No. 20-16419

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FIYYAZ PIRANI,
Plaintiff-Respondent,

v.

SLACK TECHNOLOGIES, INC., ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California
Case No. 3:19-cv-05857-SI
The Honorable Susan Illston

BRIEF OF *AMICI CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL VENTURE CAPITAL ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amici curiae* Securities Industry and Financial Markets Association, Chamber of Commerce of the United States of America, and National Venture Capital Association makes the following disclosures:

1. The Securities Industry and Financial Markets Association ("SIFMA") does not have a parent company, and there is no publicly owned corporation that owns 10% or more of SIFMA's stock.

2. The Chamber of Commerce of the United States of America (the "Chamber") does not have a parent company, and there is no publicly owned corporation that owns 10% or more of the Chamber's stock.

3. The National Venture Capital Association ("NVCA") does not have a parent company, and there is no publicly owned corporation that owns 10% or more of NVCA's stock.

Dated: November 15, 2021

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Securities Industry and Financial Markets Association ("SIFMA") is a securities industry trade association that represents the interests of hundreds of securities firms, banks, and asset managers. SIFMA is also the United States regional member of the Global Financial Markets Association.

SIFMA's mission is to support a strong financial industry while promoting investor opportunity, capital formation, job creation, economic growth, and trust and confidence in the financial markets. To further that mission, SIFMA regularly files *amicus curiae* briefs in cases such as this one that raise issues of vital concern to securities industry participants. *See, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 2585 (2014); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005); *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130 (9th Cir. 2017), *cert. dismissed sub nom. by Quality Sys., Inc. v. City of Miami Fire Fighters' & Police Officers' Ret. Trust*, 139 S. Ct. 589 (2018). This case involves an important issue concerning standing in private securities actions under the Securities Act of 1933, which is directly relevant to SIFMA's mission of promoting fair and efficient markets and a strong financial services industry.

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[1] Under Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned counsel certifies that no party's counsel authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or their counsel contributed money to fund its preparation or submission.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. This appeal concerns interests central to the Chamber's mission, as many of the Chamber's members are public companies with exposure to private securities actions.

The National Venture Capital Association ("NVCA") is a nonprofit association of venture capital investors. NVCA supports the formation of high-growth companies and seeks to ensure the United States remains the most competitive environment in the world for entrepreneurs. Venture capitalists are committed to funding America's most cutting-edge entrepreneurs. Often, private venture capitalists invest in start-up companies with the hope that, if the start-up is successful, they will be able to take the company public and earn a return on their investment. As a result, NVCA is directly interested in ensuring uniformity and predictability in the application of the federal securities laws. In addition, NVCA's members would be directly and adversely affected if the Court were to uphold the

panel majority's decision because increased litigation of federal securities class actions has a potentially chilling effect on the willingness of the companies in which they invest to go public.

SUMMARY OF ARGUMENT

Amici join Defendants-Appellants in urging this Court to rehear this case en banc. Although the panel majority's legal errors are explained fully in Defendants-Appellants' petition for rehearing en banc, amici submit this brief to stress the real-world impact of the panel majority's decision, which departs from the long-standing tracing rule upon which capital markets have come to rely.

ARGUMENT

I. THE POLICY CONCERN THAT ANIMATES THE PANEL MAJORITY'S DECISION IS UNFOUNDED

The panel majority's decision casts aside decades of precedent interpreting "such security" as used in Section 11 of the Securities Act of 1933—*i.e.*, Section 11's tracing requirement—out of concern that adhering to the settled rule would result in an undesirable policy outcome: the potential unavailability of a cause of action under Section 11 against companies that "go public" through direct listings. The panel majority then speculates that this outcome could create "a loophole large enough to undermine the purpose" of Section 11 because companies will flock to direct listings over other ways to go public. Opn. at 17. But this policy concern is not based in sound logic or evidence.

