No. 25-___

IN THE

Supreme Court of the United States

FIYYAZ PIRANI,

Petitioner,

v.

SLACK TECHNOLOGIES, LLC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises from the Ninth Circuit's ruling on remand from this Court in *Slack Technologies, LLC v. Pirani*, 598 U.S. 759 (2023). The petition presents two questions. The first is one this Court granted certiorari to decide, but did not resolve, in *Slack*. The second is a question of surpassing practical importance to the administration of the nation's securities laws in the aftermath of the Court's decision in that case and implicates a circuit conflict on the standards for allocation of burdens of proof generally.

1. Whether Section 12(a)(2) of the Securities Act of 1933 requires plaintiffs to plead and prove that they bought shares registered in the offering for which the defendant filed a misleading prospectus.

2. Whether courts should apply a burden-shifting regime to determine whether the shares the plaintiff bought were registered in direct listing cases, where registered and unregistered shares are simultaneously issued to the public pursuant to a single registration statement.

PARTIES TO THE PROCEEDINGS

1. Petitioner Fiyyaz Pirani was the plaintiff in the district court and the appellee below.

2. Respondents Slack Technologies, LLC (f/k/a Slack Technologies, Inc.), Stewart Butterfield, Allen Shim, Brandon Zell, Andrew Braccia, Edith Cooper, John O'Farrell, Chamath Palihapitiya, Graham Smith, Social+Capital Partnership GP II L.P., Social+Capital Partnership GP II Ltd., Social+Capital Partnership GP III L.P., 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 L.L.C., AH Equity Partners I L.L.C., and A16Z Seed-III LLC were the defendants in the district court and the appellants below.

STATEMENT OF RELATED PROCEEDINGS

The proceedings directly related to this petition are:

- *Pirani v. Slack Technologies, Inc.*, No. 20-16419, 127 F.4th 1183 (9th Cir. Feb. 10, 2025);
- *Pirani v. Slack Technologies, Inc.*, No. 20-16419, 13 F.4th 940 (9th Cir. Sept. 20, 2021), reh'g denied, Order at 1 (9th Cir. May 2, 2022);
- *Pirani v. Slack Technologies, Inc.*, No. 19-cv-05857, 445 F. Supp. 3d 367 (N.D. Cal. Apr. 21, 2020) (order denying motion to dismiss in part);
- *Pirani v. Slack Technologies*, Inc., No. 19-cv-05857, 2020 WL 7061035 (N.D. Cal. June 5, 2020) (order certifying order denying motion to dismiss in part for interlocutory appeal);
- *Pirani v. Slack Technologies, Inc.*, No. 20-80095 (9th Cir. July 23, 2020) (order granting petition for permission to appeal).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Regulations

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Fiyyaz Pirani respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The most recent opinion of the court of appeals (Pet. App. 1a-20a) is reported at 127 F.4th 1183. A prior decision of the court of appeals (Pet. App. 21a-51a) is reported at 13 F.4th 940. The opinion of the district court (Pet. App. 52a-99a) is reported at 445 F. Supp. 3d 367.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 2025. Pet. App. 1a. On May 2, 2025, Justice Kagan extended the time for filing this petition through July 10, 2025. No. 24A1062. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 11(a) of the Securities Act of 1933 provides, 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 (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 . . . .

15 U.S.C. § 77k(a).

Section 12(a) of the Act provides, in relevant part:

> Any person who . . . 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 . . . to recover the consideration paid for such security . . . or for damages if he no longer owns the security.

15 U.S.C. § 77*l*(a).

STATEMENT OF THE CASE

In *Slack Technologies, LLC v. Pirani*, 598 U.S. 759 (2023), this Court granted certiorari to decide whether "Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading." Pet. i, *Slack*, 598 U.S. at 759 (No. 22-200). The Court did not, however, resolve the Section 12 question, sending the case back to the Ninth Circuit to reconsider that question in light of the Court's construction of Section 11. 598 U.S. at 770 n.3. In doing so, the Court warned that it did not "endorse the Ninth Circuit's apparent belief that § 11 and § 12 necessarily travel together but instead caution[ed] that the two provisions contain distinct language that warrants careful consideration." *Ibid*. On remand, the Ninth Circuit nonetheless held that the textual distinctions made no difference, viewing that result compelled not by the text, but by this Court's decision addressing a different Section 12 question in *Gustafson v. Alloyd Co*., 513 U.S. 561, 572 (1995). *See* Pet. App. 17a-19a.

The Ninth Circuit thus held that both Sections 11 and 12 required petitioner to prove that the shares he purchased were registered. Respondent and its allies have insisted that given modern trading practices, this is simply impossible at the pleading stage, including because shareholders lack access to the information necessary to conduct such tracing. In the Ninth Circuit, petitioner therefore argued that because the tracing difficulties resulted entirely from respondent's decision to register only some of the shares in its offering, and because respondents had better access to much of the information needed for tracing, the court should adopt a burden-shifting regime of the sort this Court has applied in similar circumstances under the securities laws. *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (adopting presumption of reliance triggered by prima facie showing because requiring proof of reliance without burden-shifting "would place an unnecessarily unrealistic evidentiary burden" on plaintiffs). The Ninth Circuit concluded it lacked the power to do so because "[n]othing in the statute or in the Court's decision suggests that traceability should be an exception to the general rule that the plaintiff bears the burden of establishing every element of the claim." Pet. App. 15a.

The Ninth Circuit badly erred on both counts, to devastating effect. Sections 11 and 12 are the pillars of the Securities Act, intended to restore investor confidence in the aftermath of the market crash that precipitated the Great Depression and essential to maintaining investor confidence in our capital markets today. Yet the combination of the Ninth Circuit's construction of Section 12 and its refusal to allow a reasonable burden-shifting regime risks allowing issuers to opt-out of both protections. Worse, the court of appeals did not do so based on any thorough analysis of the text of the statute or longstanding principles governing burden-shifting. Instead, it viewed its hands tied by decisions of this Court that considered neither question.

That view of the Court's decisions, and the Ninth Circuit's ultimate resolution of both legal questions, was wrong. Only this Court can correct those errors, and it should do so in this case. This Court previously decided that the Section 12 question warranted review, and the decision below only reconfirms the necessity of deciding it promptly—the interpretation the Ninth Circuit adopted conflicts with the plain language of the statute, the provision's core purposes, and the longstanding interpretation of the SEC. The Ninth Circuit's choice to lay the blame for any error in its interpretation at the feet of this Court's 5-4 decision in *Gustafson* makes clear that only this Court will be able to decide the best reading of the statute free from the constraints of potential misinterpretation of its past decision.

The Ninth Circuit's rationale for refusing burden-shifting—that neither the statute nor this Court's prior decision in this case "suggest[]" it—is likewise premised on a misconception of this Court's precedents. It also conflicts with other circuits' understanding of this Court's burden-shifting decisions, an issue of importance extending beyond the securities fraud setting. And in the context of direct listings, the Ninth Circuit's refusal to adopt a burden-shifting regime threatens to make Section 11 (and, under its current ruling, Section 12) dead letters.

I. Legal And Factual Background

In 2019, petitioners took Slack public, introducing nearly a billion dollars' worth of its shares to public markets for the first time. As is typical, Slack was required to file with the Securities and Exchange Commission (SEC) a registration statement and a copy of the prospectus it would use to market the securities to the public. *See* 15 U.S.C. § 77e(a)-(c); *Slack*, 598 U.S. at 763, 764.

Congress intended investors to rely on such registration statements and prospectuses, and protected that reliance in Sections 11 and 12 of the Securities Act of 1934. Although both provisions are designed to protect investors from deception in the public sales of securities, they address different aspects of the problem, with respect to different sets of defendants, using different words.

Section 11 provides a cause of action against those responsible for creating misleading registration statements:

> 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 [enumerated responsible parties] . . . .

15 U.S.C. § 77k(a) (emphasis added). In *Slack*, this Court held that Section 11 applies only to the purchase of registered shares. 598 U.S. at 770.

Section 12, in contrast, makes no reference to registration statements or registered shares. Instead, it provides a cause of action against those who sell *any* security by means of a misleading prospectus:

> Any person who . . . 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 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) . . . shall be liable . . . *to the person purchasing* ***such security*** *from him* . . . .

15 U.S.C. § 77*l*(a) (emphasis added). The reference to securities "exempted by the provisions of section 77c" refers to a provision exempting certain securities from most of the Act's requirements, including the obligation to file a registration statement and prospectus in advance of sale. *See* 15 U.S.C. § 77c(a).

