

Direct Listing Dilemma for Pension Funds: Understanding the Impact of Slack Technologies v. Pirani on Liability under Section 11

By Robert Finkel & Karine Malina



Summary

Pension funds that have invested in direct non-registered initial offerings should understand that when initial offering shares are not issued pursuant to a registration statement, investors lack the same legal protections for shares that were purchased pursuant or traceable to a registration statement. Consequently, the recent Supreme Court decision in Slack Technologies v. Pirani poses a challenge in pleading and proving claims under Section 11 of the Securities Act for shares acquired through non-registered direct listings.

On June 1, 2023, the United States Supreme Court issued a unanimous decision in Slack Technologies v. Pirani.¹ Slack held that Section 11 of the Securities Act of 1933 requires all plaintiffs asserting a claim under the statute to plead and prove the shares they purchased through a direct listing are traceable to an allegedly defective registration statement.² However, in a direct listing, unregistered shares are sold into the market, and even if accompanying registered shares are sold at the same time, it is challenging to trace whether the shares purchased by a particular plaintiff are subject to the registration statement, unless those shares were purchased directly from an underwriter.

¹ Slack Techs., LLC v. Pirani, No. 22-200, 2023 U.S. LEXIS 2301 (U.S. June 1, 2023).

² Id. at 18.

In 2019, Slack went public on the New York Stock Exchange through a hybrid direct offering, rather than a traditional IPO.³ 118 million of the total shares offered by Slack were registered pursuant to a Registration Statement and 165 million shares were unregistered.⁴ The Plaintiff Fiyaz Pirani purchased shares on the NYSE the day the company went public.⁵ After the price dropped, he filed a class action lawsuit under Sections 11 and 12 of the 1933 Securities Act alleging that the registration statement filed was “materially misleading.”⁶

The Supreme Court vacated the Ninth Circuit’s decision denying the Defendant’s motion to dismiss and remanded the case for the court to decide whether the pleadings satisfy Section 11 in light of the Supreme Court’s construction of the statute.⁷ The Court’s analysis focused on the ambiguous language in Section 11(a) which “authorizes an individual to sue for a material misstatement or omission in the registration statement when [they] acquire[] ‘such security.’”⁸ The issue for the Court was to decipher the meaning of “such security” and whether Congress intended liability under the statute to extend to unregistered shares acquired in a direct listing.⁹ Through various “contextual clues,” the Court concluded that “such security” refers to a “security registered under the particular registration statement that allegedly contains a falsehood or misleading omission.”¹⁰

As a result of the Slack decision, it will be difficult for plaintiffs to prove a Section 11 claim for shares purchased on the open market as a consequence of a direct listing. In the future, companies may prefer direct listings over IPOs due to the advantage of avoiding strict liability under Section 11. Correspondingly, pension funds in direct offerings should understand that they may not be able to hold the issuers of the IPO shares to the same standard of liability as in a traditional offering. However, direct listing claims for misleading registration statements can still be brought under Section 10(b), though proof of scienter and loss causation must be shown and plaintiffs must meet a higher pleading standard of pleading fraud with specificity. In a footnote, the Court discussed Section 12 of the 1933 Act, which allows an individual to sue for a security acquired based on false or misleading statements communicated by the company orally or in a prospectus.¹¹ The Court chose not to rule on the proper interpretation of Section 12(a), but recommended the Ninth Circuit vacate its judgment and reconsider its holding sustaining the complaint under Section 12(a) based on the Supreme Court’s Section 11 holding.¹²

3 Id. at 1.
4 Id.
5 Id. at 2.
6 Id.
7 Id. at 18.

8 Id. at 12.
9 Id.
10 Id. at 4.
11 Id. at 18-19.
12 Id.



Robert C. Finkel
SENIOR PARTNER

About the Author

Robert C. Finkel is a senior partner and member of the executive committee at Wolf Popper LLP.

Robert is a graduate of the Columbia Law School, Class of 1981 (where he was a Harlan Fiske Stone Scholar), and the University of Pennsylvania, Class of 1978, where he obtained a B.S. in accounting from the Wharton School of Business and a B.A. in history from the College of Arts and Sciences. Robert began his employment in the 1980s with two large New York City defense firms. Robert became a partner at Wolf Popper LLP effective January 1, 1992. He has been repeatedly designated a Super Lawyer® in Securities Litigation.

