TREVOR MILTON, **Plaintiff,** **v.** **CNBC, INC., NATHAN ANDERSON, and HINDENBURG RESEARCH, LLC,** **Defendants.**	**SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-2791-24** **Civil Action** **On Appeal from the Superior Court of New Jersey, Bergen County, Law Division, Docket No.: Ber-L-532-25** **Sat Below:** **Hon. Anthony Suarez, J.S.C.**

DEFENDANT CNBC INC.'s APPELLATE BRIEF

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PRELIMINARY STATEMENT

This is an appeal of the trial court's decision declining to dismiss the remaining count of trade libel in this matter, which is being challenged under the Uniform Public Expression Protection Act (UPEPA). While the trial court correctly determined that UPEPA applies, it repeatedly erred in applying several long-established defamation principles designed to protect speech, especially in the media context, which should have resulted in dismissal with prejudice.

In October 2022, Defendant CNBC, LLC (erroneously sued as CNBC, Inc.) broadcast an episode of its docuseries *American Greed,* which examined allegations of fraud committed by Plaintiff Trevor Milton, particularly in his last role as founder and chief executive of the now-bankrupt Nikola Corporation. The episode aired during Milton's federal securities fraud trial and was based primarily on allegations presented in his indictment, various lawsuits, and civil enforcement actions. Milton was convicted and sentenced to four years in prison.

In January 2025, while free on bail and awaiting a decision in his appeal, Milton filed this lawsuit against CNBC and Hindenburg Research LLC, a short seller whose research had apparently sparked the federal investigations into Milton, claiming the episode was defamatory and had harmed his business prospects.

However, because the one-year statute of limitations had long expired for a defamation claim, Milton did what many plaintiffs have unsuccessfully attempted: he instead labeled his primary cause of action as "trade libel," which has a six-year statute of limitations. Trade libel applies only to product disparagement, to compensate corporations and sole proprietors for damage done their products and business. Here, the episode focused on Milton personally. Moreover, Milton was never the sole owner of Nikola and he held no position with the company at the time of the broadcast, having resigned in 2020 shortly after Hindenburg released its report exposing his alleged widespread fraud in pitching Nikola stock.

Defendants responded by seeking orders to show cause pursuant to UPEPA, arguing, inter alia, that Milton's allegations of trade libel were a subterfuge to evade the statute of limitations for defamation. While the trial court agreed that UPEPA applied and dismissed Milton's prima face tort claims against all defendants, it nonetheless refused to dismiss the trade libel claim (or the allegation that Hindenburg aided and abetted trade libel).

What followed was a series of errors that cut to the heart of defamation law. The trial court first ruled that any defamation of an individual that affects a plaintiff's personal reputation as a businessman can also be subject to the separate tort and longer statute of limitations for trade libel, essentially creating

an automatic extension of the statute for most business news coverage. But even assuming, arguendo, that Milton had a valid trade libel claim, the trial court erred by sustaining Plaintiff's complaint even though it failed to plead special damages and actual malice with particularity, as this Court's decisions require.

Additionally, although the trial court acknowledged that the defamation law privileges of fair comment and fair report apply equally to trade libel, it misapplied those privileges by allowing *every* allegation in the complaint to proceed under a trade libel theory despite finding that only a handful of those allegations fall outside the fair report privilege.

Finally, the trial court should have awarded a portion of CNBC's attorneys' fees and costs under UPEPA because CNBC's application was granted in part by the court's dismissal of the prima facie tort claim.

The trial court's errors undermine the important purpose of UPEPA to protect free speech by empowering defendants to quickly stave off meritless defamation claims without the burdens of discovery or protracted proceedings. For these and the reasons that follow, the trial court's determination that the trade libel count should be permitted to proceed must be reversed, the case dismissed with prejudice, and fees awarded to CNBC for its order to show cause and this appeal.

STATEMENT OF FACTS[1]

A. Summary

Plaintiff Trevor Milton was convicted of securities fraud in October 2022 and sentenced to four years in federal prison in connection with his involvement with Nikola Corporation, a once highly touted, publicly traded company[2] that claimed to have developed hydrogen and electric-powered vehicles as well as inexpensive energy sources. (Da3).

That same month, Defendant CNBC, LLC (a business news network that is a subsidiary of NBCUniversal Media, LLC), broadcast an episode of its docuseries *American Greed* entitled *Chasing Tesla* ("the episode"), which examined accusations of fraud by Milton. It relied primarily on allegations presented in Milton's federal indictment and in enforcement actions by the Securities and Exchange Commission (SEC). (Da3)

Nikola stock had been soaring, when on September 10, 2020 Defendant Hindenburg Research LLC (Hindenburg),[3] a research firm that engaged in short-

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[1] Da = Defendant CNBC's Appendix; 1T = April 23, 2025 OTSC hearing

[2] Nikola filed a voluntary Chapter 11 bankruptcy petition on February 19, 2025 and is now winding up sale of its assets. Keiron Greenhalgh, Nikola Administrators Plan Final Asset Sale—the IP, Transport Topics, June 17, 2025, https://www.ttnews.com/articles/nikola-final-asset-sale-ip

[3] The firm, founded by Defendant Nathan Anderson, disbanded in January 2025. (Da3)

selling stocks while also publishing investigations of mismanagement and alleged illegal activities in public corporations, published a report titled, Nikola: How to Parlay an Ocean of Lies into a Partnership with the Largest Auto OEM in America ("the report").[4]

Hindenburg's report opined that "Nikola is an intricate fraud built on dozens of lies over the course of" Milton's career and it detailed "dozens of false statements" by Milton, leading Hindenburg to conclude that it has "never seen this level of deception at a public company, especially of this size." (Da57; Da361). A day later, Nikola self-reported the matter to the SEC. (Da96-97). Nikola then publicly attempted to counter some of Hindenburg's allegations in a press release issued by its counsel Kirkland & Ellis. Milton alleges Hindenburg then "doubled down on its attacks against [Milton] and Nikola." (Da65-66). Just days later, on September 21, 2020, Milton resigned as executive chairman of Nikola. (Da78).

In the days immediately following the September 10, 2020 Hindenburg Report, Nikola's stock value plummeted nearly 25 percent, then an additional

[4] Even before the Hindenburg Report, there were public allegations that Milton had lied to investors, including reporting that Milton had lied about having a functional Nikola One truck. See, e.g., Edward Ludlow, Nikola Founder Exaggerated the Capability of His Debut Truck, Bloomberg, June 17, 2020, https://www.bloomberg.com/news/articles/2020-06-17/nikola-s-founder-exaggerated-the-capability-of-his-debut-truck. (Da 129)

10 percent after news broke of an investigation, nearly 20 percent more after Milton resigned, and another 8 percent after Nikola filed paperwork in February 2021 admitting that many of its prior financial statements were inaccurate. (Da279).

B. Milton is Indicted for Fraud

On July 29, 2021, the U.S. Attorney's Office for the Southern District of New York unsealed an indictment against Milton, charging him "with securities and wire fraud in connection with his scheme to defraud and mislead investors about the development of products and technology by" Nikola. (Da101; Da111).[5] A Department of Justice press release summarized the indictment:

- Milton schemed "to defraud investors by inducing them to purchase shares of Nikola" through "false and misleading statements regarding Nikola's product and technology development." His "scheme targeted individual, non-professional investors – so-called 'retail investors' – by making false and misleading statements directly to the investing public through social media and television, print, and podcast interviews." (Da102).
- Milton "took advantage of the fact that Nikola went public by merging with a Special Purpose Acquisition Company" (SPAC), rather than through an Initial Public Offering (IPO), "by making many of his false and misleading claims during a period where he would have not been allowed to make public statements under rules that govern IPOs." Id.

[5] On June 22, 2022, a superseding indictment charged Milton with an additional count of fraud in scheming to defraud the sellers of a Utah property which he used as collateral for his bail that would "lull the sellers and postpone actions by the sellers that would bring Milton's false and misleading statements to light." (Da161).

- Milton "made false claims regarding nearly all aspects of Nikola's business," including statements that: (a) "the company had early success in creating a 'fully functioning' semi-truck prototype known as the 'Nikola One,' when Milton knew the prototype was inoperable"; (b) 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) 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) 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) 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 or were for a truck Nikola had no intent to produce in the near-term." Id.

Simultaneously, the SEC charged Milton with violating the anti-fraud provisions of two securities laws. (Da168). The SEC complaint largely mirrored the factual allegations set forth in the indictment but focused on Milton's false and misleading communications with investors. (Da234).

On the news of Milton's federal criminal and civil charges, Nikola's stock immediately fell an additional 15 percent. (Da280). In total, Nikola's stock plummeted by a total of 76 percent between the date of the Hindenburg Report and the days immediately after Milton's indictment. (Da280).

On December 21, 2021, fourteen months after Milton resigned, the SEC announced that Nikola would pay $125 million to settle the SEC civil case, without admitting wrongdoing, while also agreeing to cooperate in the SEC's ongoing investigation. (Da238). Milton was later ordered to pay Nikola $167.7

million – the bulk of the SEC fine and other expenses – by an arbitration panel, which award a federal judge upheld.[6]

Milton's criminal trial began on September 12, 2022, and received widespread media coverage. See, e.g., Jack Ewing, Trial Begins for Truck Maker Accused of Duping Investors, N.Y. Times, Sept. 12, 2022;[7] Jury Selection Begins in U.S. Trial of Nikola Founder Trevor Milton, Reuters, Sept. 12, 2022;[8] Fraud Trial Begins for Founder of Automaker Nikola, Assoc. Press, Sept. 12, 2022.[9]

C. CNBC Airs American Greed: Chasing Tesla

On October 4, 2022, CNBC broadcast *Chasing Tesla*, which recounts the criminal allegations set forth in the criminal indictments and civil actions against Milton, along with reporting about Milton's previous business ventures. The narrator introduces the episode:

> In this episode of *American Greed* . . .
> The promise of green energy gone bad . . .

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[6] https://news.bloomberglaw.com/securities-law/nikola-beats-ex-ceo-trevor-miltons-bid-to-nix-arbitration-award

[7] https://www.nytimes.com/2022/09/12/business/trevor-milton-nikola-trial.html;

[8] https://www.reuters.com/legal/nikola-founder-trevor-miltons-us-trial-begin-with-jury-selection-2022-09-12

[9] https://apnews.com/article/new-york-nikola-corp-ae0e2b1f9547f80195aa1c4da8f83abf

> The founder of Nikola Motors, Trevor Milton, is front and center with flashing promotions that put him in the crosshairs of prosecutors . . .
>
> And when he unveils his all-electric truck . . . Milton says it will change the world . . .
>
> *American Greed* goes inside what prosecutors allege is a crime that happens in plain sight . . .
>
> Trevor Milton targets young, naïve investors who are looking for the next clean energy guru . . .
>
> But . . . does Milton have the goods?
>
> *American Greed* pulls back the curtain on clean energy technology that the feds say is "full of hot air" . . .
>
> It's a prophetic statement . . .
>
> Because later, a lawyer representing whistleblowers, together with a financial research company named after the Hindenburg Disaster
>
> Will take aim at Milton's high-flying, hydrogen-powered dream.
>
> [Da241-242.][10]

Thus, the episode made it clear from the outset that it would be based largely on allegations made by prosecutors in Milton's criminal trial and SEC filings.

D. Trevor Milton is Convicted and Faces Other Consequences

On October 14, 2022, a jury convicted Milton of two counts of wire fraud and one count of securities fraud. He was sentenced to four years in prison and

[10] In between this narration are short video clips, images, and other audio that preview the forthcoming episode. A copy of the video was made available to and was reviewed by the trial court. (1T78). It is being produced on a thumb drive to the Appellate Division. (Da420).

three years of supervised release and ordered to forfeit property and pay a $1 million fine. The trial court denied Milton's motion for a new trial and motion for a judgment of acquittal. (Da5). Milton appealed his conviction and was permitted to remain free on bail.

A putative class action by investors filed in September 2020 is pending against Nikola and Milton, relating to Milton's fraudulent actions that caused a stock loss of nearly 80 percent. (Da265). Allegations in the private civil actions also formed the basis for the episode.

In June 2024, Milton filed a $1 billion lawsuit against former Nikola executives, blaming them for his convictions and economic losses from the decline in Nikola stock value. Per the complaint, "as a result of [the defendant executives' fraudulent acts], the market price of Nikola's securities fell precipitously" and the "economic loss suffered by Mr. Milton was a direct result" of their wrongful conduct. (Da5; Da40). Milton dropped the lawsuit weeks later. Maria Dinzeo, Nikola Founder Abandons $1B Suit Against Legal Chief, Other Execs, Corporate Counsel, July 26, 2024.[11]

[11] https://www.law.com/corpcounsel/2024/07/26/nikola-founder-abandons-1b-suit-against-legal-chief-other-execs/

In March 2025, while his appeal was pending, Milton was pardoned by President Trump, alleviating him of paying nearly $700 million in restitution.[12] See Katherine Faulders, Trump's Flurry of Pardons Include Some to Campaign Contributors, ABC News,[13] May 29, 2025 ("Milton, who was pardoned by Trump on March 27, donated nearly $2 million toward the president's reelection efforts last year[.]"); Leigh Kimmins, Trump Pardons Musk Rival Represented by AG Pam Bondi's Brother, Daily Beast,[14] Mar. 28, 2025 ("Milton . . . faced charges of defrauding investors. But after a personal phone call with Trump, Milton and his lawyer—Attorney General Pam Bondi's brother, Brad Bondi—were in celebration mode.").

PROCEDURAL HISTORY

A. Milton's Lawsuit Against CNBC

On January 23, 2025, Milton filed this complaint alleging trade libel (Count I) as to CNBC, aiding and abetting trade libel (Count II) as to Anderson

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[12] The separate arbitration award in favor of Nikola against Milton was never paid and it remains an issue in Nikola's bankruptcy proceedings. Sean O'Kane, Nikola Founder Trevor Milton Is Fighting a Subpoena From His Bankrupt Company's Creditors, June 6, 2025, TechCrunch,https://techcrunch.com/2025/06/06/nikola-founder-trevor-milton-is-fighting-a-subpoena-from-his-bankrupt-companys-creditors/

[13]https://abcnews.go.com/US/trumps-flurry-pardons-include-campaign-contributors/story?id=122313284

[14] https://www.yahoo.com/news/trump-pardons-musk-rival-represented-164657435.html

and Hindenburg, and prima facie tort (Count III) as to all three defendants. (Da47).

The allegations against CNBC begin at paragraph 81 of the complaint. (Da68). Generally, the complaint alleges that the episode was full of "defamatory smears," "targets Milton and Milton alone," falsely portrays Milton "as a devious, manipulative architect of a fraudulent enterprise," and caused Nikola's stock decline along with "severe harm to [Milton] personally, financially, and reputationally." (Da69; Da74; Da78). The complaint cites no specific losses and fails to acknowledge that Nikola's stock prices and Milton's reputation were affected by Milton's felony indictment and subsequent convictions, and the bad publicity that accompanied them, as well as the SEC civil settlement and shareholder lawsuits.

B. The UPEPA Motions

On March 21, 2025, CNBC filed an order to show cause (OTSC) seeking dismissal under UPEPA, which was executed on March 24, 2025. (Da84). CNBC argued that Milton's complaint could not be brought as trade libel but rather was a time-barred defamation claim. It also provided the trial court with a chart to match most of the alleged defamatory statements to specific references in filed court records, demonstrating that the fair report privilege applied. (Da406-409). As to the few allegations that fell outside the privilege, CNBC explained they

were not actionable because they were non-defamatory, substantially true, or protected opinion or hyperbole. Finally, CNBC argued that New Jersey does not recognize the "prima facie tort."

Shortly after the OTSC was entered, Milton filed his own OTSC seeking discovery from CNBC regarding its editorial processes and sources. The trial court denied Milton's OTSC without a hearing on April 9, 2025. (Da378). Oral argument on CNBC's OTSC was held on April 23, 2025 before the Hon. Anthony R. Suarez, J.S.C. (1T). On May 5, 2025, the court partially granted CNBC's (and the Hindenburg Defendants') OTSC. [15] This appeal followed soon thereafter.

C. The Trial Court Decision

The trial court's 44-page opinion summarizes at length the arguments made by each party in its briefs with minimal analysis, finding that UPEPA applies (Da8-Da10), that Count III (prima facie tort) should be dismissed (Da43-Da45), and that Count I (trade libel) could proceed.

At primary issue here is the court's rejection of CNBC's argument that Milton's claims sounded in defamation, not trade libel, which would make them time-barred. The court concluded that trade libel and defamation can both be

[15] The Hindenburg Defendants also filed a UPEPA OTSC (Da319), which was heard at the same time. They filed a separate appeal of the trial court's decision resolving their OTSC (Da381) which is pending at A-2854-24.

brought because they "overlap" when "a statement disparages a product or business and simultaneously reflects negatively on the reputation of the individual or entity associated with it." (Da18).

Second, the court rejected CNBC's argument that Milton had not sufficiently pleaded special damages, finding it adequate that the complaint vaguely referred to unidentified "lost business opportunities and professional disruptions, including canceled stock transactions, terminated banking relationships, and the blocked acquisition of Nikola's Badger program, aligning closely with allegations of disrupted economic relationships consistently deemed sufficient by courts." (Da22). It ignored case law that allows a general diminution theory only where "the possibility that other factors caused the loss is satisfactorily excluded," Patel v. Soriano, 369 N.J. Super. 192, 247, 249 (App. Div. 2004), which, given Milton's conviction for securities fraud, is clearly not possible in this case. It also ignored the requirement that a plaintiff proceeding under a general diminution theory must plead facts establishing that they cannot identify the customers they lost.

Third, the court rejected CNBC's argument that Milton failed to plead sufficient facts to establish actual malice. Despite adopting CNBC's arguments as to what constitutes actual malice, the court concluded in a single paragraph that "CNBC's reliance on sources known to be biased, the deliberate omission

of available exculpatory information, and the strategic timing of the broadcast during Milton's criminal trial" are alleged facts sufficient to withstand a motion to dismiss. (Da29).

Finally, the court also erred in its application of the fair report privilege. Despite agreeing with CNBC that almost all the challenged statements in the episode are protected by the fair report privilege (Da39) and finding that only six paragraphs (¶¶89-90, 95-97, and 112) of the 142-paragraph complaint are not protected by the privilege, the trial court did not dismiss any of the trade libel claims, thereby allowing the lawsuit to proceed as to every statement challenged in the complaint.