A. The panel majority fails to recognize that companies choose offerings not to avoid Section 11 but based on their business needs

To justify its departure from decades of settled law requiring tracing, the panel majority warned that no company "would choose to go public through a traditional IPO if it could avoid any risk of Section 11 liability by choosing a direct listing." Opn. at 16. As an initial matter, the panel majority's supposition that companies can avoid Section 11 liability by choosing a direct listing may be incorrect because, as Defendants-Appellants note, plaintiffs in a parallel state case pending against Slack are attempting to prove tracing through discovery. *See* Petition for Rehearing at 22. But even accepting that direct listings could "avoid" Section 11 liability, the panel majority cited no support for its speculation that companies will flock to direct listings—which, as Defendants-Appellants explain, is problematic in itself. *See id.* at 17-18. But even more troubling is that market evidence shows that the panel majority's speculative conclusion is just wrong.

Though it has been known since their inception that direct listings may reduce exposure to Section 11 liability as compared to other forms of going public, market evidence shows that there has been no "flood" to direct listings. In fact, since the first direct listing (Spotify) in 2018, there have been only 10 more.[2] In comparison,

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[2] *See Deal Point Data*, Direct Listings, https://www.dealpointdata.com/rj?vb=Action.intras&app=ipo&id=q-549887726 (last visited Nov. 15, 2021).

market evidence shows there have been 919 traditional IPOs[3] and 278 public listings through mergers with special purpose acquisition companies (also known as "de-SPAC transactions") over the same time period.[4] All told, *less than one percent* of companies have gone public through a direct listing since Spotify's listing, even though market participants have known from the start that tracing shares in a direct listing is comparatively more difficult than it is for other "going public" methods.

In fact, there have always been—and continue to be, notwithstanding the panel majority's decision—a number of ways companies can "go public" that theoretically reduce exposure to Section 11 liability. De-SPAC transactions are a prime example: although the SPAC files a registration statement in order to sell shares and raise funds for the acquisition of a target company, the target company itself "goes public" through a reverse merger that does not require filing a registration statement (and thus avoids potential Section 11 liability). The upshot is that nearly 300 companies have gone public in this manner since Spotify's direct

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[3] *See* *Deal Point Data*, IPOs, https://www.dealpointdata.com/rj?vb=Action.intras&app=ipo&id=q665386804 (last visited Nov. 15, 2021).

[4] *See* *Deal Point Data*, de-SPAC, https://www.dealpointdata.com/rj?vb=Action.intras&app=ma&id=q-1254628961 (last visited Nov. 15, 2021).

listing and, out of 36 SPAC-related cases filed since 2019,[5] *only two* have attempted to assert a Section 11 claim (notably, neither court has yet weighed in on the sufficiency of the allegations).[6] Yet, as the many federal securities cases that have been filed concerning de-SPAC transactions in recent months confirms, investors remain protected by other provisions of the federal securities laws, including Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder.[7]

There are other securities offering structures that have the practical effect of reducing Section 11 liability. For example, a company could make an additional, small offering soon after its IPO, or it could issue sets of shares under duplicate registration statements. *See Scott v. ZST Digital Networks, Inc.*, 896 F. Supp. 2d 877, 887 (C.D. Cal. 2012) (requiring tracing in these offerings even though they render tracing nearly impossible, and even where the company had allegedly structured its offering in this manner to evade liability). Alternatively, issuers could

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[5] *See* Stanford Law School, Securities Class Action Clearinghouse, *Current Trends in Securities Class Action Filings: SPACs*, https://securities.stanford.edu/current-trends.html#collapse2 (last visited Nov. 8, 2021).

[6] *See Erlandson v. Triterras, Inc.*, No. 7:20-cv-10795-CS (S.D.N.Y. July 6, 2021) (proceedings stayed prior to responsive pleading from defendant); *Jedrzejczyk v. Skillz, Inc.*, No. 3:21-cv-03450-RS (N.D. Cal. May 7, 2021) (amended complaint filed on October 8, 2021; defendants' responsive pleading not yet served).

