IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE NIKOLA CORPORATION DERIVATIVE LITIGATION	CONSOLIDATED C.A. No. 2022-0023-KSJM PUBLIC VERSION FILED: February 23, 2023

VERIFIED SECOND CONSOLIDATED AMENDED STOCKHOLDER CLASS ACTION AND DERIVATIVE COMPLAINT

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Plaintiffs Barbara Rhodes, Benjamin Rowe, Zachary BeHage, Michelle Brown, and Noah Ben Israel (collectively, "Plaintiffs") by and through their undersigned counsel, bring this action derivatively on behalf of Nominal Defendant Nikola Corporation[1] against certain of its current and former directors and officers (the "Individual Defendants") and as a class action against the former Board of Directors for VectoIQ for breaching their duty of loyalty to VectoIQ's stockholders. The allegations below are made upon personal knowledge as to Plaintiffs and their own acts, and upon information and belief as to all other matters, based upon a review of: (i) review of confidential books and records pursuant to 8 *Del. C. §* 220 ("Section 220"); (ii) information publicly disseminated by Nikola, including its public filings with the U.S. Securities and Exchange Commission ("SEC"); (iii) public filings and other documents related to VectoIQ; (iv) social media postings, news reports, press releases, analysts' reports and other publicly available documents; (v) review and analysis of public court filings, including a complaint filed by the SEC against Trevor R. Milton, *SEC v. Milton*, No. 1:21-cv-6445

[1] The company currently known as Nikola Corporation (stock ticker NKLA, and CIK 0001731289) was formed on June 3, 2020 through a merger (the "Merger") between VectoIQ Acquisition Corp. ("VectoIQ") and Nikola Motor Company, LLC ("Legacy Nikola") at which time VectoIQ changed its name to Nikola Corporation. Unless otherwise specified, the term "Nikola" or the "Company" as used herein refers to Legacy Nikola, VectoIQ, and Nikola Corporation. "VectoIQ" refers only to VectoIQ and its affiliates before the Merger.

(S.D.N.Y. July 29, 2021), public docket filings and the trial transcript from the criminal prosecution of Trevor R. Milton by the U.S. Department of Justice ("DOJ"), *United States v. Milton*, No. 21-cr-478 (S.D.N.Y.), and publicly filed pleadings in six federal securities class actions involving some of the same subject matter as this litigation, which are consolidated under *Borteanu v. Nikola Corp.*, No. CV-20-01797-PHX-SPL (D. Ariz.) (the "Consolidated Securities Class Action"); (v) an order instituting cease-and-desist proceedings pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934 against Nikola Corporation, dated December 21, 2021; and (vi) multiple admissions made by certain of the Individual Defendants.

I. INTRODUCTION

1. This is the tale of a criminal fraud perpetrated by Trevor Milton, previously the founder of zero-emissions vehicle startup company Nikola and now a convicted felon. It is also the tale of how Milton could not have effectuated his criminal scheme without the knowing assistance and aid of three disloyal, self-interested, and interconnected Boards of Directors: Nikola's Boards of Directors both before and after its June 2020 Merger with VectoIQ (the "Legacy Nikola Board" and the "Post-Merger Nikola Board," respectively), and VectoIQ's Board of Directors at the time of the Merger (the "VectoIQ Board Defendants").

2. Milton's fraud was both blatant and brazen and should have been obvious to anyone faithfully fulfilling their fiduciary duties to the Company and the Class. Using social media platforms, investor presentations, podcasts and SEC filings, Milton repeatedly overstated and misrepresented Nikola's business, technology and expected financial performance in a conscious effort to inflate the price of Nikola's stock. His lies went to the very core operations of the Company, including false claims that Nikola had engineered and manufactured fully functioning vehicles and had received a large number of orders for these in-fact non-existent and non-functioning vehicles. It would have been a simple task, and indeed, a task they were obligated to undertake, for the Individual Defendants to confirm the accuracy of these statements. Indeed, the members of any of the three relevant Boards needed to only confer with the non-Milton executives to learn the truth. An internal investigation by Kirkland & Ellis LLP ("Kirkland & Ellis") later found that senior officers of Nikola described certain of Milton's public statements as "indefensible" and "completely false," among other things.

3. The members of the Boards also should have known to question the veracity of Milton's statements given his incentives to lie. In November 2019, Nikola was privately held, in need of financing, and seeking to become a publicly traded entity, which would allow Milton and Nikola's insiders to monetize and potentially cash-out their illiquid Nikola stock. Milton's false statements drove

Nikola's pre-Merger valuation to approximately $3 billion dollars. After Nikola's merger with VectoIQ (the "Merger"), Nikola became a publicly traded company, and as a result of a continued barrage of false statements, the valuation rose to as high as $28.77 billion.

4. Only after the issuance of a short-seller report, the Hindenburg Report (defined below), was Milton's scheme and the Board's related misconduct exposed. In July 2021, Milton was indicted by the DOJ for securities fraud and wire fraud, with similar charges leveled by the SEC. In October 2022, a federal jury found Milton guilty on one count of criminal securities fraud and two counts of criminal wire fraud following a month-long trial in New York. The Company's stock price was destroyed with each new disclosure and now trades at only approximately $2.60 per share.

5. In short, Milton's actions were nothing more than an old-fashioned self-dealing "pump and dump" scheme designed to enrich Milton and Nikola's insiders. Milton's actions were allowed to flourish because the other Defendants had hundreds of millions of dollars at stake, starting with the directors, officers, and controllers of VectoIQ.

6. VectoIQ was a publicly traded Special Acquisition Corporation or "SPAC" formed in 2018. VectoIQ went public that same year pursuant to a Proxy Statement issued in connection with the stockholder vote on the Merger (the "Merger

Proxy"). This transaction raised $230 million by selling 23 million units at a price of $10 per unit.[2] Before the IPO, VectoIQ's Sponsor, VectoIQ Holdings, LLC,[3] and Cowen Investments (collectively the "Founders") purchased 5.75 million "Founder Shares" for $25,000, approximately $0.004 per share. The Sponsor purchased 4,301,000 founder shares and Cowen Investments purchased the remainder. The Sponsor transferred 15,000 Founder Shares to each of the VectoIQ directors.

7. Following a series of transactions, the Sponsor held approximately 4.6 million Founder Shares and VectoIQ's directors, officers, and Sponsor collectively owned approximately 4.7 million Founder Shares. The Sponsor and certain of the VectoIQ directors and officers also held 531,672 warrants. As of the time of the Merger Proxy, these Founders Shares and warrants had an aggregate market value of $69.7 million and $2.6 million, respectively.

8. The money raised from the IPO and warrant sale were placed in trust account for the benefit of VectoIQ's IPO investors. Like most SPACs, VectoIQ's fiduciaries had 24 months to close an initial business combination. If they were unable to close a transaction in such time, the Sponsor would need to wind down the Company and return the money held in the trust account. In addition, the over $70

[2] Each unit consisted of one share and one redeemable warrant to purchase a share of common stock at a price of $11.50 per share.

[3] The Merger Proxy defines VectoIQ's sponsor to mean VectoIQ Holdings, LLC.

million worth of Founder Shares and warrants would become worthless. If VectoIQ did enter into a business combination, ordinary stockholders would have the right to "redeem" their stock for their *pro rata* amount held in the trust account. Notably, the Founders and fiduciaries of VectoIQ waived any such right to seek redemption. Any amount left in the trust account after redemptions would then go to the post-transaction company.

9. By late 2019, *the VectoIQ Board was under duress to close a deal or forever lose the opportunity for a lucrative payday*. As a result, it turned a blind eye to Milton's fraudulent activities and, without proper due diligence, agreed to a merger through which Nikola would become a public company through VectoIQ—whose stockholders would then become stockholders in Nikola.

10. VectoIQ's Board willingly provided Nikola with a vehicle to go public and for Nikola's insiders to accumulate massive wealth, while at the same time generating enormous profits for VectoIQ's Founders and Sponsor. Even a cursory diligence review would have revealed that Legacy Nikola had nowhere near the backlog of vehicle orders, manufacturing capabilities, and developed truck models it or Milton claimed. The VectoIQ Board Defendants breached their fiduciary duty and aided and abetted Milton's criminal activities by, among other things, issuing a false and misleading Merger Proxy. These materially false and misleading statements deprived VectoIQ public stockholders' of their right to a fully informed

decision whether to redeem their VectoIQ shares. The false and misleading Merger Proxy also induced these stockholders to vote to approve the Merger to their and VectoIQ's detriment – but to the substantial benefit of the VectoIQ Board Defendants. The VectoIQ Board also failed to conduct proper due diligence before entering into the Merger with Legacy Nikola.

11. The lure of lucrative paydays also infected the activities of the Legacy Nikola D&O Defendants (defined below). These defendants either personally held substantial amounts of Nikola stock or were principals in entities that invested heavily in Nikola at its early stage. They too, stood to lose their investments if Nikola could not obtain new financing, but also would profit handsomely from the hype generated by Milton if and when Nikola stock became publicly traded through a reverse merger with VectoIQ. Thus, each member of the Legacy Nikola board (and Nikola's principal officers) had strong motivation to allow Milton's scheme to continue while they or their respective firms profited handsomely.

12. Despite having been on notice of Milton's fraudulent practices prior to the Merger, the Post-Merger Nikola Board, which included all the Legacy Nikola Board members, breached their fiduciary duties by: (i) allowing Milton and Nikola to engage in illegal conduct; (ii) aiding and abetting Milton's materially false and misleading statements and omissions to stockholders; (iii) failing to implement and monitor a system of Board-level policies, procedures, and controls to ensure

Milton's public statements regarding Nikola were truthful; and (iv) repeatedly ignoring signs of his illegal conduct and failing to take necessary remedial and corrective action. Indeed, in 2021, Milton was indicted by the DOJ and charged civilly by the SEC, which ultimately found that "Nikola did not design, implement, or maintain adequate disclosure controls or procedures" over Milton's public statements and SEC disclosure requirements.[4]

13. Defendants' failure to control Milton resulted in enormous wealth for him and Nikola's insiders and Board members. One Legacy Nikola Board and Post-Merger Nikola Board member, Ubben, *unloaded $59.77 million of his fund's shares barely two months after the Merger while in possession of material, non-public information* and in violation of his lock-up agreement. Other Nikola officers and directors or the investors they represented on Legacy Nikola's Board received material financial benefits from the Merger through the conversion of millions of dollars of illiquid Nikola stock to inflated publicly traded shares and, in many cases, by disposing of Nikola stock held by them or their affiliated companies. In addition, numerous insiders acquired millions of Restricted Stock Units ("RSUs") as Milton's post-Merger misrepresentations drove Nikola's stock price higher and triggered those RSU awards. As Milton himself confirmed in a July 7, 2020, email exchange

[4] *Nikola Corporation*, SEC Administrative Proceeding File No. 3-20687 ¶ 19 (Dec. 21, 2021) ("SEC C&D Order").

with one of Nikola's directors regarding a release from his lock-up agreement, *the stock had gained "over 400%" and he made "everyone else millionaires and billionaires."*

14. Even with Milton's fraud exposed, the Nikola Board still could not be roused to act in Nikola's best interests. *The Board permitted Milton to resign with virtually no financial consequences while under criminal investigation* by the DOJ and investigation by the SEC, the Company, and others. Milton has *since sold off over $450 million of his personal holdings of Nikola stock with no repercussions*—yet the Company is expected to pay $125 million to settle an investigation with the SEC related to Milton's fraudulent scheme.

15. Defendants' breaches of fiduciary duties have caused enormous harm to Nikola including the payment of $125 million payment to the SEC. The harm to Nikola's reputation and loss of goodwill is substantial. Defendants have been unjustly enriched at the expense of Nikola and its stockholders through Milton's criminal scheme, which they knowingly facilitated and approved, and from which they benefited.

16. By intentionally and recklessly permitting Milton to engage in his fraudulent scheme to complete the Merger and take Nikola public, Defendants acted disloyally and in bad faith by placing their own financial interests over those of the Company and its stockholders. Defendants, as confirmed by the SEC, also breached

their fiduciary duties by failing to implement and monitor an appropriate system of Board-level internal controls and procedures to ensure Milton's and Nikola's public statements complied with all applicable laws despite the fact they knew Milton was disseminating materially false and misleading information regarding Nikola's business. Accordingly, Plaintiffs seek to recover for Nikola damages it suffered resulting from the Defendants' breaches of fiduciary duties.

17. Plaintiffs did not bring a pre-suit demand upon the Nikola Board because doing so was, and is, a useless and futile act.

18. Moreover, the actions of the VectoIQ Board and Controller Defendants (defined below) in connection with the Merger give rise to direct claims for breach of fiduciary duty and unjust enrichment on behalf of VectoIQ's public stockholders and is subject to entire fairness review. The entire fairness standard applies because of inherent conflicts between the VectoIQ Board Defendants and public stockholders in the context of a value-decreasing transaction, where VectoIQ's stockholders were robbed of their right to make a fully informed decision about whether to redeem their shares based on the materially false and misleading Merger Proxy. In breach of their fiduciary duties, the VectoIQ Board Defendants did not provide full and complete information to VectoIQ's public stockholders to allow them to exercise their right to redeem on a fully informed basis.

II. PARTIES

A. Plaintiffs

1. Plaintiff—Benjamin Rowe

19. Plaintiff Benjamin Rowe ("Rowe") is a current Nikola stockholder. Rowe purchased shares of VectoIQ on April 23, 2020, and has continuously held those shares since that date. After the Merger closed, Rowe's shares of VectoIQ became shares of Nikola when the Company was renamed. Accordingly, Rowe has continuously held shares in Nikola since April 23, 2020.

2. Plaintiff—Barbara Rhodes

20. Plaintiff Barbara Rhodes is a current Nikola stockholder. Rhodes purchased shares of VectoIQ on April 27, 2020, and has continuously held those shares since that date. After the Merger closed, Ms. Rhodes' shares of VectoIQ became shares of Nikola when the Company was renamed. Accordingly, Ms. Rhodes has continuously held shares in Nikola since April 27, 2020.

3. Plaintiff—Zachary BeHage

21. Plaintiff Zachary BeHage ("BeHage") is a current Nikola stockholder. BeHage purchased shares of Nikola on June 10, 2020, and has continuously held those shares since that date.

4. Plaintiff—Michelle Brown

22. Plaintiff Michelle Brown ("Brown") is a current Nikola stockholder. Brown purchased shares of Nikola on June 17, 2020, and has continuously held those shares since that date.

5. Plaintiff—Noah Ben Israel

23. Plaintiff Noah Ben Israel ("Israel") is a current Nikola stockholder.[5] Israel purchased shares of Nikola on June 30, 2020, and has continuously held those shares since that date.

B. Nominal Defendant—Nikola Corporation

24. Nominal Defendant Nikola is a Delaware corporation with its principal executive offices located at 4141 E Broadway Road, Phoenix, Arizona 85040.

25. Nikola purports to be a zero-emissions transportation company. At all times relevant to this Complaint, it operated two main business units: Truck and Energy. The Truck business unit aimed to develop and commercialize battery electric vehicles ("BEVs") and hydrogen fuel cell electric vehicles ("FCEVs"), with a focus on trucks. The Truck business also purported to design and manufacture electric vehicle drivetrains and vehicle components. The Energy business unit aimed to develop a network of hydrogen fueling stations for FCEVs.

[5] In 2020, Crisanto Gomes legally changed his name to Noah Ben Israel

26. Nikola was a "pre-revenue company," meaning it had not yet sold any vehicles or even produced a fully working prototype of any of its products that was fully ready to be commercialized, and it had not produced or sold any hydrogen fuel or built a commercially operable hydrogen fueling station.

27. Since the Merger, Nikola's stock has traded publicly on the Nasdaq Global Select Market under the ticker symbol "NKLA." As of October 31, 2022, there were 478,851,041 shares of Nikola's common stock outstanding.

C. Individual Defendants—Summary and Table of Abbreviations

28. The following table summarizes the various groups of Defendants referred to in this Complaint:

Group of Defendants	Defendants Included
The Individual Defendants	Milton, Russell, Jin, Mansuetti, Marx, Ubben, Stalsberg, Thompson, Girsky, Shindler, Gendelman, Hallac, Lynch, McInnis, Brady, and Worthen
The Demand Board Defendants	Russell, Girsky, Jin, Mansuetti, Marx, Shindler, Thompson, and Ubben
The Legacy Nikola D&O Defendants	Milton, Russell, Jin, Mansuetti, Marx, Ubben, Stalsberg, Thompson, Brady, and Worthen
The Officer Defendants	Russell, Brady, and Worthen
The VectoIQ Board Defendants	Girsky, Shindler, Gendelman, Hallac, Lynch, and McInnis

The Controller Defendants	Girsky, VectoIQ, LLC, Shindler, and Sponsor (VectoIQ Holdings, LLC)

29. The following table summarizes which Defendants were members of which of the three Boards of Directors that are the subject of this Complaint (the VectoIQ Board, the Legacy Nikola Board, and the Post-Merger Nikola Board), as well as which Defendants were members of Nikola's Board of Directors at the time of the filing of the initial Verified Stockholder Derivative Complaint in this Action (the Demand Board):

Board	**Individual Defendants Included**
The VectoIQ Board	Girsky, Shindler, Gendelman, Hallac, Lynch, and McInnis
The Legacy Nikola Board	Milton, Russell, Jin, Mansuetti, Marx, Ubben, Stalsberg, Thompson
The Post-Merger Nikola Board	Milton, Russell, Jin, Mansuetti, Marx, Ubben, Stalsberg, Thompson, Girsky, Shindler
The Demand Board	Russell, Girsky, Jin, Mansuetti, Marx, Shindler, Thompson, Ubben

D. Individual Defendants—The Legacy Nikola Board

1. Trevor Milton

30. Defendant Milton founded Nikola and served as its CEO until the Merger in June 2020, after which he served as its Executive Chairman until his so-called "resignation" from Nikola on September 20, 2020. Milton served as a

director of Legacy Nikola and Nikola during the entire length of his employment with the Company.

31. Milton was an avid and popular user of social media, including Twitter, Instagram, and Facebook, which platforms allowed him to fraudulently enrich his own holdings at Nikola's expense. Milton, with the Company's and the other Defendants' knowledge, used his personal Twitter account (@nikolatrevor), personal Instagram account (@lakepowelltrevor), and the Company's Twitter account (@nikolamotor), which Milton personally controlled, to publish materially false and misleading information about Nikola in violation of various securities and other criminal laws.

32. Following the Merger, Milton owned, directly or indirectly, approximately 91,602,734 shares in Nikola, representing approximately 25.4% of the total ownership of the company. On June 3, 2020, the day the Merger was completed, Nikola shares opened the day trading at approximately $33.69 per share, and Milton's shares became worth approximately $3.1 billion. Pursuant to the Registration Rights and Lock-Up Agreement dated June 3, 2020 and Amendment No. 1 to that Agreement dated July 17, 2020 (together, the "Lock-Up Agreement"), Milton was permitted to sell these shares starting on December 1, 2020. Additionally, Nikola paid Milton $70 million in connection with the Merger by

redeeming 7,000,000 shares of common stock from M&M Residual, LLC ("M&M") a company owned by Milton, at a purchase price of $10.00 per share.

33. During fiscal year 2019, Nikola paid Milton $266,000 in salary. During fiscal year 2020, Nikola paid Milton $153,462 in salary, and $159,026,298 in stock awards (valued by aggregate fair value computed as of the grant date), for total compensation of $159,179,760.

34. Following the Merger, Milton's compensation was (i) a salary of $1; (ii) an annual "time-vested award" of $6 million worth of restricted stock units ("RSU"), vesting three years after grant, with the first such award based on a stock price of $10 (*i.e.*, 600,000 shares of Nikola common stock); and (iii) a "performance award" consisting of up to 4,859,000 shares of restricted stock units ("RSUs") tied directly to Nikola's stock price, and which were earned by achieving certain stock trading milestones for at least twenty consecutive trading days:

Share Price Milestone	**Market Capitalization at Price**	**Incremental Performance Shares Earned at Share Price Milestone**
Below $25.00	Below $10 billion	0
$25.00	$10 billion	1,069,000
$40.00	$16 billion	1,603,000
$55.00 or Above	$22+ billion	2,187,000

The RSU performance award financially incentivized Milton to continue his misconduct after the Merger. By pumping up Nikola's stock price above any of the

share price milestones for twenty consecutive trading days, he stood to gain potentially tens of millions of dollars' worth of Nikola stock. Based on Milton's misleading statements regarding Nikola's business, and the resulting trading price of Nikola stock between June 3, 2020 and September 20, 2020, the first performance milestone was reached entitling Milton to 1,069,000 Nikola RSUs.

35. Under the terms of his September 20, 2020 separation agreement with Nikola, Milton relinquished any claim he had to the performance award of up to 4,859,000 RSUs but not the 600,000 RSUs granted as an annual "time-vested" award. According to the separation agreement, as of the date of his resignation, Milton still owned 91,644,134 shares of Nikola stock. The Post-Merger Nikola Board, having already made millions as a result of Milton's fraudulent conduct, neither sought to clawback any of his stock nor protect the Company in the face of SEC and criminal investigations, Milton departed Nikola owning over $2.5 billion worth of Nikola stock.

36. Since separating from Nikola on September 20, 2020, Milton (through M&M) has sold over $433 million worth of Nikola stock. Additionally, Milton and M&M have transferred 1,750,000 shares of Nikola to Milton's spouse.[6]

[6] See FN1 Form 4 filed on 8/6/21. ("On July 23, 2021, Mr. Milton transferred 600,000 shares and M&M Residual, LLC transferred 1,150,000 shares of Common Stock of Nikola Corporation to Mr. Milton's spouse.").

2. Mark A. Russell

37. Defendant Mark A. Russell served as Nikola's CEO and as a director of Nikola from the Merger until November 2022. Russell was personally hired as Nikola's CEO by Milton and has numerous close ties to Milton both personally and financially.

38. Before becoming Nikola's CEO, Russell served as President of Legacy Nikola from February 2019 to June 2020 and was also a director of Legacy Nikola from July 2019 to June 2020. Previously, from August 2012 to August 2018, Russell served as President and Chief Operating Officer of Worthington Industries ("Worthington"), a company where Milton was also employed until he left to found Nikola.

39. As of June 3, 2020, following the Merger, Russell owned 49,774,487 shares of Nikola's common stock. These shares included, among other things, shares held by Russell individually and shares held by T&M Residual, LLC ("T&M"), a company co-owned by Russell and Milton, and managed by Russell. Russell has sole dispositive power over the shares held by T&M, and Milton has sole voting power over those shares. On June 3, 2020 Nikola's common stock closed at $33.97 per share. Immediately after the Merger closed, Russell owned approximately $1.7 billion worth of Nikola stock. Pursuant to the Lock-Up Agreement, Russell was permitted to sell these shares starting on December 1, 2020.

40. During fiscal year 2019, Nikola paid Russell $250,866 in salary and $6,307,496 in option awards, for total compensation of $6,558,362. During fiscal year 2020, Nikola paid Russell $173,077 in salary, and $159,026,298 in stock awards (based on the grant date fair value) for total compensation of $159,199,375. During fiscal year 2021, Nikola paid Russell $1 in salary and $5,609,641 in stock awards, for total compensation of $5,609,642.

41. Following the Merger, Russell's compensation was (i) a salary of $1; (ii) an annual "time-vested award" of $6 million worth of restricted stock units ("RSU"), vesting three years after grant, with the first such award based on a stock price of $10; and (iii) a "performance award" consisting of up to 4,859,000 RSUs earned after certain stock price milestones were achieved:

Share Price Milestone	**Market Capitalization at Price**	**Incremental Performance Shares Earned at Share Price Milestone**
Below $25.00	Below $10 billion	0
$25.00	$10 billion	1,069,000
$40.00	$16 billion	1,603,000
$55.00 or Above	$22+ billion	2,187,000

The performance awards were identical to the ones granted to Milton and also financially motivated Russell to ignore or assist in Milton's misconduct. Russell stood to gain potentially tens of millions of dollars' worth of Nikola shares as a result of Milton pumping up of Nikola's stock price above the price milestones for twenty

consecutive trading days. The first stock price milestone vested entitling Russell to 1,069,000 Nikola RSUs.

3. Sooyean (Sophia) Jin

42. Defendant Sooyean (Sophia) Jin ("Jin") (also known as Jin Soo Yean) served as a director at Nikola from the Merger until April 2022. Jin also served as a member of the Audit Committee. From May 2019 until the Merger, Jin served as a director of Legacy Nikola.

43. Jin is compensated under Nikola's non-employee director compensation program. In 2020, her compensation consisted of $679,400 in stock awards. In 2021, her compensation consisted of $186,990 in stock awards.

44. According to a Form 4 filed with SEC, as of August 21, 2020, Jin owned 20,000 shares of Nikola common stock, for which she paid $0.

45. From January 2019 to May 2022, Jin served as senior director of venture investments of Hanwha Holdings, an investor representing Hanwha Corporation ("Hanwha"), and from January 2018 to December 2018 she served as Hanwha Holdings' director of venture investments. Prior to that, Ms. Jin held various positions at Hanwha Q CELLS America Inc. ("Q CELLS"), a global solar cell and module manufacturer, including director of corporate planning from July 2013 to June 2015 and director of head of marketing from July 2015 to December 2017. Hanwha, through Q CELLS, is Nikola's exclusive solar panel provider.

46. Green Nikola Holdings LLC ("Green Nikola") invested in Nikola on November 9, 2018 by purchasing 11,641,444 shares of Series C Preferred Stock of Legacy Nikola for $100,000,003.96, using funds provided by certain Hanwha affiliates. Jin is also affiliated with Green Nikola. As of June 3, 2020, following the issuance of shares as part of the Merger, Green Nikola owned 22,130,385 shares of Nikola's common stock, representing approximately 6.4% of Nikola's outstanding common shares. Based on Nikola's common stock closing at $33.97 on June 3, 2020, Green Nikola owned approximately $751.8 million worth of Nikola stock. Pursuant to the Lock-Up Agreement, Green Nikola was prohibited from selling these shares for 180 days. Subsequently, between June 9, 2021 and June 28, 2021 Green Nikola sold 2,903,352 shares of Nikola stock for approximately $53.67 million. As a result of Jin's complicity in permitting Milton to engage in an illegal scheme to increase the price of Nikola stock, Hanwha was able to convert its illiquid shares to liquid publicly traded shares through the Merger and then cash out a substantial portion of its original investment.

4. Mike Mansuetti

47. Defendant Mike Mansuetti has served as a Company director since the Merger. Mansuetti also serves as a member of the Audit Committee. Previously, from September 2019 until the Merger, Mansuetti served as a director of Legacy

Nikola. Mansuetti has also been employed by automotive company Robert Bosch LLC ("Bosch").

48. Mansuetti is compensated under Nikola's non-employee director compensation program. In 2020, his compensation consisted of $679,400 in stock awards. In 2021, his compensation consisted of $186,990 in stock awards. According to a Form 4 filed with SEC, as of August 21, 2020, Mansuetti directly owned 20,000 shares of Nikola common stock, for which he paid $0.

49. Bosch is the sole owner of Nimbus Holdings LLC ("Nimbus"). Mansuetti is affiliated with Nimbus. Nimbus purchased 11,641,443 shares of Series C preferred stock in Nikola for approximately $100 million. Nimbus also purchased 3,880,983 shares of Nikola Series B preferred stock for approximately $30 million. As of June 3, 2020, following the Merger, Nimbus owned 23,081,451 shares of Nikola, representing approximately 6.4% of Nikola's outstanding common stock. According to the Nimbus 13D, Mansuetti may be deemed to share voting and dispositive power over shares held by Nimbus although he "disclaims beneficial ownership of any shares owned of record by Nimbus Holdings LLC other than to the extent he may have a pecuniary interest therein." Based on Nikola's common stock closing at $33.97 on June 3, 2020, Bosch owned approximately $748.1 million worth of Nikola stock through Nimbus. In connection with the Merger, Nimbus entered into a stock repurchase agreement with Nikola whereby Nikola agreed to

repurchase (before the Merger) 1,499,700 shares of Nikola Series B Preferred at a price of $16.67 per share, totaling $25.0 million –nearly all of its original investment in the Series B stock while retaining more than 2.3 million shares of those shares. As a result of Mansuetti's complicity in permitting Milton to engage in an illegal scheme to increase the price of Nikola stock, Bosch was able to convert its illiquid shares to liquid publicly traded shares through the Merger and simultaneously cash out a substantial portion of its original investment.

50. Bosch is also one of Nikola's key business partners, and it supplies Nikola with its proprietary eAxle drive system, fuel-cell power modules and major fuel-cell components including fuel-cell stacks, and automotive-grade hardware and software.

51. Pursuant to the Lock-Up Agreement, Nimbus was prohibited from selling its shares for 180 days. On December 1, 2020—immediately after the lock-up expired—Nimbus sold 4,261,155 shares of Nikola stock for approximately $73.5 million.

5. Gerrit A. Marx

52. Defendant Gerrit A. Marx has served as a director of Nikola since the Merger. Marx also served as Chair of the Compensation Committee and is now a member of that committee. From September 2019 until the Merger, Marx served as a director of Legacy Nikola.

53. Marx has served as CEO of commercial vehicle manufacturer Iveco S.p.A. ("Iveco") since March 2019. Marx has also served as president of commercial and specialty vehicles of CNH Industrial N.V. ("CNHI"), an industrial goods manufacturing company, since January 2019. Marx is affiliated with Iveco.

54. Iveco is a major investor in Nikola, having purchased 13,498,921 Series D shares of Nikola for approximately $250 million. Under the agreement, the shares were exchanged for $50 million based on the value of a license, $100 million for in-kind services, and $100 million in cash. As of June 3, 2020, following the Merger, Iveco owned 25,661,449 shares of Nikola, representing approximately 7.11% of Nikola's outstanding common stock. Based on Nikola's common stock closing at $33.97 on June 3, 2020, Iveco owned approximately $871.7 million worth of Nikola stock. As a result of Marx's complicity in permitting Milton to engage in an illegal scheme to increase the price of Nikola stock, Iveco was able to convert its illiquid shares to publicly traded shares on the Merger and the opportunity to eventually cash out a substantial portion of its original investment. Pursuant to the Lock-Up Agreement, Iveco was prohibited from selling these shares for 180 days.

55. Marx is compensated under Nikola's non-employee director compensation program. In 2020, his compensation consisted of $713,370 in stock awards. In 2021, his compensation consisted of $196,347 in stock awards.

According to a Form 4 filed with the SEC, as of August 21, 2020, Marx owned 21,000 shares of Nikola's common stock, for which he paid $0.

6. Jeffrey W. Ubben & Inclusive Capital Partners Spring Master Fund, L.P.

56. Defendant Jeffrey W. Ubben served as a Company director from the Merger until February 2022. Ubben also served as Chair of the Nominating and Corporate Governance Committee.[7] From September 2019 until the Merger, Ubben served as a director of Legacy Nikola.

