No. 22-200

IN THE

Supreme Court of the United States

SLACK TECHNOLOGIES, LLC
(F/K/A 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 FOR NOKOTA CAPITAL MANAGEMENT, LP AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Nokota Capital Management, LP ("Nokota") is an investment adviser registered under the Investment Advisers Act of 1940 that has managed assets on behalf of endowments, foundations, pension funds, and other institutional and private investors.

This case is important to Nokota because Nokota purchases securities on behalf of clients in public offerings – including traditional initial public offerings and direct listings – and in doing so relies on the broad investor protections and prophylactic remedies set forth in the Securities Act of 1933 (the "Securities Act" or the "Act"). Nokota is concerned that if the Ninth Circuit's decision – which recognizes liability under Section 11 of the Securities Act in connection with direct listings of stock – is overturned, there could be a material negative impact on investors and the capital markets. This includes by eroding critical investor protections that have underpinned public offerings of stock since 1933, undermining investor confidence in new stock issuances, and subjecting Nokota's clients – and all public investors – to unnecessary investment risks.

ISSUES ADDRESSED BY AMICUS

Respondent ably demonstrates in its brief why a straightforward reading of the Act's text, animated by its legislative history and broad, remedial purpose,

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[1] Pursuant to Rule 37.6, Nokota states that no counsel for a party authored this brief in whole or in part, and no entity or person other than Nokota and its counsel funded the preparation and submission of this brief.

warrants affirmance. Nokota writes separately to expand on an additional point: to show that a direct listing such as the one undertaken by Petitioner Slack Technologies, LLC ("Slack") is – under the plain terms of the New York Stock Exchange ("NYSE" or "Exchange") rules, as approved by the Securities and Exchange Commission ("SEC" or the "Commission") – a registered public offering of stock that registered each and every share offered via the listing. Because such an offering undoubtedly gives rise to the Act's strict liability for material misstatements in, and omissions from, registered offering materials, the Ninth Circuit correctly found Respondent had standing to sue.

Nokota writes to detail the process by which the SEC approved the NYSE rule at issue, including the 2008 introduction of the requirement that a selling shareholder registration statement register the resales at issue; bring to the Court's attention what the SEC has said, and not said, on the matter; and provide context to *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967) and other caselaw on so-called "tracing" to demonstrate that *Barnes* should not disturb the conclusion that the tradeoff the SEC imposed in allowing direct listings was Section 11 liability for all shares offered.

SUMMARY OF ARGUMENT

On June 20, 2019, Slack conducted a public offering on the Exchange. The offering was conducted pursuant to a Form S-1 registration statement and prospectus that the SEC declared effective on June 7, 2019. It was Slack's first, and only, public offering,

and it resulted in Slack becoming listed, for the first time, on a national securities exchange.

The shares offered were not issued at the time of the offering by Slack, but were instead held by certain Slack shareholders who had previously received or purchased unregistered Slack stock. Those shareholders could not sell their Slack stock on the NYSE, or any other national exchange, unless and until Slack was listed. Slack gained access to the NYSE not through a traditional underwritten initial public offering ("IPO"), but instead through a recently enacted and SEC-approved rule change to the NYSE's Listed Company Manual (the "Manual"),[2] which allowed private companies to access the Exchange "directly," without going through the traditional underwriting process.

Upon the effectiveness of Slack's registration statement, 283 million shares of Slack stock were available for sale. None – not a one – of these 283 million shares, however, could have been listed on the NYSE in the absence of a Securities Act registration statement declared effective by the SEC. The NYSE's direct listing rule provides in relevant part, in a form proposed to and approved by the SEC, that

> some companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in one or more private placements, may wish to list their

[2] *Available at* https://nyseguide.srorules.com/listed-company-manual.

> 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, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements . . . . Consequently, the Exchange will, on a case by case basis, exercise discretion to list companies that are listing in connection with a [selling shareholder direct listing].

Manual, Section 102.01B & Footnote (E) (the "Direct Listing Rule"). The Commission approved the Direct Listing Rule in order to "provide a means for a category of companies" "to list on the Exchange" whose "securities . . . 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 . . . ." *See* 83 Fed. Reg. 5650-01, 5654 (Feb. 8, 2018).

In amicus's view, this Direct Listing Rule, fairly read, requires that all shares offered in a direct listing be registered under the Securities Act, even if those shares would otherwise be exempt from registration under a statutory or regulatory provision, like Rule 144. This conclusion flows naturally from the Rule's text, which speaks to a "company listing upon effectiveness of a registration statement *registering*

only the resale of shares sold by the company in earlier private placements . . . ." In a direct listing such as Slack's, the only shares being offered are those shares being resold by shareholders; Slack itself issued no additional shares for the listing. Thus, when the Commission approved the Rule, it did so knowing that any share accessing the Exchange in the course of the direct listing – whether such share needed to be registered to be sold or not – was being listed "only upon effectiveness of a selling shareholder registration statement." The implications for this case of such an interpretation are clear: Respondent Fiyyaz Pirani plainly had standing to sue because any share he acquired in Slack's direct listing would have been registered. And Slack's fundamental factual premise – that "unregistered exempt shares" were available for resale in the direct listing alongside "newly registered shares," Petitioner's Brief at 9, is simply incorrect.