[7] *See Current Trends in Securities Class Action Filings: SPACs*, *supra* note 5.

just eliminate the traditional IPO lock-up period. These approaches all render tracing (and thus Section 11 standing) extremely difficult.

Or a company could choose a "going public" path that would not invoke Section 11 liability at all. Corporate spin-offs are one example, where a parent company distributes stock of the business to be spun off to its stockholders to form a stand-alone, independent publicly traded company.[8] Another example is "uplistings" from over-the-counter trading markets to national exchanges like NASDAQ or the New York Stock Exchange. A third example is a Level 2 ADR, where a company that is public outside the United States lists its shares on a U.S. stock exchange without raising new capital.[9] These methods of going public present no risk of Section 11 liability.

What the panel majority misunderstands is that these ways of "going public" are not freely interchangeable, but serve different purposes and carry distinct costs and benefits. Companies considering going public do not, as the panel majority speculates, choose a particular method of going public solely because of potential

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[8] *See* U.S. SECURITIES & EXCHANGE COMMISSION, Staff Legal Bulletin No. 4 at ¶ 4 (Sept. 16, 1997), https://www.sec.gov/interps/legal/slbcf4.txt (noting that the spin-off company does not have to register shares of the spin-off under the Securities Act if it meets certain conditions, including the parent company providing adequate information about the spin-off to its shareholders and the trading markets.).

[9] *See* U.S. SECURITIES & EXCHANGE COMMISSION, Investor Bulletin: American Depositary Receipts (Aug. 2012), https://www.sec.gov/investor/alerts/adr-bulletin.pdf (noting that the only form needed is Form F-6).

exposure (or lack thereof) to Section 11 liability. Instead, as the data above shows, companies typically choose the method that best suits their particular company profile and business needs.

The companies that have chosen to direct list their stock have generally done so because they: (i) did not need to raise capital by offering stock;[10] (ii) desired to provide immediate liquidity to existing shareholders, including employees and early investors;[11] and (iii) preferred the more efficient price discovery and transparency that direct listings offer.[12] These significant business and practical considerations—more than the potential for avoiding Section 11 liability—are what has motivated companies to choose direct listings instead of other forms of going public. *See, e.g.*, Alexander Panish, *Spotify's Angel Investors IP-Faux: Direct Listings and the Future of Initial Public Offerings*, Fordham J. Corp. Fin. L (2018) ("Direct listings will likely be attractive to [] tech companies who, because [of] copious amounts of venture capital, don't need to raise more cash, but do need liquidity for their

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[10] Although the NYSE has approved primary direct listings, whereby issuers can raise capital by issuing new shares (*see* Opn. at 7 n.1), no company has yet gone public in this manner.

[11] *See, e.g.*, Nasdaq, *Nasdaq Direct Listings Offer a Different Way to go Public with Unrestricted Liquidity and no Lock-Up Period* (last visited Nov 13, 2021), https://www.nasdaq.com/solutions/direct-listings (noting that direct listing "provides unrestricted liquidity to existing shareholders").

[12] *See* NYSE, *Choose Your Path to Public*, https://www.nyse.com/direct-listing (last visited Nov. 8, 2021) (emphasizing the "full and equal transparency" associated with a direct listing).

shareholders."); Matt Levine, *Direct Listings Are a Thing Now*, BLOOMBERG (Jan. 11, 2019) ("Other tech companies considering going public won't think 'should we do that weird thing that Spotify did' but rather 'what are the pros and cons of direct listings compared to initial public offerings?'"). Further, recent developments in Section 11 litigation—particularly, the trend of courts enforcing forum selection clauses requiring Section 11 claims to be filed in federal court instead of state court—has the potential to reduce litigation risks associated with IPOs. It is little more than guesswork to assert that companies would flock to direct listings solely to avoid Section 11 liability, and it would make little sense to choose an offering type based on Section 11 exposure.