57. Ubben is the founder and managing partner of financial services company Inclusive Capital Partners, L.P., which was formed in 2020. He also founded ValueAct Capital Management, L.P. in 2000, for whom he was employed from 2000 to 2020. Ubben also founded Inclusive Capital Partners Spring Master Fund, L.P. ("Spring Master Fund") in 2018, formerly known as ValueAct Spring Master Fund, L.P., where Ubben currently serves as its portfolio manager.

58. Spring Master Fund purchased 809,936 shares of Nikola Series D preferred shares for approximately $15 million and five million shares of Nikola in the PIPE offering which helped close the merger deal. As of June 3, 2020, following the Merger, Ubben directly or indirectly owned 20,362,024 Nikola common shares,

[7] The Nominating and Governance Committee is now known as the Sustainability, Nominating and Corporate Governance Committee.

representing approximately 5.6% of Nikola's outstanding common stock. Based on Nikola's common stock closing at $33.97 on June 3, 2020, Ubben owned approximately $691 million worth of Nikola stock which Spring Master Fund purchased at an average price of $7.54 per share. As a result of Ubben's complicity in permitting Milton to engage in an illegal scheme to increase the price of Nikola stock, Spring Master Fund was able to convert its' illiquid shares to publicly traded shares on the Merger and sold a substantial portion of its original investment while in possession of material, non-public information. Pursuant to the Lock-Up Agreement, Ubben was prohibited from selling these shares for 180 days.

59. Ubben is compensated under Nikola's non-employee director compensation program. In 2020, his compensation consisted of $713,370 in stock awards. In 2021, his compensation consisted of $196,347 in stock awards.

60. On August 11, 2020, before the Hindenburg Report exposed Defendants' misconduct, as alleged herein, and while in possession of material, non-public information regarding Nikola, Ubben (acting through Defendant Spring Master Fund) sold 1.4 million shares of Nikola stock at a price of $42.69 per share, for a total of $59.77 million. The sale also violated the terms of the Lock-up Agreement prohibiting the sale of stock for 180 days.

7. Lonnie R. Stalsberg

61. Defendant Lonnie R. Stalsberg served as director of Nikola from the Merger until his resignation on September 29, 2020. Stalsberg also served as a member of the Compensation Committee. From July 2017 until the Merger, Stalsberg served as a director of Legacy Nikola.

62. Stalsberg was compensated under Nikola's non-employee director compensation program. In 2020, he received compensation consisting of $679,400 in stock awards. Additionally, according to a Form 4 filed with SEC, as of August 21, 2020, Stalsberg directly owned 20,000 shares of Nikola's common stock, for which he paid $0.

63. As of June 3, 2020, following the Merger, Stalsberg held an interest in H2M Fund LLC ("H2M"), which owned 918,816 shares of Nikola common stock. Based on Nikola's common stock closing at $33.97 on June 3, 2020, immediately after the Merger closed, Stalsberg owned approximately $31.2 million worth of Nikola stock. As a result of Stalsberg's complicity in permitting Milton to engage in an illegal scheme to increase the price of Nikola stock, H2M was able to convert its illiquid shares to publicly traded shares and the opportunity to eventually cash out a substantial portion of its original investment.

8. DeWitt Thompson V

64. Defendant DeWitt Thompson V served as a director of Nikola from the Merger until October 2022. Thompson also served as a member of the Compensation Committee. From July 2017 until the Merger, Thompson served as a director at Legacy Nikola.

65. As of June 3, 2020, following the Merger, Thompson owned, directly or indirectly,[8] 21,593,927 shares of Nikola's common stock. Based on Nikola's common stock closing at $33.97. on June 3, 2020, Thompson owned approximately $733 million worth of Nikola stock. As a result of Thompson's complicity in permitting Milton to engage in an illegal scheme to increase the price of Nikola stock, he was able to convert his illiquid shares to publicly traded shares and the opportunity to eventually cash out a substantial portion of his original investment. Based on the Lock-Up Agreement, Thompson was prohibited from selling these shares for 180 days.

66. Thompson is compensated under Nikola's non-employee director compensation program. In 2020, his compensation consisted of stock awards of $679,400. In 2021, his compensation consisted of stock awards of $186,990.

[88] According to a Form 4 filed with SEC on September 10, 2020, Thompson indirectly owned Nikola stock through his interests in Thompson Nikola, LLC, Thompson Nikola II, LLC, and Legend Capital Partners ("Legend"). As of September 10, 2020, Legend owned 13,144,216 shares of Nikola's common stock.

67. Thompson has been CEO and Chairman of Thompson Machinery Commerce Corporation, a Caterpillar equipment dealership from 1996 to at least 2021. He is also a dealer representing Nikola's products in Mississippi and Tennessee.

E. Individual Defendants—The VectoIQ Board

1. Stephen J. Girsky

68. Defendant Girsky founded and served as President, CEO, and a director of VectoIQ from January 2018 until the Merger in June 2020, after which he began serving on the Post-Merger Nikola Board and Nikola's Audit Committee and Nominating and Corporate Governance Committee. He became the Chairman of the Board in September 2020 and is the Chair of the Nominating and Corporate Governance Committee. He previously served as the Chair of the Audit Committee.

69. Girsky was the President, CEO, and manager of the Sponsor. Girsky had sole voting and dispositive power over the shares held by the Sponsor. Accordingly, Girsky controlled the Sponsor and the Founder Shares the Sponsor held were for Girsky's benefit.

70. Girsky is a former vice chairman of GM. Besides Nikola, Girsky has also served as a director of U.S. Steel and Brookfield Business Partners, both of which are subject to SEC reporting requirements.

71. Girsky is compensated under Nikola's non-employee director compensation program. In 2020, his compensation consisted of $813,154 in stock awards. In 2021, his compensation consisted of $327,230 in stock awards.

72. As of June 18, 2020, Girsky owned at least 1,754,344 shares of Nikola's common stock,[9] which were previously shares of VectoIQ that Girsky acquired for nominal consideration (approximately $25,000 or less). Based on Nikola's common stock closing at $67.73 on June 18, 2020, Girsky owned approximately $119 million worth of Nikola stock, for which he had paid only nominal consideration. Pursuant to the Lock-Up Agreement, Girsky was prohibited from selling these shares for a period of one year.

2. Steven M. Shindler

73. Defendant Steven M. Shindler served as the Chief Financial Officer ("CFO") of VectoIQ from January 2018 until the Merger, as well as a director of VectoIQ. Shindler has served as a Nikola director since September 2020 and serves as the Chair of the Audit Committee.

[9] The 1,754,344 shares owned by Girsky consisted of (i) 11,449 shares and 1,441 shares underlying warrants owned directly by Girsky; and (ii) 1,561,459 shares and 180,005 shares underlying warrants previously owned, as of June 3, 2020, by VectoIQ, and subsequently transferred to Girsky when VectoIQ dissolved on June 18, 2020.

74. Shindler is compensated under Nikola's non-employee director compensation program. In 2020, his compensation consisted of $134,778 in stock awards. In 2021, his compensation consisted of $196,347 in stock awards.

75. Shindler has served as a director of wireless company NII Holdings since 1997 and served as NII Holdings' CEO from 2012 to 2017. He also served as CFO of Nextel Communications and a managing director of Toronto-Dominion Bank. He was also a founding partner of RIME Communications Capital.

76. As of June 18, 2020 (the date VectoIQ Holdings, LLC, the VectoIQ-affiliated sponsor entity in the Merger, dissolved and distributed its holdings to its members), Shindler owned 402,298[10] shares of Nikola's common stock, which he had previously acquired for nominal consideration. Based on Nikola's common stock closing at $67.73 on June 18, 2020, Shindler owned approximately $27 million worth of Nikola stock. Pursuant to the Lock-Up Agreement, Shindler was prohibited from selling these shares for one year.

[10] The 402,298 shares owned by Shindler consisted of (i) 12,889 shares owned directly by Shindler; and (ii) 359,409 shares and 30,000 shares underlying warrants previously owned, as of June 3, 2020, by VectoIQ, and subsequently transferred to Shindler when VectoIQ Holdings LLC dissolved on June 18, 2020.

3. Robert Gendelman

77. Defendant Robert Gendelman served as a director at VectoIQ from May 2018 until the Merger. During that period, he also served as a member of the Audit Committee.

78. As of June 18, 2020 (the date VectoIQ dissolved and distributed its holdings to its members), Gendelman owned 44,712[11] shares of Nikola stock, which he had previously acquired for nominal consideration. Based on Nikola's common stock closing at $67.73 on June 18, 2020, Gendelman owned approximately $3 million worth of Nikola stock. Pursuant to the Lock-Up Agreement, Gendelman was prohibited from selling these shares for one year.

4. Sarah W. Hallac

79. Defendant Sarah W. Hallac served as a director at VectoIQ from May 2018 until the Merger. During that period, she also served as a member of the Audit Committee and the Compensation Committee.

80. VectoIQ's Form 10-K filed with the SEC on March 6, 2020 states that Hallac owned 15,000 shares of VectoIQ stock. Based on Nikola's common stock closing at $67.73 on June 18, 2020, Hallac owned approximately $1 million worth

[11] The 44,712 shares owned by Gendelman consisted of (i) 15,000 shares owned directly by Gendelman; and (ii) 26,341 shares and 3371 shares underlying warrants previously owned, as of June 3, 2020, by VectoIQ, and subsequently transferred to Gendelman when VectoIQ dissolved on June 18, 2020.

of Nikola stock which she had previously acquired for nominal consideration. Pursuant to the Lock-Up Agreement, Hallac was prohibited from selling these shares for one year.

5. Richard J. Lynch

81. Defendant Richard J. Lynch served as a director at VectoIQ from May 2018 until the Merger. During that period, he also served as a member of the Compensation Committee.

82. According to a prospectus filed by Nikola with the SEC on July 17, 2020, as of June 18, 2020 (the date VectoIQ dissolved and distributed its holdings to its members), Lynch owned 74,424[12] shares of Nikola stock, which he had previously acquired for nominal consideration. Based on Nikola's common stock closing at $67.73 on June 18, 2020, Lynch owned approximately $5 million worth of Nikola stock. Pursuant to the Lock-Up agreement, Lynch was prohibited from selling these shares for one year.

[12] The 74,424 shares owned by Lynch consisted of (i) 15,000 shares owned directly by Lynch; and (ii) 52,682 shares and 6742 shares underlying warrants previously owned, as of June 3, 2020, by VectoIQ, and subsequently transferred to Lynch when VectoIQ dissolved on June 18, 2020.

6. Victoria McInnis

83. Defendant Victoria McInnis served as a director at VectoIQ from May 2018 until the Merger. During that period, she also served as a member of the Audit Committee.

84. According to a prospectus filed by Nikola with the SEC on July 17, 2020, as of June 18, 2020 (the date VectoIQ dissolved and distributed its holdings to its members), McInnis owned 59,068[13] shares of Nikola stock, which she had previously acquired for nominal consideration. Based on Nikola's common stock closing at $67.73, on June 18, 2020, McInnis owned approximately $4 million worth of Nikola stock which she had previously acquired for nominal consideration. Pursuant to the Lock-Up Agreement, McInnis was prohibited from selling these shares for one year.

F. Individual Defendants—Senior Nikola Officers

1. Kim J. Brady

85. Defendant Kim J. Brady ("Brady") served as Legacy Nikola's CFO and Treasurer from November 2017 until the Merger. Following the Merger, Brady

[13] The 59,068 shares owned by McInnis consisted of (i) 15,000 shares owned directly by McInnis, and (ii) 39,068 shares and 5000 shares underlying warrants previously owned, as of June 3, 2020, by VectoIQ, and subsequently transferred to McInnis when VectoIQ dissolved on June 18, 2020.

became Nikola's CFO. Brady was personally hired to be Nikola's CFO by Milton while Nikola was privately held.

86. Following the Merger, Brady owned 10,275,414 shares of Nikola's common stock. Based on Nikola's common stock closing at $33.97 on June 3, 2020, Brady owned approximately $349 million worth of Nikola stock.

87. During fiscal year 2019, Nikola paid Brady $250,000 in salary and $12,451 in other compensation. During fiscal year 2020, Nikola paid Brady $144,231 in salary, $1,041,139 in bonus, $84,800,710 in stock awards, and $50,566 in other compensation, for total compensation of $86,036,646. During fiscal year 2021, Nikola paid Brady $1 in salary and $2,991,816 in stock awards, for total compensation of $2,991,817.

88. Following the Merger, Brady's compensation was (i) a salary of $1; (ii) an annual "time-vested award" of $3.2 million worth of restricted stock units ("RSU"), vesting three years after grant, with the first such award based on a stock price of $10; and (iii) a "performance award" consisting of up to 2,591,000 RSUs earned after certain stock price milestones were achieved:

Share Price Milestone	**Market Capitalization at Price**	**Incremental Performance Shares Earned at Share Price Milestone**
Below $25.00	Below $10 billion	0
$25.00	$10 billion	570,000
$40.00	$16 billion	855,000
$55.00 or Above	$22+ billion	1,166,000

The performance award and stock compensation financially motivated Brady to ignore or assist in Milton's misconduct, particularly in light of his $1 annual salary. Brady stood to receive potentially millions of dollars of Nikola stock by virtue of Milton's ongoing pumping up of the Company's stock price. The first stock price milestone was reached entitling Brady to 570,000 Nikola RSUs after Nikola common stock traded above $25.00 between June 3, 2020 and September 20, 2020 as a result of Milton's misleading statements regarding Nikola's business.

89. On June 3, 2020, in connection with the closing of the Merger, Brady received fully vested and exercisable stock options that gave him the right to purchase 10,275,414 shares of Nikola common stock at a price of $1.05. Those options are still worth approximately $16 million as of February 14, 2023.

2. Britton Worthen

90. Defendant Britton M. Worthen ("Worthen") has served as Nikola's Chief Legal Officer and Secretary since June 2020, and prior to that served as Legacy Nikola's Chief Legal Officer and Secretary from October 2015 to June 2020. Worthen was personally hired to serve as Nikola's Chief Legal Officer by Milton.

91. During the fiscal year ended December 31, 2020, Worthen received compensation from Nikola consisting of $144,231 in salary and stock awards valued at $79,470,349 (valued by aggregate fair value computed as of the grant date), plus whatever gains Worthen would realize from appreciation in the value of the stock he

owned. During the fiscal year ended December 31, 2021, Worthen received compensation form Nikola consisting of $1 in salary and $2,804,826 in stock awards, for total compensation of $2,804,827.

92. Following the Merger, Worthen's received compensation of (i) a salary of $1; (ii) an annual "time-vested award" of $3 million worth of restricted stock units ("RSU"), vesting three years after grant, with the first such award based on a stock price of $10; and (iii) a "performance award" consisting of up to 2,428,000 RSUs earned after certain stock price milestones were achieved:

Share Price Milestone	**Market Capitalization at Price**	**Incremental Performance Shares Earned at Share Price Milestone**
Below $25.00	Below $10 billion	0
$25.00	$10 billion	534,000
$40.00	$16 billion	801,000
$55.00 or Above	$22+ billion	1,093,000

The performance award financially motivated Worthen to ignore or assist in Milton's misconduct. Through Milton's pumping up of Nikola's stock price above any of the share price milestones for twenty consecutive trading days, Worthen (by remaining silent) stood to receive millions of dollars of Nikola stock. The first stock price milestone was reached entitling Worthen to 534,000 Nikola RSUs after Nikola common stock traded above $25.00 between June 3, 2020 and September 20, 2020 as a result of Milton's misleading statements regarding Nikola's business.

93. On June 3, 2020, in connection with the closing of the Merger, Worthen received fully vested and exercisable stock options that gave him the right to purchase 4,603,168 shares of Nikola common stock at a price of $1.05. Those options are worth approximately $7 million as of February 14, 2023.

G. Entity Defendants

1. Cowen and Company, LLC

94. Defendant Cowen and Company, LLC ("Cowen") is a broker dealer subsidiary of investment bank Cowen Inc. Cowen purports to offer equity, debt financing, trading, brokerage, mergers, and acquisitions advisory services. Cowen's headquarters is located at 599 Lexington Avenue, New York, New York 10022. Cowen was an original investor in VectoIQ having purchased 1,449,000 of the Founders shares in a March 2018 private placement before the IPO. In November 2018, Cowen invested $200 million in Legacy Nikola through a private placement. During the week of November 18, 2019—and with only six months to go before VectoIQ's May 18, 2020, deadline arrived—investment bankers from Cowen proposed Nikola as a potential acquisition target to VectoIQ's management.

2. VectoIQ, LLC

95. Defendant VectoIQ, LLC is an advisory firm controlled by Defendant Girsky with its headquarters located at 1354 Flagler Drive, Mamaroneck, New York 10543. The Sponsor, VectoIQ Holdings, LLC, was a Delaware limited liability company controlled by Girsky through VectoIQ, LLC.

H. Relevant Non-Party Demand Board Members

1. Mary Petrovich

96. Non-party Mary Petrovich ("Petrovich") has served as a director of Nikola since December 23, 2020. She currently serves as the Chair of the Compensation Committee. In 2020, Petrovich received $72,487 in total compensation from the Company.

2. Bruce Smith

97. Non-party Bruce Smith ("Smith") has served as a director of Nikola since October 2020. He is currently a member of the Nominating and Corporate Governance Committee. In 2020, Smith received $98,920 in total compensation from the Company.

III. FACTUAL BACKGROUND

98. From shortly after Nikola's founding in 2015, until the Merger with VectoIQ in June 2020, Milton and Nikola publicly portrayed themselves as bold disruptors at the cutting edge of vehicle and hydrogen-fuel technology.

99. During this period, Milton and Nikola cultivated their image through social media, public relations events, and media appearances to boast that Nikola had built an impressive business model with its own proprietary turbine, battery, hydrogen fuel cell, hydrogen production technologies, and zero-emissions trucks. They claimed that Nikola owned gas wells and had built a sustainable, off-the-grid headquarters powered by clean energy provided by solar panels on its roof. And

they claimed that Nikola had designed and built a fully functioning zero-emissions semi-truck, the Nikola One, and had developed a real, working prototype of a zero-emissions pickup truck, the Nikola Badger.

100. None of this was true. As reflected in Nikola's pre-Merger Board minutes, and as later revealed in the Hindenburg Report, the Kirkland & Ellis investigation, government investigations, and Milton's criminal fraud trial, Nikola neither possessed these claimed proprietary technologies or energy assets, nor had it built a fully functioning zero-emissions semi-truck or a prototype of a zero-emissions pickup truck. In fact, prior to release of the Hindenburg Report, Nikola had *never* manufactured and commercially released a *single* fully functioning zero-emissions truck.

101. Yet, over several years of operations, the Legacy Nikola Board (who knew the Company did not possess the claimed technology or functionality) did nothing to investigate, correct, or stop Milton's misrepresentations, which he spread through public social media posts, podcast interviews, and television appearances. Milton's conduct ultimately fueled a highly inflated and ultimately unsupported valuation of Nikola's business and financial prospects.

102. In the run-up to 2020, and unbeknownst to those outside the Company, Nikola was struggling. It was failing to produce trucks or develop infrastructure, and it was facing a major cash crunch as it had exhausted its private funding options.

If Nikola did not raise substantial capital by finding new investors soon, the stock held by Milton and Nikola's other major investors—including members of the Legacy Nikola Board and their affiliates—would significantly decrease in value, potentially to mere pennies on the dollar.

103. VectoIQ had no operating business but was created for the sole purpose of searching for and merging with an industrial technology, transportation, or smart mobility company—like Nikola. In late 2019, at a time when Nikola needed cash to fund its operations and VectoIQ was running short on the time required by its governing documents to complete a merger, the companies began working on a transaction where Nikola would merge with VectoIQ and become a public company. If the VectoIQ Board failed to find a merger partner, it would have to return its investors' money, *VectoIQ's founders $70 million plus payday*.

104. In March 2020, Nikola and VectoIQ agreed to take Nikola public through a reverse SPAC merger transaction. Through the Merger, the Legacy Nikola Board and Nikola's major stockholders—most prominently Milton and his close associate, Nikola CEO Russell, finally had the opportunity to monetize their privately held and illiquid shares in Nikola and create enormous wealth in a company whose business was built largely on smoke and mirrors and running short on cash. Milton, for his part, would profit immediately, *having negotiated a $70 million cash payment that he would receive upon the closing of the Merger*, as well as awards of

millions of units of Nikola stock in the months that followed. Based on an unsupportable $3 billion valuation attributable to Nikola for purposes of establishing the relative value of shares to be issued on the Merger, *Milton's and Russell's stock holdings combined would be valued at approximately $4.8 billion*.

105. By acquiring a target company, the VectoIQ Board and VectoIQ's major stockholders—most prominently VectoIQ's founder and CEO, Stephen J. Girsky —stood to obtain a windfall on their investments in VectoIQ, which would otherwise *become worthless* if VectoIQ did not find an acquisition target by its mid-2020 deadline. Similarly, Defendant Steven M. Shindler stood to receive a windfall by virtue of his holdings as one of the VectoIQ founders.

106. As a result of their financial self-interest to complete a transaction quickly, the VectoIQ Board recklessly ignored Milton's ongoing disinformation campaign, which continued through the issuance of the Merger Proxy and closing of the Merger. VectoIQ's Board performed nothing more than a cursory due diligence as it failed to uncover that the Company had not developed the cutting-edge electric vehicle and hydrogen-fuel technology as touted by Milton and was unable to produce a fully functioning zero-emissions semi-truck or a prototype of a zero-emissions pickup truck. In short, the VectoIQ Board simply failed to look under the hood at Nikola—both figuratively and literally—completely abdicating their responsibilities to VectoIQ's stockholders.

107. Spurred by their own self-interest, the VectoIQ Board recommended that VectoIQ stockholders vote on and approve the Merger based on a false and misleading Merger Proxy that repeated numerous false claims concerning Legacy Nikola's business and technological capabilities. The VectoIQ Board Defendants also breached their duty of loyalty to the Class by failing to disclose that the Merger was a value-decreasing transaction as stockholders were not contributing the $10.00 per share as claimed, but, because their interests had been diluted, were only contributing at most $7.66 per share. As a result of the misleading Merger Proxy, there were only 2,702 redemptions, as most stockholders decided to invest in the post-closing company.

108. After the Merger closed on June 3, 2020, VectoIQ Board member Girsky joined the eight Legacy Nikola Board members (who had previously turned a blind eye to Milton's glaring misconduct) to form the Post-Merger Nikola Board, helmed by none other than Milton as the Executive Chairman. Virtually every member of the Post-Merger Nikola Board, including Girsky, had reaped substantial monetary rewards (directly or indirectly) because of the Merger and stood to gain significantly from subsequent increases in Nikola's stock price.

109. In the wake of the Merger and Milton's continuing misrepresentations, Nikola's stock price skyrocketed. At its height on June 9, 2020, less than a week after the Merger closed, Nikola's stock price had shot up from $10.00 (the price, at

one time of buying a share in VectoIQ) to $93.99, and Nikola's market capitalization reached $28.77 *billion*.

110. Milton continued his steady stream of misleading statements, fueling increases in Nikola's stock price that entitled him and other top Nikola executives to realize *millions of dollars' worth* of "performance awards" tied to Nikola's short-term share price performance. The Post-Merger Nikola Board aided and abetted Milton's ongoing stock-price hype by giving him free rein to make statements concerning the Company's business and failing to implement any oversight on his public statements. Nikola's Board was either recklessly indifferent or knew that many of Milton's public statements were materially false or misleading, but failed to act to remedy the wrongdoing.

111. Thus, having profited handsomely from the hype generated by Milton, from June 2020 through September 2020, in dereliction of their duty and SEC regulations to oversee or implement controls concerning public statements about the Company's business, the Board knowingly permitted Nikola and Milton to continue lying to investors about everything from Nikola's hydrogen production capabilities, to its electricity sourcing costs, to its ability to manufacture vehicle components in-house, to the composition of its order book and truck reservations, to the specifications of its vehicles, to its progress in manufacturing its battery-electric truck, the Nikola Tre BEV. At that time, Nikola had never generated any revenues

from the sales of its vehicles. The Post-Merger Nikola Board, in dereliction of their duties of oversight, turned a blind eye to Milton's and Nikola's fraudulent statements even though they knew that Nikola's technological assets, manufacturing capabilities, and orders and reservations book were not as Milton and Nikola claimed them to be.

112. The Post-Merger Nikola Board continued to harm Nikola by failing to oversee or control Milton's ongoing efforts to disseminate false information to stockholders, and by continuing to allow him to violate the securities laws and to engage in criminally fraudulent conduct that endangered the Company's business, including making a litany of representations regarding Nikola's business that the Defendants knew to be demonstrably false. Despite the myriad of red flags available to insiders, including Nikola's senior executives, general counsel and certain directors, the Post-Merger Nikola Board failed to implement any controls or procedures designed to prevent or correct Milton's misleading statements.

113. Nearly every member of the Post-Merger Nikola Board held substantial holdings in Nikola stock—or was affiliated with, represented, and lacked independence from an entity that owned Nikola stock and/or sought to do business with Nikola—and, in many cases, had an interest in concealing the truth and keeping the fraud going until the expiration of certain lock-up agreements after which time

they or their affiliated companies could sell their Nikola stock at potentially enormous profits.

114. But then the Nikola bubble burst earlier than Defendants expected. On September 10, 2020, Hindenburg Research published a 52-page report (the "Hindenburg Report") arguing that "*Nikola is an intricate fraud built on dozens of lies over the course of its Founder and Executive Chairman Trevor Milton's career*." The Hindenburg Report gathered extensive evidence including recorded phone calls, text messages, private emails, and behind-the-scenes photographs to substantiate its allegations of dozens of false statements by Milton and Nikola. Ten days later, September 20, 2020, Milton resigned from Nikola just ten days later after it was disclosed that he was under criminal investigation.

115. Although Nikola and Milton denied the allegations in the Hindenburg Report, a subsequent limited internal investigation by Kirkland & Ellis (prompted by the Hindenburg Report) revealed that Milton had, in fact, made copious statements that were "inaccurate in whole or in part, when made." Kirkland & Ellis' investigation found that certain Nikola executives—including, notably, Russell, Kim Brady, Chief Financial Officer, and Britton Worthen, Chief Legal Officer—knew that at least several of Milton's public statements about Nikola's products, operations, and business were false at the time they were made and that there was concern inside the Company about Milton's propensity to make false statements

about the Company's products and capabilities to the public in an effort to artificially boost Nikola's stock price. Notably, the Kirkland & Ellis investigation was limited to only the allegations made in the Hindenburg Report.

116. On July 29, 2021, Milton was indicted by the DOJ for securities fraud and wire fraud and sued civilly by the SEC, revealing evidence showing that Milton's falsehoods extended far beyond those to which the Company had admitted after the Kirkland & Ellis investigation. The DOJ Indictment and SEC Complaint—which were corroborated or supported by internal documents, the K&E Presentation (defined below), and witness testimony directly implicating Milton—alleged a course of securities fraud engaged in by Milton that covered the period beginning no later than November 2019 through September 2020. The DOJ Indictment alleged Milton's misrepresentations "addressed nearly all aspects of the [Company's] business."[14]

117. Significantly, the SEC Complaint alleged that "*Milton repeatedly made false and misleading statements about core aspects of Nikola's products, technological advancements, and commercial prospects*" in numerous areas.[15] The SEC also cited evidence that Milton's misconduct was known to and a concern of

[14] *United States v. Milton*, No. 21-cr-478, ECF No. 1 ¶2 (S.D.N.Y. filed July 28, 2021) (the "DOJ Indictment" or "DOJ ¶__") .

[15] *SEC v. Milton*, No. 1:21-cv-6445, ECF No. 1 ¶4 (S.D.N.Y. filed July 29, 2021) (the "SEC Complaint" or "SEC Compl. ¶__") (emphasis added).

the senior executives at the Company for months before and after the Merger, including Brady, Worthen (who was Secretary to Board), and some directors.

118. On November 4, 2021, Nikola announced that it had agreed to pay a $125 million fine to the SEC to settle the investigation arising from Milton's misconduct. Almost one year later, on October 14, 2022, following a four-week jury trial in the U.S. District Court for the Southern District of New York, a federal jury convicted Milton of one count of criminal securities fraud and two counts of criminal wire fraud. The jury deliberated for approximately six hours before finding Milton guilty of these counts.[16] Milton is scheduled to be sentenced on June 21, 2023.

IV. SUBSTANTIVE ALLEGATIONS

A. Milton Has a Long History and a Well-Earned Reputation for Dishonesty and Questionable Business Dealings

119. Milton likes to invite comparisons between himself and famed entrepreneur Elon Musk.[17] But Milton's background and Musk's are very different. Musk has degrees in economics and physics from the University of Pennsylvania, and has a track record of founding successful businesses, including PayPal, Tesla, and SpaceX. By contrast, Milton has no engineering, scientific, or technical

[16] The jury acquitted Milton on one additional count of securities fraud.

[17] During a May 5, 2020, appearance on the *Rise of the Young* podcast, Milton stated that "there's two people in this world that know EVs better than anyone, and that's Elon and myself," and "there's very few people that know the EV industry or the whole entire vehicle like I do or like Elon does, so we're probably the top two guys in the world that know this shit, and we know it better than anybody."

qualifications whatsoever, and his background is checkered with claims of fraud and lawsuits. Despite this, Milton touts himself as a leading expert on electric vehicles.

120. In a series of failed businesses between 2004 and 2015 before Milton founded Nikola, his partners, business associates, and stockholders described him as dishonest, unreliable, and untrustworthy. A purchaser of Milton's alarm system dealership deemed it a "disaster," with the buyer claiming that Milton "misrepresented revenue and expense information prior to the sale." A classifieds website business that Milton touted as "the website that has nearly as many hits as Craigslist and would soon be close to Amazon in hits" left investors sustaining staggering losses on their investments.

121. In another of Milton's businesses, dHybrid, a company that developed and designed hybrid fuel systems based on compressed natural gas ("CNG") conversion technology for diesel engines, investors claimed that the trucks did not perform as promised; that dHybrid's officers or directors diverted payments for their own personal use, or for other unauthorized spending; that dHybrid defaulted on a $322,000 loan; and that Milton made numerous false claims about the technology and purported success of the business. In October 2014, dHybrid Systems was acquired by Worthington, a diversified metals manufacturing company based in Ohio that employed Russell. Milton briefly worked for Worthington under Russell, before quitting to found Nikola.

122. In interviews with CNN Business in or around October 2020, six people who "said they either invested in or did business with Milton before Nikola" said "Milton was a skilled salesman, but they soon found him hard to trust given a tendency to exaggerate and not follow through on promises. Some had questions about his character and integrity." "Two people said they invested tens of thousands of dollars, but claim they never received the stock certificates they were owed to formalize their investment. One investor said they've already filed a complaint with a regulatory body and another said they're in the process of doing so."

B. In 2015, Milton Founded Nikola and Promoted It As Revolutionary to the Trucking Industry

123. In 2015, Milton founded and became the CEO of a new zero-emissions vehicle startup named Bluegentech. In July 2017 Milton changed the company's name to "Nikola Corporation," after Nikola Tesla, the inventor and electrical engineer.