Traditionally, initial public offerings (IPOs) have been conducted through intermediary underwriters that purchased all the shares in the first instance, then sold them to the public. *Slack*, 598 U.S. at 763. Underwriters almost universally require a contractual "lock up" period at the start of the IPO, during which insiders who had previously received shares in internal transactions may not sell their shares, lest the influx of additional shares drive down the price the underwriters receive for the new shares. *Ibid*. Accordingly, all of the shares sold in the early days of the IPO are necessarily "registered" shares.

In 2018, the SEC approved an alternative method for going public, called a "direct listing." *Id*. at 764. It allows a company and its insiders to sell shares to the public for the first time without involving an underwriter. Those shares typically had been issued to initial investors, the corporation's officers and employees, and other insiders through earlier non-public transactions that required no registration statement. Nonetheless, because a direct listing is the first *public* sale of the securities, the SEC still required companies to file a registration statement and prospectus in advance of the direct listing in order to inform the investing public. *Ibid*.

Slack took advantage of the new procedure to go public. Although nothing prevented the Company from registering all the shares in the offering,[1] Slack elected to register only some. For example, Slack registered approximately 11 million of CEO Stewart Butterfield's 41 million shares. C.A. ER 535. Nothing in the registration statement identified *which* of Butterfield's 41 million shares were being registered and which were not. *Ibid*. Nor did it provide any way of figuring that out, short of asking Slack. *Ibid*. The choice to register only some shares was consistent with a strategy suggested by Slack's lawyers in a subsequent article promoting direct listings' "potential to deter private plaintiffs from bringing claims under Section 11."[2] They noted that most courts at the time required Section 11 plaintiffs to prove that the shares they purchased were registered in the challenged offering (as opposed, for example, to shares issued in earlier private transactions). Commingling registered and unregistered shares in a direct listing, they claimed, would make it impossible for plaintiffs to satisfy that tracing requirement. *Ibid*.

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[1] *See* 15 U.S.C. § 77f(a) ("*Any* security may be registered . . . .") (emphasis added).

[2] *See* Andy Clubok et al., *Complex and Novel Section 11 Liability Issues of Direct Listings*, ALM | LAW.COM Corporate Counsel (Dec. 20, 2019), https://www.law.com/corpcounsel/2019/12/20/complex-and-novel-section-11-liability-issues-of-direct-listings/?slreturn=20220928204408.

In the end, Slack registered approximately 118 million of the 283 million shares in the direct listing. Petitioner purchased 30,000 shares on the opening day and another 220,000 over the next few months. *Slack*, 598 U.S. at 764.

II. Procedural History

1. Petitioner filed this putative class action against respondents in September 2019. As relevant here, the complaint asserted claims under Sections 11 and 12. Respondents moved to dismiss for failure to adequately allege the registration status of the shares petitioner purchased. Petitioner did not contest that given the comingling of registered and unregistered shares in the direct listing, he was unable to determine whether any given share was registered or not. But the district court held that in the special circumstance of a direct listing, no such proof was required. Pet. App. 63a-72a.

2. After the Ninth Circuit affirmed, Pet. App. 26a, respondents filed a petition for certiorari with this Court, presenting the question: "Whether Sections 11 and 12(a)(2) of the Securities Act of 1933 require plaintiffs to plead and prove that they bought shares registered under the registration statement they claim is misleading." Pet. i, *Slack*, 598 U.S. at 759. This Court granted the petition. On Section 11, the Court explained that the key question was whether the statutory reference to "such security" is confined to "a security issued pursuant to the allegedly misleading registration statement." *Slack*, 598 U.S. at 766. Although the phrase had no grammatical referent, the Court concluded that, in context, the statute was best understood to refer to registered shares. *Id*. at 766-68.

Slack had argued that if proof of registration status were required, the Court should require the complaint be dismissed with prejudice given petitioner's concession that he could not sustain the burden of tracing his shares. Petr. Br. 1, 48, *Slack*, 598 U.S. at 759. Petitioner responded that the Court should remand to allow the Ninth Circuit to consider, among other things, whether to apply a burden-shifting regime that could make it possible for plaintiffs to establish statutory standing. Resp. Br. 49-50, *Slack*, 598 U.S. at 759. This Court remanded with instructions to decide "[w]hether Mr. Pirani's pleadings can satisfy § 11(a) as properly construed." *Slack*, 598 U.S. at 770.

Although the Court had also granted certiorari to decide whether Section 12 likewise requires proof of registration, it did not decide the question. The Ninth Circuit had stated that its interpretation of Section 12 followed from its analysis of Section 11, an analysis this Court had rejected. *Id*. at 770 n.3. Accordingly, the Court believed that "the best course is to vacate its judgment with respect to Mr. Pirani's § 12 claim as well for reconsideration in the light of our holding today about the meaning of § 11." *Ibid*. The Court took no view on the answer, but stressed that it did not "endorse the Ninth Circuit's apparent belief that § 11 and § 12 necessarily travel together, but instead caution[ed] that the two provisions contain distinct language that warrants careful consideration." *Ibid*.; *cf.* Oral Arg. Tr. 16 (Justice Kagan remarking at oral argument that "everything about Section 12 reads differently from Section 11").

3. On remand, the Ninth Circuit ordered dismissal of both the Section 11 and Section 12 claims.

a. Regarding Section 11, the Ninth Circuit declined to decide, as ordered by this Court, whether the "pleadings can satisfy § 11(a) as properly construed." *Slack*, 598 U.S. at 770. That, the panel believed, was the wrong question. "Whether or not the complaint would have been adequate on its own, Pirani's subsequent concessions expressly waived any allegation of traceability." Pet. App. 10a. The court found that petitioner had waived any contention that he could trace his shares. *Id*. 10a-11a.

The panel then addressed petitioner's argument that "his concessions are narrow enough that he can prevail even if he remains bound by them" for two reasons. Pet. App. 13a. First, petitioner had argued "that he can establish traceability through a statistical analysis." *Id*. But the panel found that claim "barred by Pirani's concessions." *Id*.

Second, petitioner argued that although he could not prove registration status on his own, the court should adopt a burden-shifting regime. Petr. Remand Br. 11. In support, petitioner cited *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), where the Court adopted a rebuttable presumption to address the difficulties in proving reliance in the context of modern securities markets. *Id*. at 245. He also cited this Court's more general teaching that "[p]resumptions 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." Petr. Remand Br. 11 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45

(1977)). And he pointed out that Judge Friendly, in a decision this Court had discussed with approval, had held open the possibility of shifting the burden of proving traceability if it were shown that leaving the burden on the plaintiff was "unreasonable." *Id*. 14-15 (quoting *Barnes v. Osofsky*, 373 F.2d 269, 273 n.2 (2d Cir. 1967)).

The Ninth Circuit did not find this argument barred by petitioner's concessions or otherwise waived. Instead, it rejected the argument on the merits. "We decline to adopt Pirani's burden-shifting theory," the court explained, "because '[a]bsent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.'" Pet. App. 15a (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005)). The panel then took an exceedingly narrow view of what counts as a "reason to believe" Congress would have intended otherwise, requiring something in the text of the statute showing that Congress contemplated burden-shifting. *Id.* (rejecting burden-shifting because "[n]othing *in the statute* or in the Court's decision suggests that traceability should be an exception to the general rule that the plaintiff bears the burden of establishing every element of the claim") (emphasis added).

b. Turning to Section 12, the court acknowledged this Court's guidance that Sections 11 and 12 are distinctly worded and do not necessarily travel together. Pet. App. 16a. But it concluded that those distinctions made no difference and that both require tracing. *Id.*

The panel began with only a brief foray into the text before concluding that this Court's decision in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) had effectively decided the question. Pet. App. 17a. The court acknowledged that Section 12's reference to "such security," unlike Section 11's, has "a clear referent," *i.e.*, "the 'security' that was offered or sold 'by means of a prospectus or oral communication.'" *Id.* That left the question whether only registered securities can be sold "by means of a prospectus." *Id.* The panel did not doubt that the prospectus in this case contained the information investors and markets used to value all of the securities in the direct listing. And it did not doubt that the prospectus would have been used to market and sell all the shares in that listing, registered or not. The panel nonetheless concluded that Section 12 allowed even the knowing use of a false prospectus to sell shares to an investor in the direct listing, so long as the investor was only sold unregistered shares or was unable to prove the registration status of his shares one way or the other. *Id*. 16a-19a.

