



Ruling on Issue of First Impression, Ninth Circuit Issues Decision on Statutory Standing in Direct Listing Cases

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On September 20, 2021, in the first case by a U.S. Court of Appeals to have considered the issue, the Ninth Circuit U.S. Court of Appeals held that a shareholder plaintiff had statutory standing to pursue claims under Sections 11 and 12(a)(2) of the Securities Act of 1933 stemming from a direct listing even though he could not prove that he purchased shares that were subject to the issuer's registration statement and offering prospectus. See *Pirani v. Slack Techs., Inc.*, No. 20-16419, 2021 WL 4258835 (9th Cir. Sept. 20, 2021).

In 2018, the Securities and Exchange Commission (SEC) approved a New York Stock Exchange (NYSE) rule change that allowed companies to publicly list their shares without undertaking an initial public offering that relied on a firm commitment of underwriting. In such a "direct listing," the issuer does not issue any new shares, and files a registration statement solely to allow existing shareholders to sell their shares on the NYSE. However, the registration statement covers only shares that are not exempt from registration under SEC Rule 144. Thus, a direct listing results in both registered and unregistered shares being traded on the NYSE.

In 2019, Slack Technologies, Inc. (Slack) filed a registration statement to initiate a direct listing. Fiyyaz Pirani allegedly purchased Slack shares during that listing, and later brought claims against Slack under Sections 11 and 12(a)(2) of the Securities Act alleging that Slack's registration statement and offering prospectus contained false or misleading statements. However, Mr. Pirani did not allege and could not show that the shares he purchased were registered shares covered by Slack's registration statement and prospectus, as opposed to unregistered shares. Slack therefore moved to dismiss his claims, arguing that because he could not prove that he purchased shares pursuant to the Slack SEC filings that allegedly contained false or misleading statements, he lacked standing to bring claims under Sections 11 and 12(a)(2). The district court denied Slack's motion to dismiss, and the Ninth Circuit granted Slack's request to file an interlocutory appeal.

In a 2-1 decision, the Ninth Circuit affirmed. The court held that because no shares in Slack's direct listing — whether registered or unregistered — could be traded until Slack filed its registration statement and prospectus, all shares were sufficiently traceable to Slack's offering documents to satisfy the standing requirements under Section 11 and Section 12(a)(2). The panel majority expressed concern that if it were to agree with Slack, shareholders may have no recourse if a company includes false and misleading statements in offering documents associated with a direct listing.

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Judge Eric D. Miller dissented. He argued that Sections 11 and 12(a)(2) have long been understood, in the Ninth Circuit and elsewhere, as granting standing only to shareholders who could prove that they purchased shares pursuant to the specific registration statement and offering prospectus containing alleged misstatements. Because Mr. Pirani could not prove that he purchased shares traceable to Slack's offering documents, Judge Miller would have reversed the decision and directed the district court to dismiss the case. Judge Miller argued that the majority's contrary decision was attributable more to policy concerns than to the Securities Act's text and interpreting case law.

Pirani is significant as the first appellate case to hold that a shareholder has standing to bring Section 11 and 12(a)(2) claims in the direct listing context. However, the disagreement between Judge Miller and the panel majority may foreshadow that *Pirani* might not be the last word on this issue. An *en banc* Ninth Circuit panel or other circuit courts may agree with Judge Miller's reasoning and hold that Sections 11 and 12(a)(2) do not authorize shareholders to bring suit if they cannot prove that they purchased their shares pursuant to the offering documents at issue. Ultimately, the Supreme Court may be needed to finally decide the issue.