124. On May 9, 2016, Nikola came out of what it called "stealth mode," and announced it was developing a product that would "transform" the "U.S. transportation industry." Over the next several years, Milton relentlessly promoted Nikola's supposedly proprietary technologies and misleadingly represented to the public that the Company was developing products that would revolutionize the trucking industry.

C. VectoIQ Goes Public as a SPAC to Acquire a Start-up Industrial Technology, Transportation, or Smart Mobility Company

125. SPACs, also known as "blank-check companies," are publicly traded shell corporations that undertake no business operations of their own but are instead created to merge with privately held operating businesses. SPACs typically raise funds through an IPO in which they issue and sell "units," comprised of both shares and warrants to purchase shares.

126. SPACs typically have a two-year deadline to identify a target company or business to acquire. Once a SPAC identifies a target and the target agrees to the terms of a merger, the parties effect a business combination. These transactions are often referred to as the "de-SPAC" transaction, which are subject to the SPAC's stockholders' approval.

127. The SPAC transactional structure serves as a "back door" to an IPO for the target privately held business. The target company reverse merges with a subsidiary of the publicly listed SPAC, which then serves as the SPAC's operating subsidiary going forward. The SPAC, which is the surviving entity, then assumes the identity of the target company, changing its name and applicable security listings. In theory, this structure allows the target company to bypass the time and expense of a traditional public listing. Significantly, it also permits the target company to avoid regulatory scrutiny and traditional gatekeepers, such as the underwriters who would perform due diligence in a firm commitment offering.

128. Moreover, while the traditional IPO process permits the market to set the price at which an already operating company or business is valued and sold in an IPO, the SPAC process reverses the usual order of events. With a SPAC, investors first purchase shares of an empty-shell publicly traded company, permitting them the "opportunity" to have their shares converted into shares of an as-yet unidentified operating business that will be selected by SPAC management. Essentially, stockholders who invest in SPACs are investing in the skill, experience, reputation, faithfulness, and diligence of SPAC managers, who are entrusted with finding a suitable merger target. Stockholders rely on SPAC managers to identify and vet targets and to negotiate a fair and reasonable price for any merger.

129. Most SPACs, including VectoIQ, have the same basic terms and legal structure. A SPAC will raise funds from public investors through an IPO, and then hold those funds in "trust" for those investors while the SPAC seeks a merger target. The SPAC will then have a "completion window" □ generally two years □ to identify and execute a business combination. If a merger is not completed within the time period specified when the SPAC is organized, then the SPAC automatically dissolves and the money held in trust is returned to investors. No salaries, finder's fees, or other cash compensation are paid to the founders and management team if they fail to consummate a successful business combination.

130. If the SPAC's management identifies a target, the SPAC stockholders are afforded the opportunity to exercise their voting rights to approve or reject the proposed business combination. Thus, after management identifies a target, the SPAC (and its fiduciaries) must distribute a proxy statement to all SPAC stockholders, which includes the target company's complete audited financials and the terms of the proposed business combination.

131. In response to the proposed business combination, SPAC stockholders have three options: (i) invest in the post-transaction company by accepting stock in it; (ii) sell their shares in the open market; or (iii) redeem their shares for a pro-rata share of the trust account. To make these decisions, SPAC stockholders depend on management to provide complete and accurate information about the proposed target company any contemplated transaction.

132. The founders and management team of a SPAC typically own approximately 20% of the SPAC through founders' shares, possess millions of dollars in warrants to buy additional shares, and invest significant resources in the formation of the SPAC and identification of merger targets. Accordingly, they are highly incentivized to get a qualifying transaction approved within the operating deadline. Moreover, SPAC management is heavily incentivized to reduce the stockholder redemption rate because redemptions deplete the amount of available cash to fund a business combination and ongoing operations following the merger.

This in turn reduces the value of the contingent stock that SPAC management stands to receive upon completion of the blank-check IPO, and threats the likelihood of a successful business combination altogether.

133. Indeed, leaders in the finance industry have opined that SPAC management teams have an incentive to spend the money they have raised through the IPO so they can collect fees and pay themselves in salary and stock options at the company they purchase. For example, Ben Dell, managing partner of investment firm Kimmeridge Energy, stated that "SPACs are the most egregious example in the industry of executive misalignment with investors." In addition to the reward of paying themselves a handsome salary, SPAC management teams are incentivized to receive a return on the significant time and financial resources they expended up front to set up the investment vehicle and pursue a merger target.

134. Because the founders control the SPACs' investment and financing decisions with little, if any, oversight, additional inherent conflicts abound. For example, founders often allow themselves and select investors to participate in additional investments at especially favorable terms in their SPAC mergers through private warrant placements and investment in public equity, or "PIPE" financing. When a SPAC conducts a merger using this form of PIPE financing, the SPAC managers dilute the existing SPAC investors by selecting their preferred

investors who will acquire cheap post-deal equity by providing the financing for a PIPE deal.

135. An important check on the potential for misconduct by the directors, officers, and controllers of SPACs, however, is their fiduciary duties to stockholders. Delaware SPACs are still Delaware corporations, governed by the state's statutory and common law. Accordingly, if a SPAC chooses to incorporate in Delaware, its fiduciaries are bound by non-waivable duties of loyalty, good faith, and care.

136. The VectoIQ Board Defendants enjoyed all the powers and opportunities bestowed upon them by the conflict-laden SPAC structure. But they then used those powers and opportunities to serve their own interests at the expense of the interests of the Class. Where, as here, there are "inherent conflicts between the SPAC's fiduciaries and public stockholders," then "[t]he entire fairness standard of review applies."[18] The Merger, the product of an unfair process at an unfair price, fails that standard. In breach of their fiduciary duties of loyalty, good faith, and care, the VectoIQ Board Defendants misled the Class in order to consummate the unfair Merger and minimize redemptions.

[18] *See In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 792 (Del. Ch. 2022).

137. Specifically, here, the Founders purchased 5.75 million Founder Shares for just $25,000, approximately $0.004 a share.[19] These Founder Shares would expire as worthless if VectoIQ did not enter into a business combination within 24 months of its IPO. Rather than risk losing out on the large payday associated with the Founder Shares, the VectoIQ Board undertook a value-decreasing de-SPAC merger that benefitted them to the detriment of public stockholders for whom liquidation would have been preferable. Moreover, the VectoIQ Board was incentivized to minimize redemptions to secure significant returns for themselves. Finally, the VectoIQ Board's actions—principally in the form of misstatements and omissions—impaired public stockholders' redemption rights to the VectoIQ Board's benefit.

138. VectoIQ was controlled by its sponsor, VectoIQ Holdings, LLC. Through the Sponsor, Girsky and Shindler: (i) selected the SPAC's directors; (ii) dominated the SPAC's management; (iii) made an investment in SPAC shares and/or warrants to cover the SPAC's underwriting fees and working capital; and (iv) for only a nominal investment received a 15.5% equity stake in VectoIQ. Girsky led VectoIQ, serving as its CEO and Chairman, while Shindler served as its CFO. The Sponsor, VectoIQ Holdings, LLC, was a Delaware limited liability company

[19] The Merger Proxy defines VectoIQ's founders to include VectoIQ Holdings, LLC and Cowen Investments II, LLC (collectively, the "Founders").

controlled by Girsky through VectoIQ, LLC. The Sponsor was the controller of VectoIQ.

139. Girsky leaned on his trusted associates when it became time to name individuals to the Board of Directors. First, he placed Hallac onto the Board, even though she was a "team member" of VectoIQ, LLC the parent of Girsky's SPACs and sponsors. Girsky is the managing partner of VectoIQ

140. Next, he turned to his longtime associate, McInnis. Girsky and McInnis worked for years together as high-level executives at General Motors. McInnis was General Motors Chief Tax Officer from 2009 to 2015. During this time period Girsky was a General Motors director and Vice Chairman of Corporate Strategy and Business Development, among other positions.

141. Girsky also used the same team on multiple SPACs. In addition, to Girsky, Gendeleman, Hallac, and Lynch were all directors of VectoIQ Acquisition Corp. II. Each of these directors, other than Girsky, received 15,000 founder shares of VectoIQ Acquisition Corp. II. McInnis was a director nominee of VectoIQ Acquisition Corp. II.

142. On May 18, 2018, VectoIQ completed its IPO, when it issued and sold 23 million units at $10 per unit, consisting of one share of VectoIQ common stock and one VectoIQ warrant to purchase one share of VectoIQ common stock, for a total of $230 million in gross proceeds.

143. Simultaneously with the consummation of VectoIQ's IPO, the Sponsor purchased 890,000 private placement units (consisting of one share of common stock, also referred to in the Proxy Statement as "Initial Stockholder Shares," and one VectoIQ warrant to purchase one share of VectoIQ common stock), for an aggregate purchase price of $8.9 million. The $8.9 million in proceeds were added to the proceeds from the IPO and held in the trust account. Notably, if there was no business combination within 24 months, the private warrants would also expire as worthless.

144. The $239 million raised in VectoIQ's IPO were retained in a trust account for the benefit of the public stockholders, and VectoIQ began trading on the NASDAQ Capital Market. The funds in the trust could be used only to either redeem shares if there was a business combination or to return the public stockholders' investment if VectoIQ were to liquidate rather than merge. Only in the event that VectoIQ entered into a business combination and there was money left over after satisfying redemptions could the amount left in the Trust contribute to the post–transaction company.

145. VectoIQ raised an additional $525 million through what is known as a "private investment in public equity," or "PIPE," subscriber agreement, which permits private equity investors to provide additional financing for the acquisition in exchange for shares of the merged company. The purpose of PIPE is to provide

additional capital to the business being acquired, to make the acquisition more financially attractive and to provide more funding for the business' future growth. VectoIQ planned to finance its acquisition of a target business through both the IPO proceeds and the PIPE.

D. Nikola Chooses to Go Public Through a SPAC to Avoid Scrutiny of the Merger by Investors, Regulators, and the Public

146. Because of its intense need for financing and no available option in traditional markets, in late 2019 Nikola had considered only two options for raising capital: a listing on the Oslo Børs stock exchange, or a reverse SPAC. Both options would allow Nikola to raise capital—and allow Nikola's founders to cash in—on a much faster timeframe than that for a traditional U.S. IPO. Significantly, both options would help Nikola evade more intense regulatory scrutiny.

147. Ultimately, though, the Oslo Børs route proved less attractive because it offered access to a significantly smaller investment pool, so Nikola went the SPAC route. Going public through a SPAC also had another key advantage: unlike an IPO, a SPAC reverse merger is not subject to what is commonly referred to as a "quiet period" mandated by the federal securities laws.

148. The purpose of a quiet period is to create a level playing field by ensuring that all investors have access to the same information at the same time, and to prevent executives from taking actions to hype or artificially inflate the company's stock price. The quiet period lasts from the time the company issuing the stock

discloses information about the issuance in the registration statement and prospectus that are required to be filed with the SEC until forty days after the new stock begins trading.

149. During the quiet period, the company's executives generally cannot provide any information about the company to anyone beyond what was previously disclosed in the registration statement and prospectus. Because a SPAC reverse merger is not subject to a quiet period, the executives of the private company that is merging with the SPAC are not limited in their ability to speak publicly about their company while the company goes public. This aspect of the transaction with VectoIQ, the ability to promote the stock without restrictions, played right into Milton and Defendants' hands.

150. VectoIQ also saw several other advantages to a SPAC merger versus an IPO, according to a November 2019 presentation to Nikola:[20]

[20] NIKOLABR_001882. All citations provided herein to documents produced by Nikola are to the versions produced to Plaintiff Rhodes.

151. Thus, going public through a SPAC reverse merger created an easy way for VectoIQ's founders to capitalize on their investment, and was advantageous to Nikola's principal stockholders and VectoIQ's founders (including Defendants Girsky and Shindler) in the following ways: (i) the due diligence and closing process would be quick—that is, there would not be much time to look under the hood; (ii) Nikola could market off of (overly optimistic and inaccurate) forward projections allowing its stockholders to receive equity value based on "future revenue multiples"; (iii) Nikola could give Nikola's early investors (*e.g.*, Milton, Russell, and other insiders, like Hanwha and Bosch) partial liquidity at close; and (iv) there would be "confidential marketing" with "light documentation" to avoid regulatory scrutiny of the statements the Company was making to investors.[21]

[21] *Id.*

E. VectoIQ Decides to Merge with Nikola and Become Public

152. By late 2019, the deadline for VectoIQ to close a deal was fast approaching and it faced increasing pressure to complete an acquisition by mid-2020. Otherwise, VectoIQ's founding stockholders—including Girsky, Gendelman, Hallac, Lynch, and McInnis—would lose their opportunity to realize potentially millions of dollars of appreciation in their 20% equity interest in VectoIQ based on the Merger with Nikola.

153. During the week of November 18, 2019—and with only six months to go before VectoIQ's May 18, 2020, deadline arrived—investment bankers from Cowen and Company, LLC ("Cowen") proposed Nikola as a potential acquisition target to VectoIQ's management. Cowen was an original investor in VectoIQ having purchased 1,449,000 of the Founders shares in a March 2018 private placement before the IPO.

154. Cowen was conflicted. First, Cowen is affiliated with Cowen Investments, a major holder of Founder Shares. Cowen Investments owned over 1 million Founder Shares. Second, Cowen had a prior relationship with Nikola, having provided financial advisory services to the Company in connection with an offering of preferred stock in 2018. Around this time, Cowen also pitched its idea of a VectoIQ-Nikola merger to Legacy Nikola's management.

155. Around November 25, 2019, Legacy Nikola and VectoIQ's management teams met at Nikola's headquarters. Thereafter on December 19, 2019, VectoIQ sent a non-binding letter of intent to Nikola (the "Letter of Intent").[22]

156. On December 22, 2019, Girsky proposed on a phone call, to among other things, propose: (i) a valuation of approximately $3 billion on a pre-money basis; (ii) two Board seats for VectoIQ; and (iii) that VectoIQ would raise at least $500 million in a PIPE transaction as a condition to closing. Following further negotiations, the parties agreed to a $3 billion valuation, one board seat for VectoIQ, and the $500 million to be raised through a PIPE offering.

157. Then, on December 24, 2019, the parties signed the Letter of Intent. And over the next several weeks, VectoIQ and Nikola began working together to pitch the Merger as an attractive investment opportunity with potential PIPE investors and continued to discuss the terms of the proposed Merger.

158. In January 2020—just six weeks after first learning about Nikola—VectoIQ and Nikola gave a presentation to investors titled "Investment Opportunity: Investing in a Cleaner Future."[23] The presentation was personally presented by Russell, Brady, and Girsky, who made numerous false and misleading claims about Nikola's technological portfolio and order book including that:

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[22] NIKOLABR_002086.

[23] NIKOLABR_002117.

(a) Nikola had an "industry leading technology portfolio" with a "BEV truck with best-in-class range and capabilities" and the "world's most advanced Hydrogen (H_2) FCEV truck";

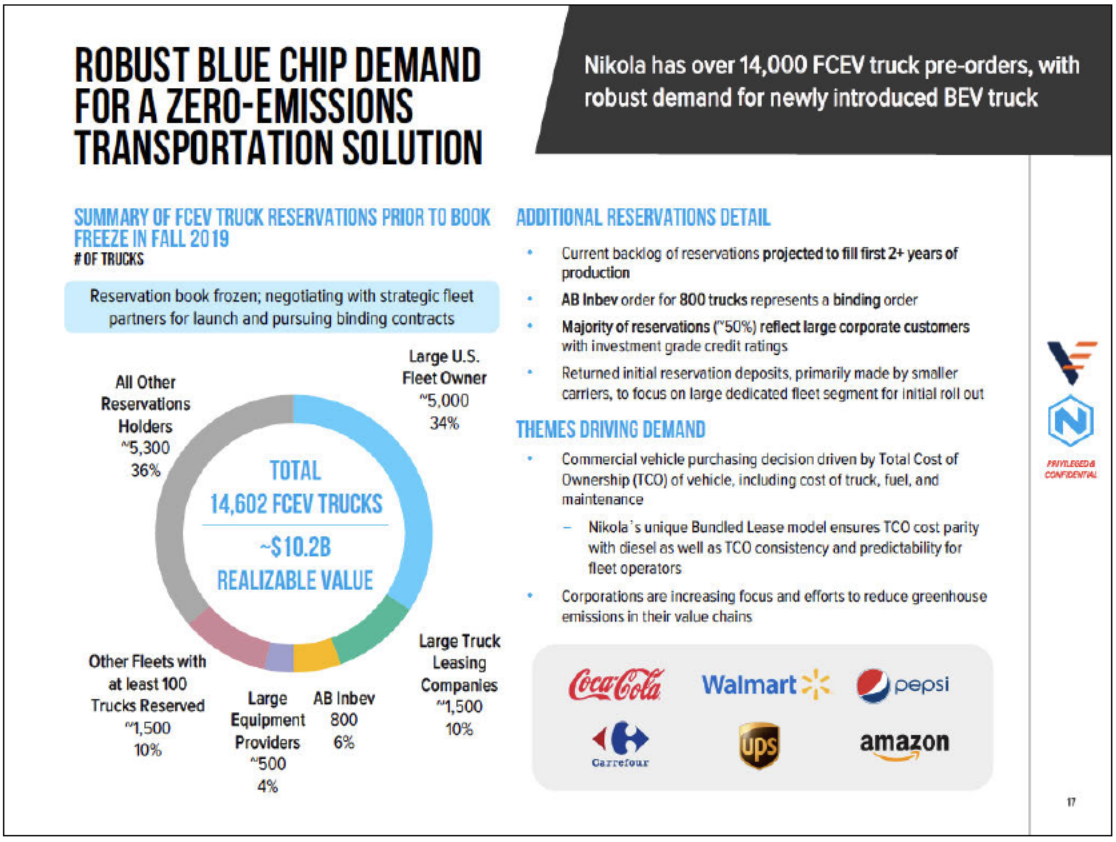
(b) Nikola had a "$10B+ FCEV order book" with a "2+ year backlog"; and

(c) Nikola had "+14,000 FCEV truck reservations to date" with "~$10B sales value".[24]

159. Slide 17 of the presentation by Russell, Brady, and Girsky contains a highly misleading portrait of Nikola's order book, which consisted of reservations that were nonbinding and cancellable at any time for any reason:[25]

[24] *Id.*

[25] *Id.*



F. The VectoIQ Board and the Legacy Nikola Board Approve the Merger Agreement

160. Both the VectoIQ Board and the Legacy Nikola Board approved the Business Combination Agreement (referred to herein as the "Merger Agreement") and related agreements, which were executed on March 2, 2020. In so doing, these boards prioritized their own financial, personal, and reputational interests in approving the Merger Agreement, which was unfair to VectoIQ's public stockholders.

161. On March 3, 2020, prior to the market opening, VectoIQ and Nikola issued a joint statement announcing execution of the Merger Agreement, which

quoted Milton as stating: "I founded the company to completely disrupt the energy and transportation market. When our company first announced the Nikola One Semi truck in 2016, most other brands said zero emission would never work. WOW, were they wrong."

162. In going public, the Legacy Nikola Board and Nikola's major stockholders—including Milton—finally had the opportunity to monetize and make liquid their privately held shares in Nikola based on a purported $3 billion valuation. And by acquiring a target company, the VectoIQ Board and VectoIQ's founders—including Girsky—realized the substantial value created from their 20% investment in VectoIQ for a relatively nominal out-of-pocket cost.

163. Girsky and Milton signed the Merger Agreement on behalf of VectoIQ and Nikola, respectively. Significantly, Section 4.18 of the Merger agreement states that the Legacy Nikola Board unanimously: "(a) determined that this Agreement and the Merger are fair to and in the best interests of the Company and its stockholders, (b) approved this Agreement and the Merger and declared their advisability, and (c) recommended that the stockholders of the Company approve and adopt this Agreement and approve the Merger and directed that this Agreement and the Transactions (including the Merger) be submitted for consideration by the Company's stockholders."

164. Section 5.10 of the Merger agreement states that the VectoIQ Board, by a majority vote of those voting, "(i) determined that this Agreement and the transactions contemplated by this Agreement are fair to and in the best interests of VectoIQ and its stockholders, (ii) approved this Agreement and the transactions contemplated by this Agreement and declared their advisability, (iii) recommended that the stockholders of VectoIQ approve and adopt this Agreement and Merger, and directed that this Agreement and the Merger, be submitted for consideration by the stockholders of VectoIQ at the VectoIQ Stockholders' Meeting."

165. The Merger was set to occur via what is known as a "SPAC reverse merger," and provided that each privately held share of Nikola common stock issued and outstanding immediately prior to the Merger would be converted into the right to receive 1.901 shares of VectoIQ common stock. VectoIQ's public stockholders would continue holding one share of common stock in the surviving corporation for each share of VectoIQ they owned prior to the Merger.

166. VectoIQ and Nikola agreed to prepare and file a proxy statement, prospectus, and information statement to be sent to VectoIQ's and Nikola's stockholders regarding the proposed transaction. Nikola agreed to seek written consent from its stockholders for the Merger, and Nikola's key stockholders—who represented approximately 80% of Nikola's outstanding shares prior to the Merger—

agreed to enter into a Stockholder Support Agreement to vote all their shares in favor of the transaction.

167. The parties further agreed that the Company would redeem 7,000,000 shares of Nikola common stock from M&M, owned by Milton, at a price of $10 per share, effectively resulting in a $70 million immediate cash payment to Milton.

G. Pressure Increases on VectoIQ and Nikola to Consummate the Merger

168. In the months preceding the close of the Merger, VectoIQ was under intense pressure to consummate a merger, as it was running up on its May 18, 2020, deadline to find a suitable acquisition target or return its investors' money. On April 20, 2020, VectoIQ filed a Schedule 14A (the "April 2020 Proxy") with the SEC, which was signed by Girsky, Gendelman, Hallac, Lynch, and McInnis pursuant to Exchange Act § 14(a).

169. The April 2020 Proxy was necessary to amend VectoIQ's certificate of incorporation and extend the date by which the Merger with Legacy Nikola would be consummated, from May 18, 2020, to July 31, 2020, to allow sufficient time to obtain stockholder approval by way of a second proxy vote and complete the Merger.

170. Nikola was also facing intense financial pressure in the months before the Merger closed—pressure that had been mounting since late 2019. Indeed, a draft

December 11, 2019, presentation to Legacy Nikola's Board notes that Nikola was having a very hard time raising capital from traditional financial investors:[26]

LACK OF MEANINGFUL TRACTION FROM TRADITIONAL FINANCIAL INVESTORS POST CNHI/IVECO PARTNERSHIP ANNOUNCEMENT

Morgan Stanley, Cowen, and the Company have reached out and met with a core group of potential lead financial investors and other interested investors; the group included those who are most familiar with and interested in Nikola

Financial investors have been reluctant to commit due to:

- Pre-revenue; a lack of clear visibility to revenue generation
- Capital intensive nature of the business (a green field manufacturing facility and H2 Station Network); preference towards capex lite businesses
- High execution risks associated with building two businesses – manufacturing trucks and building out the H2 station network
- Risks of being the next WeWork, Uber, Lyft (private round valuation being higher than the public valuation)

The presentation further notes that "the Company cannot wait for the financial community to potentially re-engage in late Q1 / early Q2, 2020."[27]

171. Nikola's financial woes continued to mount in early 2020. Just weeks after signing the Merger Agreement, Nikola was facing a major cash crunch.

172. On April 9, 2020, the Legacy Nikola Board held a telephonic meeting that was attended by Milton, Stalsberg, Thompson, Russell, Ubben, Jin, Mansuetti, Marx, Brady, and Worthen.[28] At the meeting, the Board was told about delays in developing production-ready trucks and infrastructure—despite Milton's public statements to the contrary.[29] The Board discussed Nikola's finances and "Mr. Brady provided an update related to the de-SPAC process and timeline for Nikola

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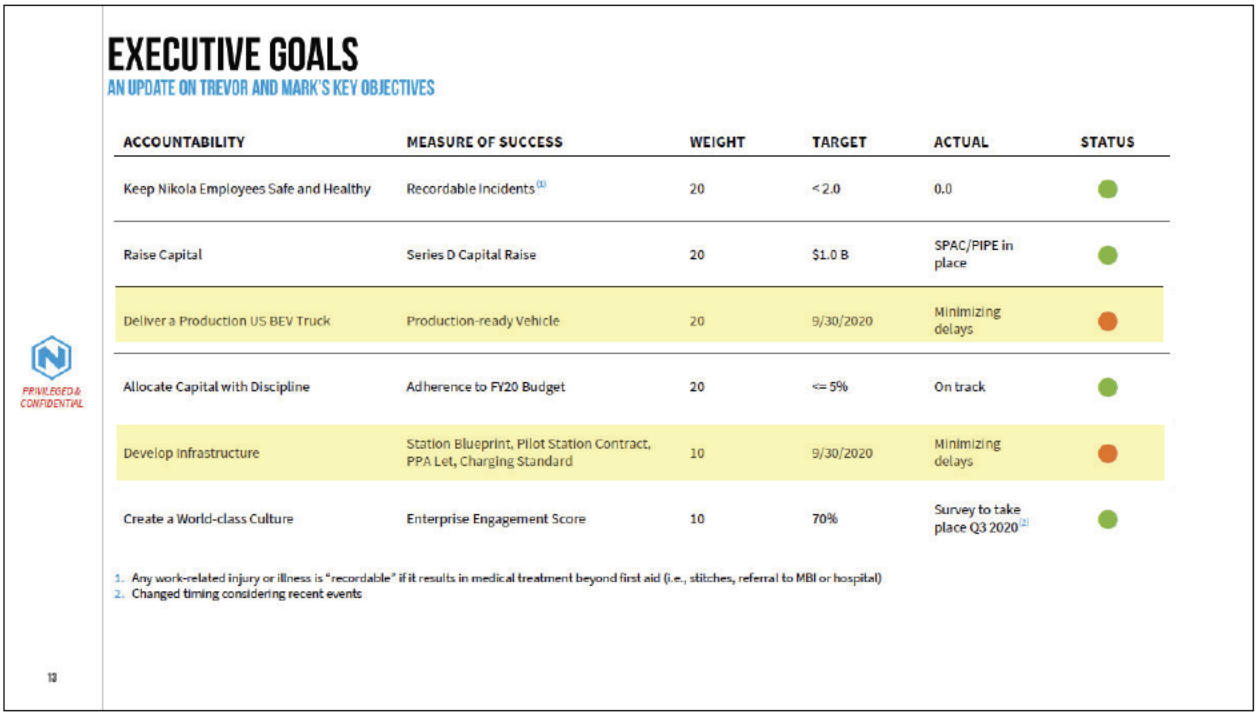
[26] NIKOLABR_002046.

[27] *Id.*

[28] NIKOLABR_000674.

[29] NIKOLABR_000620.

completing the merger transaction with VectoIQ and a summary of the capital raised for the Company through this process."[30] The Board was told that Nikola was experiencing delays delivering a production-ready "US BEV Truck" and developing infrastructure, and that VectoIQ was under pressure to complete the SPAC transaction by mid-2020:[31]



PRIVILEGED & CONFIDENTIAL

EXECUTIVE GOALS

AN UPDATE ON TREVOR AND MARK'S KEY OBJECTIVES

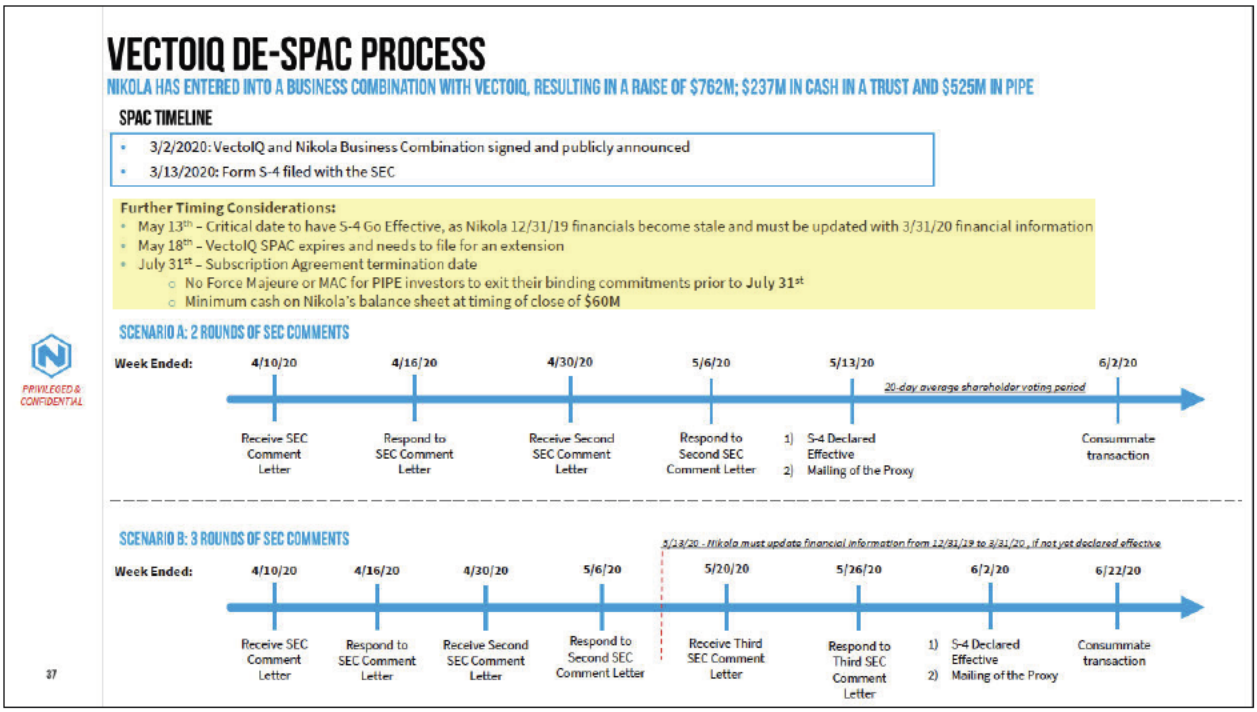
ACCOUNTABILITY	MEASURE OF SUCCESS	WEIGHT	TARGET	ACTUAL	STATUS
Keep Nikola Employees Safe and Healthy	Recordable Incidents[1]	20	< 2.0	0.0	
Raise Capital	Series D Capital Raise	20	$1.0 B	SPAC/PIPE in place	
Deliver a Production US BEV Truck	Production-ready Vehicle	20	9/30/2020	Minimizing delays	
Allocate Capital with Discipline	Adherence to FY20 Budget	20	<= 5%	On track	
Develop Infrastructure	Station Blueprint, Pilot Station Contract, PPA Let, Charging Standard	10	9/30/2020	Minimizing delays	
Create a World-class Culture	Enterprise Engagement Score	10	70%	Survey to take place Q3 2020[2]	

1. Any work-related injury or illness is "recordable" if it results in medical treatment beyond first aid (i.e., stitches, referral to MBI or hospital)
2. Changed timing considering recent events

12

[30] NIKOLABR_000674.