On June 26, 2025, this Court granted Defendants' motions for a stay of the proceedings in the court below and expedited this appeal. (Da410).

STANDARD OF REVIEW

This Court reviews a decision on a dismissal motion for failure to state a claim "de novo, without deference to the judge's legal conclusions." Neuwirth v. State, 476 N.J. Super. 377, 389 (App. Div. 2023) (quoting McNellis-Wallace v. Hoffman, 464 N.J. Super. 409, 415 (App. Div. 2020)).

LEGAL ARGUMENT

UPEPA allows a defendant to file an OTSC to seek dismissal, or partial dismissal, of any:

> cause of action asserted in a civil action against a person based on the person's:
>
> (1) . . .
>
> (2) communication on an issue under consideration or review in a legislative, executive, judicial, administrative, or other governmental proceeding; or
>
> (3) exercise of the right of freedom of speech or of the press, . . . guaranteed by the United State Constitution or the New Jersey Constitution, on a matter of public concern.
>
> [N.J.S.A. 2A:53A-50(b).]

A judge must schedule a hearing "as expeditiously as possible." N.J.S.A. 53A-53(a). In ruling on the OTSC, the court "may consider the pleadings, the [OTSC] application and supporting certifications, briefs, any reply or response to the [OTSC], and any evidence that could be considered in ruling on a motion for summary judgment." N.J.S.A. 2A:53A-54. The court must also construe UPEPA "broadly . . . to protect the exercise of the right of freedom of speech and of the press . . . guaranteed by" the state and federal constitutions. N.J.S.A. 2A:53A-59.

A court "shall dismiss with prejudice a cause of action, or part of a cause of action" if two steps are satisfied. N.J.S.A. 2A:53A-55(a). Step One requires a court to determine that (a) UPEPA generally applies to the type of speech at issue, and (b) that no exceptions apply. N.J.S.A. 2A:53A-55(a)(1) and (2). If that step is satisfied, the court moves to Step Two.

Step Two requires finding a movant is entitled to relief either under a motion to dismiss standard or under a summary judgment standard. Specifically, a court must find either:

> (a) The responding party fail[ed] to establish a prima facie case as to each essential element of any cause of action in the complaint; or
>
> (b) The moving party establishe[d] that:
>
> i. The responding party failed to state a cause of action upon which relief can be granted; or
>
> ii. There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.
>
> [N.J.S.A. 2A:53A-55(a)(3) (emphasis added).]

The trial court correctly concluded that Step One was satisfied, which Milton did not contest below or cross-appeal. Thus, UPEPA applies and only Step Two – whether the complaint fails to set forth a prima facie case as to each element of a cause of action (in this case trade libel), or fails to state a claim upon which relief can be granted, is at issue in this appeal. N.J.S.A. 2A:53A-55(a)(3)(a) and (b)(i).

I. COUNT I MUST BE DISMISSED BECAUSE MILTON'S CLAIM IS TIME-BARRED (Da1; Da10-Da18)

A. The Trade Libel Claim Is Defamation in Disguise

Milton's complaint sounds in defamation because he seeks relief for statements concerning him personally and which he says damaged his own reputation. It is splitting hairs to say that there is one type of defamation when writing about a person's character and veracity, yet another if a person claims that same statement has also affected his personal ability to attract investors or perform his business. The law of defamation does not allow such separate claims.

As explained above, Milton's complaint tries to re-package a personal defamation claim into "trade libel" so that he can evade defamation's strict one-year statute of limitations.[16] Milton alleges that a single statement can simultaneously disparage an individual's reputation as defamation, as well as their "economic relationship and business interests" as trade libel. The trial court erroneously agreed, essentially ruling that anytime an individual's

[16] The one-year statute of limitations for defamation is statutory (N.J.S.A. 2A:14-3) and the statute of limitations for trade libel is judicially-created at six years. Patel, 369 N.J. Super. at 247. But see Point I(B). The broadcast of *Chasing Tesla* took place more than two years before Milton filed this action, well beyond the statute of limitations for defamation, making any defamation claim time-barred.

business reputation is at issue, they can sue under either tort, thus allowing the trade libel claim to proceed.

It is widely accepted that "[i]t is not the label placed on [a cause of] action that is pivotal but the nature of the legal inquiry." Couri v. Gardner, 173 N.J. 328, 340 (2002). Consistent with this principle, our courts have long held that where a cause of action sounds in defamation, the court must treat those claims as defamation regardless of the label a plaintiff uses in the complaint. See, e.g., G.D. v. Kenny, 205 N.J. 275, 307 (2011) ("The intentional and negligent-infliction-of-emotional-distress claims also fail because those torts are predicated on the same conduct alleged in the defamation claim."). If more lenient standards were applied, plaintiffs would simply relabel their claims as other torts "to overcome defenses to defamation actions, to avoid short statutes of limitations for defamation, and to circumvent judicial barriers to punitive damages." Decker v. Princeton Packet, Inc., 116 N.J. 418, 432 (1989) (emphasis added). See also Swan v. Boardwalk Regency Corp., 407 N.J. Super. 108 (App. Div. 2009) (where a claim is "essentially one of defamation," allowing it to stand as false light would "condone a transparent evasion of the one-year statute of limitations") (emphasis added); Bainhauer v. Manoukian, 215 N.J. Super. 9, 48 (App. Div. 1987) (because the malicious interference count is expressly predicated on precisely the same facts as are alleged in the defamation count, proof or failure

of proof of the operative facts of the defamation count would, therefore, completely comprehend the malicious interference cause"). These principles clearly prohibit Milton from skirting defamation's statute of limitations by calling his defamation claim "trade libel."

A defamation claim relating to speech that touches upon a matter of public concern has three elements: (1) "a false and defamatory statement concerning the plaintiff"; (2) "the statement was communicated to another person (and was not privileged)"; and (3) defamatory statement was published "with actual malice." Durando v. Nutley Sun, 209 N.J. 235, 248 (2012). "A defamatory statement, generally, is one that subjects an individual to contempt or ridicule, one that harms a person's reputation by lowering the community's estimation of him or by deterring others from wanting to associate or deal with him." Id. at 248-49 (emphasis added).

On the other hand, trade libel (also known as product disparagement, injurious falsehood, disparagement of property, commercial disparagement, or slander of title) also involves speech but has been described as more akin to the tort of intentional interference with one's economic relations. Patel, 369 N.J. Super. at 246. To state a valid claim for trade libel, plaintiffs must allege four elements: "(1) publication (2) with malice (3) of false allegations concerning plaintiff's property or product (4) causing special damages (pecuniary harm)."

Dairy Stores v. Sentinel Publ'g, 104 N.J. 125, 161 (1986) (Garibaldi, J., concurring) (citing Andrew v. Deshler, 45 N.J.L. 167 (E. & A. 1883)) (emphasis added). Accord Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1140 (3d Cir. 1977). Thus, the elements of publication and malice (interpreted to be actual malice) are identical to defamation, but the third element requires that the subject matter of the statement involve plaintiff's property or product, and the fourth relies on pleading proof of specific harm.

Patel analyzes the difference between trade libel/injurious falsehood and defamation and sets forth definitional examples: Tortious interference "by falsehoods that cause pecuniary loss, but are not personally defamatory," are regarded as a tort "more or less distinct" from defamation. Patel, 369 N.J. Super. at 247 (citing Prosser & Keeton on Torts § 128 at 962 (5th ed. 1984)) (emphasis added). Further refining the distinction, the Patel court explains that generally, trade libel has been applied to statements "that are injurious to plaintiff's business but cast no reflection on either plaintiff's person or property." Ibid. (citing Prosser at 963) (emphasis added). For example, if "the aspersion reflects only on the quality of the plaintiff's product, or on the character of the business as such, it is disparagement [i.e., trade libel]." Ibid. (citing Prosser at 964-65) (emphasis added). "Additionally, one may disparage plaintiff's business by

reflecting upon its character, the manner in which it is conducted, or its popularity or danger…." Id. at 248.

By contrast, "personal defamation is usually found only 'where the imputation fairly implied is that the plaintiff is dishonest or lacking in integrity, or that he is deliberately perpetrating a fraud upon the public by selling a product which he knows to be defective.'" Patel, 369 N.J. Super. at 248 (citing Prosser at 965) (emphasis added). In the instant matter, the episode did exactly that: "it fairly implied" by presenting materials from court documents and interviews, that Milton "is [potentially] dishonest or lacking in integrity, [and/]or that [the government alleges] he is deliberately perpetrating a fraud upon the public by selling a product which he knows to be defective." Patel, 369 N.J. Super. at 248. Thus, the allegations sound in defamation.

Despite the trial court's express acknowledgement that a statement can only be trade libel if it "cast[s] no reflection on either plaintiff's person or property," (Da12), without any analysis, it determined Milton's allegations to be trade libel, simply citing generally to Patel and Dairy Stores to conclude that "many statements may implicate both causes of action, depending on their context and the harm caused as in the present matter," and action "alleging poor product quality and that also suggests fraudulent or unethical behavior by the seller could be actionable under both defamation and trade libel." (Da18)

(emphasis added). However, at the time of the broadcast, Milton was not a seller and had no product. He was neither a Nikola corporate executive, nor were Nikola or Nikola's hydrogen trucks his products. He was simply a shareholder. Nevertheless, the trial court ruled that the trade libel claim could proceed independently of a defamation claim.

Patel involved accusations of negligence against a professional medical services provider who lost referrals because the defendant made false allegations about the quality of his medical services. Id. at 249. "Since the statements did not imply that plaintiff was personally dishonest, reprehensible, or lacking in integrity, they fall under the tort of trade libel, as opposed to personal defamation." Id. Dairy Stores was a defamation action brought by a spring water company after a local newspaper claimed that its bottled water contained chlorine. The statements disparaged a product and thus they could be brought as trade libel. But because the statements also arguably disparaged the company that sold it, the Court weighed whether a corporation could simultaneously maintain an action for defamation and trade libel.[17] Id. at 133.

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[17] Similarly, in Henry v. Vaccaro Const. Co. v. A. J. DePace, Inc., 137 N.J. Super. 512, 517–18 (Law. Div. 1975), the first modern case to discern the difference between the torts, the court explained that a trade libel lawsuit by a corporation was not for the type of personal damages usually flowing from a libel and slander action. Rather, it was for damages to a corporate plaintiff's business and the failure of others to deal or contract with the plaintiff as a result. Ibid.

"The two causes may merge [for the plaintiff's business] when a disparaging statement about a product reflects on the business that made, distributed, or sold it." 104 N.J. at 133 (emphasis added). "If, for example, a statement about the poor quality of a product implies that the seller [corporation] is fraudulent, then the statement may be actionable under both theories." Ibid. But the torts are distinct, even if one statement could theoretically implicate both: defamation disparages a business or person's integrity or character and trade libel disparages a businesses' products or services.

Here, Milton has no trade libel claim. Unlike the corporate plaintiffs in Dairy Stores or Vaccaro whose products or services were allegedly disparaged, even if the episode wrongly disparaged Nikola's products as Plaintiff claims, Nikola is not a plaintiff here and Milton cites no authority, nor did the trial court in its decision, that would create a separate cause of action affording Milton the standing to sue individually for harm resulting from disparagement of Nikola's products

Rather than opining on the statute of limitations issue differentiating the torts, Dairy Stores focused on the need to apply defamation's privileges to trade libel, holding that a plaintiff could not plead product disparagement to avoid those defenses. Id. at 135. The Court then analyzed the case solely in terms of

whether the fair comment privilege applied, finding the plaintiff failed to prove actual malice by clear and convincing evidence.

While Milton founded Nikola, he resigned as its executive chairman in 2020, tellingly eleven days after the Hindenburg Report was published and two years before the episode aired. However, Milton alleges that because CNBC disparaged products he had worked on years earlier at Nikola – primarily the Badger vehicle (Da74) – or his leadership at Nikola (Da73-74) – that this alleged disparagement constituted trade libel or product disparagement.

But, at the time of the broadcast, Milton was merely a shareholder and thus does not have standing to sue on Nikola's behalf. See, e.g. Pepe v. General Motors Acceptance Corp., 254 N.J. Super 662, 666 (App. Div. 1992), cert. denied, 130 N.J. 11 (1993) ("The law is clear and uniform: shareholders cannot sue for injuries arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporations."). See also Meade v. Kiddie Acad. Domestic Franchising, LLC, 501 F. App'x 106, 108 (3d Cir. 2012) ("It is well established that, absent a direct individual injury, a shareholder of a corporation lacks standing to sue for an injury to a corporation"); Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1202 n. 4 (9th Cir. 2001) (shareholder had no standing to sue for defamation directed towards corporation because "the wrong . . . suffered by the stockholder is merely

incidental to the wrong suffered by the corporation and affects all stockholders alike"); Norman v. Borison, 994 A. 2d 1019, 1029 (Md. App. 2010) (refusing to endorse the plaintiff's contention that the defamation claims by a company and its owners were interchangeable, explaining that to do so would "chip away at the basic precept that corporations and individuals are legally separate entities."). Therefore, to the extent that the episode defamed any "product," it was not Milton's product and he has no standing to bring any claim.

If Milton were to have any claim, it would be for defamation[18] because the allegedly actionable statements were about him personally—his character, veracity, and fraudulent behavior. The complaint relentlessly focuses on personal defamation, recounting numerous statements in the episode that Milton claims cast a reflection on his personal reputation alone which the complaint itself describes as a "character assassination narrative," (Da102), including that the episode: "targets Milton and Milton alone," (Da69); was meant to "gravely harm Milton," and the episode's "images of Milton underscore his centrality to the episode's disparaging themes from the outset." (Da70). The complaint further makes clear it is suing for personal defamation when it alleges:

> CNBC would have its audience believe that Milton is a serial manipulator who scams all his business partners; that Nikola was a bizarre pump and dump scheme devised by Milton to dupe young and naïve investors,

[18] Again, a time-barred and meritless claim for the reasons argued in this brief.

> and that Nikola prototypes were all faked by Milton to drive hype for his company and for his stock fraud scheme [i.e., essentially what was as alleged and proven by the Government in its indictment and at trial].
>
> [(Da76).]

That the episode is directed as Milton's personal character and business patterns is evident from its depiction of his early ventures, including St. George Security and dHybrid. The complaint describes the episode as fraught with "misrepresentation and failure and casting doubt on Milton's integrity before the inception of Nikola," and "portraying [Milton] as a charismatic yet deceptive entrepreneur." (Da72). In other words, Milton claims he personally was accused of felony theft involving St. George Security (i.e., "telling customers to make their checks payable to him, not the company"—Da72) and that it harmed his reputation, but he argues that he is entitled to cast the same claim as trade libel so that he can sue within six years instead of one. He is wrong—his claim can only be brought as defamation, and it is time-barred.

Because defamation claims infringe upon free speech, the statute of limitations is short and rigidly applied. The discovery rule does not apply to toll the limitations period, NuWave Inc. Corp. v. Hyman Beck & Co., 221 N.J. 495 (500), nor can a plaintiff file a bare bones complaint within the one-year period in hopes of using discovery to "dredge up" details for a defamation claim. Neuwirth, 476 N.J. Super. at 390. Similarly, a plaintiff cannot evade

defamation's one-year statute of limitations by simply calling their claim something else. Swan, 407 N.J. Super. 108. Because the complaint itself repeatedly concedes that the episode's focus was personal defamation, if any, it undermines any allegation of trade libel and must be treated as a time-barred defamation claim.

B. New Jersey Should Apply a One-Year Statute of Limitations to Trade Libel

N.J.S.A. 2A:14-3 provides: "Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander." (emphasis added). As argued below, this statute of limitations should apply to every form of libel/slander, including trade libel.

As far as can be ascertained, most courts around the country that have considered the issue have held that the same statute of limitations should apply both to speech that defames a person (i.e., libel/slander) and speech that defames a product (i.e., trade libel/product disparagement/slander of title). See Enigma Software Grp. USA, LLC v. Bleeping Comput. LLC, 194 F. Supp. 3d 263, 276 (S.D.N.Y. 2016) (applying N.Y.C.P.L.R. § 215(3), which applies generally to libel, to trade libel claims); Pro Golf Mfg., Inc. v. Tribune Review Newspaper Co., 809 A.2d 243, 246 (Pa. 2002) (reviewing statute similar to N.J.S.A. 2A:14-3 and concluding it "is not limited to slander against the person only; nor would there be any legislative purpose in making such a distinction"); Bonner v.

Chicago Title Ins. Co., 487 N.W.2d 807, 812 (Mich. Ct. App. 1992) ("We, too, can see no reason to make a distinction between an action alleging defamation of title to property and an action alleging defamation of the person."); Gee v. Pima Cnty., 612 P.2d 1079, 1080 (Ariz. Ct. App. 1980) (there is no "reason to vary the statute of limitations because property rather than a person is defamed"); Scott Paper Co. v. Fort Howard Paper Co., 343 F. Supp. 229 (E.D. Wis. 1972) (applying statute of limitations for "libel, slander, assault, battery or false imprisonment" to trade libel claim); Lehigh Chem. Co. v. Celanese Corp. of Am., 278 F. Supp. 894, 898 (D. Md. 1968) ("Neither law nor reason demand that the tort of disparagement of property should be governed by a longer period of limitations than disparagement of the reputation of the individual."); Norton v. Kanouff, 86 N.W.2d 72, 76 (Neb. 1957) (" In the absence of a statute expressly referring to actions for slander of title, a statute of limitations relative to actions for libel and slander is equally applicable."); Woodard v. Pacific Fruit & Produce Co., 106 P.2d 1043, 1046 (Or. 1940) ("We can see no substantial reason why the Legislature would make any distinction between an action involving defamation of title to property and one based upon defamation of the person."). In these cases, courts were faced with similar statutory schemes to New Jersey's: a specific statute of limitations for "every" action of libel/slander and other statutes setting the limitations period for property torts. The courts noted that

the plain language of the libel/slander provisions did not limit the statute of limitations to libel/slander against a person rather than against property and that there was no reason for a court to do so.

No New Jersey appellate court has actually analyzed whether the statute of limitations for trade libel should fall under N.J.S.A. 2A:14-3. Instead, without any analysis at all, most have simply cited to Vaccaro, 137 N.J. Super. 512, a Law Division case published in 1975, which cited two much older cases for the proposition that trade libel has a six-year statute of limitations. See, e.g., Patel, 369 N.J. Super. at 247. Our Supreme Court, however, has recognized that "the common law historically has [treated] the interest in one's reputation as more worthy of protection than the interest of a business in the products that it makes[.]" Dairy Stores, 104 N.J. at 137.

