

# On Remand From SCOTUS, Ninth Circuit Rejects Investor's Efforts to Save Section 11 Direct Listing Claim, Holds Section 12(a)(2) Likewise Requires Tracing

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On February 10, 2025, the US Court of Appeals for the Ninth Circuit issued the latest decision in *Pirani v. Slack Technologies*, a long-running case examining the tracing requirements under Sections 11 and 12 of the Securities Act of 1933. Following the US Supreme Court's [unanimous decision in June 2023](#) remanding the case back to the Ninth Circuit to determine whether the plaintiff adequately pled that his shares are traceable to an allegedly misleading registration statement, the Ninth Circuit reversed the district court's decision and [ordered it to dismiss the lawsuit with prejudice](#), given the plaintiff's concessions that he could not satisfy Section 11's tracing requirement.

The Ninth Circuit then answered another question left open by the Supreme Court – namely, whether Section 12(a)(2) of the Securities Act contains a similar tracing requirement. After considering the statutory text and Supreme Court precedent, the court held that Section 12(a)(2) “imposes the same traceability requirement” as Section 11 and likewise dismissed the plaintiff's Section 12 claim.

## Background

The lengthy procedural history of this case begins in September 2019, when the plaintiff sued Slack and its officers and directors under Sections 11, 12(a)(2) and 15 of the Securities Act, alleging that the company made misrepresentations in its registration statement and prospectus when it went public in 2019 through a direct listing. [As we explained in a December 2022 post on this case](#), direct listings differ from traditional initial public offerings (IPOs) in ways that make it functionally impossible to know whether a given share is traceable to a registration statement. In a traditional underwritten IPO, all shares issued are registered, while all unregistered shares are typically subject to a “lock-up” period; however, direct listings make both registered and unregistered shares immediately available for sale to the public.

Therefore, unlike an IPO, where only registered shares are sold – and thus all shares can be traced to the challenged offering materials, at least until the expiration of any applicable lock-up period – the intermingling of registered and unregistered shares in a direct listing prevents open-market buyers from knowing whether the shares they acquired are unregistered or registered.

Highlighting this unique problem to traceability inherent in all direct listings, the defendants moved to dismiss the complaint, claiming the plaintiff had not established that he purchased registered shares issued under the registration statement and prospectus. In response, the plaintiff conceded that he could not trace his shares to those issued under the offering materials, but argued that Section 11 permits a shareholder to sue “where the registration statement contains material misstatements and omissions,” given the tracing problems inherent to direct listings. The [district court agreed with the plaintiff, denying the motion to dismiss](#), because it found that the plaintiff “could show that the securities he purchased, even if unregistered, were ‘of the same nature’ as those issued pursuant to the registration statement.” On appeal, the [Ninth Circuit recognized the tracing problem posed by direct listings](#), but nonetheless held that all shares in a direct listing offering – “whether labeled as unregistered or registered” – could be traced to the registration statement “because they could only be sold to the public upon a registration statement” under Section 11.

Two years later, the Supreme Court disagreed, holding that plaintiffs asserting a claim under Section 11 must plead that the shares they purchased “were registered under a materially misleading registration statement.” [Section 11 provides](#) that if a registration statement contains a material misstatement or omission, “any person acquiring **such security** ... may ... sue .” Focusing on the definition of “such security,” the Supreme Court unanimously held that it referred solely to “a security registered under the particular registration statement alleged to contain a falsehood or misleading omission.” The [Supreme Court thus vacated the Ninth Circuit's decision](#) and remanded for the appellate court to consider “in the first instance” whether the plaintiff's pleadings satisfied Section 11 – i.e., whether he could demonstrate that he purchased shares registered under a registration statement. The Supreme Court also left open the question of whether Section 12(a)(2) contains a similar tracing requirement.

## The decision

On remand, the Ninth Circuit reversed the district court's denial of the defendants' motion to dismiss, concluding that the plaintiff could not make the necessary showing under either Section 11 or Section 12 (which the court held similarly required tracing).