This reading also flows from the rulemaking and amendment process that led to the Direct Listing Rule.

First, when the Commission approved the Direct Listing Rule, it was plainly aware that a registration statement under Section 5 of the Act would often be unnecessary for a direct listing – the issuer was not making a sale[3] and selling

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[3] John C. Coffee, Jr., *The Spotify Listing: Can an "Underwriter-less" IPO Attract Other Unicorns?*, THE CLS BLUE SKY BLOG (Jan. 16, 2018), https://perma.cc/5HQW-CFHF ("[T]here is no inherent statutory obligation to register these shares under the Securities Act of 1933, because the issuer is not making any sale.").

shareholders' sales could qualify for exemptions under Section 4, which exempts "transactions by any person other than an issuer, underwriter, or dealer" from registration, 15 U.S.C. § 77d(a)(1), and Rule 144. This was not hypothetical or obscure. Because a selling shareholder is not an issuer or a dealer, it could only fall outside the exemption if considered an underwriter under Rule 144. Many such shareholders will not qualify as an underwriter, because they are not affiliates of the issuer and have held shares for more than one year. 17 C.F.R. § 230.144. Though Section 4 would excuse registration in any direct listing for such a selling shareholder, the SEC expressly required one.

Second, the SEC could have, if it desired, approved a Direct Listing Rule that circumvented the Securities Act altogether. The Commission, however, declined to do so, for the "protection of investors." The NYSE's first proposed "selling shareholder" direct listing rule would have allowed a private company to access the Exchange merely upon having declared effective a registration statement under the Securities Exchange Act of 1934 (the "Exchange Act") – which requires disclosure of the same information as a Securities Act registration statement but does not carry with it the stringent liability imposed by the Securities Act. The Commission, in a decision applauded by institutional investors, declined to do so, and the NYSE amended its proposal, making direct listings contingent on the effectiveness of a Securities Act registration statement.

This treatment is consistent with the SEC's historical interpretation of the registration requirement as applying to transactions and not securities. *See, e.g.*, *SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998). While a pre-existing shareholder would not face Section 5 liability for selling shares in an exempt transaction in the absence of a direct listing, Slack decided to seek such a listing on the NYSE, which decision carried with it the requirement to register the resale of private shares through a selling shareholder registration statement. And that transaction – a listing of the resold shares – required registration of the shares to be offered. A requirement to register all shares in an offering is also consistent with the Securities Act's primary inspiration, the English Companies Act of 1929.

Third, this interpretation is not at odds with Judge Friendly's decision in *Barnes*, nor can *Barnes* bear the weight placed upon it by Slack and its amici. *See, e.g.*, Cato Br. at 2-3. The history of the decision and context in which it was rendered show that Slack's over-reliance on *Barnes* is misplaced – the case addressed tracing of "certificated" shares that no longer exist and has been cited more often than not to find that Securities Act plaintiffs had standing to sue. This Court should not be bound by the logic of *Barnes*, just as it is not bound by *Barnes* or its holding.

ARGUMENT

I. A DIRECT LISTING IS A REGISTERED OFFERING OF SECURITIES THAT GIVES RISE TO LIABILITY UNDER SECTION 11

The Direct Listing Rule, as promulgated by the NYSE and approved by the SEC, makes it clear that a direct listing requires a registration statement registering all shares in an offering. Whether some portion of the shares are exempt from the registration requirement in some or all contexts is not relevant. This is because the benefit gained from such a listing is access to a national exchange, not the sale of shares, which could be done without registration by any holder of shares who qualifies for an exemption to registration. The SEC, however, conditioned a direct listing on the filing and declaring effective of a Securities Act registration statement. Having done so, any share offered in a direct listing, whether subject to an exemption or not, is registered by the applicable Securities Act registration statement. And once registered, such shares become subject to Section 11's civil liability provisions.

Stated differently, holders of securities are free to sell those shares in exempt transactions, on their own, without registration and Section 11 liability. But when the issuer – like Slack here – elects to seek a listing on a national exchange, and that listing requires the filing and declaring effective of a Securities Act registration statement, such a registration statement registers the entire set of shares and sales – which all become subject to the Act's strictures, including its civil liability provisions.

A. The 2008 Amendment Required Registration of the Entire Offering

The rulemaking and amendment process that led to the Direct Listing Rule demonstrates that the SEC intended for a direct listing subject to the registration requirements of the Securities Act to register all shares offered and sold in that listing.

In 2008, the NYSE first sought SEC approval of rule changes allowing for a direct floor listing. *See* 73 Fed. Reg. 54,442-01 (Sept. 19, 2008).[4] The exchange noted it had "been approached by a number of private companies that would like to list upon the effectiveness of a selling shareholder registration statement." *Id.* at 54,442. These private companies, it explained, "typically have sold a significant amount of common stock to qualified institutional buyers in one or more private placements and, as a condition to those sales, have agreed to file a registration statement to facilitate the resale of the privately[] placed shares." *Id.*

To that end, the NYSE proposed to amend Section 102.01 of its Manual

> to provide that the Exchange will, on a case by case basis, exercise discretion to list a company whose stock is not previously registered under the Exchange Act, where such company is listing, without a related underwritten

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[4] The NYSE, like any national exchange, requires SEC consent to change its rules. *See* 15 U.S.C. § 78b(1); 17 C.F.R. § 240.19b-4(f).