There simply is no reason why a company should have six years to sue if its product is defamed but a person only has one year to sue if their reputation is defamed. And nothing in the plain language of N.J.S.A. 2A:14-3 suggests there should be a difference: the statute is broad, applying to "every" action for libel or slander. It does not contain any qualifiers as to the type of libel/slander, the type of damages that occur, or the object (person or product) of the libel/slander. Once you apply actual malice and defamation defenses to trade

libel, narrowing the differences between the torts further, the rationale for having a six-year statute of limitations for trade libel similarly diminishes.

The decision's implications for defamation law and journalists in particular are immediate; the disparity in statutes of limitations essentially provides any business a second crack at a defamation claim after the one-year statute of limitations has expired, exposing the media to a six-year statute of limitations based on the subject matter of the speech, in clear abrogation of the legislature's express one-year limitation on defamation and our Supreme Court's express direction that if speech relates to a matter of public concern it requires maximum protection. See, e.g., Sisler v. Gannett Co., 104 N.J. 256 1083, 1088 (1986).

When the subject matter touches on speech involving a matter of public concern, the only difference between the elements of the two torts is the requirement of pleading and proving specific special damages, and the difference in the statute of limitations merely invites plaintiffs prohibited from seeking defamation damages to attempt to repackage their claims as trade libel.

Consistent with the cases cited above, particularly Patel, 369 N.J. 192, and Decker, 116 N.J. at 432, and to avoid a plaintiff's end-run around the protections afforded by N.J.S.A. 2A:14-3, the Court, at a minimum, should apply the one-year statute of limitations to claims as alleged here where the same purportedly

defamatory statement aimed at an individual is alleged also to affect that individual's personal ability to attract investors or perform his business. Alternatively, the Court should hold that all trade libel claims are subject to a one-year statute of limitations, as most courts have held. While that would be the most comprehensive determination, the simplest resolution of this appeal is by reversing the court below and dismissing the trade libel count as time-barred because it is merely a defamation claim in disguise.

II. COUNT I SHOULD BE DISMISSED BECAUSE MILTON FAILED TO PLEAD SPECIAL DAMAGES (Da22)

Even if trade libel were to apply, it "requires special damages in all cases, unlike ordinary defamation." Vaccaro, 137 N.J. Super. at 517. See also Patel, 369 N.J. Super. at 248 (a "plaintiff must prove special damages, such as the loss of a present or prospective advantage, in the form of a pecuniary loss"). A plaintiff must plead and prove special damages with specificity. See Rule 4:5-8 ("Items of special damage claimed shall be specially stated[.]"). "General, implied, or presumed damages of the kind available in personal defamation actions do not satisfy the requirement of special damages needed for [trade libel] causes of action." Patel, 369 N.J. Super. at 249.

This heightened pleading requirement compels a plaintiff to "allege either the loss of particular customers by name, or a general diminution in its business, and extrinsic facts showing that such special damages were the natural and direct

result of the false publication." Mayflower Transit, LLC v. Prince, 314 F. Supp. 2d 362, 378 (D.N.J. 2004) (emphasis added) (internal citations and quotation marks omitted). If predicating a claim on a general diminution theory, the plaintiff must allege:

> facts showing an established business, the amount of sales for a substantial period preceding the publication, the amount of sales for a [period] subsequent to the publication, facts showing that such loss in sales were the natural and probable result of such publication, and facts showing the plaintiff could not allege the names of particular customers who withdrew or withheld their custom.
>
> [Id. (citations and internal quotation marks omitted).]

Importantly, although a plaintiff is permitted to plead a general diminution theory and not identify specific losses or specific customers by name, he can do so only "where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded." Patel 369 N.J. Super. at 249 (emphasis added).

Milton fails to meet this standard. The complaint includes no specific information about his damages, alleging vaguely that: his personal reputation was damaged (Da76); "multiple clean-energy ventures Milton sought to develop post-Nikola were derailed" (Da77); he was blocked from purchasing certain products from Nikola (Da77); unidentified banks and brokerage firms terminated their relationships with him (Da77); the episode caused Nikola's

stock to begin a "downward trajectory" and "negatively impacted his financial standing to the tune of billions of dollars" (Da77). He fails to plead any facts, though, that show he "could not allege the names of particular customers who withdrew or withheld their custom." Mayflower Transit, 314 F. Supp. 2d at 378. If banks, brokerage firms, or "clean-energy ventures" refused to do business with Milton, he has that information and was required to plead it.

Moreover, Patel also prohibits Milton – a convicted felon – from proceeding on a general diminution theory because he cannot show that "the possibility that other factors caused the loss is satisfactorily excluded," Patel, 369 N.J. Super. at 249, or that the episode played a "material and substantial part" in inducing others not to deal with him. Id. at 246-47.[19] The episode recounts the many damning allegations that were set forth in civil and criminal pleadings. It was widely reported that Milton had been under investigation since September 2020 and that he was indicted in July 2021. His trial received extensive media coverage, and he was convicted by a jury a mere ten days after the episode aired, then sentenced to four years in prison followed by three years of supervised release (which he did not serve because he was free on bail while he appealed his conviction). It is preposterous to suggest that unnamed investors,

[19] Indeed, as noted above, Milton filed a lawsuit against Nikola executives in 2024, blaming them for his financial losses. See Dinzeo, supra, fn 11.

bankers, and brokerage firms ceased their relationships with him because the episode reported about his criminal conduct, rather than the fact that a jury found him guilty of that criminal conduct.[20] It is also impossible to blame Nikola's stock prices fall on the episode because it is documented that the stock began to plummet immediately after the Hindenburg Report was published and continued to drop further as the investigations became public, as Milton resigned, as Nikola conceded its financial statements were inaccurate, and as Milton was indicted. Indeed, as the stockholder class action suit makes clear, Nikola's stock declined nearly 80 percent between the time of the Hindenburg Report and the immediate days after the indictment. (Da280).

Even if this Court were to determine that the trade libel claim was valid, trade libel requires that Milton meet the heightened pleading requirements for special damages, which he fails to do as none of the requirements set forth in Rule 4:5-8, Patel, and Mayflower Transit are present in the complaint. Therefore, the trial court should have dismissed Count I for failure to state a claim.

[20] It is also absurd to claim that the episode is responsible for Nikola's refusal to do business with Milton, given that Nikola was adverse to Milton both in connection with the SEC investigation and the arbitration in which it obtained a nearly $168 million award against him.

III. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE FAIR REPORT PRIVILEGE APPLIES OR THE ALLEGED STATEMENTS ARE OTHERWISE NOT ACTIONABLE (Da29-39)

It is undisputed that the fair report privilege may be asserted in a trade libel case. See Dairy Stores, 104 N.J. at 137 ("[I]nsofar as defenses to [trade libel] are concerned, a qualified privilege should exist wherever it would exist in a defamation action."). The privilege "protects the publication of defamatory matters that appear in a report of an official action or proceeding." Salzano v. North Jersey Media Group Inc., 201 N.J. 500, 523 (2010). It extends to "[a] full, fair, and accurate report regarding a public document that marks the commencement of a judicial proceeding," such as an indictment or civil complaint. Id. at 521–22. The privilege applies regardless of "the truth or falsity of the initial allegations and defenses" because citizens have a right to know what "has been filed in court and how the judicial system responds to it." Id. at 521.

Even when a report is "not . . . exact in every immaterial detail," the privilege will apply provided that the account conveyed is "substantially correct." Id. at 523 (quoting Costello v. Ocean Cty. Observer, 136 N.J. 594, 607 (1994)). "A fair report need not be a verbatim report; it is enough that the report be a rough-and-ready summary that is substantially correct." Id. at 523 (citations and internal quotation marks omitted). Moreover, a report need not quote a

public document verbatim. So long as the "sting" of the language used is "essentially the same as that" in the public document, the privilege applies. Salzano, 201 N.J. at 525.

The fair report privilege protects the publisher "even though the publisher does not personally believe the defamatory words he reports to be true and even when he knows them to be false." Orso v. Goldberg, 284 N.J. Super. 446, 452 (App. Div. 1995) (The "privilege exists both to examine the affairs of government officials, and to provide the public with information regarding matters of legitimate public concern."). Once a court determines that the report is substantially accurate, the privilege is absolute and cannot be defeated. Salzano, 201 N.J. at 530.

Here, CNBC provided a detailed chart (Da405-409)[21] to the trial court that matched the alleged defamation within the episode to specific statements within the federal indictments, SEC complaint, SEC filings, and other pending lawsuits that involved Milton. Indeed, the trial court agreed with CNBC that "statements from the Episode that are challenged in the complaint fairly summarize documents filed by or published by the federal government or parties in court filings." (Da39). Nonetheless, the trial concluded the privilege does not apply

[21] The chart submitted pursuant to Rule 2:6-1(a)(2), which permits portions of briefs to be included in an appendix where the brief is referred to by the trial court in its decision.

because it found that a handful of statements challenged in a mere six paragraphs of the 142-paragraph complaint were not sourced from official proceedings or documents and thus not protected by the privilege:

> These include the alleged false and misleading depiction of Milton's early business venture, St. George Security, as fraudulent and criminal, alleging personal diversion of company funds (Compl. ¶¶95-97); the overall portrayal of Milton as a "corporate conman" who allegedly "scammed business partners" and orchestrated a "pump-and-dump" scheme (Compl. ¶¶89-90; 112).

[(Da39).]

First, at a minimum, the trial court should have dismissed the vast majority of the complaint after it found that the episode did "fairly summarize documents filed by or published by the federal government or parties in court filings." (Da39). The Supreme Court's decision in Salzano specifically requires such partial dismissal in the context of a fair report in a motion to dismiss setting. 201 N.J. at 532-33 (dismissing the five statements that were protected by the fair report privilege and allowing the plaintiff to proceed as to one statement that was not gleaned from any pleadings). UPEPA also unequivocally requires a court to "dismiss with prejudice a cause of action, or part of a cause of action." N.J.S.A. 53A-55 (emphasis added).

Moreover, the trial court should have similarly dismissed the numerous paragraphs of the complaint that report allegations set forth by the government

in criminal and civil pleadings, as well as those set forth by other parties in civil litigations involving Milton. (Da405-409). By failing to dismiss most of the complaint that it found to be protected by the fair report privilege, the trial court was subjecting CNBC to expansive discovery and potential liability for claims that are privileged and non-actionable as a matter of law.[22]

The trial court further erred by allowing those paragraphs it ruled were outside the privilege to proceed. For example, the trial court concluded Paragraphs 89, 90, and 112 fell outside the privilege, but failed to dismiss them as not actionable. Those paragraphs state:

> 89. *Chasing Tesla* presented a false and deeply prejudicial narrative, portraying Milton as a devious, manipulative architect of a fraudulent enterprise. It also employed cinematic techniques, including dramatic music, selective interviews, and reenactments, to frame Milton as emblematic of corporate greed. Juxtaposing Milton's public statements with misleading characterizations, the Episode weaves a narrative of intentional wrongdoing, ignoring exculpatory evidence presented in other forums, including Milton's federal trial (which was in progress at the time).
>
> 90. [The episode] opens with a narrator's voiceover that targets Milton and Milton alone, claiming that "[t]he founder of Nikola Motors, Trevor Milton, is front and center." Without any factual basis or support, the narrator claims Milton "targets young, naïve investors."
>
> [Da69.]

[22] As noted above, this Court issued a stay of discovery, presumably based at least in part, on this argument. (Da410).

> . . .
>
> 112. CNBC would have its audience believe that Milton is a serial manipulator who scams all his business partners; that Nikola was a bizarre pump-and-dump scheme devised by Milton to dupe young and naïve investors; and that the Nikola prototypes were all faked by Milton to drive hype for the company and for his stock-fraud scheme. These are baseless and malicious accusations. To make matters worse, CNBC compounded the impact of its attacks by premiering the Episode in the midst of Milton's federal criminal trial. CNBC, of course, could have timed its premiere differently. There was no reason for the timing, or urgency to the broadcast, except to "twist the knife" and maximize the harm to Milton.
>
> [Da76.]

Paragraph 80, the first sentence of Paragraph 90, and Paragraph 112 should have been dismissed because they fail to identify any false and defamatory statements made by CNBC but rather contain Milton's overall characterization of the episode, which is derived from statements within the episode that the trial court correctly concluded were protected by the fair report privilege because they are drawn from the legal proceedings against Milton. (Da39).

The second sentence of Paragraph 90 also should have been dismissed under the fair report privilege because the federal indictment specifically asserted that "Milton's scheme targeted individual, non-professional investors—so called 'retail investors'—by making false and misleading statements directly

to the investing public through social media and television, print, and podcast interviews." (Da111). See also Da101; Da112-13; Da168; Da181.

Although Milton did not cross-appeal and is thus barred from trying to revive any of the allegations in the complaint that the trial court found to be protected by the fair report privilege, CNBC anticipates that Milton will argue that the episode contains two false statements that constitute actionable defamation. Both statements are substantially true. The first pertains to the episode's reporting about Milton's stock sales. According to the complaint, the episode misrepresented the amount of stock Milton dumped after he was indicted:

> 108. The Episode continues with a blatant lie about [M]ilton's stock sales in the wake of his indictment. According to the Episode:
>
> > "Milton sells $300 million worth of Nikola stock in the three months after he is charged with securities fraud"
>
> 109. This claim is false. It grossly overstates the amount of Milton's stock sales, not slightly, but by approximately $150 million. As public records confirm, Milton sold approximately $150 million worth of stock during the three-month period after his indictment.
>
> [(Da75).]

But truth, including substantial truth, is an absolute defense to defamation. See G.D., 205 N.J. at 293 ("The law of defamation overlooks minor inaccuracies, focusing instead on 'substantial truth'" of a subject statement "so long as the

substance, the gist, the sting, of the libelous charge be justified.") (internal citations and quotation marks omitted); Ward v. Zelikovsky, 136 N.J. 516, 532 (1994) (stating that courts do not look at the "literal words" used, but the "impressions created by the words as well as the general tenor of the expression, as experienced by a reasonable person").

According to public SEC filings, Milton sold $152 million dollars in Nikola stock within two weeks of his July 29, 2021 indictment. (Da307-308; Da311). Then, on November 19, 2021, Milton sold another $131 million in Nikola stock, bringing the total he dumped to approximately $283 million within three-and-a-half months of the indictment. (Da314). A few days later, he sold another $33.5 million in shares (bringing his total sales to $316 million over four months). (Da317-318). Thus, CNBC's reporting that Milton sold $300 million in stock in the three months after his indictment was substantially true. No reasonable person would think that Milton is less of a fraud because the stock sales took place in four months instead of three months or the amount was not exactly $300 million. See Salzano, 201 N.J. at 537 (Hoens, J., concurring) (concluding that a reference to plaintiff stealing $500,000 when the true amount was $469,995 was "too inconsequential to matter"). The "sting" is the same:

Milton knew the stock was tanking after his indictment and unloaded nearly $300 million of it almost immediately.[23]

Milton will also likely point to the fact that the episode, which was necessarily investigated, filmed, and produced well before its air date, refers to Milton as "awaiting trial" when in fact his trial had already begun. But as noted above, besides that statement being non-defamatory, our courts overlook minor inaccuracies, especially where they are insignificant and convey the same sting or gist as the fully accurate statement would have conveyed. G.D., 205 N.J. at 293. Milton's trial may have already begun by the time the episode aired, but by stating that Milton was "awaiting trial," the episode correctly conveys that the allegations against Milton were pending and not yet proven at trial.

In sum, the trial court correctly held that almost every allegation in the complaint to be protected by the fair report privilege. Of the six paragraphs the court found fell outside the privilege, three should have been dismissed for the reasons argued above. That leaves only Paragraphs 95, 96, and 97 of the complaint regarding St. George Security as falling outside the fair report

[23] Other media outlets reported about Milton's stock sales in a similar manner. See, e.g., Jonathan Ponciano, Indicted Billionaire Trevor Milton Has Sold Nearly $300 Million Worth of Nikola Stock Since Criminal Fraud Charges, Forbes, April 21, 2022, https://www.forbes.com/sites/jonathanponciano/2021/11/24/indicted-billionaire-trevor-milton-has-sold-nearly-300-million-worth-of-nikola-stock-since-criminal-fraud-charges/

privilege or otherwise being non-actionable, but as argued elsewhere in this brief, the entire complaint must be dismissed because it is time-barred, fails to plead special damages, and fails to plead actual malice.

IV. COUNT I SHOULD BE DISMISSED BECAUSE MILTON FAILED TO PLEAD ACTUAL MALICE (Da24-Da29)

Milton undisputedly must plead actual malice, whether his claim is defamation or trade libel. "To satisfy the actual-malice standard, a plaintiff must show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." Lynch v. N.J. Educ. Ass'n, 161 N.J. 152, 165 (1999). Under the second prong, establishing reckless disregard requires a showing that the defendant made the statement with a "high degree of awareness of [its] probable falsity." Durando, 209 N.J. at 251 (citing Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

The court below also recognized that, a mere "failure to investigate before publishing . . . is not sufficient to establish reckless disregard." Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 668 (1989). (Da24). Similarly, an allegation that an editor or reporter "should have known" or "should have doubted veracity" of a statement is insufficient to show reckless disregard for the truth. Durando, 209 N.J. at 252. The actual-malice standard is a subjective one that does not involve consideration of whether a reasonable person would have, or should have, known the statement was false but rather whether "the

defendant in fact entertained serious doubts as to the truth of his publication." Neuwirth v. State, 476 N.J. Super. 377, 392 (App. Div. 2023) (Da24).

The Appellate Division has ruled at least three times that when actual malice is required to be proven in a defamation case, it must be sufficiently pleaded, or the complaint must be dismissed. In Neuwirth, the Appellate Division determined that a defamation plaintiff in an actual malice case cannot survive a motion to dismiss unless he pleads "facts from which a factfinder could conclude that [the defendant] knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made." Id. at 393. See also Herman v. Muhammed, 480 N.J. Super. 480 (App. Div. 2024); Darakjian v. Hanna, 366 N.J. Super. 238, 247 (App. Div. 2004). The actual malice requirement is identical in both defamation and trade libel cases. Both torts involve punishing speech, and the actual malice standard is meant to protect speech. Thus, the trial court agreed that Neuwirth's pleading instructions should be equally applicable to trade libel cases. (Da25).