The panel laid the blame for that unappealing result on this Court, claiming that its "decision in *Gustafson v. Alloyd Co.* explains the meaning of 'by means of a prospectus,' and it resolves the interpretive question presented here." Pet. App. 17a. The panel noted that in *Gustafson*, this Court held that "prospectus" is a "term of art" referring to the official prospectus the Act requires to be filed with a registration statement. *Id.* Thus, liability under Section 12 is "linked to the new duties created by the Act" and liability "cannot attach unless there is an obligation to distribute the prospectus in the first place." *Id.* 17a-18a (quoting *Gustafson*, 513 U.S. at 571-72).

The panel acknowledged that there "was an obligation to distribute the prospectus" challenged here. *See* Pet. App. 18a. And it did not contest that petitioner's claims are "linked" to the duty to file that prospectus, as petitioner's claims are premised on that mandatory filing being misleading. *Id.* 17a. The panel nonetheless believed that even when there is an obligation to file a prospectus, and even when that formal prospectus is the basis of alleged liability, *Gustafson*'s reasoning implies that "a security can be sold 'by means of a prospectus' only if it is a registered security sold in a public offering." *Id.* 18a. And because petitioner could not prove the registration status of his shares, his Section 12 claims failed as well. *Id.* 19a-20a.

ARGUMENT

I. The Section 12 Question This Court Previously Granted Certiorari To Decide Still Warrants Review.

This petition squarely presents the question this Court granted certiorari to resolve, but did not decide, just two years ago. In seeking review, respondents represented that it was "exceptionally important" for the Court to decide the question. Pet. 13, *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023) (No. 22-200) (capitalization altered). The need for a decision by this Court on that exceptionally important question persists and should be met by granting this petition.

A. The Ninth Circuit's Decision Is Irreconcilable With The Statute's Text, Premised On A Misreading Of *Gustafson*, And In Conflict With The Longstanding Interpretation Of The SEC.

This Court previously decided that the first Question Presented warrants consideration but delayed review to allow the Ninth Circuit to reassess its position in light of this Court's construction of Section 11, with express instruction to give due account to the textual differences between that provision and Section 12. The Ninth Circuit failed to follow those instructions. Instead, it based its decision not on the text of Section 12, but on its interpretation of this Court's decision in *Gustafson*. In doing so, the Court misread that decision and adopted an interpretation that cannot be reconciled with the plain text of the statute or the longstanding position of the SEC.

1. Start with the text. Section 12 permits suit against "Any person who . . . offers or sells a security . . . by means of a prospectus" that is false or misleading. 15 U.S.C. § 77*l*(a). As Justice Kagan noted at oral argument:

> There's absolutely no reference to registration. The 'such security' language does not refer back to—to registration in any way. It talks about prospectuses, but it also talks about—oral communications, which suggests that it's broader than the registration context. And, you know, it has the specific exemption. So there's—there's

> really nothing in Section 12 that makes it like Section 11.

Oral Arg. Tr. at 16-17. As the Ninth Circuit correctly acknowledged (Pet. App. 17a), in contrast to Section 11, the phrase "such security" in Section 12 *has* a "clear referent" : "a security" sold "by means of a prospectus" that is misleading. 15 U.S.C. § 77*l*(a)(2). The provision thus reaches "*[a]ny* person" who sells "*a* security" by such means, not just those who sell a *registered* security. *Id.*

Nor is there anything illogical about finding that a defendant used a misleading prospectus as a means to sell all the shares in a direct listing, including unregistered shares. The SEC required the filing of a registration statement and prospectus as prerequisites to selling *any* shares in the direct listing. 83 Fed. Reg. 5651, 5654 (Feb. 8, 2018). The prospectus contains information vital to the valuation of all of the shares, given that registered and unregistered shares are completely fungible. Thus, any broker—the quintessential Section 12 defendant, *see Pinter v. Dahl*, 486 U.S. 622, 646 (1988)—would have used the prospectus to sell shares to her clients without asking whether those shares were registered or not.

Accordingly, a prospectus is a "means" for selling *all* of the shares in the direct listing under any reasonable interpretation of that term. *See Loughrin v. United States*, 573 U.S. 351, 363 (2014) (phrase "by means of" "typically indicates that the given result (the 'end') is achieved, at least in part, *through* the specified action, instrument, or method (the 'means'), such that the connection between the two is something more than oblique, indirect, and incidental").

If there were any doubt, it is removed by the fact that the statute expressly extends to the offer or sale of "a security" "whether or not exempted by the provisions of section 77c of this title." 15 U.S.C. § 77*l*(a)(2). Section 77c of the title (Section 3 of the Act) exempts certain securities from all of the Act's requirements, including the obligation to file a prospectus or registration statement. *See id*. § 77c(a) ("Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities . . . ."). The parenthetical thus demonstrates that Section 12 provides the irreducible minimum requirement of accuracy and honesty for the sale of *any* security to the public.

It is no surprise, then, that in his famous opinion in *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967), Judge Friendly understood that even if Section 11 was limited to registered shares, Section 12 was not. *See id*. at 272 (contrasting Section 11 with Sections "12[a]2 and 17, the antifraud sections of the 1933 Act," which "are not limited to the newly registered securities."); *id*. at 272 n.1 (practice of using prospectus to sell intermixed registered and unregistered shares "may enable a purchaser of shares other than those registered to rely on § 12[a](2)").

2. The Ninth Circuit was wrong to think that *Gustafson* held otherwise.

The Court granted certiorari in that case to decide whether Section 12(a)(2) "extends to a private, secondary transaction, on the theory that recitations in the purchase agreement are part of a 'prospectus.'" *Gustafson v. Alloyd Co.*, 513 U.S. 561, 564 (1995). "The determinative question," this Court explained, "is whether the contract" is "a 'prospectus' as the term is used in the 1933 Act." *Id*. at 568. The Court concluded it was not. Writing for a 5-4 majority, Justice Kennedy reasoned that although the statutory definition of "prospectus" was broad, read in context, it refers to the kind of formal prospectus whose substance is dictated by Section 10 of the Act. *Id*. at 568-69.[3] Accordingly, the Court held, "liability imposed by § 12[a](2) cannot attach unless there is an obligation to distribute the prospectus in the first place (or unless there is an exemption)." *Id*. at 571.

> In sum, 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. The contract of sale, and its recitations, were not held out to the public and were not a prospectus as the term is used in the 1933 Act.

Id. at 584.

Thus, the Court's only holding in *Gustafson* was that Section 12 liability must be premised on a formal "prospectus" filed with a registration statement and therefore applies only to public (not private) sales. Because there was no such prospectus in the private

[3] Justice Thomas, joined by Justices Scalia, Ginsburg, and Breyer, disagreed, noting that statute defined "prospectus" in capacious terms to include "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." *Gustafson*, 513 U.S. at 585 (Thomas, J., dissenting) (quoting 15 U.S.C. § 77b(10)).

sale before it, the Court had no occasion to go further and consider the scope of liability in a case, such as this, in which a defendant used a proper "prospectus" to offer and sell both registered and unregistered shares. Accordingly, as a leading treatise has explained, "[a]lthough the Court [in *Gustafson*]" has "limited § 12(a)(2) to public offerings, it is not limited to registered offerings." Thomas Lee Hazen, *Federal Securities Law* § III.E.2.a n.308 (4th ed. 2022).

The Ninth Circuit thus was wrong to hold that *Gustafson* decided the question here. Unlike in *Gustafson*, in this case there *was* "an obligation to distribute the prospectus in the first place" and the claims are premised on that filing. 513 U.S. at 571.[4] Indeed, there's no dispute that if Slack's prospectus was misleading, respondents would have violated Section 12(a)(2) by selling "a security" by means of that prospectus. *See* 15 U.S.C. § 77*l*(a)(2). The only questions are the *scope* of that liability and which investors are entitled to recover. Nothing in *Gustafson* or its rationale speaks to that distinct question.

The Ninth Circuit was also wrong in thinking that *Gustafson* provided an answer to the point that the statute expressly prohibits misleading use of a prospectus to sell "a security . . . whether or not exempted" from registration by Section 3. 15 U.S.C. § 77*l*(a)(2). In *Gustafson*, the Court rejected Justice

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[4] For that reason, this case is distinguishable from *Yung v. Lee*, 432 F.3d 142 (2d Cir. 2005), in which the Second Circuit suggested in dicta that Section 12 did not extend to a private sale of securities just because the defendant allegedly used a prior prospectus from an earlier public sale in persuading the plaintiff to enter the transaction. *Id.* at 147-50; *contra* Pet. App. 19a.