[31] NIKOLABR_000620 (highlighting added).



173. These Board documents show that: (i) Nikola was still unable to produce trucks or develop infrastructure; (ii) the Company was having trouble hiring talent; and (iii) Nikola was going to deplete 75% of its cash between mid-April 2020 and mid-September 2020 and expected negative cash flow until 2023.[32] Aware of these concerns, the Legacy's Nikola Board and major investors grew highly motivated to close the SPAC deal at all costs to save their investment.

174. Finally, on May 13, 2020, Legacy Nikola's December 13, 2019, financials would require updating with financial information from the first quarter of 2020, which would reflect further deterioration in the Company's financial condition resulting from Nikola burning cash without generating any revenue. This

[32] *Id.*

impending deadline created additional pressure for Nikola to close a deal with any potential suitor by May 13, 2020.

H. Defendants File a Misleading Proxy Statement in Connection with the Merger

175. On March 13, 2020, VectoIQ filed a Registration Statement on Form S-4 which was declared effective on May 8, 2020. Pursuant to the Registration Statement, VectoIQ, issued the Merger Proxy in connection with the stockholder vote on the Merger, which was signed by Milton and Girsky. In approving and issuing the Merger Proxy, the VectoIQ Board acted on their conflicts and self-interest by depriving stockholders of information necessary to decide whether to redeem or to invest in the combined company. Because of a SPAC's distinctive structure and the absence of a meaningful vote on the Merger, the redemption right is the central form of stockholder protection and the focus of the harm as alleged herein. Thus, interference with that right produces an injury that ran to the stockholders.

176. The Merger Proxy contained a section titled "VectoIQ's Board of Directors' Reasons for Approval of the Business Combination" that stated in relevant part:

> VectoIQ's board of directors considered a number of factors pertaining to the Business Combination as generally supporting its decision to enter into the Business Combination Agreement and the transactions contemplated thereby, including, but not limited to, the following:

- *Highly Disruptive Technology.* VectoIQ's management and board of directors believe that Nikola is a market disruptor in an attractive and growing industry with over 70 patents issued or pending and strong growth prospects within the hydrogen fuel, BEV and FCEV sectors as well as adjacent markets;

- *Strategic Partnerships.* VectoIQ's management and board of directors considered Nikola's strategic partnerships with industry leaders, which it believes reduce Nikola's technology and execution risk from truck and hydrogen station development to truck sales and maintenance;

- *High Demand for Product.* VectoIQ's management and board of directors considered the fact that Nikola has a high volume of fuel cell electric vehicle pre-orders, currently at over $10 billion, as well as contracts with top tier customers with investment-grade credit ratings;

- *Platform Supports Further Growth Initiatives.* VectoIQ's management and board of directors believe that Nikola's business model uniquely supplies both the truck and hydrogen fueling infrastructure, solving the fleets' concerns as to where to refuel with green hydrogen at competitive pricing to diesel;

- *Due Diligence*. VectoIQ's management and board of directors conducted due diligence examinations of Nikola and discussions with Nikola's management and VectoIQ's financial and legal advisors concerning VectoIQ's due diligence examination of Nikola;

- *Financial Condition.* VectoIQ's board of directors also considered factors such as Nikola's outlook, financial plan and debt structure, as well as valuations and trading of publicly traded companies and valuations of precedent combination and combination targets in similar and adjacent sectors (see "— *Certain Nikola Projected Financial Information*");

- *Attractive Market Valuation of Comparable Companies.*

  . . . While Nikola's projected performance metrics used to derive the initial market valuation multiples of the post-Business Combination company reflected in the terms of the

Business Combination are based on forecast periods two to five years beyond the comparable peer metrics, the VectoIQ board of directors believes that the implied valuation discount is such that even applying conservative discount rate assumptions to arrive at a present value for the post-Business Combination company results in a favorable comparison. For example, when applying the median 2020 enterprise value/revenue multiple for the Comparable Fuel Cell Technology Companies of 9.5x to Nikola's 2024 projected revenue, the initial market valuation of the post-Business Combination company implies a 67.6% annual discount rate from December 31, 2024 to June 30, 2020. Since Nikola's business is not expected to achieve scale until 2024, the VectoIQ board of directors believes this present value methodology is the most reasonable method of comparison. Although this analysis is based on the current Nikola projections, the valuation multiples decline each year as a result of the high growth projected for Nikola's business;

- *Experienced and Proven Management Team.* VectoIQ's management and board of directors believe that Nikola has a strong management team which is expected to remain with the combined company to seek to execute Nikola's strategic and growth goals;

177. The forgoing statements and representations were materially false and misleading because, among other things: (i) most, if not all, of Nikola's pre-orders were non-binding and therefore not worth "over $10 billion"; (ii) the VectoIQ Board Defendants had not conducted proper due diligence; (iii) Nikola's financial condition was not as it represented; and (iv) Nikola lacked an experienced and proven management team.

178. Further, the Merger Proxy described the Company's due diligence and Nikola's purported ability to produce hydrogen as follows:

Q. Who is Nikola?

A. Nikola is a vertically integrated zero-emissions transportation solution provider that designs and manufactures state-of-the-art battery-electric and hydrogen fuel cell electric vehicles, electric vehicle drivetrains, energy storage systems, and hydrogen fueling stations. Nikola's core product offering is centered around its battery-electric vehicle ("BEV") and hydrogen fuel cell electric vehicle ("FCEV") Class 8 semi-trucks. The key differentiator of Nikola's business model is its planned network of hydrogen fueling stations. Nikola is offering a revolutionary bundled lease model, which provides customers with the FCEV truck, hydrogen fuel, and maintenance for a fixed price per mile, locks in fuel demand and significantly de-risks infrastructure development. See "*Information About Nikola*."

* * *

During the week of November 25, 2019, members of the management teams from both companies met at Nikola's' headquarters in Phoenix, Arizona to enable VectoIQ's management to learn more about Nikola's current and planned business. Throughout the week the management teams also held calls to discuss scheduling for continued due diligence meetings as well as a timeline for a potential combination. During this period, VectoIQ assembled a number of industry experts to advise with respect to vehicle development, electrification, fuel cells, software, connectivity and manufacturing in connection with its due diligence efforts.

During the week of December 2, 2019, representatives of VectoIQ and Nikola held a technical due diligence call and VectoIQ had discussions with industry experts on commercial conditions in the Class 8 Hydrogen and Electrification markets.

* * *

First Test Station Installed at Nikola's *Phoenix HQ*

> Through our partnership with Nel ASA, a Norwegian hydrogen company ("Nel"), we have initiated the development of the hydrogen station infrastructure by completing our first 1,000 kg demo station in the first quarter of 2019 at our corporate headquarters in Phoenix, Arizona. The demo hydrogen station offers hydrogen storage and dispensing and serves as a model for future hydrogen stations.

179. The forgoing statements and representations were materially false and misleading at the time they were made because, among other things: (i) the Company had not initiated development of any hydrogen infrastructure; and (ii) Nikola lacked the technical capabilities to effectively produce hydrogen.

180. The Merger Proxy described the Company's business as follows:

> *DESCRIPTION OF BUSINESS AND BASIS OF PRESENTATION*
>
> Nikola Corporation ("Nikola" or the "Company") is a designer and manufacturer of battery-electric and hydrogen-electric vehicles, electric vehicle drivetrains, vehicle components, energy storage systems, and hydrogen stations.
>
> *The Company is also developing a network of hydrogen fueling stations to meet hydrogen fuel demand for its customers*. Fueling related activities will be conducted through the Company's wholly-owned subsidiary, Nikola Energy.

(Emphasis added.)

181. The foregoing statements and representations were materially false and misleading because, among other things: (i) at the time the Merger Proxy was filed,

Nikola was not producing hydrogen; and (ii) the Company was not developing a network of hydrogen fueling stations at this time.

182. The Merger Proxy additionally touted the Company's "in-house" capabilities and Milton's purported value and expertise—and the risks faced thereby, stating in relevant part:

> In June 2019, Nikola moved into our state-of-the-art headquarters and R&D facility in Phoenix, Arizona, which consists of more than 150,000 square feet *and where we are capable of designing, building, and testing prototype vehicles in-house.*
>
> * * *
>
> We are highly dependent on the services of Trevor R. Milton, Chief Executive Officer, and largest stockholder. Mr. Milton is the source of many, if not most, of the ideas and execution driving Nikola. If Mr. Milton were to discontinue his service to us due to death, disability or any other reason, we would be significantly disadvantaged.

(Emphasis added.)

183. The foregoing statements and representations were materially false and misleading because, among other things: (i) Nikola's R&D facility was not completed to the point where it could be used to design, build, and test vehicles; and (ii) the Company was not highly dependent on Milton's services in order to succeed as Milton lacked the engineering and business acumen to effectively lead Nikola.

184. The Merger Proxy also predicted that Nikola would begin BEV truck production in 2021, followed by low volume FCEV production commencing in the first half of 2023, leading to the following financial and non-financial projections:

Key Financial Metrics:

(in millions)	Forecast Year Ended December 31, 2020P	2021P	2022P	2023P	2024P
Total Revenue	$ —	$ 150	$ 300	$ 1,414	$ 3,226
Gross Profit	—	38	58	301	719
EBITDA(1)	(211)	(245)	(175)	(66)	213
Capital expenditures(2)	(156)	(298)	(296)	(369)	(673)

(1) Earnings Before Interest, Taxes, Depreciation and Amortization.

(2) Capital expenditures for hydrogen stations are expected to be funded with approximately 60% equity and 40% debt. Capital expenditures related to our manufacturing facility are expected to be funded with 80% equity and 20% debt.

Key Non-Financial Metrics:

	Forecast Year Ended December 31, 2020P	2021P	2022P	2023P	2024P
Total BEV trucks sold or leased (*units*)	—	600	1,200	3,500	7,000
Total FCEV trucks sold or leased (*units*)	—	—	—	2,000	5,000
Hydrogen stations—Started in period	—	2	13	28	57
Hydrogen stations—Completed in period	—	—	—	10	24

185. The forgoing projections were materially false and misleading because, among other tings: (i) Nikola was nowhere near producing the BEV truck; (ii) it was not feasible for the Company to produce any trucks in 2021; and (iii) as of February 2023, Nikola still has not yet begun to produce any vehicles.

186. The Merger Proxy expressly stated that stockholders were being provided with the opportunity to redeem and instructed stockholders how to complete the redemption process. Moreover, a stockholder who opted not to redeem chose to invest his or her portion of the trust in the post-merger entity. This affirmative choice is one that each SPAC public stockholder was required to make.

187. Finally, as explained in Section V, *infra*, once the Merger closed, Milton continued his relentless dissemination of the same types of materially misleading statements.

I. The Merger Closes and Nikola Becomes a Publicly Traded Company

188. The Merger closed on June 3, 2020, with Legacy Nikola stockholders receiving 276,998,624 shares in VectoIQ, representing 77.1% of the total shares outstanding, valued for purposes of the Merger, at $2.77 billion. VectoIQ also changed its name to Nikola. On the day of the closing, Nikola stock ended the day trading at $33.97 per share giving Nikola's major stockholders stock valued at over $2 billion in the merged company.

189. As alleged above, the VectoIQ Board profited handsomely from the Merger through the conversion of their financial interests in VectoIQ into Nikola stock. Specifically, as of June 18, 2020:

(a) Girsky owned approximately $119 million worth of Nikola stock, for which he had paid only a nominal amount—*a gain of nearly $119 million*.

(b) Shindler owned approximately $27 million worth of Nikola stock, for which he had previously paid only a nominal amount—*a gain of nearly $27 million*.

(c) Gendelman owned approximately $3 million worth of Nikola stock, for which he had previously paid only a nominal amount—*a gain of approximately $3 million*.

(d) Hallac owned approximately $1 million worth of Nikola stock, for which she had previously paid only a nominal amount—*a gain of nearly $1 million*.

(e) Lynch owned approximately $5 million worth of Nikola stock, for which he had previously paid only a nominal amount—*a gain of nearly $5 million*.

(f) McInnis owned approximately $4 million worth of Nikola stock, for which she had previously paid only a nominal amount—*a gain of nearly $4 million*.

190. Further, as alleged above, VectoIQ's Board (and Nikola's Board) acceded to Milton's demands to shorten the lock-up period and also agreed to paying Milton $70 million in cash in connection with the Merger, by redeeming 7,000,000 shares of common stock that were excluded from the lock-up agreement from M&M, a company owned by Milton, at a purchase price of $10.00 per share. During the six months that followed, Milton expressed his intention within the Company to sell shares after the lock-up period was over.

191. Another consequence of the Merger was that Milton ceased being Nikola's CEO and became its Executive Chairman. Still, Milton retained extraordinary control over Nikola. Russell testified at Milton's criminal trial that in his role as Executive Chairman, Milton was in fact "still the day-to-day chief executive of the company."[33] Even after being appointed CEO, Russell continued

[33] Milton Trial Tr. 958-59; *see also id.* 1733.

to report to Milton, and Milton retained the ability to override his decisions.[34] And as Milton explained during a July 17, 2020, *Chartcast* podcast:

> I can assume any role [I] want[] at any time, whenever it needs and all . . . roles report directly up to the executive chairman . . . in other words, the CEO reports directly to me and I have the ability to . . . assume or manage any division, any person . . . anyone inside the company, any given time I need to, because they believe that I have . . . more knowledge and more vision than anyone in the company. And so they wanted to make sure I had no restrictions on that.

J. The Chain of Control Allowed Girsky to Dominate VectoIQ, the VectoIQ Board, and the Merger

192. A "chain of control" allowed Girsky to dominate VectoIQ, its Board, and the merger with Nikola. Girsky owned and controlled the Sponsor which, in turn, controlled VectoIQ. This chain of control was established through: (i) the appointment of VectoIQ directors that had multiple, long-standing relationships with Girsky; (ii) compensation of the purportedly independent directors with Initial Stockholder Shares, thereby aligning their interests with those of Girsky and the Sponsor; (iii) along with other initial stockholders, holding approximately 21% of VectoIQ outstanding shares; and (iv) stating at the time of its IPO that it would not hold an annual stockholders' meeting to elect directors, which it recognized "may not be in compliance with Section 211(b) of the DGCL."[35]

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[34] *Id.*

[35] VectoIQ Prospectus at 46.

193. Through their holdings of Initial Stockholder Shares and Sponsor membership interests, Girsky, Shindler, the Sponsor, and the other VectoIQ Board Defendants were strongly incentivized to get any deal done, because any deal (even a knowingly bad one) was virtually certain to make them a lot of money. Moreover, all of the directors also had a strong interest in maintaining their lucrative relationships with Girsky. Moreover, Girsky would become a director of Nikola following the completion of the merger. By contrast, a failure to merge would mean VectoIQ would liquidate and return the public stockholders' investment – in which case the Sponsor, Girsky and the other directors would receive nothing, and the Sponsor would lose all of its investment.

194. The deeply-conflicted members of the VectoIQ Board breached their duty of loyalty by approving the Merger and its financing, and recommending the transaction to stockholders. The VectoIQ Board Defendants failed to consider the fact that the transaction it was contemplating was in all likelihood a far worse alternative for public stockholders than a liquidation in which the stockholders would receive $10.10 per share. The Board did not consider how deeply VectoIQ's pre-merger transactions had diluted the value of the public stockholders' shares. Nor did it consider the extent to which the anticipated convertible debt issuance and transaction costs would further dilute their shares and dissipate cash. At the time of

the Merger, VectoIQ would have less than $7.66 in cash to contribute to the combined company.

195. Although the Sponsor held less than a quarter of VectoIQ's voting power at the time of the Merger, the governance structure of the SPAC made it reasonably conceivable that the Sponsor was its controlling stockholder. The sponsor of a SPAC controls all aspects of the entity from its creation until the de-SPAC transaction. In VectoIQ's case, the Sponsor created VectoIQ and incorporated it in Delaware. It selected the initial VectoIQ Board, which would remain in place until the Merger with Nikola closed. The Sponsor controlled the VectoIQ Board through Girsky who, as discussed herein (Section VIII.B, *infra*), had close ties to and influence over each of the directors.

196. The Sponsor also held unrivaled authority over VectoIQ's business affairs. Like all SPACs, VectoIQ had no substantive operations before the de-SPAC merger. Its sole objective was to seek out a merger target—a process "dominated" by Girsky (VectoIQ's Executive Chairman and CEO). The Sponsor, through its control of the VectoIQ Board, exercised power over the most crucial decision facing VectoIQ: merge or liquidate. VectoIQ's SEC filings acknowledge that the Sponsor "may exert a substantial influence on actions requiring a stockholder vote."

197. Here, it is reasonably conceivable that the Sponsor—and Girsky through his ownership of the Sponsor—received a "unique benefit" from its

ownership of the Initial Stockholder Shares and private placement units. The economic structure of the SPAC allowed the Sponsor to extract something uniquely valuable, at the expense of public stockholders.

198. The Sponsor's interests diverged from public stockholders in the choice between a bad deal and a liquidation. The Sponsor would realize enormous returns on its $25,000 investment in a value-decreasing merger. For example, the Sponsor's Founder Shares were worth nearly $70 million at the time of the Acquisition Proxy and, despite the plunge in Nikola's stock price since the Merger, the Founder Shares were still worth nearly $50 million when this action was first commenced.[36] But if VectoIQ liquidated, the Founder Shares (and warrants) would be worthless. Public stockholders, by contrast, would receive their investment plus interest from the trust in a liquidation. For those stockholders, no deal was preferable to one worth less than the liquidation price.

199. Finally, the Sponsor had an interest in minimizing redemptions after the Merger Agreement was signed. The merger with Nikola was conditioned on VectoIQ contributing at least $763.4 million in cash, $238.38 million of which was required to come from the trust account. By minimizing redemptions, the Sponsor reduced the risk that the Merger would fail and increased the value of the Sponsor's

[36] According to the Merger Proxy, on May 7, 2020, there were 4,691,924 Initial Stockholder Shares and Nikola's stock closed at $10.62 on January 7, 2022.

interest if it closed. Thus, the Sponsor effectively competed with the public stockholders for the funds held in trust and would be incentivized to discourage redemptions if the deal was expected to be value decreasing.

K. The Amount of Net Cash Per Share to Be Invested in Nikola Per the Merger Was Not $10

200. The Merger Proxy states that the merger consideration to be paid to Nikola stockholders consisted solely of VectoIQ stock valued at $10 per share. If non-redeeming stockholders were exchanging VectoIQ shares worth $10 each, they could reasonably expect to receive equivalent value in return.

201. The amount of net cash per share to be invested in Nikola was not $10. It was instead at most $7.66 per share after accounting for costs and considerable dilution. Because the Merger Proxy misstated the net cash and value underlying VectoIQ's shares, public stockholders could not make an informed choice about whether to redeem or invest. VectoIQ's sole asset at the time of the Merger Proxy and before redemptions was cash. That included funds in the trust account ($238.38 million) and funds to be received at closing in exchange for shares pursuant to the PIPE agreement ($525 million). To determine net cash per share, costs consisting of advisory and other fees and liability from the public warrants ($141.35 million) would be subtracted from that total cash before dividing by the number of pre-merger shares.

Nikola Net Cash Per Share

*all numbers below are in the thousands	
Numerator	
Cash in Trust Account	$238,383
Cash from PIPE	$525,000
Subtotal:	$763,383
Less Costs:	
Deferred Offering Costs	$179
Advisory and Underwriting Fees	$120,700
Public Warrants	$20,470
Subtotal:	$141,349
Total Numerator:	**$622,034**
Denominator	
IPO Shares	$20,000
Underwriter Option	$3,000
Initial Stockholder Shares	$5,750
PIPE Shares	$52,500
Total Denominator:	**$81,250**

202. The formula to determine the amount of net cash per share to be invested in Nikola is Cash-Costs ($622,034) / Pre-merger Shares (81,250) = Net Cash per Share.

203. The costs to be subtracted from the cash component of the numerator in the above analysis would include: (i) transaction costs, including deferred underwriter fees ($179,000) and financial advisory and other fees ($50.7 million); (ii) the market value of public warrants at the time of the Proxy (about $20.47 million); (iii) the value of the warrants in the private placement units and given to Note holders; and (iv) the value of the Notes' conversion feature. Plaintiffs also included in these costs the $70 million Nikola paid to M&M to redeem

its stock, as that cost was determined during negotiations and was effectively a cost incurred with VectoIQ's cash, which was necessary to close the Merger.

204. The denominator—pre-merger shares—would consist of: (i) public shares issued in the IPO (20 million); (ii) the Founder Shares (5.75 million); (iii) the Underwriters' Option Shares (3 million); (iv) shares to be issued at closing pursuant to the PIPE agreement (52.5 million). Using these inputs and the above formula, the VectoIQ's net cash per share at the time the Merger Proxy was $7.66 per share.

205. Accordingly, the difference between the $10 of value per share VectoIQ stockholders expected and VectoIQ's net cash per share after accounting for dilution and dissipation of cash is information that a reasonable stockholder would consider important in deciding whether to redeem or invest in Nikola. Because VectoIQ had at most $7.66 per share to contribute to the Merger, the Merger Proxy's statement that VectoIQ's shares were worth $10 each was false and materially misleading.

206. Moreover, VectoIQ stockholders could not expect to receive $10 per share of value in exchange based on the foregoing analysis.

207. Finally, the VectoIQ Board did not obtain any fairness opinion or even an informal presentation on the fairness of the Merger. Regarding this decision, the Merger Proxy states:

> In approving the combination, VectoIQ's board of directors determined not to obtain a fairness opinion. The officers and directors of VectoIQ have substantial experience in evaluating the operating and financial

> merits of companies from a wide range of industries and concluded that their experience and background, together with experience and sector expertise of Cowen, enabled them to make the necessary analyses and determinations regarding the Business Combination.

208. Considering the stake that VectoIQ Board had in the transaction and their use of a conflicted advisor, Cowen, their advice was insufficient and therefore an inadequate substitute for a fairness opinion from an unrelated entity with no stake in the Merger.

V. MILTON'S FALSE AND MISLEADING STATEMENTS

A. Milton's Misleading Statements Lay the Groundwork for a Deceptive Merger with VectoIQ

209. In dozens of misleading statements from 2016 until after Nikola became public through the Merger, *covering no fewer than seventeen different subjects*, Milton portrayed Nikola as a company on the cutting edge of electric vehicle manufacturing technology. The breadth of Milton's fraudulent statements is stunning. As further detailed below, until his resignation in September 2020, Milton and Nikola misrepresented Nikola's business with respect to the following matters:

(a) Nikola's claim to have engineered a zero emissions truck by August 2016;

(b) Nikola's purported "proprietary turbine system" technology;

(c) Nikola's purported possession of advanced hydrogen fuel cell technology and hydrogen production capabilities;

(d) Nikola's purportedly successful development of a "game-changing" battery technology;

(e) Nikola's development of the revolutionary and purportedly fully functional Nikola One truck and the Nikola's ability to bring that truck to market;

(f) Nikola's production and development of the Badger, a zero-emissions pick-up truck that Nikola would build from the "ground up" as a "clean sheet" vehicle that would use Nikola's proprietary technology, which Nikola had purportedly been developing for years;

(g) the purported development of a luxury closed-cabin version of the NZT off-road vehicle, which was to have "full HVAC, heating and air conditioning";

(h) Nikola's purported ownership of natural gas wells;

(i) claims that Nikola had built an "off-grid headquarters" powered by "3.5 megawatts of solar up on the roof producing about 18 megawatts of energy a day";

(j) Nikola's hydrogen fueling station network and its purported ability to produce hydrogen cheaply;

(k) Nikola's sourcing and costs for electricity;

(l) Nikola's purported in-house capabilities to design and manufacture the major components of its vehicles;

(m) Nikola's purported ability to develop and manufacture the Nikola Tre truck;

(n) the Nikola Two truck's purported acceleration capabilities;

(o) the nature and number of truck reservations and possible orders, the majority of which were for the discontinued Nikola One, and approximately 94% of which were nonbinding and cancellable at any time for any reason;

(p) qualifications of the Company's engineering personnel; and

(q) the nature of Nikola's proprietary inverter software and demand for that software from other vehicle manufacturers.

210. These misleading statements were not isolated or later corrected. Many of them were repeated over the years in one form or another. They created an ongoing story that Nikola, at least to the public's eyes, was on the cutting edge of electric trucking technology and development and progressing toward getting electric trucks to market, among other goals. These blatant misrepresentations were persistent, occurring well before the Merger, while the Merger was pending, and continuing unabated until Milton resigned from the Company. By November 2019, Milton had artificially pumped up the value of Nikola with many of these misleading statements to an illusory $3 billion, thus setting the stage for the combination with VectoIQ.

B. After the Merger Announcement, Milton Continues His Fraudulent Course of Conduct With the Acquiescence of the VectoIQ and Legacy Nikola Boards

211. Beginning in March 2020 when the Merger was announced, and increasingly thereafter, Milton became fixated on maximizing Nikola's value and consequently its stock price. Once the Merger was announced, VectoIQ's stock price was directly linked to statements and information concerning the success and promise of Nikola's business. Thus, on March 3, 2020, the day after the Merger was announced, VectoIQ's stock traded at $11.50 per share. On the day before the closing of the transaction it traded at $31.37 per share—pumped up over time by

Milton's continuing scheme to misrepresent Nikola's business, which was aided and abetted by both VectoIQ Board and the Legacy Nikola Board.

212. For instance, on or about March 2, 2020, the day before Nikola announced the Merger, Milton wrote an email to a member of the Legacy Nikola Board stating, "need to make sure we are getting retail investors on our side. That is what prevents the stock short selling. This is super important for me."[37] Milton continued to disseminate misleading tweets, internet posts, and other statements in the weeks leading up to the Merger. For example, Milton significantly increased his social media activity in anticipation of and after the Merger. For example, his tweets increased from only 52 in 2018 and 137 in 2019 to a staggering 2,283 tweets in 2020.

213. Additionally, on days after the Merger when Nikola' stock price declined, Milton would make frantic phone calls or send text messages to senior Nikola executives urging them to "do something" or to put out "good news" to "get people excited" about Nikola's business prospects.[38]

214. Milton was personally motivated to increase Nikola's stock price before the Merger (when it was linked to VectoIQ), pending the Merger, as well as after the Merger. First, he already owned a significant amount of Nikola stock, which he was contractually permitted (under the Merger Agreement and related

[37] DOJ ¶24.

[38] SEC Compl. ¶40.

agreements) to sell beginning six months following the Merger. Second, Milton and Nikola's senior executives stood to receive substantial grants of Nikola stock based on its trading price and would gain millions of dollars by virtue of their substantial holdings of Nikola stock which increased in value as Milton continued his relentless media campaign.

215. Milton was particularly concerned with hyping Nikola stock to unsophisticated retail investors—so-called "Robinhood investors." Milton tracked the daily number of new Robinhood users who held Nikola stock, and at one point he shared a tweet with a senior Nikola executive reflecting that over 36,000 new Robinhood users became Nikola stockholders that day.[39] The senior executive responded, in part, by expressing his amazement at how many calls he received "from retail investors today that have no clue about Nikola, other than their friends told them to buy. A lot of hype out there with retail investors," to which Milton replied: "That's how you build a foundation. Love it."[40]

216. Indeed, Milton's scheme to fraudulently influence retail investors succeeded. For example, during Milton's criminal trial, the DOJ called on retail investor Marc Schonberger to testify about his purchase of Nikola stock based on

[39] DOJ ¶43.

[40] *Id.*

Milton's false statements. Specifically, regarding Milton's claims that the Company had "billions and billions of dollars" in orders, Schonberger testified:

> Billions of dollars in orders is revenue to the company. Revenue to the company eventually translates into shareholder value at a multiple. And that's why you invest in companies, because of their ability to generate revenue. And having billions of dollars in sales is direct revenue that would translate to profit for the company and value to the shareholder.[41]

217. During the negotiations for the Merger, Milton tried to ensure that he would not be locked up from selling his Nikola stock for any period of time, but ultimately was forced to sign a one-year lock-up. However, the lock-up did not apply to the $70 million cash payment to M&M at the time the Merger closed, and it also carved out $70 million in stock that Milton could sell as soon as six months after the Merger.

218. And soon after the Merger, on July 17, 2020, Nikola's disloyal Board who had just been enriched through the Merger, approved an amendment to the lock-up agreement to permit Milton and Russell to (i) sell all of their shares (which they owned through M&M and T&M) beginning on December 1, 2020; and (ii) transfer up to 16% of their shares as collateral to borrow money to buy more Nikola stock through open-market transactions—stock that Milton and Russell could presumably then turn around and sell at any time allowing them to get around the lock-up provisions prohibiting sales.

[41] Milton Trial Tr. at 2216.

C. After the Merger, Nikola's Stock Price Skyrockets as Milton Issues a Litany of False Statements to Hype the Company

219. The Merger closed on June 3, 2020. Afterward, Milton—motivated by performance awards tied to share-price milestones and the ability to cash in on his stockholdings within the following six months—unleashed a relentless torrent of additional false and misleading statements to pump up Nikola's stock price, primarily by targeting unsophisticated "Robinhood investors" to buy Nikola stock.[42]

220. During a June 30, 2020, nationally televised interview on Fox Business, Milton summarized the value he placed on social media to manipulate the market as follows: "I mean, you heard in the previous segment about social media, there's a lot of negative in social media, but there's also a lot of positive that you can create with it. And I took the, uh, I took the decision I wanted to create the positive. And through this social media experience, where people can actually feel like they're part of it, they can talk to you, they can ask you questions, the transparency, the, the market they're just tired of the older executive that just don't care. And that's why you see the market evaluation of Nikola do well is because finally there's executives out there that they can talk to, that they can voice their problems, their opinions with and they actually get a response. Go on my Twitter Nikola Trevor and you'll see . . . you'll literally see answers to probably two thirds of every tweet out there."

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221. Specifically, in just a three-month period, *Milton knowingly made no fewer than 41 false and misleading statements*, which are described in detail Section V.D. *infra*. Defendants were aware, or should have been aware, that Milton's statements, as summarized by the following eight categories, misrepresented Nikola's business and products. Thus, Milton's illegal conduct was knowingly enabled by the Post-Merger Nikola Board's and the Officer Defendants' complete failures of oversight and control.

(a) Nikola's purported truck reservations:

> Milton, the Legacy Nikola Board and Defendants Brady and Worthen knew the vast majority of Nikola's reservations were non-binding and cancellable. However, as the SEC Complaint alleges, Milton's statements regarding the number and nature of orders for Nikola's trucks were untrue. Milton repeatedly and falsely claimed that Nikola was "sold out" on its vehicles based on the number of reservations it had taken; he claimed that Nikola had secured a 2,500-5,000 "binding truck order" from a publicly traded waste collection company; and he claimed that Nikola had secured committed pre-order reservations worth billions of dollars.[43] However, the waste collection company had several options to cancel the entire order, including an option to cancel 120 days prior to delivery date, and the contract did not set any price terms making Milton's statement that it was worth billions dollars misleading.[44]

(b) The design and development of the Nikola Badger pickup truck (which in reality consisted almost entirely of non-Nikola technology and for which Nikola had not developed a safe, working prototype):

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[43] *Id*. ¶¶104-11.