An examination of the complaint demonstrates that Milton did not properly plead actual malice and failed to reference sufficient facts to support evidence of actual malice. In fact, Milton's complaint undermines any allegation that CNBC acted with actual malice by alleging:

> Upon further information and belief, CNBC requested that Anderson and Hindenburg verify various assertions

> in the Hindenburg Report as part of CNBC's journalistic source-checking protocols, Despite having full knowledge that many assertions in the Hindenburg Report had been debunked by, among other things, the Press Release, Anderson and Hindenburg maliciously failed to correct, modify, or clarify these assertions before *Chasing Tesla* aired.
>
> [(Da71) (emphasis added).]

See also Da80 (alleging that Hindenburg "falsely confirmed to CNBC that its claims were true and accurate"). This points to the Hindenburg Defendants' alleged subjective knowledge, and not CNBC's. Milton also baselessly faults CNBC for relying on the federal government's representations concerning fraud regarding the Badger, stating "the government is well aware" that CNBC's statements were false. (Da74).

Nevertheless, despite its recitation of all the rigid legal standards for pleading actual malice, the trial court erroneously found:

> In the case at bar, and for purposes of a motion to dismiss, Milton has sufficiently pled factual allegations demonstrating actual malice in looking at the complaint with a liberal and generous reading. Milton pleads CNBC's reliance on sources known to be biased [i.e., the Hindenburg Report], the deliberate omission of available exculpatory information, and the strategic timing of the broadcast during Milton's criminal trial which would support the pleading of actual malice sufficient to withstand a motion to dismiss under established New Jersey precedent.
>
> [(Da29).]

There is no such thing as a "liberal and generous reading" of a factual basis for actual malice when it comes to a motion to dismiss; in fact, just the opposite is true. See, e.g., Neuwirth, 476 N.J. Super. 377; Herman, 480 N.J. Super. 480; Darakjian, 366 N.J. Super. 238. Actual malice is a federal constitutional and a state common law standard that is unwavering and is not diminished in any way under Rule 4:6-2. No appellate case in New Jersey acknowledges or recognizes such a refitting of this overwhelmingly strict construct just because it involves a motion to dismiss.

The three cases require plaintiffs to plead a factual basis to support a subjective knowledge of falsity by the defendant at the time of publication. Plaintiff utterly failed to do so. CNBC made clear in the episode that Hindenburg was self-interested as a short seller. (Da256). Allegedly relying on the Hindenburg Report, which the episode only fleetingly references, does not indicate a subjective knowledge of falsity; journalists often must rely on self-interested sources, and this is not evidence of actual malice. New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966) (journalists may rely on statements made by a single source even though they reflect only one side of the story without fear of libel prosecution); Spacecon Specialty Contractors, LLC v. Bensinger, 713 F.3d 1028, 1045 (10th Cir. 2013) ("Actual malice cannot be proven simply because a source of information might also have provided the

information to further the source's self-interest. . . . Self-interest (and the related desire to place opposing views and persons in an unfavorable light) motivates many news sources; if dealing with such persons were to constitute evidence of actual malice on the part of a reporter, much newsgathering would be severely chilled.").

Even more importantly, the trial court correctly found that most of the statements challenged in the complaint were fairly reported from the federal indictment and other civil complaints. This renders implausible the allegation that CNBC knew its episode was false, or that it published with reckless disregard for the truth. Lynch, 161 N.J. at 165. Publishers are free to accept or reject information as they see fit as long as it does not present evidence of subjective knowledge of falsity. See e.g., Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 396, cert. denied, 516 U.S. 1066 (1996) (holding that newspaper omitted information it had gathered, some of which may have been favorable to plaintiff, was not evidence of actual malice).

Even if CNBC intentionally broadcast the episode during Milton's trial, as he alleges, motive is not evidence of actual malice. Neuwirth, 476 N.J. Super. at 392. Thus, the fact that CNBC broadcast the episode during the trial would do nothing to show that CNBC had subjective knowledge of falsity. To hold otherwise would punish the media – or anyone else – for publishing stories about

defendants during their criminal trials, i.e., when the story is the most newsworthy. See, e.g.. In re iDreamSky Tech. Ltd. Sec. Litig., 236 F. Supp. 3d 824, 834 (S.D.N.Y. 2017) (timing of publication is not alone sufficient to support an inference of scienter); Mason v. Bexley City Sch. Dist., No. CIVA 2:07-CV-654, 2010 WL 987047, at *29 (S.D. Ohio Mar. 15, 2010) (timing of a communication does not establish actual malice). Accordingly, the complaint must be dismissed for failure to sufficiently plead actual malice.

V. CNBC IS ENTITLED TO ATTORNEYS' FEES AND COSTS (Da2)

UPEPA provides that a prevailing party shall be awarded attorneys' fees if it prevails in the OTSC. N.J.S.A. 2A:53A-58. In this case, CNBC partially prevailed because the trial court dismissed Count III (prima facie tort). (Da2). Thus, CNBC should have been awarded appropriate fees for successfully dismissing that claim. See Rendine v. Pantzer, 141 N.J. 292, 336 (1995) (providing that lodestar reduction will address fee award where party only partially prevails). CNBC is also entitled to attorneys' fees for prevailing in this appeal. This Court should reverse and remand to the trial court so CNBC can file a fee application, and the trial court can determine the amount of fees owed.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's denial of CNBC's motion to dismiss and remand this matter so that the trial court can hear CNBC's fee application and order payment for fees and costs in prosecuting this appeal.

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s/Bruce Rosen
BRUCE S. ROSEN
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Dated: July 28, 2025

TREVOR MILTON, Plaintiff, v. CNBC, INC., NATHAN ANDERSON, and HINDENBURG RESEARCH, LLC, Defendants.	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-2791-24 Civil Action On Appeal from the Superior Court of New Jersey Bergen Vicinage, Law Division Docket No.: BER-L-532-25 Sat Below: Hon. Anthony Suarez, J.S.C.

DEFENDANT CNBC INC.'S APPELLATE REPLY BRIEF

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TABLE OF DEFENDANT'S SUPPLEMENTAL APPENDIX[1]

[1] **Rule 2:6-1(a)(2) Statement:**

CNBC argued both before the trial court and on appeal that plaintiff Milton's trade libel claims were a subterfuge intended to extend his personal defamation claims outside the one-year defamation statute of limitations bar, and that to the extent any trade libel claims might possibly exist here, Milton does not have standing to bring such claims on behalf of his former company Nikola. Milton suggested this argument was not raised below, characterizing it as "newly minted." (Pb21).

Pursuant to Rule 2:6-1(a)(2), the relevant portions of CNBC's briefs before the trial court outlining these arguments are included as part of CNBC's supplemental appendix in order to address "the question of whether an issue was raised in the trial court," which Milton has now made "germane to [this] appeal."

INTRODUCTORY STATEMENT

Trevor Milton's Opposition Brief fails to refute CNBC's initial submission. Instead it leans on distortions of the record, misstatements of law and fact, and rhetorical sleight of hand. For instance, Milton repeatedly cites a single juror at his criminal trial – who had already voted to convict him – to suggest the CNBC broadcast of an "American Greed" Episode called "*Chasing Tesla*" later worsened her opinion of him, a claim that is both irrelevant and misleading. He inaccurately asserts that CNBC never argued that Milton could not seek damages on behalf of Nikola Motors when this point was argued multiple times below, misinterprets the fair report privilege and continues to insist that CNBC should have simply adopted his press releases in its broadcast—even after Nikola later publicly distanced itself from them—while citing testimony from Milton's criminal trial for the first time and improperly including it in the record. Rather than weakening CNBC's arguments, the Opposition Brief reinforces them. Nevertheless, we address the issues in the Opposition as directly and concisely as possible.

ARGUMENT

I. MILTON'S TRADE LIBEL ARGUMENTS FAIL

Milton continues to argue that trade libel is not only distinct from the defamation tort but applicable to any statement that impugns a businessperson's

reputation. CNBC already addressed this issue extensively in pointing out that Milton's claim sounds in defamation, not trade libel, and even if it were trade libel, any product disparagement claims would belong to Nikola. (Db25).

A. MILTON LACKS STANDING TO BRING TRADE LIBEL CLAIMS

Notably, the cases cited by Milton for the proposition that trade libel can be asserted in tandem with defamation all feature corporate plaintiffs (e.g., Dairy Stores, Inc. v. Sentinel Publ'g Co., 104 N.J. 125 (1986); Churchill Downs Inc. v. NLR Ent., LLC, 2015 WL 5854134 (D.N.J. Oct. 5, 2015) or individuals operating under a professional corporation (e.g., Mayer v. Mayer, 2024 WL 1283826 (D.N.J. Mar. 26, 2024)). Milton acknowledges this, says this distinguishing characteristic makes sense for "professionals," and then promptly declares himself to be one. (Pb23 n.1).

Milton also confuses the "of and concerning" requirement in defamation cases with the issue of whether Milton can sue for alleged disparagement of Nikola's products. (Pb24-25). They are not the same; the "of and concerning" element of defamation has nothing to do with whether Milton can bring a trade libel claim (he cannot).

In particular, Milton cites Schiavone v. Time, Inc., 619 F. Supp. 684, 696 (D.N.J. 1985), an "of and concerning" case, claiming it shows the "tight linkage

between the firm's brand and its leader," suggesting that Milton and Nikola are indistinguishable, and therefore, presumably, Milton should be able to sue as if he were the corporation itself. But, in Schiavone, Judge Sarokin explained that courts ordinarily prohibit stockholders or officers from suing on behalf of a corporation, except in narrow circumstances such as Schiavone's—a small business or sole proprietorship. Id. at 697. Nikola was a public company, not a closely-held or a small business, and Milton was no longer its CEO.

Milton further claims CNBC made a "newly minted" argument not raised below that Milton lacks standing to assert trade libel because he was no longer an executive. This is both misstated and erroneous.[2] In reality, CNBC's arguments both in its briefs below and then at oral argument mirror the point of law set forth in Schiavone—that Milton has no standing to claim damages on behalf of Nikola. (See 1T16:20-22 ("The law is clear and uniform, shareholders cannot sue for injuries arising from diminution of value . . ."); 1T70:12-17 ("We're mixing up Nikola and

[2] Milton's second "newly minted argument" accusation is levied against CNBC's argument that New Jersey's one-year statute of limitations should apply to all trade libel claims because it was not specifically raised below. CNBC's argument, virtually unrebutted in the Opposition, could not be raised below as the trial court is bound by precedent. However, it is permitted as a matter of public importance requiring this court's attention, Brown v. Shaw, 174 N.J. Super. 32, 39 (App. Div. 1980), and is meant to preserve the issue should there be further appeal. As CNBC's Rule 2:6-11(d) letter explains, the issue is also brought to the fore by the Supreme Court's recent decision in Chipola v. Flannery, __N.J. __ (2025).

the plaintiff and a lot of what the plaintiff is representing is his, is [actually] not his. It[] belongs to Nikola")). (See also Dsa2 and 3 (noting that Nikola is a public company as well as the only one with standing to bring any extant trade libel claims, and that Nikola and Milton separated long ago and have been adverse for years)).

B. EVEN IF MILTON HAD STANDING, HIS TRADE LIBEL CLAIMS ARE DEFICIENT AND DO NOT MEET THE REQUISITE HEIGHTENED PLEADING STANDARDS

Even if the complaint sounded in trade libel and Milton were eligible to file a trade libel claim as a former corporate officer with large stock holdings, there is no dispute that trade libel requires pleading special damages. Milton claims CNBC misstates the standard, but CNBC cites the same standard as Milton from Patel v. Soriano, 369 N.J. Super. 192 (App. Div. 2004): "Plaintiff must establish pecuniary loss that has been realized or liquidated, such as lost sales, or the loss of prospective contracts with customers," including identifying "particular business interests who have refrained from dealing with him or explain[ing] the impossibility of doing so." Id. at 248-49 (internal citation omitted). "However, where requiring such identification is unreasonable, proof of lost profits resulting from breach of contract may suffice, especially where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded." Id. at 249.

Milton claims "ongoing economic losses—disrupted transactions, terminated banking relationships, loss of acquisition opportunities, and diminished value of his holdings." (Pb27). These are mere allegations of general diminution, and do not meet the heightened pleading standard for special damages. Moreover, Milton himself is the one with access to information showing any transactions that were disrupted, banking relationships that were terminated, acquisition opportunities that were lost, and holdings that were diminished (apart declines in Nikola's stock price, which he cannot sue for as a shareholder). Milton had full opportunity to plead those facts or explain why they were impossible to plead, but he did not.

Patel indicates that lost profits could also be established, at least when a breach of contract is involved, "where the loss is shown with reasonable certainty and where the possibility that other factors caused the loss is satisfactorily excluded." Patel, 369 N.J. at 249. But Milton does not allege breach of contract here, and even if he did, he would still need to present concrete proof of lost profits to a "reasonable certainty." Instead, Milton pled only a generic claim that his business prospects were harmed. Not only is this deficiently vague, it fails to show that "the possibility that other factors caused the loss [are] satisfactorily excluded." Ibid.

Milton makes no effort to "satisfactorily exclude" those other loss factors. Instead he argues that he will hire experts for trial to determine "precise

quantification." (Pb28). CNBC is not arguing that exact quantification of damages is necessary at the pleading stage. Rather, CNBC is pointing out that Milton does not even mention in his Complaint, let alone explain or account for, other glaring factors that clearly caused his business reputation to collapse: Milton was on trial and had been under SEC investigation for since about 2020 and at the time of the broadcast, he was convicted of securities fraud just days after the Episode aired, and he was then sentenced to four years in prison.

Milton thus confuses the causation and apportionment of damages that must be proven at trial with the pleading requirements for trade libel. He cites Patel, 369 N.J. at 249, for the proposition that, "at this stage, Milton need only show that he has pleaded economic losses accompanied by extrinsic facts tied to the libelous statements." (Pb30). But Patel was an appeal decided after trial, and does not stand for that premise. Rather, it says the special damages requirement was integral to the cause of action, that the showing of special damages must be specific, and that "traditionally" plaintiffs were required to plead specific losses and lost contracts.

To justify his pleading of only general diminution, Milton cites to unpublished federal cases, but each such case is distinguishable and unavailing here: In Churchill Downs, supra, the cause of action was pleaded as

"Defamation/Trade Libel/Slander," there was no statute of limitations issue, and the court never determined which damages were applicable, but affirmed that trade libel requires special damages and cited cases which had dismissed trade libel claims for inadequately pleading special damages. 2015 WL 5854134, at *7-8. Pactiv Corp. v. Perk-Up, Inc. also reinforced the special damages requirement, but, without indicating how specific the pleading had been about special damages, apparently allowed the case to proceed because the complaint involved specific "lost sales and goodwill associated with established and prospective customers." 2009 WL 2568105, at *11 (D.N.J. Aug. 18, 2009). Intervet, Inc. v. Mileutis, Ltd. involved a corporation rather than an individual, and though it is not clear what proofs were presented to the court to support an alleged loss of investor income as a pecuniary loss, the court noted that Patel requires a plaintiff to identify particular "business interests who have refrained from dealing with it." 2017 WL 1528719, at *5 (D.N.J. Apr. 27, 2017) (citing Patel, 369 N.J. Super. at 249).

Finally, Milton cites Fairfax Fin. Holdings, Ltd. v. S.A.C. Cap. Mgmt., LLC, 450 N.J. Super 1 (App. Div. 2017), a summary judgment case, where the court found that there was extensive proof of damages ("180 specifically-identified customers"), and the case was analyzed under New York rather than New Jersey law. The footnote cited by Milton concerning proof of damages was a reference to what the court said

would need to be proved at trial if New Jersey law were applied. It is clearly inapplicable dicta.

In short, Milton has failed to plead special damages.

II. THE FAIR REPORT PRIVILEGE APPLIES HERE

A. MILTON'S OBJECTION TO THE CHASING TESLA TRANSCRIPT FAILS TO CHALLENGE THE VERACITY OF ITS CONTENT

First, Milton's "authentication" claim about the transcript of the *Chasing Tesla* broadcast is a red herring. It is undisputed that counsel submitted the transcript to the trial court and Milton did not question its substance. His only objection was that the transcript itself was not properly "authenticated." (1T47:24-48:1). The video version provided to counsel, the trial court and this court, contains the complete broadcast, as well as what Milton has characterized as "a postscript about the outcome of the trial," presumably because it was subsequently rebroadcast or prepared for rebroadcast. Again, other than this "postscript," Milton has not cited one iota of a suggestion that the broadcast that was incorrectly transcribed. Moreover, the trial court acknowledged it viewed the video, (1T78:2-16), and had the transcript, notwithstanding the same objections of counsel, which the parties agree were rejected by the trial court. (Pb at 38 n. 6).

There is also no reason for Milton or the Court to assume there was any error or non-compliance with Rule 1:6-6. Counsel did review the transcript and compared it to the video, and certified accordingly that to his knowledge that it was correct. (Da88-90). There was never any request to the trial court to cross-examine counsel pursuant to Rule 1:6-6, nor was there any need to, because Milton's arguments are purely form over substance: he has made no objection to the content of the transcript nor to the video.[3] While he claims the transcript is a "disputed fact," he has not actually identified any specific facts in dispute. (Pb37). Thus, Milton's reference to Mazur v. Crane's Mill Nursing Home, 441 N.J. Super. 168 (App. Div. 2015), which dealt with false information supplied to counsel and subsequently to the court and adversary in a certification, is of no moment. Milton should be estopped accordingly.

The transcript is pertinent only to comparing what was said in the Episode to what was said in various court filings to determine whether the Episode was a fair report of those documents. The documents were attached to the Certification of Bruce S. Rosen below (Da88-90) along with the transcript (confirmed by the primary source, the video), which were all in the hands of and reviewed by the trial court. (Da37). CNBC provided the trial court and this court with a four-page comparison of the content of the broadcast and the content of numerous filings by the U.S.

[3] Aside from his note about the post-trial "postscript."

Department of Justice, the Securities and Exchange Commission, and several civil lawsuits against Milton, many of which were also specifically referenced in the broadcast. This also was acknowledged by the trial court, which determined it was permitted to compare them independently. (Da37)

B. CNBC IS ENTITLED TO THE FAIR REPORT PRIVILEGE'S PROTECTION HERE

Milton fails to challenge the accuracy of the chart and the broadcast's clear reliance on government allegations and court filings, and instead argues as he did below that *Chasing Tesla* should not be recognized as a fair report because it used dramatic storytelling elements rather than straight reporting. The court below properly recognized that this issue was resolved in Trump v. O'Brien, 403 N.J. Super 281, 296, 303 (App. Div. 2008) (even if a television show is shot in part for entertainment purposes it "constitutes news" in New Jersey), and Kinsella v. Welch, 362 N.J. Super. 143, 154 (App. Div. 2003) (courts should be reluctant to drive a hard line between news and entertainment in applying the newsperson's shield)[4].