Robert has written for The New York Law Journal on subjects including shareholder voting rights and ERISA class actions.

About Wolf Popper LLP



Wolf Popper is a leading complex litigation law firm that represents clients in high stakes individual and class action litigations in state and federal courts throughout the United States. The firm specializes in securities fraud, mergers and acquisitions, consumer fraud litigation, healthcare litigation, ERISA, and commercial litigation and arbitration. Wolf Popper was founded in 1945, and is headquartered in New York City. Wolf Popper also has offices in Houston, Texas; Chicago and Springfield, Illinois; Boston, Massachusetts; and San Juan, Puerto Rico.

Wolf Popper's attorneys are experienced litigators, many of whom have prior experience at AmLaw 100 firms or in government agencies. Wolf Popper's reputation and expertise has been repeatedly recognized by courts, which have appointed Wolf Popper and its attorneys as lead counsel in complex litigations throughout the country. Over the past seventy-five years, Wolf Popper has recovered billions of dollars for its clients.

Wolf Popper was one of the first laws firms in the United States to develop a class action securities litigation practice. The practice was founded in 1958, and grew out of the Firm's historical commitment to protecting the rights of individuals. Wolf Popper's long-established role in the securities bar provides its clients with an understanding and insight into federal securities and state fiduciary duty laws that could only be obtained through years of practice in the fields.

Wolf Popper provides a range of services which are designed to aid shareholders seeking to recover damages related to fraud and other corporate misconduct, as well as shareholders who seek to advocate for improved corporate governance.

Wolf Popper routinely represents damaged and defrauded institutional and other large investors in class action and individual securities litigations. Wolf Popper is regularly appointed lead or co-lead counsel in complex securities litigations. Wolf Popper is very selective in the cases it litigates. The Firm's careful factual and legal research and selective prosecution has resulted in a significant percentage of the securities litigations in which the Firm is involved being sustained over, or being settled prior to a decision on, a motion to dismiss. Wolf Popper regularly litigates cases alleging materially false and misleading statements in violation of the federal securities laws, as well situations involving as other corporate misconduct, such as (i) excessive compensation being paid to a company's management; (ii) self-dealing transactions between a company and its management or

directors; or (iii) where a majority/controlling shareholder seeks to cash out the public, minority shareholders at a grossly unfair price or in a manner that compromises the process necessary to ensure that the public shareholders are treated fairly.

Wolf Popper's portfolio monitoring service aims to educate the Firm institutional investor clients about securities litigation and corporate misconduct issues that impact their investment portfolios. The Firm provides monthly and case specific reports related to current litigations and disclosures of potential fraud or other corporate misconduct. Wolf Popper also provides clients with monthly reports of recently reached class action settlements to help clients identify settlements in which they might be entitled to participate.

Wolf Popper serves as a trusted advisor to institutional shareholders, and strives to help board members, directors, administrators, and other fiduciaries meet their duties and responsibilities to protect fund assets and mitigate the risks and liabilities. Wolf Popper represents a number of state, county, and municipal pension funds as well as Taft-Hartley plans and other sophisticated institutional investors. Wolf Popper's portfolio monitoring services are provided to institutional investors at absolutely No Out-of-Pocket Cost and Risk Free. Wolf Popper provides litigation services to institutional investors on a contingent fee and non-recourse basis.

Wolf Popper has a long history of representing international clientele. Wolf Popper's office in San Juan, Puerto Rico provides the firm with a gateway to the civil law system in Latin America and Europe; Wolf Popper has working relationships with firms throughout those jurisdictions. Latin American institutional investors worldwide can expect fully bilingual services in portfolio monitoring and securities litigation from diverse and experienced attorneys.

Wolf Popper's founders always recognized the value of a workforce comprised of talent across the demographic spectrum. The Firm has been committed to diversity and inclusion and gender equality since its inception and is proud to continue to embrace that tradition of inclusion to the benefit of the Firm and the clients we serve.

To learn more, please visit us at www.wolfpopper.com, or email us at outreach@wolfpopper.com.