> offering, *upon effectiveness of a registration statement registering only the resale of shares sold by the company in earlier private placements.*

Id. at 54,442-43 (emphasis added). The Commission approved the change as written (the "2008 Amendment"), to "provide a means for a narrow category of companies whose stock is not previously registered under the Act and that are listing upon effectiveness of a selling shareholder registration statement, without a related underwritten offering, to list on the Exchange." *Id.* at 54,443. In doing so, the SEC required a "selling shareholder registration statement" without regard to whether a sale would otherwise be exempt – under Section 4 of the Securities Act, for example – which would frequently occur where the shareholder was not an "issuer, underwriter, or dealer." *See* 15 U.S.C. § 77d(a)(1); *see* 17 C.F.R. § 230.144. The Commission also did not permit the "selling shareholder registration statement" to register some, but not all, of the selling shareholders' shares.

The text of the 2008 Amendment, which continued to be the relevant rule in the Manual, is informative. The 2008 Amendment limited access to a direct listing in two ways. First, the listing must have been the first registered offering of the company's shares, as the Rule applied only to a company whose stock "is not previously registered under the Exchange Act." 73 Fed. Reg. 46,670 (Aug. 11, 2008). Second, it applied only to listings that did not involve an underwriter, and were thus outside the standard IPO procedure.

The 2008 Amendment also imposed two fundamental requirements on companies seeking to list via this route. First, it mandated a registration statement. The 2008 Amendment provided that listing can only occur "upon the effectiveness of" a Securities Act "registration statement[.]" It thus required a registration statement in all instances – even if every single share offered would otherwise be exempt.

Second, the 2008 Amendment provided that the required registration statement must be "*registering* only the resale of shares . . . ." This phrase sets out that the registration statement at issue must be *registering* the shares to be resold (or at least offered for resale). The rule makes no exception for an issuer who seeks to list when *all* of its prior shares are exempt; and the rule makes no mention of registering only those shares that are not otherwise exempt.

Read fairly, the 2008 Amendment thus provided that companies that wish to list "directly" on the NYSE without underwriters – and who will be engaging in their first registered offering – *must* file a registration statement "registering" *all* the shares for resale. There is no reason to interpret this text as not applying to "all" shares, or to otherwise limit the registration requirement. Doing so would suggest that the NYSE and the Commission envisioned a registration statement for "informational purposes only," which is not a document that exists under the federal securities laws. But such a registration statement would necessarily be pointless if all shares offered for resale were already exempt. And this interpretation would read the word "registering" out

of the text, which requires the shares for resale be registered – without reference to exemption – and also requires that this method of registration be the very registration being made effective at the time of the direct listing. The outcome would not be different if only some of the shares being offered were subject to registration – the registration statement would be purely "informational" as to those shares.

Moreover, the text of the rule referenced a registration statement "only" registering resold shares. This means that the issuer could not list and offer its own shares for sale, only those of private holders wishing to access the Exchange. Because the 2008 Amendment was limited to resold shares, including by selling holders who were exempt from registration, it makes no sense to impose a registration requirement without saying more if the SEC intended for that requirement to be limited to registering only shares from those sellers who were *not* exempt.

This notion – that the selling shareholders in a direct listing would not need to register because they were all exempt by statute – is not hypothetical. As Slack's amici explain, *see, e.g.*, Grundfest Brief at 12-13, Section 4 of the Securities Act exempts "transactions by any person other than an issuer, underwriter, or dealer." 15 U.S.C. § 77d(a)(1). Because they are not "issuer[s]" or "dealer[s]," selling shareholders could only fall outside of Section 4's exemption if they were considered underwriters under Rule 144 – otherwise, they could claim exemption. Indeed, in its 2008 application to the SEC for the right to directly list, the NYSE explained that its request

had been prompted by "institutional buyers" that had purchased common stock in "one or more private placements." 73 Fed. Reg. at 54,442. These shareholders were not contacting the Exchange because they needed to register to sell their stock – assuming they were not affiliates of the company, and had held the shares for a year, they would ordinarily be exempt under Rule 144. *See* 17 C.F.R. § 230.144(d)(1)(ii). Rather, they were contacting the NYSE because they wanted access to the Exchange to sell. So even though Section 4 would excuse such shareholders from registering, the SEC *required* registration as a condition to listing on the Exchange.