[4] Milton attempts to attack the credibility of *Chasing Tesla* as entertainment rather than news, and then argues that even if it were "news," and protected under the newsperson's shield, it is not a report of an official proceeding (Pb40). CNBC has never argued that a news report is automatically protected by the fair report privilege, but made a thorough argument as to why all the statements made in the Episode that relied on the documents were a fair report of those documents and were protected by that privilege.

Milton cites out-of-state cases that are not on point and declined to apply the fair report privilege for different reasons. First, he cites Dameron v. Washingtonian Mag., Inc., 779 F. 2d 736, 739 (D.C. Cir. 1985) for the proposition that fair report cannot be applied "after-the-fact through a frantic search of official records." But the statements at issue in Dameron were based on a single government report that was found to have been first erroneously read by a researcher and then further misreported. Id. at 738. There is no allegation that the many court-filed documents in Milton's cases were incorrectly reported, only that Milton did not like how they were reported. Then he cites Street v. Nat'l Broad. Co., 645 F.2d 1227, 1233 (6th Cir. 1981), a defamation matter involving the then 40-year-old rape trial of the "Scottsboro Boys." There, the court cursorily denied the fair report privilege but dismissed on First Amendment grounds, pointing to specific instances of literary license taken with the trial transcript. Milton has made no specific objections to *Chasing Tesla*'s fair report of the indictments, the SEC charges, or other lawsuits; he says only that they are "materially inaccurate."

The "inaccuracies" that Milton does specify in his Opposition are twofold (both addressed in CNBC's initial brief), and neither defeats the application of the fair report privilege: (1) that CNBC stated Milton was awaiting trial when in fact he

was on trial,[5] and (2) that CNBC failed to include exculpatory evidence the jury had heard, particularly testimony from Harvard economist Dr. Allen Ferrell, which concluded the day before the broadcast and the latter of which claimed that Milton's statements the government charged were fraudulent had not impacted Nikola's stock price or valuation. (Pa30-126). Besides the fact that Milton never raised Dr. Ferrell's testimony in the trial court or in his Complaint, it is clear from the verdict that Dr. Ferrell's testimony—and indeed none of the exculpatory evidence offered by Milton—swayed the jury from convicting him on three of four counts.

CNBC provided fair reports of the government's allegations in the indictment, SEC filings, and civil complaints. It was under no obligation to provide a "balanced" picture of the entire legal landscape, but simply a substantially correct, full, and fair report of judicial filings and government reports, which it did. Salzano v. N. Jersey Media Grp., Inc., 201 N.J. 500, 526 (2010) (dismissing the five statements that were protected by the fair report privilege and allowing the plaintiff to proceed as to one statement that was not gleaned from any pleadings); (see also Da39).

Finally, Milton misunderstands the "substantial truth" doctrine as it applies to fair report. The Salzano Court, on a motion to dismiss based on fair report, explained

[5] The Complaint, unlike the Opposition Brief, does not allege that the Episode's timing purposely made it appear that that "Milton was remaining silent instead of actively attempting to demonstrate his innocence." (Pb42).

that an account merely needs to convey a "substantially correct account of the contents of official documents." Id. at 523. That is, the substantial truth doctrine queries whether the report contains the same "gist" or "sting" as the official proceedings. Id. at 525. And despite Milton's continual and misleading references to the single juror who purportedly changed her mind later after seeing the episode, regardless of what that juror may have said, he was unanimously convicted on the other three counts before any juror saw the episode.

III. ACTUAL MALICE WAS NOT ADEQUATELY PLEADED.

Absent from Milton's Opposition is any mention of Neuwirth v. State, 476 N.J. Super. 377 (App. Div. 2023), which requires a factual basis for actual malice to be set forth in the Complaint, and which was discussed extensively in CNBC's moving brief. Milton goes through the same litany of insufficient factual bases as he did below, each examined in CNBC's initial appellate brief. Milton's argument and complaint primarily claim that CNBC relied heavily on co-defendant Hindenburg Research's 2020 report about Nikola and Milton, which he alleges CNBC should have discounted because Hindenburg was a short seller profiting on the information. To the contrary, the fair use chart referenced above makes it clear that CNBC actually relied on numerous court filings from well after Hindenburg's 2020 report. Moreover, *Chasing Tesla* specifically identified Hindenburg as a short seller

profiting off its information. (Da256). There is no indication that CNBC had any subjective knowledge of falsity.

Milton also raises the timing of the broadcast as an indication of bad motive, despite black-letter law that motive is not evidence of actual malice. See, e.g., Neuwirth, 476 N.J. Super. at 392. It is clear to any reasonable viewer that the Episode was prepared well before the trial. In any event, the timing of publication is insufficient to support an inference of scienter. In re iDreamSky Tech. Ltd. Sec. Litig., 236 F. Supp. 3d 824, 834 (S.D.N.Y. 2017). Milton also again mentions the supposed failure of CNBC to mention Dr. Ferrell's testimony, which is never included in the Complaint, and claims that the Episode was one-sided and therefore suggests a purposeful avoidance of the truth. While Milton claims this is enough "at the pleading stage," Neuwirth says otherwise, On the basis of failure to plead actual malice alone, this matter can be dismissed with prejudice.

IV. CNBC SHOULD BE AWARDED LEGAL FEES

Milton's assertion that the request for legal fees was not raised below is incorrect. It was raised in the initial Order to Show Cause (Da85), at the hearing (see, e.g., 1T75:7-10), and in the Motion for a Stay before the trial court.

If CNBC prevails on this appeal it will be entitled to all of its legal fees and costs to date, but if not, having been partially successful in the trial court in having

the matter declared both eligible for UPEPA and having one of two counts dismissed, the trial court still is required to award fees and costs. The statute provides that on motion, which was part of the OTSC, "the court shall award costs, reasonable attorney's fees, and reasonable litigation expenses related to the order to show cause . . . if the moving party prevails on the order to show cause." N.J.S.A. 2A:53A-58. The statute also provides that dismissal can be "in whole or part," N.J.S.A. 2A:53A-55, and it shall be "broadly construed and applied . . . ." N.J.S.A. 2A:53A-59.

CNBC partially prevailed in the trial court because Count III (prima facie tort) was dismissed. (Da2). Thus, CNBC should have been awarded appropriate fees accordingly. See Rendine v. Pantzer, 141 N.J. 292, 336 (1995) (providing that lodestar reduction will address fee award where party only partially prevails). Thus, CNBC is entitled to attorneys' fees whatever happens in this appeal.

CONCLUSION

This court should reverse the trial court, dismiss with prejudice, and remand for the trial court to determine the appropriate amount of fees owed.

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Dated: August 25, 2025

TREVOR MILTON, *Plaintiff/Respondent,* -v.- CNBC, INC., NATHAN ANDERSON, HINDENBURG RESEARCH, LLC, *Defendants/Appellants*.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002791-24 CIVIL ACTION On Appeal from an Interlocutory Order of the Superior Court of New Jersey, Law Division, Bergen County Trial Court Docket No.: No. Ber-L-532-25 Sat Below: Hon. Anthony Suarez, J.S.C.

PLAINTIFF-RESPONDENT'S TREVOR MILTON'S BRIEF

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PRELIMINARY STATEMENT

On October 4, 2022—while jurors were weighing weeks of testimony in Trevor Milton's criminal case—CNBC, Inc. ("CNBC") aired an episode of "American Greed" titled *Chasing Tesla*. The episode did not recount any witness testimony or evidence presented at trial. Rather, it regurgitated long-debunked lies, portraying Milton as the devious, manipulative architect of a fraudulent enterprise, Nikola Corporation ("Nikola" or the "Company"). It also added gratuitous and baseless lies not found in any judicial record and falsely stated that the trial had not begun. The fallout was predictable: a juror changed her view after watching the episode post-trial, Milton's business and banking relationships unraveled, and his holdings sharply dropped in value.

Those are the Complaint's allegations, and at this stage they must be taken as true. On that posture, the trial court did what New Jersey law requires. It denied CNBC's motion to dismiss Milton's claim of trade libel. New Jersey law recognizes that trade libel protects economic interests—ongoing business relationships, investment value, and the ability to pursue ventures—not merely personal reputation. It requires special damages and, for that reason, New Jersey courts have long treated trade libel differently from defamation, including by applying a longer limitations period.

Milton's name and reputation have been synonymous with Nikola ever since he founded the Company in his basement. Indeed, markets, and the business community at large, understand "Nikola" and "Trevor Milton" as inextricably and perpetually intertwined. CNBC's episode embraced that identity-of-interest, placing Milton "front and center" at Nikola's headquarters and presenting attacks on Nikola's products, operations, and integrity as attacks on him. That is the very core of a trade libel claim.

Milton's pleading also sufficiently alleges special damages. Naming every counterparty who walked away is neither practical nor required before discovery. Among other categories of pecuniary loss tied to the broadcast, the Complaint pleads the immediate decline in the value of Milton's publicly traded holdings, canceled transactions, terminated banking and brokerage relationships, the loss of specific acquisition opportunities, and the deterioration of market goodwill necessary to finance ventures. Those are tangible economic injuries, not abstract reputational slights. Moreover, the timing of the episode, its misstatements about the status of the trial, and the juror's real-time reaction together support the common-sense inference that the broadcast materially contributed the harm. Whether other causative factors also played a role is a merits question for discovery and, if necessary, a jury.

Milton has also sufficiently pleaded actual malice. CNBC relied on a short seller who held a direct financial stake in a price drop and relied on a paid source; CNBC completely ignored Nikola's contemporaneous (and scathing) refutations; and CNBC chose to ignore the evidence that had been adduced at trial (while lying to its viewers that the trial had not yet begun). Those facts comfortably support the inference that CNBC acted with reckless disregard for the truth of the challenged statements, at the very least.

CNBC's reliance on the fair report privilege is unavailing. *Chasing Tesla* was not a "report," but even if it were, the privilege does not apply because—as the trial court correctly found—it is conditional and turns on the report's fairness and accuracy. *Chasing Tesla* unfairly layered in new, unfounded accusations and inaccurately reported material facts. And, in any event, CNBC failed to properly authenticate the episode and transcript it submitted, leaving even the content of the aired broadcast in dispute. At a minimum, those defects foreclose dismissal at the pleading stage.

In short, the trial court applied the correct standard, recognized the distinct contours of trade libel, and concluded—rightly—that the Complaint plausibly alleges special damages, actual malice, and the forfeiture of the fair-report privilege. This case should proceed to discovery so that facts—not a made-for-TV script—can decide the outcome.

PROCEDURAL HISTORY

On January 23, 2025, Plaintiff Trevor Milton commenced this action against CNBC, Nathan Anderson, and Hindenburg Research, LLC ("Hindenburg"), asserting claims for trade libel and prima facie tort arising from CNBC's broadcast of its "American Greed" episode titled *Chasing Tesla*. (Da47.) CNBC was served with process on or about January 23, 2025, and Milton agreed to extend CNBC's deadline to respond to the Complaint until March 28, 2025. (*See* Pa318.)

On March 21, 2025, CNBC applied for an Order to Show Cause ("OSC") under the Uniform Public Expression Act ("UPEPA"), as adopted by New Jersey, seeking summary dismissal of the Complaint. (*See* Da44–47.) On March 24, 2025, the court issued the OSC, set a hearing for April 25, 2025, directed Milton to file his opposition by April 17, 2025, and granted CNBC leave to reply by April 21, 2025. (*Id.*) By agreement, the hearing was moved to April 23, 2025. (Pa319.)

In its OSC papers, CNBC argued that *Chasing Tesla* was protected under UPEPA as speech on a matter of public concern and sought dismissal on four grounds: (1) Milton's trade libel claim was defamation in disguise and time-barred; (2) the Complaint failed to plead trade libel elements—including special damages, actual malice, and causation; (3) Milton's claims were barred

by the fair report privilege; and (4) prima facie tort is not cognizable in New Jersey. (*See* Da44–47.)

On April 1, 2025, Milton moved for limited, targeted discovery under UPEPA to establish actual malice and causation at the summary judgement stage. (*See* Da378–81.) CNBC opposed Milton's motion the next day, invoking the New Jersey Shield Law as an absolute bar to discovery. (*See* Pa14–17.) On April 7, 2025, Milton submitted a reply acknowledging the Shield Law and explaining that CNBC still must assert any newsperson's privilege in response to specific requests, not as a blanket bar. (Pa19–25.) On April 9, 2025, the court denied Milton's discovery application, holding that the OSC would be evaluated under the traditional motion-to-dismiss standard. (Da378–80.)

On April 17, 2025, Milton filed his opposition, demonstrating that the trade libel claim alleges harm to economic relationships and business interests (not merely personal reputation) and detailing special damages categories, including the immediate decline in the value of his Nikola holdings, disrupted transactions, terminated banking relationships, and lost professional opportunities. (*See* Pa319–320.) He also demonstrated that actual malice had been sufficiently pleaded, citing CNBC's reliance on financially conflicted

sources and its decision to air the episode mid-trial while ignoring readily available exculpatory information. (*See id.*)

As to the fair report privilege, Milton demonstrated that CNBC had not submitted competent evidence of the broadcast content and that its own transcript reflected a program that was neither a "report" of official proceedings (in any respect) nor "full, fair and accurate." (*See id.*) He further argued that prima facie tort was adequately alleged as intentional, malicious conduct designed to cause harm. (*See id.*)

On May 5, 2025, the court granted in part and denied in part CNBC's UPEPA Order to Show Cause. (Da1.) The court first held UPEPA applies to the "Chasing Tesla" broadcast and, by the parties' stipulation, evaluated step two under the Rule 4:6-2(e) motion-to-dismiss standard. (Da8.) Applying that standard, the court denied dismissal of the trade libel claim, concluding Milton adequately pleaded: (i) a trade libel claim and not a time-barred defamation claim (Da17–18); (ii) special damages identifying concrete business disruptions beyond stock-price movement (Da22); and (iii) actual malice based allegations of reliance on biased sources, omission of available exculpatory material, and the timing of the trial. (Da28–29.) It further determined the fair-report privilege could not defeat the claim at the pleadings stage because the broadcast "prominently featured a host of potentially libelous assertions that

CNBC does not even contend were sourced from official proceedings." (Da39.) The court granted dismissal of the separate prima facie tort count as an impermissible substitute for traditional tort theories. (Da46.)

On May 7, 2025, CNBC moved to stay all proceedings pending appeal. (Da396.) It noticed an interlocutory appeal on May 8, 2025, amending the caption the next day. (*See* Da411.) On May 23, 2025, after additional briefing, the court denied a stay. (Da399–404.) The court found no presumptive stay under UPEPA, emphasized that any Shield Law privilege disputes would be addressed through established procedures, noted that any costs could be recovered if it ultimately prevailed, and found CNBC unlikely to succeed on appeal. (*Id.*) Weighing the equities, the court concluded that the balance of hardships and the public interest favored allowing the case to proceed. (*Id.*)

After the trial court denied a stay, CNBC sought relief in the Appellate Division; Milton opposed, filing his brief on June 12, 2025. (*See* Da26.) On June 26, 2025, Part I granted CNBC's motion for a stay and accelerated the appeal. (*See id.*) That same day, the Clerk issued a peremptory scheduling order setting July 28, 2025 for Appellants' brief and appendix, August 18, 2025 for Respondent's briefs and appendices, and August 25, 2025 for reply.

COUNTERSTATEMENT OF FACTS

This case arises from CNBC's deliberate campaign to impair Trevor Milton's professional reputation and entrepreneurial record. For over fifteen years, Milton built a longstanding and stellar track record as a successful and innovative entrepreneur, marked by significant achievements. In October 2022, CNBC aired a sensationalized and misleading episode of its program "American Greed," titled *Chasing Tesla*. The episode recycled thoroughly debunked claims originating from a notoriously biased short seller, omitted key exculpatory facts that were publicly and readily available, and fabricated false allegations of misconduct never alleged by prosecutors. As detailed below, CNBC's actions caused immediate, lasting, and substantial harm to Milton's professional credibility, business prospects, and economic standing.

A. Trevor Milton: A Proven Entrepreneur and Public Face of Innovation

1. Early Successes

Milton's entrepreneurial journey began in earnest in 2004. (Da51, Compl. ¶ 18.) At age 22, despite having endured the significant losses of both his mother and stepmother to cancer, Milton founded St. George Security & Alarms ("St. George Security"). (Da50-51, Compl. ¶¶ 16, 18.) He quickly scaled this startup, eventually selling it for approximately $800,000. (Da51, Compl. ¶ 18.) In 2009, he launched Upillar, an e-commerce marketplace that

blended features of Craigslist and Amazon. (Da51, Compl. ¶ 19.) The Upillar platform eventually reached millions of monthly visitors and drew national attention. (*Id.*)

Milton then turned to sustainable transportation. (Da51, Compl. ¶ 20.) He first founded dHybrid, a company that retrofitted diesel engines to run on natural gas, which secured contracts potentially exceeding $100 million and attracted interest from major trucking companies. (*Id.*) In 2012, he launched dHybrid Systems to develop advanced natural gas and hydrogen storage technology for trucking. (Da52, Compl. ¶ 21.) In 2014, Worthington Industries acquired dHybrid Systems for over $10 million, cementing Milton's standing in the clean-energy sector. (*Id.*)

2. The Rise of Nikola

In 2015, Milton founded Bluegentech—later renamed Nikola Corporation—with the mission of revolutionizing freight transport through low- and zero-emission heavy trucks. (Da52, Compl. ¶ 22.) His vision for the company drew on early experiences accompanying his father, a Union Pacific Railroad manager, where he saw firsthand the inefficiencies and environmental toll of traditional transport systems. (Da53, Compl. ¶ 23.) From its inception, Nikola's public image, brand value, and market credibility were closely tied to Milton himself; in media coverage, investor presentations, and industry events,

Nikola and Milton were often portrayed and referenced interchangeably. (Da48, Compl. ¶ 7; Da55, Compl. ¶ 33.) Milton was the face of the Company. (*Id.*)

Determined to build Nikola to address the industry inefficiencies he witnessed as a child, Milton recruited experienced executives and assembled a team with expertise in hydrogen fuel cells, electrification, and automotive manufacturing. (Da52–53, Compl. ¶ 24.) A core element of Milton's strategy for Nikola was an integrated offering for truckers that bundled the vehicle, alternative fuel, and maintenance services into a single package—streamlining adoption and challenging conventional industry models. (Da53, Compl. ¶ 26.)