Thomas's reasoning that if Congress had intended § 12(a)(2) "to govern only initial public offerings, it would have been simple for Congress to have referred to the § 4 exemptions" in Section 12 itself, referring to a provision exempting private security sales from registration. 513 U.S. at 573; *see* 15 U.S.C. § 77d. The majority concluded that this argument "gets the presumption backwards." *Ibid*. "Had Congress meant the term 'prospectus' in § 12[a](2) to have a different meaning than the same term in § 10, that is when one would have expected Congress to have been explicit. Congressional silence cuts against, not in favor of, Alloyd's argument." *Ibid*.

That reasoning has no bearing on the question here. Petitioner does not dispute that Section 12(a)(2) applies only to public offerings. Nor does he rely on congressional silence, but on the fact that Section 12 *expressly* applies to the sale of "a security" "whether or not exempted" from complying with the Act's other requirements, including the obligation to file a registration statement and prospectus. 15 U.S.C. § 77*l*(a)(2) (emphasis added). The statute thus expressly contemplates that using a misleading prospectus to sell unregistered shares can violate Section 12(a)(2).

Moreover, there is a perfectly obvious reason why Congress would have clarified that Section 12(a)(2) applies to securities exempted from registration by Section 3, without expressly mentioning securities exempted from registration by Section 4. Section 3 provides that "[e]xcept as hereinafter expressly provided, the *provisions of this subchapter* shall not apply to" the securities listed. 15 U.S.C. § 77c(a) (emphasis added). It thus exempts covered shares from *all* of the Act's provisions, *including Section 12*, unless the statute "expressly provide[s]" otherwise. *Ibid.*; *see also* 15 U.S.C. ch. 2A, subch. I (containing all the requirements of the 1933 Act). Congress therefore had to expressly provide in Section 12 that Section 3-exempt securities were subject to Section 12(a)(2)'s anti-fraud protection. The same was not true of Section 4, which exempts the securities listed in that provision *only* from Section 5's registration regime. *See* 15 U.S.C. § 77d(a) ("The provisions of section 77e [Section 5] of this title shall not apply to" listed securities).

3. The Ninth Circuit's contrary interpretation conflicts not only with the text of the statute and Judge Friendly's interpretation in *Barnes*, but also with the SEC's consistent interpretation of the Act across decades and administrations, before and after *Gustafson*.

As early as 1962, in guidance regarding Section 4's exemption from registration for non-public offerings, the SEC warned that "Sections 12[a](2) and 17 of the Act, which provide civil liabilities and criminal sanctions for fraud in the sale of a security, are applicable to the transactions notwithstanding the availability of an exemption from registration." Non-Public Offering Exemption, Securities Act Release No. 33-4452, 1962 WL 69540 (Nov. 6, 1962) (emphasis added). The Commission took the same position when issuing Rule 144, the rule governing the Section 4 exemption upon which respondents relied to sell unregistered shares in the direct listing (*see* Petr. Br. 9, *Slack*, 598 U.S. at 759). "While Rule 144 relates to transactions exempted by sections 4(1) and 4(4) of the Act from the registration provisions of

Section 5," the SEC explained, "it would not provide an exemption from the antifraud provisions of the securities laws or the civil liabilities provisions of Section 12[a](2) of the Act or other provisions of the securities laws." 37 Fed. Reg. 591, 595 (Jan. 14, 1972).

The Commission has maintained this interpretation after *Gustafson* as well. *See* Crowdfunding, 78 Fed. Reg. 66427, 66498 n.745 (Nov. 5, 2013) (warning that "anti-fraud and civil liability provisions of the Securities Act, such as Sections 12(a)(2) and 17, apply to exempted transactions, including those transactions that will be conducted in reliance on Section 4(a)(6)").

B. The Question Presented Remains Important And Should Be Reviewed Now.

As respondents insisted in seeking review of the same question just two terms ago, whether Section 12(a)(2) provides a remedy only for misleading use of a prospectus to sell registered shares is a question of great importance. *See* Pet. 25, *Slack*, 598 U.S. at 759; Pet. Reply 8, *Slack*, 598 U.S. at 759 (citing amicus brief from institutional investors managing $35.5 trillion in assets emphasizing "critical" importance of proper interpretation of Securities Act protections). The Court should, as respondents urged then, "decide the exceptionally important question now." Pet. Reply 12, *Slack*, 598 U.S. at 759.

Indeed, the Ninth Circuit's remand decision only reinforces the case for review now. Although this Court emphasized the need for careful attention to the language of Section 12, the panel believed the question was dictated, instead, by *Gustafson*. Until this Court intervenes, the text of the statute will continue to get short shrift in the lower courts, limiting further percolation to debates about what this Court meant in *Gustafson*. That is a question only this Court can resolve and which benefits little from further debate by other courts.

The Court's intervention is particularly warranted because even *Gustafson*'s actual holding, limiting Section 12 to public sales, was hotly contested at the time within the Court and "has drawn sharp criticism" from commentators since. *Yung v. Lee*, 432 F.3d 142, 148 (2d Cir. 2005) (collecting citations). On the dissenters' view, Section 12 necessarily is not limited to registered shares, registration not being required for private sales. *See Gustafson*, 513 U.S. at 584 (Thomas, J., dissenting). And even if statutory stare decisis counsels against reconsidering *Gustafson*'s actual holding, such a decision should not be casually extended without the careful re-examination of its premises that only this Court can provide.

Delay is not only useless, but harmful. Requiring tracing—particularly if the tracing burden must be shouldered entirely by the plaintiff without the benefit of discovery, *see infra* § II—dramatically undermines the statute's ability to play its critical role in maintaining investor confidence in the accuracy of the SEC filings markets use to value initial sales of stock. Issuers and their lawyers have repeatedly and successfully argued that once even a small number of unregistered shares enter the market during an offering, it is virtually impossible thereafter to prove that any share purchased in the market was registered. *See, e.g.*, *Krim v.*

pcOrder.com, Inc., 402 F.3d 489, 498 (5th Cir. 2005) ("[G]iven the fungible nature of stocks within a street name certificate, it is virtually impossible to differentiate PO [public offering] shares from non-PO shares."); *In re Initial Pub. Offering Sec. Litig.*., 227 F.R.D. 65, 118 (S.D.N.Y. 2004) ("The modern practice of electronic delivery and clearing of securities trades, in which all deposited shares of the same issue are held together in fungible bulk, makes it virtually impossible to trace shares to a registration statement once additional unregistered shares have entered the market."), *vacated and remanded*, 471 F.3d 24 (2d Cir. 2006); Joseph A. Grundfest, Morrison, *the Restricted Scope of Securities Act Section 11 Liability, and Prospects for Regulatory Reform*, 41 J. Corp. L. 1, 19-20 (2015) (after discussing details of modern trading, concluding "because securities trades are typically settled on a net basis by book-entry movements, it is de facto impossible to trace the path of any particular security once it enters the marketplace"); Ken Cunningham et al., *Litigating Section 11's Tracing Requirement: A Practitioner's View of a Powerful Defense*, Bloomberg L. (June 2019),[5] Others have argued that tracing is possible, so long as purchasers can gain access to relevant records in discovery. *See* Br. *Amici Curiae* L. & Bus. Professors Supp. Resp. 7-8, *Slack*, 598 U.S. at 759. But all agree that at the very least, limiting Section 12 to registered shares creates a substantial barrier to enforcement of the Act.

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[5] Https://www.bloomberglaw.com/external/document/X4M4BSU8000000/litigation-professional-perspective-litigating-section-11-s-trac.

Moreover, the problem is not limited to the relatively new practice of direct listings. It extends as well to traditional secondary offerings using underwriters because the newly issued registered shares will quickly become intermixed with shares sold under a different registration statement in early offerings. *See Slack*, 598 U.S. at 768 n.2 (collecting circuit decisions requiring tracing, all arising in context of secondary public offerings). There are typically well over 500 such follow-on offerings every year, worth hundreds of billions of dollars. [6] Accordingly, requiring tracing under Section 12 may leave issuers free to sell *billions* of dollars' worth of shares to the public every year through direct listing and more traditional offerings, free from Section 12's baseline antifraud protection.

II. The Court Should Decide Whether Tracing Requirements Are Subject To Burden Shifting In Direct Listing Cases.

The Court should also decide whether plaintiffs bear the sole burden of establishing whether the securities they purchased in a direct listing were registered. *See generally* Br. *Amici Curiae* Evid. & Civ. Proc. Scholars Supp. Resp. 11, *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023) (No. 22-200) (proposing and justifying burden-shifting framework). The Ninth Circuit's refusal to adopt a reasonable burden-shifting regime in this case was premised on a misunderstanding of this Court's general rules for

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[6] *See* William Blair, *Equity Capital Markets Update* 5 (4th Quarter 2019), https://www.williamblair.com/-/media/Downloads/Insights/IB-Market-Assets/2020/ECM-quarterly-Q4-2019.pdf?la=en.

allocating burdens in the absence of statutory direction and is in conflict with the law of other circuits.