B. The 2018 Amendment Process Also Indicates that the Commission Intended for Securities Act Liability to Attach to the Entire Direct Listing

Nearly a decade after the 2008 Amendment, the NYSE again sought to amend the Manual. This time, the Exchange tried to address what it perceived to be a competitive disadvantage with the Nasdaq Stock Market ("Nasdaq"). According to the NYSE, "over an extended period of time Nasdaq has listed a number of previously private companies in conjunction with the effectiveness of a selling shareholder registration statement without an underwritten offering." 82 Fed. Reg. 28,200-01, 28,201 (June 20, 2017). Based on this precedent, "and the absence of any Nasdaq rule . . . explicitly limiting the ability of a company to qualify for listing without a public offering," the NYSE believed that Nasdaq would allow a "previously private company" to list "upon effectiveness of an

Exchange Act registration statement without a concurrent public offering." *See id.*[5]

Thus, "to compete on equal terms with Nasdaq," *id.*, the Exchange proposed amending Footnote E to Section 102.01B of the Manual to allow a company to list immediately upon effectiveness of an *Exchange Act* registration statement. If approved, this original amendment would have allowed a previously private company to begin trading on the Exchange without registering an offering of stock under the Securities Act. *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d 367, 379 n.9 (N.D. Cal. 2020).

But the SEC believed that such a Securities Act-dodging offering did not sufficiently protect investors, and thus concluded that a Securities Act registration statement should be filed in connection with any direct listing. *See* Maureen Farrell & Anne Steele, *Spotify Files to Go Public Through Direct Listing, Cutting Out Underwriters*, WALL ST. J., Jan. 3, 2018, at B3 ("The SEC had concerns that Spotify's direct listing could open the door for other companies with potentially risky financial profiles to access the public markets without giving investors sufficient protection[.]"); 83 Fed. Reg. 5650, 5651 n.11 (Feb. 2, 2018).

[5] An Exchange Act registration statement differs from a Securities Act registration statement. It is used when a company lists shares on an exchange under Section 12(b) of the Exchange Act, and does not carry Securities Act liability for misstatements and material omissions.

Following the SEC comment period, the NYSE amended its proposal to include an absolute requirement that a Securities Act registration statement be filed, allowing listing only upon the effectiveness of such a registration statement. *See* 83 Fed. Reg. at 5651. The SEC approved the change. *See id.* Market participants, including the Council of Institutional Investors, applauded this outcome, concluding that requiring a "concurrent Securities Act registration is critical to ensuring that direct listings do not compromise investor protections."[6]

The Direct Listing Rule thus expressly required that direct listings occur with an effective Securities Act registration statement. Further, the 2018 Amendment did not alter the relevant language of the 2008 Amendment. A selling shareholder registration statement was still required, and such a registration statement was "registering" the shares for resale. Today, the NYSE Manual *continues* to reflect the language of the 2008 Amendment:

> some companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in one or more private placements, may wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement filed solely for the

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[6] E-mail from Jeffrey P. Mahoney, Gen. Counsel, Council of Institutional Inv'rs, to Brent J. Fields, Sec'y, SEC (Feb. 22, 2018).

> purpose of allowing existing shareholders to sell their shares, where such company is listing without a related underwritten offering upon effectiveness of a registration statement ***registering*** only the resale of shares sold by the company in earlier private placements (a "Selling Shareholder Direct Floor Listing").

Manual § 102.01B, Footnote E (emphasis added). In approving the Direct Listing Rule the Commission explained that it "believes that the proposed rule change will provide a means" "to list on the [NYSE]" "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, . . ." 83 Fed. Reg. at 5654 (emphasis added). In making this finding, the SEC was plainly referring to and incorporating the 2008 Amendment and its "selling shareholder registration statement" requirement.

By approving the Direct Listing Rule in this manner, the SEC was again articulating the view that a Direct Listing did not only require a registration statement alongside resales of privately sold stock (an "informational" statement) – it required a registration statement *registering* those very resales. This was so despite the fact that the Commission understood that such a registration statement was required even if *each* selling shareholder did not need to register its sales under Section 5 because they fell under the registration exemptions in Section 4 of the Act (as

construed by Rule 144) – and thus no registration statement would otherwise *need* to be filed but for the direct listing rule itself.

In amicus's view, this demonstrates that the SEC understood the Direct Listing Rule to require a "shareholder registration statement" that applied to selling shareholders' shares without regard to whether such shareholders would otherwise be exempt from registration. This understanding is consistent with the SEC's long-held position – adopted by the courts of appeals – that registration "of a security is transaction-specific." *See, e.g.*, *SEC v. Cavanagh*, 155 F.3d 129, 133 (2d Cir. 1998) ("[I]t is really the offering or sale of the particular security that is registered and not the security itself . . . ." (quotation omitted));[7] *see also SEC v. Sargent*, 589 F. Supp. 3d 173, 188 (D. Mass. 2022) (adopting the SEC's position that a "registration statement registers transactions not shares"); Brief for the SEC as Appellee at 9, *SEC v. Kahlon*, 873 F.3d 500 (5th Cir. 2017) (No. 16-41431), 2017 WL 639606 ("The registration requirement applies to the transactions in which securities are sold, not to the securities themselves or to the individuals making the offers or sales."). This is because although an issuer "registers its securities" "in form," "in substance it registers

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[7] Slack cites the Second Circuit's decision in *Cavanagh* as purported authority for the proposition that "[t]he Ninth Circuit's decision also runs roughshod over the important statutory and regulatory distinction between registered and exempt shares." *See* Pet. Br. at 44. But *Cavanagh* directly rejected the idea that differentiating between "registered shares" and "exempt shares" is the proper analysis. *See* 155 F.3d at 132-34.

offerings." Louis Loss & Joel Seligman, *Fundamentals of Securities Regulation*, 353-54 (3d ed. 1995).[8]

Because a direct listing is just such an *offering*, by virtue of requiring a selling shareholder registration statement, the SEC was evincing the intent to register all shares listed. Moreover, for Rule 144 exemptions to apply, "[a]dequate current public information with respect to the issuer of the securities must be available." 15 C.F.R. § 230.144(c). Requiring a registration statement for all shares listed via a direct listing ensured that investors will have sufficient information about a company going public via a direct listing before purchasing the first public shares offered and sold.