Under Milton's leadership, Nikola grew from a basement start-up into a full-scale design and manufacturing operation with over 250 employees. (Da53, Compl. ¶ 25.) The company secured more than $300 million in private investment, built a factory and headquarters in Coolidge, Arizona, and forged industry partnerships with global leaders, such as Bosch and Nel ASA. (Da53, Compl. ¶ 25.) By late 2019, Nikola completed public road trials with two hydrogen-powered prototype semi-trucks, delivering a shipment of beer in partnership with Anheuser-Busch. (Da53, Compl. ¶ 27.) Development of a commercial-grade hydrogen-electric semi-truck continued into 2020, attracting

additional investor and partner interest in Milton's vision for sustainable freight transport. (Da53, Compl. ¶ 28.)

B. Hindenburg's Profit-Driven "Short-and-Distort" Campaign

In August 2020, Defendants Nathan Anderson and Hindenburg targeted Nikola and Trevor Milton after establishing what Hindenburg described as its largest short position ever. (Da55–56, Compl. ¶¶ 36–37.) Because Milton was Nikola's founder and public face, statements about Nikola and its products directly implicated Milton's professional reputation and business relationships. (Da48, Compl. ¶ 7; Da55, Compl. ¶ 33.)

On September 10, 2020, Hindenburg went public with its campaign, releasing its report: "Nikola: How to Parlay an Ocean of Lies into a Partnership with the Largest Auto OEM in America" (the "Hindenburg Report"). (Da48–49, Compl. ¶¶ 5–6; Da57, Compl. ¶¶ 41–42.) As discussed more fully below, the Hindenburg Report was jam-packed with false and misleading statements deliberately crafted to incite investor panic and cause Nikola's stock price to plummet. (Da57–66, Compl. ¶¶ 41–57.)

Among other things:

- The Hindenburg Report falsely accused Nikola of deliberately deceiving investors by staging a promotional video of the Nikola One prototype truck rolling downhill, implying it lacked functional propulsion technology. (Da59, Compl. ¶¶ 46–49; Da64, Compl. ¶¶ 65–66.)

- The Hindenburg Report falsely asserted that Nikola intentionally obscured supplier labels on prototype components to falsely claim independent development of critical technologies. (Da57, Compl. ¶ 43; Da63, Compl. ¶ 64.)

- The Hindenburg Report falsely represented Nikola as lacking meaningful hydrogen-production infrastructure, despite Nikola's publicly documented investments in hydrogen fueling stations, electrolyzer equipment purchases, and strategic hydrogen technology partnerships. (Da60, Compl. ¶¶ 52–53; Da64–65, Compl ¶ 67; Da66, Compl. ¶ 75.)

- The Hindenburg Report distorted statements from Nikola's industry partners, such as Bosch, selectively quoting remarks to falsely suggest significant production delays and technical shortcomings. (Da60, Compl. ¶¶ 50–51; Da63, Compl. ¶ 63.)

- The Hindenburg Report falsely described the Nikola One as a non-functional "pusher," directly contradicting clear evidence of its capabilities and purpose. (Da59–60, Compl. ¶¶ 48–49.)

Notably, Hindenburg relied heavily on biased, financially compromised sources, including a disgruntled former subcontractor who held personal animosity toward Milton and Nikola. (Da57, Compl. ¶ 41.) Critically undermining its credibility, Hindenburg concealed from the public that this key source had received approximately $600,000. (*Id*.) Further revealing its intent to defame Milton, the Hindenburg Report also gratuitously attacked his prior successful ventures, including dHybrid, falsely undervaluing its contracts by omitting crucial details, and falsely suggesting Milton exaggerated contract

values—a claim plainly contradicted by publicly-available documents. (Da61, Compl. ¶¶ 54–55.)

C. Nikola Swiftly Rebuts Hindenburg's False Claims

Nikola quickly and authoritatively responded to the false allegations in the Hindenburg Report. (Da62–66, Compl. ¶¶ 58–71.) On September 14, 2020, only four days after the report was published, Nikola issued a detailed press release titled "Nikola Sets the Record Straight on False and Misleading Short Seller Report," comprehensively rebutting Hindenburg's false claims and challenging its underlying motivations. (Da62, Compl. ¶ 60.)

Nikola's response emphasized the suspicious timing of the Hindenburg Report, noting its release immediately after Nikola announced a major strategic partnership with General Motors. (Da63, Compl. ¶¶ 61–62.) Nikola characterized the Hindenburg Report as deliberately "false and defamatory," and designed to erode investor confidence and derail Nikola's business momentum at a critical juncture in its growth. (*Id.*)

Nikola's press release explicitly rejected several key misrepresentations in the Hindenburg Report. (Da63, Compl. ¶ 62.) Nikola made clear, for example, that Hindenburg had distorted statements by Nikola's partner Bosch, taking Bosch's remarks wildly out of context. (Da63, Compl. ¶ 63.) Nikola explained that Bosch's statements referred solely to internal schedules

unrelated to Nikola's publicly announced vehicle-production timeline, which was proceeding as planned. (Da63, Compl. ¶ 63.)

Nikola also corrected Hindenburg's false and misleading claim regarding obscured supplier labels on prototype components. (Da63–64, Compl. ¶ 64.). Nikola explained that concealing supplier labels is a standard practice within the automotive industry to prevent premature disclosure of supplier relationships, particularly given that suppliers often change before the production phase. (*Id.*) Nikola defended its proprietary technology, notably its inverter systems, powerfully countering Hindenburg's accusations that Nikola had falsely claimed third-party technology as its own. (*Id.*)

Addressing the controversy surrounding the "Nikola One in Motion" promotional video, Nikola clarified that the video was independently produced by a third-party firm solely to show the prototype vehicle in motion. (Da64, Compl. ¶¶ 65–66.) Indeed, Milton not been involved in filming or production. (*Id.*) Nikola further confirmed that private investors were fully informed about the vehicle's actual development status, contradicting Hindenburg's allegations of intentional deception. (*Id.*)

Nikola also vigorously defended its substantial investment and steady progress in hydrogen infrastructure, rejecting Hindenburg's assertion that Nikola's hydrogen capabilities were nonexistent or overstated. (Da64–65,

Compl. ¶ 67.) Nikola gave specific examples of its investments and progress, including its installation of a demonstration hydrogen fueling station, its purchases of more than $30 million worth of electrolyzer equipment, and its active participation in global hydrogen standards organizations. (*Id.*)

While Nikola's rebuttal did not individually address every misstatement in the lengthy Hindenburg Report, it noted that the report contained "dozens more inaccurate allegations" intentionally crafted to distort Nikola's and Milton's achievements and damage its market reputation. (Da65, Compl. ¶ 68.) Nevertheless, despite Nikola's prompt, thorough, and scathing fact-based response, significant reputational and economic harm had already resulted from Hindenburg's malicious short-selling campaign. (Da65–66, Compl. ¶¶ 68–71.)

D. CNBC's American Greed Episode Amplifies and Expands Hindenburg's Falsehoods

CNBC aired *American Greed: Chasing Tesla* on October 4, 2022, during Milton's federal criminal trial. (Da88, Compl. ¶ 90.) Throughout the episode, Nikola's brand and conduct are equated with Milton himself. (*See* Da69–76, Compl. ¶¶ 88-113.) It opens by targeting Milton personally—"[t]he founder of Nikola Motors, Trevor Milton, is front and center"—claiming he "targets young, naïve investors." (Da69, Compl. ¶ 90.) It pairs that narration with visuals of Milton outside Nikola's headquarters, (*see* Da70, Compl. ¶ 91), and

then spotlights the Hindenburg brand and report logo, adding that it is "taking aim" at Milton's "high-flying hydrogen-powered greed." (Da70, Compl. ¶ 92.)

Chasing Tesla then targets Milton's pre-Nikola ventures, subjects that were not addressed by prosecutors or Hindenburg. (*See* Da72–73, Compl. ¶¶ 95-99.) With respect to St. George Security, *Chasing Tesla* falsely alleges that Milton criminally diverted its accounts receivables from the company to himself, even though the buyers of the company never asserted such a claim. (Da72, Compl. ¶¶ 96–97.) Nor has anyone else. (*See id.*) *Chasing Tesla* portrays dHybrid as a chaotic sham company that Milton pawned off at an inflated value. (Da72, Compl. ¶ 98.) It was not. (Da73, Compl. ¶ 99.) As alleged in the Complaint, dHybrid pioneered natural-gas retrofits, and its technology and value were validated by partner testing and acquisition. (*See id.*)

Eventually the episode turns to Nikola, depicting the multi-billion-dollar public company as yet another example of an outright Milton scam. (Da73–76, Compl. ¶¶ 100–13.) It employs cinematic techniques—dramatic music, selective interviews, staged reenactments—to frame Milton as a symbol of corporate greed. (Da69, Compl. ¶ 89.) *Chasing Tesla* completely ignored Nikola's public rebuttal, and Milton's ongoing trial, choosing instead to recycle false and misleading accusations from the Hindenburg Report. (*See*

Da73–76, Compl. ¶¶ 100–113.) It characterized the "Nikola One in Motion" footage as staged "corporate flimflam" by Milton. (Da73–74, Compl. ¶ 102.) This is false. (Da74, Compl. ¶ 103.) The video was made for a Phillips commercial during which Milton was not present, and the "in motion" phrase originated with Nikola's general counsel. (*See id*.) CNBC also repeated the lie that the Nikola Badger "was never built" and existed only as a conceptual sketch. (Da74, Compl. ¶ 104.) In reality, fully operational Nikola Badger prototypes existed and had been inspected by counsel (and an expert witness) during Milton's criminal trial. (Da74, Compl. ¶¶ 104–05.) Indeed, the Nikola Badger program—prototypes and all—was purchased by a third-party investor in 2024. (Da74, Compl. ¶ 104.)

CNBC then went further than either prosecutors or Hindenburg. It asserted that Milton believed that Nikola was a sinking ship and had urged his friends in the summer of 2020 (including Jimmy Rex) to sell all of their Nikola shares and that Milton would do the same. (Da74, Compl. ¶ 106.) That allegation is obviously false (*see* Da75, Compl. ¶ 107): Milton maintained an enormous equity stake and a sincere belief in Nikola's long-term prospects throughout his tenure at the Company. CNBC also claimed Milton personally netted roughly $300 million in stock sales in the three months after his indictment. (Da75, Compl. ¶ 108.) Public filings show sales amounting to

only half that number (approximately $150 million), occurring largely in the immediate wake of filing of the DOJ indictment and the SEC's complaint. (Da75, Compl. ¶ 109.)

Finally, while purporting to "report" on Milton's criminal proceedings, *Chasing Tesla* told viewers he was "awaiting trial" and had "declined to speak" with the program—even though his trial was already well underway and approaching jury deliberations. (Da69, Compl. ¶ 88; Da263.) Days earlier, Milton had offered the expert testimony of renowned Harvard economist, Dr. Allen Ferrell. (Pa30–248.) Dr. Ferrell had constructed a detailed event study model, and testified that, in his expert opinion, Milton's public statements were not material and did not inflate Nikola's stock price. (Pa30–126.) Dr. Ferrell was the last witness to testify, and concluded his testimony on October 3, 2024, the day before broadcast. (*See* Pa248.)

E. The Damage: Immediate, Lasting and Continuing

The immediate and severe reputational and economic harm caused by CNBC's libelous broadcast was undeniable. (Da76–78, Compl. ¶ 114–22.) Within hours of the broadcast, social media was flooded with posts maligning Milton and echoing the episode's themes. (Da76–77, Compl. ¶ 115.) Even a juror in Milton's criminal trial, who was initially convinced by weeks of trial evidence that Milton had acted in good faith, abruptly changed her perspective

after viewing the episode. (Da78; Compl. ¶¶ 120–21.) CNBC's dramatized false narrative, lasting less than forty-five minutes, had wiped away weeks of trial testimony and exhibits. (*See* Da78, Compl. ¶ 121.)

Within days, Nikola's stock—in which Milton remained a major shareholder—fell by nearly 40%, erasing hundreds of millions of dollars in value from his personal holdings. (*See* Da77–78, Compl. ¶¶ 117–18.) Milton was blocked from purchasing the Badger program and the Powersports Division from Nikola. (Da77, Compl. ¶ 116.) Banks and brokerage firms terminated accounts or refused business altogether, forcing Milton to self-custody stock certificates and other financial assets. (*Id.*) Even after he received a presidential pardon in March 2025, eliminating the criminal consequences of his conviction, the harm flowing from CNBC's broadcast has persisted. (*See* Db11.)

STANDARDS OF REVIEW

This Court reviews *de novo* the denial of a Rule 4:6-2(e) motion to dismiss, applying the same standard as the trial court: it accepts as true the complaint's well-pleaded facts and accords the plaintiff every reasonable inference from those allegations. *See Darakjian v. Hanna*, 366 N.J. Super. 238, 248 (App. Div. 2004). Even in defamation and libel cases, pleadings are "searched in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned

even from an obscure statement of claim." *Herman v. Muhammad*, 480 N.J. Super. 480, 491 (App. Div. 2024) (quoting *Green v. Morgan Props.*, 215 N.J. 431, 451 (2013)); *see also Darakjia*n, 366 N.J. Super. at 250 (requiring a liberal search for facts defeating fair report privilege); *see also Herman*, 480 N.J. Super. at 491 (requiring a liberal search for facts supporting actual malice).

UPEPA supplies the threshold framework for CNBC's motion. The statute—codified at N.J.S.A. 2A:53A-49, *et seq*.—creates expedited procedures to test claims arising from specified speech on matters of public concern. Filing an order to show cause presumptively stays proceedings, though the court may allow narrowly tailored discovery on a showing of good cause. N.J.S.A. 2A:53A-52(d). With respect to motions to dismiss, the analysis proceeds in three steps: the movant must show UPEPA applies; the respondent may show it does not; and, if UPEPA applies, dismissal follows if the movant shows a failure to state a claim. N.J.S.A. 2A:53A-55(a). UPEPA also includes fee-shifting provisions and directs courts to construe the statute in harmony with other jurisdictions adopting the Uniform Act. N.J.S.A. 2A:53A-58.

LEGAL ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT MILTON STATES A VIABLE CLAIM FOR TRADE LIBEL. (Da17-18.)

CNBC opens its brief by recycling its meritless "defamation in disguise" argument—asserting that because the challenged statements attack Milton's

honesty, his claim is merely defamation subject to a one-year statute of limitations. (Db18-20.) CNBC then attempts to add two theories never raised below: (1) that Milton lacks standing to assert trade libel because he was no longer in an executive role at Nikola when the episode aired (Db22-26); and (2) that New Jersey's one-year defamation statute of limitations should apply to all trade libel claims. (Db28-32.)

Each of these arguments fails. As the court correctly held, New Jersey recognizes trade libel and defamation as distinct, though related, torts. A single publication can simultaneously damage personal reputation and business interests. Milton's claim explicitly targets economic harm to his ongoing business relationships and market standing—precisely the injury trade libel protects.

CNBC's newly minted standing argument is both waived and meritless. The Complaint alleges that Milton's personal brand and Nikola's market reputation were tightly intertwined from the Company's founding—an identity of interest long recognized under New Jersey law, which allows founders and public-facing executives to assert trade libel claims based on harms to associated business ventures. Likewise, CNBC's statute-of-limitations argument—also waived—is foreclosed by precedent.

A. *Chasing Tesla* damaged Milton's business interests and economic relationships—not just his character. (Da17-18.)

CNBC's argument that Milton's claim is defamation in disguise, and time-barred by the one-year statute of limitations, rests on a false dichotomy long ago rejected by New Jersey courts. Under New Jersey law, a single publication can simultaneously impugn personal reputation and inflict pecuniary harm on business interests; in those circumstances, defamation and trade libel claims may proceed together. *See Dairy Stores, Inc. v. Sentinel Publ'g Co.*, 104 N.J. 125, 133 (1986); *Patel v. Soriano*, 369 N.J. Super. 192, 248 (App. Div. 2004). Consistent with that principle, New Jersey courts routinely allow both claims where the false statements accuse a person of dishonesty while also striking at business or professional standing. *See, e.g., Mayer v. Mayer*, 2024 WL 1283826, at *5–6 (D.N.J. Mar. 26, 2024) (statements accusing attorney of theft were "potentially defamatory" and also likely to reflect on his business; trade libel and defamation both allowed); *Churchill Downs, Inc. v. NLR Ent., LLC*, 2015 WL 5854134, at *8 (D.N.J. Oct. 5, 2015) (statements calling plaintiff a "fraud," "thief," and "untrustworthy" supported simultaneous claims).

CNBC's trade libel is no different. *Chasing Tesla* asserts, among other things, that Nikola's prototypes—including the Nikola One and the Nikola Badger—were mere facades or total fabrications orchestrated by Milton to deceive investors. (Da73–74, Compl. ¶¶ 102–05.) As *Dairy Stores* recognized, attacks on

a product's supposed quality naturally imply deceit by the seller, and vice-versa—particularly where, as alleged here, the market and CNBC itself portrayed Milton and Nikola as synonymous. (Da49, Compl. ¶ 7; Da55, Compl. ¶ 33; Da69–70, Compl. ¶¶ 90–92). The episode also leveled false personal accusations that predictably damaged Milton's business relationships: that Milton diverted St. George Security account receivables to himself (Da72, Compl. ¶¶ 96–97); that Milton urged his friends to dump all of their Nikola stock (Da74–75, Compl. ¶¶ 106–07); and that Milton sold more than $150 million worth of Nikola stock than he did (Da75, Compl. ¶¶ 108–09). Those are classic examples of words that "effectuate both harms," *Patel*, 369 N.J. Super. at 248—personal and economic—and they fit squarely within the confines of a trade libel cause of action.[1]

[1] Elsewhere in its brief, CNBC's makes the halfhearted and equally specious argument that Milton's claim fails because "at the time of the broadcast, [he] was not a seller and had no product." (Db23.) New Jersey courts, however, routinely allow professionals—not just sellers of widgets—to pursue trade libel claims where falsehoods materially induce others not to deal with them. *See, e.g.*, *Patel*, 369 N.J. Super. at 248 (board-certified surgeon); *Enriquez v. W. Jersey Health Sys*, 342 N.J. Super. 501, 525 (App. Div. 2001) (physician); *Mayer*, 2024 WL 1283826, at *5–6 (attorney). That rule makes sense: for professionals, goodwill, referral streams, and market credibility are core business assets; when false statements disrupt those pecuniary relationships, trade libel liability lies even if the plaintiff was not "selling a product" at the moment of publication.