A. Tracing Requirements Are A Quintessentially Appropriate Context For Burden Shifting.

"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." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977) (citation omitted). "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." *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988) (citations omitted).

This Court has created such burden-shifting presumptions in securities cases to ensure that difficulties of proof in this complex context do not render important statutory protections practically unenforceable. Most prominently, the Court did so by creating a rebuttable presumption of reliance in *Basic*. *Id.* at 224. In that case, this Court recognized that placing the entire burden of proving reliance on a securities plaintiff "would place an unnecessarily unrealistic evidentiary burden on the Rule 10b–5 plaintiff who has traded on an impersonal market." *Id*. at 245. Presuming reliance was necessary to ensure that the securities laws remained effective in "modern securities markets," *id*. at 243, and was "also supported by common sense and probability," *id*. at 246.

Importantly, the Court created the *Basic* presumption despite any indication in the text of the statute itself that Congress had contemplated the question and intended a burden-shifting regime. Instead, it was sufficient that a presumption of reliance was "consistent with, and, by facilitating Rule 10b–5 litigation, supports, the congressional policy embodied in the 1934 Act." *Id*. at 245; *see also, e.g.*, *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys*., 594 U.S. 113, 118-19 (2021) (same).

This Court has similarly applied burden-shifting regimes in other contexts to ensure that difficulties in proof do not render statutory or constitutional protections practically meaningless. *See, e.g.*, *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018) (embracing "three-step, burden-shifting framework" to "determine whether a restraint violates the rule of reason" in antitrust context); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 772-74 (1976) (burden shifting on causation in Title VII pattern-or-practice class action); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (burden shifting on discriminatory intent).

The Court should do so again with respect to tracing in direct listing cases. In particular, the Court should hold at the very least, that when a company chooses to register only some of the shares in a direct listing, the plaintiff may establish a prima facie case of statutory standing by showing it is more likely than not he purchased some registered shares, at which point the burden should shift to the defendant to prove that none of the shares were registered.

As in *Basic*, requiring defendants to bear part of the burden of establishing registration status comports with "considerations of fairness, public policy, and probability, as well as judicial economy." 485 U.S. at 245. Fairness, because in a direct listing, the problems of proof are entirely of the company's own making. Nothing prevented Slack from registering all the shares and eliminating any tracing difficulties. *See* 15 U.S.C. § 77f(a) ("*Any* security may be registered . . . .") (emphasis added). Given the trivial cost of doing so, it is a fair inference that companies will fail to register all the shares in a direct listing only to *create* proof difficulties for injured shareholders and preclude enforcement of one of the central provisions of the Securities Act, as Slack's own lawyers have publicly advocated. *See supra* p. 8 n.2.

Public policy likewise supports the proposal. In *Basic*, the Court held that the presumption of reliance "support[ed] the congressional policy embodied in the 1934 Act" because it "facilitat[ed] Rule 10b-5 litigation" by making 10b-5 class actions possible. 485 U.S. at 245. Here, a presumption not only would facilitate class actions, but without it, Slack and others have argued that it is virtually impossible even for individual plaintiffs to pursue Section 11 or 12 claims in direct listing cases. *See supra* pp. 8, 10, 23-24.

Shifting the burden to defendants is also consistent with the principle that parties asserting an exemption to registration—as respondents do here—bear the burden of proving that entitlement. *See SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953).

Probability supports burden-shifting as well. So long as petitioner purchased *any* registered shares, he would have standing; how *many* registered shares he purchased would be a question of damages. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Rsch., Inc*., 395 U.S. 100, 114 n.9 (1969) (the "burden of proving the fact of damage" is "satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage"). When a plaintiff purchases tens of thousands of shares, as petitioner did here, the likelihood that *none* of them was registered is slight.[7]

Access to evidence also supports shifting the burden to defendants. Although some of the evidence necessary to trace a share from its original owner to the ultimate purchaser may rest in the hands of third-parties, defendants have access to *more* of the relevant information than do plaintiffs. Only Slack knows, for example, which of CEO Butterfield's shares were registered and which were not. *See supra* p. 8. The registering company is also better positioned than plaintiffs to know or find out which shares its insiders and early investors sold, through what brokers, on which exchanges, and when—all important data points in any tracing effort. *See* Br. *Amici Curiae* L. & Bus. Professors Supp. Resp. 7-8, *Slack*, 598 U.S. at 759.

At the very least, such information is generally inaccessible to plaintiffs without resort to discovery, which they will never receive if they are saddled with an unrealistic tracing burden at the pleading stage.

[7] The Ninth Circuit speculated it was possible that petitioner may have purchased all of his shares from a single source that held only unregistered shares. Pet. App. 14a. But it did not claim that this was likely. And the defense bar's claims that tracing is impossible is predicated on the assertion of extensive intermingling of shares in a market where thousands of shares are traded in matters of seconds. *See supra* p. 8.

Accordingly, plaintiff should be able to survive a motion to dismiss, and gain access to the discovery needed for further tracing, by plausibly alleging that he purchased at least some registered shares, a burden that should be easily met when, as here, a defendant has purchased significant numbers of shares in a market containing a material percentage of registered shares. If that hurdle is cleared, both sides should be entitled to conduct discovery on tracing. And it should be open to defendants to rebut the prima facie showing at summary judgment with evidence establishing that none of the purchase shares were, in fact, registered.

B. The Ninth Circuit's Burden-Shifting Ruling Conflicts With The Decisions Of This Court And Other Circuits.

The Ninth Circuit grappled with none of these arguments. Instead, the court found itself powerless to adopt a burden-shifting regime because it viewed this Court's precedents as rigidly precluding alteration of the usual allocation of burdens absent something "in the statute" that "suggests that traceability should be an exception to the general rule." Pet. App. 15a. This requirement that the statutory text must suggest an intent to shift burdens conflicts with the decisions of this Court and with the law of other circuits.

1. To be sure, when a statute expressly allocates burdens, that allocation governs. But Congress typically does not address burdens one way or the other. To fill that gap, courts *generally* assign plaintiffs the burden of proving each element of their claim. But this Court has been perfectly clear that that "[t]here are no hard-and-fast standards

governing the allocation of the burden of proof in every situation." *Keyes v. Sch. Dist. No. 1, Denv., Colo.*, 413 U.S. 189, 209 (1973). "The issue, rather, 'is merely a question of policy and fairness based on experience in the different situations.'" *Ibid*. (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)).

The Ninth Circuit seemingly thought this Court held otherwise in *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 (2005), when it stated that "absent some reason to believe that Congress intended otherwise, . . . we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Id*. at 57-58; *see* Pet. App. 15a. But the Court did not mean that the "reason to believe" must be found in the text of the statute, or intend to jettison the traditional considerations this Court has applied in cases like *Basic*. To the contrary, even after noting that "Congress has never explicitly stated . . . which party should bear the burden of proof" in the statute in that case, *Weast*, 546 U.S. at 54, and even after rejecting the plaintiffs' argument that the statute's "text compels a conclusion in their favor," *id*. at 58, the Court went on to consider the statute's purpose, *ibid*., probabilities, *id*. at 59, and access to evidence, *id*. at 60.

On this last point, the Court emphasized that because the statute provided other means for plaintiffs to critical information, they were "not left to challenge the [defendant] without a realistic opportunity to access the necessary evidence." *Id*. at 61. The opposite is true here. But that made no difference to the Ninth Circuit because it misread this Court's decision to limit consideration to what the text of the statute implied about a question Congress never considered.

2. Unlike the Ninth Circuit, other circuits have heeded this Court's burden-allocation teachings, freely adopting burden-shifting regimes in the face of statutory silence when necessary to address practical problems of proof that could interfere with the statute's effective enforcement.

For example, in *Glickenhaus & Co. v. Household Int'l, Inc.*, 787 F.3d 408 (7th Cir. 2015), the Seventh Circuit established a burden-shifting framework for deciding the loss-causation element of a securities fraud claim when the truth concealed by the fraud leaks out over time. *Id.* at 422. Requiring plaintiffs to exclude alternative potential causes of a stock drop, the court noted, "may be very difficult, if not impossible," effectively eliminating liability in leakage cases. *Ibid*. Without asking whether anything more in the statute suggested that Congress had contemplated burden-shifting in this context, the court of appeals create a burden-shifting system as a "middle ground." *Ibid*.