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[8] The transaction-oriented view of the Securities Act is rooted in the Act's original structure and historical antecedents. The 73rd Congress modeled the 1933 Act and its liability scheme on the British Companies Act. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 599 (1995) (Ginsburg, J., dissenting); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1296 (2d Cir. 1973) ("Section 11 was closely patterned after Section 37 of the English Companies Act . . . ."). Section 37 of the Companies Act created "civil liability for misstatements in [a] prospectus." 19 & 20 Geo. 5, Ch. 23, § 37 (1929). It entitled "all persons who subscribe for ***any*** shares . . . on the faith of the prospectus" to compensation from certain enumerated defendants – including directors and "every person" who "authori[z]ed the issue of the prospectus" – "for the loss or damage [the purchasers] sustained by reason of any untrue statement included therein[.]" *See id.* (emphasis added). By its terms, the Companies Act premised liability on the purchase of any share so long as that purchase was made on the basis of an issuer's prospectus, without reference to the specific shares registered and offered thereunder.

The 2018 Amendment process thus supports the view that the SEC never intended direct listings to insulate issuers from Securities Act liability – quite the opposite. In requiring a Securities Act registration statement, and its attendant liability regime, the Commission was advancing a consistent view: public offerings are transactions that require a registration statement, and because a Direct Listing is a public offering, it too requires a registration statement.

C. SEC Commentary Following the 2018 Amendment Supports the "Entire-Transaction-Registration" View

Subsequent Commission commentary also indicates that the Commission intended the Direct Listing Rule to involve the registration of the entire offering.

In October 2020, the Commission conducted a de novo review of the Direct Listing Rule, in response to a petition filed by the Council of Institutional Investors ("CII"). 85 Fed. Reg. 85,807 (Dec. 22, 2020) (the "2020 Review"). CII raised "concerns regarding shareholders' ability to pursue claims pursuant to Section 11 of the Securities Act due to traceability issues" created by the potential for direct listings to comingle registered and unregistered shares. *See id.* at 85,815. The Commission rejected these concerns, explaining that they are "not exclusive to nor necessarily inherent in [direct listings]." *See id.* Tellingly, the SEC did not address the issue as one that arose out of the form of offering itself, but one that was a consequence of "[a]ftermarket" purchasing. *See*

id. at 85,816. When viewed from that perspective, the Commission noted that although it is "possible that aftermarket purchases" following a direct listing "may present tracing challenges, this investor protection concern is not unique" to a direct listing, and the SEC did "not expect any such tracing challenges in this context to be of such magnitude as to render the proposal inconsistent with the" federal securities laws. *See id.* The SEC would not and could not have said this if the Commission believed that a registered direct listing of stock allowed for the immediate comingling of registered and unregistered shares, which would create "unique" problems.

The 2020 Review had been sparked by a further rule change sought by the NYSE, to allow "Primary Direct Floor Listings," whereby the issuer itself could sell shares in a direct listing alongside selling shareholders. In this context, the SEC observed that it "does not view a firm commitment underwriting as necessary to provide adequate investor protection in the context of *a registered offering*." 85 Fed. Reg. at 85,815 (emphasis added). In laying out that the NYSE's proposed direct listing rules provided the investor sufficient protection, the Commission emphasized that "[t]he proposed rule change will require all Primary Direct Floor Listings to be registered under the Securities Act, and thus subject to the existing liability and disclosure framework under the Securities Act *for registered offerings*." *Id.* (emphasis added).

Further, even in describing the tracing issues at the heart of this appeal, the SEC plainly articulated the view that the initial direct listing offering was a

registered *offering* that posed no challenge to standing. The Commission wrote that

> [c]ourts have interpreted [Section 11] to permit aftermarket purchasers (*i.e.*, those who acquire their securities in secondary market transactions rather than in the initial distribution from the issuer or underwriter) to recover damages under Section 11, but only if they can trace the acquired shares back to the *offering covered by* the false or misleading registration statement.

Id. at 85,816 (emphasis added). These aftermarket purchasers, however, faced "similar difficulties in tracing their shares back to a misleading registration statement" "following *either* firm commitment underwritten IPOs or direct listings[.]" *Id.* In focusing on "aftermarket" purchasers having tracing issues in either an IPO or direct listing, the Commission treated both as the same, *i.e.*, offerings of registered shares.