[44] *Id*. ¶112-13.

The Legacy Nikola Board and Defendants Brady and Worthen knew, or were reckless in not knowing, that Milton's statements about this subject were false and misleading, because on February 18, 2020, they were informed that Nikola would require third-party help to design, develop, and build the Badger, as Nikola was incapable of developing a working prototype on its own.[45] During this meeting, the Board discussed, *inter alia*, signing a letter term sheet with the Diesel Brothers, a third-party contractor, to design and build a prototype of the Badger.[46] The Board also discussed possible partnerships with other vehicle manufacturers to help Nikola build the Badger.[47] However, as late as July 2020, Nikola's Vice President of Technology sent an internal email referring to the truck as "vapor ware" and having "no technical plan."[48]

(c) Nikola's purported in-house development and manufacturing of vehicle components (Nikola in fact sourced most major components, including inverters and batteries, from third parties):

Nikola entered into an agreement to develop inverters with a supplier in 2018, but that agreement was terminated in spring 2020 due to a lack of progress. Milton was involved in the termination and requested a refund from the supplier. Further, Nikola's own in-house program for developing inverters had only just begun. Milton also knew that Nikola could not make the Nikola Tre BEV's batteries in-house and was instead using a third-party supplier. Nikola entered into a multi-million dollar purchase order for third-party batteries in November 2019, and Milton was told in April 2020 by a Nikola Vice President of Technology that the Nikola Tre BEV would have to use a third-party battery. In fact, Nikola entered into a battery supply contract in August 2020, and *Milton took steps to conceal* that the batteries for the Nikola Tre BEV were being supplied by a third party, including refusing to give the battery supplier permission to disclose that it was supplying the batteries for the Nikola Tre BEV.

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[45] NIKOLABR_002356.

[46] *Id.*

[47] *Id.*

[48] SEC Compl. ¶94.

Further, the members of the Post-Merger Nikola Board and Defendants Brady and Worthen were *repeatedly* informed that Nikola did not, in fact, manufacture all of its key vehicle components in-house, *and they therefore know, or were reckless in not knowing, that Milton was making false and misleading statements about this subject matter*. On October 1, 2019, the Legacy Nikola Board was informed that Nikola was using "off-the-shelf" inverters for the Nikola Tre, not inverters manufactured in-house, and on July 23, 2020, the Post-Merger Nikola Board received a presentation stating that Nikola abandoned its plans to use its own battery for the Nikola Tre and planned to use a battery manufactured by third-party suppliers Kreisel or BorgWarner.[49]

(d) Nikola's purportedly imminent manufacturing of the Nikola Tre truck (which was not in fact imminent because the manufacturing plant was not ready to begin production):

The Legacy Nikola Board and Defendants Brady and Worthen knew, or were reckless in not knowing, that Milton's statements about this subject matter were false and misleading, because on April 9, 2020, they had been informed in a presentation that Nikola's target date for a production-ready truck was September 30, 2020—months after Milton's misstatements on this subject—and even then, Nikola was experiencing delays.[50] Further, immediately after Milton made these false and misleading statements, on July 23, 2020, the Post-Merger Nikola Board received a presentation stating that the assembly line was still being built and Nikola was "at risk of producing ZERO trucks" even by the end of the following year, and that Nikola was bleeding a massive amount of cash and that Nikola would "need $2.9B to fund cash flows for operations and investing activities."[51]

(e) The total cost of ownership ("TCO") of Nikola's trucks:

Milton knew that Nikola's projected TCO was at best on par with diesel. In 2019, Nikola's Finance department and its Head of Business Development informed Milton and other senior executives that based

[49] *Id.*

[50] NIKOLABR_000620.

[51] NIKOLABR_000075.

on their analyses and discussions with semi-truck fleet representatives, Nikola's "costs are high and not at parity with diesel."[52] After learning this information, in March 2019, Nikola removed claims about its trucks' TCO savings compared to diesel from private offering documents. But despite his knowledge that Nikola trucks' projected TCO was at best on par with diesel, and potentially worse, Milton repeatedly falsely claimed that the TCO of Nikola's trucks was up to 20–30% below that of diesel vehicles.

(f) The Nikola Two truck's purported ability to go from 0-60 miles per hour in under five seconds (which was never documented or proven):

Milton claimed the Nikola Two truck could accelerate from a stop to 60 miles per hour in under five seconds, but nobody has ever provided proof that it can do so.

(g) Nikola's purported hydrogen production capabilities and hydrogen station network (which were in fact non-existent):

Milton and members of the Legacy Nikola Board and Defendants Brady and Worthen knew, or were reckless in not knowing, that Milton's statements about these subjects were false, because on April 9, 2020, the Legacy Nikola Board had received a presentation warning them that Nikola was unable to develop its hydrogen infrastructure and in fact did not expect to have any physical infrastructure built or operational until after September 30, 2020, the target date for completing the initial blueprints, contract, and charging standard for Nikola's fueling stations. In fact, a Board presentation on October 28, 2020 featured a slide stating that "Nikola Plan Starts with On-Site vs. Hub Production. A Network Combining Both Production Models Is Likely."[53] Accordingly, almost a month after Milton had resigned from the Company, Nikola still had not decided how it was going to produce hydrogen. Moreover, the presentation made clear that the Company has yet to "build out a full-scale commercial [hydrogen] station."[54] The slides from the presentation stated that the Company planned to

[52] *Id.* ¶150.

[53] NIKOLABR_000620.

[54] *Id.*

"[c]ommence construction on first 8-ton station in 2021 to validate technology and fueling."[55]

(h) Nikola's purported ability to tap into federal electricity transmission lines and contract with clean energy sources to obtain cheap electricity (which Nikola could not in fact do): The Post-Merger Nikola Board and Defendants Brady and Worthen learned that Milton's statements about this subject matter were false and misleading as Milton was making them. Specifically, at a July 23, 2020 Board meeting, Nikola's Power Solutions Group informed the Post-Merger Nikola Board that the Company had not yet entered into any power purchase agreements ("PPAs") to buy electricity, and that rate negotiations with electricity providers were still ongoing.[56] Despite this, the Post-Merger Nikola Board did absolutely nothing to prevent Milton from making further false and misleading statements about this subject matter or to correct his then-recent prior false and misleading statements.

222. Milton was able to make these false and misleading statements leading up to and after the Merger for two reasons. First, because Nikola went public through a SPAC reverse merger, and not a traditional IPO, Milton and Nikola were not subject to a mandatory "quiet period" preventing them from promoting the Company. Milton made this explicit during a June 2020 podcast in which he stated that an advantage of Nikola going public through a SPAC reverse merger was that he could "communicate with the market," instead of "bankers . . . trying to tell people what your company is like." During the podcast, Milton also stated "I wanted to be in control, I wanted to be in communication with the public about what we are, who we are, how our company—our business model is so successful."

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[55] *Id.*

[56] NIKOLABR_000075.

223. Second, and again, the Defendants did nothing to stop him, largely because they, too, stood to gain financially from increases in Nikola's stock price. As alleged above, the Post-Merger Nikola Board and the Officer Defendants knew, or were reckless in not knowing, that Nikola's technological assets, manufacturing capabilities, and orders and reservations book were not as Nikola and Milton claimed them to be. And the Officer Defendants (Russell, Brady and Worthen), in particular, were motivated not to intervene to stop Milton from hyping Nikola because they, too, stood to gain from performance awards and RSUs tied to Nikola's share price. *As Milton wrote in a July 7, 2020 email exchange with one of Nikola's directors regarding a release from his lock-up agreement, the stock had gained "over 400%" and he made "everyone else millionaires and billionaires."*[57]

224. Milton's unrestrained illegal promotional efforts to increase Nikola's stock price were successful. Shares in VectoIQ, which became shares of Nikola, had traded at or around $10.30 before the Merger was announced, and rose to $38 on the day before the Merger. Less than a week later, on June 9, 2020, Nikola's stock price hit $93.99. By August 14, 2020, Nikola's share price achieved the first share price milestone specified in Milton's, Russell's, Brady's, and Worthen's employment agreements, entitling them to awards of 3,242,000 shares of Nikola stock, which were at the time worth approximately $81 million.

[57] SEC Compl. ¶161.

D. Defendant Trevor Milton's False and Misleading Statements About Nikola Between June 3, 2020 and September 9, 2020

225. As summarized above, over approximately a three-month period following the close of the Merger on June 3, 2020, *Milton knowingly made no fewer than 41 false and misleading statements about Nikola*.

226. On June 3, 2020, the same day the Merger closed, Milton tweeted a link to a podcast interview during which he falsely stated that Nikola made its "own powertrains, battery, battery management systems, controls . . . in-house." The following day, in response to a tweet that another company "supplies the batteries," Milton tweeted, "We do our own batteries at Nikola and have since day 1."[58]

227. On June 3, 2020, in an interview with the *Tesla Daily* podcast, Milton stated: "When I produce hydrogen I'm paying under 4 cents everywhere I go. And that's because we're doing it behind the grid in large quantities and that's where people fill up. So, what we're able to do is really drive down the cost of energy."

228. On June 4, 2020, Milton was quoted in an article published by *Yahoo! Finance* where he claimed, "When we first started, hydrogen was $16 a kilogram.

[58] Milton began making false and misleading claims about Nikola's in-house design and manufacturing capabilities even before the Merger. In a February 14, 2020 interview on Fox Business, Milton stated: "[W]e're probably one of the only companies in the world that does everything ourselves. We do our own batteries, we do our own frames, we do our own vehicles from the ground up, our own inverters, our own infotainment, you know, the cool screens. So ultimately, that entire truck from the ground up is designed by Nikola, and they do cost a lot of money . . . ."

We can now produce it for well under $4 a kilogram. So we've cut – it's one quarter of the cost now than it was just a few years ago. And we're now cheaper to operate per mile than diesel."

229. On June 6, 2020, on Twitter, Milton falsely claimed that "All the technology, software, controls, E axle, inverters etc. we do internally." On July 1, 2020, Milton tweeted, "We make the entire [battery] pack like the top guys do . . . all internals are Nikola's IP; batteries, inverters, software, ota, infotainment, controls, etc. We own it all in-house."

230. On June 7, 2020, Milton announced on Twitter that Nikola planned to start taking reservations for the Badger on June 29, 2020. On June 9, 2020, in response to a question about when the first Badger prototype would come out, Milton falsely responded on Twitter, "Already."

231. On June 9, 2020, Milton tweeted: "We source energy directly with either wind farms, solar or hydroelectricity. Once we broker a 20-year agreement, we feed it into the federal lines, pay some small fees, then take it out on location. This ensures the energy is clean and we don't pay post meter rates."

232. On June 9, 2020, Milton tweeted: "We take all energy behind the meter which allows us to get below $.04 per kWh and guaranteed clean energy." Milton further tweeted: "Yes, we have stations going up in Canada and they use clean energy for our hydrogen. Solar, Wind and Hydro give us under $4 per kg hydrogen."

233. On June 10, 2020, Milton tweeted: "H2 is now under $4 per kg and working on sub $3 per kg. . . . 15 min full [sic] time & 10,000 lbs lighter . . . . Before anyone goes and slams me about cost of hydrogen, we don't produce it in the city, we do it behind the meter at about $.04 / kWh on PPP clean energy." In another tweet on June 10 2020, Milton claimed: "We are now below $4 per kg which is the lowest in the world. We started at $16 and now we are at $4. We plan on reducing that again. The key is to order tons of equipment, scale it and buy clean energy cheap."

234. On June 11, 2020, *Autoline After Hours* aired a podcast where Milton stated the following about Nikola's hydrogen production: "And we just ordered $30 million worth of equipment two days—or three days ago for our electrolyzer. So, it's—all it takes is just electricity, clean energy from hydro, wind, or solar. And we can produce it all 24 hours of the day, never paying peak rates, never buying dirty energy, all zero emission." When asked by the host if Nikola made the hydrogen on site, Milton further claimed: "You know, people don't get Nikola . . . we have the largest hydrogen station in the western world at our headquarters. So, we've already proven it . . . . Now we're down two, three bucks a kilogram and it's pretty awesome."

235. On June 18, 2020, the *Irish Times* published an article entitled "Nikola Motor Takes a Big-Money Punt on the Hydrogen Future," which quoted Milton as

saying: “We can now produce hydrogen for between $2 and $4 a kilogram. We’re now cheaper than diesel to operate per-mile and we’re almost at parity with a battery electric per-mile, and ultimately that’s game over for diesel.”

236. On June 21, 2020, a Twitter user asked Milton, “can you please explain how Nikola is achieving cheap power along freeways? And how will you still achieve cheap power for stations inner city? This is more of the game changer for nikola [sic] in my opinion. Thanks.” Milton responded: “Freeway allows you 20-year PPP without paying high fees to transport through utilities. It is nearly 5x cheaper to produce h2 on freeways, where hydrogen excels.”

237. On June 21, 2020, Milton published an article on LinkedIn, in which he wrote: “Most hydrogen that Nikola makes is on the freeway . . . . Nikola uses energy transmitted on the federal transmission lines before we enter the utility. We buy this clean energy directly from Wind, Solar and Hydro facilities directly. This allows us to get sub $.04/kwh 20-year agreements on the freeways.”

238. On June 25, 2020, Milton made several false claims on Twitter regarding how the Badger would use the water created by the operation of its hydrogen fuel cell. Milton tweeted that the Badger uses ““most all of it for our windshield washer fluid and . . . a little bit for clean, pure, drinking water.” Milton then tweeted, “Yes you heard that right, we will have a drinking fountain in our truck

using the hydrogen bi product water for the drivers to have nice cold, clean, pure drinking water."[59]

239. On June 29, 2020, Milton stated during the *Raging Bull* podcast, in response to a question regarding who manufactures the batteries used by Nikola's vehicles: "The battery is actually done by Nikola. We own all the tech and we're building all the batteries in-house. So it's all owned by Nikola . . . . [W]e use other people's cells. . . . [B]ut the rest of the entire battery is all our tech, like the cooling, the thermal, the structural, the battery management system, the software; all that's all Nikola."

240. Shortly after June 29, 2020, when Nikola began taking reservations and deposits for the Badger trucks, Milton falsely tweeted that the most expensive of the three available reservation packages was "sold out," even though it was not.

241. On July 1, 2020, Milton tweeted: "We don't make the cells. We make the entire [battery] pack like the top guys do. We do have an OEM making our truck,

[59] At the time, Milton had not yet discussed the idea of using fuel cell by-product as washer fluid or drinking water with Nikola's engineers, who were apparently dubious of the idea—when informed of Milton's claims, one engineer questioned whether "this [is] a joke," a marketing employee wrote that his "head is fuzzy," and a designer texted, "[u]hhhhh what." And several days later, Milton attempted to determine if such use was possible by running an internet search for: "can you drink water from a fuel cell?" Despite this, Milton instructed that Badger's engineers to build the prototypes with water fountains—even though they were BEVs, and not FCEVs that ran on hydrogen fuel—and continued to promote the Badger's drinking water system on television and social media during June-July 2020.

but all internals are Nikola's IP; batteries, inverters, software, ota, infotainment, controls, etc. We own it all in-house. Just not the plant to build the truck."

242. On July 1, 2020, Milton responded from his personal Twitter account to another user who asked, "how are you able to get the truck ready in 4 months?" Milton replied: "Exactly, which means it's not fake. Truck is real. It's going to be fun releasing teaser videos leading up to #nikolaworld2020 of the #nikolabadger."

243. On July 5 or 6, 2020, Milton falsely tweeted: "All major components are done in house; batteries, inverters, software, controls, infotainment, over the air, etc."

244. On July 6, 2020, Milton claimed in an interview on the *Founvder Hour* podcast that Nikola's total cost of ownership, as compared to diesel, was "like 20 to 30 percent sometimes, cheaper." He further stated, "So it's game over, essentially. If you don't own a Nikola truck, you're gonna go bankrupt."

245. On July 14, 2020, Milton stated the following in an Instagram Live video he posted: "Who makes Nikola's batteries? Nikola does. Do we make the cells? No, we do not. . . . We do however, make everything in our battery. All the cooling, the thermal, the battery management system, the software, the hardware, everything except for the cell."

246. On July 14, 2020, Milton stated in an Instagram Live video—which he also tweeted about—that the Badger was "a real truck, comes from a billion dollar program" and was "legitimate."

247. On July 14, 2020, Milton stated in an interview posted to YouTube by the *Observer*: "We do have a hydrogen pickup truck coming out called the Nikola Badger. It's probably one of the most anticipated automotive reveals in history, that I've ever encountered in my life . . . . And it is a hydrogen-electric pickup truck that can go much further than the Tesla truck, much further than the Rivian truck, and even much further than a Ford F-150."

248. On July 14, 2020, Milton stated the following in an Instagram Live video he posted: "we charge cost per mile, that's it. Everything all in, service, warranty, maintenance, the entire thing, including the hydrogen fuel, it's under a dollar a mile and, and in some area—it depends on how many miles you drive a year. That can range much cheaper than that, all the way up to about a dollar a mile. It depends on . . . how it's built out and . . . it's 20 to 30 percent less than diesel."

249. On July 14, 2020, the *Observer* posted a video to YouTube of an interview featuring Milton claiming: "We build all of our hydrogen through clean energy directly from the energy source . . . we produce hydrogen 24 hours a day with it. And then we can produce that very cheap like you know like $2, $3 a kilogram. We're under $4 a kilogram for hydrogen.

250. In a video published on or around July 14, 2020, Milton said, with respect to the powertrain for the Nikola Two: "We do all the e-axle design in house. All the gears, the gear reductions, the thermal, the cooling, even the controls that go with it, and also, the inverters as well. All inverters on the Nikola truck are probably some of the most advanced software systems that I know of anywhere in the automotive world." Milton also stated that while Nikola does not manufacture the battery cell, it does "make everything in our battery. All the cooling, the thermal, the battery management system, the software, the hardware, everything except for the cell."

251. On or around July 15, 2020, Milton posted a falsified video purporting to show that the Nikola Two could go "0-60 in under 5 seconds." After some Twitter users questioned whether the video really showed the Nikola Two going from 0MPH to 60MPH in five seconds, Milton promised a follow-up video to back up his claims, but one was never posted.

252. On or about July 17, 2020, Milton recorded a podcast with *The Chartcast with TC & Georgia* that was published on or about July 19, 2020, during which he stated: "So the energy on the freeway, we, we, we tap directly into the main federal transmission lines and we contract directly with groups . . . an example would be like, you know, um, would be like a Tennessee Valley Authority. . . . So out on the freeways where the federal transmission lines are, and we can tap in, and we've,

we've already preplanned all these, these locations where they can go. Um, and we're gobbling up the best locations right now. Milton further stated: "We only look at areas where we can get this energy for sub, you know, sub three or four cents a kilowatt hour, guaranteed 24 hours a day. And we've been able to do that in almost every one of our major locations that we're going up, and we're gobbling up those locations." And he stated, "we have exact costs for our customers" and "every contract we've been doing right now has been to where we get very good discounts, if not free for a lot of energy, you're talking about, you know, $2 a kilogram, buck, buck 50, buck 80." During the podcast, Milton also claimed that Nikola had five BEVs "coming off the assembly line right now in Ulm, Germany." Milton also claimed that the TCO for Nikola's trucks was "essentially 30 . . . 25, 30% less than a diesel engine to operate . . . which is game over for diesel."

253. In an interview on or about July 17, 2020 on the *TeslaCharts* podcast, Milton claimed Nikola "chop[ped] the cost of hydrogen from $16/kg down to . . . below $3/kg." Milton also claimed he had "so much experience" with hydrogen production, that he "knows the stuff better than anyone he has ever encountered," and said he spent "seven years" driving the cost of hydrogen down.

254. In a July 17, 2020 interview with Jessica Meckmann published on LinkedIn, Milton stated: "We are contracting with wind, solar and hydro plants for

energy and so far have been able to source plenty of energy under $.04 per kWh. Most of it is much lower in the 2.5 [cents] per kWh range."

255. On July 19, 2020, Milton appeared on the *Jimmy Rex Show* podcast, where he stated: "So we . . . had been working on it [the Badger] for a while. I decided to put my teams on it. We got it done."

256. On July 22, 2020, Milton falsely tweeted that Nikola had "5 units coming off assembling line now in Ulm Germany" and "5 Units coming off assembling lines in Germany for testing."

257. On July 31, 2020, during the *This Week in Startups* podcast, Milton stated as follows: "[W]e do make our own battery packs, that's the key, that's the key element because of the cost. . . . You'll never make it as an OEM if you don't build your own battery. That's the most critical part. . . . [T]he tech is ours. So the battery—like, all the important stuff like software, batteries, or, or eAxle designs, it just means we use someone else to, to build them in the thousands for us, but we own all the tech." Additionally, during the podcast, Milton claimed that Nikola had "over ten billion dollars in preorder reservations," then stated that the orders were not "non-committal" and reiterated that Nikola had "billions and billions and billions and billions of dollars in orders." When asked if these were letters of intent, Milton replied, "I wanna correct something. Not letter of intents, they're actually contracts."

258. On July 31, 2020, during the *Stockcast* podcast, Milton stated that "diesel's dead in the trucking world. And why is that? Because trucking operates on eight percent margins, somewhere around there. So if you're eight percent less than diesel, it's already game over and that's why it's so great. We're almost 20 to 30 percent less than diesel right now and we're working on, you know, if we can get really good, if we can get down to two dollars a kilogram."

259. In an August 1, 2020 interview on *Fox Business*, Milton falsely claimed that Nikola "saw an opportunity to bring the cost of hydrogen down going zero emission and putting it on parity or lower than diesel" and Nikola was able to produce hydrogen "below $4/kg" because "standardization of a hydrogen station worldwide has allowed us to drive that cost down dramatically."

260. On August 3, 2020, after a Twitter user asked Milton to share how he reduced the price of hydrogen, Milton responded: "Essentially, $.04 kWh equals under $4 per kg. We are already locking in much lower than $.04 per kWh on our stations going in as they are on freeways with 20 year PPA. That along with other things I mentioned get us below that."

261. On August 5, 2020, in an interview with *Cheddar News*, Milton stated that Nikola had received so many orders during the Covid-19 pandemic that it was "sold out for so many years."

262. On August 10, 2020, Milton announced a purportedly "binding truck order" of 2500-5000 trucks by a publicly traded waste collection company, and tweeted from his personal Twitter account to promote his upcoming appearance on CNBC's *Fast Money* to discuss the order. Then, when he appeared on *Fast Money*, Milton again stated that the "contract" was "worth about, between 1 and 2 billion dollars, um, they have the right – or they're obligated to buy up to 2500 of these electric trash trucks, and they have the option to go up to 5000." Milton also later referred to the order as a billion-dollar-plus opportunity for Nikola in tweets from his personal account on August 16, 2020 and during a TD Ameritrade Network interview on August 19, 2020. In fact, the agreement with the waste collection company did not specify a price term, and the contract gave the waste-collection company broad rights to cancel for a variety of reasons.

263. On August 13, 2020, Milton tweeted: "We currently make our own green H2 for under $4 / kg."

264. In a YouTube video posted on the Tesla Joy YouTube channel on August 24, 2020, Milton stated: "So the things that we do insource is all of our controls, all of our inverters . . . . . All of that is actually done in-house in Nikola. . . . But what we do not do is manufacture those in mass production. So we design and engineer them. . . . Same thing with our inverter. We designed our own inverter. We actually have full prototypes here."

265. On September 8, 2020, Nikola and GM announced a strategic partnership to develop and manufacture the Badger. On September 8-9, 2020, Milton stated on Twitter that Nikola had "designed the Badger from a clean sheet," "built the [B]adger from the ground up," and that GM would "use Nikola's design, and engineer it to fit on the existing GM modular EV platform."

266. During a September 9, 2020 television interview, Milton stated that Nikola had "built the Nikola Badger from the ground up ourselves, the whole thing" and that the vehicle is "pretty close" to the "final car" that GM would manufacture. Milton stated that the Badger was "probably 70 percent Nikola 30 percent GM" and that Nikola was "really doing most of the IP internally . . . the over-air updating, the software, the controls, the infotainment, the design of the vehicle, the cab, the interior of the cab, . . . even the driver profile, we've been all the way down to suspension, that all comes from Nikola." In truth, the Badger was to be built on a GM electric vehicle platform using GM components. There was no plan to use any proprietary Nikola technology, with the possible exception of the infotainment system. Nobody at GM ever saw or used Nikola's Badger prototypes.

267. Milton's foregoing statements following the completion of the Merger were materially false and misleading because, *inter alia*:

(a) Nikola did not have proprietary turbine technology and needed to obtain the technology from a third party.

(b) Nikola had never produced a single kilogram of hydrogen, had never had a station permitted to produce hydrogen, and had never signed any contracts with electricity provider relating to the production or distribution of hydrogen.

(c) Nikola did not, in fact, have any in-house hydrogen capabilities or any partners capable of providing such technology.

(d) Nikola had not sought a permit for nor built any hydrogen stations, nor had it acquired any land for the stations.

(e) Nikola never possessed the claimed battery technology and could not manufacture batteries in-house, and internal Nikola documents refer to sourcing the batteries for Nikola's vehicles from third-party suppliers.

(f) Nikola had not designed or built a functioning prototype of the Badger vehicle at the time it was announced, and the agreement Nikola later signed with GM provided that very little, if any, of Nikola's design, engineering, or intellectual property would be used in producing the Badger and GM never saw or intended to use Nikola's purported prototypes.

(g) At the time of Nikola's claims regarding the luxury closed-cabin version of the NZT, Nikola had only prepared a "mock up" vehicle that lacked some of the described features, including air conditioning, and the Company

soon after abandoned this design and outsourced a re-design of the NZT to another company.

(h) Nikola does not own any gas wells.

(i) Nikola did not have solar panels on the roof of its headquarters at least through January 2020.

(j) Nikola did not have any source for clean energy, was not able to tap into federal electricity transmission lines, and did not have any purchase power agreements ("PPA's") to buy electricity at specific rates.

(k) The purported assembly line producing the Nikola Tre was not operational.

(l) Reservations and/or orders for the Nikola trucks were fully cancellable, or highly contingent.

(m) High-ranking engineering personnel did not have the requisite education or experience to manage and develop an EV truck.

E. Starting in September 2020, the Truth Begins to Emerge

1. The Hindenburg Report

268. On September 10, 2020, Hindenburg Research published a 52-page report asserting that "Nikola is an intricate fraud built on dozens of lies over the course of its Founder and Executive Chairman Trevor Milton's career." The Hindenburg Report gathered "extensive evidence—including recorded phone calls,

text messages, private emails and behind-the-scenes photographs," to substantiate its allegations of dozens of false statements by Milton and Nikola.

269. On September 11, 2020, Nikola issued a press release responding to the Hindenburg Report titled "Nikola Refutes Allegations." Nikola claimed Hindenburg had ulterior motives and issued its report "to manipulate the market and profit from a manufactured decline in our stock price." Nikola claimed the report was "replete with misleading information and salacious accusations," and that the report was "not accurate" and a "hit job for short sale profit driven by greed." Nikola further stated: "We have nothing to hide and we will refute these allegations. They have already taken up more time and attention than they deserve. We have retained leading law firm Kirkland & Ellis LLP to evaluate potential legal recourse, including with respect to the activist short seller and any others acting in concert. Nikola also intends to bring the actions of the activist short-seller, together with evidence and documentation, to the attention of the U.S. Securities and Exchange Commission."

270. That same day, Nikola's Board held a meeting that was attended by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Thompson, Ubben, Brady, and Worthen, as well as attorneys from Kirkland & Ellis and Joseph R. Pike, Nikola's Chief Human Resources Officer.[60] The minutes from this Board meeting state:

[60] NIKOLABR_000261.

> Mr. Milton discussed the allegations in the Hindenburg Report and the press release issued by the Company on September 11 in response to the allegations. He reported that the Company, with the help of [Kirkland & Ellis LLP ("Kirkland & Ellis")], would be working over the weekend to prepare a detailed response to the allegations most relevant to the Company, with a goal of issuing a press release by Monday morning. He further reported that the draft press release would be circulated for review by the Board and that a subsequent Board meeting would be called prior to issuing the press release. The Board also discussed Mr. Milton's use of social media. Discussion ensued and the Board asked questions, which were answered by Mr. Milton and the advisors.[61]

271. On September 13, 2020, Nikola's Board held another meeting to discuss how to respond to the Hindenburg Report.[62] This meeting was attended by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Thompson, Ubben, Brady, and Worthen.[63]

272. A draft press release was shared with the Board in advance of the meeting.[64] At the meeting Nikola's Board approved the communications protocol for responding to the Hindenburg Report, including the press release.[65] Nikola's Board's approval of the communications protocol was made in bad faith, as the

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[61] *Id.*

[62] NIKOLABR_000263.

[63] *Id.*

[64] *Id.*

[65] *Id.*

allegations centered on Milton's conduct, and Nikola's Board did nothing to investigate the allegations before approving communications concerning them, aside from an apparently brief discussion of Milton's use of social media.[66]

273. Nikola then issued the press release on September 14, 2020. The press release called the Hindenburg Report "false and defamatory" and stated:

> Nikola believes that the Hindenburg [R]eport, and the opportunistic timing of its publication shortly after announcement of Nikola's partnership with General Motors Co. and the resulting positive share price reaction, was designed to provide a false impression to investors and to negatively manipulate the market in order to financially benefit short sellers, including Hindenburg itself.
>
> Nikola has contacted and briefed the U.S. Securities and Exchange Commission (SEC) regarding Nikola's concerns pertaining to the Hindenburg report. Nikola intends to fully cooperate with the SEC regarding its inquiry into these matters.
>
> Nikola, an early-stage growth company, has been through extensive due diligence processes, starting with Bosch in 2017, Hanwha Group and ValueAct Capital in 2018, CNH Industrial N.V. in 2019, and VectoIQ Acquisition Corp. and General Motors in 2020. Nikola remains laser-focused on laying the groundwork toward becoming the global leader in zero-emissions transportation.

274. In response, on September 15, 2020, Hindenburg Research issued a 25-page rebuttal report, which argued that Nikola had "debunked nothing" and had

[66] *See* NIKOLABR_000265.

"either confirmed or sidestepped virtually everything we wrote about, and in some cases raised new unanswered questions."

43. Also on September 15, 2020, in an article titled "Justice Department Probes Electric Truck Startup Nikola Over Claims It Misled Investors," the *Wall Street Journal* announced that the DOJ was investigating Nikola based on allegations of fraud that were contained in the Hindenburg Report.

2. Kirkland & Ellis' Internal Investigation

275. After Hindenburg Research published its reports, Nikola and its Board retained the law firm Kirkland & Ellis to conduct an internal investigation of the allegations in the report. Kirkland & Ellis contacted the SEC's Division of Enforcement to make it aware of the investigation, and Nikola subsequently learned that the SEC had previously opened an investigation.