The Second Circuit likewise reallocated burdens of proof for developing disgorgement remedies in *SEC v. Lorin*, 76 F.3d 458 (2d Cir. 1996), without asking whether the statute contained evidence that Congress intended that result. *See id*. at 462; *see also United States v. RaPower-3, LLC*, 960 F.3d 1240, 1250-53 (10th Cir. 2020) (same for disgorgement in tax case).

The Ninth Circuit's decision here also cannot be reconciled with Judge Friendly's decision in *Barnes v. Osofsky*, 373 F.2d 269 (2d Cir. 1967). There, after holding that Section 11 requires tracing, Judge Friendly considered the plaintiffs' request to "put the burden of tracing on the defendants." *Id*. at 273 n.2. Although nothing in the statute suggested an allocation of burdens one way or the other, Judge Friendly did not find that dispositive. To the contrary, he rejected the proposal because the plaintiffs had not "sufficiently demonstrated the *unreasonableness* of leaving that burden on them." *Ibid*. (emphasis added). Consistent with this Court's teachings then and since, the Second Circuit thus understood that courts are empowered to reallocate burdens, despite statutory silence, when necessary to ensure that plaintiffs do not bear and unreasonable burden that interferes with effective enforcement of the statute. And in the decades since *Barnes*, the unreasonableness of leaving the burden of tracing solely on plaintiffs has become apparent.

C. The Question Presented Is Important And Pressing.

The proper allocation of burdens on tracing is a question of recurring importance this Court should not let fester. As this case illustrates, the question is likely outcome determinative in most Section 11 (and, in the Ninth Circuit, Section 12) direct listing cases. And the question of the proper analytical framework for deciding when a court is empowered to re-allocate burdens is one that arises in a myriad of contexts.

To the extent there is tension between cases like *Basic* (finding broad authority to reallocate burdens to ensure a statute's effective enforcement) and *Schaffer* (read by the Ninth Circuit to restrict the analysis to the text of the statute), only this Court can resolve it and further debates among the lower courts about the meaning of this Court's precedents will serve no useful purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 10, 2025

APPENDIX

TABLE OF CONTENTS

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 II LTD.; SOCIAL+CAPITAL PARTNERSHIP GP III L.P.; 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	No. 20-16419 D.C. No. 3:19-cv-05857-SI OPINION

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

Defendants–Appellants.

On Remand from the United States Supreme Court

Filed: February 10, 2025

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

Opinion by Judge Miller

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

SUMMARY[**]

Securities Fraud

On remand from the United States Supreme Court, the panel reversed the district court's denial of defendants' motion to dismiss an action under sections 11 and 12(a)(2) of the Securities Act of 1933.

Sections 11 and 12(a)(2) impose strict liability for any untrue statement or omission of a material fact in a registration statement or prospectus, respectively. Section 11 gives a cause of action only to a "person acquiring such security," while section 12(a)(2) similarly gives a cause of action only "to the person purchasing such security." Defendant Slack Technologies, Inc., went public through a direct listing, which differed from an initial public offering in that the company listed already-issued shares rather than issuing new shares.

In *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023), the Supreme Court vacated this court's affirmance of the district court's order and held that section 11 requires plaintiffs to show that the securities they purchased were traceable to the particular registration statement alleged to be false or misleading. The panel concluded that section 12(a)(2) requires the same showing.

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

Because the plaintiff previously conceded that he could not make the required showing of traceability, all of his claims failed. The panel therefore reversed and remanded with instructions to dismiss the complaint in full and with prejudice.

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OPINION

MILLER, Circuit Judge:

This appeal arises from an action under sections 11 and 12(a)(2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, *77l*(a)(2). The case returns to us from the United States Supreme Court, which vacated our prior decision affirming the district court's denial of a motion to dismiss the complaint. The Court held that section 11 requires plaintiffs to show that the securities they purchased were registered under a materially misleading registration statement. Because the plaintiff previously conceded that he cannot make such a showing, and because we conclude that section 12(a)(2) requires the same showing, all of the claims in this case fail. We therefore reverse.

I.

Sections 11 and 12(a)(2) of the Securities Act of 1933 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). Section 11 gives a cause of action only to a "person acquiring such security," *id.* § 77k(a), while section 12(a)(2) similarly gives a cause of action only "to the person purchasing such security," *id.* § 77*l*(a). In their limitations on who may sue and their imposition of strict liability, both provisions differ from section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), 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, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *In re Cloudera, Inc.*, 121 F.4th 1180, 1186 (9th Cir. 2024).

In a traditional initial public offering, a company seeking to offer shares for sale to the public files a registration statement and then sells shares issued under that registration statement. Typically, the investment bank underwriting the offering commits to purchasing the new shares at a predetermined price if they do not otherwise sell. To ensure that the price remains stable as the shares enter the market, the bank 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 might hold shares that were issued under an exemption to the requirement that shares be registered before being sold to the public—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 2018, the Securities and Exchange Commission changed its rules to allow certain companies to go public through a direct listing. *See*Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating to Listing of Companies, 83 Fed. Reg. 5650, 5653–54 (Feb. 2, 2018). A direct listing differs from an initial public offering in that the company does not issue any new shares; it simply lists already-issued shares so that existing shareholders can sell them on the exchange.

On June 20, 2019, Slack Technologies, Inc., went public through a direct listing, with no underwriters and no lock-up period. On the first day of the offering, 118 million registered shares and 165 million unregistered shares were available for purchase on the New York Stock Exchange. That day, Fiyyaz Pirani purchased 30,000 Slack shares.

Following the direct listing, Slack experienced multiple service disruptions and reported disappointing quarterly earnings. By September, its share price had fallen by more than a third from the date of the direct listing. In response, Pirani brought this class action against Slack (as well as its officers, directors, and venture capital fund investors, whom we need not consider separately) on behalf of himself and all other persons who "purchased or otherwise acquired Slack common stock pursuant and/or traceable to the Offering Materials." He asserted claims under sections 11 and 12(a)(2), as well as derivative claims under section 15, 15 U.S.C. § 77***o***, which makes controlling persons jointly and severally liable for violations of the Securities Act. All of his claims were predicated on the allegation that Slack's registration statement (which included a prospectus) was inaccurate and misleading in various respects.

Slack moved to dismiss the complaint for failure to state a claim, arguing that Pirani's claims failed because he could not establish that he had purchased shares that were sold under the allegedly misleading registration statement. The district court denied the motion in relevant part. The court acknowledged that Pirani "did not and cannot allege that he purchased shares registered under and traceable to Slack's Registration Statement," but it held that such an allegation was unnecessary. Instead, the court concluded, it was sufficient that he alleged that the registration statement was false and that the securities he purchased were "of the same nature as [those] issued pursuant to the registration statement." *Barnes v. Osofsky*, 373 F.2d 269, 271 (2d Cir. 1967). The district court reached the same conclusion as to Pirani's section 12(a)(2) claims against the individual defendants.

The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). We granted Slack's petition to appeal, and we affirmed. *Pirani v. Slack Techs., Inc.*, 13 F.4th 940 (9th Cir. 2021) (*Pirani I*); *see id.* at 950 (Miller, J., dissenting).

The Supreme Court vacated our decision. *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 143 S.Ct. 1433, 216 L.Ed.2d 18 (2023). It noted that section 11 "authorizes an individual to sue for a material misstatement or omission in a registration statement when he has acquired 'such security.' " *Id.* at 766, 143 S.Ct. 1433. Based on an examination of the statutory context, the Court concluded that "such security" refers to the security offered in the registration statement, and accordingly that "[t]o bring a claim under § 11, the securities held by the plaintiff must be traceable to the particular registration statement alleged to be false or misleading." *Id.* at 768, 143 S.Ct. 1433. The Court remanded, leaving for us "to decide in the first instance on remand" the question "[w]hether Mr. Pirani's pleadings can satisfy § 11(a) as properly construed." *Id.* at 770, 143 S.Ct. 1433. As to section 12(a)(2), the Supreme Court explained that because our section 11 analysis was "flawed," the "best course is to vacate [the] judgment with respect to Mr. Pirani's § 12 claim as well for reconsideration in light of [the Court's] holding ... about the meaning of § 11." *Id.* at 770 n.3, 143 S.Ct. 1433.

II.

We begin with Pirani's section 11 claim. In vacating our decision, the Supreme Court expressly held that "[t]o bring a claim under § 11, the securities held by the plaintiff must be traceable to the particular registration statement alleged to be false or misleading." *Slack Techs., LLC*, 598 U.S. at 768, 143 S.Ct. 1433. The dispositive issue, therefore, is whether Pirani sufficiently pleaded that his purchased shares are traceable to Slack's registration statement.