Importantly, the Commission went on to explain that courts have denied standing to plaintiffs in the Section 11 context when they purchased shares "in secondary market transactions" where the plaintiff could not trace to the "registered *offering*." *See id.* (emphasis added). The Commission observed that "[t]hese situations arise when shares may have been issued pursuant to more than one registration statement" – inapplicable here – and when shares have "entered the market *prior* to a potential claimant's purchase other than through the registered offering" – also not applicable here, because the direct

listing represented the moment of registration. *Id.* (emphasis added). The SEC then observed that it was "not aware of, nor have commenters pointed to, any precedent to date in the direct listing context which prohibits plaintiffs from pursuing Section 11 claims." *Id.* The Commission had every right not to be concerned; if direct listings were treated the same as registered offerings, as the Commission has been expecting, then there were no investor protection issues about which to be concerned.

The SEC's view was no doubt developed in part by the proponent of the Rule: the NYSE itself. In arguing for the Rule's adoption, and against the investor protection concerns of CII, the NYSE wrote to the Commission that "[t]he Rule Changes specify that to qualify for a Primary Direct Floor Listing, an issuer must have in place an effective registration statement *covering* the shares to be sold, which is a prerequisite for potential Section 11 liability." Brief in Support of Motion to Lift Stay at 12 n.27, *In the Matter of the Petition of: The Council of Institutional Invs.*, File SR-NYSE-2019-67 (Sept. 4, 2020), (emphasis added). Here, NYSE used the term "covering" with reference to shares to be sold but without reference to any exempt shares, and then asserted that "covering" is a "prerequisite" for potential Section 11 liability. The only way to read the phrase "covering" as a "prerequisite" for Section 11 liability is as

"registering" "the shares to be sold," not just a subset of them.[9]

It is unlikely that the SEC was duped by the NYSE into approving a rule change that would effectively insulate all direct listings from Section 11 liability – despite the Commission's insistence on a Securities Act registration statement. Rather, the SEC presumably understood the Direct Listing Rule to provide for the registration of the entire offering – a conclusion this Court should endorse. And if the basis on which the SEC approved the Direct Listing Rule turns out to be false, the Commission should be allowed to address the Rule for itself to ensure it offers sufficient investor protection.

II. *PIRANI* CORRECTLY DECLINED TO FOLLOW *BARNES*

Respondent's brief ably explains why the Second Circuit's decision in *Barnes v. Osofsky* is inapposite and should not control here. *See* Resp. Br. 19, 35-38. The decision concerned tracing of aftermarket purchases following a secondary public

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[9] Quixotically, the NYSE twice relied on the decisions below in assuring the SEC that Section 11 liability as to direct listings would continue to exist. *See* 85 Fed. Reg. 54,454-01, 54,461 (Sept. 1, 2020); *see also* The New York Stock Exchange LLC's Statement in Support of Order Approving Proposed Rule Change, File SR-NYSE-2019-67 (Oct. 16, 2020). Neither the SEC nor the NYSE ever said in the course of this rulemaking and correspondence that the district court's or Ninth Circuit's decision upholding standing in the context of a direct listing was wrong.

offering where the issuer had multiple registration statements on file. *Id.* at 35-36.

Moreover, and as a threshold matter, should this Court adopt the view that the Direct Listing Rule required registration of the entire offering, *Barnes* is not an impediment to an affirmance. Respondent undoubtedly acquired registered shares from a single registered offering. He thus has standing to sue under Section 11.

Amicus writes separately to correct Slack's and its amici's argument that *Barnes* is a seminal, oft-cited case that embodies and establishes five decades worth of unassailable jurisprudence. *See, e.g.*, Cato Br. at 2-3. The holding of and logic applied in *Barnes*, when appropriately placed in the correct historical context, cannot carry the weight Slack and its amici place on them.

A. *Barnes* Cited Scant Caselaw, and What it did Cite Was Inapposite

Despite being decided in 1967, thirty-four years after the Securities Act was passed, the *Barnes* Court had little precedent to rely upon. Until that point, Section 11 had received scant judicial attention. As one commentator observed: "There were relatively few reported section 11 lawsuits in its first three decades. The first major section 11 case decided on the merits was filed in 1962." *Section 11 of the Securities Act: The Cornerstone Needs Some Tuckpointing*, 58 BUS. LAW. 1, 1-2 (2002).

Thus, when asked to decide the reach of Section 11 liability in the context of a settlement objection,

Barnes cited only two cases, *Fischman v. Raytheon Manufacturing Co.*, 9 F.R.D. 707 (S.D.N.Y. 1949), *rev'd*, 188 F.2d 783 (2d Cir. 1951) and *Colonial Realty Corp. v. Brunswick Corp.*, 257 F. Supp. 875, 876 (S.D.N.Y. 1966). *See Barnes*, 373 F.2d at 273. *Fischman* was an odd choice of citation, because the *Barnes* Court was citing a district court order that had been reversed on appeal. *See* 188 F.2d at 783. Even taken at face value, *Fischman* has little relevance here. *Fischman* concerned a registration statement that registered only preferred, not common, stock. The District Court concluded the common stock claimants thus had no Section 11 remedy. *See* 9 F.R.D. at 709. *Fischman* is otherwise entirely consistent with the interpretation of Section 11 that *Barnes rejected* – that "such security" means the "class" of securities registered. No party in *Fischman* seriously contended that the common and preferred stock were the same "class" of security.

