similarly justifiable. Here, direct proof is difficult and the difficulty was caused by Slack. Because Slack knew that there would be more unregistered shares on June 20, 2019 than registered shares, Slack should have known that it was highly likely, maybe even certain, that any shareholder who sought to bring an action alleging a violation of Section 11, Section 12(a)(2), and Section 15 of the 1933 Securities Act based on Slack's registration with the SEC would have an extremely difficult time actually showing that the shareholder held at least one registered share.

There can be no dispute that Slack could have registered all the shares at the same time. There can also be no dispute that Slack's decision not to do so

made tracing shares to the registration statement and the prospectus more difficult than it would have been if all shares had been registered simultaneously.

E. FURTHERING THE INTENT OF CONGRESS

The intent of Congress in the 1933 Act is to hold companies registering shares with the SEC strictly liable for misstatements in offering documents. It severely undermines that intent to permit companies like Slack to commingle registered and unregistered shares in order to make tracing registered shares difficult and thus to increase the likelihood that no shareholder would qualify as having standing to bring claims under the '33 Act. This case illustrates the harm that flows from commingling registered and unregistered shares. There is no doubt that 118 million shares were registered with the SEC. There is reason to believe that the statements made in the offering documents were relevant to decisions to purchase those shares. Yet, Slack's position is that the Plaintiff must bear the burden at the pleading stage of showing that he owns registered shares and that Plaintiff cannot do so with sufficient precision because of Slack's commingling.

Amici believe that the Court should adopt a presumption that when a plaintiff shows that a company could have issued registered shares in a manner that would make it easy to identify them as registered shares in the marketplace and chooses not to do so, the effect of the company's decision is to undermine the 1933 Securities Act. Under these circumstances, the shareholder should not be subject to an insurmountable burden, having borne no responsibility for the commingling.

Since Plaintiff purchased Slack shares immediately when they became available on June 20, 2019, it is highly likely that Plaintiff purchased registered shares on that day. Indeed, there is nothing in the record to prove that any unregistered shares were sold on June 20, 2019. Moreover, the Brief for Respondent makes a powerful argument that it is overwhelmingly probable that the Plaintiff purchased one or more registered shares. A presumption can be established based on "probability." *Basic* at 245. Here, the probabilities strongly support a presumption that the plaintiff purchased registered shares on the first day.

In sum, a proper consideration of probabilities and difficulties of proof, supports this Court's creation of a presumption that the Plaintiff, who purchased Slack shares at the offering price on the first day that registered shares were available for purchase, purchased registered shares and therefore has standing to bring claims that rely on the offering materials pursuant to Sections 11, 12, and 15 of the Securities Act of 1933.

Amici contend that nothing more should be required at the pleading stage given Slack's decision not to register all shares simultaneously and the resulting reality that Slack's decision caused the commingling of registered and unregistered shares.

II. WHEN A COMPANY IS FULLY AWARE THAT UNREGISTERED SHARES OF ITS STOCK ARE HELD BY EMPLOYEES, OFFICERS, EARLY INVESTORS OR OTHERS AND THE COMPANY CHOOSES TO REGISTER ONLY SOME OF ITS OUTSTANDING SHARES IN A MANNER THAT WILL MAKE IT UNNECESSARILY DIFFICULT TO DISTINGUISH REGISTERED SHARES FROM UNREGISTERED SHARES, THE BURDEN OF DRAWING THE DISTINCTION SHOULD SHIFT TO THE COMPANY

There are a number of situations in which this Court and lower courts have relieved plaintiffs from unnecessary burdens because a defendant was responsible for commingling that resulted in difficulties of proof.

In *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 406 (1940), a copyright infringement case, this Court addressed the situation in which a defendant claims expenses should be set off against gains from the infringement. The Court explained that when defendants operate in an industry that allows infringing products to be created without incurring additional costs specific to those products, it makes sense to require defendants to prove their deductible expenses with particularity, and stated that "[w]here there is a commingling of gains, [a defendant] must abide the consequences, unless he can make a separation of the profits so as to assure to the injured party all that justly belongs to him."

Slack involves a different kind of commingling. But the point remains that where the defendant is

responsible for commingling, a plaintiff should not be unfairly burdened.

In *Tom Lange Co. v. Kornblum & Co.*, 81 F.3d 280 (2d Cir. 1996), Kornblum was a dealer and/or a commission merchant of perishable agricultural commodities licensed under § 1(b) of PACA, 7 U.S.C. § 499a(b), and subject to the provisions of the Act. Kornblum made a series of investments which provided it with leases for stores and office units. Ultimately, Kornblum sold its interests in one store and one office unit and retained possession of the membership certificates and proprietary leases relating to three store and five office units until it filed for bankruptcy with the units constituting as its primary asset. Two other dealer/merchants, who had supplied produce to Kornblum and were owed money, sued Kornblum in the bankruptcy action, contending that Kornblum's interest in the units constituted property of the statutory trust created for their benefit by PACA, and sought to be paid out of the proceeds from the sale of the units. The bankruptcy court ruled that Kornblum had not diverted any PACA trust assets when it made its maintenance payments on the units in the ordinary course of its business, and the district court affirmed. The court of appeals disagreed and noted that the question before it was whether the units are PACA trust property from which the creditors are entitled to seek satisfaction of their claims and agreed with the creditors that, under applicable law, all of the Produce Debtor's (Kornblum's) product (and derivatives or proceeds) are held in a single trust of which all of the Produce Debtor's PACA creditors are beneficiaries. The court held that the burden of proof on remand was shifted to Kornblum to prove that the disputed units were not a trust asset and cited *inter alia*, *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324, 359 n.45

(1977) ("Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof)."