B. Even if not waived, CNBC's standing claim fails because Nikola's identity was inseparable from Milton's. (Issue not raised below.)

CNBC's newfound stockholder-cannot-sue-for-corporate harm argument has been forfeited. It is black-letter law that arguments not squarely presented to the trial court cannot be raised for the first time on appeal. *See Fuhrman v. Mailander*, 466 N.J. Super. 572, 596 (App. Div. 2021) ("Appellate courts will decline to consider questions or issues not properly presented to the trial court 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'") (quoting *Nieder v. Royal Indemnity Ins. Co*., 62 N.J. 229, 234 (1973)) (cleaned up). This is not an issue that concerns the jurisdiction of the trial court. Nor is it an issue of great public interest (or any public interest). It is simply another argument that CNBC wants to raise, after having lost below.

Even if considered, the theory fails on the merits. A plaintiff may recover where "there is such reference to [him] that those who read or hear the libel reasonably understand the plaintiff to be the person intended." *Taj Mahal Travel, Inc. v. Delta Airlines, Inc*., 164 F.3d 186, 189 (3d Cir. 1998) (quoting *Dijkstra v. Westerink*, 168 N.J. Super. 128, 132 (App. Div. 1979)). In *Schiavone v. Time, Inc*., the court allowed the namesake chief executive of "Schiavone Construction" to proceed even though the article did not mention him by name because readers could reasonably understand the statements as referring to him given the tight

linkage between the firm's brand and its leader. 619 F. Supp. 684, 696 (D.N.J. 1985). By contrast, in *Jovanovic v. Northrop Grumman Corp*., dismissal was proper where the was "no representation whatsoever" that the corporate entity was "synonymous" with the individual plaintiff. 2010 WL 1644690, at *4 (D.N.J. Apr. 22, 2010).

That logic applies equally here. Nikola's market credibility, media presence, and investor messaging were closely tied to Milton—indeed, the public often treated "Nikola" and "Trevor Milton" interchangeably. (Da48, Compl. ¶ 7; Da55, Compl. ¶ 33.) This closeness is reflected throughout the episode. The episode puts Milton "front and center" (with footage of Milton outside Nikola's headquarters), and frames its attacks on Nikola's products and operations as attacks on Milton. (Da69–70, Compl. ¶¶ 90–92.) That nexus did not evaporate upon Milton's resignation; CNBC chose to portray the Company and its founder as one and the same.[2] Because the claim seeks recovery for Milton's own pecuniary losses (e.g., lost transactions, banking relationships, and diminished value of his holdings), not derivative corporate damages, he has standing to sue.

[2] Nor does Milton's status as founder of Nikola evaporate upon resignation. Once a founder, always a founder.

C. Even absent waiver, the six-year limitations period applies: longstanding precedent appropriately treat trade libel differently because it requires special damages. (Issue not raised below.)

CNBC's limitations argument fares even worse than its waived standing argument. To adopt CNBC's newly raised position, this Court would need to cast aside New Jersey precedent recognizing trade libel as a distinct tort that redresses pecuniary injury to business interests—not mere personal reputation. Consistent with that distinction, this Court routinely applies the general six-year limitations period governing economic torts, not the one-year limitations period governing defamation. *See, e.g.*, *Patel*, 369 N.J. Super. at 243; *Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt., L.L.C.*, 450 N.J. Super. 1, 62–63 (App. Div. 2017) (same).

While CNBC declares in its brief that there is "simply no reason why a company should have six years to sue if its product is defamed but a person has only one year to sue if their reputation is defamed," (Db30), the decision in *Henry V. Vaccaro Constr. Co. v. A.J. DePace, Inc.*, articulates, loudly and clearly, why a longer period applies. 137 N.J. Super. 512 (Law Div. 1975). Unlike the tort of defamation—which *presumes* reputational damages—trade libel requires *proof* of special damages and pecuniary loss, typically the "failure of others to deal or contract," which "affect[s] [a] business and right to earn a living." *Id.* at 517–18. Because those losses often accrue and become measurable over time, according to the *Vaccaro* court, the six-year limitations period is more appropriate. *Id.* Courts

in New Jersey cite *Vaccaro* and its rationale approvingly. *See, e.g., Patel,* 369 N.J. Super. at 247; *Crawford v. W. Jersey Health Sys. (Voorhees Div.)*, 847 F. Supp. 1232, 1239 (D.N.J. 1994) (citing *Vacarro* and noting "Although no court has identified the statute of limitation applicable to trade libel, a six year statute of limitations appears appropriate.").[3]

That reasoning applies equally here. Milton alleges concrete, ongoing economic losses—disrupted transactions, terminated banking relationships, the loss of acquisition opportunities, and the diminished value of his holdings—which are the very injuries trade libel is designed to remedy. (Da76–78, Compl. ¶ 114–22.) In short, even apart from waiver, there is no principled basis to collapse trade libel into defamation for limitations purposes. The torts serve different ends, require

[3] New Jersey's approach aligns with the modern trend in other jurisdictions, which routinely apply longer statutes of limitations to trade libel or injurious falsehood than to defamation. *See, e.g.*, *LLT Mgmt. LLC v. Emor*y, 766 F. Supp. 3d 576, 591 (E.D. Va. 2025) (rejecting one-year defamation period under Virginia law and applying five-year period for injuries to property); *Barrash v. Am. Ass'n of Neurological Surgeons, Inc.*, 2013 WL 4401429, at *3 (S.D. Tex. Aug. 13, 2013) (noting Texas "distinguish[es] between defamation and commercial disparagement by the interests they protect and the damages that are recoverable," applying two-year period to disparagement and one-year to defamation); *State ex rel. BP Prods. N. Am. Inc. v. Ross*, 163 S.W.3d 922, 927 (Mo. 2005) (applying five-year limitations period to trade libel rather than two-year period for defamation); *Guess, Inc. v. Superior Ct.*, 176 Cal. App. 3d 473, 479 (1986) (holding California applies two-year limitations period to trade libel and one-year to defamation based on the differing nature of the harm and available damages).

different proof, and—consistent longstanding New Jersey precedent—carry different limitations timelines. *Vacarro*, 137 N.J. Super. at 517-18.

II. MILTON SUFFICIENTLY PLEADS SPECIAL DAMAGES AND CNBC'S ARGUMENTS RAISE QUESTIONS INAPPROPRIATE AT THE PLEADING STAGE. (Da22.)

CNBC claims that Milton has not pleaded special damages with sufficient specificity. (Db32–34.) But CNBC misstates the standard at the Rule 4:6-2(e)/UPEPA stage. Under *Patel*, a trade libel plaintiff need not list every lost customer or deal where doing so is impractical; special damages may be pleaded as a general diminution in business accompanied by extrinsic facts tying the economic loss to the disparagement. *See* 369 N.J. Super. at 249.

Applying *Patel*, courts routinely deny motions to dismiss trade libel claims where plaintiffs allege categories of economic injury—such as lost goodwill, disrupted customer or investor relationships, or loss of established business opportunities—even absent a customer-by-customer breakdown. *See, e.g.*, *Churchill Downs, Inc.*, 2015 WL 5854134, at *8–9 (D.N.J. Oct. 5, 2015) (denying dismissal where plaintiff alleged statements harmed his professional reputation and caused general business damage, deferring detailed quantification to discovery); *Pactiv Corp. v. Perk-Up, Inc*., 2009 WL 2568105, at *11 (D.N.J. Aug. 18, 2009) (allegations of lost sales and diminished goodwill sufficiently pled at pleading stage). Precise quantification arises through discovery and experts; it is not

required at the pleading stage. *See Fairfax Fin. Holdings Ltd. v. S.A.C. Cap. Mgmt.,* LLC., 450 N.J. Super. 1, 99–100 n.49 (App. Div. 2017). Even at the summary judgment stage, moreover, this Court has reversed a dismissal of a trade libel claim where plaintiff's proof was "nebulous" and did not include allegations that "any patient chose to go elsewhere because of what defendants said about her." *Enriquez*, 342 N.J. Super. at 525.

Milton's allegations easily clear that bar. He pleads concrete, non-speculative losses: an immediate, roughly 40% decline in the value of his Nikola holdings following the broadcast; canceled stock transactions; terminated banking and brokerage relationships; and the loss of specific business opportunities, including the Nikola Badger program. (Da77, Compl. ¶¶ 116–18.) Courts recognize lost investment value and other direct pecuniary harms as cognizable special damages in this context. *See, e.g., Intervet Inc. v. Mileutis, Ltd*., 2017 WL 1528719, at *5 (D.N.J. Apr. 27, 2017); *accord Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.,* 742 So. 2d 381, 388 (Fla. Dist. Ct. App. 1999) (stock sales after the trade libel was published was a realized loss and "chief characteristic" of special damages). Milton has pleaded them in droves.

CNBC's fallback that other causes (*e.g*., criminal proceedings or regulatory matters) necessarily explain the harm, (Db33–35), only underscores why dismissal is improper. Causation and the apportionment of damages is a fact-intensive

analysis. The timing of the broadcast, its inaccuracies about the status of the trial, the contemporaneous market reaction, the contemporaneous reactions of potential business partners, and a juror's immediate change in view after watching the episode, all plausibly support the conclusion that *Chasing Tesla* materially contributed to Milton's losses. (*See* Da76–77, Compl. ¶¶ 114–16.) The presence of other potentially causative factors may be a question of fact to be resolved at later stages of the case. (It is common, for example, for expert witnesses to conduct "event studies" and then opine with statistical support on the impact of false statements on the market price of a publicly traded security.) But at this stage, Milton need only show that he has pleaded economic losses accompanied by extrinsic facts tied to the libelous statements. *See Patel*, 369 N.J. Super. at 249 Milton has done so with ease.

In short, under *Patel* and its progeny, the Complaint more than adequately pleads special damages. CNBC's unfettered demand for itemized, trial-ready proof is premature and contrary to New Jersey law.

III. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DETERMINATION THAT FAIR REPORT PRIVILEGE DOES NOT APPLY. (Da39.)

CNBC claims absolute shelter under the fair report privilege on the theory that *Chasing Tesla* was essentially a summary of official proceedings. (Db36–44.) But the trial court saw *Chasing Tesla* for what it was. (*See* Da36.) Even if it were

a summary of an official proceeding (for the reasons outlined in Section II-B-ii, *infra*, it was not), it *unfairly* weaved new and unfounded lies (untethered to any filings) into its narrative, *unfairly* imputed corrupt motives to Milton, and *unfairly* attacked his veracity and integrity. Because the fair report privilege is conditional and turns on fairness *and* accuracy, the trial court correctly held that CNBC cannot invoke it at the pleadings stage. (Da36.)

This Court could follow the trial court's route to affirmance and hold that CNBC forfeited any privilege by unfairly adding libelous matter and comment about the very subject of the supposed report and by attempting to impugn Milton's integrity and veracity. Separately, and as discussed more fully below, the defense fails for three additional reasons not found by the trial court: (1) CNBC never authenticated the transcript of the recording it submitted, so the content of what actually aired cannot be resolved on a motion to dismiss; (2) *Chasing Tesla* is not a "report" because no reasonable viewer would believe it was reporting on the government's investigation, the indictment, the trial, or any other judicial proceeding involving Milton; and (3) even if it were deemed a report, *Chasing Tesla* was materially inaccurate because it misstated that Milton was "awaiting trial" and omitted readily available exculpatory facts. On this final point, this Court should also reject CNBC's well-worn "substantial truth" rejoinder because it is a fact-bound merits defense and provides no basis for dismissal at this stage.

A. The lower court appropriately found that CNBC had forfeited the fair report privilege because it unfairly added libelous statements and comment related to the subject of the report. (Da39.)

The fair report privilege is a conditional privilege that hinges on any report being full, fair *and* accurate. *Fortenbaugh v. New Jersey Press, Inc.*, 317 N.J. Super. 439, 448 (App. Div. 1999). New Jersey follows the Restatement of Torts' longstanding rule that a report is not "fair" if the reporter "make[s] additions of his own that would convey a defamatory impression," "impute[s] corrupt motives to anyone," or assails "the veracity or integrity of any of the parties." *See, e.g., id.* at 448–49 (quoting Restatement (Second) of Torts § 611 cmt. f (1977) (defining "fairness")). Put differently, "the interpolation of defamatory [matter or comment] … will forfeit the privilege." Restatement (Second) of Torts § 611, Reporter's Note to cmt. f. Thus, where a broadcaster goes beyond summarizing an official proceeding and layers a report with its own false allegations or motive-laden commentary, the privilege is lost. *See Fortenbaugh*, 317 N.J. Super. at 451 (reversing lower court and noting that publisher who "perform[s] its own investigation" had "los[t] the benefit of the fair-report privilege in this circumstance").

As detailed in Section III-B-ii, *Chasing Tesla* is not a summary of an official proceeding. It did not meaningfully discuss the investigation, the indictment, or the trial, and the vast majority of its statements appear nowhere in any judicial

proceeding. (Da241–63.) But even if this Court were to find that it loosely summarized official proceedings, it should adopt the trial court's determination that it did not so *fairly* because it "prominently featured a host of potentially libelous assertions that CNBC does not even contend were sourced from official proceedings." (Da39.) CNBC went beyond the bounds of any official proceeding by layering its broadcast with new, unfounded falsehoods—including, among others, the fabricated claim that Milton urged his friends (including Jimmy Rex) to dump Nikola stock, and the false statement that Milton netted $300 million in post-indictment sales. (Da74–75, Compl. ¶¶ 106, 108–09.) It also impugned Milton's integrity by branding him a "corporate conman" who "targets young, naïve investors," and advanced false narratives about the fraudulent diversion of St. George Security's receivables, and the aiding and abetting of insider trading. (Da72, Compl. ¶¶ 95–97.) *None* of those lies were made in *any* official proceeding related to Milton or Nikola. They were not abridgments; they were completely made up. As the trial court correctly found, (Da39), those fabricated additions strip the broadcast of fairness and forfeit the privilege.

CNBC's reliance on *Salzano v. N.J. Media Group*, 201 N.J. 500 (2010), is misplaced. CNBC argues that, even if the trial court found some unfair additions, the proper remedy was to isolate and preserve the privilege as to the rest of the report by striking them from the Complaint. (Db39.) That is not the law. As both

Salzano and the Restatement make clear—the privilege either applies or it does not—it is forfeited if the report as a whole is rendered unfair. *See id.* at 523, 530 (citing Restatement (Second) of Torts § 611 cmt. f).

In *Salzano*, the Supreme Court held that, while the privilege applied to an article's summary of the allegations in a bankruptcy court complaint alleging misappropriation by the plaintiff, it did not apply to an entirely separate story alleging that one of plaintiff's *separate business ventures* had gone "belly up" a year earlier. *Id.* at 532. Because the aside addressed a different subject entirely, i.e., "plaintiff's lack of business skill," and did not attack plaintiff's veracity or integrity, it did not contaminate the fair summary bankruptcy complaint, which alleged that plaintiff "stole money." *Id.*

Here, by contrast, CNBC's invented falsehoods—say, the Rex "stock-dump" tale, the non-existent Nikola Badger, or the $300 million in three months Nikola stock sales lie—go to the very subject of the supposed report: Milton's alleged misconduct in connection with Nikola. (Da73–76, Compl. ¶¶ 100–13.) As the trial court recognized, with those additions, along with direct attacks on Milton's integrity and veracity, CNBC did not summarize from the core subject matter—CNBC rewrote it with outright lies. (*See* Da39.) By unfairly altering the overall meaning of the supposed summary and falsely implying to viewers that the filings and proceedings on which they claimed to be reporting contained allegations they

did not, CNBC made its supposed report of an official proceeding "unfair," and forfeited the privilege for the broadcast as a whole.[4]

B. Alternatively, this Court can affirm the finding below on three independent grounds. (Da 37-39.)

Even if the fair report privilege were not forfeited in its entirety, affirmance is still warranted based on alternative, independently sufficient grounds. *First*, CNBC failed to authenticate either the episode or the transcript: both were submitted solely through counsel's certification and lack the personal-knowledge foundation that New Jersey Court Rule 1:6-6 and New Jersey Rule of Evidence 901 require. *Second*, Chasing Tesla is not a "report" of an official proceeding under § 611 of the Restatement; it is a prestige-TV narrative that, on its face, neither quotes nor paraphrases identifiable filings or hearings and never once

[4] The Supreme Court's decision in *Costello v. Ocean County Observer*, 136 N.J. 594, 612 (1994), further confirms that the fair report privilege was properly applied by the trial court below. In *Costello*, the Court held that the fair report privilege was lost for the entire publication because it misled readers about the procedural posture of the matter reported. *Id.* at 609–11. Specifically, although the article sourced some details from the proceeding, it also contained information that was "internally inconsistent, misleading, and confusing," causing the Court to conclude that "the privilege [was] defeated." *Id.* at 609, 612. Notably, the Court did not, as CNBC proposes here, proceed to excise only the inaccurate or misleading portions and apply the privilege to the remainder. Such an approach would yield absurd results and is inconsistent with decades of established authority on the fair report privilege.

establishes (let alone, makes clear) that it is drawing from official records. *Third*, even if deemed a "report," it was not "accurate": among other defects, it falsely told viewers that Milton was "awaiting trial" when trial had been underway for weeks and omitted readily available exculpatory evidence. As with the other distortions discussed above, these inaccuracies substantially altered the impact and meaning of the broadcast and independently defeat the fair report privilege.[5]

1. CNBC has failed to authenticate the episode and transcript. (Da. 37-38.)

CNBC's fair report defense cannot be decided on the current record because the only "evidence" it offers—the proffered transcript and recording of *Chasing Tesla*—were never properly authenticated. New Jersey law requires evidence considered on a motion to come from an affiant with personal knowledge and, where applicable, "certified copies of all papers." R. 1:6-6. Thus, this Court has

[5] CNBC suggests in its brief that Milton is "barred" from advancing alternative grounds for affirmance because he did not file a cross appeal. (*See* Db41.) That is incorrect. Under New Jersey law, only an "aggrieved" party may appeal, and Milton—having prevailed completely on the fair report issue below—was not aggrieved. *Howard Sav. Inst. v. Peep*, 34 N.J. 494, 499 (1961). Moreover, "[a]ppeals are taken from orders and judgments and not from . . . reasons given for the ultimate conclusion. *Do-Wop Corp. v. City of Rahway*, 168 N.J. 191, 199 (2001). A prevailing party may urge any record-supported ground to sustain the result, including grounds the trial court rejected or did not reach. *Chimes v. Oritani Motor Hotel, Inc.*, 195 N.J. Super. 435, 443 (App Div. 1984) ("[W]ithout having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial court's judgment.").

repeatedly reversed decisions where a trial court relied on attorney certifications not based on personal knowledge, explaining that such submissions are "objectionable hearsay." *See, e.g.*, *Mazur v. Crane's Mill Nursing Home*, 441 N.J. Super. 168, 179–80 (App. Div. 2015); *see also* N.J.R.E. 901 (proponent must offer evidence sufficient to support a finding the item is what it is claimed to be); *Sellers v. Schonfeld*, 270 N.J. Super. 424, 428–29 (App. Div. 1993) (rejecting dozens of uncertified, unauthenticated exhibits).