In the operative complaint, Pirani alleged that he "and the other members of the Class acquired Slack common stock pursuant and/or traceable to the Offering Materials." If that were all Pirani said, we would have to decide whether his allegation was sufficient to make the conclusion of traceability a plausible one under the pleading standards articulated by the Supreme Court in *Ashcroft v. Iqbal*, namely, that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). But that is not all he said. Whether or not the complaint would have been adequate on its own, Pirani's subsequent concessions expressly waived any allegation of traceability.

In his opposition to Slack's motion to dismiss, Pirani asserted that "the concept of 'tracing' a share of stock – *i.e.*, establishing a chain of title for a particular share back to the share's original owner – is a concept that no longer exists in today's market and is not possible." The district court accepted that concession, explaining that Pirani "did not and cannot allege that he purchased shares registered under and traceable to

Slack's Registration Statement" and concluding that his "inability to trace [is] undisputed."

On appeal, Pirani repeated his concession, arguing that "[b]ecause both registered and unregistered shares would hit the public market at the same time, it would be impossible for any purchasers to trace their shares back to the Registration Statement or Prospectus." That was the basis on which we decided the case: We said that Pirani "cannot prove that his shares were registered under the allegedly misleading registration statement." *Pirani I*, 13 F.4th at 945. And accepting his assertion that purchasers in a direct listing cannot "know if they purchased a registered or unregistered share," we reasoned that "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." *Id.* at 948. When the case reached the Supreme Court, Pirani confirmed that we had correctly understood his position, stating that he had "agreed below that it was impossible to trace his shares to a registration statement." Brief of Respondent at 49, *Slack Techs., LLC*, 598 U.S. 759 (No. 22-200), 2023 WL 2340467, at *49.

Despite his repeated and express concessions, Pirani now maintains that we should not conclude that he waived traceability, and he says that if we were to remand to the district court, he would be able to trace his shares to those issued under the registration statement. He advances three arguments for that position, but we find none persuasive.

First, Pirani argues that the Supreme Court has instructed us to disregard waiver and to consider the merits of "[w]hether [the] pleadings can satisfy § 11(a) as properly construed." *Slack Techs., LLC*, 598 U.S. at 770, 143 S.Ct. 1433. Noting that Slack mentioned waiver in its Supreme Court briefing, he reasons that the Court, in remanding for us to decide whether the "pleadings can satisfy § 11(a)," must have implicitly rejected Slack's arguments about waiver. *Id.*

We are not persuaded that the Court's silence on waiver should be understood as an instruction to disregard that issue. The Supreme Court has repeatedly described itself as "a court of review, not of first view." *Moody v. NetChoice, LLC*, 603 U.S. 707, 726, 144 S.Ct. 2383, 219 L.Ed.2d 1075 (2024) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005)). In keeping with that description, it does not ordinarily address issues that were not resolved by the lower courts, including waiver and forfeiture. *See, e.g., Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 685–86, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015). In our prior decision, we did not consider "§ 11(a) as properly construed" (because we adopted a different construction of it), nor did we consider whether Pirani had waived traceability (because our construction of the statute made that question irrelevant). *Slack Techs., LLC*, 598 U.S. at 770, 143 S.Ct. 1433. The Court's remand thus left both of those issues open. Because we "may consider and decide any matters left open by the mandate," we remain free to consider whether Pirani should be bound by his concessions. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 16 S.Ct. 291, 40 L.Ed. 414

(1895); *see United States v. Levy*, 416 F.3d 1273, 1280 (11th Cir. 2005) (noting that a Supreme Court remand does not prevent a court of appeals "from applying its prudential rules in a uniform and consistent manner").

Second, Pirani argues that his concessions are narrow enough that he can prevail even if he remains bound by them. Specifically, he argues that he can establish traceability through a statistical analysis. He asserts that the question is not whether he is able "to *prove* the registration status of *particular* shares," but rather "whether [he] can plausibly *allege* that he purchased at least *some* registered shares." He maintains that he can show traceability not by actually tracing the shares he purchased to those issued under the registration statement, but simply by relying on the statistical inference that given the number of shares he purchased and the fraction of shares on the exchange that were registered (about 42 percent), "the likelihood that none of the 30,000 shares was registered is infinitesimally small." Alternatively, he says, we should create a regime of burden-shifting under which Slack would have the burden to prove that Pirani's shares were *not* registered.

Pirani's statistical theory, like an allegation of direct traceability, is barred by Pirani's concessions. As the district court accurately summarized Pirani's position, "plaintiff did not and cannot allege that he purchased shares registered under and traceable to Slack's Registration Statement." Pirani's express acknowledgment that he cannot allege traceability means just that: He cannot allege traceability. That is equally true whether he attempts to do so directly or through statistical inference.

In any event, Pirani's statistical theory is both factually and legally flawed. As a factual matter, the theory rests on the unsupported assumption that Pirani's purchase of 30,000 shares involved 30,000 separate, statistically independent transactions—in which case the probability that all of the shares were unregistered would indeed be as infinitesimal as Pirani suggests. But if the purchase instead involved a single transaction with a single seller, it is entirely possible that all of the shares were unregistered. Pirani has alleged nothing that would support the former assumption.

As a legal matter, the theory of statistical tracing is contrary to our precedent. In *In re Century Aluminum Co. Securities Litigation*, the defendant conducted a secondary offering in which it sold 24.5 million shares under a new registration statement, while 49 million previously issued shares were already trading on the exchange. 729 F.3d 1104, 1106 (9th Cir. 2013). We said that plaintiffs seeking to bring section 11 claims based on the new registration statement could establish traceability only "in one of two ways": They "could prove that they purchased their shares directly in the secondary offering itself," or they "could prove that their shares, although purchased in the aftermarket, can be traced back to the secondary offering," which "would require plaintiffs to trace the chain of title for their shares back to the secondary offering." *Id.* The plaintiffs could have made the same kind of statistical argument that Pirani is making here—namely, that one third of the shares trading on the exchange had been issued under the new registration statement, so any purchaser of a large number of shares would have had a very high probability of purchasing at least some registered shares (again, assuming the statistical independence of the purchases). But we implicitly rejected that theory by holding that plaintiffs who purchased shares on the exchange must "trace the chain of title for their shares back to the secondary offering." *Id.* Given that precedent, we agree with the Fifth Circuit, which has likewise rejected the concept of "statistical tracing" in the context of a section 11 claim. *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 496–97 (5th Cir. 2005).

We decline to adopt Pirani's burden-shifting theory because "[a]bsent some reason to believe that Congress intended otherwise, ... we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer v. Weast*, 546 U.S. 49, 57–58, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005); *see Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92–93, 128 S.Ct. 2395, 171 L.Ed.2d 283 (2008). As the Supreme Court has now made clear, traceability is an element of a section 11 claim. Nothing in the statute or in the Court's decision suggests that traceability should be an exception to the general rule that the plaintiff bears the burden of establishing every element of the claim.

Finally, Pirani argues that we should excuse his waiver. Assuming that we have discretion to relieve him of his waiver, we see no reason to do so here. To the contrary, excusing the waiver would unfairly prejudice Slack. As a result of the way Pirani chose to present his claim, Slack was forced to spend years—in the district court, this court, and the Supreme Court—litigating a statutory issue that was relevant only because of Pirani's concession that he could not establish traceability. We see no reason that Pirani should be allowed to start over with a new theory, making that expenditure of party (and judicial) resources pointless. It is far too late for Pirani to say he was only kidding.

Because Pirani expressly waived any allegation that any of the shares he purchased are directly traceable to the allegedly false and misleading registration statement, he has not stated a claim under section 11. And in light of his concessions, amendment of the complaint would be futile. *See In re Cloudera, Inc.*, 121 F.4th at 1189–90.

III.

We now turn to whether Pirani stated a claim under section 12(a)(2). At the outset, we acknowledge the Supreme Court's caution that sections 11 and 12(a)(2) "contain distinct language that warrants careful consideration," and that they do not "necessarily travel together." *See Slack Techs., LLC*, 598 U.S. at 770 n.3, 143 S.Ct. 1433. Nevertheless, we conclude that section 12(a)(2) also requires tracing a plaintiff's shares to an allegedly false or misleading prospectus.