Barnes's citation of *Colonial Realty*, 257 F. Supp. at 876, suffers the same flaw. *Colonial Realty* involved a registration statement registering convertible debentures and the common stock "issuable upon conversion thereof." The court observed that 209 shares of common stock were issued for the conversion of the debentures. On the other hand, the plaintiff purchased more than 30,000 shares of common stock. *See id.* at 876-77 n.1 & 2. Consequently, there was no reason to believe that those shares came from the registered offering. *See id.* at 876. This mathematical mismatch, alone, puts *Colonial Realty* outside the instant case. *Colonial Realty* was also decided at summary judgment, with

the plaintiff effectively conceding that it never acquired any of the common stock issued upon conversion of the debentures. *See id.* at 877.

This is the caselaw that *Barnes* had to work with – two decisions, each considering situations with, at minimum, cross-security implications. And having cited scant caselaw, *Barnes* purported to engage in detailed analysis of the legislative history. But that analysis was incomplete. *Barnes* described the House of Representatives' version of the Act as providing Section 11 remedies to purchasers "'regardless of whether they bought their securities at the time of the original offer or at some later date' and that this was within the power of Congress 'to accord a remedy to all purchasers who may reasonably be affected by any statements in the registration statement.'" 373 F.2d at 273. It further noted that that version "entitle[d] the buyer of securities sold *upon* a registration statement including an untrue statement or omission of a material fact to sue for recovery of his purchase price, or for damages." *See id.* (emphasis added). Both these statements, however, adopted in words and substance the 1929 English Companies Act, which gave a cause of action to any purchaser of "any" shares who does so "on the faith of," *i.e.*, "upon," the relevant prospectus and registration statement. *See* 19 & 20 Geo. 5, Ch. 23, § 37. This language indicates that standing is available for all purchasers who rely on the registration statement regardless of when and where their shares were bought – yet *Barnes* ignored this implication, and the English Companies Act itself, altogether.

Thus, *Barnes* was decided on a very limited set of precedent, because almost no Section 11 cases had been decided in the three decades prior, and the ones that were (particularly the ones *Barnes* cited) were inapplicable to the facts of the case. *Barnes* was limited by both its procedural posture (a settlement objection), its limited facts, and the limited facts available via other cases. The case, standing alone, does not provide a reason to ignore the decades of subsequent legal and regulatory developments that can (and should) animate the Court's decision here.

B. *Barnes* Was Decided in an Antiquated Certificated Share Environment that Gave Context to the Term "Tracing"

A careful review of *Barnes* and the underlying district court opinion reveals a further key detail: while finding that the objectors had to "trace," *Barnes* did not find that they could not "trace." This is a unique feature of the case that has nothing to do with its facts or the text or intent of the Securities Act, but rather that *Barnes* was decided in an outdated "certificated" share world in which stock certificates were transferred and tracked (*i.e.*, could be physically "traced"). Because securities are no longer transferred in this manner, the logic and reasoning in *Barnes* is not useful.

For instance, the district court in *Barnes* noted that tracing was possible, it was just that the defendants would have to do so. This is because "the defendants appear to be capable of segregating the shares which were issued pursuant to the public

offering, which is the subject of these lawsuits, from other shares of the common stock of the corporate defendant . . . ." *See Barnes v. Osofsky*, 254 F. Supp. 721, 726 (S.D.N.Y. 1966). The Court of Appeals went further. The Second Circuit described the situation for each of the two objectors: Objector Occhi bought 100 shares on November 22, 1963 at about $15 each, whereas objector Zilker purchased twenty-five shares on September 12, 1963 for $23.375 each, and fifty shares on December 23, 1963, for $13.50 each. *See* 373 F.2d at 271. The *Barnes* Court observed that "it appears likely that Occhi will be able to trace 50 shares which were bought on the open market and Zilker can trace 25 which were bought from an underwriter, but not the balance – all purchased on the market." *Id.*

The district court believed defendants (not plaintiffs) could "trace" shares, and the Second Circuit believed tracing was possible to some but not all shares, because of share certification. *See, e.g.*, *Est. of Murphy v. Comm'r*, 25 T.C.M. (CCH) 1314 (T.C. 1966) (associating specific shares to no less than 13 specific stock certificates). The move from certificated shares to "street name" has been reviewed at length by the Delaware courts in a series of decisions, including *In re Appraisal of Dell Inc.*, 143 A.3d 20, 39-40 (Del. Ch. 2016) and *In re Appraisal of Dell Inc.*, No. CV 9322-VCL, 2015 WL 4313206 (Del. Ch. July 13, 2015), *as revised* (July 30, 2015). Amicus respectfully submits that a short recitation of the history will suffice.

During the late 1960s and early 1970s, and immediately after *Barnes* was decided (but with no connection to the decision), Wall Street faced a

paperwork crisis. "Increased trading volume in the securities markets overwhelmed the back offices of brokerage firms and the capabilities of transfer agents. No one could cope with the burdens of documenting stock trades using paper certificates." *Dell*, 2015 WL 4313206, at *1. Thus, "[t]he markets were forced to declare trading holidays so administrators could catch up. With trading volumes continuing to climb, it was obvious that reform was needed. Congress directed the SEC to evaluate alternatives that would facilitate trading." *Id.*

Prior to this time, certificated trading was the norm. Although presenting a burden on clearing and settlement, the stock transfer involved moving physical paper stock certificates and ultimately having the corporation itself (the defendants in *Barnes*) re-register stock from one holder to another. *See Joslyn v. St. Paul Distilling Co.*, 46 N.W. 337, 337-38 (Minn. 1890) (praising certificated stock and noting that the certificate represents "the assurance of the corporation to the commercial world that no prior right to the stock can be obtained"). This is the environment in which "tracing" was born.