Here, CNBC relied solely on counsel's certification attaching a transcript and purported recording of the broadcast, without any statement identifying *who* created them, *how* they were made, *when* they were made, *whether* they are complete, *whether* counsel even has personal knowledge of their accuracy. (*See* Da88–90.) At the OSC hearing, CNBC's counsel conceded that the submitted transcript and recording are inconsistent, and that the video includes a postscript about the outcome of Milton's trial—information that was unavailable on the October 4, 2022 airdate. (T78:12.)

Without a complete, authenticated transcript or recording of the *Chasing Tesla* episode, the content of the episode remains a disputed fact. And absent clarity on what aired, this Court cannot—on a motion to dismiss—determine whether the episode that aired on October 4, 2022 was a full, fair and accurate report as a matter of law. *See, e.g.*, *Petro-Lubricant Testing Lab'ys, Inc. v.*

Adelman, 233 N.J. 236, 261 (2018) (determining application of fair report privilege after reviewing judicially noticeable article and the complaint on which it was based).[6]

2. *Chasing Tesla* was not a "report" on an official proceeding. (Da38-39.)

CNBC's fair report defense independently fails because *Chasing Tesla* was not a legitimate "report" of any official proceeding. As the New Jersey Supreme Court observed, in order for a written publication to quality as a "report" on an official proceeding, it must be clear that "any reasonable person reading [it] would understand that it was reporting on facts alleged in [that proceeding]." *Petro-Lubricant*, 233 N.J. at 261. The privilege, in other words, does not protect reverse engineering and "should not be interpreted to protect unattributed, defamatory statements supported after-the-fact through a frantic search of official records."

[6] The trial court's analysis on this issue is internally inconsistent. On the one hand, it purported to reject Milton's authentication objection by stating that its fair-report analysis did not rely on the video or transcript, but instead on "comparing the statements from the Complaint to the court filings in the cases against Milton through a four-page chart of its initial brief." (Da37.) Yet at the outset of the opinion, the court expressly stated that its determination that the broadcast was a "report" was "based upon [its] *review of the actual episode*," and concluded that the broadcast "made it clear from the outset that it would be based largely on allegations made by prosecutors in Milton's trial and SEC filings," information outside of the Complaint and filings. (Da5 (emphasis added).) Relatedly, the language CNBC cites to argue that the broadcast was a "report" (Db8–9) is *not quoted or paraphrased anywhere in the Complaint*, underscoring the inadequacy of the record below.

See Dameron v. Washington Mag., Inc., 779 F.2d 736, 739 (D.C. Cir. 1985) (applying Section 611 approach). Applying that standard, courts reject application of the privilege where the publication departs from straightforward reporting and instead editorializes, dramatizes, or selectively omits. *See, e.g.*, *Street v. NBC*, 645 F.2d 1227, 1233 (6th Cir. 1981) (dramatization of Scottsboro trial unprotected because it omitted the plaintiff's version of events and cast her in a derogatory light); *Colborn v. Netflix*, 661 F. Supp. 3d 838, 859 (E.D. Wis. 2023) (fair report privilege inapplicable to *Making a Murderer* because it "transcends objective journalism and tries to dramatize courtroom business in a manner that the fair report privilege does not obviously contemplate").

Here, *Chasing Tesla* made only fleeting references to Milton's actual criminal trial, barely mentioned the indictment, and did not cite the SEC complaint or any other civil filings. (Da242–63.) Instead, it relied on narration, reenactments, emotionally charged music, and commentary to deliver a narrative aimed at entertainment, not accurate reporting. (*See* Da69, Compl. ¶ 89.) CNBC's effort to retroactively tie its dramatizations to scattered judicial records not cited or referenced in the episode is exactly the kind of *post hoc* rationalization courts reject. *See, e.g.*, *Dameron*, 779 F.2d at 739.

In reaching a contrary conclusion, the court below relied on *Kinsella v. Welch*, 362 N.J. Super. 143 (App. Div. 2003), which recognized that a television

program can qualify as "news media" for purposes of the New Jersey Shield Law. (Da38.) But that reliance conflates two different doctrines. The Shield Law protects journalists gathering or disseminating news from compelled disclosure; the fair-report privilege turns on *what* was published—namely, whether the content is a summary of a particular official proceeding and if, so, whether it a full, fair, and accurate one. *See, e.g., Salzano,* 201 N.J. at 522–25. *Kinsella* did not analyze Section 611 of the Restatement (Second) of Torts, did not compare a broadcast to an official record, and did not hold that any "news" program is *ipso facto* a necessarily a "report" with the meaning of fair report doctrine. Even *bona fide* journalism forfeits the fair-report privilege if it adds, omits, or dramatizes material in a way that distorts the gist or imputes false motives. *See*, *e.g.*, *Fortenbaugh*, 317 N.J. Super. at 455–56.

In short, *Chasing Tesla* may be "news" in the Shield Law sense, but that does not make it a report of an official proceeding—which is the only question that matters here.

3. *Chasing Tesla* was also materially inaccurate. (Da39.)

Even if the episode could somehow be considered a "report" of official proceedings—which it plainly is not—CNBC's broadcast independently fails because it contained material inaccuracies. To qualify for the fair report privilege, a publication must not omit or distort critical details in a way that misleads the

audience or creates a false impression about the proceedings. *See Salzano*, 201 N.J. at 522–25. As the New Jersey Supreme Court has explained, the privilege is forfeited or "abused" where a publication "garble[s] the facts," conveys an "erroneous impression," or omits exculpatory information central to the underlying record. *See Costello v. Ocean Cnty. Observer*, 136 N.J. 594, 607–08 (1994); *see also Schiavone Constr. Co. v. Time, Inc*., 847 F.2d 1069, 1088 (3d Cir. 1988) (privilege inapplicable where publication omitted exculpatory statements from an official FBI memorandum).

Chasing Tesla is precisely the sort of distorted and misleading portrayal that New Jersey courts consistently reject. Among other inaccuracies, the episode falsely informed viewers that Milton was still "awaiting trial" and had "declined to speak" with CNBC when the episode aired, (Da263), despite the fact that Milton's criminal trial was already well underway and Milton had already presented substantial exculpatory evidence to the jury. (*See* Pa29–248.) That evidence included testimony from Harvard economist Dr. Allen Ferrell which concluded the day before the broadcast. (Pa248.) Dr. Ferrell opined that, based on a detailed event study, Milton's statements had not impacted Nikola's inflated Nikola's stock price or valuation. (Pa30–126.)

This case is analogous to *Costello*, where the Court found that a newspaper's inaccurate description of a complaint as active created an erroneous

impression of the proceeding's status. *Costello*, 136 N.J. at 609. Here, CNBC's false characterization regarding the timing and status of the proceeding caused it to omit exculpatory information in the record and convey the false impression that Milton was remaining silent in the face of these allegations instead of actively attempting to demonstrate his innocence. (Da263.) The broadcast compounded these inaccuracies by unfairly layering in demonstrably false—such as, for example, Milton instructing his friends to dump Nikola stock, Milton diverting accounts receivable from St. George Security, or Milton personally netting $300 million from stock sales. (Da74–75, Compl. ¶¶ 106, 108–09.) As noted below, those statements not only misrepresented the judicial record but also altered the overall "gist" and "sting" of the broadcast, eliminating any plausible argument that it qualifies for protection under the fair report privilege.

4. CNBC's "substantial truth" argument is premature and does not justify dismissal at the pleading stage. (Da38.)

Finally, CNBC seeks—again—to sidestep responsibility for its false and misleading statements in *Chasing Tesla* by invoking the "substantial truth" doctrine. (Db41–44.) That doctrine shields only "minor misstatements" that do not materially alter the "gist or sting" of the defamatory charge. *Hill v. Evening News Co.*, 314 N.J. Super. 545, 552 (App. Div. 1998) (quoting *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420, 431–32 (App. Div. 1958)). Moreover, New Jersey courts consistently hold that it is a fact-intensive defense

properly considered at summary judgment or trial—not on a motion to dismiss. *See, e.g.*, *Hotaling & Co., LLC v. Berry Sols*. Inc., 2022 WL 4550145, at *6 (D.N.J. Sept. 29, 2022) ("While they may be able to prove otherwise after discovery, they cannot rely on 'substantial truth' as a basis for dismissal of the defamation counterclaim at this stage of proceedings.").[7]

In any event, the test for "substantial truth" is not whether a statement contains some factual basis; it is whether the challenged inaccuracy "would have a different effect on the mind of the reader [or viewer] from that which the pleaded truth would have produced." *Bank v. Lee*, 481 N.J. Super. 412, 432 (App. Div. 2022) (quoting *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 517 (1996)). Here, the Complaint alleges exactly that. A juror in Milton's trial—who, after weeks of hearing testimony and reviewing exhibits—concluded that Milton had acted in good faith and voted (unanimously with the other jurors) to acquit him of a count of securities fraud under Title 18. (*See* Da78, Compl. ¶ 120.) Yet that juror abruptly reversed course after watching *Chasing Tesla*. (Da78, Compl. ¶ 121.) Her reaction underscores just how dramatically the episode altered the "gist and sting" of the underlying proceedings.

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[7] Indeed, this was precisely the procedural posture of *G.D. v. Kenny*, 205 N.J. 275 (2011), the primary authority CNBC invokes. (Db41, 43.) It is ironic that, after vigorously and successfully opposing Milton's application for limited discovery, (Pa14–17; Da378–80), CNBC now repeatedly urges this Court to dismiss his claims under standards appropriate only at summary judgment.

CNBC purported to fairly report on Milton's proceedings, (Db36–43), yet CNBC deviated from the actual evidence at trial to such a degree as to immediately change the mind of a juror who had spent weeks reviewing that carefully presented evidence. (Da78, Compl. ¶ 121.) Simply put, the actual evidence at trial led to an acquittal on a count involving a higher degree of scienter, (*see* Da78, Compl. ¶ 120), whereas CNBC's reporting (purportedly fair and accurate reporting of that same evidence) led to an opposite conclusion (Da78, Compl. ¶ 121). These were not harmless inaccuracies or harmless missteps; they were distortions powerful enough to upend the weight of weeks of live testimony and trial evidence. That kind of impact cannot be brushed aside as "substantially true," and certainly not at the pleading stage.[8]

IV. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S FINDING THAT MILTON PLEADED ACTUAL MALICE. (Da28-29.)

CNBC argues that the trial court erred in concluding that Milton adequately pleaded actual malice, contending that the Complaint lacks facts showing CNBC aired *Chasing Tesla* with knowledge of falsity or reckless disregard for the truth.

[8] Additionally, there are a litany of libelous statements alleged in the Complaint that cannot conceivably be argued to be "substantially true" because they (indisputably) do not have a kernel of truth to them. One example is the CNBC's claim that the Nikola Badger "was never a truck" and "was never built." (Da74, Compl. ¶ 104.) Two drivable Badger prototypes were built by Nikola and still exist. (*Id.*) The prototypes were inspected by Milton's counsel during the criminal trial and were recently sold to an outside investor. (*Id.*)

(Db44–49.) But that argument mischaracterizes both the governing law and the detailed allegations in Milton's Complaint.

Under New Jersey law, actual malice is shown where the defendant either knew the challenged statements were false or acted with reckless disregard for their truth—meaning they "entertained serious doubts" about the accuracy of what was published. *Costello*, 136 N.J. at 615 (1994). Courts routinely hold that actual malice is adequately alleged where the plaintiff provides facts supporting an inference that the defendant relied on sources of "dubious veracity," "purposely avoid[ed]" the truth," or consciously ignored exculpatory or contradictory evidence. *See, e.g.*, *Herman v. Muhammad*, 2024 WL 4488462, at *4–6 (N.J. App. Div. Oct. 15, 2024); *see also Reid v. Viacom Int'l Inc.*, 2017 WL 11634619, at *3–4 (N.D. Ga. Sept. 22, 2017) (actual malice adequately pleaded by allegations of defendant's reliance on biased sources). The standards are conjunctive and sufficiently pleading any one of them satisfies the actual malice standard. *See, e.g.*, *Herman*, 2024 WL 4488462 at *6 (actual malice sufficiently alleged where plaintiff pleaded disregard of exculpatory evidence but not reliance on dubious sources).

Although only one of these standards is sufficient, the Complaint here alleges all of these. CNBC relied extensively on the Hindenburg Report and its author, Nathan Anderson, despite knowing that Hindenburg had a massive

financial motive to depress Nikola's stock price and had paid a disgruntled former contractor approximately $600,000 to participate in its campaign against Nikola. (Da48, Compl. ¶ 5; Da57, Compl. ¶ 41; Da61–62, Compl. ¶ 57.) CNBC also deliberately ignored contrary information contained in Nikola's September 14, 2020, law-firm-vetted press release, which publicly (and scathingly) rebutted many of Hindenburg's false claims with specific facts. (Da62–66, Compl. ¶¶ 58–71.) Instead of referencing or even acknowledging these contrary facts, CNBC presented Hindenburg's accusations as uncontested truths. (Da241–63.)

Most strikingly, CNBC chose to air *Chasing Tesla* during Milton's criminal trial—just days after exculpatory evidence, including testimony from expert Dr. Allen Ferrell, was presented at trial, and just a few days before jurors would deliberate on guilt or innocence. (Da69, Compl. ¶ 88; Pa30–126.) That timing supports an inference of actual malice: *Chasing Tesla* did not modify the broadcast to incorporate anything that happened during the trial (exculpatory or otherwise) even though CNBC concedes that the trial was widely covered. (Db8); *see also Herman*, 2024 WL 4488462, at *5 ("And while [plaintiff's] communications with [defendant] occurred after the posts, the amended complaint's allegation that [the defendant] did not modify her accusations against [the plaintiff after the communication] can be viewed as evidence of her subjective intent in her posts."). That choice—to broadcast a discredited, one-sided narrative

during an ongoing trial, without even acknowledging the opposing side—plainly suggests a purposeful avoidance of the truth. And as the trial court correctly held, (Da28–Da29), that is more than enough at the pleading stage.

V. CNBC'S REQUEST FOR ATTORNEYS' FEES AND COSTS FAILS. (Not raised below.)

CNBC is not a "prevailing party" under UPEPA. New Jersey courts look to results, not rhetoric: "Fundamentally, a prevailing party is one who achieves a *substantial portion of the relief it sought.*" *H.I.P. (Heightened Indep. & Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.,* 291 N.J. Super. 144, 154 (Law Div. 1996) (emphasis added). CNBC's special motion aimed at the heart of this case—the trade libel claim—and it lost. (Da3–46.) The only favorable ruling it obtained was the dismissal of prima facie tort count, which was not dismissed by the trial court on its merits. (Da46.) It was dismissed by the trial court as duplicative of trade libel, a housekeeping disposition that had nothing to do with CNBC's baseless argument that prima facie tort does not exist in New Jersey. (*See id.* ("This Court finds that the claim of intentional tort is improperly being used as a substitute for other recognized causes of action which have been asserted in the complaint and as such the prima facie tort count is dismissed[.]")) Collateral dismissal of a non-core claim—on grounds entirely distinct from those offered by the movant—is not "a substantial portion of the relief" sought and cannot transform CNBC into a prevailing party. *K. Hovnanian*, 291 N.J. Super. at 154;

see also Mann v. Quality Old Time Serv., Inc., 139 Cal. App. 4th 328, 340 (2006) ("[T]here is no reason to encourage a defendant to bring an anti-SLAPP motion where the factual and legal grounds for the claims against the defendant remain the same after the resolution of the anti-SLAPP motion. Where the results of the motion are 'minimal' or 'insignificant' a court does not abuse its discretion in finding the defendant was not a prevailing party.") (citation omitted).[9]

Moreover, even if CNBC were a prevailing party, the trial court below was justified in not awarding any attorneys' fees because of CNBC's limited success and the overlap among issues. Where successful and unsuccessful positions share a "common core of facts" or "related legal theor[ies]," courts reduce or deny fees to reflect the degree of success. *See, e.g.*, *Stoney v. Maple Shade Twp.*, 426 N.J. Super. 297, 318 (App. Div. 2012); *Endres v. Moran*, 135 Cal. App. 4th 952, 955–956 (2006) (affirming denial of attorneys' fees where defendants only succeeded in dismissing conspiracy cause of action because the motion "accomplished nothing"; "The possible recovery against defendants did not change. The factual allegations which defendants had to defend did not change.").

[9] CNBC's fee claim is waived in any event. It never asked the trial court for fees based on its limited, collateral success. Arguments not raised below are ordinarily out of bounds on appeal. *Fuhrman*, 466 N.J. Super. at 596. CNBC's new, expanded fee theory should not be considered.

In this case, the work here overwhelmingly targeted the trade libel claim on which CNBC lost: CNBC devoted less than 2 of the 30 pages of argument in their opening brief to the prima facie tort claim, (Pa11–13), only 34 words in its reply letter brief, (Pa251), and there was *no discussion* of the claim during the nearly 4-hour hearing on the motions. (*See* Pa255–306.) In short, any time tethered solely to the prima facie tort was *de minimis* and clearly did not merit an award of attorneys' fees. (*See*, *e.g.,* Da46 (dismissing prima facie tort claim because it was a "substitute" for the adequately pled trade libel)).

CONCLUSION

For all of the foregoing reasons, this Court should affirm the order below denying Defendant CNBC's motion to dismiss.

Respectfully submitted,

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