276. On September 14, 2020, Nikola and five of its officers and employees, including CEO Russell, received subpoenas from the Staff of the SEC Division of Enforcement as a part of a fact-finding inquiry related to aspects of Nikola's business as well as certain matters described in the Hindenburg Report. The Staff of the Division of Enforcement issued additional subpoenas to another three of the Company's officers and employees, including CFO Brady, on September 21, 2020 and to Nikola's current and former directors on September 30, 2020.

277. Nikola and Milton also received grand jury subpoenas from the U.S. Attorney's Office for the Southern District of New York (the "USAO SDNY") on September 19, 2020. The following day, Milton offered to voluntarily step down from his position as Nikola's Executive Chairman, as a member of the Board, including all committees thereof, and from all positions as an employee and officer of Nikola. The Board accepted his resignation and appointed Girsky as Chairman of the Board. The Company has subsequently appointed three new board members, Shindler and non-parties Petrovich and Smith.

278. Nikola also received a grand jury subpoena from the New York County District Attorney's Office on September 21, 2020. On October 16, 2020, the New York County District Attorney's Office agreed to defer its investigation.

279. On October 28, 2020, the Company received an information request from The Nasdaq Stock Market LLC, seeking an update on the status of the inquiries from the SEC and the USAO SDNY, which Nikola provided.

280. On November 12, 2020, Kirkland & Ellis presented the findings from its investigation to the DOJ and SEC (the "K&E Presentation").[67] The materials from the K&E Presentation show that certain Nikola executives—including,

[67] *United States v. Milton*, Case No. 1:21-cr-00478, ECF No. 58-4, Kirkland Presentation to Government (S.D.N.Y. filed Dec. 15, 2021).

notably, Russell, Brady and Worthen—knew that certain of Milton's public statements about Nikola' products, operations, and business were false at the time they were made, and that there was concern inside the Company about Milton's propensity to make false statements about the Company's products and capabilities to the public in an effort to artificially boost Nikola's stock price. Notably, the K&E Presentation does not reflect any interviews by Kirkland & Ellis of any members of Nikola's Board other than Russell.

281. Purportedly, Kirkland & Ellis substantially completed its investigation by February 25, 2021, the date Nikola filed its 2020 Form 10-K.

282. Based on its investigation—which, according to Nikola's 2020 Form 10-K/A, was limited in scope to the allegations in the Hindenburg Report—Kirkland & Ellis determined that the following statements by the Company or Milton were "inaccurate in whole or in part, when made":

(a) in July 2016, the Company stated that it owned rights to natural gas wells, and in August 2016 that the wells were used as a backup to solar hydrogen production;

(b) in August 2016, Milton and the Company stated that Nikola had engineered a zero emissions truck;

(c) in December 2016, Milton stated that the Nikola One was a fully functioning vehicle;

(d) that an October 2017 video released by the Company gave the impression the Nikola One was driven;

(e) in April 2019, Milton stated that solar panels on the roof of the Company's headquarters produce approximately 18 megawatts of energy per day;

(f) in December 2019 and July 2020, Milton stated that Nikola "can produce" over 1,000 kg of hydrogen at Nikola's demo stations and that Nikola was "down below" $3/kg at that time;

(g) in July 2020, Milton stated that "all major components are done in house"; he made similar statements in June 2020;

(h) in July 2020, Milton stated that the inverter software was the most advanced in the world and that other OEMs had asked to use it; and

(i) in July 2020, Milton stated that five trucks were "coming off the assembly line" in Ulm, Germany.

283. Kirkland & Ellis found that Milton's April 19, 2019 claim that Nikola had "3.5 megawatts of solar up on the roof producing about 18 megawatts of energy a day in our headquarters" was patently false. Indeed, the K&E Presentation states that Brady responded to this claim by saying it is "completely false," at the time Milton made the statement. In reality, Nikola had only discussed moving its headquarters off-grid, but this idea was deemed cost-prohibitive.[68]

284. The Kirkland & Ellis investigation found Milton's claims regarding Nikola owning natural gas wells to be false, and that at the very least, Worthen and Brady were aware of such. The K&E Presentation states that Worthen attributed Milton's statement to "an agreement with a well owner that gave [Milton] the option to buy gas wells. Milton's assertions were likely tied in some way to that agreement,

[68] *Id.* at p. 33 (pagination refers to ECF header pagination).

but are 'potentially misleading or just misleading.'"[69] Further, the K&E Presentation states that "Brady is unaware of any natural gas wells owned by Nikola."[70]

285. The Kirkland & Ellis investigation examined Milton's statements where he claimed that Nikola was producing hydrogen and could produce over 1,000 kilograms a day on site. . . . The station's already up and operational for pumping right now." The K&E Presentation also features Milton's July 17, 2020 statement on a podcast, where he claimed that Nikola has been able to "chop the cost of hydrogen from $16/kg down to – we're down below $3/kg on our hydrogen now" and that "the standardization of the hydrogen station was the most important aspect" of cost-saving.[71]

286. In response to these claims, the K&E Presentation featured the following interview summaries of Russell, Brady, and Worthen:

> Mark Russell, CEO: This statement is "indefensible." The headquarters station is for storage and dispensing, not production.
>
> Kim Brady, CFO: It is a "false statement" that Nikola is producing 1,000 kg/day of hydrogen at headquarters.
>
> Britton Worthen, CLO: The statement that Nikola can produce 1,000 kg/day is not true, and Milton knew it was

[69] *Id.* at p. 36.

[70] *Id.*

[71] *Id.* at p. 38.

> not true. We discussed this "a million times." Milton states future plans as if they are a present reality.[72]

287. Moreover, on July 20, 2020, Elizabeth Fretheim (Global Head, Business Development) emailed Russell, Brady, and Worthen, as well as Pablo Koziner, and the communications teams listing her concerns and inaccuracies regarding Trevor Milton's July 17 podcast interview, where he stated that "we're down below $3/kg on our hydrogen now."[73] As such, at the very least, Russell and Brady knew that Nikola was unable to produce hydrogen, let alone produce it for the low price Milton claimed.[74]

288. Regarding Milton's numerous claims that Nikola developed and produced its major components in-house, the K&E Presentation found that Brady was aware that "Nikola aspires to build components in-house but does not do so at present."[75] The K&E Presentation also states the following regarding Russell's knowledge of this matter:

> Once Milton gave the order, he considered that task done. That is why, for example, he would say we had the best

[72] *Id.* at p. 39.

[73] *Id.* at 40.

[74] In addition to his statements contained in the K&E Presentation, during Milton's criminal trial, Brady testified that he knew Milton's August 13, 2020 statement claiming "we currently make our own green H2 for under $4 a kilogram" was false because "we did not generate any hydrogen at that point." Milton Trial Tr. at 2022.

[75] *Id.* at p. 44.

> battery pack in the world right after hiring AVL. The battery pack was not finished in reality, but it was done in his mind because he had set it in motion.[76]

289. Milton was aware that Nikola had not developed its own inverters and was instead outsourcing them from other companies. The K&E Presentation features a summary of Varoujan Sarkissian's (Nikola's Global Head of Vehicle Electrical and Controls) interview with Kirkland & Ellis, which states: "Milton knew that Nikola was in the early stages of inverter development — the Company had canceled its contract with ITK for inverter development and was essentially starting over."[77] Further, the K&E Presentation features Kevin Lynk (Nikola's Chief Engineer), as stating it was "grandiose" for Milton to state that the inverters are "advanced software systems" when they "aren't even in production yet."[78] In addition, the K&E Presentation summarizes Brady's knowledge as: "Milton's assertion that other OEMs have asked to use Nikola's in-house inverter is 'complete fiction.'"[79]

290. The investigation by Kirkland and Ellis also shows that certain Nikola executives were aware of the falsity of Milton's statements concerning the Company making its own batteries. The K&E Presentation states:

> Kim Brady, CFO: Nikola does not make its own battery in-house. "No one can say they have their own battery

[76] *Id.* at p. 45.

[77] *Id.* at p. 51.

[78] *Id*.

[79] *Id.* at p. 53.

> other than maybe Tesla." Nikola "never told" institutional investors that it makes its own batteries. Rather, it told them the truth, namely that Nikola buys cells and works with third parties to build its modules. Milton "had paranoia about investors knowing that" even after numerous attempts to explain to him that investors understood it already. He "always played a bit of cloak and dagger" regarding battery technology. For example, he did not want to disclose Nikola's relationship with Romeo.
>
> Britton Worthen, CLO: Milton worked hard to ensure that Romeo could never say that its batteries were in Nikola's trucks.
>
> Mark Russell, CEO: Romeo was the best option, but Milton badly wanted Nikola to own its battery technology. He edged everyone else (including Umran Ashraf) out of the discussions with battery partners.[80]

291. In addition, the K&E Presentation featured a text message sent by Brady to Russell on January 1, 2020, which asked: "Spoke with Umran for a few minutes this afternoon. He said Trevor's battery presentation was full of misrepresentation. In addition, he believes a flooded module makes thermal propagation worse and not better. Who is right?"[81] Therefore, Brady and Russell were aware that Milton's statements regarding the Company's battery development were inaccurate at the time he made them.

[80] *Id.* at p. 57.

[81] *Id.* at p. 58.

292. Moreover, the K&E Presentation features an excerpt from a performance review by Umran Ashraf of Anirban Niyogi (Lead Battery Module Designer), which states:

> Umran cannot provide a detailed performance review of Anirban for any battery development responsibilities since Nikola is not developing a battery in house. Umran is not clear what career advancement or opportunities exist internally for Anirban in the future because Nikola does not have a clear plan for battery development.[82]

293. The K&E Presentation states the following regarding Brady's assessment of Milton's false claims pertaining to Nikola's battery technology:

> Nikola is "years away" from having the battery technology Milton described. There's no way he could have known how many miles the trucks could drive between charging. The whole statement was an embellishment and fiction at the time, but it may be true in 10 years if everything goes perfectly.[83]

294. Worthen was also aware that Nikola did not and still does not have "commercializable" battery technology, and that Milton's statements to the contrary were a "terrible and stupid idea," and Worthen told him not to make the statement.[84]

295. The K&E Presentation quoted Brady as saying, "As of August 1, 2016, the Nikola One was running on natural gas and thus was 'not zero emissions.'

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[82] *Id.* at p. 59.

[83] *Id.* at p. 64.

[84] *Id.*

Milton's statements to the contrary are false."[85] In addition, Worthen stated that the statement that Nikola "achieved 100% zero emissions on the Nikola One" by August 1, 2016 is "just not true."

296. Milton's false claims about the Nikola One being "fully functional" and able to drive under its own power were known to be false to Brady, who said that the Nikola One unveiled in December 2016 was a pusher.[86] Similarly, Worthen admitted that Milton's statements about the truck being "fully built" "undermined all the hard work and sacrifice by Nikola employees" who worked hard to "make something really special for the unveiling."[87]

297. The K&E Presentation also contained a slide that states Russell, who saw the October 2017 video of the Nikola One driving while he was still at Worthington, doubted its authenticity and thought it "smelled funny."[88]

298. Kirkland & Ellis said nothing about Milton's or Nikola's false, deceptive, and misleading claims relating to subject matters that the Hindenburg Report had not addressed. This omission was notable because Kirkland & Ellis was

[85] *Id.* at p. 70.

[86] *Id.* at p. 76.

[87] *Id.* at p. 77.

[88] *Id.* at p. 83.

also representing Nikola in response to the DOJ and SEC investigations, which Kirkland & Ellis knew to be much broader.

3. Defendants Cover Up Their Complicity by Granting Milton a Generous Separation Agreement from Nikola

299. On September 20, 2020, Nikola announced that Milton had resigned as its Executive Chairman. Milton was replaced as Executive Chairman by Russell, Milton's co-owner in T&M and his former boss at Worthington, which acquired Milton's previous company dHybrid Systems in 2014 and had also invested in Nikola.

300. The Post-Merger Nikola Board granted Milton a generous separation package, providing further evidence of Defendants' bad faith and attempted cover-up of the alleged misconduct at Nikola. Although Milton's separation agreement required him to forfeit 4,859,000 RSUs he had been granted through a performance award tied to Nikola's stock achieving various share-price milestones, the Board approved the accelerated vesting and settlement of 600,000 time-vested RSUs (for which Milton paid nothing), which Nikola subsequently settled on March 15, 2021.

301. Additionally, under the terms of the separation agreement, Nikola agreed to pay for the costs of a security inspection of Milton's residence and to reimburse Milton up to $100,000 for a full-time security detail for him and his family for three months. Thus, at a time when Kirkland & Ellis' and Ernst & Young's investigations had barely begun, much less concluded, and while criminal

investigations were gaining steam, the Post-Merger Nikola Board allowed Milton to resign rather than terminating him for cause, and agreed to provide him with a generous separation package rather insisting on a contingency that would claw back compensation and stock that he had earned while acting in bad faith and against the Company's interest.

4. Milton Attempts to Cash In On His Nikola Shares Before He Is Criminally Prosecuted

302. Between December 3, 2020 and when he was indicted in July 2021, Milton disposed of 7,295,997 shares of Nikola common stock for proceeds valued at approximately $112 million—allowing him to substantially cash in on his Nikola shares before he was criminally prosecuted by the DOJ.

5. Milton's Criminal Conviction for Securities Fraud and Wire Fraud and Nikola's Agreement to Pay a $125 Million Penalty to the SEC

303. On July 29, 2021, the DOJ unsealed an indictment charging Milton with two counts of securities fraud and one count of wire fraud for making "false and misleading statements regarding Nikola's product and technology development" as part of a scheme to target "individual, non-professional investors—so-called 'retail investors'" through "social media and television, print, and podcast interviews." The indictment alleges (with emphasis added):

> The deceptive, false, and misleading claims made by TREVOR MILTON, the defendant, regarding the development of Nikola's products and technology,

> *addressed nearly all aspects of the business* and included: (a) false and misleading statements that the company had early success in creating a "fully functioning" semi-truck prototype known as the "Nikola One," when MILTON knew that the prototype was inoperable; (b) false and misleading statements that Nikola had engineered and built an electric- and hydrogen-powered pickup truck known as "the Badger" from the "ground up" using Nikola's parts and technology, when MILTON knew that was not true; (c) false and misleading statements that Nikola was producing hydrogen and was doing so at a reduced cost, when MILTON knew that in fact no hydrogen was being produced at all by Nikola, at any cost; (d) false and misleading statements that Nikola had developed batteries and other important components in-house, when MILTON knew that Nikola was acquiring those parts from third parties; and (e) false and misleading claims that reservations made for the future delivery of Nikola's semi-trucks were binding orders representing billions in revenue, when the vast majority of those orders could be cancelled at any time and were for a truck Nikola had no intent to produce in the near-term.[89]

304. The Indictment alleges that Milton "made these false and misleading statements regarding Nikola's products and capabilities to induce retail investors to purchase Nikola stock," and that Milton "was motivated to engage in the fraudulent scheme in order to enrich himself and elevate his stature as an entrepreneur."[90]

305. The Indictment emphasizes that Milton specifically targeted his false statements to appeal to retail investors, stating that: "Among the retail investors who

[89] DOJ at ¶3-4.

[90] *Id.* at ¶4.

ultimately invested in Nikola were investors who had no prior experience in the stock market and had begun trading during the COVID-19 pandemic to replace or supplement lost income or to occupy their time while in lockdown."[91] The Indictment further alleges:

> [D]uring the course of the fraud, MILTON, who aspired to be listed among Forbes's 100 richest people, saw the market value of his interest in Nikola rise substantially. On or about March 3, 2020, when Nikola announced that it would go public by merging with [VectoIQ], Nikola claimed an enterprise value of approximately $3.324 billion, implying that the Nikola stock that MILTON would hold upon completion of the merger, through an entity called 'M&M Residual,' had a value of approximately $844 million. At opening on or about June 9, 2020, after the merger was complete, and when Nikola's stock peaked in the wake of announcements by MILTON about the Badger, the market value of Milton's stock was at least approximately $8.5 billion.[92]

306. As alleged above, on October 14, 2022, following a four-week jury trial, a federal jury convicted Milton of one of the counts of criminal securities fraud and two counts of criminal wire fraud. Milton is scheduled to be sentenced on June 21, 2023.

307. The SEC also filed a parallel civil action against Milton, alleging that Milton violated Securities Act §§ 10(b) and 17(a), detailing similar allegations concerning how Milton defrauded Nikola's investors. The Indictment of Milton

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[92] *Id.*

specifically references statements made on Nikola's official company Twitter and Facebook accounts, and the SEC's civil complaint against Milton alleges that "Milton made the false and misleading statements in tweets from his personal Twitter account, posts to his personal Instagram account, *tweets from Nikola's corporate Twitter account*, *in Nikola press releases*, *and in television and podcast appearances in which he was identified as Nikola's CEO or Executive Chairman*."[93] (emphasis added). As the SEC Complaint states, "much of what Milton represented as accomplishments were, at best, internal targets years away from completion and subject to significant execution risks or, worse, ideas conceived only on paper."[94]

308. On December 21, 2021, the SEC announced the resolution of its investigation arising from Milton's misconduct in a cease-and-desist order (the "SEC Cease-and-Desist Order"), which ordered Nikola to pay a $125 million fine.[95]

309. Tellingly, the SEC Cease-and-Desist Order found that "Nikola's disclosure controls and procedures for monitoring or reviewing Milton's interviews and social media activity were deficient from at least June 3, 2020, through September 2020."[96] Specifically, the SEC Cease-and-Desist Order points out that

[93] SEC Compl. ¶47.

[94] *Id.* ¶5.

[95] *See* SEC C&D Order.

[96] *Id.* ¶17.

the Company should have routinely consulted with and reviewed Milton's statements.[97]

310. The SEC Cease-and-Desist Order states, in pertinent part:

> Milton did not routinely consult with anyone at Nikola before publishing Nikola-related information on his or Nikola's social media accounts, or before being interviewed about Nikola on television programs and podcasts. Likewise, no one at Nikola routinely reviewed Milton's social media posts prior to their publication, and executives and employees alike frequently learned of Milton's interviews after they aired. Further, Nikola did not correct these statements.[98]

311. Moreover, Nikola failed to implement appropriate processes to ensure accurate dissemination of information to the public in the first instance. The SEC Cease-and-Desist Order further states:

> Nikola did not design, implement, or maintain adequate disclosure controls or procedures to assess whether the information Milton published via social media and television and podcast appearances was required to be disclosed in Nikola's Exchange Act reports within the time periods specified in the Commission's rules and forms. Similarly, Nikola did not have processes in place to ensure that information published by Milton was communicated to management to allow timely decisions regarding required disclosure.[99]

312. The SEC Cease-and-Desist Order further found that "in his capacity as CEO and later as Executive Chairman of Nikola, Milton made materially false and

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[97] *Id.* ¶18.

[98] *Id.*

[99] *Id.* ¶19.

misleading statements on numerous critical topics related to Nikola's capabilities, technology, reservations, products, and commercial prospects."[100] The SEC Cease-and-Desist Order cites certain topics to which Milton made false statements, including truck orders and reservations, the Nikola One, the Badger pickup, Nikola's hydrogen production, Nikola's battery technology, Nikola's in-house component development, and the total cost of ownership of Nikola vehicles.[101]

313. The SEC Cease-and-Desist Order found that Nikola violated the federal securities laws by, among other things, failing to maintain certain disclosure controls and procedures.[102]

VI. THE BOARD'S OVERSIGHT FAILURES

A. Nikola's Senior Executives Acted in Bad Faith and Breached their Fiduciary Duties by Failing to Institute Disclosure Controls to Prevent Milton from Disseminating Materially False Information

314. In 2019 and 2020, Nikola's senior executives had repeated conversations with Milton about his misuse of social media. Milton's relentless social media activity, and his associated fixation on Nikola's stock price and efforts to affect it, became a concern to these senior executives. Among other things, these senior executives were concerned that Milton's statements in these forums were not

[100] *Id.* ¶20.

[101] *Id.* ¶¶21-33.

[102] *Id.* ¶¶41-43.

accurate, and some senior executives advised Milton to be accurate when making public statements on social media and other contexts. Some members of senior management viewed Milton's social media activity as his means for pumping up Nikola's stock.

315. In or around 2019, Worthen, Nikola's Chief Legal Officer, advised Milton about the perils of inaccurate tweets, specifically referencing the Commission's then-recent charges against another auto company executive arising from certain allegedly misleading statements he made in tweets from his personal account relating to material information about the company. In or around early 2019, a senior Nikola executive explained to Milton that tweets from his personal account were the legal equivalent of a company press release, as Milton would be viewed as speaking on behalf of the company in any format.

316. Then, in a series of ongoing conversations in 2019 and 2020, Nikola's then-President advised Milton to let Nikola's Chief Legal Officer pre-screen any tweets that Milton planned on posting from Nikola's corporate account. With few exceptions, Milton did not have anyone pre-screen any of his tweets. And throughout 2020, senior executives half-heartedly urged Milton to be accurate in his public statements and to reduce his social media presence.

317. Moreover, Brady revealed that in 2020, he also had discussions with Milton asking him to submit his tweets and public statements for internal and

external review prior to Milton publishing them. Although Milton initially agreed to this request, he never actually followed through with it and continued to make unscreened public statements.[103]

318. Further, senior Nikola executives attempted half-heartedly attempted other tactics in the spring and summer of 2020 to try to rein in Milton's social media presence, to no avail. Even Girsky, VectoIQ's CEO was aware of Milton's propensity to issue misleading statements. For example, on March 2, 2020, Girsky and Milton engaged in the following text message exchange concerning a draft press release:

> **Girsky:** Hey, I'm not in a place I can read the changes or get on the phone, but there will be plenty of opportunity to amplify your message once we get this out the door. Just need something we can launch off tomorrow. Don't want lawyers harassing us all night.
>
> **Milton:** Not sure what you mean. I get drilled on the press releases by the reporters, so I want it a certain way, it's not a big deal.
>
> **Girsky:** Okay. The lawyers just need to approve it. They are a pain when it comes to this stuff. I'll join when I can.
>
> **Milton:** I don't care if they are a pain. They will learn who runs this show. I won't tolerate them telling me what to do when I have to deal with the aftermath.
>
> It was a shitty press release. It needed to be modified. I suggest they get my input way earlier than that and don't approve anything without me reviewing it first.[104]

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[103] Milton Trial Tr. 2018-19.

[104] *Id*. 2471-72.

319. On at least one occasion, Company executives again, tip-toeing around the issue, enlisted the help of a member of Nikola's Board of Directors, Defendant Girsky, who they believed could influence Milton. And they scheduled media training for all senior executives with a third-party service provider, but Milton did not attend.

320. Milton responded to feedback about his social media presence and his public statements about Nikola by asserting that these senior executives did not understand current capital market dynamics or what he was trying to accomplish with retail investors, and that he needed to be on social media to put out good news about Nikola to support its stock price.[105]

B. Defendants Knew of Milton's Fraudulent Scheme to Pump Nikola's Stock Price But Consciously Chose Not to Implement Appropriate Controls or Otherwise Oversee the Issuance of Misleading Information Concerning Nikola's Business

321. Evidence of Milton's fraudulent statements was either known or ascertainable through reasonable efforts to all three Boards that are the subject of this Complaint.

322. First, the VectoIQ Board, motivated by their own significant personal financial interests and the looming deadline to close a deal, and with the substantial assistance of Milton and the Legacy Nikola Board, ignored Milton's

[105] SEC Compl. ¶¶154-59.

misrepresentations, and utterly failed to satisfy its due diligence obligations to investigate Nikola's business prior to the Merger by failing to recognize obvious red flags concerning Milton's representations and Nikola's business as described above.

323. Second, and as alleged in further detail above and below, Nikola's senior executives and the Post-Merger Nikola Board—eight members of which had served on the Legacy Nikola Board—knew, were reckless in not knowing about, or disregarded red flags surrounding Milton's relentless public campaign to promote Nikola and its stock with unsubstantiated statements and failed to implement any controls over the statements he made in the Company's name as its CEO.

324. In 2019 and 2020, some of Nikola's senior executives were concerned about Milton's apparent efforts on social media to increase Nikola's value and influence potential investors. Some senior executives also became concerned that Milton's public statements were inaccurate, false, and misleading. In fact, Nikola's leadership was so concerned with Milton's false statements, leadership often discussed Milton's media appearances during weekly two-hour leadership meetings, which were attended by Defendant Worthen.[106]

[106] *USA v. Milton*, Case No. 1:21-cr-00478, ECF No. 82-2, Jan. 28, 2022 Ltr. at p. 2 (S.D.N.Y. filed Jul. 28, 2021) ("We also explained to you the existence of agendas and minutes from weekly, two-hour leadership meetings (so-called 'stand-up' meetings) that were attended by engineers and executives (including Mr. Worthen and Chief Marketing Officer Vince Caramella) and during which Mr. Milton's media appearances were discussed.")

325. Despite the foregoing, Nikola did not implement formal disclosure controls or procedures for monitoring or reviewing Milton's media interviews and social media activity, nor did anyone at the Company routinely consult with Milton before he published Nikola-related information on either his or Nikola's social media accounts or before he conducted media interviews. Nor did anyone at Nikola routinely review Milton's social media posts prior to their publication. Compounding these failures no one attempted to correct or clarify Milton's misleading statements.

326. In or around 2019, Worthen (Nikola's Chief Legal Officer and Secretary to the Board) advised Milton about the legal risks associated with inaccurate tweets. Similarly, a senior Nikola executive told Milton that even posts from his personal accounts could be viewed as statements by Nikola itself.[107] Then, in a series of conversations in 2019 and 2020, Russell (who was also on the Board) asked Milton to let Worthen pre-screen any tweets Milton planned to post from Nikola's corporate account.[108] But with only a few exceptions, Milton refused to let Nikola's legal department or anyone else pre-screen his tweets.[109]

[107] SEC Compl. ¶156.

[108] *Id.* ¶157.

[109] *Id.*

327. Throughout 2020, certain of Nikola's senior executives continued to urge Milton to reduce his social media presence, and to be sure that his posts were accurate, rather than taking corrective action because of the injury he was causing to the Company.[110] Certain senior Nikola executives also asked one of Nikola's directors for assistance in getting Milton to reduce his social media presence.[111] But although the Post-Merger Nikola Board scheduled a media training run by a third-party provider for all senior executives, it inexplicably did not require Milton to attend (which he did not).[112]

328. Even as of February 19, 2021, well after Milton's departure from the Company, Nikola had not changed its process to release public statements and make changes to safeguard against the ability of an executive team member to mislead or deceive investors or the public, according to an internal memorandum prepared by Nikola's auditor, Ernst & Young LLP.[113]

329. Milton responded to the other executives' concerns about his social media presence by telling them he needed to be on social media to put out good news

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[110] *Id.*

[111] *Id.*

[112] *Id.* ¶158.

[113] *United States v. Milton*, No. 1:21-cr-478, ECF No. 82-1, Feb. 19, 2021 Internal Memorandum to Nikola from Ernst & Young LLP at p. 4 (S.D.N.Y. filed Feb. 19, 2021).

about Nikola *to boost its stock price*, clearly telegraphing to them his intention of putting his own (and their own) financial self-interest above that of the Company and its stockholders.[114]

330. Nikola's Board of Directors and its senior executives completely deferred to Milton during his time with the Company. As Milton said in January 2020 when a member of Nikola's Board urged him to appoint independent board members with public company experience:

> *The most important [sic] is that I fully control the board at all times* and have people who work well with my personality . . . . No one sees the future like I do, and if you get too many world class brilliant people on the board, you will end up fighting over everything as they think they are the smartest in the room every time.

C. Records From Meetings of Nikola's Board of Directors Further Support Failures to Control and Correct Milton

331. On September 11, 2020, Nikola's Board held a special meeting that was attended virtually or telephonically by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Thompson, Ubben and Jin, and attended telephonically by Defendants Brady and Worthen.[115] Also present by invitation of the Board were four attorneys from Kirkland & Ellis LLP ("Kirkland & Ellis"), the Company's outside counsel, who were "present for the purpose of providing legal advice to the

[114] *Id.* ¶159.

[115] NIKOLABR_000261.

Company in anticipation of potential litigation."[116] The purpose of this meeting was to discuss the Hindenburg Report, which was distributed to the Board in advance of the meeting.[117]

332. After Milton discussed the allegations in the Hindenburg Report and how the Company planned to respond to it, "[d]iscussion ensued and the Board asked questions, which were answered by Mr. Milton and the advisors."[118] Kirkland & Ellis also led a discussion and answered questions from the Board regarding "the process and strategy with respect to the SEC, and other legal matters that can be expected to arise in the coming weeks," as well as how the Company planned to respond to the Hindenburg Report.[119] The Board also discussed Mr. Milton's use of social media.[120] At no time was Milton asked not to participate in this meeting, nor did the directors meet outside of Milton's presence and influence.

333. On September 13, 2020, Nikola's Board held a special meeting that was attended virtually or telephonically by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Thompson, Ubben, Brady, and Worthen.[121] Also present

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[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] NIKOLABR_000262.

[121] NIKOLABR_000263.

by invitation of the Board were Nikola's Chief Human Resources Officer, Joseph R. Pike, and four attorneys from Kirkland & Ellis.[122] In advance of the meeting, copies of a communications rollout plan, a cover note to employees, a top questions list, and a draft Company press release were shared with the Board.[123] At the meeting, the Board discussed and asked questions concerning the Hindenburg Report, the Company's response to the Hindenburg Report, the "SEC Process and Other Legal Matters," the Company's communications strategy, the impact of the Hindenburg Report and SEC investigation on future transactions, the Board's fiduciary duties, and Milton's use of social media, among other matters.[124] Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Thompson, Ubben, Brady, and Worthen then approved Nikola's communications plan for responding to the Hindenburg Report, including by issuing the September 14, 2020 press release.[125]

334. On September 15, 2020, Nikola's Board held a special meeting that was attended virtually or telephonically by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Jin, Ubben, Thompson, Brady, and Worthen.[126] Also

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[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] NIKOLABR_000272.

present by invitation of the Board were Pike, and six attorneys from Kirkland & Ellis, and an attorney from Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury Winthrop"), for the purpose of providing legal advice to the Company in anticipation of potential litigation.[127] At the meeting, the Board discussed the ongoing SEC investigation, rumors of a DOJ investigation, and an internal investigation by Kirkland & Ellis; and, outside of Milton's presence, the impact of the Hindenburg Report on Nikola's conversations with investors and whether Milton should continue to serve in an active role at Nikola.[128]

335. On September 16, 2020, Nikola's Board held a special meeting that was attended virtually or telephonically by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Thompson, Ubben, Jin, Brady, and Worthen.[129] Also present by invitation of the Board were three attorneys from Kirkland & Ellis, and an attorney from Pillsbury Winthrop.[130] Milton presided over the meeting as Chairman.[131] The Board received an update on discussions with the SEC and related matters, and the "directors asked questions and a discussion ensued."[132] Milton, Russell, and other

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[127] *Id.*

[128] *Id.*

[129] NIKOLABR_000275.