We begin with the statutory text. *Rajaram v. Meta Platforms, Inc.*, 105 F.4th 1179, 1181 (9th Cir. 2024). Section 12(a)(2) states that "[a]ny 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 ... not misleading ... shall be liable ... to the person purchasing such security." 15 U.S.C. § 77*l*(a)(2). Like section 11, section 12(a)(2) uses the phrase "such security." In section 11, that phrase is ambiguous because "there is no clear referent ... telling us what 'such security' means." *Slack Techs. LLC*, 598 U.S. at 766, 143 S.Ct. 1433. But in section 12(a)(2), there is a clear referent: The phrase "such security" refers back to the "security" that was offered or sold "by means of a prospectus or oral communication." Thus, a plaintiff can establish a section 12(a)(2) claim only by showing that the purchased shares were offered or sold by such means.

The Supreme Court's decision in *Gustafson v. Alloyd Co.* explains the meaning of "by means of a prospectus," and it resolves the interpretive question presented here. 513 U.S. 561, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). There, the Court held 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." *Id.* at 584, 115 S.Ct. 1061. The Court rejected the argument that sections 11 or 12(a)(2) could give rise to "liabilities that are quite independent of the new substantive obligations the Act imposes," or, in other words, in circumstances in which the Act does not require a registration statement or prospectus. *Id.* at 572, 115 S.Ct. 1061. Instead, the Court explained that the liability created by section 12(a)(2) is "linked to the new duties created by the Act," and in particular the duty to distribute a prospectus for registered shares. *Id.* Thus, the Court concluded that "the liability imposed by [section 12(a)(2)] cannot attach unless there is an obligation to distribute the prospectus in the first place."*Id.* at 571, 115 S.Ct. 1061.

Under *Gustafson*, a security can be sold "by means of a prospectus" only if it is a registered security sold in a public offering, and liability under section 12(a)(2) can be based only on the sale of such a security. Thus, it follows that section 12(a)(2) imposes the same traceability requirement as section 11.

Pirani emphasizes that the text of section 12(a)(2) differs from that of section 11 in that it covers sales of securities by means of a prospectus "or oral communication," a phrase that he reads to extend coverage beyond the registration context. Setting aside the fact that this case does not involve any oral communications, the Court answered that argument in *Gustafson* when it recognized that "the phrase 'oral communication' is restricted to oral communications that relate to a prospectus." 513 U.S. at 567–68, 115 S.Ct. 1061.

Similarly unhelpful is Pirani's observation that section 12(a)(2) expressly covers sales of securities that are exempt from the registration requirement under section 3, 15 U.S.C. § 77c. Section 3 exempts from coverage various classes of securities not at issue here, including insurance policies, securities issued by charitable organizations, and securities issued by savings and loan associations. *See id.* § 77c(a)(4), (5), (8). Because section 12(a)(2) applies notwithstanding that exemption, Pirani infers that Congress must also have intended to cover sales of securities that are exempt from the registration requirement under section 4, namely, "transactions by an issuer not involving any public offering," *id.* § 77d, such as the shares of Slack that were issued before the direct listing took place. Here, too, *Gustafson* provides the answer: The Court addressed precisely this point and explained that Congress's decision to refer to section 3, but not section 4, "cuts against, not in favor of," reading section 12(a)(2) to apply to section 4 transactions. 513 U.S. at 573, 115 S.Ct. 1061.

Finally, Pirani argues that "anyone looking to value any of the shares"—whether registered or unregistered—"would have looked to the prospectus," so the prospectus must have been "a means for soliciting sale of those securities." The Second Circuit rejected a similar argument in *Yung v. Lee*, 432 F.3d 142 (2d Cir. 2005). There, a company had prepared a registration statement and prospectus for a public offering of securities, but the plaintiffs acquired their securities in a private offering that was exempt from the registration requirement. *See id.* at 144–45. The plaintiffs argued that the company's marketing of the securities had "relied heavily" on the prospectus, so the sale had been "by means of" the prospectus. *Id.* at 149. The Second Circuit rejected that argument, reasoning that the company had no obligation to distribute a prospectus in connection with a private offering, and "without such an obligation, a securities transaction cannot reasonably be deemed to have occurred 'by means of a prospectus.' " *Id.* We agree.

Pirani's concessions as to traceability apply to his section 12(a)(2) claim just as they do to his section 11 claim, so we similarly conclude that he has not stated a claim under section 12(a)(2).

* * *

Because Pirani has not stated a claim under either section 11 or 12(a)(2), he cannot state a derivative claim under section 15. *See* 15 U.S.C. § 77***o***(a); *see also In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 886 (9th Cir. 2012). Accordingly, we reverse the district court's partial denial of the motion to dismiss and remand with instructions to dismiss the complaint in full and with prejudice.

REVERSED and REMANDED.

APPENDIX B

<u>FOR PUBLICATION</u>

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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 II LTD.; SOCIAL+CAPITAL PARTNERSHIP GP III L.P.; 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
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D.C. No.
3:19-cv-05857-
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OPINION
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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 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

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

under §§ 11 and 15, and under § 12(a)(1) to the extent it paralleled § 11.

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

[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).

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 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.

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

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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.

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 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

[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).

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, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996) (holding "the appellate court may 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

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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.

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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). A complaint must "state a claim to relief that is plausible on its face[.]" *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (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 misleading, 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, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005). Thus, we do not adopt, as the district court did, the broad meaning of Section 11 that Judge Friendly rejected in *Barnes v. Osofsky*, 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] All of

[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

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 102.01B, Footnote E*. The connection between the purchase of the security and the registration statement is clear.

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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.

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

[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.

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 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

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[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, 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.

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.

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 suchsecurity 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, 108 S.Ct. 2063, 100 L.Ed.2d 658 (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 Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 584, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995); *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, 116 S.Ct. 619 (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]

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.**

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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)." *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, 127 S.Ct. 2499, 168 L.Ed.2d 179 (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.*, ––– U.S. ––––, 137 S. Ct. 2042, 198 L.Ed.2d 584 (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, 125 S.Ct. 716, 160 L.Ed.2d 734 (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, 103 S.Ct. 683, 74 L.Ed.2d 548 (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, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Instead, "[t]he place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock v. Clayton Cnty.*, ––– U.S. ––––, 140 S. Ct. 1731, 1753, 207 L.Ed.2d 218 (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, 115 S.Ct. 1061, 131 L.Ed.2d 1 (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*, ––– U.S. ––––, 141 S. Ct. 1474, 1486, 209 L.Ed.2d 433 (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 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 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

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

"Offering Materials") with the 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 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

[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 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 988, 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. § 77*d*(a)(1).

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 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).

If plaintiff wishes to amend the complaint, he shall do so by **May 6, 2020.**

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, 127 S.Ct. 1955, 167 L.Ed.2d 929 (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, 129 S.Ct. 1937, 173 L.Ed.2d 868 (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, 127 S.Ct. 1955. "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, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955). "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. § 77*k*.

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 history[6]; dicta from within the Second

[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.*

[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

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 that the purchased shares were issued under the allegedly false or misleading one, "rather than some other

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.

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 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

[8] 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.

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

[9] The proposal's previously withdrawn Amendment No. 2 envisioned no Section 11 liability whatsoever; the proposed rule

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 take place" and that cases analyzing the tracing

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"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.

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, 88 S.Ct. 548, 19 L.Ed.2d 564 (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, 88 S.Ct. 548); *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, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988) (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151, 92 S.Ct. 1456, 31 L.Ed.2d 741 (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. § 77*k*. 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. §§ 77*k*-77*l*, 77*o*, 77*e*-77*g*. 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

[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. § 77*d*(a)(1). Section 2(a)(11) defines an underwriter as "any person who has purchased from the issuer

cases above, transactions subject to the registration requirements and those that are exempt from such requirements occur at different time periods. *See, e.g.*, *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, 108 S.Ct. 1666, 100 L.Ed.2d 96 (1988) (Marshall, J.) (plurality opinion) (rejecting an interpretation that

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with a view to ... distribution." *Id.* § 77*b*(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.

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. § 77*k*(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

[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.

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 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 (C.D. Cal. 2008) (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382, 103 S.Ct. 683, 74 L.Ed.2d 548 (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, 108 S.Ct. 2063, 100 L.Ed.2d 658 (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, 108 S.Ct. 2063. "[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, 108 S.Ct. 2063. 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 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.

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[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.

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. §§ 77*k*(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 Systems, Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005) (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

[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."

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 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

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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.*

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 Apart"[16] or even a more specific and factual description

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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

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 77*k* [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]

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

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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.

[18] "[T]he controlling person analysis is the same" for Section 15 claims under the Securities Act, as for Section 20(a) claims under

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.

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

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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).

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 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

[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.

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