B. Regardless of the merits of its policy rationale, the Court should leave policymaking changes to the elected branches

If there is a problem with Section 11 and how it has been interpreted for decades, it is the role of the elected branches, and not the courts, to devise a solution. Under our constitutional system, significant policy changes are to be made by the representatives of the people in Congress. *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress.").

And even if Congress does not act, there is strong evidence that forthcoming technological innovation may permit more exacting tracing of individual shares. Indeed, the Council of Institutional Investors ("CII") lobbied for this solution in

connection with NYSE's consideration of Primary Direct Floor Listings. *See* Petition of CII, File No. SR-NYSE-2019-67, at 12 (Sept. 8, 2020).

II. THE PANEL MAJORITY'S DECISION UNDERMINES THE CERTAINTY THAT CAPITAL MARKETS REQUIRE

For over fifty years, "tracing" has been consistently applied by the courts and left untouched by Congress. Because tracing serves to define the class of persons who may sue under Section 11, it has become a key metric that market participants rely upon to assess Section 11 liability risk associated with particular capital markets transactions. Market participants regularly rely on the rule to assess, for example, how the size of an IPO, the duration of the lock-up period following the IPO, and the conduct and timing of secondary offerings following an IPO, will impact potential Section 11 liability. And market participants' assessment of potential liability, in turn, contributes to the timing, size, and cost of a particular transaction—or whether to conduct the transaction at all. The panel majority's decision injects uncertainty into the capital markets, risking real harm to companies and investors alike. *See Adena Exploration, Inc. v. Sylvan*, 860 F.2d 1242, 1254 (5th Cir. 1988) (noting the importance of "the market certainty, reliability, and stability that [the Securities Act and Exchange Act] aim to establish").

First, the panel majority's decision creates a needless circuit split that will lead to forum shopping. If the panel majority's decision is left to stand, the scope of Section 11 liability for an issuer that is subject to personal jurisdiction in both Texas

and California would be up to the whims of prospective shareholder plaintiffs and their counsel, because the Fifth Circuit (like the Ninth Circuit before the panel majority's decision) strictly enforces strong pleading requirements for tracing. *See Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 497 (5th Cir. 2005) (departing from strict adherence to the tracing requirement "would contravene the language and intent of Section 11").[13]

Worse yet, the panel majority's decision opens the door to *all manner* of divergent approaches to tracing between circuits. Indeed, courts have already been asked to consider a number of different tracing methods. *See, e.g.*, *Puda Coal Securities Inc.*, 2013 WL 5493007, at *6 (considering whether statistical probability satisfies tracing); *Kirkwood v. Taylor*, 590 F. Supp. 1375, 1382 (D. Minn. 1984) (determining whether the "heritage method" of analyzing the lineage of stock

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[13] *See also The Hemmer Grp. v. Sw. Water Co.*, 663 F. App'x 496, 498 (9th Cir. 2016) (noting that "though difficult to meet in some circumstances, this tracing requirement is the condition Congress has imposed for granting access to the relaxed liability requirements [Section 11] affords"); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 977 (8th Cir. 2002) (upholding the "long-recognized requirement that the plaintiffs must directly trace his or her security to the allegedly defective registration statement at issue in the case"); *De Vito v. Liquid Holdings Grp., Inc.*, No. 15-6969, 2018 U.S. Dist. LEXIS 217963, at *44 (D.N.J. Dec. 31, 2018) (emphasizing that the "tracing requirement is a product of Congress' decision to balance the low-burden substantive proof by high-burden standing requirement, and courts should not abrogate the congressional intent by expanding the 'virtually absolute' liability to claims of purchasers whose securities cannot be traced"); *In re Puda Coal Securities Inc.*, No. 11-CV-2598, 2013 WL 5493007, at *7 (S.D.N.Y. Oct. 1, 2013) (concluding that "[t]he case law is uninterrupted and has long been clear: traceability is strictly construed for a Section 11 claim").