[130] *Id.*

[131] *Id.*

[132] *Id.*

members of management who were in attendance then left the meeting, after which the remaining directors discussed "the status of the business at Nikola, including key project[s], cash burn, business units and leadership"; "transition considerations should Mr. Milton leave the Company"; and "stock and lockup considerations moving forward."[133] "A further discussion ensued, in which each director commented on considerations and next steps with respect to the proposed transition of Mr. Milton from the Company."[134]

336. On September 18, 2020, Nikola's Board held a special meeting that was attended virtually or telephonically by Defendants Milton, Russell, Girsky, Mansuetti, Marx, Stalsberg, Thompson, Ubben, Jin, Brady, and Worthen.[135] Also present by invitation of the Board were Pike, three attorneys from Kirkland & Ellis, and an attorney from Pillsbury Winthrop.[136] Milton "advised the Board that he desired to resign and forego certain severance benefits he might otherwise be entitled to receive under his employment agreement."[137] The Board asked questions and "a thorough discussion ensued."[138] After Milton recused himself from the meeting, the

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[133] *Id.*

[134] *Id.*

[135] NIKOLABR_000277.

[136] *Id.*

[137] *Id.*

[138] *Id.*

Board authorized the officers of the Company to work with counsel for the Company on separation terms for Milton and scheduled a follow-up meeting to further address the separation terms.[139]

337. On September 20, 2020, Nikola's Board held a special meeting that was attended virtually or telephonically by Defendants Milton, Russell, Marx, Stalsberg, Thompson, Ubben, Jin, Brady, and Worthen.[140] Also present by invitation of the Board were Pike, two attorneys from Kirkland & Ellis, and an attorney from Pillsbury Winthrop.[141] Milton announced he was leaving the Company and left the meeting.[142] The Board then "reviewed the proposed terms of Mr. Milton's transition as an officer, director, and employee of the Company, effective immediately, as set forth in a draft Separation Agreement, a copy of which had been provided to each director."[143] The Board voted in favor of Milton's separation and the proposed terms just two days after Milton offered his resignation, and appointed Girsky as Chairman of the Board.[144] Afterward, the Board received a report on the pending SEC investigation as well as grand jury subpoenas from the USAO SDNY and the New

[139] *Id.*

[140] NIKOLABR_000279.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

York County District Attorney's Office, after which the Board asked questions and "a thorough discussion ensued."[145]

338. Following Milton's resignation Nikola's Board met frequently over the next several months. At those meetings, the Board received updates on "the Company's internal investigation and subpoena response efforts" and updates regarding investigations by the SEC, the Department of Justice, and the District Attorney for the County of New York," as well as "regulatory inquiries from Nasdaq and FINRA."[146] The Board also discussed "the impact of the existing investigations in light of the Company's need to raise additional capital."[147]

339. Ultimately, Defendants Brady and Worthen attended every meeting of Nikola's Board between November 12, 2019 and January 18, 2021, while possessing knowledge of Milton's misleading statements and the Company's failure to put appropriate controls in place to prevent Milton's fraudulent scheme.

D. In 2020, Defendants' Failure to Implement Appropriate Corporate Disclosure Controls Enabled Additional Misrepresentations by Nikola

340. In addition to the material misrepresentations Nikola made through Milton, as alleged above, the SEC charged Nikola with disseminating other material

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[145] *Id.*

[146] NIKOLABR_000286.

[147] *Id.*

misrepresentations and misleading statements to investors in the Company's SEC filings and public statements concerning its vehicles' hydrogen refueling time, its demonstration hydrogen fueling station, its electricity costs and sourcing, and the economic risks and benefits of its contemplated partnership with GM to develop and commercialize the Badger.

341. Refueling Time. Nikola presented a misleading picture of its hydrogen refueling capabilities. Nikola understood that hydrogen-fueled FCEV trucks would need to be able to be fueled in approximately 10–15 minutes to be competitive with diesel trucks. However, because of engineering obstacles, in 2020, it took Nikola 45–80 minutes to fill its semi-truck prototypes with hydrogen. But Nikola failed to publicly disclose its FCEV trucks' long refueling time. In fact, in an April 2020 investor presentation, Nikola stated that the refueling time for its FCEV was "10–15 minutes." Nikola's executives also claimed in 2020 that Nikola's FCEV refueling time was comparable to that for diesel trucks.

342. Hydrogen Station. In 2020, Nikola misled investors regarding the status of its demonstration hydrogen station. Although Nikola was not producing hydrogen in 2020, it installed a station at its headquarters designed to dispense test quantities of hydrogen purchased from third parties. The hydrogen station was beset by significant operational challenges and was only operable 21% of the time over the

course of 2020. Despite this, in several SEC filings, Nikola touted the demonstration station as a "model for future hydrogen stations."

343. Electricity. Nikola made material omissions about its electricity costs and sourcing. Low electricity costs are a critical component of Nikola's business model because electricity costs account for approximately 75% to 85% of hydrogen production costs, and Nikola planned to produce hydrogen on-site at each of its planned hydrogen fueling stations. Nikola failed to disclose that its planned hydrogen fueling station network would require up to approximately 5% of all electricity consumed in the United States to operate. Nikola also failed to disclose its planned hydrogen fueling station network's electricity costs beyond just the cost of electricity production, including transmission, distribution, and energy storage costs. And Nikola failed to disclose it was receiving significantly higher per kWh price indications from grid and solar energy suppliers than its target price point.

344. The General Motors Partnership. Nikola also misled investors by failing to disclose the potential economic impact of its proposed strategic partnership with GM to develop and commercialize the Badger. Although in a press release dated September 8, 2020 Nikola claimed that the partnership would save "over $4 billion in battery and powertrain costs over 10 years and over $1 billion in engineering and validation costs," in reality, unless the market could support a "premium" price for the Badger, Nikola's internal projections showed that the entire

Badger program could potentially generate a net loss of $3.1 billion over six years—enough to make Nikola go bankrupt. A Nikola executive prepared these internal projections and provided them to Nikola's senior executives and the Post-Merger Nikola Board.

345. Nikola's material misrepresentations concerning its vehicles' hydrogen refueling time, its demonstration hydrogen fueling station, its electricity costs and sourcing, and the economic risks and benefits of its contemplated partnership with GM to develop and commercialize the Badger, as alleged above, were enabled by Defendants' failure to implement appropriate corporate disclosure controls.

VII. CLASS ACTION ALLEGATIONS

346. Plaintiffs, stockholders in VectoIQ, bring this action individually and as a class action pursuant to Rule 23 of the Rules of the Court of Chancery of the State of Delaware on behalf of themselves and all holders of VectoIQ common stock who held such stock prior to the May 29, 2020 redemption deadline and were entitled to elect to redeem their shares but did not (except the Defendants herein, and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants) and who were injured by the Defendants' breaches of fiduciary duties and other violations of law (the "Class").

347. This action is properly maintainable as a class action.

348. A class action is superior to other available methods of fair and efficient adjudication of this controversy.

349. The Class is so numerous that joinder of all members is impracticable. The number of Class members is believed to be in the thousands, and they are likely scattered across the United States. Moreover, damages suffered by individual Class members may be small, making it overly expensive and burdensome for individual Class members to pursue redress on their own.

350. There are questions of law and fact which are common to all Class members, and which predominate over any questions affecting only individuals, including, without limitation:

(i) whether Defendants owed fiduciary duties to Plaintiffs and the Class;

(ii) whether the Controller Defendants controlled VectoIQ;

(iii) whether "entire fairness" is the applicable standard of review;

(iv) which party or parties bear the burden of proof;

(v) whether Defendants breached their fiduciary duties to Plaintiffs and the Class;

(vi) the existence and extent of any injury to the Class or Plaintiffs caused by any breach;

(vii) the availability and propriety of equitable re-opening of the redemption period; and

(viii) the proper measure of the Class's damages.

351. Plaintiffs' claims and defenses are typical of the claims and defenses of other Class members, and Plaintiffs have no interests antagonistic or adverse to the interests of other Class members. Plaintiffs will fairly and adequately protect the interests of the Class.

352. Plaintiffs are committed to prosecuting this action and have retained competent counsel experienced in litigation of this nature.

353. Defendants have acted in a manner that affects Plaintiffs and all members of the Class alike, thereby making appropriate injunctive relief and/or corresponding declaratory relief with respect to the Class as a whole.

354. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class, which would establish incompatible standards of conduct for Defendants; or adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interest of other members or substantially impair or impede their ability to protect their interests.

VIII. DERIVATIVE ALLEGATIONS

355. Plaintiffs bring this action derivatively in the right and for the benefit of Nikola to redress injuries suffered, and to be suffered, by Nikola as a direct result of breaches of fiduciary duties by the Individual Defendants. Nikola is named as a Nominal Defendant solely in a derivative capacity.

356. Plaintiffs will adequately and fairly represent the interests of Nikola in enforcing and prosecuting their rights and have retained counsel competent and experienced in derivative litigation.

357. Plaintiffs were stockholders of Nikola at the time of the wrongdoing complained of, each has continuously been a stockholder since during the relevant period and is a current stockholder of Nikola. Plaintiffs understand their obligation to hold stock throughout the duration of this action and are prepared to do so.

358. Plaintiffs have not made a demand on the Board to pursue this action because such demand would be futile, as alleged below.

IX. DAMAGES TO NIKOLA

359. As a result of the Individual Defendants' improprieties, Nikola disseminated improper public statements concerning its business, operations and prospects. These improper statements have devastated Nikola's credibility and caused the Company to lose billions in market capitalization.

360. These actions have irreparably damaged Nikola's corporate image and goodwill. For at least the foreseeable future, the Company will suffer from what is known as the "liar's discount," a term applied to the stock of companies who have been implicated in misleading the investing public, such that Nikola's ability to raise equity capital or debt on favorable terms in the future is now and will continue to be impaired. The Company stands to incur higher marginal costs of capital and debt because of the misconduct.

361. Moreover, Individual Defendants' improper course of conduct has also subjected the Company to having to investigate, defend, and settle the SEC Cease-And-Desist Proceeding for $125 million. The SEC Cease-And-Desist Proceeding found/alleged that the Company violated federal securities laws by repeatedly misrepresenting the Company's business, operations and prospects. Additional damages may follow from violations of the federal securities laws.

362. As a direct and proximate result of the Individual Defendants' conduct, Nikola has needlessly expended, and will continue to expend, significant sums of money. These expenditures include, without limitation: (i) costs and damages associated with the overpayment for the acquisition of Nikola Legacy in the Merger; (ii) costs incurred in connection with issuing false and misleading proxy solicitations seeking approval of the Merger; costs incurred in investigating and defending Nikola and its top insiders for violations of the securities laws; (iii) lost sales and orders

resulting from exposure of the Company's misleading disclosures regarding its business, operations and prospects; and (iv) costs incurred from compensation and benefits paid to the Individual Defendants, who have breached their fiduciary duties to Nikola.

363. While the Company was being harmed, the Individual Defendants, in addition to the illicit profits gained from their insider sales, enjoyed lucrative compensation that was not justified due to their oversight and managerial failures. Defendants have not fared nearly so badly. As such, the Board has not—and will not—initiate legal action against the responsible officers and directors in order to protect the Company's interests.

X. DEMAND FUTILITY ALLEGATIONS

A. Allegations Common to All Demand Board Defendants

364. As a result of the facts set forth herein, Plaintiffs have not made any demand on the Demand Board to institute this action against the Individual Defendants. Such demand would be a futile and useless act because there is reason to doubt that the Demand Board Defendants[148] would be able to bring their impartial business judgment to bear on a litigation demand.

[148] As alleged above, the Demand Board consists of the Demand Board Defendants (Defendants Russell, Girsky, Jin, Mansuetti, Marx, Shindler, Thompson, and Ubben) and non-parties Petrovich and Smith.

365. Each of the Demand Board Defendants approved and/or permitted the wrongs alleged herein to have occurred and participated in efforts to conceal or disguise those wrongs from the Company's stockholders or recklessly and/or with gross negligence disregarded the wrongs complained of herein and are therefore not disinterested parties. Each of the Demand Board Defendants received a financial benefit either directly or indirectly from the Merger as a result of Nikola shares personally held or held by an affiliate. Moreover, each of the Demand Board Defendants received payments, benefits, stock options, and other emoluments by virtue of their membership on the Board and their control of the Company.

366. In violation of Nikola's Code of Conduct, the Demand Board Defendants failed to exercise meaningful oversight of Milton's and the Company's issuance of materially false and misleading statements to investors and to disguise Defendants' violations of the law, as alleged herein. In further violation of Nikola's Code of Conduct, the Demand Board Defendants failed to maintain the accuracy of Company records and reports, conduct business in an honest and ethical manner, and properly report violations of the Code of Conduct. Thus, the Demand Board Defendants each face a substantial likelihood of liability and demand is futile as to each of them.

367. Each of the Demand Board Defendants is personally liable to the Company for breaching their fiduciary duties, which required them to correct and/or

caused the Company to correct the false and misleading material statements and omissions. As a result of their knowing or highly reckless breaches of fiduciary duty and other misconduct, the Company has been substantially damaged.

368. The Demand Board Defendants' oversight failures and additional breaches of fiduciary duty are confirmed by the SEC's December 21, 2021 announcement that it had ordered Nikola to pay $125 million in restitution and cease and desist from violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act.

369. According to the SEC Cease-and-Desist Order, before Nikola had produced a single commercial product, Defendant Milton embarked on a public relations campaign aimed at inflating and maintaining Nikola's stock price in order to enrich himself and other insiders at Nikola. Milton's statements in tweets and media appearances falsely gave investors the impression that Nikola had reached certain product and technological milestones. The SEC Cease-and-Desist Order finds that "in his capacity as CEO and later as Executive Chairman of Nikola, Milton made materially false and misleading statements on numerous critical topics related to Nikola's capabilities, technology, reservations, products, and commercial prospects."[149] "As the order finds, Nikola Corporation is responsible both for Milton's allegedly misleading statements and for other alleged deceptions, all of

[149] SEC C&D Order ¶20.

which falsely portrayed the true state of the company's business and technology," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement.

370. Among other violations and wrongdoing, the SEC found that Nikola did not have adequate disclosure controls or procedures regarding Milton's social media use and media appearances:

> Nikola's disclosure controls and procedures for monitoring or reviewing Milton's interviews and social media activity were deficient from at least June 3, 2020 through September 2020.
>
> Milton did not routinely consult with anyone at Nikola before publishing Nikola related information on his or Nikola's social media accounts, or before being interviewed about Nikola on television programs and podcasts. Likewise, no one at Nikola routinely reviewed Milton's social media posts prior to their publication, and executives and employees alike frequently learned of Milton's interviews after they aired. Further, Nikola did not correct these statements.
>
> Nikola did not design, implement, or maintain adequate disclosure controls or procedures to assess whether the information Milton published via social media and television and podcast appearances was required to be disclosed in Nikola's Exchange Act reports within the time periods specified in the Commission's rules and forms. Similarly, Nikola did not have processes in place to ensure that information published by Milton was communicated to management to allow timely decisions regarding required disclosure.[150]

[150] SEC C&D Order ¶¶17-19.

371. The SEC's civil complaint against Milton further confirms the Demand Board Defendants failed to implement adequate Board-level monitoring, information systems, and controls concerning Defendants Milton's use of social media and other mediums to communication with investors concerning Nikola's business operations and prospects. In this regard, the SEC alleged:

> Milton knew or was reckless in not knowing that his statements detailed herein were false and misleading, and Milton made these statements with the intent to influence investors, prospective investors, and Nikola's stock price. Milton engaged in additional conduct, described below, that indicates his scienter.

372. Nikola's Books and Records Productions confirm—through the complete absence of any contradictory documents—that the Demand Board Defendants breached their duties of good faith and loyalty by failing to fulfill their oversight obligations by ensuring Nikola had adequate Board-level reporting, information systems, and controls concerning the issuance of material false and misleading statements and omissions to the public and insider selling.

B. Allegations Specific to Each of the Demand Board Defendants

373. Demand is excused as to each of the Demand Board Defendants for one or more of the following reasons: (i) they received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) they face a substantial likelihood of liability on the claims that would be the subject of the litigation demand; and (iii) they lack independence from Milton or someone who

received a material personal benefit from the alleged misconduct that would be the subject of the litigation or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

1. Mark A. Russell

374. *Demand is excused as to Russell because he received a material personal benefit from the alleged misconduct.* Specifically, Russell received material personal benefits from the alleged misconduct because the alleged misconduct enabled him to receive lucrative compensation from Nikola as its CEO, including an annual time-vested award of $6 million worth of RSUs and a performance award consisting of 4,859,000 RSUs earned after stock price milestones were purportedly achieved as a result of Milton's and the Company's numerous false and misleading statements, which were designed to inflate the price of Nikola's common stock. Russell received a material personal benefit when his personal holdings of Nikola common increased in value by billions.

375. *Demand is also excused as to Russell because he faces a substantial likelihood of liability on the claims*. First, Russell is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders and the public regarding Nikola's business. As a senior executive of Nikola both before and after the Merger whose desk was next to Milton's and who

spoke with Milton multiple times a day,[151] and as a member of the Legacy Nikola Board and the Post-Merger Nikola Board, Russell knew[152] or was reckless in not knowing of the litany of false and misleading statements that were issued on the Company's behalf.[153] Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances.[154] Russell's failure in this

[151] Milton Trial Tr. 979-980.

[152] Russell was well aware of Milton's spree of misrepresentations about Nikola. Between April and July 2020, Russell received and acknowledged text messages from several Nikola employees alerting him to issues with the accuracy of Milton's public statements, *see id.* 1076-82, as well as text messages from fellow director defendants Girsky and Thompson expressing concern about Milton's activities on Twitter, *see id.* 1058-65, 1089-1091. Further, at Milton's criminal trial, Russell testified that he knew "the volume" of Milton's public statements "[a]t times . . . was high" and that Milton "would typically post or tweet multiple times a day and sometimes have multiple interviews or . . . conversations with public figures." Milton Trial Tr. 1099. Russell also testified that he "advised [Milton] several times to get off social media or, at the very least, let Britton [Defendant Worthen] prescreen anything he posts." Milton Trial Tr. 1058-1061.

[153] The evidence at Milton's criminal trial included an April 19, 2020 text message conversation in which Russell admitted that one of Milton's tweets "wouldn't have passed muster if it had been reviewed by legal and finance," and stated that he was "trying to help [Milton] understand what it means to be an executive of a public company" but he "[s]till ha[d] work to do, as you can see." Milton Trial Tr. 1058-1061. Russell also admitted under oath that he worked with Milton to draft Nikola's misleading public announcement of the Badger. Milton Trial Tr. 1005-1006.

[154] In sworn testimony at Milton's criminal trial, Russell admitted that he and the other Directors Defendants had abjectly failed to control Milton, instead choosing to make any disclosure controls optional on Milton's part. For instance, Russell advised

regard is remarkable because, as he testified at Milton's criminal trial, he knew at the time he became Nikola's CEO that Milton "did not have public executive experience and he was prone to exaggeration in making public statements."[155]

376. Second, Russell faces a substantial likelihood of liability specifically for aiding and abetting Milton's misconduct. Russell was aware of Milton's misleading public statements about Nikola prior to the Merger and permitted them to continue after the Merger in the absence of implementing appropriate internal disclosure controls.

377. Third, Russell faces a substantial likelihood of liability for approving Milton's resignation rather than terminating him for cause for his criminal misconduct and clawing back compensation and stock he had earned while acting in bad faith. Similarly, he also faces a substantial likelihood of liability for approving the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security

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Milton that Defendant Worthen, Nikola's Chief Legal Officer, should pre-screen his tweets—but took no action to *require* such prescreening. Milton Trial Tr. 1061-1062. As another example, the Company changed the passwords for the Company's Twitter account in an attempt to prevent Milton from tweeting on behalf of the company, but Milton avoided this feeble attempt to control him by simply instructing one of the employees who was in charge of passwords to give him the new password. Milton Trial Tr. 1066. Russell also asked Milton to attend a social media training, but Milton chose not to. Milton Trial Tr. 1066.

[155] Milton Trial Tr. 957-958.

inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

378. Finally, Russell faces a substantial likelihood of personal liability as a defendant in the Consolidated Securities Class Action.

379. *Demand is further excused as to Russell because he lacks independence from Milton.* Russell was a non-independent employee director who was dependent on Nikola for his primary livelihood and therefore conflicted. Defendant Russell is also a long-time colleague of Milton's and his finances are intertwined with those of Milton. Russell and Milton co-own the company T&M, which owned 49,774,487 shares of Nikola common stock as of June 3, 2020. Russell agreed to give Milton control over how to exercise the T&M shares' voting rights in exchange for some of the economic benefit from the shares.[156] Around the time of the Merger, Russell and Milton (individually and through M&M and T&M) owned over 36.4% of Nikola's common stock and had effective control of the Company. Russell, together with the Legacy Nikola Board members and officers, continues to have voting control over the Company. Finally, Milton's criminal misconduct directly enriched Russell by increasing the value of his personal holdings of Nikola stock by billions. Accordingly, Russell is interested and cannot impartially consider any demand.

[156] Milton Trial Tr. 978.

2. Sooyean (Sophia) Jin)

380. *Demand is excused as to Jin because she received a material personal benefit from the alleged misconduct.* Jin received material personal benefits from the alleged misconduct because it enabled her to receive lucrative compensation from Nikola, including $679,400 in stock awards in 2020. In addition, Jin, one of Hanwha's senior-most venture investment executives and Hanwha's representative on the Board, had an interest in protecting Hanwha's approximately $100 million investment in Nikola and maximizing its profit and ability to recover its investment the Company, as well as ensuring Hanwha's continued ability to do business with Nikola as its exclusive supplier of solar panels.[157] Jin received a material personal benefit when Hanwha's holdings of Nikola common increased in value by hundreds of millions.

381. *Demand is also excused as to Jin because she faces a substantial likelihood of liability on the claims.* First, Jin is alleged to have breached her fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders regarding Nikola's business. As a member of the Legacy Nikola Board and the Post-Merger Nikola Board, Jin, through her attendance at Board meetings

[157] In 2020, Hanwha sought to become one of Nikola's electricity suppliers. Milton Trial Tr. 860-61.

and receipt of Board communications,[158] knew or was reckless in not knowing of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances.

382. Jin faces a substantial likelihood of liability for permitting Milton to operate in violation of the federal securities laws and other criminal laws, which prohibit the dissemination of materially false and misleading information to the markets in SEC filings, public statements and through the use of social media.

383. Second, Jin faces a substantial likelihood of liability for permitting or assisting Milton in the illegal scheme to misrepresent Nikola's business and products which allowed her affiliated company, a Nikola stockholder and business partner, to profit from Milton's criminal activities. Jin was aware of Milton's misleading public statements about Nikola prior to the Merger and permitted them to continue after the Merger, without correcting them, in the absence of implementing appropriate internal disclosure controls.

[158] For instance, Jin received a copy of Nikola's misleading announcement of the Badger before it was publicly released. Milton Trial Tr. 1005-1006.

384. Third, Jin faces a substantial likelihood of liability for agreeing to let Milton resign rather than terminating him for cause for his criminal misconduct and clawing back compensation and stock he had earned while acting in bad faith. Similarly, she faces a substantial likelihood of liability for approving the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

385. Finally, Jin, as a member of the Audit Committee, had a duty to adequately oversee Nikola's Board-level controls and compliance with legal and regulatory requirements, including public disclosure controls and procedures, as well as its risk assessment and management, and internal control functions. Thus, Jin was responsible for knowingly or recklessly allowing the improper statements as alleged herein. Jin breached her fiduciary duty of loyalty and good faith by failing to maintain adequate Board-level disclosure controls and approving or otherwise allowing the improper statements, and therefore failed to properly oversee Nikola's compliance with legal and regulatory requirements, risk assessment, and the Company's internal controls.

386. *Demand was further excused as to Jin because she lacks independence from Milton.* Jin is beholden to Milton because his criminal misconduct increased

the value of Hanwha's holdings in Nikola stock by hundreds of millions of dollars and by the virtue of the protection Jin provided to Hanwha.

3. Mike Mansuetti

387. *Demand is excused as to Mansuetti because he received a material personal benefit from the alleged misconduct.* Mansuetti received material personal benefits from the alleged misconduct because it enabled him to receive lucrative compensation from Nikola, including $679,400 in stock awards in 2020. In addition, Mansuetti, as a senior executive of Bosch and Bosch's representative on the Board, had an interest in protecting Bosch's approximately $100 million investment in Nikola and maximizing its profits and ability to recover its investment in the Company. Mansuetti received a material personal benefit when Bosch's holdings of Nikola common stock increased in value by hundreds of millions of dollars.

388. *Demand is also excused as to Mansuetti because he faces a substantial likelihood of liability on the claims.* First, Mansuetti is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders regarding Nikola's business. As a member of the Legacy Nikola Board and the Post-Merger Nikola Board, Mansuetti knew, through his attendance at Board meetings and receipt of Board communications,[159] or was reckless in not knowing

[159] For instance, Mansuetti received a copy Nikola's misleading announcement of the Badger before it was publicly released. Milton Trial Tr. 1005-1006.

of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances. Mansuetti's failure to implement and oversee reasonable disclosure controls subjects him to a substantial likelihood of liability or for aiding and abetting Milton's and the Company's fraudulent conduct.

389. Second, Mansuetti also faces a substantial likelihood of liability for permitting Milton and Nikola to operate in violation of the federal securities laws and other criminal laws which prohibit the dissemination of materially false and misleading information to the markets in SEC filings, public statements and through the use of social media.

390. Third, Mansuetti faces a substantial likelihood of liability for permitting or assisting Milton in the illegal scheme to misrepresent Nikola's business and products which allowed his affiliated company, a Nikola stockholder and business partner, to profit from Milton's criminal activities. Mansuetti was aware of Milton's misleading public statements about Nikola prior to the Merger and permitted them to continue after the Merger in the absence of implementing appropriate internal disclosure controls.

391. Fourth, Mansuetti faces a substantial likelihood of liability for agreeing to let Milton resign rather than terminating him for cause for his criminal misconduct and clawing back compensation and stock he had earned while acting in bad faith. Similarly, he faces a substantial likelihood of liability for approving the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

392. Finally, Mansuetti, as a member of the Audit Committee, had a duty to adequately oversee Nikola's Board-level controls and compliance with legal and regulatory requirements, including public disclosure controls and procedures, as well as its risk assessment and management, and internal control functions. Thus, Mansuetti was responsible for knowingly or recklessly allowing the improper statements as alleged herein. Mansuetti breached his fiduciary duty of loyalty and good faith by failing to maintain adequate Board-level disclosure controls and approving or otherwise allowing the improper statements, and therefore failed to properly oversee Nikola's compliance with legal and regulatory requirements, risk assessment, and the Company's internal controls.

393. *Demand is further excused as to Mansuetti because he lacks independence from Milton.* Mansuetti is beholden to Milton because his criminal

misconduct enriched Mansuetti by increasing the value of Bosch's holdings in Nikola stock by hundreds of millions of dollars.

4. Gerrit A. Marx

394. *Demand is excused as to Marx because he received a material personal benefit from the alleged misconduct.* Marx received material personal benefits from the alleged misconduct because it enabled him to receive lucrative compensation from Nikola, including $713,370 in stock awards in 2020.

395. *Demand is also excused as to Marx because he faces a substantial likelihood of liability on the claims.* First, Marx is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders regarding Nikola's business. As a member of the Legacy Nikola Board and the Post-Merger Nikola Board, Marx through his attendance at Board meetings and receipt of Board communications[160] knew or was reckless in not knowing of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances. Marx's failure to implement and oversee reasonable

[160] For instance, Marx received a copy of Nikola's misleading announcement of the Badger before it was publicly released. Milton Trial Tr. 1005-1006.

disclosure controls subjects him to a substantial likelihood of liability or for aiding and abetting Milton's and the Company's fraudulent conduct.

396. Second, Marx also faces a substantial likelihood of liability for permitting Milton and Nikola to operate in violation of the federal securities laws and other criminal laws which prohibit the dissemination of materially false and misleading information to the markets in SEC filings, public statements and through the use of social media.

397. Third, Marx faces a substantial likelihood of liability for permitting or assisting Milton in the illegal scheme to misrepresent Nikola's business and products which allowed his affiliated company, a Nikola stockholder, to profit from Milton's criminal activities.

398. Finally, Marx faces a substantial likelihood of liability for agreeing to let Milton resign rather than terminating him for cause and clawing back compensation and stock he had earned while acting in bad faith. Similarly, he faces a substantial likelihood of liability for agreeing to the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

5. DeWitt Thompson V

399. *Demand is excused as to Thompson because he received a material personal benefit from the alleged misconduct.* Thompson received material personal benefits from the alleged misconduct because (i) the alleged misconduct enabled him to receive lucrative compensation from Nikola, including $679,400 in stock awards in 2020; (ii) it increased the value of his ownership of Nikola dealership rights in Mississippi and Tennessee; and (iii) it increased the value of his holdings of Nikola stock.

400. *Demand is also excused as to Thompson because he faces a substantial likelihood of liability on the claims.* First, Thompson is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders regarding Nikola's business. As a member of the Legacy Nikola Board and the Post-Merger Nikola Board, Thompson through his attendance at Board meetings and receipt of Board communications[161] knew[162] or was reckless in not

[161] For instance, Thompson received a copy of Nikola's misleading announcement of the Badger before it was publicly released. Milton Trial Tr. 1005-1006.

[162] For example, on April 19, 2020, Thompson sent Russell a text message expressing concern over whether information Milton had posted on Twitter was also included in Nikola's SEC filings. After Russell expressed uncertainty in response, Thompson said, "I would tell him to turn off those accounts . . . don't even read them. . . . he should delete if all possible." Thompson further stated that he was "[g]uessing the SEC doesn't take CEOs front running their process very lightly." Milton Trial Tr. 1058-1061. On another occasion, on July 24, 2020, Thompson sent

knowing of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances. Thompson's failure to implement and oversee reasonable disclosure controls subjects him to a substantial likelihood of liability or for aiding and abetting Milton's and the Company's fraudulent conduct.

401. Second, Thompson faces a substantial likelihood of liability for permitting Milton and Nikola to operate in violation of the federal securities laws and criminal laws which prohibit the dissemination of materially false and misleading information to the markets in SEC filings, public statements and through the use of social media.

402. Third, Thompson faces a substantial likelihood of liability for permitting or assisting Milton in the illegal scheme to misrepresent Nikola's business and products which allowed his affiliated companies, Nikola stockholders, to profit from Milton's criminal activities.

403. Finally, Thompson faces a substantial likelihood of liability for agreeing to let Milton resign rather than terminating him for cause and clawing back

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Russell text messages expressing concern that Milton was "clearly obsessed with Twitter and price." *Id.* 1089-1091.

compensation and stock he had earned while acting in bad faith. Similarly, he faces a substantial likelihood of liability for agreeing to the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

6. Jeffrey W. Ubben

404. *Demand is excused as to Ubben because he received a material personal benefit from the alleged misconduct.* Ubben is a major investor in Nikola and he received material personal benefits from the alleged misconduct because (a) the alleged misconduct caused material increases in the value of his holdings of Nikola stock (which as alleged above totaled 20,362,024 shares as of June 3, 2020), on which Ubben was able to cash in at least partially through his sale of 1.4 million shares at a price of $42.69 per share; and (b) the alleged misconduct enabled him to receive lucrative compensation from Nikola, including $713,370 in stock awards in 2020, the value of which increased as a result of the alleged misconduct.