The *Kornblum* court recognized that the regulation promulgated by the Secretary of Agriculture to implement the statutory trust anticipated that "commingling of trust assets is contemplated" and imposed the burden on Kornblum to establish that the units which the creditors hoped to receive as compensation in a sale were not a trust asset. The court recognized that a party that knows that assets will be commingled should bear the responsibility to sort out the commingling once a dispute arises, by way of a shift in the burden of proof.

In *Freightliner Market Dev. Corp. v. Silver Wheel Freightlines, Inc.*, 823 F.2d 362 (9th Cir. 1987), a debtor sought review of a judgment which determined priority rights in the property of its bankruptcy estate. The bankruptcy court held that the debtor violated 11 U.S.C. § 363(c)(2) because it used cash collateral derived from collection of accounts receivable purportedly covered by Freightliner's security interest, without a court order or Freightliner's consent. The bankruptcy court concluded that the burden of proof on the issue of tracing the accounts receivable was most fairly placed on the Trustee, because his predecessor's (debtor's) breach of duty resulted in the inability to trace the proceeds derived therefrom. The court of appeals agreed with the bankruptcy court that "notions of equity and fairness support the bankruptcy court's shift of the burden of proof on the issue of tracing to the Trustee." *Id.* at 369.

It was Slack's decision to commingle registered and unregistered shares when it filed its registration statement that results in Slack's argument that

Plaintiff cannot be certain as to which owners have registered and unregistered shares. As in *Freightliner*, equity and fairness support presuming that Plaintiff, who purchased Slack shares on the very first day registered shares could be sold, has standing because it can fairly be presumed that his purchase included registered shares.

Another line of cases addresses a different sort of commingling, but offers support for shifting the burden of proof to Slack. In *County of Suffolk v. Amerada Hess Corp.,* 447 F. Supp. 2d 289 (S.D.N.Y. 2006), the court explained that (a) when two or more tortfeasors act concurrently or in concert to produce a single injury, they may be held jointly and severally liable and (b) where one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor. *Id.* at 297. *Accord*, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 643 F. Supp. 2d 461 (S.D.N.Y. 2009); *Chem-Nuclear Systems, Inc. v. Arivec Chemicals, Inc.,* 978 F. Supp. 1105 (N.D. Ga. 1997); *United States v. Bliss*, 667 F. Supp. 1298 (E.D. Mo. 1987).

Although the instant case does not involve the same kind of apportionment, it does involve another kind of apportionment: namely, proving a remedy to owners of registered shares and denying a remedy to owners of unregistered shares. Slack could have made it relatively simple to identify registered shares and chose not to do it, so shifting the burden to the liable defendants of tracing would be fair and just.

Finally, the regime of burden-shifting proposed by amici is supported by this Court's decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System,* 141 S. Ct. 1951 (2021). As in *Goldman,* Congress's interest in promoting accuracy

in registration statements supports a presumption that a purchaser in a mixed-release offering purchased at least some registered shares. And if this presumption can be "burst" when the defendant has made tracing impossible, then the presumption is not worth having. In *Goldman*, the Court declared that if the defendant could defeat the *Basic* presumption by introducing any competent evidence of a lack of price impact "then the plaintiff would end up with the burden of directly proving price impact in almost every case." *Id.* at 1963. In this case, if the defendant could make tracing virtually impossible to prove, then the plaintiff would end up with the *impossible* burden of proving that registered shares were purchased. Therefore, as in *Goldman,* the burden should shift to the defendant when the defendant made tracing unreasonably difficult for the purchaser to prove.

CONCLUSION

If this Court reverses the Ninth Circuit's decision, it should remand the case and allow the Plaintiff the benefit of a presumption that he purchased registered shares and therefore has standing to sue. The ultimate burden on the question of tracing should be shifted to Slack, because 1) Slack created whatever difficulties exist in tracing shares, and 2) shifting the burden of proof is required to preserve Congress's intent to grant meaningful relief in Section 11.

Accordingly, amici submit that the disposition sought by Defendants ("[t]he judgment of the court of appeals should be reversed and the case remanded with instructions to dismiss the complaint with prejudice") is unsupportable. Assuming, as we do, that the Court believes that Plaintiff must be an owner of a registered share of Slack stock to have

standing under the 1933 Act, we submit that Plaintiff's allegations at the pleading stage are sufficient to demonstrate standing so that dismissal would be unwarranted regardless of the decision on the question presented.

Respectfully submitted,

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