certificates satisfies tracing). If permitted to stand, the panel majority's decision could invite other courts to write their own tracing rules to achieve particular outcomes. Thus, what starts as a concern with forum shopping between the Ninth Circuit, on the one hand, and all other circuits that properly adhere to strict tracing requirements, on the other, could devolve into a muddled tracing landscape that provides the plaintiffs' bar with an *à la carte* selection of the forum that has the most suitable tracing framework for their latest lawsuit. Plaintiffs surely would jump at such an opportunity. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 820 (1985) ("If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible.").

Second, the panel majority's decision injects uncertainty at a time when the market is already in the process of adjusting to the recent tidal wave of Section 11 cases flooding the courts. The Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061 (2018), permitted Securities Act claims to be litigated in either state or federal court. Not only are issuers and underwriters forced to account for these duplicative actions (which carries its own concerns about a lack of uniformity in judicial decision-making and inefficiencies in litigation), the panel majority's decision adds an untenable layer of unpredictability. Indeed, as noted below in Section III, not only is there a parallel case proceeding against Slack in California state court, that court held that tracing

was required under California law (relying on *Jensen v. iShares Trust*, 44 Cal. App. 5th 618 (Cal. Ct. App. 2020))—but overruled defendants' demurrer because plaintiffs' allegations involved factual questions about transactions in registered and unregistered shares that could not be resolved on the pleadings. The panel majority's breaking with settled law has thus resulted in two courts located just 25 miles apart reaching different conclusions about the same dispute involving the same parties—a confusing outcome that undermines the rule of law.

Third, the panel majority's new rule is inconsistent with SEC regulations that permit the sale of unregistered securities without the existence of a registration statement, threatening to make capital formation less efficient overall. SEC Rule 144 exempts the sale of securities, under certain conditions, from the Securities Act's registration requirements. 17 C.F.R. § 230.144. Prior to the panel majority's decision, it was well-settled that these Rule 144 sales would not give rise to Section 11 liability; and that the presence of unregistered shares in the market (via Rule 144 or otherwise) posed a high hurdle for plaintiffs to meet the tracing requirement even as to registered shares. The panel majority's disregard of carefully enacted SEC rules and regulations risks harming companies *and* investors, both of whom rely on the SEC's regulatory framework when engaging in securities transactions. Indeed, the SEC simplified Rule 144 in 2007, recognizing the rule's important role in facilitating efficient capital markets. *See* United States Securities and Exchange

Commission, Release No. 33-8869 at 20, 76 (noting that "Rule 144 is relied upon by many individuals to resell their restricted securities" and that the amendments to it "should increase efficiency and assist in capital formation"); *see also S.E.C. v. Big Apple Consulting USA, Inc.*, No. 6:09-cv-1963, 2011 WL 3753581, at *8 (M.D. Fla. Aug. 25, 2011) (emphasizing that the requirements of Rule 144 "provide significant safeguards for investors"). Blurring the line between Rule 144 sales and sales of registered securities—as the panel majority has done—injects significant uncertainty into the SEC's carefully considered regulatory framework regarding when unregistered sales may occur and the liability that might attach to those sales. Uncertainty creates risk, and additional risk will make capital more costly to obtain. This *hurts* the investing public by, among other things, stifling innovation that early stage capital so often supports.