405. *Demand is also excused as to Ubben because he faces a substantial likelihood of liability on the claims.* First, Ubben is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders regarding Nikola's business. As a member of the Legacy Nikola Board

and the Post-Merger Nikola Board, Ubben through his attendance at Board meetings and receipt of Board communications knew or was reckless in not knowing of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances. Ubben's failure to implement and oversee reasonable disclosure controls subjects him to a substantial likelihood of liability or for aiding and abetting Milton's and the Company's fraudulent conduct.

406. Second, Ubben faces a substantial likelihood of liability for permitting Milton and Nikola to operate in violation of the federal securities laws and criminal laws which prohibit the dissemination of materially false and misleading information to the markets in SEC filings, public statements and through the use of social media.

407. Third, Ubben faces a substantial likelihood of liability under *Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949), for his $59,766,000 million insider sale through Spring Master Fund in August 2020, which was based on his knowledge of the material, non-public information described above, and motivated, in whole or in part, by the substance of such information.

408. Fourth, Ubben also faces a substantial likelihood of liability for permitting or assisting Milton in the illegal scheme to misrepresent Nikola's

business and products which allowed his affiliated companies, Nikola stockholders, to profit from Milton's criminal activities.

409. Finally, Ubben faces a substantial likelihood of liability for agreeing to let Milton resign rather than terminating him for cause and clawing back compensation and stock he had earned while acting in bad faith. Similarly, he faces a substantial likelihood of liability for agreeing to the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

7. Steven J. Girsky

410. *Demand is futile as to fGirsky because he received a material personal benefit from the alleged misconduct.* Girsky received material personal benefits from the alleged misconduct because the alleged misconduct caused material increases in the value of his holdings of Nikola stock (as alleged above, as of June 18, 2020, Girsky owned at least 1,754,344 shares of Nikola's common stock, for which he paid only nominal consideration).

411. *Demand is also futile as to Girsky because he faces a substantial likelihood of liability on the claims.* First, Girsky is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead

stockholders regarding Nikola's business. As a member of the VectoIQ Board and the Post-Merger Nikola Board, Girsky knew or was reckless in not knowing of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton published via social media and television and podcast appearances.[163] Girsky's failure to implement and oversee reasonable disclosure controls subjects him to a substantial likelihood of liability or for aiding and abetting Milton's and the Company's fraudulent conduct.

412. Second, Girsky faces a substantial likelihood for putting his self-interest above the needs of the VectoIQ stockholders by approving the Merger without performing an adequate due diligence.

413. Third, Girsky also faces potential personal liability as a defendant in the Consolidated Securities Class Action.

414. Fourth, as a member of the Post-Merger Nikola Board, Girsky, through his attendance at Board meetings and receipt of Board communications, knew or was reckless in not knowing of the litany of false statements made concerning the

[163] Such knowledge is evidenced by, *inter alia*, Girsky's April 29, 2020 text message conversation with Defendant Russell concerning Milton's tweets about the Nikola Badger. After Girsky expressed concern that Milton was "pretty active on Twitter Re: Badger," Russell responded, "Wish he wouldn't. Can't convince him to stop that." Milton Trial Tr. 1062-1065.

Company's business. Girsky's failure to implement and oversee reasonable disclosure controls subjects him to a substantial likelihood of liability for aiding and abetting Milton's and the Company's fraudulent conduct.

415. Fifth, Girsky faces a substantial likelihood of liability for permitting Milton and Nikola to operate in violation of the federal securities laws and criminal laws which prohibit the dissemination of materially false and misleading information to the markets in SEC filings, public statements and through the use of social media.

416. Sixth, Girsky faces a substantial likelihood of liability for permitting or assisting Milton in the illegal scheme to misrepresent Nikola's business and products which allowed him to increase the value of his VectoIQ stock through the Merger with Nikola.

417. Seventh, Girsky faces a substantial likelihood of liability for agreeing to let Milton resign rather than terminating him for cause and clawing back compensation and stock he had earned while acting in bad faith. Similarly, he also faces a substantial likelihood of liability for agreeing to the terms of Milton's separation agreement with Nikola, which provided Milton with the accelerated vesting and settlement of 600,000 RSUs, the costs of a security inspection of Milton's residence, and the reimbursement of up to $100,000 for a full-time security detail for him and his family for three months.

418. Finally, Girsky faces a substantial likelihood of liability because he is also named as a defendant in the Consolidated Securities Class Action, where the plaintiffs allege he violated §§ 10(b) and 20(a) of the Exchange Act by affirmatively making false and misleading statements and/or controlling Nikola and its alleged § 10(b) violations.

8. Steven M. Shindler

419. *Demand is futile as to Shindler because he received a material personal benefit from the alleged misconduct.* Shindler received material personal benefits from the alleged misconduct because the alleged misconduct caused material increases in the value of his holdings of Nikola stock (as alleged above, as of June 18, 2020, Shindler owned 402,298 shares of Nikola's common stock, for which he paid only nominal consideration).

420. *Demand is also futile as to Shindler because he faces a substantial likelihood of liability on the claims.* First, Shindler is alleged to have breached his fiduciary duties in connection with Milton's ongoing scheme to mislead stockholders regarding Nikola's business. As a member of the VectoIQ Board, Shindler knew or was reckless in not knowing of the litany of false statements made concerning the Company's business. Moreover, the SEC found in the consent decree entered into by Nikola, that Nikola had failed to design, implement, or maintain adequate disclosure controls or procedures concerning the information Milton

published via social media and television and podcast appearances. Shindler's failure to implement and oversee reasonable disclosure controls subjects him to a substantial likelihood of liability or for aiding and abetting Milton's and the Company's fraudulent conduct.

421. Second, Shindler, as a member of the Audit Committee, had a duty to adequately oversee Nikola's Board-level controls and compliance with legal and regulatory requirements, including public disclosure controls and procedures, as well as its risk assessment and management, and internal control functions. Thus, Shindler was responsible for knowingly or recklessly allowing the improper statements as alleged herein. Shindler breached his fiduciary duty of loyalty and good faith by failing to maintain adequate Board-level disclosure controls and approving or otherwise allowing the improper statements, and therefore failed to properly oversee Nikola's compliance with legal and regulatory requirements, risk assessment, and the Company's internal controls.

422. Finally, Shindler is named as a defendant in the Consolidated Securities Class Action, where the plaintiffs allege he violated §§ 10(b) and 20(a) of the Exchange Act by affirmatively making false and misleading statements and/or controlling Nikola and its alleged § 10(b) violations.

XI. COUNTS FOR RELIEF

COUNT I

DIRECT CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE VECTOIQ BOARD DEFENDANTS

423. Plaintiffs incorporate by reference and reallege each and every allegation, contained above, with the exception of the Derivative Allegations, as though fully set forth herein.

424. As directors of VectoIQ, the VectoIQ Board Defendants owed Plaintiffs and the Class the utmost fiduciary duties of care and loyalty, which subsume an obligation to act in good faith, and to make accurate material disclosures to VectoIQ's stockholders.

425. These duties required them to place the interests of the VectoIQ stockholders above their personal interests and the interests of the Controller Defendants.

426. Through the events and actions described herein, the VectoIQ Board Defendants breached their fiduciary duties to Plaintiffs and the Class by prioritizing their own personal, financial, and reputational interests, and approving the Merger, which was unfair to VectoIQ's public stockholders.

427. The VectoIQ Board Defendants also breached their duty of candor by issuing the false and misleading Merger Proxy.

428. As a result, Plaintiffs and the Class were harmed by being deprived of the information they needed to exercise, or to choose not to exercise, their redemption rights in an informed manner prior to the Merger.

429. In addition, by virtue of misstatements and omissions in the Merger Proxy, Plaintiffs and members of the Class could not exercise their vote in an informed manner and approved the acquisition of Nikola based on false and misleading information.

430. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT II

DIRECT CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE CONTROLLER DEFENDANTS

431. Plaintiffs incorporate by reference and reallege each and every allegation contained above, with the exception of the Derivative Allegations, as though fully set forth herein.

432. The Controller Defendants were Girsky, VectoIQ, LLC, and Shindler and the Sponsor. The Sponsor – and Girsky (through VectoIQ, LLC) and Shindler through the Sponsor – elected (and could remove at any time) the members of the Board, had deep personal and financial ties to the members of the Board they selected.

433. As such, the Controller Defendants owed Plaintiffs and the Class fiduciary duties of care and loyalty, which include an obligation to act in good faith, and to provide accurate material disclosures to VectoIQ stockholders.

434. At all relevant times, the Controller Defendants had the power to control, influence, and cause—and actually did control, influence, and cause—VectoIQ to enter into the Merger.

435. The Merger was unfair, reflecting an unfair price and unfair process.

436. Through the events and actions described herein, the Controller Defendants breached their fiduciary duties to Plaintiffs and the Class by agreeing to and entering into the Merger without ensuring that it was entirely fair to Plaintiffs and the Class, thereby breaching their duty of loyalty to Plaintiffs and the Class. As a result, Plaintiffs and the Class were harmed.

437. Further, by failing to inform stockholders, and allowing them to make an informed redemption decision, the Controller Defendants breached their duty of candor. As a result, Plaintiffs and the Class were harmed by not exercising their redemption rights prior to the Merger.

438. In addition, members of the Class approved the acquisition of Nikola based on false and misleading information.

439. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT III

DIRECT CLAIM FOR UNJUST ENRICHMENT AGAINST THE CONTROLLER DEFENDANTS AND VECTOIQ BOARD DEFENDANTS

440. Plaintiffs incorporate by reference and reallege each and every allegation contained above, with the exception of the Derivative Allegations, as though fully set forth herein.

441. As a result of the conduct described above, the Controller Defendants and the VectoIQ Board Defendants breached their fiduciary duties to VectoIQ's public stockholders and were disloyal by putting their own financial interests above those of VectoIQ public stockholders.

442. The Controller Defendants and the VectoIQ Board Defendants were unjustly enriched by their disloyalty.

443. All unjust profits realized by the Controller Defendants and the VectoIQ Board Defendants should be disgorged and recouped by the affected stockholders, including Plaintiffs and the Class.

COUNT IV

DIRECT CLAIM FOR AIDING AND ABETTING BREACH OF FIDUCIARY DUTY AGAINST COWEN

444. Plaintiffs incorporate by reference and reallege each and every allegation contained above, with the exception of the Derivative Allegations, as though fully set forth herein.

445. Cowen was aware of the VectoIQ Board Defendants', and/or the Controller Defendants' fiduciary duties of care owed to the Class, as set forth above, which required that such defendants ensure that the Merger was entirely fair to Plaintiffs and VectoIQ's other public stockholders.

446. Cowen knowingly participated in the other defendants' breaches of their duties (and any exculpated care breaches by the VectoIQ Board Defendants), which presented materially misleading statements about Legacy Nikola to support its recommendation that VectoIQ stockholders vote in favor of the Merger.

447. Cowen knew that these statements were materially misleading, and that it, the VectoIQ Board Defendants, and the Controller Defendants stood to profit immensely from the consummation of the Merger——even if the Merger was unfair to VectoIQ's public stockholders.

448. As a result, Plaintiffs and the Class were harmed by not exercising their redemption rights prior to the Merger.

449. In addition, members of the Class approved the acquisition of Legacy Nikola based on false and misleading information.

450. Plaintiffs and the Class suffered damages in an amount to be determined at trial.

COUNT V

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST DEFENDANT MILTON

451. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

452. By reason of his fiduciary roles as an officer and director of the Company, Defendant Milton specifically owed or continues to owe Nikola the highest obligation of due care, good faith, and loyalty in the management and administration of Nikola's business and affairs. Defendant Milton's duties to Nikola obligated him to act in good faith and in conformity with positive law, including with complying positive law and with respect to making accurate material disclosures about Nikola.

453. Defendant Milton, through engaging in the misconduct alleged herein, intentionally or recklessly violated and breached the fiduciary duties he owed to Nikola and to protect the Company's rights and interests. Defendant Milton knew or was reckless in not knowing that his misconduct posed a serious risk of injury to Nikola. Defendant Milton's misconduct was not a good faith exercise of prudent business judgment to protect and promote Nikola's interests.

454. Defendant Milton breached his fiduciary duties to Nikola by engaging in an illegal scheme to violate federal and state law willfully or recklessly and by knowingly issuing or causing Nikola to issue false and misleading statements

between June 2020 to September 2020, in violation of the federal securities and criminal laws, concerning, among other matters and as alleged above:

(a) Nikola's purported hydrogen production capabilities and hydrogen station network;

(b) Nikola's purported ability to tap into federal electricity transmission lines and contract with clean energy sources to obtain cheap electricity;

(c) Nikola's purported in-house development and manufacturing of vehicle components;

(d) Nikola's purportedly imminent manufacturing of the Nikola Tre truck;

(e) the Nikola Two truck's purported ability to go from 0-60 miles per hour in under five seconds;

(f) the design and development of the Nikola Badger pickup truck; and

(g) Nikola's purported truck reservations.

455. As a direct or proximate result of Defendant Milton's failure to perform his fiduciary obligations to Nikola, Nikola has sustained significant monetary damages and damage to its corporate image and goodwill. Such damages include, among other things, payment of fines to government regulators, costs associated with defending securities class action lawsuits, government investigations and subpoenas, severe damage to Nikola's share price, loss of goodwill and harm to Nikola's reputation. Therefore, as a direct or proximate result of the misconduct alleged herein, Defendant Milton is liable to the Company. Further, Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT VI

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE DEMAND BOARD DEFENDANTS

456. Plaintiffs incorporate by reference and re-allege every allegation contained above, as though fully set forth herein.

457. The Demand Board Defendants owe the Company and its stockholders the fiduciary duties of due care, good faith, and loyalty.

458. The Demand Board Defendants acted with a conscious disregard for their responsibilities to ensure that the Company and Milton operated in compliance with federal and state law, and that Nikola's public statements, including those that Milton made on behalf of the Company through both his personal and the Company's Twitter accounts, other social media, and SEC filings, were not materially false and misleading, by failing to oversee Milton's misconduct or correct his or Nikola's misstatements.

459. The Demand Board Defendants also acted with a conscious disregard for their responsibilities to ensure that the Company's public statements, including those that Milton made through social media accounts, press releases and public filings, were not false and materially misleading, by failing to put into place any sort of oversight mechanism with respect to Milton's or Nikola's statements or to otherwise control his or Nikola's dissemination of false or misleading information concerning Nikola. The Demand Board Defendants failed to provide such controls

despite having been warned of Milton's misconduct and by ignoring red flags, while knowing that Milton and Nikola disseminated materially false and misleading information to the public.

460. The Demand Board Defendants, collectively and individually, violated and breached their fiduciary duties of care, loyalty, reasonable inquiry, oversight, good faith, and supervision, including by:

(a) utterly failing to implement any reporting or information system or controls capable of detecting the misconduct alleged herein and thereby engaging in a sustained or systematic failure to exercise oversight of Nikola's corporate affairs;

(b) consciously failing to monitor or oversee the operations of Nikola's system of internal controls and thus disabling themselves from being informed of the risks or problems requiring their attention associated with the misconduct alleged herein;

(c) consciously or recklessly disregarding that Nikola's employees, including Defendant Milton, were engaging in violations of the law and taking no steps in a good faith effort to prevent or remedy that situation, other than at most treating it is a mere public relations problem or litigation risk, and thereby failing to discharge their fiduciary obligation in good faith; and

(d) engaging in a sustained or systematic failure to exercise oversight.

461. The Demand Board Defendants, collectively and individually, breached their fiduciary duties of good faith, loyalty, oversight, and supervision.

462. As a direct or proximate result of the Demand Board Defendants' failure to perform their fiduciary obligations to Nikola, Nikola has sustained significant monetary damages and damage to its corporate image and goodwill and will continue to sustain damages, for which the Demand Board Defendants are liable to the Company. Such damages include, among other things, payment of fines to government regulators, costs associated with defending securities class action lawsuits, government investigations and subpoenas, severe damage to Nikola's share price, loss of goodwill and harm to Nikola's reputation. Therefore, as a direct or proximate result of the misconduct alleged herein, the Demand Board Defendants are liable to the Company. Further, Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT VII

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE OFFICER DEFENDANTS

463. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

464. By reason of their fiduciary roles as officers of the Company, the Officer Defendants (Russell, Brady, and Worthen) specifically owed or continue to owe Nikola the highest obligation of due care, good faith and loyalty.

465. The Officer Defendants, collectively and individually, through engaging in the misconduct alleged herein, intentionally or recklessly violated and breached the fiduciary duties they owed to Nikola. The Officer Defendants were aware, recklessly failed to make themselves aware, or should have been aware that this misconduct posed a serious risk of injury to Nikola. The Officer Defendants' misconduct was not a good faith exercise of prudent business judgment to protect and promote Nikola's corporate interests.

466. The Officer Defendants had actual knowledge of the misrepresentations and omissions of material facts alleged herein, or acted with reckless disregard for the truth, in that they failed to ascertain and to disclose such facts, even though such facts were available to them. Such material misrepresentations and omissions were committed knowingly or recklessly and for the purpose and effect of artificially inflating the price of Nikola's securities.

467. The Officer Defendants, collectively and individually, breached their fiduciary duties to Nikola by failing to maintain internal controls over the Company's disclosure regime and thereby directly or proximately causing the misconduct alleged herein; by willfully or recklessly making or causing Nikola to

make false and misleading statements, and failing to correct statements by Nikola or Milton that the Officer Defendants knew, were reckless in not knowing, or should have known were false and misleading.

468. The Officer Defendants had actual knowledge that Milton and Nikola was engaging in the fraudulent schemes set forth herein, and that internal controls were not adequately maintained, or acted with reckless disregard for the truth, in that they caused Nikola to improperly participate in the fraudulent schemes even though such facts were available to them. Such improper conduct was committed knowingly or recklessly and for the purpose and effect of artificially inflating the price of Nikola's securities. The Officer Defendants, in good faith, should have taken appropriate action to correct the schemes alleged herein and to prevent them from continuing to occur.

469. By their actions alleged herein, the Officer Defendants abandoned and abdicated their responsibilities and fiduciary duties with regard to prudently managing the assets and business of Nikola in a manner consistent with the operations of a publicly held corporation.

470. As a direct or proximate result of the Officer Defendants' failure to perform their fiduciary obligations to Nikola, Nikola has sustained significant monetary damages and damage to its corporate image and goodwill. Such damages include, among other things, the payment of a $125 million penalty to the SEC, costs

associated with defending securities lawsuits and government investigations and subpoenas, and reputational harm. Therefore, as a direct or proximate result of the misconduct alleged herein, the Officer Defendants are liable to the Company. Further, Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT VIII

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE POST-MERGER NIKOLA BOARD DEFENDANTS FOR FAILING TO TERMINATE MILTON FOR CAUSE

471. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

472. By reason of their fiduciary roles as directors of the Company, the Post-Merger Nikola Board Defendants (Milton, Russell, Jin, Mansuetti, Marx, Ubben, Stalsberg, Thompson, Girsky, Shindler) specifically owed or continue to owe Nikola the highest obligation of good faith, loyalty, oversight, and supervision in the management and administration of Nikola's business and affairs.

473. The Post-Merger Nikola Board Defendants, collectively and individually, breached their fiduciary duties to Nikola by failing to terminate Milton for cause based on his alleged criminal misconduct that has exposed Nikola to criminal and regulatory investigations.

474. By their actions alleged herein, the Post-Merger Nikola Board Defendants abandoned and abdicated their responsibilities and fiduciary duties with

regard to prudently managing the assets and business of Nikola in a manner consistent with the operations of a publicly held corporation.

475. As a direct or proximate result of the Post-Merger Nikola Board Defendants' failure to perform their fiduciary obligations to Nikola, Nikola has sustained significant monetary damages and damage to its corporate image and goodwill. Such damages include, among other things, the payment of a $125 million penalty to the SEC, costs associated with defending securities lawsuits and government investigations and subpoenas, and reputational harm. Therefore, as a direct or proximate result of the misconduct alleged herein, the Post-Merger Nikola Board Defendants are liable to the Company. Further, Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT IX

DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE VECTOIQ BOARD DEFENDANTS

476. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

477. This claim is asserted derivatively on behalf of Nikola.

478. By reason of their fiduciary roles as officers and/or directors of VectoIQ, the VectoIQ Board Defendants (Girsky, Shindler, Gendelman, Hallac, Lynch, and McInnis) specifically owed or, in the case of Defendant Girsky, continue to owe Nikola (*i.e.*, VectoIQ before the Merger, and Nikola Corporation after the

Merger) the highest obligation of candor, good faith, fair dealing, loyalty, due care, reasonable inquiry, oversight, and supervision in the management and administration of Nikola's business and affairs.

479. The VectoIQ Board Defendants, collectively and individually, through engaging in the misconduct alleged herein, intentionally or recklessly violated and breached the fiduciary duties they owed to protect the rights and interests of VectoIQ stockholders with respect to the Merger. The VectoIQ Board Defendants, collectively and individually, breached their fiduciary duties to the Company by willfully or recklessly directing and overseeing a wholly inadequate due diligence process, failing to obtain an independent valuation of Nikola or its businesses, misrepresenting the business and financial prospects of Nikola, and overpaying for the Legacy Nikola business and its assets.

480. The VectoIQ Board Defendants breached their duty of candor to the Company's stockholders by withholding critical information concerning Nikola's ability to actually design and manufacture zero-emission vehicles and to produce and store hydrogen fuel, and by uncritically accepting Nikola's and Milton's inflated valuations and projections.

481. The VectoIQ Board Defendants, collectively and individually, breached their duty of loyalty to the Company by causing it to adopt a structure for the Merger that allowed the Individual Defendants to enrich themselves at the

expense of the Company's stockholders. The VectoIQ Board Defendants breached their fiduciary duties to Nikola by prioritizing their own personal, financial, and reputational interests in approving the Merger.

482. The VectoIQ Board Defendants, collectively and individually, breached their fiduciary duties to the Company by willfully or recklessly permitting Milton to retain an extraordinarily high degree of concentrated control over the Company and by failing to implement adequate internal controls over disclosures and by permitting him to continue to engage in criminal misconduct involving the dissemination of misleading statements about the viability of Nikola's business and products.

483. The VectoIQ Board Defendants were aware, recklessly failed to make themselves aware, or should have been aware that Milton's illegal conduct posed a serious risk of injury to Nikola. The VectoIQ Board Defendants' misconduct was not a good faith exercise of prudent business judgment to protect and promote the Nikola's corporate interests.

484. As a direct or proximate result of the VectoIQ Board Defendants' failure to perform their fiduciary obligations to Nikola, Nikola has sustained significant monetary damages and damage to its corporate image and goodwill. Such damages include, among other things, the payment of a $125 million penalty to the SEC, overpayment for the acquisition of Legacy Nikola, costs associated with

defending securities lawsuits and government investigations and subpoenas, severe damage to Nikola's share price, and reputational harm. Therefore, as a direct or proximate result of the misconduct alleged herein, the VectoIQ Board Defendants are liable to the Company. Further, Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT X

DERIVATIVE CLAIM FOR INSIDER TRADING UNDER *BROPHY* AGAINST DEFENDANT UBBEN

485. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

486. By reason of his fiduciary role as a director of Nikola, Ubben specifically owed and continues to owe Nikola the highest obligation of due care, good faith and loyalty.

487. When Ubben sold his Nikola stock on August 11, 2020, he was in possession of material, non-public information described above, and sold Nikola stock because he was motivated, in whole or in part, by the substance of such information.

488. The information described above was proprietary, non-public information concerning the Company's business operations, financial condition, and growth prospects. It was a proprietary asset belonging to the Company, which Ubben misappropriated to his own benefit when he sold holdings in Nikola stock. Ubben

knew that this information was not intended to be available to the public. Had such information been generally available to the public, it would have significantly reduced the market price of Nikola stock.

489. Ubben's sale of stock while in possession and control of this material, adverse, non-public information was a breach of his fiduciary duties of loyalty and good faith. Ubben is therefore liable to the Company for insider trading.

490. Since the use of the Company's proprietary information for personal gain constituted a breach of the fiduciary duties of Defendant Ubben, the Company is entitled to disgorgement and/or the imposition of a constructive trust on any profits Ubben obtained thereby.

491. Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT XI

DERIVATIVE CLAIM AGAINST INCLUSIVE CAPITAL PARTNERS SPRING MASTER FUND, L.P. FOR AIDING AND ABETTING INSIDER TRADING

492. Plaintiffs incorporate by reference and reallege each and every allegation contained above as though fully set forth herein.

493. Defendant Ubben had a fiduciary relationship with Nikola and owed Nikola a fiduciary duty of loyalty.

494. Defendant Ubben breached his fiduciary duties of loyalty to Nikola by providing Spring Master Fund with material undisclosed adverse information and engaging in unlawful insider trading.

495. Spring Master Fund knowingly participated in Ubben's breach of fiduciary duty by selling shares motivated in whole or in part by material adverse inside information Ubben shared with it.

496. In selling their Nikola stock, as set forth above, these defendants used Nikola's non-public information for private gain.

497. These defendants profited through aiding and abetting breaches of fiduciary duty.

498. Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT XII

DERIVATIVE CLAIM AGAINST THE LEGACY NIKOLA D&O DEFENDANTS FOR AIDING AND ABETTING THE VECTOIQ BOARD'S BREACH OF FIDUCIARY DUTIES

499. Plaintiffs incorporate by reference and reallege each and every allegation contained above as though fully set forth herein.

500. Each member of the VectoIQ Board had a fiduciary relationship with VectoIQ and owed VectoIQ (now Nikola) fiduciary duties.

501. The VectoIQ Board Defendants breached their fiduciary duties to VectoIQ (now Nikola) as described herein.

502. The Legacy Nikola D&O Defendants knowingly participated in VectoIQ's Board's breach of fiduciary duty by aiding and abetting the unfair Merger and issuance of a materially false and misleading Merger Proxy as set forth above.

503. These Legacy Nikola D&O Defendants profited through aiding and abetting those breaches of fiduciary duty and Nikola was damaged.

504. Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT XIV

DERIVATIVE CLAIM AGAINST COWEN FOR AIDING AND ABETTING THE VECTOIQ BOARD'S BREACH OF FIDUCIARY DUTIES

505. Plaintiffs incorporate by reference and reallege each and every allegation contained above as though fully set forth herein.

506. Each member of the VectoIQ Board had a fiduciary relationship with VectoIQ and owed VectoIQ (now Nikola) fiduciary duties.

507. The VectoIQ Board Defendants breached their fiduciary duties to VectoIQ (now Nikola) as described herein.

508. Cowen knowingly participated in VectoIQ's Board's breach of fiduciary duty by aiding and abetting the unfair Merger and issuance of a materially false and misleading Merger Proxy as set forth above.

509. Cowen profited through aiding and abetting those breaches of fiduciary duty and Nikola was damaged.

510. Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT XIV

DERIVATIVE CLAIM FOR UNJUST ENRICHMENT AGAINST THE INDIVIDUAL DEFENDANTS

511. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

512. By their wrongful acts, violations of law, and false and misleading statements and omissions of material fact that they made and/or caused to be made, the Individual Defendants were unjustly enriched at the expense of, and to the detriment of, Nikola.

513. The Individual Defendants, based on improper and unjustifiable conduct, received bonuses, stock options, or similar compensation from Nikola that was tied to the performance or artificially inflated valuation of Nikola, received were that was unjust in light of the Individual Defendants' bad faith conduct, or received excessive compensation.

514. Plaintiff, as a stockholder and a representative of Nikola, seeks restitution from the Individual Defendants and seeks an order from this Court disgorging all profits, including from insider transactions, benefits, and other compensation, including any performance-based or valuation-based compensation, obtained by the Individual Defendants due to their wrongful and unjustifiable

conduct and breach of their fiduciary and contractual duties and establishing a constructive trust over such unjust compensation.

515. Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

COUNT XV

DERIVATIVE CLAIM FOR WASTE OF CORPORATE ASSETS AGAINST THE INDIVIDUAL DEFENDANTS

516. Plaintiffs incorporate by reference and reallege each and every allegation contained above, as though fully set forth herein.

517. As a result of the misconduct described above, the Individual Defendants wasted corporate assets by, *inter alia*: (i) overpaying for Legacy Nikola and its assets; (ii) paying excessive compensation, bonuses, and termination payments to certain of Nikola's executive officers; (iii) awarding self-interested stock options to certain of Nikola's officers and directors; and (iv) incurring potentially millions of dollars of legal liability and/or legal costs to defend the Individual Defendants' unlawful actions.

518. As a result of the waste of corporate assets, the Individual Defendants are liable to the Company.

519. Plaintiffs, on behalf of Nikola, have no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demands judgment and relief in their favor and in favor of the Class, and against Defendants, as follows:

A. Declaring that this Action is properly maintainable as a class action;

B. Finding the VectoIQ Board Defendants liable for breaching their fiduciary duties owed to Plaintiffs and the Class;

C. Finding the Controller Defendants liable for breaching their fiduciary duties, in their capacity as the controllers of VectoIQ, owed to Plaintiffs and the Class;

D. Finding that the Sponsor, Controller Defendants, and the VectoIQ Board Defendants were disloyal fiduciaries that were unjustly enriched;

E. Certifying the proposed Class;

F. Awarding Plaintiffs and the other members of the Class damages in an amount which may be proven at trial, together with interest thereon;

G. Ordering disgorgement of any unjust enrichment to the Plaintiffs and members of the Class;

H. Awarding Plaintiffs and the members of the Class pre-judgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs;

I. Determining that this action is a proper derivative action maintainable under law and demand on Nikola's Board is excused;

J. Declaring that the Individual Defendants have breached their fiduciary duties to Nikola, been unjustly enriched, and wasted corporate assets;

K. Awarding against all the Individual Defendants and in favor of Nikola the amount of damages sustained by the Company as a result of the Individual Defendants' breaches of fiduciary duties, unjust enrichment, and waste of corporate assets;

L. Ordering Defendant Ubben to disgorge the profits obtained as a result of his sales of Nikola stock while in possession of material nonpublic information as described herein;

M. Establishing a constructive trust over the compensation, profits or other remuneration obtained by Defendants as a result of their unjust enrichment;

N. Awarding Plaintiffs the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs, and expenses; and

O. Granting such other and further relief as the Court may deem just and equitable.

ANDREWS & SPRINGER LLC

/s/ David M. Sborz

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Dated: February 16, 2022
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February 23, 2023

CERTIFICATE OF SERVICE

I, David M. Sborz, hereby certify that on February 23, 2023, I caused a true and correct copy of the foregoing *Public Version of Verified Second Consolidated Amended Stockholder Class Action and Derivative Complaint* to be served on the following counsel of record via File & Serve*Xpress*:

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