### **The plaintiff's concessions 'waived any allegation of traceability' under Section 11.**

The court first zeroed in on the plaintiff's admitted inability to show that the securities he purchased were registered under a materially misleading registration statement. Namely, the Ninth Circuit highlighted the plaintiff's bare allegation that he purchased shares "pursuant and/or traceable to" the registration statement, and explained that the Supreme Court's opinion requires evaluating whether that "allegation was sufficient to make the conclusion of traceability a plausible one" under Rule 8 of the Federal Rules of Civil Procedure. The plaintiff's bare allegations were undermined by two "subsequent concessions" that effectively mooted the appellate court's review of the plausibility of this allegation:

1. The plaintiff's assertion in his opposition to the defendants' motion to dismiss that "'tracing' ... is a concept that no longer exist in today's market and is not possible."
2. The plaintiff's concession on appeal that "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."

Based on these concessions, the Ninth Circuit held that the plaintiff "expressly waived any allegation of traceability." In doing so, the Ninth Circuit also disregarded the plaintiff's argument that the Supreme Court "implicitly rejected Slack's arguments about waiver" by not addressing them, explaining that the Supreme Court's remand expressly left open the issue of whether the plaintiff waived traceability.

### **The court rejected any statistical inference to support tracing.**

The Ninth Circuit also rejected the plaintiff's arguments that:

1. Even if he were bound by his concessions on tracing, he could show traceability by the statistical inference that the likelihood that none of the shares he purchased were registered was "infinitesimally small."
2. The Ninth Circuit should impose a new rule that would place the burden on defendants to prove that a plaintiff's shares were **not** registered.

First, the Ninth Circuit joined the [US Court of Appeals for the Fifth Circuit](#) in rejecting the concept of "statistical tracing" in the context of Section 11 claims. The court found that the plaintiff's statistical inference failed because of the plausible inference that the shares he acquired could have "involved a single transaction with a single seller" wherein all the shares were unregistered and thus not traceable to the offering materials. The Ninth Circuit also held that the plaintiff's theory was legally faulty because "statistical tracing is contrary to our precedent," as the Ninth Circuit previously "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.'" Given this precedent, the Ninth Circuit approved of the Fifth Circuit's opinion in *Krim v. pcOrder.com, Inc.*, which conclusively held that statistical tracing "would impermissibly expand" Section 11's standing requirement, as any shareholder can make a similar claim that there is a statistical probability that their shares are traceable to the public offering in question.

Second, the court rejected the plaintiff's proposed burden-shifting regime, explaining that, "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."

### **The court held that Section 12(a)(2) contained a similar tracing requirement and rejected the plaintiff's claim on the same basis.**

Addressing the second question left open by the Supreme Court, the Ninth Circuit held that, like Section 11, Section 12(a)(2) requires "tracing a plaintiff's shares to an allegedly false or misleading prospectus." In so finding, the Ninth Circuit again focused on the definition of "such security," as Section 12(a)(2) provides that "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**.”

The court found that “the phrase ‘such security’ refers back to the ‘security’ that was offered or sold ‘by means of a prospectus or oral communication.” Thus, the Ninth Circuit held that “a plaintiff can establish a section 12(a)(2) claim only by showing that the purchased shares were offered or sold by such means.” To interpret the phrase “by means of a prospectus,” the court looked to the [Supreme Court’s decision in \*Gustafson v. Alloyd Co.\*](#), where the Supreme Court concluded that “the liability imposed by cannot attach unless there is an obligation to distribute the prospectus in the first place.” As such, the Ninth Circuit found that because a security can be sold “by means of a prospectus” only if it is a registered security sold in a public offering, “it follows that section 12(a)(2) imposes the same traceability requirement as section 11.”

## Takeaways

This Ninth Circuit’s decision raises the bar for plaintiffs attempting to plead Section 11 or Section 12(a)(2) claims for securities issued in direct listings, as plaintiffs must be able to trace the securities they purchased to materially misleading offering materials. Given the inherent difficulties with tracing in the context of direct listings, coupled with the Ninth Circuit’s rejection of statistical tracing, there is a seemingly high hurdle to overcome. However, issuers should remain cautious, as it is not clear whether and how the Ninth Circuit’s decision would have changed without the plaintiff’s concession on tracing.

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Quoting *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013).

*Krim v. pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005).

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