Consequently, in *Barnes* it was at least feasible to "trace" – in the physical sense of the term – a purchase to the offering at issue. In the *Barnes* world, this could have been done by (for instance) determining who transferred the physical stock certificates to objectors Occhi and Zilker as a matter of fact.

But that is not true today. While shares are still certificated for reasons inapplicable here,

basically no shares are moved in a certificated form. Vice Chancellor Laster of the Delaware Court of Chancery explains that this is because

> the SEC adopted a national policy of share immobilization. . . . [As a result, a new entity,] DTC emerged as the only domestic depository. Over 800 custodial banks and brokers are participating members of DTC and maintain accounts with that institution. DTC holds shares on their behalf in fungible bulk, meaning that none of the shares are issued in the names of DTC's participants. Instead, all of the shares are issued in the name of Cede. Through a Fast Automated Securities Transfer account . . . , DTC uses an electronic book entry system to track the number of shares of stock that each participant holds.
>
> By adding DTC to the bottom of the ownership chain, the SEC eliminated the need for the overwhelming majority of legal transfers. . . . With share immobilization, . . . [n]o new certificates are required.

Dell, 2015 WL 4313206, at *1-2.

But the move to non-certificated shares had other impacts. Unlike in the late 1960s, "tracing" is unlikely to be possible with the *physical* precision *Barnes* had in mind. That is not to say tracing is impossible, or even challenging, depending on the claimant and the situation. Rather, *Barnes* was

decided with a now anachronistic set of facts in place; namely, that a tracing analysis could be done using physical stock certificates and thus would and could yield a match between registered and purchased stock. Any rule of law arising from those factual circumstances is inapposite in a world of mandated share immobilization.

C. *Barnes* Has Not Been Regularly Cited by the Courts of Appeals to Restrict Section 11 Standing

Barnes is not the seminal, unassailable precedent that Slack and its amici suggest. Despite being more than fifty years old, *Barnes* has only been cited by the courts of appeals seventeen times, including by the Ninth Circuit in this matter.

For the first decade after being decided, Barnes was cited five times, but none of those decisions concerned Section 11 standing. *See, e.g.*, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1968) (citing *Barnes* with respect to scienter, not standing); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1298 (2d Cir. 1973) (same). Courts of appeals only started to cite *Barnes* regarding Section 11 standing in 1999. But each of those decisions was a variation on the same theme – single versus multiple registration statements. First, *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) (case 7 to cite *Barnes*), did so in observing that the Section 11 standing limitation "only means that the person must have purchased a security issued under that, rather than some other, registration statement." The following year, *Joseph v. Wiles*, 223 F.3d 1155, 1158-

59 (10th Cir. 2000) (case 8), *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 976-77 (8th Cir. 2002) (case 9), *DeMaria v. Andersen*, 318 F.3d 170, 176 (2d Cir. 2003) (case 10), and *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003) (case 11), each cited *Barnes* in finding that aftermarket purchasers had standing under Section 11; followed by *APA Excelsior III, L.P. v. Premiere Technologies, Inc.*, No. 03-15552, 2004 WL 6064402, at *5 (11th Cir. Sept. 23, 2004) (case 12) and *APA Excelsior III L.P. v. Premiere Technologies, Inc.*, 476 F.3d 1261, 1276-77 (11th Cir. 2007) (case 13), neither of which cited *Barnes* to reject Section 11 standing.

Thus, it would be almost *forty years* before *Barnes* was cited by a court of appeals for the supposedly unchallengeable proposition that *Barnes* limits Section 11 standing. In *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 499 (5th Cir. 2005) (case 14), *Barnes* was cited to deny standing to open market purchasers – but *Krim* still involved two separate offerings. Later, *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 768 (1st Cir. 2011) (case 15), cited *Barnes* in support of the uncontroversial proposition that plaintiffs cannot maintain a claim "based on trust certificates they did not buy." Finally, *In re Century Aluminum Company Securities Litigation*, 729 F.3d 1104, 1106-07 (9th Cir. 2013) (case 16), cited *Barnes* in holding that a plaintiff had not pled standing under Section 11 where there were multiple registration statements and the purchase was made in the open market after the offering date. That same court of appeals did not feel bound by *Century Aluminum* in

issuing the decision now on appeal (the seventeenth case to cite *Barnes*), which holds that direct listings continue to provide statutory standing to purchasers in the single registered offering of an issuer listing for the first time.

In sum, *Barnes* is a lightly cited decision that has never been applied by the courts of appeals to reject standing in a single registration statement case. It should not be given great weight here, in the unique context of a direct listing that registers for resale selling shareholders' stock under a Securities Act registration statement.

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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