Fourth, this new rule stifles critical market innovation and risks creating a ripple effect that chills the market's trust in the stability of future possible innovations. The direct listing is still a relatively new addition to the securities landscape. Indeed, as noted above, there have been only 11 direct listings in total. If the panel majority's new rule stands, the risk of stifling this innovative form of going public is palpable because it arguably subjects companies that direct list to greater liability than traditional IPOs where companies (unlike in direct listings) *choose* the offering price and *choose* the amount of shares to offer (allowing these

companies to gauge potential Section 11 liability *ex ante*). Beyond direct listings, the panel majority's insupportable approach to tracing could stave off other potential innovations. *See, e.g.*, Tom Zanki, *Slack's Direct Listing Ruling Could Have Far-Reaching Impact*, LAW360 (Oct. 22, 2021) (noting that the panel's decision "could have broad ramifications that reshape how long-standing securities laws apply to novel alternatives to initial public offerings as well as traditional IPOs"). To be sure, market innovations should not get a "free pass" on regulation; rather, the principles of market certainty and separation of powers requires the courts to apply *existing* regulations consistently, and this consistency must apply equally to settled market practices and market innovations alike. *See Adena*, 860 F.2d at 1254 (5th Cir. 1988) (noting the importance of "the market certainty, reliability, and stability that [the Securities Act and Exchange Act] aim to establish"). To accept the panel majority's total disregard for established precedent, however, eviscerates this fundamental need.

III. AT MOST TRACING IN DIRECT LISTINGS SHOULD BE AN ISSUE FOR DISCOVERY—NOT ONE RESOLVED ON THE PLEADINGS, AS THE DISTRICT COURT AND PANEL MAJORITY DID

While boilerplate allegations of traceability are insufficient to plead standing, a plaintiff need not "plead facts that prove their securities are traceable to the secondary offering, but [must] plead facts showing that their shares *can be traced*." *In re STEC Inc. Sec. Litig.*, 2011 WL 2669217, at *14 (C.D. Cal. 2011); *see also*

Scott, 896 F. Supp. 2d 877 (C.D. Cal. 2012). In this case, the only issue before the district court was whether the plaintiff had pleaded sufficient facts to allege standing. Therefore, neither the district court nor panel majority had any basis to craft a broader rule—yet, both failed to make clear that their decisions were limited to the Rule 8 inquiry of whether standing had been sufficiently alleged.

Future plaintiffs may erroneously rely upon the panel majority's new rule to claim that, within the context of a direct listing, the tracing requirement is automatically satisfied (or otherwise not required at all). Not so. The question before the district court (and thus before the panel majority on appeal) was whether plaintiff's bare allegation that he bought Slack shares "pursuant or traceable to" Slack's registration statement was sufficient to satisfy Rule 8. While Defendants-Appellants raised arguments as to why this *allegation* was not sufficient in the context of a direct listing, the issue of whether plaintiff could ultimately *prove* standing was not before the district court. Thus, the district court did not decide—indeed, could not have decided—whether plaintiff could actually prove standing to sue Slack based on his purchases of Slack shares after the direct listing. *See U.S. v. Yates*, No. 18-30183, 2021 U.S. App. LEXIS 30236, at *30 (9th Cir. Oct. 8, 2021) (noting that "[a]s a general rule, [courts] decide only the issues presented . . . by the parties"); *U.S. v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc) (emphasizing that courts "do not, or should

not, sally forth each day looking for wrongs to right"). Indeed, whether similarly situated shareholders possess standing to sue Slack is a live issue subject to ongoing discovery in a parallel case proceeding against Slack in state court based on the same facts, *In re Slack Technologies, Inc. Shareholder Litigation* (San Mateo Superior Court, No. 19CIV05370). The possibility that some courts could view the viability of such traceability claims as an issue of fact inappropriate for resolution on the pleadings is yet another reason why the panel majority's decision needlessly overreached. At a minimum, review should be granted so that the scope of the panel majority's decision can be clarified in order to avoid needless litigation when future plaintiffs inevitably (and improperly) attempt to expand the decision.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc.

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*I certify that all parties listed concur with the filing of this brief.

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32-1

I certify, pursuant to Ninth Circuit Rule 32-1(e) and Federal Rule of Appellate Procedure 32(g)(1), that the attached brief is an amicus brief and complies with the word limit of Fed R. App. P. 29(a)(5). The attached brief contains 4,126 words.

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